REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6809

Members:

ACOSTA, *Chairman*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
JUL 27 2005
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RESOLUTION

For Resolution is the "Motion to Resolve First the Issue of Whether or Not the Petitioner is the Proper Party that May Ask for Refund" filed by respondent on January 31, 2005.

Respondent raised as special & affirmative defenses in his Answer filed on December 15, 2003 the following: 1) tax refund cannot be allowed unless granted in the most explicit & categorical language; and 2) petitioner merely paid the added cost of the Jet-A-1 fuel, not the excise tax. Only Caltex Philippines Inc. and Petron Corporation are persons liable to pay excise under our tax law and, hence, may ask for a refund.

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On the other hand, petitioner submits in its Opposition to the said motion filed on March 15, 2005:

1) Sec. 135 of the National Internal Revenue Code of 1997 ("Tax Code") clearly exempts from excise tax the petroleum products sold by petitioner to international carriers;

2) The cases *Philippine Acetylene vs. Collector of Internal Revenue* (20 SCRA 1056) and *Cebu Portland Cement Co. vs. Collector of Internal Revenue* (25 SCRA 789) are inapplicable;

3) It is erroneous to hastily equate excise tax with VAT;

4) BIR Ruling No. DA-038-98-2-5-98, dated January 13, 1998, specifically declared that Mobil Phils. Inc. (petitioner's predecessor-in-interest) can avail of the excise tax privilege granted under the law and that petitioner can claim for excise tax refunds of its delivery of petroleum products to international carriers; and

5) Petitioner is the proper party to claim for a refund;

6) Respondent's motion is procedurally infirm.

The Court agrees with the respondent.

Section 130(2) of the Tax Code states:

"SEC. 130. Filing of Return and Payment of Excise Tax on Domestic Products.-

(A) Persons Liable to File a Return, Filing of Return on Removal and Payment of Tax.-

(1) Persons Liable to File a Return.-xxx
(2) Time for Filing of Return and Payment of the Tax.- Unless otherwise specifically allowed, the <u>return shall be filed and the excise tax paid by the manufacturer or producer from place of production</u>: *Provided,* That the excise tax on locally manufactured petroleum products and indigenous petroleum levied under Sections 148 and 151(A)(4), respectively, of this Title shall be paid within ten (10) days from the date of removal of such products for the period from January 31, 1998 to June 30, 1998; within five (5) days from the date of removal of such products for the period from July 1, 1998 to December 31, 1998; and before

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removal from the place of production of such products from January 1, 1999 and thereafter:xxx"

Corollarily, Section 204(C) of the same code provides:

"SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.-The Commissioner may-

(A) xxx xxx xxx
(B) xxx xxx xxx

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

xxx xxx xxx"

Carefully analyzing the above provisions, the right to claim for refund of taxes erroneously paid lies on the person statutorily liable to pay the tax being claimed. In the present case, the taxpayer referred to in Section 204(C) of the NIRC of 1997 is the manufacturer or seller of the petroleum products as, under Section 130(2) of the same Code, the manufacturer or producer pays the corresponding excise tax on petroleum products before their removal from the place of production.

While it is true that in the case of excise taxes imposed on petroleum products, the seller thereof may shift the tax burden to the buyer, the latter is not

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the proper party to claim for the refund in case of exemption from excise tax. In an analogous case, the Court of Appeals ruled:

> "The Tax Code provides for the administrative and judicial remedies of a ***taxpayer*** in instances of erroneous collection of taxes.
>
> By ***taxpayer*** is meant the person adversely affected by the action taken by the Commissioner. The Supreme Court, in ***Cebu Portland Cement Co. vs. Collector of Internal Revenue,*** ruled that in indirect taxes, like an excise tax, the proper party who can question or seek a refund of the tax is the person on whom the tax is imposed by law and who paid the tax even when he shifts the burden thereof to another. This is bearing in mind that indirect tax is paid by the manufacturer or dealer of the product which was passed on to the purchaser as part of the purchase price.xxx
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> xxx xxx xxx
>
> This simply means that petitioner Silkair cannot ask for a refund since it is not the taxpayer under the law. This is without saying that Petrol (sic) corporation, the taxpayer, may seek for a refund since it is not exempt from paying excise tax. Respondent CIR correctly observed that petitioner Silkair made the erroneous payment of passed-on excise tax, not with the BIR, but the seller, Petron Corporation.
>
> All told, it is hereby concluded that petitioner Silkair is exempt from paying excise tax on petroleum products purchased in the Philippines by virtue of Section 135(b) but it is not the proper party to seek for the refund of an indirect tax like an excise tax. Hence, this petition should fail." ***[Silkair (Singapore) Pte. Ltd. vs. Commissioner of Internal Revenue, CA-G.R. No. 82902, September 13, 2004]***

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

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The Supreme Court has ruled that: "xxx [I]ndirect taxes are taxes primarily paid by persons who can shift the burden upon someone else. For example, the excise and ad valorem taxes that the oil companies pay to the Bureau of Internal Revenue upon removal of petroleum products from its refinery can be shifted to its buyer, like the NPC, by adding them to the cash and/or selling price." (***Maceda vs. Macaraig, Jr., et. al. 197 SCRA 771***)

In the case of ***Philippine Acetylene Co., Inc., vs. Collector of Internal Revenue*** (20 SCRA 1056), the High Court explained the nature of an indirect tax, to wit:

> "It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must pay. It does not matter that an additional amount is billed as tax to the purchaser. The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the seller of a tax on the amount of the tax. The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else.
>
> "But the tax burden may not even be shifted to the purchase at all. A decision to absorb the burden of the tax is largely a matter of economics. Then it can no longer be contented that a sales tax is a tax on the purchaser."

In ***Contex Corporation vs. Hon. Commissioner of Internal Revenue*** (433 SCRA 376), the Highest Tribunal further ratiocinated:

> "At this juncture, it must be stressed that the VAT is an indirect tax. As such, the amount of tax paid on the goods, properties or services bought, transferred, or leased may be shifted or passed on by the seller, transferor, or lessor to the buyer, transferee or lessee. Unlike a direct tax, such as the income tax, which primarily taxes an individual's ability to pay based on his income or net wealth, an indirect tax, such as the VAT, is a tax on consumption of goods, services, or certain transactions involving the same. The VAT, thus, forms a substantial portion of consumer expenditures.

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> "Further, in indirect taxation, there is a need to distinguish between the liability for the tax and the burden of the tax. As earlier pointed out, the amount of the tax paid may be shifted or passed on by the seller to the buyer. What is transferred in such instances is not the liability for the tax, but the tax burden. In adding or including the VAT due to the selling price, the seller remains the person primarily and legally liable for the payment of the tax. What is shifted only to the intermediate buyer and ultimately to the final purchaser is the burden of the tax. Stated differently, a seller who is directly and legally liable for payment of an indirect tax, such as the VAT on goods or services is not necessarily the person who ultimately bears the burden of the same tax. It is the final purchaser or consumer of such goods or services who, although not directly and legally liable for the payment thereof, ultimately bears the burden of the tax."

It is clear from the foregoing that excise tax which partakes the nature of an indirect tax and the liability to pay the same falls on the manufacturer or seller who has the option whether or not to shift the burden of the tax to the purchaser. Where the burden of the tax is shifted to the buyer, the amount passed on to it is no longer a tax but becomes an added cost on the goods purchased which constitutes a part of the purchase price.

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

SO ORDERED.

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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	Present:
-versus-	**Acosta,** ***Chairman,*** **Bautista, and Casanova,** ***JJ.***
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated:
	JUL 27 2005

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Dissenting Opinion

With due respect to my esteemed colleagues, it is my humble opinion that the Resolution of the Court's First Division granting respondent's motion which has the effect of prematurely dismissing petitioner's Petitioner for Review on the sole ground that petitioner is allegedly not the proper party to the a refund claim but the sellers Petron and Caltex Corporations, inasmuch as the excise tax paid was merely factored in the purchase price, is procedurally flawed, unjust and inequitable in view of the facts and legal backdrop of the case.

The respondent's Motion praying that petitioner be declared not the proper party that may ask for a refund, in effect, is alleging that since petitioner is not the "real party in interest", then it must have no cause of action to speak of, necessitating the dismissal of its petition. In other words, respondent's motion is for all intents and purposes, a Motion to Dismiss.

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It must be pointed out that a Motion to Dismiss, which is governed by **Rule 16 of the 1997 Revised Rules of Procedure,** must comply with the requisites set by the Rules. Among the essential requirements is that the Motion to Dismiss should be filed within the reglementary period for filing a responsive pleading and before such responsive pleading is filed, save for specific circumstances where a Motion to Dismiss may be filed even after the filing of an answer, such as the grounds of lack of jurisdiction (**Ker & Co. vs. Court of Tax Appeals**, *L-12396, January 31, 1962*), *litis pendencia* (**Matela vs. Chua Tay**, *L-16797, May 30, 1962*) and prescription of action (**Section 1, Rule 9, 1997 Revised Rules of Procedure**). Clearly, respondent's basis for his Motion did not exactly fall within the enumerated exceptions.

Respondent's Motion was not only filed out of time, it was filed after petitioner is almost through with its presentation of evidence. Accordingly, the filing of the Motion was, to say the least, improper and dilatory (**Suntay vs. Suntay**, *G.R. No. 132524, December 29, 1998*).

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

Assuming *arguendo* that herein motion is not procedurally defective, thus, merits the attention of this Court, I express my view that the petitioner should be considered a proper party to a claim for tax refund taking into account the applicable law and jurisprudence on the matter.

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At this junction, **Section 2, Rule 3 of the 1997 Revised Rules of Procedure** is hereunder quoted for easy reference, thus:

> "**Section 2. Parties in interest. – A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit.** Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

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

As correctly pointed out by petitioner, the issue of whether a person to whom the burden of taxation was passed on or made liable for the tax is a proper party or real party in interest, and could therefore claim refund for taxes erroneously paid, is not a novel issue.

In the case of **Magsaysay Lines vs. Commissioner of Internal Revenue**, *CTA Case No. 4353, April 27,1992*, this Court confirmed the standing of the purchasers of vessels sold by the National Development Company to seek refund for VAT paid on such purchases, on the ground that the sale is not a transaction subject to VAT. The Tax Court explained thus:

> Respondent's theory is devoid of merit. Respondent has consistently ruled that VAT, as an indirect tax, can be passed on. [see VAT Ruling Nos. 235-89 dated September 13, 1989 and 256-89 dated October 13, 1989]. Indirect taxes are those that are demanded in the first instance from one person in the expectation and intention that he can shift the burden to someone else. [Commissioner of Internal Revenue v. John Gotamco & Sons Inc., 148 SCRA 36 (1987); citing Pollock v. Farmers, L&T Co., 1957 US 429, 15 S.CT. 673, 39 Law. Ed. 759.] The Supreme Court, speaking through Justice Feliciano, in the case of Commissioner of Internal Revenue v. Procter & Gamble Philippine Manufacturing Corporation and The Court of Tax Appeals, G.R. No. 66838, December 2, 1991, had the occasion to rule in a Resolution En

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Banc that "a "person liable for tax" has been held to be a 'person subject to tax' and properly considered a "taxpayer". [Houston Street Corporation v. Commissioner of Internal Revenue, 84 F. 2nd. 821 (1936); Bank of America v. Anglim, 138 F. 2nd. 7 (1943).] **The terms "liable for tax" and "subject to tax" both connote legal obligation or duty to pay a tax. It is very difficult, indeed conceptually impossible, to consider a person who is statutorily made "liable for tax" as not "subject to tax." By any reasonable standard, such a person should be regarded as a party in interest, or as a person having sufficient legal interest, to bring a suit for refund of taxes he believes were illegally collected from him.**"

In this case, it is undisputed that the questioned VAT collected on the sale of five (5) vessels was passed on the purchasers [Magsaysay Lines, Inc.; Baliwag Navigation, Inc. and FIM Limited of the Marden Group (HK)], pursuant to the terms of the bidding [Exh. B-1] and to the Contract of Sale [Exh. G-2]. **Being the persons or entities liable to pay the VAT, petitioners as purchasers are considered to be persons subject to the VAT since the burden has been shifted to them. In truth and in fact NDC has drawn the amount of P15,120,000.00 from the Letter of Credit charged to the account of petitioners [Exh. M]. Therefore, petitioners should not be precluded from filing this suit since they can be considered real parties in interest.**" *(Emphasis supplied.)*

Likewise, in the case of **Citibank N.A. vs. CIR**, *CTA Case No. 4069*, *June 26, 1992*, this Court held:

"If the Supreme Court deemed it fair and just in the Procter & Gamble case to consider P&G-Phil., which it found to have merely an unconfirmed implied authority to claim for refund of the overpaid withholding tax, as capacitated to file such a claim, with more reason should petitioner in the instant case be found to have the same capacity.

"The Court finds Section 2, Rule 3 of the Rules of Court likewise relevant:

> "Sec. 2. Parties in interest. — Every action must be prosecuted and defended in the name of the real party in interest. All persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs. All persons who claim an interest in the controversy or the subject thereof adverse to the plaintiff, or who are necessary to a complete determination or settlement of the questions involved therein shall be joined as defendants. (Emphasis supplied)

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> **"Certainly, petitioner has an interest in the subject of the present action and in obtaining the relief demanded, for, having already returned to PLDT the amount of P186,936.37 herein sought to be refunded or credited, petitioner is the one which stands to suffer the loss of the said amount if the instant claim is rejected."** (*Emphasis supplied.*)

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

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

It is rather unfortunate that the case of **Contex Corporation vs. Hon. Commissioner of Internal Revenue,** *G.R. No. 151135, July 2, 2004*, was cited out of context. In the said case, petitioner buyer, being registered as a non-VAT taxpayer, is thus exempt from VAT, and as an exempt VAT taxpayer, it only follows that it is not allowed any input tax previously paid because only VAT-registered entities can claim Input VAT Credit/Refund. Hence, petitioner is indeed not the proper party to ask for the refund but the petitioner's suppliers that possess such personality.

Furthermore, the case of **Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue,** *20 SCRA 1056*, is not applicable to the instant case. The facts of the said case are not in all fours with that of the case at bar. In the Philippine Acetylene case, the party asking for the refund is the seller-producer based on the exemption granted under the law to the buyer, National Power Corporation (NPC) and

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Voice of America (VOA). The pronouncement that sales tax, being an indirect tax which is passed on to the purchaser as part of the purchase price of the commodity, is indeed a tax on the seller and not on the buyer only justified the ruling that, even if the buyer happens to be tax-exempt, the seller is nonetheless liable for the payment of the tax, and not the other way around. Nowhere in the said decision can it be found that the buyer is removed of its tax exemption.

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

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

ERNESTO D. ACOSTA
Presiding Justice

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