Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
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LA SUERTE CIGAR & CIGARETTE FACTORY.,
Petitioner,

-versus-

CTA Case No. 7162

Members:

ACOSTA, Chairperson
BAUTISTA, and
CASANOVA, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 31 2007 10:00AM

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DECISION

CASANOVA, J.:

THE CASE

This is a Petition for Review filed by herein petitioner, *LA SUERTE CIGAR & CIGARETTE FACTORY*, seeking a refund in the amount of P163,350.00 allegedly representing excise taxes that were paid under protest by petitioner on March 5, 2003.

THE FACTS

The facts, as culled from the records, are the following:

Petitioner La Suerte Cigar & Cigarette Factory is a corporation organized and existing under Philippine law with office at Km. 14, West Service Road, South Superhighway, Parañaque City.

Respondent is the duly appointed Commissioner of Internal Revenue vested by law to enforce and implement the provisions of the National Internal Revenue Code ("NIRC") or the 1997 Tax Code, as well as related statutes and their implementing rules and regulations, including *inter alia*, the power and authority to act and decide upon applications for refund of erroneously or illegally collected taxes, to issue deficiency tax assessments, evaluate and decide upon merits disputed assessments pursuant to law, with office address at BIR National Office Building, Diliman, Quezon City.

On March 05, 2003, petitioner paid under protest the alleged deficiency excise taxes in the aggregate amount of P163,350.00 to the Bureau of Internal Revenue (BIR) to comply with the "Authority to Release Imported Goods" issued by then Asst. Commissioner Edwin Abella requiring the payment of excise tax under Section 144 of the 1997 NIRC before it can withdraw its importations.

On February 02, 2005, petitioner filed a claim for refund of excise taxes it paid with respondent.[1]

Because respondent did not act on the claim, petitioner filed a Petition for Review with this Court on March 3, 2005 in accordance with Section 229 of the NIRC.

In his Answer[2], respondent alleged the following special and affirmative defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;
>
> 5. Petitioner must prove that it paid the excise taxes so alleged;
>
> 6. Petitioner must prove that the tobacco it imported is properly classified as unmanufactured tobacco;
>
> 7. Petitioner must prove that its imports of allegedly unmanufactured tobacco are not subject to excise tax;

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[1] *Exhibit "A"; Rollo, pages 81-82.*
[2] *Rollo, pages 31-34.*

> 8. Petitioner must prove that the claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;
>
> 9. In an action for refund, the burden of proof is on the taxpayer to establish its right of refund, and failure to sustain the burden is fatal to the claim for refund;
>
> 10. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation."

In the Joint Stipulation of Facts and Issues[3], respondent stipulated that it will admit the fact of petitioner's (a) payment, (b) filing of excise tax return, and (c) filing of claim for refund if petitioner can present (a) a certification from the Revenue Accounting Division of the BIR to the effect that the BIR had received P163,350.00 that petitioner alleges to have paid, (b) the original of the excise tax return it had used to pay the excise taxes, and (c) the original of the claim for refund that petitioner allegedly filed with respondent, respectively. Petitioner was only able to present the original copies of the excise tax return[4] and claim for refund[5]. Thus, both parties now jointly admit that petitioner was able to file its excise tax return on March 5, 2003 and claim for refund on February 2, 2005.

During trial, petitioner submitted testimonial and documentary evidence in support of its position. Respondent, however, waived his right to present evidence since the revenue officer assigned still has not completed her examination of this case despite several resettings granted by this Court.[6]

On March 19, 2007, the case was submitted for decision taking into consideration the Memorandum filed by petitioner on February 28, 2007, *sans* respondent's Memorandum.[7]

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[3] *1st Par. of Joint Stipulation of Facts ("JSF"), Rollo, pages. 74-76.*
[4] *Exhibit "C"; Rollo, page 84.*
[5] *Exhibit "A"; Rollo, pages 81-82.*
[6] *TSN, February 01, 2007, page 3.*
[7] *Rollo, page 154.*

THE ISSUES

The parties jointly stipulated the following issues for resolution of this Court:

1. Whether or not the petitioner paid the excise taxes so alleged.

2. Whether or not petitioner's imports of tobacco in question is properly classifiable as unmanufactured tobacco.

3. Whether or not petitioner's imports of allegedly unmanufactured tobacco are not subject to excise tax.

4. Whether or not petitioner's claim was filed within the two-year prescriptive period prescribed in Section 229 of the Tax Code.

THE COURT'S RULING

The requirements to be observed in claiming a tax refund is provided under Section 229 of the NIRC, as follows:

> "**SEC. 229.** *Recovery of Tax Erroneously or Illegally Collected.* — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

We shall primary discuss the *first* and *fourth* issues.

As for the *first issue*, after examining the documents presented, We find petitioner to have paid the disputed excise tax on tobacco. The BPI Expresslink Payment indicating details of payment by petitioner, the BIR Filing Reference Number of 080300000042791, and the Tax Payment Confirmation received by the BIR[8] more than sufficiently proves that petitioner paid the excise tax and that respondent received such payment.

For the *fourth issue*, We also rule that petitioner's claim was filed within the two-year prescriptive period. Both the written claim for refund filed with respondent on February 02, 2005[9] and Petition for Review filed with this Court on March 03, 2005, were within the two-year period commencing from March 05, 2003, the date when the excise tax was paid.

We now dwell on the *second* and *third* issues which are the crucial issues of this case.

The tobacco imported by petitioner is properly classified as unmanufactured Brazilian F.C. tobacco since it was described as such in the *Dimon International AG* invoice[10] and *Nippon Yussen Kaisha* Bill of Lading.[11]

Pertitioner, in its Memorandum[12], argues that Sections 144 and 145 of the Tax Code provide that only products of tobacco and cigars and cigarettes are subject to excise tax. Nowhere in the enumeration in Sections 144 and 145 is there any mention of unmanufactured tobacco.

It further averred that specific tax is due only on the imported cigars and cigarettes, smoking and chewing tobacco, which are all manufactured tobaccos. Consequently, it is not due on the imported unmanufactured tobacco prior to its release from the customhouse. Comformably thereto, petitioner's importation of unmanufactured tobacco should not be made subject to excise tax. Petitioner concluded that respondent's collection from it of the excise tax prior to the release of the Brazillian Tobacco from the

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[8] *Exhibit "D", "E", & "F", Rollo, page 85.*
[9] *Exhibit "A", Rollo, pages 81-82.*
[10] *Exhibit "L" & "L-1"; Rollo, page 91; TSN, August 18, 2005, pages 12-14.*
[11] *Exhibit "M" & "M-1"; Rollo, page 92; TSN, August 18, 2005, pages 16-17.*
[12] *Rollo, pages 143-151.*

customhouse is tantamount to an illegal collection for which petitioner is entitled to refund.

Before determining whether or not petitioner's imported tobacco is subject to excise tax, We must discuss what flue-cured tobaccos are.

Flue-cured tobaccos are Virginia and similar tobaccos which have been treated by flue-curing. Curing is a method of promoting desired visual, physical and chemical changes by controlled drying of tobacco after the harvest. There are four main methods of curing, each of which influences the smoking characteristic and color of the tobacco. These four main processes are:

1) sun-curing, in which the leaves are exposed directly to the sun;

2) air-curing, in which they are hung in the air, though not in direct sunlight;

3) flue-curing, which is entirely dependent on artificial heat; and

4) fire-curing, where the leaves are hung over green wood fires to absorb the flavor of the smoke.[13]

Since the tobaccos involved in this case is flue-cured, We shall limit the discussion to flue-curing.

Flue-curing is a method of curing particularly used with Virginia tobaccos, using barns heated by pipes similar to normal central heating pipes. Today these are often fired by oil or liquid petroleum gas. Flue-curing is now often carried out in forced drought systems where heated air is circulated by fans through tobacco which is more densely packed. There are three distinct stages:

> *First stage:* The leaves turn yellow and wilt. The time taken depends on the variety (e.g. dark or bright), the type of leave harvested and its degree of maturity. A relatively high (80-90%) humidity is maintained, and the temperature is raised

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[13] *Voges' Tobacco Encyclopedia, The Standard Reference Work for the Tobacco Industry, New Revised and Updated Edition; Tobacco Journal International, Verlagsgruppe Rhein Main GmbH & Co. KG, Mainz, Germany, 2000, page 75.*

> from c.30ºC to 33-35ºC, at which point the color becomes fixed or "set".
>
> *Second stage:* Leaf tissue curing, the humidity is reduced to 40% and the temperature raised by 1-1.5ºC per hour until it reaches c.60ºC. This is maintained while the *laminae* of the leaves dry completely.
>
> *Final stage:* Stem drying, the temperature is raised rapidly to between 75 and 80ºC, depending on the thickness of the stems, at a humidity of less than 40%.[14]

Total curing time is 65 hours or more, depending on the variety of tobacco and the type of leaf involved. After the stems are dry, the tobacco is cooled by ventilating the shed and its consistency restored later by sprinkling the floor with water (this conditioning may be intensified in particular cases by steaming or sprinkling). Flue-cured tobaccos do not require fermenting for handling but simply ageing or redrying.[15]

Flue-cured Virginia tobacco, grown throughout the world, is renowned for its color and pleasant aroma. It is used in cigarettes, either alone or as part of an American blend, and in light pipe tobaccos.[16]

Based on the foregoing discussion of the process flue-cured tobaccos undergo, flue-cured tobaccos are *unmistakably considered as* <u>*prepared or partially prepared*</u> *to make it suitable for manufacturing cigarettes.*

Clearly, they are not unmanufactured tobacco as alleged by petitioner.

Hence, since petitioner's imported tobaccos are flue-cured, these are subject to excise tax under Section 144 (b) of the NIRC which states:

> "**SEC. 144.** *Tobacco Products.* - There shall be collected a tax of seventy-five centavos (P0.75) on each kilogram of the following products of tobacco:
>
> (a) Tobacco twisted by hand or reduced into a condition to be consumed in any manner other than the ordinary mode of drying and curing;

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[14] Id, page 105
[15] *Id, page 105*
[16] *Id, page 265*

(b) Tobacco prepared or partially prepared with or without the use of any machine or instruments or without being pressed or sweetened; and

(c) Fine-cut shorts and refuse, scraps, clippings, cuttings, stems and sweepings of tobacco.

x x x"

Thus, petitioner's payment of the excise tax pursuant to the foregoing provision cannot be considered as erroneous or illegal. Accordingly, petitioner is not entitled to a refund of the excise taxes it paid.

IN VIEW OF THE FOREGOING, the subject Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division