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. 1433
(CTA Case Nos. 8529 and 8590)

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

Promulgated:
OCT 18 2017 4:17 p.m.

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DECISION

CASANOVA, J.:

This is an appeal, by way of Petition for Review[1], filed by petitioner-Philippine Airlines, Inc., pursuant to Section 4(b), Rule 8[2] of the Revised Rules

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[1] En Banc Rollo (Vol. I), pp. 37-60.

[2] **RULE 8**
PROCEDURE IN CIVIL CASES

SEC. 4. *Where to appeal; mode of appeal.* – (a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal. (n)

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal. (n) of the Court of Tax Appeals, as amended, seeking to appeal the Decision[3] dated October 27, 2015 (Assailed Decision) and the Resolution[4] dated February 4, 2016 (Assailed Resolution) issued by the Court of Tax Appeals Third Division in CTA Case Nos. 8529 and 8590 entitled "Philippine Airlines, Inc. vs. Commissioner of Internal Revenue and Commissioner of Customs", in so far as the foregoing denied the refund of the amount of ₱5,425,576.78, representing excise taxes paid on petitioner's importations of cigarettes and liquor products for its in-flight consumption.

The respective dispositive portions of the Assailed Decision and Resolution are quoted hereunder, to wit:

Decision dated October 27, 2015:

> "**WHEREFORE**, the instant Petitions for Review dated August 17, 2012 and December 20, 2012, filed by Philippine Airlines, Inc. are hereby **DENIED**, for lack of merit.
>
> **SO ORDERED.**"

Resolution dated February 4, 2016:

> "**WHEREFORE**, the Motion for Reconsideration dated November 23, 2015, filed by petitioner Philippine Airlines, Inc., is hereby **DENIED**, for lack of merit.
>
> **SO ORDERED.**"

Petitioner Philippine Airlines, Inc. is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with registered address at PNB Financial Center, President Diosdado P. Macapagal Avenue, CCP Complex 1307, Pasay City.[5]

On the other hand, respondent Commissioner of Internal Revenue (respondent CIR) is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who holds office at the BIR National Office Building, Agham Road, Diliman Quezon City.[6]

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[3] Annex "A" to the Petition for Review, En Banc Rollo, pp. 63-87.
[4] Annex "B" to the Petition for Review, Ibid., pp. 89-93.
[5] Par. 2, The Parties, Petition for Review, Id., p. 38.
[6] Par. 3, The Parties, Petition for Review, Id.

Co-respondent Commissioner of Customs (respondent COC) is the duly appointed Commissioner of the Bureau of Customs (BOC) who holds office at G/F OCOM Building, Bureau of Customs, Port Area, Manila City.[7]

The facts[8] of the case, as narrated by the CTA Third Division in the Assailed Decision, are as follow:

> "On June 11, 1978, petitioner was granted a franchise to operate air transport services domestically and internationally under Presidential Decree (PD) No. 1590, also 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'.
>
> On January 1, 2005, Republic Act (RA) No. 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 thereof provides:
>
> > 'SEC. 6. Section 131 of the National Internal Revenue Code of 1997, as amended, is hereby amended to read as 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 customshouse, 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

[7] Par. 4, The Parties, Petition for Review, Id.
[8] Page 2-14 of the October 27, 2015 Decision, Id., pp. 64-25.

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 duty-free 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 an introduction into the Philippine customs territory.'

xxx xxx xxx

(B) Rate and Basis of the Excise Tax on Imported Articles. — Unless otherwise

> specified, imported articles shall be subject to the same rates and basis of excise taxes applicable to locally manufactured articles.'

On February 3, 2005, CIR Guillermo L. Parayno, Jr. sent a letter to Collector of Customs (COC) George M. Jereos calling the latter's attention to BOC's failure to collect excise tax on all importations of alcohol and tobacco products destined for Duty Free Philippines (DFP) and the Freeport Zone.

Acting on the said letter, COC George M. Jereos issued a Memorandum on February 4, 2005 directing BOC officers and personnel to collect excise tax due on imported alcohol and tobacco products, including those for Duty Free Philippines and Freeport Zones pursuant to RA No. 9334.

On March 1, 2005, Customs Memorandum Order (CMO) No. 13-005 entitled 'Immediate Collection at the Port of Discharge of Duties, Taxes, and Other Charges, Including Excise Tax Due on All Importations of Alcohol and Tobacco Products Destined for Duty Free Shops and Free Port Zones was issued pursuant to RA No. 9334 and BIR Regulation No. 12-2004.'

Paragraph IV of the said CMO entitled 'Operational Provisions' required the accomplishment of consumption entries instead of the previously required warehousing entries, for the clearance of imported cigarettes and liquors, to wit:

> 'In lieu of the warehousing entry required under Customs Administrative Order No. 1-97 and Customs Memorandum Order Nos. 17-97 and 17-97A, all shipments of cigar and cigarettes, distilled spirits, wines and liquors destined for duty-free shops and free-port zones shall be covered by consumption entries filed at the Port of Discharge following the procedures for cargo clearance under CAO Nos. 295 and 5-2001, CMO Nos. 3-2000 and 37-2001 and other existing customs rules and regulations.'

