DOUBLE TAXATION: RIDING ON THE BACKS OF FILIPINO EXPORT LABOUR

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Double taxation almost always brings to mind some nebulous concept generally associated with corporations whose operations span two or more jurisdictions. However, this seemingly esoteric tax notion is all too real and fiscally oppressive to a distinct sector of the working population: the Filipino 'nannies'. Its incidence however affects all Filipinos who have immigrated but have maintained their Filipino citizenship. Filipino citizenship provides the link and legal basis for the Philippines to continue to tax its citizens albeit their being resident in other jurisdictions.

The Philippines Convention, a bilateral treaty between Canada and the Philippines, whose very object is the elimination of double taxation, nevertheless gives legal effect to the maintenance of the this taxing claim.

Relief can only be achieved with the full exemption by the Philippine government of its nationals' foreign sourced income. Where the Philippine government remains intransigent with respect to its taxing power, it remains to Canada to revisit the Philippines Convention and enforce the true spirit of this treaty.

While sections of the treaty may be invoked to defeat this taxing claim, it is, as a practical matter, inconceivable that a nanny invoke such provisions. The reality remains, until such time as she becomes a landed immigrant, her legal status is prescribed by her Philippine passport.

Canada has as much responsibility to see that Filipino nannies, and those similarly placed, not suffer discrimination. In having accepted these workers as constituents to provide caregiver and housekeeping services, Canada has extended to them the rights and freedoms under the Charter. *Will it take a* Charter *challenge to eliminate this tax grab?*

La double imposition évoque presque toujours un concept nébuleux généralement associé à l'idée de sociétés ayant des activités dans deux pays ou plus. Cependant, ce concept fiscal qui semble ésotérique n'est que trop réel et oppressif sur le plan fiscal pour une partie distincte de la population active : les « bonnes d'enfants » philippines. Ce concept a toutefois une incidence sur tous les Philippins et les Philippines qui ont émigré mais qui ont conservé leur citoyenneté philippine. La citoyenneté philippine constitue d'ailleurs le lien et le fondement juridique établis par les Philippines pour continuer à taxer leurs citoyens et citoyennes, bien qu'ils résident dans d'autres pays.

La convention des Philippines, un traité bilatéral conclu entre le Canada et les Philippines, dont l'objet même est l'élimination de la double imposition, donne néanmoins un effet juridique au maintien de cette taxation.

La seule façon de redresser la situation serait que le gouvernement des Philippines accorde une exemption complète à ses ressortissants et ses ressortissantes qui ont une source de revenu à l'étranger. Si le gouvernement des Philippines demeure intransigeant en ce qui concerne son pouvoir de taxation, c'est au Canada qu'il revient de revoir la convention des Philippines et de faire valoir l'esprit véritable de ce traité.

Bien que l'on puisse invoquer des articles de ce traité pour déjouer cette taxation, il est, en pratique, inconcevable qu'une bonne d'enfants invoque ces dispositions. Toujours est-il que jusqu'à ce qu'elle devienne résidente permanente, son statut juridique est prescrit par son passeport philippin.

Il incombe au Canada de voir à ce que les bonnes d'enfants philippines, et les

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I am indebted to *Cathy, Pat, Florence, Lilia* and *Fely*. Your lives have touched mine. Your stories need to be heard and your tax plight rectified.

> *personnes qui se trouvent dans une situation semblable, ne subissent pas de discrimination. En ayant accepté ces travailleuses en tant que commettantes afin qu'elles fournissent des services de prestation de soins et d'entretien ménager, le Canada leur a accordé les droits et les libertés protégés par la* Charte. *Faudra-t-il que l'on fasse une contestation en vertu de la* Charte *pour que ce prélèvement fiscal soit éliminé?*

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I. INTRODUCTION

Much has been written about double taxation, but as Dr. A.A. Knechtle notes, "the term sounds familiar, but its substance is not clear".[1] Its effects on the bigger, more obvious tax unit such as a company, corporation or business have been discussed at length. However, the arguments against double taxation have to a large extent failed to address its pernicious effects on a distinct class of persons who suffer its incidence. These are the Filipino contract workers or live-in caregivers, colloquially referred to as nannies.

This paper will specifically address the issue of double taxation with respect to Filipino nannies. The ambit of its incidence, however, also applies to a larger group of Filipino export labour, including amongst others, construction workers, equipment operators, merchant seamen, nurses, doctors, computer specialists and others. Double taxation affects all Filipino immigrants who maintain their Filipino citizenship.

The case against double taxation is best illustrated and articulated from the point of view of those least able to bear its effects. To wit, relief is not only just and fair, but imperative.

II. THE LEGAL BACKGROUND

Before the issue can be contextualized, its legal foundations first have to be laid out. For it is on this legal basis that its incidence has been theoretically and juridically upheld. To be properly addressed and argued against, it first has to be understood. Double taxation, as generally defined is "...the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods..."[2] Juridically, several components of this term need to be expanded on to provide the groundwork upon which the issue can be fleshed out. These include: a) the taxing power; b) the taxpayer; c) the fiscal subject matter; d) identity of the tax period and e) identity or similarity of the tax.[3]

A. *Theories about the Basis of the Taxing Power*

The taxing power of States has been given legal justification and recognition in international law under four basic theories: 1) the realistic or empirical theory; 2) the ethical or retributive theory; 3) the contractual theory and 4) the sovereignty theory. These are not necessarily exhaustive or definitive, but essentially they provide the most common rationales for the imposition of double taxation.

Under the realistic or empirical theory, the power to tax, in its most extreme form, is based on the fundamental principle that "...Jurisdiction is physical power. A sovereign State has no physical power over persons and property outside its territory."[4] In essence, when a taxpayer is physically within a State's territory, and subject to its reach, that taxpayer is liable to the state's taxing powers.

The ethical or retributive theory asserts that taxation is what one returns in exchange for the

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1 A.A. Knechtle, *Basic Problems in International Fiscal Law*, trans. W.E. Weisflog (London: HFL, 1979) at 29.

2 O.E.C.D., *Model Double Taxation Convention on Income and Capital*, (Paris: OECD, 1977).

3 Knechtle, *supra* note 1 at 29-30.

4 E. Stimson, *Jurisdiction & Power to Tax*, (Kansas: 1933).

advantages or benefits the state provides.[5] There is the notion that a taxpayer owes some form of 'economic allegiance' as opposed to 'political allegiance'[6], in the sense that "...he who forms a part of an economic community contributes proportionately to the cost of such community.'[7] Drawing from H. Hofstra's treatise, R.S.J. Martha states that the "concept of retribution is... the 'fiscal face' of the 'contrat social' doctrine..."[8]

The contractual theory posits that "...taxation is the payment for goods and services received from the taxing State on the basis of a (presumed) contract between the holder of fiscal jurisdiction and the fiscal subject."[9]

The sovereignty theory is the one that has found the most supporters. A.R. Albrecht sums it up as follows:

> [T]he right to tax] is justified in international law essentially as an attribute of statehood or sovereignty, limited by international law..., and exercised in varying manners according to the policies of the states possessed of it.[10]

The limits of this sovereign power have been classed by R.S.J. Martha as being three-fold: personal, territorial and functional. Personal sovereignty is that which a state has over persons (natural or juristic). This includes "... the right to extend its laws to regulate conduct or attach legal consequences to the conduct of these people wherever they may be."[11] Territorial sovereignty conserves the right to tax all taxable subject matter found within a state's territory or jurisdiction. Functional sovereignty applies to taxable subject matter that is without domain or territory but appears to have some form of government, as in the continental shelf or the case of international organizations.[12]

The two main concepts that are of relevance to this paper are those of nationality and territory or residence. The Convention between the Philippines and Canada defines the term 'national' to mean:

> (i) any individual possessing the *citizenship* of a Contracting State; [emphasis added]
> (ii) any legal person, partnership and association created, organized or incorporated under the laws of a Contracting State.[13]

Citizenship becomes synonymous with the term 'national'. Citizenship, acquired by birth within a sovereign state's territory (*jus soli*), or by virtue of law through naturalization, becomes the *de facto* pre-condition for juridical taxation. It establishes the link between the state and the tax payer for fiscal liability.

The concept of territory or residence derives from the link between economic location and physical *situs*. Residency in this sense means not mere temporary residence, but also refers to

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5 A.R. Albrecht, *The Taxation of Aliens Under International Law*, (1952) 29 Brit. Y.B. Int'l.L. 14445 at 146.

6 R.S.J. Martha, *The Jurisdiction to Tax in International Law, Theory and Practice of Legislative Fiscal Jurisdiction* (Boston: Kluwer Law and Taxation Publishers, 1989) at 20.

7 *Ibid.*

8 *Ibid.*

9 Martha, *supra* note 6 at 21.

10 Albrecht, *supra* note 5 at 148.

11 Martha, *supra* note 6 at 43.

12 *Ibid.*

13 *The Canada-Philippines Income Tax Convention Act, 1976*, S.C. 1976-77, c. 29, Schedule IV, Article III s.(1)(h) [hereinafter *Philippines Convention*].

permanent residence, or what the *Income Tax Act* of Canada refers to as "ordinarily resident".[14] In most countries, permanent residency is statutorily defined. Under the notion of residency, the taxpayer is subject to the territorial sovereignty of the State by virtue of the place of domicile/residence, origin (source) of income, *situs* and place of work.

B. *Sovereignty and Fiscal Liability*

Most nation states including Canada and the Philippines observe the doctrine of sovereignty. Under the concept of sovereignty, the scope of tax liability encompasses "[t]he sum total of the obligations, which result for the individual from the fiscal law relationship..."[15] The fiscal attachment and the factors that give rise to this attachment establish the fiscal obligations, with taxation being one of the entailed obligations.

The first concept of sovereignty that gives rise to the power to tax posits that "...a person possessing the nationality of the taxing state can be held liable for his full, worldwide assets and income, from whatever sources they are derived."[16] This 'full, unlimited and general tax liability'[17] is generally not observed by most states, with the notable exceptions of the U.S., Mexico and the Philippines.

This legal precept is exemplified in the U.S. case of *Cook* v. *Tait*.[18] This case involved the taxing of a U.S. citizen's income and assets while the taxpayer was living in Mexico. The court held that the nationality link provided legal grounds for fiscal attachment and ruled as follows:

> The consequence of the relations is that the native citizen who is taxed may have domicile, and property from which his income is derived may have [sic] *situs*, in a foreign country and the tax be legal -- the government power to impose tax.[19]

The second and more commonly accepted concept of sovereignty that gives rise to the power to tax derives from territorial sovereignty. Here the tax unit is linked to the taxing state "...by virtue of the fact that the owner of the taxable property or recipient of the taxable income is resident in their territories".[20] As Knechtle explains, "[t]his allows the body politic to draw the total economic interests of a taxpayer, who is subject to its territorial sovereignty, into the tax net, i.e. his worldwide income and assets."[21] This becomes possible "because States can bring to bear the whole pressure of their administrative machinery on residents in their State territories."[22]

In sum, the taxing power of a state over a taxable unit, by virtue of nationality or residence within its territory, is legitimate and upheld by international fiscal law. But as will be shown, inequity ensues when both principles are observed by two or more states over the same tax unit.

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14 R.S.C. 1985 (5th Supp.), c.1 s. 250(3).
15 Knechtle, *supra* note 1 at 38.
16 Martha, *supra* note 6 at 48.
17 J.P.A. Francois, *Handboek van het Volkenrecth*, (2nd 3d. Zwolle 1949) at 709
18 265 U.S. 47 (1924).
19 *Ibid.* at 47.
20 Knechtle, *supra* note 1 at 36.
21 *Ibid.*
22 *Ibid.*

C. *Tax Subject, Tax Object and Tax Period*

The remaining components of the term 'double taxation' will be defined in terms of their specific applicability to the tax subject (i.e. the taxpayer) of this discourse, the Filipino domestic contract worker, hereinafter to be referred to as a domestic or a nanny. The tax object or the fiscal subject matter is the income derived from a source (e.g. income from employment as a domestic and/or wages and salaries from other employment) which gives rise to the tax liability, known as the income tax. The tax period is the calendar year. The identity or similarity of tax imposed, is the taxation of the same employment income by two sovereign states, Canada and the Philippines.

III. FILIPINO NANNIES IN CANADA

Canada is home for close to 90,000 Filipino nannies working mostly in large urban centres. They come to Canada through an employment agency or through personal sponsorship by a Canadian resident. Once qualified as live-in-caregivers, they enter Canada under an Employment Authorization, or what is more commonly referred to as a work permit. This gives them the right to work as domestics for a period of up to two years.[23] When a working permit is issued an application fee of $75.00 applies. Any extension of a working permit likewise entails a $75.00 fee.[24] These fees are subject to change, and are generally paid by the domestic. After two years, the domestic can apply for an open permit, which allows them to take on week-end jobs. At the end of the two year working permit period, and so long as they comply with the requirements of Citizenship and Immigration Canada they can then apply for landed immigrant status.[25]

Domestics are women who generally take on the care of the children of their employers. More specifically, section 2 of The Immigration Regulations defines 'live-in caregiver' to mean "a person who provides, without supervision, in a private household in Canada in which the person resides, child care, senior home support care, or care of the disabled".[26]

A large majority of these women leave behind their own families - a husband and children, parents or the extended family of brothers, sisters, aunts, uncles, nieces and nephews. If married, familial obligations go beyond the immediate family circle. Whether married or single, their role as financial providers for those left behind, goes without saying.

The chance to leave behind the crushing poverty and lack of opportunities in the Philippines drives these women to sacrifice their own domestic lives to gross anywhere from $250.00 to $300.00 a week as live-in caregivers.[27] For these women, their lives are put on hold for periods of up to five years. Under the federal government's 'Live-in Caregiver Program', domestics can apply for landed immigrant status after two years of steady employment. Upon acquiring landed immigrant status, domestics can then sponsor their immediate family, so long as they prove they have a steady income and a certain amount of savings set aside. Three years after having acquired landed immigrant status, domestics can then apply for Canadian citizenship. Throughout this five year period, assuming no obstacles are encountered until they obtain Canadian citizenship, domestics (as well as all Filipinos who maintain their Filipino citizenship) remain subject to Philippine taxation on their Canadian sourced income.

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[23] Citizenship & Immigration Canada, *Applying to Change Terms and Conditions or Extend Your Stay In Canada: An Information Guide For: Extension of Visitor Status, Student Authorization, Employment Authorization, Extension of Minister's Permit,* [hereinafter *Applying to Change*].

[24] Citizenship & Immigration Canada, *Immigration Fees Calculation Table.*

[25] *Applying to Change, supra* note 25

[26] *Immigration Regulations,* 1978, SOR/78-172 of the *Immigration Act,* R.S.C. 1985, I-2.

[27] I. Vincent, "Canada Beckons Cream of Nannies", *[Toronto] Globe and Mail,* (20 January 1996) A1.

On a world-wide scale, it is estimated that 4% of the Philippine total population of 67 million is engaged in contract work overseas. Of these, 70 per cent are female domestic workers, employed in such diverse countries as Singapore, Saudi Arabia, Hong Kong, the United States and Canada.[28] For these women, Canada is the destination of choice. In spite of the hardships and sacrifices they endure, Canada offers the chance to earn hard currency, enjoy the protection of their rights under provincial labour law and ultimately the possibility of obtaining landed immigrant status. Landed immigrant status offers them the opportunity to sponsor their own immediate families.

Under Ontario labour legislation, domestics are considered 'employees' subject to all minimum employment standards.[29] They are paid the minimum wage of $6.85/hour for a forty hour week. Any time worked over and above forty-four hours is to be paid at time-and-a-half (i.e. $10.27/hour). Domestics are entitled to two weeks vacation after 12 months, with vacation pay calculated at four per cent of the domestic's gross pay. They likewise are entitled to the eight statutory holidays after three months of service. Domestics are allowed two days off each week, sometimes referred to as "time-off" or "free periods".[30] These free periods can be negotiated between the employer and the domestic, having regard to the employer's own needs and requirements. For example, a doctor-employer who works on Saturdays may contract with the domestic to have her take Sunday and Monday off each week instead of the standard Saturday and Sunday reprieve.

Employers are responsible for deducting at source statutory CPP, UIC and income tax deductions from a domestic's gross income and remitting such deductions to the government. If the domestic is a live-in employee, the employer is allowed to deduct from the domestic's gross income, the current rate of $85.25/week for room and board.[31]

IV. THE IMPOSITION OF DOUBLE TAXATION

Taxation of a Filipino citizen's income regardless of source, from the perspective of the Philippine government, derives from the taxpayer's nationality (e.g. citizenship). While the effects of double taxation is borne by all Filipino nationals, including landed immigrants, its incidence is particularly exacerbated amongst domestics. Unlike landed immigrants who move to Canada and manage to essentially break their ties to the Philippines on a social and economic basis, domestics who leave behind their families in the Philippines generally go back home to the Philippines on a fairly regular basis.

Domestics and/or landed immigrants who have not elected Canadian citizenship and who return to the Philippines, do so under a Philippine passport. The Phillipne passport then becomes the mechanism through the Philippine government enforces tax assessment on foreign sourced income. Assessment is done at the various Philippine consular offices in Canada or while in the Philippines on home leave. Should one fail to file in Canada, assessment will normally take place upon departure from the Philippines while on home leave, where an income tax return may be filed with the Bureau of Internal Revenue in the Philippines. Without the requisite 'tax paid' notice stamped on a Filipino citizen's passport for the relevant year or years, departure will be disallowed until such time as compliance is met. Therefore, most if not all, returning Filipino nationals get their tax assessments done at the Philippine consular offices in Canada. Consular offices are

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[28] *Ibid.*

[29] *Employment Standards*

[30] Ontario Ministry of Labour, *Employment Standards Fact Sheet for Domestic Workers* ISSN 1192-4683 1996/01 at 3-7.

[31] *Ibid* at 3.

likewise visited to renew Philippine passports and to obtain travel tax exemptions. An enticement is provided for filing income tax at these offices through the provision of a travel tax exemption document which otherwise would have to be paid for in the Philippines. Currently this amounts to 1,750.00 Philippine Pesos (or roughly $92.00 cdn).

A. *The Effects of the* Canada-Philippine Income Tax Convention Act, 1976

As Knechtle notes, international double taxation for Philippine domestics results through the concurrence of unlimited fiscal liabilities.[32] Both Canada and the Philippines are legally entitled under international law to apply their taxing laws on the same tax unit. On the basis of her nationality, a Filipino domestic is taxed on her world wide income by the Philippine government. In Canada she is also taxed on her worldwide income on the basis of her territorial residency.

In an effort to alleviate double taxation, most nation states have entered into bilateral treaties or conventions with other nation states to provide treaty relief in respect of foreign taxes suffered by their nationals on their overseas income. Such a convention, known as the Philippines Convention exists between Canada and the Philippines.[33]

A review of the pertinent articles in the Philippines Convention is done below to outline the legal framework that continues to give effect to the double taxation of Filipino nationals in Canada.

1. *Article I - Personal Scope*

Article I of the *Philippines Convention* states:

> This convention shall apply to persons who are residents of one or both of the Contracting States [Emphasis added].

The operative words in this section are persons and residents. Under Article III - General Definitions, 'person' comprises an individual, an estate, a trust, a company, a partnership and any other body of persons. The term 'resident of a contracting state' is defined in Article IV - Fiscal Domicile. Residency is determined in Article IV section 2 on a descending scale of attributive criteria depending on where the taxable 'person' has the following:

a) a permanent home available to her and where her personal and economic relations are closest (generally referred to as her "centre of vital interests"); and if not determinable on this basis,
b) where the taxable person has a habitual abode, and if not determinable on this basis, then on the basis of
c) where she is a national, and if the taxable person is a national of both Contracting States, or of neither of them, then
d) settlement of the question is by mutual agreement by the Contracting States.

Article I is based on the 1977 OECD model where residence and source, rather than nationality, become the principal basis of taxation. However, a residual right to tax is assigned to the state of citizenship. More specifically Article XXVII - Miscellaneous Rules, subsection 3 states:

3. Nothing in this Convention shall be construed as preventing the Philippines from taxing its

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[32] Knechtle. *supra* note1.

[33] *Philippines Convention, supra* note 13.

citizens in accordance with its domestic legislation... [Emphasis added].

This 'saving' clause reserves the right of the Philippine government in accordance with its domestic laws to tax the income of those of its citizens who are resident in Canada.[34] Article XXVII, however, contains a limiting scope on the taxing power of the Philippine government. This will be addressed later in the paper.

The taxing powers of the Philippine government are defined and recognized by both contracting states in Articles I, II, III and XXVII. It is also through the operation of Article I that scope is given to the Canadian government to tax domestics so long as they are resident within its territories.

In Article I, the words "shall apply to" mean that the treaty is to extend to the persons indicated and nobody else.[35] In effect, such identified persons are entitled to treaty protection as well as to the conferring and imposition of rights and duties. The latter includes the duty to pay income tax as agreed to in the treaty.

Domestics are 'persons' who fall into the class of taxable units referred to in s.248(1) of the *ITA*. Their residency in Canada is determined on the basis of their sojourn or length of stay within Canada. For Revenue Canada's purposes, their tax liability is spelled out in Part I of the ITA, Part I, Division A, s.2(1), which states:

> 2(1) Tax Payable by persons resident in Canada - An income tax shall be paid, as required by this Act, on the taxable *income* each taxation year of every *person resident* in Canada at any time in the year. [Emphasis added].[36]

Again the operative words here are 'income', 'person' and 'resident'. Income in this case refers to the salary, wages and other remuneration, including gratuities, received by the domestic in the year as defined in section 5(1), Division B, Subdivision A of the *ITA*. Domestics are deemed 'residents' of Canada through the operation of section 250(1)(a) of the *ITA* inasmuch as they "sojourned in Canada in the year for a period of, or periods the total of which is, 183 days or more;..."[37]

For the Philippines, the scope of its taxing power is established on the basis of qualified residency as defined in Article IV of the *Philippines Convention*. Notwithstanding the fact that the "residency' of the domestic in Canada is, in the first instance, established under section 250(1)(a) of the *ITA*, domestics are generally caught under the terms "centre of vital interest" as noted in Article IV, section 2(a) of the *Philippines Convention*. This clause can be invoked inasmuch as domestics have available to them a "permanent home" in the Philippines where their "personal and economic relations are closest." It would be difficult to dispute that their immediate and extended families who have been left behind in the Philippines, are not their closest personal and economic relations. Section 2(b) of the same article which refers to "habitual abode" is less a determinative factor, insofar as their 'habitual abode' can be established in either Canada or the Philippines.

The concept of 'personal and economic interests' was clarified in a case involving an executive of a German subsidiary of a Dutch Company.[38] The taxpayer went to Germany often, worked there and lived in a residence owned by his employer. The Court held that the centre of

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[34] K. Vogel, *On Double Taxation Conventions* (The Netherlands: Kluwer Law and Taxation Publishers, 1991) at 78.

[35] *Ibid.* at 63.

[36] R. W. Pound et al., eds. *Stikeman Income Tax Act*, 24th ed. (Toronto: Carswell, 1995) at 1.

[37] *Ibid.* at 1715.

[38] Hof Amsterdam, September 14, 1967, V-N 1968, at 675.

his personal and economic interests was in Holland since his interests were there, and that he often reported back to Holland. This situation is not dissimilar to that of domestics, albeit they do not work in an executive capacity as that of the German taxpayer.

From a different perspective, the intention of the taxpayer may become a deciding factor when determining which state a taxpayer has the closest personal and economic relations to. In an Austrian decision, intention was held to be the determinative factor in assessing which state held the taxpayer's 'centre of vital interests'.[39] For domestics, one of the more pressing intentions behind their decision to work as domestics, is the procurement of landed immigrant status which will allow them fiat to sponsor their own families, subject to immigration sponsorship rules. However, this alone may not be determinative of the issue.

From a taxing point of view, the situation of domestics is made more tenuous by the fact that upon first entry into Canada, they come in under 'working permits', renewable on an annual basis, up to a period of two years before landed immigrant status can be applied for. This makes their residency during this two year period 'temporary'. In a Netherlands decision, the court gave great importance to the fact that the taxpayer only had a temporary permit of residence in the country where he worked.[40] Hence, a domestic's temporary working status in Canada could work against her in the determination of where her closest personal and economic relations lie. And for greater certainty, nationality becomes the determining factor in the chain of attribution criteria which gets applied in descending order (permanent home - habitual abode - nationality).[41] It is through the operation of these concurring and overlapping fiscal jurisdictions that the legal basis of a double tax gets imposed on the income of domestics and all other Filipino nationals who maintain their Filipino citizenship. In effect, the preconditions that give rise to the fiscal obligations of the tax object (i.e. the domestic) become duly circumscribed in objective reality on the basis of abstract fiscal law.[42]

2. *Article II - Taxes Covered*

Article II section 1 of the *Philippines Convention* states:

> 1. This convention shall apply to taxes on *income* imposed on behalf of each Contracting State, irrespective of the manner in which they are levied. ... [emphasis added].

This clause is different from most conventions in the sense that it only covers taxes on income, and not on capital. With respect to income, section 2 of Article II states that the term covers all taxes imposed on 'total income' or 'on elements of income'. For Revenue Canada's purposes income encompasses salary, wages and other remuneration, including gratuities. For domestics, these elements cover most, if not all of what they receive as wage-earners in Canada. Capital is a foreign reality for most.

At its broadest interpretation, income includes all receipts, or yield or profit. This clause also includes any gains from the alienation of movable or immovable property. These latter elements are nebulous for most domestics. 'Property' in their situations are a nullity, either in the Philippines or Canada. They move to Canada with basically one or two suitcases and that is the extent of their property. They may in time secure items of property such as a television set, a

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[39] See February 25, 1970 Verwaltungsgerichtshof (No. 21 100/69). See also BFH decision of July 23, 1971, BstBl 1971 II 758.

[40] See *Hoge Raad*, March 14, 1979, BNB 1979/116.

[41] Knechtle, *supra* note 1 at 62.

[42] *Ibid.* at 35.

microwave oven, some clothing, and other basics. For these domestics, these become not so much property, but to a large extent, signs of material achievement. In the Philippines, seldom does a domestic have 'property' of any significance, that, if sold would trigger a taxing event. More often than not, it is through their efforts as domestics employed overseas that property becomes established in the hands of their extended families.

It should be noted that the Convention applies only to income taxes imposed by the federal government under the *ITA*. Provincial taxes are not covered. The Canadian federal government does not have the constitutional power to bind provinces internationally with respect to their taxing powers. However, provinces also grant credits for foreign income taxes, and in most of the provinces the provincial tax is levied on the basis of taxable income determined according to federal rules.[43]

The term "irrespective of the manner in which taxes are levied"[44] means that the treaty applies to both Canada and the Philippines regardless of whether the tax is held at source, applied directly, or levied as supplementary taxes or surtaxes. For domestics, this means their wages from employment, wages from a second job, if such is the case, benefits received and gains from the sale of property, movable or fixed, are all subject to tax by both contracting states. These taxes remain subject to allowable treaty credits, deductions and/or exemptions.

In Canada, income tax on a domestic's wages is held at source and is the responsibility of the employer. In the Philippines, income tax is applied directly as a tax on gross income less a deduction for 'foreign national income tax paid' (e.g. federal/provincial tax) and a deduction for 'personal exemptions' as prescribed by Philippine tax law.[45] Canadian non-refundable tax credits, CPP and UIC contributions are not allowable tax deductions when filing Philippine income tax.

The above Articles of the *Philippines Convention* are the most relevant to this paper. The remaining analysis of Article XXVII - Miscellaneous Rules shall be addressed under the section "Mechanisms for relief."

V. TYPICAL CASES - THE REALITY OF DOUBLE TAXATION

Five Filipino women working as domestics and/or minimum wage earners were interviewed and their individual income tax situations were assessed. The reality of their circumstances underscores the hardships, inequity and coercive effect double taxation has on these women. While it was not possible to obtain the tax information for each person for the same tax year, the fact that the taxation years are different does not detract from any of the conclusions made.

The following table shows the annual gross incomes of these five women who work as domestics or who may have moved on to better circumstances. Statutory deductions, combined federal and provincial taxes, net income, Philippine income taxes paid for the same year, the total amount of Canadian dollar remittances sent home to the Philippines and the weekly amount of dollars these women survived on in a particular year, provide a graphic picture of their economic and fiscal plight.

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[43] D. L. Burn, "Taxes Covered (Article 2)" in International Fiscal Association (Canadian Branch) *Special Seminar on Analysis of Canada's Tax Conventions and Comparison to the O.E.C.D. Model Double Taxation Convention.*(Toronto: Richard De Boo Limited, 1979) at 14.

[44] *Philippines Convention, supra* note 13, Article II s. 1.

[45] Philippines Bureau of Internal Reserve Form No. 1701A, revised August 1993 at 2.

TABLE I CASE SUMMARIES OF FIVE FILIPINO DOMESTICS

ITEM	Case #1	Case #2	Case #3	Case #4	Case #5
Taxation year	1991	1992	1992	1994	1994
Gross Income	$11,440.00 * Note 1	$8,775.00 * Note 2	$9,930.00 * Note 3	$13,108.00 * Note 4	$18,000.00 * Note 5
CPP deduction	$153.00	$194.14	$165.72	$170.29	$368.95
UIC deduction	263.25	289.44	297.90	265.35	574.91
Fed/Prov. Inc. Tax	947.85	1,261.20	819.60	1,154.45	2,465.01
Deduction-Rm/Brd	2,500.00	2,850.00	2,856.00	3,250.00	6,600.00
Net Income	7,575.90	4,180.22	5,790.78	8,267.91	7,991.13
$ Remittances to the Phil. in the yr	3,097.53	2,157.55	4,150.17	4,233.45	3,060.14
Philippine Income Tax in the Year	92.00	66.00	81.00	83.00	289.64
Net Annual Amount (NAA)	4,478.37	2,022.67	1,640.61	4,034.46	4,930.99
Weekly Living Allowances (NAA/52 Wks)	$86.12	$38.90	$31.55	$77.59	$94.83
Marital Status	Single	Single	Married	Single Parent	Single
Dependents in the Philippines	Parents, Sister and 2 nieces	Parents, 2 Younger Brothers	Husband, 3 Sons	2 Daughters 1 Son	Mother, Sister with 2Daughters Brother and Family
Education Level	2nd year Community College	Univ. Grad. B.A. Eng.	High School Graduate	Secretarial School Graduate	Vocational School Graduate
Work Experience in the Philippines	Office Worker	Executive Secretary	Self-empl.	Nursing Aid Attendant 10 yrs as a domestic in Hong Kong	Hairdresser

A. *Their Family Profiles*

Case #1: Subject's 1991 gross income was derived from two jobs: she worked as a live-in caregiver during the week and worked as a cashier in a drug store on week-ends. She has obtained her landed immigrant status, but is not sure if she will apply for Canadian citizenship after the three- year qualifying period. She holds on to both jobs but hopes to find a better paying job other than as a live-in caregiver. She regularly remits Canadian dollars to her parents and a sister who is a single parent and is unemployed. She is also putting her two nieces through high school and expects to pay for their college education. In 1991, she survived on $86.12 a week while sharing room and board with her employer.

Case #2: In 1992 this subject worked as a live-in caregiver. Her day began at 7:00 a.m. and finished around 6:00 p.m. This was her five day work schedule for which she received no overtime pay. On a monthly basis she remitted Canadian dollars to her parents to help pay for her younger brothers' schooling, and helped pay for the construction of a small family home. In 1992 she survived on $38.90 a week. Upon obtaining her landed immigrant status she left her job as a live-in caregiver and found a job as a day care worker. Her annual income is approximately $22,000.00. She shares an apartment with another woman to save on her living expenses. She continues to regularly send money to her parents.

Case #3. This subject worked as a live-in caregiver in 1992. During that year she lived on $31.55 a week. Whatever she could afford to spare was sent home to the Philippines to support her family. She had left behind a husband and three sons. Her husband was a seasonal labourer. After receiving her landed immigrant status in 1994 she found a job as a store clerk. In 1995 her husband and three sons were allowed to immigrate to Canada. Since that time her husband has not been able to find a steady job. Her eldest son, who is ten years old, is estranged from the mother. Having grown up not knowing his mother, he is mistrustful of her. On one occasion he complained to the school's guidance counsellor that "he didn't trust his mother". This resulted in her being asked by the guidance counsellor to come in and explain the remark. This has caused her much pain. Her husband talks of returning to the Philippines. For now she is trying her best to hold the family together. This family of five live in a one-bedroom apartment. With her husband unemployed she remains the sole breadwinner.

Case #4. This subject works as a housekeeper for an elderly couple four days a week. The fifth working day is spent cleaning other people's homes. In 1994 she lived on $77.59 a week. Through all the years she has been in Canada she has worked as a domestic. When she left the Philippines to work overseas she left behind two daughters and a son. Albeit a single parent she has managed to put her two daughters through college and is now seeing her son finish college as well. She has obtained her landed immigrant status but has not seriously considered applying for Canadian citizenship. She continues to send money to the Philippines. To help economize she shares a three-bedroom apartment with three other Filipino women and a fourth woman they jokingly call a 'week-ender' (i.e. a domestic who lives with her employer through the week but who needs a place to go to on week-ends).

Case #5. This subject works as a hair dresser with a franchised salon five days a week. She had previously worked as a nanny for five years. Apart from her employment as a hair dresser she also operates a small business as a hair dresser. She works in her shop on her two off-days. The business is run out of her small two bedroom apartment that is located above a storefront. Her business hours at the apartment read: "Sundays: 9:00 a.m. – 10:00 p.m., Mondays: 9:00 a.m. – 8:00 p.m. or by appointment". She has always sent money home to the Philippines. Her remittances are sent to her mother, a widowed sister with two daughters and a brother and his family. On average, she remits anywhere from $3,000 - 4,000 on an annual basis. She is a landed immigrant but remains uncertain about applying for Canadian citizenship. In 1994, she managed on $94.83 a week.

VI. MECHANISMS FOR RELIEF FROM DOUBLE TAXATION

The Dominion Tax Cases reveal not a single case on the issue of double taxation with respect to a Filipino domestic challenging the Minister of National Revenue. Notably, the few tax cases that involved nannies were with respect to child care deductions claimed by employers[46] The absence of any cases on point is not surprising. For most domestics and Filipino nationals who pay Canadian income tax, they see no reason to object to, much less challenge Canada's jurisdiction to tax their Canadian sourced incomes. However, they do question the rationale behind what gives the Philippine government the legal right to attach tax to their incomes earned in Canada.

If it is to be presumed that the Philippine tax is imposed to fund the coffers and expenditures of the government and to generate foreign exchange, this rationalization flies in the face of other facts. Albeit, the Philippine government allows as deductions any foreign taxes paid and a further basic deduction for single or married status, the tax imposed is still a double tax. While the computed amounts may be minimal or insignificant for most, for domestics, this yearly assessment amounts to almost a quarter of a month's remittance. In all five cases it amounted to more than what they had to survive on in a given week. The Philippine income tax is but another economic hardship that has to be needlessly endured. This inequity is compounded by the fact that in their efforts to comply with the filing, they have to request of their employers a half-day or a day off to visit the consular offices. Often times, if passport renewal is the purpose of attendance at the consular office, a second visit is required to pick up their passports. This results in a further disruption of their employment and at times causes disagreements with their employers.

When the Philippine tax that is imposed is compared to what these women send home to their families on an annual basis, the rationale behind the Philippine government's taxing powers strains reason. Particularly when in the last few years, the Philippine government's balance of payments has exhibited a positive balance on the sole basis of the amount of remittances made by Filipino overseas contract workers.

Looking at the five case studies above, it is without argument that the Philippine government has more than benefited from its export labour. Is it justified in the exercise of its fiscal jurisdiction to tax for a second time, the foreign-sourced income of domestics or any of its nationals who work overseas, knowing the hardships and sacrifices its own nationals experience?

A. *Limits under Public International Law*

Public international law restricts the assertion of fiscal power by a sovereign state:

> The territorial scope of the application of administrative law and of fiscal law coincides with the range of the State legislator's spatial jurisdiction (*territorial principle*)." If a State commits acts of sovereignty outside the range, it comes into conflict with a foreign sovereignty - except, of course, where the matter has been regulated by treaty.[47]

Nowhere in the *Philippines Convention* is there any agreement that extends to Philippine authorities the jurisdiction to carry out within Canadian territory official acts which are in fact acts of coercion that result in duress for the taxpayer.[48] More specifically, this refers to the collection

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[46] *Symes* v. *Canada*, [1993] 4 S.C.R. 695, 94 D.T.C. 6001; *Chyfetz* v. *M.N.R.*(1988), 43 D.T.C. 55 (T.C.C.); *McLelan v. Canada* (1994), 95 D.T.C. 856, [1995] 1 C.T.C. 2673 (T.C.C.).

[47] Knechtle, *supra* note 1 at 40.

[48] *Ibid.* at 40.

of domestic taxes abroad. Likewise forbidden by public international law, is the ascertainment of facts abroad, for the purpose of assessment of taxes. Even the sending out or handing out of notices which compel a non-resident taxpayer to directly or indirectly take action is inadmissible.

Clearly, the 'official acts' of collecting Philippine tax within Canadian territories and jurisdiction is *ultra vires*. As the American Law Institute notes, the "[a]ction by a State in prescribing or enforcing a rule it does not have the jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law...".[49] To this end, it is notable that the government of Switzerland has enacted national penal laws to protect their sovereignty. As such anyone who carries out unauthorized acts for an alien State on Swiss territory is punishable under this law with imprisonment, and in serious cases, with hard labour.[50]

It is in recognition of the sovereignty over their territories that in most Conventions, each of the Contracting States incorporate the following clause which is found in Article XXV of the *Philippines Convention*:

> Article XXV - *Exchange of Information*:
>
> 1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is in accordance with this Convention, or for the prevention of fraud or fiscal evasion in relation to such taxes....
>
> 2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:
>   (a) to carry out administrative measures at variance with the laws or the administrative practice of that of the other Contracting State;
>   (b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;...

Implicit in this clause is the tacit agreement that any ascertainment of tax liability or the investigation of a Filipino citizen while resident in Canada, for tax purposes, shall take place through an exchange of information between Contracting States. Hence, such official acts such as tax assessments and tax collections as are practiced at the Philippine consular offices situated within the territorial jurisdiction of Canada, are contrary to public international law and are *ultra vires* its exercise of jurisdiction. Even the use of the Philippine passport to check for the "taxes paid" stamp to ascertain payment of Philippine taxes, prior to its renewal or validation, becomes a coercive official act. Entreatment to pay Philippine income taxes, refusal of consular services unless Philippine income tax is paid or even the handing out to Filipino nationals of a Bureau of Internal Revenue (BIR) Form 1701C, Non Resident Citizen Income Tax Return, all fall under inadmissible official acts and are *ultra vires*.

Insofar as these official acts are contrary to public international law and not sanctioned by the *Philippines Convention*, such acts should cease and desist. Canada, as the other Contracting State, has the obligation and responsibility to ensure public international law and the spirit of the *Philippines Convention* be upheld. Prosecution of such unsanctioned official acts should be enforced in accordance with Canada's domestic laws.

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[49] *Restatement (Second) of Foreign Relations Law of the United States*, Section S. (St. Paul, Minn: American Law Institute, 1965) at [hereinafter *Second Restatement*].

[50] Knechtle, *supra* note 1 at 41.

B. *Doctrine of Reasonableness*

The cessation of official acts with respect to the taxing powers of the Philippine government over its nationals, will not, however, eliminate double taxation. This practice can still be exercised within its territories and imposed on visiting non-resident nationals. Herein lies the difficulty. Domestics who return home to the Philippines, or other visiting Filipino non-resident nationals, remain saddled with this reality.

Amongst certain circles, the principle of comity has been referred to as a fiscal attempt to put to practice the Doctrine of Reasonableness. This rule of reasonableness is spelled out in Section 40 of Restatement (Second) of Foreign Relations of the United States and provides as follows:

> S.40 Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose on the person,
> (c) the extent to which the required conduct is to take place in the territory of the other state,
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[51]

In *U.S.* v. *First National City Bank*, the U.S. Court of Appeals quoted the above section.[52] The Court did not, however, suggest that it was required to act upon this section by any rule of general international law.[53] In essence, as R.J.S. Martha states, this section is not founded on positive international law.[54] Still, its underlying principles express the need for states to exercise their jurisdiction moderately and in good faith with due regard to the hardships endured by its nationals *vis-a-vis* their own national interests. In the five cases presented earlier, all survived on less than $100.00 a week. Yet all five women managed to remit to the Philippines in excess of 25 percent of their net earnings. And when they are further forced to pay the annual Philippine Income Tax, amounting to a week or two's allowance, clearly there is a level of unreasonableness that is abusive and patently unjust.

Some may argue that these women did not have to remit those monies to their families in the Philippines. However, this argument denies important social and economic realities. In any event, it relieves the Philippine government from having to provide social service payments, such as welfare or unemployment benefits, that in fact do not exist.

Public international law requires that the Philippines moderate its taxing powers in as much as these powers create unreasonable hardships for its nationals. Where the Philippines may argue that its fiscal powers to tax its nationals is vital to its State interests, this is readily rebutted. Through its own export contract labour, which it actively promotes, the Philippines has managed to maintain a positive balance of payments solely on the basis that "[t]he remittances translate into anywhere between $2 billion and $6 billion (U.S.) a year for the Philippines economy, the largest

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[51] *Second Restatement, supra* note 49 at 116.
[52] (1968) 7 I.L.M. 1133 at 1143.
[53] Martha, *supra* note 6 at 151.
[54] *Ibid.*

single source of foreign exchange reserves..."[55]

It is not just domestics or other export contract workers who remit money to the Philippines on a regular basis. Generally, Filipinos are very strongly attached to their families and extended relations, to the extent that foreign exchange remittances are a way of life. And more importantly, these foreign exchange remittances are monies on an after-tax basis.

Nonetheless, from the *ITA*'s perspective, often times these regular remittances are disallowed as non-refundable tax credits under sections 60(c), 118(1)(a) and (b) or 118.1(5) and (6) of the *ITA*, as they do not meet the criteria of the sections. Yet in the hearts and minds of these domestics, (parents, sisters, brothers, uncles, aunts, nephews, nieces and other familial relations - the recipients of these remittances who are wholly or partially dependent on them for support if not survival) the disallowance of Canadian tax credits is almost never questioned.

C. *Invocation of Article XXVII, section 3 of the* Philippines Convention

Article XXVII - Miscellaneous Rules, section 3 reads as follows:

> 3. Nothing in this Convention shall be construed as preventing the Philippines from taxing its citizens in accordance with its domestic legislation. *This provision shall in no case render the total taxation on a Philippine citizen who is a resident of Canada more burdensome than the total taxation that would apply if that person were a resident of the Philippines.* This paragraph shall cease to have effect with respect to taxation years beginning after the last day of the calendar year in which a Convention, concluded between the Philippines and any third State in which the Philippines relinquishes its right to tax its citizens resident in that State, enters into force. [Emphasis added].

What this clause provides for is notional horizontal equity (i.e. that individuals in similar circumstances be taxed in the same way). Article XXVII states that the total taxation of a Philippine citizen as a non-resident with Canadian sourced income should not be more burdensome than if the same taxpayer was taxed as if she were resident and earning the same wages in the Philippines.

To ascertain whether a case of 'more burdensome' exists which would allow for the invocation of Article XXVII, a comparison of the taxes imposed under the relevant scenarios has to be shown. To this end, Table II below shows what Philippine taxes would have had to be paid by the five women if they would have been resident and earning the same wages in the Philippines. Inasmuch as the writer was only able to secure a Philippine Bureau of Internal Revenue Form 1701A (Income Tax Form) for 1993, any discrepancies in the calculated income taxes arising from the use of the 1993 Income Tax form, on the whole remain insignificant.

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[55] Vincent, *supra* note 27 at A6.

TABLE II CALCULATIONS OF TAXES PAID BY DOMESTIC CASES ON INCOME EARNED IN CANADA WHILE RESIDENTS IN CANADA AND CALCULATION OF TAXES PAYABLE BY DOMESTICS IF SAME INCOME EARNED IN THE PHILIPPINES AND RESIDENT IN THE PHILIPPINES

	Case #1	Case #2	Case #3	Case #4	Case #5
Gross Compensation Income (Cnd. Income converted into Pesos at 0.05242)	218237.31	167397.94	189431.51	250057.23	353380.39
Less: Total Exemptions	12000	12000	33000	33000	12000
Taxable Compensation Income	206237.31	155397.94	156431.51	217057.23	331380.39
Tax Due (in Phil. Pesos)	39,171.95 13,675+24% Over 100,000	26,970.51 Same	27,218.56 Same	41,768.74 Same	73,275.31 49,675+29% Over 250,000
Philippine Taxes Payable in Cdn. $ (Phil. Tax converted into Cdn. $ at 0.05242)	$2,053.39	$1,413.79	$1,426.80	$2,189.52	$3,841.09
Actual Cdn. Taxes Paid	$947.85	$1,261.20	$819.60	$1,154.45	$2,465.01
Actual Phil. OCW Taxes pd.	92	66	81	83	289.64
Total Taxes Paid In Canada	$1,039.85	$1,327.20	$900.60	$1,237.45	$2,754.65
Exchange Rate Used:	0.05242	0.05242	0.05242	0.05242	0.05242

On its face, and in accordance with the *Philippines Convention*, the Philippine tax on Canadian sourced income does not render a more burdensome tax liability on the domestic when compared to taxation that would arise if the same income was earned and taxed in the Philippines. Moreover, the text of the Convention provides a credit for Canadian taxes paid subject to the provisions of the Philippine's domestic tax law. However, for the most part this provision is mostly window dressing, since the principle of horizontal equity on an international level is violated on several counts. First, the Philippines taxes its residents at marginal rates of 35%, (which is the rate that would apply when the domestic's Canadian income gets converted into Philippines pesos), while Canada taxes its residents at 17% for the applicable years 1991-1994 with respect to incomes below $28,784 (for 1991) and $29,590 (for 1992-1994). The taxing field is not level by any stretch, in the sense that these varying rates of tax in the two taxing jurisdictions give rise to discordant tax liabilities whose basis is solely that of a hypothetical precept that states if the same income was earned in the other contracting states, these rates will apply. In reality, the Canadian-sourced income which forms the base for comparison, is and never was earned, and most importantly, could never have been earned in the Philippines, given the economic realities existent in the Philippines. It is a legal fiction to presume to impose tax rates on hypothetically earned income.

Compounding the disparity of tax rates is the provision for tax deductions. When the Philippines allows a deduction for foreign taxes paid by its non-resident nationals, it violates the territorial principle of taxation at source but conforms with the principle of residence. The latter being met when residence equates to citizenship.[56] In any event, tax deductions do not resolve the problem of economic double taxation because it only allows deductions for identical taxes,[57] which in this instance is the Canadian income tax. Philippine tax rules do not in any manner allow tax deductions for other Canadian statutory deductions made at source, such as CPP and UIC. Nor are any tax deductions allowed for a domestic's board and lodging which is taken off at source. In effect the restriction of deductions to income tax alone eliminates the effects of any tax relief awarded in Canada which results in lower taxable income. Instead of alleviating the situation, the provision of non-refundable tax credits, exemptions and deductions as allowed for by the *ITA* run counterproductive to the domestic's tax liability with respect to Philippine income taxes. CPP, UIC and other non-refundable tax credits which all factor into the calculation of Canadian net taxable income become fiscally prohibitive for the Filipino national, insofar as they are not allowed as deductions (or exemptions) under Philippine domestic tax rules. Her Philippine 'taxable compensation income' is calculated strictly on the basis of her 'gross compensation income'. The only exemptions provided for are for personal exemptions (single or married) and a further 5,000 peso deduction per child to a maximum of four children. Furthermore, the claim for children is reserved for the husband, unless he waives it in favour of his wife.

Even if it were granted that the CPP and UIC deductions are non-reciprocal and as such are disallowed as deductions according to Philippine tax rules, the disallowance of a tax deduction for a domestic's room and board is unfathomable. For a domestic, the weekly deduction at source of $85.25 by her employer for room and board, is money she never gets to see or use. Nonetheless, the Philippines calculates taxes on 'gross compensation income' which includes this amount, with insensitive disregard to the reality and effects of this inclusion.

Another factor that exacerbates the situation of a domestic is the imbalance caused by the

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[56] B. Bracewell-Milnes, *The Economics of International Tax Avoidance, Political Power versus Economic Law* (The Netherlands: Kluwer, 1980) at 112-113.

[57] M. Pires, *International Juridical Double Taxation of Income* (Deventer: The Netherlands: Kluwer, 1989) at 190-191.

foreign exchange differential. The Canadian wages of a domestic when converted into Philippine pesos to allow for the calculation of Philippine tax (as if the same income were earned in the Philippines) become distorted disproportionately because of the play of exchange rate differentials. There is in excess of a 20 times exaggeration of income when the Canadian wage is converted into Philippine pesos.

However, for the domestic, her economic reality in Canada is factually constrained in that her Canadian wages are simply not the exaggerated notional peso amount that results from the multiplication of her Canadian income by an exchange rate differential. She never gets to benefit or enjoy the equivalent purchasing power that the fictional peso amount provides to such a person earning those type of wages in the Philippines. "[T]he deep-seated structural differences between the two trading areas and the diametrically opposed economic interests which result from them"[58] gives rise to an imputation of double tax that is a breach of fiscal justice. There is a violation of tax justice in the sense that her capacity to pay is abused.

Where the tax becomes an outright illegal tax and contrary to the *Philippines Convention* is when it is assessed and collected from a Filipino national whose combined Canadian and Philippine income taxes paid exceed that which would have been paid in Philippine taxes if such a person were a resident of the Philippines and earned such income in the Philippines. Article XXVII s.3 can be invoked inasmuch as the Philippine double tax "...render(s) the total taxation on a Philippine citizen who is a resident of Canada more burdensome than the total taxation that would apply if that person were a resident of the Philippines".[59]

Assuming the Philippine national is single and only claims the Canadian Basic Personal Amount credit, her total taxes paid in Canada plus the Philippine income tax paid would allow her to invoke Article XXVII, section 3 and escape Philippine taxes altogether. This situation could arise even at income levels of $10,000 per annum. Insofar as the writer did not have the occasion to locate such a person, it is not possible to attest to whether such a person was taxed by the Philippine taxing authorities without the necessary caveat being brought to her attention. Where no such proviso or advice is given such a taxpayer, any taxes collected would be outright illegal and in contravention of the Convention.

By all indications Philippine consular officers do not, under any circumstance, bring to the attention of Philippine nationals this provision of the *Philippines Convention.* What instead takes place is the seemingly convenient and presumed right to assess and collect Philippine taxes from all Filipino citizens without proper and due regard to this specific provision of the treaty. Neither is there anywhere within the four walls of any of the Philippine consular offices any official notice or announcement to this effect.

Silence on the part of consular officers with respect to Article XXVII, s.3 stems either from ignorance of the contents and meaning of the Convention or from duplicity. To this end, most if not all Philippine nationals, with varying levels of income, presume the total and absolute legality of the Philippine expatriate tax. But as shown in Table III below, the Philippine tax, under certain circumstances, becomes 'more burdensome' and should not be assessed and collected.

Table III shows hypothetical levels of income and their corresponding tax liability under two scenarios. The first set of calculations shows the total taxes payable by a Filipino national when paying both the Canadian and Philippine taxes when resident in Canada. The second set of calculations shows what Philippine taxes would have been paid if the same person was resident in the Philippines and earning the converted income in that state. Due to the progressive nature of Canada's tax rates and the incidence of federal and provincial surtaxes at certain income levels,

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[58] Knechtle, *supra* note 1 at 186-187.

[59] *Philippines Convention supra* note 13, Article XXVII, s.3.

Canadian taxes invariably supersede Philippine taxes. As such, the Philippine double tax becomes an even 'more burdensome' tax.

In light of the possibilities of the Philippine double tax being assessed and collected from persons who should not be so attached, it behooves the Philippine government to ensure that its taxing power is legitimate. More importantly the abuse and outright disenfranchisement of its citizens, through its consular offices' disregard for this provision leads to unauthorized and corrupt taxation.

TABLE III CALCULATION OF TAXES PAYABLE OF A HYPOTHETICAL PHILIPPINE NATIONAL, SINGLE PERSON IF INCOME EARNED IN CANADA AND RESIDENT IN CANADA AND CALCULATION OF TAXES PAYABLE BY SAME PERSON IF SAME INCOME EARNED IN THE PHILIPPINES AND RESIDENT IN THE PHILIPPINES

Calculation of Income Tax Payable by Filipino National if Income Earned in Canada and Resident in Canada - In Cdn. $						
Total Gross-up Income (for Philippine Income Tax) ($)	10000	15000	20000	25000	30000	35000
CPP ($)	280	420	560	700	840	850
UIC	300	450	600	750	900	1050
Basic Pers. Credit	1098	1098	1098	1098	1098	1098
Taxable Income (for Can. Inc. Tax) ($)	9420	14130	18840	23550	28260	33100
Canadian Fed. Tax Payable	1601.40	2402.10	3202.80	4003.50	4804.20	5942.47
Fed 3% Surtax	48.04	72.06	96.08	120.11	144.13	178.27
Add. 5% Surtax						
Provincial Tax (58% of Federal Tax)	928.81	1393.22	1857.62	2322.03	2786.44	3446.63
Ont. Surtax - 20 %						
Add. Ont. Surtax - 10 %						
Philippine Tax Payable	46.88	84.92	139.22	193.53	247.83	294.18
Total Tax Payable by Philippine National Expatriate ($)	2625.13	3,952..30	5295.73	6639.16	7982.59	9.861.56
Exch. rate (Cdn. to U.S.)	0.7317	0.7317	0.7317	0.7317	0.7317	0.7317
Exch. rate (Cdn. to Phil.)	0.0524	0.0524	0.0524	0.0524	0.0524	0.0524

Calculation of Tax Payable of Philippine National Income Earned in the Philippines and Taxpayer Resident in the Philippines						
Total Compensation Income (Converted into Phil. Pesos)	190839.69	286259.54	381679.39	477099.24	572519.08	667938.93
Basic Tax Exemption	9000	9000	9000	9000	9000	9000
taxable income for Philippine Income Tax	181,839.69	277,259.54	372,679.39	468,099.24	563,519.08	658,938.93
Phil. Tax Payable	33316.53	57580.27	85252.02	112923.78	144406.68	177803.63
Total Phil. Tax Payable in Cdn. $	1745.79	3017.21	4467.21	5917.21	7566.91	9316.91

Calculation of Income Tax Payable by Filipino National of Income Earned in Canada and Resident in Canada in Cdn $							
Total Gross-up Income (for Philippine Income Tax) ($)	40000	45000	50000	55000	60000	65000	70000
CPP	850.5	850.5	850.5	850.5	850.5	850.5	850.5
UIC	1200	1271.4	1271.4	1271.4	1271.4	1271.4	1271.4
Basic Pers. Credit	1098	1098	1098	1098	1098	1098	1098
Taxable Income (for Canadian Income Tax) ($)	37949.50	42878.10	47878.10	52878.10	57878.10	62878.10	67878.10
Canadian Fed. Tax Payable	7203.47	8484.91	9784.91	11084.91	12384.91	13796.45	15246.45
Fed 3% Surtax	216.10	254.55	293.55	322.55	371.55	413.89	457.39
Add. 5% Surtax						64.82	137.32
Provincial Tax (58% of Federal Tax)	4178.01	4921.25	5675.25	6429.25	7183.25	8001.94	8842.94
Ont. Surtax-20%			1135.05	1285.85	1436.65	1600.39	1768.59
Add. Ont. Surtax 10 %						0.19	84.29
Philippine Tax Payable	337.64	492.60	531.50	592.00	652.50	707.35	758.73
Total Tax Payable by Philippine National Expatriate ($)	11935.23	14153.31	17420.26	19724.56	22028.86	24585.03	27295.51

Exch. rate (Cdn. to U.S.)	0.7317	0.7317	0.7317	0.7317	0.7317	0.7317	0.7317
Exch. rate (Cdn. to Phil.)	0.0524	0.0524	0.0524	0.0524	0.0524	0.0524	0.0524
Calculation of Tax Payable of Philippine National Income Earned in the Philippines and Taxpayer Resident in the Philippines							
Total Comp. Income (Converted into Phil. Pesos)	190839.69	286259.54	381679.39	477099.24	572519.08	667938.93	
Basic Tax Exemption	9000	9000	9000	9000	9000	9000	
Taxable Income for Phil. Income Tax	181839.69	277259.39	372679.39	468099.24	563519.08	658938.93	
Phil. Tax Payable	33316.53	57580.27	85252.02	112923.78	144406.68	177803.63	
Total Phil. Tax Payable in Cdn.$	1745.79	3017.21	4467.21	5917.21	7566.91	9316.91	
Calculation of Income Tax Payable by Filipino National of Income Earned in Canada and Resident in Canada in Cdn $							
Total Gross-up Income (for Philippine Income Tax) ($)	40000	45000	50000	55000	60000	65000	70000
CPP	850.5	850.5	850.5	850.5	850.5	850.5	850.5
UIC	1200	1271.4	1271.4	1271.4	1271.4	1271.4	1271.4
Basic Pers. Credit	1098	1098	1098	1098	1098	1098	1098
Taxable Income (for Canadian Income Tax) ($)	37949.50	42878.10	47878.10	52878.10	57878.10	62878.10	67878.10
Canadian Fed. Tax Payable	7203.47	8484.91	9784.91	11084.91	12384.91	13796.45	15246.45
Fed 3% Surtax	216.10	254.55	293.55	322.55	371.55	413.89	457.39
Add. 5% Surtax						64.82	137.32
Provincial Tax (58% of Federal Tax)	4178.01	4921.25	5675.25	6429.25	7183.25	8001.94	8842.94
Ont. Surtax-20%			1135.05	1285.85	1436.65	1600.39	1768.59
Add. Ont. Surtax 10 %						0.19	84.29
Philippine Tax Payable	337.64	492.60	531.50	592.00	652.50	707.35	758.73

Total Tax Payable by Philippine National Expatriate ($)	11935.23	14153.31	17420.26	19724.56	22028.86	24585.03	27295.51
Exch. rate (Cdn. to U.S.)	0.7317	0.7317	0.7317	0.7317	0.7317	0.7317	0.7317
Exch. rate (Cdn. to Phil.)	0.0524	0.0524	0.0524	0.0524	0.0524	0.0524	0.0524
Calculation of Tax Payable of Philippine National Income Earned in the Philippines and Taxpayer Resident in the Philippines							
Total Comp. Income (Converted into Phil. Pesos)	763358.78	858778.63	954198.47	1049618.30	1145038.17	1240458.02	1335877.86
Basic Tax Exemption	9000	9000	9000	9000	9000	9000	9000
Taxable Income for Phil. Income Tax	754358.78	849778.63	945198.47	1040618.32	1136038.17	1231458.02	1326877.86
Phil. Tax Payable	211200.57	244597.52	277994.47	311391.41	344788.36	378185.31	411582.25
Total Phil. Tax Payable in Cdn.$	11066.91	12816.91	14566.91	16316.91	18066.91	19816.91	21566.91

Another area that gives rise to the illegality of the Philippine tax comes from the interpretation of the term 'more burdensome'. The concept of 'more burdensome' is a comprehensive provision that covers, not only the amount of tax, but the method of assessment, rates of tax, the basis of the charge and such administrative formalities such as returns payment and time limits.[60] Substance and form are elements that need to be scrutinized with respect to the interpretation of a 'more burdensome' incidence of taxation.

In this regard, there is strong ground for the argument that the Philippine tax on Canadian sourced income when collected through the use of the Philippine passport is tax harassment and hence a coercive fiscal practice. Apart from the fact that Philippine tax collection in Canada, as done through its consular offices, is an official act not authorized by the Canadian government, the annual consular visits by Philippine nationals to pay the Philippine tax imposes a more burdensome treatment than that experienced by Philippine nationals resident in that state. The very wording of Article XXVII section 3 notes that:

> S.3. ...This provision shall in no case render the total taxation on a Philippine citizen who is resident of Canada more burdensome than the total taxation that would apply if that person were a resident of the Philippines...

When strictly applied, the very act of having to be assessed and made to pay Philippine taxes while resident in Canada renders the act more burdensome for Philippine nationals in Canada. The

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[60] D. R. Davies, *Principles of International Double Taxation Relief* (London: Sweet & Maxwell, 1985) at 203.

filing of Canadian tax coupled with the filing of Philippine tax, if and when resident in Canada, is *ipso facto* a more burdensome form of taxation. This is simply because a domestic (or any Filipino national) in the Philippines is not required to file tax twice.

On the other hand the Filipino domestic (or any other Filipino national) resident in Canada is obligated to file twice - once to the Canadian government and a second time to the Philippine government, through the coercive mechanism of passport validation. The burden is exacerbated because the domestic must file her Philippine income tax return at the consular offices and have her passport stamped accordingly. She has to take time off work during the work week to attend at the consular office. In some instances she may be required to attend a second time. This has created some disfavour or annoyance with employers who similarly have to re-arrange their work schedules to accommodate the absence of their 'nanny'. And as noted earlier, the provision of s.3 of Article XXVII very clearly states that in complying with the section, "...[I]t shall in no case render..." the taxing event more burdensome. This section of the Convention can therefore be invoked in this regard.

The Philippine government is thus constrained in the exercise of its taxing authority to collect its taxes within Philippine territorial jurisdiction and not within Canadian . Simply put, the general rule is that in the absence of any agreement between Canada and the Philippines, (of which there is no agreement), the Philippines cannot exercise jurisdiction within Canadian territories.

VII. THE URGENT NEED FOR RELIEF

In light of the foregoing, the only equitable and just measure for relief is the provision of full exemption by the Philippine government on the foreign-sourced income of its nationals. According to international law, the state of source (Canada) has priority and preference in the power to tax. This leaves the state of one's nationality (e.g. the Philippines) responsible for eliminating double taxation. Insofar as most nation states have eliminated nationality as a basis for the attachment of fiscal liability, it is incumbent on the Philippine government to eliminate its tax on foreign sourced income of its nationals in the true spirit of substantial equity, justice and the principle of reciprocity.

The only way to achieve this is to allow for full exemption for all foreign sourced income. This means that incomes of Filipino nationals derived in Canada, should not be taxed in Canada or the Philippines, and, should not, in any manner, be considered for the purposes of assessing Philippine tax.

The advantages of full exemption include administrative ease both for the taxing state providing the exemption, and the taxpayer. Similarly, it properly recognizes the tax benefits granted in the state of source. Most importantly, it addresses the inequitable effects that double taxation imposes on its nationals, in substance and in form. And from the Philippines' particular perspective, it gives full and true recognition to its export contract labourers, who to this day, continue to prop up its balance of payments account. The regular remittance by overseas contract workers of a substantial part of their earnings to the Philippines has benefited the country many times more than what it collects through its enforcement of double taxation. Insofar as double taxation violates tax justice, its elimination through full exemption of foreign-sourced income recognizes the taxable capacities of its nationals. The five cases shown in this study are stark and living examples of the overzealous exercise of tax jurisdiction.

Canada, as a party to bilateral double taxation treaties has the responsibility of enforcing the true spirit of the *Philippines Convention.* This means that any contravention of its intent, in substance and form, should be swiftly and properly dealt with. Canada should endeavour to consult with the Philippines with regard to the elimination of double taxation in cases not provided

for in the *Philippines Convention*. The incidence of double taxation on Philippine nationals, as demonstrated in this paper is one such instance. Domestics are just as entitled to fundamental justice and the protection of their rights under the Canadian *Charter*;[61] the lives, liberties and securities of their persons, should be protected and defended.

VIII. RELIEF UNDER THE CHARTER AND TREATY OVERRIDE

A potential *Charter* challenge can be mounted on behalf of these domestic workers (or other Filipino nationals) where the *Philippines Convention*, as a law entered into by Canada, is found to be *ultra vires*. The Convention, albeit of international dimension, discriminates on the basis of national and ethnic origin and is contrary to section 15(1) of the *Charter* and in its being upheld by Canadian authorities is in contravention of section 7 of the *Charter*.

The *Charter* protects all individuals and groups to the extent that they suffer discrimination on the basis of their nationality or ethnic origin. In this instance, domestics are discriminated upon solely on the basis of their nationality (e.g. citizenship) and their security and liberty of person is threatened by the upholding of a Convention that runs counter to the tenets of the *Charter*. The *Charter* is the supreme law of the land and conventions and treaties entered into by the Canadian government could be subject to its review.

As is the practice in most Commonwealth countries, treaties are considered to form part of domestic law only to the extent to which they have been given effect through an act of parliament.[62] Such is the case with the Philippines Convention. The same status is given to treaties in the U.S. where the doctrine of incorporation is followed. Treaties are considered part of U.S. law, but only to the extent that they are not inconsistent with the U.S. constitution.[63]

Where conflict exists between domestic legislation such as the *Charter* and an international treaty such as the *Philippines Convention*, under the doctrine of *lex posterior derogate priori*,[64] the later-in-time legislation abrogates the earlier. This is the U.S. position and that of most Commonwealth countries, where subsequent legislation can override prior treaty obligations.[65] Hence, in this instance, the *Charter* which came into effect on April 17, 1982 will override the *Philippines Convention* which entered into force on December 21, 1977.

Insofar as Article XXVII of the *Philippines Convention* is contrary to the *Charter* in that it is a provision that allows for discrimination on the sole basis of one's nationality, it can be subjected to treaty override. Several authors have suggested that treaty override must be of a 'material breach' to entitle a State to terminate or suspend the operation of the agreement, in whole or in part.

Article XXVII constitutes a material breach, as it runs counter, not only to the *Charter*, but to the object or purpose of the treaty, which is the elimination of double taxation. It instead gives legal effect to the maintenance of a taxing claim that has now become internationally defunct, i.e. taxation on the basis of one's nationality. The discrimination that results makes it subject to the scrutiny of the *Charter*. Another aspect that will invoke the *Charter* is the practice of the Philippine tax authorities to enforce within Canada its sovereign jurisdiction through the mechanism of a coercive practice.

As confirmed with an officer of the International Tax Directorate of the Ministry of National

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[61] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[62] A.Qureshi, *The Public International Law of Taxation Text, Cases and Materials* (London: Graham & Trotman Ltd., 1994) at 10.

[63] *Ibid.* at 10.

[64] *Ibid.* at 11.

[65] *Ibid.*

Revenue, it would not be an administrative practice of Revenue Canada to enforce compliance with the *ITA* by using the Canadian passport to ensure Canadians pay their taxes. Ostensibly the Philippine practice is repugnant. At the very least, it should be condemned by Canada and the international community.

On the more substantive issue of the double tax on Philippine nationals whose incomes are earned overseas, absent any representation by the Minister of Finance to revisit this section of the Convention, continued injustice and oppression will prevail. Will it take a *Charter* challenge to eliminate this odious tax grab?