REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

DIAGEO PHILIPPINE FREEPORT, INC., Petitioner,	C.T.A. EB NO. 788 (C.T.A. Case No. 7575)
	Members:
- versus -	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
THE COMMISSIONER OF INTERNAL REVENUE and THE COMMISSIONER OF CUSTOMS, Respondents.	Promulgated: DEC 03 2012 3:10pm

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DECISION

Fabon-Victorino, J.:

For review is the February 14, 2011 Decision[1] and the May 25, 2011 Resolution[2] of the Court in Division in CTA Case No. 7575, which denied petitioner's claim for refund or tax credit in the aggregate amount of Php69,377,797.59, allegedly

[1] *En Banc* Docket, pp. 29-48.
[2] *En Banc* Docket, pp. 50-54.

representing erroneous payment of excise tax, value-added tax (VAT) and tariff and customs duties on the importation into the Subic Bay Freeport Zone (SBFZ) of liquors and spirits sometime during the first, second, and fourth quarters of 2005.

The pertinent facts, as culled from the record, are as follows:

Petitioner is a duly organized and existing domestic corporation engaged in the business of importation and wholesale trading of liquors and spirits with retail outlets located within the SBFZ.[3] It is a duly registered "Subic Bay Freeport Enterprise" (SBFE) in the SBFZ as indicated in the Certificate of Registration and Tax Exemption Subic Bay Freeport Enterprise Certificate No. 94-0002 dated February 5, 2005.[4] It was issued Certificate of Registration No. 4RC0000163351 by the Bureau of Internal Revenue (BIR) Revenue District Office No. 019 with Taxpayer Identification No. 002-830-343-000.[5]

Respondents, on the other hand, are the Commissioner of Internal Revenue (CIR) and the Commissioner of Customs (COC), with respective office address at the Bureau of Internal Revenue

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[3] Exhibits "A" and "A-1".
[4] Exhibit "A-2".
[5] Exhibit "A-3".

(BIR) National Office Building, BIR Road, Diliman, Quezon City, and the Bureau of Customs, Port Area, Manila.

Sometime in the first and second quarters of 2005, petitioner imported certain liquors and spirits into the Subic Special Economic and Freeport Zone.[6] Subsequently, or during the fourth quarter of 2005, petitioner exported some of the said imported liquors and spirit.[7]

On October 23, 2006, petitioner filed with respondent CIR, through the Large Taxpayer Service, an administrative claim for refund/tax credit in the amount of Php54,138,531.20, allegedly representing the excise tax and VAT it paid for taxable year 2005 on its importation into SBFZ of liquors and spirits, which were subsequently exported.[8]

On October 25, 2006, petitioner also filed with respondent COC an administrative claim for refund/tax credit in the amount of Php15,239,266.39, representing the alleged erroneous payment of tariff and customs duties on importation into and

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[6] Exhibits "B" to "B-339"; Par. 1, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Division Docket, p. 267.
[7] Exhibits "C" to "C-108"; Par. 2, Joint Stipulation of Facts, JSFI, Division Docket, p. 267.
[8] Exhibit "D".

exportation from SBFZ of liquors and spirits for taxable year 2005.[9]

Due to alleged inaction of both the respondents on its administrative claims for refund/tax credit, petitioner filed a Petition for Review before the Court in Division on February 15, 2007.

In her *Answer*[10] filed on April 18, 2007, respondent CIR posits that the Petition for Review was prematurely filed as the 120-day period for her to decide on the claim had not yet lapsed when the petition was filed. She adds that the amount of Php54,138,531.20 being claimed by petitioner as erroneous payment of VAT on the importation into the SBFZ was not properly documented in violation of Revenue Memorandum Order No. 53-98, in relation to Section 112(D) of the NIRC of 1997. For these reasons, the petition must be dismissed for lack of jurisdiction.

On the other hand, respondent COC in his *Answer*[11] filed on July 10, 2007 also moves for the dismissal of the Petition for Review on the ground that the tax exemption privileges granted

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[9] Exhibit "D-1".
[10] Division Docket, pp. 562-567.
[11] Division Docket, pp. 187-193.

to Subic Bay Freeport Enterprises under Republic Act (RA) No. 7227 were already repealed by RA No. 9334. Section 131 of the National Internal Revenue Code (NIRC) of 1997, as amended by RA No. 9334, specifically provides that taxes, duties and charges, including excise taxes, are made to apply even to the Subic Special Economic and Freeport Zone. Thus, petitioner is not exempt from payment of taxes and duties contrary to its claim

During the trial, only petitioner presented evidence to prove its case. Counsel for respondent CIR waived presentation of evidence alleging lack of investigation report from respondent's Assessment Service.

In a Resolution dated February 25, 2010, the case was submitted for decision, considering respondent's Memorandum *sans* petitioner's Memorandum, despite the opportunity granted.[12]

On February 14, 2011, the Court in Division promulgated the assailed Decision denying petitioner's claim for refund, for lack of merit. The Court in Division ratiocinated that based on the amendments introduced by Republic Act No. 9334, it is clear

[12] Division Docket, p. 440.

that "the importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the Philippines, even if destined for tax and duty-free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes". The Court in Division further emphasized that the amendments categorically provided that it will affect chartered or legislated freeports of Subic Special Economic and Freeport Zone, created under Republic Act No. 7227.

In a Resolution dated May 25, 2011,[13] the Court in Division denied petitioner's Motion for Reconsideration[14] filed on March 3, 2011.

Hence, this instant Petition for Review[15] filed before the Court *En Banc* on June 14, 2011, assigning the following errors allegedly committed by the Court in Division, to wit:

> I. THE THIRD DIVISION COMMITTED REVERSIBLE ERROR BY FAILING TO RULE THAT, UNDER CMO 13-2005, ONLY GOODS DESTINED FOR, AND INTENDED FOR CONSUMPTION IN, THE DOMESTIC MARKET ARE SUBJECT TO TAX;

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[13] See note 2, *Supra*.
[14] Division Docket, pp. 463-483.
[15] *En Banc* Docket, pp. 1-24.

II. THE THIRD DIVISION COMMITTED REVERSIBLE ERROR BY FAILING TO RULE THAT, UNDER THE DESTINATION PRINCIPLE AND CROSS BORDER DOCTRINE, ONLY GOODS DESTINED FOR, AND INTENDED FOR CONSUMPTION IN, THE DOMESTIC MARKET ARE SUBJECT TO TAX;

III. THE THIRD DIVISION COMMITTED REVERSIBLE ERROR IN DENYING THE REFUNDS BECAUSE THIS ALLOWS THE GOVERNMENT TO UNJUSTLY ENRICH ITSELF AT THE EXPENSE OF PETITIONER;

IV. SINCE THE GROUNDS FOR A REFUND HAVE BEEN DULY SUBSTANTIATED, THE THIRD DIVISION COMMITTED REVERSIBLE ERROR BY DENYING THE CLAIM OF PETITION (*sic*) FOR A REFUND.

Petitioner insists that it is entitled to refund of the taxes and duties paid on the Re-Exported Goods, pursuant to Customs Memorandum Order (CMO) No. 13-2005. Per petitioner, CMO No. 13-2005 was issued to implement RA No. 9334 and the said implementing rules and regulation validly provided that "*(I)n the event that the excisable goods are brought out of the country, i.e., not introduced into the domestic market, the taxpayer may request for the refund or a duty drawback for the excise tax paid*." And though CMO No. 13-2005 mentions only the eligibility for the refund of excise taxes, petitioner argues that there is no legal basis to exclude the VAT and customs duties paid on Re-Exported Goods. Petitioner considers the omission of VAT and customs duties in the implementing rules and regulation a plain oversight. Thus, petitioner submits that its claim for tax refund of excise tax, VAT, and tariff and customs duties falls squarely within the provisions of CMO No. 13-2005.

Further, the Re-Exported Goods never crossed to the customs territory of the Philippines and were never destined for consumption in the Philippines since they were imported into Subic, a foreign territory, and then re-exported to a foreign destination. Under the Destination Principle and Cross Border Doctrine, they are not subject to VAT, excise tax, and tariff and customs duties.

Further, granting that there is no specific mechanism for refund of taxes and duties paid on goods which are imported and subsequently exported, the general provisions on recovery of erroneously paid taxes and duties under the Tax Code and the Tariff and Customs Code should apply. Otherwise, it is without remedy thus will suffer substantial and irreparable loss in relying in good faith on CMO No. 13-2005.

Finally, its evidence sufficiently proved that it erroneously paid excise taxes, VAT, and tariff and customs duties in the aggregate amount of Php69,377,797.59, on imported distilled spirits and liquors, which it subsequently re-exported from Subic.

In her *Comment (Re: Petition for Review dated June 30, 2011)*,[16] respondent CIR counters that petitioner can no longer base its claim for refund of excise tax, VAT, and customs duties on Section 12(c) of RA No. 7227, enacted on March 13, 1992 with the enactment of RA No. 9334, which took effect on January 1, 2005. The latter legislation withdrew tax exemption privilege on the importation of distilled spirits and liquors into the Subic Special Economic and Freeport Zone.

Moreover, the law is clear and categorical when it stated that "This shall apply to cigar 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 imposition of taxes is undoubtedly directed regardless of whether the excisable goods are introduced into the domestic market or not. Besides, while rules and regulations issued by administrative or executive officers have the force and effect, or partake the nature of a statute, they must however conform to

[16] En Banc Docket, pp. 162-179.

and not contradict the standards that the law prescribes. The inherent inconsistency of RA No. 9334 and CMO No. 13-2005 is distinctly evident. Thus, it is a derogation of legislative will and reliance therewith is mislaid.

Respondent likewise claims that petitioner erroneously relied on the Destination Principle and Cross Border Doctrine to support its allegation that the subject goods are not subject to tax. The Cross Border Doctrine and Destination Principle are inapposite in the light of the clear language of the law.

Lastly, petitioner failed to prove that it is entitled to the refund sought.

In a Resolution[17] dated October 4, 2011, the Court *En Banc* gave due course to the instant Petition for Review and directed the parties to submit their respective Memoranda, within thirty (30) days from notice.

On January 4, 2012, the instant petition was deemed submitted for decision.[18]

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[17] *En Banc* Docket, pp. 190-192.
[18] *En Banc* Docket, pp. 250-251.

Ruling of the Court En Banc

Did the Court in Division err in denying petitioners claim for refund/tax credit amounting to Php69,377,797.59, allegedly representing erroneous payment of excise tax, VAT and tariff and customs duties on the importation into Subic Bay Freeport Zone of liquors and spirits sometime during the first, second, and fourth quarters of taxable year 2005?

The answer is in the negative.

Petitioner's claim for exemption from excise tax, VAT, and customs duties is anchored on Section 12(c) of RA No. 7227, enacted on March 13, 1992, as implemented by Section 43 of the Implementing Rules and Regulations of RA No. 7227, *viz*:

> (c) The provisions of existing laws, rules and regulations to the contrary notwithstanding, no taxes, local and national, shall be imposed within the Subic Special Economic Zone. In lieu of paying taxes, three percent (3%) of the gross income earned by all businesses and enterprises within the Subic Special Economic Zone shall be remitted to the National Government, one percent (1%) each to the local government units affected by the declaration of the zone in proportion to their population area, and other factors. In addition, there is hereby established a development fund of one percent (1%) of the gross income earned by

all businesses and enterprises within the Subic Special Economic Zone to be utilized for the development of municipalities outside the City of Olongapo and the Municipality of Subic, and other municipalities contiguous to the base areas.

In case of conflict between national and local laws with respect to tax exemption privileges in the Subic Special Economic Zone, the same shall be resolved in favor of the latter;

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SEC. 43. Tax Exemption. — SBF enterprises shall be exempted from all national and local taxes, including but not limited to the following:

a. Customs and import duties and national internal revenue taxes, such as VAT, excise and ad valorem taxes on foreign articles;

b. Internal revenue taxes, such as VAT, ad valorem and excise taxes on their sales of goods and services for which they are directly liable;

c. Income tax on all income from sources within the SBF and foreign countries, Export Processing Zones, Bonded Warehouses and other Special Economic Zones within the Philippines, as well as all other areas that may now or hereafter be considered to be outside the Customs Territory, whether or not payment of such income is actually received, made or collected within such areas; provided, that SBF Enterprises shall, as withholding agents for the National Government, withhold tax on compensation and income payments to persons or individuals subject to expanded withholding tax; and

d. Franchise, common carrier or value-added taxes and other percentage taxes on public and service utilities and enterprises within the SBF;

> In lieu of paying taxes, all SBF Enterprises shall pay a final tax of five (5%) percent of gross income earned in accordance to breakdown specified and defined under Section 57 hereunder.

But a significant change occurred when RA 9334[19] took effect on January 1, 2005, amending the foregoing provision. The amendatory provision reads as follows:

> SEC. 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. —
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>> (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.
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>> 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

[19] 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.

shall be liable for the duty and internal revenue tax due on such importation.

The provision of any special or general law to the contrary notwithstanding, the importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the Philippines, even if destined for tax and duty-free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes due thereon. This shall apply to cigars and cigarettes, distilled spirits, fermented liquors and wines brought directly into the duly chartered or legislated freeports of the Subic Special Economic and Freeport Zone, created under Republic Act No. 7227; the Cagayan Special Economic Zone and Freeport, created under Republic Act No. 7922; and the Zamboanga City Special Economic Zone, created under Republic Act No. 7903, and such other freeports as may hereafter be established or created by law: Provided, further, That importations of cigars and cigarettes, distilled spirits, fermented liquors and wines made directly by a government-owned and operated duty-free shop, like the Duty-Free Philippines (DFP), shall be exempted from all applicable duties only: Provided, still further, That such articles directly imported by a government-owned and operated duty-free shop, like the Duty-Free Philippines, shall be labeled 'duty-free' and 'not for resale': Provided, finally, That the removal and transfer of tax and duty-free goods, products, machinery, equipment and other similar articles other than cigars and cigarettes, distilled spirits, fermented liquors and wines, from one freeport to another freeport, shall not be deemed an introduction into the

> Philippine customs territory. (*Emphases supplied*)

With the amendment introduced by RA No. 9334, petitioner's importations of certain liquors and spirits into the Subic Special Economic and Freeport Zone **have become subject to all applicable taxes, duties, charges, including excise taxes due thereon**.

The Supreme Court clarified the matter in the case of *Republic of the Philippines, et al. vs. Hon. Ramon S. Caguioa, et al.*,[20] viz.:

> It is beyond cavil that R.A. No. 7227 granted private respondents exemption from local and national taxes, including excise taxes, on their importations of general merchandise, for which reason they enjoyed tax-exempt status until the effectivity of R.A. No. 9334.
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> By subsequently enacting R.A. No. 9334, however, Congress expressed its intention to withdraw private respondents' tax exemption privilege on their importations of cigars, cigarettes, distilled spirits, fermented liquors and wines. xxx
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> xxx xxx xxx
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> To note, the old Section 131 of the NIRC expressly provided that all taxes, duties, charges, including excise taxes shall not apply to importations of cigars,

[20] G.R. No. 168584, October 15, 2007.

> cigarettes, fermented spirits and wines brought directly into the duly chartered or legislated freeports of the SBF.
>
> On the other hand, Section 131, as amended by RA No. 9334, now provides that such taxes, duties and charges, including excise taxes, shall apply to importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the SBF. (*Underscoring supplied*)

Thus, the Court *En Banc* quotes with approval the disquisition of the Court in Division on the matter in its Decision promulgated on February 14, 2011, to wit:

> Based on the foregoing amendment introduced by RA No. 9334, it is clear that 'the importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the Philippines, even if destined for tax and duty-free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes due thereon'; this shall apply to cigars and cigarettes, distilled spirits, fermented liquors and wines brought directly into the duly chartered or legislated freeports of the Subic Special Economic and Freeport Zone, created under Republic Act No. 7227. It is categorically provided that the amendments will affect chartered or legislated freeports of Subic Special Economic and Freeport Zone, created under Republic Act No. 7227. The law is, therefore, clear that "the importation of cigars and cigarettes, distilled spirits, fermented liquors and wines into the Philippines, even if destined for tax and duty-free shops, shall be subject to all applicable taxes, duties, charges, including excise taxes. The phrase "all applicable taxes" includes tax liability for the payment of VAT on importation under Section 107 of the NIRC, as amended.

> A cardinal rule in statutory construction is that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application.
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> xxx xxx xxx
>
> Likewise, petitioner's claim for refund of paid excise tax, VAT, and customs duties covers taxable year 2005; which period is within the effectivity of the above-stated amendment as provided by RA No. 9334. Hence, petitioner's claim for refund of excise tax, VAT, and customs duties in the amount of P69,377,797.59 should be denied.

The Court *En Banc* is not also convinced with petitioner's claim that it is entitled to refund of the taxes and duties paid on the Re-Exported Goods pursuant to CMO No. 13-2005. As held in the assailed Resolution of May 25, 2011, CMO No. 13-2005 cannot provide for the duty drawback when the same is not provided for in the law, i.e., Section 131 of the NIRC of 1997, as amended. The pertinent portion of the said Resolution reads:

> We disagree with petitioner. An examination of Section 131 of the 1997 NIRC, as amended, will readily show that it does not provide for any exemption nor grant a refund of the excise tax, VAT, tariff and customs duties paid under such section. In fact, the only exemption granted is in favor of government owned and operated duty-free shops like the Duty-Free Philippines. Neither does Section 131 provide for any mechanism for refund of the taxes and

> duties paid upon importation. CMO No. 13-05 cannot provide for the duty drawback when the same is not provided for in the law.

To be sure, the Implementing Rules and Regulation, i.e., CMO No. 13-2005, issued by the Bureau of Customs cannot provide for any exemption nor grant a refund of taxes and duties when the same is not provided in the law that it wishes to implement. This is simply because "the spring cannot rise above its source".

Basic is the rule that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the entity claiming the same.[21] And the taxpayer claimant, has the burden of proof to show that it is entitled to the refund of the amount claimed as refundable because taxes are presumed to have been collected in accordance with laws and regulations on the matter. The burden of proof rests upon the taxpayer to establish by sufficient and competent evidence its entitlement to a claim for refund.[22] In the instant petition, petitioner utterly failed to show the clear grant of exemption or right to refund under the law and therefore failed to discharge its burden.

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[21] *Philippine Geothermal, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 154028, July 27, 2005.
[22] *Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd.*, 244 SCRA 336.

In view of the foregoing disquisition, a discussion of the other issues raised by petitioner is unwarranted.

WHEREFORE, the instant *Petition for Review* is **DENIED,** for lack of merit. Accordingly, the Decision dated February 14, 2011 and the Resolution dated May 25, 2011 are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice