Republic of the Philippines
Department of Finance
Securities and Exchange Commission

CHINA BANKING CORPORATION,
Petitioner

-versus- **SEC En Banc Case No. 12-15-392**

ATTY. DANIEL P. GABUYO and ATTY. MYRLA B. BARRIBAL, ET. AL.,
Respondents.

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DECISION

The present case is yet another offshoot of SEC Case No. 05-00-6609 entitled *"In the Matter of: Petition for Rehabilitation with Prayer for Suspension of Actions and Proceedings against Petitioners, ASB Holdings, Inc., ASB Realty Corp., ASB Development Corp. (formerly Tiffany Tower Realty Corp.), ASB Land, Inc., ASB Finance, Inc., Makati Hope Christian School, Inc., Bel-Air Holdings Corp., Winchester Trading, Inc., VYL Development Corp., Genrick Holdings Corp., and Neighborhood Holdings, Inc."* pending before the Special Hearing Panel 2 (**SHP2**) of the Commission.

For resolution of the Commission *En Banc* is the *Petition for Review on Certiorari with Prayer for the Issuance of a Stay/Status Quo Order* (**Petition**), dated 10 December 2015, filed by China Banking Corporation (**Petitioner**) on 11 December 2015, seeking, among others, the nullification of SHP2's *Order* dated 02 December 2015, granting the *Motion (To Allow Pro-Rata Distribution of Php 30 Million to Unsecured Creditors)* filed by ASB Group of Companies[1] (**Movants**).

Petitioner avers that the proposed distribution of P30 Million to Movants' unsecured creditors is not in accordance with the ASB Rehabilitation Plan (**ARP**) as it is beyond the authority of the Project Governing Board (**PGB**) to disburse funds from the asset pool to unsecured creditors. It claims that the ARP specifically provides that the PGB's primary responsibility is to oversee the completion of the buildings and the development of the land banked properties, and therefore, PGB's authority to disburse funds from the asset pool is limited to the disbursement of funds necessary for the completion of Movants' projects, *e.g.*, The Legaspi Place. Petitioner argues that the funds of the asset pool must be utilized to complete these projects, as mandated in the ARP, before any portion thereof may be distributed to unsecured creditors, who were not identified in the motion.

[1] Rehabilitation Plan, Definition of Terms (ASB Holdings, Inc., ASB Realty Corp., ASB Development Corp., ASB Land, Inc., ASB Finance, Inc.), Annex "B" of the Petition.

Petitioner further claims that Movants failed to mention much less show that the disbursement will be in accordance with the payment mechanism embodied in the ARP. It alleges that the SHP2 should have, at the very least, required the Movants to submit a more detailed and comprehensive description of the manner by which the P30 Million would be distributed in order to ascertain that it would be in consonance with the ARP. But SHP2, allegedly in grave abuse of discretion, failed and refused to do. Moreover, SHP2 issued *Orders*, dated 25 March 2014 and 22 December 2014, directing Petitioner to release the mortgage on the properties that secured Movants' indebtedness to Petitioner, which would make the latter an unsecured creditor. Said *Orders* are now subject of separate *Petitions for Review* with the Commission *En Banc*. Petitioner avers that the distribution of P30 Million to unidentified unsecured creditors by way of this scheme, would give undue preference to these creditors to the prejudice of the Petitioner.[2]

In response to Petitioner's allegations, Movants counter that the distribution is in accordance with ARP. In the implementation of the ARP, an Amended Trust Servicing Agreement (**ATSA**) was approved by the Commission, which authorized the PGB to approve disbursement of funds from the Asset Pool for the settlement of debts of unsecured creditors.[3] Further, Movants have made several offers to settle Petitioner's loan, but the latter has continuously rejected said offers. In view thereof, the unsecured creditors should also be given the same opportunity.[4] Moreover, the P30 Million shall be distributed *pro-rata* to all the unsecured creditors.[5] Besides, said distribution has been done for the past several years. Petitioner is now estopped from questioning it.[6] Lastly, the present Petition is already *fait accompli* as the *pro-rata* distribution to the unsecured creditors was already held last December 17 and 18, 2015.[7]

The Petition has no merit.

The ARP provides:

"**2. Creation of an Asset Pool**

It is the intention of this rehabilitation plan to create an Asset Pool.

Definition

An Asset Pool is an unincorporated entity administered by a Trustee Bank and the asset development managed by a Project Governing Board ('PGB') into which assets of ASB released from the secured creditors or otherwise unencumbered, whether developed or unfinished, will be contributed.

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[2] 10 December 2015 Petition, pp. 9 - 11.
[3] 04 January 2016 Answer, paragraphs 1 and 2.
[4] Id., paragraph 3.
[5] Id., paragraph 4.
[6] Id., paragraph 6.
[7] Id., paragraph 8.

The unsecured creditors may be paid either with properties already developed or properties still to be completed or with monies generated from the development and sale of properties contributed to the pool.

The Asset Pool is an important component for the **settlement of the obligations of ASB to the <u>unsecured</u> creditors** and the rehabilitation of the ASB Group of Companies. With the Asset Pool, funds could be generated to complete the unfinished developments; new projects could be started and the assets properly managed for the benefit and interest of the creditors. Without the asset pool, the properties in their present state would not be sufficient to settle all of the obligations. Xxx

Administration of the Asset Pool

A reputable bank acceptable to the creditors and ASB shall be chosen as Trustee and it shall administer the Asset Pool. For this purpose, a **<u>special trusteeship agreement</u>** shall be executed by and between ASB and the Trustee Bank.

The Trustee Bank shall hold the assets contributed by the ASB to the pool for the benefit and interest of the creditors and ASB."[8]

It is clear from the foregoing that the Asset Pool is created primarily **TO SETTLE THE OBLIGATIONS of Movants to UNSECURED creditors**, and that the terms of administration and management of the Asset Pool shall be provided in the special trusteeship agreement. Section 2.02, Article II of the ATSA states:

"Section 2.02 (Role and Functions) – The [PGB] shall have the following functions:

(a) Development and management of the assets in the Asset Pool;

(b) **<u>Approval of any disbursement of the funds form (*sic*) the Asset Pool for the purposes mentioned in Section 1.02 (a)</u>**;

x x x

(c) Approve such plans and budgets submitted by the ASB GROUP OF COMPANIES and recommend the same to the RECEIVER."[9]

Section 1.02(a) provides:

"Section 1.02 (Uses, Purposes, and Priorities) – The Asset Pool shall be utilized for the purposes and in the priority hereinafter set forth:

a) LIQUID FUNDS. Liquid funds, consisting of (1) cash, bank deposit instruments and government securities issued or guaranteed by the government of the Republic of the

[8] Note 1, p. 21and 23. Emphasis and underscoring supplied.

[9] Emphasis and underscoring supplied.

> Philippines, its instrumentalities and subdivisions, shares of companies listed in the Philippine Stock Exchange; and (2) receivables listed in Annex "M" hereof, when collected shall be utilized as may be approved by the [PGB] for the following:
>
> (i) For the completion and undertaking of projects contained in the Rehabilitation Plan as approved by the RECEIVER and the SEC, such as the BSA Twin Towers and Legaspi Place where units have been sold;
>
> **(ii) For the <u>settlement of debts of TRUSTORS owing to creditors</u> pursuant to such plans for set-off, exchange or other arrangements under such terms and conditions as may be approved by the RECEIVER and the SEC.**
>
> x x x"[10]

There is, therefore, no merit in Petitioner's contention that the authority of the PGB to disburse funds from the Asset Pool is limited only for the purpose of completing Movants' projects. Likewise, the argument of Petitioner that Movants' projects, must be completed first before any money from the Asset Pool can be distributed *pro-rata* to unsecured creditors is untenable.

Notably, the preference is accorded to the "**units which have already been SOLD**..."[11] Here, Petitioner just made a sweeping allegation that Movants "still have unfinished projects, one of which is The Legaspi Place."[12] It failed to adduce any specific evidence proving that the unfinished projects are units which have been sold, or assuming that they are, that Movants failed to earmark the amount of money required to complete such units before authorizing the disbursement of P30 Million. It is settled that absent any contradictory evidence, the legal presumption that official duty has been regularly performed stands.[13]

Moreover, and as stated earlier, the Asset Pool is established to SETTLE MOVANTS' INDEBTEDNESS TO **UNSECURED** CREDITORS. And said creditors "may be paid either with properties already developed or properties still to be completed or with monies generated from the development and sale of properties contributed to the pool."[14] Clearly, the completion of the units has for its object the satisfaction of Movants' obligations to unsecured creditors.

It must be stressed that the status of the Petitioner as a SECURED creditor remain unchanged. As a matter of fact, only those properties released by the secured creditors or otherwise unencumbered can be contributed to the Asset Pool. Thus, the questioned P30 Million *pro-rata* distribution to unsecured

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[10] Emphasis and underscoring supplied.
[11] Note 1, p. 25.
[12] Note 2, p. 9.
[13] Section 3(m), Rule 131, Rules of Court.
[14] Note 1, p. 21.

creditor will not prejudice Petitioner, as its liens over the mortgaged properties have been preserved.

WHEREFORE, premises considered, the *Petition for Review on Certiorari with Prayer for the Issuance of a Stay/Status Quo Order* is hereby **DISMISSED** for lack of merit. The SHP2's *Order* dated 02 December 2015 is hereby **AFFIRMED**.

SO ORDERED.

Pasay City, Philippines, 22 September 2017.

TERESITA J. HERBOSA *
Chairperson

ANTONIETA F. IBE*
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

EMILIO B. AQUINO
Commissioner

*On Leave