REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

NESTLE PHILIPPINES, INC.,
Petitioner,

CTA EB NO. 2711
(CTA Case No. 9943)

Present:

DEL ROSARIO, *P.J.*,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID,
FERRER-FLORES, *and,*
ANGELES, *JJ.*

\- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 1 1 2024 4:18 pm

x - x

DECISION

BACORRO-VILLENA, J.:

Before the Court *En Banc* is a Petition for Review[1] filed by petitioner Nestle Philippines, Inc. (**petitioner/Nestle**), pursuant to Rule 43[2] of the Rules of Court, as amended[3], in accordance with Rule 8[4]

[1] Filed on 25 November 2022, *rollo*, pp. 8-107, with annexes.
[2] *Appeals from the Court of Tax Appeals and Quasi-Judicial Agencies to the Court of Appeals.*
[3] A.M. No. 19-10-20-SC, otherwise known as the 2019 Amendments to the 1997 Rules of Civil Procedure.
[4] *Procedure in Civil Cases.*

Section 4(b)[5] of the Revised Rules of the Court of Tax Appeals (**RRCTA**). It seeks the reversal and setting aside of the Decision dated 31 May 2022[6] (**assailed Decision**) and Resolution dated 18 October 2022[7] (**assailed Resolution**) of the Court's Third Division in CTA Case No. 9943 entitled *Nestle Philippines, Inc. v. Commissioner of Internal Revenue*.

PARTIES TO THE CASE

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 Barrio Niugan, Cabuyao, Laguna.[8]

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue (**respondent/CIR**) with office address at the Bureau of Internal Revenue (**BIR**) National Office Building, BIR Road, Diliman, Quezon City, where he or she may be served with summons and legal processes.[9]

FACTS OF THE CASE

Petitioner manufactures MILO®, a powdered chocolate malt-flavored milk drink, and markets it in the following packs (collectively referred to as "**MILO® products**"):

1. Nestle MILO® Hot Mix Choco Malt Powdered Milk Drink (Institutional Pack) packed by Antonina Industrial Corporation, registered with the Food and Drug Administration (**FDA**) under Certificate of Product Registration (**CPR**) No. FR-4000003074211;[10]

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5 **SEC. 4**. *Where to appeal; mode of appeal.* —

...

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by **petition for review as provided in Rule 43 of the Rules of Court**. The Court *en banc* shall act on the appeal. (Emphasis supplied)

6 Division Docket, Volume VII, pp. 3215-3256, with exhibits. Penned by Associate Justice Erlinda P. Uy, (Ret.), with Associate Justice Ma. Belen M. Ringpis-Liban and Associate Justice Maria Rowena Modesto-San Pedro, concurring.

7 Id., pp. 3323-3329.

8 Par. 1, II. Stipulation of Facts, Joint Stipulation of Facts and Issue (JSFI), Division Docket, Volume III, p. 1114.

9 Par. 1, I. Admitted Facts, id.

10 Exhibits "P-56" to "P-56-1", id., Volume VI, pp. 2422-2424.

2. Nestle MILO® Cold Mix Choco Malt Powdered Milk Drink (Institutional Pack) packed by Antonina Industrial Corporation registered with the FDA under CPR No. FR-4000003086801;[11]

3. Nestle MILO® Choco Malt Powdered Milk Drink/Powdered Choco Malt Milk Drink (22g, 88g, 220g, 300g, 600g, 1kg) registered with FDA under CPR Nos. FR-4000002772505,[12] FR-4000002780597,[13] and FR-4000002780601[14]

4. Nestle MILO® Powdered Choco Malt Milk Drink (22g, 600g, 1kg) packed by Antonina Industrial Corporation registered with the FDA under CPR Nos. FR-40000002780614[15] and FR-4000002780627[16];

5. Nestle MILO® Powdered Choco Malt Milk Drink packed by Cofipac Corporation registered with the FDA under CPR No. FR-4000002780643[17];

6. Nestle MILO® Choco Malt Powdered Milk Drink (22g) packed by Portion Fillers registered with the FDA under CPR No. FR-4000002780656[18];

7. Nestle MILO® Choco Malt Powdered Milk Drink (22g) packed by R.M. Foods, Inc. registered with the FDA under CPR No. FR-4000002780669[19];

8. Nestle MILO® Nutri-Up Choco Malt Powdered Milk Drink/Powdered Choco Malt Milk Drink for Adults (24g and 390g) registered with the FDA under CPR Nos. FR-4000002652050[20] and FR-4000002759331[21]; and,

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11 Exhibits "P-57" to "P-57-1", id., pp. 2425-2428.
12 Exhibits "P-58" to "P-58-1", id., pp. 2429-2431.
13 Exhibits "P-59" to "P-59-1", id., pp. 2432-2434.
14 Exhibits "P-60" to "P-60-1", id., pp. 2435-2437.
15 Exhibits "P-61" to "P-61-1", id., pp. 2438-2440.
16 Exhibits "P-62" to "P-62-1", id., pp. 2441-2443.
17 Exhibits "P-63" to "P-63-1", id., pp. 2444-2446.
18 Exhibits "P-64" to "P-64-1", id., pp. 2447-2449.
19 Exhibits "P-65" to "P-65-1", id., pp. 2450-2452.
20 Exhibits "P-66" to "P-66-1", id., pp. 2453-2455.
21 Exhibits "P-67" to "P-67-1", id., pp. 2456-2458.

9. Nestle MILO® Nutri-Up Choco Malt Powdered Milk Drink for Adults (24g) packed by Antonina Industrial Corporation registered with the FDA under CPR No. FR-4000002759399.[22]

On 01 January 2018, Republic Act (**RA**) No. 10963, otherwise known as the Tax Reform for Acceleration and Inclusion Act (**TRAIN Law**), took effect. Section 47[23] thereof introduced Section 150-B[24], which imposes an excise tax on sweetened beverages, termed as Sweetened Beverage Tax (**SBT**).

In accordance with this excise tax imposition, respondent insisted that MILO® products are subject to SBT and thus, continues to refuse to remove or release petitioner's MILO® products from the place of production without prior payment of SBT.[25]

To prevent business disruptions and the potential situation where respondent might collect the SBT from whoever is in possession of its MILO® products, petitioner alleged that it was constrained to pay the SBT in advance albeit under protest, as evidenced by Payment Forms (BIR Forms No. 0605)[26] filed *via* electronic filing and payment system (**eFPS**) from 27 March 2018 to 26 April 2018, covering the April 2018 removals of MILO® products from its Lipa plant and the plants of its co-manufacturers, namely: (1) Antonina Industrial Corporation; (2) Cofipac Corporation; and, (3) Portion Fillers, Inc.

[22] Exhibits "P-68" to "P-68-1", id., pp. 2459-2461.

[23] SEC. 47. A new section designated as Section 150-B under Chapter VI, Title VI of the NIRC, as amended, is hereby inserted to read as follows[.]

[24] **SEC. 150-B.** *Sweetened Beverages.* —

[25] Par. 2, I. Admitted Facts, JSFI, Division Docket, Volume III, p. 1114.

[26] Id., Volume VI, pp. 2308-2326.

Exhibit	Date Filed	Filing Reference No.	Excise Tax Deposit/ Advance Payment	Division Docket Volume VI Page Reference
"P-1" to "P-1-1"	27 March 2018	291800024456759	₱55,800,000.00	pp. 2308-2309
"P-2" to "P-2-1"	05 April 2018	291800024543279	29,180,418.17	pp. 2310-2312
"P-3" to "P-3-1"	05 April 2018	291800024543339	24,350,450.02	pp. 2313-2314
"P-4" to "P-4-1"	12 April 2018	291800024709853	62,000,000.00	pp. 2315-2316
"P-5" to "P-5-1"	12 April 2018	291800024709652	14,400,000.00	pp. 2317-2318
"P-6" to "P-6-1"	18 April 2018	291800024802650	36,500,000.00	pp. 2319-2320
"P-7" to "P-7-1"	18 April 2018	291800024802667	22,400,000.00	pp. 2321-2322
"P-8" to "P-8-1"	26 April 2018	291800024940318	48,800,000.00	pp. 2323-2324
"P-9" to "P-9-1"	26 April 2018	291800024940290	20,000,000.00	pp. 2325-2326
Total			**₱313,430,868.19**	

Thereafter, on 09 August 2018, petitioner filed a Letter-Claim for Refund[27] and an Application for Tax Credits/Refund (BIR Form No. 1914)[28] with the BIR for the refund of erroneously paid SBT in the total amount of ₱253,926,718.50, arising from the aforesaid removals of MILO® products from petitioner's Lipa plant and the plants of its co-manufacturers.

PROCEEDINGS BEFORE THE COURT IN DIVISION

With respondent's inaction on its administrative claim for refund of alleged erroneously paid SBT, petitioner filed with the Court in Division a "Petition for Review with Urgent Motion to Suspend Collection of Tax"[29] on 08 October 2018. The same was raffled to the Third Division and docketed as CTA Case No. 9943.

In the Resolution dated 22 October 2018[30], the Third Division ordered respondent to file his or her comment on petitioner's "Urgent Motion to Suspend Collection of Tax" (**Motion for Suspension**), embodied in the original Petition for Review. In the same Resolution, the hearing on the Motion for Suspension was set on 25 October 2018.

During the 25 October 2018 hearing on the Motion for Suspension, petitioner presented as its witnesses: (1) Arturo Guinauli Pugay (**Pugay**)[31], petitioner's Head of Corporate Decision Support and Control; and, (2) Ma. Darlene E. Uy (**Uy**)[32], petitioner's Business Unit Controller of the Lifestyle and Active Beverages Business Unit, both of whom testified on direct examination by way of their Judicial Affidavits.[33]

In compliance with the Court's directive, on 09 November 2018, petitioner filed its "Formal Offer of Evidence (Re: Urgent Motion to Suspend Collection of Tax)"[34] (**FOE on the Motion for Suspension**).

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27 Exhibit "P-54", Division Docket, Volume VI, pp. 2413-2419.
28 Exhibit "P-53", BIR Records, p. 111.
29 Division Docket, Volume I, pp. 12-30.
30 Id., Volume II, pp. 533-534.
31 Judicial Affidavit of Arturo Guinauli Pugay, Exhibit "P-91", id., Volume I, pp. 477-490.
32 Judicial Affidavit of Ma. Darlene E. Uy, Exhibit "P-92", id., pp. 454-463.
33 Minutes of the Hearing and Order, both dated 25 October 2018, id., Volume II, pp. 537 and 538-539, respectively.
34 Id., pp. 553-561.

In the *interim*, on 06 December 2018, petitioner filed a "Motion for Leave to Post Provisional Surety Bond (With Motion to Set Hearing)"[35] (**Motion to Post Provisional Surety Bond**). In this motion, petitioner requested permission to provisionally post a surety bond, in lieu of cash payment, equal to the tax payable on its withdrawals of MILO® products beginning 01 January 2019. On even date, respondent filed a Manifestation[36] stating that he or she is amenable to allowing petitioner to post a bond, provided that it is sufficient to safeguard the State's interests throughout the duration of the litigation.

During the 11 December 2018 hearing[37], the Third Division submitted petitioner's Motion to Post Provisional Surety Bond for resolution and noted the manifestation of petitioner's counsel that petitioner will no longer file a memorandum relative to its Motion for Suspension.

Meanwhile, within the cumulative extension period requested in his or her First and Second "Motion for Extension of Time to File Answer"[38] and approved by the Third Division[39], respondent filed his or her Answer[40] (to the original Petition for Review) on 07 January 2019.[41] There, respondent cited the following special and affirmative defenses: (1) the Court's Third Division lacks jurisdiction over the original Petition for Review; (2) assuming, without conceding, that the Third Division has jurisdiction over the original Petition for Review, petitioner's MILO® products are subject to SBT allegedly considering the FDA's finding that MILO® choco malt powdered milk drink is not a milk product; (3) courts cannot go beyond the enrolled bill and look into the committee hearings to find basis in classifying petitioner's MILO® products as milk products exempt from SBT; and, (4) since the Third Division has no jurisdiction over the main action, it cannot grant the ancillary remedy of suspending the collection of taxes prayed for by petitioner.

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35 Id., pp. 625-628.

36 Id., pp. 636-638.

37 Minutes of the Hearing and Order, both dated 11 December 2018, id., pp. 640 and 641, respectively.

38 First Motion for Extension of Time to File Answer was filed on 06 November 2018, praying for an extension period of thirty (30) days from 07 November 2018, or until 07 December 2018, id., pp. 541-544; and, Second Motion for Extension of Time to File Answer, praying for an additional period of thirty (30) days from 07 December 2018, or until 06 January 2019, id., pp. 631-634.

39 Resolutions dated 15 November 2018 and 17 January 2019, id., pp. 617 and 664-666, respectively.

40 Id., pp. 651-661.

41 06 January 2019, fell on a Sunday; thus, the last day for the filing of the Answer was on 07 January 2019.

In the Resolution dated 17 January 2019[42], the Third Division denied petitioner's Motion to Post Provisional Surety Bond for lack of merit, reasoning that the bond referred to in Section 11[43] of RA 1125[44], as amended by RA 9282[45], covers only the disputed amount claimed in the Petition for Review. As such, the Third Division had no authority to allow petitioner to provisionally post a surety bond to cover future payments beginning 04 January 2019, which is beyond the coverage of petitioner's original Petition for Review.

On 01 February 2019, petitioner filed a "Motion for Reconsideration (Re: Resolution dated 17 January 2019)"[46] (**MR on the 17 January 2019 Resolution**).

In the Resolution dated 22 February 2019[47], the Third Division admitted all of petitioner's exhibits relative to its Motion for Suspension and deemed the same submitted for resolution.

On 08 March 2019, respondent filed an "Omnibus Motion"[48], requesting an additional period of ten (10) days from 10 March 2019, or until 20 March 2019, within which to file a comment on petitioner's MR on the 17 January 2019 Resolution. The motion also sought that the transmittal of the BIR Records be deferred for a period of thirty (30) days from 10 March 2019, or until 09 April 2019. Subsequently, respondent filed his or her "Comment (On Petitioner's Motion for

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42 Resolution dated 17 January 2019, supra at note 39.

43 **SEC. 11.** *Who May Appeal; Mode of Appeal; Effect of Appeal.* — ...

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No appeal taken to the CTA from the decision of the Commissioner of Internal Revenue or the Commissioner of Customs or the Regional Trial Court, provincial, city or municipal treasurer or the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture, as the case may be, shall suspend the payment, levy, distraint, and/or sale of any property of the taxpayer for the satisfaction of his tax liability as provided by existing law: *Provided, however*, **That when in the opinion of the Court the collection by the aforementioned government agencies may jeopardize the interest of the Government and/or the taxpayer the Court any stage of the proceeding may suspend the said collection and require the taxpayer either to deposit the amount claimed or to file a surety bond for not more thau double the amount with the Court.** (Emphasis supplied)

44 AN ACT CREATING THE COURT OF TAX APPEALS.

45 AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

46 Division Docket, Volume II, pp. 670-689.

47 Id., pp. 695-696.

48 Id., pp. 697-700.

Reconsideration)"[49] (**Comment on petitioner's MR on the 17 January 2019 Resolution**) on 20 March 2019.

In the Resolution dated 22 March 2019[50], the Third Division granted respondent's Omnibus Motion, thereby deeming his or her Comment on petitioner's MR on the 17 January 2019 Resolution timely filed on 20 March 2019 and allowing him or her to certify and elevate to the Court the BIR Records of this case until 09 April 2019.

On 10 April 2019, respondent transmitted to the Third Division the BIR Records of this case, consisting of one (1) folder with 140 pages.[51] The Third Division noted the same in a Minute Resolution dated 12 April 2019.[52]

In the Resolution dated 22 April 2019[53], the Third Division denied both petitioner's Motion for Suspension[54] and MR on the 17 January 2019 Resolution[55], reiterating that the remedy for suspension of collection of taxes applies to taxes that are already being demanded by the government and such suspension can only be granted if petitioner has presented sufficient proof that the collection will cause irreparable damage to the company. Since there is no evidence on record pertaining to the assessment notices on SBT being collected by the BIR and petitioner is asking for the suspension of collection of SBT on future removals of MILO® products, there is no delinquent tax to be collected which may be the subject of a motion for suspension of collection of tax under Rule 10[56] of the RRCTA.

Respondent and petitioner filed their Pre-Trial Briefs on 02 May 2019[57] and 03 May 2019[58], respectively. After the Pre-Trial Conference (**PTC**) held on 07 May 2019[59], the parties filed their Joint Stipulation of Facts and Issues[60] (**JSFI**) on 27 May 2019, which the Third Division

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49 Id., pp. 702-706.
50 Id., p. 709.
51 See Compliance filed by respondent on 10 April 2019, id., pp. 710-713.
52 Id., p. 714.
53 Id., pp. 717-724.
54 Supra at note 29.
55 Supra at note 46.
56 *Suspension of Collection of Tax.*
57 Division Docket, Volume II, pp. 725-728.
58 Id., pp. 730-742.
59 Minutes of the Hearing and Order, both dated 07 May 2019, id., pp. 745 and 747-749, respectively.
60 Id., Volume III, pp. 1114-1123.

admitted and approved in its Order dated 29 May 2019.[61] Later, the pre-trial was terminated and, on 03 July 2019, the Third Division issued the corresponding Pre-Trial Order (**PTO**).[62]

On 01 July 2019, petitioner filed with the Supreme Court a "Petition for *Certiorari* (With Urgent Application for the Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction)"[63] (**Petition for *Certiorari* with Application for TRO and/or WPI**), praying that the 22 April 2019 Resolution be declared null and void for having been issued with grave abuse of discretion, amounting to lack or excess of jurisdiction, and that the CTA be directed to allow petitioner to post a provisional surety bond and to suspend and/or restrain the collection of SBT on petitioner's MILO® products.

On 15 July 2019, petitioner filed a "Manifestation and Motion to Amend Pre-Trial Order"[64] (**Motion to Amend PTO**) *sans* comment from respondent (*per* manifestation of respondent's counsel). Then, in the Order dated 29 August 2019[65], the Third Division resolved said Motion to Amend PTO, as follows: (**1**) granted the proposed amendment on page 3 of the Pre-Trial Order the phrase and corrected "150-B(C)(1)" to "150-B(B)(1)"; (2) denied the proposed amendment to include the name of petitioner's expert witness, Dr. Kenneth Y. Hartigan-Go (**Dr. Hartigan-Go**), in the PTO considering that he was not mentioned during the PTC held on 07 May 2019, while the description of the supposed testimony of the witness may be stated during the offer of said testimony; and, (**3**) denied the proposed amendment to include the parties' reservation of the right to present additional documents as may be necessary considering that it is a general reservation. However, the Third Division noted that this is without prejudice to petitioner's right to present additional documents that will be examined by the Court-commissioned Independent Certified Public Accountant (**ICPA**).

At the trial proper that ensued thereafter, petitioner presented its testimonial and documentary evidence. It offered the testimonies of the

61 Id., p. 1124.
62 Id., pp. 1126-1138.
63 Id., Volumes III and IV, pp. 1198-1600 and 1601-2039, respectively, with annexes.
64 Id., Volume III, pp. 1156-1160.
65 See Order dated 29 August 2019, id., Volume IV, pp. 2051-2053.

following witnesses: (1) Katherine O. Constantino[66], the Court-commissioned ICPA (**ICPA Constantino**); (2) Atty. Arni A. Perlas[67] (**Atty. Perlas**), petitioner's Tax Department Head; (3) Maria Josephine Bueno-Gonzales[68] (**Bueno-Gonzales**), petitioner's Head of the Regulatory and Scientific Affairs; (4) Wilfrido De Ocampo, Jr.[69] (**De Ocampo, Jr.**), petitioner's Business Unit Manager; (5) Joselito L. Dalde[70] (**Dalde**), Production Manager of MILO® products in Nestle Lipa Factory; and, (6) Dr. Hartigan-Go[71], as expert witness.

On 29 August 2019, petitioner presented the testimony of its witness, Atty. Perlas.[72]

Atty. Perlas' testimony, as detailed in her Restated and Supplemental Judicial Affidavit dated 16 May 2019[73], was offered to prove that: (1) respondent has consistently maintained, and continues to assert, that petitioner's MILO® products are subject to SBT imposed under Section 150-B of the National Internal Revenue Code (**NIRC**) of 1997, as amended; (2) respondent has illegally collected, and continues to illegally collect, the SBT on MILO® products prior to their removal from the place of production; (3) for the entire month of April 2018, petitioner paid, under protest, SBT for removals of MILO® products totalling ₱253,926,718.50; (4) petitioner timely filed an administrative claim for refund of erroneously paid SBT for the month of April 2018 and issued a notice that it would be compelled to stop SBT payments effective 30 September 2018; and, (5) petitioner's administrative claim for refund was effectively denied when respondent thereafter implemented stricter collection measures (on petitioner) to ensure the

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66 See Affidavit in lieu of Direct Examination of Mrs. Katherine O. Constantino dated 10 May 2019, id., Volume II, pp. 783-787; See Judicial Affidavit In lieu of Direct Examination of Mrs. Katherine O. Constantino dated 14 October 2019, Exhibit "P-99", id. Volume V, pp. 2448-2456.

67 See Restated and Supplemental Judicial Affidavit of Atty. Arni A. Perlas dated 16 May 2019, Exhibit "P-95", id., Volume II, pp. 813-847, with attached exhibits.

68 See Restated and Supplemental Judicial Affidavit of Ms. Maria Josephine Bueno-Gonzales dated 15 May 2019, Exhibit "P-96", id., pp. 954-971; See Supplement to the Restated and Supplemental Judicial Affidavit of Ms. Maria Josephine Bueno-Gonzales dated 21 January 2020, Exhibit "P-117", id., Volume V, pp. 2488-2494.

69 See Judicial Affidavit of Wilfrido De Ocampo, Jr. dated 17 May 2019, Exhibit "P-97", id., Volume III, pp. 1061-1108, with attachments.

70 See Judicial Affidavit of Joselito L. Dalde dated 06 February 2020, Exhibit "P-116", id., Volume V, pp. 2497-2513, with attached exhibits.

71 See Judicial Affidavit of Dr. Kenneth Y. Hartigan-Go dated 28 June 2019, Exhibit "P-98", id., Volume III, pp. 1142-1150.

72 Minutes of the Hearing and Order, both dated 29 August 2019, id., Volume IV, pp. 2050 and 2051-2053, respectively.

73 Exhibit "P-95", supra at note 67.

continued payment of SBT on its MILO® products prior to their removal from the place of production.

During cross-examination, Atty. Perlas responded negatively when asked whether it is the FDA's responsibility to determine the classification of beverages, specifically if they are milk products or alcoholic beverages subject to SBT. She clarified that the FDA had already classified petitioner's MILO® products as dual-based products, considering them to be flavored fluid milk drinks under the new product classification.[74]

As regards petitioner's claim that the BIR effectively denied its administrative claim for refund, Atty. Perlas mentioned that they obtained information from a certain Eduardo Trazona, the BIR's Revenue Officer on Premise (**ROOP**) assigned to Lipa. Specifically, they learned from him about the BIR's stance that its MILO® products are classified as a 'sweetened beverage' subject to SBT, and that petitioner cannot dispatch any of its MILO® products without first paying the corresponding SBT. However, despite not receiving any written communication from the BIR regarding petitioner's refund claim, the BIR continuously deployed Revenue Officers (**ROs**) to ensure that none of petitioner's MILO® products were dispatched from the production site without the prior payment of the SBT.[75]

Petitioner did not conduct any redirect examination.[76]

In response to the Court's inquiry, Atty. Perlas confirmed that petitioner's claim for refund is predicated on the assertion that MILO®, as a chocolate malt powdered milk drink, falls within the category of flavored fluid milk drinks as defined under Codex Stan 192-1995.[77] Additionally, she clarified that flavored fluid milk drinks are categorically part of the milk products exempt from SBT under the TRAIN Law. She also stated that MILO® products are registered with the FDA and the FDA has approved their label as 'chocolate malt powdered milk products', as evidenced by the CPRs. Then, when asked about the percentage of milk in petitioner's MILO® products, she responded that

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[74] TSN dated 29 August 2019, pp. 22-23.
[75] Id., pp. 24-25.
[76] Id., p. 26.
[77] CODEX GENERAL STANDARD FOR FOOD ADDITIVES.

milk is the primary ingredient in terms of quantity or volume. This is the basis for their claim that petitioner's MILO® products are principally milk-based, properly classified as flavored fluid milk product and, therefore, qualify for exemption under Section 150-B(C)(1)[78] of the NIRC of 1997, as amended by the TRAIN Law.[79]

On 28 November 2019, petitioner presented the testimonies of its witnesses, Dr. Hartigan-Go and De Ocampo, Jr.[80]

As an expert witness, Dr. Hartigan-Go essentially declared in his Judicial Affidavit dated 28 June 2019[81] that petitioner's MILO® products fall under the sub-food category of "flavored fluid milk drinks" under the main food category of fluid milk and milk products of Codex Stan 192-1995[82] and thus, should be considered milk products that are exempt from SBT.

On cross-examination, Dr. Hartigan-Go confirmed his statement in his Judicial Affidavit that MILO® products are 'composite milk products' based on the CPRs and that there is also a reference by which the Codex Standard specified certain categories and functional classes under milk. He also admitted that he did not personally look into the actual composition of MILO® products in arriving at that conclusion and/or opinion.[83]

Petitioner did not conduct any redirect examination.[84]

As for De Ocampo, Jr., as detailed in his Judicial Affidavit dated 17 May 2019[85], he testified that: (1) petitioner's MILO® products, which

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78 SEC. 150-B. *Sweetened Beverages.* —
(C) *Exclusions.* — **The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA**, are excluded from the scope of this Act:

(1) **All milk products, iucluding** plain milk, infant formula milk, follow-on milk, growing up milk, **powdered milk, ready-to-drink milk and flavored milk**, fermented milk, soymilk, and flavored soymilk[.] (Emphasis and underscoring supplied)

79 TSN dated 29 August 2019, pp. 26-32.

80 Minutes of the Hearing and Order, both dated 28 November 2019, Division Docket, Volume V, pp. 2475 and 2476-2477, respectively.

81 Exhibit "P-98", supra at note 71.

82 Supra at note 77.

83 TSN dated 28 November 2019, pp. 9-10.

84 Id., p. 10.

85 Exhibit "P-97", supra at note 69.

are marketed as 'choco malt powdered milk drink' and 'powdered choco malt milk drink' under the MILO® brand, are healthy milk drinks and, therefore, excluded from the coverage of SBT; (2) since the SBT's implementation, petitioner's MILO® products have suffered a continuous decline in sales despite full marketing support; (3) the ongoing collection of SBT on MILO® products will result in a sustained irreparable damage to petitioner due to this sales decline; and, (4) this decline in sales reflects a decrease in the consumption of a healthy beverage option for children (intended as an alternative to plain milk) aimed at combatting undernutrition—which outcome was precisely what the framers intended to prevent by exempting milk products, such as petitioner's MILO® products, from the imposition of SBT.

During cross-examination, De Ocampo, Jr. attested that petitioner had been compelled to increase the price of its MILO® products since it started paying SBT in April 2018, and that this price increase was effectively passed on to the consumers.[86]

On redirect examination, De Ocampo, Jr. shared that following the SBT imposition on petitioner's MILO® products, compared to the twelve (12)-month period 01 April 2017 to 31 March 2018, the sales value and sales volume for the 12-month period 01 April 2018 to 31 March 2019 dropped by around 14% and 27%, respectively. As to the SBT's impact on the cost of manufacturing MILO® products, he explained that petitioner continued to bear factory overhead costs despite a reduced production volume. The additional losses incurred from operating the factory at a significantly reduced volume, due to decreased demand, are estimated at around ₱200 million. To offset these additional losses, he noted that petitioner had to reduce the profit margins of its MILO® products.[87]

Respondent did not conduct any re-cross examination.[88]

In response to the Court's clarificatory question, De Ocampo, Jr. explained that petitioner's losses stemmed from decreased profitability, specifically because SBT is paid in advance before the MILO® products

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86 TSN dated 28 November 2019, pp. 16-17.
87 Id., pp. 19-22.
88 Id., p. 22.

are released from the production facility and subsequently passed on to consumers.[89]

During the 13 February 2020 hearing, petitioner presented the testimonies of its witnesses, ICPA Constantino and Bueno-Gonzales.[90]

ICPA Constantino declared, through her Judicial Affidavit dated 14 October 2019[91], that: (1) petitioner's MILO® products are duly registered with the FDA as 'choco malt powdered milk drink', 'powdered malt and milk drink', or 'powdered choco malt milk drink'; and, (2) petitioner erroneously paid and respondent illegally collected SBT totalling ₱253,926,718.50 on petitioner's removals of MILO® products for the month of April 2018.

On cross-examination, ICPA Constantino confirmed that, with respect to the first question in her Judicial Affidavit where it referred to payments of SBT erroneously or illegally assessed, it pertains to petitioner's refund claim and not her conclusion.[92]

Petitioner did not conduct any redirect examination.[93]

In reply to the Court's question, ICPA Constantino declared that she has taken into account Department of Health (**DOH**) Circular No. 2019-0319.[94] This circular classifies and describes the food category system and descriptors, under which MILO® products are already categorized as milk products.[95]

Next to take the witness stand was Bueno-Gonzales, who identified her Restated and Supplemental Judicial Affidavit dated 15 May 2019[96] and Supplement to the Restated and Supplemental Judicial

89 Id., pp. 22-24.
90 Minutes of the Hearing and Order, both dated 13 February 2020, Division Docket, Volume V, pp. 2517 and 2518-2519, respectively.
91 Exhibit "P-99", supra at note 66.
92 TSN dated 13 February 2020, pp. 12-13.
93 Id., p. 13.
94 Adoption of Food Category System and Descriptor of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018 or Latest).
95 TSN dated 13 February 2020, pp. 13-14.
96 Exhibit "P-96", supra at note 68.

