REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BENGUET CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4945

COMMISSIONER OF INTERNAL REVENUE,

Promulgated: JAN 26 1995

Respondent.

x - x

DECISION

This is a claim for a tax credit of value-added taxes in the amount of P64,815,301.90 representing excess input taxes corresponding to taxable quarters covering February 1 to April 30, 1991 and May 1 to July 31, 1991.

Petitioner is a domestic corporation organized and existing under and by virtue of the laws of the Philippines and is engaged primarily in the mining business which includes the exploration, development and operation of mining properties for purposes of commercial production and the marketing of marketable mine products produced by it. It is a VAT registered entity in accordance with Section 107 of the Tax Code.

As such, petitioner filed with the BIR on March 25, 1992 an application for tax credit of input taxes for the VAT taxable quarter February 1 - April 30, 1991 in the amount of P49,842,730.17 and filed another application on May 7, 1992 in the amount of P40,257,651.60 covering the period May 1 to July 31, 1991 with a total amount of P90,100,381.77. Of this amount, P25,285,079.87 was granted by the BIR in the form of a tax credit certificate and it is the contention of the petitioner that the remaining balance of P64,815,301.90 was disallowed because the said amount corresponds to sale of gold to the Central Bank which respondent considers as a domestic sale subject to 10% VAT. During the hearings on this case, it was revealed that out of the P90,100,381.77 claimed as tax credit, only the amount of P55,906,955.92 was not granted for the following reasons:

P46,177,861.12 -	disallowed because this corresponds to the output tax on petitioner's sale of gold to the Central Bank which is taxable at 10% such sale being considered as a local sale.
P6,295,041.28 -	disallowed because it lacked the necessary invoicing requirements provided by Sec. 108 of the Tax Code.
P3,434,053.50 -	deferred, to be credited to the output tax liability of

succeeding quarters because this corresponds to input taxes directly traceable to the sale of gold.

P8,908,346.00 -	is to be granted by the Bureau of Customs as this represents its excess input tax corresponding to actual export sales of mineral products.
TOTAL P64,815,301.90	

With respect to the substantial amount of P46,177,861.12 which was disallowed by the BIR because this corresponds to the output taxes that petitioner should have paid on its sale of gold to Central Bank, petitioner maintains that such sales are zero rated in accordance with Section 100(a)(2) of the Tax Code which provides in part:

> That the following sales by VAT registered persons shall be subject to 0%:
>
> 1. export sales
>
> 2. Sales to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such sales to zero rate.

Furthermore, petitioner assails the fact that an assessment had been issued by respondent regarding their tax liability in the amount of P46,177,861.12 which corresponds to the output VAT petitioner should have paid on its sale of gold to Central Bank on the theory of respondent that such sales are considered local sales subject to 10% VAT (see addendum of petitioner filed on June 31, 1994). According to petitioner, this is an attempt of respondent to offset the 10% VAT output taxes due on its claim for refund thus depriving petitioner the opportunity to assail and challenge the 10% VAT output tax assessment.

Respondent in her answer presents the following special and affirmative defences:

> 7. Petitioner states no cause of action as it does not state the dates when the alleged input taxes were actually paid citing the case of Manufacturer's Bank and Trust Co., as Trustee for General Trust Plan v. Commissioner of Internal Revenue, CTA Case No. 1659, November 29, 1965).
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> 8. Petitioner's alleged separate application for tax credit of input taxes is pending investigation before the Bureau of Internal Revenue.
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> 9. Sale of gold and silver to the Central Bank is considered a local sale and is, therefore, not zero-rated, pursuant to Revenue Memorandum Order No. 22-92 and VAT Ruling No. 008-92 dated January 23, 1992. Accordingly, the alleged input taxes were collected and paid in accordance with law and pertinent BIR implementing rules and regulation.
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> 10. It is well-settled that one who claims to be exempt from payment of a particular tax must prove the same by means of a clear and positive provision of law. Failure on the part of petitioner to prove the same is fatal to its claim for refund.

11. Claims for refund of taxes are construed strictly against the claimant, the same being in the nature of exemption from taxes [Commissioner of Custom v. Phil. Acetylene Co., 39 SCRA 70 (1971); Meralco v. CIR, 67 SCRA 352 (1975)].

12. In an action for refund of taxes, the burden of proof is upon petitioner to show that the taxes paid were erroneously or illegally collected. Failure to prove the same is fatal to its claim for refund.

13. Petitioner has failed to show that the taxes paid were erroneously or illegally collected. Clearly, there is failure on its part to comply with all the requirements of Section 230 of the Tax Code.

Records show that respondent considers the amount of P46,177,861.12 as output taxes that petitioner should have paid on its sales of gold to the Central Bank covering the same quarters referred to in petitioner's claim for refund (p. 193 of the BIR Records). This fact was also made clear by counsel for respondent during the hearing of this case, portions of her statement are quoted, thus:

ATTY. ABAD (counsel for respondent):

"Insofar as Exhibit "A", respondent has no objection because it forms part of the BIR records. I would like to stress however the findings of the revenue examiner who conducted the investigation insofar as the disallowance of the output tax in the amount of P46,177,861.00

which is the subject matter or the very issue in this case, Your Honors, on the ground that this was pursuant to RMO 22-92, the same was considered as local sale to the Central Bank, thus it is not a zero rated sale."

In effect, respondent is offsetting the aforesaid amount with petitioner's claim for refund of input taxes for the same taxable quarters referred to in the petition for review.

With the facts thus narrated, the following issues are presented for resolution:

1.) Whether or not the input tax in the amount of P6,295,041.98 is unsubstantiated, thus making the disallowance proper;

2.) Whether or not the decision of respondent to defer the application of the amount of P3,434,053.50 to succeeding quarters is proper.

3.) Whether or not the sale of gold by petitioner to the Central Bank is considered to be zero-rated in accordance with Section 100(a)(2) of the Tax Code;

4.) Whether or not VAT Ruling No. 008-92 which considers sale of gold to the Central Bank as a local sale thus subject to 10% VAT is valid;

5.) Corollary to the their issue, is whether or not VAT ruling No. 59-92 which applies the VAT Ruling No. 008-92 retroactively to the year 1988 is valid;

The first issue presents to us a matter of evidence to prove that input taxes were indeed paid by petitioner. Section 108 of the Tax Code provides:

> A VAT-registered person, shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 238, the following information shall be indicated in the invoice or receipt:
>
> 1.) The VAT Registration number.
>
> 2.) If the seller bills the tax as a separate item in the invoice:
>
> A) The amount of the gross selling price or gross receipts on which the value-added tax is based;
>
> B) The amount of value-added tax determined by multiplying the amount of gross selling price or gross receipts by the rate of tax; and
>
> C) The sum of (i) the gross selling price or gross receipts and (ii) the value-added tax which the purchaser pays or is obligated to pay to the vendor.
>
> 3.) If the seller elects not to bill the tax as separate item in the invoice or receipt the total amount charged against the buyer.

During the hearing conducted on July 23, 1993, Mr. Nicasio Lumague, the BIR VAT examiner testified that petitioner failed to submit proof to substantiate the payment of the input VAT in the amount of P6,295,041.28. Portions of his testimony are quoted hereunder:

Q. And you disallowed the P6,295,041.28 because, as you said, invoicing requirements, lack of VAT registration?

A. Yes.

Q. But the receipts were shown you?

A. No. In fact, the taxpayer was given sufficient time. In fact, it were (sic) given six months to submit any proof to support the amount disallowed, the P6 million. And even that time, the tax-payer has not been able to comply, so they have agreed, but it is not in writing, that they will not anymore claim this amount, the P6 million."

The above-quoted testimony was not disputed by petitioner.

With respect to the amount of P3,434,053.50 which was not granted by the respondent because it would be applied to the output tax liability of the petitioner for the succeeding quarters, We find that this arrangement finds sufficient legal basis in Section 104 (b) of the Tax Code which provides as follows:

> Section 104
> (b) Excess output or input tax - If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT - registered person. If the input tax exceeds the output tax, <u>the excess shall be carried over to the succeeding quarter or quarters.</u> Any input tax attributable to the

> purchase of capital goods or to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 106. (underscoring supplied)

This set-up had allegedly been agreed upon by petitioner's counsel and representatives of the BIR during a conference as testified to by respondent's revenue examiner, portions of his testimony are quoted hereunder:

> A. The adjustment made by our office are as follows: out of the P90, 100, 381.77 which was claimed as Tax Credit by Benguet Corporation, we deducted the following; 46,177,861.12 as output tax on sale of gold to the Central Bank, and P6,295,041.28 as claims without the necessary substantiation requirements prescribed by the VAT law, and <u>P3,434,053.52 which we have deferred because these are input tax directly accreditable to sale of gold. What we mean here, of this amount, this was already discussed in the conference stage with taxpayer's counsel Romulo Mabanta.</u> And I believe they have already agreed to the adjustments except to the output tax on sale of gold which is P46 million. I think that is the only thing that is being raised by the Benguet Corporation. (underscoring supplied)

The 3rd, 4th and 5th issues presented to this Court involve a question of validity of several rulings issued by the BIR with respect to the sale of gold to the Central Bank. Petitioner maintains that in the sale of gold to the Central Bank it relied on VAT Ruling No.

373.88 and Revenue Memorandum Circular No. 59-88 dated December 14, 1988 which both declared that sale of gold to the Central Bank is considered as an export sale subject to zero-rate. Thus in all such sales, no value-added tax was paid nor was the 10% VAT passed on to the Central Bank. Respondent on the other hand, stands firm in her contention that sales of gold to the Central Bank are classified as local sales subject to 10% VAT. She relied on VAT Ruling No. 59-92 which applies VAT Ruling No. 008-92 retroactively to cover the taxable quarters of 1991 referred to in petitioner's claim for refund. VAT Ruling No 008-92 provides in part:

> 4. Local sales of goods, which by fiction of law are considered export sales (e.g., the Export Duty Law considers sales of gold to the Central Bank of the Philippines as export sales). This transaction shall not be considered export sale for VAT purposes.

Respondent added that only actual exportation of goods qualify under the term "export sales" pursuant to Sec. 100(a)(1) of the Tax Code and as interpreted by VAT Ruling No. 059-92. Petitioner argues that even if the sales cannot be classified under Sec. 100(a)(1) of the Tax Code, such sales may be deemed zero-rated under Sec. 100(a)(2) of the Tax Code because under special laws, specifically CB Circular No. 1301, all sales of gold to the Central Bank are considered constructive exports. Sec. 100(a)(2) provides as follows:

> "100 (a)
>
> (2) Sales to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subject such sales to zero rate."

We disagree with the petitioner.

The aforecited provision of law mentions the word "exemption", thus to fall under this category it must be shown that the buyer is entitled to an exemption under special laws or international law agreements for the sale to be classified as zero-rated. CB Circular 960, as amended by CB Circular No. 1301, relied upon by the petitioner, merely categorizes that "gold producers shall qualify as export-oriented firms even if their entire output is sold to the Central Bank". In a similar case entitled **Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue**, CTA Case No. 4794, April 5, 1994, this Court rejected the contention of the petitioner when it classified its sales of gold to CB as falling under Section 100(a)(2) of the Tax Code. The decision provides in part:

> "In the case at bar, the special laws cited by petitioner in support of its contention, are Section 16.9 of CB Circular No. 1301, and Articles 23, 39(k) and 77 of

> Executive Order No. 226 otherwise known as the Omnibus Investments Code. A close scrutiny of said provision, however, readily shows that they fail to meet the qualifications prescribed by Section 100(a)(2) of the Tax Code. In respect of Section 169 of CB Circular - 960, all the said provision states is that "gold producers shall qualify as export-oriented firms even if their entire output is sold to the Central Bank." It does not however, grant such producers any exemption in respect of internal revenue taxes due on its sales to the Central Bank: Neither is there anything in the said provision which effectively subject such sales of gold to the CB to a zero-VAT rate."

It is well-settled rule in taxation, that tax exemptions "cannot be allowed unless granted in the most explicit and categorical language" (**Resins, Inc. v. Auditor General**, L-17388; Oct. 29, 1968; **Commissioner of Internal Revenue v. Guererro**, 21 SCRA 180; **Union Garments Co., Inc. v. CTA**, 14 SCRA 304; **Republic Flour Mills, Inc. v. CIR**, 31 SCRA 520).

Petitioner in its Memorandum also disputed the retroactive application of VAT Ruling No. 008-92 to 1991, the year when such sales took place. It argued that Section 246 of the Tax Code prohibits retroactivity of rulings when the same will be prejudicial to the tax-payers. In entering into such transactions with the Central Bank, petitioner maintains that it relied on previous BIR Rulings which considered sales of gold to CB as zero-rated, thus the petitioner was not able to pass on the 10% VAT to the Central Bank, moreover, the petitioner claims the BIR has already issued an assessment demanding for the payment of VAT on these transactions. Petitioner contends that a retroactive application of the aforementioned rulings given these circumstances is highly prejudicial on its part.

This Court finds the position of the petitioner untenable. We agree with the Respondent that such retroactive application will not be prejudicial to the petitioner. In VAT Ruling No. 59-92, respondent elucidates this point clearly:

> "When the said Mining companies, relying upon the aforementioned earlier BIR rulings, sold their gold to CB at zero rate VAT, they did not fully pass on to the CB the cost of their respective input tax. Said input taxes, remained in their possessions. The only repercussion of the revocation of the said earlier rulings is -- they will be prevented the option of claiming the said input taxes as refund. But, they remain entitled to use the same in paying their output taxes in connection with their other sales transactions which are subject to the 10% VAT. It follows, there is no prejudice that may ensue from the retroactive application of the said revocation because what they only lose is the right to have their input taxes refunded which, in the first place and under the law they are any way, clearly not entitled to. Granting, for the sake of argument, that they have no other sales transactions subject to 10% VAT against which their input taxes may be used in payment, then, it follows, they are constituted as the final persons against which the Costs of the tax passed-on shall legally stop and rest, hence, in this connection, the said input taxes may already be legally converted as cost available as deduction for income tax purposes. On this

> score, they are also not prejudiced by the retroactive application of the said ruling".

With respect to the contention of petitioner that the assessment issued to them by the BIR makes damage and prejudice suffered by them actual present and real, VAT 59-92 Ruling has this to say:

> "This office does not also believe that the said mining companies may be unduly prejudiced if the said revocation is retroactively applied and this office assesses the said companies for deficiency 10% VAT, according to the opinion No. 47, s. 1992. said mining companies did not pass on to the CB any 10% VAT because they relied, in good faith, upon the said earlier rulings of the BIR.
>
> Please be informed, however, that under Section 6 of the VAT Revenue Regulations No. 5-87 in connection with the procedures in computing for the 10% VAT on sales (output tax), if the sale is not shown in the sales invoice, the 10% VAT or output tax thereon is computed, based on $^{1}/_{11}{}^{th}$ of the amount billed to the buyer (in this case, the buyer is the CB). It follows, the deficiency 10% that may be assessable against the said companies will only be equal to $^{1}/_{11}{}^{th}$ of the amount billed to the CB rather than 10% thereof. In short, said companies may only be charged based on the tax amount actually and technically passed on to the CB as part of the invoiced price. The said companies may also deduct, as input tax credit, their aforementioned input taxes, which, by virtue of the said revocation are not allowable as input tax refund. It follows, the said mining companies will not truly be unduly prejudiced by the said retroactive application of the revocation."

In the Atlas case (CTA Case No. 4794, dated April 5, 1994), this Court agreed with the respondent in the latter's contention that petitioner will not suffer any undue prejudice from a retroactive application of VAT Ruling No. 008-92 and 59-92 and subscribed to the rationale provided for by the respondent in the aforecited VAT Ruling 59-92 (supra).

WHEREFORE, we find no merit in the petition for review and the same is hereby dismissed with no pronouncement as to costs.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

(Dissenting & Concurring Opinion)
ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals