REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

LEAH EMPESANDO, *ET AL.*,
Petitioners,

CTA EB NO. 1995
(CTA CASE NO. 9093)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x-------------------------------------x

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 1996
(CTA CASE NO. 9093)

Present:

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

-versus-

LEAH EMPESANDO, *ET AL.*,
Respondents.

Promulgated:

JUL 30 2020 1:25 p.m.

x--x

DECISION

CASTAÑEDA, JR., J.:

Before the Court *En Banc* are Petitions for Review filed by the parties under Rule 8 of the Revised Rules of the Court of Tax Appeals (RRCTA) in relation to Rule 43 of the Rules of Court which seek to reverse and set aside the following:

1. September 17, 2018 Decision[1] of the CTA Third Division,[2] the dispositive portion of which reads:

"**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Respondent Commissioner of Internal Revenue is **ORDERED** to refund in favor of Petitioners the amount of Thirty-One Million One Hundred Eighty-Six Thousand One Hundred Thirty-Six Pesos and 47/100 (Php31,186,136.47), to be individually allocated based on the tabular summary provided earlier, representing their erroneously and illegally collected income tax on compensation income from the Asian Development Bank for taxable year 2012.

SO ORDERED."

2. December 14, 2018 Resolution[3] denying both the Motions for Partial Reconsideration of the parties for lack of merit.

THE FACTS

The facts are summarized from the September 17, 2018 Decision and condensed from the records, as follows:

"**The Case**

Before this Court is a Petition for Review filed by Leah Empesando, Leriza Endriaga, Alberto Enriquez, Natalie Escano, Angela Escudero, Melissa Jane Escurel, Oliver Esguerra, Maria Cecilia Estoque, Ma. Cristina Eusebio, Bebedel Fabe, Laura Falcutilla, Katrina Fano, Nilo Farrofo, Vivien Faulmino, Marilyn Fecara, Esnerjames Fernandez, Ma. Rita Festin, Jasper Florendo, Ralie Flores, Lady Vienne Fong, Kristina Formanes, Myrna Fortu, Maria Milagros Francisco, Esmeralda Fulgentes, Janice Gabriel, Adelita June Gacutan, April Marie Gallega, Lornardo Gallevo, Pamela Jhoanna Gamilla, Noel Gamo, Broderick Dalmacius Garcia, Eufemia Garcia, Luz Garcia, Ma. Socorro Carmela Garcia, Abigail Garrovillas, Raul Ambrosio Gatmaitan, Aileen Gatson, Lamberto Geronimo, Jennifer Go, Jose Frazier Gomez, Katherine Gonzales, Maria Melissa Gregorio, Asuncion Gregorios, Elverie Guanso, Lawrence Nelson Guevarra, Ma. Kristina Guillermo, Philip Gutierrez, Maria Karen Guzman, Maria Rita Habalo, Paulo Rodelio Halili, Ma. Imelda Hamo, Ma. Victoria Harder, Veronica Glady Hari, Carmelia Aurora Hernandez, Edita Hernandez, Louise Margaret Hernandez, Jerome Herradura, Virginia Herrera, Francia Macrina Holgado, Luchi Holganza, Mary Grace Huelgas, Marie Stephanie Igaya, Ana Maria Ignacio, Leticia Ignacio, Christine Infantado, Jean Claire Inocencio, Kristine Andrea Jamon, Consuelo Javier, Girlie Claire Javier, Marjorie Ann Javillonar, Carlos Jucaban, Rhea Juliano-Casis, Glenda Jurado, Ma. Cynthia Kalingo, Debbie Labarrete, Visitacion Labog, Ma.

[1] Annex A, Petition for Review, *Rollo* (EB 1995), pp. 83-107.
[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban with the concurrence of Associate Justice Esperanza R. Fabon-Victorino.
[3] Annex B, Petition for Review, *Rollo* (1995), pp. 109-114.

Victoria Lacastesantos, Regina Ladaban, Luis Antonio Lagdameo, Cristina Lagman, Pamila Lapitan, Noelle Diane Laspinas, Myrna Lavides, Editha Lavina, Nelia Layco, Maria Eloisa Lazo, Karen Lee, Catherine Leonillo, Teresita Leono, Marie Michelle Liboon, Nancy Librada, Geraldine Ligeralde, Maria Carr Cruz Ligutom, Maria Rosalyne Lim, Leonida Limqueco, Cristina Liwag, Ma. Purificacion Liwanag, Edylyn Liwanes, Llona Isabel Llamanzares, Christine Susan Lo, and Jacqueline Lo, collectively praying for the refund of their alleged erroneously paid and illegally collected income taxes for taxable years 2012 and 2013 in the total amount of Php47,751,044.82.

The Facts

Petitioners are all Filipinos and are regular employees of the Asian Development Bank ('ADB') at the time they paid their respective income taxes for taxable years 2012 and 2013.

On the other hand, Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue ('BIR'), who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code ('NIRC') of 1997, as amended, or other laws or portions thereof administered by the BIR. He holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioners argue that since the ADB started in 1966 up to 2013, Filipino ADB employees were exempted from payment of income tax on their salaries received from the ADB, pursuant to the Agreement Establishing the Asian Development Bank ('ADB Charter').

However, on April 12, 2013, Respondent issued Revenue Memorandum Circular ('RMC') No. 31-2013 entitled Guidelines on the Taxation of Compensation Income of Philippine Nationals and Alien Individuals Employed by Foreign Governments/Embassies/Diplomatic Missions and International Organizations Situated in the Philippines. It provides, among others, that only the officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax. The significant provisions are quoted hereunder:

> '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
>
> (d) *Those Employed by Organizations Covered by Separate International Agreements or Specific Provisions of Law* — 9e

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 xxx xxx

Section 45.

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

xxx xxx xxx

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

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

xxx xxx xxx

SECTION 3. Filing of Income Tax Returns and Declaration of Compensation Income. — **Philippine nationals and alien individuals who were not granted tax exemption or immunities under duly recognized international agreements or local laws shall file their annual income tax returns** on or before the 15th day of April each year using BIR Form No. 1700 or 1701, as may be applicable, **declaring therein the amount of their respective compensation income for the preceding taxable year for the services rendered or performed for such foreign government embassy/diplomatic mission, agency or international organization.**

The annual income tax return shall be filed with the Revenue District Office, Authorized Agent bank, or other proper office which has jurisdiction over the employee's legal residence or principal place of business. It may also be filed with the Revenue District Office or Authorized Agent bank where the principal office of his/her employer is situated.' (*Emphasis supplied*)

In compliance with RMC No. 31-2013, which was given retroactive application, Petitioners paid their respective income taxes for their 2012 and 2013 salaries.

Believing that RMC No. 31-2013 was issued *ultra vires*, two Filipino ADB employees questioned its legality before the Regional Trial

Court ('RTC') Branch 213 of Mandaluyong City, docketed as *Erwin Salaveria, et al. vs. Commissioner of Internal Revenue*, Civil Case No. MC14-8775.

On September 30, 2014, the RTC promulgated its 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 in the absence of legislation and/or regulation to the contrary. A Motion for Reconsideration was filed by Respondent, but it was denied on January 09, 2015.

Respondent appealed the lower court decision to the Court of Appeals, docketed as CA-G.R. CV No. 104374, which dismissed it *via* Resolution dated July 03, 2015. Subsequently, Respondent filed a Motion for Reconsideration, but it was also denied by the Court of Appeals.

Respondent then elevated the case before the Supreme Court by filing a Petition for Review on *Certiorari*. The case is still pending resolution by the High Court.

Armed with the favorable decision of the RTC, Petitioners filed administrative claims for refund with the BIR on June 22, 2015 and June 30, 2015. The judicial claim was filed before this Court on July 14, 2015.

Respondent filed his Answer on September 07, 2015, interposing the following arguments and special and affirmative defenses:

> 'Respondent contends that Petitioners being Filipino citizens and residents of the Republic of the Philippines are subject to the Philippine Income Tax;
>
> Sections 23 and 22(E) of the National Internal Revenue Code of 1997, as amended, specifically states:
>
>> *'**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'*
>>
>> *'**Section 22. Definitions.** — When used in this Title:*
>>
>> *xxx xxx xxx*
>>
>> *(E) The term 'nonresident citizen' means:*
>>
>> *(1) A citizen of the Philippines who establishes to the satisfaction of the Commissioner the fact of his physical presence abroad with a definite intention to reside therein.*

> *(2) A citizen of the Philippines who leave the Philippines during the taxable year to reside abroad, either as immigrant or for employment on a permanent basis.*
>
> *(3) A citizen of the Philippines who works and derives income from abroad and whose employment thereat requires him to be physically present abroad most of the time during the taxable year.*
>
> *(4) A citizen who has been previously considered as nonresident citizen and who arrives in the Philippines at any time during the taxable year to reside permanently in the Philippines shall likewise be treated as nonresident citizen for the taxable year in which he arrives in the Philippines with respect to his income derived from sources abroad until the date of his arrival in the Philippines.*
>
> *(5) The taxpayer shall submit proof of the Commissioner to show his intention of leaving the Philippines to reside permanently abroad or to return to and reside in the Philippines as the case may be for purposes of this Section.'*

Taxation of income in the Philippines is based on Citizenship, Residency and the Source Principle;

Under the *Citizenship principle*, the basis of the imposition of income tax is the taxpayer's citizenship. All citizens of the Philippines, whether resident or non-resident, are subject to our income tax law. In the case of resident citizens, they are subject to income tax derived from within and without the Philippines, while non-resident citizens are only subject to the income tax on the income derived from within the Philippines.

Under the *Residence principle*, the basis of the imposition of all income tax in this case is the residence of the taxpayer. All income derived by persons residing in the Philippines, whether citizens or aliens, whether domestic corporations or foreign corporations, shall be subject to income tax on the income derived from sources within the Philippines.

Under the *Source Principle*, the basis of the imposition of income tax is the source of the income. All income derived from sources within the Philippines shall be subject to income tax. Thus, even nonresident citizens or aliens and foreign corporation who derive income from within the country are subject to income tax. This also follows the territoriality principle.

Petitioners are Filipino citizens and employees of the Asian Development Bank, with business address at ADB Avenue, Ortigas Center, Pasig City. There is no doubt that Petitioners are liable for income tax on the compensation income they earned on account of such employment.

When the ADB Charter was created in 1965, it was expressly stated in Article 54 on Exemption from Taxation that:

> *'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, except where a member deposits with its instruments of ratification or acceptance a declaration that such member retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member.'*

In signing the ADB Headquarters Agreements in 1956, the Philippine government accorded tax exemption privileges to the ADB and its staff, but held on to the State's inherent power to tax, and thus made a clear limitation in so far as its right to tax its nationals. Hence, Section 45(b), Article XII of the ADB Headquarters Agreement provides that:

> *'Article XII*
>
> *PRIVILEGES AND IMMUNITIES OF GOVERNORS AND OTHER REPRESENTATIVES OF MEMBERS, DIRECTORS, PRESIDENT, VICE-PRESIDENT AND OTHERS*
>
> *Section 45*
> *Officers and staff of the Bank, including for the purposes of this Article experts and consultants performing missions for Bank, shall enjoy the following privileges and immunities:*
>
> *xxx xxx xxx*
>
> *(b) Exemptions 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; xxxx'*

In the same year, the Philippine Congress issued Resolution No. 06 to the effect that 'the Senate of the Philippines concurs, as it hereby concurs, in the ratification by the President of the Philippines of the aforesaid Agreement Establishing the Asian Development Bank, subject to the <u>*reservation*</u> that the Philippines declares that it retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to its citizens or nationals of the Philippines pursuant to Article 56, paragraph 2, of the Agreement.' (*Underscoring supplied*)

Explicit from the foregoing is that the Philippines, by making a 'reservation,' simply intimated that in entering upon an Agreement with ADB the only effect is that the income of ADB is exempt from tax by virtue of the Agreement but not the income derived by the Filipinos from ADB;

Petitioners may claim that the coverage of the Article XII of 'Headquarters Agreement' only concerns the privileges and immunities of the higher officials of the ADB. Such contention is utterly misplaced since the title of the Article itself did not restrict the application of the said Article of ADB's higher officials only, to wit: PRIVILEGES AND IMMUNITIES OF GOVERNOR'S AND OTHER REPRESENTATIVES OF MEMBERS, DIRECTORS, PRESIDENT, VICE-PRESIDENT AND OTHERS;

Moreover, the above-quoted Section 45 of the said Article referred to Officers and Staff of the bank as well;

BIR ITAD Ruling further states that there is no need for an executing law to implement the 'Reservation' because Philippine tax law already provides that Filipinos are liable for tax from income derived from within and without the Philippines;

The construction of the word 'Reservation' can only be accorded its plain meaning if, before the Philippines entered into the Agreement with ADB, Filipinos earning income from without the Philippines have no obligation to pay taxes in the Philippines. Since 1939, Filipinos earning income derived from outside the Philippines are liable for tax from such income. This is true when one considers Section 37 in relation to Section 45 of the National Internal Revenue Code of 1939, Section 21 in relation to Section 27 of the National Internal Revenue Code of 1997, and Section 24 in relation to Section 51 of the National Internal Revenue Code of 1997;

To accord the word 'reservation' with an ordinary meaning will undermine the force of existing tax laws. Thus, a contrary interpretation would mean subverting Philippine sovereignty by virtue of a mere Agreement just for the purpose of exempting some Filipinos from income tax. 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;

Same BIR ITAD Ruling added that the ADB Charter is not a law, but an agreement among Contracting States. That being the case, it is a derogatory interpretation that exempting from tax includes exemption from tax of Filipino citizens without express mention of Filipino exemption;

Pacta sunt servanda and international comity dictate that the Philippines should honor its international agreements in good faith. The Philippines has arguably complied with these principles of international law by according the proper concessions and tax breaks to ADB activities. This duty ends where the concern is a domestic matter involving the taxability of the income of its citizens. The ADB Charter was never amended by subsequent Philippine tax laws, because Philippine tax laws before and after the creation of ADB imposed taxes on income of Filipinos from within and without the Philippines.

Petitioners may contend that subsequent practice, as regards the ADB charter, is non-taxability of the income of its employees, arguing that ADB employees have never been subjected by the taxing authority ever since the Philippines' ratification of the ADB Charter. They insist that an operative act is required to change the norm followed after the ratification of the ADB Charter;

It is as if Petitioners would like this Honorable Court to treat such subsequent practice into a custom which is recognized source law. It is a standard rule that customs which are contrary to law shall not be countenanced;

In the case of *Malang vs. Moson*, the Supreme Court significantly held that:

> *'The Court is duty-bound to resolve that the instant case applying such laws and rights as are in existence at the time the pertinent civil acts took place, and is unable to supplant governing law with customs, albeit how widely observed.'*

RMC 31-2013 is only a clarification of existing policies already in the Philippine law. Thus, this alleged subsequent practice, which is contrary to existing law, cannot in any way displace what the law had provided from the start;

RMC 13-2012 [*sic*] is valid because it is only a mere clarification of existing policies embodied in the law;

As stated in BIR ITAD Ruling No. 018-14, the 'Reservation' made by the Philippines regarding its right to tax its citizen who earn income as employees of ADB is not a mere reservation but an affirmation of the inherent power of the State to tax its own citizens;

Petitioners anchor their claim that they are exempted from income tax on the provisions of Revenue Memorandum Order No. 31-2013 which provides:

xxx

(d) Those Employed by Organizations Covered by Separate International Agreements or Specific Provision 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 xxx xxx

Section 45

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

xxx xxx xxx

(b) Exemption from taxation on or in respect of the salaries and emoluments paid by the Bank <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.

Petitioners claim that they are exempt from the payment of income tax has no legal basis. Under the above-cited revenue issuance, it is clear that the exemption is still subject to the power of the Government to tax its nationals, including the herein Petitioners. Thus, reverting to the earlier discussion, Section 23, in relation to Section 24 of the National Internal Revenue Code of 1997, as amended, are the laws on the matter. As previously submitted, Petitioners, being Filipino citizens and nationals are taxable from their income within and outside the Philippines;

Petitioners must prove that they were able to comply with the following documentary and legal requirements as provided under Section 229 of the 1997 National Internal Revenue Code, as amended, to wit:

1. That the taxpayer should file a written claim for refund or tax credit with the BIR Commissioner within

two (2) years from the date of payment of the tax or penalty, non-compliance with which the latter is precluded from exercising his authority thereon;

2. That if denied or not acted upon within said period, the petition for refund be filed with the CTA within 30 days from the receipt of the denial AND within said two (2)-year period from the date of payment of the tax or penalty regardless of any supervening cause, otherwise, the claim for refund shall have prescribed;

3. The claim for refund must be a categorical demand for reimbursement;

4. There must be a proof or payment of the erroneously or illegally collected taxes; and

5. No refund shall be given resulting from availment of incentives granted pursuant to special laws for which no actual payment was made.

Petitioners must prove that their income is not taxable or exempt from income tax;

Petitioners must provide the basis for the alleged tax exemptions;

Tax exemptions are never presumed and are strictly construed against the taxpayer and liberally in favor of the taxing authority. They can only be given force when the grant is clear and categorical. The surrender of the power to tax, when claimed must be clearly shown by a language that will admit of no reasonable construction consistent with the reservation of the power. If the intention of the legislature is open to doubt, then the intention of the legislature must be resolved in favor of the State. (*Smart Communications Inc. vs. The City of Davao, et al.*, G.R. No. 155491)

A tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer. The taxpayer must present convincing evidence to substantiate a claim for refund. (*FEBTC vs. CIR*, G.R. No. 149589, September 16, 2006)

In the case of *CIR vs. Rosemarie Acosta, G.R. 154068 dated August 3, 2007*, the Honorable Supreme Court ruled, to wit:

> *'As tax refunds involve a return of revenue from the government, the claimant must show indubitably the specific provision of law from which her right arises, it cannot be allowed to exist upon a mere vague implication or inference nor can it be extended beyond the ordinary and reasonable intendment of the language actually used by the legislature in granting*

Jc

> *the refund. To repeat, strict compliance with the conditions imposed for the return of revenue collected is a doctrine consistently applied in this jurisdiction.'*
>
> **SPECIAL AND AFFIRMATIVE DEFENSES**
>
> xxx xxx xxx
>
> 10. The Honorable Court has no jurisdiction on the Petition. Herein Petitioners failed to file the instant claim for refund within the two-year prescriptive period.
>
> xxx xxx xxx
>
> 11. Granting without admitting that the Honorable Court has jurisdiction, the alleged decision of RTC Branch 213 from which Petitioners based their claim for refund is void. The same was issued by a regular court that has no jurisdiction to take cognizance of the case relating to the validity of Revenue Memorandum No. 31-2013 (RMC 31-2013). The power to rule on the validity of Revenue Issuances administered by the BIR are within the jurisdiction of the Court of Tax Appeals and not the Regular Courts.
>
> As discussed in the preceding paragraphs, the Supreme Court held in the case of *The Philippine American Life and General Insurance Company v. The Secretary of Finance and the Commissioner of Internal Revenue*, that:
>
>> 'Evidently, the *City of Manila* can be considered as departure from *Ursal* in that in spite of there being no express grant in law, the CTA is deemed granted with powers of certiorari by implication. Moreover, *City of Manila* diametrically opposes *British American Tobacco* to the effect that it is now within the power of the CTA, through its power of certiorari, to rule on the validity of a particular administrative rule or regulation so long as it is within its appellate jurisdiction. **Hence, it can now rule not only on the propriety of an assessment or tax treatment of a certain transaction but also on the validity of the revenue regulation or revenue memorandum circular on which the said assessment is based.**'"

The pre-trial conference was held on July 19, 2016. Thereafter, Petitioners and Respondent filed their Joint Stipulation of Facts and Issues on August 03, 2016.

On August 12, 2016, the Court issued the Pre-Trial Order and terminated the pre-trial conference. 9e

> Petitioners presented Atty. Peter Paul S. Romero, who testified before the Court on October 24, 2016 and identified his Judicial Affidavit.
>
> Petitioners then filed their Formal Offer of Evidence on April 21, 2017. In a Resolution dated May 26, 2017, the Court admitted all of Petitioners' exhibits.
>
> During the hearing set for Respondent's presentation of evidence, Respondent, through counsel, manifested that he has no Audit Report and therefore would no longer present evidence. The Court granted the parties thirty (30) days from notice within which to submit their respective memoranda.
>
> Respondent filed his Memorandum on September 27, 2017; while Petitioners filed their Memorandum with Manifestation on October 4, 2017. Hence, the case was submitted for decision on October 10, 2017."

On September 17, 2018, the Court *a quo* promulgated its decision which *partially* granted the claim for income tax refund.[4]

On December 14, 2018, the Court *a quo* denied both the Motions for Reconsideration of the parties for lack of merit.[5]

CTA En Banc Proceedings

On January 28, 2019, petitioners Leah Empesando et al. filed their Petition for Review assailing the September 17, 2018 decision of the Court *a quo*.

On January 15, 2019, petitioner Commissioner of Internal Revenue (CIR) filed his Petition for Review which sought to set aside the same decision.[6]

In a Minute Resolution dated January 29, 2019, the Court *En Banc* consolidated CTA EB No. 1996 with CTA EB No. 1995.[7]

In a February 21, 2019 Resolution, the Court *En Banc* ordered the respective respondents to file their comments on the petitions within ten (10) days from notice.[8]

On March 18, 2019, respondents Leah Empesando *et al.* filed their Comment/Opposition To Petition for Review.[9]

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[4] Annex A, Petition for Review, *Rollo* (EB 1995), pp. 83-107.
[5] Annex B, Petition for Review, *Rollo* (EB 1995), pp. 109-114.
[6] *Rollo* (EB 1996), pp. 1-18.
[7] *Rollo* (EB 1995), p. 115.
[8] *Id.*, pp. 117-118.
[9] *Id.*, pp. 119-130.

The respondent CIR did not file his comment.[10]

In a May 28, 2019 Resolution, the Court En Banc, after considering the arguments raised by the parties, resolved to give due course to the petitions and granted the parties thirty (30) days from notice to file their respective memoranda.[11]

On July 4, 2019, petitioners Leah Empesando et al. filed their Memorandum[12] while petitioner CIR did not file his.[13]

In an August 7, 2019 Resolution, the Court *En Banc* submitted the case for decision.[14]

THE ISSUES

In assailing the September 17, 2018 Decision and December 14, 2018 Resolution:

- The petitioners Leah Empesando *et al.* (EB 1995), on the one hand, state that the Court *a quo* erred in ruling that they are *not* exempt from income taxation under the Asian Development Bank (ADB) Charter;[15] and,

- Petitioner Commissioner of Internal Revenue (CIR) [EB 1996], on the other hand, states that it erred in ruling that RMC 31-2013 was retroactively applied which results in the refund of what the taxpayers paid for taxable year 2012 in the aggregate amount of ₱31,186,136.47.[16]

THIS COURT'S RULING

We resolve to *deny* the taxpayers' petition and *grant* the CIR's.

All the petitioners, who are claiming for refund of allegedly erroneously and/or illegally collected income tax under Section 229, are Filipino employees of the ADB.

First, a review of the relevant treaty and legislative provisions will demonstrate that Congress certainly intended to tax the salaries and emoluments received by Filipinos from ADB.

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[10] Records Verification dated April 5, 2019, *Rollo* (EB 1995), p. 132.
[11] *Rollo* (EB 1995), pp. 134-135.
[12] *Id.*, pp. 139-161.
[13] Records Verification dated July 19, 2019, *Rollo* (EB 1995), p. 163.
[14] *Rollo* (EB 1995), pp. 164-166.
[15] *Id.*, p. 12.
[16] *Rollo* (EB 1996), p. 3.

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

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

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

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

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

The 1997 NIRC, a subsequent legislation which took effect on January 1, 1998,[17] is the law that enables the clear intention of the reservation clauses

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

found in the Senate Resolution No. 6 and Section 45(b) of the ADB Headquarters Agreement. Specifically, said law leaves no room for doubt that resident citizens are subject to tax on income derived from all sources within and outside the Philippines under Sections 23(A), 24(A)(1)(a), 31 and 32, as amended:

> "**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
>
> **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;"
>
> xxx xxx xxx
>
> **TITLE II**
> **TAX ON INCOME**
>
> **CHAPTER V**
> **COMPUTATION OF TAXABLE INCOME**
>
> **SEC. 31.** *Taxable Income Defined.* - The term taxable income means the pertinent items of gross income specified in this Code, less the deductions and/or personal and additional exemptions, if any, authorized for such types of income by this Code or other special laws.
>
> **CHAPTER VI**
> **COMPUTATION OF GROSS INCOME**
>
> **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:
>
> (1) Compensation for services in whatever form paid, including, but not limited to fees, salaries, wages, commissions, and similar items;

(2) Gross income derived from the conduct of trade or business or the exercise of a profession;

(3) Gains derived from dealings in property;

(4) Interests;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Annuities;

(9) Prizes and winnings;

(10) Pensions; and

(11) Partner's distributive share from the net income of the general professional partnership." (*Underscoring supplied*)

Second, the taxpayers contend that Revenue Memorandum Circular (RMC) No. 31-2013, which was issued only on April 12, 2013, should not be given retroactive application pursuant to the prohibition under Section 246 of the 1997 NIRC.[18]

It bears emphasis, however, that RMC 31-2013 merely *reiterates* the general principles laid down in Section 23(A) and merely *implements* Sections 24(A)(1)(a), 31 and 32, all of which have been in effect since January 1, 1998.

The preface of RMC 31-2013 in Section 1 states these objectives when it cites Sections 23 and 24 of the 1997 NIRC as the foundation and states that the guidelines were intended to address the "confusion on the correct tax treatment of the compensation income earned by Philippine nationals xxx employed by foreign governments/embassies/diplomatic missions and international organizations xxx," thus:

"SECTION 1. BACKGROUND. —

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[18] **"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."

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:

xxx xxx xxx

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

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

xxx xxx xxx

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

The tax consequence of compensation income received by those employed by foreign governments/embassies/ diplomatic missions situated in the Philippines hinges on the provisions of the duly recognized international agreements or local laws granting tax privileges to employees of said institutions. It bears to emphasize that the exemption should only cover those individuals who were expressly and unequivocally identified in said international agreements or laws. Those not covered shall be subject to the general rule on taxability of Philippine nationals and alien individuals.

> Thus with respect to those not exempted by the provisions of applicable international agreements or laws, although their compensation income is exempt from withholding tax under the international agreements or the Withholding Tax Regulations, they are not relieved of their duty to report their compensation income to the Bureau and pay the taxes due thereon pursuant to Section 24 of the National Internal Revenue Code of 1997, as amended ("Tax Code"). (*Underscoring and emphases supplied*)

Section 246 of the 1997 NIRC on the non-retroactivity of issuances should be carefully read when viewed in the light of *ABS-CBN v. Court of Tax Appeals*,[19] 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 case at bench, a *refund* of income taxes paid only on 2012 and 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 petitioners paid the income taxes. It is not in question that when the income taxes were paid, the Reservation Clause in Senate Resolution No. 6 and the provisions of Sections 23(A) and 24(A)(1)(a) have long been in force and effect *prior to these payments*.

Evidently, when an administrative agency renders an opinion by means of a *circular* or memorandum, *it merely interprets a pre-existing law*.[20] RMC 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.

Third, 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.[21] 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.[22] RMC 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[23] of the 1997 NIRC, as amended.

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

[20] *La Suerte Cigar and Cigarette Factory et al. v. Court of Tax Appeals, et al.*, G.R. No. L-36130, January 17, 1985.

[21] *Senator Heherson T. Alvarez, et al. v. Hon. Teofisto T. Guingona, Jr., in his capacity as Executive Secretary, et al.*, G.R. No. 118303, January 31, 1996.

[22] *Commissioner of Internal Revenue v. Solidbank Corporation*, G.R. No. 148191, November 25, 2003.

[23] "SEC. 4. ***Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.*** - The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

RMC 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."[24] Based on this definition, RMC 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.*,[25] the Supreme Court held that Administrative Order No. 67, 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.
>
> 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

The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals."

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

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

xxx xxx xxx

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

[25] G.R. No. 190837, March 5, 2014.

> purpose or objective is merely to construe the statute being administered and purport to do no more than interpret the statute. Simply, they try to say what the statute means and refer to no single person or party in particular but concern all those belonging to the same class which may be covered by the said rules. Finally, **contingent rules** are those issued by an administrative authority based on the existence of certain facts or things upon which the enforcement of the law depends.
>
> 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.*,[26] the Supreme Court upheld the validity of RMC 25-2011 and ruled that the application of the circular to the taxable transaction in 2009 did not contravene Section 246 of the 1997 NIRC, 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." (underscoring supplied)

Fourth, even assuming there was a failure in the past by the CIR to take a categorical position on the taxation of Filipino ADB employees, such dearth 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 et al.*:[27]

> "The cigarette manufacturers contend that for a long time prior to the transactions herein involved, the Collector of Internal

[26] G.R. No. 210987, November 24, 2014.
[27] G.R. No. 125346, November 11, 2014.

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.

We are not persuaded.

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:

> 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)

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

> This Court holds that the BIR is not precluded from making a new interpretation of the law, especially when the old interpretation was flawed. It is a well-entrenched rule that [:]
>
> > ...erroneous application and enforcement of the law by public officers do not block subsequent correct application of

> the statute, and that the Government is never estopped by mistake or error on the part of its agents. (Emphasis supplied, citations omitted)
>
> **Prolonged practice of the Bureau of Internal Revenue in not collecting the specific tax** on stemmed leaf tobacco **cannot validate what is otherwise an erroneous application and enforcement of the law.** The government is never estopped from collecting legitimate taxes because of the error committed by its agents.
>
> In *La Suerte Cigar and Cigarette Factory v. Court of Tax Appeals*, this court upheld the validity of a revenue memorandum circular issued by the Commissioner of Internal Revenue to correct an error in a previous circular that resulted in the non-collection of tobacco inspection fees for a long time and declared that estoppel cannot work against the government:
>
> xxx xxx xxx" (*Underscoring and emphases supplied; citations omitted*)

Fifth, in a claim for tax refund, an "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property not subject to taxation or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.[28] In the case at bench, the payment and collection of taxes is neither erroneous nor illegal. Since the income of the ADB employees was subject to tax based on the 1997 NIRC provisions, the collection of the same was, therefore, grounded on statutory authority.

Even prior to 1966 Agreement between the ADB and the Government of the Republic of the Philippines, the Philippine government has been exercising its sovereign right to tax its citizens or nationals.

Specifically, income tax was levied, assessed, collected, and paid annually upon the entire net income of citizen and resident of the Philippines, pursuant to Sections 21, 28 and 29 of the 1939 NIRC.[29]

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[28] *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012.

[29] "SEC. 21. Rates of tax on citizens or Residents. — A tax is hereby imposed upon the taxable net income received during each taxable year from all sources by every individual, whether a citizen of the Philippines residing therein or alien residing in the Philippines determined in accordance with the following schedule: xxx

xxx xxx xxx

SEC. 28. Meaning of net income. — 'Net income' means the gross income computed under section twenty-nine, less the deductions allowed by section thirty.

SEC. 29. Gross Income. — (a) General Definition. — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form

Moreover, it is the Court *En Banc*'s view that the Philippine government, in entering upon the 1966 Agreement and giving the privilege of tax exemption on salaries emolument paid by ADB to its employees, did *not* relinquish its power of taxation over its own citizens and nationals.

In the same vein, pursuant to Sections 21, 28 and 29 of the 1977 NIRC,[30] income tax was imposed upon the taxable net income received during each taxable year from all sources by every individual, whether a citizen of the Philippines residing therein or alien residing in the Philippines.

Thereafter, pursuant to Sections 23(A), 24(A), 31 and 32 of the 1997 NIRC, all income of a resident citizen is subject to tax (derived from all sources within and without the Philippines.

The Court *En Banc* in the recent case of *Commissioner of Internal Revenue v. Rowena Vicente, et al.*[31] affirmed the position that notwithstanding the alleged reliance on various confirmations and affirmations of various revenue officials that the income of Filipino citizens from ADB was subject to lower income tax rates or to zero income tax until the issuance/publication of RMC No. 31-2013, the fact remains that the Philippine government in giving the privilege of tax exemption on salaries and emolument paid by ADB to its employees, did *not* relinquish its power of taxation over its own citizens. Thus, the income tax paid in 2012 is not in excess of what is due and the payment and collection of said tax was neither erroneous nor illegal insofar as it is anchored on a statutory authority. Thus:

> "Thus, despite the alleged reliance on various confirmations and affirmations of various revenue officials that the income was subject to lower income tax rates or to zero income tax until the issuance/publication

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paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities, or the transactions of any business carried on for gain or profit, or gains, profits, and income derived from any source whatever."

[30] "SEC. 21. Rates of tax on citizens or Residents. — A tax is hereby imposed upon the taxable net income received during each taxable year from all sources by every individual, whether a citizen of the Philippines residing therein or alien residing in the Philippines determined in accordance with the following schedule: xxx

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SEC. 28. Meaning of net income. — 'Net income' means the gross income computed under section twenty-nine, less the deductions allowed by section thirty.

SEC. 29. Gross Income. — (a) General Definition. — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities, or the transactions of any business carried on for gain or profit, or gains, profits, and income derived from any source whatever."

[31] CTA EB Case No. 1717 & 1718 (CTA Case No. 9096), August 8, 2019.

of RMC No. 31-2013, the fact remains that Philippine government in giving the privilege of tax exemption on salaries and emolument paid by ADB to its employees, did not relinquish its power of taxation over its own citizens and nationals, that amount of tax paid in taxable year 2012 is not in excess on what is due; that the payment and collection of taxes for taxable year 2012 was subject to statutory authority and is neither erroneous nor illegal. 'Render to Caesar what is Caesar's'. In sum, claim for refund must perforce fail.

Taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for the lack of the motive power to activate and operate it. Hence, despite the natural reluctance to surrender part of one's hard-earned income to taxing authorities, every person who is able to must contribute his share in the running of the government. The government for its part is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power." (*Underscoring supplied; citations omitted*)

Taxes are the lifeblood of the nation. Consequently, it must be remembered that tax refunds are construed strictly against the taxpayers.[32] Any claim for refund take the nature of tax exemptions that must be construed *strictissimi juris* against the claimants and liberally in favor of the taxing authority. This power of taxation being a high prerogative of sovereignty, its relinquishment is never presumed.[33]

As a final word, after the Court *En Banc* deliberations, however, the required votes of five justices to reverse a decision of the Division was not reached.[34]

WHEREFORE, premises considered, the Petition for Review of the taxpayers docketed as CTA EB NO. 1995 is **DENIED** for lack of merit. The Petition for Review of the CIR docketed as CTA EB NO. 1996 is, likewise, **DENIED**.

Accordingly, the September 17, 2018 Decision and the December 14, 2018 Resolution are **AFFIRMED**.

SO ORDERED.

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

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[32] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013.
[33] *Nestle Philippines, Inc. (formerly Filipro, Inc.) v. Honorable Court of Appeals, et al.*, G.R. No. 134114, July 6, 2001.
[34] Rule 2, Section 3 of the Revised Rules of the Court of Tax Appeals.

WE CONCUR:

(*See Concurring Opinion*)
ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

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

LEAH EMPESANDO, ET AL., *Petitioners,*

CTA EB No. 1995 *(CTA Case No. 9093)*

-versus-

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

x-------------------------------------x

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

CTA EB No. 1996 *(CTA Case No. 9093)*

-versus-

Present:

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

LEAH EMPESANDO, ET AL., *Respondents*

Promulgated:
JUL 30 2020 1:25 p.m.

x- -x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the ponencia's finding that petitioners' claim for refund of income taxes paid for taxable year 2012 should be denied on the ground that the income they received from Asian Development Bank (ADB) is taxable **pursuant to existing provisions of the National Internal Revenue Code of 1997, as amended, in relation to the treaty and/or agreement between the Philippine government and ADB**.

To my mind, the taxability of the aforesaid income of petitioners is not dependent on the validity or invalidity of Revenue Memorandum Circular No. 31-2013.

On this point, I reiterate the view I expressed in *Commissioner of Internal Revenue vs. Cristeta May Galang, et al., and Cristeta May Galang, et al., vs. Commissioner of Internal Revenue*[1], *viz.*:

> "I wish to stress that resident citizens or nationals of the Philippines who are working with the Asian Development Bank (ADB) are taxable on their income from all sources, including those income derived from ADB. To emphasize, **the taxability of the income they receive from ADB is not dependent on the validity or invalidity of Revenue Memorandum Circular (RMC) No. 31-2013** as the same is based on existing provisions of the National Internal Revenue Code of 1997, as amended, in relation to the treaty and/or agreement between the Philippine government and ADB.
>
> Parenthetically, while any revocation, modification or reversal of any previous CIR ruling may not generally be given retroactive application pursuant to Section 246 of the NIRC of 1997, as amended, **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.** On this point, I submit that Section 246, *supra,* does not find any application in resolving these cases.
>
> While it may be true that since the ratification of the ADB Charter in 1966, or for almost fifty (50) years, ADB employees have never been subjected by the BIR to income tax until the issuance of RMC 31-2013 on April12, 2013, suffice it to say that the failure of the BIR to collect income tax from ADB employees who are resident citizens or Philippine nationals does not *per se* justify the nonimplementation of existing legislations nor result in the absurd construction that pertinent tax laws are deemed repealed.

[1] CTA EB Nos. 1721 and 1868, February 5, 2020.

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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."

Thus, the alleged long-standing practice of the BIR of not subjecting to income tax the salaries and emoluments derived by resident citizens from their employment with ADB is not sufficient to exempt them from payment of said tax.

Moreover, it is my view that the Regional Trial Court (RTC) Decision in Civil Case No. MC14-8775 is insignificant in the resolution of the present controversy. The aforesaid RTC Decision in Civil Case No. MC14-8775 appears to be jurisdictionally infirm insofar as it declared that Section 2(d) (1) of Revenue Memorandum Circular 31-2013 is a nullity. In ***The Philippine American Life and General Insurance Company vs. Commissioner of Internal Revenue,*** the Supreme Court was categorical in saying that **the Court of Tax Appeals is vested with jurisdiction to rule on the validity of revenue regulations or revenue memorandum circulars.** Needless to say, this Court 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." *(Additional boldfacing supplied)*

All told, I CONCUR with the *ponencia*.

ROMAN G. DEL ROSARIO
Presiding Justice