Affidavit dated 21 January 2020[97], and declared therein that: (1) petitioner's MILO® products fall under the sub-food category of fluid milk and milk products of Codex Stan 192-1995[98] and thus, should be considered milk products that are exempt from SBT; and, (2) petitioner's MILO® products are flavored milk products that are excluded from the coverage of SBT.

During cross-examination, Bueno-Gonzales confirmed that all of petitioner's CPRs in this case essentially pertains to a single product. She explained that there are multiple CPRs for one product since the FDA's procedure (for issuing a CPR) is conducted on a *per* manufacturing plant and/or refilling factory basis. Additionally, she responded negatively when asked if these CPRs covered the reformulated MILO®. Instead, she clarified that they apply to MILO® before it underwent reformulation.[99]

When asked to confirm whether DOH Circular No. 2019-0319[100] explicitly states that MILO® products are categorized as 'composite milk products', Bueno-Gonzales responded that Codex Stan 192-1995, as referenced in the circular, was used to determine the category reflected in the CPRs. She also noted that the formal adoption of Codex Stan 192-1995 occurred through DOH Circular No. 2019-0319 on 01 August 2019. However, she admitted that the CPRs for MILO® products were issued before the adoption of Codex Stan 192-1995. Moreover, she conceded that the term 'composite milk products' implies that milk is not necessarily the primary ingredient but merely one of the essential ingredients.[101]

In contrast to Codex Stan 192-1995, Bueno-Gonzales continued to explain that Codex Stan 206-1999[102] focuses specifically on milk, pure milk, milk products like processed milk, and then composite milk products. She went on to state that 'composite milk products' represent a distinct category, yet they fall under the broader "major" milk category. She added that a 'choco malt milk drink' is classified under Codex Stan 192-1995 as a 'flavored fluid milk drink,' within Food Category 01.1.4. A product cannot be categorized as such without

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97 Exhibit "P-117", supra at note 68.
98 Supra at note 77.
99 TSN dated 13 February 2020, pp. 20-22.
100 Supra at note 94.
101 TSN dated 13 February 2020, pp. 22-27.
102 CODEX GENERAL STANDARD FOR THE USE OF DAIRY TERMS.

complying with Codex Stan 206-1999's standards for 'composite milk products.' Regarding the FDA-approved product names for MILO® products, namely, 'choco malt powdered milk drink' and 'powdered choco malt milk drink', she confirmed that these descriptions or representations were specified in petitioner's letter-application for a CPR filed with the FDA. Lastly, she noted that the FDA itself is capable of conducting laboratory tests to verify such descriptions or representations.[103]

On redirect examination, Bueno-Gonzales confirmed that the FDA's regulatory registration requirements did not change when DOH Circular No. 2019-0319[104] took effect.[105]

Addressing the Court's clarificatory question, Bueno-Gonzales stated that she cannot confirm whether petitioner attempted to approach the BIR for a possible reevaluation of its stance following the issuance of DOH Circular No. 2019-0319, which allegedly classified MILO® products as 'composite milk products' or 'flavored fluid milk drinks.' Furthermore, when asked if petitioner is effectively seeking a retroactive application of DOH Circular No. 2019-0319 by requesting a refund of the SBT and the suspension of SBT collection on future removals, she confirmed this was the case.[106]

On 07 October 2020[107], petitioner presented its last witness, Dalde, whose testimony, as detailed in his Judicial Affidavit dated 06 February 2020[108], was offered to prove that: (1) petitioner's MILO® products, which are marketed as 'choco malt powdered milk drink' and 'powdered choco malt milk drink' under the MILO® brand, are flavored fluid milk products that are exempt from SBT; and, (2) the main ingredient of MILO® products in terms of weight is milk.

On cross-examination, Dalde confirmed that the ingredients of 'MILO® Powdered Choco Malt Milk Drink' and 'MILO® NUTRI-UP Powdered Choco Malt Milk Drink for Adults' correspond to those listed

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103 TSN dated 13 February 2020, pp. 27-30.
104 Supra at note 94.
105 TSN dated 13 February 2020, p. 30.
106 Id., pp. 31-33.
107 Minutes of the Hearing and Order, both dated 07 October 2020, Division Docket, Volume VI, pp. 2858 and 2859-2860, respectively.
108 Exhibit "P-116", supra at note 70.

in Exhibits "P-114"[109] and "P-115"[110], respectively. When asked if the ingredient 'malted barley' serves as an alternative sweetener to sugar, Dalde initially responded that it fulfills two (2) purposes—nutrition and processing. From a processing perspective, it contributes to the overall product profile, thereby playing a role in the functional properties of MILO®. He eventually acknowledged that malted barley contains sugars such as maltose, which contribute inherent sweetness to the product.[111]

During the redirect examination, Dalde explained that 'malted barley' contains inherent sugars (distinct from added sugars) such as table sugar, which is commonly used in coffee. He further clarified that all other ingredients, whether inherent or part of the total ingredients, also contain naturally occurring sugars. For example, maltose is found in malted barley, and lactose is present in milk products.[112]

Respondent did not conduct any re-cross examination.[113]

In response to the Court's query, Dalde clarified his answer to Question No. 14 of his Judicial Affidavit (regarding the proportions of the ingredients of MILO® products manufactured in April 2018), stating that, in terms of weight, the proportions of the three (3) key ingredients are as follows: (1) milk, in the form of skimmed milk powder and whey powder, forms about 24%; (2) malted barley is about 21%; and, (3) cocoa powder is about 9%. As for sugar, he noted that it is at 18%, as indicated in Exhibit "P-114".[114]

When asked why MILO® products should be considered a milk product rather than a sweetened beverage (which is ordinarily subject to SBT), Dalde responded that they are milk products because they fall under the category of 'choco malt powdered milk drink,' as classified by the FDA. He emphasized that the primary ingredient is milk. According to him, even if 'malted barley'—a source of naturally occurring sugar—is incorporated to the product besides the 'added sugar', the quantity of sugar still does not surpass the milk content.[115]

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109 Division Docket, Volume VI, p. 2856.
110 Id., p. 2857.
111 TSN dated 07 October 2020, pp. 6-7.
112 Id., p. 8.
113 Id., p. 9.
114 Id., pp. 9-11.
115 Id., pp. 11-13.

After the Third Division granted an extension of time[116], petitioner filed its FOE[117] on 03 November 2020. Respondent filed his or her Comment thereto on 06 November 2020.[118]

In the Resolution dated 15 January 2021[119] (**FOE Resolution**), the Third Division admitted petitioner's exhibits, *except* Exhibit "P-100-526"[120], for failure to present the original for comparison.

On 25 January 2021, respondent filed a Manifestation[121] stating that, given the handling office's investigation report on petitioner's refund claim has not yet been completed, respondent will no longer present a witness.

In the Resolution dated 27 January 2021[122], the Third Division noted respondent's Manifestation, cancelled the setting for the presentation for respondent's evidence, and gave the parties a period of thirty (30) days to file their respective memoranda.

After the Third Division granted an extension of time[123], respondent filed his or her Memorandum[124] on 15 March 2021. Petitioner, on the other hand, filed its Memorandum[125] on 21 May 2021. Accordingly, in the Resolution dated 07 June 2021[126], the Third Division considered the case submitted for decision.

On 31 May 2022, the Third Division promulgated the assailed Decision,[127] which denied petitioner's original Petition for Review[128] for lack of merit. The dispositive portion reads:

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116 See Resolution dated 30 October 2020, Division Docket, Volume VI, p. 2862.
117 Id., pp. 2586-2857, with exhibits.
118 Id., pp. 2864-2866.
119 Id., pp. 2870-2873.
120 One of the voluminous documents supporting the ICPA Report dated 27 September 2019 and pre-marked by ICPA Constantino.
121 Division Docket, Volume VI, pp. 2875-2877.
122 Id., pp. 2880-2881.
123 See Resolution dated 09 March 2021, id., p. 2887.
124 Id., pp. 2888-2897.
125 Id., Volume VII, pp. 3419-3475.
126 Id., p. 3512.
127 Supra at note 6.
128 Supra at note 29.

...

WHEREFORE, in light of the foregoing considerations the Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

...

The Third Division ruled that petitioner's MILO® products are subject to SBT specified in Section 150-B(A)(1), in relation to Section 150-B(B)(1), of the NIRC of 1997, as amended by the TRAIN Law. Moreover, it determined that the exclusion provided under Section 150-B(C)(1) of the same law cannot be considered at the time of the removal of its MILO® products.

In the *interim*, the Supreme Court issued a Resolution dated 13 June 2022[129], concerning petitioner's Petition for *Certiorari* with Application for TRO and/or WPI[130], which impugned the Third Division's 22 April 2019 Resolution. The Supreme Court dismissed the petition and affirmed the Third Division's 22 April 2019 Resolution[131], holding that the Third Division did not commit a grave abuse of discretion when it exercised caution in denying petitioner's Motion for Suspension and Motion to Post Provisional Surety Bond. The said Supreme Court ruling became final and executory on 06 October 2022.[132]

Subsequently, on 27 June 2022, petitioner filed an MR[133] on the assailed Decision[134], with attached Second Judicial Affidavit dated 24 June 2022[135] of its expert witness, Dr. Hartigan-Go. After receipt of respondent's "Comment/Opposition (to Petitioner's Motion for Reconsideration)"[136] thereto, or on 18 October 2022, the Third Division promulgated the assailed Resolution[137], denying petitioner's MR for lack of merit. The dispositive portion reads:

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129 *Nestlé Philippines, Inc. v. The Court of Tax Appeals-Third Division and The Commissioner of Internal Revenue*, G.R. No. 247700 (Notice), 13 June 2022, *rollo*, pp. 127-132.
130 Supra at note 63.
131 Supra at note 53.
132 See Entry of Judgment, *rollo*, p. 139.
133 Division Docket, Volume VII, pp. 3567-3596.
134 Supra at note 6.
135 Annex "A" to Petitioner's Motion for Reconsideration (of the Decision promulgated on 31 May 2022), Division Docket, Volume VII, pp. 3597-3608.
136 Id., pp. 3614-3618.
137 Supra at note 7.

> ...
>
> **WHEREFORE**, in view of the foregoing considerations, petitioner's ***Motion for Reconsideration*** is **DENIED** for lack of merit.
>
> **SO ORDERED.**
>
> ...

PROCEEDINGS BEFORE THE COURT *EN BANC*

Following petitioner's receipt of a copy of the assailed Resolution on 26 October 2022[138], a "Motion for Extension of Time (To file Petition for Review)"[139] was filed with the Court *En Banc* on 10 November 2022. On 25 November 2022 or within the fifteen (15)-day extended period granted, petitioner filed the instant Petition for Review[140] seeking the reversal of the Third Division's assailed Decision and Resolution.

On 26 January 2023, the Court *En Banc* directed respondent to file his or her comment within ten (10) days from notice.[141] On 23 February 2023, respondent filed a "Motion to Admit Attached Comment to Petition for Review"[142] (**Motion to Admit**).

In the Resolution dated 30 March 2023[143], the Court *En Banc* granted respondent's Motion to Admit and thereby, admitted his or her Comment/Opposition thereto.[144] Accordingly, in the same Resolution, the case was submitted for decision.

On 27 June 2023, the Court *En Banc*'s noted the Supreme Court-Third Division's Entry of Judgment dated 06 October 2022, stating that the resolution on petitioner's Petition for *Certiorari* with Application for TRO and/or WPI had become final and executory.[145]

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138 See Notice of Resolution dated 20 October 2022, Division Docket, Volume VII, p. 3622.
139 Id., pp. 3632-3634.
140 Supra at note 1.
141 *Rollo*, pp. 112-113.
142 Id., pp. 114-117.
143 Id., pp. 123-124.
144 Id., pp. 119-121.
145 See Resolution dated 27 June 2023, id., pp. 145-147.

ISSUES

In the present Petition for Review before the Court *En Banc*, petitioner assigns the following errors to the Third Division's actions[146]:

I.

THE THIRD DIVISION'S INTERPRETATION OF SECTION 150-B OF THE NATIONAL INTERNAL REVENUE CODE (NIRC) OF 1997, AS AMENDED BY THE TAX REFORM FOR ACCELERATION AND INCLUSION ACT (TRAIN LAW), YIELDS ABSURD RESULTS; A LAW SHOULD BE INTERPRETED TO GIVE EFFECT TO ALL ITS PARTS;

II.

THE THIRD DIVISION FAILED TO CONSIDER THE UNCONTROVERTED TESTIMONY OF EXPERT WITNESS, DR. KENNETH Y. HARTIGAN-GO (DR. HARTIGAN-GO), A FORMER DEPARTMENT OF HEALTH (DOH) UNDERSECRETARY AND FOOD AND DRUG ADMINISTRATION (FDA) DIRECTOR GENERAL, WHO STATED THAT, PRIOR TO 2018, THE FOOD AND DRUGS ADMINSTRATION (FDA) HAD ALREADY ADOPTED AND UTILIZED CODEX STAN 192-1995 IN THE REGISTRATION OF FOOD PRODUCTS;

III.

THE THIRD DIVISION ERRED IN RULING THAT THE MERE PRESENCE OF SUGAR SUBJECTS A BEVERAGE TO SWEETENED BEVERAGE TAX (SBT), DISREGARDING THE EXPLICIT LANGUAGE OF SECTION 150-B OF THE NATIONAL INTERNAL REVENUE CODE (NIRC) OF 1997, AS AMENDED BY THE TAX REFORM FOR ACCELERATION AND INCLUSION ACT (TRAIN LAW), WHICH PROVIDES THAT, FOR SBT PURPOSES, A BEVERAGE IS CLASSIFIED BASED ON THE FOOD CATEGORY SYSTEM DESCRIPTORS IN CODEX STAN 192-1995 AND NOT SIMPLY BASED ON THE MERE PRESENCE OF SUGAR IN THE BEVERAGE;

IV.

THE THIRD DIVISION FAILED TO CONSIDER THE UNCONTROVERTED TESTIMONY OF EXPERT WITNESS, DR. KENNETH Y. HARTIGAN-GO (DR. HARTIGAN-GO), THAT MILO® PRODUCTS ARE NOT NON-ALCOHOLIC BEVERAGE UNDER FOOD CATEGORY 14.1 OF CODEX STAN 192-1995;

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[146] See Assignments of Error, Petition for Review, supra at note 1, pp. 20-21.

V.
THE THIRD DIVISION ERRED IN RULING THAT THE COCOA SUGAR MIXTURE COMPONENT OF THE MILO® PRODUCTS DISQUALIFY IT FROM BEING CLASSIFIED AS A FLAVORED MILK UNDER FOOD CATEGORY 01.1.4 OF CODEX STAN 192-1995;

VI.
THE THIRD DIVISION ERRED IN DISREGARDING THE UNCONTESTED TESTIMONY OF EXPERT WITNESS, DR. KENNETH Y. HARTIGAN-GO (DR. HARTIGAN-GO), THAT MILO® PRODUCTS ARE FLAVORED MILK UNDER FOOD CATEGORY 01.1.4 OF CODEX STAN 192-1995 EVEN IF IT CONTAINS COCOA SUGAR MIXTURE; AND,

VII.
BOTH THE TAXING PROVISION AND THE EXCLUSION PROVISION OF SECTION 150-B OF THE NATIONAL INTERNAL REVENUE CODE (NIRC) OF 1997, AS AMENDED BY THE TAX REFORM FOR ACCELERATION AND INCLUSION ACT (TRAIN LAW), AND THE UNDERLYING LEGISLATIVE DELIBERATIONS EXCLUDE FLAVORED MILK FROM THE COVERAGE OF THE SWEETENED BEVERAGE TAX (SBT), REGARDLESS OF THE PRESENCE OF SWEETENER.

ARGUMENTS

First, petitioner reiterates its contention that the FDA already effectively adopted Codex Stan 192-1995[147] even before the enactment of the TRAIN Law, as allegedly evidenced by several issuances such as: (1) Part VII[148] of Bureau of Food and Drugs (**BFAD**) Circular No. 2006-016[149]; (2) Section 9(b)[150] of RA 10611, or the Food Safety Act of 2013; and,

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147 Supra at note 77.

148 VII. REVIEW AND REVISION OF THE FOOD ADDITIVE LISTING

...

Any food additive and functional classes adopted by the Codex Alimentarius Commission (CAC) shall be <u>automatically included</u> as an addendum to the Appendix for Food Additives. (Emphasis and underscoring supplied)

149 Updated List of Food Additives.

150 SEC. 9. *Setting of Food Safety Standards.* — The DA and the DOH shall set the mandatory food safety standards. The following shall guide the setting of standards:

...

(b) **<u>Codex standards shall be adopted</u>** except when these are in conflict with what is necessary to protect consumers and scientific justification exists for the action taken[.] (Emphasis and underscoring supplied)

(3) Part VI(A)(10)[151] of DOH Administrative Order (**AO**) No. 2014-0029[152] and Annex A thereof specifically states that the food products listed thereon are those "identified by [the] FDA based from the Codex Alimentarius General Standard for Food Additives (**GSFA**)[.]" As such, Codex Stan 192-1995 should be applied to determine if the subject MILO® products are milk products that ought to be excluded from the coverage of the SBT.

Petitioner notes that Section 150-B(C)(1)[153] of the NIRC of 1997, as amended by the TRAIN Law, uses the phrase "as adopted by the FDA" rather than "to be adopted by the FDA". According to it, this could only mean that when the TRAIN Law was enacted on 19 December 2017, Codex Stan 192-1995 was already adopted by the FDA.

Applying the rule on statutory construction that the legislature is presumed to know the conditions existing as to a particular subject matter when it enacted a statute, petitioner argues that, when the TRAIN Law defined 'sweetened beverages' subject to SBT and provided exclusions therefrom by referring to Codex Stan 192-1995 "as adopted by the FDA", the legislature is presumed to have knowledge of the adoption by the FDA of Codex Stan 192-1995 through BFAD Circular No. 2006-016[154], the reference to and adoption by the DOH of the standards of the Codex Alimentarius Commission (**CAC**) in RA 10611 or the Food Safety Act of 2013 and its Implementing Rules and Regulations (**IRR**) and the FDA's practice of using the latest or current version of Codex Stan 192-1995 in the registration of foods products and the issuance of CPRs under DOH AO No. 2014-0029.[155]

Petitioner further contends that if indeed the intention of the TRAIN Law was to refer to the version of Codex Stan 192-1995 that was still to be adopted by the FDA, there should have been a directive for the FDA to adopt Codex Stan 192-1995 similar to the instructions of the law to the FDA on labelling and surveillance, as found in Section 150-

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151 VI. Guidelines in the Registration of Processed Food Products
A. General Principles
...
10. **<u>Only food additives listed</u> in the latest Codex General Standards for Food Additives (GSFA) and/or the latest FDA Listing of Food Additives... <u>shall be issued a CPR</u>**. (Emphasis and underscoring supplied)

152 Rules and Regulations on the Licensing of Food Establishments and Registration of Processed Food, and Other Food Products, and For Other Purposes.

153 Supra at note 78.

154 Supra at note 149.

155 Supra at note 152.

B(E)[156] of the NIRC of 1997, as amended by the TRAIN Law, on the FDA's specific responsibility. However, as it is worded, the responsibilities imposed by the TRAIN Law on the FDA only relate to labelling and surveillance.

As to the Third Division's ruling that the inclusion of the qualifier "Rev. 2017 or the latest" in Section 150-B(C)[157] of the NIRC of 1997, as amended by the TRAIN Law, instructs the FDA to adopt Codex Stan 192-1995, petitioner points out that the same qualifier is also found in the definition of 'sweetened beverages' under Section 150-B(B)(1)[158] of the NIRC of 1997, as amended by the TRAIN Law. On this note, petitioner submits that such qualifier does not mean that an explicit adoption is required for Section 150-B(C)[159] of the NIRC of 1997, as amended, by the TRAIN Law, to be effective. Instead, such qualifier found in both the taxing provision in Section 150-B(B)(1)[160] and the exclusion provision in Section 150-B(C) merely indicates that, under the prevailing FDA product registration guidelines, the FDA uses the current or latest version of Codex Stan 192-1995, such that, in subsequent years, the later

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156 SEC. 150-B. *Sweetened Beverages.* —

...

(E) *Specific Responsibility of the Food and Drug Administration (FDA).* — Starting June 1, 2018, the FDA shall require all manufacturers and importers of sweetened beverages covered by this Act to indicate on the label the type of sweetener used, and on sweetened beverages in powder form to indicate on the label the equivalent of each serving per liter of volume capacity.

The FDA shall also conduct post-marketing surveillance of the sweetened beverages on display in supermarkets, groceries or retail stores and/or inspection of manufacturing sites to determine compliance with the requirements of this Section. Violations of the provisions of this Act, including but not limited to, mislabeling or misbranding, shall, to the extent applicable, be punishable under existing laws.

157 Supra at note 78.

158 SEC. 150-B. *Sweetened Beverages.* —

...

(B) *Definition of Terms.* — As used in this Act:

(1) *Sweetened beverages (SBs)* refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers, and shall include, but not be limited to the following, as described in the **Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, <u>Rev. 2017 or the latest</u>) <u>as adopted by the FDA</u>**:

(a) Sweetened juice drinks;
(b) Sweetened tea;
(c) All carbonated beverages;
(d) Flavored water;
(e) Energy and sports drinks;
(f) Other powdered drinks not classified as milk, juice, tea, and coffee;
(g) Cereal and grain beverages; and
(h) Other non-alcoholic beverages that contain added sugar.

(Emphasis and underscoring supplied)

159 Supra at note 78.

160 Supra at note 158.

version thereof will be applied to determine the classification of a beverage.

Petitioner argues that the Third Division's ruling leads to an absurd outcome. Following this ruling, from the time the TRAIN Law took effect on 01 January 2018 until the FDA adopted the 2018 revision of Codex Stan 192-1995 on 01 August 2019 *via* DOH Circular No. 2019-0319[161], the SBT could be applied. However, during this period, no beverage could be exempt from the SBT, even if it would clearly be excluded under Codex Stan 192-1995 later on. Therefore, petitioner implores the Court *En Banc* to not countenance a ruling that allows for the imposition of the SBT while denying the applicability of exclusions, despite the TRAIN Law's intention for the imposition of the SBT and its exclusions to take effect simultaneously.

Second, petitioner insists that the Third Division's ruling overlooked the uncontroverted testimony of expert witness, Dr. Hartigan-Go, who is a former DOH Undersecretary and FDA Director General. He allegedly testified that Codex Stan 192-1995 was adopted by the FDA as early as 2006. This adoption was for the purpose of identifying and classifying a food item to determine a food product's compliance with the applicable maximum allowable additives for the food category. It thus necessarily follows that Codex Stan 192-1995 was already adopted by the FDA when the TRAIN Law was enacted.

Petitioner further argues that there is no conceivable reason to distinguish between the adoption of Codex Stan 192-1995 for food product registration purposes and its adoption for the imposition of the SBT, given that the purpose in both cases is the same, *i.e.*, to classify beverages.

Third, petitioner claims that the mere presence of sugar in a beverage does not automatically qualify a beverage as a "sweetened beverage" subject to SBT. Petitioner emphasizes that this is clear from Section 150-B(B)(1)(f)[162] of the NIRC of 1997, as amended, which states

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[161] Supra at note 94.

[162] SEC. 150-B. *Sweetened Beverages.* —

...

(B) *Definition of Terms.* — As used in this Act:

that, regardless of the sugar content, powdered drinks classified as milk, juice, tea and coffee, are expressly excluded from the definition of "sweetened beverage".

Additionally, petitioner asserts that Section 150-B(C)(1)[163] of the NIRC of 1997, as amended by the TRAIN Law, clearly excludes all milk products from the coverage of SBT, without qualification that it should not contain added sugar. In contrast, petitioner points out that the exclusion of natural fruit juices and natural fruit vegetable juices under subparagraphs (2) and (3) thereof both have the qualifier "that do not have added sugar or caloric sweetener". Accordingly, petitioner argues that the clear import of Section 150-B(B)(1)[164] and (C)(1)[165] is that, for milk products, such as petitioner's MILO® products, the mere presence of sugar in milk drinks does not automatically make them "sweetened beverages" and subject them to SBT.

Petitioner also cites the Senate Committee on Ways and Means' deliberations in the hearings held on 15 June 2017 and on 22 November 2017. It is alleged that, during these discussions, the intention to exclude "all milk products", regardless of sugar content, was clear. The legislators aimed to encourage the consumption of milk, especially among children.

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(1) *Sweetened beverages (SBs)* refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers, and shall include, but not be limited to the following, as described in the **Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA**:

. . .

(f) **Other powdered drinks not classified as milk, juice, tea, and coffee**[.]
(Emphasis and underscoring supplied)

163 SEC. 150-B. *Sweetened Beverages.* —
(C) *Exclusions.* — **The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA**, are **excluded** from the scope of this Act:
(1) **All milk products, including** plain milk, infant formula milk, follow-on milk, growing up milk, **powdered milk, ready-to-drink milk and flavored milk**, fermented milk, soymilk, and flavored soymilk;
(2) **One Hundred Percent (100%) Natural Fruit Juices** — Original liquid resulting from the pressing of fruit, the liquid resulting from the reconstitution of natural fruit juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural fruit juice **that do not have added sugar or caloric sweetener**;
(3) One Hundred Percent (100%) Natural Vegetable Juices — Original liquid resulting from the pressing of vegetables, the liquid resulting from the reconstitution of natural vegetable juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural vegetable juice **that do not have added sugar or caloric sweetener**[.] (Emphasis and underscoring supplied)

164 Supra at note 158.

165 Supra at note 78.

Petitioner likewise notes that pursuant to Section 16[166] of Revenue Regulations (**RR**) No. 20-2018[167] dated 25 July 2018 (the "**SBT Regulations**"), the responsibility to properly classify beverages falls on the FDA. Based on this, petitioner reasons that if the imposition of SBT is to be determined solely by the sugar content of a beverage, and not by the Food Category Descriptors in Codex Stan 192-1995, the Secretary of Finance would not have delegated the task of classifying beverages for SBT imposition to the FDA. Instead, this responsibility would have been delegated to the BIR.

According to petitioner, the FDA-approved product names 'choco malt powdered milk drink' and 'powdered choco malt milk drink', as indicated in the CPRs, accurately reflect the nature of MILO® products as a "choco malt milk drink". It also emphasizes the testimony of its expert witness, Dr. Hartigan-Go, who explained that the FDA's issuance of CPRs for the MILO® products means that they are permitted to be labeled as such. This implies that the FDA has made a determination that MILO® products are considered flavored milk, regardless of their sugar content.

Fourth, petitioner contends that its MILO® products cannot simply be generically classified as a "non-alcoholic beverage" because under Codex Stan 192-1995, the term "non-alcoholic beverage" has a technical meaning. Citing the unrefuted testimony of Dr. Hartigan-Go in his Second Judicial Affidavit dated 24 June 2022[168], MILO® products are dairy products and, as such, cannot be classified as a "non-alcoholic beverage" under Codex Stan 192-1995.

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166 SEC. 16. *Responsibility of the Food and Drug Administration (FDA).* — Starting June 1, 2018, the FDA shall require all manufacturers and importers of sweetened beverages covered by the Act to indicate on the label the type of sweetener used, and on sweetened beverages in powder form to indicate on the label the number of liters per pack size (net weight volume).

The FDA shall also conduct post-marketing surveillance of the sweetened beverages on display in supermarkets, groceries or retail stores and/or inspection of manufacturing sites to determine compliance with the requirements of Section 150-B of the NIRC, as amended. Violations of the provisions of the Act, including but not limited to, mislabeling or misbranding, shall, to the extent applicable, be punishable under existing laws.

The FDA shall provide a summary list of registered sweetened beverages together with the required details and information using the prescribed format as shown in Annex "A," hereto attached.

167 Prescribing the Implementing Rules and Guidelines on the Imposition of Excise Tax on Sweetened Beverages Pursuant to Section 47 of Republic Act No. 10963, Otherwise Known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law."

168 Annex "A" to Petitioner's Motion for Reconsideration (of the Decision promulgated on 31 May 2022), supra at note 135.

Fifth, petitioner argues that the Third Division erred in its finding that the cocoa-sugar mixture component of MILO® products disqualifies them from being classified as flavored milk under Food Category 01.1.4 of Codex Stan 192-1995. In this context, petitioner points out that the Third Division did not provide any basis for its ruling that MILO® products cannot be considered as a fluid flavored milk drink due to the presence of mixes for cocoa (cocoa-sugar mixtures). Moreover, in concluding that MILO® products do not fall under either Food Category 05.1.4 (cocoa and chocolate products) or 01.1.4 (flavored fluid milk drinks), the Third Division also failed to specify the appropriate food category to which they should be assigned for food registration and SBT purposes.

Additionally, petitioner draws attention to the fact that the product details of the MILO® products, attached as Annexes 1-16 of the assailed Decision, categorize the MILO® products as dairy-based drinks, either flavored and/or fermented, according to Codex Stan 192-1995. On the other hand, Food Category 14.0 (beverages, excluding dairy products) explicitly states that dairy-based beverages are included under Food Category 01.1.4 (flavored fluid milk drinks). Based on this, petitioner submits that its MILO® products clearly fall under Food Category 01.1.4 (flavored fluid milk drinks) as defined in Codex Stan 192-1995.

Sixth, petitioner insists that the Third Division should have taken into account the uncontested testimony of its expert witness, Dr. Hartigan-Go, who testified that MILO® products qualify as flavored fluid milk drinks despite containing cocoa and sugar. Citing Dr. Hartigan-Go's statement from his Second Judicial Affidavit dated 24 June 2022[169], petitioner emphasizes that Food Category 01.1.4 (flavored fluid milk drinks) of Codex Stan 192-1995 excludes only "mixes for cocoa," not milk-based drinks that contain cocoa and sugar.

Lastly, petitioner reasserts that, since Section 150-B(B)(1)[170] of the NIRC of 1997, as amended by the TRAIN Law, excludes flavored milk drinks from the coverage of SBT, regardless of the sugar content therein, and the FDA issued CPRs for the MILO® products with approved

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169 Annex "A" to Petitioner's Motion for Reconsideration (of the Decision promulgated on 31 May 2022), supra at note 135.

170 Supra at note 158.

product names 'choco malt powdered milk drink' and 'powdered choco malt milk drink' that confirms they are flavored milk under Food Category 01.1.4 of Codex Stan 192-1995, MILO® products are thus not "sweetened beverages" clearly, expressly, and unambiguously subject to SBT.

On the other hand, respondent simply states that petitioner's arguments have been thoroughly addressed by the Third Division in its assailed Decision[171] and Resolution.[172] Therefore, respondent reiterates his or her Comment/Opposition[173] to petitioner's MR[174] on the assailed Decision and adopts the same as his or her Comment on the present Petition for Review.

RULING OF THE COURT

Before going into the merits of the case, We shall first determine the timeliness of the present petition.

THE PETITION FOR REVIEW WAS TIMELY FILED.

The Third Division issued the assailed Resolution[175] denying petitioner's MR[176] on the assailed Decision[177] on 18 October 2022. Petitioner received the assailed Resolution on 26 October 2022.[178]

Under Section 2(a)(1)[179], Rule 4, in relation to Section 3(b)[180], Rule 8, of the RRCTA, petitioner had 15 days from 26 October 2022, or until

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171 Supra at note 6.
172 Supra at note 7.
173 Supra at note 136.
174 Supra at note 133.
175 Supra at note 7.
176 Supra at note 133.
177 Supra at note 6.
178 See Notice of Resolution dated 26 October 2022, supra at note 138.
179 **SEC 2**. *Cases Within the Jurisdiction of the Court En Banc.* — The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:
(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:
(1) Cases arising from administrative agencies — **Bureau of Internal Revenue**, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture[.] (Emphasis supplied.)
180 **SEC. 3**. *Who may appeal; period to file petition.* —

10 November 2022, within which to file an appeal before this Court. On 10 November 2022, petitioner asked for an additional period of 15 days, or until 25 November 2022, within which to file a Petition for Review.[181] The Court *En Banc* granted the same in a Minute Resolution dated 11 November 2022.[182] Accordingly, petitioner timely filed the present petition on 25 November 2022.[183]

We shall now determine the merits of this case.

After a thorough review of the records, the Court *En Banc* finds ample grounds to grant petitioner's bid for reversal of the assailed Decision and Resolution of this Court's Third Division.

In the subject Petition for Review, it is significant to note that petitioner does not dispute the findings made by this Court's Third Division as to its compliance with the *second* and *third* requisites for refund of erroneously collected taxes under Sections 204(C)[184] and 229[185] of the NIRC of 1997, as amended, which pertain to the timeliness of its claims at the administrative and judicial levels, respectively.

...

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

181 See Motion for Extension of Time (To File Petition for Review), *rollo*, pp. 1-3.

182 Id., p. 7.

183 Supra at note 1.

184 **SEC. 204.** *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* — The Commissioner may —

...

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund**[.] (Emphasis supplied)

185 **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.

Essentially, the main issue left for the Court *En Banc* to resolve is whether the subject payments of SBT on petitioner's MILO® products are "erroneous or illegal" either because: (1) it does not fall within the taxing provision of Section 150-B(A)(1), in relation to Section 150-B(B)(1), of the NIRC of 1997, as amended by the TRAIN Law; or, (2) it falls within the exclusion provision under Section 150-B(C)(1) of the same law.

Before proceeding to resolve the foregoing issue and related sub-issues, the Court *En Banc* deems it propitious to first determine whether the FDA has effectively adopted the 2017 revision of Codex Stan 192-1995 by the time the TRAIN Law was enacted and came into effect on 01 January 2018. This consideration is crucial, especially since, as petitioner validly points out, both the taxing provision in Section 150-B(A)(1), in relation to Section 150-B(B)(1), of the NIRC of 1997, as amended by the TRAIN Law, and the exclusion provision in Section 150-B(C) of the same law, specifically reference the qualifier "as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA".

THE CODEX ALIMENTARIUS FOOD CATEGORY SYSTEM, AS OUTLINED IN CODEX STAN 192-1995 (REV. 2017), SHOULD BE DEEMED ADOPTED AS OF THE EFFECTIVITY OF THE TAX REFORM FOR ACCELERATION AND INCLUSION ACT (TRAIN LAW).

A perusal of Section 47 of the TRAIN Law, which introduced Section 150-B in the NIRC of 1997 concerning the excise tax on sweetened beverages or SBT, reveals that both the taxing and the exclusion provisions explicitly refer to the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest), as adopted by the FDA, *viz*:

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. (Emphasis supplied)

...

SEC. 47. A new section designated as Section 150-B under Chapter VI, Title VI of the NIRC, as amended, is hereby inserted to read as follows:

SEC. 150-B. *Sweetened Beverages.* —

(A) *Rate and Base of Tax.* — Effective January 1, 2018.

(1) A tax of six pesos (₱6.00) per liter of volume capacity shall be levied, assessed, and collected on sweetened beverages using purely caloric sweeteners, and purely non-caloric sweeteners, or a mix of caloric and non-caloric sweeteners: *Provided*, That this tax rate shall not apply to sweetened beverages using high fructose corn syrup: *Provided, further*, That sweetened beverages using purely coconut sap sugar and purely steviol glycosides shall be exempt from this tax; and

...

(B) *Definition of Terms.* — As used in this Act:

(1) *Sweetened beverages (SBs)* refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers, and **shall <u>include</u>, but not be limited to the following, <u>as described in the Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA</u>**:

(a) Sweetened juice drinks;
(b) Sweetened tea;
(c) All carbonated beverages;
(d) Flavored water;
(e) Energy and sports drinks;
(f) Other powdered drinks not classified as milk, juice, tea, and coffee;
(g) Cereal and grain beverages; and
(h) Other non-alcoholic beverages that contain added sugar.

...

(C) *Exclusions.* — **The following products, <u>as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA</u>, are <u>excluded</u> from the scope of this Act:**

(1) All milk products, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-

drink milk and flavored milk, fermented milk, soymilk, and flavored soymilk;

(2) One Hundred Percent (100%) Natural Fruit Juices — Original liquid resulting from the pressing of fruit, the liquid resulting from the reconstitution of natural fruit juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural fruit juice that do not have added sugar or caloric sweetener;

(3) One Hundred Percent (100%) Natural Vegetable Juices — Original liquid resulting from the pressing of vegetables, the liquid resulting from the reconstitution of natural vegetable juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural vegetable juice that do not have added sugar or caloric sweetener;

(4) Meal Replacement and Medically Indicated Beverages — Any liquid or powder drink/product for oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages, or as a source of necessary nutrition used due to a medical condition and an oral electrolyte solution for infants and children formulated to prevent dehydration due to illness; and

(5) Ground coffee, instant soluble coffee, and pre-packaged powdered coffee products.[186]

...

Clearly from the foregoing, the term 'sweetened beverages' is defined as non-alcoholic beverages in any form (liquid, powder, or concentrates) that are pre-packaged and sealed according to FDA standards and contain either caloric or non-caloric sweeteners added by manufacturers. It is subject to SBT and include or exclude products as described in the Codex Alimentarius Food Category Descriptors (Codex Standard 192-1995, Rev. 2017 or the latest) as adopted by the FDA.

Specifically, Section 150-B(B)(1) of the NIRC of 1997, as amended by the TRAIN Law, enumerates included products such as sweetened juice drinks, sweetened tea, carbonated beverages, flavored water, energy and sports drinks, other powdered drinks not classified as milk, juice, tea, and coffee, as well as cereal and grain beverages and other non-alcoholic beverages with added sugar. Conversely, exclusions under

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[186] Italics in the original text, emphasis and underscoring supplied.

Section 150-B(C) cover all milk products, 100% natural vegetable juices, meal replacements and medically indicated beverages, along with ground coffee, instant soluble coffee, and pre-packaged powdered coffee products. These inclusions and exclusions align with the food product categories established under Codex Stan 192-1995.

The purpose of the Codex Alimentarius Food Category System, as outlined in Codex Stan 192-1995, is primarily to organize food products into specific categories, which is essential for the allocation and regulation of food additive uses. This system applies to all foodstuffs, including those where no additives are permitted, and is not intended for labeling purposes. It provides a structured approach for determining how food additives can be used across different types of food products, thereby ensuring safety and consistency in food manufacturing and processing.[187]

Petitioner's issue centers on the interpretation of the phrase "as adopted by the FDA". Contrary to the conclusion reached by the Third Division—that the FDA is required to adopt the Codex Alimentarius Food Category System (Codex Standard 192-1995, Rev. 2017 or the latest) as the inclusion of the said phrase would have been superfluous—petitioner contends that there is no necessity to wait for the FDA's subsequent adoption. This is because Codex Stan 192-1995 has already been effectively adopted through previous issuances, such as, BFAD Circular No. 2006-016[188], Section 9(b)[189] of RA 10611, or the Food Safety Act of 2013, and Part VI(A)(10)[190] of DOH AO No. 2014-0029.

Petitioner further argues that if the TRAIN Law intended to refer to a version of Codex Standard 192-1995 that had yet to be adopted by the FDA, it would have included a specific directive for the FDA to do so in Section 150-B(E)[191] of the NIRC of 1997, as amended, which outlines the FDA's specific responsibilities. According to it, the responsibilities mentioned in this section pertain only to labeling and surveillance.

We rule in favor of petitioner's stance.

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187 Available at https://www.fao.org/gsfaonline/foods/index.html <last accessed on 12 March 2024>.
188 Supra at note 149.
189 Supra at note 150.
190 Supra at note 152.
191 Supra at note 156.

Given that both the taxing and the exclusion provisions of Section 150-B in the NIRC of 1997, as amended by the TRAIN Law, use of the qualifier phrase "as adopted by the FDA", in relation to Codex Stan 192-1995, the inescapable implication is that for a product to be taxed or exempted under Section 150-B, its classification must align with the categories and descriptions specified in Codex Stan 192-1995, as those categories and descriptions have been accepted.

Indeed, it would be contradictory for this Court to assume that the food categories based on Codex Stan 192-1995 have not yet been adopted—or are still pending adoption—by the FDA regarding exemptions from SBT (*i.e.*, non-taxable sweetened beverages), and then, simultaneously, to affirm the same categories as a basis for determining which sweetened beverages are taxable under the SBT.

However, without necessarily ruling on petitioner's foregoing contentions on the import of the phrase "as adopted by the FDA", this Court finds that **the Codex Alimentarius Food Category Descriptors (Codex Standard 192-1995, Rev. 2017) has been adopted as of the effectivity of the TRAIN Law, or on 01 January 2018, pursuant to Sections 2 and 6, in relation to Section 19, of the SBT Regulations[192], the IRR of Section 150-B of the NIRC of 1997, as amended,** which state:

> ...
>
> SEC. 2. *Definition of Terms.* — For purposes of these Regulations and for a more effective enforcement and collection of excise taxes, the following words and phrases shall have the meaning indicated below:
>
> ...
>
> b. SWEETENED BEVERAGES (SBs) — refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers, and shall include, but not be limited to the following, **<u>as described in the Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev 2017 or the latest) as adopted by the FDA</u>**:
>
> (1) Sweetened juice drinks;

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[192] Supra at note 167.

(2) Sweetened tea;

(3) All carbonated beverages;

(4) Flavored water;

(5) Energy and sports drinks;

(6) Other powdered drinks not classified as milk, juice, tea, and coffee;

(7) Cereal and grain beverages; and

(8) Other non-alcoholic beverages that contain added sugar.

...

SEC. 6. *Exclusions.* — The following products, **as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev 2017 or the latest) as adopted by the FDA**, are not subject to the excise tax imposed under Section 150-B of the NIRC, as amended, to wit:

a. All milk products, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk, flavored milk, and fermented milk.

Milk product refers to products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing (Codex General Standard for the Use of Dairy Terms (Codex Stan 206-1999).

In accordance with the Codex Alimentarius, the following Codex Standards for various milk products are adopted:

1. Milk powders and cream powder (Codex Stan 207-1999)
2. Fermented milks (Codex Stan 243-2003)
3. Blend of evaporated skimmed milk and vegetable fat (Codex Stan 250-2006)
4. Blend of skimmed milk and vegetable fat in powdered form (Codex Stan 251-2006)
5. Blend of sweetened condensed skimmed milk and vegetable fat (Codex Stan 252-2006)
6. Evaporated milks (Codex Stan 281-1971)
7. Sweetened condensed milks (Codex Stan 282-1971)

Dairy products are not synonymous with milk products. Only milk products are covered by the exemption.

b. Soymilk and flavored soymilk shall refer to products, the main ingredients of which are the soybean and/or soy derivative(s) (*e.g.*, soybean flour, soybean concentrates, soybean isolates or defatted soya) and water which are produced without fermentation process. (Codex Stan. CXS 322R-2015)

c. One Hundred Percent (100%) Natural Fruit Juices — Original liquid resulting from the pressing of fruit, the liquid resulting from the reconstitution of natural fruit juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural fruit juice that do not have added sugar or caloric sweetener. If there is sugar or sweetener added at any amount, the product shall be considered excisable depending on the kind of sweetener added and its corresponding rate specified under the Act;

d. One Hundred Percent (100%) Natural Vegetable Juices — Original liquid resulting from the pressing of vegetables, the liquid resulting from the reconstitution of natural vegetable juice concentrate, or the liquid resulting from the restoration of water to dehydrated natural vegetable juice that do not have added sugar or caloric sweetener. If there is sugar or sweetener added at any amount, the product shall be considered excisable depending on the kind of sweetener added and its corresponding rate specified under the Act;

e. Meal Replacement and Medically Indicated Beverages — Any liquid or powder drink/product for oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages, or as a source of necessary nutrition used due to a medical condition and an oral electrolyte solution for infants and children formulated to prevent dehydration due to illness; and

f. Ground coffee, instant soluble coffee, and pre-packaged powdered coffee products.

The proper classification of beverages shall be subject to the determination by the FDA.

SEC. 19. *Effectivity*. — **These Regulations are <u>effective beginning January 1, 2018</u>, the effectivity of the TRAIN Law.**[193]

...

As can be gleaned from the foregoing provisions of the SBT Regulations, it is clear that the TRAIN Law intended to incorporate the food categories and descriptions under the Codex Alimentarius Food

[193] Italics in the original text, emphasis and underscoring supplied.

Category Descriptors (Codex Stan 192-1995, Rev. 2017) as of its effective date. It must be emphasized that the said SBT Regulations itself referred to the 2017 revision of Codex Stan 192-1995 as basis for the classification of food products under the umbrella term "sweetened beverages."

In this context, the phrase "as adopted by the FDA" is more logically interpreted as referring to the FDA's subsequent adoption of the latest version of Codex Standard 192-1995. This interpretation is supported by the issuance of DOH Circular No. 2019-0319 dated 01 August 2019[194], which specifically adopted the 2018 revision of Codex Stan 192-1995, to wit:

> ...
>
> I. BACKGROUND
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> ...
>
> Pursuant to the implementation of the foregoing policies, Section 15(2), Chapter (4) Title IX, Book IV of the Administrative Code of 1987, authorizes the Food and Drug Administration to act as the policy formulation and sector monitoring arm of the Secretary of Health on matters pertaining to food, drugs, traditional medicines, cosmetics and household products containing hazardous substances, and to formulate rules and regulations and standards in accordance with Republic Act No. 3720 as amended by Executive Order No. 175, Republic Act 9711 known as Food and Drug Administration (FDA) Act of 2009, and other pertinent laws for their proper and effective enforcement.
>
> Notwithstanding, it was expressly affirmed in the Joint Department of Agriculture and Department of Health Administrative Order (DA-AO No. 2005-001 and DOH AO No. 2005-0028) that "Philippine accession to the GATT-WTO and various bilateral and multilateral trade agreement requires compliance with international trade regulations, including the harmonization of national food standards with international food standard-setting body as the Codex Alimentarius Commission." The harmonization of standards, food in particular, is generally viewed as contributory factor to the protection of consumer health. Thus, the adoption of certain Codex standards is deemed imperative.

[194] Supra at note 94.

Accordingly, the Food Category System and Descriptors, which are parts of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018 or latest) Annex B, Part I and II is being adopted. This shall serve as a guide for identification and classification of food products by the Food and Drug Administration (FDA).

II. DIRECTIVE

The FDA hereby adopts the <u>Food Category System and Descriptors of the General Standard for Food Additives (CODEX STAN 192-1995, Rev. 2018)</u> Annex B, Part I and II, to serve as basis for the identification and classification of food products in its processing of applications for authorization.

Manufacturers (including repackers and toll-manufacturers), distributors (importers, wholesalers), and traders, of raw materials, ingredients and/or finished food products must conform to these standards for purposes of identification and classification, and compliance with the necessary regulatory registration requirements of the FDA.[195]

...

Having settled that Section 47 of the TRAIN Law (which introduced Section 150-B into the NIRC of 1997, as amended) and the SBT Regulations adopted the food categories and descriptions under the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017) as of 01 January 2018, it thus follows that not only the inclusions but also the exclusions from the coverage of SBT of food product categories therein referenced are already effective at the time of the subject transactions and/or removals of MILO® products from petitioner's Lipa plant and its co-manufacturers' plants.

This Court will now examine the nature of petitioner's refund claim of alleged erroneously or illegally paid SBT on its MILO® products to ascertain which of the two (2) contrasting legal principles applies. Is the claim based on the taxpayer's erroneous payment of the tax, or the government's imposition of the tax in the absence of a legal basis, thereby necessitating the application of the well-established doctrine of strict interpretation in favor of the taxpayer in tax imposition? Or does

195 Emphasis and underscoring supplied.

it partake the nature of a tax exemption such that the rule of strict interpretation against the taxpayer is always applicable?

THE APPLICABLE RULE IN THIS CASE IS THE STRICT CONSTRUCTION OF TAX EXEMPTIONS AGAINST THE TAXPAYER.

At the outset, it bears to point out that when petitioner argued that its MILO® products are not subject to SBT on the ground that they should be classified as "milk", which is expressly excluded from the definition of "sweetened beverage" under Section 150-B(B)(1)(f)[196] of the NIRC of 1997, as amended by the TRAIN Law, and which is among the exclusions from the scope of SBT under Section 150-B(C)(1)[197] of the same law, it seeks to be exempt from excise taxes on its MILO® products.

Based on this premise, if the TRAIN Law had not explicitly provided for exclusions from the SBT's scope, petitioner's MILO® products would unequivocally be subject to SBT, as provided in Section 150-B(A)(1), in relation to Section 150-B(B)(1), of the NIRC of 1997, as amended by the TRAIN Law.

As aptly held in the assailed Decision, petitioner's MILO® products fit squarely within the definition of the umbrella term "sweetened beverages", because they are non-alcoholic beverages that is in powdered form, pre-packed and sealed in accordance with the FDA standards. Moreover, MILO® products contain caloric sweetener such as sugar, which is widely known as a sweet substance. Given these factors and if not for the alleged exemption under Section 150-B(C)(1)[198] of the NIRC of 1997, as amended, MILO® products, therefore, fall within the scope of the taxing provision under Section 150-B(B)(1), of the NIRC of 1997, as amended by the TRAIN Law.

Since petitioner's refund claim is essentially anchored on the tax exemption for milk products under Section 150-B(C)(1) of the NIRC of 1997, as amended, the same must be construed strictly against petitioner applying the rule of strict construction of laws granting tax exemptions.

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196 Supra at note 162.
197 Supra at note 78.
198 Supra at note 78.

It is well-settled that tax exemption is a result of legislative grace. The one who claims an exemption from the burden of taxation must justify such claim by showing that the legislature intended to exempt it by words too plain to be mistaken. The rule is that tax exemptions must be strictly construed such that the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention.[199]

Accordingly, to fall within the coverage of the exclusion under Section 150-B(C)(1) of the NIRC of 1997, as amended, it is incumbent upon petitioner to clearly and distinctively state the basis for its claim and prove that its MILO® products fall under the food category "milk products" exempt from SBT. The classification of MILO® products would thus depend on whether it meets the criteria for such exemption.

PETITIONER'S MILO® PRODUCTS FALL UNDER THE FOOD CATEGORY "MILK PRODUCTS" EXEMPT FROM SWEETENED BEVERAGE TAX (SBT), AS PROVIDED IN SECTION 150-B(C)(1) OF THE NATIONAL INTERNAL REVENUE CODE (NIRC) OF 1997, AS AMENDED.

Petitioner submits that its MILO® products are not subject to SBT as they are properly classified as "flavored milk" based on the Food Category Descriptors of the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest), embraced in the phrase "all milk products" and thereby, excluded from the imposition of SBT pursuant to Section 150-B(C)(1) of the NIRC of 1997, as amended by the TRAIN Law.

We agree with petitioner.

As afore-quoted, Section 150-B(C)(1) of the NIRC of 1997, amended by the TRAIN Law, reads as follows:

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199 *Commissioner of Internal Revenue v. Fortune Tobacco Corporation*, G.R. Nos. 167274-75, 21 July 2008.

> ...
>
> SEC. 150-B. *Sweetened Beverages.* —
>
> ...
>
> (C) *Exclusions.* — **The following products**, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA, **are <u>excluded</u> from the scope of this Act**:
>
> (1) **All milk products, including** plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and **flavored milk**, fermented milk, soymilk, and flavored soymilk[.][200]
>
> ...

Section 6 of the SBT Regulations likewise above-quoted pertinently provides:

> ...
>
> SEC. 6. *Exclusions.* — **The following products**, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev 2017 or the latest) as adopted by the FDA, **are not subject to the excise tax imposed under Section 150-B of the NIRC, as amended, to wit**:
>
> a. **All milk products, including** plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk, **flavored milk**, and fermented milk.
>
> <u>Milk product refers to products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing (Codex General Standard for the Use of Dairy Terms (Codex Stan 206-1999).</u>
>
> **In accordance with the Codex Alimentarius, the following Codex Standards for various milk products are adopted:**
>
> 1. **Milk powders and cream powder (Codex Stan 207-1999)**
> 2. **Fermented milks (Codex Stan 243-2003)**
> 3. **Blend of evaporated skimmed milk and vegetable fat (Codex Stan 250-2006)**
> 4. **Blend of skimmed milk and vegetable fat in powdered form (Codex Stan 251-2006)**

[200] Emphasis and underscoring supplied.

> 5. **Blend of sweetened condensed skimmed milk and vegetable fat (Codex Stan 252-2006)**
> 6. **Evaporated milks (Codex Stan 281-1971)**
> 7. **Sweetened condensed milks (Codex Stan 282-1971)**
>
> **<u>Dairy products are not synonymous with milk products. Only milk products are covered by the exemption.</u>**
>
> b. Soymilk and flavored soymilk shall refer to products, the main ingredients of which are the soybean and/or soy derivative(s) (*e.g.*, soybean flour, soybean concentrates, soybean isolates or defatted soya) and water which are produced without fermentation process. (Codex Stan. CXS 322R-2015)
>
> ...
>
> The proper classification of beverages shall be subject to the determination by the FDA.[201]
>
> ...

Unlike the umbrella term "sweetened beverage", the TRAIN Law does not explicitly define "milk product". Instead, it provides a list of milk variations covered under this category, including, but not limited to, plain milk, infant formula, follow-on formula, growing-up milk, powdered milk, ready-to-drink milk, flavored milk, and fermented milk.

Nonetheless, **Section 6(a) of the SBT Regulations, defines "milk product" as products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing. This provision expressly refers to Codex Stan 206-1999[202], from which it derives the definition of "milk product." It also adopts seven (7) Codex Standards for various milk products, providing further guidance on identifying products covered by the SBT exemption for milk products.**

It is worth noting that the TRAIN Law and the SBT Regulations do not specify definitions for any of the variations of milk products mentioned after the phrase "[a]ll milk products," such as "flavored milk." Therefore, to determine whether the subject MILO® products can be classified as "flavored milk," one

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201 Emphasis and underscoring supplied.
202 Supra at note 102.

must refer to the food categories and descriptions under the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017), as adopted pursuant to the SBT Regulations.

An examination of the Food Category System and Descriptors of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2017)[203], Part I and II, reveals that the description for the term "flavored fluid milk drinks" under Food Category 01.1.4 includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavorings and/or food ingredients that intentionally impart flavor, excluding mixes for cocoa (cocoa-sugar mixtures, Category 05.1.1), *viz*:

> ...
> FOOD CATEGORY SYSTEM
>
> PART I: Food Category System
>
> 01.0 Dairy products and analogues, excluding products of food category 02.0
>
> 01.1 Fluid Milk and Milk Products
> 01.1.1 Fluid Milk (plain)
> 01.1.2 Other Fluid Milk (plain)
> 01.1.3 Fluid Buttermilk (plain)
> 01.1.4 **Flavoured Fluid Milk Drinks**
>
> PART II: Food Category Descriptors
> ...
>
> 01.0 Dairy products and analogues, excluding products of food category 02.0:
>
> **Includes all types of dairy products that are derived from the milk of any milking animal (e.g. cow, sheep, goat, buffalo).** In this category, with the exception of food category 1.1.4, a "plain" product is one that is not flavoured, nor contains fruit, vegetables or other non-dairy ingredients, nor is mixed with other non-dairy ingredients, unless permitted by relevant standards. Analogues are products in which milk fat has been partially or wholly replaced by vegetable fats or oils.
>
> 01.1 Fluid milk and milk products

203 Exhibit "P-69", Division Docket, Volume VI, pp. 2462-2506.

> **Includes all** plain and **flavoured fluid milks** based on skim, part-skim, low-fat and whole milk, excluding plain fermented products and plain renneted milk products of food category 1.2. **Fluid milks are 'milk products' as defined in CODEX STAN 206-1999, that are obtained by the processing of milk, and may contain food additives and other ingredients functionally necessary for processing.** Raw milk ("milk" as defined in CODEX STAN 206- 1999) shall not contain any food additives.
>
> ...
>
> <u>01.1.4 Flavoured fluid milk drinks</u>
>
> **Includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavourings and/or food ingredients that intentionally impart flavour, excluding mixes for cocoa (cocoa-sugar mixtures, category 05.1.1). Examples, include but are not limited to**, chocolate milk, **<u>chocolate malt drinks</u>**, strawberry-flavoured yoghurt drink, lactic acid bacteria drinks, whey-based drinks, and lassi (liquid obtained by whipping curd from the lactic acid fermentation of milk, and mixing with sugar or intense sweetener).[204]
>
> ...

Based on the foregoing description, a product intended to be classified as "flavored fluid milk drinks" must align with the definition of "fluid milk" under Food Category 01.1, to which it belongs. Notably, this definition is identical to that provided in Section 6(a)[205] of the SBT Regulations, that is, products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing, as previously mentioned. Therefore, determining whether a product meets the definition of a "milk product" requires analyzing its composition and the production process involved in its manufacture.

The foregoing interpretation is in line with the BIR's subsequent clarification in Revenue Memorandum Circular (RMC) No. 112-2023[206] regarding the scope of milk products, as

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[204] Underscoring in the original text and emphasis supplied.

[205] Supra at pp. 41-42.

[206] *Clarification on the Duty of the FDA to Determine Classification of Beverages Pursuant to Sec. 150-B of the NIRC of 1997, as Amended, and as Implemented by RR No. 20-2018, Revenue Memorandum Circular No. 112-2023.*

contemplated by Section 150-B of the NIRC of 1997, as amended by the TRAIN Law, *viz*:

...

To illustrate, Section 150-B (C) of the NIRC of 1997, as amended, and Section 6 of RR No. 20-2018 expressly exclude **all milk products**, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and flavored milk, fermented milk, soymilk, and flavored soymilk from the coverage of sweetened beverages subject to excise tax under Section 150-B (B) (1) of the same Code.

A careful reading of the Food Category Descriptors from Codex Stan 192-1995, Rev. 2018 or latest, as adopted by the FDA, reveals that descriptions of some milk products admit of exclusions.

As an example, under the category Fluid Milk and Milk Products, the Codex lists Fluid Milk (plain), Other Fluid Milk (plain), Fluid Buttermilk (plain), and Flavoured Fluid Milk Drinks, to wit:

...

The description for **Flavoured Fluid Milk Drinks** under 01.1.4 of the Codex is as follows: "Includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavourings and/or food ingredients that intentionally impart flavour, excluding mixes for cocoa (cocoa-sugar mixtures, category 05.1.1). It should be noted that the said description should satisfy or be aligned with the definition of **Fluid Milk** under 01.1, the category under which Flavoured Fluid Milk Drinks belongs, as "'milk products' . . . that are obtained by the processing of milk, and may contain food additives and other ingredients functionally necessary for processing."

Therefore, the classification of a product under consideration, as to whether it satisfies the definition of **milk product**, (*i.e.*, "products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing") **necessarily entails an analysis of its composition and the production process involved in its manufacture**.

In the light of the foregoing discussion, with emphasis on milk products, a review of the relevant Codex Stan shows that a product which contains milk, or marketed and advertised as a "milk drink" does not automatically make it a flavoured fluid milk drink or any of the other milk products enumerated in the Codex Stan that fall within the coverage of products excluded from the sweetened beverage excise tax under Section 150-B (C) of the NIRC of 1997, as amended, and Section 6 of RR No. 20-2018.

> To fall within the scope of milk products as contemplated by Section 150-B of the same Code, a product must satisfy the descriptors set forth in the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2018 or Latest) that the FDA adopted or any revision thereof that the agency will adopt in the future. Only when the Codex Stan includes a product or beverage as belonging to the milk product categories listed thereunder, whether by express inclusion or based on an analysis of the ingredients and the production process, that such product or beverage may be classified as a milk product and, hence, excluded from the sweetened beverage excise tax. Furthermore, a determination of whether a beverage is a milk product within the meaning of the Codex, and hence excluded from excise tax, also requires an analysis of its composition and the production process. On the other hand, when the Codex Stan explicitly excludes certain products or beverages from a milk product category, then the same are not deemed as milk products and, therefore, excluded from the exclusion from the coverage of sweetened beverages and, hence, subject to excise tax.[207]
>
> ...

Thus, for the period prior to the FDA's adoption of the 2018 revision of Codex Standard 192-1995, to be classified as a milk product under Section 150-B of the NIRC of 1997, as amended by the TRAIN Law, and thus exempt from SBT, a product must meet the criteria outlined in the 2017 revision of Codex Stan 192-1995[208], as adopted pursuant to the SBT Regulations. This classification depends on whether Codex Stan 192-1995 explicitly includes the product in the milk product categories, or if it qualifies based on an analysis of its ingredients and production process. Conversely, products or beverages explicitly excluded by Codex Stan 192-1995 from the milk product categories are not considered milk products and are subject to SBT.

For purposes of identifying and classifying beverages, Section 6(a)[209] of the SBT Regulations pertinently provides that proper classification of beverages shall be subject to the FDA's determination. RMC No. 112-2023[210] also clarified the FDA's role in determining beverage classification, stating that "the FDA's

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207 Emphasis and underscoring in the original text and supplied.
208 Exhibit "P-69", supra at note 203.
209 Supra at p. 41.
210 Supra at note 206.

identification and classification of food products, in general, is undertaken for the purpose of processing applications for authorization that food manufacturers and traders of raw materials submit to the agency, and the Codex it has adopted serves as the basis for such identification and classification." It is also emphasized therein that "[i]ntegral and central to proper classification is the mandatory use of and reference to the relevant Codex as basis for such classification".

It is important to note that while the FDA's classification of beverages is not definitive for taxation purposes, it is still instructive and can be relied upon, unless there is evidence that it failed to adhere strictly to the applicable Codex Descriptors. This is precisely because the responsibility for accurately classifying beverages falls on the FDA. Accordingly, the food categorization indicated in the application for registration approved by the FDA may validly be considered for purposes of evaluating the taxability or non-taxability of food products; the same possessing the presumption of regularity.

Applying the aforementioned parameters, petitioner's MILO® products must satisfy two (2) criteria to be classified a milk product under Food Category 01.1.4 "flavored fluid milk drinks" ***per*** **Codex Stan 192-1995 (Rev. 2017)[211]:** ***first*****, they must be determined by the FDA to fall under this milk product category, whether by express inclusion or based on an analysis of the ingredients and the production process; and** ***second*****, they must not be excluded from this category.**

As to the ***first criterion***, petitioner's MILO® products apparently fall under Food Category 01.1.4 "flavored fluid milk drinks" considering that the product names thereof commonly include "MILK DRINK" and they belong to the food categorization "HRA 1b. Dairy-based drinks, flavored and/or fermented", as indicated in the FDA-issued CPRs and the Application Details attached thereto, respectively, as shown below:

211 Exhibit "P-69", supra at note 203.

FDA Registration No.	Product Name	Exhibit No.	Food Categorization	Exhibit No.
FR-4000003074211	CHOCO MALT POWDERED **MILK DRINK** (INSTITUTIONAL PACK)	"P-56"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-56-1"
FR-4000003086801	CHOCO MALT POWDERED **MILK DRINK** (INSTITUTIONAL PACK)	"P-57"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-57-1"
FR-4000002772505	POWDERED MALT AND **MILK DRINK** 22g	"P-58"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-58-1"
FR-4000002780597	POWDERED CHOCO MALT **MILK DRINK** 88g	"P-59"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-59-1"
FR-4000002780601	CHOCO MALT POWDERED **MILK DRINK** 220g, 300G, 600g, 1Kg	"P-60"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-60-1"
FR-40000002780614	POWDERED CHOCO MALT **MILK DRINK** 22g	"P-61"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-61-1"
FR-4000002780627	POWDERED CHOCO MALT **MILK DRINK**	"P-62"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-62-1"
FR-4000002780643	POWDERED CHOCO MALT **MILK DRINK**	"P-63"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-63-1"
FR-4000002780656	CHOCO MALT POWDERED **MILK DRINK** 22g	"P-64"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-64-1"
FR-4000002780669	CHOCO MALT POWDERED **MILK DRINK** 22g	"P-65"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-65-1"
FR-4000002652050	CHOCO MALT POWDERED **MILK DRINK** FOR ADULTS 24g	"P-66"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-66-1"
FR-4000002759331	POWDERED CHOCO MALT **MILK DRINK** FOR ADULTS	"P-67"	HRA 1b. **Dairy-based drinks, flavored** and/or fermented	"P-67-1"
FR-4000002759399	CHOCO MALT POWDERED **MILK DRINK** FOR ADULTS 24g	"P-68"	HRA 1b. **Dairy-based drinks,**	"P-68-1"

FDA Registration No.	Product Name	Exhibit No.	Food Categorization	Exhibit No.
			flavored and/or fermented	

Additionally, based on the description of the term "flavored fluid milk drinks" under Food Category 01.1.4, petitioner's MILO® products may be classified as such since the examples enumerated therein specifically include "chocolate malt drinks", to wit:

> ...
>
> 01.1.4 Flavoured fluid milk drinks
>
> **Includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavourings and/or food ingredients that intentionally impart flavour, excluding mixes for cocoa (cocoa-sugar mixtures, category 05.1.1). Examples, include but are not limited to**, chocolate milk, **chocolate malt drinks**, strawberry-flavoured yoghurt drink, lactic acid bacteria drinks, whey-based drinks, and lassi (liquid obtained by whipping curd from the lactic acid fermentation of milk, and mixing with sugar or intense sweetener).[212]
>
> ...

As testified to by petitioner's expert witness, Dr. Hartigan-Go, the FDA's approval of the CPRs for the subject MILO® products indicates that: (1) they comply with all FDA regulations; (2) they may be labelled based on the product names reflected therein; (3) the product names indicate the true nature thereof; (4) the addition of the term "milk" in their product names means that they fall under the definition of "milk", "milk product" or "composite milk product" under Codex Stan 206-1999[213]; and, (5) the FDA has checked the maximum allowable amount of additives for the purpose of classifying them under the sub-category of "flavored fluid milk drinks" and approving the product names "choco malt powdered milk drink" or "powdered choco malt milk drink", *viz*:[214]

> ...
>
> Q 8 : Dr. Go, I am showing to you the Certificates of Product Registration ("**CPRs**") for the following MILO® Products,

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212 Underscoring in the original text and emphasis supplied.

213 Supra at note 102.

214 Exhibit "P-98", supra at note 71, pp. 1145-1149; Emphasis and italics in the original text and underscoring supplied.

which have been previously submitted to the Honorable Court marked as Exhibits P-56 to P-68. The CPRs indicate that the approved names of the MILO® Products are "choco malt powdered milk drink" and "powdered choco malt milk drink". What does the FDA's approval of the product names "choco malt powdered milk drink" and "powdered choco malt milk drink" signify?

A 8 : **Approval of CPR means that the product <u>complies with all FDA regulations</u>. It means that, among others, MILO® Products can be labeled as such, according to the rules governing the labelling of food products.**

Q 9 : What is the current governing regulatory issuance on the labelling of food products?

A 9 : **As far as I know, it's still DOH Administrative Order No. 2014-0030 ("AO 2014-0030"), which was signed and issued by the DOH Secretary in 2014 and during my time as Director General of the FDA.**

Q 10 : Can you please briefly tell us what AO 2014-0030 provides?

A 10 : **AO 2014-0030 provides the General and Specific Rules and Regulations for labelling. It prescribes the mandatory labeling information on pre-packaged foods which includes use of brand name or trademark, <u>product name</u>, ingredients and allergen declaration, nutrition facts, etc.**

AO 2014-0030 also states that the product name shall be specific and not generic. <u>It should indicate the true nature of the food.</u> The product name should also <u>not be misleading, deceptive or confusing</u>. AO 2014-0030 also states that <u>where a product name or names have been established for a particular food in a Food Standard, any one of the names shall be used</u>.

...

Q 15 : In your opinion, under what food category in the food category system of CODEX STAN 192-1995 do the MILO® Products belong?

A 15 : **The Milo Products are *flavored milk*. They fall under Food Category 01.1.4 on "flavoured fluid milk drinks" of CODEX STAN 192-1995.**

Q 16 : Why do you say that?

A 16 : **The Food Category System of CODEX STAN 192-1995 is generally based on product descriptors of food products as marketed. <u>The product descriptor of a food product determines the food category of a food product.</u>**

Milo is registered with the FDA and marketed as a "choco malt milk drink." <u>"Choco malt drink" is listed under 01.1.4 of CODEX STAN 192-1995 as an example of "flavoured fluid milk drinks." Therefore, Milo Products are *flavored milk.*</u>

Q 17 : Dr. Go, under CODEX STAN 192-1995, how much milk must a food product have, in terms of percentage of the ingredients, for that food product to qualify as a "flavored milk" drink under Category 01.1.4?

A 17 : **Actually, the CODEX STAN 192-1995 does not set a specific minimum percentage or amount of milk in a food product for it to be qualified as flavored milk.**

Q 18 : Does this mean that the only pre-requisite for falling under any of the "milk" food categories in CODEX STAN 192-1995 is the product's use of the term "milk" and not the actual composition or ingredients of the food product?

A 18 : **No, that is not accurate. <u>While the product descriptor is used as the basis for determining the particular food category of a food product, it is still the actual composition of the food product, which would allow you to use a particular product descriptor and thus, be classified under a particular food category.</u>**

For instance, I cannot put a drop of milk in a malt drink, call it a "milk-based drink with flavoring" and say that the food product should be classified under Category 01.1.4 of CODEX STAN 192-1995, which is a milk food category. <u>That food product will still have to comply with a certain standard for milk in order to qualify for the product descriptor "milk-based drink with flavoring."</u>

Q 19 : What standard did the Milo Products have to comply with in order to qualify for the product descriptor "milk-based drink with flavoring" and thus, fall under Category 01.1.4?

A 19 : **CODEX STAN 206-1999 or the General Standard for Use of Dairy Terms.**

Q 20 : What is this standard?

A 20 : **This standard provides the requirements needed to be able to use the term "milk." A food product must fall under the definition of "milk", "milk products," or "composite milk product" under CODEX STAN 206-1999, or satisfy some other criteria found in CODEX STAN 206-1999 before it can use the term "milk."**

Q 21 : Under what definition in CODEX STAN 206-1999 do MILO® Products belong?

A 21 : **Composite Milk Products.**

Q 22 : What is the definition of Composite Milk Products under CODEX STAN 206-1999?

A 22 : **Under Clause 2.3 of CODEX STAN 206-1999, *Composite milk product* "is a product of which the milk, milk products or milk constituents are an essential part in terms of quantity in the final product, as consumed provided that the constituents not derived from milk are not intended to take the place in part or in whole of any milk constituent."**

Q 23 : Why do you say that MILO® Products fall under the definition of Composite Milk Product in CODEX STAN 206-1999?

A 23 : **Milk is an essential part of the MILO® Products in terms of quantity and the constituents derived from milk are not intended to take the place in part or whole of any milk constituent.**

I was informed that milk is either the main or second main ingredient in the MILO® Products. If you break down the Active Go (Protomalt Malt Extract) ingredient into its components, which are water, barley, starch, vitamins and minerals, milk would actually make up the biggest portion of the MILO® Products. The other ingredients serve to add flavor or nutritional value to the MILO® Products but are not meant to replace milk.

Q 24 : The heading of Food Category 01.1.4 of CODEX STAN 192-1995 is Flavoured Fluid Milk Drink. The MILO® Products are in powdered form. Why do you say that these powdered MILO® Products still fall under the Food Category 01.1.4 of the Codex?

A 24 : **CODEX STAN 192-1995 describes Flavoured Fluid Milk Drink as 'all mixes' with certain examples of powdered milk products and do not state certain exclusion of liquid milk products.**

Q 25 : What are the requirements for food products like MILO® Products that should be submitted to the FDA for the application of a CPR?

A 25 : **Among others, the manufacturer has to submit product information such as the list of ingredients, including the amount of additives. The manufacturer has to submit a product shot to illustrate its commercial presentation, product labels and other technical documents such as certificate of analysis to substantiate the declaration of any information that are declared on the label.**

Q 26 : You mentioned additives, why does the FDA ask for the list of additives?

A 26 : **The FDA will check if the additives for a particular food product are within acceptable limits.**

Q 27 : What standard does the FDA use to check if the additives in a food product are within acceptable limits?

A 27 : **CODEX STAN 192-1995.**

Q 28 : How does the FDA determine the limits for a particular food product?

A 28 : **The FDA checks the CODEX STAN 192-1995 for the acceptable limit for food additives for a certain food product. This means that the FDA would have to determine to what particular food category in CODEX STAN 192-1995 that food product belongs and looks at the corresponding maximum amounts for additives for that particular food category.**

Q 29 : What does it mean if the FDA checked the additives in MILO® Products and issued CPRs for the MILO® Products approving the product names "choco malt powdered milk drink" or "powdered choco malt milk drink"?

A 29 : **Since the FDA approved the product names "choco malt powdered milk drink" or "powdered choco malt milk drink", it necessarily means that the FDA classified the MILO® Products under Category 01.1.4 Fluid Flavoured Milk Drinks and checked the maximum allowable amount of additives for that food category. This further signifies that MILO® Products fall under Category 01.1.4 of the Food Category System of CODEX STAN 192-1995.**

...

Furthermore, based on the uncontested testimony of Bueno-Gonzales, petitioner's Head of the Regulatory and Scientific Affairs, MILO® products fall under the definition of "composite milk product" *per* Codex Stan 206-1999[215], which, as aforesaid, was cited in Section 6(a)[216] of the SBT Regulations, and used by the FDA in approving the inclusion of the word "milk" in the product name, as shown below:[217]

...

Q 33 : What is composite milk?

A 33 : **According to Section 2.4 of the CODEX General Standard for the Use of Dairy Terms or the CODEX STAN 206-1999, a composite milk product is a product of which the milk, milk products or milk constituents are *<u>an essential part in terms of quantity in the final product, as consumed</u>*, provided that the constituents not derived from milk are not intended to take the place in part or in whole of any milk constituent.**

...

Q 44 : To classify a product as milk product, the TRAIN Act uses the "Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA" as reference. Is there anything in Codex Stan 206-1999, under which you said Milo is classified as composite milk, that conflicts with the classification of Milo as flavored milk drink under Category 01.1.4 of Codex Stan 192-1995, Rev. 2017 or latest?

A 44 : **None.**

Q 45 : Why do you say that?

A 45 : **Again, the approval from the FDA thru the CPR, evidences the correct use of the Codex references and the relevant laws and regulations that are used by the FDA, e.g. use of food category descriptors and the food additives accordingly, the use of dairy term or milk in naming and labeling the product.**

Q 46 : What is the FDA's opinion on the classification of MILO® Products?

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215 Supra at note 102.
216 Supra at pp. 42-43.
217 Exhibit "P-96", supra at note 68, pp. 965-970; Emphasis and italics in the original text and underscoring in the original text and supplied.

A 46 : **The FDA issued CPRs which approved the product name 'choco malt powdered milk drinks' or 'powdered choco malt milk drinks'. The FDA will approve the use of milk in a product name only if the product complies with the requirements of CODEX STAN 206-1999, which provides the guidelines on the use of dairy terms. In addition, the FDA regulation on labeling of pre-packaged foods explicitly requires product name or product descriptor that provides the true identity of the product.**

Also, in a letter dated 24 July 2018, the FDA stated that "[o]nce the AO is approved, MILO Choco Malt Powdered Milk Drink may be classified as a composite milk product."

...

Q 48 : Do you agree with what the FDA said in the letter dated 24 July 2018 that MILO® Products may be classified as composite milk products?

A 48 : **Yes.**

Q 49 : Why?

A 49 : **MILO® Products are appropriately described as composite milk products. That is, they satisfy the provisions for composite milk products as per CODEX STAN 206-1999, e.g. milk is an essential ingredient of MILO® products. Thus, it is appropriately described with its key ingredients as a powdered choco malt milk drink or a choco malt powdered milk drink. The FDA's pronouncement in this letter is consistent with the CPRs it issued for MILO® Products. The CPRs do not specifically mention 'composite milk product' but FDA can allow the use of 'milk' in the product name only if milk is an essential ingredient in the product.**

...

Q 52 : Can Milo be classified as a composite milk product without the AO?

A 52 : **Yes.**

Q 53 : Please explain your answer.

A 53 : **As I mentioned, in the case of MILO® Products, milk is an essential ingredient in terms of quantity in the final product, as consumed, to satisfy both the products' nutritional offering and taste profile. Without milk, Milo**

> **<u>will not be Milo.</u> This means that with or without the AO, MILO® Products would fall under the term "composite milk" as defined under CODEX STAN 206-1999.**
>
> ...

It bears stressing that the FDA's classification of petitioner's MILO® products under Food Category 01.1.4 "flavored fluid milk drinks" necessarily inferred from the approval of the product names "choco malt powdered milk drink" or "powdered choco malt milk drink" enjoys the presumption of regularity as it was done in the performance of the FDA's official duty.[218] In the absence of any contrary evidence, as in this case, such presumption prevails.

Clearly from the foregoing, there is sufficient basis to declare that petitioner's MILO® products have met the *first criterion* that they are determined by the FDA to fall under the "flavored fluid milk drinks" milk product category by express inclusion in Codex Stan 192-1995 (Rev. 2017).[219]

We now proceed to examine compliance with the ***second criterion*** that petitioner's MILO® products must not be excluded from the "flavored fluid milk drinks" milk product category.

Regarding the exception mentioned in the description of "flavored fluid milk drinks—namely, "mixes for cocoa (cocoa-sugar mixtures)"—further reference should be made to the description provided under Food Category 05.1.1 of Codex Stan 192-1995 (Rev. 2017), to wit:

> ...
>
> <u>05.1.1 Cocoa mixes (powders) and cocoa mass/cake:</u>
>
> Includes a variety of products that are used in the manufacture of other chocolate products or in the preparation of cocoa-based beverages. Most cocoa products have their origin in the cocoa nib,

[218] Section 3(m), Rule 131, Rules of Court, as amended.

SECTION 3. *Disputable Presumptions.* — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

...

(m) That official duty has been regularly performed[.]

[219] Exhibit "P-69", supra at note 203.

> which is obtained from cocoa beans that have been cleaned and freed from the shells. Cocoa mass is obtained from the mechanical disintegration of the nib. Depending on the desired finished chocolate product, the cocoa nib or mass may be treated by an alkalinization process that mellows the flavour. Cocoa dust is the fraction of the cocoa bean produced as a product during winnowing and degerming. Cocoa powder is produced by reducing the fat content of cocoa mass or liquor by pressing (including expeller pressing) and molding into a cocoa press cake. The cocoa press cake is disintegrated and ground to cocoa powder. Cocoa liquor is a homogeneous flowing paste produced from the cocoa nib, which has been roasted, dried, disintegrated and milled. **Cocoa-sugar mixtures contain only cocoa powder and sugar.** Chocolate powder for beverages is made from cocoa liquor or cocoa powder and sugar to which flavouring (e.g. vanillin) may be added. Examples include: drinking chocolate powder; breakfast cocoa; cocoa dust (fines), nibs, mass, press cake; chocolate liquor; cocoa mixes (powders for preparing the hot beverage); cocoa-sugar mixture; and dry mixes for sugar-cocoa confectionery. **<u>Finished cocoa beverages and chocolate milk are included in category 01.1.4</u>, and most finished chocolate products are included in category 05.1.4.**[220]
>
> ...

Contrary to the Third Division's ruling and based on the above description of Food Category 05.1.1 "cocoa mixes (powders) and cocoa mass/cake" *per* Codex Stan 192-1995 (Rev. 2017)[221], petitioner's MILO® products cannot be classified as "mixes for cocoa (cocoa-sugar mixtures)". This is because, firstly, such a sub-food category is supposed to contain only cocoa powder and sugar. Secondly, "finished cocoa beverages and chocolate milk" are explicitly included in Food Category 01.1.4 (*i.e.*, "flavored fluid milk drinks"), and therefore, they are necessarily excluded from Food Category 05.1.1.

Accordingly, petitioner's MILO® products have also met the *second criterion* that they are not excluded from the "flavored fluid milk drinks" milk product category.

It is noteworthy that the FDA's classification of petitioner's MILO® products as Food Category 01.1.4 "flavored fluid milk drinks", consistent with the food categorization *per* Codex Standard 192-1995 (Rev. 2017),

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220 Citations omitted, underscoring in the original text and emphasis supplied.

221 Exhibit "P-69", supra at note 203.

implies that this Court need not further scrutinize the contents or ingredients of petitioner's MILO® products to assess their non-taxability or the validity of their inclusion under the tax exemption for milk products specified in Section 150-B(C)(1) of the NIRC of 1997, as amended. The Court's examination should be confined to determining compliance with the aforementioned criteria for the SBT exemption for milk products.

In conclusion, We find petitioner's MILO® products as not subject to the excise tax on sweetened beverages imposed under Section 150-B of the NIRC of 1997, as amended by the TRAIN Law, for being classified as a 'milk product' under the sub-food category "flavored fluid milk drinks". Consequently, petitioner is entitled to the refund of the excise taxes it paid relating to the April 2018 removals of MILO® products from its Lipa plant and the plants of its co-manufacturers, summarized as follows:

Manufacturing Site	Period Covered	Total Deposits	Total Tax Due and Paid	Exhibit Nos.[222]
Lipa	April 2018	₱101,230,782.02	₱80,889,554.70	"P-1" to "P-1-1", "P-2" to "P-2-1", "P-3" to "P-3-1", "P-4" to "P-4-1", "P-5" to "P-5-1", "P-6" to "P-6-1", "P-7" to "P-7-1", "P-8" to"P-8-1", "P-9" to "P-9-1"
Co-Manufacturers	April 2018	212,090,465.17	173,037,163.80	
Total		**₱313,321,247.19**	**₱253,926,718.50**	

WHEREFORE, premises considered, the present Petition for Review filed by petitioner Nestle Philippines, Inc. on 25 November 2022 is hereby **GRANTED**. Accordingly, the Third Division's Decision dated 31 May 2022 and Resolution dated 18 October 2022, respectively, in CTA Case No. 9943 entitled *Nestle Philippines, Inc. v. Commissioner of Internal Revenue*, are **REVERSED** and **SET ASIDE**.

Respondent Commissioner of Internal Revenue is hereby **ORDERED** to refund or issue a tax credit certificate in favor of petitioner Nestle Philippines, Inc. in the total amount of

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222 Supra at note 26.

₱253,926,718.50, representing the erroneously paid excise tax on sweetened beverages covering the April 2018 removals of MILO® products from its Lipa plant and the plants of its co-manufacturers.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

(With due respect, I dissent; I adopt the ratio decidendi of the assailed Decision of the Court in Division)
ROMAN G. DEL ROSARIO
Presiding Justice

(With due respect, please see Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

(With due respect, I join the Dissenting Opinion of Justice Liban)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

(With due respect, I join the Dissenting Opinion of Justice Liban)
MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

HENRY S. ANGELES
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.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

NESTLE PHILIPPINES, INC.,

Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CTA EB NO. 2711
(CTA Case No. 9943)

Present:
DEL ROSARIO, *P.J.*,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID,
FERRER-FLORES, *and*
ANGELES, *JJ.*

Promulgated:
JUL 1 1 2024 4:18 pm

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DISSENTING OPINION

RINGPIS-LIBAN, ***J.:***

With all due respect, I dissent from the majority decision which reversed the May 31, 2022 Decision and October 18, 2022 Resolution of the Third Division, and instead ordered the refund or issuance of a tax credit certificate in favor of Petitioner in the total amount of Php253,926,718.50, allegedly representing erroneously paid excise tax on sweetened beverages ("SBT") covering the April 2018 removals of MILO® products from its Lipa plant and the plants of its co-manufacturers.

According to the *ponencia*, the subject payments of SBT on Petitioner's MILO® products are erroneous or illegal. The MILO® products do not fall within the taxing provision of Section 150-B(A)(1)[1], in relation to Section 150-

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1 **SEC. 150-B.** *Sweetened Beverages.* –
(A) Rate and Base of Tax. – Effective January 1, 2018:

B(B)(1)[2] of the National Internal Revenue Code ("NIRC") of 1997, as amended by Republic Act (RA) No. 10963, or the Tax Reform for Acceleration and Inclusion Act (TRAIN Law), and they fall within the exclusion provision under Section 150-B(C)(1)[3], namely, milk products.

The confirmation that Petitioner's MILO® products fall under the food category fluid milk products (01.1), and flavoured fluid milk drinks (01.1.4) *per* Codex Stan 192-1995 (Rev. 2017) was made by Petitioner's witness, Dr. Kenneth Hartigan-Go, previous acting Director General of the Food and Drug Administration ("FDA").

Indeed, Section 6(a) of Revenue Regulations ("RR") No. 20-2018[4] (*i.e.*, the implementing rules of Section 150-B of the NIRC of 1997, as amended) mandates that the proper classification of beverages shall be subject to the determination by the FDA. Accordingly, Petitioner's MILO® products must be determined by the FDA to fall Food Category 01.1.4 "flavored fluid milk drinks" *per* Codex Stan 192-1995 (Rev. 2017) whether by express inclusion or based on an analysis of the ingredients and the production process.

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(1) A tax of Six pesos (P6.00) per liter of volume capacity shall be levied, assessed and collected on sweetened beverages using purely caloric sweeteners, and purely non-caloric sweeteners, or a mix of caloric and non-caloric sweeteners: Provided, further, That this tax rate shall not apply to sweetened beverages using high fructose corn syrup: Provided, further, That sweetened beverages using purely coconut sap sugar and purely steviol glycosides shall be exempt from this tax[.]

2 **SEC. 150-B.** *Sweetened Beverages.* –

xxx xxx xx

(B) Definition of Terms. – As used in this Act:

(1) Sweetened beverages (SBs) refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers, and shall include, but not limited to the following, as described in the Food Category System from Codex Alimentarius Food Category Descriptors(Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA:

(a) Sweetened juice drinks;
(b) Sweetened tea;
(c) All carbonated beverages;
(d) Flavored water;
(e) Energy and sports drinks;
(f) Other powdered drinks not classified as milk, juice, tea, and coffee;
(g) Cereal and grain beverages; and
(h) Other non-alcoholic beverages that contain added sugar.

3 **SEC. 150-B.** *Sweetened Beverages.* –

xxx xxx xx

(C) Exclusions. – The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA, as excluded from the scope of this Act:

(1) All milk products, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and flavored milk, fermented milk, soymilk, and flavored soymilk[.]

4 Prescribing the Implementing Rules and Guidelines on the Imposition of Excise Tax on Sweetened Beverages Pursuant to Section 47 of Republic Act No. 10963, Otherwise Known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law", July 25, 2018.

I am of the humble belief however that the Court should not give too much weight and probative value to the opinion of Dr. Hartigan-Go as expert witness.

The testimony of an expert witness is admissible in evidence under Section 49[5], Rule 130 of the Revised Rules of Evidence. Nonetheless, admissibility is different from weight of evidence which "pertains to evidence already admitted and its tendency to convince and persuade"[6]. It is important to note that courts are not bound by the testimonies of expert witnesses and it is never mandatory for judges to give substantial weight to expert testimonies.[7]

In the instant case, no technical examination was done by the expert witness on the questioned MILO® products as to their composition and ingredients. Dr. Hartigan-Go admitted in his Judicial Affidavit that he was only "informed that milk is either the main or second main ingredient in the MILO® products". Thus, his lack of personal knowledge casts doubt to the veracity of his claim that the main composition of the said MILO® products is milk, and that for all intents and purposes, fall under the milk product category per Codex Stan 192-1995 (Rev. 2017).

In addition, I am of the humble belief that Dr. Hartigan-Go is mistaken in his claim that the FDA's approval of the Certificates of Product Registration ("CPRs") of Petitioner's MILO® products already suffice for SBT purposes.

According to Dr. Hartigan-Go, the approval by the FDA of the products names "choco malt powdered milk drink" or "powdered choco malt drink" in the CPRs necessarily means that it complies with all FDA regulations, specifically Department of Health ("DOH") Administrative Order ("A.O.") No. 2014-0030; that the FDA classified the MILO® products under category Food Category 01.1.4 "flavored fluid milk drinks"; and that the MILO® products fall under the said food category *per* Codex Stan 192-1995 (Rev. 2017).

This conclusion is erroneous.

DOH A.O. No. 2014-0030[8] governs the rule by the FDA on the labelling of food products, and does not in any way indicate the guidelines on the approval by the FDA of a Certificate of Product Registration nor the categorization by the

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5 **SECTION 49.** *Opinion of expert witness.* — The opinion of a witness on a matter requiring special knowledge, skill, experience or training which he is shown to possess, may be received in evidence.

6 Fernando Mancol, Jr. v. Development Bank of The Philippines, G.R. No. 204289, November 22, 2017.

7 *See* Cebu Shipyard & Engineering Works, Inc. v. William Lines, Inc., G.R. No. 132607, May 05, 1999.

8 Revised Rules and Regulations Governing the Labeling of Prepackaged Food Products Further Amending Certain Provisions of Administrative Order No. 88-B s. 1984 or the "Rules and Regulations Governing the Labeling of Pre-packaged Food Products Distributed in the Philippines", and For Other Purposes, September 08, 2014.

FDA of a particular product under the food category it belongs. On the other hand, it is DOH A.O. No. 2014-0029[9], in particular Part VI thereof, which provides for the guidelines in the registration of processed food products and the approval by the FDA of a Certificate of Product Registration. And yet, this is not the proper determination by the FDA as referred to in RR No. 20-2018. For if a Certificate of Product Registration of a specific product is sufficient to categorize the same for SBT purposes, it is entirely unnecessary for the FDA to promulgate FDA Circular No. 2021-005[10]. Simply stated, the FDA itself recognized the need for an FDA Confirmation of product classification for SBT purposes other than the CPRs already issued.

From all the foregoing, I vote to **DENY** the instant Petition for Review for lack of merit.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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9 Rules and Regulations on the Licensing of Food Establishments and Registration of Processed Food, and other Food Products, and For Other Purposes, September 08, 2014.

10 Implementing Guidelines for Requesting FDA Confirmation of Product Classification and Type of Sweetener/s Used for SB Products, February 09, 2021.