Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

MOBIL PHILIPPINES INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 110
C.T.A. Case No. (6573 & 6576)
Members:
ACOSTA, PJ
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
JUL 26 2006 [signature]

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DECISION

CASANOVA, J.:

This is an appeal made in pursuant to Section 11 of Republic Act 9282 from the Resolutions dated April 20, 2005 and July 26, 2005 issued by the Second Division of the Honorable Court. The assailed resolutions dismissed with finality petitioner's claim for refund or tax credit of excise taxes in the total amount of One Hundred Fifty Three Million Four Hundred Ten Thousand Three Hundred Fifty Six Pesos and 87/100 (Php153,410,356.87), which it paid on its purchases of Jet A-1 fuel and other petroleum products, and which it subsequently sold to international carriers for the period December 1, 2000 to November 30, 2001. The assailed Resolutions proceeded from the Honorable

CTA Second Division's conclusion that petitioner is not the proper party that may claim refund or tax credit.

The facts of the case as culled from the records are as follows:

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at 17/F, The Orient Square, Emerald Avenue, Ortigas Center, Pasig City.

Respondent is the Commissioner of Internal Revenue who was duly appointed and empowered to perform duties of his office, including, among others, the duty to act on and approve claims for refund or tax credit as provided by law, with office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City, where he may be served with summons and other legal processes of this Honorable Court.

Petitioner is duly registered with the BIR with Tax Identification No. 000-163-830-000.

Petitioner, on June 3, 2002, filed with the BIR an administrative claim for refund of excise taxes paid for its purchases of Jet A-1 fuel for the month of December 2000, which were subsequently sold to international carriers (KLM Group, Nauru Air, Northwest Orient Airlines, and Thai Airways) amounting to Php17,361,889.20.

Petitioner, on July 26, 2002, filed with the BIR an administrative claim for refund dated July 16, 2002 for excise taxes paid on its purchases of Jet A-1 fuel for the period October to December 2000, which was subsequently sold to China Airlines, the December portion of such excise tax payments amounted to Php2,306,448.20.

Petitioner, on July 26, 2002, filed with the BIR an administrative claim for refund dated July 16, 2002 for excise taxes paid for the month of December 2000 amounting to Php58,933.44 on its purchases or importations of base oil and additives used to manufacture marine lubes, which were subsequently sold to international carriers.

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Petitioner, on the following dates, filed with the BIR separate administrative claims for refund of excise taxes paid for taxable year 2001 for its purchases of Jet A-1 fuel which were subsequently sold to international carriers (China Airlines, KLM Group, Nauru Air, Northwest Orient Airlines, and Thai Airways) in the aggregate amount of Php133,683,086.03:

Period Covered	**Date of Filing of Administrative Claim**	**Amount of Excise Tax Claimed for Refund**
January 2001	July 12, 2002	P 18,467,293.20
May 2001	November 22, 2001	12,496,896.83
June 2001	July 12, 2002	18,432,685.10
July 2001	December 4, 2001	18,632,736.80
August 2001	December 4, 2001	20,331,506.40
September 2001	July 12, 2002	18,858,038.10
October 2001	July 12, 2002	15,357,261.80
November 2001	July 26, 2002	11,106,667.80
Total		**P133,683,086.03**

On November 29, 2002, petitioner filed a Petition for Review with the Honorable Court of Tax Appeals claiming refund or tax credit of the total amount of Nineteen Million Seven Hundred Twenty Seven Thousand Two Hundred Seventy and 84/100 Pesos (Php19,727,270.84), allegedly representing excise taxes paid on Jet A-1 fuel and other petroleum products subsequently sold to international carriers for the period December 2000. This case was docketed as CTA Case No. 6573.

Also, on December 23, 2002, petitioner filed another Petition for Review claiming a refund or tax credit of the total amount of One Hundred Thirty Three Million Six Hundred Eighty Three Thousand Eighty Six and 03/100 Pesos (Php133,683,086.03), allegedly representing excise taxes paid on petroleum products sold to international carriers for the period January 2001 to December 2001. This case was docketed as CTA Case No. 6576.

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Upon petitioner's motion, the above cases were consolidated. Thereafter, the cases were scheduled for pre-trial conference. After the termination of the pre-trial conference, petitioner proceeded to present its evidence.

On January 7, 2005, shortly before petitioner is ready to terminate the presentation of its evidence, petitioner received a copy of respondent's "Motion to Resolve First the Issue of Whether or Not the Petitioner is the Proper Party That may Ask a Refund" dated December 22, 2004.

On April 20, 2005, the Second Division of the CTA issued a Resolution granting the said motion thereby dismissing petitioner's Petition for Review. Petitioner filed its "Motion for Reconsideration" on May 12, 2005, which was denied by the Second Division in a Resolution promulgated on July 26, 2005. Hence, this Petition for Review filed with the Court *En Banc* where petitioner raised the following grounds in support of its petition:

I.

SECTION 135 OF THE NIRC OF 1997 CLEARLY EXEMPTS FROM EXCISE TAXES PETROLEUM PRODUCTS SOLD BY PETITIONER TO INTERNATIONAL CARRIERS REGISTERED IN FOREIGN COUNTRIES WHICH HAVE EXISTING BILATERAL AGREEMENTS WITH THE PHILIPPINES, ALTHOUGH NOT SOLD DIRECTLY BY THE MANUFACTURER OR PRODUCER THEREOF.

II.

CONSIDERING THAT THE EXCISE TAXES ON THE PETROLEUM PRODUCTS SOLD TO INTERNATIONAL CARRIERS WERE PAID FOR BY PETITIONER, PETITIONER IS THE PROPER PARTY TO FILE THE INSTANT CLAIM FOR REFUND.

III.

RESPONDENT'S MOTION IS ESSENTIALLY A MOTION TO DISMISS, WHICH SHOULD HAVE BEEN DENIED OUTRIGHT FOR HAVING BEEN FILED OUT OF TIME.

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The Court deemed it necessary to resolve the third issue first before determining the issue of whether petitioner is the proper party to claim for refund.

Petitioner alleges in the instant Petition for Review that from a mere procedural standpoint, respondent's motion is a Motion to Dismiss, which should have been denied outright for being filed out of time.

We do not agree.

Record shows that on January 7, 2003, the Court granted respondent fifteen (15) days from January 4, 2003, or until January 19, 2003 within which to file his answer. On January 17, 2003, respondent seasonably filed his answer, raising as one of his special and affirmative defenses that the petitioner is not the proper party to request for a refund (*page 4, No. 6, Respondent's Answer*). Pursuant to Section 6, Rule 16 of the 1997 Rules of Civil procedure, as amended, "If no motion to dismiss has been filed, any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer, and in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed". The same provision is also contained in the IBP-OCA Memorandum on Policy Guidelines dated March 12, 2002, to observe restraint in filing a motion to dismiss and instead allege the grounds thereof as defenses in the Answer. In addition, the issue of whether or not petitioner is the proper party to claim for a tax refund of the excise taxes allegedly passed on by Petron and Caltex, is included in the Joint Stipulation of Facts and Issues submitted by both parties to the Court (*page 5, No. 11, Joint Stipulation of facts and Issues*). Respondent moved to resolve the said issue in the interest of speedy disposition of the consolidated cases filed with the Court, it being one of the stipulated issues.

With regard to the first and second issues, petitioner alleges that its claim for refund finds legal support in Section 135 of the 1997 NIRC, as amended, which states:

> "Sec. 135. *Petroleum products sold to foreign international carriers and Exempt Entities or Agencies.* – Petroleum products sold to the following are exempt from excise tax:
>
> (a) International carriers of Philippine or foreign registry on their use or consumption outside the Philippines: Provided, That the petroleum products sold to these international carriers shall be stored in a bonded storage tank and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner;
>
> (b) Exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption: Provided, however, That the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carriers, entities or agencies; and
>
> (c) Entities which are by law exempt from direct and indirect taxes." (underscoring supplied)

The conclusion reached by the CTA's Second Division that petitioner is not the proper party that may claim a refund in the instant case proceeds from its pronouncement that only persons who are statutorily required to pay the excise taxes are clothed with a personality to claim refund or tax credit thereof. The Second Division correlated Section 135 with Section 130 of the 1997 NIRC, as amended, which provides that manufacturers and producers of petroleum products are obliged to file excise tax returns and pay excise taxes due thereon before their removal from the place of production.

The Court *En Banc*, however, notes that Section 135 (b) speaks of "petroleum products sold" as its subject, and it is silent as who shall have made

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the sale. It does not mention, nor require, that such products to be exempt should be sold by the manufacturer or producer only.

Sec. 135 (b) of the NIRC of 1997 exempts from excise tax the Petroleum products sold to exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption. Provided, however, that the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carrier entities or agencies.

