REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CATERPILLAR MOTOREN GmbH & CO. KG (Philippine Branch), *Petitioner,*	**C.T.A. EB No. 12** (C.T.A. Case No. 6290)
-versus-	Present:
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Acosta, *P.J.*** **Castañeda, Jr.,** **Bautista,** **Uy,** **Casanova, and** **Palanca-Enriquez, *JJ.***
	Promulgated: MAR 29 2005

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DECISION

ACOSTA, PJ.:

This is a Petition for Review seeking the reversal and setting aside of the Decision of this Court's Division dated November 18, 2003, denying petitioner's claim for refund of alleged erroneously paid output and input Value-Added Tax (VAT) and the subsequent Resolution dated May 3, 2004, denying the Motion for Reconsideration.

The antecedent facts as culled from the records are as follows:

Petitioner is a resident corporation organized and existing under the laws of Germany, duly licensed and registered with the Securities and Exchange Commission to do business in the Philippines through its branch office, initially as "MAK MOTOREN

GmbH" and later as "Caterpillar Motoren GmbH & Co. KG". It is licensed to engage in the business of acting as manager or managing agent of persons, corporations and other entities within the areas of power generation and transmission of other systems thereof whether nuclear, hydroelectric or conventional and providing consulting services such as project management, investment and technical advice for commercial, industrial, manufacturing and other kinds of enterprises engaged in the aforementioned areas.

On January 22, 1999, petitioner entered into a contract with CIP II Power Corporation (CIP II), for the engineering, erection, construction, installation, completion, testing and commissioning of Phase 1 of a 52 mega-watt diesel power station of the latter in Calamba, Laguna.

Petitioner recorded its sales from CIP II with a corresponding 10% output VAT. It tried to pass on the said 10% VAT to CIP II but the latter refused to pay alleging that it is a PEZA-registered Ecozone Utilities Enterprise and as such, it is exempt from payment of VAT under the 5% special tax incentive granted under Republic Act No. 8748.

Petitioner claims that despite its knowledge that its sales to CIP II may qualify as effectively zero-rated sales and VAT should not be due thereon provided that a prior application for zero-rating was filed with the Bureau of Internal Revenue (BIR) pursuant to Section 4.107-1(d) of Revenue Regulations No. 7-95 as amended, it decided not to file the said application on the allegation that it was the policy of the BIR at that time to deny applications for effective zero-rating relative to sales to PEZA-registered enterprises which were not directly engaged in export activities. Accordingly, it continued to report its sales to CIP II as VAT taxable sales subject to 10% output VAT.

On September 15, 1999, upon advice that the BIR will soon issue clarificatory guidelines with respect to the VAT treatment of sales to PEZA-registered enterprises, petitioner filed its application/Certificate for Zero-rate with the BIR involving its contract with CIP II. The same was approved on the same day by the BIR.

On October 15, 1999, the BIR issued Revenue Memorandum Circular No. 74-99 declaring that any sale of goods, property or services made by a VAT-registered supplier from the Customs Territory to any PEZA-registered enterprise, regardless of the class or type of the latter's PEZA registration, is legally entitled to zero percent (0%) VAT.

On April 17, 2000, petitioner filed its 1999 Annual Income Tax Return.

On April 23, 2001, the petitioner filed an Application for Tax Credits/Refunds with Revenue Region No. 8, Makati of the BIR, together with a letter-claim for refund in the amount of P1,968,224.68, as erroneously paid output VAT on petitioner's sales to CIP II for the month of January 1999 and P9,256,822.06, as unused input tax credits attributable to petitioner's sales to CIP II for the first three quarters of 1999 or a total of P11,225,046.74. And on the next day, April 24, 2001, it filed a Petition for Review with this Court.

In its Decision dated November 18, 2003, this Court denied the petition for lack of merit. On December 18, 2003, petitioner filed a Motion for Reconsideration which was likewise denied on May 3, 2004.

Hence, petitioner filed this Petition for Review with the following assignment of errors:

1. The Honorable Court erred in holding that RMC 74-99 is not curative in nature and hence cannot be applied retroactively, when in fact it was issued precisely to reverse earlier rulings of the BIR on the proper VAT treatment of sales made to PEZA-registered enterprises;

2. The Honorable Court erred in finding that RMC 74-99 can only be applied prospectively, notwithstanding the fact that its retroactive application would be beneficial to petitioner and is therefore sanctioned, as provided under Section 246 of the NIRC;

3. The Honorable Court erred in finding that petitioner should have complied with the requirement of Revenue Regulations No. 7-95 to obtain prior approval from the BIR for effective zero-rating; and

4. The Honorable Court erred in finding that petitioner's sales to CIP II were not exempt from VAT, notwithstanding that petitioner did not have an approved application for effective VAT zero-rating.

Regarding the first issue, petitioner argues that RMC 74-99 was issued purposely to clarify and fix the inconsistencies surrounding the proper VAT treatment of sales to PEZA-registered enterprises, which resulted from questionable official rulings issued by the BIR prior to RMC 74-99. It maintains that the BIR acknowledged the defects in its previous rulings on the VAT treatment of sales to PEZA-registered enterprises, and sought to rectify such defects by issuing RMC 74-99. Hence, RMC 74-99 should be considered in the nature of a curative statute, which can be retroactively applied in its favor.

We find petitioner's arguments unmeritorious. RMC 74-99 is not curative in nature. The circular was issued "to consolidate and harmonize all the pertinent tax laws and their corresponding implementing rules and regulations in respect of sales of goods, property and services to and from the Ecozones, in relation to the provisions of R.A. No. 7916, as amended by R.A. No. 8748, entitled "The Special Economic Zone Act of 1995" which created the Philippine Economic Zone Authority (PEZA) and not "to correct and harmonize xxx" as petitioner argues. There was no defect in the pertinent tax laws and their implementing rules and regulations that needs to be cured.

Anent the second issue, petitioner claims that the Court erred in finding that RMC 74-99 can only be applied prospectively, notwithstanding the fact that its retroactive application is sanctioned by Section 246 of the NIRC as long as it would be beneficial to the taxpayer petitioner.

Inasmuch as **Section 246 of the NIRC** is the focal point of this issue, the pertinent portion of the same is hereunder quoted, thus:

> "**Section 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 taxpayer xxx."

From the foregoing, it appears that as a rule, the rulings or circulars promulgated by the Commissioner shall be prospective in application. However, the Commissioner is not prohibited from giving the same retroactive application, unless, the same will prejudice the taxpayer.

In other words, the rulings or circulars issued by the Commissioner of Internal Revenue shall be prospective in application. He may or may not decide to give them a retroactive application and the sole prohibition is that it must not be prejudicial to the taxpayer. Its retroactive application is not automatic even if the said ruling or circular will benefit a taxpayer. So, unless the Commissioner specifically states for a retroactive application, the rulings or circulars will have a prospective application. This is especially true in this case where RMC 74-99 specifies the effectivity date of its provisions – October 15, 1999, the date of issuance of RMC 74-99.

62

It is a principle of long-standing that all laws operate prospectively, unless the contrary clearly appears or is clearly, plainly and unequivocally expressed or necessarily implied (**Iburan vs. Labes**, *87 Phil. 234 (1950*); **People vs. Zeta**, *98 Phil 143 (1955).*

Proceeding to the third issue.

Contrary to petitioner's argument that this Court erred in not granting its refund claim based on its failure to obtain prior authorization from the BIR for effective zero-rating as required by Revenue Regulations No. 7-95, it is quite clear that prior approval for effective zero-rating is made a condition *sine qua non* for a claim for refund of the input VAT.

Admittedly, under Section 246 of the Tax Code, any revocation, modification or reversal of any of the rules and regulations promulgated may be given retroactive application if the same will be beneficial to the taxpayers. However, as explained above, respondent CIR failed to give his imprimatur for such retroactive application. It is to be noted that RMC No. 74-99 itself provides that it shall be effective only as of the date of its issuance. Clearly, at the time the subject transactions took place, the one applicable was Revenue Regulations No. 7-95. Inasmuch as Revenue Regulations No. 7-95 was still in effect during the time covered by this petition and was not declared invalid, the requirements imposed by said regulations should be met. Hence, prior approval for zero-rating must be obtained before petitioner can subject its sales to 0% VAT pursuant to Section 4.107.1 of Revenue Regulations No. 7-95. Accordingly, this Court's decision not to grant its claim for refund is correct.

Anent petitioner's contention that the Court erred when notwithstanding the fact that petitioner did not have an approved application for effective VAT zero-rating, it still

63

found petitioner's sales to CIP II not exempt from VAT. We again find the same unmeritorious.

Undeniably, sales of a taxpayer who failed to obtain approved application for effective zero-rating will be classified as exempt sales under Section 4.107-1(d) of Revenue Regulations No. 7-95. The same, however, is not absolute. Petitioner must still comply with the formalities of issuing a non-VAT invoice pursuant to Section 4.107-2 of the same regulation. It must also be pointed out that under Section 109 of the Tax Code, a taxpayer which is not subject to VAT but issues a VAT invoice, automatically makes the sales subject to VAT at 10%. To quote:

> "**Section 109. Exempt Transactions**. – The following shall be exempt from the value-added tax. xxx
>
> The foregoing exemptions to the contrary notwithstanding, **any person whose sale of goods or properties or services which are otherwise not subject to VAT, but who issues a VAT invoice or receipt therefor shall**, in addition to his liability to other applicable percentage tax, if any, **be liable to the tax imposed in Section 106 or 108 without the benefit of input tax credit**, and such tax shall also be recognized as input tax credit to the purchaser under Section 110 all of this Code." *(Emphasis supplied)*

Clearly from the foregoing, any person whose sale of goods or properties or services which are otherwise not subject to VAT, but who issues a VAT invoice or receipt shall be liable to pay 10% VAT without the benefit of input tax credit. In this case, petitioner did exactly what the Section 109 strictly prohibits in order to qualify for VAT exemption. Hence, it is liable.

WHEREFORE, finding no reversible error in the assailed Decision promulgated on November 18, 2003 and Resolution dated May 3, 2004, the instant Petition for Review is hereby **DENIED** and accordingly **DISMISSED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice

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