REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

DUNLOP SLAZENGER PHILIPPINES, INC., *Petitioner,*	**C.T.A. E.B. NO. 102 (C.T.A. CASE NO. 6501)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** MAY 18 2006

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DECISION

PALANCA-ENRIQUEZ, J.:

Is Dunlop Slazenger Philippines, Inc. (hereafter "petitioner") entitled to a refund or the issuance of a tax credit certificate in the amount of P1,415,100.00, representing the excise tax paid on purchases of banker oil as raw materials used in the production of tennis balls which were exported for the period November 1999 to May 2001?

THE CASE

This is the issue in this Petition For Review filed by petitioner under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended,* which seeks the reversal of the Decision, dated December 29, 2004, issued by the First Division of this Court in C.T.A. Case No. 6501, the dispositive portion of which reads as follows:

> "**IN VIEW OF THE FOREGOING**, the instant Petition For Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

and the Resolution, dated June 23, 2005, denying petitioner's Motion For Reconsideration, the dispositive portion of which reads as follows:

> "**WHEREFORE**, IN VIEW OF THE FOREGOING, PETITIONER'S 'Motion for Reconsideration' is hereby **DENIED** and the pronouncement reached in the assailed DECISION is hereby **REITERATED**.
>
> SO ORDERED."

THE FACTS

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office at 10th Avenue, Bataan Economic Zone, Mariveles, Bataan (*par. 1, Stipulation of Facts*). It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer under Certificate of Registration No. 2002-020-000678 dated August 27, 2002 (*Exhibit "C"*).

Petitioner is likewise registered with the Philippine Economic zone Authority (PEZA) as an export producer of tennis balls, pursuant to the provisions of Republic Act No. 7916 and covered by the Certificate of Registration No. 77-07 dated April 27, 1998 (*Exhibit "D"*).

For the period covering November 1999 to May 2001, petitioner allegedly purchased from Pilipinas Shell Petroleum Corporation and Petron Corporation a total of 4,717,000 liters of bunker fuel oil used as raw materials in the production of 60,623,640 pieces of tennis balls which were exported for the same period. The excise taxes on the said quantity of bunker fuel oil totaling P1,415,100.00 (or at the rate of P.30 per liter) were allegedly paid by Pilipinas Shell Petroleum Corporation and Petron

Corporation to the Bureau of Internal Revenue (BIR), but were subsequently billed and passed on to petitioner as part of the selling price.

Petitioner further averred that the foreign currency proceeds of its export sales for the subject period were inwardly remitted and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

Relying on the provisions of *Section 130(D) of the National Internal Revenue Code (*hereafter "NIRC"*) of 1997,* on November 28, 2001, petitioner filed with the Large Taxpayers Services of the BIR, a letter applying for refund or tax credit of the excise taxes of P11,415,100.00 it allegedly paid on its purchases of bunker fuel oil for the period of November 1999 to May 2001 (*Exhibit "H"*).

Due to the inaction of the respondent, petitioner filed a Petition For Review with this Court on July 1, 2002.

In his Answer filed on August 2, 2002, the Commissioner of Internal Revenue (herein "respondent") alleged the following special and affirmative defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;

5. The claim has no basis in fact and in law;

5.1 Section 130(D) is not applicable to the instant case because tennis ball is not an excisable article;

5.2 Revenue Regulations No. 8-96 provides:

'SEC. 7. Creditable Excise Tax. – The crediting of excise taxes paid on purchased feedstock (bunker), as defined in Section 2(e) hereof, *used in the manufacture of exciseable articles and forming part thereof* shall be limited to the proportion of the volume such raw material used in production, in relation to the total volume of finished goods subject to tax. For purposes of these regulations, any excess of excise taxes paid on raw materials resulting from manufacturing, blending, processing, storage and handling losses shall not give rise to a tax refund or credit." (Emphasis supplied)

6. In an action for refund the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;

7. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

After trial on the merits, the First Division of this Court rendered the assailed Decision on December 29, 2004 in the terms earlier set forth.

Not satisfied, herein petitioner moved for a reconsideration of the same, which the First Division denied in the aforesaid Resolution, dated June 23, 2005.

Hence, the present petition.

THE ISSUE

Petitioner submits the following sole issue for Our consideration.

> WHETHER OR NOT PETITIONER DUNLOP IS ENTITLED TO THE REFUND OF THE EXCISE TAX PAID ON ITS DOMESTIC PURCHASES OF BUNKER FUEL OIL IN THE AMOUNT OF ONE MILLION FOUR HUNDRED FIFTEEN THOUSAND ONE HUNDRED PESOS (P1,415,100.00) COVERING THE PERIOD FROM NOVEMBER 1999 TO MAY 2001, WHICH WERE USED FOR THE PRODUCTION OR MANUFACTURING OF TENNIS BALLS THAT WERE SUBSEQUENTLY EXPORTED WITHOUT RETURNING TO THE PHILIPPINES.

On August 22, 2005, We required the respondent to file his comment to the petition, within ten (10) days from notice.

On September 26, 2005, respondent filed his "Comment".

On November 3, 2005, We gave due course to the petition and required the parties to submit their simultaneous memoranda, within a non-extendible period of thirty (30) days from notice, afterwhich the petition shall be deemed submitted for decision.

Both parties having complied thereto, the case was deemed submitted for decision.

This case was originally raffled to Justice Caesar A. Casanova for study and report. On March 14, 2006, Justice Casanova submitted his report to the Court *En Banc* recommending to grant the petition, to which Presiding Justice Ernesto D. Acosta concurred. While Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy and Olga Palanca-Enriquez voted to deny the petition. On March 14, 2006, the case was re-raffled to Justice Olga Palanca-Enriquez to write the majority decision.

THE COURT *EN BANC'S* RULING

The Petition is unmeritorious.

Petitioner's Theory

Arguing that it is entitled to its claim for refund, petitioner claims that:

1) Petitioner's claim for refund on the excise tax paid on its domestic purchases of bunker fuel oil in the amount of P1,415,100.00,

covering the period from November 1999 to May 2001, has factual and legal basis.

2) The banker oil was used by the petitioner in the production and/or manufacture of tennis balls that were subsequently exported.

3) The amount of P1,415,100.00 represents the excise tax paid by petitioner in the purchase of bunker oil.

Respondent's Theory

On the other hand, respondent counter argues that:

1) The persons liable to pay the excise tax are Shell Petroleum Corporation and Petron Corporation. The excise tax imposable under *Section 148 of the NIRC of 1997* is a direct liability of Petron and Shell, and petitioner merely paid the added cost of bunker fuel oil, not the excise tax, the entity being subject thereto being Shell and Petron, citing the case of *Cebu Portland Cement Co. vs. Collector of Internal Revenue, 25 SCRA 789.*

2) Petitioner's reliance on *Section 130(D) of the NIRC of 1997* is misplaced. Said provision applies only if the bunker fuel oil was used in the manufacture of excisable article. Tennis balls are not included in

the enumeration of products subject to excise tax under *Title VI of the NIRC of 1997.*

3) Granting arguendo, that petitioner is entitled to the claim for refund, the same is already barred by prescription. It appears that the alleged excise tax paid covers the periods from November 1999 to May 31, 2001. The administrative claim was made only on November 28, 2001 and the case was filed only on July 1, 2002 or more than two years from the date of payment of the tax.

The sole issue raised in the present petition is not novel as the Supreme Court in the case of *Philippine Acetylene vs. CIR, 20 SCRA 1056,* held that the excise tax on petroleum products is the direct liability of the manufacturer/producer, and when added to the cost of goods sold to the buyer, it is no longer a tax, but part of the purchase price which the buyer has to pay to obtain the price.

Also, in the case of *Cebu Portland Cement Co. vs. Collector of Internal Revenue, 25 SCRA 796-797,* the Supreme Court ruled that in indirect taxes, like an excise tax, the proper party who can question or seek a refund of the tax is the person on whom the tax is imposed by law and who paid the tax even when he shifts the burden thereof to another.

In the more recent case of *Contex Corporation vs. Commissioner of Internal Revenue, 433 SCRA 387-388,* the Supreme Court enunciated that:

> "The point of contention here is whether or not the petitioner may claim a refund on the Input VAT erroneously passed on to it by its suppliers.
>
> While it is true that the petitioner should not have been liable for the VAT inadvertently passed on to it by its supplier since such is a zero-rated sale on the part of the supplier, the petitioner is not the proper party to claim such VAT refund.
>
> Section 4-100-2 of BIR's Revenue Regulations 7-95, as amended, or the '*Consolidated Value-Added Tax Regulations'* provide:
>
> Sec. 4.100-2. *Zero-rated Sales.* – A zero-rated sale by a VAT-registered person, which is a taxable transaction for VAT purposes, shall not result in any output tax. However, the input tax on his purchases of goods, properties or services related to such zero-rated sale shall be available as tax credit or refund in accordance with these regulations.
>
> The following sales by VAT-registered persons shall be subject to 0%:
>
> (a) Export Sales
>
> 'Export Sales' shall mean
> . . .

Qu

> (5) Those considered export sales under Articles 23 and 77 of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, and other special laws, e.g., Republic Act No. 7227, otherwise known as the Bases Conversion and Development Act of 1992.
>
> ...
>
> (c) Sales to persons or entities whose exemption under special laws, e.g. R.A. No. 7227 duly registered and accredited enterprises with Subic Bay Metropolitan Authority (SBMA) and Clark Development Authority (CDA), R.A. No. 7916, Philippine Economic Zone Authority (PEZA), or international agreements, e.g. Asian Development Bank (ADB), International Rice Research Institute (IRRI) etc. to which the Philippines is a signatory effectively subject such sales to zero-rate.'

Since the transaction is deemed a zero-rated sale, petitioner's supplier may claim an Input VAT credit with no corresponding Output VAT liability. Congruently, no Output VAT may be passed on to the petitioner.

On the *second issue*, it may not be amiss to re-emphasize that the petitioner is registered as a NON-VAT taxpayer and thus, is exempt from VAT. As an exempt VAT taxpayer, it is not allowed any tax credit on VAT (input tax) previously paid. In fine, even if we are to assume that exemption from the burden of VAT on petitioner's purchases did exist, petitioner is still not entitled to any tax credit or refund on the input tax previously paid as petitioner is an exempt VAT taxpayer.

Rather, it is the petitioner's suppliers who are the proper parties to claim the tax credit and accordingly refund the petitioner of the VAT erroneously passed on to the latter.

Accordingly, we find that the Court of Appeals did not commit any reversible error of law in holding that

> petitioner's VAT exemption under Rep. Act No. 7227 is limited to the VAT on which it is directly liable as a seller and hence, it cannot claim any refund or exemption for any input VAT it paid, if any, on its purchases of raw materials and supplies."

Pursuant to the aforequoted rulings of the Supreme Court, petitioner Dunlop Slazenger Philippines, Inc. cannot ask for a refund since it is not the taxpayer under the law. There was no erroneous payment of tax to speak of because Shell Petroleum Corporation and Petron Corporation are the ones statutorily liable for the payment of the excise tax. When the said oil companies passed on the excise tax to petitioner, the latter merely paid such tax as part of the purchase price for and in behalf of the oil companies because such amount formed part of the purchase price.

Hence, the issue has been settled and the Supreme Court's final decisions in the said cases must be respected. This Court's hands are now tied by the finality of the said judgments.

The First Division, therefore, correctly dismissed the Petition For Review.

WHEREFORE, premises considered, the instant Petition For Review is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(Concurring With The Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(With Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A.E.B. NO. 102
(C.T.A.CASE NO. 6501)

Present:

Acosta, *P.J.*,
Castañeda, *Jr.*,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

Promulgated:

MAY 1 8 2006 [signature]

X --X

DISSENTING OPINION

I concur with the Dissenting Opinion of Associate Justice Caesar A. Casanova. With due respect to the view of the majority, I wish to point out that the Contex case cited in the majority opinion is not applicable in this case. First, what is involved in the Contex case, is value added tax (VAT) while the instant case, it is excise tax. Different law applies to excise tax. Second, in the Context case; it was held there that it is the supplier who should claim for refund because the supplier is the VAT registered enterprise while Contex is not VAT registered and therefore cannot claim input tax credit as a rule under VAT law.

Contex is a tax exempt entity not entitled to input tax credit. Meanwhile Dunlop, is a VAT Registered entity, with Certificate of Registration No. 2002-020-000678 dated Aug. 27, 2002, as shown on page 3 of the majority opinion. Therefore, contrary to the point of view of the majority, it is a taxpayer under the law, although as I stated above, VAT is not the issue here but excise tax.

The majority has mixed up and applied the rule on VAT to excise tax. The present case is governed by Title VI – Excise Taxes, particularly Section 130 (D) of the National Internal Revenue code:

> "(D) Credit for Excise Tax on Goods Actually Exported. - When goods locally produced or manufactured are removed and actually exported without returning to the Philippines, whether so exported in their original state or as ingredients or parts of any manufactured goods or products, <u>any excise tax paid thereon shall be credited or refunded upon submission of the proof of actual exportation and upon receipt of the corresponding foreign exchange payment:</u> Provided, That the excise tax on mineral products, except coal and coke, imposed under Section 151 shall not be creditable or refundable even if the mineral products are actually exported." (Underscoring supplied)

The above provision of law could not possibly refer to the supplier but certainly to the exporter, who will be entitled to the tax incentive upon compliance with a the conditions set forth. This compliance was discussed in the dissenting opinion of Associate Justice Caesar A. Casanova.

Petitioner is likewise registered with the Philippine Economic Zone Authority as an export producer of tennis balls pursuant to the provisions of

Republic Act No. 6135 with Certificate of Registration No. 77-07, April 27, 1958, on a non-pioneer status, as such entitled to tax incentives provided for in the law.

ERNESTO D. ACOSTA
Presiding Justice

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