REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

CHRISTIAN OLIVER C. MERCADO, Petitioner,	**CTA CASE NO. 9330** Members:
- versus -	**CASTAÑEDA, JR.,** Chairperson, **CASANOVA,** and **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: MAR 05 2018 9:15 a.m.

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DECISION

CASTAÑEDA, JR., ***J.*:**

THE CASE

In this Petition for Review, petitioner Christian Oliver C. Mercado seeks to refund the total amount of P996,255.51, representing Income Taxes paid for taxable years 2012 and 2013, respectively.

THE FACTS

Petitioner Mercado is a Filipino citizen, of legal age and resident of No. 27 Redwood Street, West Fairview, Quezon City, Metro

Manila.[1] He is an employee of Asian Development Bank (ADB), [2] which is an Asian financial institution consisting of sixty-seven (67) member countries, including the Philippines, with Philippine headquarters located at 6 ADB Avenue, Mandaluyong City, Metro Manila.[3]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has 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 the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On April 12, 2013, respondent issued Revenue Memorandum Circular (RMC) No. 31-2013 entitled *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.*[4]

Meanwhile, Section 2(d)(1) of RMC No. 31-2013 provides:

> "SECTION 2. TAX TREATMENT OF COMPENSATION INCOME
>
> xxx xxx xxx
>
> (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:

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[1] Par. 1.1, Parties, Petition for Review, Docket, Vol. I, p. 10.
[2] Par. 3, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, Vol. II, p. 456.
[3] Par. 3, Statement of Facts and of the Case, Petitioner's Memorandum, Docket, Vol. II, p. 906.
[4] Par. 2.b, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, Vol. II, p. 456.

'Article XII

xxx xxx 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;'

xxx xxx xxx

From the above, only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax. xxx"

Petitioner filed his Annual Income Tax Returns (ITR) for taxable years 2012 and 2013, respectively, and paid the income taxes due, as follows:

Annual ITR	Total Amount Paid	Date of Payment
2012[5]	P436,195.51	July 15, 2013[6]
2013[7]	P506,060.00	First Installment: April 14, 2014[8] Second Installment: July 15, 2014[9]

Meanwhile, petitioner and his ADB co-employees filed a case against respondent in the case entitled *Erwin Salaveria and Portia Gonzales, by themselves and as Attorneys-in-Fact of the concerned Filipino employees of the Asian Development Bank v. Commissioner of Internal Revenue*, docketed as CA – G.R. CV No. 104374, before the Court of Appeals Second Division, where they obtained a favourable resolution.[10]

[5] Exhibit "P-1", Docket, Vol. II, pp. 790-793.
[6] Exhibit "P-2", Docket, Vol. II, p. 794.
[7] Exhibit "P-3", Docket, Vol. II, pp. 795-798.
[8] Exhibits "P-4", Docket, Vol. II, p. 799.
[9] Exhibits "P-5" and "P-6", Docket, Vol. II, pp. 800-801.
[10] Exhibits "P-8" and "P-9", Docket, Vol. II, pp. 802-813.

On July 3, 2015,[11] petitioner filed his Application for Tax Credits/Refunds BIR Form No. 1914, together with his Demand Letter for Refund dated July 2, 2015. On October 19, 2015, petitioner filed his Supplement to the Applications for Tax Credits/Refunds filed on July 3, 2015 for Fiscal Years 2012 and 2013.[12]

Consequently, respondent failed to act on petitioner's application for refund. Thus, on April 13, 2016,[13] petitioner filed the instant Petition for Review.

On May 24, 2016, respondent filed his Answer,[14] where he essentially argued that petitioner is not exempt from payment of income taxes. On June 10, 2016, petitioner filed his Reply.[15]

On July 5, 2016, the parties filed their Joint Stipulation of Facts and Issues.[16] On July 29, 2016, the Court issued a Pre-Trial Order.[17]

During the hearing, petitioner presented the following witnesses: (1) Petitioner himself;[18] (2) Mr. German R. Reyes[19] - Civil-in-charge of the Regional Trial Court, Branch 213 of Mandaluyong City; (3) Mr. Marlon A. Mendoza[20] - Liaison Officer at Leynes Lozada-Marquez Law Offices; and (4) Mr. Ruben Viernes Tagapan[21] - Assistant Head of the Tax Payment Verification and Allotment Section of the Revenue Accounting Division – BIR. Likewise, petitioner filed his Formal Offer of Evidence.[22]

On the other hand, counsel for respondent manifested that she has no witness to present. As such, the Court required the parties to submit their Memoranda.[23]

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[11] Exhibits "P-10", "P-11" and "P-12", Docket, Vol. II, pp. 814-820.
[12] Exhibit "P-15", Docket, Vol. II, pp. 823-824.
[13] Petition for Review, Docket, Vol. I, pp. 10-23.
[14] Docket, Vol. I, pp. 101-111.
[15] Docket, Vol. I, pp. 124-149.
[16] Docket, Vol. II, pp. 455-460.
[17] Docket, Vol. II, pp. 478-482.
[18] Exhibit "P-16", Docket, Vol. I, pp. 165-189.
[19] Exhibit "P-17", Docket, Vol. II, pp. 534-538.
[20] Exhibit "P-18", Docket, Vol. II, pp. 726-730.
[21] Exhibit "P-19", Docket, Vol. II, pp. 763-767.
[22] Docket, Vol. II, pp. 775-789.
[23] Resolution dated September 18, 2017, Docket, Vol. II, pp. 884-885.

On October 23, 2017, respondent filed his Memorandum[24] while on October 26, 2017, petitioner filed his Memorandum.[25] Consequently, on November 2, 2017,[26] the instant case was submitted for decision. Hence, this Decision.

THE ISSUES

The parties raised the following issues for resolution of the Court:

> "1. Whether the income taxes paid by petitioner Mercado were erroneously or illegally collected by the BIR; and
>
> 2. Whether petitioner Mercado has complied with the requisites for institution of a suit for tax refund under Section 229 of the NIRC."[27]

THE RULING

The Court has no jurisdiction to entertain petitioner's claim for refund involving income taxes paid for taxable year 2012

The Court shall first determine the timeliness of the instant Petition.

Sections 204(C) and 229 of the National Internal Revenue Code of 1997, as amended, respectively provide:

> "SEC. 204. **Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.** —
>
> The Commissioner may —
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> xxx xxx xxx

[24] Docket, Vol. II, pp. 886-904.
[25] Docket, Vol. II, pp. 905-924.
[26] Resolution, Docket, Vol. II, p. 926.
[27] Statement of the Issues to be Tried and Resolved, JSFI, Docket, Vol. II, p. 456.

> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund."
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> "SEC. 229. **Recovery of Tax Erroneously or Illegally Collected.** — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

It is settled that Sections 204 and 229 of the NIRC pertain to the refund of erroneously or illegally collected taxes. Section 204 applies to administrative claims for refund, while Section 229 to judicial claims for refund. In both instances, the taxpayer's claim must be filed within two (2) years from the date of payment of the tax or penalty.[28]

For taxable year 2013, petitioner completed his installment payments on July 15, 2014. Counting the two (2)-year period under the above-quoted provisions, petitioner has until July 15, 2016 within which to file both his administrative and judicial claims for refund. Considering that the administrative claim was filed on July 3, 2015 while the judicial claim was filed on April 13, 2016, both claims were timely filed.

However, for taxable year 2012, petitioner paid his income tax due on July 15, 2013. Counting the two (2)-year period under the above-quoted provisions, petitioner had until July 15, 2015 within which to file both his administrative and judicial claims for refund. While the administrative claim was timely filed on July 3, 2015, barely nine (9) months had already lapsed when the judicial claim was filed on April 13, 2016. Considering that the judicial claim for refund for taxable year 2012 had already lapsed, the Court has no jurisdiction to entertain the said claim.

Considering the foregoing, the Court rules that it has jurisdiction over petitioner's claim for refund involving his income taxes paid for taxable year 2013. However, the Court has no jurisdiction to entertain petitioner's claim for refund involving his income taxes paid for taxable year 2012.

The Court shall now proceed to determine whether petitioner is entitled to his claim for refund for income taxes paid for taxable year 2013.

Petitioner is not entitled to his claim for refund for income taxes paid for taxable year 2013

The Congress intended to impose tax on the salaries and emoluments received by Filipinos from ADB

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[28] Consolidated cases of *CBK Power Company Limited v. Commissioner of Internal Revenue* and *Commissioner of Internal Revenue v. CBK Power Company Limited*, G.R. Nos. 193383-84 & 193407-08, January 14, 2015.

Petitioner asserts that under Article 56(2) of the Agreement Establishing the ADB, as ratified by the Philippine Senate in its Resolution dated March 16, 1966, and Section 45(b) Article XII of the Agreement between the ADB and the Government of the Republic of the Philippines regarding the Headquarters of the ADB dated December 22, 1966, its employees are exempt from income tax.[29]

The Court disagrees with petitioner.

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, **subject to the reservation that the Philippines declares that it retains for itself and its political subdivision the right to tax salaries and emoluments paid by the Bank to citizens or nationals of the Philippines.**"*(Emphasis 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: *ju*

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[29] Par. 5, Statement of Facts and of the Case, petitioner's Memorandum, Docket, Vol. II, p. 906.

"ARTICLE XII

Privileges and Immunities of Governors and Other Representatives of Members, Directors, President, Vice-President and Others

xxx xxx 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:

(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."*(Emphasis supplied)*

The NIRC of 1997, a subsequent legislation which took effect on January 1, 1998,[30] is the law that implements 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, thus:

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

(A) <u>A citizen of the Philippines residing therein is taxable on all income derived from sources within and without the Philippines</u>;

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

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**;"*(Emphasis supplied)*

Considering the foregoing, it is clearly the intent of the legislature to impose tax on petitioner's salaries. As such, petitioner's contention that he is exempt from taxation under the ADB Charter and ADB Headquarters Agreement does not hold water.

RMC No. 31-2013, which was issued only on April 12, 2013, should not be given retroactive application pursuant to the prohibition under Section 246 of the NIRC of 1997, as amended

With regard to RMC No. 31-2013 as basis for petitioner's exemption, it bears stressing that said circular, which was issued only on April 12, 2013, should not be given retroactive application pursuant to the prohibition under Section 246 of the NIRC of 1997, as amended. It provides:

"**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: *gr*

(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."

Meanwhile, RMC 31-2013 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 payments in 2012 and 2013.

The preface of RMC 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.

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 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:

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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').**" *(Emphasis supplied)*

Section 246 on the non-retroactivity of issuances should be carefully read when viewed in the light of *ABS-CBN v. Court of Tax Appeals*,[31] 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 case at bench, a *refund* of income tax paid by petitioner in 2013, are different from that of *ABS-CBN*. There is *no violation* of the rules of justice and fair play when petitioner paid the income tax. It is not in question that when the 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 these payments.

Evidently, when an administrative agency renders an opinion by means of a *circular* or memorandum, *it merely interprets a pre-existing law*.[32] RMC 31-2013, therefore, was issued merely to

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[31] G.R. No. L-52306, October 12, 1981, 108 SCRA 148.
[32] *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.

construe the *existing* provisions of the 1997 NIRC in relation to the various *existing* treaty obligations of the Philippines.

To conclude, the Court stresses the hornbook doctrine that taxes are the lifeblood of the nation. Consequently, it must be remembered that tax refunds are construed strictly against the taxpayers.[33] Any claim for refund take 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.[34]

WHEREFORE, the Petition for Review is **DENIED**, as follows: (1) for lack of jurisdiction over petitioner's claim for refund involving taxable year 2012; and (2) for lack of merit with respect to petitioner's claim for refund for taxable year 2013.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

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[33] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013, 690 SCRA 417.

[34] *Nestle Philippines, Inc. (formerly Filipro, Inc.) v. Honorable Court of Appeals, et al.*, G.R. No. 134114, July 6, 2001, 360 SCRA 583.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the 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