

## EN BANC

**[ G.R. No. 144516, February 11, 2004 ]**

**DEVELOPMENT BANK OF THE PHILIPPINES, PETITIONER, VS.  
COMMISSION ON AUDIT, RESPONDENT.**

### DECISION

**CARPIO, J.:**

#### The Case

In this special civil action for *certiorari*,<sup>[1]</sup> the Development Bank of the Philippines ("DBP") seeks to set aside COA Decision No. 98-403<sup>[2]</sup> dated 6 October 1998 ("COA Decision") and COA Resolution No. 2000-212<sup>[3]</sup> dated 1 August 2000 issued by the Commission on Audit ("COA"). The COA affirmed Audit Observation Memorandum ("AOM") No. 93-2,<sup>[4]</sup> which disallowed in audit the dividends distributed under the Special Loan Program ("SLP") to the members of the DBP Gratuity Plan.

#### Antecedent Facts

The DBP is a government financial institution with an original charter, Executive Order No. 81,<sup>[5]</sup> as amended by Republic Act No. 8523<sup>[6]</sup> ("DBP Charter"). The COA is a constitutional body with the mandate to examine and audit all government instrumentalities and investment of public funds.<sup>[7]</sup>

The COA Decision sets forth the undisputed facts of this case as follows:

xxx [O]n February 20, 1980, the Development Bank of the Philippines (DBP) Board of Governors adopted Resolution No. 794 creating the DBP Gratuity Plan and authorizing the setting up of a retirement fund to cover the benefits due to DBP retiring officials and employees under Commonwealth Act No. 186, as amended. The Gratuity Plan was made effective on June 17, 1967 and covered all employees of the Bank as of May 31, 1977.

On February 26, 1980, a Trust Indenture was entered into by and between the DBP and the Board of Trustees of the Gratuity Plan Fund, vesting in the latter the control and administration of the Fund. The trustee, subsequently, appointed the DBP Trust Services Department (DBP-TSD) as the investment manager thru an Investment Management Agreement, with the end in view of making the income and principal of the Fund sufficient to meet the liabilities of DBP under the Gratuity Plan.

In 1983, the Bank established a Special Loan Program availed thru the

facilities of the DBP Provident Fund and funded by placements from the Gratuity Plan Fund. This Special Loan Program was adopted as "part of the benefit program of the Bank to provide financial assistance to qualified members to enhance and protect the value of their gratuity benefits" because "Philippine retirement laws and the Gratuity Plan do not allow partial payment of retirement benefits." The program was suspended in 1986 but was revived in 1991 thru DBP Board Resolution No. 066 dated January 5, 1991.

Under the Special Loan Program, a prospective retiree is allowed the option to utilize in the form of a loan a portion of his "outstanding equity" in the gratuity fund and to invest it in a profitable investment or undertaking. The earnings of the investment shall then be applied to pay for the interest due on the gratuity loan which was initially set at 9% per annum subject to the minimum investment rate resulting from the updated actuarial study. The excess or balance of the interest earnings shall then be distributed to the investor-members.

Pursuant to the investment scheme, DBP-TSD paid to the investor-members a total of P11,626,414.25 representing the net earnings of the investments for the years 1991 and 1992. The payments were disallowed by the Auditor under Audit Observation Memorandum No. 93-2 dated March 1, 1993, on the ground that the distribution of income of the Gratuity Plan Fund (GPF) to future retirees of DBP is irregular and constituted the use of public funds for private purposes which is specifically proscribed under Section 4 of P.D. 1445.<sup>[8]</sup>

AOM No. 93-2 did "not question the authority of the Bank to set-up the [Gratuity Plan] Fund and have it invested in the Trust Services Department of the Bank."<sup>[9]</sup> Apart from requiring the recipients of the P11,626,414.25 to refund their dividends, the Auditor recommended that the DBP record in its books as miscellaneous income the income of the Gratuity Plan Fund ("Fund"). The Auditor reasoned that "the Fund is still owned by the Bank, the Board of Trustees is a mere administrator of the Fund in the same way that the Trust Services Department where the fund was invested was a mere investor and neither can the employees, who have still an inchoate interest [i]n the Fund be considered as rightful owner of the Fund."<sup>[10]</sup>

In a letter dated 29 July 1996,<sup>[11]</sup> former DBP Chairman Alfredo C. Antonio requested then COA Chairman Celso D. Gangan to reconsider AOM No. 93-2. Chairman Antonio alleged that the express trust created for the benefit of qualified DBP employees under the Trust Agreement<sup>[12]</sup> ("Agreement") dated 26 February 1980 gave the Fund a separate legal personality. The Agreement transferred legal title over the Fund to the Board of Trustees and all earnings of the Fund accrue only to the Fund. Thus, Chairman Antonio contended that the income of the Fund is not the income of DBP.

Chairman Antonio also asked COA to lift the disallowance of the P11,626,414.25 distributed as dividends under the SLP on the ground that the latter was simply a normal loan transaction. He compared the SLP to loans granted by other gratuity and retirement funds, like the GSIS, SSS and DBP Provident Fund.

## **The Ruling of the Commission on Audit**

On 6 October 1998, the COA *en banc* affirmed AOM No. 93-2, as follows:

The Gratuity Plan Fund is supposed to be accorded separate personality under the administration of the Board of Trustees but that concept has been effectively eliminated when the Special Loan Program was adopted. xxx

The Special Loan Program earns for the GPF an interest of 9% per annum, subject to adjustment after actuarial valuation. The investment scheme managed by the TSD accumulated more than that as evidenced by the payment of P4,568,971.84 in 1991 and P7,057,442,41 in 1992, to the member-borrowers. In effect, the program is grossly disadvantageous to the government because it deprived the GPF of higher investment earnings by the unwarranted entanglement of its resources under the loan program in the guise of giving financial assistance to the availing employees. xxx

Retirement benefits may only be availed of upon retirement. It can only be demanded and enjoyed when the employee shall have met the last requisite, that is, actual retirement under the Gratuity Plan. During employment, the prospective retiree shall only have an inchoate right over the benefits. There can be no partial payment or enjoyment of the benefits, in whatever guise, before actual retirement. xxx

PREMISES CONSIDERED, the instant request for reconsideration of the disallowance amounting to P11,626,414.25 has to be, as it is hereby, denied.<sup>[13]</sup>

In its Resolution of 1 August 2000, the COA also denied DBP's second motion for reconsideration. Citing the Court's ruling in **Conte v. COA**,<sup>[14]</sup> the COA concluded that the SLP was actually a supplementary retirement benefit in the guise of "financial assistance," thus:

At any rate, the Special Loan Program is not just an ordinary and regular transaction of the Gratuity Plan Fund, as the Bank innocently represents. xxx It is a systematic investment mix conveniently implemented in a special loan program with the least participation of the beneficiaries, by merely filing an application and then wait for the distribution of net earnings. The real objective, of course, is to give financial assistance to augment the value of the gratuity benefits, and this has the same effect as the proscribed supplementary pension/retirement plan under Section 28 (b) of C(ommonwealth) A(ct) 186.

This Commission may now draw authority from the case of *Conte, et al. v. Commission on Audit* (264 SCRA 19 [1996]) where the Supreme Court declared that "financial assistance" granted to retiring employees constitute supplementary retirement or pension benefits. It was there stated:

“xxx Said Sec. 28 (b) as amended by R.A. 4968 in no uncertain terms bars the creation of any insurance or retirement plan – other than the GSIS – for government officers and employees, in order to prevent the undue and iniquitous proliferation of such plans. It is beyond cavil that Res. 56 contravenes the said provision of law and is therefore, invalid, void and of no effect. To ignore this and rule otherwise would be tantamount to permitting every other government office or agency to put up its own supplementary retirement benefit plan under the guise of such “financial assistance.”<sup>[15]</sup>

Hence, the instant petition filed by DBP.

### **The Issues**

The DBP invokes justice and equity on behalf of its employees because of prevailing economic conditions. The DBP reiterates that the income of the Fund should be treated and recorded as separate from the income of DBP itself, and charges that COA committed grave abuse of discretion:

1. IN CONCLUDING THAT THE ADOPTION OF THE SPECIAL LOAN PROGRAM CONSTITUTES A CIRCUMVENTION OF PHILIPPINE RETIREMENT LAWS;
2. IN CONCLUDING THAT THE SPECIAL LOAN PROGRAM IS GROSSLY DISADVANTAGEOUS TO THE GOVERNMENT;
3. IN CONCLUDING THAT THE SPECIAL LOAN PROGRAM CONSTITUTES A SUPPLEMENTARY RETIREMENT BENEFIT.<sup>[16]</sup>

The Office of the Solicitor General (“OSG”), arguing on behalf of the COA, questions the standing of the DBP to file the instant petition. The OSG claims that the trustees of the Fund or the DBP employees themselves should pursue this *certiorari* proceeding since they would be the ones to return the dividends and not DBP.

The central issues for resolution are: (1) whether DBP has the requisite standing to file the instant petition for *certiorari*; (2) whether the income of the Fund is income of DBP; and (3) whether the distribution of dividends under the SLP is valid.

### **The Ruling of the Court**

The petition is partly meritorious.

#### ***The standing of DBP to file this petition for certiorari***

As DBP correctly argued, the COA *en banc* implicitly recognized DBP’s standing when it ruled on DBP’s request for reconsideration from AOM No. 93-2 and motion for reconsideration from the Decision of 6 October 1998. The supposed lack of standing of the DBP was not even an issue in the COA Decision or in the Resolution of 1 August 2000.

The OSG nevertheless contends that the DBP cannot question the decisions of the COA *en banc* since DBP is a government instrumentality. Citing Section 2, Article IX-D of the Constitution,<sup>[17]</sup> the OSG argued that:

Petitioner may ask the lifting of the disallowance by COA, since COA had not yet made a definitive and final ruling on the matter in issue. But after COA denied with finality the motion for reconsideration of petitioner, petitioner, being a government instrumentality, should accept COA's ruling and leave the matter of questioning COA's decision with the concerned investor-members.<sup>[18]</sup>

These arguments do not persuade us.

Section 2, Article IX-D of the Constitution does not bar government instrumentalities from questioning decisions of the COA. Government agencies and government-owned and controlled corporations have long resorted to petitions for *certiorari* to question rulings of the COA.<sup>[19]</sup> These government entities filed their petitions with this Court pursuant to Section 7, Article IX of the Constitution, which mandates that aggrieved parties may bring decisions of the COA to the Court on *certiorari*.<sup>[20]</sup> Likewise, the Government Auditing Code expressly provides that a government agency aggrieved by a COA decision, order or ruling may raise the controversy to the Supreme Court on *certiorari* "in the manner provided by law and the Rules of Court."<sup>[21]</sup> Rule 64 of the Rules of Court now embodies this procedure, to wit:

SEC 2. *Mode of review.* – A judgment or final order or resolution of the Commission on Elections and the Commission on Audit may be brought by the aggrieved party to the Supreme Court on *certiorari* under Rule 65, except as hereinafter provided.

The novel theory advanced by the OSG would necessarily require persons not parties to the present case – the DBP employees who are members of the Plan or the trustees of the Fund – to avail of *certiorari* under Rule 65. The petition for *certiorari* under Rule 65, however, is not available to any person who feels injured by the decision of a tribunal, board or officer exercising judicial or quasi-judicial functions. The "person aggrieved" under Section 1 of Rule 65 who can avail of the special civil action of *certiorari* pertains only to one who was a party in the proceedings before the court *a quo*,<sup>[22]</sup> or in this case, before the COA. To hold otherwise would open the courts to numerous and endless litigations.<sup>[23]</sup> Since DBP was the sole party in the proceedings before the COA, DBP is the proper party to avail of the remedy of *certiorari*.

The real party in interest who stands to benefit or suffer from the judgment in the suit must prosecute or defend an action.<sup>[24]</sup> We have held that "interest" means material interest, an interest in issue that the decision will affect, as distinguished from mere interest in the question involved, or a mere incidental interest.<sup>[25]</sup>

As a party to the Agreement and a trustor of the Fund, DBP has a material interest in the implementation of the Agreement, and in the operation of the Gratuity Plan and the Fund as prescribed in the Agreement. The DBP also possesses a real interest in upholding the legitimacy of the policies and programs approved by its Board of Directors for the benefit of DBP employees. This includes the SLP and its