REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1279** (CTA Case NO. 8400)
	Present:
- versus -	Del Rosario, P.J., Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Cotangco-Manalastas, and Ringpis-Liban, JJ.
SAN MIGUEL BREWERY, INC., A subsidiary of SAN MIGUEL CORPORATION, Respondent.	Promulgated: NOV 26 2015 3:38p.m.

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DECISION

CASTAÑEDA, JR., J.:

This Petition for Review filed by petitioner Commissioner of Internal Revenue, seeks for the Court *En Banc* to reverse and set aside the Decision[1] promulgated on December 1, 2014 and the Resolution[2] promulgated on February 18, 2015, respectively, by the CTA 3rd Division.

The dispositive portion of the assailed Decision reads:

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[1] Decision dated December 1, 2014, penned by Associate Justice Esperanza R. Fabon-Victorino, Division Docket, Vol. III, pp. 1625-1650.
[2] Resolution promulgated on February 18, 2015, Division Docket, Vol. III, pp. 1696-1698.

> "**PREMISES CONSIDERED**, the Petition for Review dated December 20, 2011, is hereby **PARTIALLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner San Miguel Brewery, Inc. in the reduced amount of **₱699,583,941.50** (₱699,584,314.54 minus ₱373.04), representing erroneously, or excessively and/or illegally collected, and overpaid excise taxes on 'San Mig Light' during the period from January 1, 2010 to December 31, 2010.
>
> **SO ORDERED.**"

On the other hand, the dispositive portion of the assailed Resolution reads:

> "**WHEREFORE**, there being no new matters and issues advanced by respondent to justify a reconsideration, let alone a modification of the assailed Decision of December 1, 2014, respondent's *Motion for Partial Reconsideration (Re: Decision promulgated on 1 December 2014)* is hereby **DENIED**, for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

Culled from the records are the following facts as found by the Court in Division:

> "Petitioner [now respondent], a subsidiary of San Miguel Corporation, (SMC), is a domestic corporation, with principal address at 40 San Miguel Avenue, Mandaluyong City, Metro Manila.
>
> Respondent [now petitioner], on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR) with authority to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes, as provided by law. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.
>
> One of the beer products manufactured by petitioner and previously by its parent company, SMC, is San Mig Light.

On October 19, 1999, SMC wrote the BIR Excise Tax Services, requesting for the registration of and authority to manufacture San Mig Light. The said request was granted in a reply-letter dated October 27, 1999.

On November 3, 1999, SMC again wrote the same office informing it about the change in the net retail price of San Mig Light which would be sold at the suggested net retail price of ₱21.15 per liter, less VAT and specific tax, to be taxed at ₱9.15 per liter.

In a letter dated January 28, 2002, SMC Group Tax Services requested the BIR Large Taxpayers Assistance Division II for information on the tax rate and classification of San Mig Light and Gold Eagle King, another beer product of the company. In response thereto, the BIR Large Taxpayers Assistance Division II confirmed on February 7, 2002, that based on the documents submitted, SMC was using the correct classification and rates for San Mig Light and Gold Eagle King. Subsequently, or on May 28, 2002, the same BIR office issued to SMC a Notice of Discrepancy stating that from the year 2000, petitioner should be subjected to a higher excise tax rate.

In a letter-reply dated July 9, 2002, the SMC requested for the withdrawal of the said Notice of Discrepancy. This was rejected by the BIR via the letter-rejoinder issued on October 14, 2002 reiterating that San Mig Light Pale Pilsen was a variant of San Miguel Pale Pilsen.

On November 20, 2002, the SMC requested the BIR to reconfirm its previous issuance that San Mig Light was a new brand and that the notice of deficiency and demand for payment against SMC be withdrawn. In a letter issued to SMC on January 6, 2004, the BIR maintained its position that San Mig Light was a variant of San Miguel Pale Pilsen in can.

On January 28, 2004, the BIR issued a Preliminary Assessment Notice (PAN) against SMC for ₱852,039,418.15, allegedly representing deficiency excise tax, inclusive of increments, on the removals of San Mig Pale Pilsen Light for the period covering 1999 to January 7, 2004.

Subsequently or on April 12, 2004, the BIR issued Formal Letter of Demand (FLD) against SMC, with Assessment Notice for the payment of deficiency excise tax in the total amount of ₱876,098,898.83, inclusive of interest until April 30, 2004, for the period of November to December 1999 at ₱12.52 per liter, and

January 2000 to January 7, 2004 at ₱13.61 per liter. In the details of Discrepancy, the BIR confirmed the classification of San Mig Light as variant of RPT in cans.

Aggrieved, SMC filed a Protest/Request for Reconsideration of the FLD with Assessment Notice. It was however denied on August 17, 2004 in a Final Decision on Disputed Assessment (FDDA), for lack of factual and legal bases. Once again, the BIR stated that San Mig Light was a variant of RPT in can.

On February 4, 2004, the BIR issued a Notice of Discrepancy in the amount of ₱28,876,108.84, this time representing SMC's deficiency excise tax due on removals of San Mig Light for the period covering January 8, 2004 to January 29, 2004.

On March 24, 2004, the BIR issued a Preliminary Assessment Notice (PAN) against SMC, noting that San Mig Light was a variant of RPT in can or San Miguel Beer Pale Pilsen. This was followed by a Formal Letter of Demand (FLD) on May 26, 2004 with Assessment Notice No. TF 129-05-04 of even date. In the FLD, the BIR demanded payment of the deficiency excise tax assessment in the total amount of ₱30,763,133.68, including interest up to June 30, 2004 maintaining that San Mig Light was a variant of RPT in can.

SMC filed a Protest/Request for Reconsideration dated July 5, 2004 assailing the FLD on May 26, 2004 which was denied for lack of factual and legal bases in the Final Decision on Disputed Assessment (FDDA) issued on August 20, 2004. The BIR pointed out the same ground that San Mig Light was a "variant of RPT in can" or San Miguel Beer Pale Pilsen in can.

In view thereof, SMC elevated the matter before this Court for the cancellation of the deficiency excise tax assessments issued against it through two Petitions for Review. The first was filed on September 17, 2004 and docketed as CTA Case No. 7052 for the April 12, 2004 assessment, while the second was filed on September 22, 2004 and docketed as CTA Case No. 7053 for the May 26, 2004 assessment.

In accordance with the January 28, 2004 PAN, SMC paid a higher excise tax on San Mig Light at the rate of ₱13.61 per liter from February 1, 2004 to December 31, 2006; and ₱17.64 from January 1, 2007 to September 30, 2007.

On different dates, SMC filed with the BIR three (3) applications for refund of the amounts allegedly representing excise taxes erroneously, excessively and/or illegally collected on the removals of San Mig Light beer product, as follows:

Amount	Period Covered	Filed On
₱782,238,161.47	February 1, 2004 up to November 30, 2005	December 28, 2005
₱926,389,172.02	December 1, 2005 up to July 31, 2007	August 30, 2007
₱105,632,376.64	August 1, 2007 up to September 30, 2007	June 17, 2009

Meanwhile, by virtue of the "Master Deed of Assignment of Domestic Beer Assets" dated August 23, 2007, SMC assigned, transferred and conveyed in favor of petitioner SMB all of its rights, title and interest over its beer assets used in its domestic beer business, effective October 1, 2007. Petitioner continued SMC's business operations of manufacturing, selling and distribution of fermented and malt-based beverages, including San Mig Light.

From October 1, 2007 to December 31, 2008, petitioner paid excise taxes on its removals of San Mig Light at the increased tax rate of ₱17.64 per liter; and from January 1, 2009 to December 31, 2010, at the increased tax rate of ₱19.05 per liter.

On October 14, 2011, petitioner filed an administrative claim for refund with the BIR in the amount of ₱699,584,314.54, claiming that the amount as excise taxes erroneously and/or excessively collected on its removals of San Mig Light for the period beginning January 1, 2010 up to December 31, 2010. The amount sought for refund arose from BIR's re-classification of San Mig Light as a variant of "RPT in can" or San Miguel Beer Pale Pilsen in can.

On December 23, 2011, petitioner filed the instant Petition for Review with the Court citing as ground respondent's inaction on its application for refund.

In her Answer filed on February 24, 2012, respondent counters that petitioner is not entitled to the refund sought. Petitioner is estopped from questioning the classification of San Mig Light as a variant of San Miguel Pale Pilsen on the following grounds: (1) it has admitted the correctness of the said classification when it started paying on the excise tax under the highest tax classification of San Miguel Pale Pilsen (RPT in cans); (2) its publication – "Kaunlaran"-

contains statements that San Mig Light is a variant of Pale Pilsen with the same full flavored taste and alcohol content or a low calorie variant; (3) the bottle of San Mig Light itself indicates that it is a low calorie pale Pilsen; and (4) in its 1999 Annual Report to its stockholders, petitioner admitted that San Mig Light is a low-calorie variant of San Miguel Beer.

Respondent further claims that the government is not estopped from collecting legitimate taxes because of the errors committed by its agent (*Visayan Terminal Co., Inc. v. Commissioner of Internal Revenue*, L-19530 and 19444, February 27, 1965).

Besides, the objectives and policies of RMO No. 6-2003 do not affirm any tax classification and rate of San Mig Light as a new brand. The master list was used for want of reference document in the conduct of survey. That being the case, the said master list cannot be SMC's legal basis for creating San Mig Light as a new brand.

Moreover, "the removal of the second part of the definition of the term 'variant of a brand' under paragraph 9 of the NIRC of 1997 does not alter the fact that SML is a variant of SMB". Also when San Mig Light was introduced in the market in 1999, Section 143 of the NIRC of 1997 still applied. Thus, the use of the same logo or design as a device to advertise the San Miguel Beer variant is adequate justification to classify San Mig Light as a variant of San Miguel Beer Pale Pilsen. Also the word "Light" in the brand name San Mig Light is a modifier suffixed to the root name that is contemplated by the definition of a variant under Section 143 of the NIRC of 1997.

During the trial, petitioner presented the following witnesses (a) Virgilio S. De Guzman; (b) Alfredo R. Villacorte, Jr.; (c) Bienvenido N. Banas; (d) Minerva Lourdes B. Bibonia; (e) Marciano B. Requilme, Jr.; (f) Noemi L. Ronquillo; and (g) Normita L. Villaruz.

Petitioner's Executive Assistant to the Chief Finance Officer **Virgilio S. De Guzman**, by way of Judicial Affidavit, testified that he was involved in the filing with the BIR of the application for the registration of San Mig Light as a new brand under the 1997 NIRC which was granted through the letter dated October 27, 1999 of Assistant Commissioner Leonardo B. Albar of the BIR Excise Tax Service. Due to the change in the suggested retail price of San Mig Light, he again wrote Assistant Commissioner Albar on November 3, 1999 advising him that San Mig Light would be sold at the suggested retail price of ₱21.15 per liter, to be taxed at ₱9.15 per liter as a medium-priced brand. In a letter dated February 7, 2002, Conrado P.

Item, Acting Chief of the BIR Large Taxpayers Assistance Division II confirmed the tax classification of San Mig Light as a new brand taxed at the rate of ₱9.15 per liter (later adjusted to ₱10.25, ₱12.30, ₱13.28, ₱14.34 and ₱15.49 per liter).

In 2007, SMC spun off its domestic beer business into a new company – San Miguel Brewery, Inc. – which continued SMC's business operations of manufacturing, selling and distribution of fermented and malt-based beverages, including San Mig Light.

Witness **Alfredo R. Villacorte, Jr.**, declared by way of Judicial Affidavit that as former SMC's Vice President and Manager, Group Tax Services from 2000 to April 30, 2008, he ensured compliance of the various SMC Groups with the requirements pertinent to the filing of tax returns and payment of corresponding taxes. He not only attended tax examinations conducted by the BIR on petitioner but also monitored their developments and status.

In his letter of January 28, 2002, he requested the Large Taxpayers Assistance Division II of the BIR for information about the tax rate and classification of San Mig Light and Gold Eagle King, another beer product of the company. On February 7, 2002, the said office, through its Acting Chief Conrado P. Item, confirmed the tax classification of San Mig Light as a new brand with a tax rate of ₱9.15 per liter (later adjusted to ₱10.25, ₱12.30, ₱13.28, ₱14.34 and ₱15.49).

On November 20, 2002, he again wrote the BIR requesting that San Mig Light be reconfirmed as a new brand and that the Notice of Discrepancy issued against SMC be set aside and the demand for payment withdrawn in view of the letter dated October 14, 2002 of BIR Assistant Commissioner Edwin R. Abella finding San Mig Light Pale Pilsen as a variant of San Miguel Pale Pilsen.

On March 11, 2003, the BIR issued Revenue Memorandum Order (RMO) No. 6-2003 prescribing the guidelines and procedures in the establishment of current net retail prices of new brands of alcohol products. Attached thereto as Annex A-3 was a Master List of Registered Brands of Locally Manufactured Alcohol Products in which San Mig Light was listed as a new brand.

He continued to declare that on January 29, 2004, the BIR served upon SMC a PAN dated January 28, 2004 for an alleged deficiency excise tax of ₱852,039,418.15, applying the higher tax rates of ₱12.52 and ₱13.61 per liter on removals of San Mig Light during the period from 1999 up to January 7, 2004. Since the BIR would not allow removal of San Mig Light unless the payment of prescribed rate was made, SMC started paying the higher rate of tax on February 1, 2004 but at the same time registered its objection. Finally, on October 14, 2011, SMB filed its claim for refund with the BIR in the amount of ₱699,584,314.54, covering the period January 1, 2010 to December 31, 2010.

Witness **Bienvenido N. Banas** also executed a Judicial Affidavit in which he declared that during his incumbency as Finance Manager, Beer Division of SMC from 1998 to December 2003, SMC regularly submitted reports to the BIR indicating that San Mig Light, one of the beer products of SMC, now SMB, was taxed as a new and medium-priced brand at ₱9.15 per liter which was subsequently adjusted to ₱10.25 per liter. The BIR never interposed any objection to the said reports.

However, in a Notice of Discrepancy dated May 28, 2002, the BIR informed SMC that San Mig Light was a variant of its existing beer products hence should be subjected to a higher excise tax rate. In his letter reply, he attached a copy of BIR letter dated February 7, 2002, confirming the tax classification of San Mig Light as a new brand.

The former Senior Vice President, Corporate Marketing but currently the Senior Vice President and Marketing Manager of SMB, **Minerva Lourdes B. Bibonia** indicated in her Judicial Affidavit which she identified in open court that she is familiar with the brands, taste and formulation of SMB products. She claimed that San Mig Light does not have the same design as Pale Pilsen or any other beer brand of petitioner. Further, the Escudo insignia is the corporate logo of both SMC and SMB which does not form part of the San Mig Light and Pale Pilsen beer brands or any other beer brands of petitioner. Lastly, San Mig Light has a different formulation giving it a distinctive taste. San Mig Light is lower in calories compared to Pale Pilsen which also has a different alcohol formulation. Significantly, San Mig Light has performed well in the market and has developed a market of its own separate from Pale Pilsen.

Also by way of a Judicial Affidavit, **Marciano B. Requilme, Jr.** testified that as Assistant Vice President and Quality Assurance Manager, Brewing Technical Group of SMB, he ensures that all SMB beer products meet the quality standards. He issues Certificates of Analysis based on the logbooks in which the results of various laboratory tests or analyses conducted under his supervision are regularly entered.

In the Certificate of Analysis he issued on August 28, 2012 or after the tests or analyses of the contents of a newly manufactured San Mig Light and Pale Pilsen were conducted on August 2, 2012 and August 17, 2012, respectively, he concluded that San Mig Light and Pale Pilsen are two (2) entirely different products.

As Manager of Accounting and Financial Services of SMB, **Noemi L. Ronquillo** testified that she is responsible for the preparation of the financial statements of the company, payment processing, including the computation of all taxes and their payment, insurance requirements of the company, cash planning and financial systems. She also assists the Chief Finance Officer of SMB, Mercy Marie J.L. Amador, in the submission and filing of documents with the BIR, including claims for refund of taxes illegally, excessively and/or erroneously paid by SMB to the BIR.

On October 14, 2011, SMB filed with the BIR a claim for refund in the amount of ₱699,584,314.54, representing overpayment of excise taxes erroneously, illegally and/or excessively assessed and collected on its removal of San Mig Light from January 1, 2010 to December 31, 2010. She participated in the preparation of the Letter/Claim for Refund filed with the BIR with all the attachments.

Finally, Independent Certified Public Accountant (ICPA) **Normita L. Villaruz** testified that as the court-commissioned ICPA, she examined and verified the voluminous documents pertaining to petitioner's Claim for Refund dated October 14, 2011, in the total amount of ₱699,584,314.54, allegedly representing overpayment of excise taxes erroneously, illegally and/or excessively assessed on its removal of San Mig Light from January 1, 2010 to December 31, 2010. Her audit revealed that the amount of ₱699,584,314.54 subject of the instant claim for refund is properly substantiated. However, when the adjustment in her report was considered, the amount was reduced from ₱699,584,314.54 to ₱699,583,941.50.

After petitioner rested, respondent moved for issuance of *Subpoena Duces Tecum and Subpoena Ad Testificandum* to Minerva Lourdes Bibonia, Head of the Beer Marketing Division of SMC and its corporate secretary. Over petitioner's Opposition, the Court granted respondent's motion in the Resolution dated September 6, 2013.

During respondent's initial presentation of evidence, the subpoenaed witness, **Atty. Mary Rose S. Tan** – SMC's Assistant Corporate Secretary, and **Ms. Minerva Lourdes Bibonia**, SMC's

Senior Vice President and Marketing Manager, appeared and testified in full. Atty. Tan identified the originals of the 1999 SMC Annual Report, Kaunlaran Magazine Issue 9 Vol 12 October 1999 and Kaunlaran Magazine Special Issue Jan 2000, while Ms. Bibonia identified a Data Disk for Laptop/Computer containing video footages of two (2) TV commercials of San Mig Light and a VCD containing as well video footages of two (2) TV commercials of San Mig Light. Thereafter, respondent formally offered her exhibits then rested.

After the parties filed their respective memoranda, the case was deemed submitted for decision."

On December 1, 2014, the Court in Division rendered the assailed Decision. Thereafter, on December 19, 2014, petitioner filed before the Court in Division her Motion for Partial Reconsideration[3] which was denied by the Court in the Resolution promulgated on February 18, 2015.

On March 26, 2015, petitioner filed the instant Petition for Review[4] before the Court *En Banc* which was given due course by this Court in the Resolution[5] dated May 29, 2015. In the same resolution, the Court *En Banc* required the parties to submit their memoranda. On July 15, 2015, respondent filed its Compliance/Manifestation,[6] stating that it is adopting its Comment[7] as its memorandum. On the other hand, petitioner filed its Manifestation[8] on July 20, 2015, stating that she is adopting the arguments raised in her Petition for Review as her memorandum. Thus, on August 4, 2015, the case was deemed submitted for decision.

Hence, this Decision.

THE ISSUES

Petitioner presented the following issues for the consideration of this Court:

"-I-

THE SURROGATE ADS OF SAN MIG LIGHT PALE PILSEN (SML) READILY REVEAL THAT IT IS INDEED A VARIANT OF SAN MIGUEL PALE PILSEN; *gr*

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[3] Division Docket, Vol. III, pp. 1651-1672.
[4] Court *En Banc* Docket, pp. 9-36.
[5] Division Docket, Vol. III, pp. 1706-1707; Court *En Banc* Docket, pp. 155-156.
[6] Court *En Banc* Docket, pp. 157-158.
[7] Court *En Banc* Docket, pp. 76-152.
[8] Court *En Banc* Docket, pp. 160-163.

-II-

NO BENEFIT SHOULD BE GIVEN TO THE OBVIOUSLY IMPROPER REGISTRATION OF A DESCRIPTIVE AND GENERIC NAME;

-III-

THE LETTER DATED 07 FEBRUARY 2002 BEARS CAVEAT WITH REGARD TO THE TAX CLASSIFICATION AND RATES USED BY SAN MIGUEL CORPORATION (SMC);

-IV-

THE SUBSEQUENT ISSUANCE OF REVENUE MEMORANDUM ORDER (RMO) NO. 6-2003 DATED 11 MARCH 2003 IS NOT CONCLUSIVE AS TO THE CLASSIFICATION OF SAN MIGUEL LIGHT;

-V-

THE HONORABLE COURT ERRED IN NOT RECOGNIZING THE INTENT OF THE LEGISLATURE IN DETERMINING A VARIANT OF A BRAND."[9]

THE RULING

We deny the Petition.

San Mig Light is a new brand and not a variant

Petitioner asserts that San Mig Light should be classified as a variant and not as a new brand.

However, as correctly held by the Court in Division, the issue whether or not San Mig Light is a new brand or a variant has already been settled in the previous cases decided by the Court *En Banc*.

[9] Issues, Petition for Review, Court *En Banc* Docket, p. 13.

In the case of *Commissioner of Internal Revenue vs. San Miguel Corporation*,[10] the Court *En Banc* held that San Mig Light is a new brand, in this wise:

> "In addition, in a similar case promulgated by the First Division involving the same parties and the same issue, it was ruled that 'San Mig Light' is a new brand. The pertinent portion of the said decision provides:
>
> The fact that 'San Mig Light' is a 'new brand' and not merely a variant of an existing brand is bolstered by the fact that Annexes 'C-1' and 'C-2' of RA No. 8240, which enumerated the fermented liquors registered with the BIR do not include the brand name 'San Mig Light'. Instead, what were listed, as existing brands of petitioner, as of the effectivity of RA No. 8240, were as follows: 'Pale Pilsen 320 mi.', 'Super Dry 355 mi.', 'Grande 1000 mi.', 'RPT in cans 330 mi.', 'Premium Bottles 355 mi.' and 'Premium Can 330 mi.' Even in Section 4 of RR No. 2-97 which provides for the classification and manner of taxation of existing brands, new brands and variants of existing brands, the list of existing brands of fermented liquors of petitioner does not include the brand 'San Mig Light', but merely 'RPT in cans 330 mi.', 'Premium Bottles 355 mi.', and 'Premium Bottle Can 330 mi.' for high priced brands; and 'Super Dry 355 mi.', 'Pale Pilsen 320 mi.', and 'Grande' for medium-priced brands.
>
> Thus, it is clear that when the product 'San Mig Light' was introduced in 1999, it was considered as an entirely new product and a 'new brand' of petitioner's fermented liquor, there being no root name of 'San Miguel' or 'San Mig' in its existing brand names. The existing registered and classified brand name of petitioner at that time was 'Pale Pilsen'. Therefore, the word 'Light' cannot be considered as a mere suffix to the word 'San Miguel', but it is part and parcel of an entirely new brand name, 'San Mig Light'. Evidently, as correctly pointed out by petitioner, 'San Mig Light' is not merely a variant of an existing brand, but an entirely 'new brand'.
>
> Anent the second type of 'variant brand', *i.e.*, when a different brand carries the same logo or design of an existing brand, records show that there are marked differences in the

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[10] CTA EB No. 755, September 20, 2012, penned by retired Presiding Justice Ernesto D. Acosta.

designs of the existing brand 'Pale Pilsen' and the new brand 'San Mig Light':

a) as to 'Pale Pilsen' and 'San Mig Light' in bottles:

1. the size, shape and color of the respective bottles are different. Each brand has a distinct design in its packaging. 'Pale Pilsen' is in a steiny bottle, while 'San Mig Light' is packed in a tall and slim transparent bottle;

2. the design and color of the inscription on the bottles are different from each other. 'Pale Pilsen' has its label encrypted or embossed on the bottle itself, while 'San Mig Light' has a silver and blue label of distinctive design that is printed on paper pasted on the bottle; and

3. the color of the letters in the 'Pale Pilsen' brand is white against the color of the bottle, while that of the words 'San Mig' is white against a blue background and the word 'Light' is blue against a silver background.

b) as to 'Pale Pilsen' and 'San Mig Light' in cans:

1. the words 'Pale Pilsen' are in ordinary font printed horizontally in black on the can against a diagonally striped light yellow gold background, while the words 'San Mig' are in Gothic font printed diagonally on the can against a blue background and the word 'Light' in ordinary font printed diagonally against a diagonally striped silver background; and

2. the general color scheme of 'Pale Pilsen' is light yellow gold, while that of 'San Mig Light' is silver.

Though the 'escudo' logo appears on both 'Pale Pilsen' bottle and can, and 'San Mig Light' bottle and can, the same cannot be considered as an indication that 'San Mig Light' is merely a variant of the brand 'Pale Pilsen', since the said 'escudo' insignia is the corporate logo of petitioner. It merely identifies the products as having been manufactured by petitioner, but does not form part of its brand. In fact, it appears not only in petitioner's beer products, but even in its non-beer products.

Thus, 'San Mig Light' is a new brand and not a variant of any of SMC's existing beer products."

In a similar fashion, the Court *En Banc* held in the case of *Commissioner of Internal Revenue vs. San Miguel Corporation,*[11] that:

"Effective January 1, 1998, Republic Act ('R.A.') No. 8424 explained the tax treatment of fermented liquors as a new brand in contrast with a variant as follows:

'CHAPTER III- EXCISE TAX ON ALCOHOL PRODUCTS

SEC. 143. Fermented Liquor.- xxx

Variants of existing brands which are introduced in the domestic market after the effectivity of Republic Act No. 8240 shall be taxed under the highest classification of any variant of that brand.

'New brands shall be classified according to their current net retail price. xxx xxx xxx

The classification of each brand of fermented liquor based on its average net retail price as of October 1, 1996, as set forth in Annex C, shall remain in force until revised by Congress.

A 'variant of a brand' shall refer to a brand on which a modifier is prefixed and/or suffixed to the root name of the brand and/or different brand which carries the same logo or design of the existing brand.

Beginning January 1, 2005, R.A. 9334 amended Section 143 of the 1997 NIRC making reference to fermented liquors either as a new brand or variant. R.A. 9334 restricted the meaning of a variant in the following manner:

'A 'variant of a brand' shall refer to a brand on which a modifier is prefixed and/or suffixed to the root name of the brand. xxx

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[11] CTA EB Case No. 873, October 24, 2012, penned by Associate Justice Juanito C. Castañeda, Jr.

'New brand' shall mean a brand registered after the date of the effectivity of R.A. 8240.

Clearly, a new brand is one that is registered after the effectivity of R.A. 8240 on January 1, 1997. Pursuant to R.A. 8424, a variant is defined as either a brand with a modifier prefixed and/or suffixed to the root name of the brand or a different brand which carries the same logo or design of the existing brand. The first type of variant is retained in R.A. 9334.

In the instant case, San Mig Light, a fermented liquor is a new brand due to the fact that on October 27, 1999, Assistant Commissioner Leonardo B. Albar of the Excise Tax Division granted respondent's request for the product's registration. To prove that San Mig Light is a new brand is supported by the fact that it was not among the brands registered after the effectivity of R.A. 8240. Nowhere is San Mig Light recognized as among the existing fermented liquor brands as shown in Annexes 'C-1' and 'C-2' of R.A. 8240 as aptly observed by the Court in Division as follows:

The fact that 'San Mig Light' is a 'new brand' and not merely a variant of an existing brand is bolstered by the fact that Annexes 'C-1' and 'C-2'of RA No. 8240, which enumerated the fermented liquors registered with the BIR do not include the brand name 'San Mig Light'. Instead, what were listed, as existing brands of petitioner, as of the effectivity of RA No. 8240, were as follows: 'Pale Pilsen 320 mi.', 'Super Dry 355 mi.', 'Grande 1000 mi.', 'RPT in cans 330 mi.', 'Premium Bottles 355 mi.' and 'Premium Can 330 mi.' Even in Section 4 of RR No. 2-97, which provides for the classification and manner of taxation of existing brands, new brands and variants of existing brands, the list of existing brands of fermented liquors of petitioner does not include the brand 'San Mig Light', but merely 'RPT in cans 330 mi.', 'Premium Bottles 355 mi.', and 'Premium Bottle Can 330 mi.' for high priced brands; and 'Super Dry 355 mi.', 'Pale Pilsen 320 mi.', and 'Grande' for medium-priced brands.

San Mig Light is not a variant of an existing brand. The petitioner erred in treating the wordings 'San Miguel' or 'San Mig' as a root word and 'Light' as a suffix. 'San Miguel' or 'San Mig' is not registered nor is it an existing classified brand under R.A. 8240. The brand 'Pale Pilsen' was registered and

> classified as a brand name at that time. The term 'Light' cannot be separated from the word 'San Mig' or 'San Miguel' but should be considered as one brand name. xxx"

In the afore-cited cases, it has been aptly ruled and explained by the Court *En Banc* that "San Mig Light" is a new brand and not a variant.

At any rate, Section 3 of Republic Act No. 9334 is clear in its *proviso* that:

> "**SEC. 3.** Section 143 of the National Internal Revenue Code of 1997, as amended, is hereby further amended to read as follows:
>
> xxx xxx xxx
>
> xxx Provided, however, That brands of fermented liquors introduced in the domestic market between January 1, 1997 and December 31, 2003 **shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31,2003. Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress.**" *(Emphasis supplied)*

In the instant case, respondent presented as evidence a request for the registration of its then new product, San Mig Light, on October 19, 1999.[12] Thus, petitioner proved that the subject product was introduced in the market between January 1, 1997 and December 31, 2003. Consequently, respondent likewise proved that San Mig Light is a new brand as of December 31, 2003 through the letter[13] from Assistant Commissioner Edwin R. Abella dated February 7, 2002, classifying San Mig Light as a new brand. Hence, pursuant to Section 143 of the NIRC, as amended by Republic Act No. 9334, said classification by the BIR cannot be revised except by an act of Congress. In other words, the BIR cannot unilaterally revise the classification it previously accorded to San Mig Light, *i.e.*, as a new brand, without an act of Congress.

Petitioner maintains that the letter dated February 7, 2002 indicates a caveat that:

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[12] Exhibit "A", Division Docket, Vol. 1, p. 88.
[13] Exhibit "E", Division Docket, Vol. 1, p. 100.

"However, should it be found that the same are different from what you have submitted and represented in your letter of January 29, 2002, this finding shall be considered null and void."

However, petitioner failed to adduce evidence showing that there was misrepresentation on the part of respondent. In light of the foregoing circumstances, this Court maintains that San Mig Light is a new brand and not a variant.

Considering the foregoing, We see no cogent reason to reverse the assailed Decision.

WHEREFORE, in view thereof, the instant Petition for Review is hereby **DENIED**, for lack of merit. Accordingly, the Decision dated December 1, 2014 is hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

with concurring opinion
ROMAN G. DEL ROSARIO
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR. A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

With Separate Dissenting Opinion.
Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

SAN MIGUEL BREWERY INC., A Subsidiary of SAN MIGUEL CORPORATION,
Respondent.

CTA EB NO. 1279
(CTA CASE NO. 8400)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, and,
RINGPIS-LIBAN, *JJ.*

Promulgated:

NOV 26 2015
3:38 p.m.

x- -x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the findings of the *ponencia* in denying the Commissioner of Internal Revenue's Petition for Review and affirming the partial grant of San Miguel Brewery, Inc.'s claim for refund representing erroneously, excessively and/or illegally collected and overpaid excise taxes on "*San Mig Light*" during the period from January 1, 2010 to December 31, 2010.

Nevertheless, I find it imperative to emphasize the mandatory nature of the freeze classification provision in Section 143 of the NIRC of 1997, as amended. Truth be told, the issue involved in this case is not of first impression. In the earlier case of *San Miguel Brewery Inc., a subsidiary of San Miguel Corporation vs. Commissioner of Internal Revenue,*[1] involving

[1] CTA Case No. 8209, September 12, 2014; penned by Honorable Presiding Justice Roman G. Del Rosario and concurred by Honorable Associate Justice Erlinda P. Uy.

the same parties herein but pertaining to a different taxable year, We expounded thusly:

> To be sure, neither taste nor alcohol content is relevant in determining whether "San Mig Light" is a variant of "Pale Pilsen" or "San Miguel Pale Pilsen", assuming the latter is an existing brand. In defining "variant of a brand", Section 143 of the 1997 NIRC, as amended by RA No. 9334, does not make any reference to the beer's calorie contents. In truth, to constitute a "variant of a brand", the law clearly requires that the brand was formed by prefixing or affixing a modifier to the root name of the existing, registered brand. As discussed above, the brand name "San Mig Light" was not formed by adding a prefix or suffix to the registered brand "Pale Pilsen".
>
> More importantly, Sections 2 (10) and 4(C) of RR No. 2-97 as earlier cited, provide that "new brands" shall refer to brands registered after January 1, 1997. There is no denying that San Mig Light" was introduced in the market only in October 1999, or between January 1, 1997 and December 1, 2003; thus, it must necessarily fall within the classification of a "new brand". Not only that, the 1997 NIRC, as amended by RA No. 9334, provides that brands of fermented liquors introduced in the domestic market between January 1, 1997 and December 31, 2003 shall remain in the classification under which the BIR has determined them to belong and such classification shall not be revised except by an act of Congress.
>
> Section 143 of the 1997 NIRC, as amended by RA No. 9334, states:
>
> > "SEC. 143. Fermented Liquors. — There shall be levied, assessed and collected an excise tax on beer, lager beer, ale, porter and other fermented liquors except tuba, basi, tapuy and similar fermented liquors in accordance with the following schedule:
> >
> > xxx xxx xxx
> >
> > "New brand' shall mean a brand registered after the date of effectivity of R.A. No. 8240.
> >
> > "'Suggested net retail price' shall mean the net retail price at which new brands, as defined above, of locally manufactured or imported fermented liquor are intended by the manufacturer or importer to be sold on retail in major supermarkets or retail outlets in Metro Manila for those marketed nationwide, and in other regions, for those with regional markets. At the end of three (3) months from the product launch, the Bureau of Internal Revenue shall validate the suggested net retail price of the new brand against the net retail price as defined herein and determine the correct tax bracket to which a particular new brand of fermented liquor, as defined above, shall be classified. After the end of eighteen (18) months from such validation, the Bureau of Interns Revenue shall revalidate the initially validated net retail price

> against the net retail price as of the time of revalidation in order to finally determine the correct tax bracket which a particular new brand of fermented liquors shall he classified: Provided, however, **That brands of fermented liquors introduced in the domestic market between January 1, 1997 and December 31, 2003 shall remain in the classification under which the Bureau of Internal Revenue has determined them to belong as of December 31, 2003. <u>Such classification of new brands and brands introduced between January 1, 1997 and December 31, 2003 shall not be revised except by an act of Congress</u>.**

Relatedly, RR No. 03-2006 amplifies the prohibition against any reclassification of certain brands of alcoholic products, thus:

> SECTION 4. Prohibition Against Reclassification of Certain Brands of Alcohol and Tobacco Products. — **The tax classification of the following brands of alcohol and tobacco products shall remain in force until revised by Congress**:
>
> (a) **Brands enumerated in Annexes "A," "B," "C" and "D" of R.A. No. 8240**;
>
> (b) **Brands listed in RR Nos. 1-97 and 2-97**; and
>
> (c) **New brands introduced in the domestic market between January 1, 1997 and December 31, 2003**.
>
> With respect to any of the brands listed in Annexes "A," "B," "C" and "D" of R.A. No. 8240, the owner of the brand may file with the BIR a notarized request for the delisting thereof from the said Annexes. The filing of such request shall be deemed a waiver of the statutory protection against reclassification of such brand; Provided, further, that in the event that the same brand shall be manufactured or imported by another entity subsequent to the filing of such request, such brand shall be considered a new brand subject to the prohibition on downward reclassification prescribed under Section 5 of these Regulations." (Emphases supplied)

As oft-repeated, "San Mig Light" is not a variant of any of the brands enumerated in Annexes "C-1" and "C-2". It is a "new brand" introduced in the domestic market between January 1, 1997 and December 31, 2003. Its classification as a "new brand" was confirmed by the BIR as early as October 27, 1999, through Assistant Commissioner Albar,[2] and again on February 27, 2002, through Mr. Item,[3] the then Acting Chief of the BIR Large Taxpayers Assistance Division II. **To now allow the BIR to re-classify "San Mig Light" from new brand to variant of an existing brand, thereby increasing the product's tax base, would infringe upon the basic legal maxim that *what cannot be done directly cannot be done indirectly*.** Indeed, only Congress can lawfully make such re-classification.

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[2] Exhibit "F", *CTA Docket*, p. 83.
[3] Exhibit "I", CTA Docket, p. 94.

In *British Tobacco vs. Commissioner of Internal Revenue*, the Supreme Court discussed the purpose of the classification freeze provision and the danger that ensues without it, *viz.*:

> To our mind, the classification freeze provision was in the main the result of Congress's earnest efforts to improve the efficiency and effectivity of the tax administration over sin products while trying to balance the same with other State interests. **In particular, the questioned provision addressed Congress's administrative concerns regarding delegating too much authority to the DOF and BIR as this will open the tax system to potential areas for abuse and corruption. Congress may have reasonably conceived that a tax system which would give the least amount of discretion to the tax implementers would address the problems of tax avoidance and tax evasion.**
>
> To elaborate a little, Congress could have reasonably foreseen that, under the DOF proposal and the Senate Version, **the periodic reclassification of brands would tempt the cigarette manufacturers to manipulate their price levels or bribe the tax implementers in order to allow their brands to be classified at a lower tax bracket even if their net retail prices have already migrated to a higher tax bracket after the adjustment of the tax brackets to the increase in the consumer price index. Presumably, this could be done when a resurvey and reclassification is forthcoming.** As briefly touched upon in the Congressional deliberations, the difference of the excise tax rate between the medium-priced and the high-priced tax brackets under RA 8240, prior to its amendment, was P3.36. For a moderately popular brand which sells around 100 million packs per year, this easily translates to P336,000,000. The incentive for tax avoidance, if not outright tax evasion, would clearly be present. Then again, the tax implementers may use the power to periodically adjust the tax rate and reclassify the brands as a tool to unduly oppress the taxpayer in order for the government to achieve its revenue targets for a given year.
>
> Thus, Congress sought to, among others, simplify the whole tax system for sin products **to remove these potential areas of abuse and corruption from both the side of the taxpayer and the government.** Without doubt, the classification freeze provision was an integral part of this overall plan. This is in line with one of the avowed objectives of the assailed law "to simplify the tax administration and compliance with the tax laws that are about to unfold in order to minimize losses arising from inefficiencies and tax avoidance scheme, if not outright tax evasion." RA 9334 did not alter this classification freeze provision of RA 8240. On the contrary, Congress affirmed this freezing mechanism by clarifying the wording of the law. We can thus reasonably conclude, as the deliberations on RA 9334 readily show, that the administrative concerns in tax administration, which moved Congress to enact the classification freeze provision in RA 8240, were merely continued

by RA 9334. Indeed, administrative concerns may provide a legitimate, rational basis for legislative classification. In the case at bar, these administrative concerns in the measurement and collection of excise taxes on sin products are readily apparent as afore-discussed.

Aside from the major concern regarding the elimination of potential areas for abuse and corruption from the tax administration of sin products, the legislative deliberations also show that the classification freeze provision was intended to generate buoyant and stable revenues for government. With the frozen tax classifications, the revenue inflow would remain stable and the government would be able to predict with a greater degree of certainty the amount of taxes that a cigarette manufacturer would pay given the trend in its sales volume over time. The reason for this is that the previously classified cigarette brands would be prevented from moving either upward or downward their tax brackets despite the changes in their net retail prices in the future and, as a result, the amount of taxes due from them would remain predictable. The classification freeze provision would, thus, aid in the revenue planning of the government.

All in all, the classification freeze provision addressed Congress's administrative concerns in the simplification of tax administration of sin products, **elimination of potential areas for abuse and corruption in tax collection, buoyant and stable revenue generation, and ease of projection of revenues.** Consequently, there can be no denial of the equal protection of the laws since the rational-basis test is amply satisfied.

The discussion in the case of *Secretary of Finance vs. La Suerte Cigar and Cigarette Factory* is also enlightening with regard to the rationale behind the one time classification of sin products:

> In order to implement RA 8240 following its effectivity on January 1, 1997, the BIR issued Revenue Regulations No. 1-97, dated December 13, 1996, **which mandates a <u>one-time classification</u> only. Upon their launch, new brands shall be initially taxed based on their suggested net retail price. Thereafter, a survey shall be conducted within three (3) months to determine their current net retail prices and, thus, fix their official tax classifications.** However, the BIR made a turnaround by issuing Revenue Regulations No. 9-2003, dated February 17, 2003, which partly amended Revenue Regulations No. 1-97, by authorizing the BIR to periodically reclassify new brands (i.e., every two years or earlier) based on their current net retail prices. Thereafter, the BIR issued Revenue Memorandum Order No. 6-2003, dated March 11, 2003, prescribing the guidelines on the implementation of Revenue Regulations No. 9-2003. This was patent error on the part of the BIR for being contrary to the plain text and legislative intent of RA 8240.

It is clear that the afore-quoted portions of Revenue Regulations No. 1-97, as amended by Section 2 of Revenue Regulations 9-2003, and Revenue Memorandum Order No. 6-2003 unjustifiably emasculate the operation of Section 145 of the NIRC because they authorize the Commissioner of Internal Revenue to update the tax classification of new brands every two years or earlier subject only to its issuance of the appropriate Revenue Regulations, when nowhere in Section 145 is such authority granted to the Bureau. Unless expressly granted to the BIR, the power to reclassify cigarette brands remains a prerogative of the legislature which cannot be usurped by the former.

More importantly, as previously discussed, the clear legislative intent was for new brands to benefit from the same freezing mechanism accorded to Annex "D" brands. To reiterate, in enacting RA 8240, Congress categorically rejected the DOF proposal and Senate Version which would have empowered the DOF and BIR to periodically adjust the excise tax rate and tax brackets, and to periodically resurvey and reclassify cigarette brands. (This resurvey and reclassification would have naturally encompassed both old and new brands.) It would thus, be absurd for us to conclude that Congress intended to allow the periodic reclassification of new brands by the BIR after their classification is determined based on their current net retail price while limiting the freezing of the classification to Annex "D" brands. Incidentally, Senator Ralph G. Recto expressed the following views during the deliberations on RA 9334, which later amended RA 8240:

Senator Recto: Because, like I said, when Congress agreed to adopt a specific tax system [under R.A. 8240], when Congress did not index the brackets, and Congress did not index the rates but only provided for a one rate increase in the year 2000, we shifted from ad valorem which was based on value to a system of specific which is based on volume. Congress then, in effect, determined the classification based on the prices at that particular period of time and classified these products accordingly.

Of course, Congress then decided on what will happen to the new brands or variants of existing brands. To favor government, a variant would be classified as the highest rate of tax for that particular brand. In case of a new brand, Mr. President, then the BIR should classify them. **But I do not think it was the intention of Congress then to give the BIR the authority to reclassify them every so often. I do not think it was the intention of Congress to allow the BIR to classify a new brand every two years, for example, because it will be arbitrary for the BIR to do so.** x x x

For these reasons, the amendments introduced by RA 9334 to RA 8240, insofar as the freezing mechanism is concerned, must be seen merely as underscoring the legislative intent already in place then, i.e. new brands as being covered by the freezing

> mechanism after their classification based on their current net retail prices.
>
> xxx xxx xxx
>
> It should be noted though that on August 8, 2003, the BIR issued Revenue Regulations No. 22-2003 which implemented the revised tax classifications of new brands based on their current net retail prices through the market survey conducted pursuant to Revenue Regulations No. 9-2003. Annex "A" of Revenue Regulations No. 22-2003 lists the result of the market survey and the corresponding recommended tax classification of the new brands therein aside from Lucky Strike. However, whether these other brands were illegally reclassified based on their actual current net retail prices by the BIR must be determined on a case-to-case basis because it is possible that these brands were classified based on their actual current net retail price for the first time in the year 2003 just like Lucky Strike. Thus, we shall not make any pronouncement as to the validity of the tax classifications of the other brands listed therein.
>
> The reclassification of Astro and Memphis pursuant to Revenue Regulations Nos. 9-2003 and 22-2003 constitutes the prohibited reclassification contemplated in British American Tobacco v. Camacho. **It will be recalled that these brands were already classified by the BIR based on their current net retail prices in 1999 through a market survey. Consequently, their upward reclassification in 2003 by the BIR through another market survey is a prohibited reclassification.**
>
> xxx xxx xxx
>
> In sum, the trial court correctly ruled that Revenue Regulations Nos. 9-2003 and 22-2003 are void insofar as they empower the BIR to periodically review or re-determine the current net retail prices of cigarettes for purposes of updating their tax classification every two years or earlier consistent with the Court's pronouncements in British American Tobacco v. Camacho. Consequently, the upward reclassification of Astro and Memphis in Annex "A" of Revenue Regulations No. 22-2003 is invalid.

The foregoing pronouncements of the Supreme Court emphasize the mandatory nature of the classification freeze mechanism. As applied to the present controversy, the notices and letters issued by the BIR, which *re-classifies* "San Mig Light" as a variant of an existing brand, is violative of such freeze mechanism.

Otherwise stated, the re-classification of a product from new brand to a variant of an existing brand, after a previous classification has already been made, necessarily engenders the same evil the law seeks to prevent - - the existence of uncertainty (and flexibility in a way of speaking) - - on the tax applicable to beer. Parenthetically, in the absence of a classification freeze provision, both the government and the taxpayers would be exposed to the undesirable scheme of changing the classification of the product to fall within the category that could either result in an increased tax rate or reduced tax rate, depending on the identity of the taxpayer as well as of the implementing officials. Precisely, the classification freeze provision seeks to address and prevent either the possible abuse of discretion by the BIR or any unfair business practice on the part of the taxpayer that thread on tax evasion. Incidentally, in fixing the selling price of their products, manufacturers take into consideration the tax component thereof. To alter the classification of a product that results in higher tax bracket, after it has been previously classified under a lower tax bracket, is anathema to a fair and just taxation.

There is no denying that "San Mig Light" is identifiable with SMC as its manufacturer. But distinction should be made between the attribution of a product to a manufacturer and the attribution of a brand to an existing brand of the manufacturer. In the first instance, the goodwill of a manufacturer is entirely irrelevant in determining whether a brand is a variant of an existing brand; but not so with respect to the second instance. **To state that SMC - - capitalizing on the goodwill of its business name - - cannot introduce a "new brand", as long as it is attributable to it as a manufacturer is absurd, to say the least. The law never intends the absurd.**

The Court is not unaware of the *1993* case of **Asia Brewery, Inc. vs. The Honorable Court of Appeals and San Miguel Corporation** where the Supreme Court held that the word *"pale pilsen"* are generic words descriptive of the color (pale) and of a type of beer (pilsen) and that the word "pale pilsen' may not be appropriated by SMC for its exclusive use. **Suffice it to say that notwithstanding afore-stated 1993 pronouncement, the legislature passed RA No. 8240 in 1996 and RA No. 8424 in 1997 which recognized the registration of "Pale Pilsen" as one of SMC's beer products.** Unless and until RA No. 8240 and RA No. 8424 *vis-a-vis* their Annexes are rendered void or unconstitutional, "Pale Pilsen" remains petitioner SMB's brand for purposes of classification of beer products and the imposition of excise tax thereon

All told, this Court concludes that "San Mig Light" is a new brand and not a variant of any of SMC's or petitioner SMB's existing beer products. Being a new brand that is being sold at the net retail price of ₱21.15 per liter, or bottle, less VAT and specific tax, the same should only be taxed at the rate of ₱12.30 per liter. *(Emphasis supplied and citations omitted)*

To be sure, the freeze classification provision in Section 143 of the NIRC of 1997, as amended, safeguards against potential abuse and corruption from both the taxpayer and the government.

All told, I VOTE to DENY the Petition for Review.

ROMAN G. DEL ROSARIO
Presiding Justice

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1279** (CTA CASE NO. 8400)
-versus-	Present: DEL ROSARIO, P.J., CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, AND RINGPIS-LIBAN, JJ.
SAN MIGUEL BREWERY INC., A SUBSIDIARY OF SAN MIGUEL CORPORATION, Respondent.	Promulgated: NOV 26 2015 3:38 p.m.

x---x

DISSENTING OPINION

MINDARO-GRULLA:

With all due respect, I dissent from the majority opinion partially granting respondent's claim for refund in the reduced amount of Six Hundred Ninety Nine Thousand Five Hundred Eighty Three Thousand Nine Hundred Forty One and Fifty Centavos (₱699,583,941.50), representing erroneously, or excessively and/or illegally collected, and overpaid excise taxes on "San Mig Light" during the period from January 1, 2010 to December 31, 2010.

I maintain my position in the earlier cases of *Commissioner of Internal Revenue* vs. *San Miguel Brewery Inc., a subsidiary of San Miguel Corporation*,[1] and *San Miguel Brewery Inc., a subsidiary of San Miguel Corporation vs. Commissioner of Internal Revenue*,[2] that the product, "San Mig Light" marketed as a "low calorie pale pilsen", is a variant of "San Miguel Pale Pilsen" described as "expertly brewed beer". It is likewise my opinion that the CIR is

[1] CTA EB No. 755 (CTA Case No. 7708), promulgated on September 20, 2012.
[2] CTA Case No. 8209, promulgated on September 12, 2014.

precluded from reclassifying the net retail prices of existing and those brands introduced between January 1, 1997 and December 31, 2003 but not in properly determining a brand as variant of a brand erroneously determined as new brand. The classification freeze provision pertains not to the determination of whether a brand is indeed a new brand or variant of a brand but rather to the specific range of net retail prices[3] of brand upon which is levied, assessed and collected a rate of excise tax[4].

Thus, as elucidated in my dissenting opinion in CTA EB No. 755 (CTA Case No. 7708), involving the same issues and parties but pertaining to a different taxable year, *viz*:

> "xxx [I]t is noteworthy to cite the intent and purpose of the legislature in defining a variant of a brand specifically the integration of prefix or suffix in the definition. In Senate's deliberation on House Bill No. 7198 (the precursor of RA 8240), the interpellation5 between Senator Juan Ponce Enrile and Senators Miriam Santiago would be relevant.
>
> "Senator Santiago:
>
>> Mr. President, allow me to begin with the elementary observation that when we institute tax reforms, we should consider certain factors including ease of administering the tax, simplicity of the tax system, the capability of the tax machinery to implement the tax laws and the avoidance of the tax leaks that encourage tax evasion.
>>
>> xxx, [I] still need to raise certain questions even only for clarification of those who will later be tasked with the implementation of this law.
>>
>> xxx. I am talking about variants of existing brands. *C*

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[3] *British American Tobacco vs. Camacho, et al.,* G.R. No. 162583, August 20, 2008.
[4] Revenue Regulations No. 03-06

(k) CLASSIFICATION — shall refer to the specific range of net retail prices of brands of alcohol or tobacco products upon which is levied, assessed and collected a rate of excise tax specified by the Act, inclusive of the tax rates imposed on certain brands under Annexes A, B, C and D of R.A. No. 8240, as implemented by Revenue Regulations No. 17-99.

I would like to lay the basis for my question. I find it confusing that the taxation of variants is defined in this manner. The definition of a variant "is made to depend on the prefix or the suffix. It is based on the name although referring to the same product.

The bill provides that the tax shall be based on the highest value. Tax wise, it would be unfair for manufacturer who would wish to introduce cheaper and more affordable versions of their products. It defeats the purpose of coming out with lower-priced products.

For example, let us assume that a beer product is well-known in the market. In order to make it available to more consumers, the manufacturer, let us assume, comes out with the cheaper version of the original and attaches the name of the original to this new product in order to assure consumers that the new one is backed by the same quality guarantee as the original one. It seems to be absurd for the new product to be taxed as much as the original product in this light.

My question then is: Should the variant not be that, which is nearest in value and not which is highest in value? (Emphasis supplied)

Senator Enrile:

Mr. President, to answer the question briefly, I would like to state here that from a purely business viewpoint, probably I will concede that there is some merit to the argument just stated by the distinguished Senator from Iloilo. But on the other hand, from a purely fiscal taxation position, to discard the provision that we have suggested would open a very wide door for tax avoidance, if not tax evasion because a beer is beer. It is just a question of brands.

What is the composition of beer? Water and some fermenting elements- malt and some other fermenting elements. But if we not put this, those brands that are already well-known in the market could be marketed under almost an identical name with a prefix, suffix or a variant and put in a lower category in order to enjoy a lower tax level, in which case, the government will be losing. That is the purpose of this measure." (Emphasis supplied)

Evidently, **when the legislature defines a "variant of a brand", the legislature refers to the word "brand" as those brand marketed to the consumers and that it intended to tax those brands marketed under almost an identical name with a prefix or suffix of brands that are already well-known in the market.** Moreover, the omission in the law of the other definition of a variant of a brand such as — "a different brand which carries the same logo or design of the existing brand" in fact reveals the legislative intent to adopt the purpose to tax those brands who ride on the popularity of previously registered brand marketed under almost an identical name with a prefix, suffix or a variant.

While in Annexes C1 and C2 of RA 8240, the list contained San Miguel Corporation as manufacturer and brand "RPT in Cans 330 ml (24)" and "pale pilsen 320 ml (24)", as high priced brands and medium priced brands respectively, it is not the brand contemplated by the legislature as being marketed to the consumer. **RPT is hardly a brand name marketed by SMC or mere "pale pilsen"; rather, it is "San Miguel Pale Pilsen". "RPT in Cans" (Ring Pull Tab) refers to San Miguel Pale Pilsen in can and "Pale Pilsen 320 ml" to San Miguel Pale Pilsen in bottles. Visibly, SMC incorporated its tradename in the product name "San Miguel Pale Pilsen" and trademark thereon. Moreover, in *Asia Brewery, Inc. vs. The Honorable Court of Appeals and San Miguel Corporation*** [G.R. No. 103543, July 5, 1993]**, the Supreme Court held that the word "pale pilsen" is mere generic words, non-registerable and not appropriable by any beer manufacturer**, to wit:

'There is hardly any dispute that the dominant feature of SMC's trademark is the name of the product: SAN MIGUEL PALE PILSEN, written in white Gothic letters with elaborate serifs at the beginning and end of the letters "S" and "M" on an amber background across the upper portion of the rectangular design.

xxx xxx xxx.

The fact that the words pale pilsen are part of ABI's trademark does not constitute an infringement of SMC's trademark: SAN MIGUEL PALE PILSEN, for "pale pilsen" are generic words descriptive of the color ("pale"), of a type of beer ("pilsen"), which is a light bohemian beer with a strong hops flavor that originated in the City of Pilsen in Czechoslovakia and became famous in the Middle Ages. (Webster's Third New International Dictionary of the English Language, Unabridged. Edited by Philip Babcock Gove. Springfield, Mass.: G & C Merriam Co., [c] 1976, page 1716.) "Pilsen" is a "primarily geographically descriptive word," (Sec. 4, subpar. [e] Republic Act No. 166, as inserted by Sec. 2 of R.A. No. 638) hence, non-registerable and not appropriable by any beer manufacturer. xxx.'

Even if mere "pale pilsen" or "RPT" (ring pull tab) were registered as SMC's brand we shall consider the name of the product as it appears on the product itself. The word "San Miguel Pale Pilsen" describes as "expertly brewed original full-flavored" and not mere "Pale Pilsen" which is non-registerable and not appropriable by any beer manufacturer, against "San Mig Light" describe as a "low calorie pale pilsen".

xxx

Unless erroneous, courts will and should respect the contemporaneous construction placed upon a statute by the executive officers whose duty it is to enforce. Moreover, the need for certainty and predictability in the implementation of tax laws is crucial in the scheme of judicial tax administration. Applying Revenue Regulations No. 03-06 implementing RA 9334 which took effect on January 1, 2005, "San Mig Light" described as a "low calorie pale pilsen" is a variant of "San Miguel Pale Pilsen" described as "expertly brewed original full-flavored". Said revenue regulations, in general have the force and effect, or partake of the nature, of a statute.

xxx

Likewise, Revenue Regulations No. 03-06, clarifies that any variation in the color and/or design of the label (such as logo, font, picturegram, and the like), manner and/or form of packaging or size of container of the brand originally registered with the BIR shall not, by itself, be deemed an introduction of a new brand or a variant of a brand. Thus, the differences or similarity in the packaging of San Miguel Pale Pilsen and San Mig Light, is not by itself deemed an introduction of a new brand or a variant of a brand.

From the definition of "variant of a brand" in RA 9334 which took effect on January 1, 2005, the revenue regulation implementing the said provision, as well as the legislative deliberation clarifying the purpose and intent behind the law, as well as the findings of CIR that of the existing beer products of SMC only "San Mig Light" and "San Miguel Pale Pilsen" has the word "pale pilsen" in its label. Thus, it can be concluded that "San Mig Light" described as low calorie pale pilsen is a "variant of a brand" of "San Miguel Pale Pilsen".

In view of the foregoing, I vote to grant the petition docketed as CTA EB No. 1279.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice