REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

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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:

MAY 31 2022
2:05 p.m.

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DECISION

UY, J.:

Before this Court is a *Petition for Review with Urgent Motion to Suspend Collection of Tax* filed on October 8, 2018, by Nestle Philippines, Inc., petitioner, against the Commissioner of Internal Revenue, respondent, praying for the following reliefs: (1) to declare petitioner not liable to pay Sweetened Beverage Excise Tax (SBT) on its removal of MILO® Products and to order respondent to cease and desist from collecting the said SBT on such products from petitioners; (2) to declare petitioner entitled to a refund of erroneously paid SBT in the amount of ₱253,926,718.50; and (3) to order respondent to refund to petitioner the amount ₱253,926,718.50.

THE FACTS

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at Barrio Niugan, Cabuyao, Laguna.[1]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (CIR) with office address at the BIR Building, Diliman, Quezon City, where he may be served with summons and legal processes.[2]

Among the products being manufactured by petitioner is MILO®, marketed in the following packs (collectively referred as MILO® products):

1. Nestle MILO® Hot Mix Choco Malt Powdered Milk Drink (Institutional Pack) packed by Antonina Industrial Corp., registered with the Food and Drug Administration (FDA) under FDA Certificate of Product Registration No. FR-4000003074211;[3]

2. Nestle MILO® Cold Mix Choco Malt Powdered Milk Drink (Institutional Pack) packed by Antonina Industrial Corp. registered with the FDA under FDA Certificate of Product Registration No. FR-4000003086801;[4]

3. Nestle MILO® Choco Malt Powdered Milk Drink/ Powdered Choco Malt Milk Drink (22g, 88g, 220g, 300g, 600g, 1Kg) registered with FDA under FDA Certificate of Product Registration Nos. FR-4000002772505,[5] FR-4000002780597,[6] and FR-4000002780601[7];

4. Nestle MILO® Powdered Choco Malt Milk Drink (22g, 600g, 1Kg) packed by Antonina Industrial Corp. registered with the FDA

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[1] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issue (JSFI), Docket – Vol. 3, p. 1114.
[2] Par. 1, JSFI, Admitted Facts, Docket – Vol. 3, p. 1114.
[3] Exhibits "P-56" to "P-56-1", Docket – Vol. 6, pp. 2422 to 2424.
[4] Exhibit "P-57" to "P-57-1", Docket – Vol. 6, pp. 2425 to 2428.
[5] Exhibit "P-58" to "P-58-1", Docket – Vol. 6, pp. 2429 to 2431.
[6] Exhibit "P-59" to "P-59-1", Docket – Vol. 6, pp. 2432 to 2434.
[7] Exhibit "P-60" to "P-60-1", Docket – Vol. 6, pp. 2435 to 2437.

under FDA Certificate of Registration Nos. FR-40000002780614[8] and FR-4000002780627[9];

5. Nestle MILO® Powdered Choco Malt Milk Drink packed by Cofipac Corporation registered with the FDA under FDA Certificate of Product Registration No. FR-4000002780643;[10]

6. Nestle MILO® Choco Malt Powdered Milk Drink (22g) packed by Portion Fillers registered with the FDA under FDA Certificate of Product Registration No. FR-4000002780656[11];

7. Nestle MILO® Choco Malt Powdered Milk Drink (22g) packed by R.M. Foods, Inc. registered with the FDA under FDA Certificate of Product Registration No. FR-4000002780669[12] ;

8. Nestle MILO® Nutri-Up Choco Malt Powdered Milk Drink/ Powdered Choco Malt Milk Drink for Adults (24g and 390g) registered with the FDA under FDA Certificate of Product Registration No. FR-4000002652050[13] and FR-4000002759331[14];

9. Nestle MILO® Nutri-Up Choco Malt Powdered Milk Drink For Adults (24g) packed by Antonina Industrial Corporation registered with the FDA under FDA Certificate of Product Registration No. FR-4000002759399[15] (24g).

On January 1, 2018, Republic Act (RA) No. 10963 or also known as the Tax Reform for Acceleration and Inclusion Act (TRAIN Law) took effect.[16] Section 47 of the TRAIN Law introduced Section 150-B which imposes excise tax on sweetened beverages.

Pursuant thereto, respondent continues to refuse or to remove or release the MILO® products from the place of production without prior payment of SBT.[17]

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[8] Exhibit "P-61" to "P-61-1", Docket – Vol. 6, pp. 2438 to 2440.
[9] Exhibit "P-62" to "P-62-1", Docket – Vol. 6, pp. 2441 to 2443.
[10] Exhibit "P-63" to "P-63-1", Docket – Vol. 6, pp. 2444 to 2446.
[11] Exhibit "P-64" to "P-64-1", Docket – Vol. 6, pp. 2447 to 2449.
[12] Exhibit "P-65" to "P-65-1", Docket – Vol. 6, pp. 2450 to 2452.
[13] Exhibit "P-66" to "P-66-1", Docket – Vol. 6, pp. 2453 to 2455.
[14] Exhibit "P-67" to "P-67-1", Docket – Vol. 6, pp. 2456 to 2458.
[15] Exhibit "P-68" to "P-68-1", Docket – Vol. 6, pp. 2459 to 2461.
[16] Exhibit "P-100-2"
[17] Par. 2, JSFI, Admitted Facts, Docket – Vol. 3, p. 1114.

Aggrieved, petitioner paid under protest SBT through advance payments supported by Payment Form (BIR Forms No. 0605) filed via electronic filing and payment system (EFPS) from the period of March 27, 2018 to April 26, 2018 covering the April 2018 removals of the MILO® products from its Lipa plant and plants of its co-manufacturers namely: Antonina Industrial Corp., Cofipac Corp. and Portion Fillers, Inc, summarized as follows:

Exhibit	***Date Filed***	***Filing Reference No.***	***Excise Tax Deposit/Advance Payment***
P-1[18]	3/27/2018	291800024456759	₱55,800,000.00
P-2[19]	4/5/2018	291800024543279	29,180,418.17
P-3[20]	4/5/2018	291800024543339	24,350,450.02
P-4[21]	4/12/2018	291800024709853	62,000,000.00
P-5[22]	4/12/2018	291800024709652	14,400,000.00
P-6[23]	4/18/2018	291800024802650	36,500,000.00
P-7[24]	4/18/2018	291800024802667	22,400,000.00
P-8[25]	4/26/2018	291800024940318	48,800,000.00
P-9[26]	4/26/2018	2918000249400290	20,000,000.00
Total			₱313,430,868.19

On August 9, 2018, petitioner filed a *letter*[27] and an *Application for Tax Credits/Refund* (BIR Form 1914)[28] with the Bureau of Internal Revenue (BIR) for the refund of erroneously paid SBT in the total amount of ₱253,926,718.50 arising from the removals of MILO® products from petitioner's Lipa plant and plants of its co-manufacturers namely: Antonina Industrial Corp., Cofipac Corp. and Portion Fillers, Inc.

On October 2, 2018, Revenue Officers (RO) Eduardo R. Trazona and Demi Ross Charlotte Caraig from the Excise Large Taxpayers Field Operations Division, conducted an inspection of petitioner's Lipa City Plant, for the following purposes:[29]

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[18] Exhibit "P-1" to "P-1-1", Docket – Vol. 6, pp. 2308 to 2309.
[19] Exhibit "P-2" to "P-2-1", Docket – Vol. 6, pp. 2310 to 2312.
[20] Exhibit "P-3" to "P-3-1", Docket – Vol. 6, pp. 2313 to 2314.
[21] Exhibit "P-4" to "P-4-1", Docket – Vol. 6, pp. 2315 to 2316.
[22] Exhibit "P-5" to "P-5-1", Docket – Vol. 6, pp. 2317 to 2318.
[23] Exhibit "P-6" to "P-6-1", Docket – Vol. 6, pp. 2319 to 2320.
[24] Exhibit "P-7" to "P-7-1", Docket – Vol. 6, pp. 2321 to 2322.
[25] Exhibit "P-8" to "P-8-1", Docket – Vol. 6, pp. 2323 to 2324.
[26] Exhibit "P-9" to "P-9-1", Docket – Vol. 6, pp. 2325 to 2326.
[27] Exhibit "P-54", Docket – Vol. 6, pp, 2413 to 2419.
[28] Exhibit "P-53", BIR Records, p. 111.
[29] Exhibit "P-55", Minutes of BIR Inspection, Docket – Vol. 6, pp. 2420 to 2421.

a. To inform petitioner that MILO is a sweetened beverage subject to excise tax under the SBT provision of the Republic Act No. 10963 or the TRAIN Law;
b. To review the manufacturing process flow for the MILO products being produced in Nestle's Lipa Factory;
c. To ask for petitioner's process for the payment of excise taxes on MILO products;
d. To introduce the Revenue Officer on Premise (RO Caraig) who will be assigned to the Nestle Lipa Factory;
e. To request for copies of Official Register Book (ORBs) filed with the National Office;
f. To ask for the background and status of Nestle's claim for refund of erroneously paid excise taxes for its MILO products;
g. To establish petitioner's ways of working with the BIR moving forward, on the payment of excise taxes on its MILO products.

Thereafter, petitioner filed the instant *Petition for Review with Urgent Motion to Suspend Collection of Tax* on October 8, 2018.[30]

On October 22, 2018, the Court ordered respondent to file his comment on petitioner's *Urgent Motion to Suspend Collection of Tax* and the hearing on the said motion was set on October 25, 2018.[31]

During the hearing of petitioner's *Urgent Motion to Suspend Collection of Tax* on October 25, 2018, petitioner presented as witness Arturo Guinauli Pugay, petitioner's Head of Corporate Decision Support and Control, and Darlene E. Uy, petitioner's Business Unit Controller of the Lifestyle and Active Beverages Business Unit, who both testified on direct examination by way of Judicial Affidavits.[32]

On November 9, 2018, petitioner filed its *Formal Offer of Evidence (Re: Urgent Motion to Suspend Collection of Tax).*[33]

On December 6, 2018, petitioner filed a *Motion for Leave to Post Provisional Surety Bond (With Motion to Set Hearing)*[34] praying that it be allowed to provisionally post a surety bond, in lieu of cash

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[30] Docket – Vol. 1, pp. 12 to 29.
[31] Resolution, Docket – Vol. 2, pp. 533 to 534.
[32] Exhibits "P-91" and "P-92", Docket – Vol.1, pp. 454 to 476, and pp. 477 to 489.
[33] Docket – Vol. 2, pp. 553 to 561.
[34] Docket – Vol. 2, pp. 625 to 628.

payment, equal to the tax payable on its withdrawals on MILO® products beginning January 1, 2019. Relative to the said motion, respondent filed his *Manifestation* on December 6, 2018 averring that he is amenable to petitioner posting a bond provided that it should be sufficient to protect the interests of the State during the entire length of litigation.

During the hearing on December 11, 2018,[35] the Court submitted petitioner's *Motion for Leave to Post Provisional Surety Bond* for resolution.

Thereafter, within the extension period requested,[36] respondent filed his *Answer*[37] on January 7, 2019, interposing the following special and affirmative defenses, among others, to wit:

1) The Court does not have jurisdiction over the instant case;

2) Assuming but without conceding that the Court has jurisdiction over the instant petition, MILO® products are subject to SBT; and

3) That Courts cannot go beyond the enrolled bill and look into committee hearings to find basis in classifying MILO® products as milk products exempt from SBT.

In the Resolution dated January 17, 2019,[38] the Court denied petitioner's *Motion for Leave to Post Provisional Surety Bond* for lack of merit, while the Court deemed as granted respondent's *Motion for Extension of Time to File Answer* in view of the filing of the Answer on January 7, 2019.

On February 1, 2019, petitioner filed a *Motion for Reconsideration (Re: Resolution dated 17 January 2019).*[39]

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[35] Minutes of the Hearing and Order dated December 11, 2018, Docket – Vol. 2, pp. 640 to 641.

[36] First *Motion for Extension to File Answer* was filed on November 6, 2018, praying for an extension period of thirty (30) days from November 7, 2018 or until December 7, 2018, Docket – Vol. 2, pp. 541 to 544; and Second *Motion for Extension of Time to File Answer* praying for an additional period of thirty (30) days from December 7, 2018, or until January 6, 2019, Docket Vol. 2, pp. 631 to 632, were both granted by the Court.

[37] Docket – Vol. 2, pp. 651 to 662.

[38] Docket – Vol. 2, pp. 664 to 666.

[39] Docket – Vol. 2, pp. 670 to 690.

In the Resolution dated February 22, 2019, the Court admitted all of petitioner's exhibits relative to petitioner's *Urgent Motion to Suspend Collection of Taxes.*[40]

On March 8, 2019, respondent filed an *Omnibus Motion*[41] praying for an additional period of ten (10) days from March 10, 2019 or until March 20, 2019 within which to file his Comment on petitioner's *Motion for Reconsideration (Re: Resolution dated 17 January 2019)* and further praying that the transmittal of the BIR Records be deferred for a period of thirty (30) days from March 10, 2019 or until April 9, 2019.

Thereafter, respondent filed his *Comment (on Petitioner's Motion for Reconsideration)* on March 20, 2019.[42]

On March 22, 2019, the Court granted respondent's *Omnibus Motion*. Respondent's prayer for additional period to file his Comment was deemed granted in view of the filing of the *Comment* on March 20, 2019 and respondent was allowed until April 9, 2019, to certify and elevate to this Court the BIR Records of this case.[43]

On April 10, 2019, respondent filed a *Compliance*[44] transmitting the BIR records of the case.

In the *Resolution* dated April 22, 2019,[45] the Court denied both petitioner's *Urgent Motion to Suspend Collection of Tax* and *Motion for Reconsideration (Re: Resolution dated 17 January 2019)* for lack of merit.

After the *Pre-Trial Conference* (PTC) held on May 7, 2019,[46] the parties filed their *Joint Stipulation of Facts and Issues* on May 27, 2019[47] which was approved by the Court in the *Order*[48] dated May

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[40] Docket – Vol. 2, pp. 695 to 696.
[41] Docket – Vol. 2, pp. 697 to 700.
[42] Docket – Vol. 2, pp. 702 to 706.
[43] Resolution dated March 22, 2019, Docket – Vol. 2, p. 709.
[44] Docket – Vol. 2, pp. 710 to 713.
[45] Docket – Vol. 2, pp. 717 to 724.
[46] Minutes of the hearing and Order dated May 7, 2019, Docket – Vol. 2, pp. 745 and 717 to 719.
[47] JSFI, Docket – Vol. 3, pp. 1114 to 1123.
[48] Docket – Vol. 3, p. 1124.

29, 2019. Subsequently, the Court issued its *Pre-Trial Order* on July 3, 2019.[49]

On July 15, 2019, petitioner filed a *Manifestation and Motion to Amend Pre-Trial Order*[50] praying for the following amendments of the Pre-Trial Order:

1.) paragraphs 1.a under I. Statement of the Case, C. Stipulation of Issues, to change "Section 150-B**(C)**(1)" to Section 150-B**(B)**(1);

2.) for paragraph 2.e under IV. Evidence of the Parties, A. For Petitioner, to read as follows:

"Dr. Kenneth Y. Hartigan-Go who will provide expert testimony on the Codex Alimentarius, the pertinent standards for milk products, and the fact that MILO® products are properly classified under Category 01.1.4 "Flavoured Fluid Milk Drinks" of Codex Stan 192-1995, Rev. 2017."

3.) under IV. Evidence of the Parties, to include the parties' reservation of their right to present additional documents as may be necessary in the course of trial.

During the hearing on August 29, 2019,[51] the Court noted the manifestation of respondent's counsel that she did not file a comment on petitioner's *Manifestation and Motion to Amend Pre-Trial Order*. The Court resolved petitioner's motion as follows:

1) The motion to amend page 3 of the Pre-Trial Order, third line of sub-paragraph 1.a was granted, correcting the phrase "150-B(C)(1)" to 150-B(B)(1)";

2) The motion to include the name of the expert witness, Dr. Kenneth Y. Hartigan-Go in the Pre-Trial Order was denied considering that said name was not mentioned during the PTC on May 7, 2019, while the description of the supposed testimony of the witness may be stated during the offer of said testimony;

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[49] Docket - Vol. 3, pp. 1126 to 1138.
[50] Docket – Vol. 3, pp. 1156 to 1160
[51] Minutes of the Hearing and Order, Docket – Vol. 4, pp. 2050 to 2053.

3) The motion to include the parties' reservation of the right to present additional documents as may be necessary is denied, considering that it is a general reservation. However, without prejudice to petitioner's right to present additional documents that will be examined by the ICPA.

Thereafter, trial on the main case ensued. Petitioner presented six (6) witnesses, who testified on direct examination by Judicial Affidavits, to wit.:

1) Katherine O. Constantino[52], duly-commissioned Independent Certified Public Accountant (ICPA);
2) Atty. Arni A. Perlas[53], petitioner's Tax Department Head;
3) Maria Josephine Bueno-Gonzales[54], petitioner's Head of the Regulatory and Scientific Affairs;
4) Wilfrido De Ocampo, Jr.[55], petitioner's Business Unit Manager;
5) Joselito Dalde, Production Manager of MILO® products in Nestle Lipa Factory;[56]
6) Dr. Kenneth Y. Hartigan-Go, as an expert witness.[57]

Upon resolution of petitioner's *Formal Offer of Evidence*[58] on January 15, 2021,[59] petitioner rested its case.

For his part, respondent filed a *Manifestation*[60] on January 25, 2021, stating that in view of the report of the office conducting the examination of petitioner's claim for refund that there is no report yet on the investigation, respondent will no longer present a witness.

Upon the filing of petitioner's Memorandum[61] on May 21, 2021 and respondent's Memorandum[62] on March 15, 2021, the instant case was submitted for Decision on June 7, 2021.[63]

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[52] Docket – Vol. 2, pp. 783 to 787.
[53] Exhibit "P-95", Docket - Vol. 2, pp. 813 to 831.
[54] Exhibit "P-96", Docket - Vol. 2, pp. 954 to 971; Exhibit "P-117", Docket – Vol. 5, pp. 2488 to 2494.
[55] Exhibit "P-97", Docket – Vol. 3, pp. 1061 to 1071.
[56] Exhibit "P-116", Docket – Vol. 5, pp. 2497 to 2508.
[57] Exhibit "P-98", Docket – Vol. 3. pp. 1142 to 1150.
[58] Docket – Vol. 6, pp. 2286 to 2307.
[59] Docket – Vol. 6, pp. 2570 to 2573.
[60] Docket – Vol. 6, pp. 2575 to 2577.
[61] Docket – Vol. 7, pp. 3119 to 3175.
[62] Docket – Vol. 6, pp. 2588 to 2597.
[63] Docket – Vol. 7, p. 3211.

Hence, this Decision.

THE ISSUES

As stipulated[64], the following issues are submitted for this Court's resolution, to wit:

1. Whether or not petitioner's MILO® products are milk products excluded from coverage of the sweetened beverage excise tax imposed under Section 150-B(B)(1) of the NIRC of 1997, as amended.

   1.a. Whether or not petitioner's MILO® products are sweetened beverages as the term is defined under Section 150-B(B)(1) of the NIRC of 1997, as amended.

2. Whether or not petitioner is entitled to a refund of illegally collected and erroneously paid SBT in the amount of Two Hundred Fifty Three Million Nine Hundred Twenty Six Thousand Seven Hundred Eighteen and 50/100 Pesos (₱253,926,718.50).

3. Whether or not the Court has jurisdiction over the instant case.

Petitioner's arguments:

Petitioner argues that the Court has jurisdiction over the instant case. Allegedly, respondent has constructively and effectively denied petitioner's claim.

According to petitioner, a refund claimant, need not wait for respondent to act on the administrative claim for refund before filing a Petition for Review before the Court of Tax Appeals (CTA); and that Section 7 of Republic Act No. 1125, as amended, provides that the CTA has exclusive appellate jurisdiction over tax refund claims in case the respondent fails to act on them.

Moreover, petitioner submits that its MILO® products are choco malt powdered milk drinks, and fall under category 01.1.4 "flavored

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[64] Stipulation of Issues, Pre-Trial Order, Docket – Vol. 3, pp. 1127 to 1128.

fluid milk drinks" of the revised codex stan 192-1996. As such, it is embraced in the phrase "all milk products" under Section 150-B (C)(1) of the Tax Code and thus excluded from the coverage of the imposition of SBT.

Further, petitioner asserts that the Food and Drug Administration (FDA) issued certificates of product registration to the MILO® products as powdered choco malt milk drinks; that the FDA-approved product name of the MILO® products reflects the true nature which is composite milk products that contains malt and cocoa, and as flavored milk drinks that fall under Category 01.1.4 of the Revised Codex Stan 192-1995.

Petitioner also submits that MILO® Products are not sweetened beverages under Section 150-B(B)(1) of the Tax Code. Petitioner claims that MILO® products are not classified as "non-alcoholic beverages" under the food descriptors of Codex Stan 1992-1995.

Likewise, petitioner avers that imposing SBT on petitioner's MILO® products is contradictory to the intention of the legislature for Section 150-B of the Tax Code; that the legislative deliberations on the rationale for imposing SBT on sweetened beverage and calculation of the excise tax based on volume will show that the intent of the legislature is to encourage milk consumption especially among children by excluding all milk products, including flavored milk drinks like MILO® products, whether in liquid or powdered form, from SBT.

Finally, petitioner submits that it is entitled to a refund of illegally collected and erroneously paid SBT in the ₱253,718,398.50.

Respondent's counter-arguments:

Respondent counter-argues that the Court has no jurisdiction over the instant case. According to respondent, there is no decision of the CIR that is appealable to this Court. Respondent submits that the statement of RO Trazona on refusing to remove or release the MILO® products without prior payment of the SBT is not tantamount to denial of the CIR and that RO Trazona is not even duly authorized to act on petitioner's claim for refund.

Assuming but without conceding, that the Court has jurisdiction over the instant petition, respondent contends that petitioner's MILO® products are subject to SBT.

Allegedly, pursuant to Section 6 of Revenue Regulations (RR) No. 20-18, the proper classification of beverages shall be subject to the determination by the FDA; that as shown in the Letter dated July 24, 2018, the FDA findings show that petitioner's MILO choco malt powdered milk drink is not a milk product.

Moreover, respondent asserts that to qualify as milk product, milk should be the dominant product in terms of quantity of the final product.

Respondent further claims that the Senate Committee Hearings relied upon by petitioner cannot be used by the Courts as basis in classifying MILO® products as milk products exempt from SBT; that pursuant to the principle of enrolled bill, the text of the act as passed and approved is deemed importing absolute and verity and is binding on the Court. Hence, the Court cannot go beyond the control act.

Lastly, respondent alleges that in granting petitioner's claim, the same is tantamount to double refund because petitioner has already recouped the amount it seeks to refund.

THE COURT'S RULING

The instant *Petition for Review* lacks merit.

Requisites for refund claim under Sections 204 (C) and 229 of the NIRC of 1997, as amended.

In a claim for tax refund of erroneously collected taxes, the taxpayer-claimant must comply with the requisites set forth under Sections 204(C) and 229 of the NIRC of 1997, as amended, which reads as follows:

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

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xxx xxx xxx

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

"SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national **internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected,** until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner, may even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." (*Emphases added*)

From the foregoing, the following requisites must be established by the taxpayer, to wit:

1. There must be an erroneous or illegal collection of tax, or a penalty collected without authority, or sum excessively or wrongfully collected;

2. The claim for refund has been duly filed with the Commissioner, within two (2) years after the payment of tax or penalty; and

3. The suit or proceeding is instituted with this Court within two (2) years from the date of payment of tax or penalty.

Thus, for the instant claim for refund to prosper, petitioner must not only establish that it timely filed both its administrative and judicial refund claims, but likewise prove that the subject excise tax paid is an "erroneous or illegal tax."

Relative thereto, an "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property not subject to taxation or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.[65]

Petitioner timely filed both its administrative and judicial claims.

For an orderly determination of petitioner's compliance with requisites for the refund claim under Sections 204(C) and 229 of the NIRC of 1997, as amended, the Court shall first discuss the *second* and *third* requisites which pertain to the timeliness of petitioner's claims at the administrative and judicial levels.

It is clear from the abovementioned provisions that a claimant for refund must first file an administrative claim for refund before the CIR, prior to filing a judicial claim before the Court of Tax Appeals (CTA). Notably, both the administrative and judicial claims for refund should be filed within the two (2)-year prescriptive period, and that the claimant is allowed to file the latter even without waiting for the resolution of the former in order to prevent the forfeiture of its claim through prescription.[66]

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[65] *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation,* G.R. No. 188497, April 25, 2012, citing the definition provided in BLACK'S LAW DICTIONARY, 5th Edition, p. 486.
[66] *Metropolitan Bank & Trust Company v. Commissioner of Internal Revenue,* G.R. No. 182582, April 17, 2017.

As regards to respondent's claim that barely 60 days after the administrative claim was filed by petitioner, he was not given ample opportunity to reach a decision or act accordingly on the refund claim, it bears pointing out that the Court is not deprived of jurisdiction to act on a judicial claim for refund of erroneously or illegally collected internal revenue taxes, even if respondent CIR has not acted, or failed to act on the taxpayer's administrative claim for refund, for as long as the taxpayer-claimant complies with the requirements set forth under Section 204 (C) and 229 of the NIRC of 1997, as amended.

The law does not require the CIR to act upon the administrative claim before the claimant can file its judicial claim for refund. Section 229, as worded, only requires that the administrative claim be filed prior to the judicial claim,[67] and that both the administrative claim and the suit or proceeding before this Court be duly filed within two (2) years from the date of payment of tax or penalty.

In this case, records show that petitioner paid under protest from March 27, 2018 to April 26, 2018 with the BIR the alleged SBT at the rate of ₱6.00 per liter in the aggregate amount of ₱313,430,868.19 on the removals of Milo® Products from its Lipa Plant and Toll Manufacturer plants, namely: Antonina Industrial Corp., Cofipac Corporation, and Portion Fillers, Inc., to wit:

Exhibits (BIR Payment Forms)	Reference	Bank Confirmation	Date	Amount
"P-1", "P-1-1"	291800024456759	ELY03282018002125343	March 27, 2018	₱55,800,000.00
"P-2", "P-2-1"	291800024543279	ELY04062018002133191	April 05, 2018	29,180,418.17
"P-3", "P-3-1"	291800024543339	ELY04062018002133192	April 05, 2018	24,350,450.02
"P-4", "P-4-1"	291800024709853	ELY04132018002146056	April 12, 2018	62,000,000.00
"P-5", "P-5-1"	291800024709652	ELY04132018002146043	April 12, 2018	14,400,000.00
"P-6", "P-6-1"	291800024802650	ELY04202018002153619	April 18, 2018	36,500,000.00
"P-7", "P-7-1"	291800024802667	ELY04202018002153622	April 18, 2018	22,400,000.00
"P-8", "P-8-1"	291800024940318	ELY04272018002163515	April 26, 2018	48,800,000.00
"P-9", "P-9-1"	291800024940290	ELY04272018002163514	April 26, 2018	20,000,000.00
TOTAL				₱313,430,868.19

[67] *CBK Power Company Limited vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 193383-84 and 193407-08, January 14, 2015.

On August 9, 2018, petitioner filed a *letter-claim*[68] and *Application for Tax Credits/Refunds* (BIR Form No. 1914)[69] with the BIR, representing allegedly excise taxes on sweetened beverages erroneously and/or illegally assessed and collected in the amount of ₱253,926,718.50 for the period of April 2, 2018 to April 30, 2018; while the present Petition for Review was filed on October 8, 2018.

In summary, the following dates are significant in determining the timeliness of the instant refund claim, viz:

Date of payment of excise tax	Last day of the two (2)-year prescriptive period	Date of filing of administrative claim	Date of filing of judicial claim
March 27, 2018	March 27, 2020	August 9, 2018	October 8, 2018
April 05, 2018	April 05, 2020		
April 05, 2018	April 05, 2020		
April 12, 2018	April 12, 2020		
April 12, 2018	April 12, 2020		
April 18, 2018	April 18, 2020		
April 18, 2018	April 18, 2020		
April 26, 2018	April 26, 2020		
April 26, 2018	April 26, 2020		

Reckoned from the dates of payment, it is clear that petitioner's administrative claim filed on August 9, 2018 and judicial claim filed on October 8, 2019 were timely filed within the two-year prescriptive period under Sections 204(C) and 229 of the NIRC of 1997, as amended. Hence, this Court has jurisdiction over the instant case.

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.

Petitioner argues that its MILO® products are not subject to SBT.

We do not agree.

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[68] Exhibit P-54, Docket- Vol. 6, pp. 2413 to 2419.
[69] Exhibit "P-53", BIR Records, p. 111 to 118;

Section 47 of RA No. 10963 introduced Section 150-B in the NIRC of 1997 pertaining to the coverage of excise tax on sweetened beverages, which reads as follows:

> "Section 150-B. Sweetened Beverages –
>
> "(A) Rate and Base of Tax. – Effective January 1, 2018."
>
> "(1) A tax of six pesos (₱6.00) per liter of volume capacity shall be levied, assessed, and collected on sweetened beverages using purely caloric sweeteners, and purely non-caloric sweeteners, or a mix of caloric and non-caloric sweeteners: *Provided*, That this tax rate shall not apply to sweetened beverages using high fructose corn syrup: *Provided, further,* That sweetened beverages using purely coconut sap sugar and purely steviol glycosides shall be exempt from this tax; and
>
> xxx
>
> "(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 are 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, and shall include, 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:
>
> "(a) Sweetened juice drinks;
>
> "(b) Sweetened tea;
>
> "(c) All carbonated beverages;
>
> "(d) Flavored water;

"(e) Energy and sports drinks;

"(f) Other powdered drinks not classified as milk, juice, tea, and coffee;

"(g) Cereal and grain beverages; and

"(h) Other non-alcoholic beverages that contain added sugar.

(2) Caloric sweetener refers to a substance that is sweet and includes sucrose, fructose, and glucose that produces a certain sweetness;

xxx xxx xxx"

Based on the foregoing, a tax of ₱6.00 per liter of volume capacity shall be levied, assessed, and collected on sweetened beverages using purely caloric sweeteners, and purely non-caloric sweeteners, or a mix of caloric and non-caloric sweeteners. Sweetened beverages, in turn, are defined as non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are 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.

In this case, the Court finds that petitioner's MILO® products fall within the category of sweetened beverages because such are non-alcoholic beverages that is in powdered form, which are pre-packed and sealed in accordance with the FDA standards. Moreover, MILO® products contain caloric sweetener such as sugar, which is widely known as a substance that is sweet. Such being the case, MILO® products thus falls within the taxing provision under Section 150-B (A) (1) in relation to (B)(1) of the NIRC of 1997, as amended by RA No. 10963.

The exclusion under Section 150-B (C)(1) of the NIRC of 1997, as amended by RA No. 10963 cannot be considered at the time of the removal of MILO® products.

Petitioner contends that its MILO® products are not subject to SBT because MILO® products are considered "flavoured milk" under the Revised Codex Stan 192-1995; that since MILO® products are properly classified as "flavoured milk" based on the Food Category Descriptors of the Revised Codex Stan 192-1995, they are embraced in the phrase "all milk products" and excluded from the imposition of excise tax on sweetened beverages pursuant to Section 150-B(C)(1) of the NIRC of 1997, as amended by R.A. No. 10963.

Again, We disagree.

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

> "(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**:
>
> "(1) **All milk products**, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and **flavored milk**, fermented milk, soymilk, and flavored soymilk;
>
> xxx xxx xxx" (*Emphases supplied*)

Relative thereto is Section 6 of Revenue Regulation (RR) No. 20-2018,[70] the implementing rule of Section 150-B of the NIRC of 1997, as amended by RA No. 10963, which states:

> "**SEC. 6. EXCLUSIONS – The following products, as described in the food category from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev 2017 or the latest) as adopted by the FDA, are not subject to the excise tax imposed under Section 150-B of the NIRC**, as amended, to wit:

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[70] SUBJECT: Prescribing the Implementing Rules and Guidelines on the Imposition of Excise Tax on Sweetened Beverages Pursuant to Section 47 of Republic Act No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law".

a. **All milk products**, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk, **flavored milk**, and fermented milk.

Milk product refers to products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing (Codex General Standard for the Use of Dairy Terms (Codex Stan 206-1999).

In accordance with the Codex Alimentarius, the following Codex Standards for various milk products are adopted:

1. Milk powders and cream powders (Codex Stan 207-1999)
2. Fermented milks (Codex Stan 243-2003)
3. Blend of evaporated skimmed milk and vegetable fat (Codex Stan 250-2006)
4. Blend of skimmed milk and vegetable fat in powdered form (Codex Stan 251-2006)
5. Blend of sweetened condensed skimmed milk and vegetable fat (Codex Stan 252-2006)
6. Evaporated milk (Codex Stan 281-1971)
7. Sweetened condensed milks (Codex Stan 282-1971)

Dairy products are not synonymous with milk products. Only milk products are covered by the exemption.

xxx xxx xxx

The proper classification of beverages shall be subject to the determination by the FDA."

Settled is the rule that exemptions from tax are strictly construed against the taxpayer and liberally construed in favor of the taxing authority. The same equally applies to tax exclusions. In the case of *Smart Communications, Inc. vs. The City of Davao,*[71] the Supreme Court has explained that a tax exemption and tax exclusion,

[71] G.R. No. 155491, September 16, 2008.

both in the nature and legal effect, have no essential difference, in this wise:

> "However, as previously held by the Court, both in their nature and effect, there is no essential difference between a tax exemption and a tax exclusion. An exemption is an immunity or a privilege; it is the freedom from a charge or burden to which others are subjected. An exclusion, on the other hand, is the removal of otherwise taxable items from the reach of taxation, *e.g.,* exclusions from gross income and allowable deductions. An exclusion, is thus, also an immunity or privilege which frees a taxpayer from a charge to which others are subjected. Consequently, the rule that a tax exemption should be applied *strictissimi juris* against the taxpayer and liberally in favor of the government applies equally to tax exclusions."

Guided by the foregoing principle, Section 150-B (C)(1) of the NIRC of 1997, as amended by RA No. 10963 must be strictly construed.

To fall within the coverage of the exclusion under Section 150-B (C)(1), the law expressly provides to refer to the products described in the food category from the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest), as adopted by the FDA.

Notably, there is no indication that the FDA has adopted the Codex Stan 192-1995, Rev. 2017 as of the time of the subject claim for refund. It is only on August 1, 2019 pursuant to Department of Health (DOH) Circular No. 2019-0319[72] issued by Secretary of Health Francisco T. Duque, III which adopted the food category system and descriptor of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018). The pertinent portion of the said circular reads as follows:

> "I. BACKGROUND
>
> xxx xxx xxx
>
> Pursuant to the implementation of the foregoing policies, Section 15(2), Chapter (4) Title IX, Book IV of the Administrative Code of 1987, authorizes the Food and

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[72] Exhibit 110, Docket – Vol. 5, pp. 2495 to 2496.

Drug Administration to act as the policy formulation and sector monitoring arm of the Secretary of Health on matters pertaining to food, drugs, traditional medicines, cosmetics and household products containing hazardous substances, and to formulate rules and regulations and standards in accordance with Republic Act No. 3720 as amended by Executive Order No. 175, Republic Act 9711 known as Food and Drug Administration (FDA) Act of 2009, and other pertinent laws for their proper and effective enforcement.

Notwithstanding, it was expressly affirmed in the Joint Department of Agriculture and Department of Health Administrative Order (DA-AO No. 2005-001 and DOH AO No. 2005-0028) that "Philippine accession to the GATT-WTO and various bilateral and multilateral trade agreement requires compliance with international trade regulations, including the harmonization of national food standards with international food standard-setting body as the Codex Alimentarius Commission." The harmonization of standards, food in particular, is generally viewed as contributory factor to the protection of consumer health. Thus, the adoption of certain Codex standards is deemed imperative.

Accordingly, the Food Category System and Descriptors, which are parts of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018 or latest) Annex B Part I and II is being adopted. This shall serve as a guide for identification and classification of food products by the Food and Drug Administration (FDA).

II. DIRECTIVE

The FDA hereby adopts the Food Category System and Descriptors of the General Standard for Food Additives (CODEX STAN 192-1995, Rev. 2018) Annex B Part I and II, to serve as basis for the identification and classification of food products in its processing of applications for authorization.

Manufacturers (including repackers and toll-manufacturers), distributors (importers, wholesalers), and traders, of raw materials, ingredients and/or finished food products must conform to these standards for purposes of identification and classification, and compliance with the necessary regulatory registration requirements of the FDA." (*Emphases and underscoring supplied*)

Clearly, at the time of the transaction, no exclusion can be considered on the removal of MILO® products from petitioner's Lipa plant and its co-manufacturers plants.

Nevertheless, even granting that the Codex Stan 192-1995, Rev. 2017 or latest as adopted by the FDA maybe given retroactive effect, the subject MILO® products are still subject to SBT.

A reading of the General Standard for Food Additives (Codex Stan 192-1995, Rev. 2018) Codex Alimentarius International Food Standards, as adopted by the FDA, Annex B, Part I and Part II states, to wit:

"FOOD CATEGORY SYSTEM

PART I: Food Category System

01.0 Dairy products and analogues, excluding products of food category 02.0

01.1 Fluid Milk and Milk Products

01.1.1 Fluid Milk (plain)
01.1.2 Other Fluid Milk (plain)
01.1.3 Fluid Buttermilk
01.1.4 Flavoured Fluid Milk Drinks

xxx xxx xxx

"PART II: Food Category Descriptors

<u>01.1.4 Flavoured fluid milk drinks</u>

Includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavourings and/or food ingredients that intentionally impart flavor, **excluding mixes for cocoa** (cocoa-sugar mixtures, category 05.1.1). Examples, include but are not limited to, chocolate milk, chocolate malt drinks, strawberry-flavoured yoghurt drink, lactic acid bacteria drinks, whey-based drinks, and lassi

> (liquid obtained by whipping curd from the lactic acid fermentation of milk, and mixing with sugar or intense sweetener)." (*Emphasis supplied*)

Based on the foregoing, 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 flavoured fluid milk drink contains mixes for cocoa (cocoa-sugar mixtures), such flavoured fluid milk drink can no longer be classified as a flavoured fluid milk drink. In other words, such flavored fluid milk drink cannot be considered within the coverage of Section 150-B (C)(1) of the NIRC of 1997, as amended by RA No. 10963.

Upon examination by the Court of the ingredients of the MILO® products reveals that cocoa and/or cocoa powder and sugar are present in MILO® products. Refer to Exhibits P-56-1 to P-68-1, attached as Annexes in this Decision.

It is noteworthy that MILO® products has malt as one of its ingredients and is marketed by petitioner as a choco malt powdered milk drink. However, it cannot be denied that cocoa-sugar mixes are also present in its composition, which as previously mentioned is excluded under 01.1.4 of the Codex Stan 192-1995, Rev. 2018.

Such being the case, MILO® products cannot be considered within the coverage of fluid flavoured 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.

But again, 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 same is of no moment because at the time of the transaction, the FDA has not yet adopted the Codex Stan 192-1995, Rev. 2017. In effect, the exclusion under Section 150-B(C)(1) of the NIRC of 1997 cannot be considered.

Thus, the subject excise tax payments cannot be deemed as erroneous or illegal.

Time and again, the Court has stressed that taxation is the rule, exemption is the exception.[73] Tax refunds, being in the nature of tax exemption, must be construed strictly against the taxpayer. As such, petitioner must clearly and unequivocally prove that it falls within the ambit of said exemption.[74]

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

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

ATTESTATION

I attest 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's Division.

ERLINDA P. UY
Associate Justice
Chairperson, 3rd Division

[73] *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company*, G.R. No. 140230, December 15, 2005.
[74] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, 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