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[G.R. Nos. 95203-05. December 18, 1990]

SENATOR ERNESTO MACEDA, *petitioner, vs.* **ENERGY REGULATORY BOARD (ERB); MARCELO N. FERNANDO, ALEJANDRO B. AFURONG; REX V. TANTIONGCO; and OSCAR E. ALA, in their collective official capacities as Chairman and Members of the Board (ERB), respectively; CATALINO MACARAIG, in his quadruple official capacities as Executive Secretary, Chairman of Philippine National Oil Company; Office of the Energy Affairs, and with MANUEL ESTRELLA, in their respective official capacities as Chairman and President of the Petron Corporation; PILIPINAS SHELL PETROLEUM CORPORATION; with CESAR BUENAVENTURA and REY GAMBOA as chairman and President, respectively; CALTEX PHILIPPINES with FRANCIS ABLAN, President and Chief Executive Officer; and the Presidents of Philippine Petroleum Dealer's Association, Caltex Dealer's Co., Petron Dealer's Asso., Shell Dealer's Asso. of the Phil., Liquefied Petroleum Gas Institute of the Phils., any and all concerned gasoline and petrol dealers or stations; and such other persons, officials, and parties, acting for and on their behalf; or in representation of and/or under their authority,** *respondents.*

[G.R. Nos. 95119-21. December 18, 1990]

OLIVER O. LOZANO, *petitioner, vs.* **ENERGY REGULATORY BOARD (ERB), PILIPINAS SHELL PETROLEUM CORPORATION, CALTEX (PHIL.), INC., and PETRON CORPORATION,** *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATUTES; EXECUTIVE ORDER NO. 172; THE ENERGY

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REGULATORY BOARD HAS THE AUTHORITY TO INCREASE PROVISIONALLY THE PRICE OF PETROLEUM AND PETROLEUM PRODUCTS WITHOUT NEED OF A HEARING.— What must be stressed is that while under Executive Order No. 172, a hearing is indispensable, it does not preclude the Board from ordering, *ex parte*, a provisional increase, as it did here, subject to its final disposition of whether or not: (1) to make it permanent; (2) to reduce or increase it further; or (3) to deny the application. Section 3, paragraph (e) is akin to a temporary restraining order or a writ of preliminary attachment issued by the courts, which are given *ex parte*, and which are subject to the resolution of the main case. Section 3, paragraph (e) and Section 8 do not negate each other, or otherwise, operate exclusively of the other, in that the Board may resort to one but not to both at the same time. Section 3(e) outlines the jurisdiction of the Board and the grounds for which it may decree a price adjustment, subject to the requirements of notice and hearing. Pending that, however, it may order, under Section 8, an authority to increase provisionally, without need of a hearing, subject to the final outcome of the proceeding. The Board, of course, is not prevented from conducting a hearing on the grant of provisional authority — which is of course, the better procedure — however, it can not be stigmatized later if it failed to conduct one.

2. ID.; ID.; ID.; REPUBLIC ACT NO. 6965 IS NOT AN INSURANCE AGAINST AN "OIL HIKE."— Republic Act No. 6965 operated to lower taxes on petroleum and petroleum products by imposing specific taxes rather than *ad valorem* taxes thereon; it is, not, however, an insurance against an "oil hike", whenever warranted, or is it a price control mechanism on petroleum and petroleum products. The statute had possibly forestalled a larger hike, but it operated no more.

3. ID.; ID.; ID.; PRESIDENTIAL DECREE NO. 1956, AS AMENDED BY EXECUTIVE ORDER NO. 137, ALLOWS THE PROCEEDS GENERATED BY THE INCREASE TO BE DEPOSITED TO THE OIL PRICE STABILIZATION FUND (OPSF). — The Board Order authorizing the proceeds generated by the increase to be deposited to the OPSF is not an act of taxation. It is authorized by Presidential Decree No. 1956, as amended by Executive Order No. 137.

