G.R. No. 210836 – ***Chevron Philippines, Inc.,*** *petitioner* ***versus*** ***Commissioner of Internal Revenue,*** *respondent.*

Promulgated:

September 1, 2015

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SEPARATE CONCURRING OPINION

VILLARAMA, JR., *J.*:

With all due respect to my esteemed colleague, Justice Mariano C. Del Castillo, I disagree with his proposed abandonment of our ruling in *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation,*[1] which reversed the earlier decision promulgated on April 25, 2012.

In its motion for reconsideration of the Resolution[2] denying the appeal from the Court of Tax Appeals (CTA) decision, petitioner argued that the rationale in *Pilipinas Shell* is applicable to this case involving a claim for refund of petroleum products sold to a tax-exempt entity under Section 135(c) of the NIRC.

The ruling in *Pilipinas Shell* is assailed on grounds that:

1. The ratiocination adopted in said case applies only to international carriers under Section 135(a) of the NIRC, and not to tax-exempt entities under paragraphs (b) and (c). It thus creates an unreasonable distinction since manufacturers, sellers and importers would be allowed to claim a tax refund or credit only under Section 135(a) but not under paragraphs (b) and (c).

2. It was mere speculation to cite the prospect of declining sales of aviation or jet fuel to international carriers due to unwillingness of major domestic oil companies to shoulder the burden of excise tax, that would encourage "tankering."

3. If the lawmakers had intended to allow manufacturers, sellers and importers to claim a refund of excise taxes paid on petroleum products sold to international carriers and tax-exempt entities under Section 135, they would have expressly provided for it, just like in Section 130 (D) which allows refund or credit of excise taxes paid on

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1 G.R. No. 188497, February 19, 2014, 717 SCRA 53.

2 Resolution (Second Division) dated March 19, 2014 where this Court denied the petition "for failure to sufficiently show any reversible error in the assailed judgment to warrant the exercise of this Court's discretionary appellate jurisdiction." *Rollo,* p. 518.

locally produced or manufactured goods subsequently exported.

4. International carriers and tax exempt entities as *buyers* could not benefit from Section 135 of the NIRC considering that this Court has consistently ruled they are not entitled to a refund or credit of the excise taxes paid on the petroleum products because they are not the statutory taxpayers. The provision simply exempts them from paying the excise taxes passed on by manufacturers, sellers and importers to buyers of petroleum products.

Claim for refund under Section 135(a)

The view that the rationale in *Pilipinas Shell* precludes similar claims for refund under Section 135(b) and (c) is simply unfounded. The legal basis for exemption from excise tax on petroleum is not the same for each of the three instances enumerated in Section 135. Understandably, the discussion in *Pilipinas Shell* concerning a refund claim under Section 135(a) makes reference to a distinct historical and policy context of the tax exemption of aviation fuel for international carriers. On the other hand, Section 135(b) pertains to our government's obligations under international and bilateral agreements conditioned on reciprocal grant of exemption from similar taxes on petroleum products sold to Philippine carriers, entities or agencies.

With respect to Section 135(c), the provision merely recognizes the fiscal incentives and privileges granted by the legislature to certain entities, among which is the Clark Development Corporation (CDC), to which petitioner sold petroleum products allegedly without passing on the customs duties and excise tax previously paid by petitioner.

The Court in *Pilipinas Shell* maintained that Section 135(a) prohibits the passing of the excise tax to the exempt entities and agencies that purchase petroleum products from local oil companies. This statement would be redundant under Section 135(c) which covers buyers expressly conferred exemption from both direct and indirect taxes. Moreover, unlike Section 135(b) which is based on the principle of reciprocity, Section 135(a) applies to *all* international carriers pursuant to the provisions of the Chicago Convention. The exemption of aviation fuel used in international flights is mainly "enshrined in the legal framework of international aviation."

Section 135(a) states that petroleum products sold to international carriers are exempt from the payment of excise tax if (a) these petroleum products sold to international carrier are bonded in a storage tank; and (b) the disposition thereof shall be in accordance with the duly promulgated rules and regulations of the Secretary of Finance. It is to be noted that under

Section 130(A)(2), excise taxes on locally manufactured petroleum products are paid before removal from the place of production while excise taxes on imported petroleum products are paid before removal from customs custody. Thus, the petroleum products sold and delivered to international carriers are sourced from tax-paid inventories.

Since these petroleum products sold to international carriers are billed net of excise taxes, the question arises whether the manufacturer/importer/seller, such as petitioner oil company, is allowed to refund the excise taxes it paid.

Interpretation of our national tax laws should be geared towards fulfilling our treaty obligations and avoid consequences that will not help promote air safety and sound development of international aviation. Upon considerations of these primary goals of the Chicago Convention and the current state of the aviation industry, the Court in *Pilipinas Shell* thus found it imperative to re-examine the effect of denying the claims for refund of excise taxes paid by the local oil companies.

Factual basis of other cited consequences

The reality is that excise tax is an indirect tax usually passed on to the purchaser of the petroleum products. It is reasonable to conclude that non-recovery of this cost by the manufacturers and importers of petroleum products would affect business decisions resulting in higher prices or deprioritizing aviation customers. However, the dissent dismisses this scenario as mere speculation despite the huge sum subject of the present case and similar claims for refund filed by oil companies in accordance with the rules and regulation issued by the BIR.

Parenthetically, even airline companies of the developed countries are facing financial challenges due to "very high fixed costs" of fleets of aircraft and aircraft staff salaries. Their precarious financial condition necessitated adjustments to minimize operating expenses and enable them to offer cheap budget fares to the travelling public. Such survival strategies help avert bankruptcy which will result in the loss of employment to thousands of airline personnel, inconvenience to business travelers, and negatively impact the tourism industry.

Further, "tankering," the act of carrying a full fuel tank to avoid paying the tax while travelling outside one's national territory, is not just an imagined effect cited in *Pilipinas Shell*. In the 1997 study[3] conducted by the Secretariat of the Organization for Economic Cooperation and Development (OECD), the occurrence of "tankering" was already recognized. It stated

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[3] "Special Issues in Carbon/Energy Taxation: Marine Bunker Fuel Charges" *http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=ocde/gd(97)78.*

that "[M]ore tankering would occur as a result of an unevenly applied fuel charge, and this might lead to an increase in CO_2 emissions due to the additional weight carried by aircraft."

Claim for refund under Section 135(c)

It is argued that a claim for refund of the excise taxes paid on petroleum products sold to a tax-exempt entity under Section 135(c) should be denied as there is nothing therein that provides a tax refund in favor of the buyers and the sellers of petroleum products. The dissent further points out that such provision for the refund of excise tax by manufacturers, sellers and importers of petroleum products should have been expressly included in Section 130(D) which allows refund or credit of excise taxes paid on locally produced or manufactured goods subsequently exported. And while Section 135 is construed as a tax exemption in favor of the buyers, this Court has consistently ruled that they are not entitled to a refund or credit of the excise taxes paid on the petroleum products because they are not the statutory taxpayers.

It was thus postulated that international carriers and tax exempt entities as *buyers* could not benefit from Section 135 of the NIRC considering that this Court has consistently ruled they are not entitled to a refund or credit of the excise taxes paid on the petroleum products because they are not the statutory taxpayers. The provision simply exempts them from paying the excise taxes passed on by manufacturers, sellers and importers to buyers of petroleum products.

In my humble view, such is not the correct interpretation of Section 135 as applied to the present controversy involving a tax-exempt entity under paragraph (c).

CDC was created pursuant to Executive Order (EO) No. 80 issued on April 3, 1993 by President Fidel V. Ramos, as the operating and implementing arm of the Bases Conversion Development Authority (BCDA) to manage the Clark Special Economic Zone (CSEZ).[4] It is an entity duly registered with the Philippine Economic Zone Authority (PEZA). Pursuant to Section 23 of R.A. 7916, CDC is entitled to the fiscal incentives provided for under Presidential Decree (P.D.) No. 66, or those provided under Book VI of EO No. 226.[5]

In *Commissioner of Internal Revenue v. Seagate Technology (Philippines)*,[6] we held that the grant of exemption to PEZA-registered

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4 Sec. 1.
5 The Omnibus Investments Code of 1987.
6 491 Phil. 317 (2005).

enterprise within a special economic zone is broad and express, as it covers both direct and indirect taxes, including the value-added tax (VAT).

In *Commissioner of Customs v. Phil. Phosphate Corporation*,[7] we interpreted the exemption granted under Section 17 of P.D. No. 66 which provided for the creation of the Export Processing Zone Authority (now PEZA), as applicable to both customs duties and internal revenue taxes. We thus affirmed the CTA decision granting the refund of customs duties paid on petroleum products which was passed on as part of the selling price to respondent, an enterprise registered with EPZA.

Philippine Phosphate Fertilizer Corporation v. Commissioner of Internal Revenue[8] involved petitioner's claim for refund of excise taxes passed on by Petron. One of the issues identified by the Court in the case was whether the CTA should have granted the claim for refund. In resolving the said issue, the Court ruled that the CTA erred when it disallowed petitioner's claim due to its failure to present invoices as there is nothing in CTA Circular No. 1-95 that requires its presentation. The Court also categorically stated that there is no dispute that petitioner is entitled to exemption from the payment of excise taxes by virtue of its being an EPZA-registered enterprise.

More recently, the Court in *Commissioner of Internal Revenue v. Philippine Associated Smelting and Refining Corporation*[9] resolved the issue of whether respondent, a PEZA-registered enterprise, is the proper party to claim the tax credit/refund on the excise taxes paid on the petroleum products purchased from Petron. We thus held:

> The next pivotal question then that must be resolved is whether PASAR has the legal personality to file the claim for the refund of the excise taxes passed on by Petron. The petitioner insists that PASAR is not the proper party to seek a refund of an indirect tax, such as an excise tax or Value Added Tax, because it is not the statutory taxpayer. The petitioner's argument, however, has no merit.
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> The rule that it is the statutory taxpayer which has the legal personality to file a claim for refund finds no applicability in this case. In *Philippine Airlines, Inc. v. Commissioner of Internal Revenue,* the Court distinguished between the kinds of exemption enjoyed by a claimant in order to determine the propriety of a tax refund claim. "**If the law confers an exemption from both direct or indirect taxes, a claimant is entitled to a tax refund even if it only bears the economic burden of the applicable tax**. On the other hand, if the exemption conferred only applies to direct taxes, then the statutory taxpayer is regarded as the proper party to file the refund claim." In PASAR's case, Section 17 of P.D. No. 66, as affirmed in *Commissioner of Customs,* specifically declared that supplies, including petroleum products, whether used directly or indirectly, shall not be subject to internal revenue laws and regulations. Such exemption includes the payment of excise taxes, which was passed

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7 481 Phil. 31 (2004).
8 500 Phil.149 (2005).
9 G.R. No. 186223, October 1, 2014, 737 SCRA 328.

on to PASAR by Petron. PASAR, therefore, is the proper party to file a claim for refund.[10] (Boldface in original text)

A similar ruling was made in *Philippine Airlines, Inc. v. Commissioner of Internal Revenue*[11] which held that since PAL is exempt from direct and indirect taxes under its franchise, it is endowed with the legal personality to file the subject tax refund claim, notwithstanding the fact that it is not the statutory taxpayer. The Court explained at length the basis for the rule:

> x x x Section 204(c) of the NIRC states that it is the statutory taxpayer which has the legal personality to file a claim for refund. Accordingly, in cases involving excise tax exemptions on petroleum products under Section 135 of the NIRC, the Court has consistently held that it is the statutory taxpayer who is entitled to claim a tax refund based thereon and not the party who merely bears its economic burden.
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> For instance, in the *Silkair* case, Silkair (Singapore) Pte. Ltd. (Silkair Singapore) filed a claim for tax refund based on Section 135(b) of the NIRC as well as Article 4(2) of the Air Transport Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Singapore. The Court denied Silkair Singapore's refund claim since the tax exemptions under both provisions were conferred on the statutory taxpayer, and not the party who merely bears its economic burden. As such, it was the Petron Corporation (the statutory taxpayer in that case) which was entitled to invoke the applicable tax exemptions and not Silkair Singapore which merely shouldered the economic burden of the tax. As explained in *Silkair*:
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> > **The proper party to question, or seek a refund of, an indirect tax is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same even if he shifts the burden thereof to another.** Section 130(A)(2) of the NIRC provides that "[u]nless otherwise specifically allowed, the return shall be filed and the excise tax paid by the manufacturer or producer before removal of domestic products from place of production." Thus, Petron Corporation, not Silkair, is the statutory taxpayer which is entitled to claim a refund based on Section 135 of the NIRC of 1997 and Article 4(2) of the Air Transport Agreement between RP and Singapore.
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> > Even if Petron Corporation passed on to Silkair the burden of the tax, the additional amount billed to Silkair for jet fuel is not a tax but part of the price which Silkair had to pay as a purchaser. (Emphasis supplied)
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> However, the abovementioned rule should not apply to instances where the law clearly grants the party to which the economic burden of the tax is shifted an exemption from both direct and indirect taxes. In which case, the latter must be allowed to claim a tax refund even if it is not considered as the statutory taxpayer under the law. Precisely, this is the peculiar circumstance which differentiates the *Maceda* case from *Silkair*.

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[10] Id. at 337.

[11] G.R. No. 198759, July 1, 2013, 700 SCRA 322, 338-339.

To elucidate, in *Maceda*, the Court upheld the National Power Corporation's (NPC) claim for a tax refund since its own charter specifically granted it an exemption from both direct and indirect taxes, viz:

> x x x [T]he Court rules and declares that the oil companies which supply bunker fuel oil to NPC have to pay the taxes imposed upon said bunker fuel oil sold to NPC. By the very nature of indirect taxation, the economic burden of such taxation is expected to be passed on through the channels of commerce to the user or consumer of the goods sold. **Because, however, the NPC has been exempted from both direct and indirect taxation, the NPC must be held exempted from absorbing the economic burden of indirect taxation.** This means, on the one hand, that the oil companies which wish to sell to NPC absorb all or part of the economic burden of the taxes previously paid to BIR, which they could shift to NPC if NPC did not enjoy exemption from indirect taxes. This means also, on the other hand, that the NPC may refuse to pay the part of the "normal" purchase price of bunker fuel oil which represents all or part of the taxes previously paid by the oil companies to BIR. **If NPC nonetheless purchases such oil from the oil companies — because to do so may be more convenient and ultimately less costly for NPC than NPC itself importing and hauling and storing the oil from overseas — NPC is entitled to be reimbursed by the BIR for that part of the buying price of NPC which verifiably represents the tax already paid by the oil company-vendor to the BIR.** (Emphasis and underscoring supplied)

Notably, the Court even discussed the *Maceda* ruling in *Silkair*, highlighting the relevance of the exemptions in NPC's charter to its claim for tax refund:

> Silkair nevertheless argues that it is exempt from indirect taxes because the Air Transport Agreement between RP and Singapore grants exemption "from the same customs duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party." **It invokes *Maceda v. Macaraig, Jr.* which upheld the claim for tax credit or refund by the National Power Corporation (NPC) on the ground that the NPC is exempt even from the payment of indirect taxes**.
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> Silkair's argument does not persuade. In *Commissioner of Internal Revenue v. Philippine Long Distance Telephone Company*, this Court clarified the ruling in *Maceda v. Macaraig, Jr.*, *viz.*:
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> > It may be so that in *Maceda vs. Macaraig, Jr.*, the Court held that an exemption from "*all taxes*" granted to the National Power Corporation (NPC) under its charter includes both direct and indirect taxes. But far from providing PLDT comfort, *Maceda* in fact supports the case of herein

petitioner, the correct lesson of Maceda being that an exemption from "*all taxes*" excludes indirect taxes, **unless the exempting statute, like NPC's charter, is so couched as to include indirect tax from the exemption**. Wrote the Court:

> x x x However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemption. Subsequently, P.D. 380, made even more specific the details of the exemption of NPC to cover, among others, **both direct and indirect taxes** on all petroleum products used in its operation. Presidential Decree No. 938 [NPC's amended charter] amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from "all forms of taxes, duties[,] fees…"
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> The use of the phrase "all forms" of taxes demonstrates the intention of the law to give NPC all the tax exemptions it has been enjoying before. . .
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> x x x x
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> It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from ***all forms*** of taxes including indirect taxes as provided under R.A. No. 6395 and P.D. 380 if it is to attain its goals.

The exemption granted under Section 135(b) of the NIRC of 1997 and Article 4(2) of the Air Transport Agreement between RP and Singapore cannot, without a clear showing of legislative intent, be construed as including indirect taxes. Statutes granting tax exemptions must be construed in *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority, and if an exemption is found to exist, it must not be enlarged by

> construction. (Emphasis and underscoring supplied)
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> Based on these rulings, it may be observed that **the propriety of a tax refund claim is hinged on the kind of exemption which forms its basis. If the law confers an exemption from both direct or indirect taxes, a claimant is entitled to a tax refund even if it only bears the economic burden of the applicable tax.** On the other hand, if the exemption conferred only applies to direct taxes, then the statutory taxpayer is regarded as the proper party to file the refund claim.[12] (Additional emphasis supplied)

The aforesaid statement in the dissent clearly runs counter to the previous rulings of this Court recognizing PEZA-registered enterprises, which by law are exempt from both direct and indirect taxes, as proper parties to file a claim for refund of excise taxes passed on to them by the sellers of petroleum products.

Claim for refund by manufacturers, sellers or importers of petroleum products sold to international carriers, international agencies and other tax-exempt entities

It is evident from the dissent that its denial of the claim for refund of excise taxes filed by petitioner under Section 135(c) is essentially anchored on our pronouncement in the 2012 decision in *Pilipinas Shell* which cited the 1967 case of *Philippine Acetylene Co., Inc. v. Commissioner of Internal Revenue.*[13] Petitioner in said case sought relief from this Court when the CTA denied its appeal from the decision of the CIR. The Court upheld the CTA insofar as it ruled that petitioner as manufacturer or producer of oxygen and acetylene gases sold to the National Power Corporation (NPC) cannot claim exemption from the payment of sales tax simply because its buyer – the NPC – is exempt from the payment of all taxes.

It is submitted that *Philippine Acetylene* is not controlling in cases involving claims for refund under Section 135. Said case was decided under the Old Tax Code and not under the 1997 NIRC where Section 135 was included as a new provision. Also, said case involved percentage or sales tax and not excise tax imposed on the production and importation of petroleum products.

FROM THE FOREGOING, I VOTE TO:

1. **GRANT** the present Motion for Reconsideration; and

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[12] Id. at 331-336.
[13] 127 Phil. 461 (1967).

2. **DIRECT** respondent Commissioner of Internal Revenue to refund or to issue a tax credit certificate to Chevron Philippines, Inc. in the amount of ₱6,542,400.00 representing the excise taxes it paid on the petroleum products sold to Clark Development Corporation from August to December 2007.

MARTIN S. VILLARAMA, JR.
Associate Justice