While it may be said that Section 135 (b) of the 1997 NIRC, as amended, does not qualify as to who the seller of the petroleum products should be, the Court *En Banc*, nevertheless, finds that the petitioner, in these consolidated cases, is not the proper party to file a claim for refund or tax credit of excise taxes.

The subject matter of the instant cases is an indirect tax which may be passed on to the buyer. Excise taxes are imposed on commodities. They form part of the commodity and passed on to the customers. Excise taxes are in the nature of indirect taxes and these taxes are transferable. These are charges paid by one person other than the one on whom they are legally imposed. They are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The liability for the payment of tax falls on one person but the burden thereof can be shifted or passed on to another. (*p. 38, Income Taxation, 2001 Revised Edition by Edwin G. Valencia & Gregorio F. Roxas; p. 49, 2005 Revised Edition*).

Section 135 (b) of the 1997 NIRC, as amended, is not applicable in these consolidated cases because petitioner neither paid nor remitted excise taxes to the BIR. When the petitioner purchased the subject petroleum products from Petron and Caltex, the excise taxes paid and remitted by the two sellers became part of the purchase price. Thus, petitioner cannot ask for a refund for its alleged payment of excise taxes.

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In a Supreme Court case, it was held that:

> "It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must. It does not matter that an additional amount is billed as tax to the purchaser. The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the seller of a tax on the amount of the tax. The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else." (*Philippine Acetylene Co. vs. CIR, 20 SCRA 1056*)

Well entrenched in our jurisprudence is that tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption ***(Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87 [1999])***.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED DUE COURSE** and **DISMISSED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

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ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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MOBIL PHILIPPINES, INC.
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 110
(C.T.A. Case No. 6573 & 6576)

Present:

Acosta, ***P.J.***
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, ***JJ.***

Promulgated:
JUL 26 2006

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Dissenting Opinion

With due respect to my distinguished colleagues, I wish to express my disagreement to the denial by the Court of Tax Appeals *En Banc* of herein petitioner's claim for refund representing excise taxes erroneously paid on the ground that herein petitioner is allegedly not the proper party to the said claim but the manufacturer of the petroleum products, Petron and Caltex Corporation, inasmuch as the excise tax paid was merely factored in the purchase price. The bases of my dissent are as follows: (1) Section 135 of the 1997 Tax Code provides for the exemption from excise tax of petroleum products sold to foreign international carriers and exempt entities; (2) the same Section 135 of the 1997 Tax Code does not distinguish between the manufacturer or dealer of the petroleum products as far as the right to claim refund; and (3) the unique factual and legal backdrop of the case qualify herein petitioner as a proper party to the refund claim.

Inasmuch as the proper interpretation of **Section 135 of the Tax Code** is the crux of the controversy, the same is hereunder quoted for ready reference:

> "**Sec. 135. Petroleum products sold to foreign international carriers and Exempt Entities or Agencies.** – Petroleum products sold to the following are exempt from excise tax:
>
> (a) International carriers of Philippine or foreign registry on their use or consumption outside the Philippines: Provided, That the petroleum products sold to these international carriers shall be stored in a bonded storage tank and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner;
>
> (b) **Exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption; Provided, however, That the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carriers, entities or agencies**; and
>
> (c) Entities which are by law exempt from direct and indirect taxes." *(Emphasis supplied)*

From the wordings of above-quoted **Section 135 (b) of the 1997 Tax Code,** petroleum products sold to exempt entities or agencies covered by tax treaties, conventions, and other international agreements for their use or consumption are exempt from excise tax, provided the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carrier, entities or agencies.

The law intentionally placed petroleum products sold to international carriers in a favored situation, relative to all other products subject to excise taxes by virtue of either specific international agreements, or simply of international reciprocity.

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Allow me to call this Court's attention to the provisions granting preferential tax treatments and/or tax exemptions to Philippine carriers or agencies in the tax treaties between the Philippines and the countries of the foreign international carriers to whom herein petitioner sold petroleum products (*Petition for Review, pages 24-25*).

The "Air Transport Agreement Between the Government of the Republic of the Philippines and the Government of the Kingdom of Netherlands," which covers the international carrier KLM group, provides in part that:

> "**Art.4**
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> "xxx
>
> "(2) **Supplies of fuels**, lubricants, spare parts, regular equipment and aircraft stores **introduced into the territory of one other Contracting Party by or on behalf of a designated airline of the other Contracting Party or taken on board the aircraft operated by such designated airline and intended solely for use in the operation of international air services shall be exempt from all duties and charges**, including customs duties and inspection fees imposed in the territory of the first Contracting Party, even when these supplies are to be used on the parts of the journey performed over the territory of the Contracting Party in which they are taken on board. The materials referred to above may be required to be kept under customs supervisions or control." (*Emphasis supplied*)

The "Agreement Between the Government of the Republic of the Philippines and the Government of the Kingdom of Thailand Relating to Air Services Between Their Respective Territories," that covers the international carrier Thai Airways, similarly provides a tax exemption provision, thus:

> "**Art.3**
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> "xxx
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> "(c) Without prejudice to the other provisions of this Article, aircraft operated on the agreed services and **supplies of fuels**, lubricating oils, spare parts, regular equipment and aircraft stores **retained on board civil aircraft of the airlines of one contracting**

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> **party authorized to operate the routes and services described in the Annex shall, upon arriving in or leaving the territory of the other contracting party, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory."** (*Emphasis supplied*)

The "Air Transport Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines," which covers the foreign carrier Northwest Orient Airlines, has a provision of similar import, to wit:

> "**Art.9. Customs Duties and Taxes**
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> "xxx
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> "(2) **There shall also be exempt, on the basis of reciprocity, from taxes,** duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the services provided, as follows:
>
> "xxx
>
> **"**(c) **fuel**, lubricants and consumable technical services **introduced or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.**" (*Emphasis supplied*)

As correctly noticed by the Court *En Banc*, Section 135 (b) of the 1997 Tax Code speaks of "petroleum products sold" as its subject, and it is silent as who shall have made the sale. It does not mention, nor require, that such products to be exempt must be sold by the manufacturer or producer only. Similarly, in all of the provisions of the afore-quoted treaties, the Philippine Government granted unconditional exemption from payment of excise taxes to international carriers registered in the countries with existing air transport agreements with the Philippines, after showing of a reciprocal grant of tax exemption privilege to carriers of Philippine registry. The treaties and Section 135 (b) did not make any distinction or qualify as to where the petroleum products are to be sourced. Whether the same are sold directly by the producers or manufacturers or from mere distributors or jobbers like herein petitioner, is immaterial. The elementary rule in statutory construction is that where the law does not distinguish, the courts should make no distinction. *Ubi lex non distinguit nec nos distinguire debemos* (**Mendoza, et. al. vs. COMELEC, et. al.**, *G. R. No. 149736, December 17, 2002).* Accordingly, in the absence of any distinction, the logical presumption is that the contracting parties in the treaties intended to exempt from excise taxes petroleum products sold in one contracting state to international carriers registered in the other contracting state, without regard to who is the actual seller. A contrary interpretation will unnecessarily restrict the scope of the exemption of international carriers to petroleum products purchased only from the producers or manufacturers.

I will now proceed to the issue of proper party or real party in interest.

The contention that petitioner is not the proper party to claim for refund is based on the line of reasoning that an excise tax, being an indirect tax, is the direct liability of the producer, although the burden of taxation falls on another person. And when the same is added to the cost of goods, it is no longer considered a tax but a part of the purchase price. Hence, the proper claimants to the subject request for tax refund are the manufacturers Petron and Caltex Corporation. Again, I beg to differ.

To assist in defining the parameters of the term "real party in interest," **Section 2, Rule 3 of the 1997 Revised Rules of Procedure** is hereunder quoted, thus:

> "**Section 2. Parties in interest. – A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit.** Unless otherwise

> authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest." (*Emphasis supplied*)

Based on the afore-quoted provision, a party who stands to be benefited or injured by the judgment or entitled to the avails of the suit is a real party in interest. Certainly, by definition alone, the petitioner must be regarded as a real party in interest inasmuch as any judgment of this Court, which may be either a grant or denial of the tax refund will injure or benefit herein petitioner. Likewise, since petitioner shouldered the payment of excise tax, petitioner should have the legal personality to ask for said refund as it stands to be injured by the excise tax billed to it. Accordingly, petitioner should be regarded as a party in interest or as a person having sufficient legal interest to bring a suit for refund of taxes it believes were erroneously collected from it, especially after showing that the requirements of the law are complied with and that the manufacturer or any other entity made no prior claim for refund.

To recapitulate, the finding that herein petitioner is not entitled to tax refund and/or is not the proper party to said refund claim is without merit. By any reasonable standard, petitioner should be regarded as a party in interest or as a person having sufficient legal interest to bring a suit for refund of taxes it believes was erroneously collected. Accordingly, I manifest my position regarding petitioner's right to claim tax refund.

ERNESTO D. ACOSTA
Presiding Justice