REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 1648** (CTA Case Nos. 8708 and 8770)
-versus-	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
PHILIPPINE AIRLINES, INC., *Respondent.*	Promulgated: OCT 18 2018 3:54 p.m.

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DECISION

MANAHAN, J.:

Before the Court of Tax Appeals *En Banc* is the instant Petition for Review[1] filed on May 24, 2017, seeking the reversal of the Decision dated January 13, 2017 and the Resolution dated April 20, 2017 promulgated by the First Division of this Court (Court in Division) in CTA Case Nos. 8708 & 8770 entitled, *"Philippine Airlines, Inc. vs.*

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[1] EB Docket, pp. 5-28.

Commissioner of Internal Revenue, the dispositive portions of which read as follows:

Decision dated January 13, 2017

> "**WHEREFORE,** premises considered, the present consolidated Petitions for Review are hereby **PARTIALLY GRANTED.** The **COMMISSIONER OF INTERNAL REVENUE** is hereby **ORDERED** to refund in favor of **PHILIPPINE AIRLINES, INC.** the amount of Twelve Million Nine Hundred Twelve Thousand Four Hundred Thirty Pesos and Eighty-Eight Centavos (P12,912,430.88) representing erroneously paid excise tax on its importation in the years 2006, 2008 to 2012 of assorted liquor, wine and cigarettes constituting its commissary and catering supplies for international flight consumption."
>
> **SO ORDERED.**

Resolution dated April 20, 2017

> **WHEREFORE**, premises considered, respondent's **Motion for Partial Reconsideration** is hereby **DENIED** for lack of merit."

THE FACTS

The facts of the case, as narrated by the First Division, are as follows:

> "On June 11, 1978 by virtue of Presidential Decree No. 1590 ("P.D. 1590") otherwise known as "An Act Granting a New Franchise to Philippine Airlines, Inc. to Establish, Operate and Maintain Air Transport Services in the Philippines And Between the Philippines and Other Countries", PAL was granted a franchise to operate and maintain air transport services domestically and internationally.
>
> Under Section 13 of its franchise, PAL must comply with certain conditions to be entitled to exemption from payment of specific taxes on all its importation of cigarettes, liquor, and wine for its commissary and catering supplies for international consumption. *an*

On January 1, 2005, Republic Act No. 9334 ("RA 9334") otherwise known as "An Act Increasing the Excise Tax Rates Imposed on Alcohol and Tobacco Products, Amending for the Purpose Sections 131, 141, 142, 143,144, 145 and 288 of the National Internal Revenue Code of 1997, as amended took effect. Section 6 of RA 9334 provides:

SEC. 6. Section 131 of the National Internal Revenue Code of 1997, as amended, is hereby amended to read as follows:

xxx xxx xxx

On July 1, 2005, Republic Act No. 9337 ("RA 9337") otherwise known as "An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, as amended, and for other purpose", expressly and specifically amended the franchise of PAL and subjected it to value-added (sic) registration and payment requirements.

On various dates during the years 2006 and 2008 to 2012, PAL's importations of assorted cigarettes, liquor and wines, covered by various Informal Import Declaration and Entries ("IIDE"), Air Waybills/Bills of Lading and Authority to Release Imported Goods ("ATRIG") arrived in Manila. PAL allegedly paid under protest the excise taxes on its importation of assorted liquor, wine and cigarettes, in the amount of P30,099,193.82, viz:

xxx xxx xxx

On various dates, Gilda L. Cinco, the Acting Chief of the Warehousing Assessment Unit ("WAU") of the Bureau of Customs ("BOC"), forwarded to Silveria Salazar, the Chief of the Collection Division of the Ninoy Aquino International Airport ("NAIA") Customshouse, the documents covering PAL's payment of duties, taxes and other charges pursuant to Customs Memorandum Order ("CMO") No. 13-2005 and Revenue Regulations ("RR") No. 3-2006.

On September 12, 2013, PAL filed with the BIR its administrative claim for refund in the amount of P26,502,912.76, seeking the recovery of excise taxes paid under protest on its importation of alcohol and tobacco products for use in international flights covering payments made on September 23, 2011, December 9, 2011, and December 29, 2011.

On February 13, 2014, PAL filed with the BIR its administrative claim for refund in the amount of P3,596,281.06 for the excise taxes paid under protest on March 7, 2012, April 13, 2012 and October 16, 2012.

Due to the inaction of the CIR on PAL's administrative claims for refund, PAL filed Petitions for Review with this Court on September 19, 2013 and February 20, 2014 which were docketed as CTA Case Nos. 8708 and 8770, respectively.

The CIR filed his Pre-Trial Brief on February 20. 2014, while PAL filed its Consolidated Pre-Trial Brief on September 18, 2014. The Pre-Trial Conference was held on September 25, 2014.

The parties submitted a Joint Stipulation of Facts and Issues on October 27, 2014, which the Court approved in the Resolution promulgated on November 7, 2014.

During trial, PAL presented the following witnesses:

1. Mr. Jonathan Castillo Lee- Manager of Company Materials Handling Division of PAL,
2. Mr. Emmanuel Y. Mendoza – Court-commissioned Independent Certified Public Accountant ("ICPA"),
3. Ms. Cheryl Imelda V. Capinpin – Manager of In-flight and Commissary Materials Purchasing Division, Corporate Logistics and Services Department of PAL;
4. Mr. Ruel Ryan O. Julian – Manager of Tax Services Division of PAL, and
5. Mr. Gilbert M. Galedo – Senior Planning and Purchasing Specialist of In-Flight Commissary Materials Purchasing Division of PAL.

PAL formally offered its documentary evidence on June 26, 2015. The CIR filed his Comment (Re: Petitioner's Formal Offer of Evidence) on July 15, 2015. The Court admitted PAL's offered documentary evidence in a Resolution dated September 17, 2015.

During the hearing dated October 8, 2015, the CIR's counsel manifested that he would not be presenting any evidence as there is no report of investigation.

As directed by the Court, the CIR and PAL filed their memoranda on December 7, 2015 and December 14, 2015, respectively.

Hence, the case was deemed submitted for decision on December 18, 2015.

After being granted an extension by the Court, the Commissioner of Internal Revenue (CIR) filed the Petition for Review docketed as CTA *EB No.* 1648, with the Court *En Banc* on May 24, 2017. *an*

On June 5, 2017, the Court *En Banc* issued a Resolution[2] requiring the respondent to file its Comment to the Petition for Review.

On July 13, 2017, respondent filed its Comment/Opposition (To: Petitioner Commissioner of Internal Revenue's Petition for Review dated 24 May 2017).[3]

On July 25, 2017, the Court *En Banc* gave due course to the Petition for Review, and ordered the parties to file their respective memoranda.[4]

On October 19, 2017, respondent Philippine Airlines, Inc. filed its memorandum.[5]

Petitioner CIR chose not to submit his memorandum based on the Records Verification Report of the Judicial Records Division of this Court dated October 25, 2017.

On November 29, 2017, the Court *En Banc* resolved[6] to submit the case for decision.

THE ISSUE

Whether or not the Court in Division erred in ruling that Philippine Airlines, Inc. (PAL) is entitled to its claim for refund of the excise taxes paid on its imported supplies or materials on the ground that said articles are not locally available in reasonable quantity, quality or price.

Petitioner's Arguments:

In his Petition for Review, petitioner CIR reiterates the argument that respondent was not able to prove that the price of the imported articles is lower than those sold in the domestic market, hence the latter is not entitled to the tax refund.

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[2] EB Docket, page 53.
[3] EB Docket, pp. 55-58.
[4] EB Docket, page 64.
[5] EB Docket, pp. 72-83.
[6] EB Docket, page 88.

It is petitioner's main assertion that in order to be exempted from taxes, duties, charges, royalties or fees on the importation of its commissary and catering supplies under Presidential Decree (P.D.) No. 1590, the claimant must prove, among others, that the imported articles are not locally available in reasonable quantity, quality or price. He quotes the pertinent provision of P.D. 1590 as his basis, thus:

> "Section 13.
>
> (1) 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 transport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality, or price;"

Petitioner challenges the reasoning of the Court in Division when it equated reasonableness with cheaper prices. He argues that even if the price of imported articles is lower than those sold in the domestic market, this does not mean that the price in the domestic market is unreasonable. The petitioner further submits that respondent's quoted importations will "forever be cheaper" because it is the base international price. In contrast, the local suppliers will also add other factors to their prices such as taxes (particularly excise taxes) and duties and their profit margin, making their prices higher. But, said factors do not make the price of locally available products "unreasonable", according to petitioner. Petitioner avers that respondent can just easily quote certain manufacturer's prices abroad, at prices no local supplier can beat, and be entitled to the tax exemption provided under P.D. 1590. He insists that this is not the scenario nor purpose contemplated by said P.D. 1590.

Respondent's Counter-arguments

In its Comment/Opposition, respondent maintains that the Court in Division correctly granted the claim for tax refund of excise taxes as it was based on evidence presented and admitted during trial as well as prevailing jurisprudence on the matter. It expressed its dissent against the reasoning of petitioner that "local prices are still reasonable" even if they are more expensive than the imported articles. This theory (as put forth by the petitioner) is suggestive of a scenario where a "reasonable price" is jointly decided by PAL, as the buyer, and its supplier, as seller and not by any third party. Respondent further avers that the "reasonable price" as theorized by petitioner is supposed to be "jointly decided by PAL, as the buyer and the supplier, as seller and not by the CIR" and this, according to respondent, is an erroneous interpretation of the law.

Respondent then shifted its argument on the degree of proof required in civil cases particularly in claims for tax refunds. It cites several decisions of this Court of Tax Appeals which held that mere preponderance of evidence is required in a claim for tax refund and since its evidence was never controverted by the CIR during trial, it is confident that it has duly proven its entitlement to the exemptions (from excise taxes) under the applicable laws.

RULING OF THE COURT *EN BANC*

A perusal of the allegations propounded by the petitioner in its Petition for Review with the Court *En Banc* reveals that he no longer questions the legal basis of respondent's exemption from taxes as provided under Republic Act (RA) 9334. Instead, he cites the insufficiency of the evidence adduced by respondent to prove compliance with the conditions for exemption under its franchise, specifically Section 13 (1) of P.D. 1590 earlier quoted.

It may be recalled that the petitioner CIR, during trial in the Division level, insisted that PAL's exemption from taxes under P.D. 1590 was already repealed by Section 6 of RA 9334. This was the main contention of petitioner to controvert the claim of respondent PAL during trial proper.

This issue was resolved by the Court in Division in favor of PAL, in this manner, thus:

> "**PAL's exemption from taxes granted under P.D. 1590 was not repealed by Section 6 of RA 9334**
>
> The issue on PAL's tax exemption under its franchise, PD 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) in this wise:

> "In CIR vs. 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.
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> xxx xxx xxx
>
> **From all the foregoing, the exemption granted to PAL under PD 1590 remains and therefore PAL may still be entitled to refund or credit of the excise taxes paid on its commissary supplies used in international flights."**(emphasis supplied)

Having settled the legal basis of respondent's entitlement to the claim for tax refund as ruled in the Decision of the Court in Division[7], the remaining controversy to be resolved by the Court *En Banc* is whether respondent PAL was able to fulfill the conditions laid down in its franchise or more particularly, Section 13 of P.D. 1590 to warrant the grant of the tax refund, to wit:

Presidential Decree No. 1590

xxx xxx xxx

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
(b) A franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or non-transport operations; provided, that with respect to international air transport

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[7] Philippine Airlines, Inc. vs. CIR, CTA Case Nos. 8708 and 8770, January 13, 2017.

> service, only the gross passenger, mail and freight revenues from its outgoing flights shall be subject to tax.
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> The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes and 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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> xxx xxx xxx
>
> **(a) All taxes, including compensating taxes, duties, charges, royalties or fees due on all importations by the grantee of aircraft, engines, equipment, machinery, spare parts and 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 imported for the use of the grantee in its transport and non-transport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality or price;"** (emphasis supplied)

Based on the aforequoted provisions, the tax exemptions on the importations made by respondent PAL are anchored on the fulfillment of the following conditions:

1. That PAL paid its corporate income tax and VAT liabilities for the period covered by the importation;
2. That the imported articles, consisting of aircraft, engines, equipment, machinery, spare parts, commissary and catering supplies, aviation gas, fuel and oil and such other articles, must be used by PAL in its transport and non-transport operations and other activities incidental thereto; and
3. That such imported articles must not be locally available in reasonable quantity, quality, or price.

During trial, respondent submitted several documents which the Court in Division admitted as evidence. We quote herein portions of the Decision of the Court in Division, thus:

> With regard to the first requisite, PAL submitted its Annual Income Tax Returns for the fiscal years ended March 2006, March 2007, March 2008, March 2009, March 2010, March 2011, March 2012 and March 2013 to prove payment of income tax. Also, PAL proved that it is VAT-registered entity and that it accounted and paid for the VAT on its sales/receipts as

> evidenced by its BIR Certificates of Registration, Payment Form No. 0605 and VAT Returns for fiscal years 2006 to 2012.
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> As to the second requisite, the imported articles were described as "Inflight Materials" under the column "Description of Articles of IIDE documents" submitted by PAL. Similarly, in the ATRIGs issued by the CIR addressed to the Collector of Customs, 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.
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> With reference to the third requisite, records show that the excise taxes paid by PAL on September 23, 2011, December 9, 2011, December 29, 2011, March 7, 2012, April 13, 2012 and October 16, 2012 totaling to P30,099,193.82 pertain to its importation in the years 2006, 2008 to 2012 of assorted liquor, wine and cigarettes constituting its commissary and catering supplies for international flight consumption, detailed as follows:
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> xxx xxx xxx
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> To prove that the imported articles were not locally available in reasonable quantity, quality or price, PAL submitted the Judicial Affidavit of Ms. Cheryl Capinpin, PAL's Manager for In-Flight and Commissary Materials Purchasing Division, Corporate Logistics and Services Department, Philippine Wine Merchants ("PWM") Price Lists for the years 2006, 2008, 2009, 2010, 2011 and 2012, Future Trade International ("FTI") Price Lists dated April 8, 2009, October 1, 2010 and for the years 2006 to 2013, the 2010 BIR Price Survey And the report of the Court-commissioned Independent Certified Public Accountant ("ICPA").
>
> It is noted that the BIR Price Survey Computation submitted by PAL was based on the 2010 Price Survey Computation submitted by PAL was based on the 2010 Price Survey conducted and published by the BIR in its Revenue Memorandum Circular 90-2012."

All told, the Court in Division found the Price Lists from the Philippine Wine Merchants, as sufficient bases of comparison to determine the disparity in the price of the same items when purchased locally and when purchased abroad.

It is this particular evidence submitted by respondent PAL in compliance with the third requisite, that petitioner ascribes as insufficient in its Petition for Review with the Court *En Banc*. Petitioner avers that the information contained in the so-called Philippine Wine Merchants Price List, although showing lower costs of importation of said products, does not mean that the costs of locally purchasing the same products is not "reasonable". Therefore, based on petitioner's reasoning, the test of "unreasonableness" of price if purchased locally, has not been breached to warrant compliance with the third requisite.

We find petitioner CIR's arguments bereft of merit.

We agree with the findings of the Court in Division that respondent PAL was able to comply with all of the aforementioned conditions for tax exemption under P.D. 1590, with certain exceptions as to the factual basis of the claim, thus resulting in the partial grant of the claim for refund of excise taxes. We again quote pertinent portions of the assailed Decision :

> "Thus only the importation cost of the following liquor, wine and cigarette products, as computed by the ICPA, can be compared with the local prices for the same liquor, wine and cigarette products reflected in the PWM and FTI Price List and BIR Price Survey Computation Presented by PAL.
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> xxx xxx xxx
>
> Thus the Court finds that PAL has sufficiently proven its exemption from the payment of excise taxes only in the amount of Php12,912,430.88 xxx xxx xxx"

More particularly, we concur with the Court in Division when it held that the Philippine Wine Merchants Price List is a valid reference material to prove that the costs of importation of the subject articles are lower than purchasing them locally, and we quote:

> With respect to the document described as the Price Lists from the Philippine Wine Merchants, **the same was given probative value in the earlier cases brought by petitioner before the Court, albeit involving different taxable periods in arriving at the conclusion that the costs of importing the articles are lower than purchasing them locally**." (emphasis supplied)

In arriving at our conclusion, we find it essential to filter the issue down to the degree of evidence required in proving one's entitlement to a claim for refund of alleged excessive or erroneously paid taxes. It is well-settled that tax refunds are construed *strictissimi juris* against the taxpayer-claimant as it partakes the nature of a tax exemption[8], as indeed it is in this case, because the claim for refund of respondent PAL is based on the tax exemption under its franchise, P.D. 1590. We strongly affirm that any tax refund anchored on the tax exemption under a special law or statute should be strictly construed against the claimant, such that an interpretation thereof should pass the crucible test of judicial scrutiny. The reason for the strict interpretation of tax exemptions is because they constitute a derogation of the sovereign authority to tax which would necessarily result to a loss or a reduction in revenues owed to the government. However, we must also temper this principle of strict interpretation of tax exemptions with the relevant provisions of the Revised Rules of Court relative to the degree of evidence required to prove entitlement to tax refunds in civil cases. Section 1, Rule 133 of the Revised Rules of Court provides as follows:

> "**Rule 133**
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> Weight and Sufficiency of Evidence
>
> Section 1. *Preponderance of evidence, how determined.* – In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence. In determining where the preponderance or superior weight of evidence on the issue involved lies, the court may consider all the facts and circumstances of the case, the witnesses' manner of testifying their intelligence, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear upon the trial. The court may also consider the number of witnesses, though the preponderance is not necessarily with the greater number."

The Supreme Court, in one case[9], had the occasion to distinguish between what elements or issues would necessitate a strict interpretation and what would constitute a mere preponderance of evidence in claims for tax refund, and we quote, *viz*:

> "Verily, a claim for tax refund may be based on a statute granting tax exemption, or as *Commissioner vs. Fortune Tobacco Corporation,* would have it, the result of legislative

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[8] CIR vs. Eastern Telecommunications Philippines, Inc., G.R. No. 163835, July 7, 2010; Atlas Consolidated Mining and Development Corporation vs. CIR, G.R. No. 159490, February 18, 2008.
[9] CIR vs. Mirant Pagbilao Corporation, G.R. No. 172129, September 12, 2008.

> grace. **In such case, the claim is construed *strictissimi juris* against the taxpayer, meaning that the claim cannot be made to rest on vague inference.** Where the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes the nature of tax exemption, the claimant must show that he clearly falls under the exempting statute. On the other hand, a tax refund may be, as is usually it is, predicated on tax refund provisions allowing a refund of erroneous or excess payment of tax. The return of what was erroneously paid is founded on the principle of *solutio indebiti*, a basic postulate that no one should unjustly enrich himself at the expense of another. **The caveat against unjust enrichment covers the government. And as decisional law teaches, a claim for tax refund proper, as here, necessitates only the preponderance-of-evidence threshold like in any ordinary civil case."** (emphasis supplied).

