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P. J. KIENER CO.,
LTD., ET AL.,
Petitioners,

versus C.T.A. CASE NO. 1143

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - x

Feb. 19/72

D E C I S I O N

This case involves claims for tax credit of the amounts of ₱8,780.40, ₱8,000.00 and ₱14,000.00, allegedly representing erroneous payments of specific taxes on petroleum products purchased on various dates by petitioners from Caltex (Phil.) Inc.

Petitioners, P. J. Kiener Co., Ltd. (P.J. Kiener for short), a domestic limited copartnership; International Construction Corporation, a domestic corporation; and Gavino T. Unchuan, a Civil Engineer, on or about December 14, 1957 entered into a joint venture for the purpose of participating in the construction of the Mactan Airfield located in the province of Cebu.

The construction of the Mactan Airfield was one of the mutual defense projects agreed upon by the United States of America and the Philippine

Republic pursuant to an agreement or "Aide Memoire" dated April 27, 1955, which, among other things, provides:

> . . . The Philippine Government agrees that no internal taxes of any kind or description, except income taxes, shall be levied on any materials, equipment, supplies and/or services which may be purchased or otherwise acquired in connection with the terms of this Agreement on an approved project as referred to herein, which materials, equipment, supplies and/or services are required solely for such projects.

Conformably to the said Agreement, the Philippine Government, represented by the Armed Forces of the Philippines, called for a public bidding for the construction of the Mactan Airfield. Petitioners participated in the bidding and, having submitted the best bid, were awarded the contract to construct the said airfield.

Section 3-19 of the General Conditions attached to the Specifications for Mactan Airfield, which was made an integral part of the contract between the government and petitioners for the construction of the Mactan Airfield Project, enjoins that:

> 3-19. Taxes.—In accordance with the Mutual Defense Agreement between the United States of America and the Republic of the Philippines, no tax of any kind or description will be levied on any materials, equipment or supplies which may be

> purchased or otherwise acquired in connection with the project under contract, which materials, equipment or supplies are required solely for such project. . .

Petitioners, for purposes of operating their equipment and machinery in connection with the construction of the Mactan Airfield, purchased from Caltex (Phil.) Inc. (Caltex for short) petroleum products, such as motor gasoline, kerosene, lubricating oil, motor oil and diesel oil. Prior to the purchase of said supplies, Caltex sought the opinion of the Secretary of Finance as to whether petitioners could be supplied the petroleum products free of taxes. In reply thereto, the Secretary of Finance Finance on July 11, 1958 wrote that "all petroleum product requirements of the aforementioned authorized joint-contractors in the construction of the MACTAN AIRFIELD PROJECT may be supplied by the firm tax free" provided that such petroleum products are "covered by a corresponding certificate of exemption" signed by the Chief of Staff, Armed Forces of the Philippines, and countersigned by the Secretary or Undersecretary of National Defense.

For the periods from October 1, 1959 to October 30, 1959, November 3, 1959 to November 27, 1959, and December 2, 1959 to January 30, 1960, petitioners purchased petroleum products from Caltex in the respective amounts of ₱8,780.40, ₱8,548.83 and ₱15,-187.99.

On the belief that the petroleum products they used in connection with the construction of the Mactan Airport are not liable for specific taxes, petitioner P. J. Kiener wrote three separate letters to respondent asking to refund to Caltex the specific taxes paid by Caltex for said petroleum products for each of the period aforesaid. Thereafter, Caltex filed separate claims for tax credit of specific taxes for each of the said period on June 13, 1960, July 28, 1960 and August 3, 1960, respectively, on the ground that it is exempt therefrom, pursuant to the aforesaid opinion-letter of the Secretary of Finance.

In letters to Caltex dated July 21, 1961 and August 23, 1961, respondent partially allowed the claim for tax credit of specific taxes in the amounts of ₱2,137.20 and ₱3,778.78 for the periods covering November 3, 1959 to November 27, 1959 and December 2, 1959 to January 30, 1960, respectively. On October 26, 1961, Caltex wrote respondent a letter seeking reconsideration of his decisions partially allowing its claims for tax credit, which was received by respondent on October 27, 1961, to which respondent has not yet replied. The claim for tax credit for specific tax paid for the period covering October 1, 1959 to October 30, 1959 was totally denied by respondent, in a letter dated January 7, 1963 after the instant petition for review had already been filed.

On October 31, 1961, petitioners filed the instant appeal alleging three causes of action, to wit:

> 1. First cause of action - tax credit of the sum of ₱8,780.40 paid as specific tax for the period October 1, 1959 to October 30, 1959;
>
> 2. Second cause of action - tax credit of the sum of ₱8,000.00 paid as specific tax for the period November 3, 1959 to November 27, 1959; and
>
> 3. Third cause of action - tax credit of the sum of ₱14,000.00 for specific tax paid for the period December 2, 1959 to January 30, 1960.

The issues posed for our consideration may be summarized as follows:

1. In so far as the Second and Third causes of action are concerned, whether or not the appeal to this Court was filed within the 30-day period prescribed under Section 11 of Republic Act No. 1125;

2. Whether or not the right to claim tax credit of the taxes paid has already prescribed under Section 306 of the Revenue Code;

3. Whether or not the petroleum products in question are exempt from specific tax under the

Mutual Defense Agreement between the United States of America and the Philippine Government; if in the affirmative,

4. Whether or not petitioners are the proper parties entitled to claim credit for the amount paid as specific taxes; and

5. Whether or not respondent is liable for interest on the amount which may be allowed as tax credit.

Respondent assails the jurisdiction of this Court to take cognizance of petitioners' second and third causes of action on the ground that the appeal was filed beyond thirty days from receipt of respondent's decisions.

In all claims for refund or credit of internal revenue taxes erroneously or illegally collected, the Revenue Code requires that the taxpayer must file a written claim for refund with the Bureau of Internal Revenue within two years after payment of the tax and that the action for recovery must be instituted in court also within two years after such payment. (Secs. 309 & 306, Revenue Code.) Under Section 11 of Republic Act No. 1125, in relation to Section 7(1) of the same Act, decisions of the Commissioner of Internal Revenue in cases involving refunds of internal revenue taxes must be appealed to the Court of Tax Appeals within thirty days after receipt of the decision of the Commissioner. However, if respondent takes time in deciding the claim, the taxpayer must commence the suit or proceeding before the end of the 2-year period without waiting for said decision. (Coll. of Int. Rev. v. Sweeney, 106 Phil. 59; Gibbs v. Coll. of Int. Rev., 107 Phil. 232; Coll. of Int. Rev. v. Convention of Phil. Baptist Churches, L-11807, Jan. 28, 1961.)

In connection with the claim for tax credit of the amounts of ₱8,548.83 and ₱15,187.99 (now ₱8,000.00 and ₱14,000.00 under the second and third causes of action) filed by Caltex, for and in behalf of P. J. Kiener, respondent, in letters dated July 21, 1961 and August 21, 1961, informed Caltex that he is only approving a partial credit in the respective amounts of ₱2,137.20 and ₱3,778.78. Not satisfied with these decisions Caltex wrote a letter, dated October 26, 1961, seeking reconsideration of said decisions. Without waiting for respondent's action on the request for reconsideration, petitioners instituted the present appeal on October 31, 1961.

(Petitioners acted correctly in appealing directly to this Court without waiting for respondent's decision on the motion for reconsideration. Respondent's decisions partially allowing credit of the taxes are not the appealable decisions because a motion for their reconsideration was filed and to which no action has as yet been taken by the respondent. As already held in several cases heretofore cited, petitioners need not wait for respondent's decision before they can appeal to this Court. However, it is also a positive requirement under Section 306 of the Revenue Code that the judicial action must be commenced within two years from the date of payment of the tax. Inasmuch as the petition for review was filed on October 31, 1961, all specific taxes paid prior to October 31, 1959 would have already prescribed.

For a clear and easy determination of what payments were made prior to October 31, 1959 and had therefore prescribed, we are tabulating below the official receipt numbers, amounts paid and dates of payment,[1] under their respective causes of action, to wit:

First Cause of Action

O.R. No.	Amount	Date of Payment
2469173	₱ 163,557.45	October 5, 1959
2469227	1,298.56	October 7, 1959
39128	251,616.00	July 23, 1959
2467627	71,198.80	September 10, 1959

(Exhs. K, K-1 to K-3.)

[1] Official receipts were admitted as evidence by the Court without objection on the part of respondent (p. 247, t.s.n.).

Second Cause of Action

O.R. No.	Amount	Date of Payment
2469227	₱ 1,298.56	October 7, 1959
2471090	62,372.61	November 4, 1959
2472763	154,187.19	November 25, 1959
391288	251,616.00	July 23, 1959

(Exhs. O, O-1 to O-3.)

Third Cause of Action

28577	2,176.00	June 4, 1959
2474582	93,224.51	December 24, 1959
2479507	71,683.45	January 15, 1960
2484406	937.56	January 25, 1960
2472763	154,187.19	November 25, 1959

(Exhs. T, T-1 to T-4.)

From the foregoing, it can readily be seen that all payments of specific taxes falling under the first cause of action were made prior to October 31, 1959 and have, therefore, prescribed.

With respect to the payments for the period covered by the second cause of action, i.e., November 3, 1959 to November 27, 1959, petitioners submitted in evidence four official receipts (Exhs. O, O-1 to O-3) allegedly representing payments for said period. It is very apparent, however, that two receipts, i.e., Exhibits O and O-3 were the very same receipts submitted in evidence as Exhibits K-1 and K-3, representing payments for the period covered by the first cause of action. Consequently, the amounts represented by Exhibits O-1 and O-3 cannot be considered as payments for the period covered by the second cause of action; otherwise, petitioners would be claiming the same payment twice. The other two (2) payments, covered by Official Receipts No. 2471090 & 2472763, Exhibits O-1 and O-2, were obviously made within the prescriptive period of two years.

In connection with the payments of specific taxes falling under the third cause of action, only Official Receipt No. 28577, dated June 4, 1959, appears to have been paid prior to October 31, 1959 and had apparently prescribed. Nonetheless, the evidence shows that Caltex always paid the specific taxes before delivery of the petroleum products to its customers. Since the first delivery of petroleum products to petitioners for the period covered by the third cause of action, i.e., December 2, 1959 to January 30, 1960, was made on December 2, 1959, as shown by Exhibits V and 20, the payment of the tax could not have been made on June 4, 1959, which is too far away from the delivery thereof. The likelihood is that the petroleum products delivered on said date (December 2, 1959) was paid on November 25, 1959, covered by Official Receipt No. 2472763, supra, which payment was still made within the 2-year prescriptive period.

The issue as to whether or not the petroleum products in question are exempt from specific tax under the Mutual Defense Agreement between the United States of America and the Philippine Government has already been passed upon by this Court in the case of P. J. Kiener Co., Ltd. v. The Commissioner of Internal Revenue, CTA Case No. 1169, June 10, 1965, involving identical parties and similar issues. On this question, we held as follows:

> Petitioners' contention that the petroleum products in question are exempt from the payment of specific tax is correct. The "Aide Memoire" of April 27, 1955 between the Philippine Republic and the United States of America, by authority of which the construction of the Mactan Airfield Project was undertaken, states that the "Philippine Government agrees that no internal taxes shall be levied on any material, equipment, supplies and/or services which may be purchased or otherwise acquired in connection with the terms of this Agreement on an approved project as referred to herein, which materials, equipment, supplies and/or services are required solely for such projects." (Vol. II, No. 4, Treaty Series, Department of Foreign Affairs, pp. 26-32; Vol. 261, United Nations Treaty Series, p. 351). And Section 3-19 of the General Conditions attached to the Specifications for Mactan Airfield, which was made an integral part of the contract between the government and petitioners for the construction of the Mactan Airfield Project, enjoins that "In accordance with the Mutual Defense Agreement between the United States of America and the Republic of the Philippines, no tax of any kind or description will be levied on any material, equipment or supplies which may be purchased or otherwise acquired in connection with the project under contract, which material, equipment or supplies are required solely for such project." Clearly, materials or supplies required solely for projects undertaken for the mutual defense of the two

countries, which are purchased or otherwise acquired in connection with such projects, are exempt from any tax, specific or otherwise. That petroleum products come within the import of the words "material" or "supplies" is beyond question.

In an analogous case, it was held "that gasoline and oil furnished its drivers during the construction job come within the import of the words material or supplies, for it has been held that gasoline and oil used by drivers in a construction job fall under the category of supplies. (West v. Detroit Fidelity and Surety Co., 225 N.W. 673, 678, 118 Neb., 544 cited on page 790 Vol. 40, Words and Phrases)" [The Comm. of Customs v. Caltex (Phil.) Inc., et al., G. R. No. L-13067, Dec. 29, 1959.]

Moreover, respondent in effect admitted that petitioners are exempt from specific tax when he allowed a partial credit of their claims constituting their second and third causes of action. The only reason why their claims were not allowed in full but to the extent only of one-fourth (¼) of the total amount of tax paid, or in the respective amounts of ₱2,137.20 and ₱3,778.78, is allegedly because some of the petroleum products were not used in the construction of the Mactan Airfield. We agree with the respondent that the exemption of petitioners from specific tax does not extend to those petroleum products which were not used in the construction of said airfield.

The reports submitted to respondent by Revenue Inspector Vicente S. Lorenzo, both dated November 10, 1960, were the bases of respondent in allowing only one-fourth (¼) of the amounts being claimed as tax credit for payments of taxes covering the periods from November 3, 1959 to November 27, 1959 and December 2, 1959 to January 30, 1960 (second and third causes of action). The disallowance of the remaining three-fourth (3/4) was based on the following grounds, to wit: (a) that out of the 168 units of vehicles and equipments, as contained in the list submitted, there were only 56 units left; (b) that the lighting power used in the camp, transportation service of workers from camp to Opon Wharf were used for the convenience of the workers; (c) that outside contractor was hired for hauling cement, gravel and sand; and (d) that petroleum products were used in the demolition of the Opon Church and theater, and in the construction of road to the Caltex Terminal in Opon, Cebu.

We are going to discuss separately the above grounds relied upon by respondent.

Units of Vehicles & Equipment Used -

By way of refutation to respondent's claim that only 56 units of vehicles and equipment were found in the construction site, petitioners presented Mr. Wenceslao Mendoza, Chief of the Equipment Division of P. J. Kiener, who testified, among others, as follows: that petitioners had 168 units being utilized in the project and not 56 units only; that the construction site is five kilometers long and 2½ kilometers wide and the units were scattered all over the project site and some outside the project hauling "aggregates" (sand, gravel and rocks); and that it will take more than two days to inspect or go over all these units.

This Court finds no justifiable reason to doubt the positive testimony of Mr. Mendoza who, as the person in-charge of the equipments used in the construction of the Mactan Airfield, is in a position to know their operations and whereabouts. Against this testimony, respondent did not even bother to present BIR Inspector Vicente Lorenzo to substantiate his findings so that same may be tested by cross-examination, otherwise they would be plain hearsay. Moreover, if we are to consider the nature and magnitude of petitioners' operations, the vehicles and equipments could not have been found in one site alone but must have been scattered throughout the area of operations or even outside of it. For instance, the gathering or quarrying of gravel, sand and rocks has to take place about 17 to 18 kilometers from the project site where vehicles and machinery are needed. Had respondent allowed Inspector Lorenzo to testify before this Court, he could have been examined as to the places he inspected where he allegedly found only 56 units. Consequently, we hold that petitioners have satisfactorily shown that there were 168 units still in operation during the periods in question.

Lighting, Transportation Service, etc. -

Respondent claims that the amount of tax paid for the petroleum products used for lighting the camp and transporting the laborers from the camp to Opon Wharf and vice versa should not be exempt because they were used for the convenience of petitioners' workers. We are of the opinion that the petroleum products used in lighting the camp and transporting the laborers, although the latter to a certain extent are for the convenience of the workers, were nonetheless utilized in connection with the construction of the airfield. As testified to by Mr. Wenceslao Mendoza, the lighting of the camp was necessary because the work was being undertaken on a 24-hour basis. The transportation of laborers to their respective places of work becomes necessary because of the big area covered by the operation.

Outside Contractors -

In connection with the use of outside contractors, Mr. Mendoza admits that petitioners employed contractors to haul cement the fuel used being for the contractors' account; the contract was only for the cost per bag hauled to the project. On the other hand, petitioners furnished the fuel to the contractors hauling aggregates (sand and gravel) because the contract was per truck hired.

Demolition of Opon Church and Construction of Opon Theater -

Petitioners admit that the demolition of the Opon Church and the construction of the Opon Theater were not in connection with the construction of the Mactan Airfield.

With regards to the demolition of the Opon Church, Mr. Mendoza testified uncontradicted that the following equipments were utilized, the number of days used, kind of fuel and consumption of each:

Equipment	Days	Fuel	Consumption (Liters) Daily	Total
1 Crane	10	Gasoline	100	1,000
2 Dump Trucks	6	Gasoline	140	840
1 Bulldozer	8	Diesel	100	800

As computed by Mr. Severino Boncaras, Supervising Accountant of Caltex, the specific tax for gasoline is ₱.08 per liter or ₱147.20 for 1,840 liters of gasoline; while the specific tax on diesel oil is ₱1.00 per metric ton, or ₱0.67 for the 806 liters used for the bulldozer. Based on this computation, which was not contradicted by respondent, the specific tax paid on the petroleum products used in the said demolition work will amount to ₱147.87 (₱147.20 plus ₱0.67).

With respect to the construction of the Open Theater, Mr. Mendoza declared that the theater owner requested petitioners' help to lift some trusses to be placed on the roof of the construction, and for this purpose a crane was used which work did not last one (1) day. Since the crane consumes only 100 liters of gasoline a day and the corresponding specific tax is ₱.08 per liter, the specific tax will only be ₱8.00.

On the alleged construction of a road to the Upon Caltex Terminal Compound, Mr. Mendoza testified that the same was constructed in 1958. Again, this testimony was not contradicted by respondent, nor was evidence presented to show that it was constructed during the period under review. Since the claim for tax credit pertains to the year 1959, payment of specific tax prior thereto would be immaterial to this case.

Consequently, the total specific tax paid on petroleum products used in the demolition of the Opon Church and the construction of the Opon Theater is ₱155.87 (₱147.87 plus ₱8.00), should be deducted from the amount that may be credited to petitioners under the second cause of action.

Coming now to petitioners' third cause of action, it is well to repeat here that the grounds relied upon by respondent in partially allowing petitioners' claim for tax credit for taxes paid from November 3, 1959 to November 27, 1959 (second cause of action) are the same grounds for the partial allowance of taxes paid for the period from December 2, 1959 to January 30, 1960 (third cause of action). Our reasons, therefore, in resolving the second cause of action apply with equal force to the resolution of the third cause of action. It should be noted, however, that we allowed the deduction of the specific tax paid on the petroleum products used in the demolition of the Opon Church and construction of the Opon Theater from the amount to be credited to petitioners. This amount, totalling ₱155.87, supra, cannot now be deducted from the amount creditable to petitioners under the third cause of action because the demolition and construction works were undertaken by petitioners only during the period from November 3, 1959 to November 27, 1959 (second cause of action).

Respondent questions the personality of petitioners to ask for credit of the taxes in question and cites in support thereof the case of Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue, 20 SCRA 1056. Said case did not involve any issue on personality to sue. It however formed as a background for the ruling in Cebu Portland Cement Co. v. Commissioner of Internal Revenue, G.R. No. L-20563, October 29, 1968, 25 SCRA 789 (which is not cited by respondent), where it was held that the right to sue for refund of sales tax is vested on the seller, not on their customers, because it is on the former that the sales tax is imposed. Although not cited by respondent, we will take up the doctrine of said Cebu Portland Cement Co. for the sake of thoroughness.

A doctrine is laid down in a case on the basis of the facts thereof. Hence, the facts of the case are important to determine the latitude of the doctrine. The Cebu Portland Cement Co. case aforementioned involved refund of taxes paid under a tax provision of general application to sellers. The law imposes a tax on sales, so Cebu Portland Co. included the tax in the price of its cement. The tax obviously is the concern of the seller, not the purchaser. In the present case, we deal with tax exemption expressly conferred on petitioners, the purchasers, under Section 3-19 of the General Conditions attached to the Specifications for Mactan Airfield, to wit:

> 3-19. Taxes.— x x x
> no tax of any kind or description will be levied on any materials, equipment or supplies which may be purchased or otherwise acquired in connection with the project under contract, which materials, equipment or supplies are required solely for such project x x x

Petitioners being the possessors of the privilege are, logically, the ones who should assert the concomitant action for redress in case of a violation thereof.

Then again, in case of sales or specific taxes the seller would generally include the tax in the price of the commodity rather than take the trouble of justifying its exclusion later before the law-enforcing arm of the government, knowing how cumbersome the ensuing proceeding can be. Once thus included, the seller will have no incentive, to put it mildly, to file a claim and then sue for refund since whatever may be recovered will not be his anyway. The record of this case gives a glimpse of the obstacles he has to hurdle till the case is finally decided. Once can very well imagine the reluctance of the seller to sue for refund considering the cost in time, trouble, effort and money of a suit, and what is more, it is a suit from which he has nothing to gain. Proof of this is that this appeal had to be filed by petitioners, the purchasers. A rule preventing the grantees of a tax exemption from suing for refund would practically render the grant nugatory.

Lastly, petitioners claim that they should be awarded interest on the amount which may be refunded to them. It is already a settled doctrine in our jurisdiction that interest may be awarded only if the collection of an internal revenue tax is attended with arbitrariness. (Coll. of Int. Rev. v. Prieto, 3 SCRA 101; Victorias Milling Co., Inc. v. Comm. of Int. Rev., 19 SCRA 430.) There is nothing in the records and evidence of this case to show that respondent's actuations herein were arbitrary.

In fine, we hold that: (1) we have jurisdiction over petitioners' second and third causes of action; (2) the right to sue for credit for taxes paid for the period covered by the first cause of action (Oct. 1, 1959 to October 30, 1959) had already prescribed when this suit was commenced; (3) the petroleum products in question are exempt from specific tax; (4) petitioners are the proper parties entitled to claim credit for the specific taxes paid; and (5) respondent is not liable for interest on the amount creditable to petitioners. Petitioners are entitled to the credit of the total sum of ₱17,664.97, computed as follows:

<u>1st Cause of Action</u> -

Taxes paid		₱ 8,548.83	
Less:			
Amount already credited . . .	₱2,137.20		
Amount used in demolition and construction works	155.87	2,293.07	
Amount subject to credit			₱ 6,255.76

<u>2nd Cause of Action</u> -

Taxes paid	15,187.99	
Less:		
Amount already credited. .	3,778.78	
Amount subject to credit		11,409.21
TOTAL AMOUNT SUBJECT TO CREDIT		₱17,664.97

WHEREFORE, judgment is hereby rendered holding petitioners exempt from specific tax. Accordingly, respondent is ordered to credit to petitioners the total amount of ₱17,664.97 as specific taxes paid on petroleum products used in the construction of the Mactan Airfield covering the periods from November 3, 1959 to November 27, 1959 and December 2, 1959 to January 30, 1960. Without pronouncement as to costs.

SO ORDERED.

Quezon City, February 19, 1972.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge