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. 1347
(CTA Case No. 8340)

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

Promulgated:

AUG 30 2017 4:10 p.m.

x- x

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 of the Court of Tax Appeals, as amended, seeking to

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[1] En Banc Rollo, pp. 49-70.

[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) reverse and set aside the Decision[3] (assailed Decision) dated February 17, 2015, and Resolution[4] (assailed Resolution) dated July 22, 2015, both rendered by the CTA Third Division in CTA Case No. 8340.

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

Decision dated February 17, 2015:

> "**WHEREFORE**, the Petition for Review filed by Philippine Airlines, Inc. on September 23, 2011 is hereby **DENIED**, for lack of merit.
>
> **SO ORDERED.**"

Resolution dated July 22, 2017:

> "**WHEREFORE**, finding no valid justification to compel a modification or reversal of the assailed Decision, petitioner Philippines Airlines, Inc.'s Motion for Partial Reconsideration posted on March 10, 2015, 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]

Co-respondent Commissioner of Customs (respondent COC) is the duly appointed Commissioner of the Bureau of Customs (BOC) who

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[3] Annex "A" to the Motion for Extension of Time to File Petition for Review, Ibid., pp. 6-40.
[4] Annex "B" to the Motion for Extension of Time to File Petition for Review, Id., pp. 41-47.
[5] Par. 2, The Parties, Petition for Review, Id., p. 50.
[6] Par. 3, The Parties, Petition for Review, Id.

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 (P.D.) No. 1590, otherwise known as 'An Act Granting a New Franchise to Philippine Airlines, Inc. to Establish, Operate, and Maintain Air-Transport Services in the Philippines and Between the Philippines and Other Countries'. Section 13 thereof specifically provides:
>
> > '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,

[7] Par. 4, The Parties, Petition for Review, Id.
[8] February 17, 2015 Decision, Id., pp. 73-83.

license, and other fees and charges of any kind, nature, or description, imposed, levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future, including but not limited to the following:

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 transport operations and other activities incidental thereto and are not locally available in reasonable quantity, quality, or price.

On January 1, 2005, Republic Act (R.A.) No. 9334, also 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 NIRC of 1997, as Amended' took effect. Section 6 thereof provides:

'SECTION 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 customs house, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption.

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

The provision of any special or general law to the contrary notwithstanding, the importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the Philippines, even if destined for tax and duty-free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes due thereon. This shall apply to cigars and cigarettes, distilled spirits, fermented liquors and wines brought directly into the duly chartered or legislated freeports of the Subic Special Economic and Freeport Zone, created under Republic Act No. 7227; the Cagayan Special Economic Zone and Freeport, created under Republic Act No. 7922; and the Zamboanga City Special Economic Zone, created under Republic Act No. 7903, and such other freeports as may hereafter be established or created by law: *Provided, further*, That importations of cigars and cigarettes, distilled spirits,

> fermented liquors and wines made directly by a government-owned and operated duty-free shop, like the Duty-Free Philippines (DFP), shall be exempted from all applicable duties only: *Provided, still further,* That such articles directly imported by a government-owned and operated 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 x x x.'

On February 3, 2005, then CIR Guillermo Parayno wrote then COC George M. Jereos calling his attention on BOC's failure to collect excise taxes on all importations for Duty Free Philippines and the Freeport zones such as the Subic Bay Freeport Zone, citing Section 6 of R.A. No. 9334. For this reason, he requested COC Jereos to immediately collect excise taxes due on the imported alcohol and tobacco products brought to the Duty Free Philippines and the Freeport zones.

On February 4, 2005, COC Jereos issued a Memorandum to BOC officers and personnel to 'effect collection of excise tax due on imported alcohol and tobacco products, including those for Duty Free Philippines and Freeport Zones'.

On March 1, 2005, then Collector of Customs (COC) Alberto D. Lina issued Customs Memorandum Order (CMO) No. 13-2005, providing for the '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 Pursuant to R.A. No. 9334 and BIR Revenue Regulations No. 12-2004'. Paragraph IV of CMO 13-2005, subtitled 'Operational Provisions' required the accomplishment of consumption entries, vice the previously required warehouse 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 filled at the Port of Discharge following the procedures for cargo clearance under CAO Nos. 2-95 and 5-2001, CMO Nos. 3-2000 and 3-2001 and other existing customs rules and regulations.'

On April 4, 2005, petitioner formally assailed the Memorandum and the COC's refusal to release its imported items unless the taxes and duties were first paid. In addition, petitioner requested to release its imported two (2) pallets of cigarettes for its commissary supplies.

In response to petitioner's reaction, the BOC's Legal Service issued a Memorandum dated April 25, 2005 addressed to COC Alberto D. Lina indicating that petitioner was liable to pay excise taxes on all its importation of the subject articles, even under the Section 131 of the NIRC of 1977, subject however to duty drawback and/or tax refund, if applicable.

On May 16, 2005, petitioner formally informed respondent COC that it would pay under protest the assessed taxes, duties and fees for its shipment of Australian wine.

For the period August 2007 to December 2008, petitioner's importations of wine, liquor and cigarettes for its international flight consumptions arrived at the Ninoy Aquino International Airport (NAIA).

On April 23, 2009, and May 20, 2009, Acting Chief Gilda L. Cinco of Warehousing Assessment Unit (WAU) of the BOC, submitted to Chief Collector Silveria Salazar of the Collection Division, NAIA Customhouse, documents covering petitioner's liabilities for customs duties, taxes, and charges on its importations of liquors and/or cigarettes for catering and commissary supplies in the aggregate amount of P2,630,868.83 and P2,922,755.57, respectively, pursuant to CMO No. 13-2005 and Revenue Regulations No. 3-2006.

On September 23, 2009, petitioner paid under protest the total excise taxes of P2,630,868.83 and P2,922,755.57, under BOC Receipt Nos. 167361092 and 16731083, respectively. Subsequently, petitioner filed separate written claim for refund with respondent COC on September 30, 2009 and with respondent CIR, on January 28, 2010.

Due to respondent CIR's alleged inaction on its administrative claims for refund, petitioner filed the instant Petition for Review on September 23, 2011."

On February 17, 2015, the CTA Third Division denied for lack of merit petitioner's Petition for Review. Thus, petitioner filed a Motion for Partial Reconsideration [of the Decision dated 17 February 2015][9] on March 10, 2015, which was, likewise, denied for lack of merit by the CTA Third Division in its Resolution[10] dated July 22, 2015.

Within the extension period granted[11], petitioner filed its Petition for Review[12] to the CTA En Banc on September 3, 2015.

The Court En Banc ordered respondents to file their comment, not a motion to dismiss, within ten days from receipt of the Resolution[13] dated December 9, 2015. Respondent CIR complied and submitted her Comment (Re: Petition for Review)[14] thereto on December 22, 2015, while respondent COC filed a Motion for Extension of Time to File Comment[15] on December 29, 2015, which was granted in a Minute Resolution[16] promulgated on January 8, 2016.

Thereafter, within the extension of time requested by respondent COC, he filed his Comment[17] on February 1, 2016.

[9] Division Docket (Vol. III), pp. 1130-1141.
[10] See Footnote No. 4.
[11] Which is until September 3, 2015, per Minute Resolution dated August 24, 2015, En Banc Rollo, p. 48.
[12] See Footnote No. 1.
[13] En Banc Rollo, pp. 367-368.
[14] Ibid., pp. 369-375.
[15] Id., pp. 376-380.
[16] Id., p. 382.
[17] Id., pp. 383-403.

In a Resolution[18] dated March 22, 2016, the Court En Banc gave due course to the Petition and required the parties to submit their Memoranda within thirty (30) days from receipt thereof.

On April 4, 2016, respondent CIR filed a Manifestation[19] stating that he is adopting the arguments raised in his Comment to the Petition for Review as his Memorandum, which was noted by the Court En Banc in its Minute Resolution[20] dated April 6, 2016, while petitioner filed its Memorandum[21] on April 29, 2016.

On May 3, 2016, respondent COC filed a Manifestation (in Lieu of Memorandum)[22], praying that he be allowed to adopt his Comment dated February 1, 2016 as his memorandum. The same was noted by the Court En Banc in its Minute Resolution[23] dated May 11, 2016.

The above-captioned case was submitted for decision in the Resolution[24] promulgated on June 1, 2016.

Hence, this Decision.

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 CIGARRETES IN THE AMOUNT OF PHP5,553,624.40, 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 it has presented enough evidence to prove that the imported articles were not locally available in reasonable quantity, quality or price; that the uncontroverted testimony of its witness, Ms. Cheryl V. Capinpin[25] shows that petitioner has

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[18] Id., pp. 406-407.
[19] Id., pp. 408-411.
[20] Id., p. 412.
[21] Id., pp. 413-437.
[22] Id., pp. 433-437.
[23] Id., p. 435.
[24] Id., pp. 441-442.
[25] Exhibit "DDD".

sufficiently complied with the conditions proving that its imported commissary and catering supplies were not locally available in reasonable quantity, quality or price; that said witness identified several pricelists issued by the following: Philippine Wine Merchants (for the years 2007[26], 2008[27] and 2009[28]), Future Trade International[29] and canvassed list of 2009 retail prices of wines, liquor and cigarettes taken from the racks of Duty Free Philippines[30]; that no evidence was presented by respondents to disprove the facts established by petitioner's evidence; and, that respondent CIR herself, in her Memorandum dated December 9, 2013, admitted that the importation of the catering and commissary supplies costs is cheaper than purchasing them locally.

On the other hand, respondent CIR argues that it is highly self-serving for petitioner's very own employee, Ms. Cheryl V. Capinpin, to certify that the imported products were not locally available in reasonable quantity, quality and price; that the latter's study on prices was not comprehensive in nature; and, that the information gathered from Philippine Wine Merchants, Future Trade International and Duty Free Philippines were seriously deficient to justify the conclusion that the said imported items were not locally available in reasonable quantity, quality and price.

For his part, respondent COC claims that petitioner's witness, Ms. Capinpin, did not exert much effort in canvassing local prices; that petitioner did not present proof that it indeed made such request for pricelists to other local wine merchants and to Duty Free Philippines; that there was no showing that the wines and cigarettes being compared were actually identical products of the same quality or brands; that Ms. Capinpin's conversion of pricelists of wines, liquors and cigarettes provided by the Philippine Wine Merchants, Future Trade International and Duty Free into US dollars is of doubtful validity; that there is no truth that respondent CIR admitted in her Memorandum that the importation of catering and commissary supplies costs is cheaper than purchasing them locally; that petitioner cannot rely on the following rulings of the Court: CTA EB Case No. 942 (CTA Case No. 7868), December 9, 2013; CTA Case Nos. 7677, 7685 and 7746, August 24, 2012, and, CTA Case No. 7843, August 3, 2012 on the ground that the same pertains to importations of commissary and catering supplies for the year 2005 and 2006, respectively.

[26] Exhibit "DDD-3".
[27] Exhibit "DDD-4".
[28] Exhibit "DDD-5".
[29] Exhibit "DDD-7".
[30] Exhibit "DDD-6".

We partially grant petitioner's claim for refund.

In the case at bench, considering that there is no question that the tax privilege of petitioner provided under Section 13 of Presidential Decree No. 1590 (P.D. No. 1590) has not been revoked by Section 131 of the 1997 National Internal Revenue Code, as amended, by Section 6 of Republic Act No. 9334[31], the Court En Banc will therefore limit its discussion on petitioner's alleged compliance with the conditions stated under Section 13 (b) (2) of PD No. 1590 in order for its imported supplies to be considered exempt from excise tax, to wit:

> "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, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future, including but not limited to the following:**
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> xxx xxx xxx
>
> (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

[31] Republic of the Philippines rep. by the Commissioner of Customs vs. Philippine Airlines, Inc. (PAL), G.R. Nos. 209353-54 and 211733-34, July 6, 2015.

> 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)

Based thereon, it is clear that, in order for petitioner to be exempt from paying taxes, including compensating taxes, duties, charges, royalties, or fees due on all importations of commissary and catering supplies, it must establish 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.

Records show that the CTA Third Division had already fully and exhaustively resolved the issue on petitioner's compliance with the aforementioned first and second requisites. We quote, hereunder, the pertinent portion of the assailed Decision to which We fully agree, to wit:

> "In support of the first requisite, petitioner presented in evidence its Annual Income Tax Returns for the fiscal years ending March 31, 2008 and March 31, 2009. Also, petitioner proved that it is a VAT-registered entity and that it accounted and paid for the VAT on its sales/receipts as evidenced by its BIR Certificates of Registration, Payment Form No. 0605, and Quarterly VAT Returns for fiscal years 2008 and 2009.
>
> Petitioner as well complied with the second requisite. Under the column 'Description of Articles' of the 'Informal Import Declaration and Entry' (IIDE) documents submitted by petitioner, the imported articles were described as 'Inflight Materials'. Similarly, in the ATRIGS issued by the respondent CIR addressed to respondent COC, it was indicated that 'the shipment to be released at

> the Port of Manila consisting of the above described articles, will be used exclusively for international inflight consumption".

However, with regard to petitioner's compliance with the third requisite, the Court in Division ruled that the information gathered from the price lists of Future Trade International and Philippine Wine Merchants, in addition to the canvassed list of 2009 retail prices of imported wines and cigarettes taken from the rack of Duty Free Philippines by Mr. Gilbert Galledo, were not sufficient to justify the conclusion that the subject imported articles were not available in reasonable quantity, quality or price.

The Court En Banc cannot subscribe to the foregoing ruling.

In a catena of cases involving Philippine Airlines, Inc.[32], although involving different taxable periods, 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, coupled 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.

The Supreme court even affirmed the factual findings of the Court of Tax Appeals in *Republic of the Philippines, represented by the Commissioner of Customs vs. Philippine Airlines, Inc.,*[33] where We ruled that the "tabulation of comparison of the cost of importing the subject articles and the cost of purchasing them locally x x x 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.

Similarly, in the more recent case of *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*[34], the Second Division of the Supreme Court acknowledged the factual

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[32] 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.

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

[34] G.R. Nos. 215705-07, February 22, 2017.

determinations of this Court in the consolidated cases of *Philippine Airlines, Inc. vs. Commissioner of Internal Revenue and Commissioner of Customs, Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc., and Commissioner of Customs vs. Philippine Airlines Inc.*[35], *docketed as* CTA EB Nos. 1029, 1031 and 1032, that PAL made a *prima facie* case that the cost of importing the alcohol products were 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.

Therefore, it is of no moment even if petitioner will compare the prices of its imported wines and liquor with only one supplier.

Applying the foregoing, the Court En Banc is convinced that petitioner has sufficiently established that the alcohol products it imported were not available in reasonable quantity, quality or price in the local market through the following: testimony of Ms. Cheryl V. Capinpin, petitioner's Manager-In-flight Materials Purchasing Division, Catering and In-flight Materials Purchasing Sub-Department[36]; Table of Comparison Between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies[37]; sales invoices issued by foreign suppliers[38]; Philippine Wine Merchants Price Lists for 2007[39], 2008[40] and 2009[41]; Future Trade International Price list dated April 8, 2009[42]; Booking Rates-August 2007[43] ; and, Monthly Philippine Dealing System (PDS) rates[44].

The general rule is that claimants of tax refunds bear the burden of proving the factual basis of their claims. Taxes are the lifeblood of the nation. Therefore, statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government.[45] And,

[35] CTA EB Nos. 1029, 1031 and 1032, April 30, 2014.
[36] Exhibit "DDD'.
[37] Exhibit "DDD-2".
[38] Exhibits "I-2", "J-2", "K-2", "L-2", "M-2", "N-2", "O-2", "P-2", "Q-2", "FF-2", "GG-2", "HH-2", "II-2", "JJ-2", "KK-2", "LL-2", and "MM-2".
[39] Exhibit "DDD-3".
[40] Exhibit "DDD-4".
[41] Exhibit "DDD-5".
[42] Exhibit "DDD-7".
[43] Exhibit "DDD-8".
[44] Exhibit "DDDD-9".
[45] Panasonic Communication Imaging Corporation of the Philippines vs. Commissioner of Internal Revenue, G.R. No. 178090, February 8, 2010.

when a prima facie case is established, the burden of evidence or the burden of going forward with the evidence shifts to the defensive party.[46]

However, the afore-mentioned evidence presented by petitioner remained unrebutted as both respondents CIR and COC failed to present any controverting evidence to refute petitioner's claim.

As for the cigarettes, petitioner fell short in proving the non-availability of the imported cigarettes at a reasonable quantity, quality or prices in the local market. Instead of presenting a certification from local dealers of cigarettes that they cannot supply petitioner enough cigarettes for its catering and in-flight use, petitioner merely opted to present the testimony of Ms. Cheryl V. Capinpin and Affidavit of Mr. Gilbert Galledo, petitioner's Senior Planning and Purchasing Specialist of Catering and In-Flight Materials Purchasing Sub-Department Corporate Logistic and Service Department. Unfortunately, the Court En Banc cannot rely on the same as they are unverifiable and self-serving. Thus, barren of evidentiary weight. Consequently, the claimed excise tax on cigarettes should be denied by the Court.

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.

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED.** The Court in Division's Decision and Resolution promulgated on February 17, 2015 and July 22, 2015, 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

[46] Caraig, Benjamin R., Revised Rules of Evidence 3rd ed., Caraig Publishing House, 2006, p. 306.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(With Concurring and Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(With Separate 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.,
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CTA EB No. 1347
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Present:
Del Rosario, *PJ,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, and
Manahan, *JJ.*

COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS,
Respondents.

Promulgated:

AUG 30 2017 4:10 p.m.

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CONCURRING AND DISSENTING OPINION

CASTAÑEDA, JR., *J.*:

I concur with the majority opinion with respect to the denial of the refund of excise tax on imported cigarettes because Philippine Airlines, Inc. (PAL) fell short in proving the non-availability of the imported cigarettes at a reasonable quantity, quality, or price in the local market

However, I dissent with respect to the finding that petitioner has sufficiently established that the alcohol products it imported were not available in reasonable quantity, quality or price in the local market.

PAL's exemption is subject to certain conditions as correctly enumerated by the CTA Third Division, as follows:

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

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

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

It is noteworthy to mention that the 1st and 2nd requisites are no longer disputed in the instant case. The third requisite, which is the core issue in this case, however, calls for the re-evaluation of the factual findings of the CTA Third Division.

PAL failed to prove that the imported liquors, wines, or cigarettes are not locally available in reasonable quantity, quality, or price.

With respect to the third requisite, in order to prove that the imported liquors, wines, and cigarettes are not locally available in reasonable quantity, quality, or price, PAL presented several documents and also its Manager for In-flight Materials Purchasing Division, Catering and In-flight Materials Purchasing Sub-Department to testify on the matter. Pertinent portions of the assailed Decision are quoted below, as follows:

> "The third condition requires that the imported liquors, wines and cigarettes must not be locally available in reasonable quantity, quality, or price. To support its claim, petitioner presented several documents, which includes, the Table of Comparison between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies, the Philippine Wine Merchants (PWM) Price List for the years 2007, 2008 and 2009, the Affidavit of Gilbert M. Galedo, the Future Trade International Price List dated April 8, 2009, the Letter of Ms. Marianne C. Raymundo, petitioner's Vice President for Financial Services with the subject 'Booking Rates-August 2007', and the Monthly Philippine Dealing System (PDS) rates for the years 2000 to 2010.

Petitioner also presented its Manager for In-flight Materials Purchasing Division, Catering and In-flight Materials Purchasing Sub-Department Cheryl Capinpin, who testified on the matter xxx xxx xxx."

After a careful review of PAL's testimonial and documentary evidence, I agree with the findings of the CTA Third Division that "petitioner failed to make a comprehensive study on the availability, quantity, and price of the subject imported wines or alcoholic drinks and cigarettes in the local market as to justify importation of the said items."[1] This is apparent from the pertinent portions of the testimony of petitioner's Manager for In-flight Materials Purchasing Division, Catering and In-flight Materials Purchasing Sub-Department Cheryl Capinpin, as follows:

20. A. My source is the 2007, 2008, and 2009 Price Lists of Philippine Wine Merchants given to us by Philippine Wine Merchants, a local wine dealer.

21. Q. Showing to you these documents labeled 'Philippine Wine Merchants 2007 Price List', 'Philippine Wine Merchants 2008 Price List', and 'Philippine Wine Merchants 2009 Price List', with a signature appearing at the bottom of the page of each Price List, on top of the name Ronald Lim Joseph Philippine Wine Merchants, attached to your Judicial Affidavit and attached as Annexes 'B', 'C', and 'D', respectively, how are they related to the 2007, 2008, and 2009 Price Lists of Philippine Wine Merchants which you mentioned as your source of the local prices of Philippine Wine Merchants for the years 2007, 2008, and 2009 appearing in your table of comparison?

21. A. Those are the price lists for the years 2007, 2008, and 2009 of Philippine Wine Merchants which I mentioned.

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

22. A. **Except for the year 2009, we have no other sources of said local prices because the other local wine merchants or dealers, including Duty Free Philippines, refused to give us their list of prices despite our persistent requests. For the**

[1] *Rollo*, p. 104.

year 2009, due to the refusal of Duty Free Philippines to give us their price list, we sent our Senior Planning & Purchasing Specialist of In-Flight Materials Purchasing Division, Corporate Logistics & Service Department, Mr. Gilbert M. Galedo, to at least look at the shelf prices of various wines, liquors, and cigarettes similar to our importation.

23. Q. And what were the findings of Mr. Galedo?

23. A. Mr. Galedo found out that the prices of Duty Free Philippines of the products similar to our importations are very much higher than our importation cost.

xxx xxx xxx

25. Q. Aside from Duty Free Philippines, do you have other sources of local prices of the products involved?

25. A. As shown in Annex 'A', for the year 2009 we have another source and that is the Future Trade International Retail Price List as of Feb. 2009.

xxx xxx xxx

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

27. A. **Except for the costs of the cigarettes sold by Duty Free Philippines for the year 2009 appearing in the list attached to the affidavit of Mr. Galedo, I have no local costs of the imported cigarettes involved because as I have stated earlier there are no local suppliers of the said cigarettes who could regularly supply PAL with the quantity and brand of the cigarettes it needs for its commissary supplies for sale in its international flights. Furthermore, if ever there are local suppliers of the said cigarettes, their selling price would definitely be higher than the importation cost of PAL."** *(Emphasis supplied)*

Bare allegations do not constitute substantial evidence and, thus, have no probative value.[2] In this case, no proof was presented to show the number

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[2] *ING Bank N.V. v. Commissioner of Internal Revenue*, G.R. No. 167679, April 20, 2016.

of local wine/liquor suppliers as well as cigarette suppliers in the local market, the scope of the survey, and how many refused to give their price lists. Without these data, this Court cannot rule that the price list of one supplier is enough representation of the local market to show that the imported wines/liquor and cigarettes were not locally available in reasonable quantity, quality, or price.

In *Republic of the Philippines, represented by the Commissioner of Internal Revenue v. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation),*[3] the Supreme Court ruled that "it is fundamental that the findings of fact by the CTA in Division are not to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties."

As correctly held by the CTA Third Division, "petitioner must be reminded that each case is decided on its own merits and based on the strength of evidence presented therein."[4] Also, "Respondent CIR's alleged admission in her Memorandum that the cost of importing the commissary supplies would always be cheaper than purchasing them locally was simply taken out of context. Pages 16 to 17 of the said Memorandum reveal that respondent CIR merely acknowledged that the quotation from petitioner's foreign commissary suppliers would always be cheaper without the excise tax and importation cost."[5]

In the cases cited by PAL, "when the court itself acknowledged that the submission of comparative local price is not the only determining factor to justify the exemption of the imported product," it only means that PAL could have presented other proof.

Failure of CIR to present evidence does not *ipso facto* entitle the taxpayer to a refund.

Anent the allegation that PAL's evidence was uncontroverted because CIR did not present an iota of evidence, the undersigned finds that petitioner is utterly mistaken in assuming that failure of the CIR to present evidence will automatically result to the granting of its claim for refund.

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[3]G.R. No. 188016, January 14, 2015 citing *Sea-Land Service Inc. v. Court of Appeals*, G.R. No. 122605, April 30, 2001, 357 SCRA 441, 445-446.
[4] *Rollo*, p. 111; assailed Resolution, p. 4.
[5] *Id.*

In *Commissioner of Internal Revenue v. Far East Bank & Trust Company,*[6] the Supreme Court emphasized that the failure of the CIR to present any evidence or to refute the evidence presented by the taxpayer does not *ipso facto* entitle the taxpayer to a tax refund. The burden is on the taxpayer to prove its entitlement to the refund. Pertinent portions of the said Decision reads:

> **"The burden is on the taxpayer to prove its entitlement to the refund.**
>
> Moreover, **the fact that the petitioner failed to present any evidence or to refute the evidence presented by respondent does not *ipso facto* entitle the respondent to a tax refund. It is not the duty of the government to disprove a taxpayer's claim for refund. Rather, the burden of establishing the factual basis of a claim for a refund rests on the taxpayer.**
>
> And while the petitioner has the power to make an examination of the returns and to assess the correct amount of tax, his failure to exercise such powers does not create a presumption in favor of the correctness of the returns. **The taxpayer must still present substantial evidence to prove his claim for refund. As we have said, there is no automatic grant of a tax refund.**
>
> Hence, for failing to prove its entitlement to a tax refund, respondent's claim must be denied. Since tax refunds partake of the nature of tax exemptions, which are construed *strictissimi juris* against the taxpayer, evidence in support of a claim must likewise be *strictissimi* scrutinized and duly proven. *(Emphases Supplied.)*

It is noteworthy to mention that in recent refund cases of PAL decided by the Supreme Court,[7] the Highest Tribunal categorically stated that "without a showing that the CTA's findings are unsupported by substantial evidence, the findings thereof are binding on the Court." It follows that substantial evidence is required to support CTA's findings. *gc*

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[6] G.R. No. 173854, March 15, 2010; Citations Omitted.

[7] *Commissioner of Internal Revenue and Commissioner of Customs v. Philippine Airlines, Inc.*, G.R. Nos. 215705-07, February 22, 2017; Consolidated cases of *Republic of the Philippines, rep. by the Commissioner of Customs v. Philippine Airlines, Inc. (PAL)*, G.R. Nos. 209353-54, and *Commissioner of Internal Revenue v. Philippine Airlines, Inc. (PAL)*, G.R. Nos. 211733-34, July 6, 2016, Resolution; *Commissioner of Internal Revenue and Commissioner of Customs v. Philippine Airlines, Inc.*, G.R. Nos. 212536-37, August 27, 2014.

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

It is a "well-established rule that tax refunds, which are in the nature of tax exemptions, are construed strictly against the taxpayer and liberally in favor of the government. This is because taxes are the lifeblood of the nation. Thus, the burden of proof is upon the claimant of the tax refund to prove the factual basis of his claim."[8]

In view of the foregoing discussions, I vote to **DENY** the Petition for Review for lack of merit, and to **AFFIRM** the unanimous Decision and Resolution of the CTA Third Division in CTA Case No. 8340, which denied PAL's claim for refund in the amount of Php5,553,624.40 allegedly representing excise taxes paid on importation of cigarettes and liquor products for its in-flights consumption.

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

[8] *Eastern Telecommunications Phils., Inc. v. Commissioner of Internal Revenue*, G.R. No. 168856, August 29, 2012, citing *Philippine Phosphate Fertilizer Corporation v. Commissioner of Internal Revenue*, 500 Phil 149, 163 (2005).

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE AIRLINES, INC., Petitioner,	CTA EB No. 1347 (CTA CASE NO. 8340)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS, Respondents.	Promulgated:
	AUG 30 2017 4:10 p.m.

x- -x

SEPARATE CONCURRING AND DISSENTING OPINION

Fabon-Victorino, *J.*:

With due respect, I maintain my stance in the assailed Decision of February 17, 2015 and the subsequent Resolution of July 22, 2015.

While there is no question that petitioner have 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 international flight consumption, I submit however 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 with respect to the denial of petitioner's claim for refund of its alleged erroneously paid excise tax on the imported cigarettes used for its in-flight consumption on the basis that petitioner failed to prove the non-availability of the imported cigarettes at a reasonable quantity, quality or prices in the local market. However, I dissent with respect to the finding that petitioner Philippine Airlines, Inc. has sufficiently established that its imported alcohol products used for in-flight consumption were not available in reasonable quantity, quality or price in the local market and therefore, may be subject to refund.

With high respect to the *ponente* and the majority view, I submit that petitioner utterly failed to comply with the third requisite. Based on the record, petitioner compared the prices of its imported wines and/or liquors with the quotation of a single supplier, the Philippine Wine Merchant. Certainly, the information gathered is insufficient to justify petitioner's pretense that imported alcohol products used for in-flight consumption were not available in reasonable quantity, quality or price in the local market. Evidently, petitioner failed to make a comprehensive and credible study on the availability, quantity and price of the subject imported wines and/or liquor in the local market to justify its importation of the said items.

Further, the record reveals that petitioner only submitted the price list provided by the Philippine Wine Merchants for the years 2007 to 2009, the price lists of Future Trade International for February 2009 and the canvassed list of retail prices for 2009 from the rack of Duty Free Philippines prepared by petitioner's employee, Gilbert Galedo. However, the three alone cannot represent the wide local market for the said item. In other words, they cannot be considered sufficient to prove the unavailibity of imported wine and/or liquors in the local market.

In fine, without any study 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. After all, 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.[1]

On this note, I vote to **DENY** the instant Petition for Review for lack of merit and **AFFIRM** the assailed Decision of February 17, 2015 and Resolution of July 22, 2015 rendered by the Court in Division.

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[1] Microsoft Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 180173, April 06, 2011.