REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

AMPRO PHILIPPINE CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 6011

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUN 16 2003

x -- x

DECISION

This is a judicial appeal from the denial of the respondent on petitioner's administrative protest against the assessment for deficiency excise tax in the aggregate amount of P80,024,121.46 for the years 1997 and 1998.

Based on the records of the case, the antecedent facts are as follows:

Petitioner is a corporation organized and existing pursuant to and by virtue of Philippine laws and may be served with processes of this court at its principal office address at Cledor Building, No. 612 Remedios St., Malate, Manila. It is a duly registered Clark Special Economic Zone (CSEZ) Enterprise, with Certificate of Registration No. 95-36 dated August 22, 1995, and is authorized to engage in warehousing and wholesale operations to supply the duty-exempt shops at the Clark and Subic Special Economic and Freeport Zone only *(par. 1, Stipulation of Facts and Issues; Exhibit U).*

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On October 27, 1998, then Commissioner of Internal Revenue Beethoven L. Rualo issued Excise Tax Mission Order (ETMO) CN 00019, addressed to the petitioner, informing the latter that a stocktaking/investigation on the company/establishment will be conducted in order to determine the correct excise tax liabilities as well as the extent of its administrative compliance to existing revenue laws and regulations especially on the prescribed affixture of the internal revenue labels and strip stamps from the date of last stocktaking to the present *(BIR Records, p.1)*.

On the same day, the assigned Revenue Officers requested petitioner to prepare and submit the essential requirements within ten (10) days from receipt of Notice in order to expedite the stocktaking/investigation. The documents include Certificate of Inventory for previous stocktaking, Excise Tax Payments, Official Register Book, Importation documents, Authority to Release Imported Goods (ATRIG) issued by the BIR, Purchases or Requisitions documents of internal revenue labels and strip stamps, Sales Invoices and Official Receipts *(BIR Records, p. 2)*. The notice was received by petitioner on November 18, 1998.

On December 3, 1998, another letter was sent to petitioner reiterating the foregoing request and petitioner was given another ten (10) days from its date of receipt on December 3, 1998, to comply with the request *(BIR Records, p.3)*.

On March 27, 1999, the Regulatory Operations Monitoring Division of the Bureau of Internal Revenue issued a Final Notice to the petitioner to submit the needed documents for the routine verification and reminded petitioner that failure to do so would be a violation of Revenue Regulations No. V-1 or the Bookkeeping Regulation, with

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regard to the presentation of the books of accounts and related records upon demand of an internal revenue officer *(BIR Records, p. 4)*.

Subsequently, petitioner submitted to the Bureau of Internal Revenue photocopies of 1997 and 1998 Import Permits their corresponding Bills of Lading, Purchase Orders from Demagus Trading Corporation and Clark Liberty Warehouse, Inc., Sales Invoices, Delivery Receipts and Gate Passes, Boat Notes and Packing List *(BIR Records, pp. 20 to 136)*.

On May 10, 1999, petitioner received the Pre-Assessment Notice dated May 6, 1999 for the proposed deficiency excise tax in the amount of P65,185,796.71. The deficiency arose from its unaccounted removals or deliveries of excisable articles allegedly sold outside of the Clark Special Economic Zone (CSEZ) covering the period from January, 1997 to November 18, 1998. In the said notice, petitioner was informed that it may send a representative within fifteen (15) days from receipt of the notice to explain its side in case it does not agree with the findings *(BIR Records, p. 138)*.

Petitioner failed to send a representative within the period given by respondent in its Pre-Assessment Notice. Hence, respondent issued a Final Assessment Notice dated October 4, 1999 which was received by petitioner on October 8, 1999 (BIR Records, pp. 154 – 157). The deficiency excise tax rose to P80,024,121.46, computed as follows:

C I G A R E T T E S

DESCRIPTION	CDC Permit No.	Quantity (In packs)	Rate	Basic
1997				
Champion MFT K.S.	96-10725	475,000	P 5.00	P 2,375,000.00
Champion Prem. FTK.S.	96-10725	25,000	5.00	125,000.00
Champion MFT K.S.	96-10726	475,000	5.00	2,375,000.00
Champion Prem. FTK.S.	96-10726	25,000	5.00	125,000.00
Champion MFT K.S.	96-01615	475,000	5.00	2,375,000.00

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Champion Prem. FTK.S.	96-01615	25,000	5.00	125,000.00
Champion MFT K.S.	97-02131	475,000	5.00	2,375,000.00
Champion Prem. FTK.S.	97-02131	25,000	5.00	125,000.00
Champion MFT K.S.	97-02132	475,000	5.00	2,375,000.00
Champion Prem. FTK.S.	97-02132	25,000	5.00	125,000.00
Marlboro Lights (Box)	97-02566	125,000	8.00	1,000,000.00
Marlboro Lights (Soft)	97-02566	25,000	8.00	200,000.00
Salem Filter	97-02566	75,000	6.96	522,000.00
Champion MFT K.S.	97-01614	475,000	5.00	2,375,000.00
Champion Prem. FTK.S.	97-01614	25,000	5.00	125,000.00
Champion MFT K.S.	97-03347	475,000	5.00	2,375,000.00
Champion Prem. FTK.S.	97-03347	25,000	5.00	125,000.00
Champion MFT K.S.	-	475,000	5.00	2,375,000.00
Champion MFT K.S.	-	25,000	5.00	125,000.00
Subtotal		**4,225,000**		**P 21,722,000.00**
Add: 50% Surcharge				**10,861,000.00**
20% Interest from 11-11-98 up to 8-15-99				**2,225,568.22**
TOTAL				**P35,808,568.22***

DESCRIPTION	**CDC Permit No.**	**Quantity (In packs)**	**Rate**	**Basic**
1998				
Champion	98-00351	500,000	P 5.00	P 2,500,000.00
Marlboro	98-00352	220,000	8.00	1,760,000.00
Champion	98-00812	500,000	5.00	2,500,000.00
Marlboro	98-00813	220,000	8.00	1,760,000.00
Champion	98-01041	500,000	5.00	2,500,000.00
Marlboro	98-01450	220,000	8.00	1,760,000.00
Champion	98-01452	500,000	5.00	2,500,000.00
Marlboro	98-02738	220,000	8.00	1,760,000.00
SE Cigarettes	98-05163	430,000	12.00	5,160,000.00
Champion	98-08136	501,000	5.00	2,505,000.00
Subtotal		**3,811,000**		**P 24,705,000.00**
Add: Surcharge				**12,352,500.00**
Interest				**3,668,523.24**
TOTAL				**P 40,726,023.24**

DISTILLED SPIRITS

DESCRIPTION	**CDC Permit Number**	**Quantity (In P.L.)**	**Rate (per P.L.)**	**Basic**
1998				
Fundador Brandy	98-08256	9,984	P75.00	P 748,800.00
Fundador Brandy	98-08257	18,240	75.00	1,368,000.00
Subtotal		**28,224**		**P 2,116,800.00**
Add: Surcharge				**1,058,400.00**
Interest				**314,330.00**
TOTAL				**P 3,489,530.00**

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Summary of Findings

Cigarettes (1997)	P 35,808,568.22
Cigarettes (1998)	40,726,023.24
Distilled Spirits	3,489,530.00
TOTAL	**P 80,024,121.46** **

Penalty

1. No Books of Accounts (RMO No. 1-90) **50,000.00**

Note: There are amendments due to additional information and documents gathered which has affected the computation of our previous assessment issued.

The court took notice that there was an error in footing. The total correct amount should be P34,808,568.22.* and the total deficiency assessment should be P79,024,121.46.**

On November 3, 1999, petitioner filed with the office of the respondent a request for reinvestigation of the assessment.

On December 3, 1999, petitioner filed a formal protest against the assessment.

On January 11, 2000, petitioner received the letter-decision dated December 15, 1999 denying its protest on the basis of Section 6 (B) and Section 131 (A) of the Tax Reform Act of 1997 and Section 6.c of Revenue Regulations No. 1-95 dated January 24, 1995.

On February 10, 2000, petitioner elevated the case to this court through a Petition for Review.

Summons was issued to respondent who subsequently filed his Answer and interposed the following as Special and Affirmative Defenses, thus:

> 4. Investigation disclosed that during the years 1997 and 1998, petitioner could not account for excisable articles, i.e. cigarettes and distilled spirits, which are presumed to have been

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sold outside of Clark Special Economic Zone (CSEZ), hence, subject to taxes and duties pursuant to Section 6.c of Revenue Regulations No. 1-95, which provides:

> "x x x Articles which are missing or cannot be accounted for in the secured area shall be presumed to have been transferred to the Customs territory without permit and therefore subject to taxes and duties."

5. Records of the Bureau of Customs reveal that, contrary to petitioner's claim, no sales or deliveries were made to Demagus Trading in 1997 nor to Clark Liberty Warehouse Club, Inc. in 1998. Petitioner could not present any official receipt of any form of payment from said entities. In other words, there is no sufficient evidence of a done sale between petitioner and said entities.

6. The assessment was issued in accordance with and regulations.

7. All presumptions are in favor of the correctness of tax assessments.

The parties jointly stipulated the issues to be resolved in this case, to wit:

1. Whether or not petitioner sold or delivered the excisable articles subject of the assessment to Demagus Trading in 1997 and to Clark Liberty Warehouse Club in 1998.

2. Whether or not the excisable articles subject of the assessment are presumed to have been transferred outside the Clark Special Economic Zone.

Respondent argued that petitioner did not sell or deliver the excisable articles subject of the assessment to Demagus Trading in 1997 and to Clark Liberty Warehouse Club, Inc. in 1998. According to respondent, in spite of several requests to the petitioner to show or submit evidence to prove that there were sales transactions by presenting any official receipt or any form of payment from the alleged buyers, the latter failed to do so.

Besides, respondent relied on the certification of Jaime Q. Capil, Customs Account Officer (CSEZ), that Demagus Trading Corporation had not received any imported cigarettes from petitioner. Based on the foregoing, respondent concluded that the unaccounted excisable articles are presumed to have been transferred outside the Customs Special Economic Zone on the basis of Section 6.c of Revenue Regulations No. 1-95 which provides:

> SECTION 6. *Taxes and Fiscal Obligations.*
> a. x x x
> b. x x x
> c. Registered enterprises operating within the Secured Area shall be responsible for the safekeeping and accounting of all articles received by them and shall be relieved from responsibility for the articles upon removal under proper permit from the Secured Area, transfer to another registered enterprise or to a Secured Area resident, destruction in the Secured Area, or abandonment to the SBMA in the Secured Area. <u>Articles which are missing or cannot be accounted for in the Secured Area shall be presumed to have been transferred to the Customs Territory without permit and therefore subject to taxes and duties</u>.

On the other hand, petitioner maintains that the cigarettes and liquors which were alleged to have been brought outside the CSEZ without permit have all been accounted for and delivered either to Demagus or Liberty in the CSEZ or in Star Trading Corporation located within the Poro Point Special Economic Zone in La Union.

In support of its claim, petitioner submitted several documents during the trial which include Purchase Orders, Sales Invoices, Delivery Receipts and Gate Passes, Applications for Import Permit and Import Permits *(Exhibits A to T, inclusive of submarkings).* Also, petitioner offered the testimonies of Ms. Lita Cruz, its Assistant

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Manager; Mr. Manuel Reyes, Customs Examiner and Mr. Jose Abriol, former project evaluation officer of Clark Development Corporation.

Moreover, petitioner argues that assessments should be based on actual facts and not on mere presumptions or speculations.

The court is reasonably convinced and so holds that the Petition for Review is bereft of merit.

Time and again, the court has ruled that all presumptions are in favor of the correctness of tax assessments. The burden of proof is on the taxpayer to show the contrary *(Delta Motors Corporation vs. Commissioner of Internal Revenue, CTA Case No. 3782, May 21, 1986).* In the case at bar, we declare that petitioner was not able to establish the fact of sale and delivery to Demagus Trading and to Clark Liberty Warehouse Club, Inc. It failed to present to the court the official receipts or any proof of payment from its buyers. In the absence of such documentary evidence, petitioner should have taken the testimonies of the managers of the said buyers or any person who received the goods. But, petitioner did not do so.

In addition, after scrutiny of the documents, we noted some irregularities. First, the sales invoices presented have no "BIR Permit No." printed thereon. This violates Section 238 of the 1997 Tax Code, which provides:

> **Sec. 238.** *Printing of Receipts or Sales or Commercial Invoices.-* All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before the printer can print the same.

Second, the dates of the Applications for Import Permit were earlier than the dates of the Purchase Orders, to wit:

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	PURCHASE ORDER		APPLICATION FOR IMPORT PERMIT			
	EXHIBIT	DATE	EXHIBIT	DATE	QUANTITY	
1997						
DEMAGUS TRADING	A	1/8/97	A-3	12/10/96	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	B	1/13/97	B-3	12/11/96	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	C	2/27/97	C-3	2/12/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	D	3/21/97	D-3	2/28/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	E	4/7/97	E-3	3/13/97	250 Cases	Marlboro Lights Box
					50 Cases	Marlboro Lights Soft
					150 Cases	Salem Filter
DEMAGUS TRADING	F	3/18/97	F-3	2/28/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	G	4/18/97	G-3	2/12/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
DEMAGUS TRADING	H	5/24/97	H-3	4/8/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
CLARK LIBERTY WAREHOUSE	I	6/21/97	I-3	5/30/97	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
1998						
CLARK LIBERTY WAREHOUSE	J	1/20/98	J-3	1/19/98	220 Cases	Marlboro Soft
					220 Cases	Marlboro Box
CLARK LIBERTY WAREHOUSE	K	2/3/98	K-3	2/2/98	220 Cases	Marlboro Soft
					220 Cases	Marlboro Box
CLARK LIBERTY WAREHOUSE	L	2/18/98	L-3	2/17/98	1000 Cases	Champion MFT KS
CLARK LIBERTY WAREHOUSE	M	2/26/98	M-3	2/6/98	950 Cases	Champion MFT KS
					50 Cases	Champion Premium
CLARK LIBERTY WAREHOUSE	N	1/16/98	N-3	1/15/98	1000 Cases	Champion MFT KS
CLARK LIBERTY WAREHOUSE	O	3/14/98	O-3	3/3/98	170 Cases	Marlboro Soft
					120 Cases	Marlboror/ Box
					150 Cases	Marlboror/ Med. Box
CLARK LIBERTY WAREHOUSE	P	5/15/98	P-3	2/27/98	1000 Cases	Champion MFT KS
CLARK LIBERTY WAREHOUSE	Q	5/29/98	Q-3	4/24/98	240 Cases	Marlboro Lights Box
					200 Cases	Malboro KS Box
CLARK LIBERTY WAREHOUSE	R	12/16/98	R-3	11/6/98	1000 Cases	Champion MFT KS
CLARK LIBERTY WAREHOUSE	S	12/21/98	S-3	11/10/98	1040 Cases	Fundador Brandy
CLARK LIBERTY WAREHOUSE	T	12/28/98	T-3	11/10/98	860 Cases	Fundador Brandy
					1040 Cases	Fundador Brandy

The foregoing details contradict the testimony of Ms. Lita Cruz, petitioner's Assistant Manager, that describes the procedures taken in the procurement of the goods as follows:

> Q. Ms. Witness, could you briefly describe the procedures involving your transactions with Demagus and Liberty?
>
> A. Well, first, Demagus Trading and Liberty Warehouse placed their order. Then, we ask them to give us their Purchase Order. Then, Ampro applies for Import Permit but the Import Permit is composed of the Purchase Order coming from the buyer and Pro forma Invoice coming from our supplier, and a packing list. But before the Import Permit is approved, this is being verified by the CDC personnel. And upon approval, we ask our supplier abroad to send us the shipment and the VL. Upon arrival of the shipment, our in-house broker process all the papers in the Customs. Then, upon release of the shipment, the shipment sent to Clark Special Economic Zone is accompanied by customs guard and the shipment is being received by the customs personnel in-charge and signed the Boat Note being sent by the Custom's Guard and it is being sent to our warehouse in the presence of two (2) customs personnel and the CDC personnel, and it is being sent to our buyers. It is usually accompanied by the Custom's personnel and CDC personnel.

(Underscoring supplied, TSN, February 1, 2001, pp. 13-14)

To emphasize, it was testified to by Ms. Lita Cruz that petitioner receive the purchase orders from Demagus Trading and Clark Liberty Warehouse prior to its application for import permit. However, the records reveal that the applications for importation were made before the purchase orders.

The court opines that while sales invoices are relevant evidence to prove sales transactions, we cannot give probative value to the sales invoices proffered by petitioner. Without the BIR permit, such sales invoices are not competent evidence to prove the fact that the subject articles were sold within the customs territory to free petitioner from

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liability. The discrepancy between the testimony and the details in the documents submitted as above presented also creates a cloud of doubt as to the veracity of the documents as well as affects the credibility of the testimonial evidence.

Considering petitioner's failure to convince the court that the subject articles are all accounted, in effect, we believe that petitioner is not entitled to the tax exemption and the preferential tax rate pursuant to Section 43(a) and (b) of the Rules and Regulations Implementing the Provisions Relative to the Subic Special Economic and Freeport Zone and the Subic Bay Metropolitan Authority Under Republic Act No. 7227, otherwise known as the "Bases Conversion and Development Act of 1992". The said provisions are hereunder quoted for easy reference, to wit:

> **Sec 43.** *Tax Exemption-* SBF Enterprises shall be exempt from all national and local taxes, including but not limited to the following:
>
> a. Customs and import duties and national internal revenue taxes, such as VAT, excise and ad valorem taxes on foreign articles;
>
> b. Internal revenue taxes, such as VAT, ad valorem and excise taxes on their sales of goods and services for which they are directly liable;
>
> x x x x x x x x x
>
> In lieu of paying taxes, all SBF Enterprises shall pay a final tax of five (5%) percent of gross income earned in accordance with the breakdown specified and defined under Section 57 hereunder.
>
> x x x x x x x x x

Rather, we declare that petitioner is liable to pay excise tax on the unaccounted excisable articles pursuant to Section 131 of the 1997 Tax Code, which provides, thus:

> **SEC. 131.** *Payment of Excise Taxes on Imported Articles -*
>
> (A) *Persons Liable.* – Excise taxes on imported articles shall be paid by the owner or importer to the Customs Officers, conformably with

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the regulations of the Department of Finance and before the release of such articles from the customhouse, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption.

In the case of tax-free articles brought or imported into the Philippines by persons, entities, or agencies exempt from tax which are subsequently sold, transferred or exchanged in the Philippines to non-exempt persons or entities, the purchasers or recipients shall be considered the importers thereof, and shall be liable for the duty and internal revenue tax due on such importation.

The provision of any special or general law to the contrary notwithstanding, the importation of cigars and cigarettes, distilled spirits and wines into the Philippines, even if destined for tax and duty free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes due thereon: *Provided, however,* That this shall not apply to cigars and cigarettes, distilled spirits and wines brought directly into the duly chartered or legislated freeports of the Subic Special Economic and Freeport Zone, created under Republic Act No. 7227; the Cagayan Special Economic Zone and Freeport, created under Republic Act No. 7922; and the Zamboanga City Special Economic Zone, created under Republic Act No. 7903, and are not transhipped to any other port in the Philippines: *Provided further,* That importations of cigars and cigarettes, distilled spirits and wines by a government-owned and operated duty-free shop, like the Duty-Free Philippines (DFP), shall be exempted from all applicable taxes, duties, charges, including excise tax due thereon: *Provided, still further,* That if such articles directly imported by a government-owned and operated duty-free shop like the Duty-Free Philippines, shall be labeled 'tax and duty free' and 'not for resale': *Provided, still further*, That if such articles brought into the duly chartered or legislated freeports under Republic Acts No. 7227, 7922 and 7903 are subsequently introduced into the Philippine customs territory, then such articles shall, upon such introduction, be deemed imported into the Philippines and shall be subject to all imposts and excise taxes provided herein and other statutes: *Provided, finally*, That the removal and transfer of tax and duty-free goods, products, machinery, equipment and other similar articles, from one freeport to another freeport, shall not be deemed an introduction into the Philippine customs territory.

Cigars and cigarettes, distilled spirits and wines within the premises of all duty-free shops which are not labelled as hereinabove required, as well as tax and duty-free articles obtained from a duty-free shop and subsequently found in a non-duty-free shop to be offered for

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resale shall be confiscated, and the perpetrator of such non-labelling or re-selling shall, be punishable under the applicable provisions, of this Code.

Articles confiscated shall be disposed of in accordance with the rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioners of Customs and Internal Revenue, upon consultation with the Secretary of Tourism and the General Manager of the Philippine Tourism Authority.

The tax due on any such goods, products, machinery, equipment or other similar articles shall constitute a lien on the article itself, and such lien shall be superior to all other charges or liens, irrespective of the possessor thereof (*emphasis supplied*).

In the light of the foregoing, the assessment on petitioner's deficiency excise tax in the amount of P79,024,121.46, inclusive of the 20% deficiency interest and 50% surcharge, is hereby **UPHELD** and computed as follows:

Cigarettes (1997)	P	34,808,568.22
Cigarettes (1998)		40,726,023.24
Distilled Spirits		3,489,530.00
TOTAL	**P**	**79,024,121.46** *

*Plus 20% delinquency interest to be computed from November 8, 1999 until fully paid.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Judge

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WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Associate Judge