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

FRANCISCO ED. LIM,
Appellant,

-versus-

CORPORATION FINANCE DEPARTMENT,
Appellee.

SEC EN BANC CASE NO. 02-10-196
For: Review of CFD's Imposition of Penalty Under Section 23 of the SRC and SRC Rule 23

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DECISION

For consideration of the Commission *En Banc* is the *Appeal* dated 15 February 2010 filed by Francisco Ed. Lim ("appellant", for brevity) on even date, praying for the reversal of the 13 January 2010 Letter-Ruling of the Corporation Finance Department ("CFD") of this Commission directing him to pay the assessed penalty of Twenty Thousand Six Hundred Pesos (P20,600.00) for violation of Subsection 23 of the Securities Regulation Code ("SRC")[1] in relation to SRC Rule 23 of its amended Implementing Rules and Regulations ("IRR").

The facts are:

Appellant was the President and Chief Executive Officer of the Philippine Stock Exchange, Inc. ("PSE"), a company whose shares are listed and traded in the PSE.

On 26 March 2008, the PSE Board of Directors approved the Employee Stock Purchase Plan ("ESPP") wherein shares of the PSE shall, within three (3) years from approval of the ESPP by the Commission, be offered for purchase to all regular employees in good standing of PSE and of the Securities Clearing Corporation of the Philippines with at least one (1) year of service prior to the Offer Date.[2]

The first year of offering was made in 2008.[3] The second year of offering took effect on 6 July 2009.[4]

During the said second year of offering, appellant purchased the following shares based on his original allocation: (1) 5,100 shares paid on 10 November 2009; and (2) **707 shares paid on 27 November 2009**.[5]

On 9 December 2009, appellant was issued a stock certificate covering the 707 shares he purchased on 27 November 2009.[6]

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[1] Republic Act No. 8799 (2000).
[2] Memorandum on Appeal, p. 2.
[3] Ibid., p. 3.
[4] Memorandum on Appeal, Annex "B".
[5] Supra Note 3.
[6] Memorandum on Appeal, Annex "E".

On 16 December 2009, appellant filed with the Commission his Statement of Changes in Beneficial Ownership of Securities (SEC Form 23-B) covering the 707 shares, in compliance with Subsection 23.1 of the SRC in relation to SRC Rule 23.[7]

On 22 December 2009, CFD issued a show-cause letter directing appellant to show cause why he should not be held liable for late filing of his SEC Form 23-B, in violation of SRC Rule 23(1)(B).

In a letter dated 12 January 2010, PSE, on behalf of appellant, admitted that the latter transacted on shares of the Exchange on 27 November 2009 and filed with the CFD the corresponding SEC Form 23-B on 16 December 2009, or six (6) days after the due date. According to appellant, he acquired the subject shares under the ESPP and said acquisition was made in good faith, with no deliberate intention to violate the Rule.[8]

Finding appellant's reasons unmeritorious, CFD issued its herein assailed 13 January 2010 Letter-Ruling. Hence, this *Appeal.*

The ultimate issue to be resolved is whether appellant violated Subsection 23.1 of the SRC in relation to SRC Rule 23.

In support of his position, appellant interposes the following arguments: (1) he acquired the subject shares under the ESPP as part of his employee benefits and not for trading related reasons; (2) he was only issued a stock certificate on 9 December 2009 and filed SEC Form 23-B on 16 December 2009; and (3) he acquired the 707 shares in good faith, with no deliberate intention to violate SRC Rule 23.

APPELLANT ACQUIRED THE SUBJECT SHARES UNDER THE ESPP AS PART OF HIS EMPLOYEE BENEFITS AND NOT FOR TRADING-RELATED REASONS

Subsection 23.1 of the SRC states:

> "Sec. 23. *Transactions of Directors, Officers and Principal Stockholders.* – 23.1. Every person who is directly or indirectly the beneficial owner of more than ten *per centum* (10%) of any class of any equity security which satisfies the requirements of Subsection 17.2, or who is a director or an officer of the issuer of such security, shall file, at the time either such requirement is first satisfied or within ten days after he becomes such a beneficial owner, director, or officer, a statement with the Commission and, if such security is listed for trading on an Exchange, also with the Exchange, of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten (10) days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission, and if such security is listed for trading on an Exchange, shall also file with the

[7]Supra Note 6.
[8]Memorandum on Appeal, Annex "H".

> Exchange, a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month."

The above provision is implemented by SRC Rule 23, which mandates the filing of reports by directors, officers and principal stockholders, to wit:

> "1. Every person who is directly or indirectly the beneficial owner of ten percent (10%) or more of any class of any security of a company which satisfies the requirements of Subsection 17.2 of the Code, or who is a director or an officer of the issuer of such security, shall:
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> xx xxx xxx
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> B. within ten (10) days after the close of each calendar month thereafter, if there has been a change in such ownership during the month, file a statement with the Commission, and with an Exchange if the security is listed on that Exchange, on Form 23-B indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during that calendar month; xxx."

Appellant argues that the evil sought to be prevented in requiring beneficial ownership reports does not exist in the present case because he was merely exercising his right under the ESPP, and hence, was not acting on any material non-public information when he purchased the 707 shares reported under the subject SEC Form 23-B.

We do not agree. It is clear that Subsection 23.1 of the SRC and SRC Rule 23 do not make a distinction: they apply to all beneficial ownerships of directors and officers whether or not such ownership resulted from the acquisition of securities through the trading process or through plans such as the ESPP of the PSE. During the deliberation on the then proposed Section 28, now Section 23, of the SRC, the House of Representatives was emphatic that "*directors, officers, [and] principal stockholders shall disclose to the SEC* ***all purchases*** *and sales of securities regardless of percentage or amount.*"[9] Thus, where the law does not distinguish, we should not distinguish.[10]

The absence of distinction is not without purpose or reason. To better understand this, Subsection 23.1 must not be considered in isolation, but should be read with the other provisions of the SRC, especially Subsections 23.2 and 23.3 thereof. Subsections 23.2 and 23.3 of the SRC provide:

> "23.2. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity

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[9]House of Representatives Deliberations on the SRC, p. 140.
[10]*Commissioner of Internal Revenue vs. Azucena T. Reyes*, G.R. Nos. 159694 & 163581, January 27, 2006.

> security of such issuer within any period of less than six (6) months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention of holding the security purchased or of not repurchasing the security sold for a period exceeding six (6) months. Suit to recover such profit may be instituted before the Regional Trial Court by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty (60) days after request or shall fail diligently to prosecute the same thereafter, but no such suit shall be brought more than two (2) years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."
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> "23.3. It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer if the person selling the security or his principal: (a) Does not own the security sold; or (b) if owning the security, does not deliver it against such sale within twenty (20) days thereafter, or does not within five (5) days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense."

APPELLANT WAS ONLY ISSUED A STOCK CERTIFICATE ON 9 DECEMBER 2009 AND FILED SEC FORM 23-B ON 16 DECEMBER 2009

Appellant argues that SRC Rule 23 should be interpreted to mean that the duty to file SEC Form 23-B arises only when the ownership of the director or officer was duly entered in the corporate records and/or is already evidenced by a stock certificate, following the rule that a subscriber becomes a stockholder of record only after his subscription is recorded in the corporate books and after the issuance of a stock certificate. Since he was issued the stock certificate covering the 707 shares only on 9 December 2009, he has ten (10) days from the close of December, or until 10 January 2010, within which to file SEC Form 23-B. Thus, he contends that he timely filed the report on 16 December 2009.

Again, we are not persuaded.

As appellant himself admits, a certificate of stock is not necessary to render one a stockholder in a corporation.[11] It is not stock in a corporation; it is a mere paper representative or tangible evidence of the stockholder's interest in the

[11] *Tan vs. Securities and Exchange Commission, et al.*, G.R. No. 95696, 3 March 1992.

corporation, his ownership of the share(s) represented thereby, but is not in law the equivalent of such ownership.[12] In this modern times where electronic data are now commonplace and practical, issuance of stock certificates is no longer necessary, and most listed companies no longer issue them (unless the stockholder demands for the same); rather, they maintain in scripless form records of stock ownership.

Neither is it required by SRC Rule 23 that the subscription be first recorded in the corporate books before the reporting obligation arises. It is enough that the director or officer already has beneficial ownership over the equity securities. In fact, what is required to be reported in SEC Form 23-B is the "Transaction Date", which is the reckoning date of the change in beneficial ownership.

According to Section 7.4 of the ESPP[13], whose provisions are incorporated as an integral part of the terms and conditions of the Employees Stock Purchase Agreement[14], the participants (to the Plan) shall become stockholders of record on the Payment Date. It is admitted by appellant that he subscribed and paid the 707 shares on 27 November 2009, the same date he declared in his SEC Form 23-B.

Based on the terms of the ESPP, appellant already became stockholder of record of PSE when he fully paid the 707 shares on 27 November 2009. It cannot be denied that on the same date, appellant already became, at the very least, the beneficial owner of such shares. Accordingly, he should have filed the SEC Form 23-B within ten (10) days from the close of November 2009, or on 10 December 2009. His filing of the same on 16 December 2009 is, thus, late, as correctly found by the CFD.

APPELLANT ACQUIRED THE 707 SHARES IN GOOD FAITH, WITH NO DELIBERATE INTENTION TO VIOLATE SRC RULE 23

As discussed above, whether or not appellant acquired the 707 shares in good faith is immaterial because he has the duty under the SRC to report any change in his ownership.

Good faith or bad faith hardly comes into the picture in the enforcement of simple regulatory rules mandating submission of reportorial requirements. To allow legal notions to intrude at every level in the implementation of these rules would defeat their very purpose, as every penalty could be subject to question and every violation based on a clear-cut rule would be qualified by the presence or absence of good faith or bad faith, or the question of motive or intent.[15]

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[12]Supra Note 11.
[13]Memorandum on Appeal, Annex "A".
[14]Memorandum on Appeal, Annex "C" of Annex "B".
[15]*Decision* dated 13 July 2006 in *SEC En Banc Case No. 04-04-13* (In the Matter of: A. Brown Company, Inc.).

Besides, appellant's claim of good faith is belied by the fact that this is already his second violation of the same Rule, which he does not dispute. Appellant was meted the penalty of Reprimand for his first violation of the same Rule on 19 May 2009. He was already warned that he must take measures to fully comply with the SRC and its IRR, otherwise, appropriate penalties shall be imposed based on the 2005 Consolidated Scale of Fines (SEC Memorandum Circular No. 6, Series of 2005) for a repetition of the same violation.

WHEREFORE, premises considered, the instant *Appeal* is hereby **DISMISSED**, and the Letter-Ruling of the Corporation Finance Department dated 13 January 2010 is hereby **AFFIRMED**. Francisco Ed. Lim is hereby **DIRECTED TO PAY** Twenty Thousand Six Hundred Pesos (P20,600.00) for his second violation of Subsection 23.1 of the Securities Regulation Code in relation to SRC Rule 23 of its Implementing Rules and Regulations, within five (5) days from receipt of this Decision.

SO ORDERED.

Mandaluyong City, 21 September 2010.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner