REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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PHILEX MINING CORPORATION ,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7329

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

MAY 16 2008 1:15 pm

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DECISION

BAUTISTA, J.:

This case seeks the refund of the amount of **THREE MILLION TWENTY-TWO THOUSAND TWO HUNDRED EIGHTY-ONE AND 79/100 PESOS (P3,022,281.79)**, allegedly representing petitioner Philex Mining Corporation's unutilized input VAT paid on its purchases of goods and services attributable to zero-rated sales of mineral products for the Third Quarter of the year 2003.

Philex Mining Corporation (petitioner) is a corporation organized under Philippine laws, with principal office at 27 Brixton St., Pasig City.[1] It is engaged in the mining business, which includes the exploration, development, and operation of mining properties for the commercial production and marketing of mine products consisting of gold bullion and

[1] Petition for Review, Docket, page 1.

copper ore concentrates.[2] Petitioner is value-added tax (VAT)-registered, with VAT Registration Certificate No. 35-6-000731[3] effective October 29, 1987, and under Bureau of Internal Revenue (BIR) Form No. 2303[4] as of January 31, 1997. It also had its application for zero-rate approved on April 12, 1988, pursuant to Section 4.100-3 of Revenue Regulations No. 7-95.[5]

Respondent, on the other hand, is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected, and other refundable or creditable taxes under the National Internal Revenue Code (NIRC). He holds office at the BIR National Office, Diliman, Quezon City.[6]

On October 27, 2003, petitioner filed its original VAT return for the Third Quarter of taxable year 2003. This return, which was amended on October 7, 2004, reflected zero-rated sales in the amount of P845,006,447.22 and input VAT in the amount of P3,022,281.79, as shown below:[7]

			Input VAT		
Zero-Rated Sales/ Receipts	Taxable Sales/ Receipts	Output VAT	Domestic Purchases - Goods other than Capital Goods	Importations-Importations-Goods other than Capital Goods	Total
P 845,006,447.22	P524,131.30	P52,413.13	P1,469,084.79	P1,553,197.00	P3,022,281.79

On September 23, 2004, petitioner filed with the BIR its Application for tax credit/refund of VAT paid for the period covering July 1 to September 30, 2003 in the

[2] Petition for Review, Docket, pages 1-2.
[3] Annex "A", Petition for Review.
[4] Annex "A-1", Petition for Review.
[5] Annex "A-2", Petition for Review.
[6] Petition for Review, Docket, page 1.
[7] Exhibit "J-7".

amount of P3,022,281.79, representing the sum of input taxes on its domestic purchases in the amount of P1,469,084.79 and importation of goods in the amount of P1,553,197.00.[8]

Likewise, petitioner filed its claim for refund or tax credit with the One-Stop-Shop Center of the Department of Finance on November 14, 2004 as evidenced by its Application No. 48828[9].

Since no action has been taken by respondent, petitioner filed this instant Petition for Review on September 30, 2005, pursuant to Sections 112(D) and 229 of the NIRC of 1997, as amended.

On October 24, 2005, respondent filed his Answer raising the following Special and Affirmative Defenses:

> "4. Claims for refund are strictly construed against the taxpayer as the same partakes the nature of a tax exemption;
>
> 5. The taxpayer has the burden to show that the taxes were erroneously or illegally paid. Failure on the part of the Petitioner to prove the same is fatal to its cause of action;
>
> 6. The Petitioner should prove that its legal basis for claiming for the amount being refunded."

During the course of the trial, petitioner presented documentary and testimonial evidence, while respondent was declared in default during the hearing on April 28, 2006.

On October 9, 2007, the case was submitted for decision after petitioner filed its Memorandum on October 4, 2007, sans respondent's Memorandum.

Based on petitioner's proposed issues[10], the following are the issues for this Court's resolution:

1. Whether or not petitioner's domestic purchases and importations of goods which are attributable to its export sales for the Third Quarter of 2003 are duly supported by documentary evidence;

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[8] Annex "C", Petition for Review.
[9] Annex "D", Petition for Review.
[10] Statement of the Issues, Pre-Trial Brief for Petitioner, Docket, page 26.

2. Whether or not the accumulated or excess input VAT was not utilized or applied by petitioner against output VAT in the Third Quarter of 2003 or in the succeeding quarters or taxable year;

3. Whether or not the export sales were paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas; and

4. Whether or not petitioner is entitled to the refund of the excess input taxes in the total amount of P3,022,281.79 for the Third Quarter of 2003, due to petitioner being an exporter of mineral products.

The main issue to be resolved is whether or not petitioner is entitled to a refund in the amount of P3,022,281.79, representing excess input taxes for the Third Quarter of 2003.

The pertinent provision on claims for refund of input taxes attributable to zero-rated or effectively zero-rated sales is Section 112(A) of the NIRC of 1997, as amended, which provides:

> "**SEC. 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."

Based on the afore-quoted provision, in order for a taxpayer to be entitled to a refund or issuance of a tax credit certificate of its unutilized input VAT, the following requisites must be satisfied:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are directly attributable to zero-rated sales or effectively zero-rated sales;

4. that the input taxes were not applied against any output VAT liability during and in the succeeding quarters; and
5. that the claim for the refund was filed within the two-year prescriptive period.

Anent the first requisite, petitioner claims that it made shipments and sales of gold to Johnson Matthey of London, England and of copper concentrates to Nippon of Tokyo, Japan, which are VAT zero-rated, pursuant to Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended. Also, petitioner alleges that its sales of copper concentrates to Philippine Associated Smelting and Refining Corporation (PASAR), a Philippine Economic Zone Authority (PEZA)-registered enterprise, are subject to zero percent (0%) VAT, citing as legal bases Section 106(A)(2)(a)(5) of the NIRC of 1997, as amended, Section 23 of Republic Act (RA) No. 7916[11], Article 77(2) of the Omnibus Investments Code, Revenue Memorandum Circular (RMC) No. 74-99, and VAT Review Committee Ruling No. 026-2001.

The Court-commissioned Independent Certified Public Accountant (ICPA), Mr. Albert G. Alba, noted in his Report[12] that petitioner declared in its Amended VAT Return[13] for the Third Quarter of 2003 that it had zero-rated export sales amounting to US$15,346,271.00 with peso value equivalent of P845,006,447.22, as follows:

Particulars	**Amount**
Current Quarter's Shipments:	
Direct exports of:	
Copper to Japan	US$ 8,372,880.00
Gold to England	81,258.00
Indirect Exports of copper to PASAR	6,936,328.00
	US$ 15,390,466.00
Previous Quarters' Shipments	
Adjustment to correct previous billings	(44,195.00)
Total Zero-Rated Sales	**US$15,346,271.00**

In order to substantiate its export sales for the Third Quarter of taxable year 2003 and the allegation that foreign currency proceeds thereof were duly accounted for in

[11] The Special Economic Zone Act of 1995.
[12] Exhibit "E".
[13] Exhibit "A-1".

accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP), petitioner proffered before this Court its sales invoices[14], export declarations[15], bills of lading/airway bills[16], bank certifications[17] and entries in petitioner's passbooks in local banks of the payments received.[18]

Petitioner's direct exports of copper concentrates and gold to Japan and England, respectively, may fall within those transactions referred to as subject to zero percent (0%) VAT under Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended, which states:

"**SEC 106. *Value-Added Tax on Sale of Goods or Properties.*—**

(A) *Rate and Base of Tax.*— xxx

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)."

However, Section 106(A)(2)(a)(1) of the NIRC of 1997 should not be read in isolation, but in conjunction with Section 113 of the same Code and as implemented by Section 4.108-1 of Revenue Regulations No. 7-95; which prescribe that a VAT-registered person like petitioner, shall for every sale, issue an invoice or receipt which must contain the following information:

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[14] Exhibits "F-1" to "F-10".
[15] Exhibits "F-1-a" to "F-4-a".
[16] Exhibits "F-1-b" to "F-10-b".
[17] Exhibits "G-1" to "G-4".
[18] Exhibits "G-1-a" to "G-4-d".

"**SEC. 113.** ***Invoicing and Accounting Requirements for VAT-Registered Persons.***—

(A) *Invoicing Requirements.* — A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:

(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."

"SECTION 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:

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.

xxx xxx xxx

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

If the taxable person is engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations. A 'VAT Invoice' shall be issued only for sales of goods, properties or services subject to VAT imposed in Section 100 and 102 of the Code."

Furthermore, such invoice or receipt must be duly registered with the Bureau of Internal Revenue as prescribed under Section 237 in relation to Section 238 of the NIRC of 1997, as amended, to wit:

"**SEC. 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. xxx"

> "**SEC. 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."

Clearly from the foregoing, any taxpayer claiming VAT zero-rated direct export sales must present at least three documents, namely: (1) the sales invoice as proof of sale of goods; (2) the export declaration and bill of lading/airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and (3) 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.

Furthermore, the sales invoices supporting the export sales must comply with the invoicing requirements under the law and regulations, *i.e.*, the same must be duly registered with the Bureau of Internal Revenue and must contain all the required information, namely: (1) the imprinted word "zero-rated"; and (2) the taxpayer's TIN-VAT number. In other words, only export sales supported by these documents may qualify for VAT zero-rating under Section 106(A)(2)(a)(1).[19]

As earlier stated, petitioner's direct export sales consisted of the following:

Direct exports of:	
Copper to Japan	US$ 8,372,880.00
Gold to England	81,258.00

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[19] Taganito Mining Corporation vs. Commissioner of Internal Revenue, CTA EB No. 7, January 31, 2006; Intel Technology Philippines, Inc. vs. CIR, CTA EB No. 28, September 14, 2005.

A careful scrutiny of the sales invoices[20] supporting petitioner's direct export sales of gold to England in the amount of US$81,258.00 shows that the same are not duly registered with the BIR in violation of Section 238 of the NIRC of 1997, as amended. Per BIR Permit No. OCN3AU0000030052 dated April 19, 1999, petitioner is only authorized to print sales invoices bearing serial numbers from PX2101 to PX2500[21]. However, the said invoices supporting petitioner's direct export sales bear serial numbers Aurex 107[22] and Aurex 108[23], which are outside the authority to print granted to petitioner. Additionally, the word "VAT" after petitioner's TIN number was not imprinted, a clear violation of the invoicing requirements under Sections 113, 237, and 238 of the NIRC of 1997, as amended, and Section 4.108-1 of Revenue Regulations No. 7-95.

Similarly, petitioner's direct export sales of copper concentrates to Japan in the amount of US$8,372,880.00 cannot qualify for VAT zero-rating. Based on petitioner's Summary of Sales and Remittances,[24] it is indicated that the invoices corresponding to the export sales in the amount of US$8,372,880.00 are two sales invoices bearing nos. 2317 and 2327 with respective gross sales amounts of U$4,222,785.00 and US$4,150,095.00. Apparently, the said invoices pertain to the Fourth Quarter of 2003; therefore, fall outside the subject period of the instant Petition.

Anent petitioner's indirect export sales to PASAR in the amount of US$15,390,466.00, the provisions of Section 106(A)(2)(a)(5) in relation to Articles 23 and 77(2) of the Omnibus Investments Code and as clarified under RMC No. 74-99, are applicable. Section 106(A)(2)(a)(5) is quoted hereunder for ready reference, to wit:

"**SEC. 106.** ***Value-added Tax on Sale of Goods or Properties. —***

(A) xxx

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[20] Exhibits "F-3" to "F-4".
[21] Reflected in sales invoices marked as Exhibits "F-1", "F-2", "F-5", "F-6", "F-7", "F-8", "F-9", and "F-10".
[22] Exhibit "F-3".
[23] Exhibit "F-4".
[24] Exhibit "G".

(1) 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:

(5) Those considered export sales under **Executive Order No. 226**, otherwise known as the Omnibus Investment Code of 1987, and other special laws."

Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987 provides in part, thus:

"ARTICLE 23. 'Export Sales' shall mean the Philippine port F.O.B. value, determined from invoices, bills of lading, inward letters of credit, landing certificates, and other commercial documents, of export products exported directly by a registered export producer or the net selling price of export product sold by a registered export producer to another export producer, or to an export trader that subsequently exports the same: *Provided*, That sales of export products to another producer or to an export trader shall only be deemed export sales when actually exported by the latter, as evidenced by landing certificates of similar commercial documents: *Provided, further*, That without actual exportation the following shall be considered "constructively exported" for purposes of this provision: (1) sales to bonded manufacturing warehouses of export-oriented manufacturers; **(2) sales to export processing zones**; . . ." (*Emphasis supplied*)

"ARTICLE 77. *Tax Treatment of Merchandise in the Zone.* — (1) Except as otherwise provided in this Code, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise whether directly or indirectly related in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the provisions of law to the contrary notwithstanding.

(2) Merchandise purchased by a registered zone enterprise from the customs territory and subsequently brought into the zone, shall be considered as export sales and the exported thereof shall be entitled to the benefits allowed by law for such transaction." (*Emphasis supplied*)

Lastly, RMC 74-99 provides that:

"SECTION 3. *Tax Treatment of Sales Made By A VAT Registered Supplier from the Customs Territory, To A PEZA Registered Enterprise.-*

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3. In the final analysis, any sale of goods, property or services made by a VAT registered supplier from the Customs Territory to any registered enterprise operating in the ecozone, regardless of the class or type of the latter's PEZA registration, is actually qualified and thus legally entitled to the zero percent (0%) VAT. **Accordingly, all sales of goods or property to such enterprise made by a VAT registered supplier from the Customs Territory shall be treated subject to 0% VAT, pursuant to Sec. 106(A)(2)(a)(5) , NIRC , in relation to Art. 77(2) of the Omnibus Investments Code**, while all sales of services to the said enterprises, made by VAT registered supplies from the Customs Territory, shall be treated effectively subject to 0% VAT, pursuant to Section 108(B)(3), NIRC, in relation to the provisions of R.A. 7916 and the 'Cross Border Doctrine' of the VAT system.

This Circular shall serve as a sufficient basis to entitle such supplier of goods, property or services to the benefit of the zero percent (0%) VAT for sales made to the aforementioned ECOZONE enterprises and shall serve as sufficient compliance to the requirement for prior approval of zero-rating imposed by Revenue Regulations No. 7-95 effective as of the date of issuance of this Circular." (*Emphasis supplied*)

Based on the afore-quoted provisions, petitioner's indirect export sales may qualify for VAT zero-rating. However, this will not mean that the requirement for substantiation will be disregarded. Petitioner must still substantiate its indirect exports by proper VAT sales invoices.

Evidence forwarded to this Court shows that the sales invoices covering petitioner's indirect exports to PASAR in the amount of US$15,390,466.00 falls outside the subject period of claim. Thus, petitioner's reported indirect export sales to PASAR in the amount of US$15,390,466.00 cannot qualify for VAT zero-rating.

In sum, since petitioner failed to comply with the first requirement for refund of unutilized input VAT for failure to properly substantiate its alleged zero-rated and effectively zero-rated sales, its claim for refund cannot be granted.

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

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division