REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

KUMAGAI-GUMI CO., LTD.
(PHIL. BRANCH),
Petitioner,

- versus -

C.T.A. CASE NO. 4717

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

Promulgated: MAY 04 1998

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D E C I S I O N

This case before Us prays for the refund or issuance of a tax credit certificate in favor of the petitioner in the amount of P3,086,647.55, representing alleged excess input value-added tax for the quarter November 1, 1989 to January 31, 1990.

The petition at bench stemmed from the following factual backdrop.

Petitioner is a resident foreign corporation duly authorized to do business in the Philippines. It is a registered value-added taxpayer with VAT Registration Certificate No. 32A-1-003227 (Exh. "F") and is licensed to undertake in the Philippines exclusively foreign financed projects awarded through international competitive bidding (Exh. "A"). It has particularly been undertaking specified projects of the Philippine government which are financed (as Grant Aid) by the Government of Japan under Exchanges of Notes between the two governments (Exh. "D").

Pursuant to the provisions of the aforementioned Exchanges of Notes, a contract (Exh. "B") between the Department of Education, Culture and Sports of the government of the Republic of the Philippines and Kumagai-Mitsubishi Consortium was executed on January 30, 1989 for the construction of primary and secondary school buildings in the Philippines. Under the said contract, the Japanese government shall pay the cost of the construction to the petitioner's head office through an account opened in an authorized Japanese Foreign Exchange Bank in the name of the Government of the Republic of the Philippines. For the actual construction and related services, petitioner then received remittances from the Japan Head Office in the form of US dollars remitted through local commercial banks.

Claiming that its sale of services is zero-rated for VAT purposes, pursuant to Section 102(a)(2) of the Tax Code, petitioner filed its VAT return on February 20, 1990(Exh. "F") for the quarter November 1, 1989 to January 31, 1990, indicating an excess input value-added tax in the amount of P3,086,647.55 computed as follows:

Domestic purchase of taxable goods	P1,622,079.44
Purchase of taxable services	2,298,920.96
	P3,921,000.40
Less output tax for the quarter	834,352.85
Excess input tax	P3,086,647.55

On August 15, 1991, petitioner filed an application for tax credit/refund of value-added tax paid (Exh. "L") with the respondent Bureau of Internal

Revenue for unused input tax credit for the period covering February 1, 1989 to January 31, 1990.

To preserve its right to judicially claim for the tax refund or issuance of a tax credit certificate, petitioner filed the instant petition before Us on February 20, 1992.

In her Answer (CTA recs., pp. 13-15), respondent alleged the following Special and Affirmative defenses:

"6. The tax in question was collected in accordance with law.

7. Petitioner's claim for refund is pending administrative investigation; thus, the petition is premature.

8. Claims for refund of taxes are construed strictly against the claimant, the same being in the nature of an exemption from taxation. In an action for refund, therefore, the burden of proof is upon the claimant to establish the right to refund.

9. Petitioner failed to show in its petition that it is entitled to a refund. Mere allegations regarding refundability does not ipso facto entitle petitioner to the refund claimed. Thus, petitioner 's failure to sustain the burden is fatal to its action for refund."

Subsequently, on May 7, 1994, petitioner filed a Motion to Admit Amended Petition for Review (CTA recs. pp. 94-100) which was granted by this Court through its Resolution dated May 20, 1994 (CTA recs. p. 103).

In its Amended Petition for Review, petitioner stated two (2) alternative causes of action, namely:

First Cause of Action: Petitioner is subject to VAT at zero-rate (0%) on its sale of services in the Philippines, pursuant to Section 102(a)(2) of the Tax Code.

> **Second Cause of Action:** Petitioner is exempt from the 10% value-added tax because the pertinent Exchanges of Notes between the Philippine and Japanese governments exempts 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.

On October 5, 1994, respondent filed her Answer to the Amended Petition for Review which contained additional defenses to controvert petitioner's alternative causes of action. Aside from the same Special and Affirmative defenses mentioned in her original Answer, the Amended Answer contained the following defenses:

> 1. The alleged exchange of notes by petitioner which is the basis of petitioner's tax exemption is without legal basis. Petitioner failed to cite an express provision of law granting them an exemption;
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> 2. Petitioner furthermore, cannot qualify as zero-rated taxpayer in accordance with Section 102(a)(2) of the Tax Code for its failure to present an approved application for zero-rated taxpayer as required under Section 8(c)(3) and (d) of Revenue Regulations No. 5-87; and
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> 3. In the case at bar, the amended petition for review states no cause of action as it does not state the dates (not merely the period) when the value added taxes were allegedly paid (Manufacturer's Bank and Trust Co., as trustee for GE Trust Plan vs. Commissioner of Internal Revenue, CTA Case No. 1659, December 29, 1965).

The lone issue to be resolved in this case is whether or not the petitioner is entitled to the refund of P3,086,647.55 as VAT input taxes paid for the quarter November 1, 1989 to January 31, 1990.

We rule in favor of the respondent.

The foregoing issue had been settled in a case involving the same party, that is, *Kumagai-Gumi Co., Ltd. vs. The Commissioner of Internal Revenue, CTA Case No. 4670, July 29, 1997,* wherein this Court ruled that the petitioner is not entitled to the refund of VAT input taxes because it failed to qualify as an effectively zero-rated VAT person and even as an exempt taxpayer by virtue of the Exchanges of Notes between the Philippine and Japanese governments. Section 9(a) of Revenue Regulations No. 5-87 expressly mandates that an exempt seller of goods and services is not entitled to any tax credit on input tax previously paid. On August 15, 1997, the decision in this case became final and executory.

Pertinent portions of the aforesaid Kumagai-Gumi case are quoted hereunder for emphasis:

> "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.
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> 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.

Anent the second cause of action of the petitioner, the same Kumagai-Gumi case has this to say:

"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 custom 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."

We do not intend to depart from the wisdom of the aforementioned rulings and thus, the same should be applied in the case at bar.

WHEREFORE, in the light of all the foregoing, the instant claim for refund or issuance of tax credit certificate is hereby **DENIED** for lack of merit.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

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