

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

FORTUNE TOBACCO CORPORATION,
Petitioner,

CTA EB CASE NO. 533
(CTA Case No. 7367)

-versus-

Present:

**ACOSTA, P.J.,
CASTAÑEDA, JR.
BAUTISTA
UY
CASANOVA
PALANCA-ENRIQUEZ
FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS, JJ.**

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

Promulgated:

MAR 12 2010

X-----X

DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *en banc* under Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended, of the Decision¹ dated April 30, 2009, rendered by the Former First Division of this Court² in CTA Case No. 7367, and its Resolution dated August 18, 2009 (not August 6, 2009).

¹ En banc docket, pp. 35-50.

² Penned by Associate Justice Caesar A. Casanova, concurred in by Presiding Justice Ernesto D. Acosta and Associate Justice Lovell R. Bautista

DECISION

Petitioner Fortune Tobacco Corporation seeks reversal of both the aforesaid Decision and Resolution, the dispositive portions of which, respectively, read as follows:

Decision dated April 30, 2009:

"WHEREFORE, the instant Petition is hereby DENIED for INSUFFICIENCY OF EVIDENCE.

SO ORDERED."

Resolution³ dated August 18, 2009:

"WHEREFORE, petitioner's Motion for Reconsideration filed on May 28, 2009 is hereby DENIED for LACK OF MERIT. The Decision dated April 30, 2009 is AFFIRMED.

SO ORDERED."

The facts as culled from the records are undisputed:

"Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal address at Fortune Avenue, Parang, Marikina City.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of his office, including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes, with office address at the Bureau of Internal Revenue (BIR), BIR Road, Diliman, Quezon City.

Petitioner is the manufacturer/producer of, among others, the following cigarette brands, with tax rate classification based on net retail price prescribed by Annex "D" to Republic Act (R.A.) No. 64280, to wit:

<u>Brand</u>	<u>Tax Rate</u>
Champion M 100	P1.00
Camel F King	P1.00
Camel Lights Box 20's	P1.00
Camel Filters Box 20's	P1.00

³ En Banc Docket pp.51-55.

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Winston F King	P5.00
Winston Lights	P5.00

Immediately prior to January 1, 1997, the above-mentioned cigarette brands were subject to ad valorem tax pursuant to then Section 142 of the Tax Code of 1977, as amended. However, on January 1, 1997, R.A. No. 8240 took effect causing a shift from the ad valorem tax (AVT) system to the specific tax system. As a result of such shift, the aforesaid cigarette brands were subjected to specific tax under Section 142 thereof, now renumbered as Section 145 of the Tax Code of 1997. Section 145 is quoted thus:

'Section 145. Cigars and Cigarettes-

(A) Cigars. – There shall be levied, assessed and collected on cigars a tax of One peso (P1.00) per cigar.

(B) Cigarettes Packed by Hand. – There shall be levied, assessed and collected on cigarettes packed by hand a tax of Forty centavos (P0.40) per pack.

(C) Cigarettes Packed by Machine. – There shall be levied, assessed and collected on cigarettes packed by machine a tax at the rates prescribed below:

(1) If the net retail price (excluding the excise tax and the value-added tax) is above Ten pesos (P10.00) per pack, the tax shall be Twelve (P12.00) per pack;

(2) If the net retail price (excluding the excise tax and the value added tax) exceeds Six pesos and Fifty centavos (P6.50) but does not exceed Ten pesos (P10.00) per pack, the tax shall be Eight Pesos (P8.00) per pack.

-- (3) If the net retail price (excluding the excise tax and the value-added tax) is Five pesos (P5.00) but does not exceed Six Pesos and fifty centavos (P6.50) per pack, the tax shall be Five pesos (P5.00) per pack;

(4) If the net retail price (excluding the excise tax and the value-added tax) is below Five pesos (P5.00) per pack, the tax shall be One peso (P1.00) per pack;

"Variants of existing brands of cigarettes which are introduced in the domestic market after the effectivity of R.A. No. 8240 shall be taxed under the highest classification of any variant of that brand. (

DECISION

The excise tax from any brand of cigarettes within the next three (3) years from the effectivity of R.A. No. 8240 shall not be lower than the tax, which is due from each brand on October 1, 1996. Provided, however, that in cases where the excise tax rate imposed in paragraphs (1), (2), (3) and (4) hereinabove will result in an increase in excise tax of more than seventy percent (70%), for a brand of cigarette, the increase shall take effect in two tranches: fifty percent (50%) of the increase shall be effective in 1997 and one hundred percent (100%) of the increase shall be effective in 1998.

Duly registered or existing brands of cigarettes or new brands thereof packed by machine shall only be packed in twenties.

The rates of excise tax on cigars and cigarettes under paragraphs (1), (2), (3) and (4) hereof, shall be increased by twelve percent (12%) on January 1, 2000. (Emphasis supplied)

New brands shall be classified according to their current net retail price.

For the above purpose, 'net retail price' shall mean the price at which the cigarette is sold on retail in twenty (20) major supermarkets in Metro Manila (for brands of cigarettes marketed nationally), excluding the amount intended to cover the applicable excise tax and value-added tax. For brands which are marketed only outside Metro Manila, the 'net retail price' shall mean the price at which the cigarette is sold in five (5) major supermarkets in the region excluding the amount intended to cover the applicable excise tax and the value-added tax.

The classification of each brand of cigarettes based on its average net retail price as of October 1, 1996, as set forth in Annex "D," shall remain in force until revised by Congress.

'Variant of a brand' shall refer to a brand on which a modifier is prefixed and/or suffixed to the root name of the brand and/or a different brand which carries the same logo or design of the existing brand.

To implement the provisions for a twelve percent (12%) increase of excise tax on cigars and cigarettes packed by machines by January 1, 2000, the Secretary of Finance, upon recommendation of the respondent Commissioner of Internal Revenue, issued Revenue Regulations No. 17-99, dated December 16, 1999,xxx.

RR No. 17-99 likewise provides in the last paragraph of Section 1 thereof, **"that the new specific tax rate for any existing brand of cigars, cigarettes packed by machine, distilled spirits, wines and** 

DECISION

fermented liquor shall not be lower than the excise tax that is actually being paid prior to January 1, 2000.

*On 31 March 2005, petitioner filed a claim for tax credit or refund under Section 229 of the National Internal Revenue Code of 1997 (1997 NIRC) for erroneously or illegally collected specific taxes covering the period June to December 31, 2004 in the total amount of Php219,566,450.00."*⁴(Italics and emphasis supplied)

On November 14, 2005, petitioner filed a Petition for Review which was raffled to the Former First Division of this Court.

Respondent in his Answer⁵ raised among others, as a Special and Affirmative Defense, that the amount of TWO HUNDRED NINETEEN MILLION FIVE HUNDRED SIXTY SIX THOUSAND FOUR HUNDRED FIFTY PESOS (Php219,566,450.00) being claimed by petitioner as alleged overpaid excise tax for the period covering 1 June to 31 December 2004, is not properly documented.

After trial on the merits, the Former First Division of this Court rendered the assailed Decision dated April 30, 2009, which consistently ruled that RR 17-99⁶ is contrary to law and that there is insufficiency of evidence on the claim for refund.

Petitioner filed its motion for reconsideration therefrom, and which was denied by the Former First Division on August 18, 2009.

Petitioner maintains that -

"THE HONORABLE COURT OF TAX APPEALS SERIOUSLY ERRED CONTRARY TO LAW AND JURISPRUDENCE WHEN IT HELD IN THE ASSAILED DECISION AND RESOLUTION THAT PETITIONER FORTUNE 

⁴ Supra. Note 1

⁵ 1st Division Docket pp.111-115

⁶ Implementing Sections 141, 142, 143 and 145 (A) and (C) (1), (2), (3) and (4) of the National Internal Revenue Code of 1997 relative to the increase of the excise tax on distilled spirits, wines, fermented liquors and cigars and cigarettes packed by machine, by twelve percent (12%) on January 1, 2000.

DECISION

***TOBACCO CORPORATION IS NOT ENTITLED TO THE CLAIM FOR
REFUND FOR INSUFFICIENCY OF EVIDENCE***⁷

Petitioner contends that the doctrine of strict construction against tax exemption does not apply to claims for refund involving illegally collected and erroneously paid internal revenue taxes and that Exhibits "G", "G-1" to "G-7" and Exhibit "H", if admitted together with the testimony of their lone witness, would sufficiently prove its claim.

The petition is without merit.

At the outset, the instant case is in essence similar to previously decided CTA Cases⁸ invalidating RR 17-99⁹ and ordering respondent to refund petitioner's overpayment of excise taxes on various dates. But unlike the previously decided cases, petitioner failed to prove the due execution/ authenticity and mathematical accuracy of its documents.

During trial, petitioner presented its lone witness together with several documents. However, records show that only Exhibit "C" was admitted¹⁰ by the Former First Division. Although petitioner submitted other documents¹¹, these were not admitted for being mere photocopies.

Petitioner posits that if their exhibits, specifically Exhibits "G"¹², "G-1" to "G-7"¹³ and Exhibit "H"¹⁴, are admitted together with the testimony of their L

⁷ En Banc Docket p. 18

⁸ CTA Case Nos. 6365, 6383 and 6612, affirmed by the Court of Appeals in CA G.R. SP No. 80675 and 83165 which were later on affirmed by the Supreme Court (Second Division) in G.R. No. 167274-75, July 21, 2008; CTA Case 7015 and affirmed in CTA EB Case No. 228, July 12, 2007.

⁹ Implementing Sections 141, 142, 143 and 145 (A) and (C) (1), (2), (3) and (4) of the National Internal Revenue Code of 1997 relative to the increase of the excise tax on distilled spirits, wines, fermented liquors and cigars and cigarettes packed by machine, by twelve percent (12%) on January 1, 2000.

¹⁰ 1st division Docket p. 286

¹¹ Ibid.

¹² FTC Production Removals, Excise Tax Payments for All FTC Brands

witness, the same would sufficiently prove their claim. A closer scrutiny of the records shows that petitioner did not file any offer of proof or tender of excluded evidence.

Section 40, Rule 132 of the Rules of Court provides:

Sec.40. Tender of excluded evidence.—If documents or things offered in evidence are excluded by the court, the offeror may have the same attached to or made part of the record. If the evidence excluded is oral, the offeror may state for the record the name and other personal circumstances of the witness and the substance of the proposed testimony.

The rule is that evidence formally offered by a party may be admitted or excluded by the court. If a party's offered documentary or object evidence is excluded, he may move or request that it be attached to form part of the records of the case. If the excluded evidence is oral, he may state for the record the name and other personal circumstances of the witness and the substance of the proposed testimony. These procedures are known as offer of proof or tender of excluded evidence and are made for purposes of appeal. If an adverse judgment is eventually rendered against the offeror, he may in his appeal assign as error the rejection of the excluded evidence.¹⁵

It is of record that the denial of the excluded evidence was never assigned as an error in this appeal. Thus, this Court cannot pass upon nor consider the propriety of their denial. Moreover, this Court cannot and should not consider the documentary and oral evidence presented which are not considered to be part of the records in the first place. Thus, Exhibits "G", "G-6"

¹³ Statements of Production and Removals with corresponding Excise Tax Payments

¹⁴ FTC Excise Tax Refund Computation Summary

¹⁵ Josefin Cruz-Arevalo vs. Judge Lydia Querubin Layosa, A.M. No. RTJ-O6-2005, July 4, 2006

1" to "G-7" and Exhibit "H", together with the testimony of petitioner's witness thereon, cannot be admitted and be given probative value.

Also, to admit Exhibits "G", "G-1" to "G-7" and Exhibit "H" together with the testimony of petitioner's witness would violate Section 3, Rule 130 of the Rules of Court¹⁶. The best evidence rule requires the highest grade of evidence obtainable to prove a disputed fact. Although there are recognized exceptions when the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself.¹⁷

The subject of inquiry is the contents of petitioner's photocopied documentary evidence, specifically, Exhibits "G-1" to "G-7"- Statements of Production and Removals with corresponding Excise Tax Payments covering the period June to December 31, 2004. But petitioner failed to prove that the photocopied documentary exhibits presented fall under the exceptions to the best evidence rule. Further, petitioner's witness is not even a signatory to C

¹⁶ Section 3, Rule 130 of the Rules of Court reads:

Sec. 3. Original document must be produced; exceptions. — When the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself, except in the following cases:

- (a) When the original has been lost or destroyed, or cannot be produced in court, without bad faith on the part of the offeror;
- (b) When the original is in the custody or under the control of the party against whom the evidence is offered, and the latter fails to produce it after reasonable notice;
- (c) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the fact sought to be established from them is only the general result of the whole; and
- (d) When the original is a public record in the custody of a public officer or is recorded in a public office.

¹⁷ Bank of the Philippine Islands as successor-in-interest of Far East Bank and Trust Company vs. SMP, Inc, G.R. No. 175466 , December 23,2009.

the said photocopied documents. Thus, it is essential that the original of these documents should have been presented.

The liberal interpretation and application of the rules apply only in proper cases of demonstrable merit and under justifiable causes and circumstances. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to insure an orderly and speedy administration of justice. Party litigants and their counsels are well advised to abide by, rather than flaunt, procedural rules.¹⁸

As pointed out by this Court's Former First Division in its assailed Resolution¹⁹

"Petitioner knew that it committed procedural lapses when it filed its Formal Offer of Evidence and even sought to remedy them by manifesting to file a Motion for Reconsideration. Petitioner's non-filing of a Motion for Reconsideration cannot now be remedied by asking this Court to relax procedural rules in order to make up for the litigant's negligence and caprice. xxx." (Italics and emphasis supplied)

To admit Exhibits "G", "G-1" to "G-7" and Exhibit "H" is to disregard the Rules of Court since petitioner miserably failed to comply with the rules. Utter disregard of the rules cannot be rationalized by harping on the policy of liberal construction. Aside from the fact that admission of Exhibits "G", "G-1" to "G-7" and Exhibit "H" is in violation of the rules, petitioner neither filed a Motion for Reconsideration on the non-admission of petitioner's photocopied exhibits nor made an offer of proof or tender of excluded evidence. But even if the fatal procedural infirmity was to be disregarded with respect to "Exhibits L

¹⁸ Norris vs. Parentetal Jr., G. R. No. 143216, February 27, 2003, 398 SCRA 346

¹⁹ Supra, Note 4

"G" and "H" due to the non-presentation of the original, the petition must still fail for lack of merit.

Petitioner has the burden of proof. Petitioner is responsible to follow through his claim and to prove its allegations by submitting sufficient evidence. If petitioner fails to proffer sufficient evidence, notwithstanding the lack of denial or any evidence in controversion thereof, the petition should be dismissed. In other words, although the evidence adduced by the petitioner is stronger than that presented by the respondent, a judgment cannot be entered in favor of the former, if his evidence is not sufficient to sustain his cause of action.²⁰ The amount of refund should come from the strength of the evidence presented by petitioner and not from the weakness of respondent's defense.

Consequently, it is incumbent upon the petitioner to present and prove the due execution/ authenticity, mathematical accuracy of their documents and other evidence to prove its claim. This Court's Former First Division correctly ruled in the assailed Decision that:

"xxx, the documentary exhibits are not sufficient to prove the amounts being claimed by petitioner as refund. Looking at Exhibit "G", the same is a mere summary of excise taxes paid by petitioner for ALL of its cigarette brands. This Court cannot verify the amounts of excise taxes paid for the brands in issue which are Champion M-100s, Camel Filter Kings, Winston Filter Kings, and Winston Lights.

This Court cannot likewise rely solely on petitioner's Excise Tax Refund Computation Summary. The figures therein must be verified through other documentary evidence which this Court must look into and which petitioner failed to properly provide."

²⁰ Ong vs. Yap, G.R. No. 146797, February 18, 2005

DECISION

This Court cannot accept on its face value petitioner's FTC Production Removals, Excise Tax Payments for All FTC Brands (Exhibit "G") which were mere summary of excise taxes payments, Excise Tax Refund Computation Summary (Exhibit "H") and testimony of petitioner's accountant thereon without verifiable supporting documents which petitioner failed to submit.

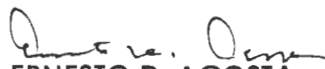
In fine, there is no reason to deviate from the rulings of this Court's Former First Division.

WHEREFORE, the petition is **DENIED**. The Decision of the Former First Division of this Court in CTA Case No. 7367, dated 30 April 2009, and its Resolution, dated 18 August 2009, are **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

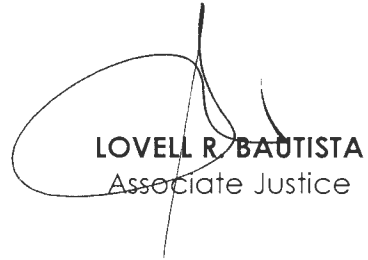

CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:


ERNESTO D. ACOSTA
Presiding Justice

DECISION


JUANITO C. CASTAÑEDA, JR.
Associate Justice


LOVELL R. BAUTISTA
Associate Justice


ERLINDA P. UY
Associate Justice


CAESAR A. CASANOVA
Associate Justice

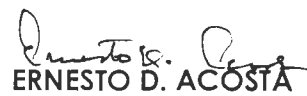

OLGA PALANCA-ENRIQUEZ
Associate Justice


ESPERANZA R. FABON-VICTORINO
Associate Justice


AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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


ERNESTO D. ACOSTA
Presiding Justice