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(G.R. No. 88291. May 31, 1991)

ERNESTO M. MACEDA, *petitioner,* vs. HON. CATALINO MACARAIG, JR., in his capacity as Executive Secretary, Office of the President; HON. VICENTE R. JAYME, in his capacity as Secretary of the Department of Finance; HON. SALVADOR MISON, in his capacity as Commissioner, Bureau of Customs; HON. JOSE U. ONG, in his capacity as Commissioner of Internal Revenue; NATIONAL POWER CORPORATION; the FISCAL INCENTIVES REVIEW BOARD; Caltex (Phils.) Inc.; Pilipinas Shell Petroleum Corporation; Philippine National Oil Corporation; and Petrophil Corporation, *respondents.*

SYLLABUS

1. **REMEDIAL LAW; SPECIAL CIVIL ACTION; MANDAMUS; CASE OF MERALCO SECURITIES CORPORATION *VS.* SAVELLANO, 117 SCRA 804 (1982), APPLIED.--** In Meralco Securities Corporation *vs.* Savellano, 117 SCRA 804 (1982), this Court recognizes the situation when mandamus can control the discretion of the Commissioners of Internal Revenue and Customs when the exercise of discretion is tainted with arbitrariness and grave abuse as to go beyond statutory authority.

2. **ID.; ID.; WRIT OF PROHIBITION; ISSUANCE THEREOF PROPER IN CASE AT BAR.--** Public respondents assert that a writ of prohibition is not proper as its function is to prevent an unlawful exercise of jurisdiction or to prevent the oppressive exercise of legal authority. Precisely, petitioner questions the lawfulness of the acts of public respondents in this case.

3. **TAXATION; TAXPAYERS SUIT; TO PROSPER DIRECT INJURY TO THE PETITIONER NOT NECESSARY; WHERE ISSUE INVOLVES ILLEGAL EXPENDITURE OF PUBLIC MONEY.--** In the petition

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it is alleged that petitioner is "instituting this suit in his capacity as a taxpayer and a duly-elected Senator of the Philippines." Public respondent argues that petitioner must show he has sustained direct injury as a result of the action and that it is not sufficient for him to have a mere general interest common to all members of the public. The Court however agrees with the petitioner that as a taxpayer he may file the instant petition following the ruling in Lozada *vs.* Commission on Elections, 120 SCRA 237 (1983) when it involves illegal expenditure of public money. The petition questions the legality of the tax refund to NPC by way of tax credit certificates and the use of said assigned tax credits by respondent oil companies to pay for their tax and duty liabilities to the BIR and Bureau of Customs.

4. ID.; APPEAL; COURT OF TAX APPEALS; SECTION 7 OF REPUBLIC ACT NO. 125; NOT APPLICABLE IN CASE AT BAR.-- Assuming petitioner has the personality to file the petition, public respondents also allege that the proper remedy for petitioner is an appeal to the Court of Tax Appeals under Section 7 of R.A. No. 125 instead of this petition. However Section 11 of said law provides - "Sec. 11. Who may appeal; effect of appeal - Any person, association or corporation adversely affected by a decision or ruling of the Commissioner of Internal Revenue, the Collector of Customs (Commissioner of Customs) or any provincial or City Board of Assessment Appeals may file an appeal in the Court of Tax Appeals within thirty days after receipt of such decision or ruling." From the foregoing, it is only the taxpayer adversely affected by a decision or ruling of the Commissioner of Internal Revenue, the Commissioner of Customs or any provincial or city Board of Assessment Appeal who may appeal to the Court of Tax Appeals. Petitioner does not fall under this category.

5. ID.; DISTINCTION BETWEEN DIRECT AND INDIRECT TAXES.-- A direct tax is a tax for which a taxpayer is directly liable on the transaction or business it engages in. Examples are the custom duties and *ad valorem* taxes paid by the oil companies to the Bureau of Customs for their importation of crude oil, and the specific and *ad valorem* taxes they pay to the Bureau of Internal Revenue after converting the crude oil into petroleum products. On the other hand, "indirect taxes are taxes primarily paid by persons who can shift the burden upon someone

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else." For example, the excise and *ad valorem* taxes that oil companies pay to the Bureau of Internal Revenue upon removal of petroleum products from its refinery can be shifted to its buyer, like the NPC, by adding them to the "cash" and/or "selling price."

6. **ID.; CASE OF NATIONAL POWER CORPORATION *VS.* PROVINCE OF ALBAY (G.R. NO. 87479, JUNE 4, 1990) MODIFIED OR SUPERSEDED IN CASE AT BAR.--** In the case of National Power Corporation *vs.* Province of Albay, the Court observed that under P.D. No. 776 the power of the FIRB was only recommendatory and requires the approval of the President to be valid. Thus, in said case the Court held that FIRB Resolutions Nos. 10-85 and 1-86 not having been approved by the President were not valid and effective while the validity of FIRB 17-87 was upheld as it was duly approved by the Office of the President on October 5, 1987. However, under Section 2 of P.D. No. 1931 of June 11, 1984, which amended P.D. No. 776, it is clearly provided for that such FIRB resolution, may be approved by the "President of the Philippines and/or the Minister of Finance." To repeat, as FIRB Resolutions Nos. 10-85 and 1-86 were duly approved by the Minister of Finance, hence they are valid and effective. To this extent, this decision modifies or supersedes the Court's earlier decision in National Power Corporation *vs.* Province of Albay.

7. **ID.; NATIONAL POWER CORPORATION; EXEMPT FROM BOTH *DIRECT* AND *INDIRECT* TAXES. --** Under R.A. No. 358, the exemption of the National Power Corporation was worded in general terms, as to cover "*all* taxes, duties, fees, imposts, charges, etc. . . ." However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemption. Subsequently, P.D. No. 380, made even more specific the details of the exemption of NPC to cover, among others, *both direct and indirect taxes* on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from "*all forms of taxes*, duties, fees, imposts, as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." The use of the phrase "all forms" of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before.

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8. ID.; ID.; ID.; RATIONALE.-- The rationale for this exemption is that being non-profit the NPC "shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion. To enable the Corporation to pay the indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, . . ." The preamble of P.D. No. 938 states - "WHEREAS, in the application of the tax exemption provision of the Revised Charter, the non-profit character of the NPC has not been fully utilized *because of restrictive interpretations of the taxing agencies of the government on said provisions. . . .*"

9. ID.; ID.; GRANT OF TAX EXEMPTION; INTERPRETED LIBERALLY IN FAVOR OF A GOVERNMENT INSTRUMENTALITY.-- The lawmaker did not intend that the said provisions of P.D. No. 938 shall be construed strictly against NPC. On the contrary, the law mandates that it should be interpreted liberally so as to enhance the tax-exempt status of NPC. Hence, petitioner cannot invoke the rule on *strictissimi juris* with respect to the interpretation of statutes granting tax exemptions to NPC. Moreover, it is a recognized principle that the rule on strict interpretation does not apply in the case of exemptions in favor of a government political subdivision or instrumentality.

10. ID.; ID.; ID.; FROM INDIRECT TAXES; NOT REPEALED BY PRESIDENTIAL DECREE NO. 938; REPEAL BY IMPLICATION NOT FAVORED.-- The contention of petitioner that the exemption of NPC from indirect taxes under Section 13 of R.A. No. 6395 and P.D. No. 380, is deemed repealed by P.D. No. 938 when the reference to it was deleted is not well-taken. Repeal by implication is not favored unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with knowledge of all existing ones on the subject, it is logical to conclude that in passing a statute it is not intended to interfere with or abrogate a former law relating to the same subject matter, unless the repugnancy between the two is not only irreconcilable but also clear and convincing as a result of the language used, or unless the latter Act fully embraces the subject matter of the earlier. The first effort of a court must always be to reconcile or adjust the provisions of one statute with those of another so as to give sensible

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effect to both provisions. The legislative intent must be ascertained from a consideration of the statute as a whole, and not of an isolated part or a particular provision alone. When construing a statute, the reason for its enactment should be kept in mind and the statute should be construed with reference to its intended scope and purpose and the evil sought to be remedied. The NPC is a government instrumentality with the enormous task of undertaking development of hydroelectric generation of power and production of electricity from other sources, as well as the transmission of electric power on a nationwide basis, to improve the quality of life of the people pursuant to the State policy embodied in Section E, Article II of the 1987 Constitution. It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from *all forms* of taxes including indirect taxes as provided for under R.A. No. 6395 and P.D. No. 380 if it is to attain its goals.

11. ID.; PRESIDENTIAL DECREE NO. 938; CONSTRUCTION AND INTERPRETATION BY OFFICE CHARGED WITH THE IMPLEMENTATION THEREOF GIVEN WEIGHT. - The construction of P.D. No. 938 by the Office charged with its implementation should be given controlling weight. Since the May 8, 1985 ruling of Commissioner Ancheta, to the letter of the Secretary of Finance of June 26, 1985 confirming said ruling, the letters of the BIR of August 18, 1986, and December 22, 1986, the letter of the Secretary of Finance of February 19, 1987, the Memorandum of the Executive Secretary of October 9, 1987, by authority of the President, confirming and approving FIRB Resolution No. 17-87, the letter of the Secretary of Finance of May 20, 1988 to the Executive Secretary rendering his opinion as requested by the latter, and the latter's reply of June 15, 1988, it was uniformly held that the grant of tax exemption to NPC under C.A. No. 120, as amended, *included exemption from payment of all taxes relative to NPC's petroleum purchases including indirect taxes*. The Court finds and so holds that the foregoing reasons adduced in the aforestated letter of the Secretary of Finance as confirmed by the then Executive Secretary are well-taken. When the NPC was exempted from *all forms of taxes, duties, fees, imposts and other charges*, under P.D. No. 938, it means exactly what it says, *i.e., all forms of taxes* including those that were imposed directly or indirectly on petroleum products used in its operation.

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12. ID.; CASE OF PHILIPPINE ACETYLENE CO., INC. *VS.* COMMISSIONER OF INTERNAL REVENUE, 20 SCRA 1056 (1967); NOT APPLICABLE IN CASE AT BAR.-- The doctrine in *Philippine Acetylene* decided in 1967 by this Court cannot apply to the present case. It involved the sales tax of products the plaintiff sold to NPC from June 2, 1953 to June 30, 1958 when NPC was enjoying tax exemption from all taxes under Commonwealth Act No. 120, as amended by Republic Act No. 358 issued on June 4, 1949 hereinabove reproduced. In said case, this Court held, that the sales tax is due from the manufacturer and not the buyer, so plaintiff cannot claim exemptions simply because the NPC, the buyer, was exempt. However, on September 10, 1971, Republic Act No. 6395 was passed as the revised charter of NPC whereby Section 13 thereof was amended by emphasizing its non-profit character and expanding the extent of its tax exemption. As petitioner concedes, Section 13(d) aforestated of this amendment under Republic Act No. 6345 spells out clearly the exemption of the NPC from indirect taxes. And as hereinabove stated, in P.D. No. 380, the exemption of NPC from indirect taxes was emphasized when it was specified to include those imposed "directly and indirectly". Thereafter, under P.D. No. 938 the tax exemption of NPC was integrated under Section 13 defining the same in general terms to cover "*all forms* of taxes, duties, fees, imposts, etc." which, as hereinabove discussed, logically includes exemption from indirect taxes on petroleum products used in its operation. This is the status of the tax exemptions the NPC was enjoying when P.D. No. 1931 was passed, on the authority of which FIRB Resolution Nos. 10-85 and 1-86 were issued, and when Executive Order No. 93 was promulgated, by which FIRB Resolution 17-87 was issued. Thus, the ruling in *Philippine Acetylene* cannot apply to this case due to the different environmental circumstances. As a matter of fact, the amendments of Section 13, under R.A. No. 6395, P.D. No. 380 and P.D. No. 838 appear to have been brought about by the earlier inconsistent rulings of the tax agencies due to the doctrine, in *Philippine Acetylene*, so as to leave no doubt as to the exemption of the NPC from indirect taxes on petroleum products it uses in its operation. Effectively, said amendments superseded if not abrogated the ruling in *Philippine Acetylene* that the tax exemption of NPC should be limited to direct taxes only.

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13. ADMINISTRATIVE LAW; DEPARTMENT SECRETARY; MAYBE OVERRULED BY EXECUTIVE SECRETARY; CASE AT BAR. - Section 2 of E.O. No. 93 provides: "Section 2. The Fiscal Incentives Review Board created under Presidential Decree No. 776, as amended, is hereby authorized to: a) restore tax and/or duty exemptions withdrawn hereunder in whole or in part; b) revise the scope and coverage of tax and/or duty exemption that may be restored; c) impose conditions for the restoration of tax and/or duty exemption; d) prescribe the date or period of effectivity of the restoration of tax and/or duty exemption; e) formulate and submit to the President for approval, a complete system for the grant of subsidies to deserving beneficiaries, in lieu of or in combination with the restoration of tax and duty exemptions or preferential treatment in taxation, indicating the source of funding therefor, eligible beneficiaries and the terms and conditions for the grant thereof taking into consideration the international commitments of the Philippines and the necessary precautions such that the grant of subsidies does not become the basis for countervailing action. The then Secretary of Justice in Opinion No. 77 dated August 6, 1977 was of the view that the powers conferred upon the FIRB by Sections 2(a), (b), (c), and (d) of Executive Order No. 93 constitute undue delegation of legislative power and is therefore unconstitutional. However, he was overruled by the respondent Executive Secretary in a letter to the Secretary of Finance dated march 30, 1989. The Executive Secretary, by authority of the President, has the power to modify, alter or reverse the construction of a statute given by a department secretary.

14. CONSTITUTIONAL LAW; NON-DELEGATION OF LEGISLATIVE POWER; STANDARD TEST; IMPLIED UNDER SECTION 3 OF EXECUTIVE ORDER 93.-- A reading of Section 3 of E.O. No. 93 which provides: "SECTION 3. In the discharge of its authority hereunder, the Fiscal Incentives Review Board shall take into account any or all of the following considerations: a) *the effect on relative price levels;* b) *relative contribution of the beneficiary to the revenue generation effort;* c) *nature of the activity the beneficiary is engaged;* d) *in general, the greater national interest to be served,*" Shows that it set the policy to be the greater national interest. The standards of the delegated power are also clearly provided for. The required "standard" need not be expressed. In *Edu vs. Ericta* and in *De*

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la Llana vs. Alba, this Court held: "The standard may be either express or implied. In the former, the non-delegated objection is easily met. The standard though does not have to be spelled out specifically. It could be implied from the policy and purpose of the act considered as a whole." In *People vs. Rosenthal* the broad standard of "public interest" was deemed sufficient. In *Calalang vs. Williams*, it was "public welfare" and in *Cervantes vs. Auditor General*, it was the purpose of promotion of "simplicity, economy and efficiency." And, implied from the purpose of the law as a whole, "national security" was considered sufficient standard and so was "protection of fish-fry or fish eggs".

15. ID.; ID.; CASE OF TABLARIN *VS.* GUTIERREZ, 152 SCRA 730 (1981); ENUNCIATED THE RATIONALE IN FAVOR OF DELEGATION OF LEGISLATIVE FUNCTIONS.-- In the case of *Tablarin vs. Gutierrez*, this Court enunciated the rationale in favor of delegation of legislative functions - "One thing however, is apparent in the development of the principle of separation of powers and that is that the maxim of *delegatus non potest delegare* or *delegati potestas non potest delegare*, adopted this practice (Delegibus et Consuetudiniis, Anglia edited by G.E. Woodline, Yale University Press, 1922, Vol. 2, p. 167) but which is also recognized in principle in the Roman Law (d. 17.18.3) *has been made to adapt itself to the complexities of modern government, giving rise to the adoption, within certain limits, of the principle of subordinate legislation, not only in the United States and England but in practically all modern governments.* (People *vs.* Rosenthal and Osmeña, 68 Phil. 318, 1939). *Accordingly, with the growing complexities of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater power by the legislative, and toward the approval of the practice by the Courts.*"

16. ID.; ID.; EXECUTIVE ORDER NO. 93; CONSTITUTIONALITY THEREOF UPHELD.-- The legislative authority could not or is not expected to state all the detailed situations wherein the tax exemption privileges of persons or entities would be restored. The task may be assigned to an administrative body like the FIRB. Moreover, all presumptions are indulged in favor of the constitutionality and validity of the statute.

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Such presumption can be overturned if its invalidity is proved beyond reasonable doubt. Otherwise, a liberal interpretation in favor of constitutionality of legislation should be adopted. E.O. No. 93 is complete in itself and constitutes a valid delegation of legislative power to the FIRB. And as above discussed, the tax exemption privilege that was restored to NPC by FIRB Resolution No. 17-87 of June 1987 includes exemption from indirect taxes and duties on petroleum products used in its operation.

17. ID.; ID.; PRESIDENTIAL DECREE NOS. 776 AND 1931; CONSTITUTIONALITY UPHELD IN THE CASE OF NATIONAL POWER CORPORATION *VS.* PROVINCE OF ALBAY (G.R. NO. 87479, JUNE 4, 1990).-- In *Albay*, this Court upheld the validity of P.D. Nos. 776 and 1931. The latter decree withdrew tax exemptions of government-owned or controlled corporations including their subsidiaries but authorized the FIRB to restore the same. Nevertheless, in *Albay*, this Court ruled that the tax exemptions under FIRB Resolution Nos. 10-85 and 1-86 cannot be enforced as said resolutions were only recommendatory and were not duly approved by the President of the Philippines as required by P.D. No. 776. The Court also sustained in *Albay* the validity of Executive Order No. 93, and of the tax exemptions restored under FIRB Resolution No. 17-87 which was issued pursuant thereto, as it was duly approved by the President as required by said executive order. Moreover, under Section 3, Article XVIII of the Transitory Provisions of the 1987 Constitution, it is provided that: "All existing laws, decrees, executive orders, proclamation, letters of instructions, and other executive issuances not inconsistent with this constitution shall remain operative until amended, repealed or revoked." Thus, P.D. Nos. 776 and 1931 are valid and operative unless it is shown that they are inconsistent with the Constitution.

18. ID.; LATEST LAW APPLICABLE ON TAX EXEMPTION OF NATIONAL POWER CORPORATION.-- Even assuming *arguendo* that P.D. Nos. 776, 1931 and Executive Order No. 93 are not valid and are unconstitutional, the result would be the same, as then the latest applicable law would be P.D. No. 938 which amended the NPC charter by granting exemption to NPC from *all forms of taxes*. This exemption of NPC covers direct and indirect taxes on petroleum products used in its operation. This is as it should be, if We are to hold as invalid and

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inoperative the withdrawal of such tax exemptions under P.D. No. 1931 as well as under Executive Order No. 93 and the delegation of the power to restore these exemptions to the FIRB.

19. ID.; GRANT OF TAX EXEMPTION TO NATIONAL POWER CORPORATION NOT A CASE OF TAX EVASION.-- This tax exemption is intended not only to insure that the NPC shall continue to generate electricity for the country but more importantly, to assure cheaper rates to be paid by the consumers. The allegations that this is in effect allowing tax evasion by oil companies is not quite correct. There are various arrangements in the payment of crude oil purchased by NPC from oil companies. Generally, the custom duties paid by the oil companies are added to the selling price paid by NPC. As to the specific and *ad valorem* taxes, they are added as part of the seller's price, but NPC pays the price net of tax, on condition that NPC would seek a tax refund to the oil companies. No tax component on fuel had been charged or recovered by NPC from the consumers through its power rates. Thus, this is not a case of tax evasion of the oil companies but of tax relief for the NPC.

CRUZ, *J.*, *dissenting opinion:*

1. TAXATION; GRANT OF TAX EXEMPTION; STRICTLY CONSTRUED.-- A tax exemption represents a loss of revenue to the State and must therefore not be lightly granted or inferred. When claimed, it must be strictly construed against the taxpayer, who must prove that he comes under the exemption rather than the rule that every one must contribute his just share in the maintenance of the government.

2. ID.; ID.; STRICT INTERPRETATION SHOULD BE APPLIED EVEN WHERE THE GRANTEE IS A GOVERNMENT AGENCY.-- The *ponencia* holds that the rule of strict construction is not applicable where the grantee is an agency of the government itself, like the NPC in the case before us. I notice, however, that the ultimate beneficiaries of the expected tax credit will be the oil companies, which certainly are not part of the Republic of the Philippines. As the tax refunds will not be enjoyed by the NPC itself, I see no reason why we should be exceptionally lenient in applying the exception.

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3. **ID.; ID.; ADMINISTRATIVE BODY WITHOUT AUTHORITY.--** It is remarkable that the respondents could seriously argue that a mere administrative body like the FIRB can exercise the legislative power to grant tax exemptions. I am not aware that any other such agency, including the Bureau of Internal Revenue and the Bureau of Customs, has this authority. An administrative body can *apply* tax exemptions under existing law but it cannot itself *create* such exemptions. This is a prerogative of the Congress that cannot be usurped by or even delegated to a mere administrative body.

4. **CONSTITUTIONAL LAW; PRESIDENTIAL DECREE NOS. 1931 AND 1955 AND IMPLEMENTING LAW EXECUTIVE ORDER NO. 93 INVALID AS AN ENCROACHMENT ON LEGISLATIVE PREROGATIVES.--** When P.D.. Nos. 1931 and 1955 were issued by President Marcos in 1984, the Batasang Pambansa was already in existence and discharging its legislative powers. Presumably, these decrees were promulgated under the infamous Amendment No. 6. Assuming that the reservation of legislative power in the President was then valid, I submit that the power was nevertheless not validly exercised. My reason is that the President could legislate under the said amendment only if the Batasang Pambansa "failed or was unable to act adequately on any matter that in his judgment required immediate action" to meet the "exigency." There is no showing that the presidential encroachment on legislative prerogatives was justified under these conditions. Simply because the rubber-stamp legislature then meekly submitted did not make the usurpation valid. By these decrees, President Marcos, exercising legislative power, delegated it to himself as executive and empowered himself and/or the Minister of Finance to restore the exemptions previously withdrawn. As the decrees themselves were invalid, it should follow that Executive Order No. 93, which was intended only to implement them, should also be illegal. But even assuming the legality of the said decrees, I would still question the authority of the President to sub-delegate the power delegated to her thereunder. Such sub-delegation was not permissible because *potestas delegata non delegari potest*. Even if we were to disregard the opinion of Secretary of Justice Sedfrey A. Ordoñez that there were no sufficient standards in Executive Order No. 93 (although he was reversed on this legal questions by the Executive Secretary). The

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President's delegated authority could still not be extended to the FIRB, which was not a delegate of the legislature.

5. ID.; ARTICLE VIII, SECTION 17 (4) OF THE 1973 CONSTITUTION (ARTICLE VI, SECTION 28 [4] OF THE 1987 CONSTITUTION); VIOLATED IN CASE AT BAR.-- When P.D.. Nos. 1931 and 1955 were issued by President Marcos, the rule under the 1973 Constitution was that "no law granting a tax exemption shall be passed without the concurrence of a majority of all the members of the Batasang Pambansa." (Art. VIII, Sec. 17[4]). Laws are usually passed by only a majority of those present in the chamber, there being a quorum, but not where it grants a tax exemption. This requires an absolute majority. Yet, despite this stringent limitation on the national legislature itself, such stricture does not inhibit the President and the FIRB in the exercise of their delegated power. It would seem that the delegate has more power than the principal. Significantly, this limitation is maintained in the present Constitution under Article VI, Section (28(4).

SARMIENTO, *J.*, *dissenting opinion:*

1. TAXATION; GRANT OF TAX EXEMPTION; PRESIDENTIAL DECREE NO. 776 WITHOUT AUTHORITY; MERELY RECOMMENDATORY BODY.-- I wish to stress that in the case of National Power Corporation *v.* Province of Albay, G.R. No. 87479, June 4, 1990, the Court held that the FIRB Resolutions Nos. 10-85 and 1-86 had the bare force of recommendations and did not operate as a restoration, in the absence of an approval by the President (in then President Marcos' exercise of legislative powers), of tax exemptions. The Court noted that there is nothing in Presidential Decree No. 776, the FIRB charter, conferring on it the authority to grant or restore exemptions, other than to make recommendations on what exemptions to grant or restore. I quote: It is to be pointed out that under Presidential Decree No. 776, the power of the FIRB was merely to "recommend to the President of the Philippines and for reasons of compatibility with the declared economic policy, the withdrawal, modification, revocation or suspension of the enforceability of any of the abovecited statutory subsidies or tax exemption grants, except those granted by the Constitution." It has no authority to impose taxes or revoke existing

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ones, which, after all, under the Constitution, only the legislature may accomplish.

2. **ID.; ID.; ID.; ID.; CASE AT BAR.--** While it is true that FIRB Resolutions Nos. 10-85 and 1-86 were signed by then Finance Minister Cesar Virata, I submit nonetheless, as Albay in fact held, that the signature of the Mr. Virata is not enough to restore an exemption. The reason is that Mr. Virata signed them (FIRB Resolutions Nos. 10-85 and 1-86) in his capacity as chairman of the Finance Incentives Review Board (FIRB). I respectfully submit that to say that Mr. Virata's signature is sufficient (please note that Resolution No. 10-85 was not even signed by Mr. Virata, but rather by Mr. Alfredo Pio de Roda, Jr.) is in fact to confer on the Board actual "restoration" or even exemption powers, because in all cases, FIRB Resolutions are signed by Mr. Virata (or the acting chairman) in his capacity as Board Chairman. I submit that we can not consider an FIRB Resolution as an act of Mr. Virata in his capacity as Minister of Finance (and therefore, as a grant or restoration of tax exemption) although Mr. Virata also happened to be concurrently, Minister of Finance, because to do so would be to blur the distinction between the capacities in which he, Mr. Virata, actually acted. I submit that he, Mr. Virata, need have issued separate approvals of the Resolutions in question, in his capacity as Finance Minister.

3. **ID.; ID.; EXECUTIVE ORDER NO. 93 DOES NOT DELEGATE POWER TO RESTORE; AUTHORITY GRANTED MERELY RECOMMENDATORY.--** Insofar as it "delegates" the power to restore exemptions to the FIRB, I hold that in the first place, Executive Order No. 93 makes no delegation at all. As the majority points out, "[u]nder Section 1(f) of Executive Order No. 93, aforestated, such tax and duty exemptions extended by the FIRB must be approved by the President." Hence, the FIRB does not exercise any power--and as I had held, its powers are merely recommendatory--and it is the President who in fact exercises it. It is true that Executive Order No. 93 has set out certain standards by which the FIRB, as a reviewing body, may act, but I do not believe that a genuine delegation question has arisen because precisely, the acts of the Board are subject to approval by the President, in the exercise of her legislative powers under the Freedom Constitution.

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4. ID.; "*INDIRECT TAXES*"; INEXISTENT FOR PURPOSES OF EXEMPTION; CASE OF *PHILIPPINE ACETYLENE CO., INC.* (G.R. NO. L-19707, AUG. 17, 1967, SCRA 1056).-- In *Philippine Acetylene Co., Inc., supra*, the Court intimated that there are no such things as indirect taxes for purposes of exemption, and that the National Power Corporation's exemption from taxes can not be claimed, as well, by a manufacturer (who sells his products to the Corporation) on the theory that the taxes he will shift will be shifted to a tax-exempt entity. According to the Court, "the purchaser does not pay the tax . . . [h]e pays or may pay the seller more for the goods because of the seller's obligation, but that is all, and the amount added because of the tax is paid to get the goods and for nothing else." It is true that a tax may be shifted, that is, to enable the payor to escape its effects by adding it to the price, thereby transferring the burden to the purchaser of whom the incidence of the tax settles (indirect tax). I submit, however, that it is only for purposes of *escape* from taxation. As *Acetylene* has clarified, the tax which the manufacturer is liable to pay directly under a statute is still a personal tax and in "passing the tax on" to the purchaser, he does not really make the latter pay the tax, and what the latter pays actually is just the price. Thus, for purposes of exemption, and so *Acetylene* tells us, the manufacturer can not claim one because the purchaser happens to be exempted from taxes. *Mutatis mutandis*, and so I respectfully submit, the purchaser can not be allowed to accept the goods "net of tax" because it never paid for the tax in the first place, and was never liable therefor, in the second place.

5. ID.; ID.; ID.; ID.; NOT DEEMED ABROGATED.-- According to the majority, *Philippine Acetylene* has been "abrogated," and the majority points to the various amendments to the charter of the National Power Corporation as authority for its view. First, there is nothing in those amendments that would remotely point to this conclusion. Second, *Acetylene's* pronoucement is founded on the very science of taxation-- that indirect taxes are no taxes for purposes of exemption, and that consequently, one who did not pay taxes can not claim an exemption although the price he paid for the goods included taxes. To enable him to claim an exemption, as the majority would now enable him (*Acetylene* having been "abrogated"), is, I submit, to defeat the very laws of science. The theory of "indirect taxes"

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and that *no* exemption is possible therefrom, so I reiterate, are well-settled concepts of taxation, as the law of supply and demand is to the law of economics. A President is said (unfairly) to have attempted it, but one can not repeal the law on supply and demand.

6. ID.; TAX PREFERENTIAL TREATMENT IN FAVOR OF NATIONAL POWER CORPORATION; "*INDIRECT TAXES*" NOT INCLUDED.-- I do not find the National Power Corporation's alleged exemption from indirect tax evident, as the majority finds it evident, from the Corporation's charter, Republic Act No. 6395, as amended by Presidential Decrees Nos. 380 and 938. It is true that since Commonwealth Act No. 120 (the Corporation's original charter, which Republic Act No. 6395 repealed), the Corporation has enjoyed a "preferential tax treatment," I seriously doubt, however, whether or not that preference embraces "indirect taxes" as well--which, as I said, are no taxes for purposes of claims for exemptions by the "indirect payor". And albeit Presidential Decree No. 938 refers to "all forms of taxes," I can not take that to include, as a matter of logic, "indirect taxes," and as I discussed above, that scenario is not possible. I quite agree that the legislative intent, based on a perusal of Republic Act No. 6395 and subsequent amendatory statutes, was to give the National Power Corporation a broad tax preference on account of the vital functions it performs, indeed, "to enable the Corporation to pay the indebtedness and obligation and in furtherance and effective implementation of the policy initiated" by its charter. I submit, however, that that alone can not entitle the Corporation to claim an exemption for indirect taxes. I also believe that its existing exemption from direct taxes is sufficient to serve the legislative purpose. The fact that the National Power Corporation has been tasked with an enormous undertaking "to improve," as the majority puts it, "the quality of life of the people" pursuant to constitutional mandates is no reason, I believe, to include indirect taxes within the coverage of its preferential tax treatment. After all, it is exempt from direct taxes, and in fact that it will be made to shoulder indirect taxes (which are no taxes) will not defeat its exemption or frustrate the intent of both legislature and Constitution.

7. ID.; TAX LAWS GRANTING EXEMPTION TO NATIONAL POWER CORPORATION; CONSTRUCTION AND INTERPRETATION GIVEN BY

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EXECUTIVE AUTHORITY CONFLICTING. - I do not think that the majority can point to the various executive constructions as authorities for its own construction. First and foremost, with respect to then Commissioner Ruben Ancheta's ruling of May 8, 1985 cited on pages 32-33 of the Decision, it is notable that in his BIR Ruling No. 183-85, dated October 22, 1985, he in fact reversed himself, I quote: In reply please be informed that after a re-study of Section 13, R.A. 6395 as amended by P.D. No. 938, this Office is of the opinion, and so holds, that the scope of the tax exemption privilege enjoyed by *NPC* under said section covers *only taxes for which it is directly liable and not on taxes which are merely shifted to it.* (Phil. Acetylene Co. *v.* Comm. of Internal Revenue, 20 SCRA 1056, 1967). Since contractor's tax is directly payable by the contractor, not by NPC, your request for exemption, based on the stipulation in the aforesaid contract that NPC shall assume payment of your contractor's tax liability, cannot be granted for *lack of legal basis.* In yet another ruling, then Commissioner Bienvenido Tan likewise declared, in connection with an apparent claim for refund by the Philippine Airlines, that "PAL's tax exemption is limited to taxes for which PAL is directly liable, and that *the payment of specific and ad valorem taxes on petroleum products is a direct liability of the manufacturer or producer thereof...*" Again, under BIR Ruling No. 152-86, the Bureau of Internal Revenue reiterated, as to the National Power Corporation's claim for a refund, I quote: ". . . *this Office has maintained the stand that your tax exemption privileges covers only taxes for which you are directly liable.*" Per BIR Ruling No.70-043, dated August 27, 1970, the Bureau likewise held that the term "all forms of taxes" covers only direct taxes. In his letter addressed to former BIR Commissioner Tan, Atty. Reynoso Floreza, BIR Assistant Commissioner for Legal, opposed Caltex Philippines' claim for a P58-million refund, and although the Commissioner at that time hedged, he was later persuaded by Special Assistant Abraham De la Viña, and in fact, instructed Atty. De la Viña to "prepare [the] corresponding notice to NPC and Caltex" to inform them that their claim has been denied. (Although strangely, he changed his mind later.) Hence, I do not think that we can judiciously rely on executive construction because executive construction has been at best, erratic, and at worst, conflicting.

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8. ID.; ID.; HISTORICAL CONSTRUCTION UNRELIABLE; EXEMPTION EXCLUDES "*INDIRECT TAXES.*"-- I do not find the majority's historical construction a reliable yardstick in this case, for if the historical development of the law were any indication, the legislative intent is, on the contrary, to exclude indirect taxes from the coverage of the National Power Corporation's tax exemption. The deletion of "indirect taxes" in Presidential Decree No. 938 is, so I hold, significant, because if the intent of the law were truly to exempt the National Power Corporation from so-called indirect taxes as well, the law would have said so specifically, as it said so specifically in Presidential Decree No. 380.

9. ID.; ID.; PAYMENT OF "*INDIRECT TAXES*"; FOR THE PURPOSE OF PRESERVING PUBLIC REVENUE.-- The majority expresses the apprehension that if the National Power Corporation were to be made to assume "indirect taxes," the latter will be forced to pass them on to the consuming public. First, and as *Acetylene* held, we do not even know if the payor will in fact "pass them on." "A decision to absorb the burden of the tax is largely a matter of economics." Furthermore, "[in] the long run a sales tax is probably shifted to the consumer, but during the period when supply is being adjusted to changes in demand it must be in part absorbed. In practice the businessman will treat the levy as an added cost of operation and distribute it over his sales as he would any other cost, increasing by more than the amount of the tax prices of goods demand for which will be least affected and leaving other prices unchanged." 47 Harv. Ld. Rev. 860, 869 (1934). It therefore appears to me that any talk of the public ultimately absorbing the tax is pure speculation. Second, it has typically been the bogeyman that business, with due respect, has invoked to avoid the payment of tax. And to be sure, the populist allure of that argument has appealed to many, yet it has probably also obscured what is as fundamental as protecting consumers--preserving public revenue, the very lifeblood of the nation. I am afraid that this is not a healthy policy, and what occurs to me--and what indeed leaves me very uncomfortable--is that by the stroke of the pen, we would have in fact given away P13,750,214,639.00 (so it is said) of legitimate government money.

