Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

ITOGON-SUYOC MINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 4852

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PROMULGATED:
JUL 10 1995

x - x

DECISION

To this Court comes petitioner Itogon-Suyoc Mines, Inc. with the prayer that respondent Commissioner of Internal Revenue be ordered to refund or issue a tax credit certificate to herein petitioner for the sum of P7,748,075.01, representing input value-added tax (VAT) allegedly paid during the period November 1, 1990 to July 31, 1991 and August 1, 1991 to January 31, 1992 as shown in its application for tax credit/refund filed on October 15, 1991 and April 29, 1992 respectively.

Petitioner is a corporation duly organized and existing under the laws of the Philippines. It is engaged in the business of mining which includes the exploration, development, operation and production of mining properties as well as the eventual marketing of mine products produced by it.

Pursuant to Section 107 of the National Internal Revenue Code as amended by Executive Order No. 273, petitioner registered itself with the Bureau of Internal Revenue (BIR) East District, Makati as a Value Added Tax (VAT) taxpayer with No. 32-0-000125 effective January 1, 1988, later petitioner changed its VAT Registration No. to 32A-8-008955 with BIR West District, Makati effective January 1, 1991, when petitioner moved to its new office at Pasay Road, Makati.

Accordingly, petitioner applied for zero-rating on its sales of mine products pursuant to Section 100 (Annex "B").

Petitioner filed with the VAT Division (BIR) Value-Added Tax Returns on the following dates to wit:

1.) February 20, 1991 VAT return for the quarter of November 30, 1990 to January 31, 1991 (Exh. "E");

2.) May 20, 1991 VAT return for the quarter of February 1 to April 30, 1991 (Exh. "F");

3.) August 20, 1991 VAT return for the quarter of May 1 to July 31, 1991 (Exh. "G");

4.) November 20, 1991 VAT return for the quarter of August 1, 1988 to October 3, 1991 (Exh. "H");

5.) February 20, 1992 VAT return for the quarter of November 1991 to January 31, 1992 (Exh. "I");

Under Section 106 of the National Internal Revenue Code, petitioner filed with respondents VAT Division two (2) applications for credit/refund which is as follows:

Date Filed	Period Covered	Amount Applied For
Oct. 15, 1991	Nov. 1, 1990 to July 31, 1990	P5,737,406.98
April 29, 1992	Aug. 1, 1991 to Jan. 31, 1992	P2,010,668.03

No action had as yet been taken by respondent on the aforementioned application at the time the instant petition for review was filed on September 25, 1991, the avowed purpose of which is to beat the two-year reglementary period within which a judicial claim should be filed.

Respondent on the other hand raised as special and affirmative defenses to wit:

> 1.) Petitioner has failed to clearly establish that its sales of mine products are subject to zero-rate (0%) in accordance with Section 100 of the Tax Code;
>
> 2.) Petitioner's claim for tax credit/refund has still to be substantiated by it;
>
> 3.) The amounts of P5,737,406.98 and P2,010,668.03, representing the alleged net input tax payments by petitioner for the periods from November 1, 1990 to July 31, 1991 and August 1, 1991 to January 1992, respectively, were collected in accordance with law and existing regulations.
>
> 4.) Well-settled is the doctrine that claims for tax refund/credit partakes of the nature of an exemption which is construed strictly against the claimants.

5.) Government officials cannot be held liable for moral or exemplary damages or for costs of suit, including attorney's fees, when sued in the performance of their official functions.

The issues to be resolved in this case are:

1.) Whether or not the sale of gold to the Central Bank is within the purview of constructive export as provided in CB Circular No. 1301, S of 1991?

2.) Whether or not the petitioner is entitled to tax credit/refund?

We find it imperative to discuss first the two general classes of zero-rated transactions under the VAT law as this will aid us in the proper resolution of the issues on hand. Under the first class is export sales defined under Section 100(a), while the second class comprised of sales which are "effectively zero-rated". The first category is further subdivided into (a) transactions involving the actual sale and shipment or exportation of goods to foreign countries (regardless of the mode of shipment or manner of payment adopted) and (b) foreign currency denominated sales.

Now, petitioner claims that its sales of gold to the Central Bank are considered constructive exports. We cannot subscribe to such assertion, insofar as Section 100 (a)(1) is concerned, the general rule is that only those transactions which involve actual exportation of goods from the Philippines to another country and those which fall under the category of foreign currency denominated sales will be considered as export sales and therefore zero-rated.

Therefore, any other kind of "export sale", including those considered as "constructive exports" under certain special laws are not considered as zero-rated sales since these neither involve actual exportation or shipment of goods nor can they be considered foreign currency denominated sales.

At this juncture, it may be stressed that the controversy, i.e., whether or not petitioner's sales of gold to the Central Bank are export sales and therefore zero-rated VAT transactions, is not new. Said question has already been passed upon and extensively discussed by this Court under practically the same backdrop of the case at bar, when We ruled that sales of gold to the Central Bank do not fall under the categories of sales which can be classified as zero-rated in accordance with Section 100 of the Tax Code. (Pls. see. **Atlas Consolidated Mining Development Corporation vs. Commissioner of Internal Revenue,** CTA Case No. 4794 [Resolution dated May 5, 1994]; see also **Itogon-Suyoc Mines, Inc. vs. Commissioner of Internal Revenue,** CTA Case No. 4658, February 20, 1995 and **Manila Mining Corporation vs. Commissioner of Internal Revenue,** CTA Case No. 4860, February 20, 1995).

Moreover, as aptly put in the case of *Hongkong and Shanghai Bank vs. Peters, 16 Phil. 824* which is quoted hereto:

> "1. In general, for purposes of the term 'export sales', only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating."

The law strictly limits "export sales" only to direct export sales and foreign currency denominated sales, to be qualified for zero rating.

It is a settled rule of statutory construction that the express mention of one person, thing or consequence implies the exclusion of all others. Expressio unius est exclusio alterius. Thus, where a statute, by its terms, is expressly limited to certain matters, it may not by interpretation or construction, be extended to other matters.

Furthermore, petitioner asserts that CB Circular Nos. 960 and 1301 are legal and binding. These laws have the force of law and could serve as basis for the tréatment of sales of gold to CB as zero-rated pursuant to Section 100 of the NIRC. However a careful review of said provisions shows that they fail to meet the qualifications prescribed by Section 100 (a)(2) of the Tax Code. With respect to Section 169 of CB Circular 960, all that 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 sales of gold to the CB to a zero-VAT rate.

Petitioner likewise maintain that VAT Ruling No. 8-92 is not valid being in violation of law. And even assuming VAT Ruling No. 8-92 to be valid, it cannot be applied retroactively as such would be prejudicial to the petitioner, citing Section 246 of the NIRC as basis. Moreover, it insist that the case of ABS-CBN Broadcasting Corporation vs. Court of Tax Appeals, 108 SCRA 142, is squarely in point.

Section 246 of the Tax Code provides as follows:

> **SEC. 246** *Non-retroactivity of rulings.* - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following case: (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith."

It is clear from the foregoing provision that the general rule is in fact that revocations, modifications and/or reversals of previous BIR rules, regulations, rulings or decisions <u>may</u> be given retroactive application. It is only when such retroactive application will result in prejudice to the taxpayer that the same is prohibited.

Now, petitioner poses the question of whether or not it will be prejudiced by such retroactive revocation. It further argued that it would stand to lose its opportunity of seeking a refund of its uncredited input taxes. This arguments are purely speculative and therefore untenable. In fact, petitioner has not been assessed by respondent Commissioner any deficiency tax as a result of the retroactive application of VAT Ruling No. 008-92. For the prohibition in Section 246 of the Tax Code to apply, it must be shown that the taxpayer will suffer actual and imminent, opposed to contingent and speculative, prejudice as a result of the retroactive application.

Respondent Commissioner is correct in holding that petitioner will not suffer any undue prejudice from a retroactive application of VAT Rulings No. 008-92 and 59-92 as cited by respondent in his Ruling No. 59-92.,

> "When the same mining companies, relying upon the aforementioned earlier BIR rulings, they did not fully pass-on to the CB the cost of their respective input taxes. Said input taxes remained in their possessions (sic). 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."

As to petitioners reliance in the ABS-CBN case ruling, the Court maintains that there is nothing in said decision which absolutely prohibits a retroactive application of the rules, regulations, rulings or decisions promulgated or rendered by respondent Commissioner pursuant to his rule-making authority. Additionally, the factual antecedents in the ABS-CBN case is not in all fours with the case at bar, such reliance is clearly misplaced. In conclusion we find that petitioner has not established that it will be prejudiced by the retroactive application of VAT Rulings No. 008-92 and 59-92.

Going over petitioners argument that VAT Ruling No. 008-92, insofar as it establishes an exception to the general rule laid down in Section 100(a)(1) of the Tax Code, is devoid of merit, and therefore untenable. This ruling was issued in accordance with Section 245 of the Tax Code, which empowers the Secretary of Finance to "promulgate all needful rules and regulations for the effective enforcement of the provisions of the Tax Code."

WHEREFORE, in view of the foregoing, the petition is hereby DENIED for lack of merit. No pronouncement as to costs.

SO ORDERED.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

(Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among 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