REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE AIRLINES, INC., Petitioner,	**CTA EB NO. 1363 (CTA CASE NO. 8198)**
	Present:
- versus -	**DEL ROSARIO**, *PJ*, **CASTAÑEDA, JR.**, **BAUTISTA**, **UY**, **CASANOVA**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, and **MANAHAN**, *JJ*.
COMMISSIONER OF INTERNAL REVENUE AND COMMISSIONER OF CUSTOMS, Respondents.	Promulgated: FEB 13 2018 4:15 p.m.

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AMENDED DECISION

DEL ROSARIO, P.J.:

This resolves petitioner Philippine Airlines, Inc.'s (PAL) **Motion for Reconsideration** filed through registered mail on May 11, 2017, with respondent Commissioner of Internal Revenue's (CIR) **Comment Re: Petitioner's Motion for Reconsideration** filed on July 18, 2017, and Commissioner of Customs' (COC) **Opposition (To Petitioner's Motion for Reconsideration dated May 11, 2017)** filed on August 4, 2017.

In its motion, petitioner moves for the reconsideration of the Court's Decision promulgated on April 5, 2017, the dispositive portion

"**WHEREFORE**, the petition is **DISMISSED**. The Decision of the Third Division of this Court in CTA Case No. 8198 dated June 2, 2015, and its Resolution dated September 10, 2015, are AFFIRMED. No pronouncement as to costs.

SO ORDERED."

The assailed Decision of the Court *En Banc* affirmed the Decision and Resolution rendered by the Court in Division dated June 2, 2015 and September 10, 2015, respectively, which denied petitioner's claim for refund or issuance of a tax credit certificate in the amount of P7,758,099.72, representing excise taxes paid on petitioner's importations of cigarettes and liquor products for its in-flight consumption.

Petitioner prays that the Court order respondents to refund and/or issue a tax credit certificate in the amount of P7,758,099.72, representing excise taxes paid by petitioner for its importations of cigarettes and liquor products for its in-flight consumption.

According to petitioner, despite the fact that it provided only one supplier, it can still sufficiently prove that the commissary supplies it imported are not locally available in reasonable quantity, quality or price. Moreover, the Table of Comparison prepared by its witness, Ms. Cheryl Capinpin and identified in her Judicial Affidavit dated March 28, 2012 reasonably shows that the cost of importing petitioner's commissary supplies are reasonably lower than acquiring them locally.

As for the imported cigarettes, petitioner contends that Ms. Capinpin's testimony clearly established that there is a lack of local suppliers which could readily supply petitioner with the quantity of imported articles to address its commissary supply needs. Thus, it would be absurd to require petitioner to provide a local price for these items for purposes of comparison, when said products are not even locally available in sufficient quantity. Petitioner avers that no evidence was presented by respondents to disprove this fact.

Respondent CIR, in his Comment Re: Petitioner's Motion for Reconsideration, contends that the claim for refund was correctly denied for failure to prove the other two requisites that must be complied in order for petitioner to be exempted from taxes, duties, charges or fees on the importation of its assorted cigarettes, alcohol and wines for international flights. Respondent CIR argues that as correctly held by the Court in Division, petitioner's witness, Mr.

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Joseph Brian T.L. Tan has no personal knowledge of whether the goods subject of the informal entries and air waybill are for commissary and catering supplies of petitioner. Further, he avers that since petitioner provided a price list only of one supplier, petitioner has no sufficient basis for comparison of the quality, quantity or prices of locally available liquors, wines and cigarettes as against the quality, quantity or prices of such imported goods. Moreover, respondent CIR alleges that Ms. Capinpin's statement is self-serving as she was the one who prepared the table based on only one source and nothing more. Thus, petitioner could not have ascertained that said imported goods are not locally available in reasonable quality, quantity or price.

On the other hand, respondent COC in his Opposition (To Petitioner's Motion for Reconsideration dated May 11, 2017), asserts that the doctrine of *stare decisis* does not apply where there is a conflict between a Supreme Court precedent[1] and the applicable laws, namely Republic Act (RA) Nos. 8424 and 9334. He posits that RA Nos. 8424 and 9334 have already repealed or modified Presidential Decree (PD) 1590. Furthermore, even assuming arguendo that RA Nos. 8424 and 9334 did not repeal PD No. 1590, petitioner is not entitled to the refund because having become a private corporation, the condition for the grant of petitioner's tax privileges under Section 13 of PD No. 1590 ceased to exist. Respondent COC also argues that petitioner failed to establish that the subject imported commissary supplies are not locally available in reasonable quantity, quality or price, to justify its prayer for the refund of excise taxes.

On August 30, 2017, petitioner's Motion for Reconsideration was submitted for resolution, which was due for resolution on November 30, 2017. In view of the results of the Court's initial deliberation, the case was eventually re-raffled.

On December 14, 2017, the resolution of petitioner's Motion for Reconsideration was extended for a period of ninety (90) days or until February 28, 2018.

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[1]Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc., G.R. Nos. 212536-37, August 27, 2014.

THE COURT'S RULING

After a judicious re-evaluation of the case and the arguments raised by petitioner in its Motion for Reconsideration, the Court *En Banc* is constrained to reconsider the assailed Decision.

PAL's exemption from taxes granted under PD 1590 was not repealed by RA 8424 and RA 9334 despite PAL now being a private corporation

The issue on PAL's tax exemption under its franchise, PD No. 1590, is not novel. No less than the Supreme Court has settled the same in the consolidated cases of ***Republic of the Philippines rep. by the Commissioner of* Customs vs. *Philippine Airlines, Inc. (PAL)* and *Commissioner of Internal Revenue* vs. *Philippine Airlines, Inc. (PAL)***[2] *(consolidated PAL cases)* in this wise:

> "xxx. In *CIR v. PAL*, the Supreme Court has already passed upon the very same issues raised by the same petitioners. The only differences are the taxable period involved and the amount of refundable tax.
>
> We have held in that case that it is a basic principle in statutory construction that **a later law, general in terms and not expressly repealing or amending a prior special law, will not ordinarily affect the special provisions of the earlier statute. A reading of the pertinent provisions of P.D. 1590 and R.A. 9334 shows that there was no express repeal of the grant of exemption**:
>
> PRESIDENTIAL DECREE NO. 1590
>
> xxxx
>
> SECTION 13. In consideration of the franchise and rights hereby granted, the grantee shall pay to the Philippine Government during the life of this franchise whichever of subsections (a) and (b) hereunder will result in a lower tax:
>
> (a) The basic corporate income tax based on the grantee's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code; or

[2] G.R. Nos. 209353-54 and G.R. Nos. 211733-34, July 6, 2015.

b) A franchise tax of two per cent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or nontransport operations; provided, that with respect to international airtransport service, only the gross passenger, mail, and freight revenues from its outgoing flights shall be subject to this tax.

The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description, imposed, levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future, including but not limited to the following:

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(2) **All taxes, including compensating taxes, duties, charges, royalties, or fees due on all importations by the grantee of** aircraft, engines, equipment, machinery, spare parts, accessories, **commissary and catering supplies**, aviation gas, fuel, and oil, whether refined or in crude form and other articles, supplies, or materials; ***provided,* that such articles or supplies or materials are imported for the use of the grantee in its transport and nontransport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality, or price**;

xxxx

SECTION 24. This franchise, as amended, or any section or provision hereof may only be modified, amended, or repealed expressly by a special law or decree that shall specifically modify, amend, or repeal this franchise or any section or provision thereof.

REPUBLIC ACT NO. 9334

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SECTION 6. Section 131 of the National Internal Revenue Code of 1997, is amended, is hereby amended to read [a]s follows:

SEC. 131. Payment of Excise Taxes on Imported Articles.-

(A) Persons Liable. - Excise taxes on imported articles shall be paid by the owner or importer to the Customs Officers, conformably with the regulations of the Department of Finance and before the release of such articles from the customs house, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption.

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

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

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SECTION 10. Repealing Clause. - All laws, decrees, ordinances, rules and regulations, executive or administrative orders, and such other presidential issuances as are inconsistent with any of the provisions of this Act are hereby repealed, amended or otherwise modified accordingly.

The Court has exhaustively discussed all issues similar to those in the present case in this wise:

> Indeed, as things stand, **PD 1590 has not been revoked by the NIRC of 1997, as amended. Or to be more precise, the tax privilege of PAL provided in Sec. 13 of PD 1590 has not been revoked by Sec. 131 of the NIRC of 1997, as amended by Sec. 6 of RA 9334.** We said as much in *Commissioner of Internal Revenue v. Philippine Air Lines, Inc.:*
>
> > That the Legislature chose not to amend or repeal [PD] 1590 even after PAL was privatized reveals the intent of the Legislature to let PAL continue to enjoy, as a private corporation, the very same rights and privileges under the terms and conditions stated in said charter. x x x
>
> To be sure, the manner to effectively repeal or at least modify any specific provision of PAL's franchise under PD 1590, as decreed in the aforequoted Sec. 24, has not been demonstrated. And as aptly held by the CTA *en banc,* borrowing from the same *Commissioner of Internal Revenue* case:
>
> > "While it is true that Sec. 6 of RA 9334 as previously quoted states that *'the provisions of any special or general law to the contrary notwithstanding.'* **such phrase left alone cannot be considered as an express repeal of the exemptions granted under PAL's franchise because it fails to specifically identify PD 1590 as one of the acts intended to be repealed ....**
>
> Noteworthy is the fact that PD 1590 is a special law, which governs the franchise of PAL. Between the provisions under PD 1590 as against the provisions under the NIRC of 1997, as amended by 9334, which is a general law, the former necessary prevails. This is in accordance with the rule that on a specific matter, the special law shall prevail over the general law, which shall be resorted only to supply deficiencies in the former. In addition, where there are two statutes, the earlier special and the later general - the terms of the general broad enough to include the matter provided for in the special -the fact that one is special and other general creates a presumption that the special is considered as remaining an exception to the general, one as a general law of the land and the other as remaining an exception to the general, one as a general law of the land and the other as the law of a particular case.

In other words, the franchise of PAL remains the governing law on its exemption from taxes. Its payment of either basic corporate income tax or franchise tax - whichever

> **is lower - shall be in lieu of all other taxes, duties, royalties, registrations, licenses, and other fees and charges, except only real property tax. The phrase 'in lieu of all other taxes' includes but is not limited to taxes, duties, charges, royalties, or fees due on all importations by the grantee of the commissary and catering supplies, provided that such articles or supplies or materials are imported for the use of the grantee in its transport and nontransport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality, or price.**
>
> However, upon the amendment of the 1997 NIRC, Section 22 of R.A. 9337 abolished the franchise tax and subjected PAL and similar entities to corporate income tax and value-added tax (VAT). PAL nevertheless remains exempt from taxes, duties, royalties, registrations, licenses, and other fees and charges, provided it pays corporate income tax as granted in its franchise agreement. Accordingly, PAL is left with no other option but to pay its basic corporate income tax, the payment of which shall be in lieu of all other taxes, except VAT, and subject to certain conditions provided in its charter.
>
> In this case, the CTA found that PAL had paid basic corporate income tax for fiscal year ending 31 March 2006. Consequently, PAL may now claim exemption from taxes, duties, charges, royalties, or fees due on all importations of its commissary and catering supplies, provided it shows that 1) such articles or supplies or materials are imported for use in its transport and nontransport operations and other activities incidental thereto; and 2) they are not locally available in reasonable quantity, quality, or price." (Boldfacing supplied)

The aforecited pronouncement of the Supreme Court is unequivocal. RA 8424 and RA 9334 did not amend the exemption granted to PAL under PD 1590. Even the change in ownership of PAL does not bear significance to the present case. PAL remains to be an entity entitled to refund or credit of the excise taxes paid on its commissary supplies used in international flights.

The doctrine of stare decisis applies

Notwithstanding the categorical ruling of the Supreme Court in the *consolidated PAL cases,* respondent COC argues that the Court in Division's reliance on the same is improper. He claims that there is a conflict between the precedent and the law, thus, the principle of *stare decisis* does not apply.

The Court notes, however, that the ***consolidated PAL* cases and the present case involve the same parties and issues** albeit referring to a different taxable period.

Thus, unless and until modified by the Supreme Court *En Banc*, the pronouncement in the *consolidated PAL cases* should be applied. Indeed, the Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is; it is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.[3]

Testimony of petitioner's witness is not self-serving

Both respondents allege that the testimony of Ms. Cheryl V. Capinpin is self-serving for being PAL's employee and, thus, will not shift the burden of evidence on respondents.

The Court finds the allegation without merit.

The declaration in ***People of the Philippines vs. Mary Lou Omictin y Singco***[4] about the nature of a self-serving evidence is instructive:

> "The phrase self-serving evidence is a concept which has a well-defined judicial meaning. *Hernandez v. Court of Appeals* clarified what self-serving evidence is and what it is not, thus:
>
> > The common objection known as self-serving is not correct because almost all testimonies are self-serving. The proper basis for objection is hearsay (Wenke, Making and Meeting Objections, 69).
> >
> > Petitioner fails to take into account the distinction between self-serving statements and testimonies made in court. Self-serving statements are those made by a party out of court advocating his own interest; they do not include a partys testimony as a witness in court (National Development Co. v. Workmens Compensation Commission, 19 SCRA 861 [1967]).

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[3] Commissioner of Internal Revenue vs. Michael J. Lhuillier Pawnshop, Inc., G.R. No. 150947, July 15, 2003.
[4] G.R. No. 188130, July 26, 2010.

> **Self-serving statements are inadmissible because the adverse party is not given the opportunity for cross-examination, and their admission would encourage fabrication of testimony.** This cannot be said of a party's testimony in court made under oath, with full opportunity on the part of the opposing party for cross-examination.
>
> This principle was reiterated in the more recent *People v. Villarama,* where the Court ruled, x x x [A] self-serving declaration is one that is made by a party, out of court and in his favor. It does not include the testimony he gives as a witness in court. Assayed against the foregoing standards, Ambrosio's testimony is not self-serving and is admissible in evidence. (Boldfacing supplied)

Considering that Ms. Capinpin's testimony was made in open court and, that she was subjected to cross-examination, the same is not hearsay, thus admissible in evidence. Accordingly, the Court finds the testimony of Ms. Capinpin worthy of credit.

PAL is entitled to a refund of the excise taxes paid

Under its franchise, particularly pursuant to Section 13 of PD 1590, as amended by RA 9337, PAL is obliged to pay corporate income tax and value-added tax (VAT), in lieu of all other taxes, including taxes on commissary and catering supplies, provided that such articles, supplies or materials are imported for its use in its transport and non-transport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality or price.

Thus, in order to be exempted from taxes, duties, charges, royalties, or fees on the importation of its commissary and catering supplies, PAL must prove the following:

1. It paid its corporate income tax and VAT liabilities for the subject period of importation;

2. The imported articles, supplies or materials are intended to be used in its transport and non-transport operations and other activities incidental thereto; and

3. The imported articles, supplies or materials are not locally available in reasonable quantity, quality or price.

With regard to the first requisite, petitioner submitted its Annual Income Tax Returns for the fiscal year ended March 31, 2009[5] to prove payment of income tax. Also, it was able to prove that it is a VAT- registered entity and that it accounted and paid for the VAT on its sales/receipts as evidenced by its BIR Certificates of Registration,[6] Payment Form No. 0605[7], and VAT Returns[8] for fiscal year 2009.

As to the second requisite, the imported articles were described as "Inflight Materials" under the column "Description of Articles" of the Informal Import Declaration and Entry[9] documents submitted by petitioner. Similarly, in the "Authority to Release Imported Goods"[10] issued by respondent CIR addressed to respondent COC, it was indicated that "the shipment to be released at the Port of Manila consisting of the above described articles, will be used exclusively for international inflight consumption."

Anent the third requisite, to prove that the imported articles were not locally available in reasonable quantity, quality or price, petitioner submitted the Judicial Affidavit of Ms. Cheryl Capinpin,[11] petitioner's Manager for In-flight Materials Purchasing Division, Catering & In-flight Materials Purchasing Sub-Department; the Philippine Wine Merchant Price List;[12] sales invoices issued to petitioner for its purchase of the subject articles, Monthly Philippine Dealing System Rates (2007 to 2010);[13] 2008 Booking Rates for the Month of May;[14] Letters of Ms. Marianne C. Raymundo, petitioner's Vice President – Financial Services re: Booking Rates for the months of January, March, and April 2008;[15] and a Table of Comparison.[16]

The controversy relating to the sufficiency of evidence of PAL to support its refund claim with respect to the third requisite, *i.e.,* the imported articles are not locally available in reasonable quantity, quality or price, is not of first impression as the same was raised in earlier cases before the Court involving the same parties, albeit relating to different taxable years.

[5] Exhibit "CCCC".
[6] Exhibit "DDDD" and "EEEE".
[7] Exhibit "FFFF".
[8] Exhibit "FFFF-1", "FFFF-1-a", "FFFF-1-b", "FFFF-1-c".
[9] Exhibits "I", "J", "K", "L", "M", "N", "O", "P", "Q", "R", "S", "T", "LL", "MM", "NN", "OO", "PP", "QQ", "RR", "SS", "TT", "UU", "VV", "WW", "XX", "YY", "ZZ", "AAA".
[10] Exhibits "W", "X", "Y", "Z", "AA", "BB", "CC", "DD", "EE", "FF", "GG", "HH", "DDD", "EEE", "FFF", "GGG", "HHH", "III", "JJJ", "KKK", "LLL", "MMM", "NNN", "OOO", "PPP", "QQQ", "RRR", "SSS", "
[11] Exhibit "JJJJJ".
[12] Exhibit "JJJJJ-2".
[13] Exhibit "JJJJJ-3".
[14] Exhibit "JJJJJ-4".
[15] Exhibit "JJJJJ-5", "JJJJJ-6", and "JJJJJ-7".
[16] Exhibit "JJJJJ-1".

In the following cases, the Court found that a Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies and the local prices reflected in one price list, *i.e.,* the Philippine Wine Merchants' Price List, were sufficient to establish that the cost of importing the imported articles is lower than purchasing them locally and accordingly granted the claims for refund:

Case Number	Evidence Presented	Ruling
CTA Case Nos. 7677, 7685, and 7746 (Decision and Amended Decision) affirmed with modifications in CTA EB 954 & 1046, October 14, 2014	1. Affidavit of Mr. Victor Santos, Assistant Vice-President in charge of the Catering and In-flight Sub-department; 2. Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies; 3. Invoices issued to PAL for its purchase of the subject articles; 4. Philippine Wine Merchants' Price List for 2005 and 2006; and 5. Monthly Philippine Dealing Systems rates for the years 2005-2006.	The claim for refund was partially granted as petitioner was able to discharge the burden of proof as regards the portions that were duly substantiated.
CTA Case No. 8153, January 17, 2013 (affirmed in CTA EB Nos. 1029, 1031 and 1032, April 30, 2014)	1. Judicial Affidavit of Mr. Victor Santos, Assistant Vice President in charge of the Catering and In-flight Materials and Purchasing Subdepartment; 2. Table of Comparison Between Cost of Locally Purchasing Commissary and Catering Supplies; 3. Philippine Wine Merchants' January 11, 2007 Price List; 4. Monthly PDS rates for the year 2007-2008, 2008-2009 and 2009-2010; 5. Bureau of Customs Official Receipt No. 15545075775; and 6. Authority to Release Imported Goods issued on various dates for the said importation of liquors and cigarettes.	The claim for refund was partially granted as the evidence presented corresponding to the excise tax payments on wines and liquors fully complied with the requirements under PD 1590. The claim for refund on the excise tax payments on cigarettes, however, was denied for failure to present a price list of local dealers or suppliers.

Consistent with the rulings in the abovementioned cases, the Court finds that the evidence presented by petitioner is sufficient for the

Court in Division to evaluate that the costs of importing liquors are lower than purchasing them locally.

With regard to the imported cigarettes, petitioner presented only the sole testimony of Ms. Capinpin in support of its position that such items are not available in reasonable quantity, quality or price locally. Ms. Capinpin's testimony, standing alone and *sans* any credible document, is insufficient to prove that indeed the cost of importing cigarettes is lower than purchasing them locally or that they are not locally available in reasonable quantity, quality or price.

In sum, the Court finds petitioner's claim for refund of its excise taxes paid on its importation of liquours valid and meritorious, subject to determination of the actual amount to be refunded by the CIR, taking into consideration the foregoing disquisition.

WHEREFORE, in view of the foregoing considerations, the Motion for Reconsideration filed by petitioner Philippine Airlines, Inc. is **PARTIALLY GRANTED**. Let the case be **REMANDED** to the Court in Division for the determination of the amount of refundable, substantiated excise taxes paid on petitioner's importation of liquors.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

(I join Justice Cielito Mindaro-Grulla's opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
(Please see Concurring and Dissenting Opinion)

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE AIRLINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE AND COMMISSIONER OF CUSTOMS,
Respondents.

CTA EB No. 1363
(CTA CASE No. 8198)

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

Promulgated:
FEB 13 2018 4:15 p.m.

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CONCURRING AND DISSENTING OPINION

MINDARO-GRULLA, J.:

I concur with the majority opinion with respect to the denial of petitioner's claim for refund of its alleged erroneously paid excise tax on the imported cigarettes used for its in-flight consumption on the basis that petitioner failed to prove the non-availability of the imported cigarettes at a reasonable quantity, quality or prices in the local market.

However, I dissent with respect to the finding that petitioner Philippine Airlines, Inc. has sufficiently established that its imported alcohol products used for in-flight consumption were not available in reasonable quantity, quality or price in the local market and therefore, may be subject to refund.

Again, I quote that PAL's exemption is subject to certain conditions as correctly summarized by the Court in Division as follows:

1. It paid its corporate income tax and VAT liabilities for the subject period of importation;

2. The imported articles, supplies, or materials are intended to be used in its transport and non-transport operations and other activities incidental thereto; and

3. The imported articles, supplies or materials are not locally available in reasonable quantity, quality, or price.

Notably, the first two requisites are no longer disputed in the instant case. With due respect, I submit however that petitioner failed to comply with third requisite, i.e that the imported articles are ***"locally available in reasonable quantity, quality, or price"***.

A careful review of PAL's testimonial and documentary evidence would reveal that it compared the prices of its imported wines and/or liquors with the quotation of a single supplier, the Philippine Wine Merchant. Certainly, the information gathered is insufficient to justify petitioner's pretense that imported alcohol products used for in-flight consumption were not available in reasonable quantity, quality or price in the local market.

Evidently, petitioner failed to make a comprehensive and credible study on the availability, quantity and price of the subject imported wines and/or liquor in the local market to justify its importation of the said items. The pertinent portions of Ms. Capinpin' s Judicial Affidavit are as follows:

> "19.Q. What is your source of the local price of Philippine Wine Merchants for the year 2008?
>
> 19.A. My source if the 2008 Price List of Philippine Wine Merchants given to me by Philippine Wine Merchants, a local wine dealer.

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20.Q. Showing to you this document labelled "Philippine Wine Merchant, 2008 Price List" with a signature appearing at the botton [sic] of the page on top of the name Ronald Lim Joseph Philippine Wine Merchants, attached to your Judicial Affidavit and marked as Annex "B," how is this related to the 2008 Price List of Philippine Wine Merchants which you mentioned as your source of the local prices of Philippine Wine Merchants for the year 2008 appearing in your table of comparison?

20.A. That is the price list for the year 2008 of Philippine Wine Merchant which you mentioned.

21.Q. Do you have other sources of local prices of the products involved?

21.A. ***We have no other sources of said local prices because other local wine merchants or dealers refused to give us their list of prices despite our persistent requests. We even tried getting the quotation of Duty Free Philippines, but they also refused to give us any.*** (Emphasis supplied)

22.Q. How about the local costs of the imported cigarettes involved?

22.A. ***I did not put a column regarding the local costs of the imported cigarettes involved because there are no local suppliers of the cigarettes who could regularly supply PAL with the quantity it regularly needs for its commissary supplies for sale in its international flights. Furthermore, if ever there are local suppliers of the said cigarettes, their selling price would definitely be higher than the importation cost of PAL.***

23.Q. Why do you say that if ever there are local suppliers of the cigarettes involved, their selling price would definitely be higher than the importation cost of PAL?

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> 23.A. ***Their selling price would definitely be higher because, unlike PAL, the said local suppliers, if they themselves import the cigarettes they are selling, will have to pay excise taxes and custom duties on said cigarettes and add the same to the selling prices of the cigarettes. Similarly, if said suppliers buy the same cigarettes from local manufacturers thereof, if there are any, the excise taxes and other costs incurred by said manufacturer of said cigarettes will be added and passed on to the local supplier, who will in tum add the same to its selling price to PAL."***

Let petitioner be reminded that bare allegations do not constitute substantial evidence and, thus, have no probative value.[1] Moreover, each case is to be decided on its own merits and based on the strength of evidence presented.

The Supreme Court, in the case of *Republic of the Philippines, represented by the Commissioner of Internal Revenue v. Team (Phils) Energy Corporation (formerly Mirant (Phils.) Energy Corporation)*[2], ruled in this wise:

> "x x x it is fundamental that the findings of fact by the CTA in Division are not to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties."

Based on the foregoing, this Court cannot give evidentiary value to the Philippine Wine Merchant's List because petitioner failed to present other proof that will show the number of local wine/liquor suppliers as well as cigarette suppliers in the local market, the scope of survey, and how many refused to give their pricelists. This alone cannot represent the wide local market for the said commissary supplies. In other words, they cannot be considered sufficient to prove the unavailability of imported wines and/or liquors in the local market.

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[1] ING Bank N.V. v. Commissioner of Internal Revenue, G.R No. 167679, April 20, 2016.
[2] G.R No. 188016, January 14, 2015, *citing*, Sea-Land Service v. Court of Appeals, G.R. No. 122605, April 30, 2001.

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Likewise, petitioner's assertion that the admission of the fact by the CIR in her (now, his) Memorandum dated May 12, 2014 that the cost of importing the commissary supplies would always be cheaper than purchasing them locally may be given in evidence against him citing Section 26 of Rule 130 of the Rules of Evidence[3] is misplaced. A careful analysis of the Memorandum will show that the CIR merely acknowledged the quotation from petitioner's commissary suppliers because it will always be cheaper without the excise tax and importation cost.

Lastly, note that there is no automatic grant of a tax refund, substantial evidence must be presented before the Court. Further, ***it is not the duty of the government to disprove a taxpayer's claim for refund. Rather, the burden of establishing the factual basis of a claim for refund rests on the taxpayer***[4]. (Emphasis supplied) Unrebutted evidence does not automatically result in the granting of petitioner's claim for refund absent any sufficient proof for its entitlement.

Given the circumstances at bar, without any study or at least solid information on the non-availability in the local market in terms quantity, quality and price of the subject commissary supplies, petitioner cannot possibly claim for exemption from payment of excise taxes. Under the premises, there are no other reliable data left through which this Court may evaluate and verify that the cost of importing the subject liquors/wines and cigarettes are indeed reasonably lower than purchasing them locally, other than the testimony of PAL's In-Flight Manager. Incidentally, an uncorroborated testimony is just a mere conclusion based on conjectures and assumptions which definitely bears no credence.

Considering that PAL failed to present sufficient proof on the third requisite in order to claim its exemption, its claim for refund must necessarily fail.

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[3] RULE 130, Rules of Admissibility.

Section 26.Admission of a party. — The act, declaration or omission of a party as to a relevant fact may be given in evidence against him.

[4] Commissioner of Internal Revenue v. Far East Bank & Trust Company, G.R. No. 173854, March 10, 2010.

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On this note, I vote to **DENY** the Motion for Reconsideration for lack of merit and **AFFIRM** the assailed Decision of the Court *En Banc* dated April 5, 2017.

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