REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FORTUNE TOBACCO CORPORATION,
Petitioner,

- versus -

LIWAYWAY VINZONS - CHATO In Her Capacity As COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 5015

Promulgated:

AUG 10 1994

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DECISION

This is an appeal from the final decision of respondent Commissioner of Internal Revenue denying petitioner's request for review, reconsideration and recall of Revenue Memorandum Circular No. 37-93 dated July 1, 1993 reclassifying the cigarettes manufactured by petitioner of the brands "HOPE", "MORE" and "CHAMPION" as locally manufactured cigarettes bearing a foreign brand and subject to the 55% ad valorem tax under Section 142(c)(1) of the National Internal Revenue Code (NIRC), as amended by Republic Act No. 6956 and holding petitioner liable for the amount of P9,598,334.00 as deficiency ad valorem tax on its removals of "HOPE", "MORE" and "CHAMPION" cigarettes on July 2, 1993 from 6:00 p.m. to 12:00 midnight, in relation to the implementation of Revenue Memorandum Circular No. 37-93 (for brevity, RMC No. 37-93).

Petitioner Fortune Tobacco Corporation is a corporation duly organized and existing under and by virtue of Philippine laws, principally engaged in the manufacture of cigarettes of various brands, among which are Hope Luxury M. King, Hope Luxury M. 100's, More Premium International, More Premium M. 100's, Champion M. 100's, Champion International M. 100's, Champion M. King and Champion Lights.

The Philippine Patent Office in a certification dated July 24, 1986 (Exhibit "C") has certified that the following trademarks for cigarettes are registered in the name of Fortune Tobacco Corporation:

Trademark	Cert. of Reg'n.	Issued
CHAMPION	15949	November 2, 1970
HOPE	16927	October 18, 1971
MORE	20077	August 17, 1978

In a letter dated January 6, 1987 addressed to Deputy Minister Ramon Diaz of the Presidential Commission on Good Government, then Commissioner of Internal Revenue

Bienvenido A. Tan, Jr. stated that "The initial position of this Office classified the aforesaid brands (Champion, Hope and More) as foreign brands since the same are listed in the current World Tobacco Directory as belonging to foreign companies. Later, however, Fortune Tobacco changed the names of Hope to Hope Luxury and More to Premium More, thereby removing the said brands from the foreign brand category. Proof was also submitted to this Bureau that Champion was an original Fortune Tobacco Corporation register and therefore a local brand." (Exhibit "D")

The aforementioned position was sustained by the BIR as "HOPE", "MORE" and "CHAMPION" continued to be classified and taxed as locally manufactured cigarettes not bearing a foreign brand throughout the term of Commissioner Jose U. Ong.

Prior to the promulgation of RMC No. 37-93 on July 1, 1993, the above-named cigarette brands manufactured by petitioner were classified and taxed as follows:

BRAND		AD VALOREM TAX RATE[1] E.O. 22 and E.O. 273 06-23-86 07-01-86 / 07-25-87 01-01-88	RA 6956 06-18-90 07-05-90
Hope Luxury M. 100's	Sec. 142, (c),(2)	40%	45%
Hope Luxury M. King	Sec. 142, (c),(2)	40%	45%
More Premium M. 100's	Sec. 142, (c),(2)	40%	45%
More Premium International	Sec. 142, (c),(2)	40%	45%
Champion International M. 100's	Sec. 142, (c),(2)	40%	45%
Champion M. 100's	Sec. 142, (c),(2)	40%	45%
Champion M. King	Sec. 142, (c), last par.	15%	20%
Champion Lights	Sec. 142, (c), last par.	15%	20%

Quoted hereunder are the pertinent portions of aforestated provision of law:

> "Sec. 142. *Cigars and Cigarettes.*
>
> (a) Cigars. - xxx
>
> (b) Cigarettes packed in thirties. - xxx
>
> (c) Cigarettes packed in twenties. - There shall be levied, assessed and collected on cigarettes packed in twenties an ad valorem tax at the rates prescribed below based on the manufacturer's registered wholesale price:
>
> (1) On locally manufactured cigarettes bearing a foreign brand, fifty-five percent (55%) Provided, That this rate shall apply regardless of whether or not the right to use or title to the foreign brand was sold or transferred by its owner to the local manufacturer. Whenever it has to be determined whether or not a cigarette bears a foreign brand, the listing of brands manufactured in foreign countries appearing in the current World Tobacco Directory shall govern.

1. Original Section 126 of the NIRC, as amended by E.O. No. 22 dated June 20, 1986 and took effect on July 1, 1986. Amended and renumbered to Section 142 by E.O. No. 273 dated July 25, 1987 and took effect on January 1, 1988. Further amended by R.A. No. 6956 dated June 18, 1990 and took effect on July 5, 1990.

> (2) Other locally manufactured cigarettes, forty five percent (45%).
>
> Duly registered or existing brands of cigarettes packed in twenties shall not be allowed to be packed in thirties.
>
> When the existing registered wholesale price, including tax, of cigarettes packed in twenties does not exceed P4.00 per pack, the rate shall be twenty per cent (20%).
>
> (d) Imported cigarettes. - xxx
>
> For purposes of this section, "manufacturer's or importer's registered wholesale price shall include the ad valorem tax imposed in paragraphs (a), (b), (c) or (d) hereof and the amount intended to cover the value-added tax imposed under Title IV of this Code" (Underscoring supplied.)

Revenue Memorandum Circular No. 37-93 dated July 1, 1993 was then issued by respondent Commissioner of Internal Revenue, the dispositive portion of which provides (Exhibit "G"):

> "In view of the foregoing, the aforesaid brands of cigarettes, viz: "HOPE", "MORE" and "CHAMPION" being manufactured by Fortune Tobacco Corporation are hereby considered locally manufactured cigarettes bearing a foreign brand subject to the 55% ad valorem tax on cigarettes."

A copy of RMC No. 37-93 was telefaxed to the factory of petitioner at Parang, Marikina, Metro Manila, under a covering letter dated July 2, 1993 signed by Deputy Commissioner Victor A. Deoferio, Jr. at 17:50 hours, July 2, 1993, a Friday (Exhibit "G-1") but appears to have come to the knowledge of petitioner several days thereafter considering that it was not addressed to anyone in particular.

Republic Act No. 7654 took effect on <u>July 3, 1993</u>. It amended Section 142 of the Tax Code, the pertinent portions of which read:

> "SEC. 142. *Cigar and cigarettes.* -
>
> xxx xxx xxx
>
> (c) Cigarettes packed by machine. - There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below based on the constructive manufacturer's wholesale price or the actual manufacturer's wholesale price whichever is higher:
>
> (1.) <u>On locally manufactured cigarettes which are currently classified and taxed at fifty-five percent (55%) provided that the minimum tax shall not be less than five pesos (P5.00) per pack.</u>
>
> (2.) On other locally manufactured cigarettes, forty-five percent (45%) provided that the minimum tax shall not be less than three pesos (P3.00) per pack.
>
> xxx xxx xxx
>
> "When the registered manufacturer's wholesale price or the actual manufacturer's wholesale price whichever is higher of existing brands of cigarettes, including the amounts intended to cover the taxes, of cigarettes packed in twenties does not exceed four pesos and eighty centavos (P4.80) per pack, the rate shall be twenty percent (20%)." (Underscoring supplied.)

In the column of Fil C. Sionil in the "Business Bulletin" issue of July 4, 1993, the reclassification was first reported (Exhibit "E") prompting petitioner's President, in letters dated July 6 and 9, 1993 to inquire into its veracity and to request for a copy of RMC No. 37-93 from respondent (Exhibits "F" and "F-1").

A certified xerox copy of RMC No. 37-93 was received by the petitioner on July 15, 1993 by ordinary mail. (Exhibit "A" and "A-1").

Petitioner requested for review, reconsideration and recall of RMC No. 37-93 in a letter dated July 19, 1993 and received by the Appellate Division of the Bureau of Internal Revenue (BIR) on July 20, 1993. (Exhibit "H").

Respondent denied the request for review, reconsideration and recall of RMC No. 37-93 in a letter dated July 29, 1993 with the concluding statement that "This constitutes the final decision of this Office on the matter." (Exhibit "B").

In a letter dated July 30, 1993, and received by the petitioner on August 2, 1993 (Exhibit "W"), Deputy Commissioner Victor A. Deoferio, Jr. stated that per verification of the Tobacco Tax Division of the BIR in relation to the implementation of RMC No. 37-93, it was ascertained that petitioner has incurred a deficiency ad valorem tax liability on removals of "HOPE", "MORE" and

"CHAMPION" cigarettes on July 2, 1993, from 6:00 P.M. to 12:00 Midnight, in the total amount of P9,598,334.00, exclusive of surcharge and interest; and in view of the Final Denial of Petitioner's request for review and reconsideration dated July 29, 1993, the assessment therein is likewise considered the Final Decision of the BIR on the matter. In view thereof, demand is made on Petitioner to pay the total amount of P9,598,334.00 within ten(10) days from receipt of said letter.

Hence, a petition for review was filed by petitioner with this Court on August 3, 1993 (CTA records, pp. 1-34). An Amended Petition for Review with Urgent Motion for Suspension of Collection of Tax Liability was subsequently filed on August 12, 1993 (CTA records, pp. 133-171).

The Court issued an injunction on September 30, 1993 (C.T.A. records, pp. 307-309) which reads:

> "Accordingly, the Court resolves to grant the motion and hereby enjoins the Commissioner of Internal Revenue and her agents from collecting the amount of P9,598,334.00 by the institution of any action for the collection of said tax. However, Respondent must issue the corresponding warrants of levy on real properties and constructive distraint over all personal properties listed for purposes of annotating the tax lien short of selling the said properties in a public auction pending final adjudication of this case. So as not to hamper the business operation of the Petitioner thereby injuring further its interest,

Respondent is likewise enjoined not to enforce her collection by issuing warrants of garnishment over the cash deposits of Petitioner inasmuch as the properties offered as security are sufficient to protect the interest of the government."

The issues submitted for resolution of this Court are:

I. Whether Revenue Memorandum Circular No. 37-93 is valid, effective and enforceable.

II. Whether petitioner is liable for the assessment in the amount of P9,598,334.00 as deficiency ad valorem tax on its removals of "HOPE", "MORE" and "CHAMPION" cigarettes on July 2, 1993 from 6:00 P.M. to 12:00 midnight.

The grounds on which petitioner anchors its prayer to have RMC No. 37-93 declared void *ab initio* and of no force or effect are as follows:

1. RMC No. 37-93 is violative of due process since it contravenes the due process clause of the Constitution; the procedures prescribed in the 1987 Administrative Code on publication, registration and holding of hearings and the formalities required by Revenue Memorandum Circular No. 20-86.

2. RMC No. 37-93 is violative of the equal protection clause of the Constitution and the constitutional provision that the rule of taxation shall be uniform and equitable in as much as other locally manufactured cigarettes similarly situated have not been reclassified as such.

3. RMC No. 37-93 dated July 1, 1993 was issued in circumvention of R.A. No. 7654 which took effect on July 3, 1993.

4. Provision in Sec. 142(c)(1) of the NIRC, upon which RMC No. 37-93 was based is null and void for it constitutes undue delegation of Legislative power.

5. Finding of respondent Commissioner that "HOPE", "MORE" and "CHAMPION" are foreign brands is contrary to the facts.

On the other hand, respondent based her claim of the validity, effectivity and enforceability of RMC No. 37-93 on the following:

1. RMC No. 37-93 is not violative of due process. It is a ruling classifying certain cigarettes for excise tax purposes pursuant to Section 245 of the Tax Code. Hence, its publication is not necessary for its validity, effectivity and enforceability. The government is never estopped from collecting legitimate taxes due to the mistakes of its agents.

2. RMC No. 37-93 is not violative of the rule on uniformity and equality in taxation since the fact that the other cigarettes similarly situated were not actually reclassified is already a matter of implementation. It applies to all cigarettes similarly situated.

3. At the time RMC No. 37-93 was issued, Section 142(c)(1) of the Tax Code, as amended by R.A. No. 6956 was still in effect such that at the time of the effectivity of R.A. No. 7654, the subject brands were already classified and taxed at 55%.

4. The adoption by the legislature of the World Tobacco Directory as an authority is a matter of legislative prerogative which the courts cannot inquire into.

5. The cigarette brands "HOPE", "MORE" and "CHAMPION" are foreign brands. The assessment is presumed correct.

To better appreciate the nature and implication of RMC No. 37-93, it is reproduced in full hereunder:

REPUBLIKA NG PILIPINAS
KAGAWARAN NG PANANALAPI
KAWANIHAN NG RENTAS INTERNAS

July 1, 1993

REVENUE MEMORANDUM CIRCULAR NO. 37-93

SUBJECT: Reclassification of Cigarettes Subject to Excise Tax

TO : All Internal Revenue Officers and Others Concerned

In view of the issues raised on whether "HOPE", "MORE" and "CHAMPION" cigarettes which are locally manufactured are appropriately considered as locally manufactured cigarettes bearing a foreign brand, this Office is compelled to review the previous ruling on the matter.

Section 142(c)(1) National Internal Revenue Code, as amended by R.A. No. 6956, provides:

> "On locally manufactured cigarettes bearing a foreign brand, fifty-five percent (55%) **Provided,** That this rate shall apply regardless of whether or not the right to use or title to the foreign brand was sold or transferred by its owner to the local manufacturer. Whenever it has to be determined whether or not a cigarette bears a foreign brand, the listing of brands manufactured in foreign countries appearing in the current World Tobacco Directory shall govern."

Under the foregoing, the test for imposition of the 55% ad valorem tax on cigarettes is that the locally manufactured cigarettes bear a foreign brand regardless of whether or not the right to use or title to the foreign brand was sold or transferred by its owner to the local manufacturer. The brand must be originally owned by a foreign manufacturer or producer. If ownership of the cigarette brand is, however, not definitely determinable, "xxxx the listing of brands manufactured in foreign countries appearing in the current World Tobacco Directory shall govern. xxx"

"HOPE" is listed in the World Tobacco Directory as being manufactured by (a) Japan Tobacco, Japan and (b) Fortune Tobacco, Philippines. "MORE" is listed in the said directory as being manufactured by: (a) Fills de Julia Reig, Andorra; (b) Rothmans, Australia; (c) RJR-Macdonald, Canada; (d) Rettig-Strenberg, Finland; (e) Karellas, Greece; (f) R.J. Reynolds, Malaysia; (g) Rothmans, New Zealand; (h) Fortune Tobacco Philippines; and (i) R.J. Reynolds, Puerto Rico; (j) R.J. Reynolds, Spain; (k) Tabacalera, Spain; (l) R.J. Reynolds, Switzerland; and (m) R.J. Reynolds, USA. "CHAMPION" is registered in the said directory as being manufactured by (a) Commonwealth, Bangladesh; (b) Sudan, Brazil, (e) Japan Tobacco, Japan; (d) Fortune Tobacco, Philippines; (e) Haggar, Sudan; and (f) Tobacco Reunies Switzerland.

Since there is no showing who among the above-listed manufacturers of the cigarettes bearing the said brands are the real owner/s thereof, then it follows that the same shall be considered foreign brand for purposes of determining the ad valorem tax, pursuant to Section 142 of the National Internal Revenue Code. As held in BIR Ruling No. 410-88, dated August 24, 1988, "in cases where it cannot be established or there is dearth of evidence as to whether a brand is foreign or not, resort to the World Tobacco Directory should be made."

In view of the foregoing, the aforesaid brands of cigarettes, viz: "HOPE", "MORE" and "CHAMPION" being manufactured by Fortune Tobacco Corporation are hereby considered locally manufactured cigarettes bearing a foreign brand subject to the 55% ad valorem tax on cigarettes.

Any ruling inconsistent herewith is revoked or modified accordingly.

SGD. LIWAYWAY VINZONS-CHATO
Commissioner

A reading of RMC No. 37-93 would readily show that on its very face it makes a determination that "HOPE", "MORE" and "CHAMPION" cigarettes manufactured by petitioner are locally manufactured cigarettes bearing a foreign brand. Said finding overturns the previous determination of two other Commissioners before her that the brands in question are local brands and subjects them to a 55% ad valorem tax rate with a minimum tax of P5.00 per pack as against the previous rate of 45% and 20% as the case may be.

Notwithstanding the far reaching impact of the aforementioned circular not only to petitioner's business but also to the tobacco industry at large, petitioner being the single biggest buyer of tobacco in the country, the same was issued without notice, without prior hearing, without submission of evidence and without opportunity to controvert. The Secretary of Finance and respondent Commissioner testified before the House Committee on Ways and Means that they did not deem it necessary to conduct *public hearings* thereon despite acknowledging its significance (Exhibit "FF-3-b", pages VI-6; VII-1; August 11, 1993; Exhibit "FF-2-g", page XV-5, August 10, 1993). In fact, petitioner first learned of the reclassification in the column of Fil C. Sionil in the "Business Bulletin" issue of July 4, 1993 (Exhibit "E") and had to write respondent on July 6 and 9, 1993 to inquire about the veracity thereof and to request for a copy of RMC No. 37-93 (Exhibits "F" and "F-1").

It is not likewise disputed that there was no *publication* of RMC No. 37-93 either in the Official Gazette or in any newspaper of general circulation in the Philippines.

There is a hollow ring in respondent's contention that *notice*, *hearing* and *publication* are not necessary for its effectivity since the aforesaid circular is only interpretative in nature, that it only lays down the guidelines for internal revenue officers to follow in determining whether or not a locally manufactured cigarette bears a foreign brand, and that it is merely a directive to the internal revenue officers so the correct ad valorem tax on cigarettes may be collected. These contentions would even sound as lame excuses if considered in the light of the circumstances surrounding the issuance of RMC No. 37-93. The supposed "guidelines" were received at the Records Division of the BIR "very late in the afternoon of July 1, 1993" with the day appearing to have been snow faked (T.S.N. September 29, 1993, pp. 17-20). It was telefaxed to petitioner's factory addressed to no one in particular on July 2, 1993, a Friday, at 5:30 in the afternoon (Exhibit "G-1") and petitioner would be later assessed for deficiency ad valorem tax on removals of "HOPE", "MORE" and "CHAMPION" cigarettes on July 2, 1993 from 6:00 P.M. to 12 midnight (Exhibit "W"). By 12:01 A.M. of July 3, 1993, R.A. No. 7654 would already take effect doing away with the classification of brand. The whole thing is done and over with perhaps even before the same can be circulated to the internal revenue officers supposedly to be "guided" by them.

No matter how said circular may be regarded, the legal provisions which have bearing on the issue were comprehensively discussed by petitioner in its pleading to which this Court concurs, thus:

The *due process clause of the Constitution* (Section 1, Article III, Bill of Rights) prohibits the taking of property without due process of law. The issuance of RMC No. 37-93 amount to depriving petitioner of property without complying with the requirements for procedural and substantive due process namely, notice, prior hearing, submission of evidence and opportunity to controvert.

Book VII entitled "Administrative Procedure" of the Administrative Code of 1987 (AC '87), which took effect on November 24, 1989, prescribes the requirements for the validity and effectivity of any rule issued by any Government agency;

Section 1 provides that "t(his) Book shall be applicable to all agencies as defined in the next succeeding section, except the Congress, the Judiciary, the Constitutional Commissions, military establishment x x x, the Board of Pardons and Parole, and state universities and colleges."

"Agency" is defined in Section 2, viz:

> "(1) 'Agency' includes any departments, bureau, office, commission, authority or officer of the National Government authorized by law or executive order to make rules, issue licenses, grant rights or privileges, and adjudicate cases; x x x."

The Bureau of Internal Revenue, as agency of the National Government, is covered by Book II, Chapter 4, Sec. 18 of AC '87 and therefore, is obliged to abide by its provisions concerning the issuance, publication and effectivity of any rule;

"Rule" is also defined in Section 2, viz;

> "(2) 'Rule' means any agency statement of general applicability that implements or interprets a law, fixes and describes the procedure in, or practice requirements of, an agency, including its regulations. The term includes memoranda or statements concerning the internal administration or management of an agency not affecting the rights of, or procedure available to, the public." (Underscoring supplied);

Section 9, Chapter 2, Book VII of the AC '87 requires that any proposed rule be first publicized and submitted to a *hearing* to afford interested parties the opportunity to express their views or opposition thereto before its adoption:

> "SEC. 9. *Public Participation.* - (1) If not otherwise required by law, an agency shall, as far as *practicable*, *publish* or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.
>
> "(2) x x x.
>
> "(3) In case of opposition, the rules on contested cases shall be observed.";

If opposed, the rules on contested cases require notice and *hearing* to give all interested parties the opportunity to submit evidence and arguments on all issues concerning the proposed rule (Section 11, Chapter 3, Book VII);

The AC '87 likewise dictates that "(e)very agency shall file with the University of the Philippines Law Center three(3) certified copies of every rule adopted by it x x x" (paragraph [1], Section 3) and that "(i)n addition to other rule-making requirements provided by law not inconsistent with this Book, each rule shall become effective fifteen(15) days from the date of filing x x x" (Section 4);

As declared in Section 4, the administrative procedures mandated by Book VII of the AC '87 are in addition to other rule-making requirements not inconsistent therewith. Insofar as internal revenue tax rules and regulations are concerned, the additional requirements for notice, publication and effectivity are prescribed in Revenue Memorandum Circular (RMC) No. 20-86, dated July 24, 1986 entitled: "Notice, publication and effectivity of internal revenue tax rules and regulation." (Exhibit "L"), with the avowed purpose "that there shall be just enforcement of rules and regulation, in conformity with the said basic element of due process". Paragraphs numbered 1 and 2 thereof provide that:

> "1. This Circular shall apply only to (a) Revenue Regulations; (b) Revenue Audit Memorandum Orders and (c) Revenue Memorandum

Circulars and Revenue Memorandum Orders bearing on internal revenue tax rules and regulations.

"2. Except when the law otherwise expressly provides, the aforesaid internal revenue tax issuances shall not begin to be operative until after due notice thereof may be fairly presumed.

"Due notice of the said issuances may be fairly presumed only after the following procedures have been taken:

"2.1 The Records Division of the National Office shall, furnish, thru registered mail, all of the following business and professional organizations with the corresponding revenue tax issuance:

a. Philippine Institute of Certified Public Accountants;

b. Integrated Bar of the Philippines;

c. Philippine Chamber of Commerce and Industry;

d. American Chamber of Commerce;

e. Federation of Filipino-Chinese Chamber of Commerce and Industry; and

f. The Japanese Chamber of Commerce and Industry of the Philippines, Inc.

"2.2 The provision of paragraph 2.1 shall not be deemed as exclusion of other person or persons who may request for a copy of the corresponding revenue issuance from the Bureau of Internal Revenue.

"2.3 The Bureau shall issue a press release about the new revenue issuance in any newspaper or newspapers of general Circulation. The press release shall cover the highlights or features thereof.

"2.4 Effectivity date for enforcement of the new revenue issuance shall take place

> thirty(30) days from the date the revenue issuance has been sent thru registered mail to the organizations enumerated under paragraph 2.1 hereof." (Underscoring supplied).

Paragraph number 5 of RMC No. 20-86 furthermore states that "(s)trict compliance with the foregoing procedures is enjoined."

There being no inconsistency between RMC No. 20-86 and Book VII of the Administrative Code of 1987, the additional requirements laid down by said circular are deemed incorporated therewith.

In addition, it is worth mentioning that the prefatory statements of RMC No. 20-86 states that one of the problem areas bearing on compliance with internal revenue tax rules and regulations is lack or insufficiency of due notice to the tax-paying public. Unless there is due notice, due compliance therewith may not be reasonably expected. And most importantly, their strict enforcement could possibly suffer from legal infirmity in the light of the Constitutional provision on "due process of law" and the essence of the Civil Code provision concerning effectivity of laws, whereby due notice is a basic requirement. (Exhibit "L", "L-1").

The records of the case are eloquent testimony that the essential requisites prescribed for validity, effectivity and enforceability of administrative regulations and circulars as provided under Book VII of the Administrative Code of 1987 as well as Revenue Memorandum Circular No. 20-86 were not complied with. There was no notice and publication of the proposed RMC No. 37-93. Petitioner was not given a chance to be heard and to oppose the adoption of the circular. There is no record that the organizations listed in RMC No. 20-86, which need to be furnished copies thereof by registered mail for the circular to be effective were furnished their copies. No certified true copy of the RMC No. 37-93 was filed with the U.P. Law Center until August 3, 1993 (T.S.N., September 29, 1993, p. 12.) that is, after petitioner raised its non-registration. Even as we have already discussed that RMC No. 37-93 is not merely interpretative or serves only as guidelines for internal administration or management of the BIR, it is still of no moment if regarded otherwise because of the clear mandate of the Administrative Code of 1987 and RMC No. 20-86 that due notice is a basic requirement for the effectivity of said BIR issuance.

The Civil Code of the Philippines in Article 2 thereof provides that "laws shall take effect after fifteen(15) days following the completion of their publication in the Official Gazette, unless it is otherwise provided." The word "law" in Article 2 includes "regulations and circulars issued in accordance with the same (**People vs. Que Po Lay**, 94 Phil. 640). Since RMC No. 37-93 was issued in accordance with and for the purpose of implementing Section 142(c)(1) of the NIRC, it should likewise be published in order that it may become effective.

In the recent case of **Philippine Association of Service Exporters, Inc. vs. Torres, et. al.**, 212 SCRA 298 (1992), the Supreme Court held that administrative circulars are legally invalid, defective and unenforceable for lack of proper publication and filing in the Office of the National Administrative Register as required in Article 2 of the Civil Code and Sections 3(1) and 4, Chapter 2, Book VII of the Administrative Code of 1987 and may not be enforced and implemented. Once more, the Court adverted to the ruling in **Tañada vs. Tuvera**, 146 SCRA 446 that "xxx Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation."

It should be noted that the cases cited by respondent holding that interpretative circulars need not be published, [La Suerte Cigar and Cigarette Factory, et., al., vs. CTA, et., al., 134 SCRA 29 (1985), Romualdez et., al., vs. Arca, et., al., 27 SCRA 829 and Tañada, et., al., vs. Tuvera, et., al., 146 SCRA 446 (1986)] were all rendered prior to the promulgation of the 1987 Administrative Code and involved issuances made before the effectivity of said code.

Premises considered, We cannot find any legal justification to bestow legitimacy on the issuance of RMC No. 37-93.

According to the Constitution, the rule of taxation shall be uniform and equitable (Art. VI, Sec. 28, par 1). The term uniformity (equality or "equal protection of the law") requires that all subjects or objects of taxation similarly situated, are to be treated alike or put on equal footing both in privileges and liabilities (**Juan Luna Subdivision vs. Sarmiento**, 91 Phil. 371). In **City of Baguio vs. De Leon**, (25 SCRA 938), it has been said that equality and uniformity in taxation means that all taxable articles or kinds of property of the same class shall be taxed at the same rate. A tax is considered uniform when it operates with the same force and effect in every place where the subject may be found. When the tax law applies equally well to all persons, firms and corporations placed in similar situation, there is no infringement of the rule on equality. (Vitug, Compendium of Tax Law and Jurisprudence, 2nd ed., p. 11.)

The taxing power has the authority to make a reasonable and natural classification for purposes of taxation but the government's act must not be prompted by a spirit of hostility, or at the very least discrimination that finds no support in reason. **(Reyes, et. al. vs. Almanzor, et. al.**, 196 SCRA 322, 328 [1991]). It suffices then that the laws operate equally and uniformly on all persons under similar circumstances or that all persons must be treated in the same manner, the conditions not being different, both in the privileges conferred and the liabilities imposed. Favoritism and undue preference cannot be allowed. For the principle is that equal protection and security shall be given to every person under circumstances, which if not identical are analogous. If law be looked upon in terms of burden or charges, those that fall within a class should be treated in the same fashion, whatever restrictions cast on some in the group equally binding on the rest. **(Sison, Jr. vs. Ancheta, et. al.**, 130 SCRA 654 [1984].

Citing J.M. Tuason and Co. vs. The Land Tenure Administration, 31 SCRA 413 [1970].)

It is evident from a reading of RMC No. 37-93 that only the cigarette brands locally manufactured by petitioner namely "HOPE", "MORE" and "CHAMPION" were singled out for reclassification as "locally manufactured cigarettes bearing a foreign brand" and subject to ad valorem tax at the rate of 55% with a minimum tax of not less than P5.00 per pack. There is no doubt that RMC No. 37-93 covers only the subject brands since it is very specific and clear. There is nothing in the questioned circular that will show that all other brands similarly situated fall within its coverage.

Respondent contended that RMC No. 37-93 merely lays down the test in determining whether of not a locally manufactured cigarette bears a foreign brand and "HOPE", "MORE" and "CHAMPION" were merely used as specific examples in the application of the test. She went on to state that the reclassification of the other cigarettes similarly situated may be made separately. The fact that the other cigarettes similarly situated were not actually reclassified is already a matter of implementation. (Respondent's Memorandum, pp. 20-21).

If the avowed purpose for the reclassification is to be believed, that it is to correct previous "erroneous" rulings, how come the other cigarettes bearing a foreign brand pursuant to the test set forth therein (listing in the World Tobacco Directory) were not likewise re-classified? Is this not violative of the rule on uniformity and equality in taxation? Examples of these brands were pointed out by petitioner and not controverted by respondent, viz:

1. Locally manufactured by ALHAMBRA INDUSTRIES, INC.
   (a) "PALM TREE" is listed as manufactured by office of Monopoly, Korea (Exhibit "R")

2. Locally manufactured by LA SUERTE CIGAR and CIGARETTE COMPANY
   (a) "GOLDEN KEY" is listed being manufactured by United Tobacco, Pakistan (Exhibit "S")
   (b) "CANNON" is listed as being manufactured by Alpha Tobacco, Bangladesh (Exhibit "T")

3. Locally manufactured by LA PERLA INDUSTRIES, INC.
   (a) "WHITE HORSE" is listed as being manufactured by Rothman's, Malaysia (Exhibit "U")
   (b) "RIGHT" is listed as being manufactured by SVENSKA Tobaks, Sweden (Exhibit "V-1)

4. Locally manufactured by MIGHTY CORPORATION
   (a) "WHITE HORSE" is listed as being manufactured by Rothman's, Malaysia (Exhibit "U-1")

5. Locally manufactured by STERLING TOBACCO CORPORATION
(a) "UNION" is listed as being manufactured by Sumatra Tobacco, Indonesia and Brown and Williamson, USA (Exhibit "U-3")
(b) "WINNER" is listed as being manufactured by Alpha Tobacco, Bangladesh; Nanyang, Hongkong; Joo Lan, Malaysia; Pakistan Tobacco Co., Pakistan; Premier Tobacco, Pakistan and Haggar, Sudan. (Exhibit "U-4")

In fact, respondent Commissioner herself informed the Committee on Ways and Means of the House of Representatives that she had doubts whether RMC No. 37-93 can cover cigarette brands manufactured by other cigarette companies although similarly situated as petitioner's subject brands. Respondent fully knows that it is no longer legally possible to reclassify other cigarettes similarly situated because this would be in contravention of R.A. No. 7654.

Quoted below are the transcript of the hearing conducted by the Committee on Ways and Means of the House of Representatives on August 10, 1993;

> THE CHAIRMAN. So you have specific information on Fortune Tobacco alone. You don't have specific information on other tobacco manufacturers. Now, there are other brands which are similarly situated. They are locally manufactured bearing foreign brands. And may I enumerate to you all these brands, which are also listed in the World Tobacco Directory x x x. Why were these brands not reclassified at 55 if your want to give a level playing field to foreign manufacturers?

MS. CHATO. Mr. Chairman, in fact, we have already prepared a Revenue Memorandum Circular that was supposed to come after RMC No. 37-93 which have really named specifically the list of locally manufactured cigarettes bearing a foreign brand for excise tax purposes and includes all these brands that you mentioned at 55 percent except that at that time, when we had to come up with this, we were forced to study the brands of Hope, More and Champion because we were given documents that would indicate the that these brands were actually being claimed or patented in other countries because we went by Revenue Memorandum Circular 1488 and we wanted to give some rationality to how it came about but we couldn't find the rationale there. And we really found based on our own interpretation that the only test that is given by that existing law would be registration in the World Tobacco Directory. So we came out with this proposed revenue memorandum circular which we forwarded to the Secretary of Finance except that at that point in time, we went by the Republic Act 7654 in Section 1 which amended Section 142, C-1, it said, that on locally manufactured cigarettes which are currently classified and taxed at 55 percent. So we were saying that when this law took effect in July 3 and if we are going to come up with this revenue circular thereafter, then I think our action would really be subject to question but we feel that ... Memorandum Circular Number 37-93 would really cover even similarly situated brands. And in fact, it was really because of the study, the short time that we were given to study the matter that we could not include all the rest of the other brands that would have been really classified as foreign brand if we went by the law itself. I am sure that by the reading of the law, you would without that ruling by Commissioner Tan they would really have been included in the definition or in the classification of foregoing brands. These brands that you referred to or just read to us and in fact just for your information, we really came out with a proposed revenue memorandum circular for those brands. (Underscoring supplied)
(Exhibit "FF-2-C", pp. V-5 to V-6, VI-1 to VI-3).

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"MS. CHATO. x x x But I do agree with you now that it cannot and in fact that is why I felt that we ... I wanted to come up with a more extensive coverage and precisely why I asked that revenue memorandum circular that would cover all those similarly situated would be prepared but because of the lack of time and I came out with a study of RA 7654, it would not have been possible to really come up with the reclassification or the proper classification of all brands that are listed there. x x x " (Underscoring supplied)
(Exhibit "FF-2d", page 1X-1)

xxx xxx xxx

HON. DIAZ. But did you not consider that there are similarly situated?

MS. CHATO. That is precisely why, Sir, after we have come up with this Revenue Memorandum Circular No. 37-93, the other brands came about the would have also clarified RMC 37-93 by I was saying really because of the fact that I was just recently appointed and the lack of time, the period that was allotted to us to come up with the right actions on the matter, we were really caught by the July 3 deadline. But in fact, We have already prepared a revenue memorandum circular clarifying with the other ... does not yet, would have been a list of locally manufactured cigarettes bearing a foreign brand for excise tax purposes which would include all the other brands that were mentioned by the Honorable Chairman. (Underscoring supplied)
(Exhibit "FF-2-d", page 1X-4).)

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The obvious implication of the foregoing is that in truth respondent Commissioner herself believes that RMC No. 37-93 effectively reclassifies only the three(3) cigarettes brands manufactured by petitioner and no other similarly situated brands. In fact, she admitted that she would have issued circulars to cover the other brands similarly situated had she not been overtaken by the effectivity of R.A. No. 7654 which prohibits her from making reclassification.

Not only is the inequality manifested so clearly in the circular itself but more so in the application thereof by the BIR. There is no denying the fact that up to present time, only the cigarettes of the brand "HOPE", "MORE" and "CHAMPION" have been assessed for deficiency ad valorem tax in relation to the implementation of RMC No. 37-93.

The above observation did not escape notice of the Presiding Officer during the hearing conducted by the Committee on Ways and Means on August 10, 1993 and We quote:

> THE PRES. OFFICER. We are aware, the chair is aware of the position of the BIR that it was your intention that the circular covers other brands except the three brands, outside of the three brands. <u>But the fact indicates otherwise because after you issued the circular, it was only Fortune Tobacco that was notified about the circular. That is on the records. Second, up to this time, you are not collecting the increase revenue rate from the other brands.</u> If really that was your intention, you should be collecting now. And the records show that up to now, you are not collecting. So, that is a very clear point on the matter. xx (Exhibit "FF-3-d, pages XII-2 to XII-3.) (Underscoring supplied.)

The more telling blows were delivered by Mr. Isidro Tecson, Jr., Chief of the Tobacco Division of the Bureau of Internal Revenue during direct examination by Atty. Estelito Mendoza (petitioner's counsel) in the hearing of this case on September 20, 1993, viz:

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Q. Prior to the issuance of Revenue Memorandum Circular No. 37-93, how were the brands "HOPE", "MORE" and "CHAMPION" classified?

A. They were classified as local brands and taxed at 45% of the wholesale price.

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Q. Now, the Bureau of Internal Revenue has stated in their Answer that this Revenue Memorandum Circular No. 37-93 is an interpretative circular and that other cigarettes could fall under this circular, which means other than "HOPE", "MORE" and "CHAMPION". Now, will you inform the court whether after the issuance of Revenue Memorandum Circular No. 37-93, any brand of a cigarette previously classified as locally brand cigarette has been considered by the Bureau of Internal Revenue as foreign brand pursuant to RMC No. 37-93?

A. Well, I can only say that we did not collect ad valorem tax on these other brands of cigarettes as foreign brands because our office did not receive any instruction to collect from these brands as foreign brands.

Q. So after the promulgation of RMC No. 37-93, no other cigarette brand previously classified as local brand was reclassified as foreign brand?

A. Well, not until after the letter by the Bureau of Internal Revenue dated July 29 where it say that all other brands of cigarettes similarly situated will be classified as foreign. (Referring to Exhibit "B").

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Q. xxx xxx
Now, has the Tobacco Tax Division applied RMC No. 37-93 to any other brand of cigarette other the "HOPE", "MORE" and "CHAMPION" since its issuance?

A. Well, not yet.

Q. What do you mean not yet?

A. We have not received any instruction yet from the higher authorities.

Q. Based on RMC no. 37-93, it would appear the brands "HOPE" "MORE" and "CHAMPION" were reclassified as foreign brand cigarettes because they appear in the current World Tobacco Directory?

A. Yes.

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Q. As head of the Tobacco Tax Division which implements the assessment and collection of excise taxes on cigarettes, would you know whether there are any other locally brand cigarettes which appear in World Tobacco Directory?

A. Yes, sir, I know there are other local brands that also appear in the World Tobacco Directory?

Q. But are classified by the Bureau of Internal Revenue as local brands?

A. Yes, sir.

Q. Can you name some of them?

A. Aurora Matamis, La Campana, Marvel, Miller, Miss Asia, then Alhambra, Fiesta, Kennon, Casino.

Q. These cigarettes were taxed as local brands?

A. Yes, sir, that is correct.

Q. But they appear also in the World Tobacco Directory.

A. They appear in the World Tobacco Directory.

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(T.S.N., September 20, 1993, pp. 16-25)

Such a flagrant actual uneven application of RMC No. 37-93 as revealed by the testimony of the BIR official concerned roundly demolish all pretentions to impartiality and stripped the same of its cloth of validity. It is clearly discriminatory.

Republic Act No. 7654 was approved by the House of Representatives and the Senate on June 10, 1993 and signed by the President on June 14, 1993. It was published on June 17, 1993 and took effect fifteen(15) days thereafter or on July 3, 1993. The law amended Section 142 of the Tax Code by doing away with the distinction regarding brand and provides in Section

42(c)(1) thereof that those locally manufactured cigarettes which are "currently classified" and taxed at 55% shall be taxed at the same rate.

Revenue Memorandum Circular No. 37-93 which was purportedly issued on July 1, 1993 reclassified "HOPE", "MORE" and "CHAMPION" as "locally manufactured cigarettes with foreign brand" and subjects them to a 55% ad valorem tax with a minimum tax of not less than P5.00 per pack from its erstwhile classification as "other locally manufactured cigarettes" subject to tax of 45% or 20% as the case may be.

Consequently, it would appear that upon the effectivity of R.A. No. 7654 on July 3, 1993, "HOPE", "MORE" and "CHAMPION" were "currently classified and taxed" at 55% and would therefore be taxed at the same rate pursuant to said law, the pertinent portion of which read:

> **SEC. 142.** *Cigar and Cigarettes. - x x x*
>
> (c) Cigarettes packed by machine. - There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below based on the constructive manufacturer's wholesale price or the actual manufacturer's wholesale price, whichever is higher:
>
> (1) On locally manufactured cigarettes which are currently classified and taxed at fifty five percent(55%) or the exportation of which is not authorized by contract or

> otherwise, fifty five percent(55%) provided that the minimum tax shall not be less than five pesos per pack. (Underscoring supplied)
>
> xxx xxx

The threshold question that has to be addressed is whether "currently classified" refers to the classification at the time of the passage and approval of R.A. No. 7654 by the House of Representatives and the Senate on June 10, 1993 and then by the President on June 14, 1993 or the classification at the time of its effectivity on July 3, 1993.

For the interpretation of statutes, "intent of the legislature" is the criterion, or test, that is most often recited. An almost overwhelming majority of judicial opinions on statutory issues are written in the idiom of legislative intent. The reason for this doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will real or attributed, of the lawmaking branch of the government is mandated by the principles of separation of powers (Sutherland Statutory Construction, 4th Edition, Vol. 2A, p. 15) Legislature intent is the vital part, the heart, the soul and the essence of law (50 Am. Jur. p. 200). Hence, every technical rule of construction is dependent upon and must yield to the expression of the paramount will of the legislature. The value of the rules of construction rests on their use as aids to the Court in better asserting legislative intent (**State vs. South Kingston**, 22 L.R.A., p. 65).

Legislative intent should be understood as the sum of the individual ideas. views and attitudes of all the members of the legislature if it is to be a meaningful and valid concept for use as a criterion for deciding questions of statutory interpretation (Sutherland Statutory Construction, 4th Edition, Vol. 2A, p. 19). It means the "objective footprints left on the trail of legislative enactment." (2 Sutherland Statutory Construction, 3rd ed., p. 322). Reference can be made to the composite or net meaning that is communicated by operation of the process of enactment applied to a statutory text. (Sutherland Statutory Construction, 4th Edition, Vol. 2A, p. 19).

The intent of Congress in enacting R.A. 7654 can be inferred from the statements made by the Chairman and Members of the Committee on Ways and Means during the hearings conducted relative to RMC No. 37-93. Said statements were partly quoted hereunder viz:

> THE CHAIRMAN. If I may just interrupt. I'll give you the real intention of this bill. When we passed this law, we froze all classifications of cigarettes. That's why we eliminated the listing in the World Tobacco Directory as a test for determining whether a

cigarette is a local or foreign brand. So after the effectivity of this law there could be no more reclassification because the test was already eliminated. And that was probably the reason why they jumped the gun of Congress because they could no longer exercise the power of reclassification. That was the reason. Not because there is a prohibition on any downward reclassification. <u>We froze all categories of cigarettes when we passed this law. That was the intention.</u> (Exhibit "FF-3-b", pages VII-4 to VII-5, transcript of the hearing conducted on August 11, 1993 by the Committee on Ways and Means) (Underscoring supplied.)

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HON. TINGA. Anyway, the best evidence will be the records, Mr. Chairman. So thank you very much, Mr. Secretary. May I address this question, then, to Commissioner Chato? <u>The new law, Republic Act No. 7654 ordains that the existing classification of cigarettes should hold.</u> As a matter of fact, the law prohibits a change in the classification. And in doing so, the law has institutionalized the classification therefore being done by the Bureau of Internal Revenue. <u>And part and parcel of that classification is the administrative interpretation of a law as embodied in the letters and rulings of Commissioner Tan.</u> That's how it is. <u>In other words, the way things stood at the time that new law was enacted, there was a classification of cigarettes. And that classification was in essence adopted by the new law. So that classification is part of the new law.</u> But the problem is before the enactment of the new law, it would seem to neutral observers that the BIR jumped the gun on Congress. The uncanny timing of the revenue ruling raises the point that the BIR attempted to pre-empt Congress, that's how it is. And the Commissioner herself, admitted it. But the BIR cannot do that. Under scheme of things, the BIR merely administers, administers the laws, the tax laws. <u>So with the enactment of the law,</u> the BIR was the, <u>the law foreclosed the authority of the BIR to change the classification.</u> <u>Because as far as</u>

<u>Congress is concerned, the classification existing at the time the law was enacted was maintained.</u> As a matter of fact, Congress, the law is, was very (inaudible) in saying that a change in the classification is prohibited. The BIR could change the classification or could make a classification only with respect to brands to be registered, which shall be registered later on. That's how it is, Madam Commissioner. So the point is, why did the BIR, what compelled the BIR to come out with this revenue ruling or revenue circular except probably to clash with Congress? (Exhibit "FF-2-e, pages XI-1 to XI-3, transcript of hearing conducted on August 10, 1993 by the Committee on Ways and Means.) (Underscoring supplied.)

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HON. TINGA. But the problem is <u>the law is very clear, that the categorization made by the BIR was adopted by Congress.</u> The problem really is at that point in time, Congress had believed the BIR. <u>Whatever categorization the BIR came out with at that point in time was institutionalized in the law itself</u>, so at that stage, the BIR have more power or authority to change the categorization which was eventually incorporated in the law. (Id. pages XI-5 to XI-7.) (Underscoring supplied.)

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HON. TAJON : Yes, in connection with the point of Cong. Teves. In fact, one of the questions that I propounded is why the discrimination on these three brands instead of including all the 18 brands that are listed in the World Tobacco Directory. And according to the ... And those were repeated by other interpellators. And she repeatedly said that to their thinking, the other brands, still 18 of them, are also included in this memorandum circular so that there is no need of issuing another circular. And moreover, they cannot issue a circular anymore because it would be a violation of Republic Act 7654. That's why there is no expectation that the Commissioner will ever issue another circular because that

> would be in violation of Republic Act 7654. And according to her, the understanding is that if it is not specified that the upgrading is prohibited, it is only downgrading that is prohibited. So according to her, her interpretation is that it is not prohibited even in the upgrading. But that was the point of disagreement because Congressman, the Gentleman from Pateros made it premise that in law when we pass or discuss this bill leading to Republic Act 7654 the current interpretation or the interpretation then was on the basis of the BIR ruling with respect to Hope, More and Champion that was issued by Commissioner Tan. The ruling was that these three brands of cigarettes are locally manufactured cigarettes and that was the present interpretation which was understood to have been adopted in Republic Act 7654. So that even if there is no clear provision there prohibiting upgrading, it assumes that it is prohibited because the interpretation that we adopted in law is that kind of interpretation. So, we have frozen the classification of cigarettes at the time we passed this R.A. 7654. And that's why I would ask the Deputy Commissioner if he is aware that this assumption or his argument that the specific naming of a specific brand in the circular would also include other brands. Is it not a fact that when you do not mention, it is what we call in statutory construction, it is elementary that what is not included is understood to have been excluded? And this is very specific. (Exhibit "FF-3-d", pages XI-5 to XI-6, XII-1, transcript of the hearing conducted on August 11, 1993 by the Committee on Ways and Means.) (Underscoring supplied.)

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At this juncture, it would appear pretty obvious from the foregoing remarks of the legislators that the legislative intent in enacting R.A. No. 7654 is to adopt, institutionalize and incorporate as included in the new law the classification of cigarettes existing at the time of the approval of said law together with the contemporaneous administrative interpretation thereof as embodied in BIR rulings and regulations. Part and parcel thereof is the classification of "HOPE", "MORE" AND "CHAMPION" cigarettes as "other locally manufactured cigarettes" subject to an ad valorem tax of 45% or 20% as the case may be.

Noteworthy are the circumstances leading to the issuance of RMC No. 37-93 and the uncanny timing by which it was issued. While respondent Commissioner was involved in the discussions and deliberations on RA No. 7654, she did not deem it proper to raise her contemplated reclassification before the Bicameral Conference Committee inspite of her admission that she was already working on said circular at that time. (Exhibit "FF-2-e", page XII-1 transcript of hearing conducted on August 10, 1993 by the Committee on Ways and Means.) Finding the final form of RA No. 7654 not to their liking since it maintains the classification of cigarettes at the time of its enactment and reclassification will no longer be possible under the new law, Secretary Leung and his group, including officials of the BIR, tried to enlist Congress to its side but was rebuke. They tried to delay its approval by the

President but was overruled. They tried to control its publication but failed. Running out of time, the BIR issued RMC No. 37-93 allegedly as a "corrective" measure.

The transcript of the hearings conducted by the Committee on Ways and Means on August 11, 1993 is partially reproduced hereunder:

> MR. LEUNG. It is hard to avoid that perception (midnight act), your honor, but the way we were looking at this, this was an issue that we have been on the forefront addressing it as best as we can with your aygust body, and we were stuck in a situation where a question of whether we should defer the signing on June 14, or not. Our view was that perhaps it is wiser not to sign but were overruled by the President who felt it is necessary to sign for the continuation of cooperation. So, we were stuck in that situation, we felt that we probably can control the process some more by controlling the publication. However the publication went out without any of us aware of it, and we just learned later, that it was already published and the time was ticking and would have to come into effect on July 3. So, in the meantime, we made further representation with the President, both the Secretary of Trade and Industry and ourselves, and this situation had to be clear. (Exhibit "FF-3-b, page VI-5.) (Underscoring supplied.)
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>
> HON. GOLEZ. Well, in effect, is there an admission here, Mr. Chairman, Your Honor, that you are trying to beat the gun on the full effectivity of Republic Act 7654?
>
> MR. LEUNG. Well, we have tried on a number of occasions - it is no secret, Your Honor - to try to get legislation that would be able to address a very important issue. So the question of beating the gun is driven by that

process. It is not trying to fool anyone. Our position was very clear, very afront at all times. (Underscoring supplied.)

HON. GOLEZ. You were trying to get a legislation passed, but you cannot get the support of Congress. So you tried to go around this. Is this what we are hearing, Mr. Secretary, by way of a memorandum circular, especially considering, Mr. Chairman, Your Honor, that in Section ... well, paragraph D. I'm looking at page 3 of my copy here. It says that any downward reclassification or present categories for tax purposes of existing brands, cigars, etc. shall be prohibited. In your discussions prior to the issuance of this memorandum circular, Your Honor, Mr. Chairman, may we know if the discussion also focused on this particular provision?

MR. LEUNG. Yes, we did.

HON. GOLEZ. In other words, you were very aware of this provision that if you were caught by the effectivity of this Republic Act that there cannot be any downward reclassification anymore?

MR. LEUNG. That's right, Your Honor.

HON. GOLEZ. So it only supports again the contention of some parties that this is indeed a midnight act that you were beating the gun. You could have waited this month and maybe deliberate further on a revenue memorandum circular of much impact, of such magnitude.

MR. LEUNG. Your Honor, as I said, the perception of midnight action is unavoidable, inevitable. Our intention was not to do midnight act. We have tried to get this problem addressed early, transparently, but we were forced into a situation wherein if we don't take any course in this area, then we have to look at what was possible under the existing law at that time before it comes to a stymied situation. (Exhibit "FF-3-b", pages VII-1 to VII-3) xxx xxx

The conclusion is inevitable after a circumspect study of the antecedent facts and the disclosures made that RMC No. 37-93 is a sophisticated attempt to undermine by executive fiat the intent of Congress in enacting R.A. No. 7654. What they could not have through the lawmaking process, they tried to accomplish through an administrative circular. It is of course deplorable and cannot be countenanced by this Court no matter how well-meaning and noble the purpose.

Premises considered, RMC No. 37-93 is without force and effect for one that has no heart and soul cannot have life. Not only is it far detached from the legislative intent which is the essence of law but it even subverts the same. Accordingly, any reclassification prescribed by RMC No. 37-93 runs counter and cannot change, the classification adopted by Congress, which can be changed by Congress itself and not by the BIR Commissioner. The classification of cigarettes existing at the time of approval of R.A. No. 7654 stands. The interpretation prevailing at the time that *"HOPE", "MORE" AND "CHAMPION"* cigarettes are locally manufactured cigarettes not bearing a foreign brand is deemed incorporated with the new law.

Anent the arguments of petitioner that Section 142(c)(1) of the NIRC, as amended by R.A. No. 6956, upon which RMC No. 37-93 was based is null and void on the ground that reference to the World Tobacco Directory is invalid for being an undue delegation of legislative power and that the finding of respondent Commissioner that "HOPE", "MORE" and "CHAMPION" are foreign brands are contrary to the facts, it should be noted that upon the effectivity of R.A. No. 7654 on July 3, 1993, the classification of cigarettes according to brand and the corollary reference to the World Tobacco Directory have already been discarded. Respondent Commissioner has likewise no longer the power to make classification of cigarettes. A fortiori, a discussion of said arguments is moot and academic serving no useful purpose in so far as herein case is concerned. Suffice it to state that a resolution of the above questions would have no bearing in the outcome of this case in view of the findings amplified in the discussions earlier.

WHEREFORE, Revenue Memorandum Circular No. 37-93 reclassifying the brands of cigarettes, viz: "HOPE", "MORE" and "CHAMPION" being manufactured by Fortune Tobacco Corporation as locally manufactured cigarettes bearing a foreign brand subject to the 55% ad valorem tax on cigarettes is found to be defective, invalid and unforceable, such that when R.A. No. 7654 took effect on July 3, 1993, the brands in question were not CURRENTLY CLASSIFIED AND TAXED at 55% pursuant to Section 142(c)(1) of the Tax Code, as amended by R.A. No. 7654 and were therefore still classified as other locally manufactured cigarettes and taxed at 45% or 20% as the case may be.

Accordingly, the deficiency ad valorem tax assessment issued on petitioner Fortune Tobacco Corporation in the amount of P9,598,334.00, exclusive of surcharge and interest, is hereby cancelled for lack of legal basis.

Respondent Commissioner of Internal Revenue is hereby enjoined from collecting the deficiency tax assessment made and issued on petitioner in relation to the implementation of RMC No. 37-93.

SO ORDERED.

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that the decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals