

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

G.R. No. 144516. February 11, 2004

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

In this special civil action for certiorari,[1] the Development Bank of the Philippines (“DBP”) seeks to set aside COA Decision No. 98-403[2] dated 6 October 1998 (“COA Decision”) and COA Resolution No. 2000-212[3] dated 1 August 2000 issued by the Commission on Audit (“COA”). The COA affirmed Audit Observation Memorandum (“AOM”) No. 93-2,[4] 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,[5] as amended by Republic Act No. 8523[6] (“DBP Charter”). The COA is a constitutional body with the mandate to examine and audit all government instrumentalities and investment of public funds.[7]

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.[8]

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.”[9] 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.”[10]

In a letter dated 29 July 1996,[11] 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[12] (“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.[13]

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*,[14] 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.”[15]

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.[16]

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,[17] 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.[18]

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.[19] 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.[20] 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." [21] 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,[22] or in this case, before the COA. To hold otherwise would open the courts to numerous and endless litigations.[23] 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.[24] 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.[25]

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 implementing rules, which the DBP Board of Directors confirmed.

The income of the Gratuity Plan Fund

The COA alleges that DBP is the actual owner of the Fund and its income, on the following grounds: (1) DBP made the contributions to the Fund; (2) the trustees of the Fund are merely administrators; and (3) DBP

employees only have an inchoate right to the Fund.

The DBP counters that the Fund is the subject of a trust, and that the Agreement transferred legal title over the Fund to the trustees. The income of the Fund does not accrue to DBP. Thus, such income should not be recorded in DBP's books of account.[26]

A trust is a "fiduciary relationship with respect to property which involves the existence of equitable duties imposed upon the holder of the title to the property to deal with it for the benefit of another." [27] A trust is either express or implied. Express trusts are those which the direct and positive acts of the parties create, by some writing or deed, or will, or by words evincing an intention to create a trust.[28]

In the present case, the DBP Board of Governors' (now Board of Directors) Resolution No. 794 and the Agreement executed by former DBP Chairman Rafael Sison and the trustees of the Plan created an express trust, specifically, an employees' trust. An employees' trust is a trust maintained by an employer to provide retirement, pension or other benefits to its employees.[29] It is a separate taxable entity[30] established for the exclusive benefit of the employees.[31]

Resolution No. 794 shows that DBP intended to establish a trust fund to cover the retirement benefits of certain employees under Republic Act No. 1616[32] ("RA 1616"). The principal and income of the Fund would be separate and distinct from the funds of DBP. We quote the salient portions of Resolution No. 794, as follows:

2. Trust Agreement – designed for in-house trustees of three (3) to be appointed by the Board of Governors and vested with control and administration of the funds appropriated annually by the Board to be invested in selective investments so that the income and principal of said contributions would be sufficient to meet the required payments of benefits as officials and employees of the Bank retire under the Gratuity Plan; xxx

The proposed funding of the gratuity plan has decided advantages on the part of the Bank over the present procedure, where the Bank provides payment only when an employee retires or on "pay as you go" basis:

1. It is a definite written program, permanent and continuing whereby the Bank provides contributions to a separate trust fund, which shall be exclusively used to meet its liabilities to retiring officials and employees; and
2. Since the gratuity plan will be tax qualified under the National Internal Revenue Code and RA 4917, the Bank's periodic contributions thereto shall be deductible for tax purposes and the earnings therefrom tax free.[33] (Emphasis supplied)

In a trust, one person has an equitable ownership in the property while another person owns the legal title to such property, the equitable ownership of the former entitling him to the performance of certain duties and the exercise of certain powers by the latter.[34] A person who establishes a trust is the trustor. One in whom confidence is reposed as regards property for the benefit of another is the trustee. The person for whose benefit the trust is created is the beneficiary.[35]

In the present case, DBP, as the trustor, vested in the trustees of the Fund legal title over the Fund as well as control over the investment of the money and assets of the Fund. The powers and duties granted to the trustees of the Fund under the Agreement were plainly more than just administrative, to wit:

1. The BANK hereby vests the control and administration of the Fund in the TRUSTEES for the accomplishment of the purposes for which said Fund is intended in defraying the benefits of the PLAN in accordance with its provisions, and the TRUSTEES hereby accept the trust xxx
2. The TRUSTEES shall receive and hold legal title to the money and/or property comprising the Fund, and shall hold the same in trust for its beneficiaries, in accordance with, and for the uses and purposes stated in the

provisions of the PLAN.

3. Without in any sense limiting the general powers of management and administration given to TRUSTEES by our laws and as supplementary thereto, the TRUSTEES shall manage, administer, and maintain the Fund with full power and authority:

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b. To invest and reinvest at any time all or any part of the Fund in any real estate (situated within the Philippines), housing project, stocks, bonds, mortgages, notes, other securities or property which the said TRUSTEES may deem safe and proper, and to collect and receive all income and profits existing therefrom;

c. To keep and maintain accurate books of account and/or records of the Fund xxx.

d. To pay all costs, expenses, and charges incurred in connection with the administration, preservation, maintenance and protection of the Fund xxx to employ or appoint such agents or employees xxx.

e. To promulgate, from time to time, such rules not inconsistent with the conditions of this Agreement xxx.

f. To do all acts which, in their judgment, are needful or desirable for the proper and advantageous control and management of the Fund xxx.[36] (Emphasis supplied)

Clearly, the trustees received and collected any income and profit derived from the Fund, and they maintained separate books of account for this purpose. The principal and income of the Fund will not revert to DBP even if the trust is subsequently modified or terminated. The Agreement states that the principal and income must be used to satisfy all of the liabilities to the beneficiary officials and employees under the Gratuity Plan, as follows:

5. The BANK reserves the right at any time and from time to time (1) to modify or amend in whole or in part by written directions to the TRUSTEES, any and all of the provisions of this Trust Agreement, or (2) to terminate this Trust Agreement upon thirty (30) days' prior notice in writing to the TRUSTEES; provided, however, that no modification or amendment which affects the rights, duties, or responsibilities of the TRUSTEES may be made without the TRUSTEES' consent; and provided, that such termination, modification, or amendment prior to the satisfaction of all liabilities with respect to eligible employees and their beneficiaries, does not permit any part of the corpus or income of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of eligible employees and workers as provided for in the PLAN. In the event of termination of this Trust Agreement, all cash, securities, and other property then constituting the Fund less any amounts constituting accrued benefits to the eligible employees, charges and expenses payable from the Fund, shall be paid over or delivered by the TRUSTEES to the members in proportion to their accrued benefits.[37] (Emphasis supplied)

The resumption of the SLP did not eliminate the trust or terminate the transfer of legal title to the Fund's trustees. The records show that the Fund's Board of Trustees approved the SLP upon the request of the DBP Career Officials Association.[38] The DBP Board of Directors only confirmed the approval of the SLP by the Fund's trustees.

The beneficiaries or cestui que trust of the Fund are the DBP officials and employees who will retire under Commonwealth Act No. 186[39] ("CA 186"), as amended by RA 1616. RA 1616 requires the employer agency or government instrumentality to pay for the retirement gratuity of its employees who rendered service for the required number of years.[40] The Government Service Insurance System Act of 1997[41] still allows retirement under RA 1616 for certain employees.

As COA correctly observed, the right of the employees to claim their gratuities from the Fund is still inchoate. RA 1616 does not allow employees to receive their gratuities until they retire. However, this does not invalidate the

trust created by DBP or the concomitant transfer of legal title to the trustees. As far back as in *Government v. Abadilla*,^[42] the Court held that “it is not always necessary that the cestui que trust should be named, or even be in esse at the time the trust is created in his favor.” It is enough that the beneficiaries are sufficiently certain or identifiable.^[43]

In this case, the GSIS Act of 1997 extended the option to retire under RA 1616 only to employees who had entered government service before 1 June 1977.^[44] The DBP employees who were in the service before this date are easily identifiable. As of the time DBP filed the instant petition, DBP estimated that 530 of its employees could still retire under RA 1616. At least 60 DBP employees had already received their gratuities under the Fund.^[45]

The Agreement indisputably transferred legal title over the income and properties of the Fund to the Fund’s trustees. Thus, COA’s directive to record the income of the Fund in DBP’s books of account as the miscellaneous income of DBP constitutes grave abuse of discretion. The income of the Fund does not form part of the revenues or profits of DBP, and DBP may not use such income for its own benefit. The principal and income of the Fund together constitute the res or subject matter of the trust. The Agreement established the Fund precisely so that it would eventually be sufficient to pay for the retirement benefits of DBP employees under RA 1616 without additional outlay from DBP. COA itself acknowledged the authority of DBP to set up the Fund. However, COA’s subsequent directive would divest the Fund of income, and defeat the purpose for the Fund’s creation.

The validity of the Special Loan Program and the disallowance of P11,626,414.25

In disallowing the P11,626,414.25 distributed as dividends under the SLP, the COA relied primarily on Republic Act No. 4968 (“RA 4968”) which took effect on 17 June 1967. RA 4968 added the following paragraph to Section 28 of CA 186, thus:

(b) Hereafter no insurance or retirement plan for officers or employees shall be created by any employer. All supplementary retirement or pension plans heretofore in force in any government office, agency, or instrumentality or corporation owned or controlled by the government, are hereby declared inoperative or abolished: Provided, That the rights of those who are already eligible to retire thereunder shall not be affected.

Even assuming, however, that the SLP constitutes a supplementary retirement plan, RA 4968 does not apply to the case at bar. The DBP Charter, which took effect on 14 February 1986, expressly authorizes supplementary retirement plans “adopted by and effective in” DBP, thus:

SEC. 34. Separation Benefits. – All those who shall retire from the service or are separated therefrom on account of the reorganization of the Bank under the provisions of this Charter shall be entitled to all gratuities and benefits provided for under existing laws and/or supplementary retirement plans adopted by and effective in the Bank: Provided, that any separation benefits and incentives which may be granted by the Bank subsequent to June 1, 1986, which may be in addition to those provided under existing laws and previous retirement programs of the Bank prior to the said date, for those personnel referred to in this section shall be funded by the National Government; Provided, further, that, any supplementary retirement plan adopted by the Bank after the effectivity of this Chapter shall require the prior approval of the Minister of Finance.

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SEC. 37. Repealing Clause. – All acts, executive orders, administrative orders, proclamations, rules and regulations or parts thereof inconsistent with any of the provisions of this charter are hereby repealed or modified accordingly.^[46] (Emphasis supplied)

Being a special and later law, the DBP Charter[47] prevails over RA 4968. The DBP originally adopted the SLP in 1983. The Court cannot strike down the SLP now based on RA 4968 in view of the subsequent DBP Charter authorizing the SLP.

Nevertheless, the Court upholds the COA's disallowance of the P11,626,414.25 in dividends distributed under the SLP.

According to DBP Board Resolution No. 0036 dated 25 January 1991, the "SLP allows a prospective retiree to utilize in the form of a loan, a portion of their outstanding equity in the Gratuity Plan Fund and to invest [the] proceeds in a profitable investment or undertaking." [48] The basis of the loanable amount was an employee's gratuity fund credit, [49] that is to say, what an employee would receive if he retired at the time he availed of the loan.

In his letter dated 26 October 1983 proposing the confirmation of the SLP, then DBP Chairman Cesar B. Zalamea stated that:

The primary objective of this proposal therefore is to counteract the unavoidable decrease in the value of the said retirement benefits through the following scheme:

I. To allow a prospective retiree the option to utilize in the form of a loan, a portion of his standing equity in the Gratuity Fund and to invest it in a profitable investment or undertaking. The income or appreciation in value will be for his own account and should provide him the desired hedge against inflation or erosion in the value of the peso. This is being proposed since Philippine retirement laws and the Gratuity Plan do not allow partial payment of retirement benefits, even the portion already earned, ahead of actual retirement. [50] (Emphasis supplied)

As Chairman Zalamea himself noted, neither the Gratuity Plan nor our laws on retirement allow the partial payment of retirement benefits ahead of actual retirement. It appears that DBP sought to circumvent these restrictions through the SLP, which released a portion of an employee's retirement benefits to him in the form of a loan. Certainly, the DBP did this for laudable reasons, to address the concerns of DBP employees on the devaluation of their retirement benefits. The remaining question is whether RA 1616 and the Gratuity Plan allow this scheme.

We rule that it is not allowed.

The right to retirement benefits accrues only upon certain prerequisites. First, the conditions imposed by the applicable law – in this case, RA 1616 – must be fulfilled. [51] Second, there must be actual retirement. [52] Retirement means there is "a bilateral act of the parties, a voluntary agreement between the employer and the employees whereby the latter after reaching a certain age agrees and/or consents to sever his employment with the former." [53]

Severance of employment is a condition sine qua non for the release of retirement benefits. Retirement benefits are not meant to recompense employees who are still in the employ of the government. That is the function of salaries and other emoluments. [54] Retirement benefits are in the nature of a reward granted by the State to a government employee who has given the best years of his life to the service of his country. [55]

The Gratuity Plan likewise provides that the gratuity benefit of a qualified DBP employee shall only be released "upon retirement under th(e) Plan." [56] As the COA correctly pointed out, this means that retirement benefits "can only be demanded and enjoyed when the employee shall have met the last requisite, that is, actual retirement under the Gratuity Plan." [57]

There was thus no basis for the loans granted to DBP employees under the SLP. The rights of the recipient DBP

employees to their retirement gratuities were still inchoate, if not a mere expectancy, when they availed of the SLP. No portion of their retirement benefits could be considered as “actually earned” or “outstanding” before retirement. Prior to retirement, an employee who has served the requisite number of years is only eligible for, but not yet entitled to, retirement benefits.

The DBP contends that the SLP is merely a normal loan transaction, akin to the loans granted by the GSIS, SSS and the DBP Provident Fund.

The records show otherwise.

In a loan transaction or mutuum, the borrower or debtor acquires ownership of the amount borrowed.[58] As the owner, the debtor is then free to dispose of or to utilize the sum he loaned,[59] subject to the condition that he should later return the amount with the stipulated interest to the creditor.[60]

In contrast, the amount borrowed by a qualified employee under the SLP was not even released to him. The implementing rules of the SLP state that:

The loan shall be available strictly for the purpose of investment in the following investment instruments:

- a. 182 or 364-day term – Time deposits with DBP
- b. 182 or 364-day T-bills /CB Bills
- c. 182 or 364-day term – DBP Blue Chip Fund

The investment shall be registered in the name of DBP-TSD in trust for avalee-investor for his sole risk and account. Choice of eligible terms shall be at the option of avalee-investor. Investments shall be commingled by TSD and Participation Certificates shall be issued to each avalee-investor.

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IV. LOANABLE TERMS

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e. Allowable Investment Instruments – Time – Deposit – DBP T-Bills/CB Bills and DBP Blue Chip Fund. TSD shall purchase new securities and/or allocate existing securities portfolio of GPF depending on liquidity position of the Fund xxx.

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g. Security – The loan shall be secured by GS, Certificate of Time Deposit and/or BCF Certificate of Participation which shall be registered in the name of DBP-TSD in trust for name of avalee-investor and shall be surrendered to the TSD for safekeeping.[61] (Emphasis supplied)

In the present case, the Fund allowed the debtor-employee to “borrow” a portion of his gratuity fund credit solely for the purpose of investing it in certain instruments specified by DBP. The debtor-employee could not dispose of or utilize the loan in any other way. These instruments were, incidentally, some of the same securities where the Fund placed its investments. At the same time the Fund obligated the debtor-employee to assign immediately his loan to DBP-TSD so that the amount could be commingled with the loans of other employees. The DBP-TSD – the same department which handled and had custody of the Fund’s accounts – then purchased or re-allocated existing securities in the portfolio of the Fund to correspond to the employees’ loans.

Simply put, the amount ostensibly loaned from the Fund stayed in the Fund, and remained under the control and custody of the DBP-TSD. The debtor-employee never had any control or custody over the amount he supposedly borrowed. However, DBP-TSD listed new or existing investments of the Fund corresponding to the “loan” in the

name of the debtor-employee, so that the latter could collect the interest earned from the investments.

In sum, the SLP enabled certain DBP employees to utilize and even earn from their retirement gratuities even before they retired. This constitutes a partial release of their retirement benefits, which is contrary to RA 1616 and the Gratuity Plan. As we have discussed, the latter authorizes the release of gratuities from the earnings and principal of the Fund only upon retirement.

The Gratuity Plan will lose its tax-exempt status if the retirement benefits are released prior to the retirement of the employees. The trust funds of employees other than those of private employers are qualified for certain tax exemptions pursuant to Section 60(B) – formerly Section 53(b) – of the National Internal Revenue Code.[62] Section 60(B) provides:

Section 60. Imposition of Tax. –

(A) Application of Tax. – The tax imposed by this Title upon individuals shall apply to the income of estates or of any kind of property held in trust, including:

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(B) Exception. – The tax imposed by this Title shall not apply to employee's trust which forms part of a pension, stock bonus or profit-sharing plan of an employer for the benefit of some or all of his employees (1) if contributions are made to the trust by such employer, or employees, or both for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, and (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees: xxx (Emphasis supplied)

The Gratuity Plan provides that the gratuity benefits of a qualified DBP employee shall be released only “upon retirement under th(e) Plan.” If the earnings and principal of the Fund are distributed to DBP employees prior to their retirement, the Gratuity Plan will no longer qualify for exemption under Section 60(B). To recall, DBP Resolution No. 794 creating the Gratuity Plan expressly provides that “since the gratuity plan will be tax qualified under the National Internal Revenue Code xxx, the Bank's periodic contributions thereto shall be deductible for tax purposes and the earnings therefrom tax free.” If DBP insists that its employees may receive the P11,626,414.25 dividends, the necessary consequence will be the non-qualification of the Gratuity Plan as a tax-exempt plan.

Finally, DBP invokes justice and equity on behalf of its affected employees. Equity cannot supplant or contravene the law.[63] Further, as evidenced by the letter of former DBP Chairman Zalamea, the DBP Board of Directors was well aware of the proscription against the partial release of retirement benefits when it confirmed the SLP. If DBP wants “to enhance and protect the value of xxx (the) gratuity benefits” of its employees, DBP must do so by investing the money of the Fund in the proper and sound investments, and not by circumventing restrictions imposed by law and the Gratuity Plan itself.

We nevertheless urge the DBP and COA to provide equitable terms and a sufficient period within which the affected DBP employees may refund the dividends they received under the SLP. Since most of the DBP employees were eligible to retire within a few years when they availed of the SLP, the refunds may be deducted from their retirement benefits, at least for those who have not received their retirement benefits.

WHEREFORE, COA Decision No. 98-403 dated 6 October 1998 and COA Resolution No. 2000-212 dated 1 August 2000 are AFFIRMED with MODIFICATION. The income of the Gratuity Plan Fund, held in trust for the benefit of DBP employees eligible to retire under RA 1616, should not be recorded in the books of account of DBP as the income of the latter.

SO ORDERED.

Davide, Jr., C.J., Puno, Vitug, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, Corona, Carpio-Morales, Callejo, Sr., Azcuna, and Tinga, JJ., concur.

[1] Under Rule 65 of the Rules of Court.

[2] Signed by Chairman Celso D. Gangan, Commissioners Sofronio B. Ursal and Emmanuel M. Dalman.

[3] Commissioner Raul C. Flores replaced Commissioner Ursal.

[4] Signed by Director Bernarda C. Lavisores, the corporate auditor assigned to DBP.

[5] “Providing for the 1986 Revised Charter of the Development Bank of the Philippines.”

[6] “An Act Strengthening the Development Bank of the Philippines, Amending for the Purpose Executive Order No. 81.”

[7] CONST. art. IX-D, sec. 2; Presidential Decree No. 1455, “Government Auditing Code of the Philippines.”

[8] Rollo, p. 20.

[9] Ibid., p. 68.

[10] Ibid.

[11] Ibid., p. 82.

[12] Ibid., p. 34.

[13] Supra, see note 8.

[14] 332 Phil. 20 (1996).

[15] Rollo, p. 24.

[16] Ibid., p. 163.

[17] Section 2, Article IX-D of the 1987 Constitution states:

(2) The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, inexpensive, extravagant, or unconscionable expenditures, or uses of government funds and properties.

[18] Rollo, p. 197

[19] For instance, in *Philippine International Trading Corporation v. COA*, 368 Phil. 478 (1999); *National Center For Mental Health Management v. COA*, G.R. No. 114864, 6 December 1996, 265 SCRA 390; *Philippine Ports Authority v. COA*, G.R. No. 100773, 16 October 1992, 214 SCRA 653.

[20] Article IX, Section 7 of the 1987 Constitution states:

Each Commission shall decide by a majority vote of all its Members any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the

rules of the Commission or by the Commission itself. Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof. (Emphasis supplied)

[21] Section 50 of P.D. No. 1445 states:

SECTION 50. Appeal from decisions of the Commission. — The party aggrieved by any decision, order or ruling of the Commission may within thirty days from his receipt of a copy thereof appeal on certiorari to the Supreme Court in the manner provided by law and the Rules of Court. When the decision, order, or ruling adversely affects the interest of any government agency, the appeal may be taken by the proper head of that agency.

[22] *Tang v. Court of Appeals*, 382 Phil. 277 (2000).

[23] *Ibid.*

[24] Rule 3, Section 2 of the Rules of Court.

[25] *Ortigas & Co. Ltd. v. Court of Appeals*, G.R. No. 126102, 4 December 2000, 346 SCRA 748.

[26] *Rollo*, p. 3.

[27] *Tala Realty Services Corporation v. Banco Filipino Savings and Mortgage Bank*, G.R. No. 137533, 22 November 2002; *Huang v. CA*, G.R. No. 108525, 236 SCRA 420 (1994) citing A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES, Vol. IV, 669 (1991).

[28] *Heirs of Yap v. Court of Appeals*, 371 Phil. 523 (1999).

[29] *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 95022, 22 March 1992, 207 SCRA 487; *Commissioner of Internal Revenue v. Visayan Electric Co.*, 132 Phil. 203 (1968).

[30] *Commissioner of Internal Revenue v. Visayan Electric Co.*, 132 Phil. 203 (1968). Employees' trusts are also exempted from certain taxes under Section 60 (B) of the National Internal Revenue Code, as amended.

[31] *Commissioner of Internal Revenue v. Court of Appeals*, *supra*, see note 29.

[32] "An Act Further Amending Section Twelve of Commonwealth Act Numbered One Hundred Eighty-Six, as Amended, by Prescribing Two Other Modes of Retirement and for Other Purposes."

[33] *Rollo*, p. 27.

[34] *Spouses Rosario v. Court of Appeals*, 369 Phil. 729 (1999), citing *Tolentino*, see note 22.

[35] Civil Code, art. 1440.

[36] *Rollo*, p. 34.

[37] *Ibid.*

[38] *Ibid.*, p. 60.

[39] "The Government Service Insurance Act" (1936).

[40] Section 12 (c) of Commonwealth Act No. 186, as amended by RA 1616, was further amended by Republic Act No. 3096 (1961) and Republic Act No. 4968 (1967) to read:

(c) Retirement is likewise allowed to any official or employee, appointive or elective, regardless of age and employment status, who has rendered a total of twenty years of service, the last three years of which are continuous. The benefit shall, in addition to the return of his personal contributions with interest compounded monthly and the payment of the corresponding employer's premiums described in subsection (a) of Section five hereof, without interest, be only a gratuity equivalent to one month's salary for every year of the first twenty years of service, plus one and one-half month's salary for every year of service over twenty but below thirty years and two months' salary for every year of service over thirty years in case of employees based on the highest rate received and in case of elected officials on the rates of pay as provided by law. This gratuity is payable by the employer or office concerned which is hereby authorized to provide the necessary appropriation or pay the same from any unexpended items of appropriation or savings in its appropriation. (Emphasis supplied)

[41] Section 49 (b) of Republic Act No. 8291 (1997) provides:

(b) The GSIS shall discontinue the processing and adjudication of retirement claims under R.A. No. 1616 except refund of retirement premium and R.A. No. 910. Instead, all agencies concerned shall process and pay the gratuities of their employees. The Board shall adopt the proper rules and procedures for the implementation of this provision. (Emphasis supplied)

[42] 46 Phil. 642 (1924).

[43] Rizal Surety & Insurance Company v. Court of Appeals, G.R. No. 96727, 28 August 1996, 261 SCRA 69.

[44] Section 2.4.2(5) of the Rules and Regulations Implementing the GSIS Act of 1997 states: "Retirement Benefit - Those in the service before June 1, 1977 shall have the option to choose among the modes of retirement under R.A. 660, R.A. 1616 or P.D. 1146."

[45] Rollo, p. 163.

[46] E.O. No. 81, as amended.

[47] See notes 5 and 6.

[48] Rollo., p. 55.

[49] Ibid.

[50] Ibid., p. 50

[51] See note 40.

[52] The pertinent portions of Sections 11 and 12 of CA 186, as amended state:

Sec. 11. (a) Amount of Annuity. – Upon retirement after faithful and satisfactory service a member shall be automatically entitled to a life annuity xxx

Sec. 12. Conditions for Retirement. – (a) xxx

(b) xxx

(c) Retirement is likewise allowed to any official or employee, appointive or elective, regardless of age and employment status, who has rendered a total of at least twenty years of service, the last three years of which are continuous. xxx

More recently, RA 8291 ("The Government Service Insurance System Act of 1997") provides:

Sec. 13-A. Conditions for Entitlement. – A member who retires from the service shall be entitled to the benefits enumerated in paragraph (a) of Section 13 hereof: Provided That:

(1) he has rendered at least fifteen (15) years of service;

(2) he is at least sixty (60) years of age at the time of retirement; and

(3) he is not receiving a monthly pension benefit from permanent total disability. (Emphasis supplied)

[53] *Pantranco North Express, Inc. v. NLRC*, G.R. No. 95940, 24 July 1996, 259 SCRA 161, citing *Soberano v. Clave*, Nos. L-43753-56 and L-50991, 29 August 1980, 99 SCRA 549.

[54] In *Santos v. Court of Appeals*, G.R. No. 139792, 22 November 2000, 345 SCRA 553, this Court held that retirement benefits do not constitute compensation. A person who has retired but is later appointed to another position may continue receiving his retirement annuity and a salary for his new appointment. This is not double compensation.

[55] *Ibid.*

[56] Article V of the DBP Gratuity Plan Rules and Regulations states:

Upon retirement under this Plan, an Employee shall receive, in addition to the return of personal contributions to the GSIS, with interest compounded monthly and the payment of the Bank's premiums on his behalf to the GSIS, without interest, a gratuity benefit equivalent to one month's Salary for every year of the first twenty years of Service xxx (Emphasis supplied).

[57] *Rollo*, p. 20.

[58] Article 1953 of the Civil Code. — A person who receives a loan of money or any other fungible thing acquires the ownership thereof, and is bound to pay to the creditor an equal amount of the same kind and quality.

[59] *Tanzo v. Drilon*, 385 Phil. 790 (2000), citing *Yam vs. Malik*, No. L-50550-52, 31 October 1979, 94 SCRA 30.

[60] Article 1953 in relation to Article 1933 of the Civil Code which states in part that a “[s]imple loan may be gratuitous or with a stipulation to pay interest.”

[61] *Rollo*, p. 38.

[62] BIR Revenue Memorandum Order No. 9-93 (15 October 1992) states:

Other employees' trust funds adverted to in this Order shall refer to the trust funds of employees other than those of private employers/companies, the tax exempt qualification of which had been determined/adjudicated by the BIR under then Section 56(b) [now Section 53(b)] of the Tax Code and not under RA 4917 or Section 28(b) (7) (A) of the Tax Code, e.g., PNB Provident Fund, CB Provident Fund, Land Bank of the Philippines Provident Fund, GSIS Provident Fund, NPC Employees' Savings & Welfare Plan, NHA Provident Fund, xxx. (Underscoring provided by BIR)

[63] *Tankiko v. Cezar*, 362 Phil. 184 (1999).

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