Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills, Mandaluyong City

IN THE MATTER OF:

SEC En Banc Case No. 10-04-19

LEXBER, INC.
x----------------------------x

DECISION

Before the Commission is a Petition for Review[1] dated 21 October 2004 filed by Lexber, Inc. ("Lexber," for brevity) of the Order dated 29 September 2004 issued by the Corporation Finance Department ("CFD," for brevity) which the party allegedly received on 07 October 2004.[2]

FACTS OF THE CASE

The CFD issued a letter dated 26 March 2004 to Lexber, directing it to submit its Information Sheet (SRC Form 20-IS) for its Annual Stockholders' Meeting held on 07 January 2004, and to show cause why it should not be held liable for the violation of SRC Rule 20 (3)(c)[3] of the Securities Regulation Code ("SRC," for brevity).[4]

Lexber replied to the CFD in a letter dated 19 April 2004, requesting "forbearance of its inadvertence in complying with said Rule owing to the recentness of its implementation"[5] and offered to pay the corresponding filing fee of Five Thousand (P5,000.00) Pesos if it is to submit a timely report.[6] The request was denied by the CFD in a directive dated 21 April 2004, ordering Lexber to pay a fine of One Hundred Thousand (P100,000.00) Pesos within five (5) days from receipt of the directive.[7] On 07 June 2004, Lexber requested reconsideration of CFD's April 21 directive meting the fine for its failure to file SEC Form 20-IS and again on 06 July 2004.[8]

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[1] A Petition for Review is not among the pleadings covered by the 2000 Rules of Procedure nor is there an applicable procedure under the Rules. The instant Petition does not make allegations otherwise included in a Petition for Review on Certiorari, hence the case shall be treated as an Appeal.
[2] Petition for Review, p.1.
[3] *Ibid.,* Statement of Facts, par. 2, p. 2.
[4] Republic Act No. 8799 (2000).
[5] Referring to the Amended Implementing Rules and Regulations of the Securities Regulation Code.
[6] *Ibid.,* Statement of Facts, par. 2, p. 3.
[7] *Id.,* par. 3, p. 3.
[8] *Ibid.,* par. 5, p. 3.

On 29 September 2004, the CFD issued an order denying the second request for reconsideration that reads in part:

> "**LEXBER, INC.**, being an issuer which has sold a class of its securities pursuant to a registration under Section 12 of the Securities Regulation Code (SRC) has the duty, pursuant to Section 20 of the SRC and its implementing rules, to file with the Commission within the mandated period SEC Form 20-IS and to transmit copies of the same to every security holder that is entitled to vote. Section 17.2 of the SRC which defines who are reporting persons does not qualify whether the issuer's registered securities are non-proprietary (as in the case of Lexber, Inc.) or equity/proprietary shares.
>
> A copy of said Information Statement filed with the Commission constitutes a disclosure document that is available to purchasers of said registered securities and/or of the investing public which they may use as basis of their investment decision. xxx"

Hence, the instant Petition.

Lexber is of the view that it did not violate SRC Rule 20 and argues that: "if the IRR of the SRC became effective only on 1 March 2004, after Lexber held its annual meeting (on *07 January 2004*), it could not have violated SRC Rule 20 (3)(c) for not submitting its Information Statement to the Commission."[9] In addition, Lexber posits the argument that as a holder of timeshares, a class of non-proprietary securities, it is not required to submit an Information Statement.

ISSUES

The issues to be resolved are the following:

1) Whether or not SRC Rule 20 applies to Lexber, an Issuer of Non-Proprietary Timeshares.

2) Whether or not Lexber violated SRC Rule 20 – Disclosure to Stockholders Prior to Meeting of the Amended IRR of the SRC, particularly SRC Rule 20 (3) (c) given that the Amended IRR became effective after the Corporation had already conducted its annual meeting.

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[9] Details supplied.

RULING

We uphold the ruling of the CFD.

Anent the first issue raised by Lexber, the SRC is clear that: "securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission."[10]

In *TIMESHARE Realty Corporation vs. Cesar Lao and Cynthia V. Cortez* [11], the Supreme Court upheld the ruling of the Commission *En Banc* in requiring registration of timeshares as securities and held:

> "(T)he provisions of B.P. Blg. 178[12] do not support the contention of petitioner that its mere registration as a corporation already authorizes it to deal with unregistered timeshares. ***Corporate registration is just one of several requirements before it may deal with timeshares: xx petitioner is absolutely proscribed under Section 4 from dealing with unregistered timeshares***, thus:
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> Section 4. Requirement of registration of securities. — (a) No securities, except of a class exempt under any of the provisions of Section five hereof or unless sold in any transaction exempt under any of the provisions of Section six hereof, shall be sold or offered for sale or distribution to the public within the Philippines unless such securities shall have been registered and permitted to be sold as hereinafter provided. (Emphasis supplied.)
>
> WHEREFORE, the petition is DENIED for lack of merit."[13]

