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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BURMEISTER AND WAIN SCANDINAVIAN CONTRACTOR MINDANAO, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5982

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Promulgated:

AUG 08 2001

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DECISION

This Petition for Review is seeking for the issuance of a tax credit certificate in the amount of P6,994,659.61, representing erroneously paid output value-added tax (VAT, for brevity) for the calendar year 1996.

Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines with principal address located at Daruma Building, Jose P. Laurel Avenue, Lanang, Davao City.

It is represented that a foreign Consortium composed of Burmeister and Wain Scandinavian Contractor A/S (BWSC-Denmark), Mitsui Engineering and Shipbuilding, Ltd., and Mitsui and Co., Ltd. entered into a contract with the National Power Corporation (NAPOCOR) for the operation and maintenance of the latter's two power barges. The Consortium appointed BWSC-Denmark as its coordination manager.

BWSC-Denmark established Petitioner, Burmeister and Wain Scandinavian Contractor Mindanao, Inc., which subcontracted the actual operation and maintenance of

NAPOCOR's two power barges as well as the performance of other duties and acts which necessarily have to be done in the Philippines.

The NAPOCOR paid capacity and energy fees to the Consortium in a mixture of currencies (Mark, Yen, and Peso). The freely convertible non-Peso component is deposited directly to the Consortium's bank accounts in Denmark and Japan, while the Peso-denominated component is deposited in a separate and special designated bank account in the Philippines. On the other hand, the Consortium pays Petitioner in foreign currency inwardly remitted to the Philippines through the banking system.

In order to ascertain the tax implications of the above transactions, Petitioner sought a ruling from the BIR which responded with BIR Ruling No. 023-95 dated February 14, 1995, declaring therein that if Petitioner chooses to register as a VAT person and the consideration for its services is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas, the aforesaid services shall be subject to VAT at zero-rate.

Petitioner chose to register as a VAT taxpayer. On May 26, 1995, the Certificate of Registration bearing RDO Control No. 95-113-007556 was issued in favor of the Petitioner by the Revenue District Office No. 113 of Davao City (Exhibit D).

For the year 1996, Petitioner seasonably filed its quarterly Value-Added Tax Returns reflecting, among others, a total zero-rated sales of P147,317,189.62 with VAT input taxes of P3,361,174.14, detailed as follows:

Qtr.	Exh.	Date Filed	Zero-Rated Sales	VAT Input Tax
1st	E	04-18-96	P 33,019,651.07	P 608,953.48
2nd	F	07-16-96	37,108,863.33	756,802.66
3rd	G	10-14-96	34,196,372.35	930,279.14

4th	H	01-20-97	42,992,302.87	1,065,138.86
Totals			P147,317,189.62	P3,361,174.14

On December 29, 1997, Petitioner availed of the Voluntary Assessment Program (VAP) of the BIR. It allegedly misinterpreted Revenue Regulations No. 5-96 dated February 20, 1996 to be applicable to its case. Revenue Regulations No. 5-96 provides in part thus:

> SECTIONS 4.102-2(b)(2) and 4.103-1(B)(c) of Revenue Regulations No. 7-95 are hereby amended to read as follows::
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> Section 4.102-2(b)(2) – "Services other than processing, manufacturing or repacking for other persons doing business outside the Philippines for goods which are subsequently exported, as well as services by a resident to a non-resident foreign client such as project studies, information services, engineering and architectural designs and other similar services, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the BSP."
>
> xxx xxx xxxx.

In conformance with the aforecited Revenue Regulations, Petitioner subjected its sale of services to the Consortium to the 10% VAT in the total amount of P103,558,338.11 representing April to December 1996 sales since said Revenue Regulations No. 5-96 became effective only on April 1996. The sum of P43,893,951.07, representing January to March 1996 sales was subjected to zero rate. Consequently, Petitioner filed its 1996 amended VAT return consolidating therein the VAT output and input taxes for the four calendar quarters of 1996. It paid the amount of P6,994,659.67 through BIR's collecting agent, PCIBank, as its output tax liability for the year 1996, computed as follows (Exhibits A-2 and B):

Amount subject to 10% VAT	P103,558,338.11

Multiply by	10%
VAT Output Tax	P 10,355,833.81
Less: 1996 Input VAT	3,361,174.14
VAT Output Tax Payable	P 6,994,659.67

On January 7, 1999, Petitioner was able to secure VAT Ruling No. 003-99 from the VAT Review Committee which reconfirmed BIR Ruling No. 023-95 "insofar as it held that the services being rendered by BWSCMI is subject to VAT at zero percent (0%)."

On the strength of the aforementioned rulings, Petitioner on April 22, 1999, filed a claim for the issuance of a tax credit certificate with Revenue District No. 113 of the BIR. Petitioner believed that it erroneously paid the output VAT for 1996 due to its availment of the Voluntary Assessment Program (VAP) of the BIR. On December 27, 1999, Petitioner filed the instant Petition for Review in order to toll the running of the two-year prescriptive period under the law.

The issues jointly stipulated by the parties to be resolved in this case by the Court are the following:

1. Whether or not the payments for the services of BWSCMI qualify as zero-rated transactions;

2. Whether or not there has been an erroneous payment by BWSCMI which can be subject to a tax refund;

3. Whether or not Respondent's failure to act with finality upon BWSCMI's claim within two years necessitates the filing of the instant claim with this Honorable Court;

4. Whether or not BWSCMI's claim for refund is substantiated by documentary evidence; and

5. Whether or not BIR Ruling No. 023-95 dated 14 February 1995 and the VAT Review Committee Ruling dated 7 January 1999 are applicable in the instant case.

In its Memorandum, Petitioner maintains that since it is a VAT registered entity and the consideration for its services to the Consortium were paid for in acceptable foreign currency and inwardly remitted to the Philippines and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas, its sale of services are not subject to 10% VAT but to 0% pursuant to Section 108(B)(2) of the Tax Code.

Respondent, on the other hand, contends that since Petitioner's services are not destined to be consumed abroad, they are not of the same class or of the same nature as "project studies, information services, engineering and architectural designs and other similar services," mentioned in Section 4.102-(b)(2) of Revenue Regulations No. 5-96, which are destined to be consumed abroad. Respondent pointed out that the services of Petitioner consist of the actual operation and maintenance of the two power barges of NAPOCOR, hence, the performance of the service is within the Philippines subjecting such sale of services to the Consortium to 10% VAT.

We disagree with the Respondent.

The issue of whether or not the sale of services of Petitioner to the Consortium are subject to VAT at zero percent has already been resolved by the Court in CTA Case Nos. 5376[1], 5471[2], and 6022, dated August 4, 1999, August 10, 1999, and June 20, 2001, respectively, involving the same parties. In CTA Case No. 5376, the Court ruled in this wise:

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[1] With Entry of Judgment dated November 3, 1999.
[2] With Entry of Judgment dated October 20, 1999,

A mere glance at Section 102(a)(2) of the Tax Code would readily reveal that to qualify as zero-rated, the sale of services must comply with the following requirements, to wit:

1.) Payment of the service fees must be in acceptable foreign currency;

2.) Inward remittance of the foreign currency into the Philippines; and

3.) The inward remittance is accounted for in accordance with the rules and regulations of the Central Bank of the Philippines (now Bangko Sentral ng Pilipinas).

With reference to the first and second requirements, there was ample compliance since records of this case reveal that the Sub-contract fees for the services rendered by the Petitioner to the Consortium involving the actual operation and maintenance of NAPOCOR's two power barges for the period January 1, 1994 to December 31, 1994, amounting to DKK 26,990,000.00 (Danish Kroner) with peso equivalent of P113,001,715.00, were billed to BWSC-Denmark, being the Consortium coordinator, as shown by Petitioner's sales invoices (Exhibits Q to Q-10, inclusive). xxx We hold that there was indeed a foreign currency inward remittance to the Petitioner for its sale of services under the Subcontract Agreement.

As regards the last requirement, We likewise agree with the Petitioner that the sub-contract fees in foreign currency were inwardly remitted and accounted for in accordance with the rules and regulations of Bangko Sentral ng Pilipinas since it was evidenced by the bank credit memos/certifications from the Bank of Philippine Islands and Hongkong and Shanghai Bank (Exhs. R to R-4, inclusive). **(Burmeister Wain and Scandinavian Contractor Mindanao, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6022, June 20, 2001, *supra*.)**

We find the afore-mentioned pronouncement on all fours with the case at bar. Petitioner's sale of services to the Consortium were paid for in acceptable foreign currency inwardly remitted to the Philippines and accounted for in accordance with the rules and regulations of Bangko Sentral ng Pilipinas. These were established by various BPI Credit Memos showing remittances in Danish Kroner (DKK) and US dollars (US$) as payments for the specific invoices billed by Petitioner to the Consortium (Exhibits I, and I-1 to I-11). These remittances were further certified by the Branch Manager, Mr. Alexis B. Barlis, of BPI-Davao Lanang Branch to represent payments for sub-contract fees that came from Den Danske Aktieselskab Bank-Denmark for the account of Petitioner (Exhibits R and R-1). Clearly, Petitioner's sale of services to the Consortium is subject to VAT at 0% pursuant to Section 108(B)(2) of the Tax Code, to wit:

> **Section 108.** ***Value-added tax on sale of services and use or lease of Properties.*** - x x x
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> (B) *Transactions Subject to Zero Percent (0%) Rate.* - The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate;
>
> (1) xxx.
>
> (2) Services other than those mentioned in the preceding paragraph, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).
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> xxx xxx xxx.

The zero-rating of Petitioner's sale of services to the Consortium was even confirmed by the Respondent in BIR Ruling No. 023-95 dated February 14, 1995, and later by VAT Ruling No. 003-99 dated January 7, 1999, which provides, thus:

> In reply, please be informed that since BWSCMI's services comprise the actual operation and maintenance of the two power barges under contract to NAPOCOR, its services are effectively connected with the sale of electricity to NAPOCOR. In a memorandum-ruling of the Secretary of Finance dated January 26, 1998, it was held that the purchase of NAPOCOR of electricity from independent power producers are subject to VAT at zero-rate. Otherwise, the VAT may simply be passed on by the seller of electricity to NAPOCOR which in turn will result into a corresponding increase in the rate of electricity it charges to the consumers.
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> Accordingly, the Peso component of the fees which NAPOCOR pays to the Consortium and which will be used to pay for the services of

> BWSCMI is subject to VAT at zero rate in accordance with the above ruling. On this basis, BIR Ruling No. 023-95 dated February 14, 1995 is reconfirmed insofar as it held that the services being rendered by BWSCMI is subject to zero percent (0%) VAT.

Since it is apparent that the payments for the services rendered by Petitioner were indeed subject to VAT at zero percent, it follows that it mistakenly availed of the Voluntary Assessment Program by paying output tax for its sale of services. It is clear that Petitioner made a mistake when it paid output VAT for the year 1996. In the case of **National Development Company vs. Cebu City, 215 SCRA 382, 396**, the Supreme Court ruled that taxes paid through error or mistake must be returned because the taxpayer cannot be penalized for his good intention to pay the tax. The pertinent portions of the said decision are hereinbelow quoted:

> In the case at bar, petitioner cannot be said to have waived his right. xxx Payment made through error or mistake, in the honest belief that petitioner was liable, and therefore could not have been made under protest, but with complete voluntariness. In any case, a taxpayer should not be held to suffer loss by his good intention to comply with what he believes is his legal obligation, where such obligation does not really exist xxx The fact that petitioner paid thru error or mistake, and the government accepted the payment, gave rise to the application of the principle of *solutio indebiti* under Article 2154 of the New Civil Code, which provides that "if something was received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises". There is, therefore, created a tie or juridical relation in the nature of *solutio indebiti*, expressly classified as quasi-contract under Section 2, Chapter 1 of Title XVII of the New Civil Code." (quoting **Ramie Textiles, Inc. vs. Mathay, Sr., 89 SCRA 586**).

The voluntariness of Petitioner to avail of the VAP and correspondingly pay the output VAT due thereon should not run against its favor especially because its sale of services to the Consortium is really subject to VAT at 0%. Considering the principle of *solutio indebiti* which requires the return of what has been delivered by mistake, Respondent is obligated to issue the tax credit certificate prayed for by Petitioner. The right of Petitioner to recover what it erroneously paid to the BIR is provided under Section 230 of the Tax Code which states, thus:

> **SEC. 230. *Recovery of tax erroneously or illegally collected.*** – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
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> In any case, no such suit or proceeding shall be begun after the expiration of the two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

In sum, Petitioner was able to substantiate that the output VAT in the amount of P6,994,659.67, as evidenced by PCIBank Official Receipt for BIR Payment No. 137831, was erroneously paid to the BIR (Exhibit B).

WHEREFORE, in view of the foregoing, the Petition for Review is hereby **GRANTED**. Respondent is **ORDERED to ISSUE a TAX CREDIT CERTIFICATE** in the amount of P6,994,659.67 in favor of Petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

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