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4. ID.; ID.; ID.; ID.; RATIONALE BEHIND THE CREATION OF OPSF, REITERATED.— The OPSF, as the Court held in the aforecited CACP cases, must not be understood to be a funding designed to guarantee oil firms' profits although as a subsidy, or a trust account, the Court has no doubt that oil firms make money from it. As we held there, however, the OPSF was established precisely to protect the consuming public from the erratic movement of oil prices and to preclude oil companies from taking advantage of fluctuations occurring every so often. As a buffer mechanism, it stabilizes domestic prices by bringing about a uniform rate rather than leaving pricing to the caprices of the market.

PARAS, *J., dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATUTES; EXECUTIVE ORDER NO. 172; SECTION 3 (e) THEREOF SHOULD APPLY AND THEREFORE A HEARING IS ESSENTIAL.— With respect to due process, it will be noted that it is Sec. 3(e) (and *not* Sec. 8) of Ex. Order No. 172 which should apply to the instant case (and therefore a hearing is essential) for it is Sec. 3(e) that refers to "the temporary adjustment of the *levels of prices of petroleum products"* or instances "when public interest so requires." Sec. 8, which is relied upon by the majority opinion, does NOT speak of price increases. Additionally it is clear that in the instant case, "public interest" [also mentioned in Sec. 3 (e)] necessitated a prior hearing.

2. ID.; ID.; ID.; PRESIDENTIAL DECREE NO. 1956, AS AMENDED BY EXECUTIVE ORDER NO. 137, WHICH AUTHORIZED THE PROCEEDS GENERATED BY THE INCREASE TO BE DEPOSITED TO OPSF, WAS IN EFFECT AN EXERCISE OF THE TAXING POWER.— Anent the unconstitutional use of the taxing power, the decision of the majority says that "the Board Order authorizing the proceeds generated by the increases" is "authorized by Presidential Decree No. 1956, as amended by Executive Order No. 137." Assuming that such is authorized by law, still a law, no matter how imperative, cannot prevail over the Constitution which grants *only to Congress* the power to tax. And indeed, there can be no denying the fact that when revenue

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is earned by the government from the consuming public (except when only licenses are concerned) there is an exercise of the taxing power.

APPEARANCES OF COUNSEL

Padilla, Jimenez, Kintanar and Asuncion Law Firm for petitioner.

Diosdado L. Mendiola and *Armando Batara* for Pilipinas Shell.

Alikpala, De Guzman, Gamboa for Petron Corporation.

Joselia Poblador for Caltex, Philippines.

D E C I S I O N

SARMIENTO, *J.*:

The petitioners pray for injunctive relief, to stop the Energy Regulatory Board (Board hereinafter) from implementing its Order, dated September 21, 1990, mandating a provisional increase in the prices of petroleum and petroleum products, as follows:

PRODUCTS	IN PESOS PER LITER OPSF
Premium Gasoline	1.7700
Regular Gasoline	1.7700
Avturbo	1.8664
Kerosene	1.2400
Diesel Oil	1.2400
Fuel Oil	1.4900
Feedstock	1.4900
LPG	0.8487
Asphalts	2.7160
Thinners	1.7121[1]

It appears that on September 10, 1990, Caltex (Philippines), Inc., Pilipinas Shell Petroleum Corporation, and Petron Corporation proferred separate applications with the Board for

[1] *Rollo,* 45.

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permission to increase the wholesale posted prices of petroleum products, as follows:

Caltex	₱ 3.2697 per liter
Shell	2.0338 per liter
Petron	2.00 per liter[2]

and meanwhile, for provisional authority to increase temporarily such wholesale posted prices pending further proceedings.

On September 21, 1990, the Board, in a joint (on three applications) Order granted provisional relief as follows:

> WHEREFORE, considering the foregoing, and pursuant to Section 8 of Executive Order No. 172, this Board hereby grants herein applicants' prayer for provisional relief and, accordingly, authorizes said applicants a weighted average provisional increase of ONE PESO AND FORTY-TWO CENTAVOS (₱1.42) per liter in the wholesale posted prices of their various petroleum products enumerated below, refined and/or marketed by them locally.[3]

The petitioners submit that the above Order had been issued with grave abuse of discretion, tantamount to lack of jurisdiction, and correctible by *certiorari*.

The petitioner, Senator Ernesto Maceda,[4] also submits that the same was issued without proper notice and hearing in violation of Section 3, paragraph (e), of Executive Order No. 172; that the Board, in decreeing an increase, had created a new source for the Oil Price Stabilization Fund (OPSF), or otherwise that it had levied a tax, a power vested in the legislature, and/or that it had "re-collected," by an act of taxation, *ad valorem* taxes on oil which Republic Act No. 6965 had abolished.

The petitioner, Atty. Oliver Lozano,[5] likewise argues that the Board's Order was issued without notice and hearing, and hence, without due process of law.

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[2] *Id.*, 32.

[3] *Id.*, 44-45.

[4] He is the petitioner in G.R. Nos. 95203-05.

[5] He is the other petitioner in G.R. Nos. 95119-21.

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The intervenor, the Trade Union of the Philippines and Allied Services (TUPAS/FSM) — W.F.T.U.,[6] argues on the other hand, that the increase can not be allowed since the respondents oil companies had not exhausted their existing oil stock which they had bought at old prices and that they can not be allowed to charge new rates for stock purchased at such lower rates.

The Court set the cases (in G.R. Nos. 95203-05) for hearing on October 25, 1990, in which Senator Maceda and his counsel, Atty. Alexander Padilla, argued. The Solicitor General, on behalf of the Board, also presented his arguments, together with Board Commissioner Rex Tantiangco. Attys. Federico Alikpala, Jr. and Joselia Poblador represented the oil firms (Petron and Caltex, respectively).

The parties were thereafter required to submit their memorandums after which, the Court considered the cases submitted for resolution.

On November 20, 1990, the Court ordered these cases consolidated.

On November 27, 1990, we gave due course to both petitions.

The Court finds no merit in these petitions.

Senator Maceda and Atty. Lozano, in questioning the lack of a hearing, have overlooked the provisions of Section 8 of Executive Order No. 172, which we quote:

"SECTION 8. *Authority to Grant Provisional Relief.* — The Board may, upon the filing of an application, petition or complaint or at any stage thereafter and without prior hearing, on the basis of supporting papers duly verified or authenticated, grant provisional relief on motion of a party in the case or on its own initiative, without prejudice to a final decision after hearing, should the Board find that the pleadings, together with such affidavits, documents and other evidence which may be submitted in support of the motion, substantially support the provisional order: *Provided*, That the Board shall immediately schedule and conduct a hearing thereon within thirty (30) days thereafter, upon publication and notice to all affected parties.

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[6] It is the intervenor in G.R. Nos. 95203-05.

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As the Order itself indicates, the authority for provisional increase falls within the above provision.

There is no merit in the Senator's contention that the "applicable" provision is Section 3, paragraph (e) of the Executive Order, which we quote:

> (e) Whenever the Board has determined that there is a shortage of any petroleum product, or when public interest so requires, it may take such steps as it may consider necessary, including the temporary adjustment of the levels of prices of petroleum products and the payment to the Oil Price Stabilization Fund created under Presidential Decree No. 1956 by persons or entities engaged in the petroleum industry of such amounts as may be determined by the Board, which will enable the importer to recover its cost of importation.

What must be stressed is that while under Executive Order No. 172, a hearing is indispensable, it does not preclude the Board from ordering, *ex parte*, a provisional increase, as it did here, subject to its final disposition of whether or not: (1) to make it permanent; (2) to reduce or increase it further; or (3) to deny the application. Section 3 paragraph (e) is akin to a temporary restraining order or a writ of preliminary attachment issued by the courts, which are given *ex parte*, and which are subject to the resolution of the main case.

Section 3, paragraph (e) and Section 8 do not negate each other, or otherwise, operate exclusively of the other, in that the Board may resort to one but not to both at the same time. Section 3(e) outlines the jurisdiction of the Board and the grounds for which it may decree a price adjustment, subject to the requirements of notice and hearing. *Pending* that, however, it may order, under Section 8, an authority to increase provisionally, without need of a hearing, subject to the final outcome of the proceeding. The Board, of course, is not prevented from conducting a hearing on the grant of provisional authority — which is of course, the better procedure — however, it can not be stigmatized later if it failed to conduct one. As we held in *Citizens' Alliance for Consumer Protection v. Energy Regulatory Board.*[7]

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[7] Nos. 78888-90, 79501-03, 79590-92, June 23, 1988, 162 SCRA 521.

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In the light of Section 8 quoted above, public respondent Board need not even have conducted formal hearings in these cases *prior* to issuance of its Order of 14 August 1987 granting a *provisional* increase of prices. The Board, upon its own discretion and on the basis of documents and evidence submitted by private respondents, could have issued an order granting provisional relief immediately upon filing by private respondents of their respective applications. In this respect, the Court considers the evidence presented by private respondents in support of their applications — *i.e.*, evidence showing that importation costs of petroleum products had gone up; that the peso had depreciated in value; and that the Oil Price Stabilization Fund (OPSF) had by then been depleted — as substantial and hence constitutive of at least *prima facie* basis for issuance by the Board of a provisional relief order granting an increase in the prices of petroleum products.[8]

We do not therefore find the challenged action of the Board to have been done in violation of the due process clause. The petitioners *may* contest however, the applications at the hearings proper.

Senator Maceda's attack on the Order in question on premises that it constitutes an act of taxation or that it negates the effects of Republic Act No. 6965, can not prosper. Republic Act No. 6965 operated to lower taxes on petroleum and petroleum products by imposing specific taxes rather than *ad valorem* taxes thereon; it is, not, however, an insurance against an "oil hike," whenever warranted, or is it a price control mechanism on petroleum and petroleum products. The statute had possibly forestalled a larger hike, but it operated no more.

The Board Order authorizing the proceeds generated by the increase to be deposited to the OPSF is not an act of taxation. It is authorized by Presidential Decree No. 1956, as amended by Executive Order No. 137, as follows:

SECTION 8. There is hereby created a Trust Account in the books of accounts of the Ministry of Energy to be designated as Oil Price Stabilization Fund (OPSF) for the purpose of minimizing frequent

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[8] *Supra*, at 535.

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price changes brought about by exchange rate adjustments and/or changes in world market prices of crude oil and imported petroleum products. The Oil Price Stabilization Fund (OPSF) may be sourced from any of the following:

> a) Any increase in the tax collection from *ad valorem* tax or customs duty imposed on petroleum products subject to tax under this Decree arising from exchange rate adjustment, as may be determined by the Minister of Finance in consultation with the Board of Energy;
>
> b) Any increase in the tax collection as a result of the lifting of tax exemptions of government corporations, as may be determined by the Minister of Finance in consultation with the Board of Energy;
>
> c) Any additional amount to be imposed on petroleum products to augment the resources of the Fund through an appropriate Order that may be issued by the Board of Energy requiring payment by persons or companies engaged in the business of importing, manufacturing and/or marketing petroleum products;
>
> d) Any resulting peso cost differentials in case the actual peso costs paid by oil companies in the importation of crude oil and petroleum products is less than the peso costs computed using the reference foreign exchange rates as fixed by the Board of Energy.

Anent claims that oil companies can not charge new prices for oil purchased at old rates, suffice it to say that the increase in question was not prompted alone by the increase in world oil prices arising from tension in the Persian Gulf. What the Court gathers from the pleadings as well as events of which it takes judicial notice, is that: (1) as of June 30, 1990, the OPSF has incurred a deficit of ₱6.1 Billion; (2) the exchange rate has fallen to ₱28.00 to $1.00; (3) the country's balance of payments is expected to reach $1 Billion; (4) our trade deficit is at $2.855 Billion as of the first nine months of the year.

Evidently, authorities have been unable to collect enough taxes necessary to replenish the OPSF as provided by Presidential

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Decree No. 1956, and hence, there was no available alternative but to hike existing prices.

The OPSF, as the Court held in the aforecited CACP cases, must not be understood to be a funding designed to guarantee oil firms' profits although as a subsidy, or a trust account, the Court has no doubt that oil firms make money from it. As we held there, however, the OPSF was established precisely to protect the consuming public from the erratic movement of oil prices and to preclude oil companies from taking advantage of fluctuations occurring every so often. As a buffer mechanism, it stabilizes domestic prices by bringing about a uniform rate rather than leaving pricing to the caprices of the market.

In all likelihood, therefore, an oil hike would have probably been imminent, with or without trouble in the Gulf, although trouble would have probably aggravated it.

The Court is not to be understood as having prejudged the justness of an oil price increase amid the above premises. What the Court is saying is that it thinks that based thereon, the Government has made out a *prima facie* case to justify the *provisional* increase in question. Let the Court therefore make clear that these findings are not final; the burden, however, is on the petitioners' shoulders to demonstrate the fact that the present economic picture does not warrant a permanent increase.

There is no doubt that the increase in oil prices in question (not to mention another one impending, which the Court understands has been under consideration by policy-makers) spells hard(er) times for the Filipino people. The Court can not, however, debate the wisdom of policy or the logic behind it (unless it is otherwise arbitrary), not because the Court agrees with policy, but because the Court is not the suitable forum for debate. It is a question best judged by the political leadership which after all, determines policy, and ultimately, by the electorate, that stands to be better for it or worse off, either in the short or long run.

At this point, the Court shares the indignation of the people over the conspiracy of events and regrets its own powerlessness,

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if by this Decision it has been powerless. The constitutional scheme of things has simply left it with no choice.

In fine, we find no grave abuse of discretion committed by the respondent Board in issuing its questioned Order.

WHEREFORE, these petitions are DISMISSED. No costs.

SO ORDERED.

Narvasa, Gutierrez, Jr., Cruz, Gancayco, Bidin, Griño-Aquino, Medialdea, and *Regalado, JJ.*, concur.

Paras, J., dissents (see separate opinion).

Fernan, C.J., no part, formerly counsel for Cebu Shell Corp.

Melencio-Herrera, J., no part; related by affinity to the Chairman, ERB.

Padilla, J., no part, related to Sen. Maceda's counsel.

Feliciano, J., on leave.

DISSENTING OPINION

PARAS, *J.*:

I dissent.

In fixing the oil prices complained of, the Energy Regulatory Board (ERB) gravely abused its discretion —

(1) in approving the prices without due process of law, and

(2) in exercising the taxing power in gross violation of the 1987 Constitution which vests such power only in Congress.

With respect to due process, it will be noted that it is Sec. 3(e) (and *not* Sec. 8) of Ex. Order No. 172 which should apply to the instant case (and therefore a hearing is essential)[1] for it

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[1] The majority opinion itself concedes that when See. 3(e) is applicable, a hearing is indispensable (See Decision, p. 6).

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is Sec. 3(e) that refers to "the temporary adjustment of the *levels of prices of petroleum products*" or instances "when public interest so requires." Sec. 8, which is relied upon by the majority opinion, does NOT speak of price increases. Additionally it is clear that in the instant case, "public interest" [also mentioned in Sec. 3 (e)] necessitated a prior hearing.

Anent the unconstitutional use of the taxing power, the decision of the majority says that "the Board Order authorizing the proceeds generated by the increases" is "authorized by Presidential Decree No. 1456, as amended by Executive Order No. 137" (See Decision, pp. 7-8). Assuming that such is authorized by law, still a law, no matter how imperative, cannot prevail over the Constitution which grants *only to Congress* the power to tax. And indeed, there can be no denying the fact that when revenue is earned by the government from the consuming public (except when only licenses are concerned) there is an exercise of the taxing power.

I am of course aware of the dangerous economic quagmire to which our country has been plunged by the sadism precipitating the Middle East crisis, but certainly one error cannot be corrected by another error. Besides there are more significant and clear-cut reasons for our economic crisis: namely, the intentional depreciation (actually, a devaluation) of our already demeaned currency, our unfortunate liberalization of imports, and our slavish subservience to the dictates of the IMF.