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No costs.

SO ORDERED.

Makasiar, Acting Chairman, Fernandez, Guerrero and *De Castro*, JJ.*, concur.

FIRST DIVISION

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

ABS-CBN BROADCASTING CORPORATION, petitioner, *vs.* COURT OF TAX APPEALS and THE COMMISSIONER OF INTERNAL REVENUE, respondents.

SYNOPSIS

Petitioner corporation was engaged in the business of telecasting local as well as foreign films acquired from foreign corporations not engaged in trade or business within the Philippines, for which petitioner paid rentals after withholding and turning over to the Bureau of Internal Revenue income tax of 30% of one-half of the film rentals pursuant to Section 24(b) of the National Internal Revenue Code, as amended by Rep. Act No. 2343 and the implementing General Circular No. V-334 issued by the Commissioner of Internal Revenue on April 12, 1961. For the years 1965 through 1968, petitioner dutifully observed the practice. With the amendment of Section 24(b) of the Tax Code by Rep. Act No. 5431 on June 27, 1968, increasing the tax rate from 30% to 35%, the Commissioner of Internal Revenue revoked, for being "erroneous for lack of legal basis" Gen. Circular No. V-334, by issuing Revised Memo-Circular No. 4-71, basing the tax therein prescribed on gross income. Pursuant thereto, respondent Commissioner issued against petitioner a letter of assessment and demand requiring the latter to pay deficiency withholding income tax on the remitted film rentals for the years 1965 to 1968 in the total amount of ₱525,897.06. Without acting on petitioner's request for a reconsideration and withdrawal of the assessment, respondent Commissioner issued a warrant of distraint and levy over the former's personal and real property. On petition for review filed with respondent Court of Tax Appeals, the latter dismissed it and affirmed the questioned assessment. Petitioner appealed contesting the retroactivity

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* Justice Pacifico P. de Castro was designated to sit in the First Division, Justice Claudio Teehankee being on official leave.

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of Revised Memo-Circular 4-71 and averring prescription of the right of respondent Commissioner to assess the deficiency withholding income tax.

In reversing the judgment appealed from and setting aside the assessment, the Court ruled that in the interest of justice and fairplay, rulings or circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers, who in the case at bar, relied in good faith and religiously complied with no less than a circular issued "to all internal revenue officials" by the highest official of the Bureau of Internal Revenue and approved by the then Secretary of Finance.

SYLLABUS

1. TAXATION; ASSESSMENT AND COLLECTION OF TAXES; CIRCULARS OR RULINGS OF THE COMMISSIONER OF INTERNAL REVENUE HAVE NO RETROACTIVE APPLICATION; CASE AT BAR.— It is clear from Sec. 338-A (now Sec. 327) of the Tax Code as inserted by Rep. Act No. 6110 on August 9, 1969 that rulings or circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers. The prejudice to petitioner of the retroactive application of Memorandum Circular No. 4-71 is beyond question. It was issued only in 1971, or three years after 1968, the last year that petitioner had withheld taxes under General Circular No. V-334. The assessment and demand on petitioner to pay deficiency withholding income tax was also made three years after 1968 for a period of time commencing in 1965. Petitioner was no longer in a position to withhold taxes due from foreign corporations because it had already remitted all film rentals and no longer had any control over them when the new circular was issued. Neither does petitioner fall under any of the enumerated exceptions stated in the Section.

2. ID.; ID.; GOVERNMENT GENERALLY NOT ESTOPPED FROM COLLECTING TAXES DUE BECAUSE OF MISTAKES OR ERRORS OF ITS AGENTS; EXCEPTIONS.— The Court is not unaware of the well-entrenched principle that the Government is never estopped from collecting taxes because of mistakes or errors on the part of its agents. In fact, utmost caution should be taken in this regard. But, like other principles of law, this also admits of exceptions in the interest of justice and fairplay. The insertion of Sec. 338-A into the National Internal Revenue Code, as held in the case of Tuason, Jr., *v.* Lingad, 58 SCRA 170 (1974) is indicative of legislative intention to support the principle of good faith. In fact, in the United States,

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from where Sec. 24 (b) was patterned, it has been held that the Commissioner or Collector is precluded from adopting a position inconsistent with one previously taken where injustice would result therefrom, or where there has been a misrepresentation to the taxpayer.

3. ID.; ID.; IMPOSITION OF SURCHARGE UNCALLED FOR IN INSTANT CASE; REASON.— The decision of the Court of Tax Appeals further requiring the petitioner to pay interest and surcharge as provided for in Sec. 51(e) of the Tax Code in addition to the deficiency withholding tax of ₱525,897.06 is much less called for because the petitioner relied in good faith and religiously complied with no less than a Circular issued "to all internal revenue officials" by the highest official of the Bureau of Internal Revenue and approved by the then Secretary of Finance.

4. STATUTORY CONSTRUCTION; RE-ENACTMENT OF STATUTE SUBSTANTIALLY UNCHANGED, A CASE OF LEGISLATIVE APPROVAL OF ADMINISTRATIVE INTERPRETATION.— Republic Act No. 2343, dated June 20, 1959, which was the basis of General Circular No. V-334, was just one in a series of enactments regarding Sec. 24(b) of the Tax Code. Republic Act No. 3825 came next on June 22, 1963 without changing the basis but merely adding a proviso. Republic Act No. 3841, dated likewise on June 22, 1963, followed later, omitting the proviso and inserting some words. It was only on June 27, 1968 under Republic Act No. 5431, which became the basis of Revenue Memorandum Circular No. 4-71, that Sec. 24(b) was amended to refer specifically to 35% of the *"gross income."* The principle of legislative approval of administrative interpretation by reenactment clearly obtains in this case. It provides that "the reenactment of a statute substantially unchanged is persuasive indication of the adoption by Congress of a prior executive construction." Note should be taken of the fact that this case involves not a mere opinion of the Commissioner or ruling rendered on a mere query, but a Circular formally issued to "all internal revenue officials" by the then Commissioner of Internal Revenue.

APPEARANCES OF COUNSEL

Quiason, De Guzman, Makalintal, Veneracion and *Barot* for petitioner.

Solicitor General Estelito P. Mendoza, Assistant Solicitor General Santiago M. Kapunan and *Solicitor Erlinda B. Masakayan* for respondent.

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DECISION

MELENCIO-HERRERA, *J.*:

This is a Petition for Review on Certiorari of the Decision of the Court of Tax Appeals in C.T.A. Case No. 2809, dated November 29, 1979, which affirmed the assessment by the Commissioner of Internal Revenue, dated April 16, 1971, of a deficiency withholding income tax against petitioner, ABS-CBN Broadcasting Corporation, for the years 1965, 1966, 1967 and 1968 in the respective amounts of ₱75,895.24, ₱99,239.18, ₱128,502.00 and ₱222,260.64, or a total of ₱525,897.06.

During the period pertinent to this case, petitioner corporation was engaged in the business of telecasting local as well as foreign films acquired from foreign corporations not engaged in trade or business within the Philippines, for which petitioner paid rentals after withholding income tax of 30% of one-half of the film rentals.

In so far as the income tax on non-resident corporations is concerned, Section 24(b) of the National Internal Revenue Code, as amended by Republic Act No. 2343 dated June 20, 1959, used to provide:

"(b) *Tax on foreign corporations.*— (1) *Non-resident corporations.*— There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by the preceding paragraph, upon the amount received by every foreign corporation not engaged in trade or business within the Philippines, from all sources within the Philippines, as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits and income, a tax equal to thirty *per centum* of *such amount.*" (Italics supplied)

On April 12, 1961, in implementation of the aforequoted provision, the Commissioner of Internal Revenue issued General Circular No. V-334 reading thus:

"In connection with Section 24(b) of Tax Code, the amendment introduced by Republic Act No. 2343, under which an income tax equal to 30% is levied upon the amount received by every foreign corporation not engaged in trade

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or business within the Philippines from all sources within this country as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits and income, it has been determined that the tax is still imposed on income derived from capital, or labor, or both combined, in accordance with the basic principle of income taxation (Sec. 39, Income Tax Regulations), and that a mere return of capital or investment is not income (Par. 5.06, 1 Mertens Law of Federal Taxation). Since according to the findings of the Special Team who inquired into business of the non-resident foreign film distributors, the distribution or exhibition right on a film is invariably acquired for a consideration, either for a lump sum or a percentage of the film rentals, whether from a parent company or an independent outside producer, *a part of the receipts of a non-resident foreign film distributor derived from said film represents, therefore, a return of investment.*

. . . . . .

