REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

EXXONMOBIL PETROLEUM & CHEMICAL HOLDINGS, INC. – PHILIPPINE BRANCH,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE ,
Respondent.

C.T.A. EB No. 204
(C.T.A. CASE No. 6809)

PRESENT:
Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez, *JJ.*:

Promulgated:

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DECISION

CASTAÑEDA, JR., *J.*:

This is a Petition for Review under Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282. The appeal filed by Exxonmobil Petroleum & Chemical Holdings, Inc. assails the Resolution dated July 27, 2005 rendered by the First Division of this Court which

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dismissed the Petition for Review in C.T.A. CASE No. 6809, and the Resolution dated July 27, 2006 which affirmed the ruling in the Resolution dated July 27, 2005.

The facts as represented by the petitioner are as follows:

> The petitioner is a foreign corporation duly organized and existing under the laws of the State of Delaware, United States of America and authorized to do business in the Philippines through its Philippine Branch, with principal office address at the 17/F, The Orient Square, Emerald Avenue, Ortigas Center, Pasig City.
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> It is engaged in the sale of petroleum products to domestic and international carriers. For this purpose, petitioner purchased and received from Caltex Philippines, Inc. and Petron Corporation Jet A-1 fuel and other petroleum products. The excise taxes on these purchases, which were paid for and remitted by both Caltex and Petron, were passed on to petitioner. Thus, petitioner ultimately shouldered the excise taxes on these deliveries.
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> From November 2001 to June 2002, petitioner sold a total of 28,635,841 liters of Jet A-1 fuel to international carriers, free of excise taxes amounting to P105,093,536.47. On various dates, petitioner filed its administrative claims for refund with the BIR amounting to P105,093,536.47.
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> On October 30, 2003, petitioner filed a Petition for Review with the Court of Tax Appeals, docketed as C.T.A. CASE No. 6809, claiming the refund or tax credit of P105,093,536.47 representing excise taxes paid on Jet A-1 fuel and other petroleum products subsequently sold to international carriers for the period November 2001 to June 2002.
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> The parties filed their Joint Stipulation of Facts and Issues on June 24, 2004, presenting a total of 14 issues for resolution. Among the issues presented for resolution is whether or not petitioner is the proper party to claim for a tax refund of the excises taxes allegedly passed on by Caltex and Petron (Joint Stipulation of Facts and Issues, issue no. 13).
>
> In the course of petitioner's presentation of evidence, respondent filed a Motion to Resolve First the Issue of Whether

or Not the Petitioner is the Proper Party That May Ask a Refund dated January 28, 2005.

On March 15, 2005, petitioner filed its Opposition to respondent's motion.

On July 27, 2005, the First Division of this Court issued its Resolution sustaining respondent's position and dismissed petitioner's claim for refund. Petitioner filed a Motion for Reconsideration which was denied in a Resolution dated July 27, 2006.[1]

In dismissing the petition for review, the dispositive portion of the Resolution of the First Division dated July 27, 2005 reads as follows:

> "**WHEREFORE,** in view of the above, the petition is hereby **DISMISSED**, on the ground petitioner is not the proper party who may apply for the refund.
>
> **SO ORDERED.**"

Petitioner's Motion for Reconsideration filed on August 25, 2005 was likewise denied for lack of merit.

Hence, this appeal.

ASSIGNMENT OF ERRORS

The grounds relied upon by petitioner are as follows:

I

SECTION 135 OF THE NIRC OF 1997 CLEARLY EXEMPTS FROM EXCISE TAXES PETROLEUM PRODUCTS SOLD BY PETITIONER TO INTERNATIONAL CARRIERS REGISTERED IN FOREIGN COUNTRIES WHICH HAVE EXISTING BILATERAL AGREEMENTS WITH THE PHILIPPINES, ALTHOUGH NOT SOLD

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1 Petition for Review, C.T.A. EB No. 204, pp. 4-10.

DIRECTLY BY THE MANUFACTURER OR PRODUCER THEREOF.

II

CONSIDERING THAT THE EXCISE TAXES ON THE PETROLEUM PRODUCTS SOLD TO INTERNATIONAL CARRIERS WERE PAID FOR BY PETITIONER, PETITIONER IS THE PROPER PARTY TO FILE THE INSTANT CLAIM FOR REFUND.

III

RESPONDENT'S MOTION IS ESSENTIALLY A MOTION TO DISMISS, WHICH SHOULD HAVE BEEN DENIED OUTRIGHT FOR HAVING BEEN FILED OUT OF TIME.

PETITIONER'S ARGUMENTS

Petitioner argues that the conclusion reached by the First Division of this Court that petitioner is not the proper party that may claim a refund in the instant case proceeds from its opinion that only persons who are statutorily required to pay the excise taxes are clothed with the personality to claim refund or tax credit thereof. Petitioner asserts that Section 135 of the National Internal Revenue Code of 1997 (1997 NIRC) speaks of petroleum products sold as its subject, and it is silent as to who shall have made the sale. It does not mention, nor require, that such products, to be exempt, should be sold by the manufacturer only. Thus, if the law does not distinguish, we should not distinguish. According to the petitioner, the First Division of this Court held that the seemingly unqualified provision of Section 135 of the Tax Code should be deemed as being in fact qualified and limited by Section 130 thereof.

Petitioner likewise argues that considering that the excise taxes on the petroleum products sold to international carriers were paid for by petitioner, it is the proper party to file the instant claim for refund citing the case of Maceda v. Macaraig, Jr., 223 SCRA 217, where the Supreme Court upheld the right of the buyer of petroleum products to claim for the refund of the excise taxes passed on to it.

Furthermore, petitioner avers that respondent's "Motion to Resolve First the Issue of Whether or Not the Petitioner is the Proper Party That May Ask a Refund" is essentially a motion to dismiss, which should have been denied outright for having been filed out of time. Clearly, respondent upon praying that petitioner be declared not the proper party that may ask for a refund, in effect, is alleging before this Honorable Court that since petitioner is not the real party in interest in the case at bar, then it must have no cause of action to speak of, necessitating the dismissal of its petition. Thus, it is essentially a motion to dismiss.

RESPONDENT'S ARGUMENTS

Respondent argues that being an indirect tax, the excise tax is the direct liability of the manufacturers which, in this case, are Petron

Corporation and Caltex Philippines, Inc. The incidence of taxation, or the person statutorily liable to pay the tax, falls on Petron and Caltex though the impact of taxation, or the burden of taxation, falls on another person, the petitioner in this case. Respondent avers that in the case of Philippine Acetylene v. Commissioner of Internal Revenue, 20 SCRA 1056, it was held that excise tax on petroleum products is the direct liability of the manufacturer/producer, and when added to the cost of goods sold to the buyer, it is no longer a tax but part of the price which the buyer has to pay to obtain the article. In the instant case, petitioner merely paid the added cost of the Jet A-1 fuel, not the specific (excise) tax.

Respondent contends that this case is analogous to the very recent case of Contex Corporation v. The Hon. Commissioner of Internal Revenue, G.R. No. 151135, July 2, 2004, where the Supreme Court discussed that an indirect tax, such as the Value-Added Tax (VAT), 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 on the selling price, the seller remains the person primarily and legally liable for the payment of the tax. Thus, the excise tax which has been passed on to petitioner by Petron Corp. and Caltex Phils., Inc. cannot be the subject matter of any

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administrative claim or judicial action for refund / tax credit by the petitioner.

Respondent argues that his Motion to Resolve First the Issue of Whether or Not the Petitioner is the Proper Party That May Ask a Refund is not a prohibited motion because under Section 6, Rule 16 of the Revised Rules of Civil Procedure, as amended, if no motion to dismiss has been filed, any of the grounds for dismissal provided for in said Rule may be pleaded as an affirmative defense in the answer, and in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed. Respondent merely moved to resolve first the issue of whether or not petitioner is the proper party that may ask for a refund, it being one of the stipulated issues, in view of the recent rulings of the Supreme Court in analogous cases and in the interest of speedy disposition of cases in court.

THIS COURT'S RULING

The petition is not meritorious.

A PRELIMINARY HEARING ON RESPONDENT'S AFFIRMATIVE DEFENSE IS ALLOWED

Petitioner's argument that respondent's motion is essentially a motion to dismiss which should have been denied outright for having been filed out of time is untenable. Section 6 of Rule 16 of the 1997 Revised Rules of Civil Procedure allows a preliminary hearing on any of the grounds for dismissal which were pleaded as an affirmative defense in the answer, in the discretion of the court. The preliminary hearing is for the purpose of determining whether or not the trial of the case should continue. Section 6 of Rule 16 provides as follows:

> **Sec. 6. Pleading grounds as affirmative defenses.** – If no motion to dismiss has been filed, **any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer and, in the discretion of the court, a preliminary hearing may be had thereon** as if a motion to dismiss had been filed.
>
> The dismissal of the complaint under this section shall be without prejudice to the prosecution in the same or separate action of a counterclaim pleaded in the answer. *(Emphasis supplied)*

In the original case, C.T.A. CASE No. 6809, the respondent did not file a motion to dismiss. However, on page 4 of his Answer, respondent raised as one of his special and affirmative defenses that petitioner is not the proper party to request for refund of the excise taxes paid by Petron Corporation and Caltex Philippines, Inc. Thereafter, the issue of "whether or not the petitioner is the proper party to claim for a tax refund of the excise taxes allegedly passed on by Caltex and Petron" was presented as one of the issues in the parties' Joint Stipulation of Facts and Issues which was approved by the First Division of this Court in a Resolution dated July 6, 2004.

There being no motion to dismiss that was filed in C.T.A. CASE No. 6809 and the fact that respondent had alleged the affirmative defense that petitioner is not the proper party to claim for the refund of the excise taxes, the holding of a preliminary hearing thereon is discretionary on the part of the First Division of this Court. Therefore, considering that the requirements of Section 6 of Rule 16 of the 1997 Revised Rules of Civil Procedure were complied with by the respondent, the First Division of this Court did not err in granting respondent's *Motion to Resolve First the Issue of Whether of Not the Petitioner is the Proper Party That May Ask a Refund*. Otherwise stated, the motion is allowed under the 1997 Revised Rules of Civil Procedure.

The Court *en banc* (hereafter this Court) speaking through Justice Caesar A. Casanova in the case of *Mobil Philippines, Inc. vs. Commissioner of Internal Revenue, C.T.A. EB No. 110, July 26, 2006* had already affirmed a similar ruling of this Court's Second Division in the consolidated cases with the same parties as above and docketed as C.T.A. CASE Nos. 6573 & 6576. In said consolidated cases, respondent filed a "Motion to Resolve First the Issue of Whether or Not the Petitioner is the Proper Party that may Ask a Refund" during the presentation of the evidence for the petitioner. The Second Division of this Court granted respondent's motion and dismissed the petitions for review in the consolidated cases on the ground that petitioner therein is not the proper party to claim the refund of excise taxes paid by the manufacturers of the petroleum products.

When the consolidated cases (C.T.A. CASE Nos. 6573 and 6576) were appealed to this Court, the third ground relied upon by Mobil Philippines, Inc. was that respondent's motion is essentially a Motion to Dismiss which should have been denied outright for having been filed out of time. In dismissing the petition, this Court ruled as follows:

> "The Court deemed it necessary to resolve the third issue first before determining the issue of whether petitioner is the proper party to claim for refund.
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> Petitioner alleges in the instant Petition for Review that from a mere procedural standpoint, respondent's motion is a Motion to Dismiss, which should have been denied outright for being filed out of time.
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> We do not agree.
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> Record shows that on January 7, 2003, the Court granted respondent fifteen (15) days from January 4, 2003, or until January 19, 2003 within which to file his answer. On January 17, 2003, respondent seasonably filed his answer, raising as one of his special and affirmative defenses that the petitioner is not the proper party to request for a refund (page 4, No. 6, Respondent's Answer). Pursuant to Section 6, Rule 16 of the 1997 Rules of Civil procedure, as amended, **"If no motion to dismiss has been filed, any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer, and in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed".** The same provision is also contained in the IBP-OCA Memorandum on Policy Guidelines dated March 12, 2002, to observe restraint in filing a motion to dismiss and instead allege the grounds thereof as defenses in the Answer. In addition, the issue of whether or not petitioner is the proper party to claim for a tax refund of the excise taxes allegedly passed on by Petron and Caltex, is included in the Joint Stipulation of Facts and Issues submitted by both parties to the Court (page 5, No. 11, Joint Stipulation of facts and Issues). Respondent moved to resolve the said issue in the interest of speedy disposition of the

consolidated cases filed with the Court, it being one of the stipulated issues."[2] *(Emphasis supplied)*

The procedural issue in the case before us is the same as the issue involved in the above-cited Mobil Philippines, Inc. case, hence, the third ground relied upon by herein petitioner - that respondent's motion is a Motion to Dismiss which should have been denied outright for being filed out of time - must perforce fail as it lacks any legal basis. Both law and jurisprudence are on the side of respondent.

In fact, the Supreme Court had ruled that an improper denial of a motion for preliminary hearing may amount to a grave abuse of discretion. In remanding the case to the trial court for preliminary hearing on petitioner's affirmative defenses, it ruled as follows:

> "The more crucial question that we must settle here is whether the trial court committed grave abuse of discretion when it denied petitioners' Motion for a Preliminary Hearing on their affirmative defense of lack of cause of action. Undeniably, a preliminary hearing is not mandatory, but subject to the discretion of the trial court. In the light of the circumstances in this case, though, we find that the lower court committed grave abuse of discretion in refusing to grant the Motion.
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> We note that the trial court deferred the resolution of petitioners' Motion to Dismiss because of a single issue. It was apparently unsure whether the charter party that the bill of lading referred to was indeed the Baltimore Berth Grain Charter Party submitted by petitioners.
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> Considering that there was only one question, which may even be deemed to be the very touchstone of the whole case, **the trial court had no cogent reason to deny the Motion for**

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[2] *Mobil Philippines, Inc. vs. Commissioner of Internal Revenue,* C.T.A. EB No. 110, July 26, 2006, penned by Justice Caesar A Casanova concurred in by Justice Lovell R. Bautista; with Dissenting Opinion of Presiding Justice Ernesto D. Acosta.

> **Preliminary Hearing. Indeed, it committed grave abuse of discretion when it denied a preliminary hearing on a simple issue of fact that could have possibly settled the entire case. Verily, where a preliminary hearing appears to suffice, there is no reason to go on to trial.** One reason why dockets of trial courts are clogged is the unreasonable refusal to use a process or procedure, like a motion to dismiss, which is designed to abbreviate the resolution of a case." [3]

As ruled by the Supreme Court, where a preliminary hearing appears to suffice, there is no reason to go on to trial. This is exactly what the First Division of this Court did, hence, it did not commit any procedural error.

Having determined that the First Division of this Court did not commit any procedural error, what remains to be resolved by this Court is the merit of petitioner's claim that it is the proper party to claim for refund. According to the petitioner, Section 135 of the 1997 National Internal Revenue Code (1997 NIRC) speaks of petroleum products sold as its subject but it is silent as to who shall have made the sale. It does not mention, nor require, that such products, to be exempt, should be sold by the manufacturer only.

PETITIONER IS NOT THE TAXPAYER IN CONTEMPLATION OF THE 1997 NIRC

The issue presented in this appeal is not novel. This Court had already ruled in prior cases[4] involving the same issue that it is only the Jc

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3 *California and Hawaiian Sugar Company; Pacific Gulf Marine, Inc.; and C.F. Sharp & Company vs. Pioneer Insurance and Surety Corporation,* G.R. No. 139273, November 28, 2000 (346 SCRA 214)

4 *Commissioner of Internal Revenue vs. Silkair (Singapore) PTE. LTD.*, C.T.A. EB No. 25, May 20, 2005; *Commissioner of Internal Revenue vs. Silkair (Singapore) PTE.*

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manufacturer of the petroleum products sold, being the taxpayer, which has the legal personality to claim for the refund of excise taxes paid on petroleum products sold to international carriers. This ruling is based on Sections 130 (A) (2) and 204 (C) of the 1997 NIRC in relation to Section 135 (a) of the same code which provides that petroleum products sold to international carriers are exempt from excise tax.

Petitioner anchors its claim for refund on Section 135 (a) of the 1997 NIRC which reads:

> SEC. 135. Petroleum Products Sold to 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 only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner;
>
> (b) xxx xxx xxx

Section 130 (A) of the same code, on the other hand, imposes the excise tax on the manufacturer or producer before the removal of the petroleum products from the place of production, thus:

> SEC. 130. Filing of return and payment of excise tax on domestic products. — *gc*

LTD., C.T.A. EB No. 56, October 20, 2005; *Commissioner of Internal Revenue vs. Silkair (Singapore) PTE. LTD.*, C.T.A. EB No. 67, January 5, 2006; *Dunlop Slazenger Phils., Inc. vs. Commissioner of Internal Revenue*, C.T.A. EB No. 102, May 18, 2006; *Mobil Philippines, Inc. vs. Commissioner of Internal Revenue*, C.T.A. EB No. 110, July 26, 2006; and *Koyo Manufacturing (Phillippines) Corp. vs. CIR*, C.T.A. EB No. 194, March 1, 2007.

(A) Persons liable to file a return, filing of return on removal and payment of the tax. —

(1) Persons liable to file a return. — . . .

(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 . . ." *(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, hence, the manufacturer or producer is the **taxpayer**.

ANY REFUND OF ERRONEOUSLY PAID TAXES SHALL ONLY BE GRANTED TO THE TAXPAYER

The determination of who is the taxpayer plays a pivotal role in claims for refund because the **same law provides that it is only the taxpayer who has the legal personality to ask for a refund in case of erroneous payment of taxes**. Section 204 (C) of the 1997 NIRC reads, in part, as follows: *Jr*

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)*

A brief discussion on the nature of the excise taxes on petroleum products is necessary in order to fully understand the significance of the above-cited provisions of the 1997 NIRC in relation to petitioner's claim for refund. The excise tax imposed on the manufacturers upon the removal of petroleum products by the oil companies is an *indirect tax*. The Supreme Court in a number of cases had explained the nature of indirect taxes vis-à-vis direct taxes, as follows:

"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**

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> **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." [5] *(Emphasis supplied)*

Furthermore, the Supreme Court had likewise explained that although the burden of an indirect tax can be shifted or passed-on to the purchaser of the goods, nevertheless, the liability for the indirect tax still remains with the manufacturer, thus:

> "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."[6] *(Emphasis supplied)*

The foregoing rulings have been recently reiterated by the Supreme Court, thus:

1. "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

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5 *Maceda vs. Macaraig, Jr., et al.*, G.R. No. 88291, May 31, 1991 (197 SCRA 771)
6 *Philippine Acetylene Co., Inc., vs. Commissioner of Internal Revenue,* G.R. No. L-19707, August 17, 1967 (20 SCRA 1056).

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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."[7] *(Emphasis supplied)*

2. "On the other hand, indirect taxes are those that are demanded, in the first instance, from, or are paid by, one person in the expectation and intention that he can shift the burden to someone else. Stated otherwise, indirect taxes are taxes wherein the liability for the payment of the tax falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. **When the seller passes on the tax to his buyer, he, in effect, shifts the tax burden, not the liability to pay it, to the purchaser as part of the price of goods sold or services rendered**."[8] *(Emphasis supplied)*

As explained in the above-cited rulings, the manufacturer has the option whether or not to shift the burden of the tax to the purchaser. When shifted, the amount added by the manufacturer becomes a part of the price, therefore, the purchaser does not really pay the tax *per se* but only the price of the commodity. This has been the consistent ruling of the Supreme Court since the landmark case of *Philippine Acetylene Co. Inc. vs. Commissioner of Internal Revenue, supra,* where the Supreme Court cited the opinion of Justice Holmes that the purchaser does not pay the tax, thus:

> "Many years ago, Mr. Justice Oliver Wendell Holmes expressed dissatisfaction with the use of 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. . . . The amount added because of**

7 *Contex Corporation vs. Hon. Commissioner of Internal Revenue,* G.R. No. 151135, July 2, 2004 (433 SCRA 377).

8 *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company,* G.R. No. 140230, December 15, 2005 (478 SCRA 61).

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> **the tax is paid to get the goods and for nothing else. Therefore it is part of the price** . . . ." *(Emphasis supplied)*

NOT BEING THE TAXPAYER, PETITIONER IS NOT THE PROPER PARTY TO CLAIM FOR THE REFUND OF THE SUBJECT EXCISE TAXES

All of the foregoing authorities show that even though the burden of an indirect tax is shifted to the purchaser, still, the liability for the indirect tax remains with the manufacturer as the **taxpayer**. To quote the words of Justice Holmes "the purchaser does not really pay the tax". We therefore concur with the ruling of the First Division of this Court that petitioner is not the proper party to claim the refund of the excise taxes paid by Petron Corporation and Caltex Philippines, Inc., thus:

> "**In the present case, the right to claim for refund of excise taxes paid on petroleum products lies with Petron Corporation and Caltex Philippines.** As correctly pointed out by respondent, 'being an indirect tax, therefore, excise tax is the direct liability of the manufacturer, Petron Corporation and Caltex Philippines in the instant case. The incidence of taxation or the persons statutority liable to pay the tax falls on Petron Corporation and Caltex Philippines though the impact of taxation or the burden of taxation falls on another person, petitioner, in this case."[9]

Necessarily, a refund of erroneously paid or illegally received internal revenue tax can only be made in favor of the taxpayer pursuant to Section 204 (C) of the 1997 NIRC which provides that "no credit or refund of taxes or penalties shall be allowed unless the **taxpayer** files

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9 Assailed Resolution, July 27, 2005, p. 4.

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in writing with the Commissioner a claim for credit or refund within two (2) years after payment of the tax or penalty". Section 204 (C) applies to both direct and indirect taxes. In indirect taxes, it is the manufacturer of the goods who is entitled to claim any refund thereof as consistently held by the Supreme Court. In a landmark case, it ruled as follows:

> "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:
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>> 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.'
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> 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."[10] *(Emphasis supplied)*

In both *Cebu Portland Cement* and *Contex Corporation* cases, the Supreme Court categorically ruled that the proper parties that may ask

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10 *Cebu Portland Cement Company vs. Collector of Internal Revenue,* No. L-20563, October 29, 1968 (25 SCRA 789).

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for the refund of the indirect taxes paid to the Bureau of Internal Revenue are the manufacturers or producers of the goods. The indirect taxes paid by the manufacturers or producers of the goods cannot be refunded to the purchasers of the goods because the purchasers are not the taxpayers.

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 and Caltex Philippines, Inc. as the manufacturers of the petroleum products, the claim for refund of the excise taxes subject of this petition shall only be made by Petron Corporation and Caltex Philippines, Inc. being the **taxpayers**. Petitioner Exxonmobil Petroleum & Chemical Holdings, Inc. – Philippine Branch, as the purchaser of said petroleum products, is not the proper party to seek for the refund of the excise taxes which were paid and remitted by Petron Corporation and Caltex Philippines, Inc.

It bears stress that tax refunds are in the nature of tax exemptions. As such they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption. The burden of proof is upon him who

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claims the exemption in his favor and he must be able to justify his claim by the clearest grant of organic or statute law.[11]

One final point, petitioner's argument "that in effectively holding that only petroleum products purchased directly from the manufacturers or producers are exempt from excise taxes, the First Division of this Court sanctioned a unilateral amendment of existing bilateral agreements which the Philippines have with other countries, in violation of the basic international principle of *"pacta sunt servanda"* is misplaced. First, the findings of fact of the First Division of this Court that "when petitioner sold the Jet A-1 fuel to international carriers, it did so free of tax"[12] negates any violation of the exemption from excise tax of the petroleum products sold to international carriers insofar as this case is concerned. Secondly, the right of international carriers to invoke the exemption granted under Section 135 (a) of the 1997 NIRC has neither been affected nor restricted in any way by the ruling of the First Division of this Court. At the point of sale, the international carriers are free to invoke the exemption from excise taxes of the petroleum products sold to them. Lastly, the law-making body is presumed to have enacted a later law with the knowledge of all other laws involving the same subject matter.

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11 *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., et al.,* G.R. No 127105, June 25, 1999 (309 SCRA 87).

12 Assailed Resolution, July 27, 2006, p. 3.

In view of all the foregoing, this Court finds that the First Division of this Court committed no reversible error and sees no cogent reason to REVERSE, MODIFY or AMEND the assailed Resolutions.

WHEREFORE, the Petition for Review filed on September 4, 2006 is hereby **DISMISSED** for lack of merit. Accordingly, the assailed Resolutions of the First Division of this Court dated July 27, 2005 and July 27, 2006 are hereby **AFFIRMED.**

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

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 this Court before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

EXXONMOBIL PETROLEUM & CHEMICAL HOLDINGS, INC. – PHILIPPINE BRANCH, *Petitioner,*	**CTA EB No. 204** (C.T.A. CASE NO. 6809)
	Present:
-versus-	**Acosta, *P.J.*** **Castañeda, Jr.,** **Bautista,** **Uy,** **Casanova, and** **Palanca-Enriquez, *JJ.***
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	***Promulgated:*** SEP 07 2007

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Dissenting Opinion

With due respect to my esteemed colleagues, I wish to express my dissent to the majority's decision affirming the July 27, 2005 Resolution of the First Division, dismissing the Petition for Review pending therein, upon the finding that petitioner is not proper party who may apply for the refund and the July 27, 2006 Resolution denying petitioner's Motion for Reconsideration.

I reiterate my opinion that the grant of respondent's motion, which has the effect of prematurely dismissing petitioner's Petition for Review, on the sole ground that petitioner is allegedly not the proper party to the a refund claim, but the sellers Petron and Caltex Corporations, because the excise tax paid was merely factored in the purchase price, is procedurally flawed, unjust and inequitable in view of the facts

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and legal backdrop of the case. In addition, even assuming that the motion is not procedurally defective, and consequently merits the attention of this Court, petitioner should be considered a proper party to a claim for tax refund.

I maintain my position that respondent's motion is for all intents and purposes, a Motion to Dismiss, which was not only filed out of time, but also filed after petitioner is almost through with its presentation of evidence. This motion is praying that petitioner be declared not the proper party that may ask for a refund, and in effect alleging that since petitioner is not the "real party in interest", then it must have no cause of action to speak of, necessitating the dismissal of its petition.

Governed by **Rule 16 of the 1997 Revised Rules of Procedure,** a Motion to Dismiss must comply with the requisites set by these Rules. Among the essential requirements is that the Motion to Dismiss should be filed within the reglementary period for filing a responsive pleading and before such responsive pleading is filed, save for specific circumstances where a Motion to Dismiss may be filed even after the filing of an answer, such as the grounds of lack of jurisdiction, *litis pendencia* and prescription of action. Clearly, respondent's basis for his Motion did not exactly fall within the enumerated exceptions. Accordingly, as I have said, I find the filing of the Motion, to say the least, improper and dilatory (**Suntay vs. Suntay**, *G.R. No. 132524, December 29, 1998*).

In any case, the case involves factual and legal issues that can only be resolved after trial, when both parties have exhaustively presented their evidence. The grant of the Motion unjustly undermined petitioner's right to prove its claim vis-à-vis this Court's power to determine all the pertinent facts and to resolve all the issues.

Moreover, petitioner should be considered a proper party to a claim for tax refund, **Section 2, Rule 3 of the 1997 Revised Rules of Procedure** finds application:

> **"Section 2. Parties in interest. – A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit.** Unless otherwise

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> authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest."

Based on the afore-quoted provision, petitioner is a real party in interest. Any judgment of this Court, which may be either a grant or denial of the tax refund will injure or benefit herein petitioner. Certainly, by definition alone, the petitioner must be regarded as a real party in interest.

Another line of reasoning used in the majority opinion is that an excise tax, being an indirect tax is the direct liability of the producer, although the burden of taxation falls on another person. And when the same is added to the cost of goods, it is no longer considered a tax, but a part of the purchase price. Accordingly, the rightful claimants to the refund claim are the sellers Petron and Caltex Corporations.

Despite the play in semantics, it is undeniable that in effect it was petitioner that paid the excise taxes due on the transaction which the sellers Petron and Caltex forwarded to the BIR; this, despite the express grant of exemption from the payment of the said excise tax by **Section 135 of the 1997 National Internal Revenue Code**.

It is rather unfortunate that the case of **Contex Corporation vs. Hon. Commissioner of Internal Revenue,** *G.R. No. 151135, July 2, 2004*, was cited out of context. In the said case, petitioner buyer, being registered as a non-VAT taxpayer, is thus exempt from VAT, and as an exempt VAT taxpayer, it only follows that it is not allowed any 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 but the petitioner's suppliers that possess such personality.

Furthermore, the case of **Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue,** *20 SCRA 1056*, is not applicable to the instant case. The facts of the said case are not in 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

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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 removed of its tax exemption.

Moreover, a clear distinction between the transaction of Philippine Acetylene and NPC from that of petitioner and the international carriers in this case is that the manufacturer's claim is premised on the exemption of the party it is dealing with – NPC – and not on any specific provision of the Tax Code exempting the transaction, or even the product from excise tax. Here, the petroleum products sold by petitioner to KLM Group, Northwest Orient Airlines, Thai Airways and China Airlines became exempt because of express provisions of the Tax Code, exempting petroleum products sold to international carriers or exempt entities from excise tax.

In sum, respondent's argument that petitioner is not the proper party to claim refund is, therefore, without merit. By any reasonable standard, petitioner should be regarded as a party in interest or as a person having sufficient legal interest to bring a suit for refund of taxes it believes was erroneously collected.

ERNESTO D. ACOSTA
Presiding Justice

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