Having passed the strict test of legal entitlement to the tax exemption under P.D. 1590, the respondent had only to prove, by preponderance of evidence, the fulfillment of the conditions for said entitlement which it was able to do by the documents submitted and the testimony of its witnesses during the trial in the Division level.

The Philippine Wine Merchants Price List which is the document offered by respondent during trial to prove the disparity in the costs of importing the subject articles as opposed to purchasing them locally, is deemed sufficient because it again passes the preponderance of evidence test in the face of little or no counter evidence offered by the petitioner to dispute the information therein. It may be recalled that petitioner CIR did not present any evidence during the trial proper on the ground that there was no report of investigation as its basis for opposition,[10] and we quote the pertinent portion of the Decision:

> "During the hearing dated October 8, 2015, the CIR's counsel manifested that he would not be presenting any evidence as there is no report of investigation."

In the face of a dearth of evidence on the part of petitioner CIR in the Division level to contravene the evidence submitted by respondent PAL in terms of documents and

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[10] EB Docket, page 20, copy of the Decision of the First Division attached as Annex "A" to the Petition for Review.

testimonies of its witnesses, the preponderance of evidence weighs greatly in favor of the latter.

The meaning and implication of the term "preponderance of evidence" was amplified by the Supreme Court in the case of *Encino vs. National Bookstore*[11], in this manner, thus:

> "Preponderance of evidence is the weight, credit and value of the aggregate evidence on either side and is usually considered to be synonymous with the term greater weight of the evidence or the greater weight of the credible evidence. Preponderance of evidence, is a phrase, which, in the last analysis, means probability of truth. **It is evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto."** (emphasis supplied)

It may be well to conclude that petitioner CIR failed to rebut the evidence presented by the respondent PAL in proving its right to the claim for refund, hence the refund should prosper.

A claim for judicial refund partakes the nature of a civil case, hence, it is the party who presents the stronger and more credible evidence that will eventually win the battle.

We therefore concur with the Court in Division in partially granting the claim for refund of excise taxes paid during the taxable years 2006, 2008 to 2012.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. The Decision of the Court in Division dated January 13, 2017 and the Resolution dated April 20, 2017 of the CTA First Division in CTA Case Nos. 8708 and 8770, are hereby **AFFIRMED.**

SO ORDERED.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice

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[11] G.R. No. 162704, November 19, 2004.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(I join Justice Fabon-Victorino's CDO)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

(with Concurring and Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation with the members of the Court *En Banc* 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

COMMISSIONER OF INTERNAL REVENUE Petitioner,	CTA EB No. 1648 (CTA Case Nos. 8708 and 8770)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, JJ.
PHILIPPINE AIRLINES INC., Respondent.	Promulgated: OCT 18 2018 3:54 p.m.

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CONCURRING AND DISSENTING OPINION

Fabon-Victorino, *J.*:

I concur with the finding of the majority that respondent's tax exemption privileges under Presidential Decree (P.D.) No. 1590 subsists notwithstanding the subsequent enactment of Republic Act (R.A.) No. 9334. However, I register my dissent to the grant of the refund of excise taxes paid by respondent, albeit partially, in the total amount of ₱12,912,430.88 on its imported wines, liquors and cigarettes for taxable years 2006, 2008-2012.

The Supreme Court categorically declared that the enactment of R.A. No. 9334 did not repeal the tax-exemption privileges of respondent under P.D. No. 1590. The privilege however is not without limitation. To be spared from the imposition of excise taxes on its imported wines, liquors and cigarettes respondent must demonstrate by convincing proof, 1) that such imported articles are to be used in its transport and non-transport operations and other activities incidental thereto; and 2) that they are not available locally in reasonable quantity, quality or price as decreed under Section 13 of P.D. No. 1590.[1]

To prove the first requirement, i.e., the subject imported articles are to be used in its flight and non-flight operations and other incidental activities, respondent presented various documents[2] designating the imported commodities as "inflight materials," and ATRIGs[3] bearing notations that such articles would be for international inflight consumption. However, the examining public officers who prepared and issued the cited documents were not presented in Court to authenticate them.

Apropos to the above discussion is the case of *Republic of the Philippines vs. Lydia Capco De Tensuan,*[4] where the Final Arbiter refused to accord evidentiary weight to a public document for failure of the issuing government officials to identify and authenticate the same as only the latter have a direct hand in preparing and issuing such class of documents, thus:

> The Court has also ruled that a document or writing admitted as part of the testimony of a witness does not constitute proof of the facts stated therein. **Here, Torres, a private individual and respondent's representative, identified the certifications but the government officials who issued the certifications did not testify on the contents of the certifications. As such, the certifications cannot be given probative value.** The contents of the certifications are hearsay because Torres was incompetent to testify on the veracity of the contents of the certifications. Torres did not prepare the certifications, he was not an officer of CENRO or FMS-DENR, and he did not conduct any verification survey whether the land falls within the area classified by the DENR Secretary as alienable and disposable. (emphasis supplied)

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[1] *Republic of the Philippines vs. Philippine Airlines, Inc.,* G.R. Nos. 212536-37, August 27, 2014.
[2] Exhibits P-47 to P-169; and P-631 to P-635.
[3] Exhibits P-294 to P-416; and P-681 to P-705.
[4] G.R. No. 171136, October 23, 2013.

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Neither did respondent able to establish by convincing proof that the subject liquors, wines and cigarettes, at the time of importation, were not locally available in reasonable quantity, quality or price.

To establish the said requisite, respondent presented: 1) Philippine Wine Merchants (PWM) Price Lists for years 2006,[5] 2008-2012,[6] 2) Future Trade International (FTI) Price Lists for years 2006-2013,[7] and 3) 2010 BIR Price Survey.[8]

The data contained in the price lists secured from two (2) wine and liquor suppliers, i.e., PWM and FTI do not categorically reflect the prices of the subject imported items in the local market at the time of importation. To be sure, the said lists from **two suppliers** of wine and liquor could not possibly provide the necessary information that would lead to a plausible conclusion that the subject imported items were not locally available at reasonable quantity, quality or price at the time of respondent's purchase. Certainly, the two suppliers could not by any stretch of human imagination competently and adequately represent the entire wine, liquor and cigarette industry in the country - indeed too scarce as to sustain respondent's posture that the imported alcohol products and/or cigarettes were not available in the Philippines in reasonable quantity, quality, or that they are more expensive if procured locally.

Respondent could not also take refuge under the mantle of BIR Price Survey relating to imported alcoholic products and cigarettes for it only covered the years 2010 and 2011 and not 2006 and 2008 to 2012, the years when the subject importations were made.

As we always say, tax refunds are in the nature of tax exemption which cannot be allowed unless granted in the most explicit and categorical language, it is strictly construed against the claimant who must discharge such

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[5] Exhibit P-418
[6] Exhibits P-419 to P-422 for the years 2008-2011; and P-732 for year 2012.
[7] Exhibit P-425.
[8] Exhibit P-783.

burden convincingly.[9] Thus, the claimant bears the burden of proving the factual basis of its claims.[10] And in the event that the taxpayer has not met the burden of proof in establishing the factual basis for its claim, as obviously obtaining in the instant case, then the claim must be rejected.[11]

In fine, respondent's failure to establish all the requisites for excise tax exemption under Section 13 of P.D. No. 1590 warrants the total denial of its refund claim of excise taxes paid on its importation of various liquors, wines and cigarettes for the years 2006, 2008-2012.

Accordingly, I vote to **GRANT** the petition for review dated May 24, 2017, filed by the Commissioner of Internal Revenue.

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[9] See *South African Airways vs. Commissioner of Internal Revenue,* G.R. No. 180356, February 16, 2010.

[10] See *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue,* G.R. No. 141973, June 28, 2005.

[11] See *Far East Bank and Trust Company vs. Court of Appeals,* G.R. No. 129130, December 9, 2005.