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. 1484
(CTA Case No. 8362)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN , *and*
MANAHAN, *JJ.*

Promulgated:

APR 10 2018 2:25 p.m.

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DECISION

RINGPIS-LIBAN, *J.*:

Before the Court En Banc is a Petition for Review[1] filed by Philippine Airlines, Inc. (PAL), petitioner in CTA Case No. 8362 *(Philippine Airlines, Inc. v. Commissioner of Internal Revenue and Commissioner of Customs)* seeking the reversal of the Decision[2] dated January 4, 2016, and the Resolution[3] dated June 22, 2016, rendered by the First Division of this Court, insofar as both denied the refund being sought by PAL in the amount of ₱3,411,054.48 representing excise taxes paid under protest on PAL's importations of cigarettes, liquors and wines for its international flight consumption on various dates in the years 2007 and 2009.

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[1] *Rollo*, pp. 76-410.
[2] *Id.*, pp. 9-60.
[3] *Id.*, pp. 61-74

THE PARTIES

PAL is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines. Its registered address is at the PNB Financial Center, President Diosdado P. Macapagal Avenue, CCP Complex, 1307, Pasay City.[4]

The CIR is the Commissioner of the Bureau of Internal Revenue (BIR), a government agency in charge of the assessment and collection of all national internal revenue taxes, fees, charges, including excise taxes paid on distilled spirits, wines, fermented liquors, cigars and cigarettes under Sections 142 and 145, respectively, of the National Internal Revenue Code (NIRC), as amended. Respondent CIR has his office address at the BIR National Building, Agham Road, Diliman, Quezon City.

The COC is the Commissioner of the Bureau of Customs (BOC), a government agency in charge of the assessment and collection of customs duties and other lawful revenues from imported articles, including excise taxes imposed on wines, liquors and cigarettes under Sections 142 and 145 of the NIRC, as amended, on the basis of the delegated authority of respondent CIR, through an Authority to Release Imported Goods (BIR Form No. 918) (ATRIG), duly issued by the CIR addressed to COC, in accordance with Section 12(a) of the NIRC, as amended. The COC has his office address at G/F OCOM Bldg., Bureau of Customs, Port Area, Manila City.

THE COURT'S JURISDICTION

On June 29, 2016, PAL received a copy of the First Division's Resolution dated June 22, 2016. Under Section 3(b), Rule 8 of the Revised Rules of the CTA (A.M. No. 05-11-07-CTA),[5] PAL had fifteen (15) days from receipt of the said Resolution, or until July 14, 2016, within which to appeal to the Court *En Banc* by way of a Petition for Review.

On July 14, 2016, PAL filed a Motion for Extension of Time to File Petition for Review[6] requesting for an extension of fifteen (15) days or until July 29, 2016 within which to file its Petition for Review.

On July 29, 2016, PAL filed its Petition for Review, hence, the same has been seasonably filed.

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[4] Docket, p. 299, par. 1, Facts, Joint Stipulation of Facts and Issues (JSFI).
[5] Dated November 22, 2005, and which took effect starting December 15, 2005.
[6] *Id.* at Note 1, pp. 1-6.

THE FACTS[7]

On June 11, 1978, PAL was granted a franchise to operate air transport services domestically and internationally[8] under Presidential Decree No. 1590 (PD 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, 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,

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[7] As found by the First Division, *Rollo,* CTA Case No. 8362, pp. 1333-1373, and as culled from the records of the case.
[8] *Id.* at Note 4, par. 4.

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**." *(Emphasis supplied)*

On January 1, 2005, Republic Act No. 9334 (RA 9334), otherwise known as "An Act Increasing the Excise Tax Rates Imposed on Alcohol and Tobacco Products, Amending for the Purpose Sections 131, 141, 142, 143, 144, 145 and 288 of the National Internal Revenue Code of 1997, as Amended" took effect.[9] 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 customshouse, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption.

In the case of tax-free articles brought or imported into the Philippines by persons, entities, or agencies exempt from tax which are subsequently sold, transferred or exchanged in the Philippines to non-exempt persons or 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

[9] *Id.* at p. 301, par. 6.

> **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 on *(sic)* introduction into the Philippine customs territory x x x" *(Emphasis supplied)*

On February 3, 2005, then CIR Guillermo Parayno wrote then COC George Jereos, calling attention to Section 6 of RA 9334 and informing the latter that, "there is a need to implement the same as soon as possible, otherwise, it will result in the non-collection of a significant amount of taxes, which is urgently needed by our country at this time."[10]

On February 4, 2005, then COC George Jereos issued a Memorandum to the BOC officers and personnel directing them to "effect

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[10] *Id.* at p. 302, par. 7.

collection of excise taxes due on imported alcohol and tobacco products, even if destined to DFP and Freeport Zones."[11]

On March 1, 2005, COC Alberto Lina issued Customs Memorandum Order No. 13-2005 (CMO 13-2005), which provided 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 RA No. 9334 and BIR Revenue Regulations No. 12-2004."[12]

Thereafter, on various dates in 2007 and 2009, petitioner's importations of assorted cigarettes, liquors and wines arrived in Manila through the Ninoy Aquino International Airport (NAIA) and South Harbor, covered by various Informal Import Declarations and Entries (IIDEs), Bills of Lading, and Authorities to Release Imported Goods (ATRIGs), as follows:

Port of Entry	Arrival Date	IIDE No.	Air Waybill/Bill of Lading No.	ATRIG	Excise Taxes Paid (Peso)
NAIA	03/21/09	2444[13]	079-3214-8255[14]	00032076[15]	105,814.80
NAIA	03/29/09	2502[16]	079-3214-8406[17]	00032467[18]	126,977.76
NAIA	03/29/09	2503[19]	079-3214-8395[20]	00032489[21]	460,296.74
NAIA	04/09/09	1280[22]	079-3286-6050[23]	00032474[24]	233,384.39
NAIA	04/11/09	3084[25]	079-3192-9892[26]	00032470[27]	104,549.40
South Harbor	04/15/09	3164[28]	0903/408[29]	00032469[30]	367,206.84
NAIA	04/25/09	2505[31]	079-3214-8885[32]	00032472[33]	380,933.28

[11] *Id.* at par. 8.
[12] *Id.* at par. 9.
[13] *Id.*, p. 876, Exhibit "I".
[14] *Id.*, p. 877, Exhibit "1-1".
[15] *Id.*, p. 916, Exhibit "V".
[16] *Id.*, p. 879, Exhibit "J".
[17] *Id.*, p. 880, Exhibit "J-1".
[18] *Id.*, p. 917, Exhibit "W".
[19] *Id.*, p. 882, Exhibit "K".
[20] *Id.*, p. 883 Exhibit "K-1".
[21] *Id.*, p. 918, Exhibit "X".
[22] *Id.*, p. 885, Exhibit "L".
[23] *Id.*, p. 887, Exhibit "L-2".
[24] *Id.*, p. 919, Exhibit "Y".
[25] *Id.*, p. 892, Exhibit "M".
[26] *Id.*, p. 893, Exhibit "M-1".
[27] *Id.*, p. 920, Exhibit "Z".
[28] *Id.*, p. 895, Exhibit "N".
[29] *Id.*, p. 896, Exhibit "N-1".
[30] *Id.*, p. 921, Exhibit "AA".
[31] *Id.*, p. 898, Exhibit "O".
[32] *Id.*, p. 899, Exhibit "O-1".
[33] *Id.*, p. 922, Exhibit "BB".

South Harbor	05/14/07	5188[34]	00704/11706[35]	00030400[36]	186,171.30
NAIA	05/20/09	3713[37]	079-3192-9903[38]	00032468[39]	40,352.40
NAIA	05/23/09	3727[40]	079-3214-9250[41]	00032473[42]	380,933.28
NAIA	03/14/09	2411[43]	079-3214-8130[44]	00032075[45]	128,154.29
SUB-TOTAL					2,514,774.48
NAIA	02/27/09	1686[46]	079-3214-7603[47]	00032166[48]	203,700.00
NAIA	06/30/09	6054[49]	079-3214-9740[50]	00037736[51]	258,020.00
NAIA	02/14/09	1556[52]	079-3214-7382[53]	00037735[54]	434,560.00
SUB-TOTAL					**896,280.00**
TOTAL					**3,411,054.48**

On July 28, 2009[55] and September 23, 2009[56] , Gilda L. Cinco, Acting Chief of WAU of the BOC, submitted to Silveria S. Salazar, Chief of the Collection Division, NAIA Customshouse, through a letter, the documents covering petitioner's payment of duties, taxes and other charges pursuant to CMO No. 13-2006 and RR No. 3-2006.

On October 26, 2009, petitioner paid, under protest, the amounts of ₱2,514,774.48 and ₱896,280.00 to the BOC, representing the excise taxes on the above importations, as evidenced by BOC Official Receipt Nos. 168546944[57] and 168546962.[58]

[34] *Id.*, p. 901, Exhibit "P".
[35] *Id.*, p. 902, Exhibit "P-1".
[36] *Id.*, p. 923, Exhibit "CC".
[37] *Id.*, p. 904, Exhibit "Q".
[38] *Id.*, p. 905, Exhibit "Q-1".
[39] *Id.*, p. 924, Exhibit "DD".
[40] *Id.*, p. 907, Exhibit "R".
[41] *Id.*, p. 908, Exhibit "R-1".
[42] *Id.*, p. 925, Exhibit "EE".
[43] *Id.*, p. 910, Exhibit "S".
[44] *Id.*, p. 911, Exhibit "S-1".
[45] *Id.*, p. 926, Exhibit "FF".
[46] *Id.*, p. 948, Exhibit "JJ".
[47] *Id.*, p. 949, Exhibit "JJ-1".
[48] *Id.*, p. 960, Exhibit "OO".
[49] *Id.*, p. 951, Exhibit "KK".
[50] *Id.*, p. 952, Exhibit "KK-1".
[51] *Id.*, p. 961, Exhibit "PP".
[52] *Id.*, p. 954, Exhibit "LL".
[53] *Id.*, p. 955, Exhibit "LL-1".
[54] *Id.*, p. 962, Exhibit "QQ".
[55] *Id.*, p. 913, Exhibit "T".
[56] *Id.*, p. 957, Exhibit "MM".
[57] *Id.*, p. 914, Exhibit "U".
[58] *Id.*, p. 958, Exhibit "NN".

On October 26, 2009, petitioner formally protested the assessment and collection of the amounts of ₱2,514,774.48[59] and ₱896,280.00[60], through letters addressed to Ms. Silveria Salazar of the BOC.

On November 6, 2009, petitioner filed with the District Collector of Customs of NAIA a written protest against the assessment and collection of ₱2,514,774.48[61] and ₱896,280.00[62] , representing the excise taxes on the above importations.

Thereafter, on January 28, 2010, petitioner filed an administrative claim with respondent CIR for the refund of ₱2,514,774.48[63] and ₱896,280.00[64] , representing the excise taxes paid for the said importations.

However, due to the inaction of respondent CIR on petitioner's administrative claim for refund, the latter filed its Petition for Review[65] on October 26, 2011, docketed as CTA Case No. 8362.

In his Answer[66] filed on January 5, 2012, respondent CIR interposed the following special and affirmative defenses: 1) petitioner failed to exhaust administrative remedies before elevating the case to the CTA when it failed to submit complete supporting documents to respondent CIR; 2) taxes collected are presumed to be in accordance with law and regulations; 3) petitioner's claim for refund is unwarranted as PD No. 1590, particularly Section 13 thereof, had already been expressly repealed or modified by RA No. 9334 which took effect on January 1, 2005; and, as a result of which, 4) the Court is bereft of jurisdiction to hear and try the case.

Respondent COC, on the other hand, submitted his Answer/Comment[67] on January 10, 2012, arguing that petitioner's importations are subject to excise tax because Section 6 of RA No. 9334 is not limited to freeports and duty-free shops; and that the same section applies to petitioner as well.

[59] *Id.*, pp. 927-937, Exhibit "GG".
[60] *Id.*, pp. 963-973, Exhibit "RR".
[61] *Id.*, pp. 928-937, Exhibit "HH".
[62] *Id.*, pp. 964-973, Exhibit "SS".
[63] *Id.*, pp. 938-947, Exhibit "II".
[64] *Id.*, pp. 974-983, Exhibit "TT".
[65] *Id.*, pp. 6-23, Exhibit "UU-1".
[66] *Id.*, pp. 206-218.
[67] *Id.*, pp. 221-250.

Respondent CIR filed his Pre-Trial Brief[68] on January 31, 2012; while respondent COC filed his Pre-Trial Brief[69] on February 13, 2012. Petitioner's Pre-Trial Brief[70] was filed on February 14, 2012. Then the Pre-Trial Conference was held on February 17, 2012.[71]

As directed by the Court in Division, the parties submitted a Joint Stipulation of Facts and Issues[72] and Supplemental Joint Stipulation[73] on April 23, 2012 and June 29, 2012, respectively; which the Court in Division adopted in the Pre-Trial Order[74] dated July 17, 2012.

In support of its refund claim, petitioner presented the following witnesses: (1) Mr. Jonathan Castillo Lee[75], Manager of Company Materials Handling Division of petitioner; (2) Ms. Ma. Evelyn Taghap[76], Manager of the Tax Services Division of petitioner; and (3) Ms. Cheryl Capinpin[77], Manager of the In-Flight Materials Purchasing Division, Catering and In-Flight Materials Purchasing Sub-Department of petitioner.

Petitioner formally offered its documentary evidence on July 26, 2013.[78] Respondent CIR filed his Comment (Re: Petitioner's Formal Offer of Evidence with Motion for Marking/Re-Marking and Motion to Correct Identification of Documents)[79] on August 13, 2013. On the other hand, respondent COC filed his Comment (On Petitioner's Formal of Evidence) on September 11, 2013.

On November 28, 2013, petitioner's Supplemental Formal Offer of Evidence[80] was filed. Respondent CIR filed his Comment (Re: Petitioner's Supplemental Formal Offer of Evidence)[81] on December 4, 2013, while respondent COC waived his right to comment.[82]

Respondent COC likewise waived his right to present evidence in a Manifestation[83] posted on December 17, 2013 and received by the Court in

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[68] *Id.*, pp. 254-259.
[69] *Id.*, pp. 261-265.
[70] *Id.*, pp. 267-275.
[71] *Id.*, p. 279, Minutes of the Hearing dated February 17, 2012.
[72] *Id.*, pp. 299-305.
[73] *Id.*, pp. 486-498.
[74] *Id.*, pp. 506-520.
[75] *Id.*, p. 501, Minutes of the Hearing dated July 12, 2012.
[76] *Id.*, p. 717, Minutes of the Hearing dated November 15, 2012.
[77] *Id.*
[78] *Id.*, pp. 781-860, Formal Offer of Evidence.
[79] *Id.*, pp. 1017-1018.
[80] *Id.*, pp. 1047-1052.
[81] *Id.*, pp. 1057-1059.
[82] *Id.*, pp. 1062-1063, Manifestation.
[83] *Id.*, pp. 1062-1063.

Division on December 20, 2013. Respondent CIR filed a Manifestation (Re: Notice of Resolution promulgated November 14, 2013)[84] on January 21, 2014, also waiving her right to present evidence.

Exhibits "I" to "EEE-8", inclusive of sub-markings, were admitted by the Court in Division via Resolutions dated February 3, 2014[85] and September 3, 2014[86] , after petitioner filed a Motion for Reconsideration (of the Resolution dated February 3, 2014),[87] and after respondents CIR and COC filed their respective comments thereto.[88] The Court in Division also took judicial notice of Exhibits "A", "B", and "E", pursuant to Section 1 of Rule 129 of the Rules of Court, and noted the manifestations of respondent CIR and COC.[89] However, the Court in Division denied the admissions of Exhibits "C", "D", "F", "G", "H", "EEE-7", "EEE-7-a", "EEE-9", "EEE-10", and "FFF".

Petitioner filed a Motion to Admit Attached Memorandum[90] on March 14, 2014, which the Court in Division granted in a Resolution[91] dated April 11, 2014. Respondent CIR filed, through registered mail, his Memorandum (For Respondent)[92] on April 8, 2014; while respondent COC filed his Memorandum[93] on October 10, 2014.

On November 7, 2014, petitioner filed a Manifestation[94] requesting the Court in Division to take note of the Supreme Court's decision in *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*[95]. Respondent COC filed his Counter-Manifestation[96] on November 26, 2014.

Also, considering the exclusion of some of its evidence, petitioner filed a Tender Offer of Documentary Evidence (Offer of Proof of Evidence)[97] on October 7, 2014. On the other hand, respondent CIR filed a

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[84] *Id.*, pp. 1068-1070.
[85] *Id.*, pp. 1074-1076.
[86] *Id.*, pp. 1238-1240.
[87] *Id.*, pp. 1079-1089.
[88] *Id.*, pp. 1153-1156, Comment (Re: Petitioner's Motion for Reconsideration dated February 25, 2014; pp. 1161-1166, Comment (On the Motion for Reconsideration [of the Resolution dated February 3, 2014]).
[89] *Id.*, pp. 1076, Resolution.
[90] *Id.*, pp. 1119-1151.
[91] *Id.*, pp. 1195-1196.
[92] *Id.*, pp. 1170-1192.
[93] *Id.*, pp. 1247-1268.
[94] *Id.*, pp. 1278-1281, Manifestation.
[95] G.R. No. 212536-37, August 27, 2014.
[96] *Id.* at Note 4, pp. 1295-1298.
[97] *Id.*, pp. 1241-1245.

Comment[98] to oppose petitioner's Tender Offer of Documentary Evidence on November 14, 2014, to which petitioner filed a Reply[99] on November 25, 2014.

In the Resolution[100] dated January 20, 2015, the Court in Division noted petitioner's Manifestation and Tender Offer of Documentary Evidence (Offer of Proof of Evidence), and respondent COC's Counter-Manifestation. The case was also submitted for decision in the same Resolution.

On January 4, 2016, the assailed Decision was rendered by the Court in Division[101] finding that PAL 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. The Court in Division also noted that the canvassed list of 2009 retail prices of imported wines and cigarettes taken from the rack of Duty Free Philippines was made by Mr. Gilbert Galedo, an employee of petitioner. The Court in Division concluded that this canvassed list and the price lists of Philippine Wine Merchants were insufficient to prove the unavailability in the local market of the commissary supplies imported by petitioner.

The dispositive portion of the Decision provided, thus:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED."**

Petitioner filed its Motion for Reconsideration[102] through registered mail on January 28, 2016 which was received by the Court in Division on February 5, 2016. Respondent COC filed his Manifestation (In lieu of Comment)[103] through registered mail on March 3, 2016 which was received by the Court in Division on March 10, 2016, while respondent CIR filed his Comment (Re: Motion for Reconsideration Dated 28 January 2016)[104], on April 4, 2016.

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[98] *Id.*, pp. 1284-1288, Comment (Re: Tender Offer of Documentary Evidence [Offer of Proof of Evidence] dated October 7, 2014).
[99] *Id.*, pp. 1290-1293, Reply to Comment (Re: Tender Offer of Documentary Evidence [Offer of Proof of Evidence]).
[100] *Id.*, pp. 1317-1319.
[101] *Id.* at Note 2.
[102] *Id.* at Note 4, pp. 1385-1395.
[103] *Id.*, pp. 1403-1406.
[104] *Id.*, pp. 1417-1423.

In a Resolution dated June 22, 2016[105], the Court in Division denied petitioner's Motion for Reconsideration for lack of merit.

As recounted in the earlier portion of this Decision, petitioner timely filed its appeal via Petition for Review with the Court *En Banc* on July 29, 2016.

In a Resolution dated September 8, 2016, the Court ordered the respondents to file their respective Comments on the Petitions for Review.[106] After asking for an extension of time[107] which was granted[108], respondent CIR filed his Comment on October 17, 2016. Respondent COC, on the other hand, posted his Motion for Extension of Time to File Comment[109] via registered mail on October 4, 2016 which the Court received on October 13, 2016.

On October 14, 2016, the Court *En Banc* granted the COC's motion by way of Minute Resolution[110], giving the COC a final and non-extendible period of thirty (30) days or until December 4, 2016 within which to file his Comment.

On October 17, 2016, respondent CIR filed his Comment[111]. Respondent COC, on the other hand, filed his Comment[112] on November 29, 2016.

The Petition for Review was given due course in a Resolution dated January 18, 2017, and the parties were ordered to submit their respective memorandum within thirty (30) days from receipt of the Resolution.[113]

On January 31, 2017, the Court received a Withdrawal of Appearance[114] of Atty. Robinita P. Chua, counsel for respondent CIR which was noted via Minute Resolution[115] dated February 2, 2017.

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[105] *Id.* at Note 3.
[106] *Id.* at Note 1.
[107] *Id.*, pp. 414-417.
[108] *Id.*, p. 418.
[109] *Id.*, pp. 419-422.
[110] *Id.*, p. 424.
[111] *Id.*, pp. 425-429.
[112] *Id.*, pp. 430-440.
[113] *Id.*, pp. 442-443.
[114] *Id.*, pp. 444-446.
[115] *Id.*, p. 447.

On March 1, 2017, the Court received respondent COC's Manifestation[116] posted via registered mail on February 24, 2017, stating that he is adopting his Comment as his Memorandum which the Court noted[117].

On March 8, 2017, petitioner filed an Entry of Appearance with Motion for Extension of Time to File Memorandum[118] posted by registered mail on February 24, 2017. Petitioner asked for an extension of thirty (30) days from February 25, 2017 or until March 27, 2017 to file its Memorandum owing to a change in counsel. This was granted by the Court.[119]

On March 27, 2017, petitioner posted its Memorandum[120] by registered mail which the Court received on April 5, 2017. Respondent CIR, on the other hand, failed to file his Memorandum as per Records Verification Report of the Judicial Records Division dated April 7, 2017.[121]

On May 9, 2017, the case was submitted for decision.[122] On August 3, 2017, however, respondent CIR filed a Motion to Admit Attached Memorandum[123] which was denied by the Court in a Resolution dated August 31, 2017[124] for insufficient justification of the more than three months' delay.

THE ASSIGNMENT OF ERRORS

Petitioner raises a single assignment of error - that the Court in Division erred in denying its claim for refund because it was able to sufficiently prove its compliance with the requirements to entitle it to exemption from the payment of excise tax.

THE ARGUMENTS OF THE PARTIES

Petitioner primarily argues that it has proven with preponderant and uncontroverted evidence that its imported products were not locally available in reasonable quantity, quality or price, and, more importantly, respondents never presented anything to counter the preponderant evidence.

[116] *Id.*, pp. 448-450.
[117] *Id.*, p. 452.
[118] *Id.*, pp. 453-457.
[119] *Id.*, p.
[120] *Id.*, pp. 460-478.
[121] *Id.*, p. 480.
[122] *Id.*, pp. 482-483.
[123] *Id.*, pp. 489-493.
[124] *Id.*, pp. 495-496.

Moreover, petitioner argues that the condition imposed by PD 1590 is in the alternative, not cumulative, and that for the exemption to apply, the imported articles must not be locally available in reasonable quantity, quality, **OR** price.

Petitioner brings to the Court *en banc's* attention, the testimony of Ms. Cheryl V. Capinpin (Ms. Capinpin) who testified that a) local suppliers do not and cannot supply all the alcohol and tobacco products used by petitioner as commissary and catering supplies, making some of these products unavailable locally; and b) for the alcohol and tobacco products that are available locally, they are not available at a reasonable price as compared to when they are imported.

Respondent CIR, on the other hand, argues that petitioner was unable to present independent and credible evidence as Ms. Capinpin's testimony certifying that the imported products are not locally available at reasonable price is highly self-serving. He further contends that petitioner's definition of "reasonable price" as the cheapest quoted price has no basis in fact and in law and to keep to this definition would render the conditional exemption afforded by PD 1590 an absolute one.