On April 4, 2005, petitioner assailed BOC's action to collect taxes on its importations and the COC's refusal to release its imported items unless the taxes and duties were first paid. In addition, petitioner requested for the release of its imported two pallets of cigarettes for its commissary supplies.

On July 1, 2005, RA No. 9337 took effect, expressly and specifically amending petitioner's franchise, PD No. 1590, and subjecting it to value-added tax (VAT) registration and payment.

On various dates in 2009, petitioner's importations of assorted cigarettes, liquor and wines arrived in Manila through the following ports of entry, covered by various Informal Import Declaration and Entry (IIDE), Air Waybills (AWB)/Bills of Lading (BL), and Authority to Release Imported Goods (ATRIG), detailed as follows:

Port of Entry	Arrival Date	IIDE No.	AWB/BL	ATRIG No.	Excise Taxes Paid
South Harbor	2/1/2009	1289	D0901/5264	00030397	₱183,603.42
NAIA	4/9/2009	3066	079-9071-7476	00037756	118,749.74
NAIA	5/7/2009	3694	074-3269-8326	00038314	9,405.92
North Harbor	6/17/2009	6074	TVS-XO-	00038308	25,866.28
NAIA	5/21/2009	4353	079-3214-9235	00037754	1,114,588.32
NAIA	5/26/2009	4422	079-3214-9331	00037755	602,558.11
NAIA	5/27/2009	4418	079-3286-7063	00037760	82,889.67
South Harbor	6/14/2009	6065	KKLULEH90304	00038310	174,249.00
NAIA	7/4/2009	6129	079-3258-0940	00038307	73,368.00
NAIA	8/7/2009	6969	079-3286-7446	00043110	83,736.18
NAIA	8/12/2009	6983	079-3289-0594	00043614	502,460.00
NAIA	10/28/2009	9454	079-3289-1714	00044033	105,814.80
TOTAL					**₱3,077,289.44**

Also on various dates in 2007, 2009 and 2010, petitioner's importations of similar articles arrived in Manila through NAIA, with the following details:

Port of Entry	Arrival Date	IIDE No.	AWB/BL	ATRIG No.	Excise Taxes Paid
NAIA	4/16/2007	3643	079-2790-6443	00046496	₱ 6,400.80
NAIA	10/11/2009	9021	079-2976-0824	00007279	7,801.74
North Harbor	10/31/2009	10099	004-20471/1	00046499	27,629.89
North Harbor	11/4/2009	9553	FRX-PH-909-	00044956	183,420.00
NAIA	11/28/2009	10137	079-3316-1203	00044953	21,093.30
NAIA	12/5/2009	10848	079-3289-2495	00044952	366,825.60
NAIA	12/13/2009	10887	079-3348-3273	00044955	28,217.76
South Harbor	12/4/2009	11612	0910/1989	00046459	183,420.00
NAIA	12/8/2009	10854	079-3289-2506	00044954	320,972.40
NAIA	12/28/2009	11652	079-3289-2790	00045853	59,079.93
NAIA	12/29/2009	11661	160-5199-8671	00046497	9,405.92
NAIA	1/15/2010	100	079-3289-3000	00046328	516,040.00
NAIA	3/12/2010	2108	079-3289-3965	00006365	434,560.00
North Harbor	7/15/2010	5748	FRX-PH-006-050/H01	00011795	183,420.00
TOTAL					**₱2,348,287.34**

On March 26, 2010 and September 7, 2010, BOC Acting Chief of Warehousing Assessment Unit (WAU) Gilda L. Cinco submitted to the Chief Collector of the Collection Division of the NAIA Customhouse Silveria Salazar an assessment on petitioner's importations pursuant to CMO No. 13-2005 and Revenue Regulations No. 3-2006.

In view thereof, petitioner paid the following specific taxes under protest:

CTA CASE NO.	DATE OF PAYMENT	AMOUNT
8529	August 18, 2010	₱2,054,771.79 ₱1,022,517.65
8590	December 28, 2010	₱ 641,389.09
		₱1,706,898.25

Subsequently, petitioner filed administrative claims for refund with respondent CIR, through the BOC, on the following dates:

CTA Case No.	Date of Payment	Amount	Date of Filing with the BIR
8529	August 18, 2010	₱2,054,771.79	February 22, 2011
		₱1,022,517.65	
8590	December 28, 2010	₱ 641,389.09 ₱1,706,898.25	February 22, 2011

Due to respondent CIR's inaction, petitioner filed with the Court two Petitions for Review on August 17, 2012 and December 21, 2012, respectively docketed as CTA Case Nos. 8529 and 8590.

In her Answer filed in CTA Case Nos. 8529 and 8590, respondent CIR essentially argues that the burden of proof is upon the petitioner who must prove its claim for refund based on a highly disfavored tax exemption. Petitioner must also establish compliance with Section 229 of the National Internal Revenue Code (NIRC), as amended, which governs claims for refund of erroneously or illegally collected taxes.

Further, PD 1590, which granted petitioner's franchise and tax exemption had been repealed by Republic Act (RA) No. 9334 which took effect on July 26, 2004. Section 6 thereof amended Section 131 of the NIRC which states, thus: '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.'

Section 10 of the same law likewise provides that 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 RA No. 9334 are repealed, amended, or otherwise modified accordingly.

More importantly, petitioner was unable to substantiate its claim that it falls under the exemption, that the subject importation of commissary and catering supplies is for the use of petitioner in its transport and non-transport operations and other activities incidental thereto.

The other respondent COC states that all importations of alcohol and tobacco products into the Philippines are excise taxable under RA No. 9334. He concurs with co-respondent CIR that RA No. 9334 amending PD 1590 revoked petitioner's alleged excise tax exemption. Moreover, any exemptions from payment of tax must be explicitly provided by law which is clearly not so in PD 1590.

Besides, the excise tax being imposed is not upon petitioner's business itself, but upon the facilities used in the transaction of its business. Since under PD 1590, the tax exemption is only on the business itself, the subject importations cannot claim exemption from excise tax, being in the nature of facilities used in the transaction of the business, separate and distinct from the business itself.

Section 6 of RA 9334 also clearly and specifically states that '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'. Therefore, items intended for free-ports and duty-free shops are no longer exempted from being levied applicable taxes.

Petitioner's reference to Letter of Instruction No. 684 (LOI 684) allegedly indicating that its importation of commissary and catering supplies were allowed informal entry free of duty is likewise flawed. LOI 684 issued on April 4, 1978 pertains to the importation of petitioner's aircraft, engines, equipment, machinery, spare parts, commissary and catering supplies, aviation gas, fuel and oil for its use which shall be allowed informal entry free of duty and released immediately subject to presentation within fifteen (15) days from the date of release, of a statement under oath stating that: (a) such articles or supplies are not locally available in reasonable quantity, quality and price; and (b) that such articles are necessary for or incidental to the operation of petitioner and its other business activities.

Under LOI 684, petitioner's imported consumable items for its catering and food services shall be transferred directly and immediately to the BOC's bonded warehouse, and may be withdrawn by accomplishing a requisition slip. The consumable items so withdrawn shall be properly accounted for by presentation of proof of actual use in the airline's operations. Petitioner however, has not shown compliance with the cited requirements to enjoy tax exemption privileges under LOI 689 which yielded to the legislative intent of RA 9334, which removed petitioner's tax exemption for the subject importations.

Anent BIR Ruling dated April 13, 1994 cited by petitioner in support of its alleged tax exemption, the same is simply not conclusive upon respondent COC as it only pertains to petitioner's exemption from payment of documentary stamp tax (DST) on bank notes/documents on certain loans, and not on matters subject of these cases.

Petitioner's invocation of the Department of Justice Opinion No. 44 dated June 17, 1996, which allegedly construed the meaning of *'in lieu of all taxes,'* is likewise misplaced as it is about petitioner's exemption from payment of filing fees relative to its application for an increase of its authorized capital stock from P5 Billion to P10 Billion and not petitioner's exemption from payment of excise taxes on its importations of liquor, cigarette and wine.

Finally, PD 1590 granting petitioner its airline franchise and its alleged tax exemption was issued when the government still owned it, albeit partly, and was the country's flag carrier. Petitioner is now privately owned, thus, no longer entitled to tax exemption.

After the pre-trial was terminated on July 2, 2013, petitioner commenced presentation of its evidence. It called to the witness stand its first witness **Jonathan R. Castillo Lee**, the Manager for Company Materials Handling Division and Manager for Company Materials Handling Division in the year 2008. He testified that part of his responsibilities was to make sure the timely release of petitioner's importation of catering and commissary supplies from different cargo warehouses. This included the filing of proper importation documents and coordination with various offices and government agencies for the release of the imported goods.

He further testified that petitioner paid under protest the assessments for excise taxes for its importations of alcohol and tobacco products for use as commissary and catering supplies in its international flights. The payment was made under protest because petitioner was exempt from excise taxes for these importations under its charter, PD 1590, specifically Section 13 thereof which provided that petitioner's importations of commissary and catering supplies were exempt from payment of excise taxes if such importation would be for use in petitioner's operations, and if the imported goods are not locally available in reasonable quantity, quality, or price.

On various occasions, petitioner protested this imposition of excise tax on the subject importations. Within the two (2)-year prescriptive period under the NIRC, as amended, petitioner applied for the refund of the excise tax it paid under protest. However, respondents failed to act on them. This prompted petitioner to file the subject Petitions for Review with the Court on August 17, 2012 and December 21, 2012, which were docketed as CTA Case Nos. 8529 and 8590, respectively.

The Manager of the In-Flight Materials Purchasing Division, Corporate Logistics and Services Department of petitioner since November 16, 2008 **Cheryl V. Capinpin**, testified that she was formerly the Supervisor of In-Flight Materials Purchasing Division and as such, she was in charge of procuring foreign and local materials, supplies, equipment and services for petitioner's In-flight operations. Thus, she knew that the subject importations being subject to excise tax were intended for petitioner's consumption during its operations of international flights.

Based on the comparison of the prices of wine and alcohol products imported by petitioner with the prices of the same products from local suppliers, such as Philippine Wine Merchants, Duty Free Philippines, Future Trade International, and the price surveys conducted by the BIR, she concluded that the locally sourced wine and alcohol products were more expensive if locally procured. She however admitted that the BIR price survey was conducted in 2003 and 2010 only while the subject importations occurred in 2009. Also, at the time of the importation, the BIR price survey was not a factor since she became aware of it only when she filed her Supplemental Judicial Affidavit for purposes of this case.

On the tobacco importation, the cost of petitioner's imported tobacco would be less as it would not pay taxes thereon being tax-free under its franchise, while the cost of the same product from local suppliers would be higher due to taxes imposed thereon.

She testified further that local suppliers and dealers had a limited range of alcohol products, worse, did not carry products imported by petitioner. Hence, she concluded that the products imported by petitioner during the subject period were not available locally at reasonable quantity and price. Even if petitioner would buy in bulk from the local suppliers with considerable discount, the price of imported products would still be cheaper.

The witness admitted that the comparative pricelist she showed to the Court was prepared only on May 17, 2013 for her presentation in court and not on or about the time of the subject importations. For purposes of the subject importation, petitioner only made internal costing and canvassing of cost both of which were not submitted to the Court. Further, the price or cost of the imported articles of petitioner did not include any excise taxes that might possibly be imposed on the products, thus lower than those locally sourced wherein the excise tax was already incorporated in the price or cost of the products. Other expenses in relation to importation such as freight, handling, and shipping cost were likewise not included in the comparative survey submitted to the Court.

The conversion rate used by petitioner to determine the price for its importations were provided by the Financial Services Department of petitioner, sourced from the Bangko Sentral ng Pilipinas (BSP). The said rates were based on the monthly average and not the prevailing rate of exchange on the actual date of the importation.

The witness emphasized that to be competitive with the other international airlines, petitioner must carry and serve foreign brands of alcohol and tobacco during international flights. Thus competition and availability of these imported products locally were factored in for purposes of importation.

Another reason for petitioner's importation is the fact that the required volume of products for international flights could not be met by the local suppliers based on the canvas conducted by petitioner.

Corollary to the foregoing, she requested the National Tobacco Administration (NTA) for the retail prices of local cigarette brands however she was informed that it had no data on the matter for the pertinent taxable years 2005 to 2013.

To allow tax exemption on the imported wine, liquors, cigarettes and tobaccos, it must be shown that they are not available locally in reasonable price. Reasonable price, the witness admitted, does not necessarily mean cheaper but that price that will give the importer such as petitioner a profit margin from selling the products. Unfortunately, petitioner is yet to set a standard to determine if the price of locally available imported alcohol and tobacco products is reasonable.

Myra Celeste O. Dabalos, the Court-commissioned Independent Certified Public Accountant (ICPA) testified that her examination of petitioner's documents in support of the instant claim for refund revealed that the total amount of excise taxes for refund is supported by official receipts issued by the Bureau of Customs (BOC) proving that the amount paid under protest was remitted to the government. She included in her ICPA Report dated October 7, 2013, and the Final Report dated October 21, 2013 submitted to the Court that petitioner's purchase price of alcohol and tobacco products from sellers abroad, if exclusive of excise taxes, was consistently lower than the purchase price of the same products from local sellers. However, she admitted that she is not an expert on the matter, and was not authorized under her commission to verify the prices of these products.

The last witness presented was **Ma. Evelyn L. Taghap**, petitioner's Manager for Tax Division since 1999. Among her responsibilities is to ensure that petitioner fulfils all its tax obligations, pursuant to its charter, PD 1590, and under the Tax Code, including the filing of the requisite tax returns and payment of taxes on time.

Based on the BIR-issued Certificates of Registration of petitioner, its tax liabilities include payment of its annual registration fee, income tax, value-added tax, excise taxes on petroleum products, and withholding taxes. However, the said Certificates of Registration do not include excise taxes on importation of alcohol and tobacco products subject of the present petition. Any changes or updates in petitioner's registered activities or tax type or liabilities are reflected in the Certificate of Registration. In fact, petitioner's Certificate of Registration had been amended several times to accurately reflect the changes in its tax information. To effect any amendment, petitioner would surrender the original of its Certificate of Registration to the BIR Large Taxpayers Division for issuance of the amended Certificate.

At the time of the subject importations, the Certificate of Registration only reflected that petitioner was liable for registration fee, corporate income tax, and value-added tax, for which the corresponding tax returns have been filed, and the pertinent taxes paid. Petitioner paid its tax obligations for the relevant years when the subject importations were made.

Respondent COC opted not to present any evidence, as did respondent CIR." (citations omitted)

On October 27, 2015, the CTA Third Division rendered the Assailed Decision[9] denying petitioner's Petitions for Review for lack of merit.

Thus, petitioner filed a Motion for Reconsideration[10] on November 23, 2015, which was denied by the Court in Division in the Assailed Resolution[11] dated February 4, 2016.

Within the extension of time it requested[12], petitioner filed its Petition for Review[13] on March 18, 2016.

In a Resolution[14] dated April 27, 2016, the Court En Banc directed respondents to file their Comment, not a motion to dismiss, within ten (10) days from receipt thereof.

On May 19, 2016, respondent COC filed a Motion for Extension of Time to File Comment[15], which was granted in a Minute Resolution[16] dated May 23, 2016.

On May 23, 2016, A Comment (For the Commissioner of Internal Revenue)[17] was filed, while respondent COC filed his Comment[18] on June 20, 2016.

[9] See Footnote No. 3.
[10] CTA Case No. 8529, Division Docket (Vol. III), pp. 1634-1647.
[11] Ibid., 1671-1675.
[12] From March 3, 2016 or until March 18, 2016, per Motion for Extension of Time to File Petition for Review, En Banc Rollo, pp. 1-2.
[13] See Footnote No. 1
[14] En Banc Rollo, pp. 272-273.
[15] Ibid, pp. 274-278.
[16] Id., p. 283.
[17] Id., pp. 279-282.
[18] Id., pp. 284-304.

On July 7, 2016, the Court En Banc gave due course to the instant Petition and directed the parties to submit their Memoranda within thirty (30) days from receipt thereof.[19]

On August 24, 2016, respondent COC filed a Manifestation (In Lieu of Memorandum)[20] stating that he is adopting his Comment dated June 17, 2016 as his Memorandum, which was noted by the Court En Banc in its Minute Resolution[21] dated September 7, 2016, while petitioner filed its Memorandum[22] on September 9, 2016. Respondent CIR, on the other hand, failed to file the same per Records Verification[23] dated September 19, 2016.

The case was submitted for Decision on October 4, 2016, per Resolution[24] of the same date.

Hence, this Decision.

In this Petition, petitioner raised this sole argument for the consideration of the Court:

> **"THE THIRD DIVISION ERRED IN DENYING PAL'S CLAIM FOR REFUND OF ERRONEOUSLY PAID EXCISE TAX ON ITS IMPORTATION OF LIQUORS AND CIGARETTES IN THE AMOUNT OF PHP5,425,576.78, BECAUSE PAL WAS ABLE TO SUFFICIENTLY PROVE ITS COMPLIANCE WITH THE REQUIREMENTS TO ENTITLE IT TO EXEMPTION FROM THE PAYMENT OF EXCISE TAX."**

Petitioner mainly argues that its witness, Ms. Cheryl V. Capinpin, has sufficiently established that petitioner was able to comply with the condition that the commissary and catering supplies imported were not locally available in reasonable quantity, quality or price; and, that respondents never presented anything to counter petitioner's evidence.

On the other hand, respondent CIR avers that the Court in Division had already meticulously discussed, passed upon, and considered the arguments raised in the instant case and, thus, to discuss them anew is superfluity.

[19] Resolution, Id., pp. 306-307.
[20] Id., pp. 308-311.
[21] Id., p. 313.
[22] Id., pp. 319-343.
[23] Id., p. 346.
[24] Resolution, Id., pp. 348-349.

For his part, co-respondent COC argues, among others, that Ms. Capinpin is incompetent to testify on local commodity prices as she was not presented as an expert in the field; that no representative of Philippine Wine Merchants, Future Trade International and Duty Free Philippines was presented in Court to confirm the data in the alleged pricelists; that a review of Ms. Capinpin's testimony would disclose that petitioner did not exert any genuine effort to determine the availability of the subject articles in the Philippines before purchasing them from sources abroad; that the canvass made by petitioner was limited to only three suppliers, thus, it cannot accurately represent that of the entire Philippines; that no comparison could be had with the prices in the BIR Price Surveys and those of the subject articles when they were purchased or imported; that not all items in the Comparative Table have the same brand, variety or quantity; and, that the pertinent exchange rate at the time of purchase or importation was not duly established.

We find petitioner's Petition for Review meritorious.

It is a settled issue that the franchise of PAL remains the governing law on its exemption from taxes.[25] Thus, the Court En Banc shall only resolve the issue on petitioner's alleged compliance with the conditions stated under Section 13 (b) (2) of PD No. 1590, thus:

> "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 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 air-transport 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,**

[25] Commissioner of Internal Revenue vs. Philippine Airlines, Inc., G.R. No. 180066, July 7, 2009.

> **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:**
>
> xxx xxx xxx
>
> (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**; . . . ." (Emphases supplied)

It can thus be seen from the foregoing that, in order for petitioner to be exempted from taxes, duties, charges, royalties, or fees on the importation of its commissary and catering supplies, it must prove the following:

1. It paid its corporate income tax covering the period when the subject importations were made;

2. The articles, supplies or materials are imported for PAL's use 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 petitioner's compliance with the first and second requisites, the Court En Banc agrees with the following findings and conclusions of the CTA Third Division, to wit:

> "Evidence show that petitioner complied with the first requisite. It paid its corporate income tax and VAT liabilities for the subject period of importation as shown in Annual Income Tax Returns for fiscal years ending March 31, 2008, March 31, 2009, March 31, 2010, and March 31, 2011. Petitioner also proved that it is a VAT-registered entity and that it accounted for and paid VAT on

its sales/receipts as evidenced by its BIR Certificates of Registration, Payment Form No. 0605, and Quarterly VAT Returns for fiscal years 2008, 2009, 2010, and 2011.

Petitioner as well satisfied the second requisite — that the imported liquors, wines and cigarettes were for its use in its transport and non-transport operations and other incidental activities. On the matter, petitioner presented ATRIGs issued by the BIR, which expressly state that the shipment to be released will be used 'exclusively for international inflight consumption'. Further, under the column 'Description of Articles' of the Informal Import Declaration and Entry documents submitted by petitioner, the imported articles were described as 'Inflight Materials'."

Petitioner, likewise, complied with the third requisite, contrary to the findings of the Court in Division.

We are convinced that petitioner has sufficiently established that the alcohol products it imported on various dates from 2007 to 2010 were not available in reasonable quantity, quality or price in the local market through the following evidence: Judicial Affidavit and Supplemental Judicial Affidavit of Ms. Cheryl V. Capinpin[26], petitioner's Manager-In-flight Materials Purchasing Division, Catering and In-flight Materials Purchasing Sub-Department; Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies[27]; Revised Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies[28]; Comparison of Quantities[29]; Computation of Cost of Imported Wine, Liquor and Cigarettes per Bottle/Can/Pack[30]; Comparison of the Cost of Importation of Wine, Liquor and Cigarettes Without Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Based on Price Lists Sent by Future Trade International[31]; Comparison of the Cost of Importation of Wine, Liquor and Cigarettes With Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Based on the Price List Sent by Future Trade International[32]; Comparison of the Cost of Importation of Wine, Liquor and Cigarettes Without Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Based on Price List Sent by Philippine Wine Merchants[33]; Comparison of the Cost of Importation of Wine,

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[26] Exhibits "KK" and "KK-2".
[27] Exhibit "X".
[28] Exhibit "X-1".
[29] Exhibit "EEE".
[30] Exhibit "FFF".
[31] Exhibit "GGG".
[32] Exhibit "HHH".
[33] Exhibit "JJJ".

liquor and Cigarettes With Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Sent by Philippine Wine Merchants[34]; Comparison of the Cost of Importation of Wine, Liquor and Cigarettes Without Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Based on BIR Price Survey per Revenue Memorandum Circular No. 90-12[35]; Comparison of the Cost of Importation of Wine, Liquor and Cigarettes with Excise Tax and the Cost of Domestic Purchases of Locally Available Wine, Liquor and Cigarettes Based on BIR Price Survey per Revenue Memorandum Circular No. 90-12[36]; Revenue Memorandum Circular No. 90-12[37];Philippine Wine Merchants Price Lists for 2007[38], 2009[39], 2010[40]; Future Trade International Price List as of February 2009[41], April 2009[42], July 2013[43], 2006 to 2013[44]; Duty free Philippine 2009 retail Prices[45]; Monthly Philippine Dealing System Rates for the Fiscal Years April 2007 to February 2013[46]; Booking Rates for April 2007[47], February 2009[48], June 2009[49], August 2009[50], October 2009[51], November 2009[52], May 2010[53]; various Bangko Sentral ng Pilipinas Reference Exchange Rate Bulletin[54]; Authority to Release Imported Good issued on various dates for the said importations[55]; Airway Bills/Bills of Lading[56], Informal Import Declarations and Entries[57]; and, Invoices[58].

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[34] Exhibit "KKK".
[35] Exhibit "LLL".
[36] Exhibit "MMM".
[37] Exhibit "LLL-1".
[38] Exhibits "Y" and "JJJ-1".
[39] Exhibits "Y-1" and "JJJ-2".
[40] Exhibit "Y-2".
[41] Exhibits "Z" and "GGG-1".
[42] Exhibits "Z-1" and "GGG-2".
[43] Exhibit "Z-2".
[44] Exhibit "GGG-3".
[45] Exhibit "BB".
[46] Exhibit "CC".
[47] Exhibit "DD".
[48] Exhibit "EE".
[49] Exhibit "FF".
[50] Exhibit "GG".
[51] Exhibit "HH".
[52] Exhibit "II".
[53] Exhibit "JJ".
[54] Exhibits "FFF-1" to "FFF-9".
[55] Exhibits "D-1-b", "D-2-b", "D-3-b", "D-4-b", "D-5-b", "D-6-b", "I-1-b", "I-2-b", "I-3-b", "I-4-b", "I-5-b", "I-6-b", "N-1-b", "N-2-b", "N-3-b", "N-4-b", "N-5-b", "N-6-b", "N-7-b", "S-1-b", "S-2-b", "S-3-b", "S-4-b", "S-5-b", "S-6-b", and "S-7-b".
[56] Exhibit "D-1-a", "D-2-a", "D-3-a", "D-4-a", "D-5-a", "D-6-a", "I-1-a", "I-2-a", "I-3-a", "I-4-a", "I-5-a", "I-6-a", "N-1-a", "N-2-a", "N-3-a", "N-4-a", "N-5-a", "N-6-a", "N-7-a", "S-1-a", "S-2-a", "S-3-a", "S-4-a", "S-5-a", "S-6-a", and "S-7-a".
[57] Exhibits "D-1", "D-2", "D-3", "D-4", "D-5", "D-6", "I-1", "I-2", "I-3", "I-4", "I-5", "I-6", "N-1", "N-2", "N-3", "N-4", "N-5", "N-6", "N-7", "S-1", "S-2", "S-3", "S-4", "S-5", "S-6", and "S-7".
[58] Exhibits "D-1-c", "D-2-c", "D-3-c", "D-4-c", "D-5-c", "D-6-c", "I-1-c", "I-2-c", "I-3-c", "I-4-c", "I-5-c", "I-6-c", "N-1-c", "N-2-c", "N-3-c", "N-4-c", "N-5-c", "N-6-c", "N-7-c", "S-1-c", "S-2-c", "S-3-c", "S-4-c", "S-5-c", "S-6-c", and "S-7-c".

Further, in a plethora of cases involving the Philippine Airlines, Inc.[59], although of different taxable period, the Court En Banc had consistently ruled that the Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies with local prices reflected in the Philippine Wine Merchants' Price List and/or Duty Free Philippines Retail Prices, together with the testimony of petitioner's witness, were deemed sufficient to rule that the cost of importing commissary and catering supplies is lower than purchasing them locally.

Furthermore, recognizing that the CTA is a highly specialized body that reviews tax cases and conducts trial de novo, the Supreme Court in the consolidated cases of *Republic of the Philippines, rep. by the Commissioner of Customs vs. Philippine Airlines, Inc.(PAL)*[60], affirmed the factual determinations of the Court of Tax Appeals Former Second Division in *Philippine Airlines, Inc. (PAL) vs. Commissioner of Internal Revenue and Commissioner of Customs*[61] where it ruled that the "tabulation of comparison of the cost of importing the subject articles and the cost of purchasing them locally, invoices issued to PAL for its purchase of the subject articles and Price List for 2005 of Duty-Free Philippines", together with the testimony of petitioner's witness, were sufficient in proving that the subject imported articles were not locally available in reasonable quantity, quality or price.

Likewise, in the more recent case of *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*[62], the Supreme Court, again, acknowledged the factual determinations of this Court in the consolidated cases of *Philippine Airlines, Inc. vs. Commissioner of Internal Revenue and Commissioner of Customs*[63], *docketed as* CTA EB Nos. 1029, 1031 and 1032, that PAL made a *prima facie* case that the cost of importing the alcohol products was reasonably cheaper than purchasing them locally through the following evidence: (a) testimony of Mr. Victor Santos, PAL's Assistant Vice President in charge of the Catering and In-flight Materials Purchasing; (b) Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies; (c) Philippine Wine Merchant's January 11, 2007 Price List; and, (6) Monthly PDS rates for the year 2007-2008, 2008-2009, and 2009-2010.

[59] CTA EB Case Nos. 1216, 1217 and 1221 (CTA Case No. 8184), May 27, 2016, CTA EB Case Nos. 954 & 1046 (CTA Case Nos. 7677, 7685 and 7746), October 14, 2014; CTA EB Case Nos. 920 & 922 (CTA Case Nos. 7665 and 7713), September 9, 2013 (G.R. Nos. 209353-54, 211733-34, July 6, 2015); CTA EB Case Nos. 1029, 1031 & 1032 (CTA Case No. 8153), April 30, 2014; CTA Case No. 8236, December 18, 2013.
[60] G.R. Nos. 209353-54 and 211733-34, July 6, 2015.
[61] CTA Case Nos. 7665 and 7713, April 17, 2012
[62] G.R. Nos. 215705-07, February 22, 2017.
[63] CTA EB Nos. 1029, 1031 and 1032, April 30, 2014.

Equally noteworthy is the fact that the evidence presented by petitioner remained unrebutted as both respondents CIR and COC opted not to present any evidence to refute petitioner's claim.

As for the cigarettes, the Court En Banc agrees with the findings of the Court in Division that petitioner fell short in proving the non-availability of the imported cigarettes at a reasonable quantity, quality or price in the local market. Pertinent portions of the assailed Decision are hereby quoted for reference, to wit:

> "While petitioner presented documents that would allegedly prove that the imported wines and liquors were not locally available in reasonable quantity, quality or price at the time of importation, it did not do the same insofar as its imported cigarettes were concerned.
>
> Witness Cheryl V. Capinpin, who testified on the matter via her Judicial Affidavit dated May 17, 2013, did not include any comparison of the prices of local and imported tobacco. She conveniently concluded that since petitioner was exempted from payment of excise taxes, its imported cigarettes would be cheaper than those from the local suppliers who were to pay taxes for their importations of the same products. She testified as follows:
>
> 25.Q. In the column 'Product Imported' of Exhibit 'X', the products pertain to alcohol products only. Can you tell whether there is similar comparative table for PAL's imported tobacco products?
>
> A. No. there is no comparative table to document the importation costs and costs of locally purchasing the tobacco products, or more particularly the foreign branded cigarette products, needed by PAL for use in its international flights.
>
> 26.Q. Would you know, if ever, why this is so?
>
> A. Yes, because there are no local suppliers that could supply PAL with the foreign brands of cigarettes at reasonable prices. The importation cost is cheaper than the local purchase price of such foreign branded cigarettes.

27.Q. What is your basis if, any, in stating that the selling price of local suppliers of foreign brand cigarette products will be more expensive than PAL's importation costs?

A. My basis in saying this is the exemption of PAL from payment of excise taxes on its importation of commissary and catering supplies. This has always been PAL's guiding principle in making such importations.

The local suppliers of tobacco products do not enjoy the same tax exemption privilege as PAL; therefore, it is logical to conclude that their importations of foreign brand cigarette products are subject to excise taxes, custom duties and other import processing fees. The value alone of these taxes, duties and fees will account for the price difference.

The local suppliers will add its incurred importation costs (i.e., taxes, duties and fees) to the purchase price they got from their foreign supplier. This will constitute as part of their selling price to PAL. Definitely, this amount will be higher or more expensive than if PAL directly imported the tobacco products from the foreign supplier.'

In other words, without any supporting and verified data, petitioner assumed that the imported cigarettes would not be locally available in reasonable quantity and quality, and would be more expensive if sourced from local suppliers. Without any evidence such assumption has no leg to stand on. This is notwithstanding her declaration in her Supplemental Judicial Affidavit dated August 1, 2013. In fine, petitioner failed to present sufficient evidence to prove that the imported tobacco products were not locally available in sufficient quantity, quality, or price at the time of importation."[64]

In view thereof, We deem it proper to remand the instant case to the Court in Division for a complete determination of the refund claim of herein petitioner.

[64] Page 22-23 of the Assailed Decision, En Banc Rollo, pp. 84-85.

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED.** The Court in Division's Decision and Resolution promulgated on October 27, 2015 and February 4, 2016, respectively, are hereby **REVERSED AND SET ASIDE**. The case is **REMANDED** to the Court in Division for the determination of the amount of refund due to petitioner.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
(I vote to affirm the Third Division Decision)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

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

(On-Leave)
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 conclusions in the above Decision were 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,	CTA EB No. 1433 (CTA Case Nos. 8529 and 8590)
-versus-	Present: DEL ROSARIO, *P.J.*, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS, Respondents.	Promulgated: OCT 18 2017 4:17 p.m.

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CONCURRING AND DISSENTING OPINION

Fabon-Victorino, J.:

With due respect, I maintain my stance in the assailed Decision of October 27, 2015 and the subsequent Resolution of February 4, 2016.

I agree that petitioner has sufficiently complied with the first and second requisites for entitlement to refund of its alleged erroneously paid excise taxes on its importations of liquor, wine and cigarettes for its international flight consumption. However, I submit that petitioner failed to comply with the third requisite, *i.e.,* that the imported articles, supplies or materials are not locally available in reasonable quantity, quality or price.

I concur with the *ponente's* view respecting 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 account of petitioner's failure 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, as to justify petitioner's claim for refund.

With high respect to the *ponente* and the majority's view, I submit that petitioner utterly failed to comply with the third requisite. Petitioner presented as evidence the following documents, namely, Table of Comparison between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies,[1] Revised Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies,[2] the Philippine Wine Merchants (PWM) Price List for the years 2007,[3] 2009,[4] and 2010,[5] the Duty Free Philippines 2009 Retail Prices,[6] the Monthly Philippine Dealing System (PDS) rates for the years 2007-2013,[7] and the various letters of petitioner's Vice President for Financial Services, Marianne C. Raymundo with attached booking rates.[8]

However, the presentation of the Table of Comparison[9] and the Revised Table of Comparison,[10] proved lethal to

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[1] Exhibit "X".
[2] Exhibit "X-1".
[3] Exhibit "Y".
[4] Exhibit "Z".
[5] Exhibit "AA".
[6] Exhibit "BB".
[7] Exhibit "CC".
[8] Exhibits "DD", "EE", "FF", "GG", "HH", "II", and "JJ".
[9] Exhibit "X", Table of Comparison between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies, docket pp. 623-632.

petitioner's cause. A closer look at the documents shows that the **<u>imported brands used by petitioner in its international flights were not even mentioned in the price list of Philippine Wine Merchants (PWM) and Duty Free Philippines</u>**.

The said observation suggests that when the subject importations were made in 2009, petitioner did not have any data, reliable or otherwise, on the price and availability of the subject imported items. In fact, petitioner's witness Cheryl Capinpin confirmed this fact in open court. She clarified that Exhibit X or the original Table of Comparison was prepared at the time she executed her Judicial Affidavit on May 17, 2013, or long after the fact,[11] hence, it was just an afterthought, a futile attempt to establish the existence of the third requisite.

Further, Ms. Capinpin also admitted in open court that petitioner had nothing to show that it conducted internal canvassing pertaining to the local availability of the subject imported products.[12]

Evidently, without any research or study conducted or at least solid information on the non-availability in the local market in terms of quantity, quality and price of the subject commissary supplies, petitioner cannot possibly claim for exemption from payment of excise taxes on its imported items. Elementary is the rule that in a claim for tax refund, the burden of proof rests on the taxpayer-claimant. The taxpayer claiming the tax credit or refund has the burden of proving that he is entitled to the refund or credit by submitting evidence that he has complied with the requirements laid down in the Tax Code under which such privilege of credit or refund is accorded,[13] which petitioner failed to discharge.

On this note, I vote to **DENY** the instant Petition for Review for lack of merit and **AFFIRM** the assailed Decision

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[10] Exhibit "X-1", Revised Table of Comparison between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies, docket pp. 868-886.
[11] TSN October 24, 2013, p. 16.
[12] TSN dated November 7, 2013, pp. 24-26.
[13] *Microsoft Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 180173, April 06, 2011.

of October 27, 2015 and Resolution of February 4, 2016 rendered by the Court in Division.

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice