REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ANTHONY ORTILE TUASON, *Petitioner,*	**CTA EB NO. 1700** (CTA Case No. 9041)
	Present:
	Del Rosario, *P.J.,* Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, Manahan, *JJ.*
- versus –	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: FEB 28 2019 3:37 p.m.

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DECISION

CASTAÑEDA, JR., *J.:*

This is a *Petition for Review*[1] filed by petitioner Anthony Ortile Tuason on August 31, 2017 which seeks the review and reversal of the Decision dated February 23, 2017[2] (Assailed Decision), as well as the Resolution dated July 31, 2017[3] (Assailed Resolution) of the First Division (Court in Division) of this Court in CTA Case No. 9041, entitled *Anthony Ortile Tuason v. Commissioner of Internal Revenue.*

The respective dispositive portions of the Assailed Decision and Resolution are quoted hereunder:

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[1] Court *En Banc's* Docket, pp. 6-29.
[2] Penned by Presiding Justice Roman G. Del Rosario, concurred in by Associate Justice Erlinda P. Uy and Associate Justice Cielito N. Mindaro-Grulla; Court *En Banc*'s Docket, pp. 33-49.
[3] Penned by Presiding Justice Roman G. Del Rosario, concurred in by Associate Justice Erlinda P. Uy and Associate Justice Cielito N. Mindaro-Grulla; Court *En Banc*'s Docket, pp. 51-53.

<u>Assailed Decision</u>:

"**WHEREFORE**, in light of the foregoing, the Petition for Review filed by Anthony Ortile Tuason on May 12, 2015 is hereby **DENIED** for lack of merit.

SO ORDERED."

<u>Assailed Resolution</u>:

"**WHEREFORE**, in light of the foregoing, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

The facts of the present case, as found by the Court in Division in its Decision dated February 23, 2017, are as follows:[4]

"On April 12, 2013, respondent CIR issued Revenue Memorandum Circular (RMC) 31-2013 *(Guidelines on the Taxation of Compensation Income of Philippine Nationals and Alien Individuals Employed by Foreign Governments/Embassies/Diplomatic Missions and International Organizations Situated in the Philippines)*, which states that only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax, pertinent part of which provides:

'SECTION 2. TAX TREATMENT OF COMPENSATION INCOME

The tax treatment of Philippine nationals and alien individuals on compensation income received by them from foreign governments/embassies and missions and international organizations shall be as follows:

xxx xxx xxx

[4] Court *En Banc's* Docket, pp. 34-37 (Citations omitted).

(d) Those Employed by Organizations Covered by Separate International Agreements or Specific Provisions of Law —

1. Asian Development Bank (ADB)

Section 45(b), Article XII of the Agreement between the Asian Development Bank and the Government of the Republic of the Philippines regarding the Headquarters of the Asian Development Bank provides:

'ARTICLE XII

xxx

Section 45

Officers and staff of the Bank, including for the purposes of this Article experts and consultants performing missions for the Bank, shall enjoy the following privileges and immunities:

xxx xxx xxx

(b) Exemption from taxation on or in respect of the salaries and emoluments paid by the Bank subject to the power of the Government to tax its nationals;

From the above, **only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax**.' *(Boldfacing supplied)*

Claiming to have been ordered to pay income tax on his salary pursuant to the aforesaid RMC, petitioner filed his Amended Annual Income Tax Return and paid the amount of P264,588.04 on May 15, 2013 as income tax on his salary for 2012. On the same date, petitioner sent a Letter to the Commissioner of Internal Revenue stating that he is availing the abatement of surcharge, interest and/or compromise penalty under Revenue Regulations No. 7-2013.

Allegedly, in February 2014, two Filipino ADB employees on behalf of the other Filipino employees of the ADB questioned the legality of RMC No. 31-2013 with the Regional Trial Court (RTC) of Mandaluyong City.

On September 30, 2014, Branch 213 of RTC of Mandaluyong City in *Erwin Salavera and Portia Gonzales by themselves and as Attorneys-in-Fact of the concerned Filipino employees of the Asian Development Bank vs. Commissioner of Internal Revenue, Civil Case No. MC14-8775*, promulgated a Decision declaring Section 2 (d) (1) of RMC 31-2013 as void for being issued without legal basis, in excess of authority and/or without due process of law, and due to absence of legislation and/or regulation to the contrary. A Motion for Reconsideration was filed by the CIR on November 11, 2014, but the same was denied on January 9, 2015.

On March 25, 2015, petitioner filed a claim for refund of income taxes erroneously and/or illegally collected by respondent.

Due to the alleged inaction on his claim for refund and due to the two-year prescriptive period which accordingly would soon lapse, petitioner was prompted to file the present Petition for Review.

On June 26, 2015, respondent filed her Answer, with the following Special and Affirmative Defenses:

> '3. She reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> 4. Taxes paid and collected are presumed to have been made in accordance with law and implementing regulations, hence, not refundable.
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> 5. In an action for refund/credit, the burden of proof is upon petitioner to establish its right to the claimed refund and failure to adduce sufficient proof is fatal to its claim.
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> 6. Petitioner's claim for refund/issuance of tax credit in the amount of Php264,588.04 as alleged erroneously paid income tax for taxable year 2012 were not duly substantiated by proper documentary evidence.
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> 7. Petitioner failed to prove that the amount subject of its claim was remitted in full to the BIR.

8. Petitioner failed to comply with the requirements prescribed under Section 76 of the 1997 Tax Code.

9. Petitioner failed to comply with the requirements under Section 204 of the 1997 Tax Code in relation to Section 229 of the same Code.

10. Claims for refund are construed strictly against herein petitioner for the same partakes the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and as such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211).*'

On August 20, 2015, petitioner filed his Pre-Trial Brief while respondent filed his Pre-Trial Brief on August 24, 2015.

Pre-Trial Conference was held on August 27, 2015. The parties filed their Joint Stipulation of Facts and Issues on October 22, 2015, and the same was approved in the Resolution dated November 11, 2015. In the same Resolution, the Court terminated the Pre-Trial.

During trial, petitioner presented testimonial and documentary evidence. Petitioner's formally offered exhibits, as contained in his Formal Offer of Documentary Evidence, were admitted in the Resolution dated August 23, 2016. Respondent, on the other hand, posted a Manifestation and Motion on June 6, 2016 stating that he will no longer present evidence in this case and moved to submit the case for resolution based on legal arguments and records presented.

Considering the filing of petitioner's Memorandum on September 23, 2016 and respondent's Memorandum on October 7, 2016, the case was submitted for decision on October 14, 2016."

On February 23, 2017, the Court in Division rendered the Assailed Decision denying petitioner's *Petition for Review* for lack of merit.

Aggrieved, petitioner filed a *Motion for Reconsideration* on March 14, 2017 but the Court in Division likewise denied the same for lack of merit in the Assailed Resolution. *gr*

Within the extended period granted by the Court *En Banc*,[5] petitioner filed the present *Petition for Review* on August 31, 2017,

In a Resolution[6] dated September 22, 2017, the Court *En Banc* directed the respondent to file her Comment, which he did via registered mail on October 23, 2017.[7] Thus, on November 29, 2017, the Court *En Banc* resolved to give due course to the Petition for Review and granted the parties a period of thirty (30) days within which to file their respective Memoranda.[8]

On February 5, 2018, petitioner filed his *Memorandum*[9] while respondent filed via registered mail on February 2, 2018 a *Manifestation and Motion*[10] wherein he manifested and moved to adopt all the arguments (factual and legal) found in his *Comment/Opposition* dated October 23, 2017 as part of his *Memorandum* in the present case. The Court *En Banc* duly noted respondent's *Manifestation and Motion* in a Minute Resolution[11] dated February 13, 2018.

Accordingly, the present case was submitted for decision in a Resolution[12] dated March 8, 2018.

THE ISSUES

Petitioner submits the following legal issues for resolution of the Court *En Banc,* to wit:[13]

a. Whether or not legislation is necessary in order to tax the income of Filipino ADB employees such as the Petitioner-Appellant;

b. Whether or not an income tax on the salaries and emoluments of Filipino ADB employees such as the Petitioner-Appellant is discriminatory and a violation of the equal protection of the laws; and

c. Whether or not BIR RMC No. 31-2013 prejudiced Filipino ADB employees such as the Petitioner-Appellant for being retroactive to year 2012.

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[5] *Id.*, p. 5.
[6] *Id.*, pp. 54-55.
[7] *Id.*, pp. 56-61.
[8] *Id.*, pp. 64-65.
[9] *Id.*, pp. 66-88.
[10] *Id.*, pp. 90-91.
[11] *Id.*, p. 93.
[12] *Id.*, pp. 95-96.
[13] *Id.*, p. 14.

THE COURT *EN BANC*'S RULING

After careful scrutiny of the relevant facts of the present case, the arguments of the parties, as well as the applicable laws and jurisprudence on the matter, the Court *En Banc* finds that the present Petition for Review should be denied for lack of merit. Petitioner failed to raise any new or substantial matter let alone any compelling reason to warrant the modification much less reversal of the Court in Division's findings.

In his *Petition*, petitioner claims that the reservation of the Philippine Government to tax its citizens when it ratified the ADB Charter is not self-executing and, as such, legislation is necessary to put it into effect.[14] Petitioner also adds that absent an implementing law, the power to tax may be arbitrarily and whimsically exercised.[15] Petitioner likewise maintains that the reservation of the right to tax the salaries of Philippine nationals only means that the exercise of said right was withheld.[16] According to petitioner, an operative act is still needed to remove it from its reserved status[17] and that the reservation is not the same as an outright retention of the right to tax and definitely not an intention to tax.[18]

A review of the relevant treaty and legislative provisions will demonstrate that Congress really intended to tax the salaries and emoluments received by Filipinos from ADB.

On December 4, 1965, the "Agreement Establishing the Asian Development Bank" (ADB Charter) was executed.

Thereafter, in a Senate Resolution No. 6 dated March 16, 1966, the ADB Charter was ratified and confirmed by the Philippine Government with a reservation of its right to tax the Filipino employees of ADB, thus:

> "NOW THEREFORE, be it known that I, FERDINAND E. MARCOS, President of the Republic of the Philippines, having seen and considered the Agreement Establishing the Asian Development Bank done on December 4, 1965 at Manila, Philippines, do hereby in pursuance of the aforesaid concurrent of the Senate of the Philippines, ratify and confirm the said Agreement and every article and clause thereof, <u>subject to the reservation that the Philippines declares that it retains for itself and its political subdivision the right to tax salaries and</u> gr

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[14] *Id.*, pp. 14-22.
[15] *Id.*
[16] *Id.*, pp. 22-24.
[17] *Id.*
[18] *Id.*

> emoluments paid by the Bank to citizens or nationals of the Philippines." *(Underscoring supplied)*

On December 22, 1966, the "Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank" (ADB Headquarters Agreement) was signed, which provides in pertinent part:

> "ARTICLE XII
>
> Privileges and Immunities of Governors and Other Representatives of Members, Directors, President, Vice-President and Others
>
> xxx xxx xxx
>
> Section 45.
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> Officers and staff of the Bank, including for the purposes of this Article experts and consultants performing missions for the Bank, shall enjoy the following privileges and immunities:
>
> (a) Immunity from legal process with respect to acts performed by them in their official capacity except when the Bank waives the immunity;
>
> (b) Exemption from taxation on or in respect of the salaries and emoluments paid by the Bank subject to the power of the Government to tax its nationals; xxx." *(Underscoring supplied)*

The 1997 NIRC, a subsequent legislation which took effect on January 1, 1998,[19] is the law that illuminates the clear intention of the reservation clauses found in the Senate Resolution No. 6 and Section 45(b) of the ADB Headquarters Agreement. Specifically, said law leaves no room for doubt that resident citizens are subject to tax on income derived from all sources within and without the Philippines under its Sections 23(A) and 24(A)(1)(a) as amended:

> "**SEC. 23.** *General Principles of Income Taxation in the Philippines*. - Except when otherwise provided in this Code: ℊ

[19] *Visayas Geothermal Power Company v. Commissioner of Internal Revenue*, G.R. No. 197525, June 4, 2014, 725 SCRA 130.

> (A) A citizen of the Philippines residing therein is taxable on all income derived from sources within and without the Philippines;
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> xxx xxx xxx
>
> **SEC. 24.** *Income Tax Rates.* –
>
> (A) *Rates of Income Tax on Individual Citizen and Individual Resident Alien of the Philippines.* -
>
> (1) An income tax is hereby imposed:
>
> (a) On the taxable income defined in Section 31 of this Code, other than income subject to tax under Subsections (B), (C) and (D) of this Section, derived for each taxable year from all sources within and without the Philippines by every individual citizen of the Philippines residing therein;" *(Underscoring supplied)*

The Court *En Banc* does not find any merit in petitioner's contention that the ADB Charter is not self-executing and thus, needs an enabling legislation before it may take effect.

In *Pharmaceutical and Health Care Association of the Philippines v. Duque III*,[20] the Supreme Court emphatically held that treaties become part of the law of the land through the doctrine of transformation pursuant to Article VII, Section 21 of the Constitution which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." In other words, the concurrence of the Senate to the President's ratification of the treaty,[21] is sufficient to transform such treaty into municipal law. Once transformed, the provisions of the treaty become enforceable within the domestic sphere and to be of the same class as a statute duly enacted by Congress.[22] In the present case, the Senate's concurrence with the President's ratification is enough to transform the ADB Charter into a domestic law that can be applied to resolve domestic conflicts.

Besides, any lingering doubt as to the true import of the reservation clauses in the Senate Resolution No. 6 and Section 45(b) of the ADB

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[20] G.R. No. 173034, October 9, 2007, 535 SCRA 289.

[21] Under our Constitution, the power to ratify treaties is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. (*Pimentel v. Executive Secretary*, G.R. No. 158088, July 6, 2005, 462 SCRA 622, 637-638).

[22] *Abbas v. COMELEC*, G.R. No. 89651, November 10, 1989, 179 SCRA 287.

Headquarters Agreement had been completely obliterated by Sections 23 and 24 of the 1997 NIRC which now clearly subjects the worldwide income of resident citizens to income tax. Assuming there is inconsistency between the ADB Charter as well as the ADB Headquarters Agreement and the provisions of the 1997 NIRC as regards the taxability of the salaries of Filipino ADB officials and employees, the provisions of the 1997 NIRC, being the later expression of legislative will, serve as the prevailing rule on the matter.[23]

Petitioner also posits that a tax on the salary of the Filipino ADB officials and employees is discriminatory and a violation of the equal protection clause of the Constitution.[24] He contends that whatever immunities and privileges granted by the government to the UN and its specialized agencies (pursuant to the Convention on the Immunities and Privileges of the United Nations and the Convention on the Immunities and Privileges of the Specialized Agencies of the United Nations) should likewise be enjoyed by the ADB.[25]

The Court *En Banc* is not persuaded.

In *City of Manila, et. al. v. Laguio, Jr.*,[26] the Supreme Court explained the meaning and scope of the equal protection clause as follows:

> "**Equal protection requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.** Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others. The guarantee means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other classes in like circumstances. The equal protection of the laws is a pledge of the protection of equal laws. It limits governmental discrimination. The equal protection clause extends to artificial persons but only insofar as their property is concerned.
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> xxx xxx xxx
>
> Legislative bodies are allowed to classify the subjects of legislation. **If the classification is reasonable, the law may operate only on some and not all of the people without**

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[23] *Secretary of Justice v. Lantion*, G.R. No. 139465, January 18, 2000, 379 Phil. 165.
[24] Court *En Banc*'s Docket, pp. 24-26.
[25] *Id.*
[26] G.R. No. 118127, April 12, 2005, 455 SCRA 347-349 (Citations omitted).

> **violating the equal protection clause.** The classification must, as an indispensable requisite, not be arbitrary. To be valid, it must conform to the following requirements:
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> 1) It must be based on substantial distinctions.
>
> 2) It must be germane to the purposes of the law.
>
> 3) It must not be limited to existing conditions only.
>
> 4) It must apply equally to all members of the class." *(Emphasis supplied)*

The Court *En Banc* notes that this particular issue was raised only in the Motion for Reconsideration of the Assailed Decision. Thus, there is no evidence on record whatsoever that would support petitioner's allegation of discrimination or violation of equal protection clause. Petitioner failed to prove that Filipino ADB officials and employees on one hand, and the officials and employees of the UN and its specialized agencies on the other hand, are "similarly situated" within the purview of the equal protection clause of the Constitution. Moreover, petitioner failed to show that the classification made by the revenue issuance (and its amendments), assuming that it really exists, is not reasonable, and that the same does not satisfy the requirements for valid classification.

On this point, the Court *En Banc* also agrees with the Court in Division when it stated that:[27]

> "In the absence of any clear provision of law or treaty, the Court cannot extend the tax exemption purportedly enjoyed by those employed by the UN to ADB Filipino employees. It is settled in this jurisdiction that taxation is the rule and exemption is the exception. A claim for refund or exemption from taxes must be clearly shown and be based on language in the law too plain to be mistaken. Tax exemption cannot be extended by mere implication or inference."

Finally, petitioner also asserts that the collection of tax on the salary of Filipino ADB officials and employees beginning taxable year 2012 is clearly prejudicial. In essence, petitioner questions the retroactive application of RMC No. 31-2013 for being illegal,[28] pursuant to the prohibition under Section 246 of the 1997 NIRC.[29]

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[27] Court *En Banc*'s Docket, pp. 52-53 (Citations omitted).
[28] *Id.*, pp. 26-28.
[29] "**SEC. 246. Non- Retroactivity of Rulings.** - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by

The Court *En Banc* is unconvinced.

A plain reading of RMC No. 31-2013 would reveal that it merely *reiterates* the general principles laid down in Section 23(A) and *amplifies* Section 24(A)(1)(a), both of which have been in effect since January 1, 1998, before the income tax payment in 2013.

The preface of RMC No. 31-2013 in Section 1 states these objectives when it cites Sections 23 and 24 of the 1997 NIRC as the foundation and states that the guidelines were intended to address the "confusion on the correct tax treatment of the compensation income earned by Philippine nationals xxx employed by foreign governments/embassies/diplomatic missions and international organizations xxx," thus:

> **"SECTION 1. BACKGROUND.—**
>
> Foreign governments/embassies/diplomatic missions and international organizations situated in the Philippines acting as employers enjoy immunity from collecting taxes on salaries and emoluments of their employees, whether they are foreigners or Philippine nationals. This immunity from being constituted as withholding agents of the Philippine Government is accorded to these entities on the basis of international comity as embodied in several international agreements to which the Philippines is a signatory, such as, the Vienna Convention for International Relations (for embassies and diplomatic missions), Convention on the Privileges and Immunities of the United Nations, Convention on the Privileges and Immunities of Specialized Agencies (for the various agencies of the United Nations), Asian Development Bank Headquarters Agreement (for ADB), Articles of Agreement of the International Finance Corporation, among others.
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> In recognition of this immunity, the Withholding Tax Regulations (Revenue Regulations No. 2-98, as amended), clearly reiterate the exemption from the withholding tax system

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the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based: or

(c) Where the taxpayer acted in bad faith."

of the remunerations being paid by foreign governments and international organizations to their employees who are residents or nationals of the Philippines. Section 2.78.1(B)(5) provides thus:

xxx xxx xxx

However, it has been observed that the foregoing provisions have been a source of confusion on the correct tax treatment of the compensation income earned by Philippine nationals and alien individuals employed by foreign governments/embassies/diplomatic missions and international organizations. **To clarify, the exemption from withholding taxes on the compensation of officials and employees applies to foreign governments/embassies/diplomatic missions and international organizations. Since the withholding of tax is merely a method of tax collection, the exemption from withholding taxes does not equate to the exemption from paying the income tax itself**.

Section 23 of the National Internal Revenue Code (Tax Code) lays down the general principles in the taxations of citizens and alien individuals, to wit:

xxx xxx xxx

As an exemption to the general rule, it is noted that most international agreements which grant withholding tax immunity to foreign governments/embassies/diplomatic missions and international organizations also provide exemption to their officials and employees who are foreign nationals and/or non-Philippine residents from paying income taxes on their salaries and other emoluments.

The tax consequence of compensation income received by those employed by foreign governments/embassies/ diplomatic missions situated in the Philippines hinges on the provisions of the duly recognized international agreements or local laws granting tax privileges to employees of said institutions. It bears to emphasize that the exemption should only cover those individuals who were expressly and unequivocally identified in said international agreements or laws. Those not covered shall be subject to the general rule on taxability of Philippine nationals and alien individuals. Thus with respect to those not exempted by the provisions of applicable international agreements or laws, although their compensation income is exempt from withholding tax under the international agreements or the Withholding Tax Regulations, they are not relieved of their duty to report their compensation income to the Bureau and pay the taxes due thereon pursuant to Section 24 of the National Internal Revenue Code of 1997, as amended ("Tax Code"). *(Underscoring and emphases supplied)*

Section 246 of the 1997 NIRC on the non-retroactivity of issuances should be carefully read when viewed in the light of *ABS-CBN v. Court of Tax Appeals*,[30] an *assessment* case wherein the revocatory administrative issuances were not given retroactive application. In said case, the Supreme Court held that there will be an injustice and it would be violative of fair play if the withholding agent would be made to pay additional withholding taxes for 1965 to 1968 under the provisions of a circular later issued in 1971.

The facts of the present case, a *refund* of income tax paid by petitioner only in 2013, are different from that of *ABS-CBN*. It is submitted that there has been *no violation* of the rules of justice and fair play when petitioner paid the income tax. It is beyond doubt that when the income tax was paid, the Reservation Clause in Senate Resolution No. 6 and the provisions of Sections 23(A) and 24(A)(1)(a) have long been in force and effect *prior* to petitioner's income tax payment.

Evidently, when an administrative agency renders an opinion by means of a *circular* or memorandum, *it merely interprets a pre-existing law*.[31] RMC No. 31-2013, therefore, was issued merely to construe the *existing* provisions of the 1997 NIRC in relation to the various *existing* treaty obligations of the Philippines. The circular was not issued or intended to impose additional tax burdens not otherwise found in the law.

The construction by an executive branch of government of a particular law although not binding upon courts must be given weight as the construction came from the branch of the government called upon to implement the law.[32] It is well-settled that the power to fill in the details and manner as to the enforcement and administration of a law may be delegated to various specialized administrative agencies.[33] RMC No. 31-2013 was

[30] G.R. No. L-52306, October 12, 1981, 108 SCRA 148.
[31] *La Suerte Cigar and Cigarette Factory, et al. v. Court of Tax Appeals, et al.*, G.R. No. L-36130, January 17, 1985, 134 SCRA 39.
[32] *Senator Heherson T. Alvarez, et al. v. Hon. Teofisto T. Guingona, Jr., in his capacity as Executive Secretary, et al.*, G.R. No. 118303, January 31, 1996, 252 SCRA 703.
[33] *Commissioner of Internal Revenue v. Solidbank Corporation,* G.R. No. 148191, November 25, 2003, 416 SCRA 460-461.

precisely issued to fill in the details and manner of the enforcement of Sections 23(A) and 24(A)(1)(a) pursuant to Section 4[34] of the 1997 NIRC.

RMC No. 31-2013 belongs to a group of issuances that "disseminate and embody pertinent and applicable portions, as well as amplifications of the rules, precedents, laws, regulations, opinions and other orders and directives issued by or administered by the Commissioner of Internal Revenue, and by offices and agencies other than the Bureau of Internal Revenue, for the information, guidance or compliance of revenue personnel."[35] Based on this definition, RMC No. 31-2013 is an *interpretative rule* issued by the administrative agency headed by the respondent.

In *Republic of the Philippines v. Drugmaker's Laboratories, Inc., et al.,*[36] the Supreme Court held that Administrative Order No. 7, an administrative regulation issued by the Department of Health, and BFAD Circulars No. 1 and 8, issued by the Food and Drug Administration (FDA), were all valid issuances of administrative agencies tasked to implement the law. It discussed the nature and function of *interpretative rules* in this wise:

> "Administrative agencies may exercise quasi-legislative or rule-making powers only if there exists a law which delegates these powers to them. Accordingly, the rules so promulgated must be within the confines of the granting statute and must involve no discretion as to what the law shall be, but merely the authority to fix the details in the execution or enforcement of the policy set out in the law itself, so as to conform with the doctrine of separation of powers and, as an adjunct, the doctrine of non-delegability of legislative power.
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> An administrative regulation may be classified as a legislative rule, an interpretative rule, or a contingent rule.

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[34] "**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.

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."

[35] Section 3(g), Revenue Administrative Order No. 1-2003 provides:

"SECTION 3. *Classification of BIR Rulings and Issuances.* — The following terms shall have the meaning described below:

xxx xxx xxx

g) *Revenue Memorandum Circulars (RMC)* — These issuances shall disseminate and embody pertinent and applicable portions, as well as amplifications of the rules, precedents, laws, regulations, opinions and other orders and directives issued by or administered by the Commissioner of Internal Revenue, and by offices and agencies other than the Bureau of Internal Revenue, for the information, guidance or compliance of revenue personnel."

[36] G.R. No. 190837, March 5, 2014, 718 SCRA 160-162.

> **Legislative rules** are in the nature of subordinate legislation and designed to implement a primary legislation by providing the details thereof. They usually implement existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress and effect a change in existing law or policy which affects individual rights and obligations. Meanwhile, **interpretative rules** are intended to interpret, clarify or explain existing statutory regulations under which the administrative body operates. Their purpose or objective is merely to construe the statute being administered and purport to do no more than interpret the statute. Simply, they try to say what the statute means and refer to no single person or party in particular but concern all those belonging to the same class which may be covered by the said rules. Finally, **contingent rules** are those issued by an administrative authority based on the existence of certain facts or things upon which the enforcement of the law depends.
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> In general, an administrative regulation needs to comply with the requirements laid down by Executive Order No. 292, s. 1987, otherwise known as the 'Administrative Code of 1987,' on prior notice, hearing, and publication in order to be valid and binding, **except when the same is merely an interpretative rule. This is because '[w]hen an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed**. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law.'" *(Underscoring and emphases supplied; citations omitted)*

More importantly, in *The Philippine American Life and General Insurance Company v. The Secretary of Finance, et al.*,[37] the Supreme Court upheld the validity of RMC No. 25-2011, issued in 2011, and ruled that the *retroactive* application of the circular to the taxable transaction in 2009 did not contravene Section 246, thus:

> "Lastly, petitioner is mistaken in stating that RMC 25-11, having been issued after the sale, was being applied retroactively in contravention to Sec. 246 of the NIRC. **Instead,**

[37] G.R. No. 210987, November 24, 2014, 741 SCRA 601.

> **<u>it merely called for the strict application of Sec. 100, which was already in force the moment the NIRC was enacted</u>.**" (Emphasis and underscoring supplied)

Even assuming there was a failure in the past by the respondent to take a categorical position on the taxation of Filipino ADB employees, such deficit does not operate to estop the government from correcting the same. In fact, prolonged practice of non-collection of certain taxes, if proven to be erroneous, does not ripen into validity as the Supreme Court *En Banc* held in the consolidated cases of *La Suerte Cigar and Cigarette Factory v. Court of Appeals*:[38]

> "The cigarette manufacturers contend that for a long time prior to the transactions herein involved, the Collector of Internal Revenue had never subjected their purchases and importations of stemmed leaf tobacco to excise taxes. This prolonged practice allegedly represents the official and authoritative interpretation of the law by the Bureau of Internal Revenue which must be respected.
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> <u>We are not persuaded</u>.
>
> <u>In *Philippine Long Distance Telephone Co. v. Collector of Internal Revenue*, this court has held that this principle is not absolute, and an erroneous implementation by an officer based on a misapprehension of law may be corrected when the true construction is ascertained</u>. Thus:
>
>> The appellant argues that the Collector of Internal Revenue, previous to the transactions herein involved, had never collected the franchise tax on items of the same nature as those herein in question and this is strong evidence that such transactions are not subject to tax on the principle that a prolonged practice on the part of an executive or administrative officer-in-charge of executing a certain statute is an authoritative construction of great weight. *This contention may be granted, but the principle is not absolute and may be overcome by strong reasons to the contrary. If through a misapprehension of law an officer has erroneously executed it for a long time, the error may be corrected when the true construction is ascertained.* Such we deem to be

[38] G.R. No. 125346, November 11, 2014, 739 SCRA 561, 563.

> the situation in the present case. Incidentally, the doctrine of estoppel does not apply here. (Emphasis supplied)

This court reiterated this rule in *Abello v. Commissioner of Internal Revenue* where it **rejected** petitioners' claim that the prolonged practice (since 1939 up to 1988) of the Bureau of Internal Revenue in not subjecting political contributions to donor's tax was an authoritative interpretation of the statute, entitled to great weight and the highest respect:

> *This Court holds that the BIR is not precluded from making a new interpretation of the law, especially when the old interpretation was flawed. It is a well-entrenched rule that* [:]
>
> > *...erroneous application and enforcement of the law by public officers do not block subsequent correct application of the statute, and that the Government is never estopped by mistake or error on the part of its agents.* (Emphasis supplied, citations omitted)

Prolonged practice of the Bureau of Internal Revenue in not collecting the specific tax on stemmed leaf tobacco **cannot validate what is otherwise an erroneous application and enforcement of the law**. The government is never estopped from collecting legitimate taxes because of the error committed by its agents.

In *La Suerte Cigar and Cigarette Factory v. Court of Tax Appeals*, this court upheld the validity of a revenue memorandum circular issued by the Commissioner of Internal Revenue to correct an error in a previous circular that resulted in the non-collection of tobacco inspection fees for a long time and declared that estoppel cannot work against the government:

xxx xxx xxx" *(Underscoring and emphases supplied; citations omitted)*

Taxes are the lifeblood of the nation. Consequently, it must be remembered that **tax refunds are construed strictly against the**

taxpayers.[39] Any claim for refund takes the nature of tax exemptions that must be construed *strictissimi juris* against the claimants and liberally in favor of the taxing authority. This power of taxation being a high prerogative of sovereignty, its relinquishment is never presumed.[40]

WHEREFORE, the present Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(With due respect, please see Concurring and Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[39] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013, 690 SCRA 417.
[40] *Nestle Philippines, Inc. (formerly Filipro, Inc.) v. Honorable Court of Appeals, et al.*, G.R. No. 134114, July 6, 2001, 360 SCRA 583.

(With due respect, I join J. Liban's Concurring and Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in above Decision were reached in consultation 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

ANTHONY ORTILLE TUASON, *Petitioner,*	**CTA EB NO. 1700** *(CTA Case No. 9041)*
	Present:
	DEL ROSARIO, *PJ,* CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN , ***and*** **MANAHAN, *JJ.***
- versus -	
COMMISSIONER OF INTERNAL REVENUE, ***Respondent.***	**Promulgated:**
	FEB 28 2019 3:37p.m.

x---x

CONCURRING & DISSENTING OPINION

With all due respect to the *ponencia* of my esteemed colleague, Hon. Juanito C. Castañeda, Jr., which denied the Petition for Review for lack of merit, I concur with the finding that the relevant treaty and legislative provisions demonstrate that Congress really intended to tax the salaries and emoluments received by the Filipinos from ADB and that the RTC Decision in Civil Case No. MC14-8775 *(RTC Decision)* declaring void Section 2(d)(1) of Revenue Memorandum Circular 31-2013 does not constitute a binding precedent.

However, as regards the propriety of enforcing RMC 31-2013 to petitioner's income from the ADB for calendar year 2012, while I agree with the *ponencia* that RMC 31-2013 is an interpretative rule, I believe that Justice and Equity dictate that it should be applied prospectively.

RMC 31-2013 was issued by respondent in calendar year 2013. Nonetheless, respondent subjected petitioner's income for the previous year (*i.e.*, calendar year 2012) to income tax. In the past, however, compensation income of resident citizens employed by foreign governments and/or international organizations were not subjected to income tax.

Section 7 of RMC 31-2013 clearly provides that the provisions thereof "shall take effect immediately" which means that it should take effect starting May 2, 2013 the date when a copy was officially submitted to the Office of the National Administrative Register of the UP Law Center pursuant to the requirement of the Administrative Code, Section 3, Chapter 2, Book VII, which provides:

> "*Filing.* (1) Every agency shall file with the University of the Philippines Law Center three (3) certified copies of every rule adopted by it. Rules in force on the date of effectivity of this Code which are not filed within three (3) months from the date shall not thereafter be the basis of any sanction against any party or persons."

In *National Association of Electricity Consumers for Reforms v. Energy Regulatory Commission*[1], the Supreme Court reiterated that both the **requirements of publication and filing of administrative issuances are mandatory for their effectivity.** The *National Association* case was promulgated in 2006 and the doctrine regarding the effectivity of administrative issuances has not been overturned to this day. Even if the date of filing of RMC 31-2013 is used as the reckoning point of its effectivity, specifically, May 2, 2013, the taxable period in which respondent wishes to impose the subject administrative issuance on petitioner, TY 2012, is one in which the said RMC was still non-existent. The only way it can be made to apply to that specific taxable period is if RMC 31-2013 were to be applied retroactively which, if done, would be anathema to the principles of justice and fair play.

For one thing, it is to be noted that prior to RMC 31-2013, in addition to the long standing practice of not taxing the income tax of Filipino ADB personnel, revenue officials have made various pronouncements regarding the subject when queried.

First, in BIR Ruling No. 029-99 dated March 11, 1999, the former BIR Commissioner, Beethoven Rualo, stated as follows:

> "Such being the case, Filipinos employed and are occupying managerial and technical positions as those of aliens employed by

[1] G.R. No. 163935, February 2, 2006.

> the bank xxx xxx are subject to the preferential tax of 15% of their gross compensation income."

Second, in a Letter Opinion dated January 29, 2001, BIR Regional Director Antonio Ortega confirmed that officers and staff of the ADB need not secure Tax Identification Numbers (TINs) since their salaries are exempt from taxation.

Third, in an opinion issued by the Chief of the Legal Division of Revenue Region No.7 dated February 6, 2013, Amado Rey B. Pagarigan reiterated the opinion of Mr. Rualo and stated that the Filipino employees of ADB are subject to the preferential tax rate of 15% on their compensation income.

From being taxed at a preferential tax rate of 15% on their compensation income to being exempted from being taxed at all, at any rate, the opinions given by revenue officials on the matter have been inconsistent, to say the least. Both the ADB and its Filipino resident employees who have relied on these inconsistent rulings by the BIR should not be faulted for relying thereon.

It was only when RMC 31-2013 was issued that then Commissioner Kim Henares categorically clarified that they are subject to tax. Pertinent portions of the said RMC are quoted below:

> "The tax treatment of Philippine nationals and alien individuals on compensation income received by them from foreign governments/embassies and missions and international organizations shall be as follows:
>
> x x x x x x x x x
>
> From the above, **only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax.**" *(Emphasis supplied)*

Considering the foregoing, the fundamental principles of fairness and equity dictate that the non-retroactive rule under Section 246 of the Tax Code be applied in this case. Section 246 provides, as follows:

> "SEC. 246. *Non- Retroactivity of Rulings.* - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or *any of the rulings or circulars promulgated by the Commissioner shall not be given*

> *retroactive application* if the revocation, modification or reversal will be prejudicial to the taxpayers, **except in the following cases**:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith." *(Emphasis supplied)*

In the case of *ABS-CBN Broadcasting Corporation vs. Court of Tax Appeals*[2], the Supreme Court rejected the retroactive application of rulings and circulars when such would cause prejudice to the taxpayers, thus:

> "It is clear from the foregoing that **rulings or circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers**. The prejudice to petitioner of the retroactive application of Memorandum Circular No. 4-71 is beyond question. It was issued only in 1971, or three years after 1968, the last year that petitioner had withheld taxes under General Circular No. V-334. The assessment and demand on petitioner to pay deficiency withholding income tax was also made three years after 1968 for a period of time commencing in 1965. Petitioner was no longer in a position to withhold taxes due from foreign corporations because it had already remitted all film rentals and no longer had any control over them when the new Circular was issued. And in so far as the enumerated regulations promulgated by the Commission
>
> x x x x x x x x x
>
> Without doubt, private respondent would be prejudiced by the retroactive application as it would be assessed of deficiency excise tax." *(Emphasis supplied)*

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[2] G.R. No. L-52306 dated October 12, 1981.

The non-retroactivity principle was later on reiterated in *Commissioner of Internal Revenue vs. Court of Appeals, Court of Tax Appeals and Alhambra Industries, Inc.,*[3] where the Supreme Court emphasized the following:

> "However, well entrenched is the rule that rulings and circulars, rules and regulations promulgated by the CIR would have no retroactive application if to so apply them would be prejudicial to the taxpayers.
>
> x x x   x x x   x x x
>
> "Without doubt, private respondent would be prejudiced by the retroactive application as it would be assessed of deficiency excise tax."

It is readily apparent that the retroactive application of the provisions of RMC 31-2013 to income received by the petitioners in 2012 made prior to its publication in 2013 already caused serious prejudice to the Filipino employees of the ADB. Due to lack of notice on the taxability of their income for TY 2012, none of the ADB Filipino employees were prepared to incur such huge tax obligations. They were not given a chance to allot or budget their finances to account for this debt to the government that they were blindsided with. Neither were they prepared to face the consequences of being unable to pay the same such as the prospect of law suits and potential garnishment of their bank deposits.

In the present case, petitioner received the compensation income being subject to income tax in calendar year 2012. During this period, petitioner believed in good faith that his compensation income was exempt from tax. Prior to the issuance of RMC 31-2013, respondent did not enforce any rules that would lead petitioner to believe otherwise. When respondent issued RMC 31-2013 and sought to enforce its provisions subjecting compensation income of resident citizens employed by ADB to the graduated income tax rates immediately, petitioner was constrained to file his Income Tax Return for calendar year 2012 and pay the amount of ₱264,588.04. Whereas previously, petitioner's income was not subjected to tax, he now had to come up a substantial amount for an individual in order to settle his income tax liability.

Considering that none of the exceptions in Non-Retroactivity Rule exist to bar its application in the instant case, I believe that RMC No. 31-2013 should be applied prospectively in the interest of justice and equity.

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[3] G.R. No. 117982 dated February 6, 1997.

In view of the foregoing, I vote to **GRANT** the Petition for Review, **REVERSE** and **SET ASIDE** the assailed Decision dated February 23, 2017 and the assailed Resolution dated July 31, 2017, and **ORDER** respondent Commissioner of Internal Revenue to refund in favor of petitioner Anthony Ortile Tuason the amount of Two Hundred Sixty-Four Thousand Five Hundred Eighty-Eight Pesos and 4/100 (₱264,588.04), representing his erroneously and illegally collected income tax on compensation income from the Asian Development Bank for calendar year 2012.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice