REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

VESTAS SERVICES PHILIPPINES, INC., Petitioner,	**CTA CASE NO. 9382**
	Members:
- versus -	**DEL ROSARIO,** *P.J., Chairperson,* **UY,** *and* **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 24 2018 . 10:00 a.m.

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RESOLUTION

DEL ROSARIO, *P.J.*:

This resolves petitioner's **Motion for Partial Reconsideration (Of the Decision dated 09 May 2018)**, filed on May 29, 2018, without respondent's comment as per Records Verification dated July 26, 2018, and respondent's **Motion for Partial Reconsideration**, filed through registered mail on May 29, 2018, and received by the Court on June 4, 2018, with petitioner's **Comment/Opposition (On Respondent's Motion for Partial Reconsideration dated 28 May 2018)**, filed on July 13, 2018.

In their respective Motions, petitioner and respondent seek reconsideration of the Court's Decision promulgated on May 9, 2018 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent **COMMISSIONER OF INTERNAL REVENUE** is **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner **VESTAS SERVICES PHILIPPINES, INC.** in

the reduced amount of **One Million Two Hundred Seventy-Two Thousand Four Hundred Forty-Nine and 90/100 Pesos (₱1,272,449.90)**, representing petitioner's unutilized excess input VAT attributable to its zero-rated sale of services for the 1st quarter of CY 2014."

SO ORDERED."

In its motion, petitioner asserts that: (i) its zero-rated sales to EDC Burgos Wind Power Corporation (EDC Burgos) are sufficiently substantiated; (ii) there is nothing in the law and regulations which require proof of the "appropriate foreign exchange rate" for zero-rated sales under Section 15(g) of Republic Act (RA) No. 9513 or the Renewable Energy Act; (iii) the requirements under the law and regulations in order to claim for VAT refund also do not require such proof; (iv) the applicable foreign exchange rate is contained in the documents submitted by the Independent Certified Public Accountant (ICPA) to the Court; (v) Exhibit "P-46" should be considered by the Court as part of the sales to EDC Burgos for the first (1st) quarter of calendar year (CY) 2014 based on its Sales Invoice Number; (vi) the exhibits corresponding to the zero-rated sales to Bayview Technologies, Inc. (Bayview) and Vestas Wind System A/S (Vestas Denmark) should be considered by the Court as the admission thereof was never objected to by respondent; and, (vii) Exhibits "P-99", "P-112", "P-113", "P-118", "P-119", "P-120", "P-137", "P-141", "P-153", "P-154", "P-155", "P-156", "P-157", "P-158", "P-159", and "P-168", corresponding to purchase documents should be considered by the Court, as the admission thereof was never objected to by respondent.

On the other hand, in his motion, respondent contends that: (i) petitioner's sale of services that do not qualify for zero-rating should be subjected to 12% VAT and, hence, the output VAT thereon should be deducted from the amount of alleged unutilized input VAT being claimed for refund; (ii) the Court erred in granting the refund inasmuch as the input taxes are not directly attributable to its zero-rated sales; and (iii) the Court erred in not applying the rule that tax refunds being in the nature of tax exemption are construed *strictissimi juris* against the person or entity claiming the exemption.

US Dollar sales to EDC Burgos were not properly substantiated and accounted for in

accordance with BSP Rules

Petitioner avers that its US Dollar-denominated sales to EDC Burgos are properly substantiated. According to petitioner, Sections 113 and 237 of the National Internal Revenue Code (NIRC) of 1997, as amended, and Section 4.113-1 of Revenue Regulations (RR) No. 16-2005, or the Consolidated VAT Regulations of 2006, do not require that the applicable foreign exchange rate must appear in a VAT official receipt or sales invoice to be considered properly substantiated. Petitioner further claims that under Section 112(A), the requirement that acceptable foreign currency exchange proceeds of zero-rated sales should be duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP), applies only to zero-rated sales under Section 106(A)(2)(a)(1),(2) and (b) and Section 108(B)(1) and (2) of the NIRC of 1997, as amended.

Section 8 of RR No. 6-2006 dated March 16, 2006 provides that tax returns shall be filed in Philippine peso currency using historical peso amounts or actual conversion/prevailing rate on transaction date, *viz.*:

> "**SEC. 8. *Currency to be Used in the Filing of Tax Returns Other than Income Tax.*** – All tax returns other than the [Income Tax Return] shall likewise be filed in Philippine peso currency using historical peso amounts or actual conversion/prevailing [Philippine Dealing System] rate on transaction day, whichever is applicable."

From the foregoing, it is clear that petitioner's US Dollar-denominated sales to EDC Burgos must be translated into Philippine Peso using, either the historical peso amounts or the actual conversion/prevailing rate at the date of transaction, whichever is applicable. The amount as converted into Philippine Peso should be reflected in the VAT Returns of petitioner. Needless to say, the conversion to Philippine Peso is necessary as the payment of any tax due or the refund of any taxes paid is made in Philippine peso. The BIR is not obligated to refund petitioner in US Dollar currency.

Likewise, petitioner's contention that it is not required to account its US Dollar-denominated sales to EDC Burgos in accordance with the rules and regulations of the BSP is without merit.

By virtue of Section 15(g) of RA No. 9513, petitioner's sales to EDC Burgos were considered "effectively zero-rated sales of goods." Under Section 4.106-6 of RR No. 16-2005, "effectively zero-rated sales of goods" refer to "the local sale of goods and properties by a VAT-registered person or entity who was granted indirect tax exemption under special laws or international agreement." Hence, the sale of petitioner to EDC Burgos, though not actual exports, are considered "constructive exports". Being a foreign currency denominated sale, it is incumbent upon petitioner to account such foreign currency payment in accordance with the rules and regulations of BSP.[1] Stated otherwise, the presentation of documents sanctioned under the BSP Manual of Regulation of Foreign Exchange Transactions[2] showing that its US Dollar-denominated sales were properly translated to Philippine Peso and reflected in corresponding VAT returns is indispensable but which petitioner failed to do.

In any case, petitioner relies on the ICPA Report as basis for the use of the appropriate foreign exchange rate. Annex 8 of the ICPA Report shows the following amounts with respect to disallowed official receipts and sales invoices:

Exhibit	OR/SI Currency	Zero-rated Sales	Withholding Tax	Amount Due	Zero-rated Sales in PhP	VSPI Forex	BSP Forex
P-39	USD	1,175,369.43	23,507.39	1,151,862.04	51,429,764.66	44.65	45.02
P-40	USD	1,246,594.17	24,931.10	1,221,663.07	54,546,327.60	44.65	45.02
P-42	USD	130,318.79		130,318.79	5,818,634.93	44.65	44.83
P-45	USD	566,956.49		566,956.49	25,314,176.39	44.65	44.83
P-47	USD	99,911.07		99,911.07	4,460,953.34	44.65	-
P-48	USD	601,626.00		601,626.00	26,862,143.66	44.65	44.97
P-50	USD	340,415.00		340,415.00	15,199,271.03	44.65	44.97
P-52	USD	-		168,416.15	7,519,653.10	44.65	-
P-53	USD	-		10,205.75	455,678.98	44.65	-

But the findings of an ICPA is not conclusive upon the Court. This is clear under Section 3, Rule 13 of the Revised Rules of the Court of Tax Appeals, to wit:

> **SEC. 3. *Findings of the independent CPA*.**—The submission by the independent CPA of pre-marked documentary exhibits shall be subject to verification and comparison with the original documents, the availability of which shall be the primary responsibility of the party possessing such documents and, secondarily, by the independent CPA. <u>The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusions subject to verification</u>. (Emphasis supplied.)

The Court cannot blindly accept the ICPA's determination of the foreign exchange rate. Upon perusal of the evidence on record, there is no competent and reliable basis in support of the "VSPI Forex" of

[1] Sec. 4.106-5 (b), RR No. 16-2005.
[2] BSP Circular No. 645 dated February 13, 2009.

Php 44.65 = USD 1, as found in the tabulation of the ICPA. In fact, evidence is totally wanting either of an accounting of petitioner's US Dollar-denominated sales in accordance with BSP Rules, nor the mode of computing the conversion to Philippine Peso of its US Dollar-denominated sales, as reflected in its VAT returns. With such fatal omission, the Court cannot reasonably determine and/or validate the correct amount of US Dollar-denominated VAT zero-rated sales of petitioner converted to Philippine Peso.

Undated sales invoice is not sufficient to prove that the sale to EDC Burgos was made within the period of the claim

In its Decision dated May 9, 2018, the Court did not consider petitioner's sales to EDC Burgos in the amount of ₱45,379,354.63, reflected in Exhibit "P-46" because said sales invoice bears no date, and thus, it could not be determined if the sale pertained to the taxable period covered by the claim for refund or tax credit certificate.

Petitioner admits that while said exhibit bears no date, all sales invoices issued before and after it are dated within March 2014, and it is only logical to infer that Exhibit "P-46" was likewise issued within the same period.

The Court finds no merit in petitioner's argument.

Section 113 of the NIRC of 1997 provides:

> **SEC. 113.** ***Invoicing and Accounting Requirements for VAT-Registered Persons.—***
>
> **(A) Invoicing Requirements.**—A VAT-registered person shall issue:
>
> (1) <u>A VAT invoice for every sale, barter or exchange of goods or properties</u>; and
>
> (2) A VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services. (Emphasis supplied).

Relatedly, Section 4-108.1 of RR No. 7-95 is explicit in requiring specific information that must appear on the face of VAT official receipts and sales invoice, *viz.*:

> **SEC. 4-108-1.** ***Invoicing Requirements.*** – All VAT-registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:
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> 1. the name, TIN and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
> 5. the word 'zero-rated' imprinted on the invoice covering zero-rated sales; and
> 6. the invoice value or consideration. (Emphasis supplied.)

Based on the foregoing provisions, the date of the transaction is indispensable in receipts or sales invoices. For failure of Exhibit "P-46" to bear the date of transaction, said exhibit cannot be considered by the Court.

Denial of admission of exhibits corresponding to zero-rated sales to Bayview and purchase documents have become final; Court has discretion on whether to admit evidence for failure to present originals for comparison

Petitioner insists that the exhibits corresponding to its zero-rated sales to Bayview (Exhibits "P-16", "P-17", and "P-18") and Vestas Denmark (Exhibit "P-12"), as well as exhibits corresponding to purchase documents (Exhibits "P-99", "P-122", "P-113", "P-118", "P-119", "P-120", "P-137", "P-141", "P-153", "P-154", "P-155", "P-156", "P-157", "P-158", "P-159", and "P-168") should be considered by the Court, as their admission was never objected to by respondent. Petitioner asserts that evidence not objected to is deemed admitted and may be considered by the Court.[3]

The Court notes that in its Motion for Partial Reconsideration of the Resolution dated 14 September 2017, petitioner moved for the admission of only the certified true copy of Exhibit "P-25" and re-marked Exhibits "P-110" and "P-111". For petitioner's failure to

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[3] Citing *Spouses Tapayan vs. Martinez*, G.R. No. 207786, January 30, 2017.

include the denial of admission of Exhibits "P-16", "P-17", "P-18", "P-12", "P-99", "P-122", "P-113", "P-118", "P-119", "P-120", "P-137", "P-141", "P-153", "P-154", "P-155", "P-156", "P-157", "P-158", "P-159", and "P-168" in its motion for reconsideration, the denial of the admission in evidence of the same has become final.

It is a basic rule that evidence which has not been admitted cannot be validly considered by the courts in arriving at their judgments.[4] Thus, the aforesaid denied exhibits may not be given evidentiary value by the Court.

Petitioner's sale of services not subject to 12% VAT

In his motion, respondent posits that petitioner's sale of services that do not qualify for zero-rating should be subjected to 12% VAT and thus, the output VAT thereon should be deducted from the amount of alleged unutilized input VAT being claimed for refund. Moreover, respondent avers that petitioner fell short of the invoicing requirements under Section 113 of the NIRC of 1997, as amended by RA No. 9337. Furthermore, he reiterates that tax refunds are tax exemption in nature and that the burden of proof is upon the taxpayer.

In its comment, however, petitioner points out that the power to determine and assess the tax liability of a taxpayer at the first instance rests solely with respondent. Moreover, assuming without conceding that the court may assess tax liability at the first instance, the right to assess had already prescribed. Since petitioner's Amended VAT Return for the 1st quarter of CY 2014 was filed on August 18, 2014, any assessment should have been done by August 18, 2017, or within three (3) years from when the return was filed. Hence, if petitioner is assessed now, prescription has undoubtedly set in.

Petitioner further argues that the portion of the sales which do not qualify for zero-rating were excluded due to other reasons and cannot be treated as subject to 12% VAT. According to petitioner, respondent failed to present any evidence or legal basis to change the nature of the sale transactions, and even assuming that the excluded portion is not zero-rated, the Court already apportioned the substantiated zero-rated sales over the total sales of petitioner. Furthermore, petitioner has adduced evidence that its input VAT is

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[4] Dra. Leila A. Dela Llano vs. Rebecca Biong, G.R. No. 182356, December 4, 2013.

directly attributable to its zero-rated sales, as opposed to respondent's bare assertions.

The Court agrees with petitioner.

As thoroughly discussed by the Court in the assailed Decision, petitioner's sales to EDC Burgos Power Corporation are zero-rated pursuant to Section 15(g) of RA No. 9513 in relation to Sections 106(A)(2)(c), 119 and 112(A) of the NIRC, as amended. Petitioner's rendition of services for the engineering, procurement and construction of a wind power plant for EDC Burgos, a registered Renewable Energy developer of wind resources may be treated as part of the whole process of exploration and development of renewable resources. As a local supplier of services needed for the development, construction and installation of EDC Burgos' facilities, the services rendered by petitioner to EDC Burgos qualify as zero-rated under Section 15(g) of RA No. 9513.

Verily, the Court's disallowance was not because the sales were subject to VAT but because the correct amount of zero-rated sales could not be determined and/or validated from the same document, considering that the OR's issued to EDC Burgos were in US Dollar currency.

Meanwhile, petitioner's sales to Bayview did not qualify as zero-rated because the supporting evidence presented by petitioner to prove that it is a Cagayan Economic Zone Authority (CEZA)-registered enterprise, entitled to VAT zero-rating, was denied admission for failure to present the original document for comparison. The Court also did not consider petitioner's sales to Vestas Denmark as zero-rated because the contract to prove the nature of the services rendered was also denied admission for failure to present the original document for comparison. Hence, the Court did not consider sales made to Bayview and Vestas Denmark due to petitioner's inability to present originals of vital documents and not because such sales were subject to 12% VAT.

As petitioner correctly asserts, in any event, the issue on the proper treatment of sales which do not qualify as zero-rated was already addressed by the Court when it apportioned the duly supported zero-rated sales over the total sales declared by petitioner.

In fine, this Court finds no cogent reason to modify the assailed Decision promulgated on May 9, 2018.

WHEREFORE, premises considered, petitioner's **Motion for Partial Reconsideration (Of the Decision dated 09 May 2018)**, filed on May 29, 2018, and respondent's **Motion for Partial Reconsideration**, filed through registered mail on May 29, 2018 are hereby **DENIED** for lack of merit. Accordingly, the Decision dated May 9, 2018 is **AFFIRMED**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

On Official Business
CIELITO N. MINDARO-GRULLA
Associate Justice