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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ABB POWER GENERATION, LTD.,
Petitioner,

- versus -

C.T.A. CASE NO. 4888

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 06 1996

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DECISION

Contested in this petition for review is the prayer of petitioner for the refund or tax credit of its excess input value-added taxes (VAT) paid for the period April 1991 to March 1992 in the aggregate amount of P740,730.82.

The facts are as follows.

Petitioner is a non-resident foreign corporation organized and existing under the laws of Switzerland with main office address at CH-5401 Baden, Switzerland. It is a duly registered VAT entity with an approved application for zero-rating effective May 3, 1991. (Exhibit "C")

Sometime in 1989, the National Power Corporation (NPC for brevity) contracted petitioner for the engineering, supply, installation, construction, testing and commissioning on a turn key basis of a two (2) unit gas turbine power plant within the Naga Thermal Power Plant Complex, Naga, Cebu Island, Philippines under NPC Contract No. KWGV-8400126 (Exhibit "A"). The contract is funded under a loan agreement between NPC and Swiss Banks dated April 30, 1990. (Exhibits "FF", "GG" and "GG-1")

Attendant to the implementation of the contract, during the period April 1991 to March 1992, petitioner purchased supplies from local suppliers and engaged the services of local subcontractors, the payment of which included the 10% input VAT, which is now the subject of refund or tax credit (Memoranda of Petitioner and Respondent, pars. 4.1 and 4.3, and p. 3, respectively).

Hereunder is the undisputed breakdown of petitioner's input VAT in the amount of P740,730.82, to wit:

Period Covered	Excess VAT Credits
April 1991 - August 1991	P 242,233.00
Sept. 1991 - Nov. 1991	482,762.00
Dec. 1991 - Feb. 1992	5,301.00
March 1991 - May 1992	10,134.82
TOTAL	P 740,730.82

On August 5, 1992, petitioner filed its application for tax credit and/or refund of the input VAT paid with respondent's Bureau. (Exhibits "H" and "I") Respondent, however, disputes this fact and alleges that petitioner did not file a written claim for refund or tax credit. (Memorandum for the Respondent, p. 3-4)

Due to alleged inaction of respondent, petitioner filed the instant petition for review on December 12, 1992.

The issues brought up by the parties and confronting this court can be summed up in this wise :

1. Whether or not this Honorable Court has jurisdiction to take cognizance of this case;

2. Whether or not petitioner needs a license from the Securities and Exchange Commission in order to be able to sue before the Philippine courts; and,

3. Whether or not petitioner is entitled to VAT refund or tax credit.

Anent the first issue, respondent contends that petitioner did not file the required written claim for refund or tax credit pursuant to Sections 230 and 204 of the Tax Code. She cites the December 13, 1994 testimony of Atty. Sergio Buaya, Assistant Revenue District Officer of Revenue District Office No. 83 of Talisay, Cebu to prove her point. We quote:

xxx xxx xxx

Q. Correct me if I am wrong, Mr. Witness, you are here in compliance with the subpoena, is that correct?

A. Yes.

Q. Now in compliance with the said subpoena, did you bring along with you pertinent records on the claim for VAT refund of the petitioner during the period April 17, 1991 to March 1992?

A. There was no available record, Your Honors.

Q. Do you know the reason why there was no available records, Mr. Witness, could you inform this Honorable Court?

A. Except for the paper that I brought, this is the only paper available in our district. We tried for two days to look for the available records, but the records I brought are the only available records.

Q. In other words, Mr. Witness, these records were not available with your office? My question is, did you try to locate this record in other districts within the region?

A. Except that I can recall that I try to inquire from the administrative office of our regional office in Cebu City and the answer is negative.

xxx xxx xxx

In addition, she avers that petitioner's VAT registration has been cancelled "on or about March 1993 for non-compliance (i.e. failure to file VAT return for the 1st, 2nd, 3rd and 4th quarters of the year 1991) as testified to by Atty. Sergio Buaya" in the hearing of December 13, 1994. (Memorandum for Respondent, p. 9). She thus submits that the herein claim for refund or tax credit be denied in view of the failure of petitioner to file its VAT returns covering the quarters ended August 1991, November 1991, February 1992 and May 1992.

