REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ITOGON-SUYOC MINES, INC.
Petitioner,

- versus -

C.T.A. CASE NO. 4658

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated :
FEB 20 1995

x - x

DECISION

This refers to the claim for refund or tax credit of Itogon-Suyoc Mines, Inc. in the total amount of P15,481,140.61 representing VAT input taxes allegedly paid for the period from January 1, 1988 to October 31, 1990.

Allegations in the petition that were admitted unqualifiedly by respondent are hereby narrated.

Petitioner is a domestic corporation duly organized and existing under Philippine laws with principal office at Room 305 One Corporate Plaza Building, 845 Pasay Road, Makati, Metro Manila. It is mainly engaged in the mining business which includes, among others the exploration, development, operation and production of mining properties as well as the eventual marketing of mine products produced by it.

It is a registered VAT taxpayer at East District, Makati with Registration No. 32-0-000125 effective January 1, 1988. Due to change of address, it surrendered said registration and registered anew with BIR, West Makati. It was assigned Registration No. 32 A-8-008955 effective January 1, 1991.

It filed with the BIR an application for zero rate on it sales of mine products.

It filed with respondent's VAT Division four (4) applications for tax credit/refund of value added taxes paid, to wit:

Period Covered	Amount	Date Filed
Jan. 1, 1988 to October 31, 1988	P 4,678,984.65	April 14, 1989
Nov. 1, 1988 to April 30, 1989	2,527,139.03	Oct. 31, 1989
May 1, 1989 to Jan. 31, 1990	4,056,930.03	April 2, 1990
Feb. 1, 1990 to Oct. 31, 1990	4,218,086.90	May 31, 1991
T O T A L	P15,481,140.61	

Likewise, respondent admits in paragraph 2 of her answer the alleged filing by petitioner of several VAT returns, original and amended, details of which are tabulated hereunder:

Kind of Return	Quarter Covered	Date Filed
Original VAT	Jan. 1, 1988 to April 30, 1988	May 19, 1988
Amended VAT	Jan. 1, 1988 to April 30, 1988	March 21, 1989
Original VAT	May 1, 1988 to July 31, 1988	Aug. 18, 1988
Amended VAT	May 1, 1988 to July 31, 1988	March 21, 1989
Original VAT	Aug. 1, 1988 to Oct. 31, 1988	Nov. 21, 1988
Amended VAT	Aug. 1, 1988 to Oct. 31, 1988	March 21, 1988
Original VAT	Nov. 1, 1988 to Jan. 31, 1989	Feb. 20, 1989
Amended VAT	Nov. 1, 1988 to Jan. 31, 1989	May 19, 1989
VAT	Feb. 1, 1989 to April 30, 1988	May 19, 1988
VAT	May 1, 1989 to July 31, 1989	Aug. 21, 1989
VAT	Aug. 1, 1989 to Oct. 31, 1989	Nov. 17, 1989
VAT	Nov. 1, 1989 to Jan. 31, 1990	Feb. 19, 1990
VAT	Feb. 1, 1990 to April 30, 1990	May 18, 1990
VAT	May 1, 1990 to July 31, 1990	Aug. 20, 1990
VAT	Aug. 1, 1990 to Oct. 31, 1990	Nov. 20, 1990

However, respondent denies the veracity and correctness of the amounts declared in the above-mentioned returns for lack of knowledge or information sufficient to form a belief as to the truth thereof.

Respondent also denies the allegations in paragraphs 8, 9 and 10 of petition which state, among others, the following:

> "8. Petitioner has duly complied with the requirements for the aforesaid applications by submitting to Respondent's office particularly with the VAT Division, all documents or papers necessary therefor. In fact, Respondent's VAT Division has processed and/or examined petitioner's applications and even issued certain forms of Authority to issue VAT Credit/Refund dates January 29, 1991 and June 10, 1991, x x x. Unfortunately, Respondent has not acted or/approved such authorities for VAT Credit/Refund prepared by his VAT personnel;
>
> 9. Under Section 106(e) of the National Internal Revenue Code, Respondent is mandated to refund input taxes within sixty days from the date the application for refund was filed with his office or his duly authorized representative. Evidently, Respondent has violated the aforesaid mandate of the Tax Code to the prejudice of petitioner;
>
> 10. x x x This Petition is being filed within the two-year period prescribed by the National Internal Revenue Code, as amended."

And by way of <u>Special and Affirmative Defenses</u>, respondent alleges in his answer the following:

> "4. Petitioner has not shown that the tax sought to be refunded were erroneously or illegally collected;

5. A claim for refund is construed strictly against the claimant since it partakes of the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Company vs Commissioner of Internal Revenue, 67 SCRA 351);

6. Taxes are presumed to have been paid and collected in accordance with law;

7. Petitioner has not shown that it has complied with the requirements of Section 292 (now Section 230) and Section 295, paragraph 3 (now Section 204, paragraph 3) of the 1988 National Internal Revenue Code (NIRC) x x x;

8. Assuming, arguendo, that petitioner is entitled to a tax refund, the tax payments made before October 18, 1989, have already prescribed. Under Section 292 (now Sec. 230) of the NIRC no suit for the recovery of national internal revenue tax shall be begun after the expiration of two years from the date of payment;

9. The petition for review states no cause of action as it does not state the dates (not merely the periods) when the value-added taxes were allegedly paid (Manufacture Bank and Trust Co., vs. Commissioner of Internal Revenue, CTA Case No. 1659, December 29, 1965);

10. For VAT purposes, petitioner's sale of gold to the Central Bank is not considered export sale since the same is limited to "ACTUAL EXPORTS" and "FOREIGN CURRENCY DENOMINATED SALES" pursuant to Section 100(a) of the NIRC x x x;

11. Under VAT Ruling No. 202, the term zero rating refers to actual exports and foreign currency denominated sales, the provision of any special law to the contrary notwithstanding;

12. Petitioner's claim for tax refund/credit is bereft of basis in fact and in law."

Before discussing the issues involved in this case, it is worth clarifying that the amount being claimed by petitioner as refundable or tax creditable has been reduced and/or changed from P15,481,140.61 to merely P8,805,901.65 (pp. 12-14, Memorandum of Petitioner). Mrs. Estrelita Operario, witness of petitioner, testified in court that the reduction was due to disallowances made after examiners of respondent's VAT Division scrutinized in details the supporting documents of the subject claim. The reduced amount was already accepted by petitioner. In fact, the "Reliefs" portion of its Memorandum, so states, thus:

"RELIEFS

> WHEREFORE PREMISES CONSIDERED, it is most respectfully prayed of this Honorable Court to give due course to the foregoing and to render judgment -
>
> 1.) x x x;
>
> 2.) x x x;
>
> 3.) <u>the respondent be ordered to grant VAT refunds/tax credits in the amount of P8,805,901.65 as found by the VAT Division of the BIR</u>." (Underscoring supplied; pp. 253-254, CTA records)."

The Court now tackles the issues to be resolved in the instant case. They are the following:

> 1. Whether or not the petition states a cause of action;

2. Whether or not the claim of petitioner has prescribed;

3. Whether or not petitioner's sale of gold to Central Bank is "export sale" and therefore, subject to zero-rate of VAT.

Under paragraph 9 of his answer, respondent argues that petition states no cause of action as it did not state or mention the dates when the value added taxes were allegedly paid. This is untenable. For the Court understands the difficulty on the part of petitioner to state in its petition all the voluminous invoice numbers together with their respective dates of issuance. Precisely, this is the reason why in one of the hearings of the case held on April 21, 1993, the Court suggested that the voluminous invoices be presented in court by preparing summaries examined/verified by a certified public accountant (p. 123, CTA records). Said summaries which were duly notarized were marked and offered in court as Exhibits "AA" to "FF" inclusive, of petitioner. In the titles or captions of these summaries were indicated the <u>month</u> and <u>year</u> when the goods covered or listed under each summary were purchased or acquired. Such dates, understandably, are dates of payment of input taxes being claimed as refundable or tax creditable. Besides, in his comment on petitioner's formal offer of evidence (see par. 3, p. 2 Comment; p. 173, CTA records), respondent admitted all the said summaries without any qualification.

As regards the second issue respondent avers that even if it is to be assumed that petitioner is entitled to a tax refund, tax payments made before October 18, 1989, have already prescribed. Respondent's stand is well-taken. The fundamental rule on prescription of claims is clearly provided under Sections 204(3) and 230 of the Tax Code, to wit:

> "**Section 204.** Authority of the Commissioner to compromise, abate, and refund/credit taxes - The Commissioner may -
>
> (1) x x x
>
> (2) x x x
>
> (3) Credit or refund taxes erroneously or illegally received, penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition x x x. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two years after the payment of the tax or penalty." (Underscoring supplied)
>
> "**Section 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.
>
> In any case, no, such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment x x x" (Underscoring supplied)

From the foregoing, it is expressly mandated that both the claim for refund with the Bureau of Internal Revenue and the subsequent appeal to the Court of Tax Appeals must be filed within the two year period. These two requirements are mandatory and non-compliance therewith would be fatal to the action for refund or tax credit (Johnston Lumber Co., Inc. vs. CTA, 101 Phil. 151; Guagua Electric Light Co., Inc. vs. Collector, L-14421, April 29, 1961.)

Looking back at the tabulation hereinbefore made, of the four (4) applications for tax credit/refund made by petitioner, it is obviously seen that the amount of P4,678,984.65, P2,527,139.03, and portion of P4,056,930.03, representing input taxes allegedly paid for the period from January 1, 1988 to October 18, 1989, have already prescribed. Date of filing in court of subject claim is October 18, 1991. Two years backward from this date is October 18, 1989. Therefore, all payments made prior to the latter date can no longer be refunded on account of prescription.

Tackling the third issue is not rendered moot and academic by the settling in of prescription. As the period of petitioner's claim extends up to October 31, 1990, payments made between this date and October 18, 1989 have not yet prescribed. For this reason, the Court moves to a discussion of the third issue. That is, whether or not petitioner's sale of gold to the Central Bank is considered as "export sale" and therefore, subject to zero rate of VAT.

Petitioner contends that its sale of gold to Central Bank is "constructive export" and must be subject to zero rate of VAT. To support its contention, it presented in court as Exhibit "C" the following Central Bank (CB) circular thus:

"CIRCULAR No. 1301

Series of 1991

> With reference to Section 169 of Central Bank Circular No. 960 dated October 21, 1983, it is hereby stated, for clarification proposes, that all sales of gold to the Central

> Bank are considered constructive exports."

Petitioner concludes that the abovequoted CB circular is a special law. Hence, its sale to CB falls under Section 100(a)(2) of the Tax Code which provides:

> **"Section 100.** *Value-added tax on sale of goods.* - (a) Rate and base of tax.- There shall be levied, assessed and collected on every sale, barter or exchange of goods, a value-added tax equivalent to 10% of the gross selling price or gross value in money of the goods sold bartered or exchanged, such tax to be paid by the seller or transferor : Provided, that the following sales by VAT-registered persons shall be subject to 0%
>
> (1) Export sales; and
>
> (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.
>
> x x x" (Underscoring supplied)

From the foregoing provision of paragraph 2, it is important to note that buyers of VAT-registered sellers must be the persons exempt under special laws or international agreements. Thus, in a resolution promulgated by this Court, it was held that:

> "x x x Under the said provision, only those sales made to 'entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such sales to zero rate' can be considered as being 'effectively zero rated.' Otherwise stated, for a sale to be considered effectively zero-rated, it must be shown that the buyer is entitled to an

> 'exemption' under certain special laws or international agreements, and that such 'exemption' effectively subjects the sale to zero-rate.
>
> x x x (Underscoring supplied; last par. of p. 8, par. 1 of p. 9, Resolution dtd. May 4, 1994, CTA Case No. 4794, "Atlas Consolidated Mining and Development Corp. vs. CIR")

Evidently, under the aforequoted provision, it is not the sellers who are exempt from payment of VAT and/or all other kinds of internal revenue taxes. Hence, even if CB Circular No. 1301 is to be treated as having the force and effect of a law, and therefore, to be considered as a special law, still the pronouncement under this Circular will not effectively subject petitioner's sale to VAT-zero rate. There must be an express provision in the special law or CB circular that Central Bank, not the instant petitioner, is exempt from payment of VAT or all kinds of internal revenue taxes.

At this point, petitioner may invoke VAT Ruling No. 378-88 dated August 28, 1988 which provides that "sales of gold with the CB is considered as export sale subject to zero-rate pursuant to Section 100 of the Tax Code." Still, this will not hold water in the instant case on the legal basis that said ruling was revoked by VAT Ruling No. 008-92 and the revocation was made retroactive to January 1, 1988 by VAT Ruling No. 59-92.

Petitioner opposes the retroactive application of VAT Ruling No. 008-92. It says that VAT Ruling No. 59-92 is in violation of Section 246 of the Tax Code which provides:

> "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 cases: (a) where the taxpayer deliberately misstates or omits material facts from the 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."

Again, this side issue has similarly been decided in the previously cited resolution, thus:

> "x x x We hold that respondent Commissioner is correct in contending that petitioner will not suffer any undue prejudice from a retroactive application of VAT Rulings No. 008-92 and 59-92. As pointed out by respondent in his Ruling No. 59-92,
>
> > 'When the same mining companies, relying upon the aforementioned earlier BIR rulings, sold their gold to the CB at zero rate VAT, 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 ruling 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.' (Underscoring supplied; pp. 14-15, Resolution, *Ibid.*)

Assuming arguendo, that VAT Ruling No. 378-88 has not been revoked retroactively, still petitioner's sale cannot be considered as to fall under Section 100(a)(2) of the Tax Code. Aside from the legal requirement that there must be a special law expressly or effectively subjecting its sale transactions to VAT zero-rate, there is another requirement which is mandatorily provided under the VAT implementing regulations, thus:

"Section 8. Zero-rating -

(a) x x x

(b) x x x

(c) x x x

(d) Application for the implementation of zero-rate - Any person claiming that its sales of goods or services are effectively zero rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero rate on said transactions. Upon approval, his status as a zero rated taxpayer shall remain valid until revoked." (Underscoring supplied)

From the above, it is a mandatory requirement that persons who claim that their sales transactions are effectively zero-rated must file an application for zero-rate with the BIR. The application must be duly approved by the Commissioner of Internal Revenue. Considering that petitioner's application for zero-rate has not been approved by the Commissioner of Internal Revenue, petitioner's sale of gold to CB cannot be considered as effectively zero-rated. Compliance to the two (2) requirements is a must pursuant to Section 100(a)(2) of the VAT law and its implementing regulations.

Petitioner's sales to CB can neither fall under Section 100 (a)(1) which refers to "actual sales" or "foreign currency denominated sales" only. They are not also effectively zero-rated. They do not fall under any of the two (2) classifications of effectively zero-rated transactions as provided under paragraph (2) of Section 100 of the VAT law.

WHEREFORE, in view of all the foregoing, petitioner's claim for refund or tax credit is hereby DENIED for lack of merit. No pronouncement as to costs.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

(Dissenting 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