Similarly, respondent COC argues that Congress has already removed PAL's tax privilege under Section 13 of PD 1590 when it enacted the NIRC which originally included in Section 131 the phrase, "[t]he provision of any special or general law to the contrary notwithstanding..." and that Section 131 is the special law that must govern in this case.

Additionally, respondent COC argues that Ms. Capinpin is a biased and incompetent witness as she was not presented as an expert in her field, that her testimony is hearsay, and that the pricelists presented are inadmissible in evidence. Moreover, respondent COC also contends that reasonableness in price is not necessarily the lowest or cheapest price.

THE RULING OF THE COURT

Before delving into the merits of the Petition, if any, it must be noted that the Assailed Decision makes several findings favorable to petitioner, to wit:

a) petitioner's entitlement to exemption from excise tax under its franchise pursuant to PD 1590 has not been revoked by the National Internal Revenue Code (NIRC) of 1997;

b) petitioner's administrative and judicial claims were both seasonably filed;

c) petitioner's corporate income tax and VAT liabilities for the subject period of importation were actually paid; and

d) the imported articles were intended to be used in petitioner's transport and non-transport operations and other activities incidental thereto.

As both respondents failed to appeal the assailed Decision, these matters have become final with respect to them. *We* see no reason to disturb the findings of the Court in Division regarding these matters.

PAL's Evidence of Compliance with the Requirements for Exemption from Payment of Taxes on Its Imported Cigarettes and Alcohol

Finally, the Court will determine whether petitioner is entitled to its claim for refund in the total amount of ₱3,411,054.48 excise taxes it paid under protest.

In order for petitioner's cigarette and alcohol importations to be tax-free, it is necessary to determine whether or not it has complied with Section 13 of PD 1590. The said section provides as follows:

> "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:
>
> 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." *(Emphasis supplied)*

The above-quoted provision provides that payment of basic corporate income tax or franchise tax, in lieu of all other taxes, exempts PAL from the payment of excise tax on its importation of cigarettes, liquor and wine for as long as three requisites are complied with, namely:

1. PAL 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 PAL's 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.

As held in the assailed Decision, the first and second conditions have been sufficiently established by petitioner.

However, with regard to petitioner's compliance with the third condition, the Court in Division ruled that the information gathered from the Judicial Affidavit of Ms. Cheryl Capinpin[125] (petitioner's Manager for In-flight Materials Purchasing Division), the Table of Comparison between Cost of Importing and Cost of Locally Purchasing Commissary and Catering Supplies[126] , the Philippine Wine Merchants (PWM) Price List for the years 2007[127], 2008[128], and 2009[129], the Affidavit of Gilbert M. Galedo[130] who testified to the canvassed list of 2009 retail prices of imported wines and cigarettes taken from the rack of Duty Free Philippines, the Future Trade International Travel Retail Price List as of Feb 2009[131], and the Monthly Philippine Dealing System (PDS) rates for the years 2007 to 2010[132] were insufficient 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 long line of cases involving petitioner[133], 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 <u>and/or</u> 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.*[134] 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.

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[125] *Id.* at Note 4, pp. 573-591, Exhibit "EEE".
[126] *Id.*, pp. 592-597, Exhibit "EEE-2".
[127] *Id.*, p. 642, Exhibit "EEE-3".
[128] *Id.*, p. 643, Exhibit "EEE-4".
[129] *Id.*, p. 644, Exhibit "EEE-5".
[130] *Id.*, p. 645, Exhibit "EEE-6".
[131] *Id.*, p. 647, Exhibit "EEE-7".
[132] *Id.*, p. 649, Exhibit "EEE-8".
[133] 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.
[134] G.R. Nos. 209353-54,211733-34, July 6, 2015.

Similarly, in the more recent case of *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*[135], the Second Division of the Supreme Court acknowledged the factual 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.*[136], 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, (d) Monthly PDS rates for the year 2007-2008, 2008-2009, and 2009-2010.

From the foregoing, it is apparent that petitioner's comparison of the prices of its imported wines and liquor with only one supplier is deemed sufficient.

As regards respondents' allegations that the testimony of Ms. Capinpin is biased and self-serving for being PAL's employee and, thus, is not the kind of evidence that will shift the burden of evidence on the CIR and COC, *We* see no merit in such allegation. In this aspect, the case of *Commissioner of Internal Revenue vs. Fax N Parcel, Incorporated*[137] is instructive on the matter:

> '"The common objection known as 'self-serving' is not correct because almost all testimonies are self-serving. The proper basis for objection is 'hearsay' (Wenke, Making and Meeting Objections, 69).
>
> Petitioner fails to take into account the distinction between self-serving statements and testimonies made in court. Self-serving statements are those made by a party out of court advocating his own interest; they do not include a party's testimony as a witness in court (National Development Co. v. Workmen's Compensation Commission, 19 SCRA 861 [1967]).

[135] G.R. Nos. 215705-07, February 22, 2017.
[136] CTA EB Nos. 1029, 1031 and 1032, April 30, 2014.
[137] CTA EB NO. 883, February 14, 2013 (CTA Case No. 7415); citing *Danilo Hernandez vs. Court of Appeals, et al.*, G.R. No. 104874, December 14, 1993.

> Self-serving statements are inadmissible because the adverse party is not given the opportunity for cross-examination, and their admission would encourage fabrication of testimony. This cannot be said of a party's testimony in court made under oath, with full opportunity on the part of the opposing party for cross-examination.'

Thus, a self-serving declaration is one that is made by a party, out of court and in his favor. It does not include the testimony he gives as a witness in Court.[138] Tested against these standards, the testimonies of the eleven (11) witnesses are not self-serving and are admissible in evidence."

Having been affirmed in open Court and, thereafter, subjected to cross-examination, *We* find that the testimony of Ms. Capinpin is relevant and material to petitioner's claim.

Ms. Capinpin testified that local suppliers do not and cannot supply all the alcohol and tobacco products used by petitioner as commissary and catering supplies, making some of these products unavailable locally; and that for the alcohol and tobacco products that are available locally, they are not available at a reasonable price as compared to when they are imported.

She also identified the pricelists from Philippine Wine Merchants[139], Future Trade International[140], and Duty Free Philippines[141] which were the basis of the *Table of Comparison*[142] which showed that petitioner's cost of importing the subject articles is lower than the prices of those locally available.

She further testified that the prices of some of the tobacco and alcohol that it imports were not included in the lists of prices because of the fact that the prices of these could not be obtained as the products were unavailable locally.

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[138] People vs. Villarama, G.R. No. 139211, February 12, 2003.
[139] *Id.* at Notes 127, 128, and 129.
[140] *Id.* at Note 131.
[141] *Id.* at Note 130.
[142] *Id.* at Note 126.

In *Commissioner of Internal Revenue v. Philippines Airlines, Inc.,*[143] *We* held that the law imposes an alternative, not cumulative, qualification for the determination of whether importations under Sec. 13(2) of PD 1590 will be subject to the exemption and that it would suffice for petitioner to be able to prove even just one qualification out of the three - not locally available in reasonable a) quantity, b) quality, or c) price.

It is apparent in this case that the quantum of evidence that the Supreme Court itself set as regards proving local unavailability of liquor in reasonable price has been exceeded. There is likewise ample testimony on the record that points to the local unavailability of the brand of the alcohol and tobacco products imported which is why they could not provide comparative prices for them. Despite requests from the different government regulatory agencies and suppliers, no prices could be provided as those particular brands were unavailable locally. This points to only one thing -- that they were not locally available in reasonable quantity.

The Court *En Banc* is convinced that petitioner has sufficiently established that the alcohol and tobacco products it imported were not available in either reasonable quantity or price in the local market. Furthermore, the afore-mentioned evidence presented by petitioner remained unrebutted as both respondents failed to present any controverting evidence to refute petitioner's claim.

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 **GRANTED.** The Court in Division's Decision and Resolution promulgated on January 4, 2016 and June 22, 2016, respectively, are hereby **REVERSED AND SET ASIDE.** The case is **REMANDED** to the Court in Division for the determination of the amount of refund due to petitioner.

SO ORDERED.

Ma. Belen S.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[143] CTA EB Nos. 1308, 1309, and 1311, February 27, 2017.

WE CONCUR:

ROMAN G. DEL ROSARIO see Concurring & Dissenting Opinion
Presiding Justice

With due respect, I vote to affirm First Division Decision. Please see Dissenting Opinion.
JUANITO C. CASTAÑEDA JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

I join Justice Castañeda, Jr.'s Dissenting Opinion.
ESPERANZA R. FABON-VICTORINO
Associate Justice

With due respect, I maintain my stand to affirm the assailed Decision.
CIELITO N. MINDARO-GRULLA
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 this Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PHILIPPINE AIRLINES, INC., Petitioner,	**CTA EB No. 1484** *(CTA Case No. 8362)*
	Present:
- versus –	Del Rosario, *P.J.*, Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan, *JJ.*
COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS, Respondent.	Promulgated: APR 10 2018 2:25 p.m.

x- x

CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, P.J.*:**

I concur with the *ponencia* insofar as it ruled that PAL was able to establish that the alcohol products it imported were not locally available in reasonable quantity, quality or price.

With respect to PAL's importation of certain tobacco products, I submit that the evidence presented by PAL was insufficient to establish that said imported tobacco products were not available in reasonable quantity, quality or price.

In concluding that PAL's importation of certain tobacco products is exempt from excise taxes, the *ponencia* in *esse* gave full faith and credit to the following evidence:

1. Testimony of Ms. Cheryl Capinpin, Manager of the In-Flight Materials Purchasing Division, Catering and In-Flight Materials Purchasing Sub-Department; and

2. Duty Free Philippines 2009 Retail Prices taken from the rack of Duty Free Philippines by Mr. Gilbert M. Galedo, PAL's Senior Planning & Purchasing Specialist, Catering & In-flight Materials Purchasing Sub-Department, Corporate Logistics & Service Department, on April 27, 2009.

I submit that the foregoing evidence, taken together, are insufficient to arrive at a logical conclusion that the imported tobacco products are not locally available in reasonable quantity, quality or price. **Evidence, whether rebutted or otherwise, much depends on its intrinsic credibility.**

I note that Duty Free Philippines is just a potential source or supplier of tobacco brands imported by PAL. The fact that said tobacco brands are not available in Duty Free Philippines should not result in the inference that no other local suppliers could provide them. To accept the proposition that items NOT available at the Duty Free Philippines are automatically not locally available in reasonable quantity, quality or price would set a dangerous precedent for the importation of any and all brands which Duty Free Philippines does not sell. The proposition is simply illogical. Unfortunately, in this case, there appears to have been no further efforts on the part of petitioner to obtain price lists from any other cigarette wholesale distributors, suppliers or retailers in the country to establish that the tobacco brands it imported are not locally available in reasonable quantity, quality or price.

In the same vein, the sole testimony of Ms. Cheryl Capinpin, standing alone, *sans* any credible document to corroborate the same, may not be given full faith and credit.

In light of the foregoing, I **VOTE** to: (i) **PARTIALLY GRANT** the Petition for Review filed by Philippine Airlines, Inc.; (ii) **REMAND** the case to the Court in Division to determine the amount of excise tax to be refunded to Philippine Airlines, Inc. which was paid on its importation of **wines and liquors**. With respect to Philippine Airlines, Inc.'s claim for refund of excise tax paid on its importation of certain **tobacco products**, I **VOTE** to **DENY** the same.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE AIRLINES, INC.,
Petitioner,

CTA EB No. 1484
(CTA Case No. 8362)

Present:

Del Rosario, P.J.,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, and
Manahan JJ.

- versus –

COMMISSIONER OF INTERNAL REVENUE and COMMISSIONER OF CUSTOMS,
Respondent.

Promulgated:

APR 10 2018 2:25 p.m.

x---x

DISSENTING OPINION

CASTAÑEDA, JR., J.:

With due respect, I dissent to the conclusion reached by the *ponencia* that the instant Petition for Review should be granted, on the ground that petitioner was able to satisfy all the requisites laid down under Section 13 of Presidential Decree (PD) No. 1590.

Pertinent to the discussion is the following provisions of Section 13 of PD No. 1590: Jr

> "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:
>
> 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**;"*(Emphasis supplied)*

Thus, petitioner needs to satisfy the condition that the imported liquors, wines and cigarettes are not locally available in reasonable quantity, quality, or price, among others. In this regard, the CTA First (1st) Division found during the hearing that petitioner compared the prices of its imported wines and liquors only with the local price list of Philippine Wine Merchants, while petitioner compared the prices of its imported cigarettes only with the price list of Duty Free Philippines.

However, despite lack of evidence that the prices of Philippine Wine Merchants and Duty Free Philippines, respectively, represent the local market price for the subject goods, the *ponencia* concluded that "petitioner's comparison of the price of its imported wines and liquor with only one supplier is deemed sufficient."

It must be stressed that the prices obtained from Philippine Wine Merchants and Duty Free Philippines, respectively, do not represent the local market price of the subject goods. These are mere individual suppliers belonging to a group of suppliers striving for competitive advantages in the market. Unless there is evidence of *monopoly* over the sale of the subject goods by Philippine Wine Merchants and Duty Free Philippines, the prices obtained from these suppliers cannot reflect the local market price. Simply put, it is not Philippine Wine Merchants and Duty Free Philippines who represent the local market, but the totality of local suppliers who are engaged in selling similar products that comprise the local market for these goods.

Since petitioner failed to adduce sufficient evidence to prove that there is an existing monopoly by Philippine Wine Merchants and Duty Free Philippines, respectively, over the sale of the liquors, wines and cigarettes, it follows that petitioner did not meet the condition that the subject goods are not locally available in reasonable quantity, quality, or price.

To conclude, the time-honored principle that taxes are the lifeblood of the nation should always be taken into consideration. Consequently, it must be remembered that tax refunds are construed strictly against the taxpayers.[1] Any claim for refund take the nature of tax exemptions that must be construed *strictissimi juris* against the claimants and liberally in favor of the taxing authority. This power of taxation being a high prerogative of sovereignty, its relinquishment is never presumed.[2]

Considering the foregoing, I **VOTE** to **DENY** the Petition for Review and **AFFIRM** the assailed Decision of the CTA First (1st) Division in CTA Case No. 8362.

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

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[1] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013, 690 SCRA 417.

[2] *Nestle Philippines, Inc. (formerly Filipro, Inc.) v. Honorable Court of Appeals, et al.*, G.R. No. 134114, July 6, 2001, 360 SCRA 583.