REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS *Petitioners,*	CTA EB CASE No. 1545 (CTA CASE Nos. 8039, 8069, 8104 and 8113)
-versus-	*Present*: DEL ROSARIO, *P.J*, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
AIR PHILIPPINES CORPORATION, *Respondent.*	Promulgated: ~~MAY 21 2018~~ 11:27 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 18 of Republic Act (RA) No. 1125,*[1] *as amended by Section 11*[2] *of RA No. 9282,*[3] of the

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[1] An Act Creating the Court of Tax Appeals.

[2] Section 11. Section 18 of the same Act is hereby amended as follows:

> "SEC. 18. Appeal to the Court of Tax Appeals *En Banc*. - No civil proceeding involving matter arising under the National Internal Revenue Code, the Tariff and Customs Code or the Local Government Code shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the CTA and disposed of in accordance with the provisions of this Act.

Amended Decision dated July 1, 2016[4] and the Resolution dated October 10, 2016[5] rendered by the Third Division of this Court, the dispositive portions of which, respectively, read as follows:

Amended Decision dated July 1, 2016:

"**WHEREFORE,** petitioner's Motion for Reconsideration, the Supplement to Motion for Reconsideration, and the Second Supplement to Motion for Reconsideration are **GRANTED**.

The Decision dated July 13, 2015 is **AMENDED** to the extent that the Petitions for Review in CTA Case Nos. 8039, 8069, 8104 & 8114 are **GRANTED**. Respondents are **ORDERED TO REFUND** or, in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in petitioner's favor in the amount of **SEVENTY FOUR MILLION FOUR HUNDRED NINETY-EIGHT THOUSAND NINE AND 11/100 PESOS** (₱ 74,498,009.11), representing specific taxes paid under protest corresponding to its importations of Jet A-1 fuel for its domestic operations for the period of March 2008 to October 2008.

SO ORDERED."

Resolution dated October 10, 2016:

"Considering that no new matters have been raised in both respondents' motions that have not been argued nor considered by this Court before, the Motions for Reconsideration of respondents CIR and COC are **DENIED** for lack of merit.

"A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA *en banc*."

[3] An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating Its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging Its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes
[4] *En Banc* Docket, pp. 25-45.
[5] *Ibid.*, pp. 46-52.

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SO ORDERED."

The facts of the case as recited by the Third Division in its Decision[6] dated July 13, 2015, read as follows:

> "Petitioner Air Philippines Corporation (APC) is a domestic corporation duly organized and existing in accordance with and by virtue of the laws of the Republic of the Philippines, with principal office at R-1 Hangar, APC Gate 1, Andrews Avenue, Nichols, Pasay City. It is engaged in the business of air transportation of passengers and cargo to and from points within and outside the Philippines, pursuant to its legislative franchise, Republic Act (RA) No. 8339, as amended by RA No. 9215.
>
> Respondent Commissioner of Internal Revenue (CIR) is the head of the Bureau of Internal Revenue (BIR), which is the government agency in charge of the assessment and collection of all national internal revenue taxes, fees, and charges, including the excise tax of P3.67 per liter of volume capacity on aviation turbo jet fuel imposed by Section 148(g) of the National Internal Revenue Code (NIRC) of 1997, as amended. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.
>
> Respondent Commissioner of Customs (COC) is the head of the Bureau of Customs (BOC) delegated and authorized by respondent CIR, through an Authority to Release Imported Goods (ATRIG), to assess and collect custom duties and all other lawful charges from imported articles, including the excise tax of P3.67 per liter on imported aviation turbo jet fuel imposed by Section 148(g) of the NIRC of 1997. He holds principal office at the Port Area, Manila.
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> Petitioner was granted by RA No. 8339, as amended by RA No. 9215, in relation to Section 13 of Presidential Decree (PD) No. 1590, tax exemptions, particularly, exemption from excise tax on its

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[6] CTA Case No. 8039, *Division Docket,* Vol. 5, pp. 2822-2922.

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importations of aviation turbo jet fuel for use in its domestic flight operations.

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Section 13 of PAL's franchise, PD No. 1590, which took effect on June 11, 1978, provides for the conditions which airlines are required to comply with in order to continue enjoying tax exemptions on their importation of petroleum products, to wit:

> "SECTION 13.
>
> XXX XXX XXX
>
> The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description, imposed, levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future but not limited to the following:
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> XXX XXX XXX
>
> > (2) All taxes, including compensating taxes, duties, charges, royalties, or fees due on all importation 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 imposed 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; x x x"

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On November 1, 1985, Letter of Instructions (LOI) No. 1483 withdrew PAL's tax exemption privilege with respect to its purchase of domestic petroleum products for use in its domestic operations. LOI No. 1483 provides in part:

> "WHEREAS, this tax-exemption privilege enjoyed by PAL has resulted in serious tax base erosions and distortions in the tax treatment of similarly situated enterprises.
>
> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order and direct that the tax exemption privilege granted to PAL on its purchase of domestic petroleum products for use in its domestic operations is hereby withdrawn.
>
> This Letter of Instructions shall take effect on November 1, 1985."

On January 29, 1999, respondent CIR issued BIR Ruling No. 013-99, which reads:

> "It is represented that Sec. 13(b) Par. 1 and 2 of PD No. 1590, provides among others, that purchases by PAL of aviation gas, fuel and oil to be used in its transport and non-transport operations are exempt from the payment of all taxes, duties, charges, royalties or fees; that since then, PAL had been enjoying this tax-exemption privileges until the same was withdrawn partially when LOI No. 1483 was issued by the President of the Philippines, the main text of which is quoted as follows:
>
>> ' ... the tax exemption privilege granted to PAL on its purchase of domestic petroleum products for use in its domestic operations is hereby withdrawn' (emphasis supplied)

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that the wordings of LOI No. 1483 is very clear that the tax exemption privilege being withdrawn refers specifically to the purchase of domestic petroleum products by PAL for use in its domestic operations, that it does not include purchases from abroad or foreign countries, and that it is for this reason that the Bureau of Customs does not impose any tax or customs duties on arrivals of petroleum products imported or purchased by PAL from abroad.

In reply, please be informed that we confirm your opinion that petroleum products purchased or imported by PAL from abroad can be used by it in its domestic operations without payment of tax since the said products were not a domestic purchase. The intention of LOI No. 1483 is to impose a tax on domestic petroleum products purchased by PAL for use in its domestic operations."

The Secretary of Finance issued a letter on September 8, 1999 to confirm BIR Ruling No. 013-99, which provides:

"I confirm BIR Ruling, dated January 29, 1999, which confirms PAL's exemption from specific and ad valorem taxes, on its importation of the foregoing petroleum products, whether for domestic or international flights,"

Section 15 of petitioner's franchise, RA No. 8339, provides for the applicability of PAL's tax exemption to petitioner, to wit:

"SECTION 15. Interpretation of Franchise. -This franchise shall not be interpreted to mean as an exclusive grant of the privilege herein provided for. However, in the event that any competing individual, partnership or corporation shall receive a similar permit or franchise with terms and/ or provisions more favorable than those herein granted or which tend to place herein grantee at any

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> disadvantage, then such terms and/ or provisions shall be deemed part hereof and shall operate equally in favor of the herein grantee."

On October 23, 2000, the BIR issued BIR Ruling No. 048-2000. This was in response to a letter dated August 7, 2000 sent by petitioner's then Executive Vice President-Chief Operating Officer, Capt. Rogelio M. Narciso. BIR Ruling No. 048-2000 affirmed petitioner's contention that it would be exempt from all taxes imposed by the Tax Code on its importation and purchases from abroad of petroleum products. Pertinent portions of BIR Ruling No. 048-2000 read as follows:

> "xxx (O)n June 28, 2000, the Secretary of Finance issued a letter-decision resolving CAI's request for a consideration, the dispositive portion of which states:
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> > 'On the basis of the foregoing, BIR Ruling No. 013-2000 is hereby revoked. BIR Ruling No. 110-99, which provides for CAI's exemption from all taxes imposed by the NIRC on its importation or purchases of petroleum products from abroad for use in its domestic operations, is hereby reinstated.
> >
> > In the interest of a level playing field, this ruling shall also apply to other airlines similarly situated.'
>
> On the basis of the letter-decision, it is now your contention that APC is likewise exempt from all taxes imposed by the NIRC on its importations and purchases from abroad of petroleum products, which are exempt from value-added tax for use in its domestic operations.
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> In reply, please be informed that pursuant to the provisions of Sec. 15 of R.A. 8339 (APC's franchise), in relation to Section

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> 13 of P.D. No. 1590 (Franchise of PAL) and the letter-decision dated June 28, 2000 of the Secretary of Finance, pertinent portions of which are heretofore quoted, APC shall be exempt from all taxes imposed by the Tax Code on its importation and purchases from abroad of petroleum products which are exempt from value-added tax under Section 109(e) of the Tax Code of 1997, which importations shall be used for its domestic operations."

However, on January 29, 2003, the BIR Commissioner issued BIR Ruling No. 001-2003, addressed to petitioner, to Philippine Airlines (PAL), to Cebu Air, Inc. (CAI), and to Pacific Airways Corporation, the significant parts of which read as follows:

> "In the light of the Certification of the Department of Energy dated December 20, 2002 that aviation gas, fuel and oil for use in domestic operation of domestic airline companies are locally available in reasonable quantity, quality, and price, it is the considered opinion of this Office that there is now an absence of the second condition required for the airlines to continue to enjoy tax exemption on their importations of petroleum products for domestic operations as stated in Section 13 of PAL's Charter (PD 1590, as amended by LOI 1483) and which condition applies *ipso facto* to other airlines. Accordingly your importations may not be given the same treatment as before for as long as there is such available domestic supply of petroleum products.
>
> This Ruling, therefore, supersedes the above rulings and all such other ruling that may be contrary to the intent of this Ruling, and constitutes the final decision of this Office on the matter."

On the basis of BIR Ruling No. 001-2003, respondent CIR, acting through respondent COC, assessed petitioner for specific taxes on the latter's importations of Jet A-1 aviation fuel used for its domestic operations.

From March 2008 to October 2008, petitioner made the following importations and corresponding payments under protest of the specific tax assessed by the Collector of Customs of the Port of Batangas, Batangas City. The payment made by petitioner is evidenced by the respective Equitable PCI Bank official receipts (ORs), as follows:

Date of Importation	Date of Payment	Amount Paid in Php (₱)	OR No.
March 1, 2008	March 19, 2008	14,762,792.00	139470c
March 13, 2008	April 10, 2008	5,872,385.00	139662c
April 29, 2008	May 7, 2008	23,649,135.00	139346c
June 4, 2008	June 27, 2008	17,754,847.11	239281c
August 23, 2008	September 18, 2008	2,966,116.00	253151c
September 23, 2008	October 10, 2008	3,557,423.00	253121c
October 22, 2008	October 31, 2008	5,935,311.00	253138c

Accordingly, petitioner filed with the District Collector of Customs, Port of Batangas, Batangas City, formal written protests for the refund of the respective specific taxes on the following dates:

CTA Case No.	Date of Importation	Date of Payment Under Protest	Date of Filing of Protest	Amount involved in Php (₱)
8039	March 1, 2008	March 19, 2008	April 1, 2008	14,762,792.00
8069	March 13, 2008	April 10, 2008	April 23, 2008	5,872,385.00
8104	April 29, 2008	May 7, 2008	May 22, 2009	23,649,135.00
8113	June 4, 2008	June 27, 2008	July 8, 2008	17,754,847.11
	August 23, 2008	September 18, 2008	October 3, 2008	2,966,116.00
	September 24, 2008	October 10, 2008	October 24, 2008	3,557,423.00
	October 22, 2008	October 31, 2008	November 13, 2008	5,935,311.00

Petitioner contends that respondent CIR also failed to act on its written claim for refund. It claims that it was compelled to file the Petitions for Review before this Court because the two-year prescriptive period within which to recover the excise taxes erroneously paid by petitioner is set to expire on the following dates:

Amount involved in Php (₱)	Date of Payment Under Protest	Date of Expiration of 2-Year Prescriptive Period	Date of Filing Written Claim for Refund with the CIR	Date of Filing of Petition for Review
14,762,792.00	March 19, 2008	March 19, 2010	March 12, 2010	March 19, 2010
5,872,385.00	April 10, 2008	April 10, 2010	March 24, 2010	April 12, 2010
23,649,135.00	May 7, 2008	May 7, 2010	May 5, 2010	May 7, 2010
17,754,847.11	June 27, 2008	June 27, 2010	June 17, 2010	June 25, 2010

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2,966,116.00	September 18, 2008	September 18, 2010	June 17, 2010	June 25, 2010
3,557,423.00	October 10, 2008	October 10, 2010	June 17, 2010	June 25, 2010
5,935,311.00	October 31, 2008	October 31, 2010	June 17, 2010	June 25, 2010

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On June 29, 2010, petitioner filed a Motion to Consolidate to the First Division CTA Case Nos. 8039, 8069 and 8104, praying that CTA Case Nos. 8069 and 8104 be consolidated with CTA Case No. 8039, since they involved the same parties and issues. On July 27, 2010, a Resolution was issued by the former Third Division of the Court, granting the consolidation of the cases docketed as CTA Case Nos. 8039 and 8104. On July 30, 2010, petitioner filed a Motion to Consolidate to the First Division CTA Case Nos. 8039 and 8113. Thereafter, a Resolution was promulgated on August 3, 2010 by the Second Division of the Court, granting the consolidation of CTA Case Nos. 8069 and 8039.

xxx. Subsequently, the Court issued another Resolution on August 24, 2010, confirming the previously issued Resolution promulgated by the Third and Second Divisions, and consolidating CTA Case Nos. 8039, 8069, and 8104. xxx

The Court promulgated a Resolution on November 15, 2010 that granted the consolidation of CTA Case Nos. 8113, 8039, 8069, and 8104. xxx

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On April 4, 2014, petitioner filed its Manifestation and Request for Admission, stating that in the case entitled *Philippine Airlines, Inc. vs. Secretary of the Department of Finance and Secretary of the Department of Energy,* the Regional Trial Court (RTC) of Pasay City declared the DOE Certification dated December 20, 2002 as null and void and of no force and effect. Petitioner prayed that respondents CIR and COC admit the rendition and genuineness of the said Decision."

The Third Division, in its Decision, ruled that both the administrative and judicial claims of Air Philippines Corporation (APC) were filed on time. The Court further ruled that it has jurisdiction over the consolidated cases. An analysis of Section 13 of PD No. 1590 shows that to be exempt from all taxes, including compensating taxes, duties, charges, royalties, or fees due on all importations, the following conditions must be satisfied:

1. The basic corporate income tax or franchise tax, whichever is lower, must be paid, under the conditions set forth in Section 13 of PD No. 1590;

2. The articles, materials or supplies imported should be for its use in its transport and non-transport operations and other activities incidental thereto; and

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

The Third Division ruled that APC was able to satisfy the first and second requirements. As regards the issue of whether its imported Jet A-1 fuel is locally available in reasonable quantity, quality or price, for purposes of determining whether there is locally available supply of aviation fuel at a given time, one must consider not only the refinery production, but also the inventory and the product importation. APC's own witness stated that the local supply of Jet A-1 fuel is sufficient to satisfy the needs of the market. APC's own witness also debunked its argument that "locally available supply", by definition, excludes imported products.

Regarding the question of whether the imported Jet A-1 fuel of petitioner is locally available in reasonable price, the Third Division ruled in its Decision that although the total cost of purchasing Jet A-1 fuel locally would still be greater than the total cost of its importation, however, since APC was not able to prove that its imported Jet A-1 fuel is not locally available in reasonable quantity, its claim for refund in the total amount of ₱74,498,009.11 was denied.

However, the Third Division promulgated the assailed Amended Decision, thereby granting APC's petition for a

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refund. It cited therein its previous ruling in the case of *Air Philippines Corporation vs. Commissioner of Internal Revenue and Commissioner of Custom,*[7] *(the "APC 2016 Case")* that in determining local availability of Jet A-1 fuel, the term "locally available" cannot include imported Jet A-1 fuel. In *APC 2016 Case*, the Third Division cited the Supreme Court case of *Philippine Airlines vs. Commissioner of Internal Revenue,*[8] *(the "PAL Case")* where the Supreme Court ruled that domestic petroleum products excluded imported products. Applying the *PAL Case* to the present case, in the determination of whether there is locally available Jet A-1 fuel in reasonable quantity, quality, or price, the Third Division held that Jet A-1 fuel which was imported cannot be possibly included in the computation.

The Third Division further reviewed the testimonies of the witnesses and placed more probative value on the testimony of APC's expert witness, former Secretary of the Department of Energy (DOE), Mario V. Tiaoqui, who testified that "local supply" and "locally available supply" is equivalent to, and has always been deemed to be equivalent to local refinery production.

Also, albeit the *PAL Case*, in construing LOI 1483, which defines the term "domestic petroleum products" while the phrase to be construed in the instant case is "locally available" supply, the Third Division found the same synonymous as it applies to this case. Using Oxford and Miriam-Webster Dictionaries, the term "domestic" is more expansive and broader in scope in terms of geographical area rather than the term "local". Therefore, according to the Third Division, the judicial construction of the term "domestic", by necessary implication, must include and encompass the term "local" when construing the phrase "locally available". The greater includes the lesser.

Further, the Third Division held that it would suffice for APC to be able to prove even just one qualification out of the three -- not locally available in reasonable a) quantity, b) quality, or c) price. The Third Division explained that the word "or" signifies that a preference can be made among the

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[7] CTA Case Nos. 7767, 7791, 7807, 7816, 7837, 7839 & 7851, June 10, 2016.
[8] G.R. No. 198759, July 1, 2003, 700 SCRA 322.

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presented alternatives. As long as APC is able to prove the absence of one condition (either reasonable quantity, quality, or price), the exemption applies. For the Third Division, APC is not required to prove the absence of all three conditions. Having this in mind, the Third Division upheld its stand with respect to the unreasonableness of price of locally available Jet A-1 fuel through the document presented by APC denominated as Comparison of the Cost of Importation of Aviation Turbo Jet Fuel or Jet A-1 and the Cost of Domestic Purchases of Locally Available Turbo Jet Fuel or Jet A-1 for the Period February to October 2008 Using the Price Quotation Issued to the Company by Pilipinas Shell Petroleum Corporation,[9] as well as Independent Certified Public Accountant (ICPA)'s Financial Report[10] and Supplemental Report,[11] showing that had APC purchased locally the same volume of Jet A-1 fuel subject of this case during the said period, it would have cost it a substantial additional amount had it purchased from the local refiners.

Hence, the instant Petition for Review was filed.

The CIR in its petition, claims that the words "domestic petroleum products" cannot be equated with "locally available supply." As far as DOE is concerned, through the testimony of its Senior Science Research Specialist Ms. Glendalyn P. Dela Cruz, total local available supply of petroleum products in the country is the sum of three (3) components, namely: refinery production, product importation and inventory. The CIR gave emphasis that the DOE is the official government office authorized to determine whether the total fuel and energy supply is enough for total demand.

The CIR also took note that based on the table report[12] prepared by Ms. Dela Cruz, which contains lists of various statistics or data concerning local production and importation and the locally available supply of Jet A-1 fuel for the years 2001 to 2010, the supply for Jet A-1 fuel is always higher than the demand, thus, the local available supply is more than adequate to meet the requirement of the local market.

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[9] Exhibit C[6]
[10] Exhibit O[4]
[11] Exhibit B[6]
[12] Exhibit ZZZZ.

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Also, CIR insists that reasonableness of the price should not be equated with cheaper prices for the importation will most likely be cheaper because it is the base international price. On the other hand, the local suppliers will also add other factors to their prices such as the taxes, duties, transport costs and their profit margin.

On the other hand, it is the contention of APC that locally available supply excludes imported products. In its Comment,[13] APC raises that the Petition for Review is a mere rehash of arguments already ruled upon by the Court in Division. It reiterated the Third Division's cited Supreme Court case of *PAL* where it ruled that domestic petroleum products excluded imported products. APC reiterated the Regional Trial Court (RTC) Decision entitled *Philippine Airlines vs. Secretary of Department of Finance and Secretary of Department of Energy (the "RTC Decsision"),*[14] nullifying the 2002 DOE Certification where the DOE stated therein that locally available Jet A-1 includes imported products. In the said RTC Decision, it ruled that the DOE had no authority to issue certifications as to availability of Jet A-1 fuel as the DOF already acknowledged through several indorsement letters that ATO certifications, which certifies that there is no reasonable locally available Jet A-1 fuel in terms of quantity, quality or price to meet the demands of PAL, are actually enough for PAL's tax exemption purposes. The said RTC Decision further explained that "locally available" excludes what was sourced from outside the Philippines.

APC also claims that the CIR and COC's interpretation would also mean that APC's own importation would actually contribute to a condition that will prevent it from claiming the tax exemption privilege under P.D. No. 1590.

APC reiterates the credibility of former DOE Secretary Tiaoqui. APC adds that nowhere in Republic Act 7638, which creates the DOE, does it state that it has the exclusive powers or duties with respect to navigational facilities, such

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[13] *En Banc* Docket, pp. 65-83, filed on January 18, 2017.
[14] Branch 114, Pasay City, February 27, 2014, Civil Case No. R-Psy-10-03889-CV, pending appeal with the CTA.

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as aviation fuel. According to APC, the Civil Aviation Authority of the Philippines (CAAP)'s charter[15] actually confers authority to CAPP specifically over "technical and operational phase of civil aviation matters," which categorically includes "navigational facilities" such as aircraft fuel.

Lastly, APC contends that the price of locally available fuel was completely unreasonable compared to the price of imported fuel. APC insists that it is entitled to choose the option with the least burden or least tax and expense, pursuant to its charter. An additional amount of ₱56.8 Million or ₱69.73 Million to purchase the local aviation fuel is certainly, in any sense of the word, unreasonable, not viable and unsustainable.

The COC in its Memorandum[16] introduces DOE Circular No. 98-03-004, issued on March 11, 1998, also known as the Implementing Rules and Regulations of Republic Act 8479, or the "Downstream Oil Industry Deregulation Act of 1998," which provides that the DOE is the sole government agency which has the power or authority to monitor the quantity, quality and the price of oil and petroleum products in the country. On the other hand, Republic Act No. 776 and CAAP's charter allegedly show that ATO, now CAAP, is not vested with the power and duty to issue certification as to availability of aviation fuel, such as Jet A-1 fuel.

The COC also highlights his witness, former Secretary of the DOE Zenaida Y. Monsada, who contradicted former DOE Secretary Tiaoqui and testified that total local available supply includes not just refinery production, but also the inventory and the product importation, as well as ADG I Saturnino B. Dela Cruz of the Flight Standards Inspectorate Service of CAAP, whose functions and duties include assisting the Director General of the CAAP in the management and carrying out of the responsibilities of the Authority for certification and inspection of aircraft, airmen and air operators, and confirms that CAAP has no authority to issue any certification as to local availability of Jet A-1 fuel in reasonable quantity, quality or price as it is not part

[15] Republic Act No. 9497, An Act Creating the Civil Aviation Authority of the Philippines, Authorizing the Appropriation of Funds Therefor, and for Other Purposes.
[16] *En Banc Docket,* pp. 99-167.

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of CAAP's mandate, and that it has no data or information on the total supply, quality or prices of aviation fuel, oil or gas in the country so as to support the ATO certifications.[17]

As to reasonableness of local Jet A-1 fuel's price, COC insists that the ICPA unnecessarily added taxes and duties to the price of local Jet A-1 fuel that naturally made its price higher, thus, imported fuel, which is tax and duty-free, cannot be considered cheaper than locally-refined fuel that is priced with all taxes and duties. It is also the observation of the COC that based on the cost comparison made by the ICPA and reflected in her reports, the cost price per liter of Jet A-1 fuel locally available from Pilipinas Shell Petroleum Corporation (PSPC) and Petron for the months of April and May 2008, respectively, is lower than the cost of imported Jet A-1 fuel.[18]

Lastly, the COC alleges that the petitions for review filed by APC before this Court's Division were prematurely filed insofar as they seek to declare as void the DOE Certification and BIR Ruling No. 001-2003 for failure to exhaust administrative remedies.

On the other hand, APC, in its Memorandum,[19] reiterates that the ATO certifications were upheld by the DOF and were deemed sufficient for purposes of its tax exemption. APC asserts that the 2002 DOE Certification stating that aviation gas, fuel and oil for use in domestic operation of domestic airline companies are locally available in reasonable quantity, quality, and price, which was subsequently nullified in the RTC Decision could not be reasonably relied upon for importation in year 2008 as it would be based on data available for up to year 2002 only. APC claims that the doctrine of exhaustion of administrative remedies is not available in this case, and that the CIR and the COC in fact lost its right to appeal when it filed a motion for reconsideration to the Amended Decision instead of a petition for review before the Court *En Banc.*

We rule.

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[17] Judicial Affidavit, Exhibit "1."
[18] Exhibits "RRRR," "WWWW-3," and "SSSS-1."
[19] *En Banc* Docket, pp. 175-225, filed on April 25, 2017.

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As to the CIR's arguments in his Petition for Review, the Court *En Banc* finds no new and compelling averment. The arguments raised therein are mere rehash of previously discredited arguments and were sufficiently acted upon in the assailed Amended Decision and Resolution. In any event, the CIR's arguments shall be discussed at length to bolster the ruling of the Court in Division.

As to the alleged wrong remedy filed by the CIR and COC, the Supreme Court,[20] as well as this Court,[21] have already ruled in several cases[22] that an amended decision is an entirely new decision, modifying or reversing the previous decision, and the review of cases in the Court *En Banc* must be preceded first by a motion for reconsideration or a new trial, to wit:

> "RULE 8
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> PROCEDURE IN CIVIL CASES
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> SECTION 1. Review of cases in the *Court en banc*. – In cases falling under the exclusive appellate jurisdiction of the Court *en banc*, the petition for review of a decision or resolution of the Court in Division must be preceded by the filing of a timely motion for reconsideration or new trial with the Division."

Since the Amended Decision granted new relief in favor of APC, the filing of the Motion for Reconsideration upon receipt of the Amended Decision by the CIR and COC is proper.

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[20] *Asiatrust Development Bank, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 201530, April 19, 2017; *Commissioner of Internal Revenue vs. Asiatrust Development Bank, Inc.,* G.R. Nos. 201680-81, April 19, 2017.

[21] Rule 14, Revised Rules of Court of Tax Appeals (A.M. No. 05-11-07-CTA):

> SEC. 3. Amended decision. – Any action modifying or reversing a decision of the Court *en banc* or in Division shall be denominated as Amended Decision.

[22] *Commissioner of Internal Revenue vs. Coral Bay Nickel Corporation,* CTA EB No. 1543 and 1546, August 16, 2017; *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation,* CTA EB Nos. 1410 and 1414, July 11, 2017.

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APC's legislative franchise, Republic Act No. 8339, as amended by Republic Act No. 9215, places APC on equal footing with PAL. Section 15 of Republic Act 8339 provides that APC is entitled to the same tax-exemption privileges currently enjoyed by PAL under P.D. 1590, provided that APC satisfies the 3 conditions laid down therein.

Based on Section 13 of PD No. 1590, for PAL to be exempt from all taxes, including compensating taxes, duties, charges, royalties, or fees due on all importations, the following requisites must be satisfied:

1. The basic corporate income tax or franchise tax, whichever is lower, must be paid, under the conditions provided in Section 13 of PD No. 1590;

2. The articles, materials or supplies imported should be for its use in its transport and non-transport operations and other activities incidental thereto; and

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

The sole issue raised before this Court is with respect to compliance with the third requisite. This issue is not new. The case of *Air Philippines Corporation vs. Commissioner of Internal Revenue and Commissioner of Customs,*[23] also with respect to APC's claim for refund for payment of excise tax on importation of Jet A-1 fuel, rules that APC's importations are supported by Certifications issued by the Air Transportation Office (ATO), stating to the effect that the imported Jet A-1 aviation fuel were not locally available in reasonable quantity, quality and price and is necessary/incidental for the operation of APC, and these ATO Certifications are given weight, pursuant to Section 44, Rule 130 of the Rules of Court, which provides:

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[23] *Air Philippines Corporation vs. Commissioner of Internal Revenue and Commissioner of Customs,* CTA Case Nos. 7630, 7642, 7643, 7673, 7712 and 7734, December 1, 2015.

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"SEC. 44. Entries in official records.- Entries in official records made in the performance of his duty by a public officer of the Philippines, or by a person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts therein stated."

The ATO Certifications were issued by the Air Transportation Office or ATO, prior to its replacement by the Civil Aviation Authority of the Philippines under Republic Act (RA) No. 9497, and was not precluded from issuing the subject Certifications with respect to the availability of supply of aviation fuel.[24] A perusal of the powers of the ATO (now CAAP) in relation with its authority to issue the ATO Certifications, would show that such is in line with its general powers under Sections 32 and 35 of its charter, RA No. 776, to wit:

"SECTION 32. Powers and duties of the Administrator. -Subject to the general control and supervision of the Department Head, the Administrator shall have among others, the following powers and duties:

(1) To carry out the purposes and policies established in this Act; to enforce the provisions of, the rules and regulations issued in pursuant to, said Act, and he shall primarily be vested with authority to take charge of the technical and operational phase of civil aviation matters.

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(21) <u>To cooperate, assist and coordinate with any research and technical studies on</u> design, materials, workmanship, construction, performance, maintenance, and operation of aircraft, aircraft engines, propellers, appliances and <u>air navigation facilities including aircraft fuel and oil;</u> Provided, That nothing in this Act shall be construed to authorize the duplication of the laboratory research, activities or

[24] *Ibid.,* Resolution to Motion for Reconsideration, May 3, 2016.

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technical studies of any existing governmental agency." (Underlining supplied.)

With the foregoing functions mandated by law before the abolition of the ATO, the latter had the means of knowing the facts stated in the subject ATO Certifications. Thus, there can be no merit on petitioners' contention to the effect that it is only the DOE which is in a best position to determine the local availability in reasonable quantity, quality and price of the subject Jet A-1 Aviation fuel.

The APC 2016 Case regarding the very same issues and same parties ruled that imported products are excluded from the determination of locally available supply of Jet A-1 fuel, citing therein the Supreme Court *PAL Case,* ruling that "domestic" means locally manufactured or produced. No less than the Supreme Court equated "domestic" with "local," therefore, the "locally available supply" of Jet A-1 fuel could never refer to products which are imported.

This Court cannot simply brush aside the testimony of no other than the former Secretary of DOE, Mario V. Tiaoqui, who testified that "local supply" and "locally available supply" is equivalent to, and has always been deemed to be equivalent to local refinery production only.[25] The question here is not as to the practice of CAAP in including the imported Jet A-1 fuel in its list of locally available supply, but as to the proper inclusion of such in the said category, and based on testimony of an expert witness and interpretation of the law, imported products should never be included in the term "locally available" supply. As correctly observed in the alleged Decision, if locally available Jet A -1 fuel includes both local production and imports, there will never be an instance when the Jet A-1 fuel available is insufficient to meet the demands of the domestic market.[26]

The Court notes APC's manifestation filed on April 4, 2014 stating that the 2002 DOE Certification invoked herein by petitioners, and on which the 2003 BIR Ruling is solely based, was already declared null and void by the *RTC Decision.*

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[25] Transcript of Stenographic Notes dated May 22, 2012.
[26] *Supra,* note 4, citing *Air Philippines Corporation, Supra,* note 23.

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Although as a general rule, courts are not authorized to take judicial notice of the foregoing action of the RTC of Pasay City, in the case of *"Occidental Land Transportation Company, Inc. vs. Court of Appeals and Heirs of Trencio Almedilla, et al."*,[27] the Supreme Court held that the general rule admits of exceptions, among which is, in the absence of objection, and as a matter of convenience to all parties.[28]

In the instant case, petitioners herein have not refuted nor objected to said contention.[29] Thus, considering that the enforceability of said DOE Certification is still subject of appellate review, petitioners' reliance thereon bears little probative value in this case.[30]

Nevertheless, the said DOE Certification obviously refers to a statement made by the department based on a 2002 report as to inclusion of imported Jet A-1 fuel to the locally available supply. Thus, this Certification is highly irrelevant in the instant subject matter, where the subject Jet A-1 fuel refers to the supply for year 2008.

Even assuming *arguendo* that there is locally available supply of Jet A-1 fuel as to quantity, the government would allow importation of Jet A-1 fuel if the local refiners would be unable to meet the abovementioned requirements. In this case, the said alleged available supply failed as to the reasonable price requirement. APC was able to prove that the price of locally available supply in the Philippines is unreasonable. Using the conjunction "or" in "quantity, quality *or* price," the law imposes an alternative qualification for exemption. APC is not required to prove the absence of all three conditions.[31] The lawmakers could simply use the conjunction "and" if they mean otherwise. As shown in the Comparison of the Cost of Importation of Aviation Turbo Jet Fuel or Jet A-1 and the Cost of Domestic Purchases of Locally Available Turbo Jet Fuel or Jet A-1 for the Period February to October 2008 Using the Price Quotation Issued to the Company by Pilipinas Shell Petroleum Corporation,

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[27] G.R. No. 96721, March 19, 1993.
[28] *Supra,* note 23.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

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the ICPA's Financial and Supplemental Reports, it would have cost APC a substantial additional amount had it purchased from the local refiners. As correctly observed by the Third Division:

> To require petitioner to prove the absence of all three conditions - locally available supply in reasonable quantity, quality and price -- would result in an absurd situation wherein the airline would be constrained to purchase fuel locally while sacrificing one or another standard it holds its suppliers up to. For example, if petitioner was unable to establish that there is insufficient quantity of locally available supply, then it may be constrained to purchase aviation fuel locally despite the fact that it may not be at par with petitioner's standards when it comes to quality and may even be more expensive than importing.
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> It is evident from the above-quoted provisions that the law exacts from common carriers extraordinary diligence in its affairs, and the utmost diligence of very cautious persons when it comes to the safety of its passengers. xxx This would include an adequate source of materials of good quality, inadequate quantities, and at the lowest possible price, especially since that price is passed on to the public, its ultimate consumers." (Underlining supplied.)

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the Amended Decision dated July 1, 2016 and the Resolution dated October 10, 2016 are hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
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 among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice