LIB

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PILIPINAS SHELL PETROLEUM CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5132

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 06 1997

x - x

DECISION

This is an appeal from the denial of the Commissioner of Internal Revenue of the protest filed by the petitioner disputing the assessment demanding the payment of deficiency surtax on alleged extraordinary gains arising from the oil price increase authorized by the Energy Regulatory Board (ERB) on August 15, 1989 in the total amount of P50,080,140.96 inclusive of interest and surcharge.

On August 26, 1992, petitioner received an assessment notice demanding the payment of deficiency surtax on extraordinary gains obtained by the petitioner as a result of the oil price increase authorized by the ERB on August 15, 1989. The details of the assessment are specified hereunder as follows:

Company Recovery	P 3,425,950.08
Contribution to the OPSF	35,502,742.49
Total	P38,928,692.57
Multiply by rate	65%
Basic Tax	P25,303,650.17
Amount Paid	---
	P25,303,650.17
Add: 25% Surcharge	6,325,912.54
Total	P31,629,562.71
Add: Interest from Sept. 16, 1989 to Aug. 15, 1992	18,450,578.25
TOTAL DEFICIENCY, SURCHARGE & INTEREST	P50,080,140.96

The revenue examiners based their computation on the product inventory listed in the Official Registry Book of Pilipinas Shell Petroleum for the month ending August 31, 1992, detailed as follows:

PRODUCT	OPENING BALANCES
Premium Mogas	7,623,741
Regular Mogas	2,420,032
Kerosene	1,805,988
Gas Oil	24,651,770
Fuel Oil	37,504,218
Refinery Fuel Oil	1,074,849
LPG	3,398,437
Av tur	5,761,335
Lams	126,383
SBP	136,989
Component Products	29,497,592

Based on this inventory list, the revenue examiners then computed the inventory gain realized by the petitioner by multiplying said inventory by the individual components mentioned in the ERB order, dated August 15, 1989, detailed as follows:

PRODUCT	OIL COMPANY NETBACK	OIL PRICE STABILIZATION FUND
Premium gasoline	P0.03	(P0.0577)
Regular gasoline	0.03	(0.0577)
Av turbo	0.03	(0.9423)
Kerosene	0.03	(0.0394)
Diesel Oil	0.03	(0.0395)
Fuel Oil/Feedstock	0.03	0.47
LPS	0.03	(0.0394)
Asphalt	0.03	0.4605
Thinner	0.03	0.4606

The final assessed amount of P50,080,140.96 is summarized as follows:

PRODUCT	NETBACK	OPSF	TOTAL
Premium Gas	228,712.23	(439,889.86)	(211,177.63)
Regular Gas	72,600.98	(139,635.85)	(67,034.87)
Kerosene	54,179.64	(71,155.92)	(16,976.28)
Gas Oil	745,553.10	(981,644.92)	(236,091.82)
Fuel Oil	1,125,126.54	17,626,982.46	18,752,109.00
Refinary Fuel Oil	32,155.47	505,179.03	537,334.50
L P G	101,953.11	(133,898.42)	(31,945.31)
Av Turbo	172,840.09	5,428,905.97	5,601,746.06
LAWS	3,791.49	58,212.00	62,003.49
SBP	4,109.67	63,097.13	67,206.80
Components Products	884,927.76	13,586,590.87	14,471,518.63
T O T A L	3,425,950.08	35,502,742.49	38,928,692.57
Total Inventory Gain			38,928,692.57
Surtax Due - 65%			25,303,650.17
Add: Surcharge			6,325,912.54
Interest 20% Fr. 9-16-89 to 8-15-92			18,450,578.25
Total Amount Due			50,080,140.96

Petitioner filed a letter protest on September 22, 1992, disputing the assessment and declaring therein that the deficiency surtax imposed by the respondent lacks legal and factual bases. This protest letter contained a denial that petitioner realized extraordinary gains or windfall profits from the 1989 oil price increase because said increase was merely intended to grant oil companies relief from increases in cost of transshipment, chemicals and additives and to cover the deficiency in the Oil Price Stabilization Fund (OPSF).

Respondent denied the aforementioned protest in a letter, dated March 9, 1994, and received by the petitioner on June 22, 1994. Shortly thereafter, an appeal was made in this Court by means of a petition for review filed on July 22, 1994, reiterating its opposition to the assessment issued for deficiency surtax and affirming its stand that it did not realize any gain much less extraordinary gain as a result of said price increase.

In answer to the petition, respondent asserts the following special and affirmative defenses:

> 9. As a result of the increase in prices of petroleum products authorized by the Energy Regulatory Board (ERB) on August 15, 1989, petitioner realized extraordinary gains which are subject to the sixty five percent (65%) surtax imposed under Presidential Decree (P.D.) No. 1889.
>
> 10. In the computation of extraordinary gains realized from the increase in prices of petroleum products, petitioner's contributions to the Oil Price Stabilization Funds are included since the contributions form part of the price increase (cf. Section 2, P.D. No. 1889).

> 11. It is an established doctrine in taxation that the assessment of the Commissioner of Internal Revenue is prima facie correct and the burden of proof that it is otherwise is on the taxpayer to prove all the facts necessary to establish the illegality of the assessment (Commissioner of Internal Revenue vs. Construction Resources of Asia, Inc., 145 SCRA 671; Interprovincial Auto Bus Co., Inc. vs. Commissioner of Internal Revenue, 98 Phil. 290).
>
> 12. Finally, in view of this Honorable Court's Decision in Caltex (Philippines), Inc, vs. Commissioner of Internal Revenue (C.T.A. Case No. 4711, July 5, 1994), petitioner is, therefore, liable to pay government the amount of P50,080,140.96 as deficiency surtax, inclusive of interest and surcharge, on extraordinary gains arising from the oil price increase authorized by ERB last August 15, 1989.

This Court is called upon to resolve the issue of whether or not petitioner realized extraordinary gains from the oil price increase authorized by the ERB in an order, dated August 15, 1989, and if findings show that extraordinary gains were indeed realized, whether or not a 65% surtax shall be imposed on this extraordinary gain pursuant to the provisions of Presidential Decree No. 1889.

Petitioner maintains that the revenue examiners erred in applying the provisions of Presidential Decree No. 1889 to the 1989 oil price increase because said decree which imposed a 65% surtax on extraordinary gains is applicable only to oil price increases authorized prior to the promulgation of said decree which was in 1983 as clearly seen from the wordings of this particular law. Petitioner further avers that the oil price increase of August 15, 1989 was specifically authorized to reimburse the oil companies for unrecovered costs and to replenish the OPSF, a situation which is wholly different from that prevailing when P.D. 1889 was promulgated in 1983. Petitioner explains that in 1983 the OPSF was not yet in existence and that the oil price increase contemplated by P.D. 1889 which resulted to a windfall profit for the oil companies was due primarily from the fact that these companies sold petroleum products at a higher price as compared to the price they had paid in acquiring and purchasing these products prior to the price adjustment. To prove this point, petitioner quoted a portion of the preamble of P.D. 1889 which provides, thus:

> "WHEREAS, the immediate price increases on the whole range of refined or blended petroleum products have brought about extraordinary gains for oil companies on account of the sale at higher prices of finished products, processed from crude oil and other base stocks, purchased or acquired by them before the price adjustment."

Petitioner insists that the situation which brought about the oil price increase on August 15, 1989 is entirely different from that contemplated by the aforequoted preamble because no gain was possible from the then prevailing pricing system in 1989. To put petitioner's allegations in simple terms, the 1989 price increase, subject of the present assessment, pertained to the recovery of increased inland transshipment and freight charges and costs of chemicals incurred by the oil companies and to the replenishment of the OPSF, precluding the possibility of any gain, thus it should not be held liable for any deficiency surtax. Petitioner further stresses that the absence of any implementing regulations to serve as guidelines in the determination of extraordinary gains pertaining to the August 15, 1989 oil price increase serves to illustrate the point that no extraordinary gain could be realized by the oil companies from this particular increase unlike in the previous oil price hikes prior to the promulgation of P.D. 1889, where several implementing regulations were issued, particularly Revenue Regulations 13-84, 12-84 and 22-84.

On the other hand, respondent remains firm in her theory that the 65% surtax imposed by P.D. 1889 applies to the August 15, 1989 oil price increase. To illustrate her point, respondent focuses on Section 2 of said law which defines what constitutes extraordinary gains and that under Section 8 of P.D. 1956, a law that created the Oil Price Stabilization Fund (OPSF), the extraordinary gains realized by the oil companies is not one of the sources of the OPSF, hence petitioner cannot claim that a substantial portion of the gain realized by the oil price increase of 1989 was remitted to the OPSF. Furthermore, respondent, in her memorandum, stated that the Chairman of the Energy Regulatory Board has no legal authority to transfer that portion of the increase in the wholesale posted price to the OPSF because under the provisions of P.D. 1956 there are only three sources of funds that can be put into the OPSF and increase in the wholesale posted price is not one of them. Lastly, respondent belittled petitioner's claim that the absence of revenue regulations is proof that P.D. 1889 is not applicable to the 1989 oil price increase. Respondent declared that an implementing regulation is necessary only if the law is ambiguous and therefore susceptible of different interpretations and this is not true in the instant case because P.D. 1889 clearly defines what constitutes "extraordinary gain."

The issues that press Us for determination could be justly resolved through a thorough analysis of the order issued by the ERB on August 15, 1989 authorizing an oil price increase and its relevance, if any, to the provisions of P.D. 1889 which imposes a 65% surtax on extraordinary gain or windfall profit.

The ERB order, dated August 15, 1989 provides in part as follows:

> WHEREFORE, considering the foregoing, and pursuant to Section 8 of Executive Order No. 172, this Board hereby grants 'applicants' prayer for provisional relief and, accordingly, authorizes said applicants, pending hearing and final decision of the above entitled cases, a weighted average provisional increase of TWENTY-FIVE POINT FOUR CENTAVOS (P0.254) per liter, broken down as follows:
>
> | | In Centavos Per Liter |
> |---|---|
> | Crude | 22.4 |
> | Transshipping, TEL, Chemicals and Additives | 3.0 |
> | TOTAL | 25.4 |
>
> The increases authorized herein shall be reflected as an upward adjustment in the respective posted prices of the said four products ex-terminal/depot in other parts of the country and in the price build-up of all products as follows:
>
> | PRODUCT | NETBACK | OPSF |
> |---|---|---|
> | Premium gasoline | P0.03 | (P0.0577) |
> | Regular gasoline | 0.03 | (0.0577) |
> | Avturbo | 0.03 | 0.9423 |
> | Kerosene | 0.03 | (0.0394) |
> | Diesel oil | 0.03 | (0.0395) |
> | Fuel oil/Feedstock | 0.03 | 0.47 |
> | Regular gasoline | 0.03 | (0.0577) |
> | LPG | 0.03 | (0.0394) |
> | Asphalt | 0.03 | 0.4605 |
> | Thinner | 0.03 | 0.4606 |

From the ensuing oil price increase brought about by the aforequoted order, the Bureau of Internal Revenue issued the disputed assessment against the petitioner anchored on the provisions of P.D. 1889, particularly Sections 1 and 2, quoted hereinbelow, thus:

> SECTION 1. *Surtax on Extraordinary Gains; Rate of Surtax.* - In addition to the income tax imposed under Title II of the National Internal Revenue Code, there is hereby imposed a surtax of sixty-five (65%) per cent on extraordinary gains realized by oil companies as a result of price increases authorized for petroleum products, which surtax shall be allowed as part of the cost of petroleum product sold on or after November 3, 1983.
>
> SECTION 2. *Computation of Extraordinary Gains.* - The extraordinary gains shall be measured by the difference between the approved wholesale posted prices of refined petroleum products immediately before the authorized price increases and the new posted prices multiplied by the number of units of petroleum products existing as of the day of effectivity of the price increases. Extraordinary gains shall also refer to the aggregate increases in the value of crude oil and base stocks.

It is clear from the abovecited provisions that P.D. 1889 imposes a 65% surtax on <u>extraordinary gains</u> realized as a result of an oil price increase and since the dispute centers around the concept of extraordinary gain, it is appropriate at this point to strike a working definition of what constitutes extraordinary gain.

The testimonies of witnesses for both parties seem to point to a common definition of extraordinary gains as evidenced by statements made during the hearings held on this case. The witness for respondent, Guillermo Guzi, Division Chief of the Special Investigation Division, Revenue District Office No. 7, Quezon City, during the hearing held on December 6, 1995, defined it in this manner:

> A. In that case, if the crude oil was purchased at P6.00 and selling that for P8.00 and suddenly the following day, Your Honors, it was sold for P10.00, then, there was additional P2 increase that will go to the offers (sic) of the oil company assuming that there is no intervening factors that will affect the P2.00.
>
> Q. We assumed that....
>
> JUDGE GRUBA
>
> What do you mean to say? Do you mean to say that the crude oil cost is P6.00 and sell it at P8.00, there is already a profit on it and then, the next day they increased it to P10, that is the windfall profit?
>
> A. Yes, Your Honors.

Similarly, the witness for the petitioner, then ERB Chairman Rex Tantiongco, in his testimony made on May 23, 1995, also defined extraordinary gain, thus:

> Q. And how will the oil companies realize a gain under P.D. 1889 with reference to the crude oil inventories?

A. You mean to say, sir, how they are slapped by the...

Q. No, how will they realize an extraordinary gain?

A. They realize an extraordinary gain as I said because the price increase is made ahead of schedule or even before the exhaustion or depletion of the old stocks. What I mean by old stocks, is inventory acquired at a lower price. The oil companies were allowed already to increase their price ahead.

Q. So there was a gain with regard to that increase in prices although purchased at a lower price, is that correct?

A. That's correct, Sir. So, if to be brutally, if we are going to use a brutal term about it, it was a legalized hoarding.

Q. I see. And that gain refers only to increases in crude oil cost?

A. Increase in crude oil cost, sir, yes.

Q. If we refer to 3 centavo increase, would that refer to increases in the crude oil cost?

A. No, as I said it was an increase in transshipment and additives.

Q. And could P.D. 1889 apply with regard to the August 16, 1989 price build up?

A. No. Definitely, no.

From the aforequoted testimonies, extraordinary gain occurs when the oil companies sell their petroleum products at a much higher price by reason of an oil price hike, compared to the amount actually spent by them in acquiring its raw materials prior to the said oil price increase.

Respondent insists that petitioner realized extraordinary gains as a result of the oil price increase authorized by the ERB on August 15, 1989.

For its part, petitioner presented the then ERB Chairman, Rex Tantiongco, to shed light on the mechanics of an oil price hike, particularly the one authorized on August 15, 1989.

The gist of the testimony of Chairman Tantiongco centered on the components of the wholesale posted price or WPP of petroleum products because it is this WPP that increased its rate by 25.4 centavos/liter in the order dated August 15, 1989. By the use of a transparency which was later presented by the petitioner as Exhibit "A", Chairman Tantiongco defined WPP as the amount paid by the dealers when they withdraw petroleum products from the depot or the terminal. He went on to enumerate the composition of the WPP during the hearing held on May 23, 1995, thus:

> A. Your Honors, the <u>wholesale posted price is the amount paid by the dealers when they withdraw petroleum products from the</u>

depot or the terminal. In case of Metro Manila, the amount paid ex-Pandacan terminal. And the composition of the wholesale posted price are the company netback or the company take, the amount realized or retained by the oil companies plus the tax, specific tax and the OPSF, the Oil Price Stabilization Fund. It may be a negative or a positive. So the total of these three components are the wholesale posted price.

Q. Mr. Chairman, you mentioned about a netback. Could you tell us what are the compositions of this netback?

A. The netback are the cost of manufacturing such as materials which is crude oil, the conversion costs which are the labor and the overhead, then also the tax or the ad valorem tax which is already part of the raw materials and the profit of the oil companies.

(Underscoring supplied)

As seen from the aforequoted testimony, the wholesale posted price or WPP has three components namely: specific tax on petroleum products (ad valorem tax), the company's netback and the OPSF (see Exhibit "A", p. 114, CTA rec.). Therefore, an increase authorized by the ERB on the WPP on petroleum products is distributed among these three components. Chairman Tantiongco explained that out of the 25.4 centavos/liter increase authorized by the ERB on August 15, 1989, .81

centavos went to the ad valorem tax, 21.57 centavos went to the OPSF and the remaining three centavos went to the oil companies as reimbursement for increase in operating costs such as transshipment costs and increase in the price of additives and chemicals used in refining these products (see TSN of May 23, 1995 and Exhibit "C", p. 123, CTA records). The question that was then presented focused on the 3 centavos that supposedly went back to the oil companies, because if this 3 centavo increase was given to the company's netback portion of the WPP, then did not these companies earn profit as a result? The answer given by Chairman Tantiongco was still in the negative as shown by his answer narrated in the same hearing held on May 23, 1995, thus:

Q. So you're saying that even this 3 centavos increase constitutes cost recovery only?

A. Cost recovery of their operating expenses particularly the increase in the transshipment cost and additives or chemicals added to enhance the quality or to improve the quality of petroleum products.

Q. Now, how much of this August 16, 1989 WPP increase, how much went to the improvement of the profitability of the oil companies?

A. Actually, it did not improve the profitability of the oil

> companies but merely allowed them to recover the additional costs increase in that particular period.
>
> Q. So inspite of the fact that there was a 3 centavos increase in the netback or direct company recovery, it's (sic) still did not improve the profitability of the oil companies?
>
> A. Compared with the previous years it did not improve the profitability of the oil companies, as I said it was a mere recovery of the incremental cost incurred by them in that particular period.

This Court in arriving at a sound conclusion gives much weight to the position held by then Chairman Rex Tantiongco primarily because it is his office, the Energy Regulatory Board, that is involved in the study of the market prices of crude oil and it is this agency which is tasked in administering the OPSF. Furthermore, We are guided by the decision promulgated by this Court in the case entitled **"Pilipinas Shell Petroleum v. Commissioner of Internal Revenue, CTA Case No. 4780, August 9, 1996"** involving exactly a similar issue regarding extraordinary gains.

Our decision in this aforecited Pilipinas Shell case (CTA Case No. 4780) gave special emphasis on the explanation made by Chairman Tantiongco as to the reason why oil companies may no longer realize windfall profits or extraordinary gains after the issuance of Presidential Decree No. 1956 on October 10, 1984, which created the Oil Price Stabilization Fund or OPSF and We quote, thus:

> To explain further his point, Mr. Tantiongco testified that before the introduction of the OPSF on October 15, 1984 by Presidential Decree No. 1956, it is possible for the oil companies to get windfall profit because increase in prices are calculated based on the lowest inventory of the oil companies and the effectivity of the increase approximate that period. The oil companies will be realizing gain because the products they are selling then was out of the crude imported In previous period which was at low price. However, it is different after the effectivity of PD 1956 and the subsequent issuance of LOI 1441 on November 20, 1984 (T.S.N. pp. 76-77, January 9, 1995). In an answer to the question why oil companies may no longer realize windfall profits in the context of P.D. 1889 after the establishment of the OPSF, Mr. Tantiongco states as follows:
>
> > "A. Because the adjustment in the netback now is based on their actual importation. So the Energy Regulatory Board gathered all the documents from the Bureau of Customs, from the Department of Energy which approves the importation of the oil companies and at the same time from the submission of the oil companies together with their documents or receipts they received from the Bureau of Customs. So the netback is adjusted based on the actual cost of the importation. And whatever adjustment in the pump price is reflected only on the OPSF and not in the netback of the oil companies. Although that adjustment is reflected in the wholesale posted price, the composition of the wholesale posted price whether upward or downward after the OPSF is created is directly

> absorbed by the Oil Price Stabilization Fund. (T.S.N. January 9, 1995, pp. 78 to 79.)"

In the instant case, the rationale of ERB's approval of an oil price hike effective August 16, 1989 stemmed from the increase in the peso landed cost of crude oil coupled with a corresponding deficit of the OPSF in the amount of P818 million as of the end of May 1989. This is illustrated by a portion of the ERB order which declared, thus:

> The Board has noted that the actual FOB cost of crude imported by the applicants during the period March-April 1989 stood at an average of $16.6941 per barrel which, when compared with the reference FOB of $11.2859 per barrel existing as of November 8, 1988 when the Board ordered a reduction in the wholesale posted prices of petroleum products (WPP) by an average amount of P0.757 per liter, shows an increase in the peso landed cost of crude by an average amount of P129.0371 per barrel, or P0.8543 per liter of product. As a result of such significant increase in crude cost, the Oil Price Stabilization Fund (OPSF) component of the WPP has become a negative figure of minus P0.8785 per liter effective May 1, 1989 under ERB Resolution No. 89-15 dated June 6, 1989.
>
> The OPSF which was established to absorb fluctuations in product costs arising from changes in world market prices of crude oil and in the peso-dollar exchange rate and thereby minimize frequent changes in the prices of petroleum products sold locally, has been subsidizing the local selling prices. In the process, and as appearing in the report dated July 27, 1989 submitted to this Board by the Office of Energy Affairs, which is responsible for the administration of the OPSF, the latter

> has accumulated an accrued deficit of P818 Million as of the end of May 1989, and that the present shortfall of the Fund is increasing at an estimated average monthly drawdown rate of P1 Billion.

The 25.4 centavos/liter increase primarily seeks to reimburse the oil companies for the increase in the costs of transshipment, chemicals and additives that were already shouldered by the oil companies prior to the increase and to replenish the OPSF which at that time was already depleted. We find merit in the testimony of petitioner's witness, Atty. Armando P. Batara, the in-house counsel of Pilipinas Shell, when he concluded that the 65% surtax imposed by P.D. 1889 is applicable only when the oil companies purchase raw materials at the old price then subsequently sell the finished products based on the higher price brought about by an oil price hike, giving rise to an extraordinary gain which should be taxed at 65%. A portion of his testimony made during the hearing held on February 22, 1995, is quoted hereunder as follows:

> A. That is P.D. 1889, Your Honors. I quote, Your Honors:
>
> "Whereas, the immediate price increases on the whole grains of refined or blended petroleum products have brought about extraordinary gains for oil companies on account of the sale at higher prices of finished

> products processed from crude oil and other base tax purchased or acquired by them before the price adjustment."
>
> From this particular Whereas Clause, Your Honors, it is apparent that this provision would only come into play when an oil company purchases raw materials at the old price and sells finished products at a higher price based on the increased price, Your Honors.

The situation contemplated by P.D. 1889 is not entirely analogous to the instant case as can be clearly seen from the facts earlier discussed. A review of the history surrounding the issuance of P.D. 1889 on July 23, 1983, would reveal that its purpose was to impose a surtax on the profits obtained by the oil companies by reason of an oil price increase which enabled them to dispose of their old stocks purchased at the old rate, by selling them at the increased price due to the oil price hike resulting in extraordinary gain or windfall profit. The prevailing circumstances were different at the time of the price increase authorized on August 15, 1989. During this time, Presidential Decree No. 1956 (issued on October 10, 1984) was already in existence. P.D. 1956 created the Oil Price Stabilization Fund or the OPSF, the purpose of which was clearly enunciated in said decree and We quote:

"The Fund created herein shall be used to reimburse the oil companies for cost increases on crude oil and imported petroleum products resulting from exchange rate adjustment and/or increase in world market prices of crude oil."

The current situation that was then prevailing at the time of the issuance of ERB order dated August 15, 1989 was described in said order and We quote, thus:

The OPSF, which was established to absorb fluctuations in product costs arising from changes in world market prices of crude oil and in the peso-dollar exchange rate and thereby minimize frequent changes in the prices of petroleum products sold locally, has been subsidizing the local selling prices. In the process, and as appearing in the report dated July 27, 1989 submitted to this Board by the Office of Energy Affairs, which is responsible for the administration of the OPSF, the latter has accumulated an accrued deficit of P818 Million as of the end of May 1989, and that the present shortfall of the Fund is increasing at an estimated average monthly drawdown rate of P1 Billion.

Moreover, the peso-dollar reference rate of P21.25 per US$1.00 used by the Board as basis for the November 8, 1988 price reduction had noticeabl[y] risen. The Bankers Association of the Philippines (BAP) has reported a reference rate of P21.88 as of August 11, 1989. Reckoned together with other related costs of importation, the aforementioned increase in FOB cost of crude, increased peso-dollar reference rate and depletion of the OPSF would necessitate an increase in WPP by what this Board has so far tentatively determined from its continuing studies and the submissions of the applicants as an average amount of approximately P1.25 per liter of product.

The Board, however, is also mandated by Letter of Instructions No. 1460 to consider at its periodic review of the domestic petroleum product prices, "the need to maintain stable

> prices in the domestic petroleum product market through such feasible alternatives and measures as shall be necessary and appropriate".
>
> In line with the above mandate, and in order to meet and cover the aforementioned deficiency in the OPSF and at the same time forestall any serious jeopardy to the financial viability of the applicants to supply the fuel requirements of the country, this Board is of the opinion, notwithstanding the aforementioned substantial average figure which may justifiably be granted as an increase, that the applicants may in the meantime be authorized to increase the wholesale posted prices of certain petroleum products by a general weighted average of P0.254 per liter only.
>
> In regard to the alleged increase in inland transshipment and freight charges and cost of chemicals and additives, this Board has determined that indeed said applicants have been incurring such additional costs.

It is obvious from the aforequoted situation, that the controversial price increase of 25.4 centavos was partly distributed to replenish the OPSF and to reimburse the oil companies for the increased cost of chemicals and additives as well as increases in inland transshipment and freight charges already spent by them.

The situation in the present case does not however preclude any kind of profit whatsoever. It must be remembered that one of the components of the wholesale posted price is the ad valorem tax which in this case increased to .81 centavos. Respondent failed to consider the ad valorem tax component in her assessment. Nevertheless, this particular component is of significance because ad valorem taxes are paid fifteen (15) days from date of removal of petroleum products from the place of production in accordance with Section 127(a) of the Tax Code. It follows then that the ad valorem taxes paid by the oil companies when they acquired these petroleum products were still at the old rate prior to the increase, therefore when they subsequently sold these products at the increased price, profits were realized with respect to this particular component. In the aforecited case of **Pilipinas Shell Petroleum v. Commissioner of Internal Revenue, CTA Case No. 4780, August 9, 1996**, this Court upheld respondent's assessment of petitioner's tax liabilities for extraordinary gain due to the increase in the ad valorem tax component of the WPP. We quote a portion of the decision of said case entitled **Pilipinas Shell Petroleum vs. Commissioner of Internal Revenue, CTA Case No. 4780, dated August 9, 1996**, thus:

> "x x x. The respondent is correct in assessing petitioner for 65% surtax on extraordinary gain covering tax paid petroleum products because the taxes on those products have already been paid at the old rate as required by law and when sold at the higher pump price petitioner certainly benefitted by the increase in ad valorem tax. The increase in ad valorem tax goes to the petitioner as the law requires payment of the tax within fifteen (15) days from the date of removal of petroleum products from the place of production (Section

> 127[a] National Internal Revenue Code). These stocks are stored in unbonded installations or depots ready for marketing and are not subjected again to the payment of the higher tax rate. To the extent of this unbonded or tax paid stocks, this Court believes petitioner is liable to 65% surtax for extraordinary gain pursuant to PD 1889. In fact, petitioner failed to dispute this finding of the respondent."

In applying the above principle to the present case, the assessment issued against petitioner for surtax on windfall profit is modified to include the extraordinary gains realized by the petitioner as a result of the increase in ad valorem tax by .81 centavos brought about by the ERB order dated August 15, 1989.

Accordingly, the assessment of 65% surtax on the alleged extraordinary gains that went to the OPSF and to the oil companies as a mere reimbursement of costs incurred, is cancelled but the assessment is hereby modified to impose a 65% surtax on extraordinary gains which resulted in the increase in ad valorem tax covering unbonded stocks and is computed as follows:

ITEM	INVENTORY
Premium Mogas	30,961,079
Regular Mogas	14,244,797
Kerosene	7,726,850
Gas oil	82,417,406
Fuel oil	132,556,134
Refined fuel oil	3,956,890
LPG	1,131,672
AV turbo	723,322
Total	273,718,150
Multiply by average rate of increase	

in ad valorem tax	x .0081
	2,217,117.07
Multiply by rate of surtax	x 65%
	1,441,126.06
Add: 25% surcharge	360,281.51
	1,801,407.57*

*plus 20% interest from date prescribed for payment which is within thirty (30) days after August 15, 1989, the effectivity date of the price increase until the amount is fully paid pursuant to Section 249 of the NIRC.

WHEREFORE, in view of the foregoing, the assessment issued by the respondent for deficiency surtax on the oil price increase dated August 15, 1989, is hereby **MODIFIED**. Petitioner is **ORDERED** to **PAY** respondent the total amount of ₱1,801,407.57 representing deficiency surtax on extraordinary gains, inclusive of the 25% surcharge plus 20% interest from August 16, 1989, until fully paid.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

RAMON O. DE VEYRA
Associate Judge
Court of Tax Appeals