REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

SILKAIR (SINGAPORE) PTE., LTD.,
Respondent.

C.T.A. EB No. 56
(C.T.A. CASE NO. 6217)
Members:
Acosta, *Presiding Justice,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez, *JJ:*

Promulgated
OCT 20 2005

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DECISION

CASTAÑEDA, JR., *J.*:

This is a petition for review filed by the Commissioner of Internal Revenue with the Court of Tax Appeals *En Banc* pursuant to Section 18 of Republic Act No. 9282 assailing the Resolution dated November 25, 2004 of the then Court of Tax Appeals in C.T.A. Case No. 6217 captioned Silkair (Singapore) PTE. LTD. vs. Commissioner of Internal Revenue.

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This case involves a claim for refund of allegedly erroneously paid excise taxes on respondent's purchases of aviation jet fuel from Petron Corporation for the period from January 1, 1999 up to June 30, 1999. The original amount of the claim for refund is P4,239,374.81 The Petition for Review filed by Silkair (Singapore) PTE., LTD. was denied by the majority of the members of the Court in its Decision promulgated on November 5, 2003. The dispositive portion of said Decision is quoted hereunder:

> "In view of the foregoing, the instant Petition for Review is hereby ***DENIED***."

Silkair (Singapore) Pte. Ltd. filed a Motion for Reconsideration on December 2, 2003. In a Resolution dated June 17, 2004 the Court granted Silkair's Motion for Reconsideration. The dispositive portion of the Resolution reads as follows:

> **IN VIEW OF ALL THE FOREGOING**, our Decision promulgated on November 5, 2003 is hereby **SET ASIDE**. Petitioner's claim for refund in the reduced amount of P3,680,474.18 is **GRANTED**. Accordingly, respondent is **ORDERED** to **REFUND** to the petitioner the amount of P3,680,474.18 representing excise taxes erroneously paid for the period January 1, 1999 to June 30, 1999.

Since the Decision was set aside, the Commissioner of Internal Revenue filed his Motion for Reconsideration on July 2, 2004. Said Motion for Reconsideration was denied by the majority of the members

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of the Court in a Resolution promulgated on November 25, 2004. The dispositive portion of the said Resolution reads as follows:

> **IN VIEW OF ALL THE FOREGOING**, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit and the pronouncement in the assailed Resolution promulgated on June 17, 2004 is hereby ***REITERATED***.

Hence, this appeal to the Court *En Banc.*

The petition is impressed with merit.

The sole issue presented for resolution by the petitioner is whether or not respondent is entitled to the refund of the reduced amount of P3,680,474.18 allegedly representing excise taxes erroneously paid for the period from January 1, 1999 to June 30, 1999. According to the petitioner, the Court committed reversible error in holding that (1) respondent is entitled to a refund; and (2) that respondent is the proper party to claim for a refund. Stated differently, viewed in the light of the facts of the case, who is the proper party to claim the refund of indirect taxes.

The excise tax imposed on the removal of petroleum products by the oil companies is an indirect tax. The Supreme Court in a number of cases had elucidated on the nature of indirect taxes vis-à-vis direct taxes, as follows:

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"It may be useful to make a distinction, for the purpose of this disposition, between a direct tax and an indirect tax. A direct tax is a tax for which a taxpayer is directly liable on the transaction or business it engages in. Examples are custom duties and ad valorem taxes paid by the oil companies to the Bureau of Customs for their importation of crude oil, and the specific and ad valorem taxes they pay to the Bureau of Internal Revenue after converting the crude oil into petroleum products. On the other hand, indirect taxes are taxes primarily paid by persons who can shift the burden upon someone else. For example, the excise and ad valorem taxes that the oil companies pay to the Bureau of Internal Revenue upon removal of petroleum products from its refinery can be shifted to its buyer, like the NPC, by adding them to the cash and/or selling price." *(Maceda vs. Macaraig, Jr., et. al., 197 SCRA 771)*

Moreover, the Supreme Court had explained that although an indirect tax can be passed-on to the purchaser of goods, nevertheless, the liability for the indirect tax still remains with the manufacturer or seller. The Supreme Court ruled:

"It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must pay. It does not matter that an additional amount is billed as tax to the purchaser. The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the seller of a tax on the amount of the tax. The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else.

But the tax burden may not even be shifted to the purchaser at all. A decision to absorb the burden of the tax is largely a matter of economics. Then it can no longer be contended that a sales tax is a tax on the purchaser.

We therefore hold that the tax imposed by section 186 of the National Internal Revenue Code is a tax on the manufacturer or producer and not a tax on the purchaser except probably in a very remote and inconsequential sense. Accordingly its levy on the sales made to tax-exempt entities like NPC is permissible" *(Philippine Acetylene Co., Inc., vs. Commissioner of Internal Revenue, G.R. No. L-19707, August 17, 1967).*

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More recently, in the case of ***Contex Corporation vs. Hon. Commissioner of Internal Revenue, G.R. No. 151135, July 2, 2004***, the High Court likewise discussed the nature of indirect taxes:

> "At this juncture, it must be stressed that the VAT is an indirect tax. As such, the amount of tax paid on the goods, properties or services bought, transferred, or leased may be shifted or passed on by the seller, transferor, or lessor to the buyer, transferee or lessee. Unlike a direct tax, such as the income tax, which primarily taxes an individual's ability to pay based on his income or net wealth, an indirect tax, such as the VAT, is a tax on consumption of goods, services, or certain transactions involving the same. The VAT, thus, forms a substantial portion of consumer expenditures.
>
> Further, in indirect taxation, there is need to distinguish between the liability for the tax and the burden of the tax. As earlier pointed out, the amount of tax paid may be shifted or passed on by the seller to the buyer. What is transferred in such instances is not the liability for the tax, but the tax burden. In adding or including the VAT due to the selling price, the seller remains the person primarily and legally liable for the payment of the tax. What is shifted only to the intermediate buyer and ultimately to the final purchaser is the burden of the tax. Stated differently, a seller who is directly and legally liable for payment of an indirect tax, such as the VAT on goods or services, is not necessarily the person who ultimately bears the burden of the same tax. It is the final purchaser or consumer of such goods or services who, although not directly and legally liable for the payment thereof, ultimately bears the burden of the tax." *(Citations omitted)*

As explained in the above-cited decisions, the manufacturer or seller has the option whether or not to shift the burden of the tax to the purchaser. When shifted, the amount added by the manufacturer or seller then becomes only a part of the price, therefore, the purchaser does not really pay the tax *per se* but only the price of the commodity.

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This was explained by the Supreme Court in the aforementioned *Philippine Acetylene Co. Inc.* case, *supra*, as follows:

> "But is is argued that a sales tax is ultimately passed on to the purchaser, and that, so far as the purchaser is an entity like the NPC which is exempt from the payment of "all taxes, except real property tax" the tax cannot be collected from sales.
>
> Many years ago, Mr. Justice Oliver Wendell Holmes expressed dissatisfaction with the use if the phrase "pass the tax on." Writing the opinion of the U.S. Supreme Court in *Lash's Products v. United States [278 U.S. 175 (1928)]*, he said: "**The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. The purchaser does not really pay the tax.** He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. x x x The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price x x x." (Emphasis supplied)

The foregoing jurisprudence shows that even though the burden of an indirect tax is shifted to the purchaser, still, the liability for the indirect tax remains with the taxpayer as specified by the law itself. In the National Internal Revenue Code of 1997, the liability for the excise taxes on petroleum products is imposed upon the manufacturer or producer, thus, *Sec. 130 (A) (2)* provides:

> "(2) Time for filing of Return and Payment of the Tax. – Unless otherwise specifically allowed, the return shall be filed and **the excise tax paid by the manufacturer or producer** before removal of domestic products from place of production: Provided, That the excise tax on locally manufactured petroleum gas products and indigenous petroleum levied under Sections 148 and 151 (A) (4), respectively, of this Title shall be paid within ten (10) days from the date of removal of such products for the period from January 1, 1998 to June 30, 1998; within five (5) days from the date of removal of such products for the period from July 1, 1998 up to December 31, 1998; and before removal from the place of production of such products from January 1, 1999 and thereafter; Provided, further, That xxx xxx xxx" *(Emphasis supplied)*

The afore-quoted provision makes the manufacturer or producer of the petroleum products as the one directly liable for the payment of excise tax before removal from the place of production. The manufacturer or producer is therefore the ***taxpayer*** under the law.

The law also requires that it is only the **taxpayer** - the one liable for tax - that may ask for a refund in case of erroneous payment of taxes. Section 204 (C) of the NIRC of 1997 provides:

> SEC. 204. Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes. - The Commissioner may –
>
> xxx xxx xxx
>
> (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.
>
> xxx xxx xxx (emphasis supplied)

The issue of who is the proper party who can claim for the refund of indirect taxes is not novel. The Supreme Court in ***Cebu Portland Cement Co. vs. Collector of Internal Revenue, 25 SCRA 789,*** ruled that it is the producer of the goods who is entitled to claim for a refund of indirect taxes, thus:

> "Again, We agree with the petitioner in assigning as error of the respondent Court its conclusion that for so much of the sales

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taxes that were billed, charged, and paid for by the petitioner's customers, the petitioner is not the proper party to claim refund. The first paragraph of section 186 of the Tax Code, pursuant to which the 7% sales taxes were collected from the petitioner, reads:

> SEC. 186. – Percentage tax on sales of other articles. – There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable considerations intended to transfer ownership of, or title to, the articles not enumerated in sections one hundred and eighty-four, and one hundred and eighty-five a tax equivalent to seven per centum of the gross selling price or gross value in money of the articles so sold, bartered, exchanged, or transferred, *such tax to be paid by the manufacturer or producer*. *Provided*, That where the articles subject to tax under this section are manufactured out of materials likewise subject to tax under this section and section one hundred and eighty-nine, the total cost of such materials, as duly established shall be deductible from the gross selling price or gross value in money of such manufactured articles.

The tax provided under this section of the Code is imposed upon the manufacturer or producer and not on the purchaser. On this matter of who bears the burden of the sales tax, this Court, after an extensive research on the subject, said:

> We begin with an analysis on the nature of the percentage (sales) tax imposed by Section 186 of the Code. Is it a tax on the producer or on the purchaser? Statutes of the type under consideration, which impose a tax on sales, have been described as 'act(s) with schizophrenic symptoms', as they apparently have two faces – one that of a vendor tax, and the other, a vendee tax. Fortunately, for us, the provisions of the Code throw some light on the problem. The Code states that the sales tax 'shall be paid by the manufacturer or producer' who must make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon.'
>
> xxx xxx xxx.

It follows that it is petitioner, and not its customers, that may ask for a refund of whatever amounts it is entitled for the percentage or sales taxes it paid before the amendment of section 246 of the Tax Code."

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Likewise, in a recent decision promulgated on September 13, 2004 by the First Division of the Court of Appeals involving the same parties and subject matter, docketed as ***Silkair (Singapore) Pte. Ltd., vs. Commissioner of Internal Revenue, CA-GR. SP – 82902,*** it was held that petitioner therein Silkair (Singapore) Pte. Ltd. *is not the proper party to seek for the refund of excise taxes passed-on to it by Petron Corporation*, thus:

> " xxx Respondent CIR correctly observed that petitioner Silkair made the erroneous payment of passed-on excise tax, not with the BIR, but with the seller, Petron Corporation.
>
> All told, it is hereby concluded that petitioner Silkair is exempt from paying excise tax on petroleum products in the Philippines by virtue of Section 135 (b) <u>but</u> **it is not the proper party to seek for the refund of an indirect tax like an excise tax**. Hence, this petition should fail." (Emphasis supplied)

Applying all the foregoing to the case before Us, since the liability for the excise tax pursuant to Section 130 (A) (2) was placed upon Petron Corporation as the manufacturer of the petroleum products and it was shown that that the excise taxes were paid by Petron Corporation (*Exhibits B to H*), any claim for refund of the excise taxes subject of this petition should only be made by Petron Corporation being the ***taxpayer***. This is in consonance with the rule on *strictissimi juris* with respect to tax exemptions. The respondent cannot be considered as

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the taxpayer because what was transferred to it was only the burden of the indirect tax (excise tax) on petroleum products.

Although Petron Corporation and the respondent have an Aviation Fuel Supply Agreement (Exhibit T) which provides under item 11.1 of its General Terms & Conditions that:

> "Buyer shall pay any taxes, fees or other charges imposed by any national, local or airport authority on the delivery, sale, inspection, storage and use of fuel, except for taxes on Seller's income and taxes on raw material. To the extent allowed, Seller shall show these taxes, fees and other charges as separate items on the invoice for the account of the Buyer"

nevertheless, the liability for the excise tax remained with Petron Corporation as manufacturer or producer of the aviation jet fuel. Respondent merely assumed the burden of the excise tax. There is nothing wrong with assuming the burden of the excise tax but such act did not transform the respondent into the category of the taxpayer liable for the payment of the excise tax. The liability for the excise tax on petroleum products cannot be shifted by agreement because of the mandatory provision of *Sec. 130 (A) (2)* of the NIRC of 1997 imposing the tax on the manufacturer or producer of the domestic products. Being the ***taxpayer***, Petron Corporation is the proper party who can claim for the refund of the allegedly erroneous excise tax payments.

Furthermore, the Supreme Court reiterated in ***Contex Corporation vs. Hon. Commissioner of Internal Revenue,*** *supra,* its ruling that in case of erroneously passed-on indirect tax, the proper party to claim the refund thereof is the taxpayer who is liable for the tax, thus:

> "The point of contention here is whether or not the petitioner may claim a refund on the Input VAT erroneously passed on to it by its suppliers.
>
> While it is true that the petitioner should not have been liable for the VAT inadvertently passed on to it by its supplier since such is a zero-rated sale on the part of the supplier, the petitioner is not the proper party to claim such VAT refund.
>
> Section 4.100-2 of BIR's Revenue Regulations 7-95, as amended, or the "*Consolidated Value-Added Tax Regulations*" provide:
>
>> Sec. 4.100-2. Zero rated Sales. A zero-rated sale by a VAT-registered person, which is a taxable transaction for VAT purposes, shall not result in any output tax. However, the input tax on his purchases of goods, properties or services related to such zero-rated sale shall be available as tax credit or refund in accordance with these regulations.
>>
>> The following sales by VAT-registered persons shall be subject to 0%:
>>
>> (a) Export Sales
>>
>> "Export Sales" shall mean . . .
>>
>> (5) Those considered export sales under Articles 23 and 77 of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, and other special laws, e.g. Republic Act No. 7227, otherwise known as the Bases Conversion and Development Act of 1992.

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> (c) Sales to persons or entities whose exemption under special laws, e.g. R.A. No. 7227 duly registered and accredited enterprises with Subic Bay Metropolitan Authority (SBMA) and Clark Development Authority (CDA), R.A. No. 7916, Philippine Economic Zone Authority (PEZA), or international agreements, e.g. Asian Development Bank (ADB), International Rice Research Institute (IRRI), etc. to which the Philippines is a signatory effectively subject such sales to zero-rate."

> Since the transaction is deemed a zero-rated sale, petitioner's supplier may claim an Input VAT credit with no corresponding Output VAT liability. Congruently, no Output VAT may be passed on to the petitioner.
>
> On the second issue, it may not be amiss to re-emphasize that the petitioner is registered as a NON-VAT taxpayer and thus, is exempt from VAT. As an exempt VAT taxpayer, it is not allowed any tax credit on VAT (input VAT) previously paid. In fine, even if we are to assume that exemption from the burden of VAT on petitioner's purchases did exist, petitioner is still not entitled to any tax credit or refund on the input VAT previously paid as petitioner is an exempt VAT taxpayer.
>
> Rather, it is the petitioner's suppliers who are the proper parties to claim the tax credit and accordingly refund the petitioner of the VAT erroneously passed on to the latter."

Although the above-mentioned case involves Value-Added Tax (VAT), the ruling is applicable in the case before Us considering that the excise tax on petroleum products is likewise an indirect tax. *A fortiori*, the same rule applies to excise taxes on petroleum products considering that the determination as to who is the **taxpayer** is much easier than in the value-added tax system. This is because in VAT, there is a system of offsetting the input and output VAT payments. In the Contex case, the Supreme Court ruled that the proper party who should claim the refund of VAT erroneously passed-on to therein petitioner is the "petitioner's suppliers" referring to the taxpayers. In the case before Us, the taxpayer is unmistakably Petron Corporation, hence, respondent Silkair (Singapore) Pte., Ltd. is not entitled to its claim for refund.

Finally, respondent's assertion that "the more relevant ruling is the case of *Maceda vs. Macaraig (197 SCRA 771[1991]; 223 SCRA 217 [1993])"* cannot be sustained because in that case the Supreme Court categorically stated that the National Power Corporation is exempt from all taxes - both direct and indirect taxes – including excise taxes on petroleum products. The Supreme Court pointed out that the legislative intent to grant to the National Power Corporation an immunity from all taxes was clearly shown.

Moreover, the rule on *strictissimi juris* was not applied in the *Maceda vs. Macaraig, Jr.* case since the National Power Corporation is a government owned or controlled corporation, the Supreme Court said:

> "The reason for the rule does not apply in the case of exemptions running to the benefit of the government itself or its agencies. In such case, the practical effect of an exemption is merely to reduce the amount of money that has to be handled by government in the course of its operations. For these reasons, provisions granting exemptions to government agencies may be construed liberally, in favor of non-tax liability of such agencies."

Respondent Silkair (Singapore) Pte., Ltd., unlike the National Power Corporation, is neither a government owned or controlled corporation

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nor an entity which has been granted exemption from all kinds of taxes. As such, respondent cannot rely thereon as basis for its claim for refund.

Likewise, respondent's reliance on Sec. 135 (b) as basis of its exemption from excise taxes on petroleum products is misplaced. Sec. 135 (b) of the NIRC of 1997 does not grant any "exemption" in favor of the entities mentioned therein, rather, Sec. 135 exempts the *sale* of petroleum products to the entities mentioned therein. It is the transaction that is exempt from the excise taxes on petroleum products. Moreover, Section 135 (b) should not be taken independently of the other provisions of the NIRC of 1997 pertaining to excise taxes. As explained above, Sec. 130 (A) (2) imposes the liability for the excise tax on the manufacturer or producer of the petroleum products, and Section 204 (C) allows the credit or refund of taxes to the ***taxpayer*** only.

WHEREFORE, the petition for review is hereby **GRANTED**. The assailed **RESOLUTION** dated November 25, 2004 is hereby **REVERSED** and a new one entered in favor of the petitioner. Accordingly, the **DENIAL** of respondent's claim for refund in C.T.A. CASE NO. 6217 is **REINSTATED** based on the above-stated grounds.

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SO ORDERED.

Juanito C. Castaneda, Jr.
JUANITO C. CASTANEDA, JR.
Associate Justice

WE CONCUR:

(Concurs with Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(See Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EB No. 56 (C.T.A. Case No. 6217)
- versus -	Promulgated:
SILKAIR (SINGAPORE) PTE, LTD., Respondent.	OCT 20 2005 apApolinario

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DISSENTING OPINION

With due respect to the opinion of the majority, I beg to disagree with their opinion that respondent-Silkair (Singapore) Pte. Ltd. is not the proper party to seek refund of excise taxes passed-on to it by Petron Corporation.

Petitioner's only issue now is whether or not respondent is entitled to the refund of the amount of P3,680,474.18 allegedly representing excise taxes erroneously paid for the period 01 January 1999 to 30 June 1999.

Petitioner argues that excise taxes are imposed on commodities. They form part of the purchase price of the commodity and passed on to the customers. Excise taxes are in the nature of indirect taxes and these taxes are transferable. These are charges paid by a person other than the one on whom they are legally imposed. They are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The liability for the payment of tax falls on one person but the burden

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thereof can be shifted or passed on to another. *(p.38, Income Taxation, 2001 Revised Edition by Edwin G. Valencia & Gregorio F. Roxas; p. 49, 2005 Revised Edition).*

Hence, excise tax, being an indirect tax, is the direct liability of the manufacturer, or Petron Corporation in the instant case. The incidence of taxation, or the person statutorily liable to pay the tax, falls on Petron Corporation though the impact of taxation, or the burden of taxation, falls on another person, the petitioner (now respondent) in this case, who allegedly reimbursed the former for the excise taxes paid to the Bureau of Internal Revenue.

In addition, Petitioner states that even assuming that respondent squarely falls under any of the transactions/persons enumerated in Section 135 of the Tax Code, they submit and reiterate that respondent is **not** the proper party that may ask for a refund as held by the Supreme Court in ***Cebu Portland Cement*** case, and ***more significantly***, in the recent cases of ***Contex Corporation v. Commissioner, G.R. No. 151135 dated 02 July 2004*** and ***Silkair (Singapore) PTE, Ltd. v. Commissioner of Internal Revenue, CA-G.R. SP – 82902*** dated ***13 September 2004.***

The tax contemplated by law as refundable tax in case of erroneous payment are those taxes remitted to the BIR by the person statutorily liable to pay the same. When Petron Corporation remitted the excise tax to the BIR, this was pursuant to the provision of the law, and that is by virtue of the provision of Section 130 of the Tax Code. There was no erroneous remittance of tax to speak of in this case because Petron Corporation is not exempt from the payment of excise tax. When Petron Corporation passed on the excise tax to the respondent, granting the respondent is qualified for exemption under Section 135 of the Tax Code, respondent made an erroneous payment of passed-on excise tax, *not with the BIR,* but with the seller-Petron Corporation. The respondent in this case should have and could have remedied the situation *either* by not paying the passed-on excise tax to the seller by virtue of its alleged exemption under Section 135 of the Tax Code *or* it may simply opt to purchase from another seller of fuel who does not include as part of the purchase price its excise tax component. It must be observed, however, that respondent, for a long time now, as evidenced by the series of judicial claims for refund involving the same parties but covering different periods filed before this Court, that respondent *has been paying* the passed-on excise tax to the seller-Petron Corporation. We submit that respondent slept on its right to remedy the situation if it indeed believed it is exempted from the payment of excise tax, because it regularly paid the passed-on tax which is already tantamount to consent to the practice of the seller-Petron Corporation in passing on the excise tax to its buyer as part of the purchase price of the fuel.

On the part of the respondent, it lays down the foregoing reasons why it is the proper party to claim for refund, in reference to all the arguments raised by the petitioner in its Petition for Review: Petitioner alleged that respondent is not the proper party to claim for refund for the reason that excise tax, being an indirect tax, is the direct liability of the producer, Petron Corporation in the case at bar, although the burden of taxation falls on another person, respondent in this case; that excise tax, when added to the cost of goods, is no longer a tax but part of the price which the buyer has to pay to obtain the article. No matter how one looks at it, in reality, respondent paid the excise tax on the transaction and it was respondent who made the actual payment which Petron has only remitted to the BIR. It was respondent buyer who actually paid the tax and

Petron was only the one who remitted such payment. To adhere to the argument that the rightful claimant of the subject refund is the seller Petron and not the respondent would seem that respondent's right of recovery of erroneously paid excise taxes will be at the mercy of Petron's exercise of the right to refund the same, which when ignored or belatedly realized will bar further claim, resulting to undue deprivation of private property on the part of the respondent. This surely is not what our great legislators had envisioned in enacting the subject provision of law.

After a careful and thorough perusal, evaluation and consideration of the instant Petition for Review, the Court *En Banc* finds that respondent-Silkair (Singapore) PTE, Ltd. is entitled to the refund of the amount of P3,680,474.18 allegedly representing excise taxes erroneously paid for the period 01 January 1999 to 30 June 1999. Hence, upholding petitioner's arguments will not only run counter to this self-evident fact but also most importantly, will render ineffectual the tax exemption expressly granted to the respondent provided under the law and the treaty. It is quite clear when Section 135 of the Tax Code and Article 4 of the Air Transport Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Singapore provide for the exemption of respondent from the payment of excise tax on its purchases of petroleum products, to quote:

<u>Section 135</u>

"Sec. 135. *Petroleum products sold to foreign international carriers and Exempt Entities or Agencies.* – Petroleum products sold to the following are exempt from excise tax:

(a) International carriers of Philippine or foreign registry on their use or consumption outside the Philippines: Provided, That the petroleum products sold to these international carriers shall be stored in a bonded storage tank and may be disposed of

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only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner;

(b) Exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption: Provided, however, That the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carriers, entities or agencies; and

(c) Entities which are by law exempt from direct and indirect taxes." (underscoring supplied)

ARTICLE 4, AIR TRANSPORT AGREEMENT

"2. Fuel, lubricants, spare parts, regular equipment and aircraft stores introduced into, or taken on board aircraft in the territory of one Contracting Party by or on behalf of, a designated airline of the other Contracting Party and intended solely for use in the operation of the agreed services shall, with the exception of charges corresponding to the service performed, be exempt from the same custom duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party, even when these supplies are to be used on the parts of the journey performed over the territory of the Contracting Party in which they are introduced into or taken on board. The materials referred to the above may be required to be kept under customs supervision and control." (underscoring supplied)

It is rather unfortunate that petitioner cites the case of *Cebu Portland Cement Co. vs. Collector of Internal Revenue (25 SCRA 789)* again and the case of *Contex Corporation vs. Hon. Commissioner of Internal Revenue (G.R. No. 151135, 02 July 2004)*, out of context. In the first case, it was the petitioner, producer of cement, who is expressly granted the exemption from the payment of percentage taxes. Hence, there is no doubt that petitioner, in that particular case, is indeed the proper party to ask for the refund. In the second case,

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petitioner-buyer, being registered as a NON-VAT taxpayer, is thus exempt form VAT, and as an exempt VAT taxpayer, it only follows that it is not allowed any tax credit on VAT (input tax) previously paid because only VAT-registered entities can claim Input VAT Credit/Refund. Hence, petitioner is indeed not the proper party to ask for the refund and it is rather the petitioner's suppliers who possess the personality to do so. This is the real reason behind such afore-quoted pronouncement laid down by the petitioner in its Petition for Review which it intentionally deleted to its favor.

Furthermore, petitioner relies heavily on the case *Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue (20 SCRA 1056)* which unfortunately is not applicable to the instant case; the facts of the said case do not squarely fall "on all fours" with that of the case at bar. In the *Philippine Acetylene case*, the party asking for the refund is the seller-producer based on the exemption granted under the law to the buyer, National Power Corporation (NPC) and Voice of America (VOA). The pronouncement that sales tax, being an indirect tax which is passed on to the purchaser as part of the purchase price of the commodity, is indeed a tax on the seller and not on the buyer only justified the ruling that, even if the buyer happens to be tax-exempt, the seller is nonetheless liable for the payment of the tax, and not the other way around. Nowhere in the said decision can it be found that the buyer is stripped of its exemption granted under the law.

The more relevant ruling is the case of ***Maceda vs. Macaraig (197 SCRA 771 [1991]; 223 SCRA 217 [1993])***, where the honorable Supreme Court ruled that if the exemption granted clearly includes indirect taxes (which sellers of goods and services usually pass on to their customers), then there is a valid reason for allowing the refund. In the said case, the tax exemption of NPC was in general terms to cover "all forms of taxes, duties, fees, imposts etc." which logically includes exemption from indirect taxes on petroleum products used in its operation. In the same way, Article 4 of the Air Transport Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Singapore provides that "Fuel, lubricants x x x introduced into, or taken on board aircraft in the territory of one Contracting Party by or on behalf of, a designated airline of the other Contracting Party and intended solely for use in the operation of the agreed services shall with the exception of charges corresponding to the service performed, <u>be exempt from the same custom duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party x x x."</u>

Sec. 135 (b) of the NIRC of 1997 exempts from excise tax the Petroleum products sold to exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption. Provided, however, that the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carrier entities or agencies. Respondent Silkair (Singapore) PTE, Ltd. falls within the sphere of the above provision. In fact, a certified true copy of the Air Transport Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Singapore was formally offered as *Exhibit "U"* plus the BIR Ruling No. 339-92 dated 01 December 1992 (Exhibit "V"), where it was declared by petitioner itself that the laws of Singapore exempt Philippine carriers from similar taxes on petroleum products sold to the latter and a Certification from Customs and Excise Department, Singapore and a letter dated 01 September 1992 from Philippine Airlines (PAL) were even presented by the respondent to attest that effect, to quote:

"It is represented that Silkair is a corporation duly organized and existing under the laws of Singapore and engaged in international airline business; that on May 14, 1992, the Civil Aeronautics Board approved the petition of Silkair for the issuance of the Temporary Operating Permit (TOP) as a foreign carrier with routing Singapore/Cebu/Singapore; and that the laws of Singapore exempt Philippine carriers from similar taxes on petroleum products sold to the latter.

In support of the above representation, you presented the following documents, viz: (1) Copy of the Articles of Incorporation and Certification of the Company's Secretary; (2) Certification of the Civil Aeronautics Board regarding the approval of the petition of Silkair for Temporary Operating Permit; (3) Certification from Customs and Excise Department, Singapore, that commercial air operating companies enjoy duty exemption from payment of custom duties on petroleum uplifted by the aircraft departing to destinations outside Singapore; and (4) Letter dated September 1, 1992 from Philippine Airlines (PAL) confirming that it is exempt from tax and duty on its fuel purchases in Singapore.

Based on the foregoing and since the Cebu link of the route Singapore-Cebu-Singapore is an international flight the petroleum products purchased by Silkair and consumed in such flights shall not be subject to excise tax pursuant to Section 132 of the Tax Code, as amended."

Furthermore, by virtue of judicial notice – in CTA decisions involving same facts, parties, and issues (CTA Case Nos. 5382, 5430, 5655, 5710, and 5891), this honorable Court in granting the refund claims recognized the existence of the Air Transport Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Singapore, executed on 11 January 1974. The pertinent resolution of this honorable Court in CTA Case No. 5710 dated 08 March 2001 is hereby quoted:

"In CTA Case No. 5655, involving the same parties promulgated on May 24, 2000, the Court ruled that indeed there was an Air Transport Agreement between the Government of the

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Republic of the Philippines and the Government of the Republic of Singapore executed on July 11, 1974. Article 4(2) of the same, quoted below, provides that the Government of Singapore is obliged to grant Philippine air carriers exemption from payment of excise taxes on petroleum products, thus, the second issue must be ruled in the affirmative.

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Moreover, the aforequoted Air Transport Agreement between the Philippines and Singapore is not a mere moral obligation but creates a legally binding obligation between the Philippines and Singapore. It forms part of the laws of the countries involved in accordance with the most fundamental rule in international law, known as *pacta sunt servanda* – international agreements must be performed in good faith. Hence, both parties must fulfill the obligations undertaken."

In addition, in the case of ***Commissioner of Internal Revenue vs. Procter & Gamble Philippine Manufacturing Corp. (204 SCRA 377 [1991]),*** the Supreme Court made a pronouncement that the BIR should not be allowed to defeat an otherwise valid claim for refund by subsequently raising the question of alleged incapacity to file the claim. According to the Court in later cases, ***Commissioner of Internal Revenue vs. Court of Appeals, et. al. (267 SCRA 557 [1997]) and Commissioner of Internal Revenue vs. Court of Appeals, et. al. (303 SCRA 508 [1999]),*** admittedly, the Government is not estopped from collecting taxes legally due because of mistakes or errors of its agents, but like other principles of law, this admits of exceptions in the interest of justice and fair play, as where injustice will result to the taxpayer. In BIR Ruling No. 036-99 dated 29 March 1999, petitioner is already barred from questioning the personality of respondent to file a claim for refund when it resolved that:

"However, under Section 130(A)(2) of the Tax Code, the excise tax on locally manufactured petroleum products shall be paid

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> before removal thereof from the place of production beginning January 1, 1999. For this reason, if the petroleum products sold by Petron to NPC are sourced from tax-paid inventories, the recourse of Petron is to claim for refund or tax credit of the excise taxes paid. In the event that Petron did not opt to claim the same as refund but, as in the instant case, passed on the cost of excise tax to NPC, then the latter may claim for refund or tax credit pursuant to Section 135(c) of the Tax Code."

In reality, respondent paid the excise taxes due on the transaction and it was respondent itself who made the actual payment which Petron has only remitted to the BIR. It was respondent buyer who actually paid the tax and Petron was only the one who remitted such payment. To adhere to the argument that the rightful claimant of the subject refund is the seller Petron and not the respondent would seem that respondent's right of recovery of erroneously paid excise taxes will be at the mercy of Petron's exercise of the right to refund the same, which when ignored or belatedly realized will bar further claim, resulting to undue deprivation of private property on the part of the respondent.

WHEREFORE, premises considered, I vote to DENY the instant Petition for Review for lack of merit.

CAESAR A. CASANOVA
Associate Justice

I CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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