10. ID.; ID.; ID.; EXEMPTION THEREFROM MEANS LOSS FOR THE GOVERNMENT.-- According to the Decision, no

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tax is left unpaid because they have been pre-paid before the oil is delivered to the National Power Corporation. But whatever taxes are paid are in fact wiped out because the subsequent credit transfer will enable the oil companies to recover the taxes pre-paid. According to the majority, "[t]his is not a case of tax evasion of the oil companies but a tax relief for the NPC." The problem, precisely, is that while it is NPC which is entitled to "tax relief," the arrangement between NPC and the oil companies has enabled instead the latter to enjoy relief--when relief is due to NPC alone. The point still remains that *no* tax money actually reaches our coffers because as I said, that arrangement enables them to wipe it out. If the NPC were the direct importer, I would then have no reason to object, after all, the NPC is exempt from direct taxation and secondly, the money it is paying to finance its importations belongs to the government. The law, however, gave the exemption to NPC, not to the oil companies. According to the Decision: "The amount of revenue received or expected to be received by this tax exemption is, however, not going to any of the oil companies..." and that "[t]here would be no loss to the government." With due respect to the majority, it is erroneous, if not misleading, to say that no money is going to the oil companies and that the government is not losing anything. Definitely, the tax-credit assignment arrangement between the NPC and the oil firms enables the latter to *recover* revenue they have paid. And definitely, that means *loss* for the government.

11. ID.; EXEMPTIONS; PERSONAL PRIVILEGE OF GRANTEE; UNASSIGNABLE.-- Tax exemptions furthermore are a matter of personal privilege of the grantee. It has been held that as such, they can not be assigned, unless the statute granting them permits an assignment.

12. ID.; *SHIFTING TAX BURDEN* PERMISSIBLE BUT NOT *EVASION*.-- While "shifting the burden of tax" is a permissible method of avoiding a tax, evading it is a totally different matter. And while I agree that the National Power Corporation should be given the widest financial assistance possible, assistance should not be an excuse for plain tax evasion, if not tax fraud, by Big Business, in particular, Big Oil.

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APPEARANCES OF COUNSEL

Villamor & Villamor for petitioner.

The Solicitor General for public respondent.

Angara Abello Concepcion Regala & Cruz for Pilipinas Shell Petroleum Corp.

Siguion Reyna, Montecillo & Ongsiako for Caltex (Phils.), Inc.

DECISION

GANCAYCO, *J.*:

This petition seeks to nullify certain decisions, orders, rulings, and resolutions of respondents Executive Secretary, Secretary of Finance, Commissioner of Internal Revenue, Commissioner of Customs and the Fiscal Incentives Review Board (FIRB) for exempting the National Power Corporation (NPC) from indirect tax and duties.

The relevant facts are not in dispute.

On November 3, 1936, Commonwealth Act No. 120 created the NPC as a public corporation to undertake the development of hydraulic power and the production of power from other sources.[1]

On June 4, 1949, Republic Act No. 358 granted NPC tax and duty exemption privileges under --

"Sec. 2. To facilitate payment of its indebtedness, the National Power Corporation shall be exempt from all taxes, duties, fees, imposts, charges and restrictions of the Republic of the Philippines, its provinces, cities and municipalities."

On September 10, 1971, Republic Act No. 6395 revised the charter of the NPC wherein Congress declared as a national policy the total electrification of the Philippines through the development of power from all sources to meet the needs of industrial development and rural electrification which should be pursued coordinately and supported by all instrumentalities and agencies of

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[1] Section 1, Com. Act No. 120 (1936).

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the government, including its financial institutions.[2] The corporate existence of NPC was extended to carry out this policy, specifically to undertake the development of hydro electric generation of power and the production of electricity from nuclear, geothermal and other sources, as well as the transmission of electric power on a nationwide basis.[3] Being a non-profit corporation, Section 13 of the law provided in detail the exemption of the NPC from all taxes, duties, fees, imposts and other charges by the government and its instrumentalities.

On January 22, 1974, Presidential Decree No. 380 amended section 13, paragraphs (a) and (d) of Republic Act No. 6395 by specifying, among others, the exemption of NPC from such taxes, duties, fees, imposts and other charges imposed "directly or indirectly," on all petroleum products used by NPC in its operation. Presidential Decree No. 938 dated May 27, 1976 further amended the aforesaid provision by integrating the tax exemption in general terms under one paragraph.

On June 11, 1984, Presidential Decree No. 1931 withdrew all tax exemption privileges granted in favor of government-owned or controlled corporations including their subsidiaries.[4] However, said law empowered the President and/or the then Minister of Finance, upon recommendation of the FIRB, to restore, partially or totally, the exemption withdrawn, or otherwise revise the scope and coverage of any applicable tax and duty.

Pursuant to said law, on February 7, 1985, the FIRB issued Resolution No. 10-85 restoring the tax and duty exemption privileges of NPC from June 11, 1984 to June 30, 1985. On January 7, 1986, the FIRB issued resolution No. 1-86 indefinitely restoring the NPC tax and duty exemption privileges effective July 1, 1985.

However, effective March 10, 1987, Executive Order No. 93 once again withdrew all tax and duty incentives granted to government and private entities which had been restored under Presidential Decree Nos. 1931 and 1955 but it gave the authority

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[2] Section 1, Rep. Act No. 6395 (1971).
[3] Section 2, Rep. Act No. 6395 (1971).
[4] Section 1, Pres. Decree No. 1931 (1984).

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to FIRB to restore, revise the scope and prescribe the date of effectivity of such tax and/or duty exemptions.

On June 24, 1987 the FIRB issued Resolution No. 17-87 restoring NPC's tax and duty exemption privileges effective March 10, 1987. On October 5, 1987, the President, through respondent Executive Secretary Macaraig, Jr., confirmed and approved FIRB Resolution No. 17-87.

As alleged in the petition, the following are the background facts:

The following are the facts relevant to NPC's questioned claim for refunds of taxes and duties originally paid by respondents Caltex, Petrophil and Shell for specific and ad valorem taxes to the BIR; and for Customs duties and ad valorem taxes paid by PNOC, Shell and Caltex to the Bureau of Customs on its crude oil importation.

Many of the factual statements are reproduced from the Senate Committee on Accountability of Public Officers and Investigations (Blue Ribbon) Report No. 474 dated January 12, 1989 and approved by the Senate on April 21, 1989 (copy attached hereto as Annex "A") and are identified in quotation marks:

1. "Since May 27, 1976 when P. D. No. 938 was issued until June 11, 1984 when P. D. No. 1931 was promulgated abolishing the tax exemptions of all government-owned or-controlled corporations, the oil firms *never* paid excise or specific and ad valorem taxes for petroleum products sold and delivered to the NPC. This non-payment of taxes therefore spanned a period of eight (8) years." (par. 23, p. 7, Annex "A")

During this period, the Bureau of Internal Revenue was not collecting specific taxes on the purchases of NPC of petroleum products from the oil companies on the erroneous belief that the National Power Corporation (NPC) was exempt from indirect taxes as reflected in the letter of Deputy Commissioner of Internal Revenue (DCIR) Romulo Villa to the NPC dated October 29, 1980 granting blanket authority to the NPC to purchase petroleum products from the oil companies without payment of specific tax (copy of this letter is attached hereto as petitioner's Annex "B").

2. The oil companies started to pay specific and ad valorem taxes on their sales of oil products to NPC only after the promulgation of P.D. No. 1931 on June 11, 1984, withdrawing all exemptions granted in favor of government-owned or-controlled corporations and empowering the

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FIRB to recommend to the President or to the Minister of Finance the restoration of the exemptions which were withdrawn. "Specifically, Caltex paid the total amount of ₱58,020,110.79 in specific and ad valorem taxes for deliveries of petroleum products to NPC covering the period from October 31, 1984 to April 27, 1985." (par. 23, p. 7, Annex "A")

3. "Caltex billings to NPC until June 10, 1984 always included customs duty without the tax portion. Beginning June 11, 1984, when P.D. 1931 was promulgated abolishing NPC's tax exemptions, Caltex's billings to NPC always included both duties and taxes. (Caturla, tsn, Oct. 10, 1988, pp. 1-5)" (par. 24, p. 7, Annex "A")

4. "For the sales of petroleum products delivered to NPC during the period from October, 1984 to April, 1985, NPC was billed a total of ₱522,016,77.34 (sic) including both duties and taxes, the specific tax component being valued at ₱58,020,110.79." (par. 25, p. 8, Annex "A").

5. "Fiscal Incentives Review Board (FIRB) Resolution 10-85, dated February 7, 1985, certified true copy of which is hereto attached as Annex "C", restored the tax exemption privileges of NPC effective retroactively to June 11, 1984 up to June 30, 1985. The first paragraph of said resolution reads as follows:

> "1. Effective June 11, 1984, the tax and duty exemption privileges enjoyed by the National Power Corporation under C.A. No. 120, as amended, are restored up to June 30, 1985."

Because of this restoration (Annex "G") the NPC applied on September 11, 1985 with the BIR for a "refund of Specific Taxes paid on petroleum products in the total amount of ₱58,020,110.79." (par. 26, pp. 8-9, Annex "A")

6. In a letter to the president of the NPC dated May 8, 1985 (copy attached as petitioner's Annex "D"), Acting BIR Commissioner Ruben Ancheta declared:

> "FIRB Resolution No. 10-85 serves as sufficient basis to allow NPC to purchase petroleum products from the oil companies free of specific and ad valorem taxes, during the period in question."

The "period in question" is June 11, 1984 to June 30, 1985.

7. "On June 6, 1985, - The president of the NPC, Mr. Gabriel Itchon, wrote Mr. Cesar Virata, Chairman of the FIRB (Annex "E"), requesting "the FIRB to resolve conflicting rulings on the tax exemption privileges of the National Power Corporation (NPC)." These rulings involve FIRB Resolutions No. 1-84 and 10-85. (par. 40, p. 12, Annex "A")

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8. In a letter to the President of NPC (Annex "F"), dated June 26, 1985, Minister Cesar Virata confirmed the ruling of May 8, 1985 of Acting BIR commissioner Ruben Ancheta. (par. 41, p. 12, Annex "A")

9. On October 22, 1985, however, under BIR Ruling No. 186-85, addressed to Hanil Development Co., Ltd., a Korean contractor of NPC for its infrastructure projects, certified true copy of which is attached hereto as petitioner's Annex "E", BIR Acting Commissioner Ruben Ancheta ruled:

> "In Reply please be informed that after a re-study of Section 13, R.A. 6395, as amended by P.D. 938, this Office is of the opinion, and so holds, that the scope of the *tax exemption privilege enjoyed by NPC under said section covers only taxes for which it is directly liable and not on taxes which are only shifted to it.* (Phil. Acetylene *vs.* C.I.R. et al., G.R. L-19707, Aug. 17, 1967) Since contractor's tax is directly payable by the contractor, not by NPC, your request for exemption, based on the stipulation in the aforesaid contract that NPC shall assume payment of your contractor's tax liability, cannot be granted for lack of legal basis." (Annex "H") (italics added)

Said BIR ruling clearly states that NPC's exemption privileges covers (sic) only taxes for which it is directly liable and does not cover taxes which are only shifted to it or for indirect taxes. The BIR, through Ancheta, reversed its previous position of May 8, 1985 adopted by Ancheta himself favoring NPC's indirect tax exemption privilege.

10. Furthermore, "in a BIR Ruling, unnumbered," dated June 30, 1986, "addressed to Caltex (Annex "F"), the BIR Commissioner declared that PAL's tax exemption is limited to taxes for which PAL is directly liable, and that the payment of specific and ad valorem taxes on petroleum products is a direct liability of the manufacturer or producer thereof". (par. 51, p. 15, Annex "A")

11. "On January 7, 1986, FIRB Resolution No. 1-86 was issued restoring NPC's tax exemptions retroactively from July 1, 1985 to an indefinite period," certified true copy of which is hereto attached as petitioner's Annex "H".

12. NPC's total refund claim was ₱468.58 million but only a portion thereof i.e. the ₱58,020,110.79 (corresponding to Caltex) was approved and released by way of a Tax Credit Memo (Annex "Q") dated July 7, 1986, certified true copy of which [is] attached hereto as petitioner's Annex "F," which was assigned by NPC to Caltex. BIR Commissioner

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Tan approved the Deed of Assignment on July 30, 1987, certified true copy of which is hereto attached as petitioner's Annex "G"). (par. 26, 52, 53, pp. 9 and 15, Annex "A")

The Deed of Assignment stipulated among others that NPC is assigning the tax credit to Caltex in partial settlement of its outstanding obligations to the latter while Caltex, in turn, would apply the assigned tax credit against its specific tax payments for two (2) months. (per memorandum dated July 28, 1986 of DCIR Villa, copy attached as petitioner Annex "G")

13. As a result of the favorable action taken by the BIR in the refund of the P58.0 million tax credit assigned to Caltex, the NPC reiterated its request for the release of the balance of its pending refunds of taxes paid by respondents Petrophil, Shell and Caltex covering the period from June 11, 1984 to early part of 1986 amounting to P410.58 million. (The claim of the first two (2) oil companies covers the period from June 11, 1984 to early part of 1986; while that of Caltex starts from July 1, 1985 to early 1986). This request was denied on August 18, 1986, under BIR Ruling 152-86 (certified true copy of which is attached hereto as petitioner's Annex "I"). The BIR ruled that NPC's tax free privilege to buy petroleum products covered only the period from June 11, 1984 up to June 30, 1985. It further declared that, despite FIRB No. 1-86, NPC had already lost its tax and duty exemptions because it only enjoys special privilege for taxes for which it is *directly* liable. This ruling, in effect, denied the P410-Million tax refund application of NPC." (par. 28, p. 9, Annex "A")

14. "NPC filed a motion for reconsideration on September 18, 1986. Until now the BIR has not resolved the motion. (Benigna, II-3, Oct. 17, 1988, p. 2; Memorandum for the Complainant, Oct. 26, 1988, p. 15)." (par. 29, p. 9, Annex "A")

15. On December 22, 1986, in a 2nd Indorsement to the Hon. Fulgencio S. Factoran, Jr., BIR Commissioner Tan, Jr. (certified true copy of which is hereto attached and made a part hereof as petitioner's Annex "J"), reversed his previous position and states this time that all deliveries of petroleum products to NPC are tax exempt, regardless of the period of delivery.

16. On December 17, 1986, President Corazon C. Aquino enacted Executive Order No. 93, entitled "Withdrawing All Tax and Duty Incentives, Subject to Certain Exceptions, Expanding the Powers of the Fiscal Incentives Review Board and Other Purposes".

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17. On June 24, 1987, the FIRB issued Resolution No. 17-87, which restored NPC's tax exemption privilege and included in the exemption "those pertaining to its domestic purchases of petroleum and petroleum products, and the restorations were made to retroact effective March 10, 1987, a certified true copy of which is hereto attached and made a part hereof as Annex "K".

18. On August 6, 1987, the Hon. Sedfrey A. Ordoñez, Secretary of Justice, issued Opinion No. 77, series of 1987, opining that "the power conferred upon Fiscal Incentives Review Board by Section 2-(a), (b), (c) and (d) of Executive Order No. 93 constitute undue delegation of legislative power and, therefore, [are] unconstitutional," a copy of which is hereto attached and made a part hereof as Petitioner's Annex "L".

19. On October 5, 1987, respondent Executive Secretary Macaraig, Jr. in a Memorandum to the Chairman of the FIRB, a certified true copy of which is hereto attached and made a part hereof as petitioner's Annex "M," confirmed and approved FIRB Res. No. 17-87 dated June 24, 1987, allegedly pursuant to Sections 1 (f) and 2 (e) of Executive Order No. 93.

20. "Secretary Vicente Jayme in a reply dated May 20, 1988 to Secretary Catalino Macaraig, who by letter dated May 2, 1988 asked him to rule "on whether or not, as the law now stands, the National Power Corporation is still exempt from taxes, duties... on its local purchases of ... petroleum products..." declared that "NPC under the provisions of its Revised Charter retains its exemption from duties and taxes imposed on the petroleum products purchased locally and used for the generation of electricity," a certified true copy of which is attached hereto as petitioner's Annex "N". (par. 30, pp. 9-10, Annex "A")

21. Respondent Executive Secretary came up likewise with a confirmatory letter dated June 15, 1988 but without the usual official form of "By the Authority of the President," a certified true copy of which is hereto attached and made a part hereof as Petitioner's Annex "O".

22. The actions of respondents Finance Secretary and the Executive Secretary are based on the RESOLUTION No. 17-87 of FIRB, restoring the tax and duty exemption of the respondent NPC pertaining to its domestic purchases of petroleum products (petitioner's Annex "K" *supra*).

23. "Subsequently, the newspapers particularly, the *Daily Globe*, in its issue of July 11, 1988 reported that the Office of the President and the Department of Finance had ordered the BIR to refund the tax

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payments of the NPC amounting to P1.58 Billion which includes the P410 Million Tax refund already rejected by BIR Commissioner Tan, Jr., in his BIR Ruling No. 152-86. And in a letter dated July 28, 1988 of Undersecretary Marcelo B. Fernando to BIR Commissioner Tan, Jr. the P1.58 Billion tax refund was ordered released to NPC." (par. 31, p. 10, Annex "A")

24. On August 8, 1988, petitioner "wrote both Undersecretary Fernando and Commissioner Tan requesting them to hold in abeyance the release of the P1.58 billion and await the outcome of the investigation in regard to Senate Resolution No. 227," copies attached as Petitioner's Annexes "P" and "P-1" (par. 32, p. 10, Annex "A").

Reacting to this letter of the petitioner, Undersecretary Fernando wrote Commissioner Tan of the BIR dated August, 1988 requesting him to hold in abeyance the release of the tax refunds to NPC until after the termination of the Blue Ribbon investigation.

25. In the Bureau of Custom's "oil companies import crude oil and before removal thereof from customs custody, the corresponding customs duties and ad valorem taxes are paid. Bunker fuel oil is one of the petroleum products processed from the crude oil; and same is sold to NPC. After the sale, NPC applies for tax credit covering the duties and *ad valorem exemption* under its Charter. Such applications are processed by the Bureau of Customs and the corresponding tax credit certificates are issued in favor of NPC which, in turn assigns it to the oil firm that imported the crude oil. These certificates are eventually used by the assignee-oil firms in payment of their other duty and tax liabilities with the Bureau of Customs." (par. 70, p. 19, Annex "A")

A lesser amount totalling P740 million, covering the period from 1985 to the present, is being sought by respondent NPC for refund from the Bureau of Customs for duties paid by the oil companies on the importation of crude oil from which the processed products sold locally by them to NPC was derived. However, based on figures submitted to the Blue Ribbon Committee of the Philippine Senate which conducted an investigation on this matter as mandated by Senate Resolution No. 227 of which the herein petitioner was the sponsor, a much bigger figure was actually refunded to NPC representing duties and ad valorem taxes paid to the Bureau of Customs by the oil companies on the importation of crude oil from 1979 to 1985.

26. Meantime, petitioner, as member of the Philippine Senate introduced P. S. Res. No. 227, entitled:

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"Resolution Directing the Senate Blue Ribbon Committee, In Aid of Legislation, To Conduct a Formal and Extensive Inquiry into the Reported Massive Tax Manipulations and Evasions by Oil Companies, particularly Caltex (Phils.) Inc., Pilipinas Shell and Petrophil, Which Were Made Possible By Their Availing of the Non-Existing Exemption of National Power Corporation (NPC) from Indirect Taxes, Resulting Recently in Their Obtaining A Tax Refund Totalling P1.55 Billion From the Department of Finance, Their Refusal to Pay Since 1976 Customs Duties Amounting to Billions of Pesos on Imported Crude Oil Purportedly for the Use of the National Power Corporation, the Non-Payment of Surtax on Windfall Profits from Increases in the Price of Oil Products in August 1987 amounting Maybe to as Much as P1.2 Billion Surtax Paid by Them in 1984 and For Other Purposes".

27. Acting on the above Resolution, the Blue Ribbon Committee of the Senate did conduct a lengthy formal inquiry on the matter, calling all parties interested to the witness stand including representatives from the different oil companies, and in due time submitted its Committee Report No. 474 . . ..- The Blue Ribbon Committee recommended the following courses of action.

"1. Cancel its approval of the tax refund of P58,020,110.70 to the National Power Corporation (NPC) and its approval of Tax Credit memo covering said amount (Annex "P" hereto), dated July 7, 1986, and cancel its approval of the Deed of Assignment (Annex "Q" hereto) by NPC to Caltex, dated July 28, 1986, and collect from Caltex its tax liabilities which were erroneously treated as paid or settled with the use of the tax credit certificate that NPC assigned to said firm.:

"1.1 NPC did not have any indirect tax exemption since May 27, 1976 when PD 938 was issued. Therefore, the grant of a tax refund to NPC in the amount of P58 million was illegal, and therefore, null and void. Such refund was a nullity right from the beginning. Hence, it never transferred any right in favor of NPC.

"2. Stop the processing and/or release of P1.58 billion tax refund to NPC and/or oil companies on the same ground that the NPC, since May 27, 1976 up to June 17, 1987 was never granted any indirect tax exemption. So, the P1.58 billion represent taxes legally and properly paid by the oil firms.

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"3. Start collection actions of specific or excise and ad valorem taxes due on petroleum products sold to NPC from May 27, 1976 (promulgation of PD 938) to June 17, 1987 (issuance of EO 195).

"B. For the Bureau of Customs (BOC) to do the following:

"1. Start recovery actions on the illegal duty refunds or duty credit certificates for purchases of petroleum products by NPC and allegedly granted under the NPC charter covering the years 1978-1988 . . .".

28. On March 30, 1989, acting on the request of respondent Finance Secretary for clearance to direct the Bureaus of Internal Revenue and of Customs to proceed with the processing of claims for tax credits/refunds of the NPC, respondent Executive Secretary rendered his ruling, the dispositive portion of which reads:

"IN VIEW OF THE FOREGOING, the clearance is hereby GRANTED and, accordingly, unless restrained by proper authorities, that department and/or its line-tax bureaus may now proceed with the processing of the claims of the National Power Corporation for duty and tax free exemption and/or tax credits/refunds, if there be any, in accordance with the ruling of that Department dated May 20, 1988, as confirmed by this Office on June 15, 1988." . . .[5]

Hence, this petition for certiorari, prohibition and mandamus with prayer for a writ of preliminary injunction and/or restraining order, praying among others that:

"1. Upon filing of this petition, a temporary restraining order forthwith be issued against respondent FIRB, Executive Secretary Macaraig, and Secretary of Finance Jayme restraining them and other persons acting for, under, and in their behalf from enforcing their resolution, orders and ruling, to wit:

A. FIRB Resolution No. 17-87 dated June 24, 1987 (petitioner's Annex "K");

B. Memorandum-Order of the Office of the President dated October 5, 1987 (petitioner's Annex "M");

C. Order of the Executive Secretary dated June 15, 1988 (petitioner's Annex "O");

D. Order of the Executive Secretary dated March 30, 1989 (petitioner's Annex "Q"); and

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[5] Pages 7 to 19, *rollo*.

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E. Ruling of the Finance Secretary dated May 20, 1988 (petitioner's Annex "N").

2. Said temporary restraining order should also include respondents Commissioners of Customs Mison and Internal Revenue Ong restraining them from processing and releasing any pending claim or application by respondent NPC for tax and duty refunds.

3. Thereafter, and during the pendency of this petition, to issue a writ or preliminary injunction against above-named respondents and all persons acting for and in their behalf.

4. A decision be rendered in favor of the petitioner and against the respondents:;

A. FIRB Resolution No. 17-87 dated June 24, 1987 (petitioner's Annex "K")

B. Nullifying and setting aside the following:

1. FIRB Resolution No. 17-87 dated June 24, 1987 (petitioner's Annex "K");
2. Memorandum-Order of the Office of the President dated October 5, 1987 (petitioner's Annex "M");
3. Order of the Executive Secretary dated June 15, 1988 (petitioner's Annex "O");
4. Order of the Executive Secretary dated March 30, 1989 (petitioner's Annex "Q");
5. Ruling of the Finance Secretary dated May 20, 1988 (petitioner's Annex "N");
6. Tax Credit memo dated July 7, 1986 issued to respondent NPC re-presenting tax refund for P58,020,110.79 (peti-tioner's Annex "F");
7. Deed of Assignment of said tax credit memo to respondent Caltex dated July 30, 1987 (peti-tioner's Annex "G");
8. Application of the assigned tax credit of Caltex in payment of its tax liabilities with the Bureau of Internal Revenue; and
9. Illegal duty and tax refunds issued by the Bureau of Customs to respondent NPC by way of tax credit certificates from 1979 up to the present.

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C. Declaring as illegal and null and void the pending claims for tax and duty refunds by respondent NPC with the Bureau of Customs and the Bureau of Internal Revenue;

D. Prohibiting respondents Com-missioner of Customs and Commissioner of Internal Revenue from enforcing the above-questioned resolution, orders and ruling of respondents Executive Secretary, Secretary of Finance, and FIRB by processing and releasing respondent NPC's tax and duty refunds;

E. Ordering the respondent Commissioner of Customs to deny as being null and void the pending claims for refund of respondent NPC with the Bureau of Customs covering the period from 1985 to the present; to cancel and invalidate the illegal payment made by respondents Caltex, Shell and PNOC by using the tax credit certificates assigned to them by NPC; and to recover from respondents Caltex, Shell and PNOC all the amounts appearing in said tax credit certificates which were used to settle their duty and tax liabilities with the Bureau of Customs.

F. Ordering respondent Commissioner of Internal Revenue to deny as being null and void the pending claims for refund of respondent NPC with the Bureau of Internal Revenue covering the period from June 11, 1984 to June 17, 1987.

PETITIONER prays for such other relief and remedy as may be just and equitable in the premises.'"[6]

The issues raised in the petition are the following:

"To determine whether respondent NPC is legally entitled to the questioned tax and duty refunds, this Honorable Court must resolve the following issues:

Main issue --

Whether or not the respondent NPC has ceased to enjoy *indirect* tax and duty exemption with the enactment of P.D. No. 938 on May 27, 1976 which amended P.D. No. 380, issued on January 22, 1974.

Corollary issues --

1. Whether or not FIRB Resolution No. 10-85 dated February 7, 1985 which restored NPC's tax exemption privilege effective June 11, 1984

[6] Pages 49 to 52, *rollo*.

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to June 30, 1985 and FIRB Resolution No. 1-86 dated January 7, 1986 restoring NPC's tax exemption privilege effective July 1, 1985 included the restoration of *indirect* tax exemption to NPC; and

2. Whether or not FIRB could validly and legally issue Resolution no. 17-87 dated June 24, 1987 which restored NPC's tax exemption privilege effective March 10, 1987; and if said Resolution was validly issued, the nature and extent of the tax exemption privilege restored to NPC.''[7]

In a resolution dated June 6, 1989, the Court, without giving due course to the petition, required respondents to comment thereon, within ten (10) days from notice. The respondents having submitted their comment, on October 10, 1989 the Court required petitioner to file a consolidated reply to the same. After said reply was filed by petitioner on November 15, 1989 the Court gave due course to the petition, considering the comments of respondents as their answer to the petition, and requiring the parties to file simultaneously their respective memoranda within twenty (20) days from notice. The parties having submitted their respective memoranda, the petition was deemed submitted for resolution.

First the preliminary issues.

Public respondents allege that petitioner does not have the standing to challenge the questioned orders and resolution.

In the petition it is alleged that petitioner is ''instituting this suit in his capacity as a taxpayer and a duly-elected Senator of the Philippines.'' Public respondent argues that petitioner must show he has sustained direct injury as a result of the action and that it is not sufficient for him to have a mere general interest common to all members of the public.[8]

The Court however agrees with the petitioner that as a taxpayer he may file the instant petition following the ruling in *Lozada* when it involves illegal expenditure of public money. The petition questions the legality of the tax refund to NPC by way of tax credit certificates and the use of said assigned tax credits by respondent oil companies

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[7] Page 19, *rollo*.

[8] Citing *Ex parte* Levit, 302 U.S. 633; Tileson *vs.* Ullman, 318 U.S. 446; Lozada *vs.* Commission on Elections, 120 SCRA 337 (1983).

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to pay for their tax and duty liabilities to the BIR and Bureau of Customs.

Assuming petitioner has the personality to file the petition, public respondents also allege that the proper remedy for petitioner is an appeal to the Court of Tax Appeals under Section 7 of R.A. No. 125 instead of this petition. However Section 11 of said law provides --

"Sec. 11 Who may appeal; effect of appeal - Any person, association or corporation adversely affected by a decision or ruling of the Commissioner of Internal Revenue, the Collector of Customs (Commissioner of Customs) or any provincial or City Board of Assessment Appeals may file an appeal in the Court of Tax Appeals within thirty days after receipt of such decision or ruling."

From the foregoing, it is only the taxpayer adversely affected by a decision or ruling of the Commissioner of Internal Revenue, the Commissioner of Customs or any provincial or city Board of Assessment Appeal who may appeal to the Court of Tax Appeals. Petitioner does not fall under this category.

Public respondents also contend that mandamus does not lie to compel the Commissioner of Internal Revenue to impose a tax assessment not found by him to be proper. It would be tantamount to a usurpation of executive functions.[9]

Even in *Meralco*, this Court recognizes the situation when mandamus can control the discretion of the Commisioners of Internal Revenue and Customs when the exercise of discretion is tainted with arbitrariness and grave abuse as to go beyond statutory authority.[10]

Public respondents then assert that a writ of prohibition is not proper as its function is to prevent an unlawful exercise of jurisdiction[11] or to prevent the oppressive exercise of legal authority.[12] Precisely, petitioner questions the lawfulness of the acts of public respondents in this case.

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[9] Citing Meralco Securities Corporation *vs.* Savellano, 117 SCRA 804 (1982).

[10] *Ibid*, page 812.

[11] Citing Strong *vs.* Castro, 137 SCRA 322 (1985).

[12] Citing Fortun *vs.* Labang, 104 SCRA 607 (1981).

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Now to the main issue.

It may be useful to make a distinction, for the purpose of this disposition, between a direct tax and an indirect tax. A direct tax is a tax for which a taxpayer is directly liable on the transaction or business it engages in. Examples are the custom duties and *ad valorem* taxes paid by the oil companies to the Bureau of Customs for their importation of crude oil, and the specific and *ad valorem* taxes they pay to the Bureau of Internal Revenue after converting the crude oil into petroleum products.

On the other hand, "indirect taxes are taxes primarily paid by persons who can shift the burden upon someone else."[13] For example, the excise and *ad valorem* taxes that oil companies pay to the Bureau of Internal Revenue upon removal of petroleum products from its refinery can be shifted to its buyer, like the NPC, by adding them to the "cash" and/or "selling price."

The main thrust of the petition is that under the latest amendment to the NPC charter by Presidential Decree No. 938, the exemption of NPC from indirect taxation was revoked and repealed. While petitioner concedes that NPC enjoyed broad exemption privileges from both direct and indirect taxes on the petroleum products it used, under Section 13 of Republic Act No. 6395 and more so under Presidential Decree No. 380, however, by the deletion of the phrases "directly or indirectly" and "on all petroleum products used by the Corporation in the generation, transmission, utilization and sale of electric power" he contends that the exemption from indirect taxes was withdrawn by P. D. No. 938.

Petitioner further states that the exemption of NPC provided in Section 13 of Presidential Decree No. 938 regarding the payments of "all forms of taxes, etc." cannot be interpreted to include indirect tax exemption. He cites *Philippine Aceytelene Co., Inc. vs. Commissioner of Internal Revenue.*[14] Petitioner emphasizes the principle in taxation that the exception contained in the tax statutes must be strictly construed against the one claiming the exemption, and that the rule that a *tax statute* granting exemption must be strictly

[13] 51 Am. Jur. Section 21; 61 C.J. Section 6, note 57(e), p. 73.
[14] 20 SCRA 1056 (1967).

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construed against the one claiming the exemption is similar to the rule that a statute granting taxing power is to be construed strictly, with doubts resolved against its existence.[15] Petitioner cites rulings of the BIR that the phrase exemption from "all taxes, etc." from "all forms of taxes" and "in lieu of all taxes" covers only taxes for which the taxpayer is directly liable.[16]

On the corollary issues. First, FIRB Resolution Nos. 10-85 and 1-86 issued under Presidential Decree No. 1931, the relevant provision of which are to wit:

"P.D. No. 1931 provides as follows:

"SECTION 2. The *President* of the Philippines and/or the *Minister of Finance*, upon the *recommendation of the Fiscal Incentives Review Board...* is hereby empowered to restore, partially or totally, the exemptions withdrawn by Section 1 above ..." (Italics supplied.)

The relevant provisions of FIRB resolution Nos. 10-85 and 1-86 are the following:

Resolution No. 10-85

"BE IT RESOLVED AS IT IS HEREBY RESOLVED,That:

"1. Effective June 11, 1984, the tax and duty exemption privileges enjoyed by the National Power Corporation under C.A. No. 120 as amended are restored up to June 30, 1985.

"2. Provided, That this restoration does not apply to the following:

a. importations of fuel oil (crude equivalent) and coal as per FIRB Resolution No. 1-84;

b. commercially-funded importations; and

"3. Provided further, That in case of importations funded by international financing agreements, the NPC is hereby required to furnish the FIRB on a periodic basis the particulars of items

[15] Citing United Garment Co., Inc. *vs.* Court of Tax Appeals, 4 SCRA 304 (1962); and Butuan Sawmill, Inc. *vs.* City of Butuan, 16 SCRA 755 (1966).

[16] See page 27 of Petition.

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received or to be received through such arrangements, for purposes of tax and duty exemptions privileges."[17]

Resolution No. 1-86

"BE IT RESOLVED AS IT IS HEREBY RESOLVED: That:

"1. Effective July 1, 1985, the tax and duty exemption privileges enjoyed by the National Power Corporation (NPC) under Commonwealth Act No. 120, as amended, are restored; *Provided*, That importations of fuel oil (crude oil equivalent), and coal of the herein grantee shall be subject to the basic and additional import duties; *Provided, further*, that the following shall remain fully taxable:

a. Commercially-funded importations; and

b. Interest income derived by said grantee from bank deposits and yield or any other monetary benefits from deposit substitutes, trust funds and other similar arrangements.

