REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**C.T.A. E.B. NO. 91 (C.T.A. CASE NOS. 6506 & 6559)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
PILIPINAS SHELL PETROLEUM CORPORATION, *Respondent.*	**Promulgated:** NOV 25 2005

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DECISION

PALANCA-ENRIQUEZ, J.:

This is a Petition For Review filed by the Commissioner of Internal Revenue (hereafter "petitioner") under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended,* which seeks the reversal of the Decision dated February 9, 2005 granting

Pilipinas Shell Petroleum Corporation's claim for refund in C.T.A. Case Nos. 6506 and 6559, the dispositive portion of which reads as follows:

> "**WHEREFORE**, petitioner's claims for refund in CTA Case Nos. 6506 and 6559 are hereby **GRANTED**. respondent is hereby **ORDERED** to **REFUND** or in the alternative **ISSUE A TAX CREDIT CERTIFICATE** in favor (sic) petitioner the amount of P175,901,950.20 representing excise taxes paid for the period July 2000 to December 2001.
>
> **SO ORDERED**."

and the Resolution dated April 28, 2005 denying the Commissioner of Internal Revenue's Motion For Reconsideration.

THE FACTS

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent is a corporation duly organized and existing under and by virtue of Philippine laws, with address at the Shell House, 156 Valero Street, Salcedo Village, Makati City.

Pilipinas Shell Petroleum Corporation (hereafter "Shell") is engaged in the business of processing and refining crude oil into various petroleum products. Part of its operations consists of the extraction of lubricating oil base stock, wax and bitumen from heavy fuel oil/feedstock. This process is undertaken at petitioner's Pililla Baseoil Refinery.

After the extraction process, the residual fuel oil, which allegedly comprises approximately sixty (60%) percent of the heavy fuel oil/feedstock received from its Tabangao Refinery, is sold to National Power Corporation (hereafter "NPC"), which is then used at the NPC Power Plant to generate electricity.

Upon withdrawal of the feedstock from Shell's Tabangao Refinery, it was subjected to excise taxes in the amount of P0.30 per liter of volume capacity, pursuant to Section 148 (1) of the 1997 Tax Code.

The aforesaid excise tax was paid by Shell and passed on to NPC as part of the selling price of the volumes of fuel oil purchased from the former. However, NPC refused to pay the same, invoking its exemption under its Charter, RA 6935.

During the period of July 2000 to December 2001, Shell delivered to NPC a total of 586,339,834 liters of fuel oil. Thus, on December 12, 2001 and February 26, 2002, Shell filed an administrative claim for refund with the BIR in the total amount of P175,901,950.20. On July 9, 2002, it filed its judicial claim for refund with this Court by way of a Petition for Review, for the period covering July 2000 to June 2001, docketed as C.T.A. Case No. 6506, and on December 30, 2002, it filed a judicial claim for the period covering July 2001 to December 2001, docketed as C.T.A. Case No. 6559.

In his Answer, the Commissioner of Internal Revenue alleged the following special and affirmative defenses:

> "1. The petition states no cause of action as it does not allege the dates when taxes sought to be refunded were actually paid;
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> 2. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue v. Ledesma, 31 SCRA 95; Manila Electric Co. v. Commissioner of Internal Revenue, 67 SCRA 35);
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> 3. One who claims to be exempt from payment of a particular tax must do so under clear and unmistakable terms found in the statute (Asiatic Petroleum v. Llanes, 49 Phil. 466; Union Garment Co. v. Court of Tax Appeals, 4 SCRA 304);

> 4. In an action for tax refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund;
>
> 5. It is incumbent upon petitioner to show compliance with the provisions of Section 112 and Section 229, both of the National Internal Revenue Code, as amended;
>
> 6. Taxes paid and collected are presumed to have been made in accordance with the law and regulations, hence, not refundable."

In a Motion filed on March 3, 2003, Shell moved for consolidation of C.T.A. Case Nos. 6506 and 6559 on the ground that both cases involve claims for refund or tax credits of excise taxes paid by Shell on residual fuel oil it sold to NPC, which the Court granted in its Resolution of May 14, 2003.

After trial on the merits, on February 9, 2005, the First Division of this Court rendered the assailed Decision in the terms earlier set forth.

Not satisfied, petitioner Commissioner of Internal Revenue moved for a reconsideration of the same, which the First Division denied in a Resolution dated April 28, 2005.

ISSUES

Hence, this Petition For Review raising the following errors committed by the First Division of this Court:

I

THE HONORABLE COURT ERRED IN DENYING HEREIN PETITIONER'S MOTION FOR RECONSIDERATION.

II

THE HONORABLE COURT ERRED IN HOLDING THAT ITS DECISION IN C.T.A. CASE NO. 5882 IS APPLICABLE TO THIS CASE.

III

THE HONORABLE COURT ERRED IN HOLDING THAT SHELL IS ENTITLED TO A TAX REFUND OR CREDIT IN THE AMOUNT OF P175,901,950.20.

On November 7, 2005, We required respondent to file its comment, within ten (10) days from receipt thereof.

On September 21, 2005, respondent filed a "Motion To Admit Comment".

On October 7, 2005, We admitted respondent's "Comment" and considered the petition submitted for decision.

On October 21, 2005, petitioner filed his "Motion To Admit Reply", which is hereby granted and petitioner's "Reply (To Respondent's Comment)" is admitted.

THE COURT EN BANC'S RULING

We deny the petition.

The three (3) issues raised in this petition boil down to the principal issue of whether respondent Pilipinas Shell Petroleum Corporation is entitled to the refund sought.

Petitioner claims that in ruling in favor of Shell, the First Division of this Court applied its decision in C.T.A. Case No. 5882 entitled "Shell Philippine Petroleum Corporation (now Pilipinas Shell Petroleum Corporation) vs. Commissioner of Internal Revenue". He claims that said decision in C.T.A. Case No. 5882 is not supported by any provision of the *1997 Tax Code* nor the Charter of the NPC. He maintains that the fact that the fuel oil was sold to the NPC, an entity exempt from direct and indirect taxes by virtue of its Charter, does not entitle respondent to claim a refund or credit because the law does not expressly grant an exemption to it, much less allow it to recover the excise tax it paid.

Petitioner further points out that Shell cannot anchor its entitlement to a refund or credit on the ground that under *Section 135 (c) of the Tax Code*, petroleum products sold to entities which are by law exempt from direct or indirect taxes are exempt from excise tax. Petitioner claims that this provision simply means that Shell cannot pass on to NPC the excise tax it paid for the fuel and sold to the latter. It cannot be interpreted to mean that simply because the buyer is exempt, the seller will be exempt, as well.

On the other hand, respondent Pilipinas Shell Petroleum Corporation maintains that *Section 135 (c) of the 1997 Tax Code* itself explicitly exempts the article (petroleum products) from excise tax, if sold to a tax exempt entity. Said provision does not require that the seller must itself be tax exempt for it to apply. This could not have been the intent of the lawmaker either – if the seller of an article is already tax exempt, it would have been pointless to provide that the article sold shall be exempt from tax.

The law applicable is *Section 135 (c) of the National Internal Revenue Code of 1997* (hereafter "NIRC"), *as amended*, which provides:

> "SEC. 135. *Petroleum Products Sold to International Carriers and Exempt Entities or Agencies*.- Petroleum products sold to the following are exempt from excise tax:
>
> (a) Internal 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;
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> (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."

Pursuant to the aforecited provision, petroleum products are exempt from excise tax if sold to "(c) entities which are by law exempt from direct and indirect taxes."

Corollarily thereto, *BIR Ruling 036-99, dated March 29, 1999* and *BIR Ruling 051-99, dated April 19, 1999*, provide:

> "BIR RULING 036-99
>
> The basic issue in this case is whether the sale of petroleum fuel by Petron to NPC for delivery to EBCC

pursuant to the Energy Conversion Agreement and Fuel Management Agreement is exempt from excise tax.

In reply, please be informed that Section 135 of the Tax Code of 1997 provides that the sale of petroleum products shall be exempt from excise tax if sold to an entity that enjoys exemption from indirect taxes as follows:

> 'SEC. 135. *Petroleum Products sold to International Carriers and Exempt Entities or Agencies.* – Petroleum products sold to the following are exempt from excise tax:
>
> xxx xxx xxx
>
> (c) Entities which are by law exempt from direct and indirect taxes.'

Moreover, NPC is exempt from 'indirect taxes' pursuant to the provisions of its Charter (*Maceda vs. Macaraig, Jr., G.R. 88291, June 8, 1993; Department of Finance Memorandum addressed to Commissioner Liwayway V. Chato, January 26, 1998*).

Such being the case, this Office is of the opinion as it hereby holds that the sale of petroleum products by Petron to NPC to be used by EBCC in generating electricity for the Bataan EPZA is exempt from excise tax.

However, under Section 130 (A) (2) of the Tax Code, the excise tax on locally manufactured petroleum products shall be paid before removal thereof from the place of production beginning January 1, 1999. For this reason, if the petroleum products sold by Petron to NPC are sourced from tax-paid inventories, the recourse of Petron is to claim for refund or tax credit of the excise taxes paid. In the event that

> Petron did not opt to claim the same as refund but, as in the instant case, passed on the cost of excise tax to NPC, then the latter may claim for refund or tax credit pursuant to Section 135 (c) of the Tax Code. Therefore, the issue of whether EBCC is exempt from excise tax is already moot and academic."
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> "BIR RULING 051-99
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> In reply, please be informed that since your petroleum product withdrawals are for use by entities or agencies exempt from excise tax under Section 135 of the Tax Code of 1997, and that the petroleum products are to be delivered to the tax-exempt entities within ten (10) days (for the period January 1, 1998 to June 30, 1998); within five (5) days (for the period July 1, 1998 to December 31, 1998) from the date of removal of such products; and before removal from the place of production of such products (from January 1, 1999 and thereafter), you are allowed to claim a tax credit/refund of the excise taxes paid on petroleum products sold to tax-exempt entities or agencies, subject to the two-year prescriptive period under Section 229 of the Tax Code of 1997."

Considering that the NPC is exempt from "indirect taxes" under its Charter (*Maceda vs. Macaraig Jr., 223 SCRA 217*), the sale of petroleum products by respondent Pilipinas Shell Petroleum Corporation to NPC is therefore exempt from excise tax.

In *C.T.A. Case No. 5882* entitled "*Shell Philippine Petroleum Corporation (now Pilipinas Shell Petroleum Corporation) vs.*

Commissioner of Internal Revenue, promulgated on July 26, 2000 (with Entry of Judgment dated November 24, 2000), which involved the same parties and issues as in the case at bar, this Court ruled as follows:

> "Since the ownership of the fuel oil remained with NPC, which entity is exempt from payment of direct and indirect taxes, consequently, Petitioner's sale of fuel oil to NPC to be used by the Contractor, KEPCO, is exempt from the payment of specific taxes. This conclusion finds support in BIR Rulings 36-99 and 51-99, dated March 29, 1999 and April 19, 1999, respectively, cited by Petitioner, the pertinent portions of which provide:
>
> BIR RULING 036-99
>
> 'The basic issue in this case is whether the sale of petroleum fuel by Petron to NPC for delivery to EBCC pursuant to the Energy Conversion Agreement and Fuel Management Agreement is exempt from excise tax.
>
> In reply, please be informed that Section 135 of the Tax Code of 1997 provides that the sale of petroleum products shall be exempt from excise tax if sold to an entity that enjoys exemption from indirect taxes as follows:
>
> 'SEC. 135. *Petroleum Products sold to International Carriers and Exempt Entities or Agencies.* – Petroleum products sold to the following are exempt from excise tax:
>
> xxx xxx xxx

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(c) Entities which are by law exempt from direct and indirect taxes.'

Moreover, NPC is exempt from 'indirect taxes' pursuant to the provisions of its Charter (*Maceda vs. Macaraig, Jr., G.R. 88291, June 8, 1993; Department of Finance Memorandum addressed to Commissioner Liwayway V. Chato, January 26, 1998*).

Such being the case, this Office is of the opinion as it hereby holds that the sale of petroleum products by Petron to NPC to be used by EBCC in generating electricity for the Bataan EPZA is exempt from excise tax.

However, under Section 130 (A) (2) of the Tax Code, the excise tax on locally manufactured petroleum products shall be paid before removal thereof from the place of production beginning January 1, 1999. For this reason, if the petroleum products sold by Petron to NPC are sourced from tax-paid inventories, the recourse of Petron is to claim for refund or tax credit of the excise taxes paid. In the event that Petron did not opt to claim the same as refund but, as in the instant case, passed on the cost of excise tax to NPC, then the latter may claim for refund or tax credit pursuant to Section 135 (c) of the Tax Code. Therefore, the issue of whether EBCC is exempt from excise tax is already moot and academic.'

BIR RULING 051-99

'In reply, please be informed that since your petroleum product withdrawals are for use by entities or agencies exempt from excise tax under Section 135 of the Tax Code of 1997, and that the petroleum products are to be delivered to the tax-exempt entities within ten

(initials)

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> (10) days (for the period January 1, 1998 to June 30, 1998); within five (5) days (for the period July 1, 1998 to December 31, 1998) from the date of removal of such products; and before removal from the place of production of such products (from January 1, 1999 and thereafter), you are allowed to claim a tax credit/refund of the excise taxes paid on petroleum products sold to tax-exempt entities or agencies, subject to the two-year prescriptive period under Section 229 of the Tax Code of 1997.'

Finally, considering that Petitioner's sale of fuel oil to NPC is exempt from the payment of excise taxes, then Petitioner may rightfully recover the excise taxes it paid to PSPC. And as correctly pointed out by Petitioner, since it ended up shouldering the specific tax component of the fuel oil, it is but just and reasonable to allow it to recover what it would have otherwise have passed on to NPC had it not been for NPC's exemption from indirect taxes. 'The view which refuses to accord the exemption because the tax is first paid by the seller disregards realities and gives more importance to form than to substance. Equity and law always exalt substance over form.' (Opinion No. 106, S'54, cited in Maceda vs, Macaraig, Jr., 223 SCRA 217).

Likewise, it is worth mentioning that the case of **Maceda vs. Macaraig 223 SCRA 217** is just a reiteration of an earlier ruling of the Supreme Court in the case of **CIR vs. Gotamco 148 SCRA 36** where it was held that the contractor of the World Health Organization (WHO) is not liable to contractor's tax which the BIR assessed considering that it cannot pass on the said tax to the WHO because the latter is exempted from all taxes, direct or indirect, by virtue of the Host Agreement with the Philippine Government.

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In view of the settled jurisprudence on the matter, We find legal basis and merit to the arguments raised by the Petitioner."

Thus, the First Division of this Court aptly ruled:

"Well-settled is the rule that NPC is exempt from direct and indirect taxes pursuant to its Charter, Republic Act No. 6395, as amended by P.D. 380. And that there is no indication that its tax exemption privileges have been withdrawn. Hence, the Decision in CTA Case No. 5882 is definitely applicable to the consolidated cases at bar.

The subject matter of the claim for refund in CTA Case No. 5882 and in the consolidated cases at bar are similar. Both claims for refund in the prior case and in these consolidated cases were brought about by petitioner's sale of residual fuel oil to NPC, for which specific taxes have been paid. However, by virtue of NPC's exemption from direct and indirect taxes, petitioner cannot pass on to NPC the specific taxes paid on the fuel oil sold to the latter.

Thus, as held by this Court in CTA Case No. 5882, 'it but just and reasonable to allow it to recover what it would have otherwise have passed on to NPC had it not been for NPC's exemption from indirect taxes.'

Moreover, Respondent has, in fact, complied with the aforesaid Decision, and issued tax credit certificates in relation to petitioner's claims for refund for the period prior to July 2000. Such that, his act of discontinuing the issuance of tax credit certificates to petitioner in relation to the excise taxes paid on fuel oil sold and delivered to NPC for the period July 2000 to December 2001 has no basis."

For all the foregoing, We see no reason to reverse the assailed Decision dated February 9, 2005 and Resolution dated April 28, 2005 of the First Division of this Court.

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

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
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