REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SHELL PHILIPPINE PETROLEUM CORPORATION (Now PILIPINAS SHELL PETROLEUM CORPORATION),
Petitioner,

- versus -

C.T.A. CASE NO. 5882

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 26 2000

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DECISION

This is a petition seeking for the refund or tax credit in the amount of P109,497,108.19, allegedly representing specific taxes paid by Petitioner on its purchase of heavy fuel oil from May to December of 1997. The residual fuel oil coming from the said heavy fuel oil was sold to National Power Corporation (NPC) by Petitioner, the former refusing to pay the specific taxes passed on and billed by the latter.

The antecedent facts follow.

Petitioner is a domestic corporation duly organized and existing under Philippine laws. It is engaged, among others, in the business of processing, treating and refining petroleum for the purpose of producing marketable products and by-products and the subsequent sale thereof.

Petitioner, prior to its merger with Pilipinas Shell Petroleum Corporation (PSPC), purchased heavy fuel oil/feedstock from the latter, out of which Petitioner extracts lubricating oil base stock, wax and bitumen. After the extraction process, the residual fuel oil of the heavy fuel oil/feedstock is then sold to the NPC which, in turn, uses the said fuel oil on its Malaya Thermal Power Plant located in Pililla, Rizal in order to generate electricity.

In May 1995, NPC, as owner and operator of the Malaya Power Plant, contracted the services of Korean Electric Power Corporation (KEPCO) for the rehabilitation, operation, maintenance, and management of the Malaya Power Plant under a "Rehabilitation, Operation, Maintenance and Management Agreement" (ROMMA) executed by the parties.

During the effectivity of Executive Order (E.O.) No. 195 dated June 17, 1987, fuel oil (including fuel oil purchased by Petitioner) was subject to zero percent (0%) ad valorem tax. However, with the implementation of Republic Act No. 8184 (An Act Restructuring the Excise Tax on Petroleum Products, Amending for the Purpose Pertinent Sections of the National Internal Revenue Code, as amended), bunker fuel oil and similar fuel oils having more or less the same generating power became subject to specific tax at the rate of Thirty Centavos (P0.30) per liter of volume capacity, effective August 14, 1996. Hence, from said date, the selling price of PSPC's heavy fuel oil deliveries to Petitioner included the specific tax of P0.30 per liter of volume capacity.

Petitioner, on its part, passed on to NPC the P0.30 specific tax it previously paid to PSPC. However, NPC refused to pay, invoking its exemption under its charter as a power generation company as well as BIR Ruling dated November 12, 1993 which allows oil companies to deliver fuel to NPC without having to pay the corresponding specific tax when the product is withdrawn or removed from the place of production.

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NPC paid Petitioner for its purchases of fuel oil net of the specific tax component. From April 30, 1997 to December 27, 1997, PSPC sold to Petitioner 577,562,647 liters of heavy fuel oil amounting to P1,995,678,745.02, inclusive of the specific taxes previously paid by PSPC to the BIR in the amount of P173,268,794.10, detailed as follows:

Period Covered (1997)	Volume	Amount	Specific Tax
May	99,472,034	P 315,396,170.25	P 29,841,610.20
June	65,311,391	208,752.007.97	19,593,417.30
July	77,823,617	242,499,694.34	23,347,085.10
August	92,273,885	296,817,656.02	27,682,165.50
September	79,519,848	272,083,788.61	23,855,954.40
October	91,142,188	358,054,940.69	27,342,656.40
November	19,728,464	81,123,899.89	5,918,539.20
December	52,291,220	220,950,587.25	15,687,366.00
TOTAL		P1,995,678,745.02	P173,268,794.10

On the other hand, the total volume of fuel oil delivered by Petitioner to NPC and the amount of specific tax it passed on to the latter but which it refused to pay are summarized as follows:

Period Covered (1997)	Volume	Specific Tax
May	58,823,419	P 17,647,025.70
June	46,673,262	14,001,978.59
July	37,511,941	11,253,582.30
August	87,808,027	26,342,408.10
September	31,354,338	9,406,301.40
October	62,331,777	18,699,533.10
November	10,758,434	3,227,530.20
December	29,729,163	8,918,748.90
TOTAL	364,990,163	P109,497,108.29

On December 2, 1996, Petitioner requested for a ruling from the Respondent on whether or not NPC should pay the gross selling price, inclusive of the P0.30 specific tax, on Petitioner's fuel oil deliveries, and whether or not NPC should file the corresponding

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claim for refund of the specific tax component included in Petitioner's gross billings to NPC. In its request, Petitioner made the following representations:

> "Shell Philippine Petroleum Corporation (SPPC) is a BOI-registered enterprise engaged in the manufacture of lubricating oil base stocks, paraffin wax and bitumen with refining facilities at Malaya, Pililla, Rizal; that the said products are produced from heavy fuel oil which SPPC purchased from Pilipinas Shell PETROLEUM (PSPC); that the residual oil (around 60%) is sold by SPPC to NPC for its Malaya Power plant located beside SPPC's refinery; that upon implementation of RA No. 8184, fuel oil became taxable at P0.30 per liter effective August 14, 1996; that since that date, PSPC's billings on feedstock deliveries to SPPC included the P0.30 per liter specific tax; that, in turn, SPPC's selling price of fuel oil to NPC included the P0.30 per liter specific tax earlier billed by PSPC on fuel oil/feedstock purchased from it; and that NPC refused to pay the specific tax element being billed by SPPC invoking its exemption under its charter as a power generation company."

In connection with this request for a ruling from the Respondent, the BIR's Regulatory Operations Monitoring Division (ROMD) allegedly conducted an investigation and, thereafter, provided the Respondent Commissioner with the following information:

a. That the Malaya Power Plant is operated not by NPC itself but by a third party under the ROMMA contract with NPC;

b. That NPC does not by itself generate electricity from the said Plant but only becomes the exclusive offtaker of the generated power of the plant operator;

c. That in the contract between NPC and the independent contractor, it is stipulated that all petroleum requirements by the contractor shall be supplied by NPC excise tax-free and payment thereof shall be made as direct offsets against offtake of generated power; and

d. That deliveries of petroleum products to the independent contractor directly by the oil companies were all billed under the name of NPC as the purchaser, in effect making the latter as a mere conduit between the contractor and the oil companies for the said transactions.

And so, based on the facts represented by the Petitioner and on the additional facts supplied by the ROMD, herein Respondent issued BIR Ruling No. 40-98 on April 13, 1998, thus:

> "Accordingly, you are correct in your gross billings to NPC which include the P0.30 specific tax on the latter's fuel oil purchases from SPPC and which are already tax-paid. Moreover, since NPC's tax exemption does not include the aforedescribed transactions, it cannot file a claim for tax refund with this Office."

However, despite the issuance of said ruling, NPC continued to refuse payment of the specific tax component billed by Petitioner. It disputed the factual basis of BIR Ruling No. 40-98 and maintained its position that it is exempt from direct and indirect taxes. NPC then furnished Petitioner a copy of the ROMMA and upon its review of the said agreement, Petitioner allegedly discovered the following that are contrary to the findings of the ROMD, upon which the Commissioner based its ruling:

a. KEPCO does not pay for the fuel oil supplied by NPC;

b. Ownership of the fuel oil remains with NPC;

c. KEPCO's responsibility is to "convert" fuel oil to electricity;

d. In computing the fees payable to KEPCO, there is no deduction for the price of fuel oil; and

e. There is absence of proof that KEPCO purchased its fuel oil requirements.

On the basis of the foregoing newly discovered facts, Petitioner requested the Commissioner to modify BIR Ruling No. 40-98 which was based on facts represented by Petitioner in good faith but which turned out to be erroneous. Petitioner then wrote another letter to the Commissioner on September 3, 1998, this time requesting confirmation of its opinion that the sale by the Petitioner of fuel oil to NPC is exempt

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from the P0.30 specific tax and that Petitioner may file a claim for refund of the P0.30 specific tax component of its tax paid fuel oil deliveries to NPC. Petitioner alleges that the Commissioner has yet to rule on this request for modification.

On November 4, 1998, Petitioner filed with the Large Taxpayers Division of the BIR eight (8) separate claims for refund of specific taxes paid by Petitioner on its purchases of heavy fuel oil from May to December, 1997 in the aggregate amount of P109,497,108.19.

As there was no action on the part of the Respondent and the two-year period within which to file a judicial action was about to expire, the instant petition was filed on May 14, 1999.

In his Answer, Respondent claimed by way of Special and Affirmative Defenses that:

> "8. The fuel oils sold to NPC allegedly used in its Malaya Thermal Power Plant were residues/remnants of taxpaid heavy oils/feedstocks which petitioner Shell Philippine Petroleum Corporation (SPPC) purchased from Pilipinas Shell Petroleum Corporation (PSPC) and used by the Petitioner in the manufacture of lubricating oil base stock, paraffin wax and bitumen. The specific tax of P0.30 per liter on said feedstocks was paid by PSPC and included in its billings to SPPC;
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> 9. The NPC Malaya Plant is being operated not by NPC itself but by a third party under the Rehabilitate, Operate and Maintain Contract with NPC. The NPC does not generate the electricity from the said plant but only becomes the exclusive buyer of the generated power of the plant operator;
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> 10. In the contract between NPC and the independent contractor, it was stipulated that all petroleum requirements by the contractor shall be supplied by NPC excise tax free and payments thereof shall be made as direct offsets against purchases of generated power;
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> 11. The deliveries of petroleum products to the independent contractor directly by the oil companies were all billed under the name of NPC as the

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purchaser. In effect, NPC is merely acting as a conduit between the contractor and the oil companies for these transactions;

12. Fuel oil deliveries to NPC which the latter in turn delivers/sells to a third party can no longer be considered as tax-exempt deliveries. Accordingly, the tax exemption granted to NPC under its Charter with respect to fuel oil purchases applies only to those used by NPC itself in the operation of its own power plants. This tax-exempt privilege is exclusive to NPC as the grantee and cannot be used by another as a tool to evade the payment of tax;

13. The gross billings by herein Petitioner, inclusive of specific tax, with respect to its fuel oil sales/deliveries to NPC is in accordance with law, rules and regulations and therefore, not refundable;

14. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (**Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Company vs. Commissioner of Internal Revenue, 67 SCRA 35**);

15. In an action for tax refund, the burden is upon the taxpayer to prove that he is entitled thereto and failure to sustain the same is fatal to the action for tax refund;

16. It is incumbent upon herein Petitioner to show compliance with the provision of Section 229 of the Tax Code, as amended;

17. One who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute (**Asiatic Petroleum vs. Llanes, 49 Phil. 466; Union Garment Co. vs. Court of Tax Appeals, 4 SCRA 304**);

18. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable."

The issues addressed to this Court for determination have been agreed upon by the parties to be as follows:

I. Whether or not the ownership of fuel oil sold by Petitioner to NPC for its use in the Malaya Power Plant belongs to NPC pursuant to the ROMMA executed by and between NPC and KEPCO;

II. Whether or not the sale by Petitioner of fuel oil to NPC for use by the latter in its Malaya Power Plant located in Pililla, Rizal is exempt from specific taxes; and

III. Whether or not Petitioner is entitled to recover the specific taxes that it had passed on to NPC but which NPC refused to pay on account of its exemption from indirect taxes.

To support its case, Petitioner offered the following in evidence:

EXHIBIT	DESCRIPTION
"A"	Illustration showing the composition of heavy fuel oil/ feedstock.
"B"	Rehabilitation, Operation, Maintenance and Management Agreement ("ROMMA") executed by and between the National Power Corporation ("NPC") and the Korea Electric Power Corporation ("KEPCO").
"C"	Certification and Audit Report, dated September 9, 1999, prepared by Mr. Wilfredo S. Madarang, Jr., the Independent Certified Public Accountant (CPA) commissioned by this Court pursuant to CTA Circular No. 1-95, as amended.
"D"	Summary of Specific Taxes Paid by PSPC for the Period from May to December 1997.
"E"	Summary of Petitioner's Purchases of Heavy Fuel Oil/ Feedstock from PSPC for the Period from April 30, 1997 to December 27, 1997.
"F"	Summary of Specific Taxes Billed by Petitioner to NPC for the Period from May to December 1997.
"G"	Schedule of Specific Taxes Paid by PSPC to the BIR for the Period from May to December 1997.
"G-1 to G-68"	Various Withdrawal Certificates and Authority to Accept Payment for Excise Taxes (ATAPET).
"H"	Schedule of Purchases of Heavy Fuel Oil/Feedstock Made by Petitioner from PSPC for the Period from April 30, 1997 to December 27, 1997.
"H-1 to H-34"	Invoices issued by PSPC to Petitioner.
"I"	Schedule of Residual Fuel Oil Sold by Petitioner to NPC

and Amount of Specific Taxes Passed-on/Billed by Petitioner to NPC for the Period from May 3, 1997 to December 29, 1997.

"I-1 to I-113"	Bulk Invoices and Official Receipts issued by Petitioner to NPC.

Respondent, on his part, manifested during the hearing of this case on March 9, 2000 that as the issues are purely legal, he is submitting his case without presenting any documentary or testimonial evidence (p. 560, CTA Records).

After a careful study of the evidence adduced by Petitioner as well as the applicable laws, rules and jurisprudence, this Court finds for the Petitioner.

NPC's exemption from payment of all forms of taxes, direct and indirect is conceded. In fact, Respondent himself admitted in his memorandum that there is no question that under Section 13, Paragraphs (a) and (d) of Republic Act No. 6395 (NPC Charter), as amended by P.D. No. 380, NPC is exempt from such taxes, duties, fees, imposts and other charges imposed directly or indirectly on all petroleum products used by NPC in its operation. Hence, We shall tackle the first two issues jointly because if indeed the ownership of the fuel oil belongs to NPC, then the sale of Petitioner of fuel oil to NPC for the consumption of KEPCO is exempt from specific taxes.

According to Petitioner, the ownership of the fuel oil sold by Petitioner to NPC for the latter's use in the Malaya Power Plant belongs to NPC since the latter neither sells to KEPCO, nor causes it to shoulder the cost of the fuel oil.

Respondent, however, maintains that based on the findings of the ROMD of the BIR, NPC does not itself generate electricity from the Malaya Thermal Power Plant but only becomes the exclusive buyer of the generated power of KEPCO. Respondent

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further insists that the deliveries of petroleum products to the independent contractor directly by the oil companies were all billed under the name of NPC as a purchaser which in effect makes the latter a mere conduit between the contractor and the oil companies for the said transaction.

After a careful examination of the records, the Court finds merit in the contention of Petitioner that NPC is the owner of the fuel oil purchased. For clarity, hereunder are the applicable provisions of the ROMMA:

"Art. 2.1 CONTRACTUAL INTENT.

(a) In entering into this Agreement, the parties hereby declare and affirm that their primary contractual intent is for CONTRACTOR, subject to the terms and conditions herein set forth, to rehabilitate, operate, maintain and manage the Power Complex at its own cost, **for NPC to supply the Fuel requirements of the Power Complex at its own cost** and pay to CONTRACTOR the agreed fees in converting such Fuel into electricity and for **CONTRACTOR** to transfer the Power Complex to NPC on the Transfer Date.

(b) All the provisions of this Agreement shall be interpreted to accomplish the foregoing contractual intent.

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Art. 2.4 RESPONSIBILITIES OF NPC.

(b) NPC shall, **at its own cost**, supply Fuel in accordance with the specifications set out in Schedule 4 (Fuel Management) and if necessary, construct, install and connect additional transmission lines, substations and any other ancillary equipment and systems.

Art 2.7 OWNERSHIP.

(a) NPC shall retain legal ownership over all the assets of the Power Complex and all improvements thereon, however, for the duration of this Agreement, NPC shall transfer the possession of the Power Complex to CONTRACTOR subject to the conditions set forth in Article 8.1(a).

Art. 4.2 FUEL.

(b) Cost of Fuel. **The cost of Fuel to be supplied by NPC shall be for NPC's account**.

Art. 6.1 SUPPLY OF FUEL. Throughout the Cooperation Period until the Transfer Date, NPC shall at all times supply and deliver all Fuel required by CONTRACTOR and necessary for the Power Complex to generate the electricity required to be produced by it under this Agreement. NPC may, under such terms and conditions that it may determine, allow CONTRACTOR to purchase the Fuel required for the operation of the Power Complex.

Art. 7.1 SUPPLY OF ELECTRICITY. Subject to NPC supplying the necessary Fuel pursuant to Article 6, CONTRACTOR agrees to convert such Fuel into electricity and NPC agrees to take and pay for all electricity delivered on the high voltage side of each transformer requested by NPC. CONTRACTOR shall dedicate to NPC the entire Power Complex output, net of Power Complex usage.

From the foregoing terms, it is clear to Us that the services of the contractor were engaged by the Petitioner merely to rehabilitate, operate and convert the fuel supplied by NPC into electricity for a specified period of time and for an agreed consideration. As correctly pointed out by Petitioner, NPC remains the owner of the Power Complex and buys for its own account the fuel oil which it in turn delivers to the contractor to be used in the generation of electricity. We are not persuaded by Respondent's argument that NPC is a mere conduit between the contractor and Petitioner when the terms of the ROMMA are clear and leave no doubt upon the intention of the contracting parties. "Contracts, which are the private laws of the contracting parties should be fulfilled according to the literal sense of their stipulations, if their terms are clear and leave no room for doubt as to the intention of the contracting parties, for contracts are obligatory, no matter what their forms may be, whenever the essential requisites for their validity are present. **[Salvatierra v. Court of Appeals, 261 SCRA 45 (1996), cited in Civil Code Annotated, Santiago, p. 744]**.

Since the ownership of the fuel oil remained with NPC, which entity is exempt from payment of direct and indirect taxes, consequently, Petitioner's sale of fuel oil to NPC to be used by the Contractor, KEPCO, is exempt from the payment of specific taxes. This conclusion finds support in BIR Rulings 36-99 and 51-99, dated March 29, 1999 and April 19, 1999, respectively, cited by Petitioner, the pertinent portions of which provide:

BIR RULING 036-99

> "The basic issue in this case is whether the sale of petroleum fuel by Petron to NPC for delivery to EBCC pursuant to the Energy Conversion Agreement and Fuel Management Agreement is exempt from excise tax.
>
> In reply, please be informed that Section 135 of the Tax Code of 1997 provides that the sale of petroleum products shall be exempt from excise tax if sold to an entity that enjoys exemption from indirect taxes as follows:
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>> **"SEC. 135. *Petroleum Products sold to International Carriers and Exempt Entities or Agencies.*** – Petroleum products sold to the following are exempt from excise tax:
>>
>> x x x x x x x x x
>>
>> (c) Entities which are by law exempt from direct and indirect taxes."
>
> Moreover, NPC is exempt from "indirect taxes" pursuant to the provisions of its Charter (*Maceda vs. Macaraig, Jr., G.R. No. 88291, June*

> *8, 1993; Department of Finance Memorandum addressed to Commissioner Liwayway V. Chato, January 26, 1998*).
>
> Such being the case, this Office is of the opinion as it hereby holds that the sale of petroleum products by Petron to NPC to be used by EBCC in generating electricity for the Bataan EPZA is exempt from excise tax.
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> However, under Section 130 (A) (2) of the Tax Code, the excise tax on locally manufactured petroleum products shall be paid before removal thereof from the place of production beginning January 1, 1999. For this reason, if the petroleum products sold by Petron to NPC are sourced from tax-paid inventories, the recourse of Petron is to claim for refund or tax credit of the excise taxes paid. In the event that Petron did not opt to claim the same as refund but, as in the instant case, passed on the cost of excise tax to NPC, then the latter may claim for refund or tax credit pursuant to Section 135 (c) of the Tax Code. Therefore, the issue of whether EBCC is exempt from excise tax is already moot and academic."
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> **BIR RULING 051-99**
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> "In reply, please be informed that since your petroleum product withdrawals are for use by entities or agencies exempt from excise tax under Section 135 of the Tax Code of 1997, and that the petroleum products are to be delivered to the tax-exempt entities within ten (10) days (for the period January 1, 1998 to June 30, 1998); within five (5) days (for the period July 1, 1998 to December 31, 1998) from the date of removal of such products; and before removal from the place of production of such products (from January 1, 1999 and thereafter), you are allowed to claim a tax credit/refund of the excise taxes paid on petroleum products sold to tax-exempt entities or agencies, subject to the two-year prescriptive period under Section 229 of the Tax Code of 1997."

Finally, considering that Petitioner's sale of fuel oil to NPC is exempt from the payment of excise taxes, then Petitioner may rightfully recover the excise taxes it paid to PSPC. And as correctly pointed out by Petitioner, since it ended up shouldering the specific tax component of the fuel oil, it is but just and reasonable to allow it to recover what it would have otherwise have passed on to NPC had it not been for NPC's exemption from indirect taxes. "The view which refuses to accord the exemption because the tax is first paid by the seller disregards realities and gives more importance to form than to substance . Equity and law always exalt substance over form." (Opinion No. 106, S'54, cited in Maceda vs. Macaraig, Jr., 223 SCRA 217)

Likewise, it is worth mentioning that the case of ***Maceda vs. Macaraig 223 SCRA 217*** is just a reiteration of an earlier ruling of the Supreme Court in the case of ***CIR vs. Gotamco 148 SCRA 36*** where it was held that the contractor of the World Health Organization (WHO) is not liable to contractor's tax which the BIR assessed considering that it cannot pass on the said tax to the WHO because the latter is exempted from all taxes, direct or indirect, by virtue of the Host Agreement with the Philippine Government.

In view of the settled jurisprudence on the matter, We find legal basis and merit to the arguments raised by the Petitioner.

WHEREFORE, premises considered, judgment is hereby rendered ordering the Respondent to **REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the Petitioner the amount of P109,497,108.19 representing specific taxes paid by Petitioner on its purchases of heavy fuel oil from May to December of 1997.

SO ORDERED.

Ernesto D. Acosta
ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
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
Presiding Judge