"2. The NPC as a government corporation is exempt from the real property tax on land and improvements owned by it provided that the beneficial use of the property is not transferred to another pursuant to the provisions of Sec. 10 (a) of the Real Property Tax Code, as amended."[18]

Petitioner does not question the validity and enforceability of FIRB Resolution Nos. 10-85 and 1-86. Indeed, they were issued in compliance with the requirement of Section 2, P.D. No. 1931, whereby the FIRB should make the recommendation subject to the approval of "the President of the Philippines and/or the Minister of Finance who is also duly authorized to approve the same. In fact it was the Minister of Finance who signed and promulgated said resolutions.[19]

The observation of Mr. Justice Sarmiento in the dissenting opinion that FIRB Resolution Nos. 10-85 and 1-86 which were promulgated by then Acting Minister of Finance Alfredo de Roda, Jr. and Minister of Finance Cesar E.A. Virata, as Chairmen of FIRB, respectively,

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[17] Annex C, petition; page 123, *Rollo*.

[18] Annex H, petition; page 135, *Rollo*.

[19] Annexes C and I to the Petition.

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should be separately approved by said Minister of Finance as required by P.D. 1931 is a superfluity. An examination of the said resolution which are reproduced in full in the dissenting opinion shows that the said officials signed said resolutions in the dual capacity of Chairman of FIRB and Minister of Finance.

Mr. Justice Sarmiento also makes reference to the case National Power Corporation vs. Province of Albay,[20] wherein the Court observed that under P.D. No. 776 the power of the FIRB was only recommendatory and requires the approval of the President to be valid. Thus, in said case the Court held that FIRB Resolutions Nos. 10-85 and 1-86 not having been approved by the President were not valid and effective while the validity of FIRB 17-87 was upheld as it was duly approved by the Office of the President on October 5, 1987.

However, under Section 2 of P.D. No. 1931 of June 11, 1984, hereinabove reproduced, which amended P.D. No. 776, it is clearly provided for that such FIRB resolution, may be approved by the "President of the Philippines and/or the Minister of Finance." To repeat, as FIRB Resolutions Nos. 10-85 and 1-86 were duly approved by the Minister of Finance, hence they are valid and effective. To this extent, this decision modifies or supersedes the Court's earlier decision in *Albay* afore-referred to.

Petitioner, however, argues that under both FIRB resolutions, only the tax and duty exemption privileges enjoyed by the NPC under its charter, C. A. No. 120, as amended, are restored, that is, only its direct tax exemption privilege; and that it cannot be interpreted to cover indirect taxes under the principle that tax exemptions are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority.

Petitioner argues that the release by the BIR of the P58.0 million refund to respondent NPC by way of a tax credit certificate[21] which was assigned to respondent Caltex through a deed of assignment approved by the BIR[22] is patently illegal. He also contends that the

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[20] G.R. No. 87479 promulgated on June 4, 1990.

[21] Annex 3 to the Petition (tax credit memo).

[22] Annex F to the Petition.

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pending claim of respondent NPC in the amount of ₱410.58 million with respondent BIR for the sale and delivery to it of bunker fuel by respondents Petrophil, Shell and Caltex from July 1, 1985 up to 1986, being illegal, should not be released.

Now to the second corollary issue involving the validity of FIRB Resolution No. 17-87 issued on June 24, 1987. It was issued under authority of Executive Order No. 93 dated December 17, 1986 which grants to the FIRB, among others, the power to recommend the restoration of the tax and duty exemptions/incentives withdrawn thereunder.

Petitioner stresses that on August 6, 1987 the Secretary of Justice rendered Opinion No. 77 to the effect that the powers conferred upon the FIRB by Section 2(a), (b), (c) and (4) of Executive Order No. 93 "constitute undue delegation of legislative power and is, therefore, unconstitutional." Petitioner observes that the FIRB did not merely recommend but categorically restored the tax and duty exemption of the NPC so that the memorandum of the respondent Executive Secretary dated October 5, 1987 approving the same is a surplusage.

Further assuming that FIRB Reslution No. 17-87 to have been legally issued, following the doctrine in *Philippine Aceytelene*, petitioner avers that the restoration cannot cover indirect taxes and it cannot create new indirect tax exemption not otherwise granted in the NPC charter as amended by Presidential Decree No. 938.

The petition is devoid of merit.

The NPC is a non-profit public corporation created for the general good and welfare[23] wholly owned by the government of the Republic of the Philippines.[24] From the very beginning of its corporate existence, the NPC enjoyed preferential tax treatment,[25] "to enable the Corporation to pay the indebtedness and obligation and in

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[23] Section 1, Commonwealth Act No. 120; Sections 2 and 13, Republic Act No. 6395 in relation to Section 3, Act No. 1495.

[24] Section 5, Republic Act No. 6395.

[25] Section 4, Republic Act No. 120; Section 2 Republic Act No. 358; Section 13, Republic Act No. 6395; Section 10, Presidential Decree No. 380.

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furtherance and effective implementation of the policy enunciated in Section one of "Republic Act No. 6395" which provides:

"Section 1. *Declaration of Policy* -- Congress hereby declares that (1) the comprehensive development, utilization and conservation of Philippine water resources for all beneficial uses, including power generation, and (2) the total electrification of the Philippines through the development of power from all sources to meet the need of rural electrification are primary objectives of the nation which shall be pursued coordinately and supported by all instrumentalities and agencies of the government including its financial institutions."

From the changes made in the NPC charter, the intention to strengthen its preferential tax treatment is obvious.

Under Republic Act No. 358, its exemption is provided as follows:

"SEC. 2. To facilitate payment of its indebtedness, the National Power Corporation shall be exempt from *all taxes, duties, fees, imposts, charges, and restrictions of the Republic of the Philippines, its provinces, cities and municipalities.*"

Under Republic Act No. 6395:

"Sec. 13. *Non-profit Character of the Corporation; Exemption from all Taxes, Duties, Fees, Imposts and other Charges by Government and Governmental Instrumentalities.*-- The Corporation shall be non-profit and shall devote all its returns from its capital investment, as well as excess revenues from its operation, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, the Corporation is hereby declared exempt:

"(a) From the payment of all taxes, duties, fees, imposts, charges, costs and service fees in any court or administrative proceedings in which it may be a party, restrictions and duties to the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities;

"(b) From all income taxes, franchise taxes and realty taxes to be paid to the National Government, its provinces, cities, municipalities and other government agencies and instrumentalities;

"(c) From all import duties, compensating taxes and advanced sales tax, and wharfage fees on import of foreign goods required for its operations and projects; and

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"(d) *From all taxes, duties, fees, imposts, and all other charges imposed by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the Corporation in the generation, transmission, utilization, and sale of electric power.*" (Italics supplied.)

Under Presidential Decree No. 380:

"Sec. 13. *Non-profit Character of the Corporation: Exemption from all Taxes, Duties, Fees, Imposts and other Charges by the Government and Government Instrumentalities.* - The Corporation shall be non-profit and shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, the Corporation, including its subsidiaries, is hereby declared, exempt:

"(a) From the payment of all taxes, duties, fees, imposts, charges, costs and services fees in any court or administrative proceedings in which it may be a party, restrictions and duties to the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities.

"(b) From all income taxes, franchise taxes and realty taxes to be paid to the National Government, its provinces, cities, municipalities and other governmental agencies and instrumentalities;

"(c) From all import duties, compensating taxes and advances sales tax, and wharfage fees on import of foreign goods required for its operations and projects: and

"(d) *From all taxes, duties, fees, imposts, and all other charges imposed directly or indirectly by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum produced used by the Corporation in the generation, transmission, utilization, and sale of electric power.*" (Italics supplied.)

Under Presidential Decree No. 938

"Sec. 13. Non-profit Character of the Corporation: Exemption from all Taxes, Duties, Fees, Impost and Other Charges by the Government and Government Instumentalities.- The Corporation shall be non-profit and shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion. To enable the Corporation to

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pay the indebtedness and effective implementation of the policy enunciated in Section One of this Act, the Corporation, including its subsidiaries hereby declared exempt from the payment of *all forms of taxes, duties, fees, imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court of administrative proceedings.*" (Italics supplied.)

It is noted that in the earlier law, R.A. No. 358, the exemption was worded in general terms, as to cover "*all* taxes, duties, fees, imposts, charges, etc. . . .." However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemption. Subsequently, P.D. No. 380, made even more specific the details of the exemption of NPC to cover, among others, *both direct and indirect taxes* on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from "*all forms of taxes*, duties, fees, imposts, as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings."

The use of the phrase "all forms" of taxes demonstrates the intention of the law to give NPC all the tax exemptions it has been enjoying before. The rationale for this exemption is that being non-profit the NPC "shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion. To enable the Corporation to pay the indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, ..."[27]

The preamble of P. D. No. 938 states -

"WHEREAS, in the application of the tax exemption provision of the Revised Charter, the non-profit character of the NPC has not been fully utilized *because of restrictive interpretations of the taxing agencies of the government on said provisions. . .*(" (Italics supplied.)

It is evident from the foregoing that the lawmaker did not intend that the said provisions of P.D. No. 938 shall be construed strictly against NPC. On the contrary, the law mandates that it should be

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[27] Section 13, P.D. No. 938.

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interpreted liberally so as to enhance the tax-exempt status of NPC.

Hence, petitioner cannot invoke the rule on *strictissimi juris* with respect to the interpretation of statutes granting tax exemptions to NPC.

Moreover, it is a recognized principle that the rule on strict interpretation does not apply in the case of exemptions in favor of a government political subdivision or instrumentality.[28]

"The basis for applying the rule of strict construction to statutory provisions granting tax exemptions or deductions, even more obvious than with reference to the affirmative or levying provisions of tax statutes, is to minimize differential treatment and foster impartiality, fairness, and equality of treatment among tax payers.

"The reason for the rule does not apply in the case of exemptions running to the benefit of the government itself or its agencies. In such case the practical effect of an exemption is merely to reduce the amount of money that has to be handled by government in the course of its operations. For these reasons, provisions granting exemptions to government agencies may be construed liberally, in favor of non tax-liability of such agencies."[29]

In the case of property owned by the state or a city or other public corporations, the express exemption should not be construed with the same degree of strictness that applies to exemptions contrary to the policy of the state, since as to such property "exemption is the rule and taxation the exception."[30]

The contention of petitioner that the exemption of NPC from indirect taxes under Section 13 of R.A. No. 6395 and P.D. No. 380, is deemed repealed by P.D. No. 938 when the reference to it was deleted is not well-taken.

Repeal by implication is not favored unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with knowledge of all existing ones on the subject,

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[29] C. Dallas Sands, Statutes and Statutory Construction, Vol. 3, p. 207, citing Crosby *vs.* U.S., 292 F. Supp. 314; Pasadena *vs.* Los Angeles Country, 187 P. 418 and other cases.

[30] Com. vs. City of Richmond, 116 Va. 69, 81 S.E. 69.

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it is logical to conclude that in passing a statute it is not intended to interfere with or abrogate a former law relating to the same subject matter, unless the repugnancy between the two is not only irreconcilable but also clear and convincing as a result of the language used, or unless the latter Act fully embraces the subject matter of the earlier.[31] The first effort of a court must always be to reconcile or adjust the provisions of one statute with those of another so as to give sensible effect to both provisions.[32]

The legislative intent must be ascertained from a consideration of the statute as a whole, and not of an isolated part or a particular provision alone.[33] When construing a statute, the reason for its enactment should be kept in mind and the statute should be construed with reference to its intended scope and purpose[34] and the evil sought to be remedied.[35]

The NPC is a government instrumentality with the enormous task of undertaking development of hydroelectric generation of power and production of electricity from other sources, as well as the transmission of electric power on a nationwide basis, to improve the quality of life of the people pursuant to the State policy embodied in Section E, Article II of the 1987 Constitution.

It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from *all forms* of taxes including indirect taxes as provided for under R.A. No. 6395 and P.D. No. 380 if it is to attain its goals.

Further, the construction of P. D. No. 938 by the Office charged with its implementation should be given controlling weight.[36]

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[31] U.S. *v.* Palacio, 33 Phil. 208 (1916); Commissioner of Customs *v.* Esso Standard Eastern, Inc., 66 SCRA 113 (1975).

[32] Larga *vs.* Ranada, Jr., 164 SCRA 18 (1988).

[33] Aboitiz Shipping Corp. *vs.* City of Cebu, 12 SCRA 449(1965); and Aisporna *vs.* Court of Appeals, 113 SCRA 459 (1982).

[34] Statutory Construction by E.T. Crawford, pages 604 to 605, cited in Commissioner of Internal Revenue *vs.* Filipinas Compania de Seguros, 107 Phil. 1055 (1960).

[35] Luzon Stevedoring Corporation *vs.* Court of Tax Appeals, 163 SCRA 647 (1988).

[36] Pascual *vs.* Director of Lands, 10 SCRA 354 (1964); Salaria *vs.* Buenviaje, 81 SCRA 722 (1978); La Suerte Cigar and Cigarette Factory *vs.* Court of Tax Appeals, 134 SCRA 29 (1985).

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Since the May 8, 1985 ruling of Commissioner Ancheta, to the letter of the Secretary of Finance of June 26, 1985 confirming said ruling, the letters of the BIR of August 18, 1986, and December 22, 1986, the letter of the Secretary of Finance of February 19, 1987, the Memorandum of the Executive Secretary of October 9, 1987, by authority of the President, confirming and approving FIRB Resolution No. 17-87, the letter of the Secretary of Finance of May 20, 1988 to the Executive Secretary rendering his opinion as requested by the latter, and the latter's reply of June 15, 1988, it was uniformly held that the grant of tax exemption to NPC under C. A. No. 120, as amended, *included exemption from payment of all taxes relative to NPC's petroleum purchases including indirect taxes.*[37] Thus, then Secretary of Finance Vicente Jayme in his letter of May 20, 1988 to the Executive Secretary Macaraig aptly stated the justification for this tax exemption of NPC -

"The issue turns on the effect to the exemption of NPC from taxes of the deletion of the phrase `taxes imposed indirectly' on oil products and its exemption from `all forms of taxes.' It is suggested tht the change in language evidenced an intention to exempt NPC only from taxes directly imposed on or payable by it; since taxes on fuel-oil purchased by NPC locally are levied on and paid by its oil suppliers, NPC thereby lost its exemption from those taxes. The principal authority relied on is the 1967 case of Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue, 20 SCRA 1056.

"First of all, *tracing the changes made through the years in the Revised Charter, the strengthening of NPC's preferential tax treatment was clearly the intention.* To the extent that the explanatory 'whereas clauses' may disclose the intent of the law-maker, *the changes effected by P.D. 938 can only be read as being expansive rather than restrictive, including its version of Section 13.*

"Our Tax Code does not recognize that there are taxes directly imposed and those imposed indirectly. The textbook distinction between a direct and an indirect tax may be based on the possibility of shifting the incidence of the tax. A direct tax is one which is demanded from the very person intended to be the payor, although it may ultimately be shifted to another. An example of a direct tax is the personal income

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[37] Annexes 7, 8, T, V, W and 17.

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tax. On the other hand, indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. An example of this type of tax is the sales tax levied on sales of a commodity.

"The distinction between a direct tax and one indirectly imposed (or an indirect tax) is really of no moment. What is more relevant is that when an 'indirect tax' is paid by those upon whom the tax ultimately falls, it is paid *not as a tax* but as an additional part of the cost or of the market price of the commodity.

"This distinction was made clear by Chief Justice Castro in the Philippine Acetylene case, when he analyzed the nature of the percentage (sales) tax to determine whether ir is a tax on the producer or on the purchaser of thecommodity. Under our Tax Code, the sales tax falls upon the manufacturer or producer. The phrase 'pass on' the tax was criticized as being inaccurate. Justice Castro says that the tax remains on the manufacture alone. The purchaser does not pay the tax; he pays an amount added to the price because of the tax. Therefore, the tax is not 'passed on' and does not for that reason become an 'indirect tax' on the purchaser. *It is eminently possible that the law maker in enacting P.D. 938 in 1976 may have used lessons from the analysis of Chief Justice Castro in 1967 Philippine Acetylene case.*

"When P.D. 938 which exempted NPC from 'all forms of taxes' was issued in May 1976, the so-called oil crunch had already drastically pushed up crude oil prices from about $1.00 per bbl. in 1971 to about $10 and a peak (as it turned out) of about $34 per bbl. in 1981. In 1974-78, NPC was operating the Meralco thermal plants under a lease agreement. The power generated by the leased plants was sold to Meralco for distribution to its customers. This lease and sale arrangement was entered into for the benefit of the consuming public, by reducing the tax burden on the swiftly rising world crude oil prices. This objective was achieved by the use of NPC's 'tax umbrella' under its Revised Charter - the exemption from specific taxes on locally purchased fuel oil. In this context, I can not interpret P.D. 938 to have withdrawn the exemption from tax on fuel oil to which NPC was already entitled and which exemption Government in fact was utilizing to soften the burden of high crude prices.

"There is one other consideration which I consider pivotal. *The taxes paid by oil companies on oil products sold to NPC, whether paid to them by NPC or not, never entered into the rates charged by NPC to its customers - not even during those periods of uncertainty engendered*

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by the issuance of P.D. 1931 and E.O 93 on NPC's tax status. No tax component on the fuel have been charged or recovered by NPC through its rates.

"There is an import duty on the crude oil imported by the local refineries. After the refining process, specific and ad valorem taxes are levied on the finished products including fuel oil or residue upon their withdrawal from the refinery. These taxes are paid by the oil companies as the manufacturer thereof.

"In selling the fuel oil to NPC, the oil companies include in their billings the duty and tax component. NPC pays the oil companies' invoices including the duty component but net of the tax component. NPC then applies for drawback of customs duties paid and for a credit in amount equivalent to the tax paid (by the oil companies) on the products purchased. The tax credit is assigned to the oil companies - as payment, in effect, of the tax component shown in the sales invoices. (NOTE: These procedures varied over time - There were instances when NPC paid the tax component that was shifted to it and then applied for tax credit. There were also side issues raised because of P.D. 1931 and E.O. 93 which withdrew all exemptions of government corporations. In these latter instances, the resolutions of the Fiscal Incentives Review Board (FIRB) come into play. These incidents will not be touched upon for purposes of this discussion)

"NPC rates of electricity are structured such that changes in its cost of fuel are automatically (without need of fresh approvals) reflected in the subsequent months's billing rates.

"This Fuel Cost Adjustment clause protects NPC's rate of return. *If NPC should ever accept liability to the tax and duty component on the oil products, such amount will go into its fuel cost and be passed on to its customers through corresponding increases in rates. Since 1974, when NPC operated the oil-fired generating stations leased from Meralco (which plants it bought in 1979), until the present time, no tax on fuel oil ever went into NPC's electric rates.*

"That the exemption of NPC from the tax on fuel was not withdrawn by P.D. 938 is impressed upon me by yet another circumstance. It is conceded that NPC, at the very least, is exempt from taxes to which it is directly liable. NPC therefore could very well have imported its fuel oil or crude residue for burning at its thermal plants. There would have been no question in such a case as to its exemption from all duties and taxes, even under the strictest interpretation that can be put forward.

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However, at the time P.D. 938 was issued in 1976, there were already operating in the Philippines three oil refineries. The establishment of these refineries in the Philippines involved heavy investments, were economically desirable and enabled the country to import crude oil and process/refine the same into the various petroleum products at a savings to the industry and the public. The refining process produced as its largest output, in volume, fuel oil or residue, whose conventional economic use was for burning in electric or steam generating plants. Had there been no use locally for the residue, the oil refineries would have become largely unviable.

"Again, in this circumstance, I cannot accept that P.D. 938 would have in effect forced NPC to by-pass the local oil refineries and import its fossil fuel requirements directly in order to avail itself of its exemption from 'direct taxes.' *The oil refineries had to keep operating both for economic development and national security reasons. In fact, the restoration by the FIRB of NPC's exemption after P.D. 1931 and E.O. 93 expressly excluded direct fuel oil importations, so as not to prejudice the continued operations of the local oil refineries.*

"To answer your query therefore, *it is the opinion of this Department that NPC under the provisions of its Revised Charter retains its exemption from duties and taxes imposed on the petroleum products purchased locally and used for the generation of electricity.*

"The Department in issuing this ruling does so pursuant to its power and function to supervise and control the collection of government revenues by the application and implementation of revenue laws. It is prepared to take the measures supplemental to this ruling necessary to carry the same into full effect.

"As presented rather extensively above, the NPC electric power rates did not carry the taxes and duties paid on the fuel oil it used. The point is that while these levies were in fact paid to the government, no part thereof was recovered from the sale of electricity produced. As a consequence, as of our most recent information, some P1.55 B in claims represent amounts for which the oil suppliers and NPC are 'out-of-pocket.' There would have to be specific orders to the Bureaus concerned for the resumption of the processing of these claims." [38]

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[38] Annex N; Italics supplied.

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In the letter of June 15, 1988 of then Executive Secretary Macaraig to the then Secretary of Finance, the said opinion-ruling of the latter was confirmed and its implementation was directed.[39]

The Court finds and so holds that the foregoing reasons adduced in the aforestated letter of the Secretary of Finance as confirmed by the then Executive Secretary are well-taken. When the NPC was exempted from *all forms of taxes, duties, fees, imposts and other charges*, under P. D. No. 938, it means exactly what it says, *i.e., all forms of taxes* including those that were imposed directly or indirectly on petroleum products used in its operation.

Reference is made in the dissenting opinion to contrary rulings of the BIR that the exemption of the NPC extends only to taxes for which it is directly liable and not to taxes merely shifted to it. However, these rulings are predicated on *Philippine Acytelene*.

The doctrine in *Philippine Acytelcne* decided in 1967 by this Court cannot apply to the present case. It involved the sales tax of products the plaintiff sold to NPC from June 2, 1953 to June 30, 1958 when NPC was enjoying tax exemption from all taxes under Commonwealth Act No. 120, as amended by Republic Act No. 358 issued on June 4, 1949 hereinabove reproduced.

In said case, this Court held, that the sales tax is due from the manufacturer and not the buyer, so plaintiff cannot claim exemptions simply because the NPC, the buyer, was exempt.

However, on September 10, 1971, Republic Act No. 6395 was passed as the revised charter of NPC whereby Section 13 thereof was amended by emphasizing its non-profit character and expanding the extent of its tax exemption.

As petitioner concedes, Section 13(d) aforestated of this amendment under Republic Act No. 6345 spells out clearly the exemption of the NPC from indirect taxes. And as hereinabove stated, in P.D. No. 380, the exemption of NPC from indirect taxes was emphasized when it was specified to include those imposed "directly and indirectly."

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[39] Annex O to the Petition.

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Thereafter, under P.D. No. 938 the tax exemption of NPC was integrated under Section 13 defining the same in general terms to cover "*all forms* of taxes, duties, fees, imposts, etc." which, as hereinabove discussed, logically includes exemption from indirect taxes on petroleum products used in its operation.

This is the status of the tax exemptions the NPC was enjoying when P.D. No. 1931 was passed, on the authority of which FIRB Resolution Nos. 10-85 and 1-86 were issued, and when Executive Order No. 93 was promulgated, by which FIRB Resolution 17-87 was issued.

Thus, the ruling in *Philippine Acetylene* cannot apply to this case due to the different environmental circumstances. As a matter of fact, the amendments of Section 13, under R.A. No. 6395, P.D. No. 380 and P.D. No. 838 appear to have been brought about by the earlier inconsistent rulings of the tax agencies due to the doctrine in *Philippine Acetylene*, so as to leave no doubt as to the exemption of the NPC from indirect taxes on petroleum products it uses in its operation. Effectively, said amendments superseded if not abrogated the ruling in *Philippine Acytelene* that the tax exemption of NPC should be limited to direct taxes only.

In the light of the foregoing discussion the first corollary issue must consequently be resolved in the affirmative, that is, FIRB Resolution No. 10-85 dated February 7, 1985 and FIRB Resolution No. 1-86 dated January 7, 1986 which restored NPC's tax exemption privileges included the restoration of the indirect tax exemption of the NPC on petroleum products it used.

On the second corollary issue as to the validity of FIRB resolution No. 17-87 dated June 24, 1987 which restored NPC's tax exemption privilege effective March 10, 1987, the Court finds that the same is valid and effective.

It provides as follows:

"BE IT RESOLVED, AS IT IS HEREBY RESOLVED, That the tax and duty exemption privileges of the National Power Corporation, including those pertaining to its domestic purchases of petroleum and petroleum products, granted under the terms and conditions of Commonwealth Act No. 120 (Creating the National Power Corporation,

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defining its powers, objectives and functions, and for other purposes), as amended, are restored effective March 10, 1987, subject to the following conditions:

"1. The restoration of the tax and duty exemption privileges does not apply to the following:

1.1 Importation of fuel oil (crude equivalent) and coal;

1.2 Commercially-funded importations (i.e., importations which include but are not limited to those financed by the NPC's own internal funds, domestic borrowings from any source whatsoever, borrowing from foreign-based private financial institutions, etc.); and

1.3 Interest income derived from any source.

"2. The NPC shall submit to the FIRB a report of its expansion program, including details of disposition of relieved tax and duty payments for such expansion on an annual basis or as often as the FIRB may require it to do so. This report shall be in addition to the usual FIRB reporting requirements on incentive availment."[40]

Executive Order No. 93 provides as follows -

"SECTION 1. The provisions of any general or special law to the contrary notwithstanding, all tax and duty incentives granted to government and private entities are hereby withdrawn, except:

a) those covered by the non-impairment clause of the Constitution;

b) those conferred by effective international agreements to which the Government of the Republic of the Philippines is a signatory;

c) those enjoyed by enterprises registered with:

(i) the Board of Investments pursuant to Presidential Decree No. 1789, as amended;

(ii) the Export Processing Zone Authority, pursuant to Presidential Decree No. 66, as amended;

(iii) the Philippine Veterans Investment Development Corporation Industrial Authority pursuant to Presidential Decree No. 538, as amended;

d) those enjoyed by the copper mining industry pursuant to the provisions of Letter of Instruction No. 1416;

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[40] Annex K to the Petition; page 176, *Rollo*.

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e) those conferred under the four basic codes namely:

(i) the Tariff and Customs Code, as amended;

(ii) the National Internal Revenue Code, as amended;

(iii) the Local Tax Code, as amended;

(iv) the Real Property Tax Code, as amended;

f) *those approved by the President upon the recommendation of the Fiscal Incentives Review Board.*

"SECTION 2. The Fiscal Incentives Review Board created under Presidential Decree No. 776, as amended, is hereby authorized to:

a) restore tax and/or duty exemptions withdrawn hereunder in whole or in part;

b) revise the scope and coverage of tax and/or duty exemption that may be restored.

c) impose conditions for the restoration of tax and/or duty exemption;

d) prescribe the date or period of effectivity of the restoration of tax and/or duty exemption;

e) formulate and submit to the President for approval, a complete system for the grant of subsidies to deserving beneficiaries, in lieu of or in combination with the restoration of tax and duty exemptions or preferential treatment in taxation, indicating the source of funding therefor, eligible beneficiaries and the terms and conditions for the grant thereof taking into consideration the international commitments of the Philippines and the necessary precautions such that the grant of subsidies does not become the basis for countervailing action.

"SECTION 3. In the discharge of its authority hereunder, the Fiscal Incentives Review Board shall take into account any or all of the following considerations:

a) *the effect on relative price levels;*

b) *relative contribution of the beneficiary to the revenue generation effort;*

c) *nature of the activity the beneficiary is engaged;*

d) *in general, the greater national interest to be served.*"

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True it is that the then Secretary of Justice in Opinion No. 77 dated August 6, 1977 was of the view that the powers conferred upon the FIRB by Sections 2(a), (b), (c), and (d) of Executive Order No. 93 constitute undue delegation of legislative power and is therefore unconstitutional. However, he was overruled by the respondent Executive Secretary in a letter to the Secretary of Finance dated March 30, 1989. The Executive Secretary, by authority of the President, has the power to modify, alter or reverse the construction of a statute given by a department secretary.[41]

A reading of Section 3 of said law shows that it set the policy to be the greater national interest. The standards of the delegated power are also clearly provided for.

The required "standard" need not be expressed. In *Edu vs. Ericta*[42] and in *De la Llana vs. Alba*,[43] this Court held: "The standard may be either express or implied. If the former, the non-delegated objection is easily met. The standard though does not have to be spelled out specifically. It could be implied from the policy and purpose of the act considered as a whole.

In *People vs. Rosenthal* [44] the broad standard of "public interest" was deemed sufficient. In *Calalang vs. Williams*, [45] it was "public welfare" and in *Cervantes vs. Auditor General*, [46] it was the purpose of promotion of "simplicity, economy and efficiency." And, implied from the purpose of the law as a whole, "national security" was considered sufficient standard[47] and so was "protection of fish-fry or fish eggs."[48]

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[41] Annex Q to petition, citing University of the East *vs.* U.E. Faculty Association, 117 SCRA 554, 572 (1982).

[42] 35 SCRA 481 (1970).

[43] 112 SCRA 294 (1982).

[44] 68 Phil. 328 (1939).

[45] 70 Phil. 726 (1940).

[46] 91 Phil. 359 (1952).

[47] Hirabayashi *vs.* United States, 320 U.S. 99.

[48] Araneta *vs.* Gatmaitan, 101 Phil. 328 (1957); see also Justice Isagani A. Cruz, Philippine Political Law, 1984 Ed., pages 105 to 106.

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The observation of petitioner that the approval of the President was not even required in said Executive Order of the tax exemption privilege approved by the FIRB, unlike in previous similar issuances, is not well-taken. On the contrary, under Section 1(f) of Executive Order No. 93, aforestated, such tax and duty exemptions extended by the FIRB must be approved by the President. In this case, FIRB Resolution No. 17-87 was approved by the respondent Executive Secretary, by authority of the President, on October 15, 1987.[49]

Mr. Justice Isagani A. Cruz commenting on the delegation of legislative power stated -

"The latest in our jurisprudence indicates that delegation of legislative power has become the rule and its non-delegation the exception. The reason is the increasing complexity of modern life and many technical fields of governmental functions as in matters pertaining to tax exemptions. This is coupled by the growing inability of the legislature to cope directly with the many problems demanding its attention.The growth of society has ramified its activities and created peculiar and sophisticated problems that the legislature cannot be expected reasonably to comprehend. Specialization even in legislation has become necessary. To many of the problems attendant upon present day undertakings, the legislature may not have the competence, let alone the interest and the time, to provide the required direct and efficacious, not to say specific solutions."[50]

Thus, in the case of *Tablarin v. Gutierrez*, [51] this Court enunciated the rationale in favor of delegation of legislative functions -

"One thing however, is apparent in the development of the principle of separation of powers and that is that the maxim of *delegatas non potest delegare* or *delegati potestas non potest delegare*, adopted this practice (Delegibus et Consuetudiniis, Anglin edited by G.E. Woodline, Yale University Press, 1922, Vol. 2, p. 167) but which is also recognized in principle in theRoman Law (d. 17.18.3) *has been made to adapt itself to the complexities of modern government, giving rise to the adoption, within certain limits, of the principle of subordinate legislation, not only in the United States and England but in the United States and England*

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[49] Annex M to the Petition.

[50] Pages 82 to 83, Philippine Political Law, Isagani A. Cruz, 1989 Ed.

[51] 152 SCRA 730 (1987).

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but in practically all modern governments. (People *vs.* Rosenthal and Osmeña, 68 Phil. 318, 1939). *Accordingly, with the growing complexities of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater power by the legislative, and toward the approval of the practice by the Courts.*"(Italics supplied.)

The legislative authority could not or is not expected to state all the detailed situations wherein the tax exemption privileges of persons or entities would be restored. The task may be assigned to an administrative body like the FIRB.

Moreover, all presumptions are indulged in favor of the constitutionality and validity of the statute. Such presumption can be overturned if its invalidity is proved beyond reasonable doubt. Otherwise, a liberal interpretation in favor of constitutionality of legislation should be adopted.[52]

E. O. No. 93 is complete in itself and constitutes a valid delegation of legislative power to the FIRB. And as above discussed, the tax exemption privilege that was restored to NPC by FIRB Resolution No. 17-87 of June 1987 includes exemption from indirect taxes and duties on petroleum products used in its operation.

Indeed, the validity of Executive Order No. 93 as well as of FIRB Resolution No. 17-87 has been upheld in *Albay.* [53]

In the dissenting opinion of Mr. Justice Cruz, it is stated that P.D. Nos. 1931 and 1955 issued by President Marcos in 1984 are invalid as they were presumably promulgated under the infamous Amendment No. 6 and that as they cover *tax exemption*, under Section 17(4), Article VIII of the 1973 Constitution, the same cannot be passed "without the concurrence of the majority of all the members of the Batasang Pambansa." And, even conceding that the reservation of legislative power in the President was valid, it is opined that it was not validly exercised as there is no showing that such presidential encroachment was justified under the conditions

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[52] Victoriano *vs.* Elizalde Rope Workers Union, 59 SCRA 54, 66 (1974).
[53] *Supra.*

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then existing. Consequently, it is concluded that Executive Order No. 93, which was intended to implement said decrees, is also illegal. The authority of the President to sub-delegate to the FIRB powers delegated to him is also questioned.

In *Albay*, [54] as above stated, this Court upheld the validity of P.D. Nos. 776 and 1931. The latter decree withdrew tax exemptions of government-owned or controlled corporations including their subsidiaries but authorized the FIRB to restore the same. Nevertheless, in *Albay*, as above- discussed, this Court ruled that the tax exemptions under FIRB Resolution Nos. 10-85 and 1-86 cannot be enforced as said resolutions were only recommendatory and were not duly approved by the President of the Philippines as required by P.D. No. 776.[55] The Court also sustained in *Albay* the validity of Executive Order No. 93, and of the tax exemptions restored under FIRB Resolution No. 17-87 which was issued pursuant thereto, as it was duly approved by the President as required by said executive order.

Moreover, under Section 3, Article XVIII of the Transitory Provisions of the 1987 Constitution, it is provided that:

"All existing laws, decrees, executive orders, proclamation, letters of instructions, and other executive issuances not inconsistent with this constitution shall remain operative until amended, repealed or revoked."

Thus, P.D. Nos. 776 and 1931 are valid and operative unless it is shown that they are inconsistent with the Constitution.

Even assuming *arguendo* that P.D. Nos. 776, 1931 and Executive Order No. 93 are not valid and are unconstitutional, the result would be the same, as then the latest applicable law would be P.D. No. 938 which amended the NPC charter by granting exemption to NPC from *all forms of taxes*. As above discussed, this exemption of NPC covers direct and indirect taxes on petroleum products used in its operation. This is as it should be, if We are to hold as invalid and inoperative the withdrawal of such tax exemptions under P.D. No.

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[54] *Supra*.

[55] P.D. No. 1955 was issued effective October 15, 1984 providing for the withdrawal of tax exemptions of private business enterprises and/or persons engaged in any economic activity. It is not relevant to this case which involves a government corporation.

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1931 as well as under Executive Order No. 93 and the delegation of the power to restore these exemptions to the FIRB.

The Court realizes the magnitude of the consequences of this decision. To reiterate, in *Albay* this Court ruled that the NPC is liable for real estate taxes as of June 11, 1984 (the date of promulgation of P.D. No. 1931) when NPC had ceased to enjoy tax exemption privileges since FIRB Resolutions Nos. 1085 and 1-86 were not validly issued. The real estate tax liability of NPC from June 11, 1984 to December 1, 1990 is estimated to amount to ₱7.49 billion plus another ₱4.76 billion in fuel import duties the firm had earlier paid to the government which the NPC now proposed to pass on to the consumers by another 23-centavo increase per kilowatt hour in power rates on top of the 17-centavo increase per kilowatt hour that took effect just over a week ago.[56] Hence, another case has been filed in this Court to stop this proposed increase without a hearing.

As above-discussed, at the time FIRB Resolutions Nos. 10-85 and 1-86 were issued, P.D. No. 776 dated August 24, 1975 was already amended by P.D. No. 1931,[57] wherein it is provided that such FIRB resolutions may be approved not only by the President of the Philippines but also by the Minister of Finance. Such resolutions were promulgated by the Minister of Finance in his own right and also in his capacity as FIRB Chairman. Thus, a separate approval thereof by the Minister of Finance or by the President is unnecessary

As earlier stated, a reexamination of the ruling in *Albay* on this aspect is therefore called for and consequently, *Albay* must be considered superseded to this extent by this decision. This is because P.D. No. 938 which is the latest amendment to the NPC charter granting the NPC exemption from *all forms of taxes* certainly covers real estate taxes which are direct taxes.

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[56] See March 5, 1991 issue of the *Philippine Daily Inquirer* and other newspapers of same day as well as the March 10, 1991 issue of the *Manila Bulletin*.

[57] Please see Sec. 5 of P.D. No. 1931 which provide that all other laws, decrees, etc. inconsistent with the same decree are "thereby repealed, amended or modified accordingly."

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This tax exemption is intended not only to insure that the NPC shall continue to generate electricity for the country but more importantly, to assure cheaper rates to be paid by the consumers.

The allegation that this is in effect allowing tax evasion by oil companies is not quite correct. There are various arrangements in the payment of crude oil purchased by NPC from oil companies. Generally, the custom duties paid by the oil companies are added to the selling price paid by NPC. As to the specific and *ad valorem* taxes, they are added as part of the seller's price, but NPC pays the price net of tax, on condition that NPC would seek a tax refund to the oil companies. No tax component on fuel had been charged or recovered by NPC from the consumers through its power rates.[58] Thus, this is not a case of tax evasion of the oil companies but of tax relief for the NPC. The billions of pesos involved in these exemptions will certainly inure to the ultimate good and benefit of the consumers who are thereby spared the additional burden of increased power rates to cover these taxes paid or to be paid by the NPC if it is held liable for the same.

The fear of the serious implication of this decision in that NPC's suppliers, importers and contractors may claim the same privilege should be dispeled by the fact that (a) this decision particularly treats of only the exemption of the NPC from all taxes, duties, fees, imposts and all other charges imposed by the government on the petroleum products it used or uses for its operation; and (b) Section 13(d) of R.A. No. 6395 and Section 13(d) of P.D. No. 380, both specifically exempts the NPC from all taxes, duties, fees, imposts and all other charges imposed by the Government on all petroleum products used in its operation only, which is the very exemption which this Court deems to be carried over by the passage of P.D. No. 938. As a matter of fact in Section 13(d) of P.D. No. 380 it is specified that the aforesaid exemption from taxes, etc. covers those "directly or indirectly" imposed by the "Republic of the Philippines, its provincies, cities, municipalities and other government agencies and instrumentalities on said petroleum products." The exemption therefore from direct and indirect tax on petroleum products used

[58] See letter opinion of Secretary of Finance Vicente Jayme dated May 20, 1988.

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by NPC cannot benefit the suppliers, importers and contractors of NPC of other products or services.

The Court realizes the laudable objective of petitioner to improve the revenue of the government. The amount of revenue received or expected to be received by this tax exemption is, however, not going to any of the oil companies. There would be no loss to the government. The said amount shall accrue to the benefit of the NPC, a government corporation, so as to enable it to sustain its tremendous task of providing electricity for the country and at the least cost to the consumers. Denying this tax exemption would mean hampering if not paralyzing the operations of the NPC. The resulting increased revenue in the government will also mean increased power rates to be shouldered by the consumers if the NPC is to survive and continue to provide our power requirements.[59] The greater interest of the people must be paramount.

WHEREFORE, the petition is DISMISSED for lack of merit. No pronouncement as to costs.

SO ORDERED.

Narvasa, Melencio-Herrera, Feliciano, Bidin, Medialdea and *Regalado, JJ.*, concur.

Fernan, C.J., no part, formerly counsel for one of the respondents.

Gutierrez, Jr., J., joins the dissents.

Cruz, J., dissents.

Paras, J., dissents but adds that NPC should be refunded not by the consuming public but by the *oil* companies, for ultimately these oil companies get the benefit of the alleged tax exemption.

Padilla, J., no part; counsel for respondent Pilipinas Shell Petroleum Corp. formerly member of his legal staff.

Sarmiento, J., dissents.

Griño-Aquino and *Davide, Jr., JJ.*, joins the dissent of Justice Sarmiento.

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[59] NPC Vice-President Cris Herrera said the average rate increase to be passed to consumers is P0.23 per year. (please see Daily Inquirer of March 5, 1991; "Napocor wants new power rate increase").

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CRUZ, *J., dissenting opinion:*

I join Mr. Justice Abraham F. Sarmiento in his excellent dissent and would stress only the following additional observations.

A tax exemption represents a loss of revenue to the State and must therefore not be lightly granted or inferred. When claimed, it must be strictly construed against the taxpayer, who must prove that he comes under the exemption rather than rule that every one must contribute his just share in the maintenance of the government.

In the case at bar, the *ponencia* would justify the tax exemption as having been validly granted under P.D. Nos. 1931 and 1955 and Resolutions Nos. 10-85 and 1-86 of the Fiscal Incentives Review Board. It is also asserted that FIRB Resolution No. 17-87, was lawfully adopted pursuant to a valid delegation of power made by Executive Order No. 93.

When P.D.. Nos. 1931 and 1955 were issued by President Marcos in 1984, the Batasang Pambansa was already in existence and discharging its legislative powers. Presumably, these decrees were promulgated under the infamous Amendment No. 6. Assuming that the reservation of legislative power in the President was then valid, I submit that the power was nevertheless not validly exercised. My reason is that the President could legislate under the said amendment only if the Batasang Pambansa "failed or was unable to act adequately on any matter that in his judgment required immediate action" to meet the "exigency." There is no showing that the presidential encroachment on legislative prerogatives was justified under these conditions. Simply because the rubber-stamp legislature then meekly submitted did not make the usurpation valid.

By these decrees, President Marcos, exercising legislative power, delegated it to himself as executive and empowered himself and/or the Minister of Finance to restore the exemptions previously withdrawn.

As the decrees themselves were invalid, it should follow that Executive Order No. 93, which was intended only to implement them, should also be illegal. But even assuming the legality of the said decrees, I would still question the authority of the President to sub-delegate the power delegated to her thereunder.

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Such sub-delegation was not permissible because *potestas delegata non delegari potest*. Even if we were to disregard the opinion of Secretary of Justice Sedfrey A. Ordoñez that there were no sufficient standards in Executive Order No. 93 (although he was reversed on this legal questions by the Executive Secretary). The President's delegated authority could still not be extended to the FIRB, which was not a delegate of the legislature.

It is remarkable that the respondents could seriously argue that a mere administrative body like the FIRB can exercise the legislative power to grant tax exemptions. I am not aware that any other such agency, including the Bureau of Internal Revenue and the Bureau of Customs, has this authority. An administrative body can *apply* tax exemptions under existing law but it cannot itself *create* such exemptions. This is a prerogative of the Congress that cannot be usurped by or even delegated to a mere administrative body.

In fact, the decrees clearly provided that it was the President and/or the Minister of Finance who could restore the exemption, subject only to the recommendation of the FIRB. The FIRB was not empowered to directly restore the exemption. And even if it be accepted that the FIRB merely recommended the exemption, which was approved by the Finance Minister, there would still be the curious anomaly of Minister Virata upholding his very own act as chairman of the FIRB.

This Court called it a "travesty of justice" when in Zambales Chromite *v.* Court of Appeals, 94 SCRA 261, the Secretary of Agriculture and Natural Resources approved a decision earlier rendered by him when he was the Director of Mines, and in Anzaldo v. Clave, 119 SCRA 353, where the respondent. as presidential executive assistant, affirmed on appeal to Malacañang his own decision as chairman of the Civil Service Commission.

It is important to note that when P.D.. Nos. 1931 and 1955 were issued by President Marcos, the rule under the 1973 Constitution was that "no law granting a tax exemption shall be passed without the concurrence of a majority of all the members of the Batasang Pambansa." (Art. VIII, Sec. 17[4]). Laws are usually passed by only a majority of those present in the chamber, there being a quorum,

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but not where it grants a tax exemption. This requires an absolute majority. Yet, despite this stringent limitation on the national legislature itself, such stricture does not inhibit the President and the FIRB in the exercise of their delegated power. It would seem that the delegate has more power than the principal. Significantly, this limitation is maintained in the present Constitution under Article VI, Section 28(4).

The *ponencia* holds that the rule of strict construction is not applicable where the grantee is an agency of the government itself, like the NPC in the case before us. I notice, however, that the ultimate beneficiaries of the expected tax credit will be the oil companies, which certainly are not part of the Republic of the Philippines. As the tax refunds will not be enjoyed by the NPC itself, I see no reason why we should be exceptionally lenient in applying the exception.

The tax credits involved in this petition are tremendous - no less that P1.58 billion. This amount could go a long way in improving the national economy and the well-being of the Filipino people, who deserve the continuing solicitude of the government, including this Court. I respectfully submit that it is to them that we owe our foremost loyalty.

SARMIENTO, *J.*, *dissenting opinion*:

I would like to point out specifically two things in connection with the majority's disposition as to: (1) Finance Incentives Review Board (FIRB) Resolutions Nos. 10-85 and 1-86; and (2) the National Power Corporation's tax exemption vis-a-vis our decision in the case of *Philippine Acetylene Co., Inc. v. Commission of Internal Revenue*[1] and in the light of the provisions of its charter, Republic Act No. 6395, and the various amendments entered into it.

(1)

On pages 20-23 of the Decision, the majority suggests that FIRB Resolutions Nos. 10-85 and 1-86 had validly restored the National

[1] No. L-19707, August 17, 1967, 20 SCRA 1056.

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Power Corporation's tax exemption privileges, which Presidential Decree No. 1931 had meanwhile suspended. I wish to stress that in the case of *National Power Corporation v. Province of Albay*,[2] the Court held that the FIRB Resolutions Nos. 10-85 and 1-86 had the bare force of recommendations and did not operate as a restoration, in the absence of an approval by the President (in then President Marcos' exercise of legislative powers), of tax exemptions. The Court noted that there is nothing in Presidential Decree No. 776, the FIRB charter, conferring on it the authority to grant or restore exemptions, other than to make recommendations on what exemptions to grant or restore. I quote:

. . . . . .

"It is to be pointed out that under Presidential Decree No. 776, the power of the FIRB was merely to "recommend to the President of the Philippines and for reasons of compatibility with the declared economic policy, the withdrawal, modification, revocation or suspension of the enforceability of any of the abovecited statutory subsidies or tax exemption grants, except those granted by the Constitution." It has no authority to impose taxes or revoke existing ones, which, after all, under the Constitution, only the legislature may accomplish.. .

. . . . . .

As the Court held there, it was only on March 10, 1987 that the restoration became effective, not because Resolutions Nos. 10-85 and 1-86 decreed a restoration, but because of Resolution No. 17-87 which, on the other hand, carried the approval of the Office of the President.[4] (FIRB Resolution No. 17-87 made the National Power Corporation's exemption effective March 10, 1987.) Hence, the National Power Corporation, so the Court held, was liable for payment of real property taxes to the Province of Albay between June 11, 1984, the date Presidential Decree No. 1931 (withdrawing its tax exemptions) took effect, and March 10, 1987.

As far therefore as the majority in the present case rules that the National Power Corporation is also entitled to a refund as a result

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[2] G.R. No. 87479, June 4, 1990.
[3] *Supra*, 7.
[4] *Supra*, 5.

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of FIRB Resolutions Nos. 10-15 and 1-86, I respectfully submit that a serious conflict has arisen.

While it is true that FIRB Resolutions Nos. 10-85 and 1-86 were signed by then Finance Minister Cesar Virata,[5] I submit nonetheless, as *Albay* in fact held, that the signature of Mr. Virata is not enough to restore an exemption. The reason is that Mr. Virata signed them (FIRB Resolutions Nos. 10-85 and 1-86) in his capacity as chairman of the Finance Incentives Review Board (FIRB). I find this clear from the very Resolutions in question:

FISCAL INCENTIVES REVIEW BOARD

RESOLUTION NO. 10-85

BE IT RESOLVED, AS IT IS HEREBY RESOLVED, That:

1. Effective June 11, 1984, the tax and duty exemption privileges enjoyed by the National Power Corporation under C.A. No. 120 as amended are restored up to June 30, 1985.

2. Provided, That this restoration does not apply to the following:

a. importations of fuel oil (crude equivalent) and coal as per FIRB Resolution No. 1-84;

b. commercially-funded importations; and

c. interest income derived from any investment source.

3. Provided further, That in case of importations funded by international financing agreements, the NPC is hereby required to furnish the FIRB on a periodic basis the particulars of items received or to be received through such arrangements, for purposes of tax and duty exemption privileges.

(Sgd.) ALFREDO PIO DE RODA, JR.
Acting Minister of Finance
Acting Chairman, FIRB

[5] Under Presidential Decree No. 1931, the Minister of Finance could restore exemptions.

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FISCAL INCENTIVES REVIEW BOARD
RESOLUTION NO. 1-86

BE IT RESOLVED, AS IT IS HEREBY RESOLVED: That

1. Effective July 1, 1985, the tax and duty exemption privileges enjoyed by the National Power Corporation (NPC) under Commonwealth Act No. 120, as amended, are restored; Provided, That importations of fuel oil (crude oil equivalent) and coal of the herein grantee shall be subject to the basic and additional import duties; Provided, further, That the following shall remain fully taxable:

   a. Commercially-funded importations; and

   b. Interest income derived by said grantee from bank deposits and yield or any other monetary benefits from deposit substitutes, trust fund and other similar arrangements.

2. The NPC as a government corporation is exempt from the real property tax on land and improvements owned by it provided that the beneficial use of the property is not transferred to another pursuant to the provisions of Sec. 40(a) of the Real Property Tax Code, as amended.

(Sgd.) CESAR E.A. VIRATA
Minister of Finance
Chairman - FIRB

I respectfully submit that to say that Mr. Virata's signature is sufficient (please note that Resolution No. 10-85 was not even signed by Mr. Virata, but rather by Mr. Alfredo Pio de Roda, Jr.) is in fact to confer on the Board actual "restoration" or even exemption powers, because in *all cases*, FIRB Resolutions *are* signed by Mr. Virata (or the acting chairman) in his capacity as Board Chairman. I submit that we can not consider an FIRB Resolution as an act of Mr. Virata in his capacity as Minister of Finance (and therefore, as a grant or restoration of tax exemption) although Mr. Virata also happened to be concurrently, Minister of Finance, because to do so would be to blur the distinction between the capacities in which he, Mr. Virata, actually acted. I submit that he,

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Mr. Virata, need have issued separate approvals of the Resolutions in question, in his capacity as Finance Minister.

Parenthetically, on the issue of the constitutional validity of Executive Order No. 93, insofar as it "delegates" the power to restore exemptions to the FIRB, I hold that in the first place, Executive Order No. 93 makes no delegation at all. As the majority points out, "[u]nder Section 1(f) of Executive Order No. 93, aforestated, such tax and duty exemptions extended by the FIRB must be approved by the President."[6] Hence, the FIRB does not exercise any power--and as I had held, its powers are merely recommendatory--and it is the President who in fact exercises it. It is true that Executive Order No. 93 has set out certain standards by which the FIRB, as a reviewing body, may act, but I do not believe that a genuine delegation question has arisen precisely, the acts of the Board are subject to approval by the President, in the exercise of her legislative powers under the Freedom Constitution.[7]

(2)

According to the Decision, the National Power Corporation, under its charter, is also exempt from indirect taxes, and that there is nothing irregular about what is apparently standard operating procedure between the Corporation and the oil firms in which the latter sell to the Corporation oil "net of tax" and that thereafter, the Corporation assigns to them its tax credit.

I gather first, and with all due respect, that there has been a misunderstanding about so-called indirect taxes and the theory of shifting taxes. In *Philippine Acetylene Co., Inc., supra*, the Court intimated that there are no such things as indirect taxes for purposes of exemption, and that the National Power Corporation's exemption from taxes can not be claimed, as well, by a manufacturer (who sells his products to the Corporation) on the theory that the taxes he will shift will be shifted to a tax-exempt entity. According to the Court, "the purchaser does not pay the tax...[h]e pays or may pay

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[6] Decision, 42.

[7] Please note that under the 1987 Constitution, tax exemptions may be granted alone by Congress, (Const., art. VI, sec. 28, par. 4.) Unless and until Congress, however, repeals Executive Order No. 93, the President may continue to grant exemptions.

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the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else."[8]

It is true that a tax may be shifted, that is, to enable the payor to escape its effects by adding it to the price, thereby transferring the burden to the purchaser of whom the incidence of the tax settles (indirect tax). I submit, however, that it is only for purposes of *escape* from taxation. As *Acetylene* has clarified, the tax which the manufacturer is liable to pay directly under a statute is still a personal tax and in "passing the tax on" to the purchaser, he does not really make the latter pay the tax, and what the latter pays actually is just the price. Thus, for purposes of exemption, and so *Acetylene* tells us, the manufacturer can not claim one because the purchaser happens to be exempted from taxes. *Mutatis mutandis*, and so I respectfully submit, the purchaser can not be allowed to accept the goods "net of tax" because it never paid for the tax in the first place, and was never liable therefor, in the second place.

According to the majority, *Philippine Acetylene* has been "abrogated," and the majority points to the various amendments to the charter of the National Power Corporation as authority for its view.

First, there is nothing in those amendments that would remotely point to this conclusion.

Second, *Acetylene's* pronouncement is founded on the very science of taxation--that indirect taxes are no taxes for purposes of exemption, and that consequently, one who did not pay taxes can not claim an exemption although the price he paid for the goods included taxes. To enable him to claim an exemption, as the majority would now enable him (*Acetylene* having been "abrogated"), is, I submit, to defeat the very laws of science.

The theory of "indirect taxes" and that *no* exemption is possible therefrom, so I reiterate, are well-settled concepts of taxation, as the law of supply and demand is to the law of economics. A President is said (unfairly) to have attempted it, but one can not repeal the law on supply and demand.

[8] At 1063.

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I do not find the National Power Corporation's alleged exemption from indirect tax evident, as the majority finds it evident, from the Corporation's charter, Republic Act No. 6395, as amended by Presidential Decrees Nos. 380 and 938. It is true that since Commonwealth Act No. 120 (the Corporation's original charter, which Republic Act No. 6395 repealed), the Corporation has enjoyed a "preferential tax treatment," I seriously doubt, however, whether or not that preference embraces "indirect taxes" as well--which, as I said, are no taxes for purposes of claims for exemptions by the "indirect payor". And albeit Presidential Decree No. 938 refers to "all forms of taxes," I can not take that to include, as a matter of logic, "indirect taxes," and as I discussed above, that scenario is not possible.

I quite agree that the legislative intent, based on a perusal of Republic Act No. 6395 and subsequent amendatory statutes, was to give the National Power Corporation a broad tax preference on account of the vital functions it performs, indeed, "to enable the Corporation to pay the indebtedness and obligation and in furtherance and effective implementation of the policy initiated" by its charter. I submit, however, that that alone can not entitle the Corporation to claim an exemption for indirect taxes. I also believe that its existing exemption from direct taxes is sufficient to serve the legislative purpose.

The fact that the National Power Corporation has been tasked with an enormous undertaking "to improve," as the majority puts it, "the quality of life of the people" pursuant to constitutional mandates is no reason, I believe, to include indirect taxes within the coverage of its preferential tax treatment. After all, it is exempt from direct taxes, and in fact that it will be made to shoulder indirect taxes (which are no taxes) will not defeat its exemption or frustrate the intent of both legislature and Constitution.

I do not think the majority can point to the various executive constructions as authorities for its own construction. First and foremost, with respect to then Commissioner Ruben Ancheta's ruling of May 8, 1985 cited on pages 32-33 of the Decision, it is notable that in his BIR Ruling No. 183-85, dated October 22, 1985, he in fact reversed himself, I quote:

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"In reply please be informed that after a re-study of Section 13, R.A. 6395 as amended by P.D. No. 938, this Office is of the opinion, and so holds, that the scope of the tax exemption privilege enjoyed by *NPC* under said section covers *only taxes for which it is directly liable and not on taxes which are merely shifted to it.* (Phil. Acetylene Co. *v.* Comm. of Internal Revenue, 20 SCRA 1056, 1967). Since contractor's tax is directly payable by the contractor, not by NPC, your request for exemption, based on the stipulation in the aforesaid contract that NPC shall assume payment of your contractor's tax liability, cannot be granted for *lack of legal basis.* " (italics added)[9]

In yet another ruling, then Commissioner Bienvenido Tan likewise declared, in connection with an apparent claim for refund by the Philippine Airlines, that "PAL's tax exemption is limited to taxes for which PAL is directly liable, and that *the payment of specific and ad valorem taxes on petroleum products is a direct liability of the manufacturer or producer thereof...*" [10]

Again, under BIR Ruling No. 152-86, the Bureau of Internal Revenue reiterated, as to the National Power Corporation's claim for a refund, I quote:

. . . this Office has maintained the stand that your tax exemption privileges covers only taxes for which you are directly liable.[11]

Per BIR Ruling No.70-043, dated August 27, 1970, the Bureau likewise held that the term "all forms of taxes" covers only direct taxes.[12]

In his letter addressed to former BIR Commissioner Tan, Atty. Reynoso Floreza, BIR Assistant Commissioner for Legal, opposed Caltex Philippines' claim for a P58-million refund, and although the Commissioner at that time hedged, he was later persuaded by Special Assistant Abraham De la Viña, and in fact, instructed Atty. De la Viña to "prepare [the] corresponding notice to NPC and Caltex"[13] to inform them that their claim has been denied. (Although strangely, he changed his mind later.)

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[9] See Comm. on Accountability of Public Officers and Investigations. S. Rpt. 474, ist Cong., 2nd Sess. (1989), 4-5; also 13; also 25; also 29; italics in the original.

[10] *Id.*, 4; also 15; also 25; also 39, 40; italics in the original.

[11] *Id.*, 16; italics in the original.

[12] *Id.*, 24; also BIR Ruling No. 069-79 (1979).

[13] *Id.*, 31.

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Hence, I do not think that we can judiciously rely on executive construction because executive construction has been at best, erratic, and at worst, conflicting.

I do not find the majority's historical construction a reliable yardstick in this case, for if the historical development of the law were any indication, the legislative intent is, on the contrary, to exclude indirect taxes from the coverage of the National Power Corporation's tax exemption. Thus, under Commonwealth Act No. 120, the Corporation was made exempt from the payment of all taxes in connection with the issuance of bonds. Under Republic Act No. 358, it was made exempt from the payment of all taxes, duties, fees, imposts, and charges of the national and local governments.

Under Republic Act No. 6395, the National Power Corporation was further declared exempt:

(e) From all taxes, duties, fees, imposts, and all other charges imposed by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the Corporation . . .

By virtue of Presidential Decree No. 380, it was made exempt:

(d) from all taxes, duties, fees, imposts, and all other charges imposed directly or indirectly by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the corporation in the generation, transmission, utilization and sale of electric power.

By virtue however of Presidential Decree No. 938, reference to "indirect taxes" was omitted thus:

. . . To enable the Corporation to pay its indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section One of this Act, the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes, duties, fees, imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings.

The deletion of "indirect taxes" in the Decree is, so I hold, significant, because if the intent of the law were truly to exempt the National Power Corporation from so-called indirect taxes as well, the law would have said so specifically, as it said so specifically in Presidential Decree No. 380.

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I likewise do not think that the reference to the whereas clauses of Presidential Decree No. 938 is warranted, in particular, the following whereas clause:

WHEREAS, in the application of the tax exemption provisions of the Revised Charter, the non-profit character of NPC has not been fully utilized because of the restrictive interpretations of the taxing agencies of the government on said provisions;

I am not certain whether it can be basis for a "liberal" construction. I am more inclined to believe that the term "restrictive interpretations" refers to BIR rulings confining the exemption to the Corporation alone (but not its subsidiaries), and not, rather, to the scope of its exemption. Indeed, as Presidential Decree No. 938 specifically declares, "the Corporation, *including its subsidiaries*, is hereby declared exempt..."[14]

The majority expresses the apprehension that if the National Power Corporation were to be made to assume "indirect taxes," the latter will be forced to pass them on to the consuming public.

First, and as *Acetylene* held, we do not even know if the payor will in fact "pass them on." "A decision to absorb the burden of the tax is largely a matter of economics."[15] Furthermore:

In the long run a sales tax is probably shifted to the consumer, but during the period when supply is being adjusted to changes in demand it must be in part absorbed. In practice the businessman will treat the levy as an added cost of operation and distribute it over his sales as he would any other cost, increasing by more than the amount of the tax prices of goods demand for which will be least affected and leaving other prices unchanged. 47 Harv. Ld. Rev. 860, 869 (1934).[16]

It therefore appears to me that any talk of the public ultimately absorbing the tax is pure speculation.

Second, it has typically been the bogeyman that business, with due respect, has invoked to avoid the payment of tax. And to be sure, the populist allure of that argument has appealed to many, yet

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[14] Pres. Decree No. 938, sec. 13; italics supplied.

[15] At 1064.

[16] *Supra*, fn. 15.

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it has probably also obscured what is as fundamental as protecting consumers --preserving public revenue, the very lifeblood of the nation. I am afraid that this is not healthy policy, and what occurs to me -- and what indeed leaves me very uncomfortable -- is that by the stroke of the pen, we would have in fact given away P13,750,214,639.00 (so it is said) of legitimate government money.

According moreover to Committee Report No. 474 of the Senate, "NPC itself says that it does not use taxes to increase prices of electricity to consumers because the cost of electric generation and sale already takes into account the tax component."[17]

I can not accept finally, what to me is an unabashed effort by the oil firms to evade taxes, the arrangement (as I gather from the Decision) between the National Power Corporation and the oil companies in which the former assigns its tax credit to the latter. I also presume that this is the natural consequence of the "understanding," as I discussed above, to purchase oil "net of tax" between NAPOCOR and the oil firms, because logically, the latter will look for other sources from which to recoup the taxes they had failed to shift and recover their losses as a result. According to the Decision, no tax is left unpaid because they have been pre-paid before the oil is delivered to the National Power Corporation. But whatever taxes are paid are in fact wiped out because the subsequent credit transfer will enable the oil companies to recover the taxes pre-paid.

According to the majority, "[t]his is not a case of tax evasion of the oil companies but a tax relief for the NPC."[18] The problem, precisely, is that while it is NPC which is entitled to "tax relief," the arrangement between NPC and the oil companies has enabled instead the latter to enjoy relief -- when relief is due to NPC alone. The point still remains that no tax money actually reaches our coffers because as I said, that arrangement enables them to wipe it out. If the NPC were the direct importer, I would then have no reason to object, after all, the NPC is exempt from direct taxation

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[17] Comm. on Accountability of Public Officers and Investigations, S. Rpt. 474, *id.*, 61.
[18] Decision, 47.

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and secondly, the money it is paying to finance its importations belongs to the government. The law, however, gave the exemption to NPC, not the oil companies.

According to the Decision: "The amount of revenue received or expected to be received by this tax exemption is, however, not going to any of the oil companies..."[19] and that "[t]here would be no loss to the government."[20]

With due respect to the majority, it is erroneous, if not misleading, to say that no money is going to the oil companies and that the government is not losing anything. Definitely, the tax-credit assignment arrangement between the NPC and the oil firms enables the latter to *recover* revenue they have paid. And definitely, that means *loss* for the government.

The majority is concerned with the high cost of electricity. The increasing cost of electricity is however due to myriad factors, foremost of which, is the devaluation of the peso[21] and as recent events have suggested, "miscalculations" at the top levels of NPC. I can not however attribute it, as the majority in all earnest attributes it, to the fact, far-fetched as it is, that the NPC has not been allowed to enjoy exemption from indirect taxes.

Tax exemptions furthermore are a matter of personal privilege of the grantee. It has been held that as such, they can not be assigned, unless the statute granting them permits an assignment.[22]

While "shifting the burden of tax" is a permissible method of avoiding a tax, evading it is a totally different matter. And while I agree that the National Power Corporation should be given the widest financial assistance possible, assistance should not be an excuse for plain tax evasion, if not tax fraud, by Big Business, in particular, Big Oil.

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[19] *Supra*, 51.

[20] *Supra*.

[21] See Maceda v. Energy Regulatory Board, G.R. Nos. 95203-05 and 95119-21, December 18, 1990.

[22] DE LEON, THE FUNDAMENTALS OF TAXATION 55 (1980 ed.).

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(3) *Postscripts*

With all due respect, I do not think that the majority has appreciated enough the serious implications of its decision--to the country, in particular, its shrinking coffers. I do not think that we are, after all, taking here of "simple" billions, but in fact, billions upon billions in lost revenue looming large.

I am also afraid that the majority is not quite aware that it is setting a precedent not only for the oil companies but in fact, for the National Power Corporation's suppliers, importers, and contractors. Although I am not, as of this writing, aware of their exact number or the precise amount the National Power Corporation has spent in payment of supplies and equipment, I can imagine that the Corporation's assets consisting of those supplies and equipment, machines and machinery, are worth no fewer than billions.

With this precedent, there is no stopping indeed the NAPOCOR's suppliers, from makers of storage tanks, steel towers, cables and cable poles, to builders of dikes, to layers of pipelines, and pipes, from claiming the same privilege.

There is no stopping the NPC's contractors, from suppliers of cement for plant fixtures and lumber for edifices, to the very engineers and technicians who designed them, from demanding equal rights.

There will be no stopping the Corporation's transporters, from container van and rig owners to suppliers of service vehicles of NPC executives, from demanding the privilege.

What is to stop, indeed, caterers of food served in board meetings or in NAPOCOR cafeterias from asking for exemption, since food billed includes sales taxes shifted to a tax-exempt entity and, following the theory of the majority, taxes that may be refundend?

What is, indeed, to stop all imagined claimants from demanding all imagined claims, since as we are aware, the rule of taxation--and consequently, tax exemption--is uniform and equitable?[23]

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[23] CONST. Art. VI, sec. 28(1).

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Of course, we have discussed NAPOCOR alone; we have not touched other tax-exempt entities, say, the Marinduque Mining Corporation and Nonoc Mining Corporation. Per existing records and per reliable information, Caltex Philippines, between 1979 and 1986, successfully recovered the total sum of P49,835,791.00. In 1985, Caltex was said to have been refunded the amount of P4,217,423.00 arising from the same tax arrangement with the Nonoc Miming Corporation.

Again, what is stopping -- by virtue of this decision -- not only the oil firms but also Marinduque's and Nonoc's suppliers, importers, ridiculously, caterers, from claiming a future refund?

The Decision, to be sure, attempts to allay these apprehensions and "dispel[s] [them] by the fact that . . . the decision particularly treats of only the exemption of the NPC from all taxes, duties, fees, imposts and all other charges imposed by the government on the petroleum products it need or uses for its operation. . . ."[24] Firstly, under Presidential Decree No. 938, the supposed tax exemption of the National Power Corporation covers "all forms of taxes."[25] If therefore "all forms of taxes" covers as well, indirect taxes because Presidential Decree No. 380 supposedly extended the Corporation's exemption to indirect taxes (and the majority "deems Presidential Decree No. 380 to have been carried over to Presidential Decree No. 938"), then the conclusion seems inescapable -- following the logic of the majority -- that the Corporation is exempt from all indirect taxes, on petroleum and any and all other products and services.

The fact of the matter, second of all, is that the Decision is premised on the alleged exemption of the National Power Corporation from all forms of taxes, meaning, direct and indirect taxes. It is a premise that is allegedly supported by statutory history, and the legislature's alleged intent to grant the Corporation awesome exemptions. If that were the case, the Corporation must logically be exempt from all kinds of taxes payable. Logically, the majority can not limit the sweep of its pronouncement by exempting the

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[24] *Supra.*

[25] Pres. Decree No. 938, *supra*, sec. 10.

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National Power Corporation from "indirect taxes on petroleum" alone. What is sauce for the goose (taxes on petroleum) is also sauce for the gander (all other taxes).

I still would have reason for my fears.

I can not, in all candor, accept the majority's efforts, and going back to the Corporation's chaters, to "carry over," in particular, Section 13(d) of Presidential Decree No.380, to Presidential Decree No. 938. First of all, if Presidential Decree No. 938 meant to absorb Presidential Decree No. 380 it would have said so specifically, or at the very least, left it alone. Obviously, Presidential Decree No. 938 meant otherwise, to begin with, because it is precisely an amendatory statute. Secondly, a "carry-over" would have allowed this Court to make law, so only it can fit in its theories.

The country has gone to lengths fashioning an elaborate tax system and an efficient tax collection machinery. Planners' efforts have seen various shifts in the taxing system, from specific, to *ad valorem*, to value-added taxation, purportedly to maximize collection. For this year,the Bureau of Internal Revenue has a collection target of P130 billion, and sugnificantly, it has been unrelenting in its tax and tax-consciousness drive. I am not prepared to cite numbers but I figure that the money it will lose by virtue of this Decision is a meaningful chunk off its target, and a significant setback to the government's programs.

I am afraid that by this Decision, the majority has ignored the forest (the welfare of the entire nation) in favor of a tree (the welfare of a government corporation). The issue, in may opinion, is not the viability of the National Power Corporation -- as if the fate of the nation depended alone on it -- but the very survival of the Republic. I am not of course to be mistaken as being less concerned with NAPOCOR's fiscal chart. The picture, as I see it however, is that we are in fact assisting the oil companies, out of that alleged corcern, in evading taxes at the expense, needless to state, of our coffers. I do not think that that is a question of legal hermeneutics, but rather, of plain love of country.