"4. The local distributor should withhold *30% of one-half of the film rentals* paid to the non-resident foreign film distributor, and pay the same to this office in accordance with law unless the non-resident foreign film distributor makes a prior settlement of its income tax liability." (Italics supplied)

Pursuant to the foregoing, petitioner dutifully withheld and turned over to the Bureau of Internal Revenue the amount of 30% of one-half of the film rentals paid by it to foreign corporations not engaged in trade or business within the Philippines. The last year that petitioner withheld taxes pursuant to the foregoing Circular was in 1968.

On June 27, 1968, Republic Act No. 5431 amended Section 24(b) of the Tax Code increasing the tax rate from 30% to 35% and revising the tax basis from "such amount" referring to rents. etc. to *"gross income,"* as follows.

"(b) *Tax on foreign corporations.*— (1) *Non-resident corporations.*— A foreign corporation not engaged in trade or business in the Philippines including a foreign life insurance company not engaged in the life insurance business in the Philippines shall pay a tax equal to thirty-five per cent of the *gross income* received during each taxable year from all sources within the Philippines, as interests, dividends, rents, royalties, salaries, wages, premiums, annuities, compensations, remunerations for technical services

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or otherwise, emoluments or other fixed or determinable annual, periodical or casual gains, profits and income, and capital gains, *Provided, however,* That premiums shall not include reinsurance premiums." (Italics supplied)

On February 8, 1971, the Commissioner of Internal Revenue issued Revenue Memorandum Circular No. 4-71, revoking General Circular No. V-334, and holding that the latter was "erroneous for lack of legal basis," because "the tax therein prescribed should be based on gross income without deduction *whatever*," thus:

"After a restudy and analysis of Section 24(b) of the National Internal Revenue Code, as amended by Republic Act No. 5431, and guided by the interpretation given by tax authorities to a similar provision in the Internal Revenue Code of the United States, on which the aforementioned provision of our Tax Code was patterned, this Office has come to the conclusion that the tax therein prescribed *should be based on gross income without deduction whatever.* Consequently, the ruling in General Circular No. V-334, dated April 12, 1961, allowing the deduction of the proportionate cost of production or exhibition of motion picture films from the rental income of non-resident foreign corporations, is erroneous for lack of legal basis.

"In view thereof, General Circular No. V-334, dated April 12, 1961, is hereby revoked and henceforth, local films distributors and exhibitors shall deduct and withhold *35% of the entire amount* payable by them to non-resident foreign corporations, as film rental or royalty, or whatever such payment may be denominated, without any deduction whatever, pursuant to Section 24(b), and pay the withheld taxes in accordance with Section 54 of the Tax Code, as amended.

"All rulings inconsistent with his Circular is likewise revoked." (Italics supplied)

On the basis of this new Circular, respondent Commissioner of Internal Revenue issued against petitioner a letter of assessment and demand dated April 16, 1971, but allegedly released by it and received by petitioner on April 12, 1971, requiring them to pay deficiency withholding income tax on the remitted film rentals for the years 1965 through 1968 and film royalty as of the end of 1968 in the total amount of ₱525,897.06 computed as follows:

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"1965

Total amount remitted	₱511,059.48
Withholding tax due thereon	153,318.00
Less: Amount already assessed	89,000.00
Balance	₱ 64,318.00
Add: 1/2% mo. int. fr. 4-16-66 to 4-16-69	11,577.24
Total amount due & collectible	₱ 75,895.24

1966

Total amount remitted	₱373,492.24
Withholding tax due thereon	112,048.00
Less: Amount already assessed	27,947.00
Balance	84,101.00
Add: 1/2% mo. int. fr. 4-16-67 to 4-16-70	15,138.18
Total amount due and collectible	₱99,239.18

Total amount remitted	₱601,160.65
Withholding tax due thereon	180,348.00
Less: Amount already assessed	71,448.00
Balance	108,900.00
Add: 1/2% mo. int. fr. 4-16-68 to 4-16-71	19,602.00
Total amount due and collectible	₱128,502.00

1968

Total amount remitted	₱881,816.92
Withholding tax due thereon	291,283.00
Less: Amount already assessed	92,886.00
Balance	198,447.00
Add: 1/2% mo. int. fr. 4-16-69 to 4-29-71	23,813.64
Total amount due and collectible	₱222,260.64"[1]

On May 5, 1971, petitioner requested for a reconsideration and withdrawal of the assessment. However, without acting thereon,

[1] Comment of Respondents, Rollo, pp. 73-74.

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respondent, on April 6, 1976, issued a warrant of distraint and levy over petitioner's personal as well as real properties. The petitioner then filed its Petition for Review with the Court of Tax Appeals whose Decision, dated November 29, 1979, is, in turn, the subject of this review. The Tax Court held:

"For the reasons given, the Court finds the assessment issued by respondent on April 16, 1971 against petitioner in the amounts of ₱75,895.24, ₱99,239.18, ₱128,502.00 and ₱222,260.64 or a total of ₱525,897.06 as deficiency withholding income tax for the years 1965, 1966, 1967 and 1968, respectively, in accordance with law. As prayed for, the petition for review filed in this case is dismissed, and petitioner ABS-CBN Broadcasting Corporation is hereby ordered to pay the sum of ₱525,897.06 to respondent Commissioner of Internal Revenue as deficiency withholding income tax for the taxable years 1965 thru 1968, plus the surcharge and interest which have accrued thereon incident to delinquency, pursuant to Section 51(e) of the National Internal Revenue Code, as amended.

"WHEREFORE, the decision appealed from is hereby affirmed at petitioner's costs.

"SO ORDERED."[2]

The issues raised are twofold:

"I. Whether or not respondent *can apply* General Circular No. 4-71 *retroactively* and issue a deficiency assessment against petitioner in the amount of ₱525,897.06 as deficiency withholding income tax for the years 1965, 1966, 1967 and 1968.

"II. Whether or not the right of the Commissioner of Internal Revenue to assess the deficiency withholding income tax *for the year 1965 has prescribed.*"[3]

Upon the facts and circumstances of the case, review is warranted.

In point is Sec. 338-A (now Sec. 327) of the Tax Code. As inserted by Republic Act No. 6110 on August 9, 1969, it provides:

"Sec. 338-A. *Non-retroactivity of rulings.*— Any revocation, modification, or reversal of any of the rules and regulations promulgated

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[2] Decision, Annex "A", Rollo, pp. 53-54.

[3] Memorandum of petitioner, Rollo, p. 97.

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in accordance with the preceding Section or any of the rulings or circulars promulgated by the Commissioner of Internal Revenue *shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers,* except in the following cases: (a) where the taxpayer deliberately mis-states or omits material facts from his return or any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith." (Italics for emphasis)

It is clear from the foregoing that rulings or circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers. The prejudice to petitioner of the retroactive application of Memorandum Circular No. 4-71 is beyond question. It was issued only in 1971, or three years after 1968, the last year that petitioner had withheld taxes under General Circular No. V-334. The assessment and demand on petitioner to pay deficiency withholding income tax was also made three years after 1968 for a period of time commencing in 1965. Petitioner was no longer in a position to withhold taxes due from foreign corporations because it had already remitted all film rentals and no longer had any control over them when the new Circular was issued. And in so far as the enumerated exceptions are concerned, admittedly, petitioner does not fall under any of them.

Respondent claims, however, that the provision on non-retroactivity is inapplicable in the present case in that General Circular No. V-334 is a nullity because, in effect, it changed the law on the matter. The Court of Tax Appeals sustained this position holding that: "Deductions are wholly and exclusively within the power of Congress or the law-making body to grant, condition or deny; and where the statute imposes a tax equal to a specified rate or percentage of the gross or entire amount received by the taxpayer, the authority of some administrative officials to modify or change, much less reduce, the basis or

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measure of the tax should not be read into law."[4] Therefore, the Tax Court concluded, petitioner did not acquire any vested right thereunder as the same was a nullity.

The rationale behind General Circular No. V-334 was clearly stated therein, however: "It ha(d) been determined that the tax is still imposed on income derived from capital, or labor, or both combined, in accordance with the basic principle of income taxation . . . and that a mere return of capital or investment is not income . . . ." "A part of the receipts of a non-resident foreign film distributor derived from said film represents, therefore, a return of investment." The circular thus fixed the return of capital at 50% to simplify the administrative chore of determining the portion of the rentals covering the return of capital.[5]

Were the "gross income" base clear from Sec. 24(b), perhaps, the ratiocination of the Tax Court could be upheld. It should be noted, however, that said Section was not too plain and simple to understand. The fact that the issuance of the General Circular in question was rendered necessary leads to no other conclusion than that it was not easy of comprehension and could be subjected to different interpretations.

In fact, Republic Act No. 2343, dated June 20, 1959, *supra,* which was the basis of General Circular No. V-334, was just one in a series of enactments regarding Sec. 24(b) of the Tax Code. Republic Act No. 3825 came next on June 22, 1963 without changing the basis but merely adding a proviso (in bold letters).

"(b) *Tax on foreign corporation.*— (1) *Non-resident corporations.*— There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by the preceding paragraph, upon the amount received by every foreign corporation not engaged in trade or business within the Philippines, from all sources within the Philippines, as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits and income, a tax equal to thirty *per centum of such amount*: PROVIDED,

[4] Decision, Annex "A", Rollo, p. 41.

[5] Comment of Commissioner of Internal Revenue, p. 3.

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HOWEVER, THAT PREMIUMS SHALL NOT INCLUDE REINSURANCE PREMIUMS." (double emphasis ours)

Republic Act No. 3841, dated likewise on June 22, 1963, followed after, omitting the proviso and inserting some words (also in bold letters).

"(b) *Tax on foreign corporations.*— (1) *Non-resident corporations.*— There shall be levied, collected and paid for each taxable year, in lieu of the tax imposed by the preceding paragraph, upon the amount received by every foreign corporation not engaged in trade or business within the Philippines, from all sources within the Philippines, as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical OR CASUAL gains, profits and income, AND CAPITAL GAINS, a tax equal to thirty *per centum of such amount.*"[6] (double emphasis supplied)

The principle of legislative approval of administrative interpretation by re-enactment clearly obtains in this case. It provides that "the re-enactment of a statute substantially unchanged is persuasive indication of the adoption by Congress of a prior executive construction."[7] Note should be taken of the fact that this case involves not a mere opinion of the Commissioner or ruling rendered on a mere query, but a Circular formally issued to "all internal revenue officials" by the then Commissioner of Internal Revenue.

It was only on June 27, 1968 under Republic Act No. 5431, *supra,* which became the basis of Revenue Memorandum Circular No. 4-71, that Sec. 24(b) was amended to refer specifically to 35% of the "*gross income.*"

This Court is not unaware of the well-entrenched principle that the Government is never estopped from collecting taxes because

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[6] The omission of the proviso "*Provided, however,* That premiums shall not include reinsurance premiums" appears to be due to oversight as the purpose of the amendment was to include capital gains in gross income of foreign non-resident corporations. See footnote 13, Filipinas Life Assurance Co. *vs.* Court of Tax Appeals, 21 SCRA 622 (1967).

[7] Biddle *vs.* Commissioner, 302 U.S., 573 (1938); Alexander Howden & Co., Ltd. *vs.* Collector of Internal Revenue, 13 SCRA 601 (1965).

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of mistakes or errors on the part of its agents.[8] In fact, utmost caution should be taken in this regard.[9] But, like other principles of law, this also admits of exceptions in the interest of justice and fairplay. The insertion of Sec. 338-A into the National Internal Revenue Code, as held in the case of Tuason, Jr. *vs.* Lingad,[10] is indicative of legislative intention to support the principle of good faith. In fact, in the United States, from where Sec. 24(b) was patterned, it has been held that the Commissioner or Collector is precluded from adopting a position inconsistent with one previously taken where injustice would result therefrom,[11] or where there has been a misrepresentation to the taxpayer.[12]

We have also noted that in its Decision, the Court of Tax Appeals further required the petitioner to pay interest and surcharge as provided for in Sec. 51(e) of the Tax Code in addition to the deficiency withholding tax of ₱525,897.06. This additional requirement is much less called for because the petitioner relied in good faith and religiously complied with no less than a Circular issued "to all internal revenue officials" by the highest official of the Bureau of Internal Revenue and approved by the then Secretary of Finance.[13]

With the foregoing conclusions arrived at, resolution of the issue of prescription becomes unnecessary.

WHEREFORE, the judgment of the Court of Tax Appeals is hereby reversed, and the questioned assessment set aside. No costs.

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[8] Visayan Cebu Terminal Co., Inc. *vs.* Commissioner of Internal Revenue, 13 SCRA 357 (1965); Zamora *vs.* Court of Tax Appeals, 36 SCRA 77 (1970); Balmaceda *vs.* Corominas & Co., Inc. 66 SCRA 555 (1975).

[9] Senator James Couzens, 11 BTA 1040 (1928), 48 Harvard Law Review 1281, 1300, cited in 10A Metens, Law of Federal Income Taxation, Sec. 60. 13, p. 189.

[10] 58 SCRA 170 (1974).

[11] Ford Motor Co. *vs.* U.S., 9 F. Supp. 590 (1935).

[12] J. W. Carter Music Co. *vs.* Bass, 20 F. 2d 390 (1927).

[13] Tuason, Jr. *vs.* Lingad, 58 SCRA 170 (1974); Connel Bros. Co. (Phil.) *vs.* Collector of Internal Revenue, 10 SCRA 470 (1964).

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SO ORDERED.

Makasiar, Fernandez, Guerrero and *De Castro*, JJ.*, concur.

EN BANC

[Adm. Mat. No. P-2095. October 23, 1981]

ELISEO M. TENZA, complainant, *vs.* RODOLFO M. ESPINELLI, respondent.

SYNOPSIS

Respondent, a deputy sheriff of Quezon City, was charged with grave misconduct in office for inflicting physical injuries on the complainant who was at the sixth floor of the Quezon City Hall, on his way to the Court of First Instance of Rizal, in Quezon City. He denied the charge explaining that he simply acted in self-defense as the complainant, who took offense to his questions on pertinent documents relating to a case involving respondent's parents, of which complainant was the counsel-of-record, assaulted him with fistic blows, basis of a criminal case he thereafter filed against him. The Executive Judge, Hon. Aloysius Alday, to whom the case was referred for investigation by the Court Administrator, found respondent guilty of inflicting the physical injuries complained of and recommended his resignation without prejudice to reinstatement.

The Supreme Court held that to be guilty of misconduct in office, the acts complained of must be such as affects respondent's performance of his duties as an officer and not such only as affects his character as a private individual. The respondent's conduct did not have any relation to his work but as he inflicted physical injuries on a member of the Philippine Bar in the building where the court rooms are located, he should be punished with the penalty of suspension from office for a period of four months, the same not to be charged to his accumulated leave. The decision must be made part of his personal record.

The opinion obtained the vote of 7 members, lacking one vote to constitute a majority. Justices Barredo and Melencio-Herrera voted for one month suspension while Justices Aquino and De Castro voted for exoneration. In view thereof, the penalty to be imposed was limited to one month, the

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* *De Castro, J.*, was designated to sit in the First Division, *Teehankee, J.*, being on official leave.