REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

EGIS PROJECTS S.A., *Petitioner,*	**CTA EB No. 1023** (CTA Case No. 8413)
	Present:
- versus -	Del Rosario, *PJ,* Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Cotangco-Manalastas, and Ringpis-Liban, *JJ.*
THE SECRETARY OF FINANCE and COMMISSIONER OF INTERNAL REVENUE, *Respondents.*	Promulgated: SEP 16 2014 4:25pm

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D E C I S I O N

COTANGCO-MANALASTAS, J.:

Before the Court *En Banc* is a *Petition for Review* filed by petitioner, Egis Projects S.A., assailing the *Resolution*[1] dated January 29, 2013 of the former Second Division and the *Resolution*[2] dated May 17, 2013 of the Special Second Division of the Court dismissing its Petition for Review in CTA Case No. 8413 for lack of jurisdiction.

The Facts

The facts[3] as *alleged* in the petition are as follows:

Petitioner is a corporation duly organized and existing under the laws of France with principal office at 11 Avenue du Centre, 78 280 Guyancourt, France. It is a stockholder of

[1] *Rollo*, pp. 40-44.
[2] *Rollo*, pp. 46-50.
[3] *Rollo*, pp. 8-12.

Manila North Tollways Corporation (MNTC). It is not registered as a corporation or partnership licensed to do business in the Philippines and it does not do business in the Philippines.

On July 2, 2010, the Board of Directors of MNTC declared cash dividends in the amount of P550,560,000.00 for stockholders of record as of said date and payable on or before July 15, 2010. As of July 2, 2010, petitioner is the stockholder of 2,468,638 common shares of stock of MNTC, with a par value of P100 per share, or a total par value of P246,863,800.00, which is equivalent to 13.9% of the total issued and outstanding shares of MNTC.

On August 25, 2010, the Commissioner of Internal Revenue (CIR) issued Revenue Memorandum Order (RMO) No. 72-2010 or the "Guidelines on the Processing of Tax Treaty Relief Applications (TTRA) Pursuant to Existing Philippine Tax Treaties".

On February 4, 2011, petitioner filed a TTRA dated February 3, 2011 with the International Tax Affairs Division (ITAD) of the Bureau of Internal Revenue (BIR) requesting confirmation that the dividends paid by MNTC to petitioner on July 16, 2010 are subject to a preferential tax rate of 10% on the basis of the RP-France Tax Treaty.

On July 27, 2011, CIR Kim S. Jacinto-Henares issued BIR Ruling No. ITAD 2013-11, received by petitioner on August 12, 2011, denying petitioner's TTRA, as follows:

> "In reply, please be informed that Sections 14 and 13 of *Revenue Memorandum Order ("RMO") No. 72-2010 (Guidelines on the Processing of Tax Treaty Relief Applications (TTRA) Pursuant to Existing Philippine Tax Treaties)*, effective *November 4, 2010*, provide:
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> 'Section 14. *When and Where to File the TTRA.* —
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> xxx xxx xxx
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> Filing should always be made BEFORE the transaction. Transaction for purposes of filing the TTRA shall mean before the occurrence of the first taxable event.

Failure to properly file the TTRA with ITAD within the period prescribed herein shall have the effect of disqualifying the TTRA under the RMO.

'Section 13. *Definitions.* —

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4. First taxable event *for purposes of filing the Tax Treaty Relief Application (TTRA), shall mean the first or the only time when the income payor is required to withhold the income tax thereon or should have withheld taxes thereon had the transaction been subjected to tax . . .'*

Under the RMO, the filing of TTRAs should be made *before* the occurrence of the *first taxable event*, or the first or the only time when an income payor is required to withhold income tax on payments subject to preferential treatment. The *first or only time* referred herein corresponds to the *period a withholding agent is required to file the necessary returns on final and creditable income taxes withheld in a particular month*, which is *within ten days after the end of that month*, or, if the withholding was made in *December*, *on or before January 15 of the following year*, pursuant to Section 2.58 (A) (2) of *Revenue Regulations No. 2-98 (Implementing Republic Act No. 8424, "An Act Amending the National Internal Revenue Code, as amended" Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes)*, thus:

xxx xxx xxx

Accordingly, since the subject TTRA was filed on *February 4, 2011*, or before the nearest deadline of filing a monthly return on *February 10, 2011*, such payments made by MNTC that will be subject to preferential treatment under a tax treaty are those made beginning *January 1, 2011*, and thereafter. Therefore, such dividends paid by MNTC to *Egis* on *July 15, 2010*, will be subject to the regular income tax of 30 percent of the gross amount thereof, under Section 28 (B) (1) (a) of the National Internal Revenue Code of 1997, as amended,..."

On September 12, 2011, petitioner appealed to the Secretary of Finance for the review and reversal of BIR Ruling No. ITAD 203-11.

In its appeal, petitioner also sought the revocation of RMO No. 72-2010 on the ground that the CIR exceeded her authority to implement the tax treaties by providing, under the terms of the said RMO, additional requirements not otherwise stated in the law/treaty that it seeks to implement. Specifically, the mandatory requirement of filing a TTRA prior to the taxable event by the resident of a treaty country and securing a favorable BIR ITAD ruling before it can qualify for tax treaty relief under the RP-France Tax Treaty.

Petitioner likewise pointed out that the stringent documentary requirements to be submitted to the ITAD for it to accept the TTRA makes it impossible for the affected taxpayer, *i.e.*, a non-resident foreign corporation, to comply with the documentary requirements under RMO No. 72-2010 and beat the deadline set in said RMO for filing of the application.

On December 22, 2011, petitioner received a copy of the ruling of respondent Secretary of Finance dated November 15, 2011 affirming the ruling of the respondent CIR.

Hence, on January 24, 2012, petitioner filed a petition for review before the Court in Division docketed as CTA Case No. 8413.

Upon motion of respondent CIR, the former Second Division issued a *Resolution* [4] dated January 29, 2013 dismissing the case for lack of jurisdiction. The Court in Division ruled that the issue on the constitutionality or validity of RMO Nos. 72-2010 and 1-2000 or its relevant provisions is beyond the jurisdiction of the Court citing the cases of *British American Tobacco vs. Camacho*[5] and *St. Paul College of San Rafael vs. CIR*[6].

The Special Second Division denied petitioner's Motion for Reconsideration in the *Resolution*[7] dated May 17, 2013.

Aggrieved, petitioner filed the instant *Petition for Review*[8] on June 21, 2013.

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[4] *Supra*, Note 1.
[5] G.R. No. 163583, August 20, 2008.
[6] CTA Case No. 8217, November 9, 2011.
[7] *Supra*, Note 2.
[8] *Rollo*, pp 5-38.

Respondents were ordered to file their comment within ten (10) days from receipt of the Resolution[9] dated July 23, 2013.

Respondent CIR filed her Comment (Re: Petition for Review dated 20 June 2013)[10] on August 30, 2013 while respondent Secretary of Finance filed his Comment[11] (On the Petition for Review dated June 20, 2013) on September 9, 2013.

In the Resolution[12] dated October 8, 2013, the Court resolved to give due course to the petition and ordered the parties to submit their respective memoranda.

Petitioner filed a Manifestation[13] on November 27, 2013 stating that it adopts and repleads its allegations, arguments and citations raised in its petition for review as its memorandum.

Likewise, respondent CIR filed a Manifestation[14] on November 28, 2013 stating that she is adopting the arguments raised in her comment on the petition for review as her memorandum. On the other hand, respondent Secretary of Finance filed his Memorandum[15] on December 27, 2013 by registered mail and received by this Court on January 6, 2014. Thus, the above-captioned case was submitted for decision on March 12, 2014.

The Issues

The petitioner raises several issues[16] for the Court *En Banc's* resolution. However, the pivotal issue in this case is whether or not the Court in Division erred in dismissing CTA Case No. 8413 on the ground of lack of jurisdiction.

The Petitioner's Arguments

Petitioner argues that the Court of Tax Appeals (CTA) has jurisdiction on appealed RMOs and RMCs citing as basis *CIR*

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[9] *Rollo*, pp. 54-55.
[10] *Rollo*, pp. 76-108.
[11] *Rollo*, pp. 114-135.
[12] *Rollo*, pp. 138-140.
[13] *Rollo*, pp. 141-142.
[14] *Rollo*, pp. 150-151.
[15] *Rollo*, pp. 154-170.
[16] *Rollo*, pp. 13-14.

vs. Leal[17], *Big AA Corporation vs. BIR*[18], and *Asia International Auctioneers, Inc. and Subic Bay Motors Corporation vs Hon. Guillermo L. Parayno, Jr.*[19]. Petitioner emphasizes that Republic Act (RA) No. 9282, by its very title, was passed to expand the jurisdiction of the CTA, not to diminish it. Therefore, there cannot be any justifiable reason why the Court will rule against its jurisdiction by virtue of said amendatory law and contrary to established jurisprudence.

Petitioner also argues that respondents acted beyond their constitutional authority and the corresponding RMO or its relevant provisions are not valid for being unconstitutional.

While Section 4 of R.A. No. 8424 grants the CIR the power to interpret tax laws in the exercise of its rule-making or quasi-legislative power, such rule-making power is not without limitations. An administrative agency cannot impose a penalty not so provided in the law authorizing the promulgation of the rules and regulations.

The BIR defines RMOs as issuances that provide directives or instructions; thus, RMO No. 72-2010 may only operate as a mere guideline that outlines processes, operations, activities, workflows, methods and procedures necessary in carrying out the provision of the Philippine tax treaties. However, the BIR failed to adhere to its own letter because it did more than just prescribe a guideline, directive or instruction in implementing the Philippine tax treaties. The said RMOs impose additional conditions (*i.e.*, mandatory requirement of filing of TTRA and securing a BIR ITAD ruling before the occurrence of the first taxable event and disqualification or denial of the benefit of preferential tax treaty rates for failure to comply with mandatory requirement) not otherwise found in any of the tax treaties which they seek to implement. The imposition of such disqualification actually partakes of the nature of a penalty which is not provided for under the tax treaty being implemented. This disqualification is evident in the ITAD ruling itself when it clearly states that petitioner is qualified to a tax treaty relief under the RP-France Tax Treaty but nevertheless denied the TTRA because the TTRA was not filed within the period prescribed in RMO No. 72-2010.

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[17] G.R. No. 113459, November 18, 2002.
[18] CTA Case No. 7093, February 22, 2006.
[19] G.R. No. 163445, December 18, 2007.

Petitioner contends that assuming a TTRA is required or allowed under the terms of a treaty, still the retroactive application of said RMO, to taxable event occurring prior to its issuance, offends due process and the basic principle of statutory construction. The subject ITAD ruling covers petitioner's TTRA filed on February 4, 2011 for dividends declared on July 2, 2010 and paid on July 16, 2010, both of which occurred prior to the issuance of RMO No. 72-2010 on August 25, 2010 and to its effectivity on November 4, 2010. Hence, the requirement under RMO No. 72-2010 became known to petitioner only after the transaction or the occurrence of the first taxable event has already expired and it was already impossible for petitioner to comply with the documentary requirements within the period required by RMO No. 72-2010. Subjecting the dividend income of petitioner to the regular tax rate of 30% instead of the lower tax rate of 10% under the RP-France Tax Treaty through a retroactive application works to the undue prejudice of petitioner.

It may be true that prior to RMO No. 72-2010, RMO No. 1-2000 also mandated that any availment of tax treaty relief shall be preceded by an application with the ITAD at least 15 days before the transaction. However, this rule has been relaxed and in fact the BIR ITAD has been issuing favorable rulings despite the fact that the transaction already took place prior to the filing of the request for ITAD ruling. Moreover, the CTA in an en banc decision[20] ruled that non-compliance with the period of fifteen (15) days is not fatal to a claim for refund.

Accordingly, dividends received by petitioner from MNTC are subject to the 10% preferential tax rate under the RP-France Tax Treaty.

The Respondents' Counter-Arguments

Respondent CIR counter-argues that the Court in Division correctly ruled that it lacks jurisdiction over the original petition for review considering that the primordial issue was the constitutionality or validity of RMO Nos. 72-2010 and 1-2000 or its relevant provisions.

While R.A. No. 9282 confers to the CTA jurisdiction to resolve tax disputes in general, this does not include cases

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[20] *CIR vs. Wrigley Philippines, Inc.*, CTA EB Case No. 598, August 27, 2010.

where the constitutionality of a law or rule is challenged citing *British American Tobacco vs. Camacho*[21].

Respondent CIR submits that the decisions mentioned under the special jurisdiction of the CTA are those issued in the exercise of quasi-judicial power bestowed by law. When the CIR renders a decision on a disputed assessment, claim for refund including penalties, charges or other matters related thereto, she is rendering such after a quasi-judicial proceeding provided by law. This decision made after quasi-judicial proceeding is what is encompassed by the special jurisdiction of the CTA.

Clearly, RMOs and other issuances are rendered under the rule-making power of the CIR. These issuances do not fall under the specialized jurisdiction of the CTA. Accordingly, Regional Trial Courts have jurisdiction over cases such as this.

Respondent CIR did not issue any assessment notice to petitioner nor was there any administrative claim for refund. Hence, the CTA did not acquire jurisdiction over the present petition. The CTA's jurisdiction to resolve tax disputes excludes the power to rule on the constitutionality or validity of a law or rule or regulation, which is vested by no less than the Constitution to regular courts pursuant to the doctrine of hierarchy of courts.

Respondent CIR also submits that at the time the taxable event transpired, RMO No. 1-2000 was in effect since RMO No. 72-2010 applies only to taxable events after its issuance on August 25, 2010 and effectivity on November 4, 2010. Petitioner's TTRA was not filed prior to the declaration and payment of dividends as mandated by RMO No. 1-2000. Therefore, petitioner is liable for the payment of the regular tax rate of 30% on its dividend income.

For his part, respondent Secretary of Finance likewise asserts that the Court in Division correctly ruled that it had no jurisdiction over the petition for review.

First, the petition for review is premature for lack of an actual controversy or urgent necessity to justify judicial intervention. Worse, petitioner failed to show that the CTA has jurisdiction over the subject matter of its petition. Nowhere may it be inferred from Section 11 of R.A. No. 1125, as amended, bestowing upon the CTA the jurisdiction to

[21] G.R. No. 163583, August 20, 2008.

render an interpretative ruling outside a tax dispute. Absent a tax dispute, the petition for review is akin to a petition for declaratory relief, but without a justiciable controversy. There was no mention of either a "protest" or an "assessment" in the petition that could give rise to a tax dispute.

Second, the petition must be dismissed for its premature invocation of the Court's intervention having failed to exhaust all available administrative remedies, *i.e.*, petitioner's failure to ask respondent CIR to "reconsider" the assailed RMOs and ITAD ruling before appealing to respondent Secretary of Finance.

Third, the relief prayed for by petitioner consisted mainly of asking for the nullification of RMO Nos. 72-2010 and 1-2000 for being unconstitutional as it claimed that the same were issued beyond the CIR's rule-making power. This relief prayed for is beyond the ambit of the CTA's jurisdiction as these rules were issued pursuant to the quasi-legislative power of respondent CIR. Hence, the regular courts, and not the CTA, has jurisdiction over the petition.

Finally, respondent Secretary of Finance contends that petitioner's failure to comply with the conditions precedent for the availment of benefits under a tax treaty as set forth under RMO Nos. 1-2000 and 72-2010 is fatal to its claim for refund.

The Ruling of the Court

The Petition for Review has no merit.

The pivotal issue in this case is whether the Court has jurisdiction to rule on the petition.

Basic as a hornbook principle is that jurisdiction over the subject matter of a case is conferred by law and determined by the allegations in the complaint which comprise a concise statement of the ultimate facts constituting the plaintiff's cause of action. The averments in the complaint and the character of the relief sought are the ones to be consulted.[22]

[22] *City of Dumaguete vs. Philippine Ports Authority*, G.R. No. 168973, August 24, 2011.

The jurisdiction of the CTA is defined in R.A. No. 1125[23], as amended by R.A. No. 9282. Section 7 thereof provides in part:

> "Sec.7. *Jurisdiction.* — The CTA shall exercise:
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> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
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> (2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;
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> xxx xxx xxx."

In interpreting the above provisions, the Supreme Court, in the case of *British American Tobacco vs. Camacho*[24] (*British American Tobacco* case), held that the CTA's jurisdiction to resolve tax disputes in general excludes the power to rule on the constitutionality or validity of a law, rule or regulation, thus:

> **"While the above statute confers on the CTA jurisdiction to resolve tax disputes in general, this does not include cases where the constitutionality of a law or rule is challenged. Where what is assailed is the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function, the regular courts have jurisdiction to pass upon the same.** The determination of whether a specific rule or set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts. Indeed, the Constitution vests the power of judicial review or

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[23] An Act Creating the Court of Tax Appeals.
[24] G.R. No. 163583, August 20, 2008.

> the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. This is within the scope of judicial power, which includes the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." (*Emphasis supplied*)

Administrative agencies possess quasi-legislative or rule-making powers and quasi-judicial or administrative adjudicatory powers. Quasi-legislative or rule-making power is the power to make rules and regulations which results in delegated legislation that is within the confines of the granting statute and the doctrine of nondelegability and separability of powers.[25]

Interpretative rule, one of the three (3) types of quasi-legislative or rule making powers of an administrative agency (the other two being supplementary or detailed legislation, and contingent legislation), is promulgated by the administrative agency to interpret, clarify or explain statutory regulations under which the administrative body operates. The purpose or objective of an interpretative rule is merely to construe the statute being administered. It purports to do no more than interpret the statute. Simply, the rule tries to say what the statute means. Generally, it refers to no single person or party in particular but concerns all those belonging to the same class which may be covered by the said interpretative rule.[26]

Section 4 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides for two powers of the CIR: the power to interpret tax laws and the power to decide tax cases, *to wit*:

> "Sec. 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.* — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

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[25] *CIR vs. CA, CTA and Fortune Tobacco Corp.*, G.R. No. 119761, August 29, 1996, Separate Opinion of Justice Bellosillo.
[26] *Ibid.*

> The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals."

The CIR's power to make interpretative rules is specifically granted in the first paragraph of above-quoted Section 4, which provides that the power to interpret provisions of tax laws is under the exclusive and original jurisdiction of the CIR, subject to review by the Secretary of Finance.

Pursuant to Section 4 above, the CIR issued Revenue Administrative Order No. 1-03, providing therein the classes and definitions of interpretative rulings and issuances issued by the BIR, which includes rulings and RMOs.

BIR Rulings are official position of the BIR to queries raised by taxpayers and other stakeholders relative to clarification and interpretation of tax laws.[27] It may be classified into: (1) rulings of first impression[28] or (2) rulings with established precedents[29].

On the other hand, RMOs are directives or instructions outlining procedures, techniques, methods, processes, operations, activities, work flow, and the like, which are necessary to carry out programs or to achieve policy goals and objectives.[30]

From the foregoing, BIR Rulings and RMOs fall under the quasi-legislative or rule-making powers of the CIR provided in the first paragraph of Section 4 of the NIRC of 1997, as amended, and *not* under the CIR's power to decide tax cases including "other matters" arising under tax laws provided in the second paragraph of the same section.

Since decisions of the CIR rendered in the exercise of her power to decide tax cases provided in the second paragraph of Section 4 of the NIRC of 1997, as amended, are the ones that

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[27] http://www.bir.gov.ph/iss_rul/issuances.htm
[28] Section 3(a), Revenue Administrative Order No. 1-03.
[29] Section 3(b), Revenue Administrative Order No. 1-03.
[30] Section 3(h), Revenue Administrative Order No. 1-03.

are subject to review, on appeal, to the CTA under Section 7(a)(1) of R.A. No. 1125[31], as amended by R.A. No. 9282, then BIR Rulings and RMOs does not fall under "other matters" to which the CTA has jurisdiction.

Moreover, the decisions of the CIR on "other matters" that this Court is authorized to review, on appeal, provided in Section 7(a)(1) of R.A. No. 1125[32], as amended by R.A. No 9282, were interpreted to include the following:

1. Determination if the warrant of distraint and levy issued by the BIR is valid[33];

2. Determination if the Waiver of Statute of Limitations was validly effected[34]; and

3. Determination of whether or not the BIR's right to collect taxes had already prescribed[35].

Having discussed the CTA's jurisdiction, the Court will now examine the allegations in the petition for review and the relief sought therein.

In its petition for review before the Court in Division, petitioner basically alleges that it filed a TTRA with BIR-ITAD requesting confirmation that the dividends paid by MNTC to petitioner on July 16, 2010 are subject to a preferential tax rate of 10% under the RP-France Tax Treaty. In reply, respondent CIR issued BIR Ruling No. ITAD 2013-11, denying petitioner's TTRA since the TTRA was filed after the occurrence of the first taxable event in violation of RMO No. 72-2010. Petitioner appealed to respondent Secretary of Finance for the review and reversal of the BIR ITAD ruling. In its appeal, petitioner also sought the revocation of the invalid provisions of RMO No. 72-2010. Respondent Secretary of Justice then issued its ruling affirming the ruling of the respondent CIR. Hence, petitioner filed a petition for review before the Court in Division substantially questioning the mandatory requirement provided under RMO Nos. 72-2010 and 1-2000. Petitioner basically argues that respondents acted beyond their constitutional authority and the corresponding RMOs or its

[31] An Act Creating the Court of Tax Appeals.
[32] *Ibid.*
[33] *Philippine Journalist, Inc. vs. CIR*, G.R. No. 162852, December 16, 2004.
[34] *Ibid.*
[35] *CIR vs. Hambrecht & Quist Philippines, Inc.*, G.R. No. 169225, November 17, 2010.

relevant provisions are not valid for being unconstitutional. Petitioner prays that judgment be rendered as follows:

1. Reversing BIR Ruling No. ITAD 2013-11 and the DOF Ruling that affirmed the same;

2. Revoking and nullifying RMO Nos. 72-2010 and 1-2000 or its relevant provisions for being unconstitutional since the same was issued beyond the CIR's rule-making powers; and

3. Rendering judgment declaring Egis France to be entitled to the 10% preferential tax rate under the RP – France double tax treaty on dividends received from MNTC, regardless of the time when it filed the application for tax treaty relief.[36]

Based on the allegations in the petition for review, petitioner is substantially questioning the validity or constitutionality of BIR Ruling No. ITAD 2013-11 (including the DOF Ruling affirming the same) and RMO Nos. 72-2010 and 1-2000, which were issued by the BIR in the exercise of its quasi-legislative function, hence, beyond the jurisdiction of this Court.

In several recent cases, the Court has consistently ruled that the power to decide or rule on the validity or constitutionality of a rule, regulation or ruling issued by respondents is not within the province of the Court, *to wit*:

1. In *Salaveria, et al. vs. CIR*[37], the Court ruled that it has no jurisdiction to rule on the validity of Revenue Memorandum Circular (RMC) No. 31-2013;

2. In *Delta Air Lines, Inc. vs. Purisima, et al.*[38], the issue pertaining to the validity of BIR Ruling No. 099-2011 dated April 6, 2011, DOF Letter dated September 8, 2011, and Answer 11 to Question 11 of RMC No. 46-2008 were held to be beyond the jurisdiction of this Court;

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[36] Division docket, p. 42.
[37] CTA Case No. 8681, October 1, 2013.
[38] CTA Case No. 8360, August 15, 2013.

3. In *CIR vs. United Cadiz Sugar Farmers Association Multi-Purpose Cooperative*[39], the Court *En Banc* held that it cannot pass upon the validity of Sections 3 and 4 of Revenue Regulations No. 13-2008; and

4. In *St. Paul College of San Rafael vs. CIR*[40], the Court *En Banc* held that the question on the validity and/or constitutionality of BIR Ruling No. 143-2010 is beyond the competence of the Court.

Also, the Supreme Court held in two cases that the jurisdiction over the validity and constitutionality of rules and regulations issued by the Commissioner of Customs (COC) lies before the regular courts and not with the CTA, thus:

1. In *Commissioner of Customs and the District Collector of the Port of Subic vs. Hypermix Feeds Corporation*[41], the Supreme Court held that an action for declaratory relief on the constitutionality of Customs Memorandum Order No. 27-2003 issued by the COC was properly filed before the Regional Trial Court; and

2. In *Carbonilla, et al. vs. Board of Airlines Representatives*[42], the Supreme Court held that the jurisdiction over the validity and constitutionality of Customs Administrative Order No. 1-2005, which was issued pursuant to the COC's power to make rules and regulations, lies before the regular courts.

The petitioner is hinging on the case of *CIR vs. Leal*[43] (*Leal* case) to bolster its claim that the Court has jurisdiction over the instant petition. However, the same is not relevant to the instant petition.

It should be noted that the applicable law at the time the *Leal* case was decided was the old NIRC of 1977. In that case, the questioned RMO No. 15-91 and RMC No. 43-91 were held to be issued pursuant to the CIR's powers under the second paragraph of Section 245 of the NIRC of 1977, as follows:

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[39] CTA EB Case No. 846, June 5, 2013.
[40] CTA EB Case No. 874, May 27, 2013.
[41] G.R. No. 179579, February 1, 2012.
[42] G.R. No. 193247, September 14, 2011.
[43] G.R. No. 113459, November 18, 2002.

> "SEC. 245. Authority of the Secretary of Finance to promulgate rules and regulations. — The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code.
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> The authority of the Secretary of Finance to determine articles similar or analogous to those subject to a rate of sales tax under certain category enumerated in Section 163 and 165 of this Code shall be without prejudice to **the power of the Commissioner of Internal Revenue to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws, including ruling on the classification of articles of sales and similar purposes**." (*Emphasis supplied*)

However, the second paragraph of the above provision was deleted and the first paragraph now appears in Section 244[44] of the NIRC of 1997. Relative to this amendment, Section 4 of the NIRC of 1997 was introduced as a new provision. Therefore, petitioner cannot rely on the *Leal* case.

In contrast, the applicable law at the time the *British American Tobacco* case was decided was the NIRC of 1997. It is a more recent pronouncement of the Supreme Court and was decided by the Supreme Court sitting *En Banc*.

Time and again, it has been held that the CTA is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction[45] and its jurisdiction should not be deemed to exist on mere implication.[46] Therefore, the Court in Division did not err when it dismissed petitioner's petition for review in CTA Case No. 8413 on the ground of lack of jurisdiction. Accordingly, the Court deems it unnecessary to discuss the other grounds raised by petitioner in its petition for review.

Finding no reversible error, *We* affirm the assailed *Resolutions* dated January 29, 2013 and May 17, 2013 of the Court in Division.

[44] Section 244. *Authority of Secretary of Finance to Promulgate Rules and Regulations* — The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code.
[45] *Rizal Commercial Banking Corporation v. CIR*, G.R. No. 168498, April 24, 2007.
[46] *Southern Cross Cement Corporation vs. The Philippine Cement Manufacturers Corporation, et al.*, G.R. No. 158540, July 8, 2004.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(Concurs with the Dissenting Opinion of Presiding Justice Del Rosario. However, there should be no categorical declaration of nullity of the subject BIR Ruling)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

EGIS PROJECTS S.A.,
Petitioner,

- *versus* -

THE SECRETARY OF FINANCE and COMMISSIONER OF INTERNAL REVENUE,
Respondents.

CTA EB NO. 1023
(CTA Case No. 8413)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:
SEP 16 2014 4:25pm

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DISSENTING OPINION

With utmost respect to my esteemed colleagues, I dissent on the dismissal of the petition for review. It is my humble opinion that the Court of Tax Appeals (CTA) is clothed with authority to review rulings of the Commissioner of Internal Revenue (CIR) which were issued to interpret the provisions of the National Internal Revenue Code (NIRC) and other laws administered by the Bureau of Internal Revenue (BIR).

Section 4 of the NIRC of 1997[1] vests the CIR with the exclusive and original jurisdiction to interpret the provisions of the NIRC and other tax laws, subject to review by the Secretary of Finance. Pertinent portion of the aforesaid provision of the NIRC states:

> "**SECTION 4**. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.* — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original

[1] Republic Act No.8424 (An Act Amending the National Internal Revenue Code, as amended, and for Other Purposes).

jurisdiction of the Commissioner, subject to review by the Secretary of Finance."

To provide for the procedure on the proper implementation of the afore-quoted provision of the NIRC, then CIR Rene G. Bañez issued Revenue Administrative Order (RAO) No. 03-01[2] dated October 22, 2001, which states that:

> "III. PROCEDURE
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> 1. Within thirty (30) days from the date of receipt of the adverse ruling of the Commissioner, the affected taxpayer may seek the review of the ruling by the Department of Finance. In all cases, the adverse ruling that can be brought to the Department of Finance shall only be the final adverse decision of the Commissioner.
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> In the case of rulings by the Commissioner's delegates, the taxpayer shall exhaust administrative remedies within the Bureau of Internal Revenue by filing a letter of reconsideration addressed to the Commissioner, but filed with the Office of the Assistant Commissioner for Legal Service (ACIR-LS) in the case of adverse rulings decided by the Revenue Regional Directors or with the Office of the Deputy Commissioner of Internal Revenue for Legal and Inspection Group (DCIR-LIG) in the case of adverse rulings decided by the ACIR-LS within fifteen (15) days from receipt of an adverse ruling, before requesting for a review by the Secretary of Finance;" *(Emphases supplied)*

Subsequently, then CIR Bañez issued Revenue Memorandum Circular (RMC) No. 40-A-02[3] on May 7, 2002, which quoted Department Order (DO) No. 7-02 dated May 7, 2002 issued by then Secretary of Finance, Jose Isidro N. Camacho. Section 3 of DO No. 7-02 provides that "a taxpayer who receives an adverse ruling from the CIR may, within thirty (30) days from the date of receipt of such ruling, seek its review by the Secretary of Finance."

From the foregoing, it is clear that a taxpayer who receives an adverse ruling of the CIR, interpreting the provisions of tax laws, may seek a review thereof by the Secretary of Finance within 30 days from receipt of such ruling. The NIRC of 1997, including the above-mentioned issuances of the

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[2] Subject: Implementing Further Department Order No. 23-01 dated October 5, 2001 that Provides for the Rules on the First Paragraph of Section 4 of the Tax Code of 1997.

[3] Subject: Department Order No. 7-02, "Providing for the Implementing Rules of the First Paragraph of Section 4 of the National Internal Revenue Code of 1997, Repealing for this Purpose Department Order No. 005-99 and Revenue Administrative Order No. 1-99".

CIR, do not provide for the procedural rule on instances when the Secretary of Finance affirms the ruling of the CIR and a taxpayer intends to further question such ruling. Notwithstanding this limitation, I am of the view that the affected taxpayer can still seek a review of the CIR's ruling before the CTA pursuant to Section 7 of Republic Act (R.A.) No. 1125,[4] as amended by R.A. No. 9282,[5] which provides:

> "***Sec. 7. Jurisdiction. — The CTA shall exercise***:
>
> ***(a) Exclusive appellate jurisdiction to review by appeal, as herein provided***:
>
> (1) **Decisions of the Commissioner of Internal Revenue in cases involving** disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or **other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue**; *(Emphasis supplied)*

Plainly, the CTA is authorized to review, on appeal, decisions of the CIR on *"other matters arising under the NIRC and other tax laws administered by the BIR."* The *"other matters"* contemplated under the aforesaid provision of law includes rulings of the CIR implementing tax laws. In ***CIR vs. Josefina Leal***,[6] the Supreme Court was no less categorical in declaring that jurisdiction to review rulings of the CIR, *i.e., RMO No. 15-91 and RMC No. 43-91*, is vested with the CTA, *viz.*:

> "**The questioned RMO No. 15-91 and RMC No. 43-91 are actually rulings or opinions of the Commissioner implementing the Tax Code on the taxability of pawnshops**. xxx
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> xxx xxx xxx
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> **Under Republic Act No. 1125 (An Act Creating the Court of Tax Appeals [CTA for brevity])**, as amended, **such rulings of the Commissioner of Internal Revenue are appealable to that court**, thus:
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> > 'SEC. 7. Jurisdiction. — The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided —

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[4] An Act Creating the Court of Tax Appeals.
[5] An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes.
[6] G.R. No. 113459, November 18, 2002.

(1) *Decisions of the Commissioner of Internal Revenue in cases involving* disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or *other matters arising under the National Internal Revenue Code or other laws or part of law administered by the Bureau of Internal Revenue*;

xxx xxx xxx' (emphasis added)

'SEC. 11. Who may appeal; effect of appeal. — Any person, association or corporation adversely affected by a decision or ruling of the Commissioner of Internal Revenue, or the Commissioner of Customs or any provincial or city Board of Assessment Appeals may file an appeal in the Court of Tax Appeals within thirty days after the receipt of such decision or ruling.' xxx

'SEC. 18. . . . — No judicial proceedings against the Government involving matters arising under the National Internal Revenue Code, the Customs Law or the Assessment Law shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the Court of Tax Appeals and disposed of in accordance with the provisions of this Act.' xxx

The Court, in *Rodriguez, etc. vs. Blaquera*, etc., ruled:

'Plaintiff maintains that this is not an appeal from a ruling of the Collector of Internal Revenue, but merely an attempt to nullify General Circular No. V-148, which does not adjudicate or settle any controversy, and that, accordingly, this case is not within the jurisdiction of the Court of Tax Appeals.

'We find no merit in this pretense. General Circular No. V-148 directs the officers charged with the collection of taxes and license fees to adhere strictly to the interpretation given by the defendant to the statutory provisions abovementioned, as set forth in the Circular. The same incorporates, therefore, a decision of the Collector of Internal Revenue (now Commissioner of Internal Revenue) on the manner of enforcement of the said statute, the administration of which is entrusted by law to the Bureau of Internal Revenue. As such, it comes within the purview of Republic Act No. 1125, Section 7 of which provides that the Court of Tax Appeals 'shall exercise exclusive appellate jurisdiction to review by appeal . . . decisions of the Collector of Internal Revenue in . . . matters arising under the National Internal Revenue Code or other law or part of the law administered by the Bureau of Internal Revenue.' . . .' xxx

In the same vein, we held in *Meralco Securities Corporation vs. Savellano*, thus:

'Respondent judge has no jurisdiction to take cognizance of the case because the subject matter thereof clearly falls within the scope of cases now exclusively within the jurisdiction of the Court of Tax Appeals. Section 7 of Republic Act No. 1125,

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> enacted June 16, 1954, granted to the Court of Tax Appeals exclusive appellate jurisdiction to review by appeal, among others, decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue. The law transferred to the Court of Tax Appeals jurisdiction over all cases involving said assessments previously cognizable by Courts of First Instance, and even those already pending in said courts. The question of whether or not to impose a deficiency tax assessment on Meralco Securities Corporation undoubtedly comes within the purview of the words "disputed assessments" or of "other matters arising under the National Internal Revenue Code. . . ." In the case of Blaquera, etc. vs. Rodriguez, etc. (103 Phil. 511 [1958]), this Court ruled that 'the determination of the correctness or incorrectness of a tax assessment to which the taxpayer is not agreeable, falls within the jurisdiction of the Court of Tax Appeals and not of the Court of First Instance, for under the provisions of Section 7 of Republic Act No. 1125, the Court of Tax Appeals has exclusive appellate jurisdiction to review, on appeal, any decision of the Collector of Internal Revenue in cases involving disputed assessments and other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue.'
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> Here, as earlier mentioned, respondent Josefina Leal, being a pawnshop owner, is assailing the revenue orders imposing 5% lending investor's tax on pawnshops issued by petitioner. Clearly then, **she should have filed her petition with the Court of Tax Appeals**, not the RTC. Indeed, the Court of Appeals erred in holding that the RTC order should have been challenged before this Court. *(Emphases supplied)*

Indubitably, rulings or opinions of the CIR implementing tax laws are reviewable by the CTA as they pertain to *"other matters"* arising under the NIRC or other laws administered by the BIR.

While it may appear that it is the DOF ruling affirming BIR Ruling ITAD 203-11 that prompted petitioner to file an appeal with the Court in Division, in truth and in fact, the subject of the appeal is BIR Ruling ITAD 203-11 itself. Petitioner cannot be faulted for seeking review of BIR Ruling ITAD 203-11 before the Secretary of Finance for it is in accordance with the procedure set out in RAO 03-01 and RMC No. 40-A-02. Petitioner therefore merely exhausted the available administrative remedy before it finally questioned BIR Ruling ITAD 203-11 (which was affirmed by the Secretary of Finance), including Revenue Memorandum Order (RMO) Nos. 1-2000 and 72-2010, with the Court in Division. Considering that BIR Ruling ITAD 203-11, including RMO Nos. 1-2000 and 72-2010, are opinions of the CIR implementing the tax laws, such rulings/opinions of the CIR are clearly within the jurisdiction of the CTA pursuant to Sec. 7(a)(1) of R.A. 1125, as amended, and as interpreted by the Supreme Court in *Leal*.

With utmost respect, I believe that the Court's reliance on ***British American Tobacco vs. Camacho,***[7] which states that *the regular courts, not the CTA, have jurisdiction to pass upon the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function,* is misplaced since **the present appealed case does not seek to have the provisions of tax laws, or any rules and regulations issued by the Secretary of Finance** *(upon recommendation of the CIR)* **declared as invalid and unconstitutional <u>through a petition for injunction</u>** - - which is the nature of the action in the cited case. Rather, the issue in the present case dwells on the correctness of a BIR Ruling, the review of which clearly falls within the jurisdiction of the CTA as it is considered as *"other matter"* contemplated under R.A. No. 1125, as amended by R.A. No. 9282.

At the risk of being repetitive, the applicable principle is that pronounced by the Supreme Court in *Leal* which explicitly recognized the jurisdiction of the CTA to review opinions and rulings of the CIR.

To hold otherwise will result in an absurd situation wherein the CTA may conveniently be deprived of jurisdiction to review a ruling issued by the BIR by a mere invocation of a constitutional issue no matter how frivolous such issue may be. Otherwise stated, to say that the CTA is deprived of jurisdiction when the controversy involves the constitutionality of BIR rulings or regulations would open the door to procedural or jurisdictional mischiefs. Illustratively, a taxpayer who wishes to avoid CTA jurisdiction in disputing a tax assessment would simply present a patently unmeritorious constitutional challenge on the BIR ruling or regulation upon which the assessment is based. While in such an instance, the regular court may be expected to rule in favor of the constitutionality of the assailed BIR ruling or regulation, the same court would nevertheless pass upon the validity of the assessment. Truth to tell, a remedial policy of removing from CTA's jurisdiction all cases which involve the "constitutionality" or "validity" of BIR rulings or regulations would be anathema to a judicious and reasonable application of *British American Tobacco* doctrine.

But even in a situation where the CTA's jurisdiction may hypothetically be recognized on cases within its undisputed sphere of authority *vis-à-vis* the purported jurisdiction of regular courts on cases

[7] G.R. No. 163583, August 20, 2008.

involving constitutionality or validity of a law, still, the havoc that two (2) conflicting decisions may arise cannot be discounted.

Again, by way of illustration, an income may have been subjected to preferential tax rate pursuant to a tax treaty without first filing a Tax Treaty Relief Application (TTRA) required under RMO Nos. 1-2000 and 72-2010. The BIR may then issue a BIR Ruling, similar to the scenario in the present case, denying the taxpayer the preferential tax rate for violation of the procedure of the RMO, and may eventually assess the taxpayer based on such adverse BIR Ruling for deficiency tax pertaining to the difference between the tax paid based on the preferential tax rate imposed under a tax treaty and the tax due based on the imposition under the NIRC. If we are to follow the majority of the Court *En Banc*, the BIR Ruling will have to be questioned before the regular court, while the CIR's final decision on disputed assessment will have to be appealed before the CTA. Once the tax assessment case is appealed before the CTA, the CTA will have to rule on the constitutionality or validity of BIR ruling as it is the very *lis mota* or crux of the controversy in a tax assessment case. Considering the CTA has jurisdiction to review ruling/opinion of the BIR, the CTA has the power to touch the issue of the constitutionality of a law, or validity of revenue regulations and issuances of the BIR, upon which the assessment is based. Jurisprudence dictates that courts will not touch the issue of constitutionality unless it is truly unavoidable and is the very *lis mota* or crux of the controversy.[8] Conversely, courts are mandated to resolve the issue of constitutionality if it is unavoidable and is the very *lis mota* of the case. Based on this paradigm, the issue of the constitutionality or validity of BIR rulings/opinions brought before the regular court, which at the same time is the very *lis mota* or crux of controversy before the CTA, may be decided differently by two (2) courts.

Based on the foregoing, I am of the view that the CTA has jurisdiction over the petition for review. Consequently, it should resolve the issue of whether or not compliance with the procedural requirements set forth under RMO No. 72-2010 is a condition precedent to the availment of the benefits under a tax treaty, which in this case refers to the RP-France Tax Treaty. In my humble mind, the answer is in the negative.

The same issue, *albeit involving RMO No. 1-2000 and RP-German Tax Treaty*, was already resolved by the Supreme Court in *Deutsche Bank AG Manila Brach vs. CIR*[9], in this wise:

[8] Ernesto B. Francisco, Jr. vs. The House of Representatives, G.R. No. 160261, November 10, 2003
[9] G.R. No. 188550, August 19, 2013.

"Tax Treaty vs. RMO No. 1-2000

Our Constitution provides for adherence to the general principles of international law as part of the law of the land. The time-honored international principle of *pacta sunt servanda* demands the performance in good faith of treaty obligations on the part of the states that enter into the agreement. Every treaty in force is binding upon the parties, and obligations under the treaty must be performed by them in good faith. More importantly, treaties have the force and effect of law in this jurisdiction.

Tax treaties are entered into 'to reconcile the national fiscal legislations of the contracting parties and, in turn, help the taxpayer avoid simultaneous taxations in two different jurisdictions.' CIR v. S.C. Johnson and Son, Inc. further clarifies that 'tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods. The apparent rationale for doing away with double taxation is to encourage the free flow of goods and services and the movement of capital, technology and persons between countries, conditions deemed vital in creating robust and dynamic economies. Foreign investments will only thrive in a fairly predictable and reasonable international investment climate and the protection against double taxation is crucial in creating such a climate.' Simply put, tax treaties are entered into to minimize, if not eliminate the harshness of international juridical double taxation, which is why they are also known as double tax treaty or double tax agreements.

'**A state that has contracted valid international obligations is bound to make in its legislations those modifications that may be necessary to ensure the fulfillment of the obligations undertaken**.' Thus, laws and issuances must ensure that the reliefs granted under tax treaties are accorded to the parties entitled thereto. **The BIR must not impose additional requirements that would negate the availment of the reliefs provided for under international agreements. More so, when the RP-Germany Tax Treaty does not provide for any pre-requisite for the availment of the benefits under said agreement**.

Likewise, it must be stressed that **there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period**. We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.

Bearing in mind the rationale of tax treaties, **the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty. The denial of the availment of tax relief**

for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. At most, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.

The obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000. Logically, noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors. While the consequences sought to be prevented by RMO No. 1-2000 involve an administrative procedure, these may be remedied through other system management processes, e.g., the imposition of a fine or penalty. But **we cannot totally deprive those who are entitled to the benefit of a treaty for failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief.**" *(Emphases supplied)*

While the jurisprudence discussed RMO No. 1-2000 and the RP-German Tax Treaty, the principles pronounced therein apply to this case. Foremost, the questioned RMO No. 72-2010 in the case at bench requires prior tax treaty relief application as a condition precedent to the availment of the benefits under a tax treaty, which requirement is similarly found in RMO No. 1-2000. Moreover, the RP-France Tax Treaty involved in this case does not provide for any pre-requisite for the availment of the benefits under said agreement, which is similar to the RP-German Tax Treaty involved in *Deutsche*.

In BIR Ruling ITAD 203-11, which was affirmed by the Secretary of Finance, the CIR ruled as follows:

"In reply, please be informed that Sections 14 and 13 of **Revenue Memorandum Order ('RMO') No. 72-2010** (Guidelines on the Processing of Tax Treaty Relief Applications (TTRA) Pursuant to Existing Philippine Tax Treaties), effective November 4, 2010, provide:

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Under the RMO, the filing of TTRAs should be made before the occurrence of the first taxable event, or the first or the only time when an income payor is required to withhold income tax on payments subject to preferential treatment. The first or only time referred herein corresponds to the period a withholding agent is required to file the necessary returns on final and creditable income taxes withheld in a particular month, which is within ten days after the end of that month, or, if the withholding was made in December, on or before January 15 of the following year, pursuant to Section 2.58(A)(2) of Revenue Regulations No. 2-98 (Implementing Republic Act No. 8424, 'An Act Amending the National Internal Revenue Code, as amended' Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax

> on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes) xxx.
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> Accordingly, **since the subject TTRA was filed on February 4, 2011, or before the nearest deadline of filing a monthly return on February 10, 2011, such payments made by MNTC that will be subject to preferential treatment under a tax treaty are those made beginning January 1, 2011, and thereafter. Therefore, such dividends paid by MNTC to Egis on July 15, 2010, will be subject to the regular income tax of 30 percent of the gross amount thereof**, under Section 28(B)(1)(a) of the National Internal Revenue Code of 1997, as amended, xxx.
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> This ruling is issued on the basis of the facts as represented. However, if upon investigation it shall be disclosed that the actual facts are different, then this ruling shall be without force and effect insofar as the herein parties are concerned." *(Emphases supplied)*

Clearly, based on the representation made by petitioner, the BIR confirms that petitioner is entitled to the preferential tax rate under a tax treaty but only beginning January 1, 2011; and that the dividends paid by MNTC to petitioner on July 15, 2010 will be subject to the regular income tax under Section 28(B)(1)(a) of the NIRC of 1997. The BIR took into account the date of filing of petitioner's TTRA on February 4, 2011, which accordingly is before the nearest deadline of filing a monthly return on February 10, 2011. In other words, petitioner was denied of a preferential tax rate under the RP-France Tax Treaty on dividends paid by MNTC to petitioner on July 15, 2010 for failure of petitioner to comply with the requirements imposed under RMO No. 72-2010 albeit said requirements are not prescribed in the RP-Finance Tax Treaty. BIR Ruling ITAD 203-11 therefore divested petitioner of the preferential tax rate allowed under the tax treaty.

To re-echo the Supreme Court, the obligation to comply with a tax treaty must take precedence over the objective of the RMO. The BIR cannot simply deprive a taxpayer of a treaty benefit for a mere failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief; otherwise, it would constitute a violation of the duty required by good faith in complying with a tax treaty.[10]

Thus, on the basis of the circumstances presented in BIR Ruling ITAD 203-11, petitioner is entitled to the preferential tax rate on dividend under the RP-France Tax Treaty not only beginning January 1, 2011 as ruled by the respondent, but also for dividends paid by MNTC to petitioner on July 15, 2010.

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[10] Note 25, *supra*.

In view of the foregoing, I VOTE to **GRANT** the Petition for Review filed by petitioner on June 21, 2013. Petitioner should not be deprived of its entitlement to the benefits under the RP-France Tax Treaty for failure to strictly comply with RMO Nos. 1-2000 and 72-2010 requiring prior application for tax treaty relief.

ROMAN G. DEL ROSARIO
Presiding Justice