She further asserts that it was proven that there was no claim filed with her Bureau, as the alleged claim for refund or tax credit dated August 5, 1992 was discovered to be non-existent and spurious. (ibid., p. 9)

Respondent's arguments must necessarily fail. There is much misunderstanding and ambivalence in respondent's posturing in the case at bar.

Firstly, respondent already admitted in her answer the fact of petitioner's filing of its application for tax credit and/or refund of VAT on August 5, 1992. It is to be noted therein that she only specifically denied the *rest* of the allegations pertinent to said application, more particularly on the reasons advanced by petitioner in support of its claim. (Answer, par. 6, p. 34, CTA records). Such act of respondent constitutes judicial admission and she may not thus be allowed to contradict it, unless it is shown that it was made through palpable mistake or that no such admission was made. (Section 4, Rule 129, Revised Rules of Court). Matter of factly, therefore, petitioner's written application exists.

Secondly, respondent's reliance on the above-quoted testimony of Atty. Buaya to establish the fact that no claim for refund was filed by petitioner is altogether misplaced. A reading of his testimony shows that the VAT records of petitioner were merely deemed to be unavailable, after two days of search for such records proved futile. It is incorrect for the respondent to conclude somewhat that because the records were unavailable, *ipso facto*, petitioner failed to file the requisite claim or application. The unavailability of the records could have been due to the lack of a vigorous and diligent search or effort, or that it may have been lost by the Bureau by reason of negligence or willful attempt by anyone to cause injury on the affected party, and so on. In fine, the testimony of Atty. Buaya has little or no probative value in establishing the definite existence or absence of the written claim for refund.

Lastly, respondent's adventurous inference, which she would like us to believe, that the cause of cancellation of petitioner's VAT registration for non-compliance on or about March 1993 was due to its failure to file VAT returns for the year 1991, as quoted, supra, bespeaks of a myopic appreciation of the evidence on record.

Respondent herself presented in evidence the Taxpayer's Master Card of the petitioner (Exhibit "2", p. 350, CTA records) which clearly reveals that it filed on December 13, 1991, December 20, 1991, March 19, 1992 and June 22, 1992 its second, third, and fourth quarterly VAT returns for 1991 and first quarterly VAT return for 1992 respectively. These apparent different dates of filing of the VAT returns , except for the fourth quarter, *as compared* with the dates indicated in the VAT returns offered in evidence by petitioner (Exhibits "D", "E" and "G"), after a painstaking scrutiny, could be fully explained by the fact that petitioner's exhibits are <u>amended</u> returns.

The fact that petitioner's VAT registration was cancelled on March of 1993 for non-compliance does not necessarily signify that during prior years, i.e. 1991 and 1992, petitioner did not file its VAT returns. That is a convoluted digestion of logic and actual fact. The March 11, 1993 Memorandum of Cathrina D. Laurente, Revenue Officer I of Revenue District No. 60-A, Talisay, Cebu, which dealt on the various reasons on why VAT registered establishments were not complying with the requirements embodied under Revenue Regulations No. 5-87, readily states that the cancellation of petitioner's registration was due to the completion of its project with the NPC and that it has been called back to its office in Switzerland. (Exhibit "1", p. 348, CTA records) Respondent must have forgotten its own records.

Moreover, respondent already admitted the existence of petitioner's VAT returns (Answer, par. 5; p. 33, CTA records). Likewise, she interposed no objection to the existence of the VAT returns when they were formally offered in evidence. (Comment to Petitioner's Offer of Evidence, p. 329, CTA records)

On the second issue, events show that petitioner was only engaged in an isolated transaction, and therefore need not secure license to do business in the Philippines.

Section 123 of the Corporation Code defines the limited rights of a foreign corporation, such as petitioner, to wit:

> "**SEC. 123. *Definitions and rights of foreign corporations.***- For the purposes of this Code, a foreign corporation is one formed, organized or existing under any laws other than those of the Philippines and whose laws allow Filipino citizens and corporations to do business in its own country or state. <u>It shall have the right to transact business in the Philippines after it shall have obtained a license to transact business in this country in accordance with this Code and a certificate of</u>

<u>authority from the appropriate government agency.</u>" (Underscoring supplied)

And pertinent to the issue on maintaining a suit before this Court, Section 133 of the Corporation Code states, thusly:

> "SEC. 133. ***Doing business without a license.*** - No foreign corporation transacting business in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines; but such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws."

Insofar as petitioner is concerned, it has only to contend with what is meant by the phrase "transacting business" in the above-quoted provision of law in order to justify its right to institute the present suit or proceedings with or without license.

Respondent, on the other hand, argues that petitioner failed to prove or even show proof that it is a duly registered corporation with the Securities and Exchange Commission, and as a consequence, respondent theorized that petitioner has no legal, corporate and juridical existence.

As we ponder into the merit of the respective proposition of herein parties, we believe that the key lies in what is meant by the phrase "transacting business".

Our Supreme Court has interpreted in the case of The **Mentholaum Co., Inc. vs. Mangaliman,** 72 Phil. 528, the true meaning of transacting business, thusly:

> "No general rule or governing principle can be laid down as to what constitutes 'doing' or 'engaging in' or 'transacting' business. Indeed, each case must be judged in the light of its peculiar environmental circumstances. The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another. (**Traction Cos. vs. Collectors of Internal Revenue [C.C.A., Ohio],** 223 F. 984, 987). The term implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of its organization. xxx"

Records reveal that petitioner entered into a lone contract with the NPC for, among others, the construction of the gas turbine project within the Naga Thermal Power plant in Naga, Cebu Island (Exhibit "A", **supra**), and after the completion of which, it was recalled to report back to Switzerland. (TSN of Atty. Sergio Buanga, December 12, 1994, p. 348, CTA records)

Verily, petitioner did not intend to prosecute its business in the Philippines on a regular basis, as it returned back to Switzerland after the completion of its contract. It only entered into an isolated business or transaction founded on a single agreement with the NPC.

"It is a rule generally accepted that one single or isolated business transaction does not constitute 'doing business' within the meaning of the law, and that transactions which are occasional, incidental and casual, that of a character to indicate a purpose to engage in business do not constitute the doing or engaging in business contemplated by law. In order that a foreign corporation may be regarded as doing business in a State, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character. xxx" (**Pacific Micronesian Line, Inc. vs. Del Rosario and Pelingon,** 96 Phil 30)

Considering, therefore, that petitioner is not doing or transacting business in the Philippines, it is but axiomatic to conclude, *a fortiori*, that it need not obtain license before it may sue.

With regard to the last issue, we find the instant claim for refund or tax credit to be amply supported by proofs.

Both parties agree that the legal authority for herein claim springs from Section 8(b) of Republic Act No. 6935, the enabling statute of the NPC, which states, to quote:

> "(b) Foreign loans - The corporation (NPC) is hereby authorized to contract loans, credit, in any convertible foreign currency, or capital goods, and indebtedness from time to time from foreign government or fund source. xxx
>
> The loans credits and indebtedness contracted under this subsection and the payment of the principal, interest and other charges thereon, as well as the importation of the machinery, equipment, materials, supplies and services, by the corporation, paid from the proceeds of any loan, credit or indebtedness incurred under the Act, <u>shall also be exempt from all direct and indirect taxes,</u> fees, imposts, other charges and restrictions."(Petition for Review and Answer, pars. 4 and 3 respectively, underscoring supplied)

On the basis of the above provision of law, and VAT Ruling No. 097-90 dated May 2, 1990, wherein the BIR ruled that the construction services rendered by a foreign corporation to NPC, if funded by loans incurred under R.A. No. 6935 shall not be subjected to VAT because NPC's exemption include "indirect taxes" on the purchases of services funded by foreign loans, petitioner applied for VAT zero-rating pursuant to Section 102 (a) (3) of the Tax Code, inasmuch as the services rendered by it to NPC are under similar circumstances with said BIR ruling. Consequently, respondent approved petitioner's application for zero-rating on May 3, 1991. (Petition for Review, par. 7; Answer, par. 2) In her answer, she, however, deemed the applicability of said ruling to the instant case as mere conclusion bereft of basis in fact and in law.

Respondent raises a singular objection in this issue. She asserts that petitioner failed to substantiate or show proof that the fund used in the construction of the gas turbine power plant came from the proceeds of foreign loans obtained by NPC, and therefore, fatal to petitioner's case.

A cursory reading of the evidences formally offered by the petitioner, unobjected to by respondent as to their existence, would show that NPC contracted a foreign loan agreement with Swiss Banks for the financing of the gas turbine power plant within the Naga Thermal Power Complex in Naga, Cebu Island. This was further certified to by the President of NPC, Ernesto Aboitiz on February 26, 1991. (Exhibits "FF", "GG", and "GG-1", pp. 312-314, CTA records)

The meandering opposition of respondent is thus not worth its salt. The above evidences speak for themselves. *Res ipsa loquitor.*

Moreover, we find the objection of respondent entirely opposite her prior approval of petitioner's application for VAT zero-rating. The approved application glaringly shows on its face the typewritten description of the nature of services rendered by petitioner, and the NPC's enabling law, R. A. No. 6375, as amended. There is no other conceivable rationale for the approval, except that petitioner has fully complied with the requirements of R.A. No. 6375, one of which is the use of foreign funds. Respondent is, for all intents and purposes, estopped from questioning petitioner's alleged non-compliance with said law.

With the disposition of all the legal and factual obstacles thrown by the respondent, there is no longer any justification to prolong the agony of the petitioner in its quest for the refund or tax credit of its excess input VAT taxes.

We note however that petitioner presented claims for items which were not proven to be directly and entirely attributable to the services performed pursuant to Section 106(b) of the Tax Code and BIR Revenue Regulations No. 3-88. Correspondingly, such items are excluded in the computation, namely:

a. invoices bearing dates beyond the period of claim or after March 1992 (Exhibits "AA", "BO" to "BS" and "EF" to "EI");

b. gasoline receipts which according to Section 103(d) are exempt from payment. Hence, there is no input tax that can be shifted to petitioner (Exhibits "AL" to "AZ", "BA" to "BD", "BT" to "BZ", "CA" to "CE", "DT", "EA", "EB", "EE");

c. correspondence to various persons (Exhibits "CF" to "CZ", "DA" to "DF");

d. office supplies which cannot be attributed to the power plant construction (Exhibits "DG", to "DK", "DN" and "DO");

e. miscellaneous expenses such as coffee, coffee filter, toilet paper, alcohol, mineral water, etc. (Exhibits "DL", "DM", "DU", "DV", "DW", "DX", "DY", "ED");

f. repairs of automobile (Exhibits "DP", "DQ", "DR" and "DS");

g. invoice referring to OR (Exhibit "AK"); and

h. not a VAT invoice (Exhibit "EC").

What can thus be granted to petitioner are the following, to wit:

Supplier	VAT Reg. No.	Exh.	Inv/OR #	Date	Inv. Amount	Input Tax
Mindanao Oriental Builders, Inc.	75-5-000260	K	463	11-09-91	P1,500,000.00	P136,363.64
Mindanao Oriental Builders, Inc.	75-5-000260	L	470	11-20-91	145,200.00	13,200.00
Mindanao Oriental Builders, Inc.	75-5-000260	M	502	12-05-91	1,277,340.00	116,121.82
Mindanao Oriental Builders, Inc.	75-5-000260	N	508	12-15-91	3,306,153.00	300,559.36
Mindanao Oriental Builders, Inc.	75-5-000260	O	351		810,000.00	73,636.36
Mindanao Oriental Builders, Inc.	75-5-000260	P	516	12-17-91	50,470.00	4,588.18
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	Q	006	04-29-91	96,400.00	8,763.64
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	R	015	06-28-91	94,472.00	8,588.36
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	S	012	06-25-91	31,680.00	2,880.00
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	T	011	06-05-91	26,730.00	2,430.00
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	U	016	06-25-91	60,687.00	5,517.00
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	V	017	06-25-91	4,100.00	372.73
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	W	018	07-09-91	41,514.25	3,774.02
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	X	013	06-25-91	25,000.00	2,272.73
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	Y	014	06-28-91	44,251.47	4,022.86
Omnitech Builders & Allied Contractors, Inc.	28-5-001988	Z	007	06-10-91	26,942.00	2,449.27

Supplier	VAT Reg. No.	Exh.	Inv/OR #	Date	Inv. Amount	Input Tax
Philips Electrical Lamps, Inc.	34-7-000011	AB	101091	07-02-91	15,591.40	1,417.40
Lily's General Merchandise	60A-5-000146	AC	106305	04-26-91	138,000.00	12,545.45
Lily's General Merchandise	60A-5-000146	AD	107034	05-09-91	7,800.00	709.09
Asian High Technology Corp.	317-001803	AE	2579	06-03-91	325,480.35	29,589.12
Telecommunications & Computer Tech., Inc.	32A-7-000110	AF	941	05-09-91	29,500.00	2,681.82
Tropical Marketing	60-4-000642	AG	4942	07-05-91	27,480.00	2,498.18
Philippine Packings & Seals Corporation	32A-3-000601	AJ	35029	03-05-92	10,780.00	980.00
Lipercon Services, Inc.	32A-100096	BE	9138	11-06-91	10,079.73	916.34
Lipercon Services, Inc.	32A-100096	BF	9077	11-14-91	2,108.41	191.67
Lipercon Services, Inc.	32A-100096	BG	9085	11-29-91	2,635.50	239.59
Lipercon Services, Inc.	32A-100096	BH	9151	12-13-91	2,635.50	239.59
Lipercon Services, Inc.	32A-100096	BI	9164	01-03-92	1,845.00	167.73
Lipercon Services, Inc.	32A-100096	BJ	9209	01-15-92	2,371.96	215.63
Lipercon Services, Inc.	32A-100096	BK	9214	01-30-92	3,162.61	287.51
Lipercon Services, Inc.	32A-100096	BL	9222	02-19-92	3,947.99	358.91
Lipercon Services, Inc.	32A-100096	BM	9256	03-11-92	3,072.66	279.33
Lipercon Services, Inc.	32A-100096	BN	9259	03-21-92	3,464.13	314.92
Yale Hardware	23-7-001761	DZ	93912	02-24-92	570.00	51.82
Total					P8,131,464.96	P739,224.07

It must be stressed at this point that a refund [or tax credit] of taxes partakes the nature of a tax exemption and are construed in *strictissimi juris* against the taxpayer and in favor of the taxing authority. (**Associated Sugar, Inc. vs. CIR,** CTA Case No. 2944, May 6, 1994, p. 4 citing **Insular Lumber Co. vs. CTA,** 104 SCRA 721, and **CIR vs. Rio Tuba Nickel Mining Corp.,** 207 SCRA 549)

WHEREFORE, in view of the foregoing, this Court hereby resolves to **GRANT** the **PETITION.** In consideration, however, of the fact that petitioner is a non-resident foreign corporation not engaged in business in the Philippines, whereby the issuance of a tax credit certificate would be of no use to it, this Court hereby **ORDERS** the respondent to **REFUND** the amount of P739,224.07 in favor of the petitioner. No costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate 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