REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION
Petitioner,

- versus -

C.T.A. CASE NOS. 5130, 5161 and 5190

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 05 1998

x -x

DECISION

These petitions for review are seeking for a refund or issuance of tax credit certificates of alleged excess input value-added taxes paid by the petitioner from the second to the last quarter of 1992 in the following amounts:

Second Quarter (CTA Case No. 5130)	-	P24,031,673.00
Third Quarter (CTA Case No. 5161)	-	P16,597,709.17
Fourth Quarter (CTA Case No. 5190)	-	P29,839,894.82

The facts of the case are simple.

Petitioner is a mining corporation duly organized and existing by virtue of the laws of the Philippines, with copper concentrates as its main product which are all for export.

Petitioner filed its Quarterly VAT Returns for 1992 reflecting its input tax payments as follows:

197

	2nd Quarter	3rd Quarter	4th Quarter
Date Filed	06/20/92	10/20/92	01/20/93
Capital Goods		P 779.00	
Regular:			
Domestic Purchases	P 6,909,499.00	P 7,636.411.95	P 8,565,483.96
Importations	5,900,012.00.	3,190,527.00	6,337,197.00
Adjustments:			
Domestic Purchases	1,482,366.00	1,592,238.22	9,381,582.86
Importations	9,739,796.00	4,177,753.00	5,555,631.00
Total	P24,031,673.00	P16,597,709.17	P29,839,894.82

Subsequently, petitioner filed its applications for tax credit/refund of excess input value-added tax it paid pursuant to Section 106(b) of the Tax Code for the second to the last quarter of 1992.

As these claims for refund/applications for the issuance of tax credit certificates were not resolved by the respondent, petitioner filed the corresponding petitions for review with this Court.

Respondent, in her Answer to the Petitions for Review maintained the following Special and Affirmative defenses:

SPECIAL AND AFFIRMATIVE DEFENSES

CTA CASE NO. 5130

x x x

7) That Petitioner is not a zero rated Value Added Tax taxpayer under Section 100 of the Tax Code;

8) That granting that Petitioner filed a Value Added Tax Return on or about June 20, 1992 and paid the Value Added Tax due, it is clear that when the instant Petition for Review was filed with this Honorable Court only on July 18, 1994 more than two (2) years have already lapsed, hence even granting without admitting that Petitioner is a zero rated person under Section 100 of the Tax Code,

198

it is no longer entitled to tax credit or refund of the amount so paid as Value Added Tax under Section 230 of the Tax Code as more than two (2) years has lapsed from the date of actual payment to the filing of the Instant Petition for Review on July 18, 1994;

9) That based on the premises established in the proceeding (sic) paragraph, it is clear that this Honorable Court has no jurisdiction over the instant Petition for Review.

<u>CTA CASE NO. 5161</u>

x x x

7) The petition states no cause of action as it does not allege the date/s when the taxes sought to be refunded were actually paid;

8) Petitioner's claim for tax credit of alleged excess VAT input taxes is still under investigation/examination by the BIR;

9) Petitioner failed to show compliance with the provisions of Section 16(c)(3) of Revenue Regulations No. 3-88;

x x x

10) Petitioner has not shown that the alleged VAT input taxes attributable to its export sales have not yet been applied to the output tax and that the alleged total foreign exchange proceeds have been accounted for by the Central Bank;

11) Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes.

12) One who claims to be exempt from the payment of a particular tax must do so under clean and unmistakable terms found in the statute, which is not so in this case

13) All told, the petition does not state a cause of action.

<u>CTA CASE NO. 5190</u>

x x x

4) In an action for refund, the taxpayers have the burden to show that the taxes paid were erroneously or illegally collected and failure to do so is fatal to the action;

199

5) Claims for tax refunds are strictly construed against the taxpayer. Taxpayer-petitioner has no cause of action

During the course of the trial, petitioner presented as evidence the testimonies of its financial officers who identified the documentary evidence they submitted before Us and that of the representative of SGV & Co. who testified that petitioner's claim for refund/credit are properly supported by documents covering value-added tax paid by the petitioner in 1992. To bolster its claim, petitioner formally offered the following documentary evidence:

1. Approved Application for zero-rating of petitioner's sales to Philippine Associated Smelting & Refining Corp. (PASAR), Central Bank (CB) and foreign buyers. (Exh. "A");

2. Approved Application for zero-rating of petitioner's sales to Philippine Phosphates, Inc. (Philphos) (Exh. "B");

3. VAT Returns for the second, third and fourth quarters of 1992 (Exhs. "C", "E", "G" and "H");

4. Applications for Tax Credit/Refund of VAT paid for the second, third and fourth quarters of 1989 (Exhs. "D", "D-1", "F", and "J");

5. Listings of VAT documents analyzed by SGV (Exhs. "V", "V-23" to "V-39", "V-189" to "V-649");

6. Letter Certification of SGV & Co. dated March 9, 1995 and August 9, 1995 (Exhs. :K:, "K-1, "K-2", "L", "L-1", and "L-2"); and

7. VAT Registration Certificate No. 32-0-004622.

Respondent, on the other hand, not only failed to present any evidence to support her special and affirmative defenses, but she also opted not to file a memorandum to defend her case.

The issues of this case are as follows:

207

1) Validity of VAT Ruling Nos. 008-92 and 59-92, which effectively rendered petitioner's sales of gold to the Central Bank as local sales, not VAT zero-rated and sales of copper concentrates to PASAR and Pyrite to PHILPHOS, both EPZA registered enterprises, as local sales where there is no proof of actual exportation and payment of foreign currency.

2) Validity of the requirement under VAT Ruling No. 008-92 that a BOI-registered enterprise export more than 70% of total annual production for zero-rating to be apportioned to the amount of export sales.

3) The validity of respondent's position of disallowing claims for VAT refund/credit on the basis of an alleged failure to comply with certain documentary requirements imposed by the respondent although such penalty of disallowance is not contemplated in the law.

4) Whether or not petitioner is entitled to its claim for refund/credit of excess input VAT for the second, third and fourth quarters of 1992.

The first three issues had long been settled by this Court through a number of cases involving the same parties and a precedent has thereby been established. Quoted hereunder are portions of the leading case of ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4794, in a Resolution dated April 5, 1994,*** for purpose of emphasis:

> "Petitioner claims that its sales to the CB, PASAR and PHILPHOS, which are considered constructive exports under certain special laws, should be classified as effectively zero-rated transactions pursuant to Section 100(a)(2) of the Tax Code. Accordingly petitioner contends that VAT Rulings No. 008-92 and 59-92 limit zero-rated transactions only to export sales as this term is defined in Section 100(a) of the Tax Code and totally does away with the second class of zero-rated transactions covered by Section 100(a)(2). For this reason, said Rulings should be declared null and void and of no legal effect.

201

We find petitioner's position untenable. There is nothing in the said VAT Rulings No. 008-92 and 59-92 which purports to limit the scope of Section 100(a) of the Tax Code only to "export sales" as this term is defined in said section, or which abolishes the second category of zero-rated transactions, i.e., those which are "effectively zero-rated" under special laws. All that said rulings provide is that in so far as Section 100(a)(1) is concerned, the general rule is that only those transactions which involve actual exportation of goods from the Philippines to another country and those which fall under the category of foreign currency denominated sales will be considered as "export sales" and therefore zero-rated. Any other kind of "export sale", including those considered as "constructive exports" under certain special laws, are not considered as zero-rated sales since these neither involve actual exportation or shipment of goods nor can they be considered foreign currency denominated sales. Thus:

"1. In general, for purposes of the term 'export sales' only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating."

The law strictly limits "export sales" only to direct export sales and foreign currency denominated sales, to be qualified for zero-rating.

It is a settled rule of statutory construction that the express mention of one person, thing or consequence implies the exclusion of all others. *Expressio unius est exclusio alterius*. Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. ***(Hongkong & Shanghai Bank vs. Peters, 16 Phil. 824)***

Neither can we subscribe to petitioner's contention that its sales to the CB, PASAR and Philphos, being constructive exports under special laws, should be considered as "effectively zero-rated" transactions under Section 100(a)(2) of the Tax Code. 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.

In the case at bar, the special laws cited by the petitioner in support of its contention, are Section 169 of CB Circular No. 960, as

202

amended by CB Circular No. 1301, and Articles 23, 39(k) and 77 of Executive Order No. 226 otherwise known as the Omnibus Investments Code. A close scrutiny of said provisions, however, readily shows that they fail to meet the qualifications prescribed by Section 100(a)(2) of the Tax Code. In respect of Section 169 of CB Circular - 960, all the said provision states is that "gold producers shall qualify as export-oriented firms even if their entire output is sold to the Central Bank" It does not however, grant such producers any exemption in respect of internal revenue taxes due on its sales to the Central Bank: Neither is there anything in the provision which effectively subject such sales of gold to the CB to a zero-VAT rate. On the contrary, as pointed out by respondent Commissioner, the said provision was based on Executive Order No. 581 which is a tax imposition law and not a tax exemption law. Thus:

"Section 2. Gold sold to the Central Bank shall be considered export and shall be subject to the export and premium duties. The Central Bank and the Bureau of Customs are hereby directed to implement this provision."

The same may be said of petitioner's sales to PASAR and Philphos. There is nothing to Articles 23, 39, and 77 of Executive Order No. 226 (The Omnibus Investment Code) which grants any form of tax exemption to sellers of goods to export processing zone enterprises. In fact, under Article 39 of the said Code, the sale of raw materials to an export processing zone registered enterprises merely entitles such enterprise to "tax credits" equivalent to the national internal revenue taxes and customs duties paid on such raw materials. Even then, the same provision states that to entitle the enterprise concerned to such tax credits, the raw materials purchased must form part of the export products exported directly or indirectly by such registered enterprise.

It is axiomatic that one who claims a tax exemption must point to the specific provision of law expressly and categorically granting such exemption. In the case at bar, we are hard put to find anything in the provisions of the Omnibus Investment Code cited by petitioner which grants any tax exemption. Had the law intended to exempt suppliers of raw materials to EPZA-registered enterprises from the payment of internal revenue taxes, it would have stated so in no uncertain terms as it did for instance, in Article 39(c) thereof in respect of importations of capital equipment. Thus:

"(c) The Tax and Duty Exemption on Imported Capital Equipment. - Within five (5) years from the effectivity of this Code, importations of machinery and equipment and accompanying spare parts of new and expanding enterprises shall be exempt to the extent of one hundred percent (100%) of the customs duties and national internal revenue tax payable thereon xxx"

From the foregoing, it is clear that petitioner's sales to the CB, Pasar and Philphos do not fall under the coverage of Section 100(a)(2) of the Tax Code. Accordingly, they cannot be considered effectively zero-rated transactions."

In Our most recent Decision entitled ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4601, 4632, 4655 and 4701, promulgated on November 18, 1997,*** citing the foregoing pronouncements, it was ruled that:

"The aforecited decisions effectively affirmed respondent's VAT Ruling Nos. 8-92, dated January 23, 1992; 59-92, dated April 28, 1992, and Revenue Memorandum Circular No. 22-92, dated May 14, 1992 which rendered similarly situated mining companies' sales of gold to the Central Bank and sales of copper concentrates to PASAR and pyrite to PHILPHOS, both EPZA-registered enterprises, as local sales subject to 10% VAT.

However, with the passage of R.A. No. 7716, otherwise known as the E-VAT Law, which expressly included sale of gold to the Bangko Sentral ng Pilipinas within the term "export sales" which are zero-rated, the issue on the same had indisputably been completely settled.

With respect to the issue on sale of copper concentrates to PASAR and PHILPHOS, We stand firm on our previous decision in the case of ***Marcopper Mining Corporation vs. Jose U. Ong, Commissioner of Internal Revenue, CTA Case No. 4603 and 4677, October 3, 1995,*** where We ruled that:

"From the foregoing, it is indubitably clear that in order for the petitioner to avail of 'zero-rating' of input taxes, the only requirement to be complied is for it to sell its 'raw materials to export oriented BOI-registered enterprises whose export sales . . . exceed seventy percent (70%) of total annual production . . .' In other words, the law does not require a one-hundred percent export sales. Hence, local sales in excess of

204

the 70% requirement may be allowed, contrary to the contention of the respondent. The above requirement although also subject to the condition that 'the raw materials sold are to be used exclusively by the buyer in the manufacture, processing or repacking of his own registered export products' yet, in this particular case, was satisfactorily established by the petitioner through documentary and testimonial evidences. Hence, We cannot do otherwise but grant Petitioner's claim for refund." (Underscoring Supplied)

The foregoing decision is in consonance with the provisions of VAT Ruling No. 008-92 in relation to Section 2 of Revenue Regulations No. 2-88, to wit:

VAT Ruling No. 008-92:

"In general, for purposes of the term "export sales" only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating.

Exception - Sales of raw materials to export-oriented BOI-registered enterprises whose export sales, under the rules and regulations of the Board of Investments, exceed seventy percent (70%) of total annual production, shall also be subject to zero-rate for VAT purposes, pursuant to Section 2 of Revenue Regulations No. 2-88."

Revenue Regulations No. 2-88:

"**Sec. 2. Zero-rating.** ***(a) Sales of raw materials to BOI-registered exporters***. Sales of raw materials to export-oriented BOI-registered enterprises whose export sales, under rules and regulations of the Board of Investments, exceed seventy percent (70%) of total annual production, shall be subject to zero-rate under the following conditions:

(1) The seller shall file an application with the BIR , ATTN.: Division, applying for zero-rating for each and every separate buyer, in accordance with Section 8(d) of Revenue Regulations No. 5-87. The application should be accompanied with a favorable recommendation from the Board of Investments.

205

> (2) The raw materials sold are to be used exclusively by the buyer in the manufacture, processing or repacking of his own registered export product;
>
> (3) The words "Zero-rated Sales" shall be prominently indicated in the sales invoice. The exporter (buyer) can no longer claim from the Bureau of Internal Revenue or any other government office tax credits on their zero-rated purchases;
>
> xxx xxx xxx"

Having settled all the legal issues involved in this case, We are now tasked to resolve the last issue as to whether or not petitioner is entitled to its claim for refund/credit of excess input VAT it paid for the second, third and fourth quarters of 1992.

A thorough and careful examination of all the evidence presented by the petitioner has led this Court to conclude that petitioner is not entitled to the refund/credit of its excess input VAT for the second quarter, third and fourth quarters of 1992 on the ground of prescription. Petitioner's claim for refund was not filed by the petitioner within the reglementary period of two years pursuant to Section 106 (b) in relation to paragraph (e) of the same section of the Tax Code which provides:

> "**Section 106.** ***Refunds or tax credits of input tax.*** -
> a) *Export sales.* - x x x
>
> b) *Zero-rated or effectively zero-rated sales.* - <u>Any person,</u> except those covered by paragraph (a) above, <u>whose sales are zero-rated or are effectively zero-rated may, within two years after the close of the quarter when such sales were made</u>, apply for the <u>issuance of a tax credit certificate or refund of the input taxes</u>

206

attributable to such sales to the extent that such input tax has not been applied against output tax.

c) x x x

d) x x x

e) *Period within which refund of input taxes maybe made by the Commissioner.* - The Commissioner shall refund input taxes within 60 days from the date the application for refund was filed with him or his duly authorized representative. No refund of input taxes shall be allowed unless the VAT registered person files an application for refund within the period prescribed in paragraph (a), (b) and (c) as the case may be. (Underscoring Supplied)"

In the case of ***Nichimen Corporation, Philippine Branch vs. Commissioner of Internal Revenue, CTA Case No. 4431, February 13, 1995***, cited in another case involving ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case Nos. 4831, 4859 & 4944, October 30, 1997***, it was held that the computation of the two-year reglementary period provided for under Section 230 of the Tax Code should be read in relation with Section 106 of the same code when it comes to cases involving refunds of input taxes. Thus, the two year period should be counted from the close of the quarter to the time the petition for review was filed before Us. In the case at bar, records revealed the following pertinent dates:

CTA Case No.	Period Involved	Close of the Quarter	Date Filed BIR	CTA
5130	04-01-92 to 06-30-92	06-30-92	03-31-93	07-18-94
5161	07-01-92 to 09-30-92	09-30-92	03-31-93	10-20-94
5190	10-01-92 to 12-31-92	12-31-92	03-31-93	01-18-95

207

Apparently, when petitioner filed its judicial claim for refund before this Court, more than two years had elapsed counting from the close of each quarter, therefore, applying the aforementioned provisions of law and the pronouncements on the ***Nichimen case (supra),*** the petitions had already been barred by prescription.

Moreover, a closer look on all the evidence presented by the petitioner reveal that the instant petitions should likewise be denied on the ground that the petitioner failed to fully substantiate its claim for tax refund/credit due to insufficiency of evidence. This Court had the occasion to make the same ruling in the recent case of ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case Nos. 4601, 4632, 4655 and 4701, November 18, 1997,*** thus:

> "Section 2 (c)(1) of Revenue Regulations No. 3-88 specifically enumerates the requirements for the issuance of tax credit certificate or tax refund of input taxes previously paid by a zero-rated taxpayer engaged in sale of goods, to quote:
>
> > "(c) Claims for tax credits/refunds. - Application For Tax Credit/Refund of Value Added Tax Paid (BIR Form No. 2552) shall be filed with the Revenue District Office of the city or municipality where the principal place of business of the applicant is located or directly with the Commissioner, Attention: VAT Division.
> >
> > A photocopy of the purchase invoice or receipt evidencing the value added tax paid shall be submitted together with the application. The original copy of the said invoice /receipt, however, shall be presented for cancellation prior to the issuance of the Tax Credit Certificate or refund. x x x."
>
> In the case at bar, petitioner substantially failed to comply with the aforementioned requirements when it opted not to submit

208

the purchase invoices or receipts evidencing the value added taxes paid.

Aside from the fact that non-compliance by the petitioner with the provisions of Section 2 (c)(1) of Revenue Regulations No. 3-88 is fatal to its claim for tax credit/refund, We also find that unavailability of the said documentary evidence prevented Us from confirming the veracity of the amount claimed by the petitioner as excess input VAT payments. Mere listing of VAT invoices and receipts even if certified to have been previously examined by an independent Certified Public Accountant, would not suffice to establish the truthfulness and accuracy of the contents thereof unless actually verified by this Court itself.

Moreover, CTA Circular 10-97 amending the provisions of CTA Circular 1-95 clearly provides that:

> "2. The method of individual presentation of each and every receipt, invoice or account for marking, identification and comparison with the originals thereof need not be done before the Court or Clerk of Court anymore after the introduction of the summary and CPA certification. <u>It is enough that the receipts, invoices, vouchers or other documents covering the said accounts or payments to be introduced in evidence must be pre-marked by the party concerned and submitted to the Court</u> in order to be made accessible to the adverse party who desires to check and verify the correctness of the summary and CPA certification. x x x."

The foregoing provisions of Circular 10-97 does not permit the petitioner to present a CPA Certification and Summary Listings of Invoices and Receipts in lieu of submitting the voluminous photocopies of the invoices and receipts before Us. The said Circular merely aims to avoid the time-consuming procedure of presenting, identifying and marking each document before this Court or Clerk of Court, thus, encouraging speedy administration of justice."

WHEREFORE, in the light of all the foregoing, petitioner's claim for issuance of tax credit certificates or refund of excess input VAT payments for the

209

second, third and fourth quarters of 1992 are hereby **DENIED.** No pronouncements as to costs.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

I concur & Dissent; see separate opinion

ERNESTO D. ACOSTA
Presiding Judge

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
Court of Tax Appeals

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION
Petitioner,

- versus -

C.T.A. CASE NO. 5130 5161 & 5190

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 05 1998

x- -x

CONCURRING & DISSENTING OPINION

I concur with the conclusion reached by the majority that this claim should be denied by reason of prescription of action and failure to fully substantiate its claim for tax credit. Whether the two-year period should be counted from close of the quarter or the filing of the corresponding VAT return, the claim for refund as well as the petition for review were all filed out of time.

With respect to deliveries of copper to PASAR and pyrite to Philphos, both EPZA registered enterprise, I also concur with the majority opinion in view of our decision in Marcopper Mining Corp. vs. Jose U. Ong, CTA Case Nos. 4603 and 4677, Oct. 31, 1995.

However, I dissent in the conclusion of the majority that deliveries of gold to the Bangko Central ng Pilipinas does not constitute export sale in view of the provision of Section 100 (a) (2) of the Tax Code in correlation with CB Circular Nos. 960, 1301, and 1318 which declares sale of gold to CB as constructive exports. This opinion was exhaustively discussed in my dissenting opinion in CTA Case No. 4794. involving the same parties.

Respectfully submitted, this 5th day of January 1998.

ERNESTO D. ACOSTA
Presiding Judge

211