Republic of the Philippines
Supreme Court
Manila



**EN BANC**

**SAINT WEALTH LTD., as represented by DAVID BUENAVENTURA & ANG LAW OFFICES,**
*Petitioner,*

-versus-

**BUREAU OF INTERNAL REVENUE, herein represented by HON. CAESAR R. DULAY, in his capacity as COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, and JOHN DOES and JANE DOES, as persons acting for, in behalf, or under the authority of respondents,**
*Respondents.*
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**G.R. No. 252965**

**MARCO POLO ENTERPRISES LIMITED, MG UNIVERSAL LINK LIMITED, OG GLOBAL ACCESS LIMITED, PRIDE FORTUNE LIMITED, VIP GLOBAL SOLUTIONS LIMITED, AG INTERPACIFIC RESOURCES LIMITED, WANFANG TECHNOLOGY MANAGEMENT LTD., IMPERIAL CHOICE LIMITED, BESTBETINNET LIMITED, RIESLING CAPITAL LIMITED, GOLDEN DRAGON EMPIRE LTD., ORIENTAL GAME LIMITED, MOST SUCCESS INTERNATIONAL GROUP LIMITED, and HIGH ZONE CAPITAL INVESTMENT GROUP LIMITED,**
*Petitioners,*

**G.R. No. 254102**

Present:

GESMUNDO, *C.J.*,
PERLAS-BERNABE,
LEONEN,
CAGUIOA,
HERNANDO,
CARANDANG,
LAZARO-JAVIER,
INTING,
ZALAMEDA,
LOPEZ, M.,
GAERLAN,
ROSARIO,
LOPEZ, J.,
DIMAAMPAO,* *and*
MARQUEZ, *JJ.*

* On official leave.

-versus-

**THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ III and THE COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY,**
*Respondents.*

Promulgated:
December 7, 2021

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# DECISION

**GAERLAN, *J.*:**

These are consolidated petitions for *certiorari* and prohibition with urgent prayer for the issuance of a temporary restraining order (TRO) and/or preliminary injunction (*Consolidated Petitions*),[1] seeking to annul and set aside: (1) Section 11(f) and (g) of Republic Act (R.A.) No. 11494 (**Bayanihan 2 Law**); (2) Revenue Regulation (RR) No. 30-2020 (**RR No. 30-2020**) of the Department of Finance (DOF) and the Bureau of Internal Revenue (BIR); (3) Revenue Memorandum Circular (RMC) No. 64-2020 (**RMC No. 64-2020**) of the BIR; (4) **RMC No. 102-2017** of the BIR; and (5) **RMC No. 78-2018** of the BIR (the *Assailed Tax Issuances).*

## *The Antecedents*

In 1983, Presidential Decree No. 1869 (PAGCOR Charter) was enacted, consolidating all laws relative to the franchise and powers of the Philippine Amusement and Gaming Corporation (PAGCOR).[2] Under Section 10 of the PAGCOR Charter, PAGCOR is granted rights, privileges, and authority to operate and license gambling casinos, gaming clubs, and other similar recreation or amusement places within the territorial jurisdiction of the Philippines.[3]

From 2016, the Philippines began regulating online gaming hubs, specifically the Philippine Offshore Gaming Operators (POGOs). Thus, on September 1, 2016, the PAGCOR issued the Rules and Regulations for Philippine Offshore Gaming Operations (POGO Rules and Regulations).[4]

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1 *Rollo* (G.R. No. 252965), pp. 3-54; *Rollo* (G.R. No. 254102), pp 3-119.
2 *Rollo* (G.R. No. 252965), p. 16.
3 *Rollo* (G.R. No. 254102), p. 22.
4 Id.

The POGO Rules and Regulations defines **offshore gaming** as "the offering by a licensee of PAGCOR authorized online games of chance via the internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee."[5] Moreover, the POGO Rules and Regulations explains that offshore gaming has three components:

> b.1. prize consisting of money or something else of value which can be won under the rules of the game.
>
> b.2. a player who:
>
> b.2.a being located outside of the Philippines and not a Filipino citizen, enters the game remotely or takes any step in the game by means of a communication device capable of accessing an electronic communication network such as the internet.
>
> b.2.b gives or undertakes to give, a monetary payment or other valuable consideration to enter in the course of, or for, the game; and
>
> b.3. the winning of a prize is decided by chance.[6]

The POGO Rules and Regulations further provides that POGOs must register with PAGCOR. Upon registration, the POGO is given an Offshore Gaming License (OGL). Entities who may be given an OGL are either: (1) **Philippine-based operators**; or (2) **offshore-based operators**. Philippine-based operators are corporations organized in the Philippines which will either conduct offshore gaming operations themselves or engage the services of PAGCOR-accredited service providers. Meanwhile, offshore-based operators are corporations organized in any foreign country which will engage the services of PAGCOR-accredited local gaming agents and/or service providers for its offshore gaming operations.[7]

POGO licensees are likewise required to pay several monthly regulatory fees. Thus, from these regulatory fees alone, PAGCOR is able to generate billions of pesos in revenues.

On December 27, 2017, the BIR issued **RMC No. 102-2017**, entitled "*Taxation of Taxpayers Engaged in Philippine Offshore Gaming*

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5 POGO RULES AND REGULATIONS, Section 4(b).
6 Id.
7 Id., Section 6; *Rollo* (G.R. No. 254102), p. 23.

*Operations,*" which recognized that online activity is sufficient to constitute doing business in the Philippines, and clarified the taxability of POGOs. Under RMC No. 102-2017, POGOs may either be classified as *Licensees* (Philippine-based or offshore-based) or *Other Entities* (such as local gaming agents and other service providers).

Further, RMC No. 102-2017 outlines the tax treatments for *Licensees* and *Other Entities,* to wit:

> a) The entire gross gaming receipts/earnings or the agreed or pre-determined minimum monthly revenues/income from Gaming Operations under existing rules, whichever is higher, shall be subject to a franchise tax of five percent (5%), in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description. This income is therefore exempt from any kind of tax, income or otherwise, as well as fees, charges or levies of whatever nature, whether national or local.
>
> b) Income from Other Related Services income from non-gaming operations) shall be subject to normal income tax, value-added tax and other applicable taxes, as may be deemed appropriate. The 5% franchise tax in lieu of all taxes shall not apply.
>
> c) A Licensee deriving income from both gaming operations and from other related services shall be subject to 5% franchise tax on its gaming revenues and normal income tax, value-added tax and other applicable taxes on its non-gaming revenues.
>
> d) An Other Entity, specifically including the gaming agent, Service Provider and Gaming Support Provider, who is also a POGO Licensee shall be taxed 5% Franchise tax on its gaming activities and subject to the normal tax rate and other appropriate taxes on its non-gaming operations. An Other Entity, who is not a POGO Licensee, deriving or earning only Income from Other Related Services or from non-gaming operations shall be subject to normal income tax, value-added tax and other applicable taxes on its entire revenues.
>
> e) Income payments made by POGO Licensees or any other business entity licensed or authorized by PAGCOR for all their purchases of goods and services shall [be] subject to withholding taxes as may be appropriate and applicable.
>
> f) Compensation, fees, commissions or any other form of renumeration as a result of services rendered to POGO licensees or any other business entity licensed by PAGCOR shall be subject to applicable withholding taxes under existing revenue laws and regulations.
>
> g) Purchases (local or imported) and sale (local or international) of goods (tangible or intangible) or services shall be subject to existing tax laws and revenue issuances, as may be applicable.

Thus, under RMC No. 102-2017, *Licensees* must pay a **five percent (5%) franchise tax**, in lieu of all other taxes, for their income arising from their **gaming operations**. Such franchise tax is based on their **entire gross gaming revenues**. Meanwhile, for income arising from **non-gaming operations**, *Licensees* must pay normal income tax, value-added tax (VAT), and other applicable taxes.[8]

On the other hand, *Other Entities,* who must also be registered with PAGCOR, are subject to five percent (5%) franchise tax for income arising from gaming operations, and normal income tax, VAT, and other applicable taxes for income arising from non-gaming operations. *Other Entities* deriving income solely from non-gaming operations shall be liable to pay normal income tax, VAT, and other applicable taxes.[9]

Thereafter, to implement RMC No. 102-2017, the BIR issued **RMC No. 78-2018** dated September 7, 2018, entitled "*Registration Requirements of Philippine Offshore Gaming Operators and Its Accredited Service Providers*," which reiterated that online activity is sufficient to do business in the Philippines and considered POGOs as "Resident Foreign Corporation Engaged in Business in the Philippines." As such, **RMC No. 78-2018**, requires all offshore-based and Philippine-based POGO licensees to register with the BIR.[10]

*The COVID-19 Pandemic*

At the start of 2020, the COVID-19 pandemic hit the Philippines, which brought about the closure of several business establishments and industries. Sometime in mid-2020, the Philippines began relaxing community quarantine restrictions, and the government started allowing some industries to operate, including POGOs. Thus, on May 7, 2020, the BIR issued **RMC No. 46-2020**, entitled "*Guidelines & Requirements for POGO Licensees and Service Providers in the Application of a BIR Clearance for the Resumption of Operations*." Under RMC No. 46-2020, POGOs must comply with the following conditions and submit the following documents before they can resume their operations:

A. Conditions

1. Registered with the concerned Revenue District Office (RDO) having jurisdiction over the place of business;

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8 REVENUE MEMORANDUM CIRCULAR NO. 102-2017, paragraph IV(2).

9 Id.

10 REVENUE MEMORANDUM CIRCULAR NO. 78-2018, paragraph B.

2. Submit copies of 2019 & First Quarter of 2020 Franchise Tax Quarterly returns and proof of payments;

3. Remitted and paid the withholding taxes due from the months of January to April, 2020;

4. Submission of a notarized undertaking to pay all tax arrears for prior years;

5. Failure to comply with any of the above will result in the denial of the issuance of a BIR Clearance for resumption of operations.

B. Documentary Requirements

1. Copy of Application for Registration of Corporations, et al. duly received by the concerned RDO (BIR Form No. 1903) or BIR Certificate of Registration (COR), if already registered;

2. Copies of Franchise Tax Returns (BIR Form No. 2553) for the taxable quarters of 2019 and 1st quarter of 2020 together with proof of payments;

3. Copies of Monthly Remittance Form for Income Taxes Withheld (BIR Form Nos. 1601-C and 0619-E and F), Quarterly Remittance Return of Income Taxes Withheld (BIR Form 1601-EQ and FQ) or Payment Form (BIR Form No. 0605) for January to April, 2020; and

4. Notarized Undertaking to pay all tax arrears for prior years.

On June 24, 2020, the BIR issued **RMC No. 64-2020**, revising RMC 46-2020, as follows:

A. Conditions

1. Registered with the concerned Revenue District Office (RDO) having jurisdiction over the place of business;

2. Payment of Franchise Tax and submit proof of payments;

3. Remitted and paid the withholding taxes, if applicable;

4. Submission of a notarized undertaking to pay tax arrears; and

5. Failure to comply with any of the above will result in the denial of the issuance of a BIR Clearance for resumption of operations.

B. Documentary Requirements

1. Copy of Application for Registration of Corporations, et al. duly received by the concerned RDO (BIR Form No. 1903) or BIR Certificate of Registration (COR), if already registered;

> 2. Copies of Franchise Tax Returns (BIR Form No. 2553) together with proof of payments;
>
> 3. Copies of Monthly Remittance Form for Income Taxes Withheld (BIR Form Nos. 1601-C and 0619-E and F), Quarterly Remittance Return of Income Taxes Withheld (BIR Form 1601-EQ and FQ) or Payment Form (BIR Form No. 0605) for January to April, 2020; and
>
> 4. Notarized Undertaking to pay tax arrears.

On September 11, 2020, the Bayanihan 2 Law, entitled "*An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, Providing Funds Therefor, and For Other Purposes,*" was enacted as an emergency response law to address the COVID-19 pandemic. Section 11 of the Bayanihan 2 Law outlines the sources of funding for the COVID-19 measures to be undertaken by the government.[11] Among others, Section 11 mentions a **five percent (5%) franchise tax** based on the **gross bets or turnovers** earned by POGOs:

> SECTION 11. *Sources of Funding.* — The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
>
> x x x x
>
> (f) Amounts derived from the **five percent (5%) franchise tax on the gross bets or turnovers or the agreed pre-determined minimum monthly revenues from gaming operations, whichever is higher**, earned by offshore gaming licensees, including gaming operators, gaming agents, services-providers and gaming support providers;
>
> (g) Income tax, VAT, and other applicable taxes on income from non-gaming operations earned by offshore gaming licensees, operators, agents, service providers and support providers.
>
> The tax shall be computed on the peso equivalent of the foreign currency used, based on the prevailing official exchange rate at the time of payment, otherwise the same shall be considered as a fraudulent act constituting under declaration of taxable receipts or income, and shall be subject to interests, fines and penalties under Sections 248(B), 249(B), 253, and 255 of the National Internal Revenue Code of the Philippines.
>
> After two (2) years or upon a determination that the threat of COVID-19 has been successfully contained or abated, whichever comes first, **the revenues derived from franchise taxes on gross bets or turnovers under paragraph (f) and income from non-gaming**

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11 *Rollo* (G.R. No. 254102), p. 28.

> **operations under paragraph (g) shall continue to be collected and shall accrue to the General Fund of the Government**. The BIR shall implement closure orders against offshore gaming licensees, operators, agents, service providers and support providers who fail to pay the taxes due, and such entities shall cease to operate.[12] (Emphasis supplied)

To implement Section 11(f) and (g) of the Bayanihan 2 Law, the BIR and the DOF issued **RR No. 30-2020** dated September 30, 2020, which provides:

> Section 3. Sources of Funding for the Subsidy, Stimulus Measures, and Other Measures to address the COVID-19 Pandemic. –
>
> a. **Franchise Tax at the rate of five percent (5%)** imposed on the **gross bets or turnovers**, or the agreed pre-determined minimum monthly revenues from gaming operations, whichever is higher, earned by offshore gaming licensees, including gaming operators, gaming agent, service providers and gaming support providers.
>
> b. **Income Tax, Value-Added Tax, and other applicable taxes imposed on income from Non-Gaming Operations** earned by offshore gaming licensees, including gaming operators, gaming agent, service providers and gaming support providers.
>
> The above taxes shall be computed on the peso equivalent of the foreign currency used and based on the prevailing official exchange rate at the time of payment.

*The Saint Wealth Petition*

On August 24, 2020, Saint Wealth Ltd. (Saint Wealth), an offshore-based POGO licensee, filed a *Petition for Certiorari and Prohibition [With Application for a Temporary Restraining Order and/or Writ of Preliminary Injunction]* (the *Saint Wealth Petition*), assailing the constitutionality of **RMC No. 64-2020**, and praying for the issuance of a TRO and/or writ of preliminary injunction to enjoin the enforcement of the same.

According to Saint Wealth, RMC No. 64-2020 should be invalidated based on the following arguments:

*First,* RMC No. 64-2020 violates Saint Wealth's constitutional right to due process because when the BIR issued RMC No. 64-2020, in relation to RMC No. 102-2017, the BIR arrogated upon itself the power to determine the classification and taxability of POGOs, notwithstanding the absence of any

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12 BAYANIHAN 2 LAW, Section 11.

tax law passed by Congress.[13] Therefore, the issuance of RMC No. 64-2020 and RMC No. 102-2017, with respect to the imposition of franchise tax on off-shore based POGO licensees, is an invalid exercise of quasi-legislative powers on the part of the BIR, and consequently, is a violation of POGO licensees' constitutional right to due process.[14]

*Second,* RMC No. 64-2020 violates the equal protection clause. Under RMC No. 64-2020, Saint Wealth, an offshore-based POGO licensee, is treated as if it is similarly situated with Philippine-based casino providers.[15] However, there exists a reasonable classification between offshore-based POGO licensees and Philippine-based entities that justifies a difference in treatment:

1. There is a substantial distinction between Philippine-based entities and offshore-based POGO licensees because the former performs services within the Philippines, while the latter performs services outside of the Philippines. Hence, the former is subject to tax for income from services rendered within the Philippines, while the latter is not subject to tax for its income derived from services performed abroad.

2. The classification is germane to the purpose of RMC 64-2020, because its purpose is to regulate POGO licensees and operators which are within the taxing authority of the BIR. Thus, only those entities which are within the taxing authority of the BIR may be subjected to the BIR's regulations.

3. The distinction is not limited to existing conditions only because the distinction is based on established principles in taxation with regard to classifying taxable entities.

4. The distinction applies equally to all members of the same class. The distinction between Philippine-based entities and offshore-based POGO licensees is equally applicable to the members of each class.[16]

Considering that a reasonable classification exists between Saint Wealth, an offshore-based POGO licensee, and Philippine-based operators, the BIR should treat them differently and should not impose similar tax liabilities on these different classes of entities.[17]

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13 *Rollo* (G.R. No. 252965), pp. 26-27.
14 Id. at 32.
15 Id. at 33-36.
16 Id. at 35.
17 Id. at 36.

*Third,* RMC No. 64-2020 violates the fundamental principle of situs of taxation. Saint Wealth is a non-resident foreign corporation. Under Philippine tax laws, specifically the National Internal Revenue Code (NIRC), non-resident foreign corporations are only liable to pay taxes on income received from sources within the Philippines. However, Saint Wealth's income is derived from sources outside the Philippines since all of its operations are located abroad. Therefore, it should not be subjected to any Philippine tax.[18]

*Fourth,* RMC No. 64-2020 violates the rule on uniformity of taxation. Since offshore-based POGO licensees are differently situated from Philippine-based casino providers, offshore-based POGO licensees, including Saint Wealth, should be taxed differently. Moreover, RMC No. 64-2020 likewise violates the rule on uniformity of taxation because it treats differently offshore-based POGO licensees from other foreign corporations which are not engaged in trade or business in the Philippines. RMC No. 64-2020 imposes several tax liabilities, including taxes on income derived from sources abroad, upon offshore-based POGO licensees, while other foreign corporations are not being imposed with such taxes.[19]

Meanwhile, as regards Saint Wealth's prayer for the issuance of injunctive relief, Saint Wealth alleged that all the requisites for the issuance of such relief are present because: (1) the issuance of RMC No. 64-2020 violates its right to due process and equal protection, and RMC No. 64-2020 likewise violates the principles of situs and uniformity of taxation; (2) there is an urgent need for injunctive relief to prevent the BIR from unduly collecting taxes from Saint Wealth; and (3) there is no other ordinary, speedy, or adequate remedy to prevent the infliction of irreparable injury, except for the issuance of a TRO and/or a writ of preliminary injunction.[20]

*The Marco Polo Petition*

On November 19, 2020, offshore-based POGO licensees, namely: (1) Marco Polo Enterprises Limited; (2) MG Universal Link Limited; (3) OG Global Access Limited; (4) Pride Fortune Limited; (5) VIP Global Solutions Limited: (6) AG Interpacific Resources Limited; (7) Wanfang Technology Management Ltd.; (8) Imperial Choice Limited; (9) Bestbetinnet Limited; (10) Riesling Capital Limited; (11) Golden Dragon Empire Ltd.; (12) Oriental Game Limited; (13) Most Success International Group Limited; and (14) High Zone Capital Investment Group Limited (collectively referred to as *Marco Polo* petitioners) filed a *Petition for Certiorari and Prohibition (With Application for Temporary Restraining Order/Writ of Preliminary Injunction)*

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18 Id. at 36-38.
19 Id. at 38-40.
20 Id. at 45.

(the *Marco Polo Petition),* assailing the constitutionality of Section 11(f) and (g) of the Bayanihan 2 Law, RR No. 30-2020, RMC No. 102-2017, and RMC No. 78-2018.

The *Marco Polo Petition* argued the following:

*First,* Section 11(f) and (g) of the Bayanihan 2 Law are unconstitutional for being riders. They are violative of Article VI, Section 26(1) of the 1987 Constitution because they go beyond and are not germane to the subject matter of the Bayanihan 2 Law:[21]

> The subject matter of the Bayanihan 2 Law is the implementation of COVID-19 relief measures. It is not a tax measure. However, Section 11(f) and (g) of the said law impose new taxes upon POGOs, which cannot be found in any other legislation. Moreover, the Bayanihan 2 Law is a temporary relief measure. However, under the said law, the collections under Section 11(f) and (g) shall subsist beyond the effectivity of the Bayanihan 2 Law, and even after the COVID-19 pandemic is successfully contained. Clearly, therefore, Section 11(f) and (g) of the Bayanihan 2 Law go beyond the subject matter of the law.[22]
>
> Furthermore, Section 11(f) and (g) of the Bayanihan 2 Law are not germane to the purpose of the law. Again, the Bayanihan 2 Law is a temporary pandemic relief measure. Thus, there is no logical connection between the perpetual tax imposition under Section 11(f) and (g) to the purpose of the law which is to provide a temporary pandemic relief measure.[23]

*Second,* Section 11(f) of the Bayanihan 2 Law violates substantive due process, and is arbitrary and confiscatory:[24]

> The concept of a tax based on gross bets or turnover of POGO licensees was introduced for the first time in the Bayanihan 2 Law, pursuant to a last minute change during the Bicameral Conference Committee meeting. As a result of such change, POGO licensees are now being subjected to tax, not only on their earnings, receipts, or income, but even on the winnings that they pay out to patrons.[25]

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21 *Rollo* (G.R. No. 254102), pp. 31-39.
22 Id. at 32-33.
23 Id. at 33.
24 Id. at 39-41.
25 Id. at 39-40.

> Clearly, it is arbitrary and confiscatory to tax POGO licensees on the basis of gross bets or turnover because these do not equate to earnings, income, or wealth flowing to the POGO licensees. Such rule likewise violates the Constitutional mandate that the rule of taxation shall be uniform, and equitable, and that Congress shall evolve a progressive system of taxation.[26]

*Third,* Section 11(f) of the Bayanihan 2 Law is repugnant to substantive due process because it whimsically disregards the principle of territoriality in taxation:[27]

> Section 11(f) of the Bayanihan 2 Law is unconstitutional because it taxes an activity that does not take place in the Philippines. Under the POGO Rules and Regulations, the activity which generates gaming revenue or income for offshore-based POGO licensees is the game of chance or offshore gaming. This is because income is generated only when patrons access the gaming website, place bets, and then lose their bets. Therefore, the situs of income derived from offshore gaming is the place where such game is played. Notably, the PAGCOR expressly prohibits POGO licensees from the following activities: (1) allowing their gaming websites to be accessed within Philippine territory; (2) allowing the placing of bets within Philippine territory; (3) allowing the paying of winnings within the Philippine territory; and (4) allowing Filipino citizens, wherever located, and foreign nationals while in the Philippines, from accessing their games through their websites. From the foregoing, it is clear that the income from offshore gaming operations are from sources outside the Philippine jurisdiction because the activity that produces the income occurs abroad – the online gaming websites are operated and accessed abroad, the bets are placed abroad, and the winnings are paid abroad.[28]

*Fourth,* Section 11(f) of the Bayanihan 2 Law violates the equal protection clause:[29]

> The Bayanihan 2 Law violates the equal protection clause for the following reasons: (1) it is the only statute that taxes a business entity even for its losses (taxing turnover); and (2) it is the only statute that taxes foreign corporations for income earned

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26 Id. at 40-41.
27 Id. at 41-46.
28 Id. at 41-44.
29 Id. at 46-50.

> abroad. Thus, only offshore-based POGO licensees are subjected to the type of tax treatment imposed under Section 11(f) of the Bayanihan 2 Law.[30]
>
> Moreover, the requirements for a valid classification under the equal protection clause are not met. There is no substantial distinction between offshore-based POGO licensees and other gaming businesses to justify taxing POGO licensees based on **gross bets or turnover** when other similar gaming business (such as casinos operating in the Philippines and licensed by PAGCOR) are only subjected to a five percent (5%) franchise tax based on **gross gaming revenues**. Gross gaming revenue is the total sum received **less** the total of all sums paid out as winnings to casino players. There is likewise no substantial distinction between offshore-based POGO licensees and other foreign corporations to justify the tax treatment of taxing POGO licensees even for income derived abroad. Finally, the discrimination against POGO licensees is not germane to the purpose of the law because such discrimination has no logical connection to the purpose of the Bayanihan 2 Law, which, again, is only a temporary pandemic relief measure.[31]

*Fifth,* Section 11(g) of the Bayanihan 2 Law is also unconstitutional because it whimsically disregards the principle of territoriality in taxation. Similar to Section 11(f) of the Bayanihan 2 Law, Section 11(g) also violates the principle of territoriality in taxation because it taxes "non-gaming" income of offshore-based POGO licensees derived from sources abroad. Section 11(g) likewise disregards the destination principle because it imposes VAT on goods and services which are consumed outside the territory of the Philippines.[32]

*Sixth,* Section 11(g) of the Bayanihan 2 Law likewise violates the equal protection clause. There is no substantial distinction or justification to treat offshore-based POGO licensees differently and to tax them on income from sources abroad when other foreign corporations are only taxed on income derived from sources within the Philippines. There is likewise no substantial distinction or justification to charge offshore-based POGO licensees with VAT for their sale of goods and services destined for abroad. Further, the discrimination against offshore-based POGO licensees is not germane to the purpose of the Bayanihan 2 Law because such discrimination has no relation to the law's purpose as a COVID-19 temporary relief measure.[33]

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30 Id. at 46.
31 Id. at 46-49.
32 Id. at 50-51.
33 Id. at 51.

*Seventh,* since Section 11(f) and (g) of the Bayanihan 2 Law are unconstitutional, RMC No. 30-2020 is also unconstitutional because it has no statutory basis and/or mandate of any existing law.[34]

*Eighth,* RMC No. 102-2017 is likewise void for having no statutory basis:[35]

> RMC No. 102-2017 was issued purportedly to clarify the taxability of POGOs. It then imposed a franchise tax of five percent (5%) on the gross gaming revenues of POGOs, including offshore-based POGO licensees. However, prior to the Bayanihan 2 Law, there was no statute which imposed taxes on the gaming revenue of offshore-based POGOs.[36]
>
> Apparently, in issuing RMC No. 102-2017, the BIR based the imposition of the five percent (5%) franchise tax on gross gaming revenues on the PAGCOR Charter. However, the PAGCOR Charter grants PAGCOR and its contractees (licensees) operating within the territorial jurisdiction of the Philippines an exemption from all national and local fees and taxes in exchange for the payment of the five percent (5%) franchise tax. The PAGCOR Charter does not authorize the collection of any new tax whatsoever. It cannot be a source of a new tax on offshore gaming done online, and outside the jurisdiction of the Philippines. Considering that there is no law which allows for the taxation of foreign-sourced income of foreign corporations, including offshore-based POGO licensees, RMC No. 102-2017 has no legal basis, and therefore, must be struck down and declared void.[37]

*Ninth,* RMC No. 102-2017 is confiscatory and violates the equal protection clause. Similar to the provisions of the Bayanihan 2 Law, RMC No. 102-2017 discriminates against offshore-based POGO licensees, making them the only foreign corporations subject to taxes for income abroad, therefore, violating the principle of territoriality. There is also no substantial distinction or justification to treat offshore-based POGO licensees differently and tax them on income from sources abroad when other foreign corporations are not subjected to the same.[38]

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34 Id. at 51-52.
35 Id. at 52-55.
36 Id. at 54.
37 Id. at 54-55.
38 Id. at 55.

*Tenth,* RMC No. 78-2018, which imposed registration requirements pursuant to the taxes imposed under RMC No. 102-2017, is void for having been issued without statutory basis and/or for being unconstitutional. Since RMC No. 102-2017 is unconstitutional and void, it follows that RMC No. 78-2018, which imposes registration requirements to enforce RMC No. 102-2017, is likewise unconstitutional and void.[39]

The *Marco Polo Petition* likewise prayed for the issuance of a TRO and/or writ of preliminary injunction.[40] In support of its application for the issuance of a TRO and/or writ of preliminary injunction, the *Marco Polo Petition* made the following arguments:

1. The *Marco Polo* petitioners have a clear and unmistakable right against deprivation of property without due process of law.[41]

2. Section 11(f) and (g) of the Bayanihan 2 Law and the *Assailed Tax Issuances* directly and specifically target offshore-based POGO licensees such as the *Marco Polo* petitioners. The imposition of the taxes in question would amount to a deprivation of their property without due process of law, and is a material and substantial invasion of their constitutional rights.[42]

3. There is an extreme urgency for the issuance of injunctive relief because if the same is not issued, the *Marco Polo* petitioners would bleed financially because of illegal and oppressive taxes.[43]

4. The *Marco Polo* petitioners will suffer irreparable injury if injunctive relief is not granted. If they are forced to cease operations, either because of closure orders or because they cannot afford to pay the illegal and oppressive taxes, their business reputations will be tarnished, and they will lose their clientele who may decide to patronize other operators permanently.[44]

*Issuance of the TRO*

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39 Id. at 56.
40 Id. at 60.
41 Id. at 57-58.
42 Id. at 58.
43 Id.
44 Id. at 57-58.

On January 5, 2021, a TRO[45] was issued in favor of the *Marco Polo* petitioners. The TRO enjoined the implementation of: (1) Section 11(f) and (g) of the Bayanihan 2 Law; (2) RR No. 30-2020; (3) RMC No. 102-2017; and (4) RMC No. 78-2018.

*Respondents' Consolidated Comment*

On January 15, 2021, the DOF Secretary and the BIR Commissioner (respondents), through the Office of the Solicitor General (OSG), filed their *Consolidated Comment*[46] to the *Consolidated Petitions.*

In the *Consolidated Comment,* the respondents raised several procedural and substantive issues.

With regard to the procedural issues, the respondents argued that the *Consolidated Petitions* did not present an actual justiciable controversy. Moreover, the respondents contended that resort to a petition for *certiorari* and prohibition was improper, and a facial challenge is not permitted to assail the provisions of the Bayanihan 2 Law and the BIR issuances. Finally, the respondents alleged that the *Consolidated Petitions* violated the doctrine of hierarchy of courts, and exhaustion of administrative remedies.[47]

Meanwhile, for the substantive issues, the respondents argued the following:

*First,* Section 11(f) and (g) of the Bayanihan 2 Law does not violate the "one subject, one title rule" under Article VI of the Constitution:

> Section 26(1), Article VI of the Constitution requires that "[e]very bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof." Such requirement is satisfied if all the parts of the statute are related, and are germane to the subject matter expressed in the title, or as long as they are not inconsistent with the general subject and title of the law.[48]
>
> The full title of the Bayanihan 2 Law provides: "*An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and*

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45 Id. at 211-215.
46 *Rollo* (G.R. No. 252965), pp. 101-176.
47 Id. at 117-129.
48 Id. at 130.

*Bolster the Resiliency of the Philippine Economy,* ***Providing Funds Therefor,*** *And For Other Purposes.*" The phrase "***Providing Funds Therefor***" shows that Section 11 of the said law, which enumerates the **existing sources of funding** for COVID-19 relief measures, is germane to the purpose of the law. Furthermore, Section 11(f) and (g) of the Bayanihan 2 Law do not impose new taxes because as early as 2017 and pursuant to RMC 102-2017, revenues derived by POGO operators have been subject to a five percent (5%) franchise tax.[49]

Clearly, Section 11(f) and (g) of the Bayanihan 2 Law are not riders but are valid sources of funds, the identification of which is germane to the subject and purpose of the law. As such, the Bayanihan 2 Law did not impose any new tax, but merely allowed **the realignment of collections from already existing taxes.**[50]

*Second,* Section 11(f) and (g) of the Bayanihan 2 Law, as well as the *Assailed Tax Issuances*, do not violate the petitioners' right to due process:[51]

Section 11(f) and (g) of the Bayanihan 2 Law are valid and constitutional. The collection of franchise tax under the said law does not violate the principle of territoriality in taxation because what is being collected is a tax not based on income, but rather, on the exercise of a privilege. Since such franchise tax partakes of the nature of an excise tax, the situs of taxation is the place where the privilege is exercised, regardless of the place where the services are performed, or where the products are delivered.[52]

RR No. 30-2020, which implements Section 11(f) and (g) of the Bayanihan 2 Law, is valid, and enjoys the presumption that the legislature intended to enact a valid, sensible, and just law. Furthermore, it bears emphasis that the NIRC empowers the DOF Secretary to promulgate revenue regulations to ensure effective enforcement of tax laws. Considering that RR No. 30-2020 was issued by the proper authority (the DOF Secretary and the BIR), and in accordance with a valid statute enacted by Congress, the same enjoys the presumption of validity.[53]

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49 Id. at 132-134.
50 Id. at 129-134.
51 Id. at 135-143.
52 Id. at 136-137.
53 Id. at 138-139.

> RMC No. 102-2017 has statutory basis. It was issued by the BIR in accordance with the PAGCOR Charter, which imposes a five percent (5%) franchise tax on the gross gaming revenues of businesses engaged in gambling operations under the mantle of PAGCOR. Clearly, the tax mentioned in RMC No. 102-2017 is not a new tax.[54]
>
> RMC No. 78-2018 and RMC No. 64-2020, which impose requirements for POGO registration and BIR clearance, are valid. Again, these issuances did not impose new taxes on POGO licensees. They merely provide for guidelines for registration and application for a BIR Clearance in connection with their resumption of operations. Notably, the act of providing guidelines is within the powers of the BIR as the administrative body tasked to enforce tax laws, and administrative issuances. Hence, RMC No. 78-2018 and RMC No. 64-2020 have in their favor the presumption of legality.[55]

*Third,* Section 11(f) and (g) of the Bayanihan 2 Law, as well as the *Assailed Tax Issuances*, do not violate the equal protection clause.[56] There exists a reasonable classification between offshore-based POGO licensees and other foreign corporations that justifies the difference in treatment under the Bayanihan 2 Law:

1. Not all foreign corporations are engaged in offshore gaming, and not all foreign corporations are required to obtain a license from PAGCOR before they could operate. Moreover, with the recognition that online activity is sufficient to constitute doing business in the Philippines, foreign corporations engaged in offshore gaming are regarded as resident foreign corporations engaged in business in the Philippines. Clearly, substantial distinctions exist between foreign corporations engaged in offshore gaming, and foreign corporations.[57]

2. The classification is germane to the purpose of the law since Section 11(f) and (g) of the Bayanihan 2 Law are mechanisms to accelerate the recovery of the Philippine economy.[58]

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54 Id. at 140.
55 Id. at 142-143.
56 Id. at 143-155.
57 Id. at 146-147.
58 Id. at 147.

3. The classification applies equally to all members of the same class – all foreign corporations granted with an OGL.[59]

4. The classification is not limited to existing conditions since the Bayanihan 2 Law itself provides for the collection of taxes under Section 11(f) and (g) even after the COVID-19 pandemic is successfully contained.[60]

For the same reasons, RMC No. 102-2017, RMC No. 78-2018 and RMC No. 64-2020 do not violate the equal protection clause because there are valid classifications and distinctions to justify the difference in treatment between POGO licensees and other corporations.

*Fourth,* the tax impositions on POGO licensees do not violate the principles of situs and uniformity of taxation:[61]

The principle of situs of taxation only applies to income taxation. Clearly, such principle does not apply in the imposition of franchise tax – the tax imposed upon POGO licensees. Hence, in imposing franchise tax on POGO licensees, the location or the situs of their income is immaterial, because what is being taxed is the exercise of their rights and privileges granted to them by the government.[62]

Nevertheless, assuming *arguendo* that the principle of situs of taxation applies, the revenues of POGOs are still subject to tax as they are considered income within the Philippines. The income-producing activity of POGOs is its entire gaming operations, which consist of operating the software, taking bets, provision of gaming, provision of services, and streaming of the games. Such gaming operations, or parts of it, are done in the Philippines. Thus, the revenues derived from these activities are taxable in the Philippine jurisdiction.[63]

Moreover, offshore-based POGO licensees are considered resident foreign corporations, and as such, they are taxable in the Philippines. Based on the Opinion of the Office of the General Counsel of the Securities and Exchange Commission (SEC), the setting up of game servers in the Philippines by a foreign corporation is considered as "doing business" in the Philippines.

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59 Id. at 147-148.
60 Id. at 148.
61 Id. at 155-165.
62 Id. at 155-159.
63 Id. at 159.

> According to the SEC, since these game servers will be in continued operations while being physically present in the Philippines, the foreign corporation which set up these servers are considered to be engaged in activities which imply a continuity of commercial dealings in the Philippines.[64]
>
> Meanwhile, as regards the income tax and VAT imposed upon revenues from non-gaming operations, these non-gaming operations are services performed in the Philippines. Thus, these are subject to normal income tax, VAT, and other applicable taxes under the NIRC.[65]
>
> With respect to the principle of uniformity of taxation, the taxes imposed upon POGO licensees are uniform because they are imposed on all POGOs wherever they operate. Uniformity of taxation simply requires that all subjects or objects of taxation, similarly situated, are to be treated alike.[66]

In the *Consolidated Comment,* the respondents likewise moved for the reconsideration of the issuance of the TRO. The respondents argued that the requisites for the issuance of a TRO were not met because:

1. The petitioners failed to show that they have a clear legal right as there is no violation of the "one subject, one title," due process, and equal protection clauses of the Constitution.[67]

2. The petitioners failed to prove the element of grave and irreparable injury. The injury or damage sought to be prevented is not irreparable and is actually capable of pecuniary estimation. Moreover, the petitioners have other remedies such as tax refund or tax credit under the NIRC.[68]

3. The petitioners failed to show extreme necessity for the issuance of injunctive relief.[69]

*Legislative Developments During the Pendency of the Case*

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64 Id. at 159-160.
65 Id. at 160.
66 Id. at 163.
67 Id. at 168.
68 Id. at 170.
69 Id.

On September 22, 2021, President Rodrigo Duterte signed R.A. No. 11590, entitled "*An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22, 25, 27, 28, 106, 108, and Adding New Sections 125-A and 288-G of the National Internal Revenue Code of 1997, As Amended, And For Other Purposes.*"

R.A. No. 11590 categorically classifies POGO licensees, whether Philippine-based or offshore-based as corporations "engaged in doing business in the Philippines."[70] R.A. No. 11590 likewise imposes a **five percent (5%) gaming tax** on the income of POGOs derived from their gaming operations.[71] Such gaming tax is based on the entire gross gaming revenue or receipts or the agreed predetermined minimum monthly revenue, whichever is higher:

> Section 125-A. *Gaming Tax on Services Rendered by Offshore Gaming Licensees.* – Any provision of existing laws, rules or regulations to the contrary notwithstanding, the entire gross gaming revenue or receipts or the agreed predetermined minimum monthly revenue or receipts from gaming, whichever is higher, shall be levied, assessed, and collected **a gaming tax equivalent to five percent (5%), in lieu of all other direct and indirect internal revenue taxes and local taxes, with respect to gaming income** x x x. (Emphasis supplied)

As regards income derived from non-gaming operations, R.A. No. 11590 imposes a 25% income tax on Philippine-based POGOs for their income derived from sources within and without the Philippines.[72] On the other hand, for offshore-based POGO licensees, they are subject to 25% income tax for their income only from sources **within** the Philippines:[73]

> Sec. 28. *Rates of Income Tax on Foreign Corporations.* –
>
> x x x x
>
> (7) *Offshore Gaming Licensees.* – The provisions of existing special or general laws to the contrary notwithstanding, the **non-gaming revenues derived within the Philippines of foreign-based offshore gaming licensees** as defined and duly licensed by the Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority shall be subject to an income tax equivalent to twenty-five percent (25%) of the taxable income derived during each taxable year. (Emphasis supplied)

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70 See REPUBLIC ACT NO. 11590, Section 2.
71 Id., Section 8.
72 Id., Section 4.
73 Id., Section 5.

Finally, with respect to the imposition of VAT, R.A. No. 11590 provides that sales of goods and properties to POGOs, as well as services rendered to POGOs by service providers, shall be subject to zero percent (0%) rate.[74]

## The Issues

This Court is tasked to tackle the following pivotal issues: (1) whether offshore-based POGO licensees are liable to pay a five percent (5%) franchise tax for income derived from their gaming operations; and (2) whether offshore-based POGO licensees are liable to pay income tax, VAT, and other applicable taxes for income derived from their non-gaming operations.

## Our Ruling

The *Consolidated Petitions* are meritorious.

Prefatorily, it is worthy to note that the *Consolidated Petitions* appear to have been rendered moot by the enactment of R.A. No. 11590, which categorically imposes the following taxes on offshore-based POGO licensees, such as the petitioners:

1. Five percent (5%) gaming tax on all income derived from gaming operations; and

2. Twenty-Five percent (25%) income tax on income derived from non-gaming operations from sources within the Philippines.

R.A. No. 11590 similarly states that all laws, rules and regulations, including the Bayanihan 2 Law, which are contrary to or inconsistent with any provision of the same are repealed and modified accordingly.[75]

In *Jacinto-Henares v. St. Paul College of Makati*,[76] this Court explained the principle of mootness in this wise:

> A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the

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74 Id., Sections 6 and 7.
75 Id., Section 13.
76 807 Phil. 133 (2017).

> case or a declaration on the issue would be of no practical value or use. Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness.[77] (Citations omitted)

With the enactment of R.A. No. 11590, a supervening event has transpired which directly addressed the pivotal issues raised in the *Consolidated Petitions* because a valid law has been passed clarifying the taxability of POGOs, including offshore-based POGO licensees, and imposing the applicable taxes thereon.

Nevertheless, this Court finds it imperative to resolve the instant case vis-à-vis the petitioners' tax liabilities prior to the passage of R.A. No. 11590, and to discuss the substantive issues raised by the petitioners. As succinctly held in *David v. Macapagal-Arroyo*,[78] this Court may still decide a case, which is otherwise moot and academic, when constitutional issues raised require the formulation of controlling principles to guide the bench, the bar, and the public:

> The "moot and academic" principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: *first*, **there is a grave violation of the Constitution**; *second*, the exceptional character of the situation and the **paramount public interest is involved**; *third*, when **constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public**; and *fourth*, the case is **capable of repetition yet evading review**.[79] (Emphasis supplied; citations omitted)

Here, the petitioners raise, among others, genuine issues on the constitutionality of Section 11(f) and (g) of the Bayanihan 2 Law. Thus, this Court is impelled to consider and resolve the *Consolidated Petitions* to provide guidance as to the tax liabilities of offshore-based POGO licensees, including the petitioners, prior to the passage of R.A. No. 11590.

***The PAGCOR Charter Imposes a Franchise Tax upon its Licensees on Revenues Derived from Gaming Operations, and Income Tax, VAT, and Other Applicable Taxes on Revenues Derived from Non-Gaming Operations.***

Under Section 13(2)(a) of the PAGCOR Charter, PAGCOR is exempt from the payment of any and all taxes on its income derived from gaming

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77 Id. at 140-141.
78 522 Phil. 705 (2006).
79 Id. at 754.

operations, except for a five percent (5%) franchise tax on its gross revenues or earning:

> SECTION 13. Exemptions. –
>
> x x x x
>
> (2) Income and other taxes. — (a) Franchise Holder: **No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise.** Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority. (Emphasis and underscoring supplied)

Such exemption extends to PAGCOR's licensees pursuant to Section 13(2)(b) of the PAGCOR Charter, which provides:

> (b) Others: The **exemptions herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise** and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator. (Emphasis and underscoring supplied)

Considering the above-cited provisions, this Court clarified in *Bloomberry Resorts and Hotels, Inc. v. Bureau of Internal Revenue* (*Bloomberry*),[80] that PAGCOR's tax privilege of paying only a five percent (5%) franchise tax for income generated from its gaming operations, in lieu of all other taxes, **inures to the benefit of PAGCOR's licensees**:

> As the PAGCOR Charter states in unequivocal terms that exemptions granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, ***shall inure to the benefit of and extend to*** corporation(s), association(s), agency(ies), or individual(s) with whom the PAGCOR or operator has any contractual

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80 792 Phil. 751 (2016).

> relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise, **so it must be that all *contractees and licensees* of PAGCOR, upon payment of the 5% franchise tax, shall likewise be exempted from all other taxes, including corporate income tax realized from the operation of casinos.**
>
> x x x x
>
> Plainly, too, **upon payment of the 5% franchise tax**, petitioner's **income from its gaming operations of gambling casinos, gaming clubs and other similar recreation or amusement places, and gaming pools, defined within the purview of the aforesaid section, is not subject to corporate income tax.**[81] (Emphasis and underscoring supplied)

Clearly, both law and jurisprudence mandate that PAGCOR's licensees are only liable to pay a five percent (5%) franchise tax for income derived from its gaming operations. However, a plain reading of the PAGCOR Charter and the ruling in *Bloomberry* shows that the liability of paying the five percent (5%) franchise tax only applies to PAGCOR's licensees which are connected to the **operations of casinos and other related amusement places**.

**Stated differently, the payment of this five percent (5%) franchise tax only applies to PAGCOR licensees which operate casinos and other related amusement places, and excludes those licensees who derive profit from other means, such as POGOs.** Thus, POGOs, including offshore-based POGO licensees, are not taxed under the PAGCOR Charter.

***Prior to the Bayanihan 2 Law, there is No Law which Imposes a Five Percent (5%) Franchise Tax on POGO Licensees.***

To recall, in 2017, the BIR issued RMC No. 102-2017, which is the first issuance which dealt with the taxability of POGOs. RMC No. 102-2017 imposed, among others, a five percent (5%) franchise tax upon the gross gaming revenues derived from gaming operations of POGOs. Supposedly, such franchise tax is based on the PAGCOR Charter and settled jurisprudence.

However, as stated above, the franchise tax liability of PAGCOR licensees **only applies to those which operate casinos and other related amusement places**. It is undeniable that POGOs do not fall within the contemplation of licensees who operate casinos and other related amusement places. The PAGCOR Charter is clear, and when a law is clear, there is no room for any interpretation.

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81 Id. at 767-768.

Moreover, as aptly observed by Senior Associate Justice Estela Perlas-Bernabe (Justice Perlas-Bernabe), when the PAGCOR Charter was enacted, offshore gaming was not yet in existence. Thus, the PAGCOR Charter could not have contemplated virtual gaming websites as "casinos and other related amusement places" mentioned under Section 13(2)(b) thereof. Consequently, the PAGCOR Charter cannot be said to have been the basis for imposing tax on POGO Licensees.[82]

Simply then, when RMC No. 102-2017 was issued, there was **no law imposing any franchise tax on POGOs**. Thus, RMC No. 102-2017 is invalid, insofar as it imposed franchise taxes on POGOS, because it was passed without any statutory basis.

Likewise, as pointed out by Associate Justice Alfredo Benjamin Caguioa (Justice Caguioa),[83] RMC No. 102-2017 is likewise invalid and unconstitutional because it effectively amended the PAGCOR Charter when it imposed taxes on entities not taxed under the law. It must be emphasized that the State's inherent power to tax is exclusively vested in Congress.[84] Without such imprimatur from Congress, the BIR cannot arrogate upon itself the authority to impose taxes, especially because "[t]he rule is that a tax is never presumed and there must be clear language in the law imposing the tax. Any doubt whether a person, article or activity is taxable is resolved against taxation."[85]

Moreover, the BIR cannot enlarge or go beyond the provisions of the law it administers. As held in *Purisima v. Lazatin* (*Purisima*):[86]

> *RR 2-2012 is unconstitutional.*
>
> According to the respondents, the power to enact, amend, or repeal laws belong exclusively to Congress. In passing RR 2-2012, petitioners illegally amended the law - a power solely vested on the Legislature.
>
> We agree with the respondents.
>
> The power of the petitioners to interpret tax laws is not absolute. **The rule is that regulations may not enlarge, alter, restrict, or otherwise go beyond the provisions of the law they administer; administrators and implementors cannot engraft additional requirements not contemplated by the legislature.**

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82 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 18.

83 Justice Caguioa's *Comments,* p. 2.

84 *Film Development Council of the Philippines v. Colon Heritage Realty Corporation,* 760 Phil. 519, 535 (2015); *Purisima v. Lazatin,* 801 Phil. 395, 426 (2016).

85 *Light Rail Transit Authority v. Quezon City,* G.R. No. 221626, October 9, 2019.

86 Supra note 84 at 425-426.

> It is worthy to note that RR 2-2012 **does not even refer to a specific Tax Code provision it wishes to implement**. *While it purportedly establishes mere administration measures for the collection of VAT and excise tax on the importation of petroleum and petroleum products, not once did it mention the pertinent chapters of the Tax Code on VAT and excise tax.* (Emphasis supplied; citations omitted)

Indeed, the ruling in *Purisima* applies squarely in this case. The BIR encroached upon the authority reserved exclusively for Congress when it issued RMC No. 102-2017 and imposed a five percent (5%) franchise tax upon POGOs when the PAGCOR Charter itself does not tax POGOs. RMC No. 102-2017 likewise failed to indicate which provisions of the PAGCOR Charter it was implementing when it imposed the franchise tax. Accordingly, **RMC No. 102-2017, and consequently, RMC No. 78-2018, insofar as they imposed franchise taxes on POGOS, are invalid and unconstitutional for being issued without any statutory basis and for encroaching upon legislative power to enact tax laws.**

***The BIR can only Impose Income Tax Upon Income Derived from the Philippines; VAT can only be Imposed for Services and Goods Consumed in the Philippines.***

Apart from franchise tax, RMC No. 102-2017 likewise imposed income tax, VAT, and other applicable taxes on offshore-based POGO licensees upon their income derived from non-gaming operations or other related services.

"Income from Other Related Services" is defined by RMC No. 102-2017 as "income or earning realized or derived not from gaming operations but from such other necessary and related services, shows, and entertainment."[87]

At this juncture, it is vital to recall that the principle of taxation is an inherent attribute of sovereignty. As stated by Justice Perlas-Bernabe, taxation emanates from **necessity**,[88] and is grounded on a **mutually advantageous relationship between the State and those it governs**; every person surrenders a portion of their income for the running of the government, and the government in turn, provides tangible and intangible benefits to serve and protect those within its jurisdiction.[89] Similarly, Associate Justice Japar B. Dimaampao (Justice Dimaampao) cited the principle of **equality in taxation**,

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87 RMC No. 102-2017, paragraph IV(1)(b).

88 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 9. *Phil. Guaranty Co., Inc. v. Commissioner of Internal Revenue,* 121 Phil. 755, 760 (1965).

89 *Id.; Commissioner of Internal Reveue v. Algue, Inc.,* 241 Phil. 829, 836 (1988).

which states that the subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, **in proportion to the revenue which they respectively enjoy under the protection of the state.**[90]

Thus, it is within the context of whether or not POGOs, particularly offshore-based POGO licensees, enjoy the protection of the State that this Court must determine whether the Philippines may impose taxes upon them.

To resolve this query, it is vital to understand the services performed by offshore-based POGO licensees to determine how they operate and how they derive revenues.

Under the POGO Rules and Regulations, POGOs are entities which provide and participate in offshore gaming services. As stated above, **offshore gaming** refers to "the offering by a licensee of PAGCOR authorized online games of chance via the Internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee."[91] Offshore gaming has three components:

> b.1.) prize consisting of money or something else of value which can be won under the rules of the game;
>
> b.2.) a player who:
>
> > b.2.a.) being located outside of the Philippines and not a Filipino citizen, enters the game remotely or takes any step in the game by means of a communication device capable of accessing an electronic communication network such as the internet.
> >
> > b.2.b.) gives or undertakes to give, a monetary payment or other valuable consideration to enter in the course of, or for, the game; and
>
> b.3.) the winning of a prize is decided by chance.[92]

All these three components do not involve and are not performed within the Philippine territory. None of these components likewise deals with Filipino citizens. To reiterate, the placing of bets occurs outside the

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90 Justice Dimaampao's *Reflections,* p. 1; Smith, Adam, "*The Wealth of Nations,*" Bantam Classic (2003).
91 POGO RULES AND REGULATIONS, Section 4(b).
92 Id.

Philippines; the players must not be Filipino citizens, or within the Philippines; and the payment of the prize also occurs outside of the Philippines.

Given the above, the only point of contact of an offshore-based POGO licensee to the Philippines is that it is required, pursuant to its OGL, to engage the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations.[93] **These service providers are separate and distinct entities from the offshore-based POGO licensees.** Simply put, the only transaction entered into by these offshore-based POGO licensees are the service contracts with these service providers located in the Philippines.

Because of the supposed continuing presence (through transacting with service providers) of offshore-based POGO licensees in the Philippines, the BIR has categorized offshore-based POGO licensees as **resident foreign corporations**. Notably, R.A. No. 11590 likewise classifies all POGO licensees, including offshore-based POGO licensees as corporations "engaged in doing business in the Philippines." Nevertheless, the NIRC provides that foreign corporations are only taxed for income derived in the Philippines:

> **SEC. 23.** ***General Principles of Income Taxation in the Philippines.*** - Except when otherwise provided in this Code:
>
> x x x x
>
> (f) A foreign corporation, whether engaged or not in trade or business in the Philippines, is taxable only on **income derived from sources within the Philippines**. (Emphasis supplied)

In fact, R.A. No. 11590 likewise categorically provides that offshore-based POGO licensees are only liable to pay income tax **for income derived within the Philippines**.

As mentioned by Justice Perlas-Bernabe, Section 42(A)[94] of the NIRC provides the guidelines in determining what income is derived from sources within the Philippines, while Section 42(C)[95] thereof identifies what income

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93 *See* PAGCOR Manual, p. 2.

94 Section 42(A) of the NIRC provides:
Section 42. **Income from Sources Within the Philippines.** –
(A) Gross Income From From Sources Within the Philippines. – The following items of gross income shall be treated as gross income from sources within the Philippines:
x x x x
(3) Services. – Compensation for labor or personal services **performed in the Philippines[.]** (Emphasis supplied)

95 Section 42(C) of the NIRC provides:
Section 42. Income from Sources Within the Philippines. –

is sourced without. In explaining the concept of "source" vis-à-vis taxation, this Court stated in *Manila Gas Corporation v. Collector of Internal Revenue*:[96] "[t]he word 'source' conveys only one idea, that of origin, and the origin of the income was the Philippines." Thus, the test is to determine if the income **originated from the Philippines**.[97]

A reading of Section 42(A) and (C) of the NIRC makes it clear that for income derived from the sale of services, the focal point is where the **actual performance of the service occurs**. In this regard, the seminal case of *Commissioner of Internal Revenue v. British Overseas Airways Corporation (BOAC)*[98] is instructive to understand the precise aspect of the activity which triggers the taxable event, *viz.*:

> The source of an income is the property, activity or service that produced the income. **For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines. In BOAC's case, the sale of tickets in the Philippines is the activity that produces the income. The tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.**
>
> x x x x
>
> BOAC, however, would impress upon this Court that income derived from transportation is income for services, with the result that **the place where the services are rendered determines the source**; and since BOAC's service of transportation is performed outside the Philippines, the income derived is from sources without the Philippines and, therefore, not taxable under our income tax laws. The Tax Court upholds that stand in the joint Decision under review.
>
> The absence of flight operations to and from the Philippines is not determinative of the source of income or the situs of income taxation. Admittedly, BOAC was an off-line international airline at the time pertinent to this case. **The test of taxability is the "source"; and the source of an income is that activity x x x which produced the income.** Unquestionably, the passage documentations in these cases were sold in the Philippines and the revenue therefrom was derived from a business activity

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x x x x

(C) Gross Income From Sources Without the Philippines. – The following items of gross income shall be treated as income from sources without the Philippines:

x x x x

(3) Compensation for labor or personal **services performed without the Philippines[.]** (Emphasis supplied)

96 62 Phil. 895, 901 (1936).

97 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 10.

98 233 Phil. 406 (1987).

> regularly pursued within the Philippines. And even if the BOAC tickets sold covered the "transport of passengers and cargo to and from foreign cities," **it cannot alter the fact that income from the sale of tickets was derived from the Philippines. The word "source" conveys one essential idea, that of origin, and the origin of the income herein is the Philippines.**[99] (Emphasis supplied; citations omitted)

Thus, as observed by Justice Perlas-Bernabe, in *BOAC,* the Court held that, while the actual transportation would occur outside the Philippines, the sale of tickets in the Philippines already constituted a taxable activity.[100] In this regard, in *Commissioner of Internal Revenue v. Baier-Nickel (Baier-Nickel)*,[101] this Court expounded on its ruling in *BOAC,* and clarified that the "source" of income is not determined by where income is disbursed or physically received, but rather, where the business activity that produced such income is actually conducted:

> Both the petitioner and respondent cited the case of *Commissioner of Internal Revenue v. British Overseas Airways Corporation* in support of their arguments, but the correct interpretation of the said case favors the theory of respondent that **it is the *situs* of the activity that determines whether such income is taxable in the Philippines**. The conflict between the majority and the dissenting opinion in the said case has nothing to do with the underlying principle of the law on sourcing of income. In fact, both applied the case of *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue. The divergence in opinion centered on whether the sale of tickets in the Philippines is to be construed as the "activity" that produced the income, as viewed by the majority, or merely the physical source of the income, as ratiocinated by Justice Florentino P. Feliciano in his dissent. The majority, through Justice Ameurfina Melencio-Herrera, as ponente*, interpreted the sale of tickets as a business activity that gave rise to the income of BOAC. **Petitioner cannot therefore invoke said case to support its view that source of income is the physical source of the money earned. If such was the interpretation of the majority, the Court would have simply stated that source of income is not the business activity of BOAC but the place where the person or entity disbursing the income is located or where BOAC physically received the same. But such was not the import of the ruling of the Court**. It even explained in detail the business activity undertaken by BOAC in the Philippines to pinpoint the taxable activity and to justify its conclusion that BOAC is subject to Philippine income taxation. x x x.
>
> x x x x
>
> The Court reiterates the rule **that "source of income" relates to the property, activity or service that produced the income**. With respect to rendition of labor or personal service, as in the instant case, it is the place where the labor or service was performed that determines the source of the

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99 Id. at 422-424.

100 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, pp. 10-11.

101 531 Phil. 480 (2006).

> income. There is therefore no merit in petitioner's interpretation which equates source of income in labor or personal service with the residence of the payor or the place of payment of the income.[102] (Emphasis supplied)

Applying the rulings of *BOAC* and *Baier-Nickel* to the instant case, it appears that offshore-based POGO licensees derive **no income from the sources within the Philippines** because the "activity" which produces income occurs and is located outside the territory of the Philippines. Indeed, the flow of wealth or the income-generating activity – the placing of bets less the amount of payout – transpires outside the Philippines.

Pertinently, apart from the disquisitions found in *BOAC* and *Baier-Nickel,* Justice Dimaampao also observed the necessity to discuss the other jurisprudential tests to ascertain whether a resident foreign corporation is "doing" or "engaging in" or "transacting" business in the Philippines, to determine the taxability of POGOs, particularly offshore-based POGO licensees, within the jurisdiction of the Philippines.[103] These jurisprudential tests are as follows:

1. Substance Test;[104]
2. Contract Test;[105]
3. Intention Test;[106] and
4. Actual Performance Test.[107]

***Substance Test*** – the true test in determining whether a foreign corporation is transacting business "seems to be whether [it] is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another."[108] As noted by Justice Dimaampao, the ***Substance Test*** implies a **continuity of commercial dealings and arrangements**, and contemplates, to the extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose of its organization.[109]

***Contract Test*** - transactions entered into by a foreign corporation which constitute an **isolated transaction** and are not a series of commercial dealings which signify an intent on the part of such corporation to do business

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102 Id. at 491-493.
103 Justice Dimaampao's *Reflections,* p. 3.
104 *Id.; The Mentholatum Co., Inc. v. Mangaliman,* 72 Phil. 524, 528 (1941).
105 *Id.; Pacific Vegetable Oil Corporation v. Singzon,* 96 Phil. 986 (1955).
106 *Id.; Eriks Pte. Ltd., v. Court of Appeals,* 335 Phil. 229, 239 (1997).
107 *Id.; B. Van Zuiden Bros., Ltd. v. GTVL Manufacturing Industries, Inc.,* 551 Phil. 231, 237 (2007).
108 *The Mentholatum Co., Inc. v. Mangaliman,* supra note 104 at 528.
109 Justice Dimaampao's *Reflections,* pp. 3-4.

in the Philippines, does not fall under the category of "doing business." Thus, as stressed by Justice Dimaampao, **isolated transactions** by a foreign corporation do **not** constitute engaging in business in the Philippines.[110]

***Intention Test*** – what is determinative of "doing business" is not really the number or the quantity of the transactions, but the intention of the entity to continue the body of its business in the country. The number and quantity are merely evidence of such intention. The phrase "*isolated transaction*" has a definite and fixed meaning, *i.e.,* a transaction or series of transactions set apart from the common business of a foreign enterprise in the sense that no intention to engage in a progressive pursuit of the purpose and object of the business organization. As such, Justice Dimaampao noted in his *Reflections* that under the ***Intention Test,*** the question of whether a foreign corporation is "doing business" does not necessarily depend upon the frequency of its transactions, but more upon the **nature and character of the transactions**.

***Actual Performance Test*** – an essential condition to be considered as "doing business" in the Philippines is the **actual performance of specific commercial acts within the territory of the Philippines**, because, as aptly pointed out by Justice Dimaampao in his *Reflections,* the Philippines has no jurisdiction over commercial acts performed in foreign territories.

Applying these jurisprudential tests, as well as the discussion of what constitutes doing business under Section 3(d) of the Foreign Investments Act of 1991 (FIA),[111] it is abundantly clear that the POGOs, particularly offshore-based POGO licensees, are **not doing, engaging in, nor transacting business in the Philippines**. As emphasized by Justice Dimaampao: *first,* the activities of offshore-based POGO licensees do not fall under Section 3(d) of the FIA; *second,* offshore-based POGO licensees only have a **limited** presence in the Philippines; and *third,* the transactions of offshore-based POGO licensees not performed in the Philippines are beyond our jurisdiction.[112]

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110 Id. at 4.

111 Section 3(d) of the FIA provides:
Section 3. *Definitions.*- As used in this Act:
x x x x
d) The phrase "**doing business**" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization: *Provided, however*, **That the phrase "doing business" shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business**, and/or the **exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account[.]** (Emphasis supplied)

112 Justice Dimaampao's *Reflections,* p. 5.

In view of all the foregoing, and to answer the query above, it is apparent that POGOs, particularly offshore-based POGO licensees, do not enjoy any protection from the State. To be clear, the very nature of their operations and the limited presence of offshore-based POGO licensees in the Philippines negate the concept of "doing business" in the Philippines; and therefore, POGOs, particularly offshore-based POGO licensees cannot be taxed here.

Relevantly, while the application of the aforementioned jurisprudential tests, including the rulings in *BOAC* and *Baier-Nickel,* and the provisions of the FIA, lead to the inescapable conclusion that POGOs, particularly offshore-based POGO licensees, cannot be subjected to tax in the Philippine jurisdiction, it must be borne in mind that the foregoing were promulgated and enacted during a time when businesses require **physical presence** within a State to provide certain services. As observed by both Justice Perlas-Bernabe and Justice Dimaampao, with the proliferation of digital and online commerce, it becomes more complicated and less straightforward to determine where the activity which produces income occurs, as when the transaction is conducted over the internet.[113]

Thus, this Court finds it crucial to add a discussion with respect to the challenges of taxing the "digital economy" as suggested by Justice Perlas-Bernabe.[114]

Justice Perlas-Bernabe explained that according to the Organization for Economic Cooperation and Development (OECD), the digital economy brought about the emergence of new business models which may "quickly cause existing businesses to become obsolete."[115] From a tax perspective, the digital economy likewise poses several challenges because of the following key features:

- Mobility, with respect to *(i)* the *intangibles* on which the digital economy relies heavily, *(ii) users*, and *(iii) business functions* as a consequence of the decreased need for local personnel to perform certain functions as well as the flexibility in many cases to choose the location of servers and other resources.

- Reliance on data, including in particular the use of so-called "big data".

- Network effects, understood with reference to user participation, integration and synergies.

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113 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 12; Justice Dimaampao's *Reflections,* p. 5.

114 Id. at 13.

115 *See* OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 73; *available at* https://doi.org/10.1787/9789264218789-en.

- Use of multi-sided business models in which the two sides of the market may be in different jurisdictions.

- Tendency toward monopoly or oligopoly in certain business models relying heavily on network effects.

- Volatility due to low barriers to entry and rapidly evolving technology.[116]

To illustrate, the mobility of users in the digital economy allows them to: (1) carry on commercial activities remotely across borders; and (2) use of virtual private networks (VPNs) or proxy servers that could mask the location of where the digital transaction actually occurs.[117] Meanwhile, with respect to the mobility of business functions, the digital economy allows entities to coordinate activities across several territories in one central point while being geographically removed from both the location where the business operations are carried out and where the suppliers or customers are serviced.[118]

Thus, as observed by Justice Perlas-Bernabe, the complexity of the digital economy could allow businesses to avoid a taxable presence or escape taxation anywhere by simply working around local laws and outdated conceptions of permanent establishments. As stated by the OECD:

> *5.2.1.1 Avoiding a taxable presence*
>
> In many digital economy business models, a non-resident company may interact with customers in a country remotely through a website or other digital means (e.g. an application on a mobile device) without maintaining a physical presence in the country. Increasing reliance on automated processes may further decrease reliance on local physical presence. The domestic laws of most countries require some degree of physical presence before business profits are subject to taxation. In addition, under Articles 5 and 7 of the OECD Model Tax Convention, a company is subject to tax on its business profits in a country of which it is a non-resident only if it has a permanent establishment (PE) in that country. Accordingly, such non-resident company may not be subject to tax in the country in which it has customers.
>
> Companies in many industries have customers in a country without a PE in that country, communicating with those customers via phone, mail, and fax and through independent agents. That ability to maintain some level of business connection within a country without being subject to tax on business profits earned from sources within that country is the result of

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116 *See* OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 84; *available at* https://doi.org/10.1787/9789264218789-en.

117 *See* OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 85; *available at* https://doi.org/10.1787/9789264218789-en.

118 Id.

> particular policy choices reflected in domestic laws and relevant double tax treaties, and is not in and of itself a BEPS issue. However, while the ability of a company to earn revenue from customers in a country without having a PE in that country is not unique to digital businesses, it is available at a greater scale in the digital economy than was previously the case. Where this ability, coupled with strategies that eliminate taxation in the State of residence, results in such revenue not being taxed anywhere, BEPS concerns are raised. In addition, under some circumstances, tax in a market jurisdiction can be artificially avoided by fragmenting operations among multiple group entities in order to qualify for the exceptions to PE status for preparatory and auxiliary activities, or by otherwise ensuring that each location through which business is conducted falls below the PE threshold. Structures of this type raise BEPS concerns.[119]

To combat this, the OECD offers several proposals, such as revising treaty terms on Permanent Establishments, and implementing better domestic foreign corporation rules among countries.[120]

However, as mentioned by Justice Perlas-Bernabe, to which this Court concurs, until such time as existing tax treaties and tax laws are revised and revisited to account for the digital economy, this Court must apply the laws as they currently are. **Since, as explained above, no income is derived from sources within the Philippines, offshore-based POGO licensees cannot be subjected to income tax.**

All things considered, RMC No. 102-2017, and consequently, RMC No. 78-2018, should be struck down, insofar as they imposed income tax and other applicable taxes upon offshore-based POGO licensees, notwithstanding the fact that offshore-based POGO licensees do not derive any income from sources within the Philippines.

***Section 11(f) and (g) of the Bayanihan 2 Law are Unconstitutional for Being Riders.***

The title of the Bayanihan 2 Law reads: "*An Act Providing for Covid-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy,* ***Providing Funds Therefor****, and For Other Purposes.*" Meanwhile, Section 11 thereof lists the sources of funding to address the COVID-19 pandemic, which includes, among others, the following:

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119 *See* OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 102; *available at* https://doi.org/10.1787/9789264218789-en.

120 *See* OECD (2014), *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, pp. 112-121; *available at* https://doi.org/10.1787/9789264218789-en.

> SECTION 11. *Sources of Funding.* — The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
>
> x x x x
>
> (f) Amounts derived from the **five percent (5%) franchise tax on the gross bets or turnovers or the agreed pre-determined minimum monthly revenues from gaming operations, whichever is higher**, earned by offshore gaming licensees, including gaming operators, gaming agents, services-providers and gaming support providers;
>
> (g) Income tax, VAT, and other applicable taxes on income from non-gaming operations earned by offshore gaming licensees, operators, agents, service providers and support providers.
>
> The tax shall be computed on the peso equivalent of the foreign currency used, based on the prevailing official exchange rate at the time of payment, otherwise the same shall be considered as a fraudulent act constituting underdeclaration of taxable receipts or income, and shall be subject to interests, fines and penalties under Sections 248(B), 249(B), 253, and 255 of the National Internal Revenue Code of the Philippines.
>
> After two (2) years or upon a determination that the threat of COVID-19 has been successfully contained or abated, whichever comes first, **the revenues derived from franchise taxes on gross bets or turnovers under paragraph (f) and income from non-gaming operations under paragraph (g) shall continue to be collected and shall accrue to the General Fund of the Government**. The BIR shall implement closure orders against offshore gaming licensees, operators, agents, service providers and support providers who fail to pay the taxes due, and such entities shall cease to operate.[121] (Emphasis supplied)

To determine whether certain provisions are riders, it is vital to understand the rationale behind its prohibition. Such proscription against riders was explained by this Court in *Fariñas v. Executive Secretary*,[122] thus:

> Section 26(1), Article VI of the Constitution provides:
>
> SEC. 26(1). Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.
>
> The proscription is aimed against the evils of the so-called omnibus bills and log-rolling legislation as well as surreptitious and/or unconsidered encroaches. The provision merely calls for **all parts of an act relating to its subject finding expression in its title**.

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121 BAYANIHAN 2 LAW, Section 11.
122 463 Phil. 179 (2003).

> To determine whether there has been compliance with the constitutional requirement that the subject of an act shall be expressed in its title, the Court laid down the rule that —
>
> Constitutional provisions relating to the subject matter and titles of statutes should not be so narrowly construed as to cripple or impede the power of legislation. The requirement that the subject of an act shall be expressed in its title should receive a reasonable and not a technical construction. **It is sufficient if the title be comprehensive enough reasonably to include the general object which a statute seeks to effect, without expressing each and every end and means necessary or convenient for the accomplishing of that object**. Mere details need not be set forth. The title need not be an abstract or index of the Act.[123] (Emphasis supplied; citations omitted)

Similarly, and as observed by Justice Perlas-Bernabe,[124] in *Atitiw v. Zamora*,[125] this Court elucidated that the rationale for the prohibition against riders is to prevent hodge-podge or log-rolling legislation, and to ensure that all provisions of a statute have some reasonable relation to the subject matter as expressed in the title thereof:

> The rationale against inserting a rider in an appropriations bill under the specific appropriation clause embodied in Section 25(2), Article VI of the Constitution is similar to that of the "one subject in the title clause provided in Section 26(1) also of Article VI, which directs that **every provision in a bill must be germane or has some reasonable relation to the subject matter as expressed in the title thereof. The unity of the subject matter of a bill is mandatory in order to prevent hodge-podge or log-rolling legislation, to avoid surprise or fraud upon the legislature, and to fairly appraise the people of the subjects of legislation that are being considered.**[126] (Emphasis supplied; citation omitted)

Following such jurisprudential guides, it is evident that all provisions of a law must be germane to the purpose of the law, and contemplated by the title thereof.

Here, the respondents admit that the Bayanihan 2 Law is **not a tax measure**. Simply stated, the Bayanihan 2 Law was not enacted to impose new taxes in order to address the COVID-19 pandemic. In fact, and as pointed out by Justice Perlas-Bernabe,[127] the proponents of House Bill No. 6953 and Senate Bill No. 1564, the precursors of the Bayanihan 2 Law, all characterized

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123 Id. at 198.
124 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, pp. 2-3.
125 508 Phil. 321 (2005).
126 Id. at 335.
127 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 3.

the same as "socioeconomic relief efforts,"[128] a "stopgap measure,"[129] or a "stimulus bill."[130]

While the title of the law contains the phrase "providing funds therefor," it must be emphasized that all other provisions relating to sources of funding under Section 11, except for Section 11(f) and (g), are already existing taxes. The Bayanihan 2 Law merely realigns these already existing sources of funding and funnels it to be used for COVID-19 relief measures.

However, as expounded above, before the passage of the Bayanihan 2 Law, there was no law in effect which imposes franchise taxes upon offshore-based POGO licensees. Similarly, there was also no statutory basis to impose income tax and VAT upon offshore-based POGO licensees before the enactment of the Bayanihan 2 Law. This means that the Bayanihan 2 Law, specifically Section 11(f) and (g), appear to introduce new tax impositions.

Such conclusion is likewise supported by the fact that, unlike the other provisions under Section 11 of the Bayanihan 2 Law that are temporary in nature, Section 11(f) and (g) thereof were intended to outlive the December 19, 2020 expiration date of the Bayanihan 2 Law, *viz.*:

> After two (2) years or upon a determination that the threat of COVID-19 has been successfully contained or abated, whichever comes first, the revenues derived from franchise taxes on gross bets or turnovers under paragraph (f) and income from non-gaming operations under paragraph (g) **shall continue to be collected and shall accrue to the General Fund of the Government**. The BIR shall implement closure orders against offshore gaming licensees, operators, agents, service providers and support providers who fail to pay the taxes due, and such entities shall cease to operate. (Emphasis supplied)

Indeed, and as emphasized by Justice Perlas-Bernabe,[131] if all sources of funding under Section 11 of the Bayanihan 2 Law are already existing taxes, there would be no need to specify that the collections thereof after the COVID-19 pandemic has been thwarted would accrue to the General Fund of the Government. The logical implication of this statement, therefore, is that prior to the Bayanihan 2 Law, there was no statute which imposed the same taxes as found in Section 11(f) and (g) of the Bayanihan 2 Law; and consequently, the foregoing provisions are new tax measures.

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128 See Sponsorship Remarks of Deputy Speaker Villafuerte, House of Representatives Journal No. 59, June 1-5, 2020, p. 101.

129 See Interpellation of Representative Abante, House of Representatives Records, August 5, 2020, p. 45.

130 Id. at 46; see *also* Interpellations of Senator Recto, Senate Journal No. 67, June 1, 2020, p. 614.

131 Concurring and Dissenting Opinion, Senior Associate Justice Perlas-Bernabe, p. 5.

**Thus, this Court is convinced that Section11(f) and (g) of the Bayanihan 2 Law are not germane to the purpose of the law, and therefore, violates the "one subject, one title rule" of the Constitution.** The imposition of new taxes, camouflaged as part of a long list of existing taxes, cannot be contemplated as an integral part of a temporary COVID-19 relief measure. Invariably, Section 11(f) and (g) of the Bayanihan 2 Law are unconstitutional, in so far as it imposes **new taxes** on POGO licensees.

**On this score alone, the *Consolidated Petitions* must be granted.** Section 11(f) and (g) of the Bayanihan 2 Law are unconstitutional. Consequently, the *Assailed Tax Issuances,* specifically RR No. 30-2020 and RMC No. 64-2020, which merely implement Section 11(f) and (g) of the Bayanihan 2 Law, are likewise invalid for having no legal basis.

All in all, before the enactment of R.A. No. 11590, there is no valid law which imposes taxes upon POGOs, including offshore-based POGO licensees. However, this Court deems it proper to emphasize that R.A. No. 11590 **cannot be applied retroactively**.[132] Thus, POGOs, including offshore-based POGO licensees such as the petitioners, cannot be made liable for taxes prior to the enactment and effectivity of R.A. No. 11590.

**WHEREFORE**, premises considered, the *Petition for Certiorari and Prohibition [With Application for a Temporary Restraining Order and/or Writ of Preliminary Injunction]* dated August 20, 2020 in G.R. No. 252965 and the *Petition for Certiorari and Prohibition (With Application for Temporary Restraining Order/Writ of Preliminary Injunction)* dated November 17, 2020 in G.R. No. 254102 are **GRANTED**. Section 11(f) and (g) of Republic Act No. 11494, Revenue Regulation No. 30-2020; Revenue Memorandum Circular No. 64-2020; Revenue Memorandum Circular No. 102-2017; and Revenue Memorandum Circular No. 78-2018, in so far as they impose franchise tax, income tax, and other applicable taxes upon offshore-based POGO licensees are declared **NULL** and **VOID** for being contrary to the Constitution and other relevant laws.

**SO ORDERED.**

**SAMUEL H. GAERLAN**
Associate Justice

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132 CIVIL CODE, Article 4.

WE CONCUR:

**ALEXANDER G. GESMUNDO**
Chief Justice

Please see Concurring & Dissenting Opinion

**ESTELA M. PERLAS-BERNABE**
Associate Justice

I dissent. See separate opinion.

**MARVIC M.V.F. LEONEN**
Associate Justice

**ALFREDO BENJAMIN S. CAGUIOA**
Associate Justice

**RAMON PAUL L. HERNANDO**
Associate Justice

**ROSMARI D. CARANDANG**
Associate Justice

Pls. see Dissenting Opinion

**AMY C. LAZARO-JAVIER**
Associate Justice

**HENRI JEAN PAUL B. INTING**
Associate Justice

**RODIL V. ZALAMEDA**
Associate Justice

**MARIO V. LOPEZ**
Associate Justice

**RICARDO R. ROSARIO**
Associate Justice

**JHOSEP Y. LOPEZ**
Associate Justice

(On official leave)
**JAPAR B. DIMAAMPAO**
Associate Justice

**JOSE MIDAS P. MARQUEZ**
Associate Justice

# CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

**ALEXANDER G. GESMUNDO**
Chief Justice

*EN BANC*

**G.R. No. 252965 – SAINT WEALTH LTD., as represented by DAVID BUENAVENTURA & ANG LAW OFFICES**, *Petitioner*, *v.* **BUREAU OF INTERNAL REVENUE, *et al.***, *Respondents*; and

**G.R. No. 254102 – MARCO POLO ENTERPRISES LIMITED, *et al.***, *Petitioners*, *v.* **THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ III and THE COMMISSIONER OF INTERNAL REVENUE, in the person of CAESAR R. DULAY**, *Respondents*.

Promulgated:

December 7, 2021

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## CONCURRING AND DISSENTING OPINION

**PERLAS-BERNABE, *J.*:**

I concur in striking down Sections 11 (f) and (g) of Republic Act No. (RA) 11494[1] (Bayanihan 2 Law) for being unconstitutional, and Revenue Regulation No. (RR) 30-2020, Revenue Memorandum Circular No. (RMC) 64-2020, as well as parts of RMC 102-2017 and RMC 78-2018 (collectively, the Assailed Tax Issuances), for having been issued contrary to relevant tax laws and RA 9487, or the "PAGCOR Charter."[2] However, I respectfully dissent insofar as the *ponencia* purports that the instant case has already been rendered moot and academic by the enactment of RA 11590, entitled "*An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22, 25, 27, 28, 106, 108, and Adding New Sections 125-A and 288-G of the National Internal Revenue Code of 1997, as amended, and for Other Purposes*."[3]

### I.

As pointed out by Associate Justice Alfredo Benjamin S. Caguioa (Justice Caguioa) during the Court's deliberations, the issue in the instant petition has not been rendered moot and academic by RA 11590.[4] The general rule is that laws do not have retroactive effect, unless the contrary is provided.[5] This principle of prospectivity applies whether the statute is

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1 Entitled "AN ACT PROVIDING FOR COVID-19 RESPONSE AND RECOVERY INTERVENTIONS AND PROVIDING MECHANISMS TO ACCELERATE THE RECOVERY AND BOLSTER THE RESILIENCY OF THE PHILIPPINE ECONOMY, PROVIDING FUNDS THEREFOR, AND FOR OTHER PURPOSES," approved on September 11, 2020.

2 See *ponencia*, p. 40.

3 See id. at 22-23.

4 See Letter of Justice Caguioa to J. Gaerlan dated October 4, 2021.

5 See Article 4 of the CIVIL CODE OF THE PHILIPPINES.

original or amendatory,[6] such as RA 11590. It bears stressing that nowhere in RA 11590 does it provide for the retroactive application of any of its provisions, including its repealing clause which expressly mentions the PAGCOR Charter and the Bayanihan 2 Law, as well as their corresponding rules and regulations, *e.g.*, the Assailed Tax Issuances. In fact, the aforesaid principle finds particular significance in tax statutes and tax rules and regulations for it has been settled that the taxing authority's right to receive tax collections accrues the moment the said tax is deemed payable under the provisions of the relevant tax law, and must be paid without delay once it is due.[7] Thus, prior to the Court passing upon the legality or constitutionality of tax laws or revenue measures, the same must enjoy the presumption of validity and must be said to produce legal effects, unless otherwise enjoined.

Here, the Court issued a temporary restraining order (TRO) on January 5, 2021 which prevented the Bureau of Internal Revenue (BIR) from enforcing the provisions of the Bayanihan 2 Law and the Assailed Tax Issuances. However, while the BIR was prevented from implementing the foregoing, it does not necessarily follow that the taxes that could have been exacted therefrom did not accrue in favor of the State. Rather, the issuance of a TRO in this case simply means that the State, through the BIR, could not yet **demand the payment of said taxes**. Consequently, had the Court deemed it proper to uphold the Assailed Tax Issuances and the Bayanihan 2 Law, petitioners, and any other similarly situated taxpayers, would have been liable for all the accrued taxes up until the effectivity date of RA 11590 which repealed them. On the other hand, if the Court had struck down the Assailed Tax Issuances and Sections 11 (f) and (g) of the Bayanihan 2 Law, as it eventually did,[8] then no taxes would have accrued since a void act cannot give rise to any right or obligation.[9]

Therefore, what the Court had to resolve in this case was not whether petitioners, and other similarly situated taxpayers, were liable for any taxes after the passage of RA 11590, but rather if they were liable for the payment of taxes from the issuance of RMC 102-2017 up until the effectivity of RA 11590. Hence, the issues presented in the instant petition have not been rendered moot and academic and are, in fact, ripe for judicial review.

## II.

On the validity of Sections 11 (f) and (g) of the Bayanihan 2 Law, I concur with the *ponencia* that the same are unconstitutional for being riders.[10] A "rider" is any provision "which is alien to or not germane to the

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6 See *Co v. Court of Appeals*, 298 Phil. 221, 226 (1993).

7 See *Film Development Council of the Philippines v. Colon Heritage Realty Corp.*, G.R. Nos. 203754 & 204418 (Resolution), October 15, 2019.

8 See *ponencia*, p. 40.

9 See *Commissioner of Internal Revenue v. San Roque Power Corp.*, 719 Phil. 137, 157 (2013).

10 See *ponencia*, pp. 36-40.

subject or purpose of the bill in which it is incorporated,"[11] and is specifically proscribed by Sections 25 (2) and Section 26 (1), Article VI of the 1987 Constitution, to wit:

> ARTICLE VI
>
> The Legislative Department
>
> x x x x
>
> Sec. 25. x x x
>
> (2) No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates.
>
> x x x x
>
> Sec. 26. (1) Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

The rationale for the prohibition against riders is to "to prevent hodge-podge or log-rolling legislation, to avoid surprise or fraud upon the legislature, and to fairly appraise the people of the subjects of legislation that are being considered."[12] Jurisprudence has laid down a "germaneness" standard to test whether a provision is a rider, *i.e.*, that the provision must have some reasonable relation to the subject matter as expressed in the title thereof.[13]

As the *ponencia* aptly pointed out, Bayanihan 2 Law was not intended to be a tax measure. Its full title reads: "*An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, Providing Funds Therefor, and For Other Purposes*." The proponents of House Bill No. 6953 and Senate Bill No. 1564, the pre-cursors of the Bayanihan 2 Law, all characterized the Act as "socioeconomic relief efforts,"[14] a "stopgap measure,"[15] or a "stimulus bill."[16] At its core, the law intends to empower the government to further address the COVID-19 pandemic while providing some measure of financial assistance to the public for a limited time.[17]

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11 *Atitiw v. Zamora*, 508 Phil. 321, 334 (2005).

12 Id. at 335.

13 Id.

14 See Sponsorship Remarks of Deputy Speaker Villafuerte, House of Representatives Journal No. 59, June 1 to 5, 2020, p. 101.

15 See Interpellation of Representative Abante, House of Representatives Records, August 5, 2020, p. 45.

16 See Interpellation of Representative Abante, House of Representatives Records, August 5, 2020, p. 46; and Interpellation of Senator Recto, Senate Journal No. 67, June 1, 2020, p. 614.

17 The effectivity of the law is only until the next adjournment of the Eighteenth Congress on December 19, 2020, *viz.*:

> SECTION 18. *Effectivity*. – Except as otherwise specifically provided herein, this Act shall be in full force and effect until the next adjournment of the Eighteenth Congress on December 19, 2020. This Act shall take effect immediately upon its publication in a

A close reading of the provisions of the Bayanihan 2 Law would show that there are two (2) main pillars to this relief measure: (1) empowering the President to exercise the necessary powers under Section 23 (2), Article VI of the Constitution to address a national emergency;[18] and (2) providing for the appropriations of the funds necessary to enable the response and recovery interventions under the law.[19]

The assailed provisions of the Bayanihan 2 Law are found under Section 11 thereof, captioned "*Sources of Funding.*" A perusal of paragraphs (a) to (e), however, would show that these identify already-existing funds that are to be realigned or funds previously identified under the FY 2020 Budget of Expenditures and Sources of Financing (BESF).[20] Paragraphs (f) and (g), on the other hand, if read on their own, appear to introduce new tax impositions, to wit:

> SECTION 11. *Sources of Funding.* – The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
>
> x x x x
>
> (f) Amounts derived from the five percent (5%) franchise tax on the gross bets or turnovers or the agreed pre-determined minimum monthly revenues from gaming operations, whichever is higher,

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newspaper of general circulation or in the Official Gazette: Provided, That Section 4 (cc) of this Act shall be deemed to be in effect since Republic Act No. 11469 expired.

[18] Section 4 of RA 11494 reads:

> SECTION 4. *COVID-19 Response and Recovery Interventions.* – Pursuant to Article VI, Section 23 (2) of the Constitution, the President is hereby authorized to exercise powers that are necessary and proper to undertake and implement the following COVID-19 response and recovery interventions:
>
> x x x x

[19] Section 10 of RA 11494 reads:

> SECTION 10. *Appropriations and Standby Fund.* – The amounts that will be raised under Section 4 paragraphs (pp), (qq), (rr), (ss), (sss) and (ttt) of this Act shall be used for the response and recovery interventions for the COVID-19 pandemic authorized in this Act x x x x

[20] Section 11, paragraphs (a) to (e) of RA 11494 reads:

> SECTION 11. *Sources of Funding.* – The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
>
> (a) 2020 GAA: Provided, That funds for the herein authorized programs and projects shall be sourced primarily from the unprogrammed funds and savings realized from modified, realigned, or reprogrammed allocations for operational expense of any government agency or instrumentality under the Executive Department, including, but not limited to, travelling expenses, supplies and materials expenses, professional services, general services, advertising expenses, printing and publication expenses, and other maintenance and operating expenses in the 2020 GAA;
>
> (b) Savings pooled pursuant to Republic Act No. 11469 and Section 4 paragraphs (pp), (qq), (rr), (ss), (sss) and (ttt) of this Act;
>
> (c) Excess revenue collections in any one of the identified tax or non-tax revenue sources from its corresponding revenue collection target, as provided in the FY 2020 Budget of Expenditures and Sources of Financing (BESF);
>
> (d) New revenue collections or those arising from new tax or non-tax sources which are not part of nor included in the original sources included in the FY 2020 BESF;
>
> (e) All amounts derived from the cash, funds, and investments held by any GOCC or any national government agency;

> earned by offshore gaming licensees, including gaming operators, gaming agents, service providers and gaming support providers;
>
> (g) Income tax, VAT, and other applicable taxes on income from non-gaming operations earned by offshore gaming licensees, operators, agents, service providers and support providers.
>
> x x x x

Neither provision identifies any pre-existing tax laws from which such tax liabilities would arise. Undeniably, it appears to be a new revenue measure altogether. Moreover, unlike the other provisions of this temporary relief statute, Sections 11 (f) and (g) were intended to outlive the December 19, 2020 expiration date of RA 11494, *viz.*:

> After two (2) years or upon a determination that the threat of COVID-19 has been successfully contained or abated, whichever comes first, the revenues derived from franchise taxes on gross bets or turnovers under paragraph (f) and income from non-gaming operations under paragraph (g) **shall continue to be collected and shall accrue to the General Fund of the Government**. The BIR shall implement closure orders against offshore gaming licensees, operators, agents, service providers and support providers who fail to pay the taxes due, and such entities shall cease to operate. (emphasis supplied)

Had Sections 11 (f) and (g) merely directed the collection of funds from existing tax exactions to the COVID-19 intervention measures of the Bayanihan 2 Law, there would be no need to specify that the collections thereof after the pandemic has abated would accrue to the General Fund. The logical implication of including this paragraph is that prior to the Bayanihan 2 Law, there was no statute which imposed the same taxes as found in Sections 11 (f) and (g); necessarily, the foregoing provisions should be considered as new tax measures.

The question now devolves as to whether introducing new tax measures is germane to the subject matter of the Bayanihan 2 Law. It is my considered view that it is not. As above-mentioned, the two (2) pillars which characterize the law are its emergency power provisions and the special appropriations to fund the same. Moreover, the law was never intended to remain effective for an extended period of time; hence, it provides for its own expiration date in Section 18 thereof. It was simply a necessary "stopgap" to further bolster the government's efforts to address the COVID-19 pandemic. Undoubtedly, the Executive can neither exercise emergency powers nor re-allocate funding without a statute passed by Congress. These exigencies are what impelled the passage of the Bayanihan 2 Law. Surely, tax measures intended to remain effective for an indefinite amount of time are anathema to the admitted limited lifespan of an act passed to provide only temporary relief, and cannot be said to be germane to the subject matter of the said law.

Given the foregoing, I concur with the *ponencia* that Sections 11 (f) and (g) should be struck down for being riders to the Bayanihan 2 Law in contravention of Section 26 (1) of the Constitution.[21] Necessarily, RR 30-2020 and RMC 64-2020, which merely implement Sections 11 (f) and (g) of RA 11494, should similarly be struck down since it is a basic legal principle that the spring cannot rise higher than its source.[22]

**III.**

In determining the validity of RMC 102-2017 and RMC 78-2018, it becomes imperative to identify the statutory basis of the BIR in circulating these issuances and the obligations they impose on taxpayers, such as herein petitioners.

The subject of RMC 102-2017 reads: "*Taxation of Taxpayers Engaged in Philippine Offshore Gaming Operations.*" The prelude of the circular is clear that the BIR's aim was to "adapt existing taxes" to Philippine Offshore Gaming Operations (POGOs) to lessen the tax leak from their activities:

> The Bureau of Internal Revenue (BIR), not a newcomer to the workings and tax issues presented by online business transactions through the internet, feels that the challenge in gaming operations is how to implement a fair and equitable taxation of online gaming businesses, how to monitor the revenues and revenue-generating activities of POGO and how to adapt existing taxes to POGO so as to lessen the so-called "lost potential tax revenues". This is the perspective from which the current issue of taxing taxpayers engaged in POGO should be viewed.[23]

The BIR further states that "online activity is sufficient to constitute doing business in the Philippines x x x." Hence, it imposed regulatory and administrative requirements to POGOs, which was further outlined in RMC 78-2018.[24] It likewise clarified that the following taxes apply to POGOs:

1. Income from gaming operations are subject to the five percent (5%) franchise tax which are in lieu of all other taxes, whether national or local;

2. Income from their other related services or non-gaming operations will be subject to normal income tax, value-added tax (VAT), and other applicable taxes;

3. Other entities, such as gaming agents, service providers, and gaming support providers, who provide specific components to a

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21 See *ponencia*, p. 40.

22 See *Republic v. Bajao*, 601 Phil. 53, 59 (2009).

23 See RMC 102-2017.

24 The subject of RMC 78-2018 reads "Registration Requirements of Philippine Offshore Gaming Operators and its Accredited Service Providers."

POGO Licensee's own offshore gaming services, and who are themselves registered as a POGO Licensees, shall also be subject to the five percent (5%) franchise tax for their gaming activities, and normal income tax, value-added tax (VAT), and other applicable taxes for their non-gaming operations;

4. Income payments of any Licensee for the purchase of goods and services shall be subject to withholding taxes;

5. Compensation, fees, commission or any other form of remuneration as a result of services rendered to POGO Licensees or the other entities shall be subject to withholding taxes; and

6. Purchases and sale of goods or services shall be subject to existing tax laws and revenue issuances.

Petitioners in G.R. No. 254102 argue that RMC 102-2017 is void for lack of statutory basis since there is no law imposing any kind of taxes on the offshore gaming revenue of foreign-based POGO Licensees.[25] They posit that income of foreign-based POGO Licensees are necessarily income derived from sources outside of the Philippines since the generating "activity", *i.e.*, the games of chance, occur abroad. Even the National Internal Revenue Code (Tax Code) limits the taxation of foreign corporations to income derived from within the Philippines. Moreover, they argue that the PAGCOR Charter could likewise not be the basis for the taxation of POGOs considering that when it was enacted in 1983, offshore gaming through the internet did not yet exist. Considering that no tax law allows the taxation of foreign-source income of foreign corporations, RMC 102-2017 has no legal basis.[26] Aside from the lack of statutory basis, petitioners also attack RMC 102-2017 on the grounds of violation of the rule on territoriality of taxation. They argue that imposing taxes on foreign-sourced income violates the basic principle that the taxing power of a State does not extend beyond its territorial limits.[27] With respect to RMC 78-2018, petitioners advance that since this issuance merely enforces RMC 102-2017, the latter's infirmity likewise extends to the former.[28]

For their part, respondents, in their consolidated comment, counter that RMC 102-2017 did not impose a tax but merely interpreted the provisions of the PAGCOR Charter. They argue that the mere fact that POGOs are Licensees of PAGCOR already subjects them to the five percent (5%) franchise tax. Respondents maintain that the POGOs' gaming and income generating activities are rendered in the Philippines through their service providers, and that the placement of online bets are "just a small portion of a POGO [L]icensee's gaming activity." In any case, respondents

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25 *Rollo* (G.R. No. 254102), p. 54.
26 Id. at 54-55.
27 Id. at 55.
28 Id. at 55-56.

insist that even if petitioners' income is derived from sources outside the Philippines, it still would not exempt them from the five percent (5%) franchise tax since a franchise tax is imposed on the exercise of enjoying a franchise. Hence, the mere fact that petitioners operate within the Philippines would make them liable for the same.[29] With respect to RMC 78-2018, respondents argue that this merely provides guidelines on the registration of POGOs and it enjoys the presumption of legality.[30]

As earlier stated, while I concur with the majority in striking down RMC 102-2017 and RMC 78-2018 for want of statutory basis, I would like to offer my own views regarding the matter as it presents an opportunity to propound on principles in an emerging area of tax law, *i.e.*, the taxation of the digital economy.

In the above-enumeration of the alleged applicable taxes, RMC 102-2017 draws from both the PAGCOR Charter and the Tax Code. Specifically, items 1 to 3 on the treatment of income from gaming and non-gaming operations of POGOs and other entities, are derived from the language of Section 13 of the PAGCOR Charter,[31] whereas items 4 to 6 are applications of Section 57[32] of the Tax Code on withholding taxes. Hence, the issue to

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29 *Rollo* (G.R. No. 252965), pp. 140-142.

30 Id. at 142-143.

31 SECTION 13. *Exemptions.*

x x x x

(2) Income and other taxes. – (a) Franchise Holder: No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.

(b) Others: The exemptions herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator.

32 Section 57 of the Tax Code, as amended by RA Nos. 10963 and 11534 reads:

Sec. 57. *Withholding of Tax at Source.* -

(A) *Withholding of Final Tax on Certain Incomes.* – Subject to rules and regulations the Secretary of Finance may promulgate, upon the recommendation of the Commissioner, requiring the filing of income tax return by certain income payees, the tax imposed or prescribed by Sections 24(B)(1), 24(B)(2), 24(C), 24(D)(1); 25(A)(2), 25(A)(3), 25(B), 25(C), 25(D), 25(E), 27(D)(!), 27(D)(2), 27(D)(3), 27(D)(5), 28 (A)(4), 28(A)(5), 28(A)(7)(a), 28(A)(7)(b), 28(A)(7)(c), 28(B)(1), 28(B)(2), 28(B)(3), 28(B)(4), 28(B)(5)(a), 28(B)(5)(b), 28(B)(5)(c); 33; and 282 of this Code on specified items of income shall be withheld by payor-corporation and/or person and paid in the same manner and subject to the same conditions as provided in Section 58 of this Code.

(B) *Withholding of Creditable Tax at Source.* – The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, by payor-corporation/persons as provided for by law, at the rate of not less than one percent (1%) but

resolve is whether RMC 102-2017 went beyond the ambit of these statutes so as to constitute an invalid exercise of quasi-legislative power; particularly, with regard to the application of the taxes therein to the income of offshore or foreign-based POGO Licensees. However, even before delving into the import of the above-mentioned statutes for the applicable taxes, it must first be determined if offshore or foreign-based POGO Licensees are even taxable in the Philippines.

The power of taxation is an inherent attribute of sovereignty which every independent government may exercise even without express conferment by the people.[33] Taxation emanates from necessity,[34] and is grounded on a **mutually advantageous relationship** between the State and those it governs; every person surrenders a portion of their income for the running of the government, and the government in turn, provides tangible and intangible benefits to serve and protect those within its jurisdiction.[35] Indeed, it seems only logical to exact a tax from those who stand to benefit, whether directly or indirectly, from the expenditure of public funds derived from the same.[36] Necessarily, implied within the power to tax is the power to choose what or whom to tax.[37] Undoubtedly, the State may tax any persons, property, income, or business within its territorial limits.[38] In this regard, it should be clarified that even non-resident aliens or foreign corporations may likewise be subjected to the State's power to tax if they have availed of the State's resources or protection in some manner in the conduct of an income-generating activity.[39] However, the State's choice of who specifically to tax is not unbridled, and is, in fact, restrained by the fundamental rights enshrined in our Constitution, specifically, the due process clause.[40]

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not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.

(C) *Tax-free Covenant Bonds.* – In any case where bonds, mortgages, deeds of trust or other similar obligations of domestic or resident foreign corporations, contain a contract or provisions by which the obligor agrees to pay any portion of the tax imposed in this Title upon the obligee or to reimburse the obligee for any portion of the tax or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the Philippines, or any state or country, the obligor shall deduct bonds, mortgages, deeds of trust or other obligations, whether the interest or other payments are payable annually or at shorter or longer periods, and whether the bonds, securities or obligations had been or will be issued or marketed, and the interest or other payment thereon paid, within or without the Philippines, if the interest or other payment is payable to a nonresident alien or to a citizen or resident of the Philippines.

(Note: Section 57 [B] was amended by RA 10963, which took effect on January 1, 2018. A new paragraph was also introduced by RA 11534, which took effect in April 2021. However, RMC 102-2017 was promulgated prior to these amendments, hence, the original wording is footnoted.)

33 See *Film Development Council of the Phils. v. Colon Heritage Realty Corp.*, 760 Phil. 519, 537 (2015).

34 *Phil. Guaranty Co., Inc. v. Commissioner of Internal Revenue*, 121 Phil. 755, 760 (1965).

35 *Commissioner of Internal Revenue v. Algue, Inc.*, 241 Phil. 829, 836 (1988).

36 See *Lutz v. Araneta*, 98 Phil. 148, 153 (1955).

37 See id.

38 See *Cargill Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 203346, September 9, 2020.

39 *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue*, 121 Phil. 579, 582 (1965).

40 Article III, Section 1 of the 1987 Constitution reads:

> SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

As a rule, the State's power to tax does not extend beyond its territorial limits.[41] Case law holds that "[i]f an interest in property is taxed, the situs of either the property or interest must be found within the State. If an income is taxed, the recipient thereof must have a domicile within the State or the property or business out of which the income issues must be situated within the State so that the income may be said to have a situs therein. Personal property may be separated from its owner and he may be taxed on its account at the place where the property is although it is not a citizen or resident of the State which imposes the tax."[42] This territorial limitation of taxation is what necessitates the taxation of only income derived from sources "within" the Philippines for non-resident aliens and foreign corporations. If the income was derived or sourced within the Philippines, then naturally, the non-resident alien or foreign corporation should give a portion of the said income to the government as a reasonable payment for its protection and for allowing the facility of the transaction which made the generation of income possible in the first place.[43] Hence, keeping in mind this limitation, it is apt to determine whether income was derived or sourced within the Philippines relative to the sale of services which POGOs are engaged in.

Section 42 (A)[44] of the Tax Code provides the guidelines in determining what income is sourced within the Philippines, whereas Section 42 (C)[45] identifies what are income sourced without. The word "source" connotes "origin;"[46] the test is to determine if the income **originated from the Philippines**. A reading of the foregoing provisions makes it clear that for income derived from the sale of services, the focal point is where the **actual performance of the service occurs**. On this score, it is instructive to refer to the seminal case of *Commissioner of Internal Revenue v. British Overseas Airways Corp. (BOAC)*[47] to understand the precise aspect of the activity which triggers the taxable event, *viz.*:

> The source of an income is the property, activity or service that produced the income. For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines. **In BOAC's case, the sale of tickets**

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41 *Manila Gas Corp. v. Collector of Internal Revenue*, 62 Phil. 895, 900 (1936).

42 Id.

43 See *Phil. Guaranty Co., Inc. v. Commissioner of Internal Revenue*, supra note 32.

44 Section 42. *Income from Sources Within the Philippines.*-
(A) *Gross Income From Sources Within the Philippines.* – The following items of gross income shall be treated as gross income from sources within the Philippines:
x x x x
(3) *Services.* – Compensation for labor or personal services performed in the Philippines;
x x x x

45 Section 42. *Income from Sources Within the Philippines.*-
x x x x
(C) *Gross Income From Sources Without the Philippines.* – The following items of gross income shall be treated as income from sources without the Philippines:
x x x x
(3) Compensation for labor or personal services performed without the Philippines;
x x x x

46 *Manila Gas Corp. v. Collector of Internal Revenue*, supra note at 901.

47 233 Phil. 406 (1987).

> **in the Philippines is the activity that produces the income. The tickets exchanged hands here and payments for fares were also made here in Philippine currency**. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.
>
> x x x x
>
> **The absence of flight operations to and from the Philippines is not determinative of the source of income or the situs of income taxation.** Admittedly, BOAC was an off-line international airline at the time pertinent to this case. The test of taxability is the "source"; and the source of an income is that activity . . . which produced the income. Unquestionably, **the passage documentations in these cases were sold in the Philippines and the revenue therefrom was derived from a business activity regularly pursued within the Philippines**. And even if the BOAC tickets sold covered the "transport of passengers and cargo to and from foreign cities", **it cannot alter the fact that income from the sale of tickets was derived from the Philippines**. The word "source" conveys one essential idea, that of origin, and the origin of the income herein is the Philippines.
>
> x x x x[48] (emphases supplied; citations omitted)

In *BOAC*, the transaction involved the sale of air transport to passengers. Even though the actual transportation would occur outside of the Philippines, the Court held that the sale of tickets here already constituted a taxable activity. However, the Court had occasion to expound on this doctrine in *Commissioner of Internal Revenue v. Baier-Nickel* (*Baier-Nickel*).[49] In *Baier-Nickel*, the Court clarified that the "source" was not determined by where the income is disbursed or physically received, but rather where the business activity that produced the income was actually conducted, *viz.*:

> Both the petitioner and respondent cited the case of *Commissioner of Internal Revenue v. British Overseas Airways Corporation* in support of their arguments, but the correct interpretation of the said case favors the theory of respondent that it is the situs of the activity that determines whether such income is taxable in the Philippines. The conflict between the majority and the dissenting opinion in the said case has nothing to do with the underlying principle of the law on sourcing of income. In fact, both applied the case of *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue*. The divergence in opinion centered on whether the sale of tickets in the Philippines is to be construed as the "activity" that produced the income, as viewed by the majority, or merely the physical source of the income, as ratiocinated by Justice Florentino P. Feliciano in his dissent. The majority, through Justice Ameurfina Melencio-Herrera, as *ponente*, interpreted the sale of tickets as a business activity that gave rise to the income of BOAC. **Petitioner cannot therefore invoke said case to support its view that source of income is the physical source of the**

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48 Id. at 422-424.

49 531 Phil. 480 (2006).

> **money earned. If such was the interpretation of the majority, the Court would have simply stated that source of income is not the business activity of BOAC but the place where the person or entity disbursing the income is located or where BOAC physically received the same. <u>But such was not the import of the ruling of the Court</u>.** It even explained in detail the business activity undertaken by BOAC in the Philippines to pinpoint the taxable activity and to justify its conclusion that BOAC is subject to Philippine income taxation. x x x.
>
> x x x x
>
> The Court reiterates the rule that **"source of income" relates to the property, activity or service that produced the income**. With respect to rendition of labor or personal service, as in the instant case, **it is the place where the labor or service was performed that determines the source of the income**. There is therefore no merit in petitioner's interpretation which equates source of income in labor or personal service with the residence of the payor or the place of payment of the income.
>
> x x x x[50] (emphases and underscoring supplied; citations omitted)

However, this reading of the law flows from the dated notion that a business requires physical presence within the State to provide its services, or a more analog form of conducting business. With the proliferation of digital commerce, there is now the added complication of specifically pinpointing where the "activity that produced the income" occurs when the transaction is conducted over the internet, as in the case of offshore gaming.

This is essentially the same complication when resolving the situs of taxation rules under current tax conventions that bind the Philippines. It bears noting that "[t]he purpose of these international agreements is to reconcile the national fiscal legislations of the contracting parties in order to help the taxpayer avoid simultaneous taxation in two different jurisdictions. More precisely, the tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods."[51] Aside from the rules on situs of taxation under Section 42 of the Tax Code, the provisions on Permanent Establishments, as found in tax treaties, can also serve as basis for determining whether an entity or activity is taxable in one Contracting State or the Other, since treaties also form part of the law of the land under our Constitution.[52]

For example, the Permanent Establishment provision in the Republic of the Philippines (RP)-United States of America (US) Tax Treaty defines a "permanent establishment" as a "fixed place of business through which a

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50 Id. at 491-493.

51 *Commissioner of Internal Revenue v. S.C. Johnson and Son, Inc.*, 368 Phil. 388, 404 (1999).

52 See *Pharmaceutical and Health Care Association v. Duque III*, 561 Phil. 386, 398 (2007).

resident of one of the Contracting States engages in a trade or business,"[53] and includes a "seat of management," "branch," "office," "store or other sales outlet," "factory," "workshop," "warehouse," "mine, quarry, or other place of extraction of natural resources," or "building site or construction or assembly project or supervisory activities."[54] Interestingly, an almost exact same definition is found in the RP-China Tax Treaty,[55] as well as other tax treaties.[56]

However, since the traditional meaning of Permanent Establishment is a "fixed place" of business, it stands to reason that it requires the occupation of a physical premises or some manner of installation or spaces used for the carrying on of business within the Contracting State.[57] It bears emphasizing that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[58] The fact that offshore gaming and other digital transactions were not yet existing at the time these treaties were ratified lends credence to the view that virtual spaces, such as gaming websites or portals, could not constitute "fixed places" amounting to Permanent Establishments. If anything, it would be the server which hosts the website or portal which could constitute a "place of business" for purposes of constituting a Permanent Establishment.

This is the challenge of taxing the "digital economy" as observed by the Organization for Economic Cooperation and Development (OECD) – specifically: (1) the mobility of users that allow them to carry on commercial activities remotely across borders, compounded by the use of virtual private networks (VPNs) or proxy servers that could mask the location of where the digital transaction actually occurs; (2) the mobility of business functions that allow entities to coordinate activities across several territories in one central point while being geographically removed from both the location where the business operations are carried out and where the suppliers or customers are serviced; and (3) the volatility due to further rapidly evolving technology.[59]

As the OECD observed, the complexity of the digital economy could allow businesses to avoid a taxable presence or escape taxation anywhere by working around local laws and outdated conceptions of Permanent Establishments, *viz.*:

5.2.1.1 *Avoiding a taxable presence*

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53 See Article 5 (1) of the RP-US Tax Treaty.
54 See Article 5 (2) of the RP-US Tax Treaty.
55 See Article 5 of the RP-China Tax Treaty.
56 See Article 5, RP-Singapore Tax Treaty; Article 5, RP-Japan Tax Treaty; and Article V, RP-Canada Tax Treaty, as examples.
57 Organization for Economic Cooperation and Development (OECD), Commentaries on the Articles of the Model Tax Convention, p. 93 (2010).
58 Vienna Convention on the Law of Treaties, Section 3, Article 31.1 (1969).
59 OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, pp. 84-95 (2014).

> In many digital economy business models, a non-resident company may interact with customers in a country remotely through a website or other digital means (e.g. an application on a mobile device) without maintaining a physical presence in the country. Increasing reliance on automated processes may further decrease reliance on local physical presence. The domestic laws of most countries require some degree of physical presence before business profits are subject to taxation. In addition, under Articles 5 and 7 of the OECD Model Tax Convention, a company is subject to tax on its business profits in a country of which it is a non-resident only if it has a permanent establishment (PE) in that country. Accordingly, such non-resident company may not be subject to tax in the country in which it has customers.
>
> Companies in many industries have customers in a country without a PE in that country, communicating with those customers via phone, mail, and fax and through independent agents. That ability to maintain some level of business connection within a country without being subject to tax on business profits earned from sources within that country is the result of particular policy choices reflected in domestic laws and relevant double tax treaties, and is not in and of itself a [base erosion and profit shifting (BEPS)] issue. However, while the ability of a company to earn revenue from customers in a country without having a PE in that country is not unique to digital businesses, it is available at a greater scale in the digital economy than was previously the case. Where this ability, coupled with strategies that eliminate taxation in the State of residence, results in such revenue not being taxed anywhere, BEPS concerns are raised. In addition, under some circumstances, tax in a market jurisdiction can be artificially avoided by fragmenting operations among multiple group entities in order to qualify for the exceptions to PE status for preparatory and auxiliary activities, or by otherwise ensuring that each location through which business is conducted falls below the PE threshold. Structures of this type raise BEPS concerns.[60]

The OECD itself proposes several ways to combat the potential "double non-taxation" of the digital economy, including the revision of treaty terms on Permanent Establishments, and implementing better domestic foreign corporation rules among countries.[61] Nevertheless, until such time as the existing tax treaties are revisited, or the rules on situs under Section 42 of the Tax Code are amended to account for the digital economy, of which offshore gaming conducted by POGOs are naturally part of, the Court must apply the laws as they currently are and not go beyond their auspices.

Therefore, it is my view that if the foregoing prevalent principles are applied in the present case, the Philippines cannot tax the offshore revenues of foreign-based POGO Licensees.

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[60] OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, p. 102 (2014).

[61] OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, pp. 112-121 (2014).

## IV.

At this juncture, it must be clarified that foreign-based POGO Licensees do not conduct their business in the same manner as Philippine-based POGO Licensees. The former are required to engage the services of PAGCOR-accredited Service/Support Providers for the conduct of their online gaming activities,[62] while the latter conduct the activities themselves. However, as pointed out by the *ponencia*, the Service Providers and Support Providers are separate entities from the foreign-based POGO Licensees. While the Licensee is the one that offers the gaming activities to bettors, the actual conduct of the online gaming activities is conducted by the Service Providers and Support Providers. Applying the above-discussed principles in *BOAC* and *Baier-Nickel*, the activity that generates the income for the foreign-based POGO Licensee is the placing of bets and paying out of winnings to the bettors found outside of the Philippines, whereas the gaming activity is the non-revenue generating component of the whole service. Hence, none of the revenues generated by the foreign-based POGO Licensees can be said to be sourced within the Philippines. On the other hand, the fees paid by the POGO Licensees for the services rendered by the Service Providers and Support Providers can be said to be sourced within the Philippines.

Furthermore, nothing in the version of the Tax Code prior to the amendments under RA 11590 provides for the taxation of the income derived from sources without the Philippines for foreign corporations. Neither was there any tax law that could be said to govern foreign-based Licensees specifically. This was similarly the observation of the proponents of House Bill No. 5777 and Senate Bill No. 2232, the precursor bills of RA 11590:

**Interpellation of Representative Zarate on House Bill No. 5777**[63]

> REP. ZARATE. Yes, thank you for that. But there was one hearing that I attended which in fact said that out of the 60, only 10 were actually paying, and in fact, President Duterte…
>
> REP. SALCEDA. Dalawa iyan, sa BIR oo, pero sa PAGCOR, oo, lahat.
>
> REP. ZARATE. So, ang…
>
> REP. SALCEDA. So, pasensya ka na kasi ang tanong mo ay sino ang nagbabayad. Kung ang nagbabayad sa BIR, sampu, oo; ang nagbabayad sa PAGCOR, lahat.
>
> REP. ZARATE. Lahat sila, nagbabayad ng 2 percent.
>
> REP. SALCEDA. Sa PAGCOR.
>
> REP. ZARATE. Yes. Now that was…

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62 See Section 6, PAGCOR Offshore Rules and Regulations.

63 Congressional Record Vol. 5, February 1, 2021, p. 46.

REP. SALCEDA. And kaya naman, kaya naman ganoon po ay **dahil wala naming tax regime e.**

REP. ZARATE. Yes, yes, oo. So, that …

REP. SALCEDA. **Kaya nga inilalagay natin ito.**

REP. ZARATE. So, iyon iyong POGO BC or before COVID?

REP. SALCEDA. Yes. (emphases supplied)

**Sponsorship Speech of Senator Cayetano on Senate Bill No. 2232**[64]

The reason for this is because, at present, **nowhere under the National Internal Revenue Code, otherwise known as the NIRC, as amended, can we find explicit tax provisions pertaining to the offshore gaming licensees including gaming operators, gaming agents, and service providers.**

x x x x

Hence, the long-standing question about the tax obligations of POGOs conducting business in our country remain unanswered and unaddressed, which means billions worth of revenue losses for our government.

Having said these, it is high time that **we clarify and establish the taxation regime of offshore gaming licensees**, including gaming operators, gaming agents, service providers, and gaming support providers, and incorporate these entities in the Philippine taxation system.

As your Chair of the Senate Ways and Means Committee, we have reviewed the various bills, listened to government agencies, industry and other stakeholders. I believe that legislating the tax regime of the POGOs and incorporating the same in the NIRC is a step towards the right direction.

It will not only **plug the loopholes in our country's tax code that led to issues of confusion surrounding the operation of POGOs, but it will also prevent similar issues in the future,** which could gravely undermine our government's power to impose and collect the right taxes.

By addressing these gaps in our tax system, we can maximize the POGO industry's potential as a revenue source. In turn, we will have more resources in our country's coffers to fund programs that will improve people's lives and help us build back better following this global health and economic crisis. (emphases supplied)

It is a basic principle that laws shall not be construed as imposing a tax unless they do so clearly and expressly, and any doubt must be strictly construed against the government.[65] Consequently, RMC 102-2017 could

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64 Senate Journal Session No. 63, May 25, 2021, p. 791.

65 See *Bureau of Internal Revenue v. First E-Bank Tower Condominium Corp.*, G.R. Nos. 215801 & 218924, January 15, 2020.

not have drawn validity from the provisions of the Tax Code, or any other tax law, to cover offshore revenues of foreign-based POGO Licensees during the period prior to the effectivity of RA 11590.

There is also no merit to respondents' contention that even if their income is deemed sourced without the Philippines, they would still be liable for the five percent (5%) franchise tax under the PAGCOR Charter since a franchise tax is imposed on the exercise of enjoying a franchise. In the first place, it should be emphasized that franchise tax, like any other tax, is still subject to the territoriality principle since, as above-discussed, to hold otherwise would amount to a violation of the due process clause. In this regard, while the five percent (5%) franchise tax is an exaction, it is simultaneously an exemption granted to exempt PAGCOR and its Licensees from regular taxes.[66] This is the clear import from the wording of Section 13 of the PAGCOR Charter itself:

> SECTION 13. ***Exemptions***. –
>
> x x x x
>
> (2) *Income and Other Taxes*. – (a) Franchise Holder: No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. **Such tax** shall be due and payable quarterly to the National Government and **shall be in lieu of all kinds of taxes**, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.
>
> (b) Others: The exemption herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator.
>
> x x x x (emphases supplied)

As a form of tax exemption, it necessarily implies that the PAGCOR Licensees are subject to tax in the first place. Moreover, any form of tax exemption must be strictly construed to benefit only those clearly covered thereby.[67] The *ponencia* aptly observed that Section 13 (2)(b) which forms the basis for the extension of the tax exemption to Licensees clearly apply

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[66] See *Phil. Amusement and Gaming Corp. v. Bureau of Internal Revenue*, 749 Phil. 1010 (2014).

[67] *Commissioner of Internal Revenue. v. Philippine Airlines, Inc.*, 535 Phil. 95, 109 (2006).

only to those engaged in "the **operations of the casino(s) authorized to be conducted** under this Franchise and to **those receiving compensation or other remuneration from the Corporation or operator** as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator."[68]

**Given that the PAGCOR Charter and its amendment through RA 9487[69] were promulgated at the time offshore gaming was not yet in existence, it could not have contemplated virtual gambling websites as the "casinos" mentioned under Section 13 (2)(b) thereof.** Consequently, the PAGCOR Charter cannot be said to have been the basis for imposing a tax on the offshore revenues of foreign-based POGO Licensees. Hence, RMC 102-2017 could likewise not draw its validity from the PAGCOR Charter.

As a result, RMC 102-2017 must be struck down but only insofar as the foregoing points are concerned. As above-mentioned, RMC 102-2017 itemizes several taxes and the others are not necessarily void or subject to the Court's review at present. Petitioners themselves limit their attack based on the taxation of the offshore revenue of foreign-based POGO Licensees. Hence, the circular should only be invalidated to the extent that it went beyond both the Tax Code and the PAGCOR Charter in imposing a tax on the said foreign-based Licensees. Corollary thereto, RMC 78-2018 is similarly void only as it applies to the same foreign-based POGO Licensees since it was merely in further implementation of RMC 102-2017.

As a final note, it should be borne in mind that RA 11590 sought to impose the five percent (5%) franchise tax on POGO Licensees, without any distinction as to whether such gaming revenues were realized within or without the Philippines.[70] Whether this constitutes a valid exercise of the power of taxation, however, is a matter that should be resolved separately should a case be brought before the Court specifically challenging RA 11590. I wish to reiterate that my views are confined to the particular period from the issuance of RMC 102-2017 up until the effectivity of RA 11590.

**ESTELA M. PERLAS-BERNABE**
Senior Associate Justice

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68 See *ponencia*, p. 24.

69 Entitled "AN ACT FURTHER AMENDING PRESIDENTIAL DECREE NO. 1869, OTHERWISE KNOWN AS PAGCOR CHARTER," approved on June 20, 2007.

70 See Section 125-A, in relation to Section 22 (II), of the Tax Code, as amended by RA 11590.

**EN BANC**

**G.R. No. 252965 – SAINT WEALTH LTD., as represented by DAVID BUENAVENTURA & ANG LAW OFFICES,** *Petitioner*, **v. BUREAU OF INTERNAL REVENUE herein represented by HON. CAESAR R. DULAY, in his capacity as COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, and JOHN DOES and JANE DOES, as persons acting for, and in behalf, or under the authority of respondents,** *Respondents*.

**G.R. No. 254102 – MARCO POLO ENTERPRISES LIMITED, MG UNIVERSAL LINK LIMITED, OG GLOBAL ACCESS LIMITED, PRIDE FORTUNE LIMITED, VIP GLOBAL SOLUTIONS LIMITED, AG INTERPACIFIC RESOURCES LIMITED, WANFANG TECHNOLOGY MANAGEMENT LTD., IMPERIAL CHOICE LIMITED, BESTBETINNET LIMITED, RIESLING CAPITAL LIMITED, GOLDEN DRAGON EMPIRE LTD., ORIENTAL GAME LIMITED, MOST SUCCESS INTERNATIONAL GROUP LIMITED, AND HIGH ZONE CAPITAL INVESTMENT GROUP LIMITED,** *Petitioners*, **v. THE SECRETARY OF FINANCE in the person of CARLOS G. DOMINGUEZ III, and the COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY,** *Respondents*.

**Promulgated:**
December 7, 2021

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**DISSENTING OPINION**

**LEONEN, *J.*:**

The consolidated cases must be dismissed, as the issues they raise were rendered moot by the passage of Republic Act No. 11590 which amended the National Internal Revenue Code, codified the 5% franchise tax on gaming operations of Philippine Offshore Gaming Operators (POGOs), and considered the operations of offshore gaming licensees as doing business in the Philippines, among others.

In any case, the assailed issuances are not unconstitutional.

The assailed statute, Republic Act No. 11494, or the "Bayanihan to Recover As One Act" (Bayanihan 2), is an emergency measure enacted by the legislature which the President deemed necessary and urgent to address

the pandemic. It enjoys a presumption of constitutionality which petitioners did not overcome.

The Bayanihan 2 does not violate the "one subject, one title" rule in Article VI, Section 26(1) of the Constitution.[1]

The title of the law is clear, "An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, ***Providing Funds Therefor***, and for Other Purposes." It sought to "[e]nhance the financial stability of the country to support government programs in combatting the COVID-19 pandemic."[2]

Sections 11(f) and (g) which outlined the taxes imposed on POGOs cannot be deemed riders when they are undoubtedly germane to the subject matter of the Bayanihan 2. Dismissing the provisions as tax measures irrelevant to the statute's purpose—to provide the sources of funds for the various government projects to meet the pandemic—is grasping at straws.

Further, the imposition of a 5% franchise tax, in lieu of other taxes, on the gaming operations of offshore gaming licensees, whether they be Philippine- or foreign-based, was not introduced by Bayanihan 2. *It is not a new tax measure*.

Presidential Decree No. 1869 created the Philippine Amusement and Gaming Corporation (PAGCOR) to "centralize and integrate the right and authority to operate and conduct games of chance"[3] and conferred it with broad powers.[4] PAGCOR was granted "the rights, privileges and authority to operate and license gambling casinos, gaming clubs and other similar recreation or amusement places, gaming pools, i.e. basketball, football, bingo, etc. except jai-alai, whether on land or sea, within the territorial jurisdiction of the Republic of the Philippines: *Provided*, That the corporation shall obtain the consent of the local government unit that has territorial jurisdiction over the area chosen as the site for any of its operations."[5]

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1 Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

2 Republic Act No. 11494 (2020), sec. 3(l).

3 Presidential Decree No. 1869 (1983), sec. 1(a).

4 Presidential Decree No. 1869 (1983), sec. 3(l) provides:
SECTION 3. *Corporate Powers*. — The Corporation shall have the following powers and functions, among others:

. . .

l) to do anything and everything necessary, proper, desirable, convenient or suitable for the accomplishment of any of the purpose or the attainment of any of the objects or the furtherance of any of the powers herein stated, either alone or in association with other corporations, firms or individuals, and to do every other act or thing incidental, pertaining to, growing out of, or connected with, the aforesaid purposes, objects or powers, or any part thereof.

5 Presidential Decree No. 1869 (1983), sec. 10, as amended by Republic Act No. 9487 (2007), sec. 1.

Under Presidential Decree No. 1869, PAGCOR franchise holders are assessed and held liable for a franchise tax of 5% of the gross revenue or earnings derived from operations under the franchise, in lieu of all taxes.[6]

In line with its aim to "[e]nsure that online games are properly regulated and monitored,"[7] PAGCOR issued the *Rules and Regulations for Philippine Offshore Gaming Operations* on September 1, 2016. It provided the requirements for an offshore gaming license and the grounds for its suspension and cancellation.

On February 2, 2017, Executive Order No. 13, series of 2017 was issued, titled "Strengthening the Fight against Illegal Gambling and Clarifying the Jurisdiction and Authority of Concerned Agencies in the Regulation and Licensing of Gambling and Online Gaming Facilities, and for Other Purposes." It reiterated the jurisdiction of concerned agencies, among which is PAGCOR, in regulating online gaming operations. It stated that "nothing shall prohibit the duly licensed online gambling operator from allowing the participation of persons *physically located outside Philippine territory*."

On December 27, 2017, the Bureau of Internal Revenue issued Revenue Memorandum Circular No. 102-17 on the *"Taxation of Taxpayers Engaged in Philippine Offshore Gaming Operations."* This was later followed by Revenue Memorandum Circular No. 78-2018 which outlined the registration process for offshore gaming operations.

The Commissioner of Internal Revenue who has the exclusive and original jurisdiction "to interpret provisions of the Tax Code and other tax laws,"[8] was well within its rights when it issued the revenue circulars. The 5% franchise tax, in lieu of other taxes on PAGCOR licensees, was not newly imposed by the agency, but was provided for in Presidential Decree No. 1869. Thus, in its interpretation of existing tax laws on PAGCOR licensees and its issuance of Revenue Memorandum Circular Nos. 102-17 and 78-2018, the Commissioner of Internal Revenue did not encroach upon the legislative power to impose taxes. It merely issued guidelines to clarify existing tax measures.

The *ponencia* harps on territoriality issues. However, there is merit in respondents' argument that "what is being collected is a tax not based on income, but rather, on the exercise of a privilege."[9] We have allowed POGOs to operate under licenses that the PAGCOR issued. We cannot, on

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6 Presidential Decree No. 1869 (1983), sec. 13(2).
7 Rules and Regulations for Philippine Offshore Gaming Operations (2016), sec. 2(b).
8 TAX CODE, Title I, sec. 4, as amended by Rep. Act No. 8424 (1997), Tax Reform Act of 1997.
9 Ponencia, p. 17.

one hand, issue offshore gaming licenses to POGOs, and on the same breath, reject their taxability. When we let licensees operate in the Philippines, pass through our borders, and set up game servers in the country,[10] it is not unreasonable nor unconstitutional to impose the same 5% franchise tax which is collected from other PAGCOR franchise holders.

It was error for petitioners to argue that Philippine-based and offshore POGO licensees must be treated *differently*, considering that PAGCOR, the agency that regulates their operations, issues the same gaming license to both. The 5% franchise tax was imposed by virtue of their license to operate. Petitioner Saint Wealth's argument that it should not be subjected to any Philippine tax since all of its operations are located abroad[11] and offshore-based POGO licensees must be similarly treated with foreign corporations *not* engaged in trade or business in the Philippines[12] is untenable. Precisely, its game servers are here because they could not operate in their home country. Thus, offshore-based POGO licensees granted franchises by PAGCOR are naturally engaged in business in the Philippines.

I join Justice Amy C. Lazaro-Javier in concluding that offshore-based POGO licensees are *doing business in the Philippines*, and adopt the findings in a Security and Exchange Commission Opinion with similar facts:

> SCEH averred that it was not doing business in the Philippines since the activities of SCEH were carried outside of the Philippines, its employees were in Hong Kong, its property was outside the Philippines, and that the SEN servers were located in the United States (U.S.). Offshore-based POGO licensees raised the same arguments save for the fact that they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.
>
> Despite the averments of SCEH, the SEC still opined that the activities SCEH proposed to undertake would deem it as "doing business" in the Philippines since the twin characterization test was satisfied. ***First***, the enumerated activities to be undertaken by SCEH indicated that it would be continuing in the Philippines the substance of the business for which it was organized. ***Second***, the SCEH enumerated activities which were considered consummated within the Philippines, albeit done in a virtual plane. I see no reason not to apply the same ruling to offshore-based POGO licensees whose footprints are all over the Philippines; they entered into contracts with PAGCOR-accredited local gaming agents and service providers in furtherance of their main line of business, *i.e.* gaming operations.
>
> Verily, the gaming operations conducted by offshore-based POGO licensees within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations implies the continuity of commercial dealings and

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10 Id. at 19.
11 Id. at 8.
12 Id. at 9.

> arrangements, and contemplates the performance of acts incident to, and in the progressive prosecution of their business. These services will not be provided intermittently but for a long period of time in the Philippines. Accordingly, petitioners are considered resident foreign corporations doing business in the Philippines.[13] (Emphasis in the original)

I likewise agree that petitioners' activities are consummated here which subject them to government regulations—among which is taxation:

> For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines, e.g., sale of tickets in the Philippines is the activity that produces the income as the tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.
>
> Here, I respectfully submit that **the services of offshore-based POGO [licensees]** "*offering by a licensee of PAGCOR authorized online games of chance via the Internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee*"- **are being rendered here. These enumerated activities are transactions deemed to have been consummated within the Philippines, albeit done on the virtual plane**. From placing the bet to winning a bet, the commercial transaction, e-commerce or any sort of virtual transactions find themselves within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations.[14] (Emphasis in the original)

The transnational nature of POGOs blur borderlines and facilitate the possibility of non-taxation in any of the jurisdiction where they operate. The revenue from gambling operations may not be worth the kind of values they instill, the politics they infect, the health they risk, and the lives they destroy. Thus, allowing gambling operations and issuing licenses for them entail the corresponding duty to strictly regulate them, and efficiently collect their enforced contributions.

Bayanihan 2 was an urgent piece of legislation passed by Congress and signed by the President.[15] The statute and the revenue regulations were acts of the legislature and the concerned administrative agency that has expertise over the matter. These bodies are presumed to have acted meticulously, aware of their constitutional and statutory bounds. Absent any

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[13] J. Lazaro-Javier, Dissenting Opinion, p. 8.

[14] J. Lazaro-Javier, Dissenting Opinion, p. 14.

[15] Genalyn Kabiling, *President signs into law Bayanihan 2*, MANILA BULLETIN, September 11, 2020, <https://mb.com.ph/2020/09/11/president-signs-into-law-bayanihan-2/> (last accessed January 6, 2021).

showing of grave abuse of discretion, judicial restraint must be exercised in reviewing the technical details of their issuances.

**ACCORDINGLY,** I vote to **DENY** the consolidated Petitions.

**MARVIC M.V.F. LEONEN**
Associate Justice

***G.R. No. 252965 – SAINT WEALTH LTD. v. BUREAU OF INTERNAL REVENUE, THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ, III and THE COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY***

***G.R. No. 254102 - MARCO POLO ENTERPRISES LIMITED, MG UNIVERSAL LINK LIMITED, OG GLOBAL ACCESS LIMITED, PRIDE FORTUNE LIMITED, VIP GLOBAL SOLUTIONS LIMITED, AG INTERPACIFIC RESOURCES LIMITED, WANFANG TECHNOLOGY MANAGEMENT LTD., IMPERIAL CHOICE LIMITED, BESTBETINNET LIMITED, RIESLING CAPITAL LIMITED, GOLDEN DRAGON EMPIRE LTD., ORIENTAL GAME LIMITED, MOST SUCCESS INTERNATIONAL GROUP LIMITED, and HIGH ZONE CAPITAL INVESTMENT GROUP LIMITED v. THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ, III and THE COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY***

**Promulgated:**

December 7, 2021

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# DISSENTING OPINION

**LAZARO-JAVIER, *J.*:**

With the digital age comes the proliferation of online gaming and gambling. Games of chance are now within the fingertips of every Filipino in the comfort of their respective homes. The entry of these online gaming and gambling entities was so swift even government was at a quandary on their proper tax treatment. It took time before the conundrum got definitively resolved upon the enactment of Republic Act 11590 (RA 11590),[1] An Act Taxing Philippine Offshore Gaming Operations (POGOs).

The law introduced Section 125-A of the National Internal Revenue Code (NIRC), thus:

> **SEC. 125-A.** *Gaming Tax on Services Rendered by Offshore Gaming Licensees.* — Any provision of existing laws, rules or regulations to the contrary notwithstanding, the entire gross gaming revenue or receipts or the agreed predetermined minimum monthly revenue or receipts from gaming, whichever is higher, shall be levied, assessed, and collected a

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1 An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22, 25, 27, 28, 106, 108, and Adding New Sections 125-A and 288(G) of the National Internal Revenue Code of 1997, As Amended and for Other Purposes. (Republic Act No. 11590, Approved on September 22, 2021).

> gaming tax equivalent to five percent (5%), in lieu of all other direct and indirect internal revenue taxes and local taxes, with respect to gaming income: *Provided*, That the gaming tax shall be directly remitted to the Bureau of Internal Revenue not later than the 20th day following the end of each month: *Provided, further*, That the Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority may impose regulatory fees on offshore gaming licensees which shall not cumulatively exceed two percent (2%) of the gross gaming revenue or receipts derived from gaming operations and similar related activities of all offshore gaming licensees or a predetermined minimum guaranteed fee, whichever is higher: *Provided, furthermore,* That for purposes of this Section, gross gaming revenue or receipts shall mean gross wagers less payouts: *Provided, finally*, That the taking of wagers made in the Philippines and the grave failure to cooperate with the third-party auditor sell result in the revocation of the license of the offshore gaming licensee.
>
> The Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority shall engage the services of a third-party audit platform that would determine the gross gaming revenues or receipts of offshore gaming licensees. To ensure that the proper taxes and regulatory fees are levied, periodic reports about the results of the operation showing, among others, the gross gaming revenue or receipts of each offshore gaming licensee shall be submitted to the Bureau of Internal Revenue by the Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority as certified by their third-party auditor: *Provided*, That the third-party auditor shall be independent, reputable, internationally-known, and duly accredited as such by an accrediting or similar agency recognized by industry experts: *Provided, finally*, That nothing herein shall prevent the Bureau of Internal Revenue and the Commission on Audit from undertaking a post-audit or independent verification of the gross gaming revenues determined by the third-party auditor.[2]

Verily, the taxability of POGOs is now beyond question. Section 125-A, NIRC imposes a five percent (5%) gaming tax on all income derived from gaming operations and twenty-five percent (25%) income tax on income derived from non-gaming operations from sources within the Philippines on offshore-based POGO licensees such as petitioners here.

I nevertheless agree with the *ponencia* that the passage of RA 11590 should not deter the Court from ruling on the validity of the assailed tax issuances and petitioners' consequent tax liabilities, if any, prior to the enactment of RA 11590.

With all due respect, however, I disagree with the finding of the *ponencia* that offshore-based POGO licensees derive no income from sources within the Philippines, hence, cannot be subjected to income tax. As will be discussed: (1) petitioners are foreign corporations "doing business" in the Philippines under the **twin characterization** test; (2) the Philippines has jurisdiction over petitioners under the **sliding scale test**; and (3) they are

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[2] *Id.*

taxable as **resident foreign corporations** under the NIRC on sources from within the Philippines.

***Offshore-based POGO licensees are deemed "doing business" in the Philippines***

Under the **twin characterization test** laid out by this Court in the landmark case of ***Mentholatum Co., Inc. v. Mangiliman***,[3] a foreign corporation is considered "**doing business**" in the Philippines when:

> a. The foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another; and
>
> b. The foreign corporation is engaged in activities which implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of its organization.[4]
>
> x x x x

This definition has since been adopted with qualification in various pieces of legislation.[5] For instance, Republic Act No. 7042,[6] the Foreign Investment Act of 1991, defines "**doing business**" thus:

> d) The phrase 'doing business' shall include soliciting orders, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eight(y) (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity, or corporation in the Philippines; **and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works; or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization;** *Provided*, however, That the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account."[7] (Emphasis supplied)

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3 72 Phil. 524-531 (1941).

4 *Id.* at 528.

5 *MR Holdings, Ltd. v. Bajar, et al.*, 430 Phil. 443, 462 (2002).

6 An Act to Promote Foreign Investments, Prescribes the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes.

7 Section 3(d) of Republic Act No. 7042, Approved on June 13, 1991 (as amended).

More, Section 1, Republic Act No. 5455[8] decrees:

> SECTION. 1. *Definition and scope of this Act.* - (1) x x x the phrase "doing business" shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days [180] or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and **any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization**." (Emphasis supplied)

In Section 65, Presidential Decree No. 1789,[9] the Omnibus Investment Code of 1981, a similar definition has been provided.

> ARTICLE 65. *Definition of Terms.* – As used in this Book, the term "investment" shall mean equity participation in any enterprise formed, organized[,] or existing under the laws of the Philippines; and the phrase **"doing business"** shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totalling one hundred eighty [180] days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, **and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.** (Emphases supplied)

There are other statutes defining the term "doing business" in the same wise, and as may be observed, one common denominator among them all is the concept of "**continuity**."[10]

Indeed, the **twin-characterization test** (*i.e. transactions must be for the* ***pursuit of the main business****, and with* ***intent to continue*** *the same for some time*) has become the hallmark of what constitutes "doing business in the Philippines."[11] What is determinative of "doing business" is not just the number or the quantity of the transactions, but also **the intention of an entity**

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8 An Act to Require that the Making of Investments and the Doing of Business Within the Philippines by Foreigners or Business Organizations Owned in Whole or in Part by Foreigners Should Contribute to the Sound and Balanced Development of the National Economy on a Self-Sustaining Basis, and for Other Purposes, Enacted Without executive approval, September 30, 1968, (65 O.G. No. 29, p. 7410).

9 A Decree to Revise, Amend and Codify the Investment, Agricultural, and Export Incentives Acts to be known as the Omnibus Investment Code, (Presidential Decree No. 1789, Signed on January 16, 1981).

10 Supra note 5 at 464.

11 C. Villanueva, Philippine Corporate Law (2010 ed.), p. 986.

**to continue the body of its business in the country**. The fact that it derives income from its activities should also be considered.[12]

Here, it is admitted that in pursuit of their main business (*i.e.*, offshore gaming), petitioners applied for a Philippine Amusement and Gaming Corporation (PAGCOR) license for offshore gaming operations with the intent to continue their main line of business here. In fact, they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.

The *ponencia* focuses on the so called three (3) components of offshore gaming:

1. Prize consisting of money or something else of value which can be won under the rules of the game;
2. A player who:
   a. Being located outside of the Philippines and not a Filipino citizen, enters the game remotely or takes any step in the game by means of a communication device capable of accessing an electronic communication network such as the internet
   b. Gives or undertakes to give, a monetary payment or other valuable consideration to enter in the course of, or for, the game; and
3. The winning of a prize is decided by chance.

to support the conclusion that offshore-based POGO licensees such as petitioners are not doing business in the Philippines.

But offshore gaming activities are said to be not supposedly performed within the Philippine territory only **because they are done on the virtual plane.**

Hence, the question is, may offshore-based POGO licensees be deemed doing business in the Philippines though their transactions are done online?

I believe so.

In **SEC-OGC Opinion No. 17-03 dated April 4, 2017**,[13] the Securities and Exchange Commission (SEC) was faced with the same dilemma relative to the inquiry of Sony Computer Entertainment Hong Kong (SCEH) on the license requirement for foreign corporations doing business in the Philippines:

> By way of a background, you stated that SCEH is a company organized and existing under the laws of Hong Kong and operates Sony Entertainment Network (SEN) in Singapore, Indonesia, Taiwan, Malaysia, Thailand, and Hong Kong. SEN is an online platform that offers various

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12 See *Cargill, Inc. v. Intra Strata Assurance Corporation, Inc.*, 629 Phil. 320, 333 (2010).

13 SEC-OGC Opinion No. 17-03 Re: Foreign Corporation; Doing business; Online Gaming, issued by Hon. Camilo S. Correa, General Counsel of Securities and Exchange Commission.

content and services such as an online community and an online gaming system, which requires a SEN account in order to participate. Since SEN is an internet-based system, persons in the Philippines can create a SEN account to participate in the online community and to purchase content from and/or use SEN's services even if the SCEH does not have a physical presence in the Philippines. A SEN account holder can buy content and services from SEN only by using funds from an associated SEN online wallet, which can be funded by using a credit or debit card or a prepaid card where available.

Finally, SEN employees are located in Hong Kong while SEN's servers are based in the United States.

SCEH is seeking confirmation that it is not engaged in doing business in the Philippines and will not be required to obtain a license for the following activities:

1) Offer and sale of SEN services on the internet without restricting persons located in the Philippines from availing of these services (Maintenance);
2) Assuming that Maintenance, by itself, is not considered doing business in the Philippines, accepting online payments for using SEN in any currency, including Philippine currency;
3) Marketing or advertising the SEN in the Philippines through (a) online and printed publications, and (b) television and radio commercials, which is based on the enumerated acts constituting not "doing business" provided in Section 1(f) of the Implementing Rules and Regulations (IRR) of the Foreign Investment Act of 1991 (FIA); and
4) Further, as a form of expansion, hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

x x x x

Using the **twin-characterization test**, the SEC found SCEH to be "doing business" in the Philippines, *viz.*:

You stated that **there is no reason to consider that SCEH will be doing business in the Philippines since the activities of SCEH are carried outside of the Philippines**, considering that its employees are in Hong Kong, that its property is outside the Philippines, and that the SEN servers are in the United States.

However, **we opine that the activities SCEH proposes to undertake shall be considered as "doing business" in the Philippines since the twin characterization test is satisfied in this case. First**, the following **activities indicate that SCEH will be continuing the body or substance of the business of SCEH for which it was organized in the Philippines**, to wit: (i) funding of the SEN online wallet; (ii) offering and selling SEN services; (iii) accepting online payments for using SEN in any currency, including Philippine currency; (iv) marketing or advertising; and (v) hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

**Second**, the above-mentioned **enumerated activities are transactions consummated within the Philippines although they are done in virtual plane**. The following salient points of the online commercial transactions, or e-commerce, will find themselves in the Philippines:

(i) The creation of a new SEN account will take place in the Philippines in order to participate in SEN;
(ii) The offering for sale and sale of online content and services of SEN will be made to the SEN account holder who is located in the Philippines;
(iii) The funding of the SEN online wallet will take place in the Philippines as will be further discussed below;
(iv) The payment of the sale of online content and services of SEN will be made from the Philippines by the SEN account holder; and
(v) The delivery of the online content and services of SEN will be made in the Philippines.

The salient points above-mentioned are evidenced by the use of an IP address through a device (e.g. PlayStation 4, computer, HDTV or mobile device) used by the SEN account holder. IP address is short for Internet Protocol (IP) address. The IP is the method or protocol by which data is sent from one computer to another on the Internet. Each computer (known as a host) on the Internet has at least one IP address that uniquely identifies it from all other computers on the Internet. An IP address consists of four numbers, each of which contains one to three digits, with a single dot (.) separating each number or set of digits (e.g., 78.125.0.209). Moreover, an IP address may reveal such information as the continent, country, region, and city in which a computer is located; the ISP (Internet Service Provider) that services that particular computer; and such technical information as the precise latitude and longitude of the country, as well as the locale, of the computer. The location of an IP address can be traced through the use of an IP geolocation service.

Here, once the SEN account holder enters the SEN online store through his device, he may view the content or service which is offered to him for sale that is sent to his device in the Philippines. Thereafter, the SEN account holder may accept the offer of the content or service from the Philippines by clicking "Confirm Purchase." Once it is purchased, the acceptance of the offer is transmitted from his IP Address through his device in the Philippines to the virtual plane, and the content or service is delivered through said virtual plane to the account of the SEN account holder who is in the Philippines. The SEN account holder will then download the content or service through his device through his IP address located in the Philippines. Clearly, such transaction(s) will be consummated in the Philippines.

Furthermore, **it must be remembered that the offering for sale and the sale of content and services, and the funding of the SEN online wallet, are intricately connected since the sale of the SEN content and services cannot be consummated without the funding of said SEN online wallet.** Since the SEN online wallet funded by credit cards and debit cards, it, thus, logically and reasonably means that may be SCEH will likewise have arrangements with the credit card/debit card issuers here in the Philippines.

> The permission to use and buy from the SEN online store through the funding of the SEN online wallet also clearly indicates that there is intent to continue the main business for a period of time. Once the SEN account holder puts funds in the SEN online wallet, he can resume transactions on the SEN while his account is still active (subject of course, to the SEN's rules on membership in the network), thereby maintaining a business relationship with the SCEH even if the transactions are intermittent and infrequent and even if the SEN user only purchases credit and uses them up at one time.
>
> x x x x

SCEH averred that it was not doing business in the Philippines since the activities of SCEH were carried outside of the Philippines, its employees were in Hong Kong, its property was outside the Philippines, and that the SEN servers were located in the United States (U.S.). Offshore-based POGO licensees raised the same arguments save for the fact that they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.

Despite the averments of SCEH, the SEC still opined that the activities SCEH proposed to undertake would deem it as "doing business" in the Philippines since the twin characterization test was satisfied. ***First***, the enumerated activities to be undertaken by SCEH indicated that it would be continuing in the Philippines the substance of the business for which it was organized. ***Second***, the SCEH enumerated activities which were considered consummated within the Philippines, albeit done in a virtual plane. I see no reason not to apply the same ruling to offshore-based POGO licensees whose footprints are all over the Philippines; they entered into contracts with PAGCOR-accredited local gaming agents and service providers in furtherance of their main line of business, *i.e.* gaming operations.

Verily, the gaming operations conducted by offshore-based POGO licensees within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations implies the continuity of commercial dealings and arrangements, and contemplates the performance of acts incident to, and in the progressive prosecution of their business. These services will not be provided intermittently but for a long period of time in the Philippines. Accordingly, petitioners are considered resident foreign corporations doing business here in the Philippines.

***Petitioners' activities are deemed consummated in the Philippines, hence, they are proper subjects of government regulations and taxes***

In the U.S., there is currently no statute or case law which addresses the question of whether owning or operating a website or online platform

constitutes "doing business."[14] Numerous court opinions, however, have addressed a similar issue: whether a corporation's internet activities in a foreign State is sufficient to justify the court of that State in exercising personal jurisdiction over the corporation.

Exploring the issue of "jurisdiction" with regard to websites is useful in determining where the online activities of a corporation are deemed consummated and, corollarily, whether it need to "qualify [or obtain a license] to do business" based on its website or online activities. One requisite for courts to obtain personal jurisdiction is that the corporation has "minimum contacts" with the foreign state, such that its ability to be sued there "does not offend the traditional notions of fair play and substance."

In ***Zippo Mfg. Co. v. Zippo Dot Com, Inc.***,[15] the U.S. District Court for Western District of Pennsylvania elucidated on the State's jurisdiction over non-resident defendants in cases involving the latter's internet activities:

> x x x x
>
> **The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant.**[16] General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state.[17] **In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of International Shoe Co. v. Washington**[18] **and its progeny.**[19] Manufacturing does not contend that we should exercise general personal jurisdiction over Dot Com. Manufacturing concedes that if personal jurisdiction exists in this case, it must be specific.
>
> **A three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted *1123 against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable.**[20] The "Constitutional touchstone" of the minimum contacts analysis is embodied in the first prong, "whether the defendant purposefully established" contacts with the forum state.[21]

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14 *Id.*

15 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). https://law.justia.com/cases/federal/district-courts/FSupp/952/1119/1432344/. (Accessed on December 27, 2021, 9:19 PM), citing *Mellon, 960 F.2d at 1221*.

16 *Id, Mellon, 960 F.2d* at 1221.

17 *Id, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984).

18 *Id, International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

19 *Id, Mellon, 960 F.2d* at 1221.

20 *Id.*

21 *Id, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 159-60, 90 L. Ed. 95 (1945)).

Defendants who "'reach out beyond one state' and create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions."[22] "[T]he foreseeability that is critical to the due process analysis is x x x that the defendant's conduct and connection with the forum State are such that he should reasonably expect to be haled into court there."[23] This protects defendants from being forced to answer for their actions in a foreign jurisdiction based on "random, fortuitous or attenuated" contacts.[24] "Jurisdiction is proper, however, where contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State."[25]

**The "reasonableness" prong exists to protect defendants against unfairly inconvenient litigation.[26] Under this prong, the exercise of jurisdiction will be reasonable if it does not offend "traditional notions of fair play and substantial justice".** [27] When determining the reasonableness of a particular forum, the court must consider the burden on the defendant in light of other factors including: "the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's right to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies." [28]

2. The Internet and Jurisdiction

In *Hanson v. Denckla*, the Supreme Court noted that **"[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."** [29] **Twenty seven years later, the Court observed that jurisdiction could not be avoided "merely because the defendant did not physically enter the forum state.**"[30] The Court observed that:

> [I]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

Enter the Internet, a global "'super-network' of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide."[31] "In recent years, businesses have begun to use the Internet to provide information and products to consumers

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22 *Id*, citing *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S. Ct. 927, 929, 94 L. Ed. 1154 (1950)).

23 *Id*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980).

24 *Id*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984).

25 *Id*, *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183-84 (citing *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957)).

26 *Id*, *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564-65.

27 *Id*, *International Shoe*, 326 U.S. at 316, 66 S. Ct. at 158.

28 *Id*, *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564.

29 *Id*, *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1237-39, 2 L. Ed. 2d 1283 (1958).

30 *Id*, *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184.

31 *Id*, *Panavision Intern., L.P. v. Toeppen*, 938 F. Supp. 616 (C.D.Cal. 1996) (citing American Civil *Liberties Union v. Reno*, 929 F. Supp. 824, 830-48 (E.D.Pa. 1996)).

> and other businesses."[32] The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The *1124 cases are scant. Nevertheless, **our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles.** At **one end** of the spectrum are situations where a **defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.** *E.g.*[,] *CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996).* At the **opposite end** are situations where a **defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions.** A passive Web site that does little more than make information available to those who are interested in it is **not grounds for the exercise personal jurisdiction.** *E.g.*[,] *Bensusan Restaurant Corp., v. King, 937 F. Supp. 295 (S.D.N.Y.1996).* The **middle ground** is occupied by interactive Web sites **where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.** *E.g.*[,] *Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D.Mo.1996).*
>
> **Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper.[33] Different results should not be reached simply because business is conducted over the Internet.** x x x
>
> x x x x

Thus, the **Sliding Scale Test** or ***Zippo Test*** was born. This test was based on the premise that "the likelihood that 'personal jurisdiction' can be constitutionally exercised is directly proportionate to the nature and quantity of commercial activity that an entity conducts over the internet." At one end of the scale are "passive" websites, which alone generally do not generate sufficient contacts with a foreign state to establish personal jurisdiction since they are only used to post information therein. At the other end of the scale are "active" websites, which generate sufficient business over the internet to establish personal jurisdiction. "Interactive" websites fall in the center of the scale since they are hybrid sites that contain elements of both passive and active websites, and courts determine whether to exercise personal jurisdiction over the interactive website owner on a case-by-case basis.

Verily, the **Sliding Scale Test** was specifically tailored to aid courts in determining whether the nature and level of a non-resident defendant's internet activity constitute "minimum contacts" for jurisdictional purposes. I submit that the same test is applicable here in determining whether the

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32 *Id.*

33 *Id, Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183-84.

Philippines may regulate and tax offshore-based POGOs in view of the nature and extent of their operations here.

Here, the Court can take judicial notice of the fact that offshore-based POGO licensees have conducted gaming operations through PAGCOR-accredited local gaming agents and service providers for its gaming operations. The enormity of the transactions has been noticeable not only from the end of the BIR and PAGCOR but by the Legislature itself through congressional hearing by both Houses in aid of legislation, ranging from taxability, immigration issues, rise of criminal activities, *etc.*. Billions of foreign currency transactions go through these entities day by day aided by the internet. It is not merely a passive website as money has been changing hands here in the Philippines.

***Offshore-based POGO licensees are taxable as resident foreign corporations***

Since offshore-based POGO licensees are deemed to be doing business here, they squarely fall under the definition of "resident foreign corporations" in Section 22(H) of the NIRC, thus:

> **SEC. 22. *Definitions.*** - When used in this Title:
>
> (H) The term '***resident foreign corporation***' applies to a foreign corporation engaged in trade or business within the Philippines.[34]

Consequently, they are subject to income tax in accordance with Section 23 of the NIRC:

> 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;
>
> (B) A nonresident citizen is taxable only on income derived from sources within the Philippines;
>
> (C) An individual citizen of the Philippines who is working and deriving income from abroad as an overseas contract worker is taxable only on income derived from sources within the Philippines: Provided, That a seaman who is a citizen of the Philippines and who receives compensation for services rendered abroad as a member of the complement of a vessel engaged exclusively in international trade shall be treated as an overseas contract worker;
>
> (D) An alien individual, whether a resident or not of the Philippines, is taxable only on income derived from sources within the Philippines;

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[34] AN ACT AMENDING THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, AND FOR OTHER PURPOSES, Republic Act No. 8424, December 11, 1997.

> (E) A domestic corporation is taxable on all income derived from sources within and without the Philippines; and
>
> (F) A **foreign corporation, whether engaged or not in trade or business in the Philippines,** is **taxable only on income derived from sources within the Philippines**.[35] (Emphases supplied)

As the provision plainly states, a foreign corporation, whether engaged or not in trade or business in the Philippines, is subject to Philippine income taxation on income received from all sources within the Philippines. This rule is based on the source concept defined as:

> **Source concept.** The jurisdiction to impose income tax is based either on the relationship of the income (tax object) to the taxing state (commonly known as the source or situs principle) or the relationship of the taxpayer (tax subject) to the taxing state based on residence or nationality. Under the source principle, a State's claim to tax income is based on the State's relationship to that income.[36]

In ***CIR v. Baier-Nickel***,[37] the Court provided a background on sourcing of income under the Internal Revenue Code of the U.S. from whence our Tax Code originated:

> The following discussions on sourcing of income under the Internal Revenue Code of the U.S., are instructive:
>
> The Supreme Court has said, in a definition much quoted but often debated, that income may be derived from three possible sources only: (1) capital and/or (2) labor; and/or (3) the sale of capital assets. While the three elements of this attempt at definition need not be accepted as all-inclusive, they serve as useful guides **in any inquiry into whether a particular item is from "sources within the United States"** and suggest an **investigation into the nature and location of the activities or property which produce the income**.
>
> **If the income is from labor the place where the labor is done should be decisive; if it is done in this country, the income should be from "sources within the United States." If the income is from capital, the place where the capital is employed should be decisive; if it is employed in this country, the income should be from "sources within the United States." If the income is from the sale of capital assets, the place where the sale is made should be likewise decisive.**
>
> Much confusion will be avoided by regarding the term "source" in this fundamental light. It is not a place, it is an activity or property. As such, it has a situs or location, and if that situs or location is within the United States the resulting income is taxable to nonresident aliens and foreign corporations.

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35 *Id.*

36 Concepts and issues, I. International Double Taxation, UN Committee of Experts on International Cooperation in Tax Matters Seventh session, Geneva, 24-28 October 2011, Item 5 (h) of the provisional agenda, Revision of the Manual for the Negotiation of Bilateral Tax Treaties.

37 *CIR v. Juliane Baier-Nickel*, 531 Phil. 480-496 (2006).

> **The intention of Congress in the 1916 and subsequent statutes** was to discard the 1909 and 1913 basis of taxing nonresident aliens and foreign corporations and **to make the test of taxability the "source," or situs of the activities or property which produce the income.** The result is that, on the one hand, nonresident aliens and nonresident foreign corporations are prevented from deriving income from the United States free from tax, and, on the other hand, there is no undue imposition of a tax when the activities do not take place in, and the property producing income is not employed in, this country. **Thus, if income is to be taxed, the recipient thereof must be resident within the jurisdiction, or the property or activities out of which the income issues or is derived must be situated within the jurisdiction so that the source of the income may be said to have a situs in this country.**
>
> The **underlying theory** is that the **consideration for taxation is protection of life and property and that the income rightly to be levied upon to defray the burdens of the United States Government is that income which is created by activities and property protected by this Government or obtained by persons enjoying that protection.**[38](Emphases supplied)
>
> The important factor which determines the source of income of personal services, therefore, is not the residence of the payor, or the place where the contract for service is entered into, or the place of payment, but the place where the services were actually rendered.[39]

For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines, e.g., sale of tickets in the Philippines is the activity that produces the income as the tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.[40]

Here, I respectfully submit that **the services of offshore-based POGO licencees** – *"offering by a licensee of PAGCOR authorized online games of chance via the Internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee"* – **are being rendered here. These enumerated activities are transactions deemed to have been consummated within the Philippines, albeit done on the virtual plane.** From placing the bet to winning a bet, the commercial transaction, e-commerce or any sort of virtual transactions find themselves within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations.

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38 *Id.* at 488-489.

39 *Id.* at 489.

40 See *CIR v. British Overseas Airways Corporation*, 233 Phil. 406, 422 (1987).

In an emerging digital economy, no clear boundaries has been set nor a scope of authority or imposition has been taken up by the Legislature. Even then, if the Philippines that has substantial connection with the assets or services which are subject to tax, e.g., enrolled under the Philippine Payment System, or the delivery of goods and services are in the Philippines, then the government can assert that the Philippines is the tax situs for the digital transaction.

***At any rate, offshore-based POGO licensees should be subject to tax in exchange for the privileges they enjoy***

While PAGCOR insists that none of the components of offshore gaming are being performed within Philippine territory, I cannot take its submission hook, line and sinker. At the back of my mind, so many questions linger as to their operations:

a. Why is there a proliferation of foreigners in the Philippines engaged in such operations?

b. Why are there numerous offices, residential condominiums rented specifically for POGO operations and other array of services for them?

c. If the only transaction entered into by these offshore-based POGO licensees are the service contracts with these service providers located in the Philippines, what interest do they have here in the Philippines?

It is an open secret that PAGCOR and other institutions have provided aide and protection to these entities to the point that even the government could not explain their proliferation. Since their inception, they enjoyed protection here in the Philippines, it is high time they contribute to the expenditures of the government.

In ***Lorenzo v. Posadas, Jr.***,[41] this benefit-based taxation was mentioned by the Court, but it nevertheless emphasized that the obligation to pay taxes rests on governmental existence and necessity, to wit:

> Taxes are essential to the very existence of government.[42] The obligation to pay taxes rests not upon the privileges enjoyed by, or the protection afforded to, a citizen by the government, but upon the necessity of money for the support of the state.[43] For this reason, no one is allowed to object to or resist

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41 *Pablo Lorenzo v. Juan Posadas, Jr.*, 64 Phil. 353, 370 (1937).

42 *Id*, citing *Dobbins v. Erie County*, 16 Pet., 435; 10 Law. ed., 1022; *Kirkland v. Hotchkiss*, 100 U.S., 491; 25 Law. ed., 558; Lane County v. Oregon, 7 Wall, 71; 19 Law. ed., 101; *Union Refrigerator Transit Co., v. Kentucky*, 199 U. S., 194; 26 Sup. Ct., Rep., 36; 50 Law. ed., 150; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; 9 Law. ed., 773.

43 *Id*, citing *Dobbins v. Erie County*.

> the payment of taxes solely because no personal benefit to him can be pointed out.[44]
>
> x x x x

This basis of taxation was subsequently articulated in ***CIR v. Algue, Inc.***,[45] where the Court pronounced:

> It is said that taxes are what we pay for civilization society. Without taxes, the government would be paralyzed for 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 the 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.[46] (Emphasis and italics supplied)
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> x x x x

Thus, the basis of taxation is the existence of a social contract, characterized as a symbiotic relationship between the State and its citizens – offshore gaming licensees in this case, which compel reciprocal duties of protection and support between the parties. In ***Abakada Guro Party List v. Ermita***,[47] the Supreme Court restated the basis of taxation – "The expenses of government, having for their object the interest of all, should be borne by everyone, and the more man enjoys the advantages of society, the more he ought to hold himself honored in contributing to those expenses."

As a result, I register my dissent and vote to dismiss the Petition.

**AMY C. LAZARO-JAVIER**
*Associate Justice*

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44 *Id*, citing *Thomas v. Gay*, 169 U. S., 264; 18 Sup. Ct. Rep., 340; 43 Law. ed., 740.
45 *CIR v. Algue*, 241 Phil. 829- 836 (1988).
46 *Id.* at 836.
47 506 Phil. 1, 74 (2005).

*EN BANC*

**G.R. No. 252965 – SAINT WEALTH LTD., as represented by DAVID BUENAVENTURA & ANG LAW OFFICES**, *Petitioner*, *v.* **BUREAU OF INTERNAL REVENUE, *et al.***, *Respondents*; and

**G.R. No. 254102 – MARCO POLO ENTERPRISES LIMITED, *et al.***, *Petitioners*, *v.* **THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ III and THE COMMISSIONER OF INTERNAL REVENUE, in the person of CAESAR R. DULAY**, *Respondents*.

Promulgated:

December 7, 2021

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## CONCURRING AND DISSENTING OPINION

**PERLAS-BERNABE, *J.*:**

I concur in striking down Sections 11 (f) and (g) of Republic Act No. (RA) 11494[1] (Bayanihan 2 Law) for being unconstitutional, and Revenue Regulation No. (RR) 30-2020, Revenue Memorandum Circular No. (RMC) 64-2020, as well as parts of RMC 102-2017 and RMC 78-2018 (collectively, the Assailed Tax Issuances), for having been issued contrary to relevant tax laws and RA 9487, or the "PAGCOR Charter."[2] However, I respectfully dissent insofar as the *ponencia* purports that the instant case has already been rendered moot and academic by the enactment of RA 11590, entitled "*An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22, 25, 27, 28, 106, 108, and Adding New Sections 125-A and 288-G of the National Internal Revenue Code of 1997, as amended, and for Other Purposes*."[3]

### I.

As pointed out by Associate Justice Alfredo Benjamin S. Caguioa (Justice Caguioa) during the Court's deliberations, the issue in the instant petition has not been rendered moot and academic by RA 11590.[4] The general rule is that laws do not have retroactive effect, unless the contrary is provided.[5] This principle of prospectivity applies whether the statute is

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1 Entitled "AN ACT PROVIDING FOR COVID-19 RESPONSE AND RECOVERY INTERVENTIONS AND PROVIDING MECHANISMS TO ACCELERATE THE RECOVERY AND BOLSTER THE RESILIENCY OF THE PHILIPPINE ECONOMY, PROVIDING FUNDS THEREFOR, AND FOR OTHER PURPOSES," approved on September 11, 2020.

2 See *ponencia*, p. 40.

3 See id. at 22-23.

4 See Letter of Justice Caguioa to J. Gaerlan dated October 4, 2021.

5 See Article 4 of the CIVIL CODE OF THE PHILIPPINES.

original or amendatory,[6] such as RA 11590. It bears stressing that nowhere in RA 11590 does it provide for the retroactive application of any of its provisions, including its repealing clause which expressly mentions the PAGCOR Charter and the Bayanihan 2 Law, as well as their corresponding rules and regulations, *e.g.*, the Assailed Tax Issuances. In fact, the aforesaid principle finds particular significance in tax statutes and tax rules and regulations for it has been settled that the taxing authority's right to receive tax collections accrues the moment the said tax is deemed payable under the provisions of the relevant tax law, and must be paid without delay once it is due.[7] Thus, prior to the Court passing upon the legality or constitutionality of tax laws or revenue measures, the same must enjoy the presumption of validity and must be said to produce legal effects, unless otherwise enjoined.

Here, the Court issued a temporary restraining order (TRO) on January 5, 2021 which prevented the Bureau of Internal Revenue (BIR) from enforcing the provisions of the Bayanihan 2 Law and the Assailed Tax Issuances. However, while the BIR was prevented from implementing the foregoing, it does not necessarily follow that the taxes that could have been exacted therefrom did not accrue in favor of the State. Rather, the issuance of a TRO in this case simply means that the State, through the BIR, could not yet **demand the payment of said taxes**. Consequently, had the Court deemed it proper to uphold the Assailed Tax Issuances and the Bayanihan 2 Law, petitioners, and any other similarly situated taxpayers, would have been liable for all the accrued taxes up until the effectivity date of RA 11590 which repealed them. On the other hand, if the Court had struck down the Assailed Tax Issuances and Sections 11 (f) and (g) of the Bayanihan 2 Law, as it eventually did,[8] then no taxes would have accrued since a void act cannot give rise to any right or obligation.[9]

Therefore, what the Court had to resolve in this case was not whether petitioners, and other similarly situated taxpayers, were liable for any taxes after the passage of RA 11590, but rather if they were liable for the payment of taxes from the issuance of RMC 102-2017 up until the effectivity of RA 11590. Hence, the issues presented in the instant petition have not been rendered moot and academic and are, in fact, ripe for judicial review.

## II.

On the validity of Sections 11 (f) and (g) of the Bayanihan 2 Law, I concur with the *ponencia* that the same are unconstitutional for being riders.[10] A "rider" is any provision "which is alien to or not germane to the

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6 See *Co v. Court of Appeals*, 298 Phil. 221, 226 (1993).

7 See *Film Development Council of the Philippines v. Colon Heritage Realty Corp.*, G.R. Nos. 203754 & 204418 (Resolution), October 15, 2019.

8 See *ponencia*, p. 40.

9 See *Commissioner of Internal Revenue v. San Roque Power Corp.*, 719 Phil. 137, 157 (2013).

10 See *ponencia*, pp. 36-40.

subject or purpose of the bill in which it is incorporated,"[11] and is specifically proscribed by Sections 25 (2) and Section 26 (1), Article VI of the 1987 Constitution, to wit:

> ARTICLE VI
>
> The Legislative Department
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> x x x x
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> Sec. 25. x x x
>
> (2) No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates.
>
> x x x x
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> Sec. 26. (1) Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

The rationale for the prohibition against riders is to "to prevent hodge-podge or log-rolling legislation, to avoid surprise or fraud upon the legislature, and to fairly appraise the people of the subjects of legislation that are being considered."[12] Jurisprudence has laid down a "germaneness" standard to test whether a provision is a rider, *i.e.*, that the provision must have some reasonable relation to the subject matter as expressed in the title thereof.[13]

As the *ponencia* aptly pointed out, Bayanihan 2 Law was not intended to be a tax measure. Its full title reads: "*An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, Providing Funds Therefor, and For Other Purposes*." The proponents of House Bill No. 6953 and Senate Bill No. 1564, the pre-cursors of the Bayanihan 2 Law, all characterized the Act as "socioeconomic relief efforts,"[14] a "stopgap measure,"[15] or a "stimulus bill."[16] At its core, the law intends to empower the government to further address the COVID-19 pandemic while providing some measure of financial assistance to the public for a limited time.[17]

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11 *Atitiw v. Zamora*, 508 Phil. 321, 334 (2005).

12 Id. at 335.

13 Id.

14 See Sponsorship Remarks of Deputy Speaker Villafuerte, House of Representatives Journal No. 59, June 1 to 5, 2020, p. 101.

15 See Interpellation of Representative Abante, House of Representatives Records, August 5, 2020, p. 45.

16 See Interpellation of Representative Abante, House of Representatives Records, August 5, 2020, p. 46; and Interpellation of Senator Recto, Senate Journal No. 67, June 1, 2020, p. 614.

17 The effectivity of the law is only until the next adjournment of the Eighteenth Congress on December 19, 2020, *viz.*:

> SECTION 18. *Effectivity*. – Except as otherwise specifically provided herein, this Act shall be in full force and effect until the next adjournment of the Eighteenth Congress on December 19, 2020. This Act shall take effect immediately upon its publication in a

A close reading of the provisions of the Bayanihan 2 Law would show that there are two (2) main pillars to this relief measure: (1) empowering the President to exercise the necessary powers under Section 23 (2), Article VI of the Constitution to address a national emergency;[18] and (2) providing for the appropriations of the funds necessary to enable the response and recovery interventions under the law.[19]

The assailed provisions of the Bayanihan 2 Law are found under Section 11 thereof, captioned "*Sources of Funding.*" A perusal of paragraphs (a) to (e), however, would show that these identify already-existing funds that are to be realigned or funds previously identified under the FY 2020 Budget of Expenditures and Sources of Financing (BESF).[20] Paragraphs (f) and (g), on the other hand, if read on their own, appear to introduce new tax impositions, to wit:

> SECTION 11. *Sources of Funding.* – The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
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> x x x x
>
> (f) Amounts derived from the five percent (5%) franchise tax on the gross bets or turnovers or the agreed pre-determined minimum monthly revenues from gaming operations, whichever is higher,

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newspaper of general circulation or in the Official Gazette: Provided, That Section 4 (cc) of this Act shall be deemed to be in effect since Republic Act No. 11469 expired.

[18] Section 4 of RA 11494 reads:

> SECTION 4. *COVID-19 Response and Recovery Interventions.* – Pursuant to Article VI, Section 23 (2) of the Constitution, the President is hereby authorized to exercise powers that are necessary and proper to undertake and implement the following COVID-19 response and recovery interventions:
>
> x x x x

[19] Section 10 of RA 11494 reads:

> SECTION 10. *Appropriations and Standby Fund.* – The amounts that will be raised under Section 4 paragraphs (pp), (qq), (rr), (ss), (sss) and (ttt) of this Act shall be used for the response and recovery interventions for the COVID-19 pandemic authorized in this Act x x x x

[20] Section 11, paragraphs (a) to (e) of RA 11494 reads:

> SECTION 11. *Sources of Funding.* – The enumerated subsidy and stimulus measures, as well as all other measures to address the COVID-19 pandemic shall be funded from the following:
>
> (a) 2020 GAA: Provided, That funds for the herein authorized programs and projects shall be sourced primarily from the unprogrammed funds and savings realized from modified, realigned, or reprogrammed allocations for operational expense of any government agency or instrumentality under the Executive Department, including, but not limited to, travelling expenses, supplies and materials expenses, professional services, general services, advertising expenses, printing and publication expenses, and other maintenance and operating expenses in the 2020 GAA;
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> (b) Savings pooled pursuant to Republic Act No. 11469 and Section 4 paragraphs (pp), (qq), (rr), (ss), (sss) and (ttt) of this Act;
>
> (c) Excess revenue collections in any one of the identified tax or non-tax revenue sources from its corresponding revenue collection target, as provided in the FY 2020 Budget of Expenditures and Sources of Financing (BESF);
>
> (d) New revenue collections or those arising from new tax or non-tax sources which are not part of nor included in the original sources included in the FY 2020 BESF;
>
> (e) All amounts derived from the cash, funds, and investments held by any GOCC or any national government agency;

> earned by offshore gaming licensees, including gaming operators, gaming agents, service providers and gaming support providers;
>
> (g) Income tax, VAT, and other applicable taxes on income from non-gaming operations earned by offshore gaming licensees, operators, agents, service providers and support providers.
>
> x x x x

Neither provision identifies any pre-existing tax laws from which such tax liabilities would arise. Undeniably, it appears to be a new revenue measure altogether. Moreover, unlike the other provisions of this temporary relief statute, Sections 11 (f) and (g) were intended to outlive the December 19, 2020 expiration date of RA 11494, *viz.*:

> After two (2) years or upon a determination that the threat of COVID-19 has been successfully contained or abated, whichever comes first, the revenues derived from franchise taxes on gross bets or turnovers under paragraph (f) and income from non-gaming operations under paragraph (g) **shall continue to be collected and shall accrue to the General Fund of the Government**. The BIR shall implement closure orders against offshore gaming licensees, operators, agents, service providers and support providers who fail to pay the taxes due, and such entities shall cease to operate. (emphasis supplied)

Had Sections 11 (f) and (g) merely directed the collection of funds from existing tax exactions to the COVID-19 intervention measures of the Bayanihan 2 Law, there would be no need to specify that the collections thereof after the pandemic has abated would accrue to the General Fund. The logical implication of including this paragraph is that prior to the Bayanihan 2 Law, there was no statute which imposed the same taxes as found in Sections 11 (f) and (g); necessarily, the foregoing provisions should be considered as new tax measures.

The question now devolves as to whether introducing new tax measures is germane to the subject matter of the Bayanihan 2 Law. It is my considered view that it is not. As above-mentioned, the two (2) pillars which characterize the law are its emergency power provisions and the special appropriations to fund the same. Moreover, the law was never intended to remain effective for an extended period of time; hence, it provides for its own expiration date in Section 18 thereof. It was simply a necessary "stopgap" to further bolster the government's efforts to address the COVID-19 pandemic. Undoubtedly, the Executive can neither exercise emergency powers nor re-allocate funding without a statute passed by Congress. These exigencies are what impelled the passage of the Bayanihan 2 Law. Surely, tax measures intended to remain effective for an indefinite amount of time are anathema to the admitted limited lifespan of an act passed to provide only temporary relief, and cannot be said to be germane to the subject matter of the said law.

Given the foregoing, I concur with the *ponencia* that Sections 11 (f) and (g) should be struck down for being riders to the Bayanihan 2 Law in contravention of Section 26 (1) of the Constitution.[21] Necessarily, RR 30-2020 and RMC 64-2020, which merely implement Sections 11 (f) and (g) of RA 11494, should similarly be struck down since it is a basic legal principle that the spring cannot rise higher than its source.[22]

**III.**

In determining the validity of RMC 102-2017 and RMC 78-2018, it becomes imperative to identify the statutory basis of the BIR in circulating these issuances and the obligations they impose on taxpayers, such as herein petitioners.

The subject of RMC 102-2017 reads: "*Taxation of Taxpayers Engaged in Philippine Offshore Gaming Operations.*" The prelude of the circular is clear that the BIR's aim was to "adapt existing taxes" to Philippine Offshore Gaming Operations (POGOs) to lessen the tax leak from their activities:

> The Bureau of Internal Revenue (BIR), not a newcomer to the workings and tax issues presented by online business transactions through the internet, feels that the challenge in gaming operations is how to implement a fair and equitable taxation of online gaming businesses, how to monitor the revenues and revenue-generating activities of POGO and how to adapt existing taxes to POGO so as to lessen the so-called "lost potential tax revenues". This is the perspective from which the current issue of taxing taxpayers engaged in POGO should be viewed.[23]

The BIR further states that "online activity is sufficient to constitute doing business in the Philippines x x x." Hence, it imposed regulatory and administrative requirements to POGOs, which was further outlined in RMC 78-2018.[24] It likewise clarified that the following taxes apply to POGOs:

1. Income from gaming operations are subject to the five percent (5%) franchise tax which are in lieu of all other taxes, whether national or local;

2. Income from their other related services or non-gaming operations will be subject to normal income tax, value-added tax (VAT), and other applicable taxes;

3. Other entities, such as gaming agents, service providers, and gaming support providers, who provide specific components to a

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21 See *ponencia*, p. 40.

22 See *Republic v. Bajao*, 601 Phil. 53, 59 (2009).

23 See RMC 102-2017.

24 The subject of RMC 78-2018 reads "Registration Requirements of Philippine Offshore Gaming Operators and its Accredited Service Providers."

POGO Licensee's own offshore gaming services, and who are themselves registered as a POGO Licensees, shall also be subject to the five percent (5%) franchise tax for their gaming activities, and normal income tax, value-added tax (VAT), and other applicable taxes for their non-gaming operations;

4. Income payments of any Licensee for the purchase of goods and services shall be subject to withholding taxes;

5. Compensation, fees, commission or any other form of remuneration as a result of services rendered to POGO Licensees or the other entities shall be subject to withholding taxes; and

6. Purchases and sale of goods or services shall be subject to existing tax laws and revenue issuances.

Petitioners in G.R. No. 254102 argue that RMC 102-2017 is void for lack of statutory basis since there is no law imposing any kind of taxes on the offshore gaming revenue of foreign-based POGO Licensees.[25] They posit that income of foreign-based POGO Licensees are necessarily income derived from sources outside of the Philippines since the generating "activity", *i.e.*, the games of chance, occur abroad. Even the National Internal Revenue Code (Tax Code) limits the taxation of foreign corporations to income derived from within the Philippines. Moreover, they argue that the PAGCOR Charter could likewise not be the basis for the taxation of POGOs considering that when it was enacted in 1983, offshore gaming through the internet did not yet exist. Considering that no tax law allows the taxation of foreign-source income of foreign corporations, RMC 102-2017 has no legal basis.[26] Aside from the lack of statutory basis, petitioners also attack RMC 102-2017 on the grounds of violation of the rule on territoriality of taxation. They argue that imposing taxes on foreign-sourced income violates the basic principle that the taxing power of a State does not extend beyond its territorial limits.[27] With respect to RMC 78-2018, petitioners advance that since this issuance merely enforces RMC 102-2017, the latter's infirmity likewise extends to the former.[28]

For their part, respondents, in their consolidated comment, counter that RMC 102-2017 did not impose a tax but merely interpreted the provisions of the PAGCOR Charter. They argue that the mere fact that POGOs are Licensees of PAGCOR already subjects them to the five percent (5%) franchise tax. Respondents maintain that the POGOs' gaming and income generating activities are rendered in the Philippines through their service providers, and that the placement of online bets are "just a small portion of a POGO [L]icensee's gaming activity." In any case, respondents

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25 *Rollo* (G.R. No. 254102), p. 54.
26 Id. at 54-55.
27 Id. at 55.
28 Id. at 55-56.

insist that even if petitioners' income is derived from sources outside the Philippines, it still would not exempt them from the five percent (5%) franchise tax since a franchise tax is imposed on the exercise of enjoying a franchise. Hence, the mere fact that petitioners operate within the Philippines would make them liable for the same.[29] With respect to RMC 78-2018, respondents argue that this merely provides guidelines on the registration of POGOs and it enjoys the presumption of legality.[30]

As earlier stated, while I concur with the majority in striking down RMC 102-2017 and RMC 78-2018 for want of statutory basis, I would like to offer my own views regarding the matter as it presents an opportunity to propound on principles in an emerging area of tax law, *i.e.*, the taxation of the digital economy.

In the above-enumeration of the alleged applicable taxes, RMC 102-2017 draws from both the PAGCOR Charter and the Tax Code. Specifically, items 1 to 3 on the treatment of income from gaming and non-gaming operations of POGOs and other entities, are derived from the language of Section 13 of the PAGCOR Charter,[31] whereas items 4 to 6 are applications of Section 57[32] of the Tax Code on withholding taxes. Hence, the issue to

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29 *Rollo* (G.R. No. 252965), pp. 140-142.

30 Id. at 142-143.

31 SECTION 13. *Exemptions.*

x x x x

(2) Income and other taxes. – (a) Franchise Holder: No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.

(b) Others: The exemptions herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator.

32 Section 57 of the Tax Code, as amended by RA Nos. 10963 and 11534 reads:

Sec. 57. *Withholding of Tax at Source.* -

(A) *Withholding of Final Tax on Certain Incomes.* – Subject to rules and regulations the Secretary of Finance may promulgate, upon the recommendation of the Commissioner, requiring the filing of income tax return by certain income payees, the tax imposed or prescribed by Sections 24(B)(1), 24(B)(2), 24(C), 24(D)(1); 25(A)(2), 25(A)(3), 25(B), 25(C), 25(D), 25(E), 27(D)(!), 27(D)(2), 27(D)(3), 27(D)(5), 28 (A)(4), 28(A)(5), 28(A)(7)(a), 28(A)(7)(b), 28(A)(7)(c), 28(B)(1), 28(B)(2), 28(B)(3), 28(B)(4), 28(B)(5)(a), 28(B)(5)(b), 28(B)(5)(c); 33; and 282 of this Code on specified items of income shall be withheld by payor-corporation and/or person and paid in the same manner and subject to the same conditions as provided in Section 58 of this Code.

(B) *Withholding of Creditable Tax at Source.* – The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, by payor-corporation/persons as provided for by law, at the rate of not less than one percent (1%) but

resolve is whether RMC 102-2017 went beyond the ambit of these statutes so as to constitute an invalid exercise of quasi-legislative power; particularly, with regard to the application of the taxes therein to the income of offshore or foreign-based POGO Licensees. However, even before delving into the import of the above-mentioned statutes for the applicable taxes, it must first be determined if offshore or foreign-based POGO Licensees are even taxable in the Philippines.

The power of taxation is an inherent attribute of sovereignty which every independent government may exercise even without express conferment by the people.[33] Taxation emanates from necessity,[34] and is grounded on a **mutually advantageous relationship** between the State and those it governs; every person surrenders a portion of their income for the running of the government, and the government in turn, provides tangible and intangible benefits to serve and protect those within its jurisdiction.[35] Indeed, it seems only logical to exact a tax from those who stand to benefit, whether directly or indirectly, from the expenditure of public funds derived from the same.[36] Necessarily, implied within the power to tax is the power to choose what or whom to tax.[37] Undoubtedly, the State may tax any persons, property, income, or business within its territorial limits.[38] In this regard, it should be clarified that even non-resident aliens or foreign corporations may likewise be subjected to the State's power to tax if they have availed of the State's resources or protection in some manner in the conduct of an income-generating activity.[39] However, the State's choice of who specifically to tax is not unbridled, and is, in fact, restrained by the fundamental rights enshrined in our Constitution, specifically, the due process clause.[40]

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not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.

(C) *Tax-free Covenant Bonds.* – In any case where bonds, mortgages, deeds of trust or other similar obligations of domestic or resident foreign corporations, contain a contract or provisions by which the obligor agrees to pay any portion of the tax imposed in this Title upon the obligee or to reimburse the obligee for any portion of the tax or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the Philippines, or any state or country, the obligor shall deduct bonds, mortgages, deeds of trust or other obligations, whether the interest or other payments are payable annually or at shorter or longer periods, and whether the bonds, securities or obligations had been or will be issued or marketed, and the interest or other payment thereon paid, within or without the Philippines, if the interest or other payment is payable to a nonresident alien or to a citizen or resident of the Philippines.

(Note: Section 57 [B] was amended by RA 10963, which took effect on January 1, 2018. A new paragraph was also introduced by RA 11534, which took effect in April 2021. However, RMC 102-2017 was promulgated prior to these amendments, hence, the original wording is footnoted.)

33 See *Film Development Council of the Phils. v. Colon Heritage Realty Corp.*, 760 Phil. 519, 537 (2015).

34 *Phil. Guaranty Co., Inc. v. Commissioner of Internal Revenue*, 121 Phil. 755, 760 (1965).

35 *Commissioner of Internal Revenue v. Algue, Inc.*, 241 Phil. 829, 836 (1988).

36 See *Lutz v. Araneta*, 98 Phil. 148, 153 (1955).

37 See id.

38 See *Cargill Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 203346, September 9, 2020.

39 *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue*, 121 Phil. 579, 582 (1965).

40 Article III, Section 1 of the 1987 Constitution reads:

> SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

As a rule, the State's power to tax does not extend beyond its territorial limits.[41] Case law holds that "[i]f an interest in property is taxed, the situs of either the property or interest must be found within the State. If an income is taxed, the recipient thereof must have a domicile within the State or the property or business out of which the income issues must be situated within the State so that the income may be said to have a situs therein. Personal property may be separated from its owner and he may be taxed on its account at the place where the property is although it is not a citizen or resident of the State which imposes the tax."[42] This territorial limitation of taxation is what necessitates the taxation of only income derived from sources "within" the Philippines for non-resident aliens and foreign corporations. If the income was derived or sourced within the Philippines, then naturally, the non-resident alien or foreign corporation should give a portion of the said income to the government as a reasonable payment for its protection and for allowing the facility of the transaction which made the generation of income possible in the first place.[43] Hence, keeping in mind this limitation, it is apt to determine whether income was derived or sourced within the Philippines relative to the sale of services which POGOs are engaged in.

Section 42 (A)[44] of the Tax Code provides the guidelines in determining what income is sourced within the Philippines, whereas Section 42 (C)[45] identifies what are income sourced without. The word "source" connotes "origin;"[46] the test is to determine if the income **originated from the Philippines**. A reading of the foregoing provisions makes it clear that for income derived from the sale of services, the focal point is where the **actual performance of the service occurs**. On this score, it is instructive to refer to the seminal case of *Commissioner of Internal Revenue v. British Overseas Airways Corp. (BOAC)*[47] to understand the precise aspect of the activity which triggers the taxable event, *viz.*:

> The source of an income is the property, activity or service that produced the income. For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines. **In BOAC's case, the sale of tickets**

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41 *Manila Gas Corp. v. Collector of Internal Revenue*, 62 Phil. 895, 900 (1936).

42 Id.

43 See *Phil. Guaranty Co., Inc. v. Commissioner of Internal Revenue*, supra note 32.

44 Section 42. *Income from Sources Within the Philippines.*-
(A) *Gross Income From Sources Within the Philippines.* – The following items of gross income shall be treated as gross income from sources within the Philippines:
x x x x
(3) *Services.* – Compensation for labor or personal services performed in the Philippines;
x x x x

45 Section 42. *Income from Sources Within the Philippines.*-
x x x x
(C) *Gross Income From Sources Without the Philippines.* – The following items of gross income shall be treated as income from sources without the Philippines:
x x x x
(3) Compensation for labor or personal services performed without the Philippines;
x x x x

46 *Manila Gas Corp. v. Collector of Internal Revenue*, supra note at 901.

47 233 Phil. 406 (1987).

> **in the Philippines is the activity that produces the income. The tickets exchanged hands here and payments for fares were also made here in Philippine currency**. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.
>
> x x x x
>
> **The absence of flight operations to and from the Philippines is not determinative of the source of income or the situs of income taxation.** Admittedly, BOAC was an off-line international airline at the time pertinent to this case. The test of taxability is the "source"; and the source of an income is that activity . . . which produced the income. Unquestionably, **the passage documentations in these cases were sold in the Philippines and the revenue therefrom was derived from a business activity regularly pursued within the Philippines**. And even if the BOAC tickets sold covered the "transport of passengers and cargo to and from foreign cities", **it cannot alter the fact that income from the sale of tickets was derived from the Philippines**. The word "source" conveys one essential idea, that of origin, and the origin of the income herein is the Philippines.
>
> x x x x[48] (emphases supplied; citations omitted)

In *BOAC*, the transaction involved the sale of air transport to passengers. Even though the actual transportation would occur outside of the Philippines, the Court held that the sale of tickets here already constituted a taxable activity. However, the Court had occasion to expound on this doctrine in *Commissioner of Internal Revenue v. Baier-Nickel* (*Baier-Nickel*).[49] In *Baier-Nickel*, the Court clarified that the "source" was not determined by where the income is disbursed or physically received, but rather where the business activity that produced the income was actually conducted, *viz.*:

> Both the petitioner and respondent cited the case of *Commissioner of Internal Revenue v. British Overseas Airways Corporation* in support of their arguments, but the correct interpretation of the said case favors the theory of respondent that it is the situs of the activity that determines whether such income is taxable in the Philippines. The conflict between the majority and the dissenting opinion in the said case has nothing to do with the underlying principle of the law on sourcing of income. In fact, both applied the case of *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue*. The divergence in opinion centered on whether the sale of tickets in the Philippines is to be construed as the "activity" that produced the income, as viewed by the majority, or merely the physical source of the income, as ratiocinated by Justice Florentino P. Feliciano in his dissent. The majority, through Justice Ameurfina Melencio-Herrera, as *ponente*, interpreted the sale of tickets as a business activity that gave rise to the income of BOAC. **Petitioner cannot therefore invoke said case to support its view that source of income is the physical source of the**

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48 Id. at 422-424.

49 531 Phil. 480 (2006).

> **money earned. If such was the interpretation of the majority, the Court would have simply stated that source of income is not the business activity of BOAC but the place where the person or entity disbursing the income is located or where BOAC physically received the same. <u>But such was not the import of the ruling of the Court</u>.** It even explained in detail the business activity undertaken by BOAC in the Philippines to pinpoint the taxable activity and to justify its conclusion that BOAC is subject to Philippine income taxation. x x x.
>
> x x x x
>
> The Court reiterates the rule that **"source of income" relates to the property, activity or service that produced the income**. With respect to rendition of labor or personal service, as in the instant case, **it is the place where the labor or service was performed that determines the source of the income**. There is therefore no merit in petitioner's interpretation which equates source of income in labor or personal service with the residence of the payor or the place of payment of the income.
>
> x x x x[50] (emphases and underscoring supplied; citations omitted)

However, this reading of the law flows from the dated notion that a business requires physical presence within the State to provide its services, or a more analog form of conducting business. With the proliferation of digital commerce, there is now the added complication of specifically pinpointing where the "activity that produced the income" occurs when the transaction is conducted over the internet, as in the case of offshore gaming.

This is essentially the same complication when resolving the situs of taxation rules under current tax conventions that bind the Philippines. It bears noting that "[t]he purpose of these international agreements is to reconcile the national fiscal legislations of the contracting parties in order to help the taxpayer avoid simultaneous taxation in two different jurisdictions. More precisely, the tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods."[51] Aside from the rules on situs of taxation under Section 42 of the Tax Code, the provisions on Permanent Establishments, as found in tax treaties, can also serve as basis for determining whether an entity or activity is taxable in one Contracting State or the Other, since treaties also form part of the law of the land under our Constitution.[52]

For example, the Permanent Establishment provision in the Republic of the Philippines (RP)-United States of America (US) Tax Treaty defines a "permanent establishment" as a "fixed place of business through which a

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50 Id. at 491-493.

51 *Commissioner of Internal Revenue v. S.C. Johnson and Son, Inc.*, 368 Phil. 388, 404 (1999).

52 See *Pharmaceutical and Health Care Association v. Duque III*, 561 Phil. 386, 398 (2007).

resident of one of the Contracting States engages in a trade or business,"[53] and includes a "seat of management," "branch," "office," "store or other sales outlet," "factory," "workshop," "warehouse," "mine, quarry, or other place of extraction of natural resources," or "building site or construction or assembly project or supervisory activities."[54] Interestingly, an almost exact same definition is found in the RP-China Tax Treaty,[55] as well as other tax treaties.[56]

However, since the traditional meaning of Permanent Establishment is a "fixed place" of business, it stands to reason that it requires the occupation of a physical premises or some manner of installation or spaces used for the carrying on of business within the Contracting State.[57] It bears emphasizing that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[58] The fact that offshore gaming and other digital transactions were not yet existing at the time these treaties were ratified lends credence to the view that virtual spaces, such as gaming websites or portals, could not constitute "fixed places" amounting to Permanent Establishments. If anything, it would be the server which hosts the website or portal which could constitute a "place of business" for purposes of constituting a Permanent Establishment.

This is the challenge of taxing the "digital economy" as observed by the Organization for Economic Cooperation and Development (OECD) – specifically: (1) the mobility of users that allow them to carry on commercial activities remotely across borders, compounded by the use of virtual private networks (VPNs) or proxy servers that could mask the location of where the digital transaction actually occurs; (2) the mobility of business functions that allow entities to coordinate activities across several territories in one central point while being geographically removed from both the location where the business operations are carried out and where the suppliers or customers are serviced; and (3) the volatility due to further rapidly evolving technology.[59]

As the OECD observed, the complexity of the digital economy could allow businesses to avoid a taxable presence or escape taxation anywhere by working around local laws and outdated conceptions of Permanent Establishments, *viz.*:

5.2.1.1 *Avoiding a taxable presence*

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53 See Article 5 (1) of the RP-US Tax Treaty.
54 See Article 5 (2) of the RP-US Tax Treaty.
55 See Article 5 of the RP-China Tax Treaty.
56 See Article 5, RP-Singapore Tax Treaty; Article 5, RP-Japan Tax Treaty; and Article V, RP-Canada Tax Treaty, as examples.
57 Organization for Economic Cooperation and Development (OECD), Commentaries on the Articles of the Model Tax Convention, p. 93 (2010).
58 Vienna Convention on the Law of Treaties, Section 3, Article 31.1 (1969).
59 OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, pp. 84-95 (2014).

> In many digital economy business models, a non-resident company may interact with customers in a country remotely through a website or other digital means (e.g. an application on a mobile device) without maintaining a physical presence in the country. Increasing reliance on automated processes may further decrease reliance on local physical presence. The domestic laws of most countries require some degree of physical presence before business profits are subject to taxation. In addition, under Articles 5 and 7 of the OECD Model Tax Convention, a company is subject to tax on its business profits in a country of which it is a non-resident only if it has a permanent establishment (PE) in that country. Accordingly, such non-resident company may not be subject to tax in the country in which it has customers.
>
> Companies in many industries have customers in a country without a PE in that country, communicating with those customers via phone, mail, and fax and through independent agents. That ability to maintain some level of business connection within a country without being subject to tax on business profits earned from sources within that country is the result of particular policy choices reflected in domestic laws and relevant double tax treaties, and is not in and of itself a [base erosion and profit shifting (BEPS)] issue. However, while the ability of a company to earn revenue from customers in a country without having a PE in that country is not unique to digital businesses, it is available at a greater scale in the digital economy than was previously the case. Where this ability, coupled with strategies that eliminate taxation in the State of residence, results in such revenue not being taxed anywhere, BEPS concerns are raised. In addition, under some circumstances, tax in a market jurisdiction can be artificially avoided by fragmenting operations among multiple group entities in order to qualify for the exceptions to PE status for preparatory and auxiliary activities, or by otherwise ensuring that each location through which business is conducted falls below the PE threshold. Structures of this type raise BEPS concerns.[60]

The OECD itself proposes several ways to combat the potential "double non-taxation" of the digital economy, including the revision of treaty terms on Permanent Establishments, and implementing better domestic foreign corporation rules among countries.[61] Nevertheless, until such time as the existing tax treaties are revisited, or the rules on situs under Section 42 of the Tax Code are amended to account for the digital economy, of which offshore gaming conducted by POGOs are naturally part of, the Court must apply the laws as they currently are and not go beyond their auspices.

Therefore, it is my view that if the foregoing prevalent principles are applied in the present case, the Philippines cannot tax the offshore revenues of foreign-based POGO Licensees.

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[60] OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, p. 102 (2014).

[61] OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, pp. 112-121 (2014).

## IV.

At this juncture, it must be clarified that foreign-based POGO Licensees do not conduct their business in the same manner as Philippine-based POGO Licensees. The former are required to engage the services of PAGCOR-accredited Service/Support Providers for the conduct of their online gaming activities,[62] while the latter conduct the activities themselves. However, as pointed out by the *ponencia*, the Service Providers and Support Providers are separate entities from the foreign-based POGO Licensees. While the Licensee is the one that offers the gaming activities to bettors, the actual conduct of the online gaming activities is conducted by the Service Providers and Support Providers. Applying the above-discussed principles in *BOAC* and *Baier-Nickel*, the activity that generates the income for the foreign-based POGO Licensee is the placing of bets and paying out of winnings to the bettors found outside of the Philippines, whereas the gaming activity is the non-revenue generating component of the whole service. Hence, none of the revenues generated by the foreign-based POGO Licensees can be said to be sourced within the Philippines. On the other hand, the fees paid by the POGO Licensees for the services rendered by the Service Providers and Support Providers can be said to be sourced within the Philippines.

Furthermore, nothing in the version of the Tax Code prior to the amendments under RA 11590 provides for the taxation of the income derived from sources without the Philippines for foreign corporations. Neither was there any tax law that could be said to govern foreign-based Licensees specifically. This was similarly the observation of the proponents of House Bill No. 5777 and Senate Bill No. 2232, the precursor bills of RA 11590:

**Interpellation of Representative Zarate on House Bill No. 5777**[63]

> REP. ZARATE. Yes, thank you for that. But there was one hearing that I attended which in fact said that out of the 60, only 10 were actually paying, and in fact, President Duterte…
>
> REP. SALCEDA. Dalawa iyan, sa BIR oo, pero sa PAGCOR, oo, lahat.
>
> REP. ZARATE. So, ang…
>
> REP. SALCEDA. So, pasensya ka na kasi ang tanong mo ay sino ang nagbabayad. Kung ang nagbabayad sa BIR, sampu, oo; ang nagbabayad sa PAGCOR, lahat.
>
> REP. ZARATE. Lahat sila, nagbabayad ng 2 percent.
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> REP. SALCEDA. Sa PAGCOR.
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> REP. ZARATE. Yes. Now that was…

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62 See Section 6, PAGCOR Offshore Rules and Regulations.

63 Congressional Record Vol. 5, February 1, 2021, p. 46.

REP. SALCEDA. And kaya naman, kaya naman ganoon po ay **dahil wala naming tax regime e.**

REP. ZARATE. Yes, yes, oo. So, that …

REP. SALCEDA. **Kaya nga inilalagay natin ito.**

REP. ZARATE. So, iyon iyong POGO BC or before COVID?

REP. SALCEDA. Yes. (emphases supplied)

**Sponsorship Speech of Senator Cayetano on Senate Bill No. 2232**[64]

The reason for this is because, at present, **nowhere under the National Internal Revenue Code, otherwise known as the NIRC, as amended, can we find explicit tax provisions pertaining to the offshore gaming licensees including gaming operators, gaming agents, and service providers.**

x x x x

Hence, the long-standing question about the tax obligations of POGOs conducting business in our country remain unanswered and unaddressed, which means billions worth of revenue losses for our government.

Having said these, it is high time that **we clarify and establish the taxation regime of offshore gaming licensees**, including gaming operators, gaming agents, service providers, and gaming support providers, and incorporate these entities in the Philippine taxation system.

As your Chair of the Senate Ways and Means Committee, we have reviewed the various bills, listened to government agencies, industry and other stakeholders. I believe that legislating the tax regime of the POGOs and incorporating the same in the NIRC is a step towards the right direction.

It will not only **plug the loopholes in our country's tax code that led to issues of confusion surrounding the operation of POGOs, but it will also prevent similar issues in the future,** which could gravely undermine our government's power to impose and collect the right taxes.

By addressing these gaps in our tax system, we can maximize the POGO industry's potential as a revenue source. In turn, we will have more resources in our country's coffers to fund programs that will improve people's lives and help us build back better following this global health and economic crisis. (emphases supplied)

It is a basic principle that laws shall not be construed as imposing a tax unless they do so clearly and expressly, and any doubt must be strictly construed against the government.[65] Consequently, RMC 102-2017 could

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64 Senate Journal Session No. 63, May 25, 2021, p. 791.

65 See *Bureau of Internal Revenue v. First E-Bank Tower Condominium Corp.*, G.R. Nos. 215801 & 218924, January 15, 2020.

not have drawn validity from the provisions of the Tax Code, or any other tax law, to cover offshore revenues of foreign-based POGO Licensees during the period prior to the effectivity of RA 11590.

There is also no merit to respondents' contention that even if their income is deemed sourced without the Philippines, they would still be liable for the five percent (5%) franchise tax under the PAGCOR Charter since a franchise tax is imposed on the exercise of enjoying a franchise. In the first place, it should be emphasized that franchise tax, like any other tax, is still subject to the territoriality principle since, as above-discussed, to hold otherwise would amount to a violation of the due process clause. In this regard, while the five percent (5%) franchise tax is an exaction, it is simultaneously an exemption granted to exempt PAGCOR and its Licensees from regular taxes.[66] This is the clear import from the wording of Section 13 of the PAGCOR Charter itself:

> SECTION 13. ***Exemptions***. –
>
> x x x x
>
> (2) *Income and Other Taxes*. – (a) Franchise Holder: No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. **Such tax** shall be due and payable quarterly to the National Government and **shall be in lieu of all kinds of taxes**, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.
>
> (b) Others: The exemption herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator.
>
> x x x x (emphases supplied)

As a form of tax exemption, it necessarily implies that the PAGCOR Licensees are subject to tax in the first place. Moreover, any form of tax exemption must be strictly construed to benefit only those clearly covered thereby.[67] The *ponencia* aptly observed that Section 13 (2)(b) which forms the basis for the extension of the tax exemption to Licensees clearly apply

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[66] See *Phil. Amusement and Gaming Corp. v. Bureau of Internal Revenue*, 749 Phil. 1010 (2014).

[67] *Commissioner of Internal Revenue. v. Philippine Airlines, Inc.*, 535 Phil. 95, 109 (2006).

only to those engaged in "the **operations of the casino(s) authorized to be conducted** under this Franchise and to **those receiving compensation or other remuneration from the Corporation or operator** as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator."[68]

**Given that the PAGCOR Charter and its amendment through RA 9487[69] were promulgated at the time offshore gaming was not yet in existence, it could not have contemplated virtual gambling websites as the "casinos" mentioned under Section 13 (2)(b) thereof.** Consequently, the PAGCOR Charter cannot be said to have been the basis for imposing a tax on the offshore revenues of foreign-based POGO Licensees. Hence, RMC 102-2017 could likewise not draw its validity from the PAGCOR Charter.

As a result, RMC 102-2017 must be struck down but only insofar as the foregoing points are concerned. As above-mentioned, RMC 102-2017 itemizes several taxes and the others are not necessarily void or subject to the Court's review at present. Petitioners themselves limit their attack based on the taxation of the offshore revenue of foreign-based POGO Licensees. Hence, the circular should only be invalidated to the extent that it went beyond both the Tax Code and the PAGCOR Charter in imposing a tax on the said foreign-based Licensees. Corollary thereto, RMC 78-2018 is similarly void only as it applies to the same foreign-based POGO Licensees since it was merely in further implementation of RMC 102-2017.

As a final note, it should be borne in mind that RA 11590 sought to impose the five percent (5%) franchise tax on POGO Licensees, without any distinction as to whether such gaming revenues were realized within or without the Philippines.[70] Whether this constitutes a valid exercise of the power of taxation, however, is a matter that should be resolved separately should a case be brought before the Court specifically challenging RA 11590. I wish to reiterate that my views are confined to the particular period from the issuance of RMC 102-2017 up until the effectivity of RA 11590.

**ESTELA M. PERLAS-BERNABE**
Senior Associate Justice

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68 See *ponencia*, p. 24.

69 Entitled "AN ACT FURTHER AMENDING PRESIDENTIAL DECREE NO. 1869, OTHERWISE KNOWN AS PAGCOR CHARTER," approved on June 20, 2007.

70 See Section 125-A, in relation to Section 22 (II), of the Tax Code, as amended by RA 11590.

**EN BANC**

**G.R. No. 252965 – SAINT WEALTH LTD., as represented by DAVID BUENAVENTURA & ANG LAW OFFICES,** *Petitioner*, **v. BUREAU OF INTERNAL REVENUE herein represented by HON. CAESAR R. DULAY, in his capacity as COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, and JOHN DOES and JANE DOES, as persons acting for, and in behalf, or under the authority of respondents,** *Respondents*.

**G.R. No. 254102 – MARCO POLO ENTERPRISES LIMITED, MG UNIVERSAL LINK LIMITED, OG GLOBAL ACCESS LIMITED, PRIDE FORTUNE LIMITED, VIP GLOBAL SOLUTIONS LIMITED, AG INTERPACIFIC RESOURCES LIMITED, WANFANG TECHNOLOGY MANAGEMENT LTD., IMPERIAL CHOICE LIMITED, BESTBETINNET LIMITED, RIESLING CAPITAL LIMITED, GOLDEN DRAGON EMPIRE LTD., ORIENTAL GAME LIMITED, MOST SUCCESS INTERNATIONAL GROUP LIMITED, AND HIGH ZONE CAPITAL INVESTMENT GROUP LIMITED,** *Petitioners*, **v. THE SECRETARY OF FINANCE in the person of CARLOS G. DOMINGUEZ III, and the COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY,** *Respondents*.

**Promulgated:**
December 7, 2021

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**DISSENTING OPINION**

**LEONEN, *J.*:**

The consolidated cases must be dismissed, as the issues they raise were rendered moot by the passage of Republic Act No. 11590 which amended the National Internal Revenue Code, codified the 5% franchise tax on gaming operations of Philippine Offshore Gaming Operators (POGOs), and considered the operations of offshore gaming licensees as doing business in the Philippines, among others.

In any case, the assailed issuances are not unconstitutional.

The assailed statute, Republic Act No. 11494, or the "Bayanihan to Recover As One Act" (Bayanihan 2), is an emergency measure enacted by the legislature which the President deemed necessary and urgent to address

the pandemic. It enjoys a presumption of constitutionality which petitioners did not overcome.

The Bayanihan 2 does not violate the "one subject, one title" rule in Article VI, Section 26(1) of the Constitution.[1]

The title of the law is clear, "An Act Providing for COVID-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, ***Providing Funds Therefor***, and for Other Purposes." It sought to "[e]nhance the financial stability of the country to support government programs in combatting the COVID-19 pandemic."[2]

Sections 11(f) and (g) which outlined the taxes imposed on POGOs cannot be deemed riders when they are undoubtedly germane to the subject matter of the Bayanihan 2. Dismissing the provisions as tax measures irrelevant to the statute's purpose—to provide the sources of funds for the various government projects to meet the pandemic—is grasping at straws.

Further, the imposition of a 5% franchise tax, in lieu of other taxes, on the gaming operations of offshore gaming licensees, whether they be Philippine- or foreign-based, was not introduced by Bayanihan 2. *It is not a new tax measure*.

Presidential Decree No. 1869 created the Philippine Amusement and Gaming Corporation (PAGCOR) to "centralize and integrate the right and authority to operate and conduct games of chance"[3] and conferred it with broad powers.[4] PAGCOR was granted "the rights, privileges and authority to operate and license gambling casinos, gaming clubs and other similar recreation or amusement places, gaming pools, i.e. basketball, football, bingo, etc. except jai-alai, whether on land or sea, within the territorial jurisdiction of the Republic of the Philippines: *Provided*, That the corporation shall obtain the consent of the local government unit that has territorial jurisdiction over the area chosen as the site for any of its operations."[5]

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1 Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

2 Republic Act No. 11494 (2020), sec. 3(l).

3 Presidential Decree No. 1869 (1983), sec. 1(a).

4 Presidential Decree No. 1869 (1983), sec. 3(l) provides:
SECTION 3. *Corporate Powers*. — The Corporation shall have the following powers and functions, among others:

. . .

l) to do anything and everything necessary, proper, desirable, convenient or suitable for the accomplishment of any of the purpose or the attainment of any of the objects or the furtherance of any of the powers herein stated, either alone or in association with other corporations, firms or individuals, and to do every other act or thing incidental, pertaining to, growing out of, or connected with, the aforesaid purposes, objects or powers, or any part thereof.

5 Presidential Decree No. 1869 (1983), sec. 10, as amended by Republic Act No. 9487 (2007), sec. 1.

Under Presidential Decree No. 1869, PAGCOR franchise holders are assessed and held liable for a franchise tax of 5% of the gross revenue or earnings derived from operations under the franchise, in lieu of all taxes.[6]

In line with its aim to "[e]nsure that online games are properly regulated and monitored,"[7] PAGCOR issued the *Rules and Regulations for Philippine Offshore Gaming Operations* on September 1, 2016. It provided the requirements for an offshore gaming license and the grounds for its suspension and cancellation.

On February 2, 2017, Executive Order No. 13, series of 2017 was issued, titled "Strengthening the Fight against Illegal Gambling and Clarifying the Jurisdiction and Authority of Concerned Agencies in the Regulation and Licensing of Gambling and Online Gaming Facilities, and for Other Purposes." It reiterated the jurisdiction of concerned agencies, among which is PAGCOR, in regulating online gaming operations. It stated that "nothing shall prohibit the duly licensed online gambling operator from allowing the participation of persons *physically located outside Philippine territory*."

On December 27, 2017, the Bureau of Internal Revenue issued Revenue Memorandum Circular No. 102-17 on the *"Taxation of Taxpayers Engaged in Philippine Offshore Gaming Operations."* This was later followed by Revenue Memorandum Circular No. 78-2018 which outlined the registration process for offshore gaming operations.

The Commissioner of Internal Revenue who has the exclusive and original jurisdiction "to interpret provisions of the Tax Code and other tax laws,"[8] was well within its rights when it issued the revenue circulars. The 5% franchise tax, in lieu of other taxes on PAGCOR licensees, was not newly imposed by the agency, but was provided for in Presidential Decree No. 1869. Thus, in its interpretation of existing tax laws on PAGCOR licensees and its issuance of Revenue Memorandum Circular Nos. 102-17 and 78-2018, the Commissioner of Internal Revenue did not encroach upon the legislative power to impose taxes. It merely issued guidelines to clarify existing tax measures.

The *ponencia* harps on territoriality issues. However, there is merit in respondents' argument that "what is being collected is a tax not based on income, but rather, on the exercise of a privilege."[9] We have allowed POGOs to operate under licenses that the PAGCOR issued. We cannot, on

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6 Presidential Decree No. 1869 (1983), sec. 13(2).
7 Rules and Regulations for Philippine Offshore Gaming Operations (2016), sec. 2(b).
8 TAX CODE, Title I, sec. 4, as amended by Rep. Act No. 8424 (1997), Tax Reform Act of 1997.
9 Ponencia, p. 17.

one hand, issue offshore gaming licenses to POGOs, and on the same breath, reject their taxability. When we let licensees operate in the Philippines, pass through our borders, and set up game servers in the country,[10] it is not unreasonable nor unconstitutional to impose the same 5% franchise tax which is collected from other PAGCOR franchise holders.

It was error for petitioners to argue that Philippine-based and offshore POGO licensees must be treated *differently*, considering that PAGCOR, the agency that regulates their operations, issues the same gaming license to both. The 5% franchise tax was imposed by virtue of their license to operate. Petitioner Saint Wealth's argument that it should not be subjected to any Philippine tax since all of its operations are located abroad[11] and offshore-based POGO licensees must be similarly treated with foreign corporations *not* engaged in trade or business in the Philippines[12] is untenable. Precisely, its game servers are here because they could not operate in their home country. Thus, offshore-based POGO licensees granted franchises by PAGCOR are naturally engaged in business in the Philippines.

I join Justice Amy C. Lazaro-Javier in concluding that offshore-based POGO licensees are *doing business in the Philippines*, and adopt the findings in a Security and Exchange Commission Opinion with similar facts:

> SCEH averred that it was not doing business in the Philippines since the activities of SCEH were carried outside of the Philippines, its employees were in Hong Kong, its property was outside the Philippines, and that the SEN servers were located in the United States (U.S.). Offshore-based POGO licensees raised the same arguments save for the fact that they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.
>
> Despite the averments of SCEH, the SEC still opined that the activities SCEH proposed to undertake would deem it as "doing business" in the Philippines since the twin characterization test was satisfied. ***First***, the enumerated activities to be undertaken by SCEH indicated that it would be continuing in the Philippines the substance of the business for which it was organized. ***Second***, the SCEH enumerated activities which were considered consummated within the Philippines, albeit done in a virtual plane. I see no reason not to apply the same ruling to offshore-based POGO licensees whose footprints are all over the Philippines; they entered into contracts with PAGCOR-accredited local gaming agents and service providers in furtherance of their main line of business, *i.e.* gaming operations.
>
> Verily, the gaming operations conducted by offshore-based POGO licensees within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations implies the continuity of commercial dealings and

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10 Id. at 19.
11 Id. at 8.
12 Id. at 9.

> arrangements, and contemplates the performance of acts incident to, and in the progressive prosecution of their business. These services will not be provided intermittently but for a long period of time in the Philippines. Accordingly, petitioners are considered resident foreign corporations doing business in the Philippines.[13] (Emphasis in the original)

I likewise agree that petitioners' activities are consummated here which subject them to government regulations—among which is taxation:

> For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines, e.g., sale of tickets in the Philippines is the activity that produces the income as the tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.
>
> Here, I respectfully submit that **the services of offshore-based POGO [licensees]** "*offering by a licensee of PAGCOR authorized online games of chance via the Internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee*"- **are being rendered here. These enumerated activities are transactions deemed to have been consummated within the Philippines, albeit done on the virtual plane**. From placing the bet to winning a bet, the commercial transaction, e-commerce or any sort of virtual transactions find themselves within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations.[14] (Emphasis in the original)

The transnational nature of POGOs blur borderlines and facilitate the possibility of non-taxation in any of the jurisdiction where they operate. The revenue from gambling operations may not be worth the kind of values they instill, the politics they infect, the health they risk, and the lives they destroy. Thus, allowing gambling operations and issuing licenses for them entail the corresponding duty to strictly regulate them, and efficiently collect their enforced contributions.

Bayanihan 2 was an urgent piece of legislation passed by Congress and signed by the President.[15] The statute and the revenue regulations were acts of the legislature and the concerned administrative agency that has expertise over the matter. These bodies are presumed to have acted meticulously, aware of their constitutional and statutory bounds. Absent any

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[13] J. Lazaro-Javier, Dissenting Opinion, p. 8.

[14] J. Lazaro-Javier, Dissenting Opinion, p. 14.

[15] Genalyn Kabiling, *President signs into law Bayanihan 2*, MANILA BULLETIN, September 11, 2020, <https://mb.com.ph/2020/09/11/president-signs-into-law-bayanihan-2/> (last accessed January 6, 2021).

showing of grave abuse of discretion, judicial restraint must be exercised in reviewing the technical details of their issuances.

**ACCORDINGLY,** I vote to **DENY** the consolidated Petitions.

**MARVIC M.V.F. LEONEN**
Associate Justice

***G.R. No. 252965 – SAINT WEALTH LTD. v. BUREAU OF INTERNAL REVENUE, THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ, III and THE COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY***

***G.R. No. 254102 - MARCO POLO ENTERPRISES LIMITED, MG UNIVERSAL LINK LIMITED, OG GLOBAL ACCESS LIMITED, PRIDE FORTUNE LIMITED, VIP GLOBAL SOLUTIONS LIMITED, AG INTERPACIFIC RESOURCES LIMITED, WANFANG TECHNOLOGY MANAGEMENT LTD., IMPERIAL CHOICE LIMITED, BESTBETINNET LIMITED, RIESLING CAPITAL LIMITED, GOLDEN DRAGON EMPIRE LTD., ORIENTAL GAME LIMITED, MOST SUCCESS INTERNATIONAL GROUP LIMITED, and HIGH ZONE CAPITAL INVESTMENT GROUP LIMITED v. THE SECRETARY OF FINANCE, in the person of CARLOS G. DOMINGUEZ, III and THE COMMISSIONER OF INTERNAL REVENUE in the person of CAESAR R. DULAY***

**Promulgated:**

December 7, 2021

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# DISSENTING OPINION

**LAZARO-JAVIER, *J.*:**

With the digital age comes the proliferation of online gaming and gambling. Games of chance are now within the fingertips of every Filipino in the comfort of their respective homes. The entry of these online gaming and gambling entities was so swift even government was at a quandary on their proper tax treatment. It took time before the conundrum got definitively resolved upon the enactment of Republic Act 11590 (RA 11590),[1] An Act Taxing Philippine Offshore Gaming Operations (POGOs).

The law introduced Section 125-A of the National Internal Revenue Code (NIRC), thus:

> **SEC. 125-A.** *Gaming Tax on Services Rendered by Offshore Gaming Licensees.* — Any provision of existing laws, rules or regulations to the contrary notwithstanding, the entire gross gaming revenue or receipts or the agreed predetermined minimum monthly revenue or receipts from gaming, whichever is higher, shall be levied, assessed, and collected a

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1 An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22, 25, 27, 28, 106, 108, and Adding New Sections 125-A and 288(G) of the National Internal Revenue Code of 1997, As Amended and for Other Purposes. (Republic Act No. 11590, Approved on September 22, 2021).

> gaming tax equivalent to five percent (5%), in lieu of all other direct and indirect internal revenue taxes and local taxes, with respect to gaming income: *Provided*, That the gaming tax shall be directly remitted to the Bureau of Internal Revenue not later than the 20th day following the end of each month: *Provided, further*, That the Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority may impose regulatory fees on offshore gaming licensees which shall not cumulatively exceed two percent (2%) of the gross gaming revenue or receipts derived from gaming operations and similar related activities of all offshore gaming licensees or a predetermined minimum guaranteed fee, whichever is higher: *Provided, furthermore,* That for purposes of this Section, gross gaming revenue or receipts shall mean gross wagers less payouts: *Provided, finally*, That the taking of wagers made in the Philippines and the grave failure to cooperate with the third-party auditor sell result in the revocation of the license of the offshore gaming licensee.
>
> The Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority shall engage the services of a third-party audit platform that would determine the gross gaming revenues or receipts of offshore gaming licensees. To ensure that the proper taxes and regulatory fees are levied, periodic reports about the results of the operation showing, among others, the gross gaming revenue or receipts of each offshore gaming licensee shall be submitted to the Bureau of Internal Revenue by the Philippine Amusement and Gaming Corporation or any special economic zone authority or tourism zone authority or freeport authority as certified by their third-party auditor: *Provided*, That the third-party auditor shall be independent, reputable, internationally-known, and duly accredited as such by an accrediting or similar agency recognized by industry experts: *Provided, finally*, That nothing herein shall prevent the Bureau of Internal Revenue and the Commission on Audit from undertaking a post-audit or independent verification of the gross gaming revenues determined by the third-party auditor.[2]

Verily, the taxability of POGOs is now beyond question. Section 125-A, NIRC imposes a five percent (5%) gaming tax on all income derived from gaming operations and twenty-five percent (25%) income tax on income derived from non-gaming operations from sources within the Philippines on offshore-based POGO licensees such as petitioners here.

I nevertheless agree with the *ponencia* that the passage of RA 11590 should not deter the Court from ruling on the validity of the assailed tax issuances and petitioners' consequent tax liabilities, if any, prior to the enactment of RA 11590.

With all due respect, however, I disagree with the finding of the *ponencia* that offshore-based POGO licensees derive no income from sources within the Philippines, hence, cannot be subjected to income tax. As will be discussed: (1) petitioners are foreign corporations "doing business" in the Philippines under the **twin characterization** test; (2) the Philippines has jurisdiction over petitioners under the **sliding scale test**; and (3) they are

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[2] *Id.*

taxable as **resident foreign corporations** under the NIRC on sources from within the Philippines.

***Offshore-based POGO licensees are deemed "doing business" in the Philippines***

Under the **twin characterization test** laid out by this Court in the landmark case of ***Mentholatum Co., Inc. v. Mangiliman***,[3] a foreign corporation is considered "**doing business**" in the Philippines when:

> a. The foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another; and
>
> b. The foreign corporation is engaged in activities which implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of its organization.[4]
>
> x x x x

This definition has since been adopted with qualification in various pieces of legislation.[5] For instance, Republic Act No. 7042,[6] the Foreign Investment Act of 1991, defines "**doing business**" thus:

> d) The phrase 'doing business' shall include soliciting orders, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eight(y) (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity, or corporation in the Philippines; **and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works; or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization;** *Provided*, however, That the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account."[7] (Emphasis supplied)

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3 72 Phil. 524-531 (1941).

4 *Id.* at 528.

5 *MR Holdings, Ltd. v. Bajar, et al.*, 430 Phil. 443, 462 (2002).

6 An Act to Promote Foreign Investments, Prescribes the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes.

7 Section 3(d) of Republic Act No. 7042, Approved on June 13, 1991 (as amended).

More, Section 1, Republic Act No. 5455[8] decrees:

> SECTION. 1. *Definition and scope of this Act.* - (1) x x x the phrase "doing business" shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days [180] or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and **any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization**." (Emphasis supplied)

In Section 65, Presidential Decree No. 1789,[9] the Omnibus Investment Code of 1981, a similar definition has been provided.

> ARTICLE 65. *Definition of Terms.* – As used in this Book, the term "investment" shall mean equity participation in any enterprise formed, organized[,] or existing under the laws of the Philippines; and the phrase **"doing business"** shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totalling one hundred eighty [180] days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, **and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.** (Emphases supplied)

There are other statutes defining the term "doing business" in the same wise, and as may be observed, one common denominator among them all is the concept of "**continuity**."[10]

Indeed, the **twin-characterization test** (*i.e. transactions must be for the* ***pursuit of the main business****, and with* ***intent to continue*** *the same for some time*) has become the hallmark of what constitutes "doing business in the Philippines."[11] What is determinative of "doing business" is not just the number or the quantity of the transactions, but also **the intention of an entity**

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8 An Act to Require that the Making of Investments and the Doing of Business Within the Philippines by Foreigners or Business Organizations Owned in Whole or in Part by Foreigners Should Contribute to the Sound and Balanced Development of the National Economy on a Self-Sustaining Basis, and for Other Purposes, Enacted Without executive approval, September 30, 1968, (65 O.G. No. 29, p. 7410).

9 A Decree to Revise, Amend and Codify the Investment, Agricultural, and Export Incentives Acts to be known as the Omnibus Investment Code, (Presidential Decree No. 1789, Signed on January 16, 1981).

10 Supra note 5 at 464.

11 C. Villanueva, Philippine Corporate Law (2010 ed.), p. 986.

**to continue the body of its business in the country**. The fact that it derives income from its activities should also be considered.[12]

Here, it is admitted that in pursuit of their main business (*i.e.*, offshore gaming), petitioners applied for a Philippine Amusement and Gaming Corporation (PAGCOR) license for offshore gaming operations with the intent to continue their main line of business here. In fact, they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.

The *ponencia* focuses on the so called three (3) components of offshore gaming:

1. Prize consisting of money or something else of value which can be won under the rules of the game;
2. A player who:
   a. Being located outside of the Philippines and not a Filipino citizen, enters the game remotely or takes any step in the game by means of a communication device capable of accessing an electronic communication network such as the internet
   b. Gives or undertakes to give, a monetary payment or other valuable consideration to enter in the course of, or for, the game; and
3. The winning of a prize is decided by chance.

to support the conclusion that offshore-based POGO licensees such as petitioners are not doing business in the Philippines.

But offshore gaming activities are said to be not supposedly performed within the Philippine territory only **because they are done on the virtual plane.**

Hence, the question is, may offshore-based POGO licensees be deemed doing business in the Philippines though their transactions are done online?

I believe so.

In **SEC-OGC Opinion No. 17-03 dated April 4, 2017**,[13] the Securities and Exchange Commission (SEC) was faced with the same dilemma relative to the inquiry of Sony Computer Entertainment Hong Kong (SCEH) on the license requirement for foreign corporations doing business in the Philippines:

> By way of a background, you stated that SCEH is a company organized and existing under the laws of Hong Kong and operates Sony Entertainment Network (SEN) in Singapore, Indonesia, Taiwan, Malaysia, Thailand, and Hong Kong. SEN is an online platform that offers various

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12 See *Cargill, Inc. v. Intra Strata Assurance Corporation, Inc.*, 629 Phil. 320, 333 (2010).

13 SEC-OGC Opinion No. 17-03 Re: Foreign Corporation; Doing business; Online Gaming, issued by Hon. Camilo S. Correa, General Counsel of Securities and Exchange Commission.

content and services such as an online community and an online gaming system, which requires a SEN account in order to participate. Since SEN is an internet-based system, persons in the Philippines can create a SEN account to participate in the online community and to purchase content from and/or use SEN's services even if the SCEH does not have a physical presence in the Philippines. A SEN account holder can buy content and services from SEN only by using funds from an associated SEN online wallet, which can be funded by using a credit or debit card or a prepaid card where available.

Finally, SEN employees are located in Hong Kong while SEN's servers are based in the United States.

SCEH is seeking confirmation that it is not engaged in doing business in the Philippines and will not be required to obtain a license for the following activities:

1) Offer and sale of SEN services on the internet without restricting persons located in the Philippines from availing of these services (Maintenance);
2) Assuming that Maintenance, by itself, is not considered doing business in the Philippines, accepting online payments for using SEN in any currency, including Philippine currency;
3) Marketing or advertising the SEN in the Philippines through (a) online and printed publications, and (b) television and radio commercials, which is based on the enumerated acts constituting not "doing business" provided in Section 1(f) of the Implementing Rules and Regulations (IRR) of the Foreign Investment Act of 1991 (FIA); and
4) Further, as a form of expansion, hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

x x x x

Using the **twin-characterization test**, the SEC found SCEH to be "doing business" in the Philippines, *viz.*:

You stated that **there is no reason to consider that SCEH will be doing business in the Philippines since the activities of SCEH are carried outside of the Philippines**, considering that its employees are in Hong Kong, that its property is outside the Philippines, and that the SEN servers are in the United States.

However, **we opine that the activities SCEH proposes to undertake shall be considered as "doing business" in the Philippines since the twin characterization test is satisfied in this case. First**, the following **activities indicate that SCEH will be continuing the body or substance of the business of SCEH for which it was organized in the Philippines**, to wit: (i) funding of the SEN online wallet; (ii) offering and selling SEN services; (iii) accepting online payments for using SEN in any currency, including Philippine currency; (iv) marketing or advertising; and (v) hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

**Second**, the above-mentioned **enumerated activities are transactions consummated within the Philippines although they are done in virtual plane**. The following salient points of the online commercial transactions, or e-commerce, will find themselves in the Philippines:

(i) The creation of a new SEN account will take place in the Philippines in order to participate in SEN;
(ii) The offering for sale and sale of online content and services of SEN will be made to the SEN account holder who is located in the Philippines;
(iii) The funding of the SEN online wallet will take place in the Philippines as will be further discussed below;
(iv) The payment of the sale of online content and services of SEN will be made from the Philippines by the SEN account holder; and
(v) The delivery of the online content and services of SEN will be made in the Philippines.

The salient points above-mentioned are evidenced by the use of an IP address through a device (e.g. PlayStation 4, computer, HDTV or mobile device) used by the SEN account holder. IP address is short for Internet Protocol (IP) address. The IP is the method or protocol by which data is sent from one computer to another on the Internet. Each computer (known as a host) on the Internet has at least one IP address that uniquely identifies it from all other computers on the Internet. An IP address consists of four numbers, each of which contains one to three digits, with a single dot (.) separating each number or set of digits (e.g., 78.125.0.209). Moreover, an IP address may reveal such information as the continent, country, region, and city in which a computer is located; the ISP (Internet Service Provider) that services that particular computer; and such technical information as the precise latitude and longitude of the country, as well as the locale, of the computer. The location of an IP address can be traced through the use of an IP geolocation service.

Here, once the SEN account holder enters the SEN online store through his device, he may view the content or service which is offered to him for sale that is sent to his device in the Philippines. Thereafter, the SEN account holder may accept the offer of the content or service from the Philippines by clicking "Confirm Purchase." Once it is purchased, the acceptance of the offer is transmitted from his IP Address through his device in the Philippines to the virtual plane, and the content or service is delivered through said virtual plane to the account of the SEN account holder who is in the Philippines. The SEN account holder will then download the content or service through his device through his IP address located in the Philippines. Clearly, such transaction(s) will be consummated in the Philippines.

Furthermore, **it must be remembered that the offering for sale and the sale of content and services, and the funding of the SEN online wallet, are intricately connected since the sale of the SEN content and services cannot be consummated without the funding of said SEN online wallet.** Since the SEN online wallet funded by credit cards and debit cards, it, thus, logically and reasonably means that may be SCEH will likewise have arrangements with the credit card/debit card issuers here in the Philippines.

> The permission to use and buy from the SEN online store through the funding of the SEN online wallet also clearly indicates that there is intent to continue the main business for a period of time. Once the SEN account holder puts funds in the SEN online wallet, he can resume transactions on the SEN while his account is still active (subject of course, to the SEN's rules on membership in the network), thereby maintaining a business relationship with the SCEH even if the transactions are intermittent and infrequent and even if the SEN user only purchases credit and uses them up at one time.
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> x x x x

SCEH averred that it was not doing business in the Philippines since the activities of SCEH were carried outside of the Philippines, its employees were in Hong Kong, its property was outside the Philippines, and that the SEN servers were located in the United States (U.S.). Offshore-based POGO licensees raised the same arguments save for the fact that they conducted their offshore gaming operations through the services of PAGCOR-accredited local gaming agents and service providers for its gaming operations.

Despite the averments of SCEH, the SEC still opined that the activities SCEH proposed to undertake would deem it as "doing business" in the Philippines since the twin characterization test was satisfied. ***First***, the enumerated activities to be undertaken by SCEH indicated that it would be continuing in the Philippines the substance of the business for which it was organized. ***Second***, the SCEH enumerated activities which were considered consummated within the Philippines, albeit done in a virtual plane. I see no reason not to apply the same ruling to offshore-based POGO licensees whose footprints are all over the Philippines; they entered into contracts with PAGCOR-accredited local gaming agents and service providers in furtherance of their main line of business, *i.e.* gaming operations.

Verily, the gaming operations conducted by offshore-based POGO licensees within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations implies the continuity of commercial dealings and arrangements, and contemplates the performance of acts incident to, and in the progressive prosecution of their business. These services will not be provided intermittently but for a long period of time in the Philippines. Accordingly, petitioners are considered resident foreign corporations doing business here in the Philippines.

***Petitioners' activities are deemed consummated in the Philippines, hence, they are proper subjects of government regulations and taxes***

In the U.S., there is currently no statute or case law which addresses the question of whether owning or operating a website or online platform

constitutes "doing business."[14] Numerous court opinions, however, have addressed a similar issue: whether a corporation's internet activities in a foreign State is sufficient to justify the court of that State in exercising personal jurisdiction over the corporation.

Exploring the issue of "jurisdiction" with regard to websites is useful in determining where the online activities of a corporation are deemed consummated and, corollarily, whether it need to "qualify [or obtain a license] to do business" based on its website or online activities. One requisite for courts to obtain personal jurisdiction is that the corporation has "minimum contacts" with the foreign state, such that its ability to be sued there "does not offend the traditional notions of fair play and substance."

In ***Zippo Mfg. Co. v. Zippo Dot Com, Inc.***,[15] the U.S. District Court for Western District of Pennsylvania elucidated on the State's jurisdiction over non-resident defendants in cases involving the latter's internet activities:

> x x x x
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> **The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant.**[16] General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state.[17] **In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of International Shoe Co. v. Washington**[18] **and its progeny.**[19] Manufacturing does not contend that we should exercise general personal jurisdiction over Dot Com. Manufacturing concedes that if personal jurisdiction exists in this case, it must be specific.
>
> **A three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted *1123 against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable.**[20] The "Constitutional touchstone" of the minimum contacts analysis is embodied in the first prong, "whether the defendant purposefully established" contacts with the forum state.[21]

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14 *Id.*

15 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). https://law.justia.com/cases/federal/district-courts/FSupp/952/1119/1432344/. (Accessed on December 27, 2021, 9:19 PM), citing *Mellon, 960 F.2d at 1221*.

16 *Id, Mellon, 960 F.2d* at 1221.

17 *Id, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984).

18 *Id, International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

19 *Id, Mellon, 960 F.2d* at 1221.

20 *Id.*

21 *Id, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 159-60, 90 L. Ed. 95 (1945)).

Defendants who "'reach out beyond one state' and create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions."[22] "[T]he foreseeability that is critical to the due process analysis is x x x that the defendant's conduct and connection with the forum State are such that he should reasonably expect to be haled into court there."[23] This protects defendants from being forced to answer for their actions in a foreign jurisdiction based on "random, fortuitous or attenuated" contacts.[24] "Jurisdiction is proper, however, where contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State."[25]

**The "reasonableness" prong exists to protect defendants against unfairly inconvenient litigation.[26] Under this prong, the exercise of jurisdiction will be reasonable if it does not offend "traditional notions of fair play and substantial justice".** [27] When determining the reasonableness of a particular forum, the court must consider the burden on the defendant in light of other factors including: "the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's right to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies." [28]

2. The Internet and Jurisdiction

In *Hanson v. Denckla*, the Supreme Court noted that **"[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."** [29] **Twenty seven years later, the Court observed that jurisdiction could not be avoided "merely because the defendant did not physically enter the forum state.**"[30] The Court observed that:

> [I]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

Enter the Internet, a global "'super-network' of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide."[31] "In recent years, businesses have begun to use the Internet to provide information and products to consumers

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22 *Id*, citing *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S. Ct. 927, 929, 94 L. Ed. 1154 (1950)).

23 *Id*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980).

24 *Id*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984).

25 *Id*, *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183-84 (citing *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957)).

26 *Id*, *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564-65.

27 *Id*, *International Shoe*, 326 U.S. at 316, 66 S. Ct. at 158.

28 *Id*, *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564.

29 *Id*, *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1237-39, 2 L. Ed. 2d 1283 (1958).

30 *Id*, *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184.

31 *Id*, *Panavision Intern., L.P. v. Toeppen*, 938 F. Supp. 616 (C.D.Cal. 1996) (citing American Civil *Liberties Union v. Reno*, 929 F. Supp. 824, 830-48 (E.D.Pa. 1996)).

> and other businesses."[32] The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The *1124 cases are scant. Nevertheless, **our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles.** At **one end** of the spectrum are situations where a **defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.** *E.g.*[,] *CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996).* At the **opposite end** are situations where a **defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions.** A passive Web site that does little more than make information available to those who are interested in it is **not grounds for the exercise personal jurisdiction.** *E.g.*[,] *Bensusan Restaurant Corp., v. King, 937 F. Supp. 295 (S.D.N.Y.1996).* The **middle ground** is occupied by interactive Web sites **where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.** *E.g.*[,] *Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D.Mo.1996).*
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> **Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper.[33] Different results should not be reached simply because business is conducted over the Internet.** x x x
>
> x x x x

Thus, the **Sliding Scale Test** or ***Zippo Test*** was born. This test was based on the premise that "the likelihood that 'personal jurisdiction' can be constitutionally exercised is directly proportionate to the nature and quantity of commercial activity that an entity conducts over the internet." At one end of the scale are "passive" websites, which alone generally do not generate sufficient contacts with a foreign state to establish personal jurisdiction since they are only used to post information therein. At the other end of the scale are "active" websites, which generate sufficient business over the internet to establish personal jurisdiction. "Interactive" websites fall in the center of the scale since they are hybrid sites that contain elements of both passive and active websites, and courts determine whether to exercise personal jurisdiction over the interactive website owner on a case-by-case basis.

Verily, the **Sliding Scale Test** was specifically tailored to aid courts in determining whether the nature and level of a non-resident defendant's internet activity constitute "minimum contacts" for jurisdictional purposes. I submit that the same test is applicable here in determining whether the

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32 *Id.*

33 *Id, Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183-84.

Philippines may regulate and tax offshore-based POGOs in view of the nature and extent of their operations here.

Here, the Court can take judicial notice of the fact that offshore-based POGO licensees have conducted gaming operations through PAGCOR-accredited local gaming agents and service providers for its gaming operations. The enormity of the transactions has been noticeable not only from the end of the BIR and PAGCOR but by the Legislature itself through congressional hearing by both Houses in aid of legislation, ranging from taxability, immigration issues, rise of criminal activities, *etc.*. Billions of foreign currency transactions go through these entities day by day aided by the internet. It is not merely a passive website as money has been changing hands here in the Philippines.

***Offshore-based POGO licensees are taxable as resident foreign corporations***

Since offshore-based POGO licensees are deemed to be doing business here, they squarely fall under the definition of "resident foreign corporations" in Section 22(H) of the NIRC, thus:

> **SEC. 22. *Definitions.*** - When used in this Title:
>
> (H) The term '***resident foreign corporation***' applies to a foreign corporation engaged in trade or business within the Philippines.[34]

Consequently, they are subject to income tax in accordance with Section 23 of the NIRC:

> 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;
>
> (B) A nonresident citizen is taxable only on income derived from sources within the Philippines;
>
> (C) An individual citizen of the Philippines who is working and deriving income from abroad as an overseas contract worker is taxable only on income derived from sources within the Philippines: Provided, That a seaman who is a citizen of the Philippines and who receives compensation for services rendered abroad as a member of the complement of a vessel engaged exclusively in international trade shall be treated as an overseas contract worker;
>
> (D) An alien individual, whether a resident or not of the Philippines, is taxable only on income derived from sources within the Philippines;

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[34] AN ACT AMENDING THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, AND FOR OTHER PURPOSES, Republic Act No. 8424, December 11, 1997.

> (E) A domestic corporation is taxable on all income derived from sources within and without the Philippines; and
>
> (F) A **foreign corporation, whether engaged or not in trade or business in the Philippines,** is **taxable only on income derived from sources within the Philippines**.[35] (Emphases supplied)

As the provision plainly states, a foreign corporation, whether engaged or not in trade or business in the Philippines, is subject to Philippine income taxation on income received from all sources within the Philippines. This rule is based on the source concept defined as:

> **Source concept.** The jurisdiction to impose income tax is based either on the relationship of the income (tax object) to the taxing state (commonly known as the source or situs principle) or the relationship of the taxpayer (tax subject) to the taxing state based on residence or nationality. Under the source principle, a State's claim to tax income is based on the State's relationship to that income.[36]

In ***CIR v. Baier-Nickel***,[37] the Court provided a background on sourcing of income under the Internal Revenue Code of the U.S. from whence our Tax Code originated:

> The following discussions on sourcing of income under the Internal Revenue Code of the U.S., are instructive:
>
> The Supreme Court has said, in a definition much quoted but often debated, that income may be derived from three possible sources only: (1) capital and/or (2) labor; and/or (3) the sale of capital assets. While the three elements of this attempt at definition need not be accepted as all-inclusive, they serve as useful guides **in any inquiry into whether a particular item is from "sources within the United States"** and suggest an **investigation into the nature and location of the activities or property which produce the income**.
>
> **If the income is from labor the place where the labor is done should be decisive; if it is done in this country, the income should be from "sources within the United States." If the income is from capital, the place where the capital is employed should be decisive; if it is employed in this country, the income should be from "sources within the United States." If the income is from the sale of capital assets, the place where the sale is made should be likewise decisive.**
>
> Much confusion will be avoided by regarding the term "source" in this fundamental light. It is not a place, it is an activity or property. As such, it has a situs or location, and if that situs or location is within the United States the resulting income is taxable to nonresident aliens and foreign corporations.

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35 *Id.*

36 Concepts and issues, I. International Double Taxation, UN Committee of Experts on International Cooperation in Tax Matters Seventh session, Geneva, 24-28 October 2011, Item 5 (h) of the provisional agenda, Revision of the Manual for the Negotiation of Bilateral Tax Treaties.

37 *CIR v. Juliane Baier-Nickel*, 531 Phil. 480-496 (2006).

> **The intention of Congress in the 1916 and subsequent statutes** was to discard the 1909 and 1913 basis of taxing nonresident aliens and foreign corporations and **to make the test of taxability the "source," or situs of the activities or property which produce the income.** The result is that, on the one hand, nonresident aliens and nonresident foreign corporations are prevented from deriving income from the United States free from tax, and, on the other hand, there is no undue imposition of a tax when the activities do not take place in, and the property producing income is not employed in, this country. **Thus, if income is to be taxed, the recipient thereof must be resident within the jurisdiction, or the property or activities out of which the income issues or is derived must be situated within the jurisdiction so that the source of the income may be said to have a situs in this country.**
>
> The **underlying theory** is that the **consideration for taxation is protection of life and property and that the income rightly to be levied upon to defray the burdens of the United States Government is that income which is created by activities and property protected by this Government or obtained by persons enjoying that protection.**[38](Emphases supplied)
>
> The important factor which determines the source of income of personal services, therefore, is not the residence of the payor, or the place where the contract for service is entered into, or the place of payment, but the place where the services were actually rendered.[39]

For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines, e.g., sale of tickets in the Philippines is the activity that produces the income as the tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.[40]

Here, I respectfully submit that **the services of offshore-based POGO licencees** – *"offering by a licensee of PAGCOR authorized online games of chance via the Internet using a network and software or program, exclusively to offshore authorized players excluding Filipinos abroad, who have registered and established an online gaming account with the licensee"* – **are being rendered here. These enumerated activities are transactions deemed to have been consummated within the Philippines, albeit done on the virtual plane.** From placing the bet to winning a bet, the commercial transaction, e-commerce or any sort of virtual transactions find themselves within the Philippines through the services of PAGCOR-accredited local gaming agents and service providers for its offshore gaming operations.

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38 *Id.* at 488-489.

39 *Id.* at 489.

40 See *CIR v. British Overseas Airways Corporation*, 233 Phil. 406, 422 (1987).

In an emerging digital economy, no clear boundaries has been set nor a scope of authority or imposition has been taken up by the Legislature. Even then, if the Philippines that has substantial connection with the assets or services which are subject to tax, e.g., enrolled under the Philippine Payment System, or the delivery of goods and services are in the Philippines, then the government can assert that the Philippines is the tax situs for the digital transaction.

***At any rate, offshore-based POGO licensees should be subject to tax in exchange for the privileges they enjoy***

While PAGCOR insists that none of the components of offshore gaming are being performed within Philippine territory, I cannot take its submission hook, line and sinker. At the back of my mind, so many questions linger as to their operations:

a. Why is there a proliferation of foreigners in the Philippines engaged in such operations?

b. Why are there numerous offices, residential condominiums rented specifically for POGO operations and other array of services for them?

c. If the only transaction entered into by these offshore-based POGO licensees are the service contracts with these service providers located in the Philippines, what interest do they have here in the Philippines?

It is an open secret that PAGCOR and other institutions have provided aide and protection to these entities to the point that even the government could not explain their proliferation. Since their inception, they enjoyed protection here in the Philippines, it is high time they contribute to the expenditures of the government.

In ***Lorenzo v. Posadas, Jr.***,[41] this benefit-based taxation was mentioned by the Court, but it nevertheless emphasized that the obligation to pay taxes rests on governmental existence and necessity, to wit:

> Taxes are essential to the very existence of government.[42] The obligation to pay taxes rests not upon the privileges enjoyed by, or the protection afforded to, a citizen by the government, but upon the necessity of money for the support of the state.[43] For this reason, no one is allowed to object to or resist

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41 *Pablo Lorenzo v. Juan Posadas, Jr.*, 64 Phil. 353, 370 (1937).

42 *Id*, citing *Dobbins v. Erie County*, 16 Pet., 435; 10 Law. ed., 1022; *Kirkland v. Hotchkiss*, 100 U.S., 491; 25 Law. ed., 558; Lane County v. Oregon, 7 Wall, 71; 19 Law. ed., 101; *Union Refrigerator Transit Co., v. Kentucky*, 199 U. S., 194; 26 Sup. Ct., Rep., 36; 50 Law. ed., 150; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; 9 Law. ed., 773.

43 *Id*, citing *Dobbins v. Erie County*.

> the payment of taxes solely because no personal benefit to him can be pointed out.[44]
>
> x x x x

This basis of taxation was subsequently articulated in ***CIR v. Algue, Inc.***,[45] where the Court pronounced:

> It is said that taxes are what we pay for civilization society. Without taxes, the government would be paralyzed for 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 the 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.[46] (Emphasis and italics supplied)
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> x x x x

Thus, the basis of taxation is the existence of a social contract, characterized as a symbiotic relationship between the State and its citizens – offshore gaming licensees in this case, which compel reciprocal duties of protection and support between the parties. In ***Abakada Guro Party List v. Ermita***,[47] the Supreme Court restated the basis of taxation – "The expenses of government, having for their object the interest of all, should be borne by everyone, and the more man enjoys the advantages of society, the more he ought to hold himself honored in contributing to those expenses."

As a result, I register my dissent and vote to dismiss the Petition.

**AMY C. LAZARO-JAVIER**
*Associate Justice*

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44 *Id*, citing *Thomas v. Gay*, 169 U. S., 264; 18 Sup. Ct. Rep., 340; 43 Law. ed., 740.
45 *CIR v. Algue*, 241 Phil. 829- 836 (1988).
46 *Id.* at 836.
47 506 Phil. 1, 74 (2005).