REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1976** (CTA Case No. 9083)
-versus-	
MARIA LORENA DINO, *ET AL.*, Respondents.	

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MARIA LORENA DINO, *ET AL.*, Petitioners,	**CTA EB NO. 1978** (CTA Case No. 9083)
	Present:
-versus-	**DEL ROSARIO**, *P.J.*, **CASTAÑEDA, JR.**, **UY**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, **MANAHAN**, **BACORRO-VILLENA**, and **MODESTO-SAN PEDRO**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: OCT 09 2019 2:03 p.m.

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DECISION

DEL ROSARIO, *P.J.*:

Submitted for decision are the consolidated Petitions for Review separately filed by the Commissioner of Internal Revenue (CIR) on

December 12, 2018[1] and Maria Lorena Dino, *et al.* (Dino *et al.*) on December 13, 2018[2] assailing the Decision dated September 25, 2018[3] and Resolution dated November 20, 2018 [4] promulgated by the Special Second Division (Court in Division) in CTA Case No. 9083 entitled *Maria Lorena Dino et al., Petitioners versus Commissioner of Internal Revenue, Respondent,* which partially granted the refund claim of Dino *et al.* representing illegally collected income taxes for taxable year (TY) 2012. The dispositive portion of the assailed Decision and Resolution state:

<u>September 25, 2018 Decision</u>

"**WHEREFORE**, in light of the foregoing, the Petition for Review filed by petitioners is hereby **PARTIALLY GRANTED.**

Accordingly, respondent is **ORDERED TO ISSUE A TAX REFUND/TAX CREDIT CERTIFICATE** in favor of petitioners in the amount of Php9,566,626.40 to be individually allocated based on the tabular summary provided below, representing the illegally collected income taxes for taxable year 2012:

Employees' Name	Tax Paid for 2012 Income			Refundable Tax Paid for 2012 Income
	Per Petition for Review	Per Supporting Documents	Exhibit No.	
Araullo, Anna Clarissa C.	₱ 303,495.63	₱ 303,495.73	P-9, P-9-1, P-32	₱ 303,495.63
Arceo, Sonia Marie P.	-	-		-
Concio, Angela Cecilia C.	621,429.38	621,429.38	P-10, P-32	621,429.38
Dino, Maria Lorena L.	376,639.78	376,639.78	P-11, P-32	376,639.78
Dogelio, Arlene C.	258,276.76	258,276.76	P-12, P-32-2	258,276.76
Estrella, Marizenia G.	242,292.12	244,292.12	P-27, P-32	242,292.12
Gerilla-Teknomo, Gloria P.	480,177.03	480,177.03	P-13, P-32	480,177.03
King, Marie Rose Rhodora	188,629.68	188,629.68	P-14, P-32	188,629.68
Lamberte, Benedict M.	621,863.83	621,861.83	P-15, P-32	621,861.83
Littaua, Carmela Theresa E.	181,148.85	181,148.55	P-28, P-32	181,148.55
Mariano, Elsa Del Valle	205,111.89	205,111.89	P-16, P-32	205,111.89
Munsayac, Jocelyn Erlinda S.	1,321,840.39	1,321,840.39	P-32, P-32	1,321,840.39
Padrinao, Lalinka Yana M.	175,467.85	175,417.85	P-18, P-32	175,417.85
Panlilio, Maria Luisa T.	877,655.53	877,655.53	P-19, P-32	877,655.53
Potian, Zynthia Albina N.	932,679.37	932,679.37	P-20, P-32	932,679.37
Principe, Marife B.	485,086.76	485,086.76	P-21, P-32	485,086.76
Raymundo, Rosanna R.	316,431.19	316,431.19	P-22, P-32	316,431.19
Samiano, Raneliza D.	348,114.67	348,144.67	P-23, P-23-1, P-32	348,144.67
Tiangco, Cinderella C.	700,835.89	700,835.89	P-24, P-32	700,835.89
Tolentino, Josefina A.	440,413.94	440,413.94	P-25, P-32	440,413.94
Yabut, Maria Charmina G.	201,211.78	201,211.78	P-29, P-32	201,211.78
Zafra, Sharon S.	287,846.38	287,846.38	P-30, P-32	287,846.38
Total	**₱ 9,566,678.70**	**₱ 9,568,626.50**		**₱9,566,626.40**

[1] CTA EB No. 1976 Docket, pp. 1-74.
[2] CTA EB No. 1978 Docket, pp. 1-89.
[3] Penned by Associate Justice Catherine T. Manahan, with Associate Justice Ma. Belen M. Ringpis-Liban concurring and Associate Justice Juanito C. Castañeda, Jr. dissenting; CTA EB No. 1976 Docket, pp. 24-59.
[4] Penned by Associate Justice Catherine T. Manahan, with Associate Justice Ma. Belen M. Ringpis-Liban concurring and Associate Justice Juanito C. Castañeda, Jr. maintaining his Dissenting Opinion; CTA EB No. 1976 Docket, pp. 61-68.

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However, with regard to the claims for refund covering the year 2013, the same is hereby **DENIED** for lack of merit.

SO ORDERED."

<u>November 20, 2018 Resolution</u>

"**WHEREFORE**, in light of the foregoing premises, [p]etitioners' *Motion for Partial Reconsideration and respondent's Motion for Partial Reconsideration (Re: Decision dated September 25, 2018*) are both **DENIED** for lack of merit.

SO ORDERED."

Dino *et al.* seeks the reversal of the denial of their refund claim with respect to their income tax payments for TY 2013 while the CIR prays for the denial of the entire refund claim of Dino *et al.* representing their income tax payments for TYs 2012 and 2013.

PARTIES

The CIR[5] is the government official charged with the administration and enforcement of national internal revenue laws, with power to grant refunds and tax credits of tax erroneously or illegally collected. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Dino, *et al.*[6] are all of legal age, Filipinos and at the time they paid their respective income taxes on their compensation income for TYs 2012 and 2013, were employed at the Asian Development Bank (ADB) which office is located at 6 ADB Avenue, Mandaluyong City 1550.[7]

FACTS

The undisputed facts of the case, as narrated by the Court in Division and supported by evidence, are as follows:

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[5] The incumbent CIR is Hon. Caesar R. Dulay.
[6] Dino *et al.* are composed of the following Filipino ADB Employees, namely: Anna Clarissa C. Araullo, Sonia Marie P. Arceo, Angela Cecilia C. Concio, Maria Lorena L. Dino, Arlene C. Dogelio, Marizenia G. Estrella, Gloria P. Gerilla-Teknomo, Marie Rose Rhodora King, Benedict M. Lamberte, Carmela Theresa E. Littaua, Elsa Del Valle Mariano, Jocelyn Erlinda S. Munsayac, Lalinka Yana M. Padrinao, Maria Luisa T. Panlilio, Zynthia Albina N. Potian, Marife B. Principe, Rosanna R. Raymundo, Raneliza D. Samiano, Cinderella C. Tiangco, Josefina A. Tolentino, Maria Charmina G. Yabut, and Sharon S. Zafra.
[7] Petition for Review, CTA EB No. 1978 Docket, pp. 1-2; Paragraph II, Pre-Trial Order, CTA EB No. 1976 Docket, p. 166; Paragraph I(1), Joint Stipulation of Facts and Issues, CTA Case No. 9083 Docket, p. 158.

On April 12, 2013, the CIR issued Revenue Memorandum Circular (RMC) No. 31-2013 *(Guidelines on the Taxation of Compensation Income of Philippine Nationals and Alien Individuals Employed by Foreign Governments/Embassies/Diplomatic Missions and International Organization Situated in the Philippines),* which provides, among others, that officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax, *viz.*:

> "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
>
> (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
>
> (b) **Exemption from taxation on or in respect of the salaries and emoluments paid by the Bank <u>subject to the power of the Government to tax its nationals</u>**;'
>
> From the above, **only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax**. xxx" *(Boldfacing supplied)*

Dino *et al.* filed their respective Annual Income Tax Returns and paid the income tax due thereon on the following dates[8]:

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[8] Petition for Review, CTA Case No. 9083 Docket, p. 14; Decision, CTA EB No. 1976 Docket, pp. 35-36.

Employee Name	Date of Full Payment of 2012 Income Tax	Date of Full Payment of 2013 Income Tax
Maria Lorena Dino	7/11/2013	4/10/2014
Benedict Lamberte	7/12/2013	3/21/2014
Ma. Luisa Panlilio	7/12/2013	4/14/2014
Elsa Mariano	7/12/2013	3/4/2014
Zynthia Pontian	7/12/2013	4/2/2014
Anna Clarissa Araullo	7/12/2013	4/11/2014
Maria Charmina Yabut	7/12/2013	4/11/2014
Angela Cecilia Concio	7/15/2013	3/21/2014
Jocelyn Erlinda Munsayac	7/15/2013	4/11/2014
Marife Principe	7/15/2013	4/10/2014
Raneliza Samiano	7/15/2013	4/4/2014
Josefina Tolentino	7/15/2013	3/21/2014
Lalinka Padrinao	7/15/2013	4/11/2014
Cinderella Tiangco	7/15/2013	4/11/2014
Gloria Gerilla-Teknomo	7/15/2013	4/10/2014
Rosanna Raymundo	7/15/2013	4/11/2014
Arlene Dogelio	7/15/2013	4/7/2014
Marie Rose Rhodora King	7/15/2013	4/8/2014
Carmela Theresa Littaua	7/15/2013	4/11/2014
Sharon Zafra	7/15/2013	4/8/2014
Marizenia Estrella	7/15/2013	4/11/2014
Sonia Maria Arceo	N/A	4/14/2014

In February 2014, other Filipino ADB employees, represented by Mr. Erwin Salaveria and Ms. Portia Gonzales questioned the legality of RMC No. 31-2013 in the Regional Trial Court (RTC) of Mandaluyong City, seeking its invalidation. Their case was docketed as Civil Case No. MC14-8775 entitled *Erwin Salaveria (sic) and Portia Gonzales, by themselves and as Attorneys-in-Fact of the concerned Filipino employees of Asian Development Bank, Petitioners versus Commissioner of Internal Revenue, Respondent.*[9]

On September 30, 2014, the RTC of Mandaluyong City promulgated a decision in Civil Case No. MC14-8775 declaring Section 2 (d) (1) of RMC No. 31-2013 as void for being issued without legal basis, in excess of authority and/or without due process of law; and due to the absence of legislation or regulation to the contrary.[10]

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[9] Petition for Review, CTA EB No. 1978 Docket, p. 6; Decision, CTA EB No. 1978 Docket, p. 50; Exhibit "P-1", CTA Case No. 9083, pp. 406-437.
[10] *Id.*

On the basis of the September 30, 2014 Decision in Civil Case No. MC14-8775, Dino *et al.* filed their respective refund claims with the CIR[11] on May 14, 2015[12] and June 5, 2015.[13]

In the Letter dated May 26, 2015[14] and received on June 30, 2015 by Dino *et al.*'s counsel, the CIR denied the refund claim filed on May 14, 2015 while the refund claim filed on June 5, 2015 was unacted by the CIR.[15]

Thus, on July 9, 2015, Dino *et al.* timely filed their Petition for Review with the Court in Division.[16]

On August 26, 2015, within the extended period, the CIR filed his Answer.[17] He contended, among others, that: (i) Dino *et al.* being Filipino citizens and residents of the Republic of the Philippines are subject to Philippine Income Tax; (ii) in signing the ADB Headquarters Agreement in 1956, the Philippine Government accorded tax exemption privileges to the ADB and its staff, but held on to its inherent power to tax; (iii) RMC No. 31-2013 is valid because it is only a clarification of existing policies etched in Philippine law; and, (iv) a tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer.

On October 29, 2015, the Pre-trial Conference was conducted.[18] On December 1, 2015, the parties filed their Joint Stipulation of Facts and Issues (JSFI).[19] On January 18, 2016, the parties' JSFI was approved, the Pre-trial was terminated and a Pre-trial Order was issued.[20]

During trial, Dino *et al.* presented their sole witness, Atty. Peter Paul S. Romero[21] while the CIR did not present any evidence opining that the case involves legal issues only.[22]

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[11] Petition for Review, CTA EB No. 1978 Docket, p. 6.
[12] Exhibit "P-4", CTA Case No. 9083 Docket, pp. 45-53.
[13] Exhibit "P-5", CTA Case No. 9083 Docket, pp. 54-65.
[14] Annex "C", Petition for Review, CTA Case No. 9083 Docket, p. 66.
[15] Petition for Review, CTA Case No. 9083 Docket, p.13.
[16] CTA Case No. 9083 Docket, pp. 10-108.
[17] CTA Case No. 9083 Docket, pp. 117-127.
[18] CTA Case No. 9083 Docket, pp. 130.
[19] CTA Case No. 9083 Docket, pp. 158-161.
[20] CTA Case No. 9083 Docket, pp. 166-168.
[21] CTA Case No. 9083 Docket, pp. 260, 338, 340 and 397-398.
[22] CTA Case No. 9083 Docket, pp. 397-398.

On February 13, 2017, Dino *et al.* filed their Formal Offer of Evidence (for the Petitioners).[23] All their offered exhibits were admitted in evidence in the Resolutions dated August 29, 2017[24] and January 22, 2018[25] without the CIR's comment despite notice.[26]

On May 31, 2017, the CIR filed his Memorandum[27] while on January 29, 2018, Dino *et al.* filed their Memorandum with Manifestation.[28]

In the Resolution dated January 31, 2018, the Court in Division submitted the case for decision.[29]

On September 25, 2018, the Court in Division promulgated the assailed Decision which partially granted Dino *et al.*'s refund claim.[30]

On October 11, 2018, both parties timely filed their respective Motions for Partial Reconsideration of the Decision dated September 25, 2018.[31]

On November 20, 2018, the Court in Division denied both Motions for Partial Reconsideration for lack of merit.[32]

Undaunted, both parties timely appealed to the Court *En Banc.*

Considering that the captioned cases are appeals from the Decision dated September 25, 2018 and Resolution dated November 20, 2018, both rendered by the Court in Division, they were consolidated in the Court *En Banc*'s Minute Resolution dated December 14, 2018.[33]

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[23] CTA Case No. 9083 Docket, pp. 399- 450.
[24] CTA Case No. 9083 Docket, pp. 475-476.
[25] CTA Case No. 9083 Docket, pp. 489-491.
[26] Records Verification dated March 2, 2017, CTA Case No. 9083 Docket, p. 451; and Records Verification dated November 7, 2017, CTA Case No. 9083 Docket, p. 487.
[27] CTA Case No. 9083 Docket, pp. 452-473.
[28] CTA Case No. 9083 Docket, pp. 492-502.
[29] CTA Case No. 9083 Docket, p. 504.
[30] *Supra*, Note 3.
[31] Motion for Partial Reconsideration dated October 11, 2018, CTA Case No. 9083 Docket, pp. 543-557; Motion for Partial Reconsideration (Re: Decision dated September 25, 2018) dated October 10, 2018, CTA Case No. 9083 Docket, pp. 558-582.
[32] *Supra*, Note 4.
[33] CTA EB No. 1976 Docket, p. 75.

In the Resolution dated January 3, 2019, the parties were directed to file their comments on the petitions within ten (10) days from receipt thereof.[34]

On January 28, 2019, Dino *et al.* timely filed their Comment/Opposition[35] while the CIR failed to file his comment despite notice.[36]

In the Resolution dated April 2, 2019, the petitions were given due course and the parties were directed to submit simultaneously their respective memoranda within thirty (30) days from receipt thereof.[37]

On May 14, 2019, Dino *et al.* filed their Memorandum[38] while the CIR failed to file his memorandum despite notice.[39]

In the Resolution dated June 26, 2019, the consolidated cases were deemed submitted for decision.[40]

Hence, this Decision.

ISSUES

The parties submitted the following issues for this Court's resolution:

> 1. Whether Dino *et al.* failed to substantiate their refund claim in the aggregate amount of P20,452,112.00 representing their income tax payments for TYs 2012 and 2013;[41]
>
> 2. Whether the RTC Decision in Civil Case No. MC14-8775 declaring Section 2 (d) (1) of RMC No. 31-2013 as void, is not a binding precedent;[42]

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[34] CTA EB No. 1976 Docket, pp. 77-78.
[35] CTA EB No. 1976 Docket, pp. 79-85.
[36] Records Verification dated March 5, 2019, CTA EB No. 1976 Docket, p. 86.
[37] CTA EB No. 1976 Docket, pp. 88-89.
[38] CTA EB No. 1976 Docket, pp. 90-110.
[39] Records Verification dated May 27, 2019, CTA EB No. 1976 Docket, p. 111.
[40] CTA EB No. 1976 Docket, pp. 113-114.
[41] Petition for Review, CTA EB No. 1976 Docket, p. 2.
[42] *Id.*

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3. Whether or not legislation is necessary in order to tax the income of Filipino ADB employees such as Dino, *et al.*;[43] and,

4. Whether or not an income tax on the salaries and emoluments of Filipino ADB employees is discriminatory and a violation of the equal protection of the laws.[44]

Essentially, the issue for the Court *En Banc*'s consideration is whether or not Dino *et al.*, who are Filipino employees of the ADB, are exempt from income tax for TYs 2012 and 2013.

PARTIES' ARGUMENTS

Arguments of the CIR

Dino *et al.* are not entitled to the refund of their income tax payments for TYs 2012 and 2013 for failure on their part to substantiate their claim for refund. Their income is subject to Philippine Income Tax, considering that taxation of income in the Philippines is based on citizenship, residency and source principles. As they are Filipino citizens and under the employ of the ADB with business address at ADB Avenue, Ortigas Center, Pasig City, there is no doubt that they are liable for income tax on the compensation income they earned on account of such employment.

In signing 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) in 1956, the Philippine Government accorded tax exemption privileges to ADB and its staff, but held on to its inherent power to tax, and thus made a clear limitation in so far as its right to tax its nationals. When the Philippine Congress issued Resolution No. 6 to the effect that the Senate of the Philippines concurs in the ratification by the President of the Philippines of the "Agreement Establishing the Asian Development Bank" (ADB Charter), it was subject to the reservation that the Philippines retains for itself and its political subdivisions the right to tax the salaries and emoluments paid by ADB to its citizens or nationals pursuant to Article 56, paragraph 2 of the ADB Charter. By making a "reservation", the Philippines simply intimated that in entering upon the ADB Headquarters Agreement, the only effect is that the income of ADB is exempt from tax by virtue of the Agreement but not the income derived by Filipinos from ADB. Contrary

[43] Petition for Review, CTA EB No. 1978 Docket, p. 8.
[44] *Id.*

to Dino *et al.*'s claim, Article XII of the ADB Headquarters Agreement covers the privileges and immunities of the officers of ADB as well as its staff.

Thus, there is no need for an executing law to implement the "reservation" because Philippine Tax Law already provides that Filipinos are liable for tax on income derived from within and without the Philippines. The construction of the word "reservation" can only be accorded its plain meaning. Since 1939, Filipinos earning income derived from outside the Philippines are liable to tax for such income pursuant to Section 37 in relation to Section 45 of the National Internal Revenue Code (NIRC) of 1939; Section 21 in relation to Section 27 of the NIRC of 1977; and Section 24 in relation to Section 51 of the NIRC of 1997. While international comity is laudable and a constitutional requirement, the power to tax is an inherent power of the State that cannot be bargained away so easily.

Further, RMC No. 31-2013 is valid because it is only a clarification of existing policies etched in Philippine Law. The alleged subsequent practice of not taxing Filipino ADB employees' income, which is contrary to existing law, cannot in any way displace what the law had provided from the start. Not even that customs, which are contrary to law, may be countenanced. A tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer.

Furthermore, the RTC decision in Civil Case No. MC14-8775 declaring Section 2 (d) (1) of RMC No. 31-2013 as void, is not a binding precedent. In *Edzen Jogie B. Garcia vs. Commissioner of Internal Revenue*,[45] and *Anthony Ortile Tuazon vs. Commissioner of Internal Revenue*,[46] the Court in Divisions ruled that the taxability of income received by Filipino ADB employees is not dependent on the validity or invalidity of RMC No. 31-2013, as the same is based on the existing provisions of the Tax Code. Further, in *Majella R. Canzon and Helen B. Cruda vs. Commissioner of Internal Revenue,*[47] the Court in Division ruled that *sans* a specific grant of income tax exemption, the salaries and emoluments received by officers and employees of the ADB who are resident citizens or nationals of the Philippines are subject to income tax pursuant to Section 24 (A) (1) (a) of the NIRC of 1997, as amended.

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[45] CTA Case No. 9075, February 9, 2017.
[46] CTA Case No. 9041, February 24, 2017.
[47] CTA Case No. 9384, September 28, 2018.

Dino *et al.*, in their Comment/Opposition, counter that the CIR is in error in arguing that they are subject to income tax by virtue of their being citizens and residents of the Philippines. They insist that their claim for tax exemption has already been settled by a court of law having jurisdiction over the same. Thus, they submit that the only matter to be settled by the Court *En Banc* is whether they have complied with the requirements for the refund of their income tax.

On the matter of the refund sought, Dino *et al.* aver that they have presented clear and unequivocal evidence to prove their allegations that: (i) they are Filipinos; (ii) they were regular employees of the ADB at the time they paid their respective income taxes for TYs 2012 and 2013; and, (iii) they paid their respective income taxes for said TYs. On the other hand, the CIR did not present any countervailing evidence to rebut their allegations.

Assuming purely for the sake of argument that the matters raised by the CIR in his Petition are valid and binding, Dino *et al.* claim that the same still lack merit. The "reservation" of the right to tax the salaries of Philippine nationals only means that the exercise of said right was withheld. An operative act is still needed to remove it from its reserved statu

s. Consequently, an implementing legislation must be passed, and in the meantime, absent this legislation, the Filipino ADB employees should enjoy the general rule in the ADB Charter of tax exemption.

Arguments of Dino *et al.*

The government's power to tax Filipino ADB employees still requires the passage of a law that clearly, unequivocally and directly states that henceforth their compensation will be subject to income tax. The word "reservation" in the Philippine Senate's ratification of the ADB Charter cannot by itself already be construed as the excepting clause to the tax exemptions in the treaty.

Under Article 56 of the ADB Charter, non-taxation of the salary is the general rule while taxation is the exception. As an exception to the general rule of the ADB Charter, its taxability should be strictly construed.

The assailed Decision failed to take into account that the term "reservation" has a specific meaning under the Vienna Convention on the Law of Treaties particularly, Article 2 (d)[48] thereof. The word "purports" in the definition of reservation allegedly means "to claim to be or to do a particular thing when the claim may not be true". Thus, if the reservation merely purports to exclude or to modify the legal effect of certain provisions of a treaty, then such exclusion or modification is not categorical and definite. If the Philippine Government's reservation to the ADB Charter only purports to tax its nationals, then something express, categorical and definite must follow in order for the purported taxation to be clothed with authority. Here, what must follow is no less than proper legislation. A tax burden cannot be based on something not categorical or not definite or simply implied.

Assuming there is doubt in the interpretation of the reservation clause, *i.e.* Article 56 of the ADB Charter, and in the subsequent ratification of the ADB Charter, the Vienna Convention on the Law of Treaties itself provides the rules of interpretation. Section 3, Article 31[49] thereof provides, among others, that together with the context for the purpose of the interpretation of a treaty, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation must be taken into account.

It is evident that based on the subsequent practice of the Philippine Government and the ADB, there was no intention to tax the salaries of Filipino ADB employees. Specifically, (1) for close to 50 years since the establishment of ADB, the salaries of Filipino ADB employees have not been subjected to income tax; in the past, the Bureau of Internal Revenue (BIR) even refused to issue them Tax Identification Numbers; (2) Regional Director Antonio Ortega of Mandaluyong City opined and confirmed that salaries and emoluments of ADB officers and staff are exempt from taxation citing Article 56 of

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[48] Article 2, Use of Terms, (d) 'reservation' means a unilateral statement, however, phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

[49] SECTION 3. INTERPRETATION OF TREATIES

Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. *(Boldfacing supplied)*

the ADB Charter; (3) the Philippine Government even enhanced the tax privileges of ADB through Executive Order No. 161 dated April 21, 1987 of President Corazon Aquino and Memorandum Circular No. 94, S. 1984 of President Fidel V. Ramos, "enjoining all government agencies to recognize and respect the privileges and immunities of the Asian Development Bank and its staff;" and, (4) most member countries of the ADB that either reserved or retained the right to tax their nationals employed in the county office of ADB have practiced exemption rather than taxation which underscores that even among member nations, tax exemption is the rule. Regardless whether their national are to be taxed or not, these member countries have passed legislation on the matter of taxation.

Absent an implementing law, like in the case of the Philippines, the power to tax may be arbitrarily and whimsically exercised as what precisely happened in 2012, when the BIR was accepting income tax payments based on both 32% (maximum graduated rate) and 15% (then preferential rate for Regional Headquarters) rates from Filipino ADB employees since there was no clear rule on what tax rate to apply. Without an implementing law, discretion is left with the CIR. Without the limits or standards on the power to tax, which can only be prescribed by the Legislature, the CIR's acts will necessarily be beyond authority and/or tainted with grave abuse as exemplified by the retroactive application of RMC No. 31-2013 to cover taxation of income earned prior to its effectivity.

The use of the word "reservation" in the ratification instruments of the Philippines instead of an outright retention of the right to tax its nationals should be presumed as a conscious and deliberate act on the part of both Executive and Legislative Branches of the government. This should not be presumed as an accident or an oversight in statutory drafting since "reservation" has a specific meaning in the context of international law and treaty interpretation. Thus, by making a reservation that the Philippines retains for itself the right to tax, it can only mean that the existence of that right is withheld in the meantime until the government calls on its reservation through an implementing legislation. Absent such legislation, the Filipino ADB employees should enjoy the general rule of tax exemption provided by the ADB Charter.

The Court in Division's ruling that under the NIRC, Filipinos earning income from without are already taxed on such income is militated by the fact that the NIRC is a law of general application while the ADB Charter is a specific law; Filipino employees were not taxed even after the establishment of ADB; and as a tax burden, RMC No. 31-2013 must be interpreted against the taxing authority.

Finally, a tax on the salary of the Filipino officials and employees of ADB is discriminatory and a violation of the equal protection of the laws. ADB and its officials and employees should not be treated differently from the other International Organizations covered by 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.

RULING OF THE COURT *EN BANC*

Petitions for Review were timely filed

Section 18 of Republic Act No. 1125, as amended, *vis-à-vis* Section 3 (b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, provides that a party adversely affected by a decision or a resolution of a Division of the Court on a motion for reconsideration or new trial, may file a petition for review with the Court *En Banc* within fifteen (15) days from receipt of the questioned decision or resolution.

In the cases at bar, the assailed Decision dated September 25, 2018 was received by the parties on September 26, 2018.[50] Thus, the filing of their respective Motions for Partial Reconsideration on October 11, 2018 was timely.

The assailed Resolution dated November 20, 2018 was received by the CIR on November 27, 2018 and by Dino *et al.* on November 28, 2018.[51] Thus, the filing of their respective Petitions on December 12, 2018 and December 13, 2018 was timely.

On the substantive merits of the Petitions, the Court *En Banc* has in earlier cases[52] settled the controversy relating to the taxation of income of Filipino ADB employees, where the Court *En Banc* denied the Filipino ADB employees' refund claims for their paid income taxes for TYs 2012 and 2013. The Court *En Banc* sees no compelling reason to decide the present consolidated cases differently.

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[50] CTA Case No. 9083 Docket, p. 505

[51] CTA Case No. 9083 Docket, p. 592.

[52] *Edzen Jogie B. Garcia vs. Commissioner of Internal Revenue,* CTA EB No. 1674, December 6, 2018; *Anthony Ortile Tuason vs. Commissioner of Internal Revenue,* CTA EB No. 1700, February 28, 2019; and, *Commissioner of Internal Revenue vs. Licel Calderon et al. / Licel Calderon et al. vs. Commissioner of Internal Revenue,* CTA EB Nos. 1876 and 1878, July 2, 2019; *Commissioner of Internal Revenue vs. Rowena Vicente, et al. / Rowena Vincente, et al. v. Commissioner of Internal Revenue,* CTA EB Nos. 1717 and 1718, August 8, 2019.

RTC Decision in Civil Case No. MC14-8775, declaring Section 2 (d) (1) of RMC No. 31-2013 as void, is not a binding precedent

Dino *et al.*'s reliance on the RTC Decision in Civil Case No. MC14-8775 is misplaced.

The RTC Decision in Civil Case No. MC14-8775 is insignificant in the resolution of the present Petitions. For one, Dino *et al.* are not parties to the said civil case where the doctrine of *res judicata* may possibly apply. For another, as correctly ruled by the Court in Division, it is not a binding precedent that forms part of the Philippine legal system such that *stare decisis* becomes operative since only decisions issued by Supreme Court become part of the legal system.[53]

Notably, the RTC Decision in Civil Case No. MC14-8775 appears to be jurisdictionally infirm insofar as it declared Section 2 (d) (1) of RMC No. 31-2013 a nullity. In *Banco De Oro, et. al. vs. Republic of the Philippines, et al.,*[54] the Supreme Court in no uncertain terms confirmed the exclusive jurisdiction of the Court of Tax Appeals (CTA) to determine the validity or constitutionality of tax laws, rules and regulations, *viz.*:

> We revert to the earlier rulings in *Rodriguez, Leal*, and *Asia International Auctioneers, Inc.* **The Court of Tax Appeals has exclusive jurisdiction to determine the constitutionality or validity of tax laws, rules and regulations, and other administrative issuances of the Commissioner of Internal Revenue.**
>
> xxx xxx xxx
>
> **Section 7, as amended, grants the Court of Tax Appeals the exclusive jurisdiction to resolve all tax-related issues:**
>
> xxx xxx xxx
>
> **The Court of Tax Appeals has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer as a defense in disputing or contesting an assessment or claiming a refund. It is only in the lawful exercise of its power to pass upon all maters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.**

[53] G.R. No. 204039, January 29, 2018.
[54] G.R. No. 198756, August 16, 2016.

> **This Court, however, declares that the Court of Tax Appeals may likewise take cognizance of cases directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance (revenue orders, revenue memorandum circulars, rulings).**
>
> Section 7 of Republic Act No. 1125, as amended, is explicit that, except for local taxes, appeals from the decisions of quasi-judicial agencies (Commissioner of Internal Revenue, Commissioner of Customs, Secretary of Finance, Central Board of Assessment Appeals, Secretary of Trade and Industry) on tax-related problems must be brought *exclusively* to the Court of Tax Appeals.
>
> **In other words, within the judicial system, the law intends the Court of Tax Appeals to have exclusive jurisdiction to resolve all tax problems.** Petitions for writs of certiorari against the acts and omissions of the said quasi-judicial agencies should, thus, be filed before the Court of Tax Appeals.
>
> Republic Act No. 9282, a special and later law than Batas Pambansa Blg. 129 provides an exception to the original jurisdiction of the Regional Trial Courts over actions questioning the constitutionality or validity of tax laws or regulations. Except for local tax cases, actions directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance may be filed directly before the Court of Tax Appeals.
>
> Furthermore, with respect to administrative issuances (revenue orders, revenue memorandum circulars, or rulings), these are issued by the Commissioner under its power to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws. Tax rulings, on the other hand, are official positions of the Bureau on inquiries of taxpayers who request clarification on certain provisions of the National Internal Revenue Code, other tax laws, or their implementing regulations. Hence, the determination of the validity of these issuances clearly falls within the exclusive appellate jurisdiction of the Court of Tax Appeals under Section 7(1) of Republic Act No. 1125, as amended, subject to prior review by the Secretary of Finance, as required under Republic Act No. 8424. *(Boldfacing supplied; citations omitted)*

Needless to say, the Court *En Banc* may not be deprived of its power to review the validity of a claim for tax refund, falling as it is within its exclusive appellate jurisdiction, simply on the basis of the existence of the RTC Decision in Civil Case No. MC14-8775.

The NIRC of 1997, as amended, implements the Philippine Government's reservation of its right to tax its nationals

Dino *et al.* concedes that the Philippine Government reserved its right to tax Filipino ADB employees on their salaries and emoluments received from ADB. But they are adamant that such reservation is not self-executing, such that a specific legislation must be passed to impose income tax on the salaries and emoluments of Filipino ADB employees allegedly similar to the practice of other members of the ADB.

The Court *En Banc* agrees with the Court in Division in concluding that a scrutiny of the relevant treaty and legislative issuances show that Congress indeed intended to tax the salaries and emoluments received by Filipino ADB employees and that they are covered by the provisions of the NIRC of 1997, as amended. Thus, there is no need to enact a law to subject their income to tax.

The ADB Charter executed on December 5, 1965, relied upon by Dino *et al.* in claiming tax exemption, states:

"Article 56
EXEMPTION FROM TAXATION

1. The Bank, its assets, property, income and its operations and transactions, shall be exempt from all taxation and from all customs duties. The Bank shall also be exempt from any obligation for the payment, withholding or collection of any tax or duty.

2. **No tax shall be levied on or in respect of salaries and emoluments paid by the Bank** to Directors, alternates, officers or **employees of the Bank**, including experts performing missions for the Bank, **<u>except</u> where a member deposits with its instrument of ratification or acceptance a declaration that such member <u>retains</u> for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member**." *(Boldfacing and underscoring supplied)*

Surely, the ADB Charter provides a tax exemption provision with respect to the salaries and emoluments paid by ADB to its officers and employees but the same ADB Charter also clarifies that the tax exemption does not apply where the member-country retains the right to tax the salaries and emoluments paid by ADB to their citizens or nationals in the instrument of ratification or acceptance.

The ADB Charter was ratified and confirmed by the Philippine Government with a reservation through Senate Resolution No. 6 dated March 16, 1966, *viz.*:

> "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 emoluments paid by the Bank to citizens or nationals of the Philippines</u>**." *(Boldfacing and underscoring supplied)*

The aforesaid ratification and confirmation was made by the Philippine Government, pursuant to Article 56 (2) of the ADB Charter. Note the categorical proviso that the ratification and confirmation of the ADB Charter is "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". There is nothing in Senate Resolution No. 6 which would suggest, even remotely, that the Philippine Government has granted tax exemption to its citizens or nationals with respect to salaries and emoluments paid by ADB. Had it been the intention of the Philippine Government to exempt from income tax the salaries or emoluments that its citizens or nationals would derive from ADB, a full ratification of the ADB Charter could have been made, without any declaration as to the retention of its right to tax its citizens or nationals.[55]

On the other hand, the ADB Headquarters Agreement, signed on December 22, 1966, pertinently provides:

> "ARTICLE XII
>
> Privileges and Immunities of Governors and Other Representatives of Members, Directors, President, Vice-President and Others
>
> xxx xxx xxx

[55] *Edzen Jogie Garcia vs. Commissioner of Internal Revenue,* CTA Case No. 9075, February 9, 2017.

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" *(Boldfacing and underscoring supplied)*

The ADB Headquarters Agreement likewise recognizes the tax exemption privilege of ADB officers and employees but said Agreement also declares in no uncertain terms that the same is subject to the power of the Government to tax its nationals.[56]

The NIRC of 1997, a subsequent legislation which took effect on January 1, 1998, leaves no room for doubt that Filipino ADB employees are subject to tax on income derived from all sources within and without the Philippines.

Salaries and emoluments of Filipino ADB employees are subject to income tax under Sections 23 (A) and 24 (A) (1) (a) of the NIRC of 1997, as amended

Under Section 23 (A) and 24 (A) (1) of the NIRC of 1997, as amended, resident citizens are taxed on their income derived from all sources within and without the Philippines, *viz.*:

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

(A) A Citizen of the Philippines residing therein is taxable on all income derived from sources within and without the Philippines;"

xxx xxx xxx

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[56] *Id.*

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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**;" *(Boldfacing supplied)*

While a resident citizen is taxable on all income derived from all sources within and without the Philippines, Section 32 of the NIRC of 1997, as amended, exempts from income taxation, income exempt under a treaty, *viz.*:

SEC. 32. *Gross Income.* –

(A) *General Definition.*- Except when otherwise provided in this Title, gross income means all income derived from whatever source, including (but not limited to) the following items:

xxx xxx xxx

(B) *Exclusions from Gross Income.*- The following items shall not be included in gross income and shall be exempt from taxation under this Title:

(1) Life Insurance. – xxx xxx xxx

xxx xxx xxx

(5) *Income Exempt under Treaty.* -Income of any kind to the extent required by a treaty obligation binding upon the Government of the Philippines. *(Boldfacing supplied)*

xxx xxx xxx

Thus, in general, a resident citizen is taxable on all income derived from all sources within and without the Philippines, except in a situation where the resident citizen is exempt under the provisions of the NIRC of 1997, as amended.

Based on the afore-quoted provisions of the NIRC of 1997, as amended, Dino *et al.* who are employees working with the ADB and resident citizens or nationals of the Philippines are taxable on their income from all sources, including their income derived from the ADB.

The taxability of the income received by Filipino ADB employees from the ADB is not dependent on the validity or invalidity of RMC No. 31-2013 as the same is based on existing provisions of the NIRC of 1997, as amended, in relation to the treaty and/or agreement between the Philippine Government and the ADB. Consequently, their obligation as resident citizens or nationals to pay income tax commenced on the taxable year that they were employed by the ADB, not on the effectivity of RMC No. 31-2013.

The issuance of RMC No. 31-2013 does not have the effect of modifying any rules or regulations promulgated by the CIR, as there is nothing on record which would show that the CIR had, in the past, issued any rules or regulations exempting from income tax the income derived by resident citizens or nationals of the Philippines who are employees of ADB. Thus, Section 246 of the NIRC of 1997, as amended, on the non-retroactivity of rulings, does not find any application in resolving these consolidated cases.

Previous acts of the BIR of not subjecting to income tax the salaries and emoluments derived by Filipino ADB employees and tax exemptions granted by other ADB member-States relative to the ADB Charter are not sufficient to exempt them from payment of income tax

The purported practice of the BIR in not subjecting to income tax the salaries and emoluments derived by Filipino ADB employees from their employment with the ADB as well as the tax-exemptions granted by other ADB member-States relative to the ADB Charter are not sufficient to exempt them from payment of income tax; neither do they negate the Philippine Government's right to tax its nationals or citizens, as mandated by the NIRC of 1997, as amended. Verily, the government is never estopped from collecting legitimate taxes because of the error committed by its agents.[57]

Besides, while non-payment of taxes cannot be considered as custom, yet, even if so, Article 11 of the Civil Code provides that "[c]ustoms which are contrary to law, public order or public policy shall not be countenanced."

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[57] *La Suerte Cigar & Cigarette Factory vs. Court of Appeals and Commissioner of Internal Revenue,* G.R. No. 125346, November 11, 2014.

Present controversy can be settled without passing upon the constitutionality of RMC 31-2013

Dino *et al.* insist that a tax on the salary of the Filipino officials and employees of the ADB is discriminatory and a violation of their right to equal protection of the laws.

The prevailing rule in constitutional litigation is that no question involving the constitutionality or validity of a law or governmental act may be heard and decided by the Court unless the issue of constitutionality must be the very *lis mota* of the case."[58]

The *lis mota* requirement means that the petitioner who questions the constitutionality of a law must show that the case cannot be resolved unless the disposition of the constitutional question is unavoidable. Consequently, if there is some other ground *(i.e.* a statute or law) upon which the court may rest its judgment, that course should be adopted and the question of constitutionality avoided.[59]

Considering that the merits of the present controversy have been fully addressed without the need of touching on the constitutional issue raised by Dino *et al.*, the Court will no longer pass upon such issue.

It cannot be over-emphasized that tax refunds, being in the nature of tax exemptions, are construed in *strictissimi juris* against the taxpayer and liberally in favor of the government.[60] Exemption from taxation is never presumed. For tax exemption to be recognized, the grant must be clear and express; it cannot be made to rest on doubtful implications.[61]

WHEREFORE, in view of the foregoing disquisitions, the Petition for Review filed by Maria Lorena Dino, *et al.*[62] is **DENIED** for lack of

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[58] *Samahan ng mga Progresibong Kabataan (SPARK), et al., vs. Quezon City, as represented by Mayor Herbert Bautista, et al.*, G.R. No. 225442, August 8, 2017.
[59] *Republic of the Philippines, represented by the Pollution Adjudication Board vs. N. Dela Merced & Sons, Inc.*, G.R. No. 201501, January 22, 2018.
[60] *Eastern Telecommunications Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 183531, March 25, 2015.
[61] *Michel J. Lhuiller Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 166786, May 3, 2006.
[62] Dino *et al.* are composed of the following Filipino ADB employees, namely: Anna Clarissa C. Araullo, Sonia Marie P. Arceo, Angela Cecilia C. Concio, Maria Lorena L. Dino, Arlene C. Dogelio, Marizenia G. Estrella, Gloria P. Gerilla-Teknomo, Marie Rose Rhodora King, Benedict M. Lamberte, Carmela Theresa E. Littaua, Elsa Del Valle Mariano, Jocelyn Erlinda S. Munsayac, Lalinka Yana M. Padrinao, Maria Luisa T. Panlilio, Zynthia Albina N. Potian, Marife B. Principe,

merit while the Petition for Review filed by the Commissioner of Internal Revenue is **GRANTED.** Accordingly, the assailed September 25, 2018 Decision and November 20, 2018 Resolution in CTA Case No. 9083 are hereby **REVERSED** and **SET ASIDE**. The refund claims of Maria Lorena Dino *et al.* for TYs 2012 and 2013 are **DENIED** for lack of merit.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(Please see Concurring and Dissenting Opinion.)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With due respect, please see my Concurring and Dissenting Opinion.)
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(With due respect, I join the Concurring and Dissenting Opinion of Justice Liban.)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Rosanna R. Raymundo, Raneliza D. Samiano, Cinderella C. Tiangco, Josefina A. Tolentino, Maria Charmina G. Yabut, and Sharon S. Zafra.

CERTIFICATION

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

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 1976
(CTA Case No. 9083)

- versus -

MARIA LORENA DINO, *ET.AL.,*
Respondents.

x--x

MARIA LORENA DINO, *ET.AL.,*
Petitioners,

CTA EB NO. 1978
(CTA Case No. 9083)

Present:

- versus -

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

OCT 09 2019

2:03 p.m.

x--x

CONCURRING & DISSENTING OPINION

With all due respect to the *ponencia* of my esteemed colleague, Hon. Roman G. Del Rosario, which denied the Petition for Review of Maria Lorena Dino, et al. in CTA EB No. 1978 for lack of merit, and granted the Petition for Review of the Commissioner of Internal Revenue (CIR) by reversing and setting aside the assailed September 25, 2018 Decision and November 20, 2019 Resolution in CTA Case No. 9083, effectively denying the refund claims of Petitioners for TY 2012 and 2013, I register my concurrence and dissent, as will be discussed below.

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 believe that RMC 31-2013 is indeed 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, the CIR subjected petitioners' 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

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

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 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

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

> 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)*

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.

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

In the present case, petitioners received the compensation income being subject to income tax in calendar year 2012. During this period, petitioners believed in good faith that their compensation income was exempt from tax. Prior to the issuance of RMC 31-2013, the CIR did not enforce any rules that would lead petitioners to believe otherwise. When the CIR 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, petitioners were constrained to file their Income Tax Return for calendar year 2012 and pay the amounts relative thereto. Whereas previously, petitioners' income was not subjected to tax, they now had to come up a substantial amount for each individual in order to settle their respective income tax liabilities.

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.

In view of the foregoing, I vote to **DENY** both the Petition for Review filed by the CIR, docketed as CTA EB No. 1976, and the Petition for Review filed by Maria Lorena Dino, et al., docketed as CTA EB No. 1978, and **AFFIRM** the assailed Decision dated September 25, 2018 and the assailed Resolution dated November 20, 2018.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

MARIA LORENA DINO, *ET. AL.*,
Respondents.

CTA *EB* NO. 1976
(CTA Case No. 9083)

x- x

MARIA LORENA DINO, *ET.AL.*,
Petitioners,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 1978
(CTA Case No. 9083)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
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MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, and
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
OCT 09 2019
2:03 p.m.

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CONCURRING AND DISSENTING OPINION

MANAHAN, J.:

Similar to my position in the cases of *Rowena Vicente, et.al., vs. Commissioner of Internal Revenue,*[1] *Cristeta Galang,*

[1] CTA Case No. 9096, July 7, 2017.

et.al., vs. Commissioner of Internal Revenue[2] as well as in the above-captioned case when this was decided in the Division level[3], I concur with the majority opinion that the compensation income of the Filipino employees of the ADB is subject to tax and that the Commissioner of Internal Revenue (CIR) did not abuse his discretion in issuing the controverted Revenue Memorandum Circular (RMC) No. 31-2013.

My opposition centers on the denial of the claims for refund pertaining to the taxable year 2012 on the ground that the provisions of RMC No. 31-2013 issued on April 12 2013, should be applied prospectively in light of the conflicting positions taken by the representatives of the Bureau of Internal Revenue (BIR) prior to the issuance of said RMC. The pronouncements made by officials of the BIR as to the taxability of the compensation received by the Filipino employees of ADB leaned more towards exemption from income taxes, causing the latter to believe that no taxes on their compensation income should be paid.

I quote portions of the decision promulgated by the Court in Division (with the undersigned as ponente) in the aforesaid case of *Rowena Vicente, et.al., vs. Commissioner of Internal Revenue,* where I held the position that the principles of fair play and substantial justice dictate that the provisions of RMC No. 31-2013 should apply only prospectively, and I quote:

> "In saying this, it is vital at this point to legally scrutinize the application of the provisions of RMC 31-2013 to the instant claims for refund.
>
> 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 thereof 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:
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>> 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.

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[2] CTA Case No. 9081, June 8, 2017.
[3] CTA Case No. 9083, September 25, 2018.

> Pursuant to the abovementioned provision, the Supreme Court emphasized in *National Association of Electricity Consumers for Reforms v. Energy Regulatory Commission, G.R. No. 163935, February 2, 2006* that both the requirements of publication and filing of administrative issuances are mandatory for their effectivity."
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> However, despite these clear wordings on its effectivity, respondent still proceeded to collect income tax payments from petitioner starting 2012. Seen against the backdrop of confirmations and affirmations of various revenue officials that their income was subject to lower income tax rates or to zero income tax until the issuance/publication of RMC No. 31-2013, the principles of fair play and substantial justice dictate that its provisions should apply to claims starting only from 2013 and onwards."

Premises considered, I vote to **DENY** the Petition for Review filed by petitioner in CTA EB No. 1976 and **PARTIALLY GRANT** the Petition for Review filed by petitioners in CTA *EB* No. 1978 with regard to the claims for refund covering the income taxes paid by them on their compensation income earned in 2012.

CATHERINE T. MANAHAN
Associate Justice