

FIRST DIVISION

[G.R. No. 222239, January 15, 2020]

ASSOCIATION OF INTERNATIONAL SHIPPING LINES, INC., APL CO. PTE LTD., AND MAERSK-FILIPINAS, INC., PETITIONERS, VS. SECRETARY OF FINANCE AND COMMISSIONER OF INTERNAL REVENUE, RESPONDENTS.

DECISION

LAZARO-JAVIER, J.:

Antecedents

On July 1, 2005, Republic Act No. 9337^[1] (RA 9337) was enacted, amending select provisions of the 1997 National Internal Revenue Code (NIRC), namely, Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288.

In relation to these amendments, then Commissioner of Internal Revenue (CIR) Lilian Hefti issued Revenue Memorandum Circular No. 31-2008^[2] (RMC 31-2008) dated January 30, 2008. It sought to "*clarify certain provisions of the National Internal Revenue Code of 1997, as amended (Code), as it applies to shipping companies and their agents as well as their suppliers to ensure that the law is properly implemented and taxes are properly collected, in a manner that aligns with acceptable business practices.*" Its relevant portions read:

Q-3: Are on-line international sea carriers subject to VAT?

A-3: No. On-line international sea carriers are not subject to VAT they being subject to percentage tax under Title V of the Tax Code. They are liable to the three percent (3%) percentage tax imposed on their gross receipts from outbound fares and freight, pursuant to Section 118 of the Code.

However, if these on-line international sea carriers engage in other transactions not exempt under Section 119 of the Code, they shall be liable to the twelve percent (12%) VAT on these transactions.

Q-4: Are demurrage fees collected by on-line international sea carriers due to delay by the shipper in unloading their inbound cargoes subject to tax?

A-4: Yes, Demurrage fees, which are in the nature of rent for the use of property of the carrier in the Philippines is considered income from Philippine source and is subject to income tax under the regular rate as the other types of income of the on-line carrier. Said other line of business may likewise be subject to VAT or percentage tax applying the rule on threshold discussed in the succeeding paragraph.

Q-5: Are detention fees and other charges collected by international sea carriers subject to tax?

A-5: Detention fees and other charges relating to outbound cargoes and inbound cargoes are all considered Philippine-sourced income of the international sea carriers they being collected for the use of property or rendition of services in the Philippines, and are subject to the Philippine income tax under the regular rate, and to the Value added tax, if the total annual receipts from all the VAT-registered activities exceeds one million five hundred thousand pesos (P1,500,000.00). However, if the total annual gross receipts do not exceed one million five hundred thousand pesos, said taxpayer is liable to pay the 3% percentage tax.

x x x

Q-14: Are sales of goods, supplies, equipment, fuel and services to persons engaged in international shipping operations subject to VAT?

A-14: The sale of goods, supplies, equipment, fuel and services including leases of property) to the common carrier to be used in its international sea transport operations is zero-rated. Provided, that the same is limited to goods, supplies, equipment, fuel and services pertaining to or attributable to the transport of goods and passengers from a port in the Philippine directly to a foreign port without docking or stopping at any other port in the Philippines to unload passengers and/or cargoes loaded in and from another domestic port; Provided, further, that if any portion of such fuel, equipment, goods or supplies and services is used for purposes other than that mentioned in this paragraph, such portion of fuel, equipment, goods, supplies and services shall be subject to 12% VAT.

x x x

Q-34: Are commission incomes received by the local shipping agents from their foreign principals subject to VAT?

A-34: The commission income or fees received by the local shipping agents for outbound freights/fares received by their foreign principals which are on-line international sea carriers (touching any port in the Philippines as part of their operation) shall be zero-rated pursuant to the provisions of Section 108(B)(4) of the Code. Said provision does not require that payments of the commission income or fees for "services rendered to persons engaged in international shipping operations, including leases of property for use thereof," be paid in acceptable foreign currency in order that such transaction may be zero-rated. On the other hand, commission income or fees received by the local shipping agents pertaining to inbound freights/fares received by their foreign principals/on-line international sea carriers or pertaining to freights/fares received by off-line international sea carriers shall be subject to VAT at 12%.

Five (5) years after the enactment of RA 9337, on December 6, 2010, petitioners Association of International Shipping Lines, Inc.^[3] (AISL), APL Co. Pte. Ltd.^[4] (APL), and Maersk-Filipinas, Inc. (Maersk) sought to nullify RMC 31-2008 via a petition for declaratory relief entitled "*Association of International Shipping Lines, Inc. (AISL), APL Co. Pte. Ltd. (APL), and Maersk-Filipinas, Inc. (Maersk) v.*

Commissioner of Internal Revenue." The case was raffled to RTC-Branch 98, Quezon City, and docketed as Civil Case No. Q-09-64241.^[5]

Petitioners prayed that the trial court: 1) issue a writ of preliminary injunction enjoining the then BIR Commissioner and her representatives, agents, or those acting under her instructions or on her behalf from implementing, enforcing, or acting pursuant to or on the basis of the challenged provisions of RMC 31-2008; and 2) render judgment declaring these challenged provisions void.^[6]

According to petitioners, RMC 31-2008 was void insofar as it imposed regular tax rate of thirty percent (30%) and twelve percent (12%) VAT on the demurrage and detention fees collected by international shipping carriers from shippers or consignees for delay in the return of containers, on the domestic portion of services to persons engaged in international shipping operations, and on commission income received by local shipping agents from international shipping carriers or in connection with inbound shipments.

By Order^[7] dated May 18, 2012, Branch 98 held that international carriers were not subject to income tax under Section 28 (A)(1)(3b)^[8] of the NIRC. Too, demurrage fees were not considered income derived from other or separate business of the international carrier. Being incidental to the trade or business of the international carrier, demurrage fees should instead form part of the Gross Philippine Billings (GPB) subject to 2.5% tax under Section 28. Further the law did not expressly impose 12% VAT on the domestic portion of the services rendered by international carriers.^[9] Thus:

WHEREFORE, premises considered, and pursuant to Rule 35 of the 1997 Rules of Civil Procedure, the Court grants the motion for summary judgment and declares as **INVALID**, the pertinent portions of Revenue Memorandum Circular No. 31-2008, insofar as the latter subjects the: a) demurrage and detention fees to the regular corporate income tax rate under Section 28(A)(1) and 12% VAT; b) domestic portion of the services rendered to persons engaged in international shipping operation to 12% VAT; and c) commission income or fees received by local shipping agents from international shipping carriers for the latter's inbound freights/fares to 12% VAT, for being contrary to Section 28 (A)(1), and (3) and Section 108 (B)(4) of the National Internal Revenue Code of 1997, as amended.

SO ORDERED.^[10]

The Order became final and executory as of June 16, 2012.^[11]

On March 7, 2013, Republic Act No. 10378^[12] (RA 10378) was enacted, amending Section 28 (A)(3)(a) of the NIRC. The provision now reads:

SEC. 28. Rates of Income Tax on Foreign Corporations.—

(A) Tax on Resident Foreign Corporations. —

(1) xxx

(2) xxx

(3) International Carrier. — An international carrier doing business in the Philippines shall pay a tax of two and one-half

percent (2 1/2 %) on its 'Gross Philippine Billings' as defined hereunder:

(a) International Air Carrier. — 'Gross Philippine Billings' refers to the amount of gross revenue derived from carriage of persons, excess baggage, cargo, and mail originating from the Philippines in a continuous and uninterrupted flight, irrespective of the place of sale or issue and the place of payment of the ticket or passage document: Provided, That tickets revalidated, exchanged and/or indorsed to another international airline form part of the Gross Philippine Billings if the passenger boards a plane in a port or point in the Philippines: Provided, further, That for a flight which originates from the Philippines, but transshipment of passenger takes place at any part outside the Philippines on another airline, only the aliquot portion of the cost of the ticket corresponding to the leg flown from the Philippines to the point of transshipment shall form part of Gross Philippine Billings.

(b) International Shipping. — 'Gross Philippine Billings' means gross revenue whether for passenger, cargo or mail originating from the Philippines up to final destination, regardless of the place of sale or payments of the passage or freight documents.

Provided, That international carriers doing business in the Philippines may avail of a preferential rate or exemption from the tax herein imposed on their gross revenue derived from the carriage of persons and their excess baggage on the basis of an applicable tax treaty or international agreement to which the Philippines is a signatory or on the basis of reciprocity such that an international carrier, whose home country grants income tax exemption to Philippine carriers, shall likewise be exempt from the tax imposed under this provision.

x x x.

The Secretary of Finance, thereafter, issued the implementing rules under Revenue Regulation No. 15-2013^[13] (RR 15-2013), the validity of which is now the subject of this petition.

The Proceedings Before the Trial Court

Over three (3) years later, on December 4, 2013, petitioners initiated the present petition for declaratory relief,^[14] this time, challenging Section 4.4 of RR 15-2013 and impleading as respondents both the Secretary of Finance and the CIR. Section 4.4 reads:

4.4) Taxability of Income Other Than Income From International Transport Services. — All items of income derived by international carriers that do not form part of Gross Philippine Billings as defined under these Regulations shall be subject to tax under the pertinent provisions of the NIRC, as amended.

Demurrage fees, which are in the nature of rent for the use of property of the carrier in the Philippines, is considered income from Philippine source and is subject to income tax under the regular rate as the other types of income of the on-line carrier.

Detention fees and other charges relating to outbound cargoes and inbound cargoes are all considered Philippine-sourced income of international sea carriers they being collected for the use of property or rendition of services in the Philippines, and are subject to the Philippine income tax under the regular rate.
(Emphasis supplied)

The case was raffled to RTC-Branch 77, Quezon City, and docketed Special Civil Action No. R-QZN-13-05590-CV, then presided by Acting Presiding Judge Cleto R. Villacorta III.

Petitioners' Arguments

Petitioners argued that Section 4.4 of RR 15-2013 invalidly subjects demurrage and detention fees collected by international shipping carriers to regular corporate income tax rate. This very same imposition had been previously declared invalid by Branch 98 through its final and executory Order dated May 18, 2012.^[15] Section 4.4 of RR 15-2013 should not, therefore, be given effect by reason of *res judicata*.^[16] The treatment of demurrage and detention fees on the carriage of cargoes prior to and after the enactment of RA 10378 did not change. There is nothing in RA 10378 which even touches on demurrage and detention fees, much less, provides or even implies that they should be treated as income subject to tax at the regular corporate income tax rate.^[17]

In fact, RR 15-2013 unduly widens the scope of RA 10378 by imposing additional taxes on international shipping carriers not authorized or provided by law. Besides, demurrage and detentions fees are not income but penalties imposed by the carrier on the charterer, shipper, consignee, or receiver, as the case may be, to allow the carrier to recover losses or expenses associated with or caused by the undue delay in the loading and/or discharge of the latter's shipments from the containers.^[18] They are akin to damages.^[19] Assuming that demurrage and detention fees may be treated as income, these fees are taxable only if they form part of Gross Philippine Billings (GPB) and taxed at the preferential rate of 2.5%.^[20]

Further, RR 15-2013 is invalid because it was promulgated without public hearing as required by the Revised Administrative Code and case law. Also, no copies of RR 15-2013 were filed with the University of the Philippines - Law Center, as required by the Revised Administrative Code, thus, the same is deemed not to have become effective.^[21]

Respondents' Arguments

By Comment^[22] dated February 3, 2014, the Secretary of Finance, through the Office of the Solicitor General (OSG), countered that the Order dated May 18, 2012 in Civil Case No. Q-09-64241 did not preclude the Secretary of Finance from issuing Section 4.4 of RR 15-2013 because a) the first case involves RMC 31-2008 which the CIR issued to clarify matters involving common carriers by sea, in relation to