REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE ASSOCIATED SMELTING AND REFINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 2172
(CTA CASE NO. 7565)

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.,
Uy,
Ringpis-Liban,
Manahan,
Bacorro-Villena, *and*
Modesto-San Pedro, *JJ.*

Promulgated:

JAN 27 2021 11:13 a.m.

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DECISION

RINGPIS-LIBAN, J.

Before the Court *En Banc* is a Petition for Review[1] seeking nullification of the Decision dated June 27, 2019[2] (Assailed Decision) and Resolution dated October 22, 2019[3] (Assailed Resolutions), all promulgated by the Special Second Division of this Court (Court in Division) in CTA Case No. 7565 entitled "*Philippine Associated Smelting and Refining Corporation vs. The Honorable Commissioner of Internal Revenue*" which denied the Petition for Review due to insufficiency of evidence.

The dispositive portions of the assailed Decision and Resolution read as follows:

[1] Rollo, CTA EB No. 2172, pages 8-42, with annexes.
[2] Ibid., pp.. 711-725.
[3] Ibid.., pp. 768-773.

June 27, 2019 Decision:

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** due to insufficiency of evidence. Accordingly, the denial of respondent of petitioner's application for tax credit and/or refund of excise tax payments is hereby **AFFIRMED**.

SO ORDERED."

October 22, 2019 Resolution:

"**WHEREFORE**, petitioner's *Motion for Reconsideration and/or Motion for New Trial* is **DENIED** for lack of merit.

SO ORDERED."

THE PARTIES

Petitioner Philippine Associated Smelting and Refining Corporation (PASAR) is a domestic corporation duly organized and existing under Philippine laws, with office address at 11th Floor Zuellig Building, Makati Ave., cor. Paseo De Roxas, Makati City.[4]

On the other hand, respondent Commissioner of Internal Revenue (CIR) is being sued in his official capacity, having been duly appointed to exercise the powers and perform the duties of his office. Respondent holds office at the 5th Floor, BIR National Office Building, Agham Road, East Triangle, Diliman, Quezon City.[5]

THE FACTS

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

PASAR is engaged in the business of exporting, processing, smelting and refining metals. Its plant is located at Leyte Industrial Development Estate (LIDE), Isabel Leyte, a Special Export Processing Zone established pursuant to Presidential Decree (PD) No. 66, as amended, and Executive Order (EO) No. 567, dated November 13, 1979.

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[4] Petition for Review, p 9.
[5] Decision, p. 1.

PASAR is duly registered as a Zone Export Enterprise with the Export Processing Zone Authority (EPZA) pursuant to the provisions of PD No. 66, as amended, and EO No. 567.

In its operations, PASAR uses petroleum products such as industrial diesel oil (IDO), automotive diesel oil (ADO), diesel, bunker fuel oil (BFO) or industrial fuel oil (IFO) and lubricants. These are purchased from local distributors like Petron Corporation (Petron), which imports the same and pays the corresponding customs duties to the Bureau of Customs (BOC) and the excise taxes to the Bureau of Internal Revenue (BIR). Petron, in turn, bills PASAR the duties and excise taxes it paid on the petroleum products.

On November 23, 2006, PASAR, invoking the provisions of Section 17(1) of PD No. 66 and Article 77 of EO No. 226, originally filed an application with respondent, thru Assistant Commissioner Nestor Valeroso of the Large Taxpayers Service Division of the main office of the BIR, for tax credit and/or refund arising from excise tax payments in connection with its purchase of petroleum products covering the period January 2005 to October 2005 in the total amount of Php11,687,467.62. Since, it is not a large taxpayer, PASAR re-filed its claim for tax credit and/or refund with the Office of the Regional Director of Revenue Region No. 14, Palo, Leyte on December 28, 2006.

In a letter dated January 3, 2007, respondent, through Regional Director Estrella V. Martinez of Revenue Region No. 14, Palo, Leyte, denied PASAR's Application for tax credit and/or refund of excise tax payments.

On January 9, 2007, PASAR filed a Petition for Review before the Court in Division, docketed as CTA Case No. 7565, entitled "*Philippine Associated Smelting and Refining Corporation vs. The Honorable Commissioner of Internal Revenue*". The Petition for Review was filed to appeal the denial of petitioner's claim for tax credit and/or refund of excise tax payments.

On February 6, 2007, the CIR filed his Answer.[6]

On February 23, 2007, PASAR filed its Reply (to the Answer of Respondent.[7]

On June 27, 2019, the Court in Division rendered the assailed Decision.

On July 19, 2019, PASAR filed a "Motion for Reconsideration and/or Motion for New Trial."[8] N

[6] Docket, CTA Case No. 7565, pp. 43-49.
[7] Ibid., pp. 51-57.
[8] Ibid. pp. 2502-2520, with Annexes.

On October 22, 2019, the Court in Division issued a Resolution on the Motion for Reconsideration.

On November 18, 2019, the Court *En Banc* received PASAR's "Motion for Extension of Time to File Petition for Review"[9] praying that it be granted an extension of fifteen (15) days from November 19, 2019 or until December 4, 2019 within which to file its Petition for Review.

On November 21, 2019, the Court *En Banc* issued a Minute Resolution[10] granting petitioner's "Motion for Extension of Time to File Petition for Review." Hence, as prayed for, PASAR is granted a final and non-extendible period of fifteen (15) days from November 19, 2019 or until December 4, 2019 within which to file its Petition for Review.

On December 4, 2019, petitioner filed through registered mail the instant Petition for Review, which was received by the Court on December 11, 2019.[11]

In the Resolution[12] dated January 8, 2020, the Court *En Banc* issued a Resolution ordering respondent to file a Comment, not a Motion to Dismiss, to the instant Petition for Review within ten (10) days from notice.

On January 22, 2020, respondent filed a "Comment (on petitioner's Motion for Reconsideration."[13]

On February 10, 2020, the Court *En Banc* issued a Resolution giving due course to the Petition for Review. Thereafter, the Court *En Banc* deemed the case submitted for decision.[14]

THE ASSIGNMENT OF ERRORS

Petitioner submits that the Court in Division erred when it failed to rule that there is sufficient evidence to show that excise taxes were passed on and charged by Petron to PASAR as part of the fuel price; and when it failed to rule that Petron actually paid the excise taxes subject of the refund to the BIR.

THE RULING OF THE COURT *EN BANC*

TIMELINESS OF THE PETITION

[9] Rollo, pp. 1-6.
[10] Ibid., p. 7.
[11] Ibid., pp. 8-42, with Annexes.
[12] Ibid., p. 798.
[13] Ibid., p. 800-810.
[14] Ibid., pp. 812-813.

The Court *En Banc* shall determine first whether PASAR's claim for refund was timely filed.

Pertinent to the resolution of this matter are Sections 204(C) and 229 of the NIRC of 1997, as amended, which provide for the procedure governing refund of erroneously paid taxes, to wit:

> "**SEC. 204.** ***Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*** – The Commissioner may-
>
> *xxx* *xxx* *xxx*
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamped that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund xxx.
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> **SEC. 229.** ***Recovery of Tax Erroneously or Illegally Collected.***- No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefore, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

The foregoing provisions govern all kinds of refund or credit of internal revenue taxes collected erroneously or illegally, pursuant to the NIRC of 1997, as amended.[15] Section 204(C) applies to administrative claims filed with the BIR, while Section 229 refers to judicial actions for the recovery of the tax.

In the case of *Commissioner of Internal Revenue v. Goodyear Philippines, Inc.*,[16] the Supreme Court held that Section 229 of the NIRC of 1997, as amended, states that judicial claims for refund must be filed within two (2) years from the date of payment of the tax or penalty, providing further that the same may not be maintained until a claim for refund or credit has been duly filed with the CIR.

Thus, the settled rule is that both the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period from the date of payment of the tax.[17]

PASAR filed before the Large Taxpayers Service Division of the BIR its administrative claim for refund on November 23, 2006, covering the excise tax payments from its purchases of petroleum products from Petron for the period of January 2005 to October 2005. Since PASAR was not a large taxpayer, it then re-filed on December 28, 2006, its application with the Regional Director of Revenue Region No. 14, Palo, Leyte.

On January 9, 2007, PASAR filed its Petition for Review before the Court in Division. It received the Court in Division's Decision on July 4, 2019. Thereafter, on July 15, 2019, PASAR filed a "Motion for Reconsideration and/or Motion for New Trial." On June 27, 2019, the Court in Division issued the assailed Resolution denying PASAR's motion. Said Resolution was received by PASAR on November 4, 2019.

From receipt of the said Resolution, petitioner had until November 19, 2019 within which to file the Petition for Review before the Court *En Banc*. On November 18, 2020, PASAR filed a "Motion for Extension of Time to File Petition for Review."[18] On November 21, 2019, the Court *En Banc* issued a Minute Resolution[19] granting PSAR motion. Hence, as prayed for, PASAR was granted a final and non-extendible period of fifteen (15) days from November 19, 2019 or until December 4, 2019, within which to file its Petition for Review. On December 4, 2019, PASAR filed through registered mail the instant Petition for Review. Hence, the Petition for Review was timely filed.

WHETHER OR NOT PASAR IS ENTITLED TO REFUND

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[15] CIR v. Central Azucarera Don Pedro, L-28467, February 28, 1973; CIR v. Insular Lumber Co., L-24221, December 11, 1967.
[16] G.R. No. 216130, August 3, 2016.
[17] Commissioner of Internal Revenue v. Victorias Milling Co., Inc. and The Court of Tax Appeals, G.R. No. L-24108, January 03, 1968; Collector v. J. N. Sweeney, A. O. Baigrie, and Ramon Burgas, G.R. No. L-12178, August 21, 1959; P.J. Kiener Company, Ltd. v. Saturnino David, G.R. No. L-5163, April 23, 1953.
[18] Rollo, pp. 1-6.
[19] Ibid., p. 7.

PASAR contends that there is sufficient basis for the Court *En Banc* to grant its Petition for Review because based on the evidence presented during trial, it was shown that Petron passed on the excise taxes to PASAR and that Petron paid said excise taxes to the BIR.

After a careful evaluation of the facts, assigned errors and arguments raised by petitioner, the Court *En Banc* finds that the arguments presented by petitioner are mere reiterations of the arguments or matters which have already been judiciously considered, discussed and passed upon by the Court in Division in the assailed Decision and Resolution.

The Court *En Banc* agrees with the findings of the Court in Division that PASAR is not entitled to refund because it failed to prove that Petron paid to the BIR the excise taxes due on petroleum products it sold to PASAR and that the said excise taxes were substantially charged to and paid by PASAR.

As correctly ruled by the Court in Division[20] in the assailed Decision:

> "The Court-commissioned Independent Certified Public Accountant (ICPA), Ocampo, Mendoza, Leong, Lim & Co., through its Managing Partner, Ma. Maria Cristina Josefina B. Ocampo, presented in her report dated June 14, 2017, a summary of the total quantity in liters and the corresponding amount of excise taxes of petroleum products delivered by Petron to petitioner for January 2005 to October 2005, as follows:

Month	Exhibit No.	Deliveries of ADO	Deliveries of IDO	Deliveries of IFO
Total Volume of Purchases:				
January to March 2005	P-8 to P-8-B	246,000	961,817	5,424,115
April to June 2005		240,000	918,888	4,965,235
July to September 2005		240,000	868,176	5,722,757
October 2005		72,000	324,073	1,813,935
		798,000	**3,072,954**	**17,926,042**
Multiplied by excise tax rate per liter charged by Petron		P1.63	P1.63	P0.30
Refund claimed for excise taxes erroneously paid		P1,300,740.00	P5,008,915.02	P5,377,812.60
Total				**P11,687,467.62**

[20] Citations omitted.

Out of the total claim for refund in the amount of P11,687,467.62 representing excise taxes paid for the period of the amount of P10,644,267.62 was adequately substantiated by supporting documents. On the other hand, the difference of P1,043,200.00 pertains to excise taxes with sales invoices untraceable to cash receipts in the amount of P1,007,340.00 and excise taxes on petroleum products with no corresponding attachments in the amount of P35,860.00 summarized as follows:

Amount of Excise Tax					
Per Claim	**Per ICPA's Verification**			**Difference**	
Amount	Exhibit No.	Payor No.	Amount	Exhibit No.	Amount
	P-13-E to P-13-H	1003842	P10,386,727.62		
	P-13-I to P-13-J	1003376	257,540.00		
P11,687,467.62			**P10,644,267.62**	P-13-K to P-13-N	**P1,043,200.00**

The Court finds that the sales invoices, cash receipts, and accounts payable vouchers supporting the ICPA recommended amount of P10,644,267.62 do not show any indication that the fuel prices charged by Petron against petitioner included the excise taxes imposed on the petroleum products. Neither did petitioner offer its Supply or Sales Agreement with Petron which would show that the amounts billed by Petron to petitioner per the sales invoices are inclusive of excise taxes.

Moreover, petitioner failed to establish that Petron actually paid the said excise taxes to the BIR.

Petitioner submitted a Certification from Petron attesting that the latter paid to the BIR excise taxes amounting to P11,687,467.62 on petroleum products sold and delivered to petitioner during the period of January 2005 to October 2005. However, the Court cannot ascertain the truthfulness of such claim from the supporting documents submitted such as Petron's Excise Tax Returns (BIR Form No. 2200-P) (together with the Summary of Removals and Excise Tax Due on petroleum products, Payment Order for Liftings, and Daily Summary of Liftings); Schedule of Petroleum Deliveries to PASAR, Withdrawal Certificates Manufactures Petroleum Products (BIR Form No. 267); and, List of Withdrawal Certificates. The excise taxes on petroleum products sold to petitioner cannot be traced from the Daily Summary of Liftings attached to Petron's Excise Tax Returns. The invoices related to petron's deliveries to petitioner cannot be found among those listed per the Daily Summary of Liftings.

Thus, for petitioner's failure to sufficiently prove that Petron paid to the BIR the excise taxes due on the petroleum products it sold to petitioner and that the said excise taxes were subsequently passed on/charged to and paid by petitioner, the instant case must fail."

As to PASAR's contention that the Court shall recognize the letter dated January 3, 2017 although not formally offered in evidence because the said letter contains the BIR Regional Office's finding on the payment of excise taxes by Petron. The Court *En Banc* finds this argument without merit.

The Court *En Banc* has consistently declared that, being a court of record, cases filed before it are litigated de novo, party-litigants must prove every minute aspect of their cases.[21] Indubitably, no evidentiary value can be given to any documentary evidence that is merely attached to the records of the case as the rules on documentary evidence require that such documents must be formally offered before the Court. Pertinent is Section 34, Rule 132 of the Rules of Court which reads:

> "Section 34. Offer of evidence. – The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."

Also, in the case of *Pilipinas Shell Petroleum Corporation v. Commissioner of Customs,*[22] the Supreme Court held that the mere fact that a particular document is identified and marked as an exhibit does not mean that it has already been offered as part of the evidence of a party, to wit:

> "x x x We had the occasion to make a distinction between identification of documentary evidence and its formal offer as an exhibit. We said that the first is done in the course of the trial and is accompanied by the marking of the evidence as an exhibit while the second is done only when the party rests its case and not before. A party, therefore, may opt to formally offer his evidence if he believes that it will advance his cause or not to do so at all. In the event he chooses to do the latter, the trial court is not authorized by the Rules to consider the same.
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> **The Rule on this matter is patent that even documents which are identified and marked as exhibits cannot be considered into evidence when the same have not been formally offered as part of the evidence, <u>but more so if the same were not identified and marked as exhibits</u>, such as in**

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[21] Section 8 of R.A. No. 1125, as amended.
[22] *Pilipinas Shell Petroleum Corporation v. Commissioner of Customs*, G.R. No. 195876, December 5, 2016, citing *Interpacific Transit, Inc. v. Rufo Aviles, et al.*, G.R. No. 86062 June 6, 1990.

the present case. An assay of the records reveals that the subject Memorandum dated 2 February 2001 was neither identified nor offered in evidence by respondent during the entire proceedings before the CTA in Division. Consequently, this is fatal to respondent's cause in establishing the existence of fraud committed by petitioner since the burden of proof to establish the same lies with the former alone.

As a matter of fact, **even if the aforesaid documentary evidence was included as part of the BOC Records submitted before the CTA in compliance with a lawful order of the court, this does not permit the trial court to consider the same in view of the fact that the Rules prohibit it**. The reasoning forwarded by the CTA in Division in its Resolution dated 24 February 2009, that the apparent purpose of transmittal of the records is to enable it to appreciate and properly review the proceedings and findings before an administrative agency, is misplaced. **Unless any of the party formally offered in evidence said Memorandum, and <u>accordingly, admitted by the court a quo</u>, it cannot be considered as among the legal and factual bases in resolving the controversy presented before it**." (Emphases and underscoring supplied)

The Petition for Review filed with the Court is a judicial claim for refund which partakes of the nature of a tax exemption,[23] and is therefore strictly construed against the claimant. As such, it is incumbent upon PASAR to prove not only its entitlement to the grant of the claim under substantive law, but also its compliance with all the documentary and evidentiary requirements provided by the NIRC, as well as by revenue regulations implementing them.[24]

In this case, PASAR was not able to prove that it is entitled to a refund or issuance of a tax credit certificate representing excise taxes paid for the period January 2005 to October 2005.

In *Republic of the Philippines, represented by the Commissioner of Internal Revenue v. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation),* [25] the Supreme Court ruled that "it is fundamental that the findings of fact by the CTA in Division are not to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties.

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[23] *Citibank v. Court of Appeals, et al.*, G.R. No. 107434, October 10, 1997.
[24] *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*, G.R. No. 145526, March 16, 2007.
[25] G. R. No. 188016, January 14, 2015, citing Sea-Land Service, Inc. vs. Court of Appeals, G.R. No. 122605, April 30, 2001.

There being no reversible error committed by the Court in Division, hence, the Court *En Banc* finds no cogent reason to disturb the assailed Decision and Resolution.

WHEREFORE, premises considered, the Petition for Review is **DENIED for lack of merit**. Accordingly, the assailed Decision dated June 27, 2019 and assailed Resolution dated October 22, 2019 are affirmed.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision have 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.

ROMAN G. DEL ROSARIO
Presiding Justice