Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

In the matter of:
MAKATI HOPE CHRISTIAN SCHOOL, INC.

LUKE C. ROXAS, REBEKAH T. ROXAS, SARAH T. ROXAS, MARY T. ROXAS, BESSIE C. MANZANO, ELENA F. FELIPE, CONCEPCION MARIA P. DELOS SANTOS, NOEL S. R. JOSE and PHILEMON TIE,
Appellants,

- *versus* -

JOSE P. AQUINO, in his capacity as Director of Enforcement and Investor Protection Department; and ROBERT SUN,
Appellees.

SEC En Banc Case No. 09-14-344
Promulgation: 16 May 2024

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DECISION

Before the Commission *En Banc* is the *Memorandum on Appeal* dated 11 September 2014 (the "Appeal") filed by Luke C. Roxas, Rebekah T. Roxas, Sarah T. Roxas, Mary T. Roxas, Bessie C. Manzano, Elena F. Felipe, Concepcion Maria P. Delos Santos, Noel S. R. Jose and Philemon Tie (the "Appellants"), assailing the *Order* dated 13 August 2014 (the "Assailed Order") issued by the Enforcement and Investor Protection Department (EIPD), which found Appellants liable for violating Article XIV, Section 4(1) of the Constitution, in relation to Section 5 of Republic Act No. 7042, otherwise known as the Foreign Investments Act (FIA).

RELEVANT FACTS

Makati Hope Christian School, Inc. ("Makati Hope") is a non-stock, non-profit corporation organized and existing under the laws of the Philippines, having been issued a Certificate of Incorporation with SEC Registration No. 0000126469. Its primary purpose is "to establish, maintain, and operate a Christian institution of learning for students of both sexes and all nationalities and to provide instruction therein as prescribed by the government."

Appellants were all members of the Board of Trustees of Makati Hope[1], while Appellant Noel S.R. Jose was its corporate secretary, at the time of the filing of the instant case.

Appellee Robert Sun ("Mr. Sun") was the former president of the Parent-Teachers Association (PTA) of Makati Hope.

The instant case stemmed from a letter-complaint[2] filed with the EIPD by Mr. Sun, who requested for the conduct of an investigation on the (a) alleged anomalies relating to the use and disposition of the assets of Makati Hope by the Appellants; and (b) the election of Mr. Philemon Tie (Mr. Tie), a foreigner, as a member of the Board of Trustees, and as Vice-Principal of Makati Hope which allegedly violated Article XIV, Section 4(1) of the 1987 Constitution in relation to Section 5 of the FIA.

On 25 April 2012, Mr. Sun filed a *Verified Complaint* reiterating his allegations in his letter-complaint, where he further claimed that Appellants misrepresented Mr. Tie's nationality when they indicated him to be a "Filipino" in the 2012 GIS of Makati Hope.

On 8 June 2012, Appellants filed their *Joint Counter-Affidavit* where in relation to the allegation that they misrepresented the nationality of Mr. Tie, they put up the defense of inadvertence or clerical oversight, arguing that they had no reason to misstate since as a mission school, Makati Hope was not prohibited from appointing a foreigner.

On 13 August 2014, the EIPD issued the *Assailed Order* finding herein Appellants administratively liable for violating Article XIV, Section 4(1) of the Constitution, in relation to Section 5 of the FIA, and directed them to pay a fine in the amount of Two Hundred Thousand Pesos (₱200,000.00). The EIPD also found the engagement of Mr. Tie to be legally infirm and directed him to immediately vacate his position at Makati Hope. Finally, the EIPD found Appellant Noel S. R. Jose to have violated Section 26 of the

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[1] Page 3, Memorandum of Appeal, Pp. 3-4, EIPD Order dated 13 August 2014 (Annex A of the Appeal).

[2] Received on 10 April 2012

Corporation Code, and directed him to pay a fine in the amount of Ten Thousand Pesos (₱10,000.00).

In their Appeal, Appellants prayed for the reversal of the Assailed Order, claiming that Makati Hope did not violate the 1987 Constitution and the FIA. They also reiterated the argument that the entry on Mr. Tie's nationality as a Filipino in Makati Hope's GIS was a mere oversight. Finally, Appellants pointed out that the issue on the alleged unlawful engagement of Mr. Tie has become moot and academic after his consultancy ended on 30 April 2012.

On 26 September 2014, Appellee Mr. Sun filed a *Reply to Respondents' Memorandum of Appeal and Partial Appeal,* therein praying, among others, for the issuance of an order (a) directing the conduct of an investigation on Appellants who allegedly mortgaged Makati Hope's properties to secure the commercial loans of ASB Group of Companies, in violation of the Corporation Code; (b) finding the Appellants liable/accountable for interest-free advances to related parties in the amount of P61M for 2011; and (c) directing the conduct of an investigation for the purpose of determining the accountability of Appellants for the years covering 2000 to 2013.

On 11 November 2015, Mr. Sun filed a *Motion to Withdraw* based on a Compromise Agreement that had been entered into between him and Makati Hope, which was granted by the EIPD in its Order dated 01 February 2016.

The grant of the *Motion to Withdraw* notwithstanding, the EIPD nonetheless ruled that the liability of Appellants for violation of the FIA subsisted, and should be enforced against them.

On 05 July 2023, the EIPD filed a Compliance and Manifestation, where it stated that there is no known fact, information or report of any supervening events or developments pertinent to the case.

On 04 August 2023, Appellants filed a *Manifestation* stating that with the execution of the compromise agreement by Makati Hope and Mr. Sun, as well as the fact that the FIA is not applicable to Makati Hope, the instant case should be dismissed.

ISSUE

The sole issue presented for the consideration of the Commission is whether the EIPD committed reversible error in holding that the appointment of Mr. Tie, a foreigner, as OIC of Makati Hope violated the FIA.

RULING

The EIPD maintained that Makati Hope violated Sec. 5 of the FIA when it engaged the services of Mr. Tie, a foreigner, inasmuch as he allegedly participated in the "*management, supervision or control of a domestic business, firm, entity or corporation in the Philippines,*" which already constitutes "*doing business*" in the Philippines.

Appellants countered with the argument that Sec. 5 of the FIA is not applicable in the instant case since Makati Hope, being a non-stock, non-profit corporation, holds no investments from foreigners, nor does it have foreign equity participation. Appellants also argued that Mr. Tie's engagement as consultant of Makati Hope did not result in the latter "doing business" in the Philippines.

We find for the Appellants.

Section 5 of the FIA provides:

> "**SEC. 5.** ***Registration of Investments of Non-Philippine Nationals***. – Without need of prior approval, **a non-Philippine national**, as the term is defined in Sec. 3[a], and not otherwise disqualified by law **may, upon registration with the Securities and Exchange Commission** [SEC], or with the Bureau of Trade Regulation and Consumer Protection [BTRCP] of the Department of Trade and Industry in case of single proprietorships, **do business** as defined in Sec. 3[d] of this Act **or invest in a domestic enterprise up to one hundred percent (100%) of its capital**, unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or under the provisions of this Act." (Emphasis supplied)

The afore-quoted provision allows a **non-Philippine national**[3] either (a) to do business in the Philippines, or (b) to invest in a domestic enterprise, *provided* that if the same is a corporation, it must be registered with the Commission. Relatedly, Sec. 3[d] of the FIA defines "doing business" as follows:

> "The praise "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; **and any other act or acts that imply a continuity of commercial dealings or arrangements**, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, **commercial gain or of the purpose and object of the business organization**: Provided, however, That the phrase "doing business: shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account;" (Emphasis and underscoring supplied)

The concept of "doing business" is relevant, and should be applied only if a Non-Philippine National is engaged in business or commerce in the Philippines, consistent with the State policy which Sec. 2 of the FIA seeks to implement i.e. to attract and promote productive foreign investments which significantly contribute to national industrialization

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[3] **"Section 3. *Definitions.*** - As used in this Act:
a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national;" (Underscoring supplied)

and socioeconomic development, expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services.

Agilent Technologies Singapore, LTD vs Integrated Silicon Technology Philippines Corporation[4] which established the twin tests in determining if an act constitutes "doing business," in fact emphasized that what is essential is the presence of acts/transactions which are commercial in nature, thus:

> "In *Mentholatum*, this Court discoursed on the two general tests to determine whether or not a foreign corporation can be considered as "doing business" in the Philippines. The first of these is the substance test, thus:
>
> The true test [for doing business], however, seems to be whether the foreign corporation is **continuing the body of the <u>business or enterprise</u>** for which it was organized or whether it has substantially retired from it and turned it over to another.
>
> The second test is the continuity test, expressed thus:
>
> The term [doing business] implies a **continuity of <u>commercial</u> dealings and arrangements**, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in the progressive prosecution of, the purpose and object of its organization." (Emphasis and underscoring supplied)

Prescinding therefrom, it is clear that the provisions of FIA applies only if a subject person, partnership or corporation is a foreign national doing business in the Philippines, <u>or</u> if the foreign national invests in a domestic enterprise engaged in business or enterprise. The FIA has no application if the subject person, partnership or corporation is a Philippine National, as defined in Section 3[a][5] of the FIA, doing business

[4] G.R. No. 154618. April 14, 2004

[5] "The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the

in the Philippines with no foreign equity, **or** if the domestic corporation is non-stock non-profit, and not carrying out a business enterprise.

Relative thereto, Section 87 of the Batas Pambansa Blg. 68, the law applicable to the instant case, provides for the definition of a non-stock corporation, which can be established for educational purposes, among others, to wit:

> "Section 87. Definition. – For the purposes of this Code, a non-stock corporation is one where no part of its income is distributable as dividends to its members, trustees, or officers, subject to the provisions of this Code on dissolution: Provided, That any profit which a non-stock corporation may obtain as an incident to its operations shall, whenever necessary or proper, be used for the furtherance of the purpose or purposes for which the corporation was organized, subject to the provisions of this Title."

In our jurisdiction, it is settled in jurisprudence that a non-stock non-profit corporation organized for educational purpose is not considered a commercial or business organization, thus:

> "In the present case, **the record reveals that the petitioner University of Santo Tomas is not an industry organized for profit but an institution of learning devoted exclusively to the education of the youth**. The court of First Instance of Manila in its decision in Civil Case No. 28870, which has long become final and consequently the settled law in the case, found as established by the evidence adduced by the parties therein (herein petitioner and respondent labor union) that while the University collects fees from its students, all its income is used for the improvement and enlargement of the institution. The University declares no dividend, and the members of the corporation who founded it, as ordained in its articles of incorporation, receive no material compensation for the time and sacrifice they render to the University and its students. The respondent union itself in a case before the Industrial Court (case No. 314-MC)

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trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national;"

> has averred that "the University of Sto. Tomas, like the San Beda College, is an educational institution operated not for profit but for the sole purpose of educating young men." (See Annex "B" to petitioner's motion to dismiss.) **It is apparent, therefore, that on the face of the record the University of Santo Tomas is not a corporation created for profit but an educational institution and <u>therefore not an industrial or business organization</u>**."[6] (Emphasis and underscoring supplied)

In the instant case, it is not disputed that Makati Hope is a non-stock, non-profit educational institution which was organized for the following purpose:

> "To establish, maintain and operate a Christian institution or institutions of learning for students of both sexes and all nationalities to provide instruction therein in the arts, sciences and other studies as prescribed by the Government for nursery, kindergarten, elementary and high school, and to offer special, vocational and technical courses as conditions may demand from time to time."

Moreover, the records show that Makati Hope is fully-owned by Filipinos, thereby negating any allegation that Mr. Tie has equity interests and controls the same. Also, the fact that Makati Hope is a non-stock non-profit domestic educational institution necessarily means that it is not engaged in business or commerce. We agree with Appellants that the FIA finds no application in the instant case, and any finding of violation of its provisions cannot be sustained for want of legal basis. Thus, the instant case should be dismissed.

Anent the issue on the alleged violation of Article XIV, Section 4(1) of the Constitution by Makati Hope, We find nothing in the records that will support the same. Article XIV, Section 4(1) of the Constitution requires educational institutions, except those established by religious groups and mission boards, to be owned solely by citizens of the Philippines, to wit:

> "Section 4. (1) The State recognizes the complementary roles of public and private institutions in the educational system

[6] *University of Santo Tomas v. Villanueva* (G.R. No. L-13748, [October 30, 1959], 106 PHIL 439-444)

and shall exercise reasonable supervision and regulation of all educational institutions.

(2) **Educational institutions**, other than those established by religious groups and mission boards, **shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens**. The Congress may, however, require increased Filipino equity participation in all educational institutions." (Emphasis supplied)

Considering that Makati Hope was able to establish that all its members are Filipino citizens, We hold that it is fully compliant with the afore-quoted Constitutional provision. The engagement of Mr. Tie as consultant of Makati Hope did not result in the Constitutional provision being violated since he did not become a member of the institution. Moreover, We note that the records of the case also show that Makati Hope became exempt from the nationality requirement on 15 March 2011, after it became affiliated with Christian Testimony Mission, a mission board. This notwithstanding, Makati Hope has not admitted any non-Filipino member.

A final note on matters of procedure.

The records show that Appellee Tie filed a Motion to Withdraw based on a Compromise Agreement with the EIPD, which the latter granted notwithstanding the fact that the case was already appealed to the *En Banc*.

In our legal system, it is settled that the perfection of an appeal divests the court *a quo* with jurisdiction over the case, and any order issued by the same which determines the merits of the case, including orders approving compromises, are null and void for want of jurisdiction.[7]

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[7] "I**n appeals by notice of appeal, the court loses jurisdiction over the case upon the perfection of the appeals** filed in due time and the expiration of the time to appeal of the other parties.

In appeals by record on appeal, the court loses jurisdiction only over the subject matter thereof upon the approval of the records on appeal filed in due time and the expiration of the time to appeal of the other parties.

In either case, prior to the transmittal of the original record or the record on appeal, the court may issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal, approve compromises, permit appeals of indigent litigants, order execution pending appeal in accordance with Section 2 of Rule 39, and allow withdrawal of the appeal." (*Villamor vs National Power Corporation*, G.R. No. 146735. October 25, 2004)

The EIPD should not have accepted, given due course and acted on the Motion to Withdraw as it was fully aware that an appeal was already filed with, and pending with the *En Banc*. By doing so, it assumed the risk of having its orders/actions nullified for want of jurisdiction.

WHEREFORE, premises considered, the *Appeal* is hereby **GRANTED**. The *Assailed Order* dated 13 August 2014 of the Enforcement and Investor Protection Department is hereby **REVERSED and SET ASIDE**.

SO ORDERED.

Makati City, Philippines.

EMILIO B. AQUINO*
Chairperson

JAVEY PAUL D. FRANCISCO
Commissioner

KARLO S. BELLO
Commissioner

MCJILL BRYANT T. FERNANDEZ
Commissioner

*On official business