LIB

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

KUMAGAI-GUMI CO., LTD.,
(Phil. Branch)
Petitioner,

- versus -

C.T.A. CASE NO. 4670

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 29 1997

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DECISION

This case involves a claim for tax credit or refund of the amount of ₱6,184,463.77 as excess input value added tax (VAT) paid during the period from February to October 1989.

Petitioner is a resident foreign corporation, duly licensed by Securities and Exchange Commission to transact business in the Philippines through its Manila branch, particularly to engage in the general construction business.

It registered as a VAT entity and was issued a VAT Certificate with Registration No. 32A-1-003227.

For the period from February 1, 1989 to October 31, 1989, it undertook the construction of specified projects of the Philippine government which were financed by the government of Japan pursuant to various Exchanges of Notes between the two governments.

As the construction and related services rendered by petitioner were paid in U.S. dollars remitted into the Philippines, petitioner claimed that its sale of services is zero-rated for VAT purposes pursuant to Section 102(a)(2) of the Tax Code.

Hence, it filed VAT returns for the quarters February to April 1989, May to July 1989 and August to October 1989, declaring therein refundable value added taxes in the respective amounts of ₱2,020,566.60, ₱2,141,232.94 and ₱2,022,664.23 or a total amount of ₱6,184,463.77.

Then on August 15, 1991 it filed with the BIR an application for tax credit/refund of its value added taxes paid in the said total amount.

There being no action on its application, petitioner filed the instant petition for review with this Court on November 20, 1991, alleging that it is entitled to the aforementioned claim for refund or tax credit.

Respondent filed her Answer (pp. 18-20, CTA rec.) on February 13, 1992 alleging as Special and Affirmative Defenses the following:

1. In a claim for refund, taxpayer has the burden of proof to show that the tax paid was erroneously collected;

2. A claim for refund is construed strictly against the taxpayer;

3. Taxes are presumed to have been collected in accordance with law;

4. Petitioner must show compliance with the provisions of Section 230 and paragraph 5 of Section 204, both of the 1988 Tax Code; and

5. Petition for Review states no cause of action as it failed to indicate the dates when the value added taxes were paid.

After several hearings were conducted for the presentation of petitioner's evidence, the latter realized that there was a need to amend its Petition for Review. Thus, on May 7, 1994, petitioner filed a Motion to Admit Amended Petition for Review (pp. 92-93, CTA rec.).

In its amended petition (pp. 94-98, ibid.) petitioner stated two (2) alternative causes of action, namely:

1. First Cause of Action - That it is subject to VAT at zero-rate percent (0%) on its sale of services in the Philippines, pursuant to Section 102(a)(2) of the Tax Code, and also zero percent (0%) rate on its sale of goods pursuant to Section 100(a)(2) of the Tax Code.

2. Second Cause of Action - That it is exempt from the 10% value-added tax as the pertinent Exchanges of Notes between the Philippine and Japanese governments exempt Japanese nationals from customs duties, internal taxes and other fiscal levies which may be imposed in the Republic of the

> Philippines with respect to the supply of products and services under the verified contracts for the undertaking of Philippine projects funded by the Japanese government.

Petitioner also stated in its amended petition that respondent has already denied petitioner's application for tax credit/refund which is the subject of the instant petition for review.

In its Resolution of May 20, 1994 (p. 100, CTA rec.), the Court granted petitioner's motion to amend and admitted the amended petition for review.

Respondent's Answer to the amended petition for review (pp. 156-159, CTA rec.) was filed on October 5, 1994. Aside from the same special and affirmative defenses mentioned in her previous answer, the amended answer contained two additional defenses to controvert petitioner's alternative causes of action. Such defenses are:

> 1. Petitioner did not qualify as a zero-rated VAT person for it failed to secure an approved application for zero-rated taxpayer as required under Section 8(c)(3) and (d) of Revenue Regulations No. 5-87; and
>
> 2. Petitioner's alleged exemption under the exchange of notes is without legal basis.

Needing ventilation in this case is the lone issue of whether or not petitioner is entitled to the refund of the amount of P6,184,463.77 as VAT input taxes paid from February to October 1989.

The Court rules in favor of respondent. Petitioner is not entitled to the refund sought. As correctly argued by the respondent, petitioner cannot be classified as a zero-rated VAT entity for it failed to present an approved application for zero-rating. Section 8(d) of Revenue Regulations 5-87 expressly provides that:

> "(d) Application for the imposition 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 the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked."

Clearly from the foregoing, to qualify as effectively zero-rated VAT person under Sections 100 and 102, an application for that purpose must be filed with, and the same must be duly approved by, the BIR.

In the case at bar, petitioner failed to present such application duly approved by the BIR. For such failure, petitioner cannot be legally classified as a zero-rated VAT person. Hence, this contradicts its first cause of action as mentioned in its Amended Petition for Review. Petitioner is not a zero-rated VAT entity and therefore, not entitled to the refund of its input taxes.

With respect to petitioner's second cause of action, We find legal basis that it is VAT exempt based on the exchange of notes between the Japanese and Philippine governments, pertinent portion of which states:

> "xxx
>
> (1) The Government of the Republic of the Philippines will take necessary measures:
>
> xxx
>
> (d) to exempt Japanese nationals from customs duties, internal taxes and other fiscal levies which may be imposed in the Republic of the Philippines with respect to the supply of the products and services under the Verified Contracts; xxx." (Exh. "C", Pet.; p. 209, CTA rec.)

Therefore, the petitioner herein being Japanese nationals may be considered exempted from value-added tax pursuant to Section 103(u) of the NIRC. However, this pertains to its own direct tax liability by reason of its own supply of products and services, meaning the output value added tax due. This cannot refer to input value added taxes pass on to it by its suppliers as forming part of the invoice price. This is in fact the essence of the provision of Section 103 of the NIRC. A VAT exempt person is exempted for value added tax but is not entitled to claim input tax credit.

Therefore, the Court cannot grant the refund being sought by the petitioner. It is expressly mandated under Section 9(a) of Revenue Regulations No. 5-87 that a VAT exempt seller of goods or services is not entitled to any tax credit on input tax previously paid. Thus:

> "Sec. 9. *Exemptions.* - (a) *In general.* - An exemption means that the sale of goods or service is not subject to value-added tax (output tax). The seller is not allowed any tax credit on VAT (input tax) previously paid. The person making the exempt sale of goods or services shall not separately bill any output tax to his customers because the said transaction is not subject to VAT.
>
> xxx" (Underscoring supplied)

To support its contention that it is VAT-exempt, petitioner cited on page 20 (p. 337, CTA rec.) of its Memorandum, this Court's decision promulgated on July 24, 1991 in CTA Case Nos. 4163 and 4239 entitled "**P & N Corporation v. Commissioner of** Internal Revenue," wherein We resolved in the affirmative the issue of whether Exchanges of Notes are a valid source of tax exemption even without legislative concurrence.

The Court rules out the applicability of said decision to the case at bar. The cited case involves claim for refund of contractor's and withholding taxes. Instant case involves refund of input VAT. The legal basis for refund of the former taxes is not applicable for the refund of input VAT. The latter's legal basis for refund is strictly governed by Section 104 of the Tax Code as implemented by Revenue Regulations No. 5-87, particularly Section 16 thereof, which in summary provides that refund or tax credit of VAT is allowed only in the following cases:

> (1) for input taxes corresponding to zero-rated sales; and
>
> (2) for input taxes paid on capital goods.

Petitioner's use of two alternative causes of action - that it is a VAT zero-rated person or that it is VAT-exempt, did not serve its purpose of proving its entitlement to the refund sought. The Court has resolved that it failed to qualify as a zero-rated VAT entity and that even if it is to be assumed that the exchange of notes made it VAT-exempt, its claim for refund should be denied pursuant to the aforementioned Revenue Regulations No. 5-87.

WHEREFORE, in view of all the foregoing, the Court finds the instant claim for tax credit or refund unmeritorious and hereby **DENIES** the same.

No pronouncement as to cost.

SO ORDERED.

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this 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
Court of Tax Appeals