Timeshares are neither exempt securities nor among the exempt transactions involving securities. As such, Lexber, as issuer of registered securities, is required to comply with the reportorial requirements of the SRC, which provides:

> "17.2.The reportorial requirements of Subsection 17.1 shall apply to the following:
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> (a) ***An issuer which has sold a class of its securities pursuant to a registration under Section 12*** hereof: *Provided, however,* That the obligation of such issuer to file reports shall be suspended for any

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[10] Ibid., Sec. 8.
[11] G.R. No. 158941. February 11, 2008.
[12] Now the Republic Act No. 8799 or the Securities Regulation Code (2000).
[13] Emphasis supplied.

> fiscal year after the year such registration became effective if such issuer, as of the first day of any such fiscal year, has less than one hundred (100) holders of such class of securities or such other number as the Commission shall prescribe and it notifies the Commission of such; xxx"

Notably, even issuers whose securities are exempt from registration requirements are nonetheless required to comply with the filing of reportorial requirements, as held in *Union Bank of the Philippines vs Securities and Exchange Commission (SEC)*:[14]

> "Because its securities are exempt from the registration requirements under Section 5(a)(3) of the Revised Securities Act,[15] petitioner argues that it is not covered by RSA Implementing Rule 11(a)-1, which requires the filing of annual, quarterly, current predecessor and successor reports; Rule 34(a)-1 which mandates the filing of proxy statements and forms of proxy; and Rule 34(c)-1, which obligates the submission of information statements.
>
> We do not agree.
>
> xxx
>
> ***This provision exempts from registration the securities issued by banking or financial institutions mentioned in the law. Nowhere does it state or even imply that petitioner, as a listed corporation, is exempt from complying with the reports required*** by the assailed RSA Implementing Rules. Worth repeating is the CA's disquisition on the matter, which we quote:
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> "However, the exemption from the registration requirement enjoyed by petitioner does not necessarily connote that [it is] exempted from the other reportorial requirements. Having confined the exemption enjoyed by petitioner merely to the initial requirement of registration of securities for public offering, and not [to] ***the subsequent filing of various periodic reports, respondent Commission, as the regulatory agency, is able to exercise its power of supervision and control over corporations and over the securities market as a whole. Otherwise, the objectives of the 'Full Material Disclosure' policy would be defeated since petitioner corporation and its dealings would be totally beyond the reach of respondent Commission and the investing public.***"[16]

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[14] G.R. No. 138949. June 6, 2001
[15] See Note 12.
[16] Emphasis supplied.

Moreover, Lexber did not allege that it has ceased to become a reporting company under SRC Subsection 17.2(a), that requires that "as of the first day of any fiscal year after the effectivity of its registration statement, it has less than 100 holders of the registered securities *and* it notifies the SEC of such fact."[17]

Thus, the CFD's position that Lexber is required to comply with the reportorial requirements of the IRR of the SRC is correct.

Anent the second issue, Lexber asserts that it did not violate the provisions of SRC Rule 20- Disclosures to Stockholders Prior to Meeting considering that the Amended IRR of the SRC became effective only after fifteen (15) days from its publication on 13 February 2004 which is *after* the stockholders' meeting of Lexber took place on 07 January 2004.

In its Comment[18] to the petition, CFD is of the position that "a mere citation therefore of SRC Rule 20 instead of SRC Rule 17.1(b) should not be taken as a technical deficiency to warrant a reversal of the imposable penalty on the erring company."[19]

The said rule provides:

> "SRC Rule 17.1(b) *Information Statement Rule:*
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> 1. *Applicability of SRC Rule 17.1(b).* - The provisions of this Rule shall apply to issuers required to file reports pursuant to Section 17 of the <u>Code</u> and SRC Rule 17 thereunder.
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> XXX
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> 5. *Filing Requirements.* -
> a. Preliminary copies of the information statement shall be filed with the Commission along with the payment of the prescribed fee at least ten (10) business days prior to the date definitive copies of such material are first sent or given to stockholders.
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> b. Definitive copies of the information statement and the annual report pursuant to paragraph 4 above, in the form in which such material is furnished to stockholders shall be filed with, or mailed for filing to, the Commission not later than the date such material is first sent or given to any security holder. One (1) copy of such material shall at the same time be filed with, or mailed for filing to, each Exchange upon which any class of securities of the registrant is listed for trading."[20]

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[17] Rafael A. Morales, The Philippine Securities Regulation Code (Annotated), p.141.(2005)
[18] Dated 10 March 2005.
[19] Comment, p. 2.
[20] IRR of the SRC.

Meanwhile, Rule 20 of the Amended IRR provides:

> "Rule 20 – Disclosures to Stockholders Prior to Meeting
>
> xxx
>
> C. Filing Requirements
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> i. Preliminary copies of the information statement and proxy form shall be filed with the Commission at least ten (10) business days prior to the date definitive copies of such material shall be first sent or given to security holders.
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> The registrant shall contact the Commission for any comment on the preliminary materials.
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> ii. At the time of filing the preliminary information material, the registrant shall pay the Commission the fee of Five Thousand Pesos (P5,000.00) or such other amount as the Commission may prescribe.
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> iii. Copies of the definitive information statement, proxy form and all other materials (if any), shall be filed with the Commission prior to the date such material/s shall be first sent or given to security holders. One (1) copy of such material shall at the same time be filed with, or mailed for filing to, any Exchange in which any class of securities of the registrant is listed for trading.
>
> iv. The information statement, proxy form and the management report under paragraph (4) of this Rule, if applicable, shall be distributed to security holders at least fifteen (15) business days from the date of the stockholders' meeting.xxx"

A perusal of the two provisions will show that the two rules are not inconsistent with each other, and the requirement for issuers of registered securities has always existed. In addition, Rule 78 of the Amended IRR of the Securities Regulation Code provides: "All rules and regulations, circulars, orders, or any part thereof and the rules and regulations promulgated by persons required to be registered under the SRC or any part thereof, in conflict with or contrary to these rules or any portion hereof, are hereby repealed or modified accordingly."

The policy against implied repeal is clear:

> "A repealing clause in an Act which provides that 'all laws or parts thereof inconsistent with the provisions of this Act are hereby repealed

> or modified accordingly' is certainly not an express repealing clause because it fails to identify or designate the Act or Acts that are intended to be repealed. Rather, ***it is a clause which predicates the intended repeal upon the condition that a substantial conflict must be found in existing and prior Acts.*** Such being the case, the presumption against implied repeals and the rule against strict construction regarding implied repeals apply *ex proprio vigore*."[21]
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> "Repeals by implication are not favored and will not be indulged, unless it is manifest that the administrative agency intended them. As a regulation is presumed to have been made with deliberation and full knowledge of all existing rules on the subject, ***it may reasonably be concluded that its promulgation was not intended to interfere with or abrogate any earlier rule relating to the same subject, unless it is either repugnant to or fully inclusive of the subject matter of an earlier one, or unless the reason for the earlier one is 'beyond peradventure removed.'*** Every effort must be exerted to make all regulations stand — and a later rule will not operate as a repeal of an earlier one, if by any reasonable construction, the two can be reconciled."[22]

Moreover, by analogy, it is worth noting that the Supreme Court stated in _Securities and Exchange Commission vs. Interport Resources Corporation, et al._[23]:

> "***As a rule, an absolute repeal of a penal law has the effect of depriving the court of its authority to punish a person charged with violation of the old law prior to its repeal.*** This is because an unqualified repeal of a penal law constitutes a legislative act of rendering legal what had been previously declared as illegal, such that the offense no longer exists and it is as if the person who committed it never did so. There are, however, exceptions to the rule. One is the inclusion of a saving clause in the repealing statute that provides that the repeal shall have no effect on pending actions. ***Another exception is where the repealing act reenacts the former statute and punishes the act previously penalized under the old law.*** In such instance, the act committed before the reenactment continues to be an offense in the statute books and pending cases are not affected, regardless of whether the new penalty to be imposed is more favorable to the accused. xx

[21] Iloilo Palay and Corn Planters Association, Inc. et al. vs. Hon. Jose Y. Feliciano, etal. G.R. No. L-24022, March 3, 1965.
[22] Commissioner of Internal Revenue vs. Solidbank Corporation, G.R. No. 148191. November 25, 2003.
[23] G.R. No. 135808 October 6, 2008

> the Securities Regulations Code ***impose duties that are substantially similar*** to Sections 8, 30 and 36 of the repealed Revised Securities Act."[24] (emphasis supplied)

Applying the analogy, the reportorial requirements under Section 17.1(b) of the IRR of the SRC were reenacted in Section 20 of the Amended IRR. Thus, the non-compliance by Lexber with the requirements under the IRR, whether the original or amended version, was correctly identified and penalized by the CFD.

WHEREFORE, premises considered, the instant Petition is hereby **DENIED** for lack of merit.

Lexber is hereby **ORDERED** to immediately pay the assessed penalty in the amount of One Hundred Thousand Pesos (P100,000.00) within five (5) days from receipt of this Decision.

SO ORDERED.

Mandaluyong City, 25 March 2011.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner

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[24] G.R. No. 135808 October 6, 2008