REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

NESTLE PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9943

Members:

UY, *Chairperson*,
RINGPIS-LIBAN, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

OCT 18 2022
7:50 a.m.

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RESOLUTION

UY, J.:

For resolution is petitioner's ***Motion for Reconsideration (of the Decision promulgated on 31 May 2022)*** filed on June 27, 2022, with respondent's ***Comment/Opposition (to Petitioner's Motion for Reconsideration)*** filed on July 12, 2022.

In its *Motion*, petitioner prays that this Court's Decision dated May 31, 2022 be reversed and set aside, the dispositive portion of which reads:

> "**WHEREFORE**, in light of the foregoing considerations, the Petition for Review is **DENIED** for lack of merit.
>
> **SO ORDERED**."

Petitioner's Motion for Reconsideration:

Petitioner maintains that the Codex Stan 192-1995 was already effectively adopted by the Food and Drug Administration (FDA) even before the enactment of Republic Act (RA) No. 10963, otherwise known as the "Tax Reform Acceleration and Inclusion (TRAIN) Law, invoking several issuances such as BFAD Circular No. 2006-016[1], Section 9 (b) of RA No. 10611 or the Food Safety Act of 2013, and DOH Administrative Order No. 2014-0029.[2] Hence, it should be applied to determine if the MILO® Products are milk products excluded from the coverage of sweetened beverage excise tax (SBT).

Moreover, petitioner claims that it is plain from the text of Section 47 of RA No. 10963, which introduced Section 150-B in the Tax Code, that Codex 192-1995 was already adopted by the FDA prior to the enactment of RA No. 10963, and the phrase "*as adopted by the FDA*" is descriptive of such fact. The qualifier "*2017 Rev. or the latest*" does not mean that a formal adoption is required for Section 150-B to be effective. It merely considers that under the prevailing FDA product registration guidelines, the FDA uses the current or latest version of Codex Stan 192-1995, such that, in the subsequent years the later versions of the Codex will be applied to determine the classification of a beverage. Otherwise, the imposition of the excise tax on sweetened beverage would not take effect on January 1, 2018, but only upon the formal adoption of Codex Stan 192-1995 through DOH Circular 2019-319 on August 1, 2019.

Petitioner further contends that if the intention of the RA No. 10963 was to refer to the version of Codex that was still to be adopted by the FDA, there should have been a directive for the FDA to adopt the Codex in Section 150-B par. (E) on the specific responsibility of the FDA. However, as it is, the responsibilities imposed by RA No. 10963 on the FDA only relate to labelling and surveillance.

Likewise, petitioner stresses that it is clear from the descriptor of Codex food category 01.1.4 that chocolate malt drinks, such as the MILO Products, are flavored milk even if it contains cocoa and sugar; that MILO Products are not cocoa mixes under category 05.1.1 because category 05.1.1 explicitly states that "cocoa-sugar mixtures

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[1] Subject: Updated List of Food Additives.
[2] Title: Rules and Regulations on the Licensing of Food Establishments and Registrations of Processed Food, and Other Food Products, and For Other Purposes.

contain only cocoa powder and sugar" and that "[f]inished cocoa beverages and chocolate milk are included in category 01.1.4"

Allegedly, the text of Section 150-B of RA No. 10963 as well as the legislative intent behind it will tell that all milk products are not subject to excise tax on sweetened beverages regardless of the sugar content.

Petitioner submits that MILO Products are not "sweetened beverages" as the term is defined in Section 150-B(B)(1) of R.A. No. 10963 because the term "non-alcoholic beverage" in the definition of "sweetened beverages" has a technical meaning referenced to Codex Stan 192-1995 and is not based simply on the presence of a sweetener, such as sugar, in the beverage.

According to petitioner, if Section 150-B(B)(1) of the Tax Code, defining sweetened beverages, and Section 150-B(C) of the Tax Code, providing for exclusions from excise tax on sweetened beverages, are read in relation to Codex Stan 192-1995, it is clear that even sweetened milk products are excluded from the coverage of the SBT.

Lastly, petitioner points out that since the issue in the instant petition is the taxability of the MILO Products, the applicable rule of statutory construction is the strict interpretation in the imposition of tax, not the strict interpretation of tax refunds.

Respondent's Comment/ Opposition:

Respondent submits that the arguments petitioner propounded lack merit and hence should not be given any consideration. Respondent maintains that the subject MILO products cannot be considered within the coverage of fluid flavored drinks as ruled by the Court.

Allegedly, granting without conceding that MILO products are considered as fluid flavored milk drink, petitioner is not entitled to its claim for refund as granting the same would be tantamount to double refund. According to respondent, the alleged erroneously paid taxes sought to be refunded by petitioner has already been essentially refunded because the amount so paid was included in the cost of the MILO products.

THE COURT'S RULING

Petitioner's *Motion for Reconsideration* lacks merit.

We do not subscribe to petitioner's stand that based on the previous issuances, such as, BFAD Circular No. 2006-016, Section 9 (b) of RA No. 10611 or the Food Safety Act of 2013, and DOH Administrative Order No. 2014-0029, the FDA has effectively adopted the Codex 192-1995, Rev. 2017 or the latest when RA No. 10963 was enacted.

To reiterate, Section 150-B(C) of the NIRC of 1997, as amended by RA No. 10963 reads as follows:

> "(C) Exclusions. – The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors **(Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA**, are excluded from the scope of this Act: x x x" (*Emphasis and underscoring added*)

Based on the wordings of the said provision, it is clear that it requires the FDA to adopt, in relation to Section 150-B (C) of the NIRC of 1997, as amended by RA No. 10963, the Codex Stan 192-1995, ***Rev. 2017 or the latest***. To follow petitioner's reasoning that there is no need for the FDA to adopt the Codex Stan 192-1995, Rev. 2017 or the latest since the same has been effectively adopted by previous issuances, the wordings ***"as adopted by the FDA***" in Section 150-B(C) of the NIRC of 1997, as amended by RA No. 10963 would be superfluous if the intention was not to require the FDA to adopt the Codex 192-1995, Rev. 2017 or the latest. Since the legislature included such wordings, it necessitates the adoption by the FDA.

From the foregoing, We also find no merit in petitioner's contention, that if the intention of RA No. 10963 was to refer to the version of Codex that was still to be adopted by the FDA, there should have been a directive for the FDA to adopt the Codex in Section 150-B par. (E) on the specific responsibility of the FDA, since the responsibilities of the FDA imposed by RA No. 10963 only relate to labelling and surveillance.

It cannot be simply inferred that the responsibility of the FDA is confined only to Section 150-B par. (E). To the mind of the Court, this does not negate the instruction of the law to the FDA to adopt the Codex 192-1995, Rev. 2017 or the latest.

Again, there is no showing that the FDA has adopted the Codex Stan 192-1995, Rev. 2017 as of the time of filing the subject claim for refund. It is only on August 1, 2019 pursuant to DOH Circular No. 2019-0319 issued by the Secretary of Health Francisco T. Duque III which adopted the food category system descriptor of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018).

With regard to petitioner's argument that if the Codex 192-1995 was not yet adopted when the RA No. 10963 took effect on January 1, 2018, then it follows that MILO® Products should not have been the subject of SBT because the definition of "Sweetened Beverages" referred to Codex Stan 192-1995, the same deserves scant consideration.

For reference, Section 150-B (1) of the NIRC of 1997, as amended by RA No. 10963, provides:

"(B) Definition of Terms. – *As used in this Act:*

(1) *Sweetened beverages (SBs)* refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or non-caloric sweeteners added by the manufacturers **<u>and shall include</u>, but not be limited to the following**, as described in the Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA: x x x" (*Emphasis and underscoring ours*)

A reading of the foregoing provision shows that it defined what sweetened beverages are, which are non-alcoholic beverages of any constitution (in the form of liquid, powder or concentrates) that are pre-packaged and sealed in accordance with the FDA standards and contains caloric and/or non-caloric sweeteners added by the manufacturers. The words "*and shall include, but not limited to*" were added in the provision indicating that, in addition to the foregoing definition, it includes those described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev 2017 or the latest) as adopted by the FDA. m

We are also not persuaded by petitioner's argument that the descriptor of Codex Food Category 01.1.4 is clear that chocolate malt drinks, such as the MILO® Products, are flavored milk even if it contains cocoa and sugar. The MILO® Products are not cocoa mixes under category 05.1.1 because category 05.1.1 explicitly states that "cocoa-sugar mixtures contain only cocoa powder and sugar" and that "finished cocoa beverages and chocolate milk are included in category 01.1.4"

To repeat Our disquisition, while indeed all flavoured fluid milk drinks shall include all mixes and ready-to-drink fermented or not fermented milk-based drink with flavourings and/or food ingredients that intentionally impart flavor, however, when such type of fluid milk drink contains **mixes for cocoa** (cocoa-sugar mixtures), such flavored fluid milk drink can no longer be classified as a flavoured fluid milk drink. MILO® Products contain malt as one of its ingredients and is marketed by petitioner as a choco malt powdered milk drink. However, it contains **mixes for cocoa** (cocoa-sugar mixtures) in its composition. Such being the case, petitioner's MILO® products cannot be considered within the coverage of fluid flavored milk drinks. Correspondingly, it cannot be covered by the exclusion under Section 150-B(C)(1) of the NIRC of 1997, as amended by RA No. 10963.

Furthermore, We maintain that even if the subject MILO® products would fall within the exclusion under Section 150-B(C)(1) of the NIRC of 1997, as amended by RA No. 10963, the Court cannot consider the exclusion under Section 150-B(C)(1) of the NIRC of 1997, as amended by RA No. 10963 because the FDA had not yet adopted the Codex Stan 192-1995, Rev. 2017, during the period of subject transaction. Thus, the subject excise tax payment cannot be deemed as erroneous or illegal.

Petitioner also contends that since the issue in the instant Petition is the taxability of MILO® products, the applicable rule of statutory construction is the strict interpretation in the imposition of taxes, not the strict interpretation of refunds as cited in the case of *Commissioner of Internal Revenue v. Fortune Tobacco* (*Fortune Tobacco* case).[3]

We are not convinced.

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[3] G.R. Nos. 167274-75, July 21, 2008.

The Court adheres to the time-honored principle that tax laws are strictly construed against the State. As already shown in the assailed Decision and the above disquisition, the Court finds that petitioner's MILO® products fall within the taxing provision of Section 150-B(A)(1) in relation to Section 150-B (B)(1) of the NIRC of 1997, as amended by RA No. 10963, and thus, subject to SBT.

In the same vein, the *Fortune Tobacco* case is not on all fours with the instant case as the main issue therein is whether or not the revenue regulation has exceeded the allowable limits of legislative delegation.[4] Moreover, as held in *Fortune Tobacco*, tax refunds (or tax credits) "*are not founded principally on legislative grace but on the legal principle which underlies all quasi-contracts abhorring a person's unjust enrichment at the expense of another.*" In the instant case, there can be no unjust enrichment on the part of the Government or respondent at the expense of petitioner, because the imposition of the subject excise tax is in accordance with law. In other words, there is no erroneous payment of excise tax to speak of.

In sum, the Court finds no compelling reason to reverse, set aside or modify our Decision dated May 31, 2022.

WHEREFORE, in view of the foregoing considerations, petitioner's ***Motion for Reconsideration*** is **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(On Leave)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

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[4] *Id.*