REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ANTHONY ORTILE TUASON,
Petitioner,

- *versus* –

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1700
(CTA Case No. 9041)

Present:

Del Rosario, *P.J.*,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban,
Manahan,
Bacorro-Villena, and
Modesto-San Pedro, *JJ.*

Promulgated:

JUL 17 2019 3:25 p.m.

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RESOLUTION

CASTAÑEDA, JR., *J.:*

For resolution of the Court *En Banc* is petitioner Anthony Ortile Tuason's *Motion for Reconsideration*[1] filed on March 21, 2019. Petitioner's *Motion* seeks reconsideration of the Decision of the Court *En Banc* promulgated on February 28, 2019,[2] (the "Assailed Decision") denying his Petition for Review for lack of merit.

In support of his *Motion*, petitioner reiterates his position that the reservation on the right to tax Filipino ADB employees needs an enabling

[1] Court *En Banc*'s Docket, pp. 127-133.
[2] *Id.*, pp. 98-123.

legislation before it may take effect.[3] He even posited that no specific reservation was made, even with the ratification of the agreement through Senate Resolution No. 6.[4] Petitioner also contends that given the confusion persisting up to the time of the issuance of Revenue Memorandum Circular (RMC) No. 31-2013 in the year 2013, it is only proper to reckon the imposition of taxes on petitioner's salaries from that year onwards.[5] He submits that a retroactive application of RMC No. 31-2013 is violative of the basic principles of justice and fair play.[6]

Respondent Commissioner of Internal Revenue failed to file his Comment or Opposition to petitioner's *Motion* despite directive from this Court to do so[7] as per the Records Verification report[8] issued by this Court's Judicial Records Division dated June 4, 2019.

The Court *En Banc* resolves to deny petitioner's *Motion* for lack of merit.

At the outset, it bears noting that petitioner merely recycled the arguments he raised in his *Motion* as these matters had already been thoroughly discussed and resolved by the Court *En Banc* in the Assailed Decision. To put it bluntly, there is nothing in his *Motion* that was not sufficiently passed upon by the Court *En Banc* in the Assailed Decision. Petitioner utterly failed to raise any new or substantial matter let alone any compelling reason to warrant the modification much less reversal of the Court *En Banc*'s findings.

At any rate, the Court *En Banc* takes this occasion to emphasize that it stands by its ruling that the income and emoluments of Filipino ADB employees are subject to tax by virtue of the reservation clauses in the Senate Resolution No. 6 and Section 45(b) of the ADB Headquarters Agreement, as further reinforced by Sections 23 and 24 of the National Internal Revenue Code of 1997, as amended. There is simply no merit in petitioner's contention that the ADB Charter is not self-executing and thus, needs an enabling legislation before it may take effect. The reason for this view was thoroughly explained in the Assailed Decision and need not be belabored here.

The Court *En Banc* likewise finds as equally unmeritorious petitioner's claim that the retroactive application of RMC No. 31-2013 is violative of the basic principles of justice and fair play. If only to illuminate

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[3] *Id.*, p. 128.
[4] *Id.*
[5] *Id.*, pp. 128-129.
[6] *Id.*, pp. 128-132.
[7] Resolution dated April 10, 2019; Court *En Banc*'s Docket, pp. 136-137.
[8] Court *En Banc*'s Docket, p. 138.

petitioner's position, the extensive discussion of the Court *En Banc* on this particular point is reproduced below:

> "A plain reading of RMC No. 31-2013 would reveal that it merely *reiterates* the general principles laid down in Section 23(A) and *amplifies* Section 24(A)(1)(a), both of which have been in effect since January 1, 1998, before the income tax payment in 2013.
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> The preface of RMC No. 31-2013 in Section 1 states these objectives when it cites Sections 23 and 24 of the 1997 NIRC as the foundation and states that the guidelines were intended to address the 'confusion on the correct tax treatment of the compensation income earned by Philippine nationals xxx employed by foreign governments/embassies/diplomatic missions and international organizations xxx,' thus:
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> **'SECTION 1. BACKGROUND.—**
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>> Foreign governments/embassies/diplomatic missions and international organizations situated in the Philippines acting as employers enjoy immunity from collecting taxes on salaries and emoluments of their employees, whether they are foreigners or Philippine nationals. This immunity from being constituted as withholding agents of the Philippine Government is accorded to these entities on the basis of international comity as embodied in several international agreements to which the Philippines is a signatory, such as, the Vienna Convention for International Relations (for embassies and diplomatic missions), Convention on the Privileges and Immunities of the United Nations, Convention on the Privileges and Immunities of Specialized Agencies (for the various agencies of the United Nations), Asian Development Bank Headquarters Agreement (for ADB), Articles of Agreement of the International Finance Corporation, among others.
>>
>> In recognition of this immunity, the Withholding Tax Regulations (Revenue Regulations No. 2-98, as amended), clearly reiterate the exemption from the withholding tax system of the remunerations being paid by foreign governments and international organizations to their employees who are residents or nationals of the Philippines. Section 2.78.1(B)(5) provides thus: Jr

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

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

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

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

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

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

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

The construction by an executive branch of government of a particular law although not binding upon courts must be given weight as the construction came from the branch of the government called upon to implement the law. It is well-settled that the power to fill in the details and manner as to the enforcement and administration of a law may be delegated to various specialized administrative agencies. RMC No. 31-2013 was precisely issued to fill in the details and manner of the enforcement of Sections 23(A) and 24(A)(1)(a) pursuant to Section 4 of the 1997 NIRC.

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

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

> 'Administrative agencies may exercise quasi-legislative or rule-making powers only if there exists a law which delegates these powers to them. Accordingly, the rules so promulgated must be within the confines of the granting statute and must involve no discretion as to what the law shall be, but merely the authority to fix the details in the execution or enforcement of the policy set out in the law itself, so as to conform with the doctrine of separation of powers and, as an adjunct, the doctrine of non-delegability of legislative power.
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> An administrative regulation may be classified as a legislative rule, an interpretative rule, or a contingent rule. **Legislative rules** are in the nature of subordinate legislation and designed to implement a primary legislation by providing the details thereof. They usually implement existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress and effect a change in existing law or policy which affects individual rights and obligations. Meanwhile, **interpretative rules** are intended to interpret, clarify or explain existing statutory regulations under which the administrative body operates. Their purpose or objective is merely to construe the statute being administered and purport to do no more than interpret the statute. Simply, they try to say what the statute means and refer to no single person or party in particular but concern all those belonging to the same

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class which may be covered by the said rules. Finally, **contingent rules** are those issued by an administrative authority based on the existence of certain facts or things upon which the enforcement of the law depends.

In general, an administrative regulation needs to comply with the requirements laid down by Executive Order No. 292, s. 1987, otherwise known as the 'Administrative Code of 1987,' on prior notice, hearing, and publication in order to be valid and binding, **except when the same is merely an interpretative rule. This is because '[w]hen an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed**. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law.'' *(Underscoring and emphases supplied; citations omitted)*

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

'Lastly, petitioner is mistaken in stating that RMC 25-11, having been issued after the sale, was being applied retroactively in contravention to Sec. 246 of the NIRC. **Instead, it merely called for the strict application of Sec. 100, which was already in force the moment the NIRC was enacted**.' (Emphasis and underscoring supplied)

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

> 'The cigarette manufacturers contend that for a long time prior to the transactions herein involved, the Collector of Internal Revenue had never subjected their purchases and importations of stemmed leaf tobacco to excise taxes. This prolonged practice allegedly represents the official and authoritative interpretation of the law by the Bureau of Internal Revenue which must be respected.
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> We are not persuaded.
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> In *Philippine Long Distance Telephone Co. v. Collector of Internal Revenue*, this court has held that this principle is not absolute, and an erroneous implementation by an officer based on a misapprehension of law may be corrected when the true construction is ascertained. Thus:
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>> The appellant argues that the Collector of Internal Revenue, previous to the transactions herein involved, had never collected the franchise tax on items of the same nature as those herein in question and this is strong evidence that such transactions are not subject to tax on the principle that a prolonged practice on the part of an executive or administrative officer-in-charge of executing a certain statute is an authoritative construction of great weight. *This contention may be granted, but the principle is not absolute and may be overcome by strong reasons to the contrary. If through a misapprehension of law an officer has erroneously executed it for a long time, the error may be corrected when the true construction is ascertained.* Such we deem to be the situation in the present case. Incidentally, the doctrine of estoppel does not apply here. (Emphasis supplied)
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> This court reiterated this rule in *Abello v. Commissioner of Internal Revenue* where it **rejected** petitioners' claim that the prolonged practice (since 1939 up to 1988) of the Bureau of Internal Revenue in not subjecting political contributions to donor's tax

was an authoritative interpretation of the statute, entitled to great weight and the highest respect:

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

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

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

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

Taxes are the lifeblood of the nation. Consequently, it must be remembered that **tax refunds are construed strictly against the taxpayers**. Any claim for refund takes the nature of tax exemptions that must be construed *strictissimi juris* against the claimants and liberally in favor of the taxing authority. This power of taxation being a high prerogative of sovereignty, its relinquishment is never presumed." *(Citations omitted)*

In sum, the Court *En Banc* finds no plausible reason to deviate from its ruling in the Assailed Decision.

WHEREFORE, petitioner's *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
I reiterate my Concurring and Dissenting Opinion
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
With due respect, I join J. MBRL's Concurring and Dissenting Opinion
CATHERINE T. MANAHAN
Associate Justice

Took no part
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

Took no part
MARIA ROWENA G. MODESTO-SAN PEDRO
Associate Justice