REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHIL. GOLD PROCESSING AND REFINING CORP., *Petitioner,*	CTA EB No. 1278 (CTA CASE Nos. 8542 & 8577)
-versus-	*Present*: DEL ROSARIO, P.J., CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, and RINGPIS-LIBAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: OCT 03 2016 3:25 p.m.

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D E C I S I O N

MINDARO-GRULLA, J.:

Submitted for Decision of this Court En Banc is a Petition for Review filed by Phil. Gold Processing and Refining Corp., under *Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals*[1], *as amended,*

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[1] RULE 8, Sec 3. *Who may appeal; period to file petition.-*

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(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (Rules of Court, Rule 42, sec. 1a)

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seeking the reversal of the Decision[2] dated November 11, 2014 and the Resolution[3] dated February 16, 2015, denying the claim for refund, allegedly representing unutilized input value-added tax (VAT) attributable to zero-rated sales of goods during the third and fourth quarters of fiscal year ending June 30, 2010 in the total amount of P42,967,020.74, the dispositive portions of which, respectively read as follows:

Decision dated November 11, 2014:

"**WHEREFORE** premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED."

Resolution dated February 16, 2015:

"**WHEREFORE**, petitioner's *Motion for Reconsideration of the Decision dated November 11, 2014 with Motion for New Trial filed on November 28, 2014* is **DENIED** for lack of merit.

SO ORDERED."

The factual antecedents, as found by the Court in Division[4], read as follows:

Petitioner Phil. Gold Processing and Refining Corp., is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, prinicipally engaged in the business of processing, milling, crushing, refining, smelting, and concentrating mineral resources. It was issued a Certificate of Incorporation on December 27, 2004 by the Securities and Exchange Commission (SEC) under its former name, LFT Processing Corporation[5]. It is registered as a VAT taxpayer with the Bureau of

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[2] Penned by Associate Justice Juanito C. Castaneda, concurred in by Associate Justice Caesar A. Casanova and Associate Justice Amelia Cotangco-Manalastas, En Banc Docket, pp. 10-32.
[3] Id., pp. 34-39.
[4] Supra note 2.
[5] Par.1 Summary of Stipulated Facts, Joint Stipulation of Facts and Issues, Division Docket, p.747.

Internal Revenue (BIR) with Tax Identification No. (TIN) 004-498-686-000 issued on March 15, 1996. Petitioner is likewise a bonafide Board of Investment (BOI)-registered enterprise with a Non-Pioneer Status with Pioneer Incentives being located in Less Developed Area as a new producer of Gold and Silver Dore. It commenced its commercial operation sometime in March 2009.

On the other hand, repondent Commissioner of Internal Revenue is the public officer authorized under the National Internal Revenue Code (NIRC) of 1997 to examine any taxpayer, to assess the correct amount of internal revenue tax, and to act on refund claims. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On March 17, 2012, petitioner filed its Amended Quarterly VAT Return for the third quarter of fiscal year ending June 30, 2010 before the BIR, showing creditable input taxes on domestic purchases of goods and services as well as importations of capital equipment and landed cost for the said quarter in the amount of P19,065,073.61.

On June 29, 2012, petitioner filed its Amended Quarterly VAT Return for the fourth quarter of fiscal year ending June 30, 2010 with the BIR, indicating creditable input taxes on various purchases of goods and services, importations on capital equipment, and landed costs for the said quarter in the amount of P23,901,947.13.

In a letter dated July 8, 2009, petitioner sought confirmation from the BIR that the input VAT on its domestic purchases of goods and services and importations of capital equipment attributable to zero-rated sales can be claimed as tax credit or refund pursuant to Section 112 of the NIRC of 1997.

In BIR Ruling No. DA (VAT-073)435-2009 dated August 3, 2009, respondent through Assistant

Commissioner James H. Roldan, confirmed the entitlement of petitioner to claim tax credit or refund.

Accordingly, on March 30, 2012, petitioner filed an Application for Input Tax Credit for the third quarter of fiscal year ending June 30, 2010 with the Tax and Revenue (VAT) Group under the One-Stop-Shop Inter-Agency Tax Credit and Duty Drawback Center of the Department of Finance in the total amount of P19,065,073.61.

On June 29, 2012, petitioner filed another Application for Input Tax Credit for the fourth quarter of fiscal year ending June 30, 2010 with the Revenue District Office No. 121 (Large Taxpayers Service Excise), BIR National Office, Quezon City in the total amount of P23,901,947.13.

Claiming that respondent failed to act on both applications for refund or issuance of tax credit certificate, petitioner filed two (2) Petitions for Review, later docketed as CTA Case Nos. 8542 and 8577, on September 7, 2012 and November 23, 2012, respectively, seeking a refund or tax credit of its purported unutilized input VAT attributable to zero-rated sales of goods during the third and fourth quarters of fiscal year ending in June 30, 2010.

In her Answer[6] in CTA Case No. 8542 filed on October 29, 2012, respondent alleged the following counter-arguments:

> "1.Respondent reiterates and repleads the preceding paragraphs of the answer as part of his Special and Affrirmative Defenses;
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> 2. Petitioner's claim for refund is still subject to investigation by the Bureau of Internal Revenue;

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[6] CTA Case No. 8542, Division Docket, pp. 678-680.

3.Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;

4. Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not refundable;

5. It is incumbent upon the petitioner to show that it has complied with the provision of Section 204 (C) in relation to Section 229 of the 1997 Tax Code, as amended;

6. Petitioner's claim for refund or issuance of tax credit certificate in the amount of Php 19,065,073.61, as alleged excess and unutilized input VAT paid on purchases of goods and services attributable to its zero-rated sales for the 3rd Quarter of fiscal year ending in June 2010 (or for the period January 1, 2010 to March 31, 2010) was not fully substantiated by proper documents, such as sales invoices, official receipts and others";

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Respondent interposed the following special and affirmative defenses in her Answer[7] in CTA Case No. 8577 filed on January 17, 2013:

"5. The instant case should be dismissed outright on the ground that the petition for review is already time-barred. The judicial claim for refund or for issuance of a tax credit certificate for the creditable input VAT payment made by petitioner Phil. Gold Processing and Refining Corporation filed on November 23, 2012 was filed beyond the period provided by law for such claim.

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[7] CTA Case No. 8577, Division Docket, pp. 399-405.

Petitioner anchors its claim for refund or issuance of a tax credit certificate under Section 112(A) & (C) of the Tax Code of 1997, as amended.

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From the foregoing, it is clear that the two-year prescriptive period provided in Section 112 (A) of the Tax Code of 1997, as amended, should be reckoned not from the payment of the tax, but from the close of the taxable quarter when the sales were made.

In this case, petitioner is claiming for refund or the issuance of a tax credit certificate of its alleged unutilized input VAT paid on domestic purchases of goods or services as well as importation of capital goods allegedly attributable to its zero-rated sales of goods for the 4th quarter of fiscal year ending in June 30, 2010, hence, the two (2) year prescriptive period should be reckoned from June 30, 2010, the close of the taxable quarter. Accordingly, petitioner had until June 30, 2012, within which to file its claim both in the administrative and judicial levels.

Records show that while the administrative claim for refund or the issuance of a tax credit certificate filed by petitioner on June 29, 2012 falls within the two (2) year prescriptive period; however, the Petition for Review filed before this Honorable Court on November 23, 2012 is beyond the two (2) year period prescribed by law. Thus, petitioner is barred from claiming refund of the alleged unutilized input taxes for the 4th quarter of fiscal year ending in June 30, 2012 in the amount of P23, 901,947.13, due to prescription.

It is respondent's humble assertion that the two-year period is a limitation of action not only in submitting a written claim for refund or issuance of tax credit certificate to the Commissioner of Internal Revenue, but likewise in instituting an action with the Court of Tax Appeals. A different interpretation would necessarily allow an extension of the two-year prescriptive period, for as long as the 120-day period had not elapsed from the filing of the administrative claim for refund.

Notably, nowhere in Section 112 is it stated nor implied, that the periods under paragraphs (A) and (B) thereof, are limited to administrative claims only, while it is more evident that the periods (120 days and 30 days) mentioned in paragraph (C) thereof, are provided for the taxpayer's guidance in the exhaustion of administrative remedies. Clearly, the mandate to act on claims for refund or issuance of tax credit certificate of creditable input VAT due within the 120-day period mentioned under the first paragraph of Section 112 (C) is addressed to the Commissioner of Internal Revenue, while the second paragraph of the same Section is an optional recourse given to the taxpayer-claimant, should there be a denial of the refund claim, or inaction on the part of the Commissioner on the claim for 120 days.

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While the respondent agrees that it is only upon full or partial denial of the claim for tax refund or tax credit, or failure of the Commissioner to act on the application within the 120-day period, may the taxpayer-claimant seek judicial recourse, within the 30-day period from submission of complete documents in support of said

> application, however, it is the respondent's humble opinion that in the observance of the 120-day and 30-day periods mentioned in Section 112, the two-year prescriptive period from the close of the taxable quarter when the sales were made for seeking judicial recourse must not be disregarded. And as mentioned earlier, it is the taxpayer-claimant's duty to monitor the dates of filing of its administrative claims to ensure compliance, not only with the 120-day and 30-day periods, but also with the two-year prescriptive period, in filing both its administrative and judicial claims.
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> 8. In order for petitioner to be entitled to its claim for refund/issuance of tax credit certificate allegedly representing unutilized input VAT attributable to its zero-rated sales for the fourth quarter fiscal year ending June 30, 2012, it must comply with the substantiation requirements under the appropriate Revenue Regulations. Thus, it is incumbent upon the petitioner to show that it has complied with the provisions of Section 112 (A)(C) of the 1997 Tax Code, as amended, including but not limited to Revenue Regulations No. 5-87 as amended by Revenue Regulations Nos. 3-88 and 7-95 as further amended by Revenue Regulations No. 16-2005; and Revenue Memorandum Order No. 9-2000.
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Petitioner filed its Pre-trial brief[8] on November 16, 2012, while respondent filed her Pre-trial brief[9] on November 19, 2012. Thereafter, the parties filed their Joint Stipulation of Facts and Issues[10] in CTA Case No. 8542 on December 20,

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[8] CTA Case No. 8542, Division Docket, pp. 682-691.
[9] Id., pp. 692-694.
[10] Id., pp.698-700.

2012, which was approved in a Resolution dated December 27, 2012.

On January 21, 2013, petitioner filed an Urgent Omnibus Motion, praying, among others, for the consolidation of CTA Case No. 8542 with CTA Case No. 8577; which was subsequently granted by the Court during the hearing held on January 28, 2013.

Accordingly, the parties filed their consolidated Joint Stipulation of Facts and Issues on April 23, 2013, which was approved by this Court on May 6, 2013.

After presentation, marking, identification, and formal offer of petitioner's evidence, Exhibits "A" to "Q-181", "R" to "HH-1", "II", and "JJ" to "KK-1" were admitted as part of its documentary evidence; while Exhibits "Q-182", "Q-183", "Q-184", "Q-185", "Q-186", and "Q-187" were denied admission for not being found in the records of the case and for petitioner's failure to have the same identified in Court. Respondent, on the other hand, manifested during the hearing held on September 11, 2013 that she will not present any evidence.

The case was then submitted for decision on April 28, 2014. Petitioner's Memorandum[11] was filed on April 15, 2014, while respondent's Memorandum[12] was submitted through registered mail on April 11, 2014.

The Court in Division rendered the assailed Decision dated November 11, 2014, which denied herein petitioner's claim for refund or issuance of tax credit certificate representing unutilized tax attributable to its zero-rated sale of goods. Petitioner's motion for reconsideration was likewise denied in the Resolution dated February 16, 2015, hence, this petition.

Petitioner maintains that the Court in Division erred in denying its claim for refund on the ground of insufficiency of evidence to qualify for zero-rating on its direct export sales, and further insists that it was able to submit all required

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[11] Division Docket, pp. 1080-1109.
[12] Id., 1100-1108.

complete documents to prove that all of its export sales qualify for zero-rating.

The Court is not persuaded, and finds the instant petition bereft of merit.

Petitioner anchors its entitlement to the claim for refund or issuance of a tax credit certificate under Section 112 (A) of the National Internal Revenue Code (NIRC) of 1997, as amended, which provides as follows:

> "SECTION 112. Refunds or Tax Credits of Input Tax. -
>
> (A) Zero-rated or Effectively Zero-rated Sales. - Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

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In sum, Section 112 (A) of the NIRC provides the following requisites that must be complied with in order to be entitled to a refund or tax credit of unutilized VAT, to wit;

1. There must be zero-rated or effectively zero-rated sales;
2. Input taxes were incurred or paid;
3. Such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. The input taxes were not applied against any output tax; and
5. The claim for refund was filed within the two-year prescriptive period.

Petitioner allegedly exported 100% of its processed gold and silver ore for the third and fourth taxable quarters of fiscal year ending in June 30, 2010 and generated sales therefrom in the respective amounts of P1,943,817,077.47 and P2,181,389,239.39 or in the sum of P4,125,206,316.86. These sales were purportedly paid in foreign currency and duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

It is likewise asserted that such export sales are subject to zero percent (0%) VAT rate under Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended, which provides:

> "Section. 106. *Value-Added Tax on Sale of Goods or Properties.* –
>
> **(A)** ***Rate and Base of Tax.***
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> xxx xxx xxx
>
> (2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (a) ***Export Sales.*** - The term *"export sales"* means:
>
> (1) The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for

> in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);
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> xxx xxx xxx

Based on the above provision, the Court in Division already discussed in the assailed decision the conditions that must be complied with in order for an export sale to qualify as zero-rated. To reiterate, the following must concur:

1. That there was a sale and actual shipment of goods from the Philippines to a foreign country;
2. The sale was made by a VAT-registered person;
3. The sale was paid for in acceptable currency or its equivalent in goods or services; and
4. The payment was accounted for in accordance with the rules and regulations of the BSP.

Significantly, Sections 113(A)(1), (B)(1), (2)(c) and (3) of the NIRC of 1997, as amended, and as implemented by Sections 4.113-1(A)(1), B(1) and (2)(c) of Revenue Regulations (RR) No. 16-2005, as amended, mandate that a VAT taxpayer, like herein petitioner, shall for every sale, barter, or exchange of goods or properties, issue a VAT invoice, which must contain the following information;

> Section 113. *Invoicing and Accounting Requirements for VAT-Registered Persons.* -
>
> **(A)** ***Invoicing Requirements.*** - A VAT-registered person shall issue:
>
> (1) A VAT invoice for every sale, barter or exchange of goods or properties; and
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>
> **(B)** ***Information Contained in the VAT Invoice or VAT Official Receipt.*** - The following information shall be indicated in the VAT invoice or VAT official receipt:
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> (1) A statement that the seller is a VAT-registered person, followed by his Taxpayer's Identification Number (TIN); and

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax. Provided, That:

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(c) If the sale is subject to zero percent (0%) value-added tax, the term **"zero-rated sale"** shall be written or printed prominently on the invoice or receipt.

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(3) The date of transaction, quantity, unit cost and description of the goods or properties or nature of the service; and

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"*Section. 4.113-**1. Invoicing Requirements***. -

(A) A VAT-registered person shall issue:-

(1) A VAT invoice for every sale, barter or exchange of goods or properties; and

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Only VAT-registered persons are required to print their TIN followed by the word 'VAT' in their invoice or official receipts. Said documents shall be considered as a 'VAT invoice' or 'VAT Official Receipt.' All purchases covered by invoices/receipts other than VAT Invoice/VAT Official Receipt shall not give rise to any input tax.

VAT invoice/official receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records.

(B) Information contained in VAT invoice or VAT official receipt. -The following information shall be indicated in VAT invoice or VAT official receipt:

(1) A statement that the seller is a VAT-registered person, followed by his TIN;

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the VAT; Provided, That:

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(c) If the sale is subject to zero percent (0%) VAT, the term "zero-rated sale" shall be written or printed prominently on the invoice or receipt;" (Emphasis supplied)

Incidentally, Section 237[13] in relation to Section 238[14] of the NIRC additionally requires that the invoices or receipts must be duly registered with the BIR and must contain all the required information under the law and regulations, such as the imprinted words "zero-rated" and the taxpayer's TIN-VAT number.

Based on the afore-quoted provisions, any VAT-registered person claiming VAT-zero rated direct export sales must present at least three (3) types of documents, to wit;

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[13] Section. 237. *Issuance of Receipts or Sales or Commercial Invoices.* -

All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, **issue duly registered receipts or sales or commercial invoices**, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service

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[14] Section 238. *Printing of Receipts or Sales or Commercial Invoices.* -

All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same

No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner." (Emphasis supplied)

1. The sales invoice as proof of sale of goods;
2. The export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and
3. The bank credit advice, certificate of bank remittance, or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services.

Clearly, only export sales substantiated by these documents shall qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended.

In the case at bar, it is undisputed that herein petitioner is a VAT-registered entity as per BIR Certificate of Registration. The Court in Division correctly held that while petitioner proferred before this Court documents such as sales invoices, official receipts, schedule of export sales, and Certification from Hong Kong and Shanghai Banking Corporation Limited (HSBC), the same do not fully substantiate its alleged export sales for the third and fourth quarters of fiscal year ending in June 30, 2010, considering that petitioner failed to submit export documents such as export declarations and bills of lading or airway bills. Thus, petitioner's alleged export sales cannot qualify for zero rating.

The Court cannot stress enough that actions for tax refund, as in this case, are in a nature of a claim for exemption and the law is construed in *strictissimi juris* against the taxpayer. The Supreme Court, in several pronouncements, has consistently ruled that claims for tax refund or tax credit must prove not only entitlement to the claim, but also compliance with all the documentary and evidentiary requirements[15]. It bears emphasis therefore, that the pieces of evidence presented entitling a taxpayer to an exemption are also *strictissimi* scrutinized and must be duly proven[16]. *c*

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[15] J.R.A Philippines Inc., vs. Commissioner of Internal Revenue, G.R. No. 171307, August 28, 2013, citing Western Mindanao Power Corporation vs. Commissioner of Internal Revenue, G.R. No. 181136, June 13, 2012.

[16] Kepco Philippines Corporation vs. Commissioner of Internal Revenue, G.R. No. 179961, January 31, 2011.

Finding no reversible error, We AFFIRM the assailed Decision of the Second Division dated November 11, 2014 and the Resolution dated February 16, 2015.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

(with Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PHIL. GOLD PROCESSING AND REFINING CORP.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 1278
CTA CASE Nos. 8542 & 8577

Present:

DEL ROSARIO, *P.J.,*
CASTANEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA, and
RINGPIS-LIBAN, *JJ.*

Promulgated:

OCT 03 2016 3:25 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the *ponencia* which denies the Petition for Review filed by the Phil. Gold Processing and Refining Corp. thereby affirming the assailed Decision promulgated on November 11, 2014 and the assailed Resolution dated February 16, 2015.

I, however, find it necessary to address the argument raised by petitioner in its Petition for Review that the Court erred in denying its Motion for New Trial. Citing *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue,*[1] petitioner insists it should have been allowed to present additional documents in evidence to justify its claim for refund

Petitioner's contention is bereft of merit.

[1] G.R. No. 141973, June 28, 2005.

Section 5 and 6, Rule 15 of the Revised Rules of the Court of Tax Appeals provide:

"**SEC. 5.** *Grounds of motion for new trial.* – A motion for new trial may be based on one or more of the following causes materially affecting the substantial rights of the movant:

(a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights; or

(b) Newly discovered evidence, which he could not, with reasonable diligence, have discovered and produced at the trial and, which, if presented, would probably alter the result.

A motion for new trial shall include all grounds then available and those not included shall be deemed waived.

SEC. 6. *Contents of motion for reconsideration or new trial and notice.* – The motion shall be in writing stating its grounds, a written notice of which shall be served by the movant on the adverse party.

A motion for new trial shall be proved in the manner provided for proof of motions. A motion for the cause mentioned in subparagraph (a) of the preceding section shall be supported by affidavits of merits which may be rebutted by counter-affidavits. A motion for the cause mentioned in subparagraph (b) of the preceding section shall be supported by affidavits of the witnesses by whom such evidence is expected to be given, or by duly authenticated documents which are proposed to be introduced in evidence.

A motion for reconsideration or new trial that does not comply with the foregoing provisions shall be deemed pro forma, which shall not toll the reglementary period for appeal." (*Boldfacing supplied*)

Furthermore, Sections 1 and 2 of Rule 37 of the Rules of Court provide:

"**RULE 37**

New Trial or Reconsiderations

Section 1. *Grounds of and period for filing motion for new trial or reconsideration.* — Within the period for taking an appeal, the aggrieved party may move the trial court to set aside the judgment

> or final order and grant a new trial for one or more of the following causes materially affecting the substantial rights of said party:
>
> (a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights; or
>
> (b) Newly discovered evidence, which he could not, with reasonable diligence, have discovered and produced at the trial, and which if presented would probably alter the result.
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> Within the same period, the aggrieved party may also move for reconsideration upon the grounds that the damages awarded are excessive, that the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law. (1a)
>
> **Section 2.** *Contents of motion for new trial or reconsideration and notice thereof.* — The motion shall be made in writing stating the ground or grounds therefor, a written notice of which shall be served by the movant on the adverse party.
>
> **A motion for new trial shall be proved in the manner provided for proof of motion. A motion for the cause mentioned in paragraph (a) of the preceding section shall be supported by affidavits of merits which may be rebutted by affidavits. A motion for the cause mentioned in paragraph (b) shall be supported by affidavits of the witnesses by whom such evidence is expected to be given, or by <u>duly authenticated</u> documents which are proposed to be introduced in evidence.**
>
> A motion for reconsideration shall point out specifically the findings or conclusions of the judgment or final order which are not supported by the evidence or which are contrary to law, making express reference to the testimonial or documentary evidence or to the provisions of law alleged to be contrary to such findings or conclusions.
>
> A *pro forma* motion for new trial or reconsideration shall not toll the reglementary period of appeal." (*Boldfacing supplied*)

Indubitably, it is essential in a Motion for New Trial to state the ground upon which it is based so as to determine the proof which the movant itself must present. If the said Motion is grounded on either fraud, accident, mistake or excusable negligence, then it is incumbent upon the movant to submit an affidavit of merit. If the said Motion is based on newly discovered evidence, it necessitates the movant to submit affidavits of the witnesses by whom evidence is expected to be given or by duly authenticated documents which are proposed to be introduced in evidence.

In *Felixberto W. Ferrer, as administrator of the Intestate Estate of the Spouses Esteban F. Ferrer, Sr. and Miguela Wenceslao vs. Yang Sepeng*,[2] the Supreme Court categorically ruled that the failure of the appellant therein to submit an affidavit of merit to support his Motion for New Trial is fatal to his cause, *viz*:

> "The reason is fundamental and elementary. The rule requires that motions for new trial founded on fraud, accident, mistake or excusable negligence **must be accompanied by affidavits of merits, i.e. affidavits showing the facts** (not mere conclusions or opinions) constituting the valid cause of action or defense which the movant may prove in case a new trial is granted, because a new trial would serve no purpose and would just waste the time of the court as well as the parties if the complaint is after all groundless or the defense is nil or ineffective.
>
> The decisive undisputed fact is that no affidavit of merits to support his motion for new trial as required by Rule 37, section 2 was submitted by defendant-appellant. **Such failure is fatal to his cause and is decisive on the question of law presented by his sole assignment of error.**
>
> The Court accordingly rules that the appeal has no merit since the failure to submit an affidavit of merits is fatal to appellant's cause and the trial court therefore committed no error in law in denying his motion for new trial." (*Boldfacing supplied*)

Records reveal that petitioner did not specify the factual and legal premises upon which the new trial may be justified much less did it submit the required affidavit of merit. While petitioner attached to the Motion for New Trial photocopies of provisional invoices with corresponding shipment number together with packing list, bar list, Transport Permit from the Mines and Geosciences Bureau, bill of lading, export declaration, airway bill, and a computer-generated reconciliation of the BNP Bank Remittances over the export sales of petitioner for the third and fourth quarters of the fiscal year ending June 30, 2010, the same cannot be considered by the Court for they do not come within the ambit of newly discovered evidence. Truth to

[2] G.R. No. L-39373, September 30, 1974.

tell, petitioner was afforded every opportunity to present the attached documents during trial, and yet it failed to do so. **The documents attached to the aforesaid Motion are, at the very least, in the nature of forgotten evidence.** Moreover, these documents have not even been duly authenticated in accordance with the rules, *supra.*

Petitioner's non-submission of the export documents in this case has been raised in earlier cases before the CTA where the very same parties in this case are involved, albeit relating to different taxable years. In the said cases, the Court denied petitioner's claim for refund due to petitioner's failure to submit the export documents:

Case Number	**Evidence Presented**	**Ruling**
CTA Case No. 8048, [Resolution dated June 28, 2012 as affirmed in CTA EB No. 756 dated June 28, 2012]	x	The Court *En Banc* denied the petition for review for lack of jurisdiction on the ground of premature filing.
CTA Case No. 8270 [Decision dated June 11, 2013 as affirmed in CTA EB No. 1082 dated November 26, 2014],	Petitioner failed to submit the following documents: 1. VAT zero-rated sales invoices; and 2. export documents.	The Court *En Banc* affirmed the Court in Division's Decision in denying the claim as petitioner was not able to establish that there was actual shipment of goods from the Philippines to a foreign country.
CTA Case No. 8301, February 27, 2014	Petitioner failed to submit the following documents: 1. VAT zero-rated sales invoices; and 2. export documents.	The Court in Division denied the claim as petitioner was not able to establish that there was actual shipment of goods from the Philippines to a foreign country.
CTA Case Nos. 8327 & 8328 [Decision dated October 22, 2013 as affirmed in CTA EB No. 1121 dated March 31, 2015]	Petitioner submitted export documents such as provisional invoices, bills of lading, bar list, packing list, export declarations and airway bills.	The Court *En* Banc affirmed the Court in Division 's denial of petitioner's claim as the invoices submitted by petitioner does not bear its TIN-VAT number and the word "zero-rated" is not written or imprinted on it.

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		Petitioner also failed to show that the provisional invoices it submitted were duly registered with the BIR.

Indeed, in view of the disposition by the Court on petitioner's several claims for refund in aforecited cases, it cannot now feign ignorance on the indispensability of export documents in substantiating its claim. Interestingly, in CTA Case No. 8652 and CTA Case No. 8669, the Court partially granted petitioner's claim for refund when it was able to submit the export documents which, necessarily should have given petitioner awareness of the significance of such export documents. In fine, petitioner cannot attribute in the present case its failure to submit the export documents during trial to a **"mistake"** in supposedly believing that the documents it submitted in evidence is adequate to support its claim for refund as same is palpably erroneous.

In *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*,[3] the Supreme Court stressed that invoking negligence or mistake as a ground to move for new trial must be established clearly and it must be shown that it is one which ordinary diligence and prudence could not have guarded against, *viz*:

> "Even so, this Court finds no sufficient ground for granting the motion of petitioner corporation for the re-opening of its cases and/or holding of new trial.
>
> xxx xxx xxx
>
> The rule that the grant or denial of motions for new trial rests on the discretion of the trial court, may likewise be extended to the CTA. When the denial of the motion rests upon the discretion of a lower court, this Court will not interfere with its exercise, unless there is proof of grave abuse thereof.
>
> xxx xxx xxx
>
> Finally, assuming for the sake of argument that the non-presentation of the required documents was due to the fault of the counsel of petitioner corporation, this Court finds that it does not

[3] G.R. Nos. 141104 & 148763, June 8, 2007.

constitute excusable negligence or mistake which would warrant the re-opening of the cases and/or holding of new trial.

Under Section 1, Rule 37 of the Revised Rules of Court, the negligence must be excusable and generally imputable to the party because if it is imputable to the counsel, it is binding on the client. To follow a contrary rule and allow a party to disown his counsels conduct would render proceedings indefinite, tentative, and subject to re-opening by the mere subterfuge of replacing the counsel. What the aggrieved litigant should do is seek administrative sanctions against the erring counsel and not ask for the reversal of the court[']s ruling.

As elucidated by this Court in another case, the general rule is that the client is bound by the action of his counsel in the conduct of his case and he cannot therefore complain that the result of the litigation might have been otherwise had his counsel proceeded differently. **It has been held time and again that blunders and mistakes made in the conduct of the proceedings in the trial court as a result of the ignorance, inexperience or incompetence of counsel do not qualify as a ground for new trial.** If such were to be admitted as valid reasons for re-opening cases, there would never be an end to litigation so long as a new counsel could be employed to allege and show that the prior counsel had not been sufficiently diligent, experienced or learned.

Moreover, **negligence, to be excusable, must be one which ordinary diligence and prudence could not have guarded against.** xxx

Neither is there any merit in the contention of petitioner corporation that the non-presentation of the required documentary evidence was due to the excusable mistake of its counsel, a ground under Section 1, Rule 37 of the revised Rules of Court for the grant of a new trial. **Mistake, as it is referred to in the said rule, must be a mistake of fact, not of law, which relates to the case.** xxx

Besides, litigation is a not a trial and error proceeding. **A party who moves for a new trial on the ground of mistake must show that ordinary prudence could not have guarded against it. A new trial is not a refuge for the obstinate. Ordinary prudence in these cases would have dictated the presentation of all available evidence that would have supported the claims for refund/credit of input VAT of petitioner corporation.**" (*Citations omitted* and *Boldfacing supplied*)

On the basis of the foregoing disquisition, I submit that the Court in Division is correct in denying petitioner's Motion for New Trial.

All told, I **VOTE** to **DENY** the Petition for Review filed by Phil. Gold Processing and Refining Corp. before the Court *En* Banc for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice