22-000215-0043

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CTA CASE NO. 10855

BASF PHILIPPINES, INC.,
Petitioner ,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent .

NOTICE OF DECISION

To:

OFFICE OF THE SOLICITOR GENERAL
134 Amorsolo Street, Legazpi Village
Makati City

ATTY. APRILYN T. POBAR
Bureau of Internal Revenue
Legal Division, Revenue Region No.8B
2nd Floor, No.313 Sen. Gil Puyat Avenue
Makati City

ROMULO MABANTA BUENAVENTURA SAYOC & FROM THE ANGELS
21st Floor, AIA Tower (formerly Philam Tower)
8767 Roxas Avenue, Makati City

GREETINGS:

You are hereby notified by these presents that on **September 27, 2024,** a Decision was rendered in the above-entitled case, copy of which is attached hereto.

Quezon City, Philippines, **September 30, 2024.**

Atty. Maria Johoanna F. Chan-Te
Executive Clerk of Court II

REPUBLIC OF THE PHILIPPINES
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BASF PHILIPPINES, INC., *Petitioner*,

- versus -

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

CTA CASE NO. 10855

Members:

DEL ROSARIO, *P.J., Chairperson*,
BACORRO-VILLENA, *and*
CUI-DAVID, *JJ.*

Promulgated:

SEP 2 7 2024, 3:50PM

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DECISION

CUI-DAVID, J.:

Before the Court is the *Petition for Review* [1] filed by petitioner BASF Philippines, Inc. on May 11, 2022, praying for the Court to render judgment ordering respondent Commissioner of Internal Revenue to refund or issue a tax credit certificate in the amount of ₱7,560,000.00, representing petitioner's alleged erroneously paid and/or collected excise tax and value-added tax (VAT) on its importation of Lactolan ® LS 5879 on May 12, 2020.

THE PARTIES

Petitioner BASF Philippines, Inc. is a domestic corporation duly organized and existing under the laws of the Philippines and is primarily engaged in the production, manufacture, exportation, importation, and sale at wholesale of basic chemicals and chemical products of every nature and description and compounds, intermediates, derivatives and by-products thereof. [2] It is registered in the Philippines as a

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[1] Docket, pp. 5–17.
[2] Exhibit "P-1", Docket, pp. :8–5 0.

taxpayer under the jurisdiction of Revenue District Office (RDO) No. 53B – Muntinlupa City, having been issued a Certificate of Registration OCN: 53BRC20210000001986 dated May 24, 2021,[3] with address at Unit 03-04 Upper Penthouse, CTP Asean Tower FCC Alabang 1781 City of Muntinlupa NCR, Fourth District, Philippines, under Tax Identification Number 000-282-714-00000.[4]

Respondent is the duly appointed Commissioner of Internal Revenue with office address at the Bureau of Internal Revenue (BIR) Building, Diliman, Quezon City but may be served with summons, notices, and court processes at the Legal Division of BIR Revenue Region No. 8B – South NCR, 2nd Floor BIR Regional Office Building, 313 Gil Puyat Avenue, Makati City, pursuant to Executive Order No. 366 dated October 4, 2004, as implemented by Revenue Administrative Order No. 3-2014 dated November 5, 2014.[5]

THE FACTS AND THE PROCEEDINGS

On May 12, 2020, petitioner lodged the importation of five (5) packages of Lactolan ® LS 5879 with a volume of 1,500 liters through the Bureau of Customs (BOC) electronic-to-mobile (E2M) system and paid excise tax and value-added tax (VAT) in the respective amounts of ₱6,750,000.00 and ₱1,141,251.29[6] under the Harmonized System (HS) Code 38249999, as evidenced by Assessment Notice (with number L 1012281),[7] BOC Single Administrative Document (SAD),[8] and Statement of Settlement of Duties and Taxes (SSDT),[9] all with Import Entry No. C1002474. Based on the Certification dated February 23, 2022, issued by the Chief Accountant, Revenue Accounting Division (RAD) of the BOC,[10] the said amounts were collected on the same date.

Allegedly, Lactolan ® LS 5879, as a cosmetic ingredient, is not among the products subject to excise tax under the Tax Code. However, it was subjected to an excise tax at the rate of P45.00/10 mL when HS Code 38249999 was used in the E2M

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3 Par. 2, Summary of Admitted Facts, *Joint Stipulation of Facts and Issue* (JSFI), Docket, p. 230.
4 Exhibit "P-2", BIR Records, pp. 257–259.
5 Par. 1, Summary of Admitted Facts, JSFI, Docket, p. 230.
6 Allegedly, out of the amount of Php1,141,251.29, only the amount of Php810,000.00 is erroneously paid/collected VAT; Paragraphs 15 to 17, Petition for Review, Docket, pp. 8 to 9.
7 Exhibit "P-7", Docket, p. 463.
8 Exhibit "P-6", Docket, pp. 460–462.
9 Exhibit "P-8", BIR Records, p. 45.
10 Exhibit "P-9", Docket, pp. 84–85.

System.[11] Since petitioner uses the Payment Application Secure System version 5 (PASS5) for the electronic payment of customs duties, taxes, and other charges with the BOC, the payment was automatically posted, debited from petitioner's bank account with Deutsche Bank, and remitted to the BOC on May 12, 2020.[12]

Thus, on May 5, 2022, petitioner, through counsel, filed with the BIR – RDO No. 53B – Muntinlupa City the letter dated May 4, 2022, transmitting certain documents relative to its application for a claim for refund of erroneously paid excise tax and VAT on its importation of Lactolan ® LS 5879.[13]

Due to respondent's alleged inaction, petitioner elevated its claim for refund before the Court *via* the instant *Petition for Review* filed on May 11, 2022.[14]

In his *Answer (With Special and Affirmative Defense)*[15] filed through registered mail on July 18, 2022, and received by the Court on July 26, 2022, respondent submits that the instant *Petition for Review* should be dismissed for lack of merit. According to respondent, the total amount of ₱7,560,000.00 being claimed by petitioner as alleged overpaid excise tax and VAT was not properly documented when petitioner filed its administrative claim for refund before the BIR. Allegedly, under the *Checklist of Documentary Requirements for Claims for VAT Credit/Refund pursuant to Section 229 of the Tax Code, As Amended* of Annex 'A.3' of Revenue Memorandum Order (RMO) No. 47-2020,[16] copy of the proofs of payment of the taxes claimed for tax credit/refund, such as but not limited to bank deposit slip, and debit memo, must be submitted to the BIR for the processing of its claim for refund.

However, per page 4 of petitioner's Letter dated 21 December 2021[17] addressed to the BIR, the list of allegedly submitted documents to support petitioner's administrative claim for refund did not include proof of payment of the alleged erroneously assessed and collected taxes. As such, the BIR is denied its prerogative to determine the actual date of collection of the alleged overpaid taxes and to ascertain that the claim for

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11 Par. 7, Petition for Review, Docket, p. 6.
12 *Id.*
13 Exhibit "P-16", Docket, pp. 93–95.
14 Docket, pp. 5–19.
15 *Id.* at 169–172.
16 SUBJECT: Consolidated and Updated Guidelines and Procedures on the Processing of Claims for Value-Added Tax Credit/Refund Except Those under the Authority and Jurisdiction of the Legal Group.
17 Exhibit P-16-A, Docket, pp. 96–100.

refund was filed within the two-year period from payment of the tax sought to be refunded. For respondent, this is fatal to petitioner's claim for a refund.

After the *Pre-Trial Conference*, the parties filed their *Joint Stipulation of Facts and Issue*[18] on November 24, 2022, on the basis of which a *Pre-Trial Order*[19] was issued on February 20, 2023.

The trial then ensued, during which petitioner presented its witnesses, namely: (1) Mr. Angelo Publico,[20] petitioner's Supply Chain Manager; (2) Ms. Raquel B. Nacinopa,[21] Operations Manager of TMW Worldwide Express, Inc.; and (3) Mr. Leonardo B. Aldueza, Jr.,[22] petitioner's Manager – Finance and Controlling.

On May 30, 2023, petitioner filed its *Formal Offer of Evidence*,[23] to which respondent filed his *Comment (To Petitioner's Formal Offer of Evidence)*[24] through registered mail on June 16, 2023, and received by the Court on June 22, 2023.

On July 27, 2023, the Court issued a Resolution[25] admitting all of petitioner's offered exhibits. Also, considering the manifestation[26] of respondent's counsel that she would no longer present Revenue Officer (RO) Romy P. Carandang, the parties were given thirty (30) days from notice to file their respective memoranda.

In compliance therewith, petitioner filed its *Memorandum*[27] on September 4, 2023. Respondent, on the other hand, filed his *Memorandum (For the Respondent)*[28] *via* registered mail on September 8, 2023, to which petitioner filed its *Motion to Admit Reply Memorandum* on September 19, 2023.[29]

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18 Docket, pp. 230–238.
19 *Id.* at 364–368.
20 Exhibit "P-39", Docket, pp. 23–37; and Minutes of the hearing held on, and Order dated, March 1, 2023, Docket, pp. 369–370.
21 Exhibit "P-40", Docket, pp. 205–215; and Minutes of the hearing held on, and Order dated, April 12, 2023, Docket, pp. 387–389.
22 Exhibits "P-41" and "P-45", Docket, pp. 247–257, and 395–402; and Minutes of the hearing held on, and Order dated, May 10, 2023, Docket, pp. 413–416.
23 Docket, pp. 419–440.
24 *Id.* at 567–568.
25 *Id.* at 574–575.
26 Minutes of the hearing held on, and Order dated, May 10, 2023, Docket, pp. 413–416.
27 Docket, pp. 576–596.
28 *Id.* at 601–606.
29 *Id.* at pp. 608–615.

On September 26, 2023, the instant case was submitted for decision, considering the filing of petitioner's *Memorandum* and *Memorandum (For the Respondent)*. Petitioner's *Motion to Admit Reply Memorandum* was merely noted without action. [30]

Hence, this Decision.

THE ISSUE

As stipulated by the parties, the lone issue for this Court's resolution is:[31]

> **"Whether or not Petitioner is entitled to the refund of PhP7,560,000.00 representing the erroneously paid excise tax and VAT on the importation of Lactolan ® LS 5879 on 12 May 2020."**

Petitioner's Arguments:

Petitioner argues that the assessment and collection of excise taxes and VAT on the importation of Lactolan ® LS 5879 was erroneous and illegal; that it is entitled to a refund of ₱7,560,000.00 representing excise taxes and VAT erroneously assessed and collected on the importation of Lactolan ® LS 5879; that it timely filed the claim for refund and the instant *Petition for Review*; that the ₱7,560,000.00 erroneous excise tax and VAT payments are duly substantiated and have not been expensed out nor recovered by petitioner as a tax credit or otherwise; that respondent's denial of petitioner's claim for refund is without factual or legal basis; and that the retention by respondent of the erroneously paid excise tax and VAT constitutes unjust enrichment on the part of the government.

Respondent's Arguments:

Respondent contends that petitioner failed to prove that it is entitled to its claim for refund; that the total amount of ₱7,560,000.00 being claimed as alleged erroneously paid excise tax and VAT was not properly documented when petitioner filed its administrative claim for refund before the BIR; that petitioner's evidence is not sufficient to prove entitlement to the claim for refund; that although petitioner posited that the

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[30] Resolution dated September 26, 2023, Docket, p. 621.
[31] Stipulated Issue, JSFI, Docket, p. 231.

erroneous payment of excise tax and VAT was made on May 12, 2020, the books of accounts and the audited financial statements of petitioner prove otherwise; and that claims for tax refunds are in the nature of tax exemptions which result in loss of revenue for the government.

THE COURT'S RULING

Pertinent to the resolution of the issue at hand are Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, which read as follows:

> SEC. 204. *Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes.* — The Commissioner may x x x
>
> (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. *Provided, further*, That That in proper cases, the Commissioner shall grant a refund for taxes or penalties within ninety (90) days from the date of complete submission of the documents in support of the application filed: *Provided, furthermore*, That should the Commissioner find that the grant of refund is not proper, the Commissioner must state in writing the legal and factual basis for the denial: *Provided, finally*, That in case of full or partial denial of the claim for tax refund, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim, appeal the decision with the Court of Tax Appeals.
>
> 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.

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> 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.

Pursuant to the afore-quoted provisions, to be entitled to a refund of erroneously or illegally collected tax, the following requisites must be satisfied and established:

1. that the tax has been erroneously or illegally collected, or the penalty has been collected without authority, and/or any sum has been excessively or in any manner wrongfully collected; and

2. that the claim for refund or credit has been filed within two (2) years from the date of payment of tax or penalty, regardless of any supervening cause that may arise after payment.

As in other refund cases, the Court must first determine the timeliness of the filing of petitioner's administrative and judicial claims for refund.

Both Sections 204 and 229 of the NIRC pertain to the refund of erroneously or illegally collected taxes. Section 204 applies to administrative claims for refund, while Section 229 to judicial claims for refund. In both instances, the claim must be filed within two (2) years from the date of payment of the tax or penalty. Section 229 further requires that an administrative claim for refund must first be lodged with the CIR before the taxpayer may seek judicial intervention for the claim for refund or credit.[32] The two (2)-year prescriptive period is mandatory regardless of any supervening cause that may arise after payment.[33]

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[32] *CBK Power Company Limited v. Commissioner of Internal Revenue*, G.R. Nos. 193383-84, January 14, 2015 and *Commissioner of Internal Revenue v. CBK Power Company Limited*, G.R. Nos. 193407-08 [Per J. Perlas-Bernabe, First Division].

[33] *Commissioner of Internal Revenue v. Manila Electric Company (MERALCO)*, G.R. No. 181459, June 9, 2014 [Per J. Peralta, Third Division].

In other words, filing the claim for refund with respondent is a pre-requisite to filing the *Petition for Review* with this Court. However, both actions must be filed within two (2) years from the payment of the tax being refunded.

Petitioner's administrative and judicial claims for refund were filed within the two (2)-year prescriptive period.

Records show that petitioner lodged its importation of the five (5) packages of Lactolan ® LS 5879 with the BOC through the BOC E2M System and paid the corresponding excise tax and VAT as shown in SAD[34] with Import Entry No. C1002474 and SSDT,[35] on May 12, 2020. Counting two (2) years therefrom, petitioner had until May 12, 2022, to file its administrative and judicial claims for refund.

Petitioner seasonably filed its administrative and judicial claims for a tax refund or credit on May 5, 2022[36] and May 11, 2022,[37] respectively.

Petitioner failed to prove that the excise tax and VAT paid on the imported Lactolan ® LS 5879 are erroneously or illegally collected.

Petitioner argues that its importation of Lactolan ® LS 5879, a cosmetic ingredient, was erroneously assessed of excise tax at the rate of ₱45.00/10 mL as *Conventional Freebase* or *Classic Nicotines* under Republic Act (RA) No. 11467[38] dated January 22, 2020. It also claims that there was an erroneous assessment and collection of VAT, considering that the assessment of excise tax on Lactolan ® LS 5879 increased its landed cost, which, in turn, served as the tax base for the 12% VAT on importation of goods.

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[34] Exhibits "P-6", "P-7", "P-7-A", "P-7-B", Docket, pp. 460 to 463; and Exhibit "P-9", Docket, pp. 84–85.
[35] Exhibit "P-8", BIR Records, p. 45.
[36] Exhibits "P-16", "P-16-A", "P-16-B", "P-14", "P-15" and "P-42", Docket, pp. 93–102.
[37] Docket – Vol. 1, pp. 1–15.
[38] AN ACT AMENDING SECTIONS 109,141, 142, 143,144, 147, 152, 263, 263-A, 265, AND 288-A, AND ADDING A NEW SECTION 290-A TO REPUBLIC ACT NO. 8424, AS AMENDED, OTHERWISE KNOWN AS THE NATIONAL INTERNAL REVENUE CODE OF 1997, AND FOR OTHER PURPOSES.

Furthermore, petitioner avers that while Lactolan ® LS 5879 falls within the same HS Code as nicotine products, it stresses that HS Code 38249999 is a very broad commodity classification covering "*Prepared binder for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.*" In this regard, it claims that the BOC issued Management Information System and Technology Group (MISTG) Memo No. 03-2020 dated April 2, 2020,[39] which provided the Tariff Specification 1001 under HS Code 38249999 for goods not intended for nicotine. However, petitioner asserts that it inadvertently failed to select Tariff Specification 1001 when it formally lodged the SAD on May 12, 2020, as it was unaware of the recent updating in the E2M system pursuant to said MISTG Memo No. 03-2020 and as a result, Lactolan ® LS 5879 was automatically subjected to the excise tax for *Conventional Freebase* or *Classic Nicotines*.

Moreover, petitioner states that unlike the importation of Lactolan ® LS 5879 on May 12, 2020, its subsequent importation of the same product on May 20, 2020, was not assessed excise tax and additional VAT on the excise tax.[40]

Petitioner's arguments failed to convince.

The assessment and collection of excise tax on petitioner's importation were allegedly based on Section 144 of the NIRC of 1997, as last amended by Section 3 of RA No. 11467, to wit:

> "SEC. 3. Section 144 of the National Internal Revenue Code of 1997, as amended by Republic Act No. 11346, is hereby amended to read as follows:
>
> > SEC. 144. *Tobacco Products, Heated Tobacco Products, and Vapor Products.* –
> >
> > (A) *Tobacco Products.* – xxx
> >
> > (B) *Heated Tobacco Products.* - There shall be levied, assessed, and collected on heated tobacco products an excise tax at the rate prescribed below:
> >
> > xxx xxx xxx

[39] Exhibit "P-10", Docket, p, 464.
[40] Exhibits "P-11", "P-11-A", "P-11-B", "P-12" and "P-13", Docket, pp, 465–468.

> C) *Vapor Products.* - There shall be levied, assessed and collected on vapor products an excise tax at the rates prescribed below:
>
> (1) *Nicotine Salt or Salt Nicotine.* - There shall be levied, assessed and collected on any liquid substance, regardless of nicotine content, including nicotine-free liquids or any similar product, further classified as nicotine salt or salt nicotine, an excise tax based on the following schedules:
>
> xxx xxx xxx
>
> (2) ***Conventional 'Freebase' or 'Classic' Nicotine.*** **- There shall be levied, assessed and collected on any liquid substance, regardless of nicotine content, including nicotine-free liquid or any similar product, further classified as conventional 'freebase' or 'classic' nicotine an excise tax** based on the following schedules:
>
> **Effective on January 1, 2020, Forty-five pesos (P45.00) per ten (10) milliliters or a fraction thereof** xxx" (*Emphases added*)

To implement the above provision, the BOC issued MISTG Memo No. 03-2020, which updated the excise tax rates of alcohol, heated tobacco, and vapor products in the E2M System, pursuant to RA No. 11467, effective April 3, 2020, as follows:

> "Please be informed that the updating of Excise Tax rates for the following products under Republic Act No. 11467 has been implemented in E2M System effective April 03, 2020:
>
> - **Alcohol, Heated Tobacco and Vapor Products As per Republic Act No. 11467**

Description	**Classification**	**2020**
Fermented Liquors Specific Tax	All HS codes under heading 2203; 2206.00.10, 2206.00.20, 2206.00.41, 2206.00.49, 2206.00.91, 2206.00.99	Php 35.00/liter
Distilled Spirits Ad Valorem Specific Tax	All HS codes under heading 2208	22% of NRP Php 42.00/PL (Proof Liter)
Wine Specific Tax	All HS codes under headings 2204 and 2205	Php 50.00/liter

Heated Tobacco Products	2403.99.90	Php 25.00/pack of twenty (20) units or packaging combinations of not more than twenty (20) units
Nicotine Salt or Salt Nicotine (Salt Nicotine Vape)	*3824.99.99 (Tariff Specification – 1002)	Php 37.00/ml
Conventional "Freebase" or "Classic" Nicotines	*3824.99.99	Php 45.00/10 ml or a fraction thereof

***If goods are not intended for nicotine, please use Tariff Specification 1001"**
(Emphasis added)

Petitioner contends that Lactolan ® LS 5879 is a cosmetic ingredient intended for skin and hair products and that the erroneous assessment and collection of excise tax were because of its inadvertent failure to select the Tariff Specification 1001, pursuant to BOC MISTG Memo No. 03-2020.

In support of the above allegation, petitioner presented its *Safety Data Sheet*,[41] and *Product Brochure*,[42] for Lactolan ® LS 5879. The *Safety Data Sheet* mentions "*Lactolan ® LS 5879 Use: cosmetic ingredient*", while *Product Brochure* enumerates its skin and hair benefits and cosmetic use, among others.

However, the Court finds these documents to be insufficient.

The *Safety Data Sheet* and *Product Brochure* are self-serving evidence as they were issued by petitioner; thus, have insufficient probative value. This fact was also admitted by petitioner's witness, Mr. Angelo Publico.[43] Moreover, while Mr. Angelo Publico identified these documents, he did not appear competent to testify and authenticate the contents of the documents, not only because he failed to demonstrate his personal knowledge or participation in their execution but also, as petitioner's Supply Chain Manager, his duties are only to oversee clearance and delivery operations, to ensure regulatory requirements, and the processing of the proper documents as well as the payment of duties and taxes.[44]

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[41] Exhibit "P-3", Docket, pp. 441–448.
[42] Exhibit "P-4", Docket, pp. 449–457.
[43] TSN, Angelo Publico, March 1, 2023, p. 9.
[44] Exhibit "P-39", Docket, p. 25.

Other than the above pieces of evidence, petitioner presented no other independent proof to show that Lactolan ® LS 5879 is a cosmetic ingredient and is not intended for nicotine or in any way related to vapor products. Moreover, the use of Tariff Specification 1001 under BOC MISTG Memo No. 03-2020 does not, in any way, suggest or imply that Lactolan ® LS 5879 is a cosmetic ingredient.

It is also worth noting that "cosmetics" are considered "health products" within the definition provided under RA No. 9711[45] and fall under the regulatory authority of the Food and Drug Administration (FDA), to wit:

> "**Section 9.** Section 10, subsections (a), (e), (f), (g), (h), (i), (q),(r), (v), and (w) of Republic Act No. 3720, as amended, are hereby further amended, and new subsections (x), (y), (z), (aa), (bb), (cc), (dd), (ee), (ff), (gg), (hh), (ii), (jj), (kk), (ll), and (mm) are hereby added to read as follows:
>
> SEC. 10. For the purposes of this Act, the term:
>
> xxx xxx xx
>
> (h) 'Cosmetics' means any substance or preparation intended to be placed in contact with the various external parts of the human body or with the teeth and the mucous membranes of the oral cavity, with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance and/or correcting body odor, and/or protecting the body or keeping them in good condition.
>
> xxx xxx xx
>
> (ff) 'Health products' means food, drugs, **cosmetics**, devices, biologicals, vaccines, in-vitro diagnostic reagents and household/urban hazardous substances and/or a combination of and/or a derivative thereof. It shall also refer to products that may have an effect on health which require regulations as determined by the FDA." (*Emphasis added*)

Consequently, Section III (1) and IV (B) of Department of Health Administrative Order No. 2016-0003[46] dated February 15, 2016, requires authorization from the FDA prior to engaging

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[45] AN ACT STRENGTHENING AND RATIONALIZING THE REGULATORY CAPACITY OF THE BUREAU OF FOOD AND DRUGS (BFAD) BY ESTABLISHING ADEQUATE TESTING LABORATORIES AND FIELD OFFICES, UPGRADING ITS EQUIPMENT, AUGMENTING ITS HUMAN RESOURCE COMPLEMENT, GIVING AUTHORITY TO RETAIN ITS INCOME, RENAMING IT THE FOOD AND DRUG ADMINISTRATION (FDA), AMENDING CERTAIN SECTIONS OF REPUBLIC ACT NO. 3720, AS AMENDED, AND APPROPRIATING FUNDS THEREOF.

[46] Guidelines on the Unified Licensing Requirements and Procedures of the Food and Drug Administration (FDA).

in the manufacture, importation and/or any activity that involves health products, as follows:

"**I. RATIONALE**

The 1987 Philippine Constitution mandates the establishment of an effective food and drug regulatory system that is responsive to the country's health needs and problems.

Consistent with said constitutional provision, Congress passed landmark legislations, namely Republic Act (RA) No. 3720 (Food, Drugs and Devices and Cosmetics Act), as amended by RA No. 9711 (Food and Drug Administration Act of 2009), RA No. 10611 (Food Safety Act of 2013), and RA No. 9502 (Universally Accessible Cheaper and Quality Medicine Act of 2008) mandating FDA to regulate establishment engaged in health products to ensure consumer safety, welfare protection, and fair trade practice.

In order to improve FDA's effectiveness and efficiency in carrying out its mandate, there is a need to harmonize, unify and streamline its processes and licensing requirements. This will help ensure the availability and accessibility of quality and safe health products in the market.

xxx xxx xxx

III. SCOPE

This Order shall apply to the four (4) FDA Centers – namely, **Center for Cosmetics Regulation and Research (CCRR)**, Center for Drug Regulation and Research (CDRR), Center for Food Regulation and Research (CFRR), Center for Device Regulation, Radiation Health and Research (CDRRHR) and the Field Regulation Operations Office (FROO).

These guidelines shall cover, the following establishments, whether public or private:

1. Manufacturers, traders and distributors (importers, exporters, and wholesalers) of processed foods, drugs (including vaccine, biologics, veterinary drugs and products), **cosmetics**, medical devices, in-vitro diagnostic device and reagents, household/urban pesticides, toys, and child care articles; xxx

xxx xxx xxx

Mr

IV. GENERAL GUIDELINES

> B. All establishments covered in this AO shall first secure the **appropriate or authorization from FDA** prior to engaging in the manufacture, importation, exportation, sale, offering for sale, distribution, transfer, promotion, advertisement and/or sponsorship of any activity that involves health product." (*Emphases added*)

Accordingly, Article I, Section 1 (a) of Book II of the Implementing Rules of RA No. 9711 provides that the "manufacture, importation, exportation, sale, offering for sale, distribution, transfer, non-consumer use, promotion, advertising, or sponsorship of any health product without the proper authorization from the FDA is prohibited."

Notably, petitioner failed to present FDA certificates of registration and/or FDA License to Operate (LTO) showing that Lactolan ® LS 5879 is a cosmetic ingredient/product. Also, petitioner's witness, Mr. Angelo Publico, testified that he was not aware of the corresponding food and drugs authority for the product to show that it is indeed a non-nicotine product or whether it is registered with the FDA.[47]

From the foregoing, petitioner failed to prove that Lactolan ® LS 5879 falls under "cosmetics" under RA No. 9711.

In addition, even assuming that petitioner was able to establish Lactolan ® LS 5879 as a cosmetic ingredient and is not intended for nicotine, it, however, failed to cite any specific provision of law or any evidence to prove that the said product is indeed not subject to excise tax.

To recall, petitioner claims an error in selecting Tariff Specification 1001 on its importation of Lactolan ® LS 5879 on May 12, 2020, and presented documents of its subsequent importation of the same product already indicating Tariff Specification 1001 on May 20, 2020, which were allegedly not subjected to excise tax, as the basis for its exemption.[48]

Nevertheless, petitioner failed to provide basis to hold that the mere use of Tariff Specification 1001 entails exemption from the imposition of excise tax. After all, in a tax refund or credit claim, the taxpayer has the burden of proving his cause of

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[47] *Supra* note 43, at 7–8.
[48] Exhibits "P-11", "P-11-A", "P-11-B", "P-12" and "P-13", Docket, pp. 465–468.

action. As such, it enjoys relative freedom to submit such evidence to prove his claim.[49] Moreover, settled is the rule that a court cannot rely on speculations, conjectures, or guesswork but must depend upon competent proof and on the basis of the best evidence obtainable under the circumstances. We emphasize that litigations cannot be properly resolved by suppositions, deductions, or even presumptions, with no basis in evidence, for the truth must be determined by the hard rules of admissibility and proof.[50]

Furthermore, Sections 3.2, 5.6 and 5.7 of Customs Memorandum Order (CMO) No. 16-2020[51] dated July 6, 2020, provide that:

> "3.2 **Box No. 33 of the Goods Declarant in E2M** – refers to the specification code box of the Goods Declaration in the electronic to mobile system (E2M).
>
> xxx xxx xxx
>
> 5.6 Box No. 33 (Specification Code) of the goods declaration in the E2M must be **mandatorily filled-up in the E2M system**. The Value Added Service provider (VASP) and MISTG shall ensure that this functionality will be operational in the enhanced E2M system.
>
> 5.7 When using Box No. 33 of the E2M SAD (Single Administrative Document), **the declarants will be provided with coded product description list in the form of drop-down menu. However, for goods which has no specification code, the declarant is required to use 'other' and manually input the specific description of goods in Box No. 31 (Packages and Description of Goods). The declarant is responsible in ensuring that goods are sufficiently described pursuant to CAO No. 8-2007 and CMO No. 28-2007**." *(Emphases added)*

Hence, as the declarant (consignee/importer) is mandated to fill up the specification code in Box 33 of SAD and is provided with a coded product description list in the form of a drop-down menu, the Court finds it difficult to believe petitioner's contention that it erroneously failed to select Tariff Specification Code 1001 during its importation. Notably, both the HS Code

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[49] As culled from *Pilipinas Total Gas, Inc. v. Commissioner of Internal Revenue*, G.R. No. 207112, December 8, 2015 [Per J. Mendoza, En Banc].

[50] As culled from *Pilipinas Shell Petroleum Corporation v. Commissioner of Customs*, G.R. No. 195876, June 19, 2017 [Per J. Velasco Jr., Special Third Division].

[51] Implementation of the Enhanced Value reference Information System (e-VRIS) in the Electronic to Mobile (E2M) System.

(which petitioner was able to fill out) and the Tariff Specification Code were found in the same Box 33 of SAD.

In addition, Section 403 of RA No. 10863 or the Customs Modernization and Tariff Act (CMTA), allows the importer or consignee to lodge a Provisional Goods Declaration if it does not have all the information or supporting documents required to complete the goods declaration, as follows:

> "SEC. 403. *Provisional Goods Declaration.* – Where the declarant does not have all the information or supporting documents required to complete the goods declaration, the lodging of a provisional goods declaration may be allowed: *Provided*, That it substantialy contains the necessary information required by the Bureau and the declarant undertakes to complete the information or submit the supporting documents within forty-five (45) days from the filing of the provisional goods declaration, which period may be extended by the Bureau for another forty-five (45) days for valid reasons.
>
> If the Bureau accepts a provisional goods declaration, the duty treatment of the goods shall not be different from that of goods with complete declaration.
>
> Goods under a provisional goods declaration may be released upon posting of any required security equivalent to the amount ascertained to be the applicable duties and taxes."

Likewise, in case of an error in goods declaration, Section 408 of the CMTA allows the amendment of goods declaration before the receipt of final assessment notice, to wit:

> "SEC. 408. *Lodgement and Amendment of Goods Declaration.* – The Bureau shall permit the electronic lodgement of the goods declaration at any designated customs office. The Bureau shall, for valid reason and under terms and conditions provided by regulation, permit the declarant to amend the goods declaration that has already been lodged: *Provided*, That the request to amend the goods declaration, together with the intended amendments, must be received prior to final assessment or examination of the goods."

Section 429 of the CMTA provides that an assessment shall be deemed final fifteen (15) days after receipt of the notice of assessment by the importer or consignee.

It must be noted that the Assessment Notice was issued, and the subject taxes were already paid on May 12, 2020. However, petitioner neither showed that it availed of the

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provisional goods declaration nor sought the amendment of its goods declaration within the prescribed period. Apparently, these circumstances belied its contention of inadvertent failure to input in its SAD the proper Tariff Specification Code.

Moreover, it must be stressed that petitioner's liability for excise tax is allegedly based on Section 3 of RA No. 11467 imposing excise on *Conventional Freebase* or *Classic Nicotine, i.e.*, on any liquid substance, **regardless of nicotine content**, including **nicotine-free liquid** or any similar product, as follows:

> "SEC. 3. Section 144 of the National Internal Revenue Code of 1997, as amended by Republic Act No. 11346, is hereby amended to read as follows:
>
> xxx xxx xxx
>
> (2) *Conventional 'Freebase' or 'Classic' Nicotine.* - There shall be levied, assessed and collected **on any liquid substance, regardless of nicotine content**, including **nicotine-free liquid** or any similar product, further classified as conventional 'freebase' or 'classic' nicotine an excise tax based on the following schedules:
>
> **Effective on January 1, 2020, Forty-five pesos (P45.00) per ten (10) milliliters or a fraction thereof** xxx" *(Emphases added)*

Thus, even assuming that Lactolan ® LS 5879 is not imported for its nicotine content that circumstance alone will not necessarily remove petitioner's product from the liability of payment of excise tax. Besides, nowhere in MISTG Memo No. 03-2020, exempts petitioner from excise tax. At most, the memo merely requires the use of Tariff Specification 1001 if the goods are not imported for its nicotine content. However, it is not clear whether the use of said code would exempt petitioner from excise tax.

On the other hand, HS Code 38.24 described as "*Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included,*"[52] are broad enough to include petitioner's product as subject to excise tax, as follows:

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[52] Section VI (Products of the Chemical or Allied Industries), Chapter 38 (Miscellaneous chemical products), Tariff Book, ASEAN Harmonized Tariff Nomenclature (AHTN) 2017 edition.

x---x

Hdg. No.	AHTN Code 2017	Description	Rates of Duty 2020
38.24		Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included	
	xxx	xxx	xxx
	3824.99.99	Other	3

Moreover, records also reveal that petitioner made the importation of "cetiol" on April 14, 2020, before the subject importation with the **same HS Code 38249999** (also **without tariff specification**) but was not assessed excise tax on nicotines despite the effectivity of MISTG Memo No. 03-2020.[53] The difference in the tax treatment of these two (2) importations (with the same HS Code and after the effectivity of MISTG Memo No. 03-2020) further raises serious doubts as to petitioner's entitlement to the refund.

In sum, petitioner failed to present sufficient and convincing evidence to prove that the excise tax and VAT paid and/or collected in the total amount of ₱7,560,000.00 on the importation of Lactolan ® LS 5879 were erroneously or illegally collected. Hence, this Court finds no erroneous or illegal excise tax and VAT, which are refundable in favor of petitioner.

In fine, actions for tax refund or credit, as in the present case, are in the nature of tax exemptions. As such, they are regarded as a derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the refund.[54] The pieces of evidence presented entitling a taxpayer to an exemption are also *strictissimi* scrutinized and must be duly proven.[55] Hence, an applicant for a tax refund or

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[53] Exhibit "P-18", Docket, pp. 472–473.
[54] *Commissioner of Internal Revenue v. S.C. Johnson & Son, Inc.*, G.R. No. 127105, June 25, 1999 [Per J. Gonzaga-Reyes, Third Division].
[55] *Kepco Philippines Corporation v. Commissioner of Internal Revenue*, G.R. No. 179961, January 31, 2011 [Per J. Mendoza, Second Division] citing *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008 [Per J. Velasco Jr., Second Division].

credit must not only prove entitlement to the claim but also compliance with all the documentary and evidentiary requirements.[56] Unfortunately for petitioner, it has failed to prove such entitlement.

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

SO ORDERED.

LANEE S. CUI-DAVID
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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[56] *Eastern Telecommunications Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 183531, March 25, 2015 [Per J. Reyes, Third Division] citing *J.R.A. Philippines, Inc. v. CIR*, G.R. No. 171307, August 28, 2013 [Per J. Perlas-Bernabe, Second Division].

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CERTIFICATION

Pursuant to Section 13, Article VIII 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