EN BANC

"G.R. No. 213860 ***(Philippine Stock Exchange, Inc., Bankers Association of the Philippines, Philippine Association of Securities Brokers and Dealers, Inc., Fund Managers Association of the Philippines, Trust Officers Association of the Philippines and Marmon Holdings, Inc., petitioners vs. Secretary of Finance, Commissioner of Internal Revenue and Chairperson of the Securities and Exchange Commission, respondents).***

Promulgated:

July 5, 2022

x -- x

CONCURRING OPINION

GESMUNDO, *CJ.*:

Before this Court is a Petition for Certiorari and Prohibition filed by petitioners Philippine Stock Exchange, Inc. *(PSE),* Bankers Association of the Philippines *(BAP),* Philippine Association of Securities Brokers and Dealers, Inc. *(PASBDI),* Fund Managers Association of the Philippines *(FMAP),* Trust Officers Association of the Philippines *(TOAP),* and Marmon Holdings, Inc. *(MHI)* to assail the constitutionality of Revenue Regulation No. 1-2014 *(RR 1-2014),* Revenue Memorandum Circular No. 5-14 *(RMC 5-14)* and the Securities and Exchange Commission *(SEC)* Memorandum Circular No. 10-14, for having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction.

The *ponencia* grants the petition and sets aside RR 1-2014, RMC 5-14 and SEC Memorandum Circular No. 10-14.

I respectfully agree.

Stock market transactions affect the general public and the national economy. The rise and fall of stock market indices reflect to a considerable degree the state of the economy. Trends in stock prices tend to herald changes in business conditions. Consequently, securities transactions are impressed with public interest.[1] The importance of the stock market in the economy cannot simply be glossed over.[2]

---

[1] *Roy III v. Herbosa*, 800 Phil. 459, 524 (2016), citing *Abacus Securities Corp. v. Ampil*, 518 Phil. 478, 482 (2006).
[2] Id.

Indeed, stock trading is an essential aspect of the economy where the stockholders and potential investors, whether domestic or foreign, are free to buy and sell stocks in furtherance of commercial development. Absolutely unrestricted trading in the stock market could be potentially harmful as fraud transactions may be perpetrated by scrupulous individuals. At the other end of the spectrum, too much restriction in stock trading would discourage investors to enter the market due to the high costs and burdens of business. Thus, whenever there is a regulation imposed by the State in the commercial aspect of the stock market, the Court should not simply brush aside the issue; rather, such issue must be meticulously examined to determine whether it is in line with the Constitutional principle to recognize the indispensable role of the private sector, encourage private enterprise, and provide incentives to needed investments.[3]

Purpose of RR 1-2014

As explained by the Office of the Solicitor General *(OSG)*, the Philippine stock market adopted the scripless trading system. In the current market set-up, an owner of certificates of stocks of listed companies who wishes to participate in the stock market delivers his stock certificate to a broker who enters the details of transfer into the system. Then, the shares are electronically recorded (lodgement) into the broker's account under the name "PCD Nominee". Thereby, the scrip is forwarded to the Registry (transfer agent) where the certificate is cancelled and issued under "PCD Nominee". The deposit of shares is then confirmed in the book of entry of Philippine Depository & Trust Corporation *(PDTC)* and may now be traded in the stock market. Considering that shares may be traded (buy and sell) several times in a given day, the PSE matches the trade such that at the end of a given trade day, a broker may either be a net selling broker or a net buying broker. Once the trade is matched, shares are delivered from the account of the net selling broker to the account of the net buying broker. Thereby, shares are electronically transferred to the buying broker's account at the PDTC. The buying client can then uplift the shares and register it under his or her name in the shares registry. Afterwards, the payment can be made by net buyer and net sellers can receive the payments.[4]

Trading through a broker by the stockholder, or the use of securities intermediary, is allowed under Section 43.1 of Securities Regulations Code *(SRC)*.[5] In stock trading through a broker, the principals of the broker are

---

[3] 1987 CONSTITUTION, Art. II, Sec. 20 provides:

Sec. 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

[4] *Rollo*, p. 487.

[5] Decision, p. 12.

generally undisclosed, hence, the broker is personally liable for the contracts thus made.[6]

Before the advent of RR-1-2014, the broker buys and sells stock on behalf of the principal in the stock market, usually several times in a given day, and at the end of the trading day, the PSE matches the trades. Whenever there is a dividend declaration on the stocks owned by the principal during the process, the broker, as the withholding agent for tax purposes and PDC nominee, reports such taxable event to the BIR immediately and may lump the payees into one account such as "PCD Nominee," "Various Payees," or "Others." The broker does not disclose the personal information immediately of the principals. To my mind, this system ensures the privacy of the principals' data, boost investor confidence on data privacy on the market, and, at the same time, it would be tedious to enumerate all the principals and their personal information, as the transactions in the stock market are numerous and ever changing, especially when a publicly-listed corporation declares dividends.

However, due to the RR 1-2014 and its related issuance, the broker cannot anymore avail of such system. Rather, the broker must disclose all its principals and their personal information to the BIR in an alpha list whenever there is a dividend declaration, no matter how tedious or how many transactions there may be. The BIR will be able to track all the movements and identities of the stockholders and passive investors, whenever they transact from one corporation to another and receive dividends declarations, which include both domestic and foreign investors. In effect, the practice of the undisclosed principal between the principal stockholder and the broker shall be barred. It will result in the amendment of whatever non-disclosure agreements between stockholder and broker as the latter are now required to disclose the former's personal information. If investors find that this new policy increases the cost of doing business and discourage portfolio inflow, it may result into capital flight where investors move to a country with more investor-friendly policies.

In light of the potential substantial changes imposed by RR 1-2014 in the capital markets, the Court should determine the purpose or rationale of RR 1-2014.

At first glance, it may appear that the new system imposed by RR 1-2014 is to collect withholding taxes from the dividend declarations. However, that is not the case. As conceded by the *ponencia,* the obligation to pay taxes on dividend income already exists as provided in the Tax Code, particularly,

---

[6] *Abacus Securities Corp. v. Ampil*, supra note 1 at 495.

Sec. 57, as amended. The obligation to withhold these taxes at source on dividend income is already functioning as provided in the Tax Code and RR 2-98.[7]

Notably, even if the principals are not disclosed immediately to the BIR by the broker, the BIR may still collect the withholding taxes due from the dividend income. As explained *CIR v. La Flor Dela Isabela, Inc.*,[8] under the existing withholding tax system, the withholding agent retains a portion of the amount received by the income earner. In turn, the said amount is credited to the total income tax payable in transactions covered by the Expanded Withholding Tax *(EWT)*. On the other hand, in cases of income payments subject to Withholding Tax on Compensation *(WTC)* and Final Withholding Tax *(FWT)*, the amount withheld is already the entire tax to be paid for the particular source of income. Thus, it can readily be seen that the payee is the taxpayer, the person on whom the tax is imposed, while the payor, a separate entity, acts as the government's agent for the collection of the tax in order to ensure its payment.[9]

In the operation of the withholding tax system, the withholding agent is the payor, a separate entity acting no more than an agent of the government for the collection of the tax in order to ensure its payments; the payer is the taxpayer — he is the person subject to tax imposed by law; and the payee is the taxing authority. In other words, the withholding agent is merely a tax collector, not a taxpayer. Under the withholding system, however, the agent-payor becomes a payee by fiction of law. His (agent) liability is direct and independent from the taxpayer, because the income tax is still imposed on and due from the latter. The agent is not liable for the tax as no wealth flowed into him — he earned no income. The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguished from its duty to pay tax.[10]

Even if the principals are undisclosed in the alpha list, the brokers, as the withholding agents of the principal stockholders, are liable for the withholding tax if they breach of their legal duty to withhold under the Tax Code. Verily, the brokers must file monthly returns for its withholding taxes, from which the BIR can determine whether the taxes were properly withheld from the compensation derived from dividends declarations of their stockholder principals.[11] If the brokers do not withhold the proper taxes from

---

[7] Decision, p. 15.
[8] 845 Phil. 568 (2019).
[9] Id. at 580.
[10] *Commissioner of Internal Revenue v. Court of Appeals*, 361 Phil. 103, 117 (1999).
[11] Revenue Regulations No. 2-98.

their principals, the BIR can hold the brokers liable for the deficient taxes as they breached their legal duty to withhold taxes.

Further, the personal information sought to be collected by the BIR from the stockholders or the principals of the broker under RR 1-2014, such as the complete name and TIN,[12] are readily available in the SEC forms submitted by the corporations. According to SEC Memorandum Circular No. 16-2016, in the GIS, the TIN of the Board of Directors/Trustees, Officers and stockholders of the domestic corporations shall be indicated in a separate sheet designated as the TIN Page.[13] Further, SEC Memorandum Circular 1-2013, all documents to be filed with the SEC by corporations after their incorporation, such as the General Information Sheets *(GIS)*, shall include the TIN of all its foreign investors, natural or juridical, resident or non-resident.[14] In addition, as stated by the *ponencia,* the SEC released MC 17 in November 2018, which requires domestic stock and non-stock corporations to include beneficial ownership information in their GIS effective January 1, 2019. The Beneficial Ownership Declaration page contain the beneficial owner's complete name, residential address, nationality, tax identification number and percentage of ownership. The SEC also issued SEC MC 30-20 requiring foreign corporations to disclose beneficial ownership information in their GIS.[15] Verily, the personal information of the stockholders requested by the BIR, in both domestic and foreign corporation, are already available in the documents filed in the SEC.

So if neither the collection of withholding taxes nor collection of personal information of the stockholders is the objective of RR 1-2014, then what is its ultimate purpose? The Background portion of RR 1-2014 states that its end view is to establish a simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities, to wit:

Section 2.57.4. Time of Withholding.— The obligation of the payor to deduct and withhold the tax under Section 2.57 of these regulations arises at the time an income is paid or payable, whichever comes first, the term "payable" refers to the date the obligation become due, demandable or legally enforceable.
Section 2.58. Returns and Payment of Taxes Withheld at Source.
(A) Monthly return and payment of taxes withheld at source.

[12] RMC 5-2014.

[13] SEC Memorandum Circular No. 16-2016, September 26, 2016, paragraph 1.

[14] SEC Memorandum Circular 1-2013, January 7, 2013, Section. 3. All documents to be filed with the SEC by corporations and partnerships after their incorporation (i.e. General Information Sheets) shall not be accepted unless the TIN of all its foreign investors, natural or juridical, resident or non-resident, are indicated therein.

[15] Decision, p. 25.

REVENUE REGULATIONS NO. 1-2014

SUBJECT: Amending the Provisions of Revenue Regulations (RR) No. 2-98, as Further Amended by RR No. 10-2008, Specifically on the Submission of Alphabetical List of Employees/Payees of Income Payments

TO: All Internal Revenue Officials and Others Concerned

BACKGROUND

These Regulations are hereby issued for purposes of ensuring that information on all income payments paid by employers/payors, whether or not subject to the withholding tax except on cases prescribed under existing international agreements, treaties, laws and revenue regulations, regardless on the number of employees and/or payees, are monitored by and captured in the taxpayer database of the Bureau of Internal Revenue (BIR), **with the end in view of establishing simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities.**[16] (emphasis supplied)

Thus, the BIR is willing to set aside the expectation of privacy of the stockholders whenever dividends are declared for the purpose of establishing a simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities. These end objectives are vague and highly subjective. It was not established by the BIR that the disclosure of the personal information of the stockholders under RR 1-2014 are indispensable to attain such subjective purposes. It was not even determined whether there are other alternative ways to achieve the same. Rather, the BIR is eager to risk increasing the cost of doing business and discouraging portfolio inflow, including the possibility of capital flight, for the sake of merely setting up some future and contingent policy studies for the agency.

Administrative agencies may exercise quasi-legislative or rule-making powers only if there exists a law which delegates these powers to them. Accordingly, the rules so promulgated must be within the confines of the granting statute and must involve no discretion as to what the law shall be, but merely the authority to fix the details in the execution or enforcement of the policy set out in the law itself, so as to conform with the doctrine of separation of powers and, as an adjunct, the doctrine of non-delegability of legislative power.[17] Hence, while the BIR may issue RR 1-2014 pursuant to its quasi-legislative power, it must not do so capriciously, based on some arbitrary purpose to the detriment of stockholders, as it will not anymore be within the confines of the Tax Code.

---

[16] RR 01-2014, Background.

[17] *Republic of the Phils. v. Drugmaker's Laboratories, Inc.*, 728 Phil. 480, 489 (2014).

Data Privacy Act

The policy of the Data Privacy Act is to protect the fundamental human right of privacy of communication while ensuring free flow of information to promote innovation and growth.[18] The law protects all types of personal information and applies to any natural and juridical person involved in personal information processing subject to several exceptions. Among those exceptions is Sec. 4 (e), which provides:

> Section 4. *Scope*. - x x x x
>
> This Act does not apply to the following:
>
> x x x x
>
> (e) Information **necessary** in order to carry out the functions of public authority which includes the processing of personal data for the performance by the independent, central monetary authority and law enforcement and regulatory agencies of their constitutionally and statutorily mandated functions. Nothing in this Act shall be construed as to have amended or repealed Republic Act No. 1405, otherwise known as the Secrecy of Bank Deposits Act; Republic Act. No 6426, otherwise known as the Foreign Currency Deposit Act; and Republic Act No. 9510, otherwise known as the Credit Information System Act (CISA)[.] (emphasis supplied)

When the information sought to be disclosed is necessary in order to carry out the functions of public authority, which includes the processing of personal data for the performance by the independent central monetary authority and law enforcement and regulatory agencies, then the Data Privacy Act shall not be applied. The key word here is "necessary." Thus, if the information to be disclosed by the government agency concerned is unnecessary, then the exception under the law shall not be effective. In this case, the information sought to be disclosed by the BIR through RR 1-2014 from the brokers would be the personal information of the principal stockholders, including the sensitive personal information, such as the TIN.

I share the view of Senior Associate Justice Leonen that such information cannot be classified as necessary. Based on the above-discussion, the information is only intended for the purposes of establishing their simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities. The information

---

[18] Data Privacy Act of 2012, Republic Act No. 10173, Section 2. Declaration of Policy. — It is the policy of the State to protect the fundamental human right of privacy of communication while ensuring free flow of information to promote innovation and growth. The State recognizes the vital role of information and communications technology in nation-building and its inherent obligation to ensure that personal information in information and communications systems in the government and in the private sector are secured and protected.

contemplated is not indispensable for the collection of withholding tax, and the information is available elsewhere in the documents submitted to the SEC. Evidently, the BIR failed to establish that disclosing the personal information of the stockholders is the only necessary to achieve such purposes. Indeed, there may be other less invasive means to achieve the stated purpose of RR 1-2014.

Further, Sec. 13 of the Data Privacy Act provides that the processing of sensitive personal information and privileged information shall be prohibited,[19] which includes the TIN. However, it lays down some exceptions, such when the processing of sensitive information is provided for by existing laws and regulations, to wit:

> (b) The processing of the same is provided for by existing laws and regulations: *Provided*, That such regulatory enactments **guarantee** the protection of the sensitive personal information and the privileged information: *Provided, further,* That the consent of the data subjects are not required by law or regulation permitting the processing of the sensitive personal information or the privileged information[.][20] (emphasis supplied)

Verily, the law does not simply allow the disclosure of sensitive personal information simply because an existing regulation requires it. Rather, there must also be regulatory enactment that must guarantee the protection of such sensitive personal information. The assailed provision under RR 1-2014, particularly, Sec. 2.83.3 regarding the list of payees,[21] shows that there is nothing therein that demonstrates how the regulatory agency, the BIR, will guarantee the protection of the sensitive personal information gathered regarding the principal stockholders from the brokers. There is no mechanism stated therein on how to ensure that the sensitive personal information shall be protected and safeguarded.

The *ponencia* demonstrates that there is no assurance that the anonymity, or privacy, of the investors shall be maintained under RR 1-2014 even if the information is disclosed only to the BIR for tax purposes and not the public.[22]

I agree. The mere fact that the sensitive information is disclosed to a particular government agency only does not *ipso facto* guarantee that it will be secured absent any express guarantee that such data is safeguarded. To rule otherwise would sanction the acquisition of any sensitive data information by

---

[19] Section 13. *Sensitive Personal Information and Privileged Information.* — The processing of sensitive personal information and privileged information shall be prohibited x x x

[20] Data Privacy Act of 2012, Republic Act No. 10173, Sec. 13(b).

[21] Decision, p. 4.

[22] Id. at 17.

the government even if there is no guarantee or procedure to protect such information. Indeed, the Data Privacy Act mandates that the State protect the fundamental human right of privacy of communication and there must be some provided system for the protection of sensitive personal information.

Procedural due process

Even assuming that RR 1-2014 and its related issuances comply with the Data Privacy Act, it should still be struck down for its violation of the procedural due process as it did not comply with the requirement of prior notice, hearing, and publication.

An administrative regulation may be classified as a legislative rule, an interpretative rule, or a contingent rule. Legislative rules are in the nature of subordinate legislation and designed to implement a primary legislation by providing the details thereof. They usually implement existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress and effect a change in existing law or policy which affects individual rights and obligations. Meanwhile, interpretative rules are intended to interpret, clarify or explain existing statutory regulations under which the administrative body operates. Their purpose or objective is merely to construe the statute being administered and purport to do no more than interpret the statute. Simply, they try to say what the statute means and refer to no single person or party in particular but concern all those belonging to the same class which may be covered by the said rules. Finally, contingent rules are those issued by an administrative authority based on the existence of certain facts or things upon which the enforcement of the law depends.[23]

In general, an administrative regulation needs to comply with the requirements laid down by Executive Order No. 292, s. 1987, otherwise known as the Administrative Code of 1987, on prior notice, hearing, and publication in order to be valid and binding, except when the same is merely an interpretative rule. This is because when an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed, it behooves the agency to accord at least to those

[23] *Republic of the Phils. v. Drugmaker's Laboratories, Inc.*, supra note 17 at 489-490.

directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law.[24]

The crux of this case is to determine whether RR 1-2014 is either a legislative rule or an interpretative rule. If it is a legislative rule, it shall be void for violation of procedure due process because it did not comply with the mandatory requirements of prior notice, hearing, and publication under the Administrative Code. In contrast, if RR 1-2014 is an interpretative rule, then it is valid because the requirements of prior notice, hearing, and publication are not mandatory.

I concur with Senior Associate Justice Leonen and Associate Justice Lazaro-Javier that RR 1-2014 is a legislative rule. As discussed above, a legislative rule implements existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress and effect a change in existing law or policy which **affects individual rights and obligations** and substantially increases the burden of those governed. Evidently, RR 1-2014 substantially affects the rights and obligations of the stockholders of corporations. Before the advent of the said regulation, stockholders maintain the privacy of their personal information whenever they will trade in the stock market and receive dividends therein as against the BIR. They have an assurance that their investment activities would not be unnecessarily exposed to the taxing body, but, at the same time, while maintaining the stockholders' anonymity, their brokers will be able to regularly withhold the taxes due on the dividend income.

However, due to RR 1-2014, the right to privacy of the stockholders as against the BIR is taken away. Whatever obligation of the stock brokers to keep the privacy and anonymity of their principals shall be modified and altered. Again, the purpose of this substantial change in the privacy of the stockholders is not even for the purpose of facilitating the payment of the withholding tax from the dividend income; rather, it is only to subjectively establish a simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities.[25]

As it affects individual rights and obligations of the stockholders and investors, both domestic and foreign, RR 1-2014 cannot be treated as a mere interpretative rule. Manifestly, it does not to simply interpret, clarify or explain existing statutory regulations but provides additional substantial burdens to those governed.

---

[24] Id. at 490.

[25] Background portion of RR 1-2014, December 17, 2013, p. 1.

Since RR 1-2014 did not comply with the mandatory requirements of prior notice, hearing, and publication under the Administrative Code, then it is invalid and not binding.

WHEREFORE, I vote to **GRANT** the petition.

ALEXANDER G. GESMUNDO
Chief Justice