REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BURMEISTER & WAIN SCANDINAVIAN CONTRACTORS, MINDANAO, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5471

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 10 1999

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DECISION

This Petition for Review is seeking for a refund or issuance of a tax credit certificate in the total amount of ₱4,675,072.39 representing excess input value-added tax (VAT, for brevity) paid for the period January 1, 1995 to December 31, 1995.

Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines. It is wholly-owned by Burmeister & Wain Scandinavian Contractors - Denmark (BWSC-Denmark, for brevity) with principal office address located in Daruma Industries Corporation Bldg., Km. 7, Lanang, Davao City.

The petition alleges that a consortium composed of BWSC-Denmark, Mitsui Engineering & Shipbuilding, Ltd. and Mitsui & Co., Ltd., entered into a Consortium Agreement with NAPOCOR, a government-owned and controlled corporation, for the operation and maintenance of two-megawatt power barges for a fifteen-year term. BWSC-Denmark was elected to be the Consortium's coordination manager.

As the coordination manager, BWSC-Denmark organized Burmeister Wain and Scandinavian Contractors, Mindanao, Inc., and thereafter, the Consortium entered into a Sub-contract Agreement with Petitioner. Consequently, Petitioner undertook the main responsibility of actual operation and maintenance of the two power barges, as well as all the works under the Consortium Agreement that will necessarily have to be performed in the Philippines (TSN, July 7, 1997, pp. 9-11). In exchange for the services rendered, Petitioner receives a subcontract fee.

In the belief that its sales of services are subject to VAT, Petitioner registered itself with RDO No. 113 (Davao City) of the Bureau of Internal Revenue as a VAT registered taxpayer with VAT Registration No. 003-295-598 (Exh. A).

On February 14, 1995, Petitioner was able to secure BIR Ruling No. 25(a)(1)-000-00-023-95, subjecting its gross receipts from the services it renders to the Consortium to zero-rate because the consideration it receives from said sales of services is paid for in acceptable foreign currency inwardly remitted to the Philippines in accordance with the rules and regulations of Bangko Sentral ng Pilipinas (Exh. F).

For the year 1995, Petitioner timely filed its quarterly VAT returns declaring therein total zero-rated sales in the amount of ₱155,515,059.87 with total corresponding purchases of taxable goods and services in the sum of ₱46,750,072.45, inclusive of input VAT, detailed as follows:

(1995) Quarter	Exh.	AMOUNT Sales	Purchases
1st	B	₱ 36,875,700.00	₱12,499,810.48
2nd	C	41,952,000.00	18,166,310.63
3rd	D	48,534,333.00	8,251,417.02
4th	E	28,153,026.87	7,833,184.32
Total		₱155,515,059.87	₱46,750,722.45

As a consequence of the zero-rated status of its sales of services, Petitioner filed, on two separate occasions, Applications for Tax Credit/Refund of Value-Added Tax Paid, pursuant to Section 106(b) of the 1995 Tax Code, as amended, to wit:

Inclusive Dates of Input Tax Payments	Date of Filing	Exh.	Amount
January 1995 to June 1995	10-17-95	I	₱3,066,612.29
July 1995 to December 1995	02-06-97	J	1,608,460.10
T o t a l			₱4,675,072.39

The inaction of the Respondent on said applications compelled Petitioner to file the instant Petition for Review on March 24, 1997, in order to preserve its right to judicially claim for the refund of excess input VAT payments.

Respondent, in his Answer, raised the following special and affirmative defenses:

9. Petitioner's claim for refund has already prescribed.

10. The total amount of P4,675,072.39 claimed by petitioner as alleged refundable input taxes was not properly documented.

11. Taxes paid and collected are presumed to have been made in accordance with law and regulations. In an action for tax refund/credit, it is incumbent upon the taxpayer to establish that the taxes paid were erroneously or illegally collected. Failure to meet this burden is fatal to the claim for refund/credit. In the present case, petitioner has not shown that the tax claimed was erroneously or illegally collected.

12. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation with Section 230 of the National Internal Revenue Code, as amended.

13. BIR Ruling No. 023-95 does not apply to the present case because the facts are materially different from the facts on which the ruling is based.

To bolster its claim for refund, Petitioner formally offered the following documentary evidence:

1. VAT registration certificate (Exh. A);

2. Value-Added Tax Returns for the period January 1, 1995 to December 31, 1995 (Exhs. B to E, inclusive of sub-markings);

3. BIR Ruling No. 25(A)(1)-000-00-023-95, classifying petitioner's sale of services as a Vatable transaction at 0% (Exh. F);

4. Applications for tax credit/refund of VAT paid (Exhs. G and H);

5. Independent CPA certification pertaining to Petitioner's claim for refund of input taxes and sales of services (Exh. I);

6. Schedule of input taxes paid and zero-rated sales (Exhs. J and K); and

> 7. Photocopies of suppliers' sales invoices and/or official receipts and photocopies of Petitioner's sales invoices and bank credit memos (Exhs. J-1 to J-949 and K-1 to K-28).

Respondent, on the other hand, failed to submit any controverting evidence. This case was eventually submitted for decision sans the memorandum of the Respondent.

The issues to be resolved by this Court are as follows:

1. Whether or not Petitioner's sales of services to the Consortium are subject to zero percent rate of VAT, pursuant to Section 102(a)(2) of the 1995 Tax Code, as amended; and

2. Whether or not Petitioner is entitled to input VAT refund, pursuant to Section 106(b) of the same code.

Pertinent to the resolution of the first issue is Section 102(a)(2) of the Tax Code, to wit:

> **SEC. 102. *Value-added tax on sale of services.*** — *(a) Rate and base of tax.* — There shall be levied, assessed and collected, a value-added tax equivalent to 10% percent of gross receipts derived by any person engaged in the sale of services. The phrase "sales of services" means the performance of all kinds of services for others for a fee, remuneration or consideration including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of personal property; lessors or distributors of cinematographic films; persons engaged in milling, processing, manufacturing or repacking goods for others; and similar services regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties" *Provided,* That

> the following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> (1) xxx
>
> (2) Services other than those mentioned in the preceding sub-paragraph, the consideration for which is paid for in acceptable foreign currency which is remitted inwardly to the Philippines and accounted for in accordance with the rules and regulations of the Central Bank of the Philippines.
>
> xxx xxx xxx

It can be deduced from the aforequoted provision that whenever (1) the consideration for services rendered by a VAT person is paid for in acceptable foreign currency; (2) inwardly remitted to the Philippines; and (3) accounted for in accordance with the rules and regulations of Central Bank of the Philippines, the same is subject to 0% VAT.

It is undeniable that Petitioner was able to satisfy all of the above requirements. Petitioner presented in evidence the bank credit memos to show that the consideration for services it rendered to the Consortium were paid for in foreign currency, inwardly remitted to the Philippines, in accordance with Bangko Sentral ng Pilipinas' rules and regulations. In fact, the zero-rating of Petitioner's sales of services was confirmed by the Respondent in BIR Ruling No. 25(A)(1)-000-00-023-95, classifying its gross receipts from the services it renders to the Consortium to zero-rate (Exh. F).

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With respect to Respondent's objection that the aforementioned ruling is misrepresented, this Court finds the same to be without merit.

BIR Revenue Officer, Ms. Nynette Montana, opines that an addendum to the Sub-Contract Agreement nullifies the validity of the ruling because the addendum changes the payment procedure of Napocor to the Consortium. Instead of Napocor paying direct to the Consortium members, Napocor coursed its payment to Petitioner being the appointed collection agent. As such, Napocor pays BWSC-Denmark, Mitsui Engineering & Shipbuilding, Ltd., and Mitsui & Co., Ltd., through Petitioner, in the form of three different currencies; the Mark, the Yen, and the Peso.

Ms. Montana believes that the peso payment to BWSC-Denmark was offset against Petitioner's charges for the services rendered to the Consortium. Pertinent portion of the testimony of Ms. Montana is quoted hereunder:

ATTY. DE DIOS:

Q. Ms. Witness, you mentioned earlier that there is a misrepresentation on the part of the petitioner, is that correct?

MS. MONTANA:

A. Yes, Sir.

ATTY DE DIOS:

Q. Can you please state again what this misrepresentation is, Ms. Witness?

MS. MONTANA:

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A. BIR Ruling No. 23-95 stated there:

"That Napocor will pay directly to BWSC Denmark in foreign currency."

Now, what actually happened was that there was an Addendum to the Sub-contract Agreement, wherein BWSC Mindanao acted as a Collection Agent in behalf of the consortium, collecting three (3) kinds of foreign currency from Napocor. These three (3) are Mark, Yen, and Philippine Peso, Sir.

ATTY. DE DIOS:

Q. So, BWSC Mindanao, Inc., acted as the Collection Agent, meaning to say, that all currencies remitted to Burmeister and Wain Scandinavian Contractors Mindanao was not coming from foreign sources, is that correct, Ms. Witness?

MS. MONTANA:

A. Actually it's a Collection Agent of Napocor, Sir.

ATTY. DE DIOS:

Q. Your answer is not responsive to my question.

JUDGE ACOSTA:

Who is paying?

ATTY. DE DIOS:

Who is paying? Is it coming from abroad?

JUDGE ACOSTA:

Do you know who is paying? Napocor or Burmeister?

MS. MONTANA:

A. Napocor. The money from Napocor was coursed through BWSC Mindanao for the foreign consortium, Sir.

ATTY. DE DIOS:

So you are saying ....

JUDGE ACOSTA:

So, the local Burmeister was the one who remitted to Burmeister Scandinavian?

MS. MONTANA:

A. Yes, Denmark, Sir.

JUDGE ACOSTA:

Okay, counsel.

ATTY. DE DIOS:

Q. And you are saying that instead of Burmeister and Wain Denmark paying directly BWSC Mindanao, Inc., in foreign currency the latter merely offset or set off the payments coming from Napocor, is that correct, Ms. Witness?

MS. MONTANA:

A. That is what I *believe*, Sir.

ATTY. DE DIOS:

Q. So you are saying, yes, Ms. Witness?

MS. MONTANA:

A. Yes, Sir.
(TSN, February 16, 1998, pp. 35 to 37; underlining supplied).

The position of Ms. Montana that there was an offsetting between BWSC-Denmark and Petitioner with regard to the sub-contract fee is untenable. In fact, Petitioner was able to support the inward remittances of foreign currencies from BWSC-Denmark with bank credit memos evidencing payments for the services rendered to the Consortium which tallies with the billings of Petitioner. Moreover, the payment between Petitioner and the Consortium and the payment between the Consortium and

Napocor are two different transactions and should be treated separately. Therefore, in the absence of evidence that will establish that Petitioner and BWSC-Denmark had an arrangement of setting-off of obligations, the opinion of the revenue officer holds little importance.

It is worth stressing though that Respondent failed to present to this Court the BIR records of the case and even failed to formally offer the documents it previously marked during the hearing of February 16, 1998.

With regard to the second issue at bar, We find Petitioner to be legally entitled to the claim for refund as mandated by Section 106(b) of the Tax Code:

> **SEC. 106.** ***Refund or tax credits of input tax.*** - (a) *Export Sales.* - xxx.
>
> (b) *Zero-rated or effectively zero-rated sales.* - Any person, except those covered by paragraph (a) above, whose sales are zero-rated or are effectively zero-rated may, within two years after the close of the quarter when such sales were made, apply for the issuance of a tax credit certificate or refund of the input taxes attributable to such sales to the extent that such input tax has not been applied against output tax.

However, Petitioner still has the burden of proving its entitlement to the claim for refund as required under Sec. 16(a) and 16(c) of Revenue Regulations No. 5-87, as amended, to quote:

> **SECTION 16.** ***Refund or tax credits of input tax.*** (a) *Zero-rated sales of goods and services.* - Only a VAT registered person may be granted a tax credit or refund of value-added

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taxes paid corresponding to the zero-rated sales of goods and service, to the extent that such taxes have not been applied against out taxes, upon showing of the proof of the compliance with the conditions stated in Section 8 of these Regulations.

xxx xxx xxx

(c) Claims for tax credits/refunds. - Application For Tax Credit/Refund of Value-Added Tax Paid (BIR Form No. 2552) shall be filed with the Revenue District Office of the city or municipality where the principal place of business of the applicant is located or directly with the Commissioner, Attention: VAT Division.

A photocopy of the purchase invoice or receipt evidencing the value added tax paid shall be submitted together with the application. The original copy of the said invoice/receipt, however, shall be presented for cancellation prior to the issuance of the Tax Credit Certificate or refund. In addition, the following documents shall be attached whenever applicable:

xxx xxx xxx

(2) Zero-rated sale of services.

i) Authenticated copy of the contract showing the person for whom the services were rendered, the amount of consideration and description of the services and document evidencing actual payments.

ii) Statement from the Central Bank or any of its accredited agent bank that the consideration in acceptable foreign currency has been inwardly remitted and accounted for in accordance with applicable banking regulations.

Under subparagraphs 1(ii) and 2(ii), the statement shall show the amount in foreign currency of the export proceeds or consideration and the date of inward remittance, conversion rate into Philippine currency and the total peso value thereof.

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The evidence presented by Petitioner clearly established the following facts:

1. That Petitioner is a VAT registered person with VAT Registration No. 003-295-598V (Exh. A);

2. That input taxes sought to be refunded herein were never carried-over to succeeding taxable year 1996 (Exhs. L, M, N, and O);

3. That applications for tax credit/refund of VAT paid were duly filed with BIR Revenue Region No. 19 of Davao City (Exhs. G and H);

4. That there were payments of input taxes as shown by the photocopies of purchase invoices and/or official receipts issued to Petitioner (Exhs. J-1 to J-949); and

5. That Petitioner received foreign currency remittances for the services rendered to the Consortium (Exhs. K-1 to K-28).

An analysis of the evidence reveal that Petitioner is only entitled to a lesser sum of ₱4,424,584.47 as found by Mr. Gregorio S. Navarro, the independent CPA engaged by Petitioner and commissioned by the Court, to check on the accuracy of Petitioner's summary of input taxes as well as the summary of sales of services.

WHEREFORE, in view of the foregoing, the Petition for Review is hereby **PARTIALLY GRANTED.** Respondent is **ORDERED** to **REFUND** or, in the alternative, to **ISSUE** a tax

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credit certificate in favor of Petitioner the amount of P4,424,584.47.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above 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.

ERNESTO D. ACOSTA
Presiding Judge