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G.R. No. 175356 – MANILA MEMORIAL PARK, INC. and LA FUNERARIA PAZ-SUCAT, INC., Petitioners, v. SECRETARY of the DEPARTMENT OF SOCIAL WELFARE AND DEVELOPMENT and the SECRETARY of the DEPARTMENT OF FINANCE, Respondents.

Promulgated:

DECEMBER 03, 2013

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CONCURRING AND DISSENTING OPINION

LEONEN, J.,

This case involves the constitutionality of Section 4 of Republic Act No. 7432 as amended by Republic Act No. 9257¹ as well as the implementing rules and regulations issued by respondents Department of Social Welfare and Development and Department of Finance. The provisions allow the 20% discount given by business establishments to senior citizens only as *a tax deduction* from their gross income. The provisions amend an earlier law that allows the senior citizen discount as *a tax credit* from their total tax liability.

I concur with the *ponencia* in denying the constitutional challenge.

The enactment of the provision as well as its implementing rules is a proper exercise of the inherent power to tax and police power. However, I regret I cannot join my esteemed colleagues Justice Mariano del Castillo as the *ponencia* and Justice Antonio Carpio in his thoughtful dissent that the power of eminent domain is also involved. It is for these reasons that I offer this separate opinion.

The Petition

Before us is a Petition for Prohibition² filed by Manila Memorial Park, Inc. and La Funeraria Paz-Sucat, Inc. against the Secretaries of the Department of Social Welfare and Development and the Department of

¹ Republic Act No. 9257 is otherwise known as the Expanded Seniors Citizens Act of 2003. It was amended by Republic Act No. 9994, February 15, 2010.

² Petition is filed pursuant to Rule 65 of the Rules of Court.

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Finance. Petitioners are domestic corporations engaged in the business of providing funeral and burial services.

On April 23, 1992, Republic Act No. 7432 was passed granting senior citizens privileges. Section 4(a) grants them a 20% discount from certain establishments provided “[t]hat private establishments may claim the cost as tax credit.”

On August 23, 1993, Revenue Regulation No. 02-94 was issued to implement Republic Act No. 7432. Section 2(i) on the definition of “tax credit” provides that the discount “shall be deducted by the said establishments from their gross income x x x.” Section 4 on bookkeeping requirements for private establishments similarly states that “[t]he amount of 20% discount shall be deducted from the gross income for income tax purposes and from gross sales of the business enterprise concerned for purposes of VAT and other percentage taxes.”

*Commissioner of Internal Revenue v. Central Luzon Drug Corporation*³ later declared these sections of Revenue Regulation No. 02-94 as erroneous for contravening Republic Act No. 7432, which specifically allows establishments to claim a tax credit.

On February 26, 2004, Republic Act No. 9257 was passed amending certain provisions of Republic Act No. 7432. Specifically, Section 4 now provides as follows:

SECTION 4. Privileges for the Senior Citizens. – The senior citizens shall be entitled to the following:

(a) the grant of twenty percent (20%) discount from all establishments relative to the utilization of services in hotels and similar lodging establishments, restaurants and recreation centers, and purchase of medicines in all establishments for the exclusive use or enjoyment of senior citizens, including funeral and burial services for the death of senior citizens;

x x x x

The establishment may claim the discounts granted under (a), (f), (g) and (h) as tax deduction based on the net cost of the goods sold or services rendered: Provided, That the cost of the discount shall be allowed as deduction from gross income for the same taxable year that the discount is granted. Provided, further, That the total amount of the claimed tax deduction net of value added tax if applicable, shall be included in their gross sales receipts for tax purposes and shall be subject to proper documentation and to the provisions of the National Internal Revenue Code, as amended.

³ 496 Phil. 307 (2005).

The Secretary of Finance issued Revenue Regulation No. 4-2006 to implement Republic Act No. 9257. The Department of Social Welfare and Development also issued its own Rules and Regulations Implementing Republic Act No. 9257.

Petitioners, thus, filed this Petition urging that Section 4 of Republic Act No. 7432 as amended by Republic Act No. 9257, as well as the implementing rules and regulations issued by respondents, be declared unconstitutional insofar as these allow business establishments to claim the 20% discount given as a tax deduction; that respondents be prohibited from enforcing them; and that the tax credit treatment of the 20% discount under the former Section 4(a) of Republic Act No. 7432 be reinstated.⁴

The most salient issue is as follows: whether Section 4 of Republic Act No. 7432 as amended by Republic Act No. 9257, as well as its implementing rules and regulations, insofar as they provide that the 20% discount to senior citizens may be claimed as a tax deduction by private establishments, is invalid and unconstitutional.

The arguments of the parties as summarized in the *ponencia* are as follows:

Petitioners contend that the tax deduction scheme contravenes Article III, Section 9 of the Constitution, which states that: “[p]rivate property shall not be taken for public use without just compensation.”⁵ Moreover, petitioners cite *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*⁶ ruling that the 20% discount privilege constitutes taking of private property for public use which requires the payment of just compensation,⁷ and *Carlos Superdrug Corporation v. Department of Social Welfare and Development*⁸ acknowledging that the tax deduction scheme does not meet the definition of just compensation.⁹

Petitioners also seek a reversal of the ruling in *Carlos Superdrug* that the tax deduction scheme is justified by police power.¹⁰ They assert that “[a]lthough both police power and the power of eminent domain have the general welfare for their object, there are still traditional distinctions between the two”¹¹ and that “eminent domain cannot be made less supreme

⁴ *Rollo*, p. 31.

⁵ *Id.* at 401-402.

⁶ 496 Phil. 307 (2005).

⁷ *Rollo*, pp. 402-403.

⁸ 553 Phil. 120 (2007).

⁹ *Rollo*, pp. 405-409.

¹⁰ *Id.* at 410-420.

¹¹ *Id.* at 411-412.

than police power.”¹² They claim that in amending Republic Act No. 7432, the legislature relied on an erroneous contemporaneous construction that prior payment of taxes is required for tax credit.¹³

Petitioners likewise argue that the tax deduction scheme violates Article XV, Section 4, and Article XIII, Section 11 of the Constitution because it shifts the State’s constitutional mandate or duty of improving the welfare of the elderly to the private sector.¹⁴ Under the tax deduction scheme, the private sector shoulders 65% of the discount because only 35% (now 30%) of it is actually returned by the government.¹⁵ Consequently, its implementation affects petitioners’ businesses,¹⁶ and there exists an actual case or controversy of transcendental importance.¹⁷

Respondents, on the other hand, question the filing of the instant Petition directly with this Court in disregard of the hierarchy of courts.¹⁸ They assert that there is no justiciable controversy as petitioners failed to prove that the tax deduction treatment is not a “fair and full equivalent of the loss sustained” by them.¹⁹ On the constitutionality of Republic Act No. 9257 and its implementing rules and regulations, respondents argue that petitioners failed to overturn its presumption of constitutionality.²⁰ They maintain that the tax deduction scheme is a legitimate exercise of the State’s police power.²¹

I

Uncertain Burdens and Inchoate Losses

What is in question here is *not* the actual imposition of a senior citizen discount; *rather, it is the treatment of that senior citizen discount for taxation purposes*. From being a tax credit, it is now only a tax deduction. The imposition of the senior citizen discount is an exercise of police power. The determination that it will be a tax deduction, not a tax credit, is an exercise of the power to tax.

The imposition of a discount for senior citizens affects the price. It is thus an inherently regulatory function. However, nothing in the law controls the prices of the goods subject to such discount. Legislation interferes with the autonomy of contractual arrangements in that it imposes a two-tiered

¹² Id. at 413.

¹³ Id. at 427-436.

¹⁴ Id. at 421-427.

¹⁵ Id. at 425.

¹⁶ Id. at 424.

¹⁷ Id. at 394-401.

¹⁸ Id. at 363-364.

¹⁹ Id. at 359-363.

²⁰ Id. at 368-370.

²¹ Id. at 364-368.

pricing system. There will be two prices for every good or service: one is the regular price for everyone except for senior citizens who get a twenty percent (20%) discount.

Businesses' discretion to fix the regular price or improve the costs of the goods or the service that they offer to the public — and therefore determine their profit — is not affected by the law. Of course, rational businesses will take into consideration economic factors such as price elasticity,²² the market structure, the kind of competition businesses face, the barriers to entry that will make possible the expansion of suppliers should there be a change in the prices and the profits that can be made in that industry. Taxes, which include qualifications such as exemptions, exclusions and deductions, will be part of the cost of doing business for all such businesses.

No price restriction, no certain losses

There is no restriction in the law for businesses to attempt to recover the same amount of profits for the businesses affected by the law.

To put this idea in perspective, let us assume that Company A is in the business of the sale of memorial lots. The demand for memorial lots is not usually influenced by price fluctuations. There will always be a static demand for memorial lots because it is strictly based on a non-negotiable preference of the purchaser.

Let us also assume, for purposes of argument, that Company A acquired the plots of land at zero cost. This means that the price of the plot multiplied by the number of plots sold will always be considered revenue.²³ To simplify, consider this formula:

$$R = P \times Q$$

Where R = Revenue
 P = Price per unit
 Q = Quantity sold

²² “[Price elasticity] measures how much the quantity demanded of a good changes when its price changes.” P. A. SAMUELSON AND W. D. NORDHAUS, ECONOMICS 66 (Eighteenth Edition, 2005).

²³ Revenue in the economic sense is not usually subject to such simplistic treatment. Costs must be taken into consideration. In economics, to evaluate the combination of factors to be used by a profit-maximizing firm, an analysis of the marginal product of inputs is compared to the marginal revenue. Economists usually compare if an additional unit of labor will contribute to additional productivity. For a more comprehensive explanation, refer to P. A. SAMUELSON AND W. D. NORDHAUS, ECONOMICS 225-239 (Eighteenth Edition, 2005).

Given these assumptions, let us presume that in any given year before the promulgation of any law for senior citizen discounting, Company A sells 1,600 square meters of memorial plots at the price of ₱100.00 per square meter. Considering the formula, the total profit of Company A will be:

$$R_0 = P \times Q$$
$$R_0 = \text{₱}100.00 \times 1,600 \text{ sq. m.}$$

$$R_0 = \text{₱}160,000.00$$

Let us assume further that out of the 1,600 square meters sold, only 320 square meters are bought by senior citizens, and 1,280 square meters are bought by ordinary citizens.

When Congress enacted Republic Act No. 7432, Company A was forced to give a 20% discount to senior citizens. There will be a price discrimination scheme wherein senior citizens can avail a square meter of a memorial plot for only ₱80.00 per square meter. The total revenue received by Company A will now constitute revenue derived from plots sold to senior citizens added to the revenue derived from plots sold to ordinary citizens. Hence, the formula becomes:

$$R_T = R_S + R_C$$
$$R_S = P_S \times Q_S$$
$$R_C = P_C \times Q_C$$
$$R_T = (P_S \times Q_S) + (P_C \times Q_C)$$

Where R_T = Total Revenue
 R_S = Revenue from Senior Citizens
 R_C = Revenue from Ordinary Citizens
 P_S = Price for Senior Citizens per Unit
 Q_S = Quantity Sold to Senior Citizens
 P_C = Price for Ordinary Citizens per
 Unit
 Q_C = Quantity Sold to Ordinary
 Citizens

In our example, this means that the total revenue of Company A becomes:

$$R_{TI} = (P_S \times Q_S) + (P_C \times Q_C)$$
$$R_{TI} = (\text{₱}80.00 \times 320 \text{ sq. m.}) + (\text{₱}100.00 \times 1,280 \text{ sq. m.})$$
$$R_{TI} = \text{₱}25,600.00 + \text{₱}128,000.00$$
$$R_{TI} = \text{₱}153,600.00$$

Obviously, the Total Revenue after the discount was applied is lower than the Revenue derived by Company A before the discount was imposed.

The natural consequence of Company A, in order to maintain its profitability, is to increase the price per square meter of a memorial lot. Assume that the price increase was ₱10.00. This makes the price for ordinary citizens go up to ₱110.00 per square meter. Meanwhile, the discounted price for senior citizens becomes ₱88.00 per square meter. The effects of that with respect to total revenue of Company A become:

$$\begin{aligned} R_{T2} &= (P_S \times Q_S) + (P_C \times Q_C) \\ R_{T2} &= (\text{₱}88.00 \times 320 \text{ sq. m.}) + (\text{₱}110.00 \times 1,280 \text{ sq. m.}) \\ R_{T2} &= \text{₱}28,160.00 + \text{₱}140,800.00 \\ R_{T2} &= \text{₱}168,960.00 \end{aligned}$$

After Company A increases its prices, despite the application of the mandated discount rates, Company A becomes more profitable than it was before the implementation of Republic Act No. 7432.

Again, nothing in the law prohibits Company A from increasing its prices for regular customers.²⁴

The tax implications of Republic Act No. 7432 vis-à-vis the tax implications of the amendment introduced in Republic Act No. 9257 are also augmented by controlling the price. If we compute for the tax liability and the net income of Company A after the implementation of Republic Act No. 7432 and after treating the discount given to senior citizens becomes tax credit for Company A, we will get:

Gross Income (<i>R_{T1}</i>)	₱ 153,600
Less: Deductions	(₱ 60,000)
Taxable Income	₱ 93,600
Income Tax Rate	30%
Income Tax Liability	₱ 28,080
Less: Senior Citizen Discount <i>Tax Credit</i>	(₱ 6,400)
Final Income Tax Liability	₱ 21,680
<div><div>Net Income</div><div>₱ 131,920</div></div>	

²⁴ To determine the price for both ordinary customers and senior citizens that will retain the same level of profitability, the formula for the price for ordinary customers is $P_C = R_0 / (0.8Q_S + Q_C)$ where R_0 is the total revenue before the senior citizen discount was given.

Given the changes made in Republic Act No. 9257, senior citizen discount is considered a deduction. Hence:

Gross Income (R_{T1})	₱ 153,600
Less: Deductions	(₱ 60,000)
Less: Senior Citizen Discount	(₱ 6,400)
Taxable Income	₱ 87,200
Income Tax Rate	30%
Income Tax Liability	₱ 26,160
Less: Tax Credit	₱ 0
Final Income Tax Liability	₱ 26,160

Net Income	₱ 127,440
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Keeping the number of units sold to senior citizens and ordinary citizens constant, Republic Act No. 9257 will mean a smaller net income for Company A. However, if Company A uses pricing to respond to Republic Act No. 9257, as discussed in the earlier example where Company A increased its prices from ₱100.00 to ₱110.00, the net income becomes:

Gross Income (R_{T2})	₱ 168,960
Less: Deductions	(₱ 60,000)
Less: Senior Citizen Discount	(₱ 7,040)
Taxable Income	₱ 101,920
Income Tax Rate	30%
Income Tax Liability	₱ 30,576
Less: Tax Credit	₱ 0
Final Income Tax Liability	₱ 30,576

Net Income	₱ 138,384
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It becomes apparent that despite converting the discount from tax credit to an income deduction, Company A could improve its net income than in the situation where the senior citizen discount was treated as a tax credit if it imposes a price increase. Note that the price increase we provided in this example was even less than the discount given to senior citizens.

The decision to increase price as well as its magnitude depends upon a number of non-legal factors. Businesses, for instance, will consider whether they are in a situation of near monopoly or a competitive market. They will want to know whether the change in their prices would encourage customers to shift their preferences to cremating their loved ones instead of burying

them.²⁵ They might also want to determine if the subsequent increase in relative profits will encourage the setting up of more competition into their market.

Losses, therefore, are not guaranteed by the change in legislation challenged in this Petition. Put simply, losses are not inevitable. On this basis alone, the constitutional challenge should fail. The case is premised on the inevitable loss to be suffered by the petitioners. There is no factual basis for that kind of certainty. We do not decide constitutional issues on the basis of inchoate losses and uncertain burdens.

Furthermore, income and profits are not vested rights. They are the results of good or bad business judgments occasioned by the proper response to their economic environment. Profits and the maintenance of a steady stream of income should be the reward of business acumen of entrepreneurship. Courts read law and in doing so provide the givens in a business environment. We should not allow ourselves to become the tools for good business results for some businesses.

Profits can improve with efficiency

Apart from increasing the price of goods and services, efficiency in the business can also maintain or even increase profits. A more restrictive business environment should occasion a review of the cost structure of the economic agent.²⁶ We cannot simply assume that businesses, including the businesses of petitioners, are at their optimum level of efficiency. The change in the tax treatment of senior citizen's discount, therefore, in some cases, can be better for the economy although it may, without any certainty, occasion some pain on some businesses. Our view should be more all-encompassing.

Besides, compensating for the alleged losses of the petitioners assumes that we accept their current pricing as correct. That is, it is the price that covers their costs and provides them with profits that a competitive market can bear. We cannot have the situation where establishments can just set any price and come to court to recover whatever profit they were enjoying prior to a regulatory measure.

²⁵ This sensitivity is referred to as price elasticity. "The precise definition of price elasticity is the percentage change in quantity demanded divided by the percentage change in price." P. A. SAMUELSON AND W. D. NORDHAUS, ECONOMICS 66 (Eighteenth Edition, 2005).

²⁶ Another algebraic formula will show us how costs should be minimized to retain the same level of profitability. The formula is $C_1 = C_0 - [(20\% \times P_C) \times Q_S]$ where:
 C_1 = Cost of producing all quantities after the discount policy
 C_0 = Cost of producing all quantities before the discount policy
 P_C = Price per unit for Ordinary Citizens
 Q_S = Quantity sold to Senior Citizens

II Power to Tax

The power to tax is “a principal attribute of sovereignty.”²⁷ Such inherent power of the State anchors on its “social contract with its citizens [which] obliges it to promote public interest and common good.”²⁸

The scope of the legislative power to tax necessarily includes not only the power to determine the rate of tax but the method of its collection as well.²⁹ We have held that Congress has the power to “define what tax shall be imposed, why it should be imposed, how much tax shall be imposed, against whom (or what) it shall be imposed and *where it shall be imposed*.”³⁰ In fact, the State has the power “to make reasonable and natural classifications for the purposes of taxation x x x [w]hether it relates to the subject of taxation, the kind of property, the rates to be levied, or the amounts to be raised, the *methods of assessment, valuation and collection*, the State’s power is entitled to presumption of validity x x x.”³¹ This means that the power to tax also allows Congress to determine matters as whether tax rates will be applied to gross income or net income and whether costs such as discounts may be allowed as a deduction from gross income or a tax credit from net income after tax.

While the power to tax has been considered the strongest of all of government’s powers³² with taxes as the “lifeblood of the government,” this power has its limits. In a number of cases,³³ we have referred to our discussion in the 1988 case of *Commissioner of Internal Revenue v. Algue*,³⁴ as follows:

Taxes are the lifeblood of the government and so should be collected without unnecessary hindrance. On the other hand, such collection should be made in accordance with law as any arbitrariness will negate the very reason for government itself. It is therefore necessary to reconcile the apparently conflicting interests

²⁷ *National Power Corporation v. City of Cabanatuan*, 449 Phil. 233, 247 (2003) citing *Hong Kong & Shanghai Banking Corp. v. Rafferty*, 39 Phil. 145 (1918); *Wee Poco & Co. v. Posadas*, 64 Phil. 640 (1937); *Reyes v. Almanzor*, 273 Phil. 558, 564 (1991).

²⁸ *National Power Corporation v. City of Cabanatuan*, supra at 248.

²⁹ For instance, Republic Act No. 9337 introducing further reforms to the Value Added Tax (VAT) system was upheld as constitutional. Sections 106, 107, and 108 of the Tax Code were amended to impose a Value Added Tax rate of 10% to be increased to 12% upon satisfaction of enumerated conditions. Relevant portions of Sections 110 and 114 of the Tax Code were also amended, providing for limitations on a taxpayer’s claim for input tax. See *Abakada Guro Party List v. Executive Secretary*, 506 Phil. 1 (2005).

³⁰ *Chamber of Real Estate and Builders’ Associations, Inc. v. Executive Secretary Romulo*, G.R. No. 160756, March 9, 2010, 614 SCRA 605, 626. (Emphasis supplied)

³¹ *Abakada Guro Party List v. Executive Secretary Ermita*, supra at 129. (Emphasis supplied)

³² *Reyes v. Almanzor*, 273 Phil. 558, 564 (1991).

³³ See for instance *Lascona Land Co. v. Commissioner of Internal Revenue*, G.R. No. 171251, March 5, 2012, 667 SCRA 455; *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010, 637 SCRA 633, 647-648.

³⁴ 241 Phil. 829 (1988).

of the authorities and the taxpayers so that the real purpose of taxation, which is the promotion of the common good, may be achieved.

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It is said that taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for lack of the motive power to activate and operate it. Hence, despite the natural reluctance to surrender part of one's hard-earned income to the taxing authorities, every person who is able to must contribute his share in the running of the government. The government, for its part, is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power.

But even as we concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure. If it is not, then the taxpayer has a right to complain and the courts will then come to his succor. For all the awesome power of the tax collector, he may still be stopped in his tracks if the taxpayer can demonstrate, as it has here, that the law has not been observed.³⁵ (Emphasis supplied)

The Constitution provides for limitations on the power of taxation. First, “[t]he rule of taxation shall be uniform and equitable.”³⁶ This requirement for uniformity and equality means that “all taxable articles or kinds of property of the same class [shall] be taxed at the same rate.”³⁷ The tax deduction scheme for the 20% discount applies equally and uniformly to all the private establishments covered by the law. Thus, it complies with this limitation.

Second, taxes must neither be confiscatory nor arbitrary as to amount to a “[deprivation] of property without due process of law.”³⁸ In *Chamber of Real Estate and Builders’ Associations, Inc. v. Executive Secretary Romulo*,³⁹ petitioners questioned the constitutionality of the Minimum Corporate Income Tax (MCIT) alleging among others that “pegging the tax base of the MCIT to a corporation’s gross income is tantamount to a confiscation of capital because gross income, unlike net income, is not

³⁵ Id. at 830-836.

³⁶ CONSTITUTION, Art. VI, Sec. 28 (1).

Sec. 28 (1) The rule of taxation shall be uniform and equitable. The Congress shall evolve a progressive system of taxation.

³⁷ *Tolentino v. Secretary of Finance*, 319 Phil. 755, 795 (1995).

³⁸ CONSTITUTION, Art. III, Sec. 1.

Sec. 1 No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

³⁹ G.R. No. 160756, March 9, 2010, 614 SCRA 605.

‘realized gain.’”⁴⁰ In dismissing the Petition, this Court discussed the due process limitation on the power to tax:

As a general rule, the power to tax is plenary and unlimited in its range, acknowledging in its very nature no limits, so that the principal check against its abuse is to be found only in the responsibility of the legislature (which imposes the tax) to its constituency who are to pay it. Nevertheless, it is circumscribed by constitutional limitations. At the same time, like any other statute, tax legislation carries a presumption of constitutionality.

The constitutional safeguard of due process is embodied in the fiat “[no] person shall be deprived of life, liberty or property without due process of law.” In *Sison, Jr. v. Ancheta, et al.*, we held that the due process clause may properly be invoked to invalidate, in appropriate cases, a revenue measure when it amounts to a confiscation of property. But in the same case, we also explained that we will not strike down a revenue measure as unconstitutional (for being violative of the due process clause) on the mere allegation of arbitrariness by the taxpayer. There must be a factual foundation to such an unconstitutional taint. This merely adheres to the authoritative doctrine that, where the due process clause is invoked, considering that it is not a fixed rule but rather a broad standard, there is a need for proof of such persuasive character. (Citations omitted)⁴¹

In the present case, there is no showing that the tax deduction scheme is confiscatory. The portion of the 20% discount petitioners are made to bear under the tax deduction scheme will not result in a complete loss of business for private establishments. As illustrated earlier, these establishments are free to adjust factors as prices and costs to recoup the 20% discount given to senior citizens. Neither is the scheme arbitrary. Rules and Regulations have been issued by agencies as respondent Department of Finance to serve as guidelines for the implementation of the 20% discount and its tax deduction scheme.

In fact, this Court has consistently upheld the doctrine that “taxing power may be used as an implement of police power”⁴² in order to promote the general welfare of the people.

III Eminent Domain

⁴⁰ Id. at 625.

⁴¹ Id. at 626-627.

⁴² *Gerochi v. Department of Energy*, 554 Phil 563, 582 (2007) citing *Osmeña v. Orbos*, G.R. No. 99886, March 31, 1993, 220 SCRA 703, 710-711; *Gaston v. Republic Planters Bank*, 242 Phil. 377 (1988); *Tio v. Videogram Regulatory Board*, 235 Phil. 198 (1987); and *Lutz v. Araneta*, 98 Phil. 148 (1955).

Even assuming that the losses and the burdens can be determined and are specific, these are not enough to show that eminent domain is involved. It is not enough to conclude that there is a violation of Article III, Section 9 of the Constitution. This provision mandates that “[p]rivate property shall not be taken for public use without just compensation.”

Petitioners claim that there is taking by the government of that portion of the 20% discount they are required to give senior citizens under Republic Act No. 9257 but are not allowed to deduct from their tax liability in full as a tax credit. They argue that they are inevitably made to bear a portion of the loss from the 20% discount required by law. In their view, these speculative losses are to be provided with just compensation.

Thus, they seek to declare as unconstitutional Section 4 of Republic Act No. 7432 as amended by Republic Act No. 9257, as well as the implementing rules and regulations issued by respondents Department of Social Welfare and Development and Department of Finance, for only allowing the 20% discount as a tax deduction from gross income, and not as a tax credit from total tax liability.

Petitioners cannot be faulted for this view. *Carlos Superdrug Corporation v. Department of Social Welfare and Development*,⁴³ cited in the *ponencia*, hinted:

The permanent reduction in their total revenues is a forced subsidy corresponding to the taking of private property for public use or benefit. This constitutes compensable taking for which petitioners would ordinarily become entitled to a just compensation.

Just compensation is defined as the full and fair equivalent of the property taken from its owner by the expropriator. The measure is not the taker’s gain but the owner’s loss. The word *just* is used to intensify the meaning of the word *compensation*, and to convey the idea that the equivalent to be rendered for the property to be taken shall be real, substantial, full and ample.

A tax deduction does not offer full reimbursement of the senior citizen discount. As such, it would not meet the definition of just compensation.

Having said that, this raises the question of whether the State, in promoting the health and welfare of a special group of citizens, can impose upon private establishments the burden of partly subsidizing a government program.

The Court believes so.⁴⁴

⁴³ Supra note 8.

⁴⁴ Id. at 129-130. (Citations omitted)

The *ponencia* is, however, open to the possibility that eminent domain will apply. While the main opinion held that the 20% senior citizen discount is a valid exercise of police power, it explained that this is due to the absence of any clear showing that the discount is unreasonable, oppressive or confiscatory as to amount to a taking under eminent domain requiring the payment of just compensation.⁴⁵ *Alalayan v. National Power Corporation*⁴⁶ and *Carlos Superdrug Corp. v. Department of Social Welfare and Development*⁴⁷ were cited as examples when there was failure to prove that the limited rate of return for franchise holders, or the required 20% senior citizens discount, “were arbitrary, oppressive or confiscatory.”⁴⁸ It found that petitioners similarly did not establish the factual bases of their claims and relied on hypothetical computations.⁴⁹

The *ponencia* refers to *City of Manila v. Hon. Laguio, Jr.*⁵⁰ citing the U.S. case of *Pennsylvania Coal v. Mahon* in that we must determine on a case to case basis as to when the regulation of property becomes a taking under eminent domain.⁵¹ It cites the U.S. case of *Munn v. Illinois*⁵² in that the State can employ police power measures to regulate pricing pursuant to the common good “provided that the regulation does not go too far as to amount to ‘taking’.”⁵³ This concept of regulatory taking, as opposed to ordinary taking, is amorphous and has not been applied in our jurisdiction. What we have is indirect expropriation amounting to compensable taking.

In *National Power Corporation v. Sps. Gutierrez*,⁵⁴ for example, we held that “the easement of right-of-way [due to electric transmission lines constructed over the property] is definitely a taking under the power of eminent domain. x x x the limitation imposed by NPC against the use of the land for an indefinite period deprives private respondents of its ordinary use.”⁵⁵

⁴⁵ *Ponencia*, p. 21.

⁴⁶ 133 Phil. 279 (1968).

⁴⁷ *Supra* note 8.

⁴⁸ *Ponencia*, p. 22.

⁴⁹ *Id.* at 22.

⁵⁰ 495 Phil. 289 (2005).

⁵¹ *Id.* at 320-321 citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

No formula or rule can be devised to answer the questions of what is too far and when regulation becomes a taking. In *Mahon*, Justice Holmes recognized that it was “a question of degree and therefore cannot be disposed of by general propositions.” On many other occasions as well, the U.S. Supreme Court has said that the issue of when regulation constitutes a taking is a matter of considering the facts in each case. The Court asks whether justice and fairness require that the economic loss caused by public action must be compensated by the government and thus borne by the public as a whole, or whether the loss should remain concentrated on those few persons subject to the public action.

⁵² 94 U.S. 113 (1877).

⁵³ *Ponencia*, p. 20.

⁵⁴ 271 Phil. 1 (1991).

⁵⁵ *Id.* at 7. See also *Republic of the Phil. v. PLDT*, 136 Phil. 20 (1969).

The *ponencia* also compares the tax deduction scheme for the 20% discount with price controls or rate of return on investment control laws which are valid exercises of police power. While it acknowledges that there are differences between these laws and the subject tax deduction scheme,⁵⁶ it held that “the 20% discount may be properly viewed as belonging to the category of price regulatory measures which affects the profitability of establishments subjected thereto.”⁵⁷

I disagree.

The eminent domain clause will still not apply even if we assume, without conceding, that the 20% discount or a portion of it is lost profits for petitioners. Profits are intangible personal property⁵⁸ for which petitioners merely have an inchoate right. These are types of property which cannot be “taken.”

Nature of Profits: Inchoate and Intangible Property

Eminent domain has been defined as “an inherent power of the State that enables it to forcibly acquire private lands intended for public use upon payment of just compensation to the owner.”⁵⁹ Most if not all jurisprudence on eminent domain involves real property, specifically that of land. Although Rule 67 of the Rules of Court, the rules governing expropriation proceedings, requires the complaint to “describe the real *or personal property* sought to be expropriated,”⁶⁰ this refers to tangible personal property for which the court will deliberate as to its value for purposes of just compensation.⁶¹

In a sense, the forced nature of a sale under eminent domain is more justified for real property such as land. The common situation is that the government needs a specific plot, for the construction of a public highway for example, and the private owner cannot move his land to avoid being part of the project. On the other hand, most tangible personal or movable property need not be subject of a forced sale when the government can procure these items in a public bidding with several able and willing private sellers.

⁵⁶ *Ponencia*, p. 20.

⁵⁷ *Id.* at 20.

⁵⁸ See CIVIL CODE, Article 416. This provides for the definition of personal property.

⁵⁹ *Association of Small Land Owners in the Phil., Inc. v. Hon. Secretary of Agrarian Reform*, 256 Phil 777, 809 (1989).

⁶⁰ RULES OF COURT, Rule 67, Sec. 1.

⁶¹ See *National Power Corporation v. Tuazon*, G.R. No. 193023, June 29, 2011, 653 SCRA 84, 95 where this Court held that “[t]he determination of just compensation in expropriation cases is a function addressed to the discretion of the courts x x x.”

In *Republic of the Philippines v. Vda. de Castelvi*,⁶² this Court also laid down five (5) “circumstances [that] must be present in the ‘taking’ of property for purposes of eminent domain”⁶³ as follows:

First, the expropriator must enter a private property. x x x.

Second, the entrance into private property must be for more than a momentary period. x x x.

Third, the entry into the property should be under warrant or color of legal authority. x x x.

Fourth, the property must be devoted to a public use or otherwise informally appropriated or injuriously affected. x x x.

Fifth, the utilization of the property for public use must be in such a way as to oust the owner and deprive him of all beneficial enjoyment of the property. x x x.⁶⁴

The requirement for “entry” or the element of “oust[ing] the owner” is not possible for intangible personal property such as profits.

Profits are not only intangible personal property. They are also inchoate rights. An inchoate right means that the right “has not fully developed, matured, or vested.”⁶⁵ It may or may not ripen. The existence of profits, more so its specific amount, is uncertain. Business decisions are made every day dealing with factors such as price, quantity, and cost in order to manage potential outcomes of profit or loss at any given point. Profits are thus considered as “future economic benefits” which, at best, entitles petitioners only to an inchoate right.⁶⁶

This is not the private property referred in the Constitution that can be taken and would require the payment of just compensation.⁶⁷ Just compensation has been defined “to be the just and complete equivalent of the loss which the owner of the thing expropriated has to suffer by reason of the expropriation.”⁶⁸

Petitioners’ position in seeking just compensation for the 20% discount assumes that the discount always translates to lost profits. This is not always the case. There may be taxable periods when they will be

⁶² 157 Phil. 329 (1974).

⁶³ Id. at 345.

⁶⁴ Id. at 345-346.

⁶⁵ BLACK’S LAW DICTIONARY 777 (Eighth Ed., 2004).

⁶⁶ See *Ermita v. Aldecoa-Delorino*, G.R. No. 177130, June 7, 2011, 651 SCRA 128,143.

⁶⁷ CONSTITUTION, Art. III, Sec. 9.

⁶⁸ *National Power Corporation v. Gutierrez*, 271 Phil. 1, 7 (1991) citing *Province of Tayabas v. Perez*, 66 Phil. 467 (1938); *Assoc. of Small Land Owners of the Phils., Inc. v. Hon. Secretary of Agrarian Reform*, *Acuna v. Arroyo*, *Pabrico v. Juico*, *Manaay v. Juico*, 256 Phil. 777 (1989).

reporting a loss in their ending balance as a result of other factors such as high costs of goods sold. Moreover, not all their sales are made to senior citizens.

At most, profits can materialize in the form of cash, but even then, this is not the private property contemplated by the Constitution and whose value will be deliberated by courts for purposes of just compensation. We cannot compensate cash for cash.

Justice Carpio submits in his dissent that the Constitution speaks of private property without distinction, thus, the issue of profit or loss to private establishments like petitioners is immaterial. The 20% discount belongs to them whether they make a profit or suffer a loss.⁶⁹

When the 20% discount is given to customers who are senior citizens, there is a *perceived* loss for the establishment for that same amount at that precise moment. However, this moment is fleeting and the perceived loss can easily be recouped by sales to ordinary citizens at higher prices. The concern that more consumers will suffer as a result of a price increase⁷⁰ is a matter better addressed to the wisdom of the Congress. As it stands, Republic Act No. 9257 does not establish a price control. For non-profit establishments, they may cut down on costs and make other business decisions to optimize performance. Business decisions like these have been made even before the 20% discount became law, and will continue to be made to adapt to the ever changing market. We cannot consider this fluid concept of possible loss and potential profit as private property belonging to private establishments. They are inchoate. They may or may not exist depending on many factors, some of which are within the control of the private establishments. There is nothing concrete, earmarked, actual or specific for taking in this scenario. Necessarily, there is nothing to compensate.

Our determination of profits as a form of personal property that can be taken in a constitutional sense as a result of valid regulation would invite untold consequences on our legal system. Loss of profits will be difficult to prove and will tax the imagination and speculative abilities of judges and justices. Every piece of legislation in the future would cause the filing of cases that will ask us to determine the loss or damage caused to an ongoing business. This certainly is not the intent of the eminent domain provisions in our bill of rights. This is not the sort of protection to property imagined by our constitutional order.

Final Note

⁶⁹ *Dissenting Opinion of Justice Carpio*, p. 9.

⁷⁰ *Id.* at 14.

Article XIII was introduced in the 1987 Constitution to specifically address Social Justice and Human Rights. For this purpose, the state may regulate the acquisition, ownership, use, and disposition of property and its increments, viz:

Section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.⁷¹

Thus, in the exercise of its police power and in promoting senior citizens' welfare, the government "can impose upon private establishments [like petitioners] the burden of partly subsidizing a government program."⁷²

Accordingly, I vote to DENY the Petition and hold that the challenge to the constitutionality of Section 4 of Republic Act No. 7432 as amended by Republic Act No. 9257, as well as the implementing rules and regulations issued by respondents Department of Social Welfare and Development and Department of Finance, should fail.


MARVIC MARIO VICTOR F. LEONEN
Associate Justice

⁷¹ CONSTITUTION, Art. XIII, Sec. 1.

⁷² *Carlos Superdrug Corp. v. Department of Social Welfare and Development*, supra note 8, at 130.