Republic of the Philippines
Supreme Court
Manila

EN BANC

NOTICE

Sirs/Mesdames:

Please take notice that the Court en banc issued a Resolution dated **JANUARY 10, 2023,** *which reads as follows:*

"**G.R. No. 252965 (*Saint Wealth Ltd., as Represented by David Buenaventura & Ang Law Offices 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*) and 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*).** – This Resolution resolves the Motion for Reconsideration[1] dated October 4, 2022 filed by the Secretary of the Department of Finance (DOF) and the Bureau of Internal Revenue (BIR) Commissioner (respondents), seeking reconsideration of the Court's Decision[2] dated December 7, 2021 (Assailed Decision), which held as unconstitutional Sections 11(f) and (g) of Republic Act (R.A.) No. 11494[3] (Bayanihan 2 Law), Revenue Regulation (RR) No. 30-2020; Revenue Memorandum Circular (RMC) No. 64-2020; RMC No. 102-2017; and RMC No. 78-2018 (Assailed Tax Issuances), in so far as they impose franchise tax, income tax, and other applicable taxes upon offshore-based Philippine Offshore Gaming Operators (POGO) licensees.

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1 *Rollo* (G.R. No. 254102), pp. 361-385.

2 Id. at 275-356; penned by Associate Justice Samuel H. Gaerlan, with Chief Justice Alexander G. Gesmundo, Associate Justices Alfredo Benjamin S. Caguioa, Ramon Paul L. Hernando, Rosmari D. Carandang, Henri Jean Paul B. Inting, Rodil V. Zalameda, Mario V. Lopez, Ricardo R. Rosario, Jhosep Y. Lopez, and Jose Midas P. Marquez, concurring; with Senior Associate Justice Estela M. Perlas-Bernabe, concurring and dissenting; and with Associate Justices Marvic M. V. F. Leonen and Amy C. Lazaro-Javier, dissenting. Associate Justice Japar B. Dimaampao was on official leave.

3 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.

In the Motion for Reconsideration, the respondents argue, among others, that: (1) the Assailed Tax Issuances are valid having been issued on account of the expanded licensing and regulatory authority of the Philippine Amusement and Gaming Corporation (PAGCOR);[4] (2) offshore-based POGOs are subject to franchise and income taxes;[5] (3) Sections 11(f) and (g) of the Bayanihan 2 law are not riders, and as a consequence, RR Nos. 30-2020 and 64-2020 are also valid;[6] and (4) in the event that the Court will sustain the invalidity of the Assailed Tax Issuances and Sections 11(f) and (g) of the Bayanihan 2 Law, the operative fact doctrine should be held to apply as to their effects.[7]

After a judicious review of the allegations raised in the Motion for Reconsideration, the Court finds the same bereft of merit.

RMC No. 102-2017 has no statutory basis and its issuance encroached upon the power of the legislature to enact tax measure.

To recall, RMC No. 102-2017, issued in 2017 and before the enactment of the Bayanihan 2 Law, imposed on POGO licensees a five percent (5%) franchise tax. However, as exhaustively explained in the Assailed Decision, prior to the enactment of the Bayanihan 2 Law, there was no law which imposes a five percent (5%) franchise tax on POGO licensees. Thus, RMC No. 102-2017 is invalid, insofar as it imposed franchise taxes on POGOs, because it was passed without any statutory basis.

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. Clearly, the BIR encroached upon the exclusive authority of the legislature to enact tax measures.

Offshore-based POGO licensees cannot be made liable for income tax and other applicable taxes because no income is derived within the Philippines, and offshore-based POGO licensees do not provide goods or services 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

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4 *Rollo* (G.R. No. 254102), pp. 363-367.
5 Id. at 367-376.
6 Id. at 377-378.
7 Id. at 378-382.

related services. On this score, the Court declared RMC No. 102-2017 unconstitutional.

As discussed in the Assailed Decision, all the components of offshore gaming do not involve and are not performed within the Philippine territory. None of the components likewise deal with Filipino citizens. Again, the placing of bets occurs outside the Philippines; the players must not be Filipino citizens, or within the Philippines; and the payment of the prize also occurs outside of the Philippines. In other words, 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. The flow of wealth or the income-generating activity – the placing of bets less the amount of payout – transpires outside the Philippines.

Sections 11(f) and (g) of the Bayanihan 2 Law are unconstitutional for being riders.

To recall, the Bayanihan 2 Law was enacted as an emergency response measure to address the Coronavirus Disease 2019 (COVID-19) Pandemic. Section 11 thereof outlines the sources of funding for the COVID-19 measures to be undertaken by the government. Specifically, Sections 11(f) and (g) of the Bayanihan 2 Law mention that the amounts derived from the payment of franchise tax, income tax, Value-Added Tax (VAT), and other applicable taxes imposed upon POGOs shall be utilized to address the COVID-19 pandemic:

> 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, 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.
>
> 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 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.[8] (Emphases supplied)

However, it must be emphasized that the Bayanihan 2 Law is **not** a tax measure. It was not enacted to impose new taxes to address the COVID-19 pandemic. Thus, Sections 11(f) and (g) of the Bayanihan 2 Law are riders.

As expounded in the Assailed Decision, prior to the enactment of the Bayanihan 2 Law, no statute imposed tax measures on POGO licensees. In other words, Sections 11(f) and (g) of the Bayanihan 2 Law introduced **new** tax impositions on POGO licensees.

Undeniably, Sections 11(f) and (g) of the Bayanihan 2 Law are not germane to the purpose of the law and violate the "one subject, one title rule" of the Constitution because the imposition of new taxes cannot be contemplated as an integral part of a temporary COVID-19 relief measure. Thus, Sections 11(f) and (g) of the Bayanihan 2 Law are unconstitutional, in so far as it imposes **new taxes** on POGO licensees. Consequently, the Assailed Tax Issuances, which were issued to implement Sections 11(f) and (g) of the Bayanihan 2 Law, are likewise unconstitutional and invalid.

The operative fact doctrine is inapplicable in the case at bar.

During the pendency of the case before the Court, former President Rodrigo Duterte signed R.A. No. 11590,[9] 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."[10] R.A. No. 11590 likewise imposes a five percent (5%) gaming tax on the income of POGOs derived from their gaming operations.[11] Further, R.A. No. 11590 imposes a 25% income tax on

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8 BAYANIHAN 2 LAW, Section 11.

9 Approved on September 22, 2021.

10 R.A. No. 11590, Section 2, amending Section 22 (II), paragraph 3 of the National Internal Revenue Code (NIRC) of 1997.

11 See R.A. No. 11590, Section 8, amending Section 125-A of the NIRC of 1997.

Philippine-based POGOs for their income derived from sources within and without the Philippines,[12] and 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.[13]

Thus, the issue of the lack of statutory basis in the imposition of taxes upon POGO licensees had been resolved and rendered moot by the passage of R.A. No. 11590. On this note, however, the Court clarified in the Assailed Decision that R.A. No. 11590 cannot be applied retroactively. In other words, POGO licensees, such as the petitioners, cannot be made liable for the payment of taxes prior to the enactment and effectivity of R.A. No. 11590.

Nevertheless, respondents argue that the operative fact doctrine should apply, and thus, any and all amounts collected prior to the passage of R.A. No. 11590 should not be returned and refunded to the POGO licensees.

The Court is unconvinced.

In *Commissioner of Internal Revenue v. San Roque Power Corp.*,[14] the Court, sitting *En Banc*, thoroughly discussed the operative fact doctrine in this wise:

> The general rule is that a void law or administrative act cannot be the source of legal rights or duties. Article 7 of the Civil Code enunciates this general rule, as well as its exception: "Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary. When the courts declared a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern. Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution."
>
> The doctrine of operative fact is an exception to the general rule, such that a judicial declaration of invalidity may not necessarily obliterate all the effects and consequences of a void act prior to such declaration. In *Serrano de Agbayani v. Philippine National Bank*, the application of the doctrine of operative fact was discussed as follows:
>
> > The decision now on appeal reflects the orthodox view that an unconstitutional act, for that matter an executive order or a municipal ordinance likewise suffering from that infirmity, cannot be the source of any legal rights or duties. Nor can it justify any official act taken under it. Its repugnancy to the fundamental law once judicially declared results in its being to all intents and purposes a mere scrap of paper. x x x. It is understandable why it should be so, the Constitution being supreme and paramount. Any legislative or executive act contrary to its terms cannot survive.

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12 See R.A. No. 11590, Section 4, amending Section 27 of the NIRC of 1997.

13 See R.A. No. 11590, Sections 6 (amending Section 106 of the NIRC of 1997) and 7 (amending Section 108 of the NIRC of 1997).

14 719 Phil. 137 (2013).

> Such a view has support in logic and possesses the merit of simplicity. It may not however be sufficiently realistic. It does not admit of doubt that prior to the declaration of nullity such challenged legislative or executive act must have been in force and had to be complied with. This is so as **until after the judiciary, in an appropriate case, declares its invalidity, it is entitled to obedience and respect**. Parties may have acted under it and may have changed their positions. What could be more fitting than that in a subsequent litigation regard be had to what has been done while such legislative or executive act was in operation and presumed to be valid in all respects. It is now accepted as a doctrine that prior to its being nullified, its existence as a fact must be reckoned with. This is merely to reflect awareness that precisely because **the judiciary is the governmental organ which has the final say on whether or not a *legislative or executive measure* is valid, a period of time may have elapsed before it can exercise the power of judicial review that may lead to a declaration of nullity. It would be to deprive the law of its quality of fairness and justice then, if there be no recognition of what had transpired prior to such adjudication.**
>
> In the language of an American Supreme Court decision: "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official." x x x.
>
> Clearly, for the operative fact doctrine to apply, there must be a "**legislative or executive measure**," meaning **a law or executive issuance**, that is invalidated by the court. From the passage of such law or promulgation of such executive issuance until its invalidation by the court, the effects of the law or executive issuance, when relied upon by the public in good faith, may have to be recognized as valid. x x x.[15] (Underscoring supplied; emphases and italics in the original; citations omitted)

From the foregoing, it is clear that a void or unconstitutional law generally produces no legal effect. The doctrine of operative fact serves as an exception to the general rule, and is applied only in situations where the nullification of the effects of a law prior to its declaration of invalidity will result in inequity and injustice. When no injustice and inequity will ensue, "the general rule that an unconstitutional law is totally ineffective should apply."[16]

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15 Id. at 157-158.

16 *Araullo v. Aquino III*, 752 Phil. 716, 777 (2015).

In this case, the Court finds that the operative fact doctrine is inapplicable because there is no inequity or injustice that will ensue despite the declaration of unconstitutionality of Sections 11(f) and (g) of the Bayanihan 2 Law and the Assailed Tax Issuances. The taxes collected from POGO licensees pursuant to the implementation of the Bayanihan 2 Law and the Assailed Tax Issuances must be returned. In fact, a contrary view – that the taxes should not be refunded – will result in inequity or injustice on the part of the POGO licensees.

In this regard, the Court's ruling in *Planters Products, Inc. v. Fertiphil Corp.*,[17] is instructive. In the said case, the Court declared:

> The doctrine of operative fact, as an exception to the general rule, only applies as a matter of equity and fair play. It nullifies the effects of an unconstitutional law by recognizing that the existence of a statute prior to a determination of unconstitutionality is an operative fact and may have consequences which cannot always be ignored. The past cannot always be erased by a new judicial declaration.
>
> The doctrine is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied on the invalid law. Thus, it was applied to a criminal case when a declaration of unconstitutionality would put the accused in double jeopardy or would put in limbo the acts done by a municipality in reliance upon a law creating it.
>
> Here, We do not find anything iniquitous in ordering PPI to refund the amounts paid by Fertiphil under LOI No. 1465. It unduly benefited from the levy. It was proven during the trial that the levies paid were remitted and deposited to its bank account. **Quite the reverse, it would be inequitable and unjust not to order a refund. To do so would unjustly enrich PPI at the expense of Fertiphil. Article 22 of the Civil Code explicitly provides that "every person who, through an act of performance by another comes into possession of something at the expense of the latter without just or legal ground shall return the same to him." We cannot allow PPI to profit from an unconstitutional law. Justice and equity dictate that PPI must refund the amounts paid by Fertiphil.**[18] (Emphasis supplied; citations omitted)

Applying the foregoing, it is evident that not to order a refund will result in injustice and inequity on the part of the POGO licensees. Thus, any amount that was collected from the POGO licensees based on the implementation of the Bayanihan 2 Law, and prior to the passage of R.A. No. 11590 should be returned. All things considered, the Court finds no compelling reason to reverse and set aside the Assailed Decision. Thus, the Motion for Reconsideration must be denied with finality.

WHEREFORE, the Motion for Reconsideration filed by the Secretary of the Department of Finance and the Bureau of Internal Revenue Commissioner is **DENIED** with **FINALITY**.

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17 572 Phil. 270 (2008).
18 Id. at 302.

Let an **ENTRY OF JUDGMENT** in this case be issued immediately."
Hernando, J., on leave. (21)

By authority of the Court:

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Clerk of Court

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