Republic of the Philippines
Department of Finance
Securities and Exchange Commission
PICC Secretariat Building, PICC Complex, Pasay City

COMMISSION EN BANC

CALATA CORPORATION,
Appellant,

- versus -

THE PHILIPPINE STOCK EXCHANGE, INC.,
Appellee.
x-----------------------------------x

SEC EB Case No. 01-18-437
Appeal of PSE Decision

DECISION

This is an appeal to the Commission En Banc by CALATA CORPORATION (CALATA), assailing the **Decision dated 3 November 2017** and the **Order dated 22 November 2017** of THE PHILIPPINE STOCK EXCHANGE, INC. (PSE).

RELEVANT FACTS

CALATA is a corporation duly-registered with the Commission.

PSE is a corporation duly-registered with the Commission, established for the purpose of operating a stock exchange, and also a self-regulatory organization empowered to regulate the corporations listed and traded therein.

On **23 August 2016**, **26 August 2016**, and **5 September 2016**, CALATA disclosed to the PSE that it was entering into a partnership with Sino-American Gaming Investment Group, LLC (SINO) and the Macau Resources Group Limited (MRG) for the creation of a Real Estate Investment Trust (REIT), owned by CALATA, for the development and operation of Mactan Leisure City (MLC).

CALATA also disclosed the following milestones in the MLC project: (a) the REIT would be incorporated by September 2016; (b) the site works would begin by January 2017; and (c) it would be completed by mid-2020.

On **15 March 2017**, CALATA disclosed that "a particular group of foreign investors" have "decided to retract their commitment" to the MLC project, and that it was "working diligently to create a commitment with another group."

Between 29 November 2016 and 16 March 2017, Joseph H. Calata, Chairman/CEO/President of CALATA, made multiple trades of CALATA shares. The corporation disclosed these transactions on **23 June 2017**.

Between 20 April 2017 to 20 June 2017, Mr. Calata again made multiple trades of CALATA shares. The corporation disclosed these transactions on **7 July 2017**.

On **26 April 2017**, Joseph H. Calata, along with Acting CFO Rose Ann P. Gonzaga, signed CALATA's Statement of Management's Responsibility (SMR) attached to the Audited Financial Statements for 2016.

Joseph H. Calata traded CALATA shares on **26 April 2017**.

On **27 April 2017**, CALATA disclosed an increase in annual revenues.

On **30 April 2017**, CALATA was featured in a Manila Bulletin article entitled, "Calata, Israeli firm talks for greenhouse tie-up." The article stated that Calata was negotiating with a leading greenhouse solution provider, Netafim Greenhouse, in order to improve the quality of locally-grown crops. The greenhouse project would also include the Yupangco Group.

On **2 May 2017**, CALATA disclosed to the PSE that indeed they were going to pursue the greenhouse project with Netafim and the Yupangco Group.

Joseph H. Calata traded CALATA shares on **2 May 2017**.

On **12 July 2017**, the PSE initiated **Involuntary Delisting** proceedings against CALATA, serving notices on the latter on 19 July 2017 via PSE EDGE and on 21 July 2017 via courier.

On **9 August 2017**, CALATA filed its **Position Paper** with the PSE, along with a written request for hearing.

On **31 August 2017** and **4 September 2017**, respectively, CALATA submitted its **Supplemental Position Paper** and its **Manifestation re: Errors in the Supplemental Position Paper**.

On **5 September 2017** and on **2 October 2017**, Hearings were held by the Delisting Panel formed by the PSE to hear the case against CALATA. The PSE gave CALATA seven (7) days from the last hearing to file its Memorandum.

On **11 October 2017**, CALATA filed its **Memorandum** with the PSE.

On **13 October 2017**, the PSE notified CALATA that the case was submitted for decision.

On **3 November 2017**, the PSE issued the assailed **Decision**, finding the CALATA liable for multiple violations of Sections 13.1 and 13.2 of the PSE Disclosure Rules.

On **8 November 2017**, CALATA filed a **Motion for Reconsideration**.

On **22 November 2017**, the PSE issued the assailed **Order** denying CALATA's Motion for Reconsideration.

On **11 December 2017**, CALATA's shares were **delisted** from the official registry of the PSE.

On **8 January 2018**, CALATA filed its **Memorandum of Appeal** with the Commission En Banc.

On **16 May 2017**, the Commission En Banc issued an **Order to File Comment** to the PSE. This was returned unserved, after being inadvertently sent to the PSE's previous address indicated in the Memorandum of Appeal.

On **10 July 2018**, the Commission En Banc issued a **Second Order to File Comment** to the PSE, which was received by the latter on 11 July 2018.

On **26 July 2018**, the PSE filed its **Comment** on CALATA's Memorandum on Appeal.

On **7 September 2018**, the Commission En Banc issued an **Order** submitting this case for decision.

Hence this appeal.

DISCUSSION

The PSE's **rule-making power** as a Self-Regulatory Organization (SRO) is well-settled, and so is the validity on the **PSE Disclosure Rules** and **Delisting Rules** that were duly-approved by the Commission.

SEC. 3-11, Rule III, Part V of 2016 SEC Rules of Procedure provides the review standard for Decisions of the PSE, an SRO, viz.

> SEC. 3-11. *Review Standard.* Findings of fact by the Operating Department, the Special Hearing Panel, or the Self-Regulatory Organization shall not be disturbed by the Commission En Banc, unless serious errors of fact have been committed.

In the assailed PSE Decision, CALATA was held liable for multiple violations of **PSE Disclosure Rules 13.1 and 13.2**, in relation to Section 2 of the **Penalties and Fines** of the PSE Disclosure Rules and Paragraphs (a) and (i) of the **PSE Delisting Rules**.

Section 13.1 of the PSE Disclosure Rules states that:

> SECTION 13. *Disclosure on Transactions of Directors and Principal Officers in the Issuer's Securities –*
>
> **13.1** Notwithstanding Section 17.5 of these Rules, Issuers must disclose to the Exchange the direct and indirect ownership of its directors and principal officers in its securities within five (5) Trading Days after:
>
> xxx xxx xxx
>
> **c.** any acquisition, disposal, or change in the shareholdings of the Directors and Officers.

Section 13.2 of the PSE Disclosure Rules, also known as the "**Blackout Rule**," states that:

> SECTION 13. *Disclosure on Transactions of Directors and Principal Officers in the Issuer's Securities –*
>
> **13.2.** A Director or Principal Officer of an Issuer must not deal in the Issuer's securities during the period within which a material non-public information is obtained and up to two (2) full Trading Days after the price sensitive information is disclosed.

Section 2 of the Penalties and Fines of the PSE Disclosure Rules states that:

> SECTION 2. *Penalty for Non-Compliance with Unstructured Disclosure Requirements* – Any violation of the terms and conditions of the Listing Agreement and of any other provisions of these Rules committed within a twelve-month period shall make the Issuer liable for the following penalties:

First Violation	P50,000.00
Second Violation of a similar nature	P75,000.00
Third Violation	Suspension of trading the issue for a period of one (1) month
Fourth Violation	Ground for delisting

Paragraphs (a) and (i) of the PSE Delisting Rules states that:

> **Criteria for Delisting** – A listed company that is experiencing one of the following conditions shall be considered for delisting:
>
> **(a)** The listed company has failed to comply with the Listing Agreement or the Listing and Disclosure Rules of the Exchange, now or hereinafter in effect, despite notice and after the lapse of the period specified;
>
> xxx xxx xxx
>
> **(i)** The listed company repeatedly fails to make timely, adequate, and accurate disclosures of information, or fails to submit any reportorial requirement to the Exchange, its shareholders and the investing public in accordance with the Disclosure Rules of the Exchange, or willfully makes a false statement in the financial statements[.]

SECTION 13.1 VIOLATIONS

Section 13.1 holds the listed corporation liable for its failure to timely disclose the change in shareholdings of its Director and Principal Officers. **Section 2 of the Penalties and Fines of the PSE Disclosure Rules** states that the Fourth (and Subsequent) Violations would be a Ground for Delisting.

The Commission En Banc adopts the findings of fact of the PSE, insofar as there being **twenty-nine (29) distinct violations** of Section 13.1 of the PSE Disclosure Rules, composed of two sets of undisclosed transactions.

Under Section 13.1(c), Directors and Principal Officers of a listed company must disclose to the PSE any "acquisition, disposal, or change" in their shareholdings within five (5) trading days.

Here, Joseph H. Calata, a Director and Principal Officer, made multiple trades of CALATA shares between 29 November 2016 and 16 March 2017 but the corporation only disclosed this **first set of undisclosed transactions** on 23 June 2017, which is manifestly beyond five (5) trading days.

Mr. Calata also made multiple trades of CALATA shares from 20 April 2017 to 20 June 2017 but the corporation only disclosed this **second set of undisclosed transactions** on 7 July 2017, which is manifestly beyond five (5) trading days.

Intent is immaterial in Section 13.1 violations.

The first and second set of undisclosed transactions add up to twenty-nine (29) distinct violations of Section 13.1, in excess of four violations.

Therefore, CALATA may be validly Delisted because of twenty-nine (29) violations of Section 13.1 of the PSE Disclosure Rules.

SECTION 13.2 VIOLATIONS

Section 13.2 holds the listed corporation liable for trades by its Directors and Principal Officers executed during a "Blackout Period," where only they are in possession of material non-public information. **Section 2 of the Penalties and Fines of the PSE Disclosure Rules** states that the Fourth (and Subsequent) Violations would be a Ground for Delisting.

The Commission En Banc adopts the findings of fact of the PSE, insofar as there being **twenty-six (26) distinct violations** of the Blackout Rule, i.e. Section 13.2 of the PSE Disclosure Rules, within two Blackout Periods.

Here, the following are deemed **material non-public information,** triggering the corresponding Blackout Periods, which extend to two (2) trading days after the disclosure of such information, viz.

(1) **The disclosure of the indefinite delays in the MLC project due to foreign investors having retracting their commitment,**

Blackout Period between 1 October 2016 and 17 March 2017 (**first blackout period**);

(2) **The disclosure of increase in annual revenues**, Blackout Period between 26 April 2017 and 29 April 2017, along with **the disclosure of a greenhouse project between CALATA, Netafim, and the Yupangco group**, Blackout Period between 30 April 2017 to 4 May 2017 (collectively, **second blackout period**).

Regarding the MLC project, we agree with the PSE that: "Even the Company, by its act of disclosing its partnership with Sino and MRG, is deemed to have admitted that this information is material and disclosable."[1]

Intent is immaterial in Section 13.2 violations.

During these two Blackout Periods, Joseph H. Calata traded his CALATA shares, which is attributable to the corporation as twenty-six (26) distinct violations of Section 13.2, in excess of four violations.

Therefore, CALATA may be validly Delisted because of twenty-six (26) violations of Section 13.2 of the PSE Disclosure Rules.

DISQUALIFICATIONS

We affirm *in toto* the disqualifications imposed by the PSE, considering that multiple violations of Sections 13.1 and 13.2 of the PSE Disclosure Rules have been established. The PSE correctly invoked the Corporation Code and the Code of Corporate Governance to hold the Directors of CALATA personally liable, viz.

> Under the **Corporation Code**, the corporate powers of all corporations shall be exercised by the Board of Directors. As such, directors of the Company are expected to oversee and ensure the Company's compliance with all the relevant rules and regulations.
>
> Further, the **Code of Corporate Governance for Publicly Listed Companies ("CCGPLC")** is replete with provisions imposing on the Board of Directors, as a whole, and on the directors themselves, individually, the duties of ensuring the Company's compliance with relevant and pertinent laws and rules, overseeing that [the] appropriate internal control system is in place, and establishing policies and procedures which ensure comprehensive, accurate, reliable, and timely disclosures and reports to shareholders and other stakeholders.[2]

Indeed, the PSE has discretion on the penalties to impose on erring Directors and Principal Officers, pursuant to its "mandate to ensure a fair, orderly, efficient, and transparent market by way of ascertaining, among others, that the

[1] Page 28 of PSE's Comment.
[2] Page 41 of PSE's Comment.

gatekeepers of a listed company are suitable and have the integrity, capability, and track record to dutifully perform their obligations."[3] Such discretion, however, must conform to the PSE Rules and the Securities Regulation Code (SRC).

The PSE ruled that "the concomitant penalty of disqualification is **relationship-based**, *i.e.* it is imposed upon the directors and executive officers of a company that has been delisted, by virtue of their positions in, or affiliation with, the company."[4] The violations of the corporation must thus be borne by its Directors and Principal Officers in proportion to their involvement.

Essentially, CALATA's violations are: (a) trading while in possession of material non-public information, under Section 13.2 of the PSE Disclosure Rules; and (b) failure to disclose the changes in equity of a Director or Principal Officer, under Section 13.1 of the PSE Disclosure Rules. The illicit trades pertain to approximately 125 Million shares of CALATA.

Joseph H. Calata, in his capacity as Chairman, CEO, and President, is primarily liable because: (1) he is the Director and Principal Officer who traded on CALATA shares while in possession of material non-public information; and (2) he is the Director and Principal Officer who failed to inform the corporation, through its Compliance Officer, of his transactions in CALATA shares.

Atty. Jose Maria Fabella, in his capacity as Compliance Officer, is primarily liable (1) for the trades performed by a Director or Principal Officer while in possession of material non-public information, and (2) for failing to inform the PSE of the transactions of a Director or Principal Officer.

CALATA was afforded due process while the case was pending before the PSE, where pleadings were exchanged and hearings held, and in the present appeal to the Commission En Banc, where there was again an exchange of pleadings. Nevertheless, CALATA consistently admitted that trades were executed while in possession of material non-public information and that there was a failure to disclose the same to the PSE.

The Commission confirms the penalties of perpetual disqualifications imposed on Mr. Calata and Atty. Fabella, because the violations committed are analogous to those in Section 27 of the SRC, which may be punished by disqualification in Section 54.1(iii) thereof, viz.

> **Section 27. Insider's Duty to Disclose When Trading. - 27.1.** It shall be unlawful for an insider to sell or buy a security of the issuer, while in possession of material information with respect to the issuer or the security that is not generally available to the public, unless: **(a)** The insider proves that the information was not gained from such relationship; or **(b)** If the other party selling to or buying from the insider (or his agent) is identified, the insider proves: **(i)** that he disclosed the information to the other party, or **(ii)** that he had reason to believe that the other party otherwise is also in possession of the information. A purchase or sale of a security of the

[3] Page 38 of PSE's Comment.
[4] Page 40 of PSE's Comment.

issuer made by an insider defined in Subsection 3.8, or such insider's spouse or relatives by affinity or consanguinity within the second degree, legitimate or common-law, shall be presumed to have been effected while in possession of material nonpublic information if transacted after such information came into existence but prior to dissemination of such information to the public and the lapse of a reasonable time for market to absorb such information: Provided, however, That this presumption shall be rebutted upon a showing by the purchaser or seller that he was aware of the material nonpublic information at the time of the purchase or sale.

27.2. For purposes of this Section, information is "material nonpublic" if: **(a)** It has not been generally disclosed to the public and would likely affect the market price of the security after being disseminated to the public and the lapse of a reasonable time for the market to absorb the information; or **(b)** would be considered by a reasonable person important under the circumstances in determining his course of action whether to buy, sell or hold a security.

xxx xxx xxx

Section 54. Administrative Sanctions. - 54.1. If, after due notice and hearing, the Commission finds that: **(a)** There is a violation of this Code, its rule, or its orders; **(b)** xxx; **(c)** Any registrant or other person has, in a registration statement or in other reports, applications, accounts, records or documents required by law or rules to be filed with the Commission, made any untrue statement of a material fact, or **omitted to state any material fact required to be stated** their or necessary to make the statements therein not misleading; or, in the case of an underwriter, has failed to conduct an inquiry with reasonable diligence to insure that a registration statement is accurate and complete in all material respects; or **(d)** xxx, it shall, in its discretion, and subject only to the limitations hereinafter prescribed, impose any or all of the following sanctions as may be appropriate in light of the facts and circumstances:

xxx xxx xxx

(iii) In the case of a violation of Sections 19.2, 20, 24, 26 and **27**, **disqualification** from being an **officer, member of the Board of Directors, or person performing similar functions, of an issuer** required to file reports under Section 17 of this Code

> or any other act, rule or regulation administered by the Commission[.] (Emphasis supplied)

The other directors, although they neither illicitly-traded nor failed to disclose, may also be held liable because they bound themselves to ensure that CALATA would not commit any violation of the PSE Disclosure Rules. This duty is echoed in the Listing Agreement between CALATA and the PSE.

We note that under the PSE's **"Suitability Rule,"** there is a "serious question relating to the integrity or capability of the Issuer or **any of its directors**, executive officers, promoters or control person" if, during the past five (5) years, any of the following events occurred:

> Being found by a domestic or foreign court of competent jurisdiction (in a civil action), the Commission or comparable foreign body, or a domestic or foreign exchange or electronic marketplace or **self-regulatory organization**, to have violated a securities or commodities law, and the judgment has not been reversed, suspended, or vacated.[5] (Emphasis supplied)

CALATA was found to have violated the securities laws, and there is thus a "serious question" as to the integrity of each and every director. None of them would be deemed suitable to assume office in any listed corporation.

Therefore, there is nothing irregular in the penalties of disqualification, in degrees proportionate to their involvement in the offense: (1) upon Mr. Calata as Chairman/CEO/President, (2) upon Atty. Fabella as Compliance Officer, and (3) upon the other directors of CALATA, who bound themselves to ensure that no violations of the PSE Disclosure Rules would be committed.

TENDER OFFER AS EXIT STRATEGY

In the assailed **Decision dated 3 November 2017**, the PSE required CALATA to immediately submit a tender offer (buy back) plan, which was intended by PSE as an exit strategy for CALATA's shareholders, because they are presently unable to sell their shares. In the guise of **investor protection**, the PSE adapted its procedure for voluntary delisting, which would compel the delisting corporation to buy-back any and all shares tendered by its shareholders.

The PSE further ruled that a tender offer (buy back) by CALATA is viable despite its **lack of retained earnings**. But CALATA argued that the presence of sufficient unrestricted retained earnings is an absolute requirement before a Tender Offer can be enforced, and that compelling the same, despite the lack of unrestricted retained earnings, would bankrupt the corporation.

Pursuant to **Section 40.2 of the SRC**, the PSE is mandated to abide by the provisions of the SRC and its Implementing Rules, viz.

> Every self-regulatory organization shall comply with the provisions of this Code, the rules and regulations

[5] Section 1(c)(iv) of Part I-B of the PSE Consolidated Listing and Disclosure Rules.

> thereunder, and its own rules, and enforce compliance therewith, notwithstanding any provisions of the Corporation Code to the contrary, by its members, persons associated with its members of its participants.

Even though **Section 19 of the SRC** does not explicitly require unrestricted retained earnings, the Commission imposed the requirement in **Rule 19.4 of the 2015 SRC Implementing Rules (SRC Rule 19.4)**, viz.

> **19.4 Tender Offer by an Issuer or Buy Back**
>
> **19.4.1** Reacquisition or repurchase by an Issuer of its own securities shall only be made if such Issuer has **unrestricted retained earnings** in its books to cover the amount of shares to be purchased, and is undertaken for any of the following purchases:
>
> xxx xxx xxx
>
> **19.4.1.3** To pay dissenting or withdrawing stockholders entitled to payment for their securities under the Corporation Code[.] (Emphasis supplied)

Since CALATA **does not have sufficient unrestricted retained earnings**, a tender offer (buy back) initiated by CALATA would be sourced from capital. This not only violates **SRC Rule 19.4**, but it goes against the **Trust Fund Doctrine**, which essentially states that the assets of the corporation are held in trust for its **creditors**, before any distribution can be made to its shareholders.

The Supreme Court ruling in **Ong Yong v. Tiu**[6] is instructive, viz.

> The Trust Fund Doctrine, first enunciated by this Court in the 1923 case of *Philippine Trust Co. vs. Rivera,* provides that subscriptions to the capital stock of a corporation constitute a fund to which the creditors have a right to look for the satisfaction of their claims. This doctrine is the underlying principle in the procedure for the distribution of capital assets, embodied in the Corporation Code, which allows the distribution of corporate capital only in three instances: (1) amendment of the Articles of Incorporation to reduce the authorized capital stock, (2) purchase of redeemable shares by the corporation, regardless of the existence of unrestricted retained earnings, and (3) dissolution and eventual liquidation of the corporation. Furthermore, the doctrine is articulated in Section 41 on the power of a corporation to acquire its own shares and in Section 122 on the prohibition against the distribution of corporate assets and property unless the stringent requirements therefor are complied with.

[6] G.R. No. 144476, 8 April 2003.

> The distribution of corporate assets and property cannot be made to depend on the whims and caprices of the stockholders, officers or directors of the corporation, or even, for that matter, on the earnest desire of the court *a quo* to prevent further squabbles and future litigations unless the indispensable conditions and procedures for the protection of corporate creditors are followed. Otherwise, the corporate peace laudably hoped for by the court will remain nothing but a dream because this time, it will be the creditors turn to engage in squabbles and litigations should the court order an unlawful distribution in blatant disregard of the Trust Fund Doctrine. (Emphasis supplied)

In this regard, the latest reports filed by CALATA with Commission establish that **the corporation does not have sufficient unrestricted retained earnings to buy back all the outstanding shares.**

Thus, we set aside the Tender Offer (Buy Back) ordered by the PSE.

CONCLUSION

Considering that CALATA has **admitted** to the non-disclosures and illicit trades, and because these acts are imputed to the corporation and not just the Directors and Principal Officers involved, we affirm the ruling of the PSE except for the tender offer (buy back) requirement.

WHEREFORE, premises considered, the PSE's Decision dated 3 November 2017 and Order dated 22 November 2017 are hereby **AFFIRMED**, except for the Tender Offer (Buy Back) requirement imposed by the PSE.

SO ORDERED.

Pasay City, Philippines; 25 October 2018.

EMILIO B. AQUINO
Chairperson

ANTONIETA F. IBE*
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

*On Leave