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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING &
DEVELOPMENT CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5102

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 24 1997

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DECISION

This is a judicial claim for tax refund/issuance of tax credit certificate on input value-added taxes ("VAT" for brevity) paid by petitioner on effectively zero-rated sale of goods and purchase of capital goods pursuant to Section 106(b) and (c) of the Tax Code for the period covering the first quarter of 1992 in the amount of P26,030,460.00.

Petitioner is a corporation organized and existing under and by virtue of the laws of the Republic of the Philippines. It is engaged in the business of mining, production and sale of various mineral products, such as gold, pyrite and copper concentrates, and is duly registered with respondent's Bureau as a VAT entity. It is also a zero-rated VAT person under Section 100 of the Tax Code (Exhibit "C").

The facts are simple.

On April 20, 1992, petitioner filed its VAT return for the aforecited period and on an unspecified date, petitioner allegedly filed its corresponding Application for Tax Credit/Refund of VAT Paid (BIR Form No. 2552).

Claiming that its application has not been acted upon by respondent and that the two-year prescriptive period for a judicial action was about to expire under Section 230 of the Tax Code, petitioner instituted the present petition for review before this Court on April 20, 1994.

At bar, petitioner repleads the preceding allegations. On the other hand, respondent avers, among others, the following special and affirmative defenses, namely:

x x x x x x x x x

> 5. The petitioner has no cause of action as it does not contain any allegations (sic) that petitioner is entitled to a certificate of refund under Section 106 of the National Internal Revenue Code corresponding to the P26,030,460.00 being sought by it.
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> x x x x x x x x x
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> 7. Moreover, the petition does not contain any allegation of the date when the tax sought to be refunded and/or credited was paid.

> Nor is there any showing that the tax sought to be refunded and/or credited was <u>actually paid</u> by petitioner.
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> x x x x x x x x x

Records reveal that respondent failed to submit her memorandum (Order, February 26, 1997; p. 197, CTA records). In its memorandum, petitioner exclusively raised legal issues in settling the claims at bar. We note, however, that petitioner's satisfaction of the documentary requirements of a valid claim for refund or tax credit remains unresolved insofar as this Court is concerned. The legal and factual issues thus confronting this Court are:

1. Whether or not petitioner's sales of gold to Central Bank of the Philippines ("CBP" for short) are subject to the 10% value added tax pursuant to Section 100 of the Tax Code, as amended;

2. Whether or not prejudice will result to petitioner on the retroactive application of respondent's VAT Ruling Nos. 008-92 dated January 23, 1992 and 59-92 dated April 20, 1992;

3. The validity of the requirement under Revenue Regulations No. 2-88 dated February 15, 1988 and VAT Ruling No. 008-92 that a BOI-registered enterprise export more than 70% of total annual production for zero rating to apply, such zero rating to be apportioned to the amount of export sales;

4. Whether or not petitioner's sales to Philippine Associated Smelting and Refining Corporation and Philippine

Phosphate Fertilizer Corporation ("PASAR" and "PHILPHOS", respectively, for brevity) should be considered as effectively zero-rated transactions under Section 100 (a) (2) of the Tax Code, as amended; and, if in the affirmative;

5. Whether or not petitioner has factually substantiated its claim;

6. Whether or not petitioner's claim has fulfilled the jurisdictional requisites for the filing of a judicial claim for refund as prescribed under Section 230 in relation with Section 106 (b) and (c) of the Tax Code; and,

7. The validity of respondent's disallowance of petitioner's claim for VAT refund/credit based on petitioner's failure to comply with the requirement on VAT invoice prescribed under Section 21 of Revenue Regulations No. 5-87 and pursuant to Section 108(a) of the Tax Code

After a careful review of all the applicable provisions of law, rules and regulations, and jurisprudence in point together with the arguments of the parties, this Court resolves to peremptorily rule in favor of the petitioner with respect to the first and second legal issues, in view of the decision of the Court of Appeals in **Manila Mining Corporation vs. Commissioner of Internal Revenue, CA-G.R. SP-No. 38287, promulgated on June 5, 1997 with entry of judgment on October 2, 1997,** upholding petitioner's legal perspective based solely on the provisions of Section 246 of the Tax Code which prohibits the retroactivity of rulings in case prejudice shall be suffered by the taxpayer. Thus:

> Concisely and pointedly stated by the Office of the Solicitor General in its comment, the issue is whether the denial of petitioner's claim for tax credit/refund premised on the retroactive application of VAT Ruling No. 008-92, issued on January 23, 1992 is valid (Comment, p. 6; Rollo, p 137).
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> We resolve to reverse the decision.
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> The Court of Tax Appeals, giving retroactive application to VAT Ruling 008-92 issued on January 23, 1992 and Revenue Memorandum Order No. 22-92 which classify the sale of gold to the Central Bank as local sale subject to 10% VAT, denied petitioner's claim for tax credit/refund.
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> The applicable law is Section 246 of the National Internal Revenue Code which provides:
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>> "**Sec. 246. - *Non-retroactivity of rulings.*** - Any revocation, modification, or reversal of any rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner of Internal Revenue shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or c) where the taxpayer acted in bad faith."

The law is clear. VAT Ruling 008-92 issued on January 23, 1992 and Revenue Memorandum Order No. 22-92 cannot be applied retroactively to petitioner's sales to Central Bank from July 1, 1990 to December 31, 1990.

In the recent case of *Commissioner of Internal Revenue vs. Court of Appeals, et. al., G.R. No. 117982, February 6, 1997*, the Supreme Court citing the cases of Commissioner of Internal Revenue v. Telefunken Semiconductor Philippines, Inc., G.R. No. 103915, 23 October 1995, 249 SCRA 401; Bank of America v. CA, G.R. No. 103092, 21 July 1994, 234 SCRA 302; Commissioner of Internal Revenue v. CTA, No. L-44007, 20 March 1991, 195 SCRA 444; Commissioner of Internal Revenue v. Mega General Merchandising Corp., G.R. No. 69136, 30 September 1988, 166 SCRA 166; Commissioner of Internal Revenue v. Burroughs, G.R. No. 66653, 19 June 1986, 142 SCRA 324; ABS-CBN v. CTA, G.R. No. 52306, 12 October 1981, 108 SCRA 142, in no uncertain terms, pronounced, "... well-entrenched is the rule that rulings and circulars, rules and regulations promulgated by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to the taxpayers."

Revenue Memorandum Circular No. 59-88, dated December 14, 1988, and BIR Ruling No. 036-90, dated February 14, 1990 considered sales of gold by a VAT registered firm to the Central Bank as export sale subject to zero rate pursuant to E.O. 581 and Section 1690 of CB Circular No. 960.

The retroactive application of VAT Ruling No. 008-92 deprived petitioner not only of its claim for refund but worse, made petitioner liable for deficiency VAT in the amount of ₱8,012,213.47.

As explained by Presiding Judge Ernesto D. Acosta in his dissenting opinion:

> "The conclusion is irresistible that prejudice will be suffered by petitioner with the retroactive application of VAT Ruling No. 008-92.

> One has only to compare the petitioner's original claim for refund/tax credit amounting to ₱4,795,135.85 which was denied by the respondent and in addition, has assessed petitioner the total amount of ₱8,012,213.47 as deficiency VAT for the taxable year 1990, the year in question to get a clear picture of the damage which petitioner will suffer as a consequence of the retroactive application of the revocation. Considered in the context of the total denial of the claim and the issuance of a deficiency tax assessment there is a hollow ring to respondent's assertion that there is no prejudice to petitioner's interest. There is therefore utter dearth of merit in respondent's insistence that retroactive application of the revocation in the face of the obvious implications of said ruling." (Rollo, pp. 98-99).
>
> In the abovementioned case of *Commissioner of Internal Revenue vs. Court of Appeals, et. al., supra*, promulgated two (2) years after the assailed decision of the Court of Tax Appeals, the Supreme Court ruled: "Without doubt, private respondent would be prejudiced by the retroactive application of the revocation as it would be assessed deficiency excise tax."

This Court would like to emphasize, however, that the above decision of the Court of Appeals on non-retroactivity of rulings correspondingly admits of the fact, by necessary implication, that the rulings in question are valid when applied prospectively. Such rulings are now limited in time by Republic Act No. 7716 as further amended by R.A. 8241, otherwise known as the

Expanded VAT Law which is already in effect at the time of the promulgation of this decision. Under the latter amendatory law, sales of gold to CBP, now *Bangko Sentral ng Pilipinas*, have been clearly categorized as zero-rated.

Anent the third issue, petitioner contends the following ratiocination, to wit:

> There is nothing in the Omnibus Investments Code which provides for any 70% export requirement before sales to an exporter could be deemed as constructive export sale. <u>The 70% requirement imposed by Revenue Regulations No. 2-88 is, thus, an effective amendment of the law, i.e., Articles 23 and 77(2) of the Omnibus Investment Law in relation to Section 100(a)(1) of the NIRC, and is therefore an undue exercise of the power to issue rules, which should be deemed illegal and of no effect</u>. x x x
>
> (Underscoring supplied; p. 49, Memorandum)

A close analysis of the arguments of the petitioner would readily tell us that the latter is urging this Court to declare as invalid and contrary to law said Revenue Regulations No. 2-88. On this aspect, this Court is not inclined to favor petitioner.

We observe that the particular issue at bar has not been the subject of discussion during the trial. It was only raised for the first time in petitioner's memorandum leaving the respondent without any opportunity to present her learned views on the matter. In addition, We note in said regulations that the limitation on the percentage of export sales, which is at 70% has been pegged *under the rules and regulations of the BOI* [Section 2(a), Revenue Regulations No. 2-88]. Under such circumstances, it would be quite improvident for this Court to attempt any consideration of the validity of said regulations on account of the non-inclusion of the BOI as a proper party to the case at bar.

There being no opportunity given to the respondent and BOI to be heard on the issue, We could do nothing less but to protect their rights to procedural due process of law, which is found to be wanting in the instant issue.

Aside from the foregoing procedural infirmity, it is also apropos to state that the construction given to a statute by administrative agencies charged with the interpretation and application of the statute is entitled to great respect and should be accorded great weight by the courts, unless such construction is clearly shown to be in a sharp conflict with the governing statute or the Constitution and other laws. (**Nestle Philippines, Inc. vs. Court of Appeals, 203 SCRA 504**) The conspicuous absence of any adversarial discussion on the validity of the applicable rules and regulations of BOI in consonance with Revenue Regulations No. 2-88 of the respondent readily convinces this Court of the failure of the petitioner to demonstrate any sharp conflict between said regulations and the Omnibus Investment Code. Verily, insofar as this case is concerned, said revenue regulations subsists to have the force and effect of law.

With regard to the fourth and fifth issues, We have held before in the case of **Marcopper Mining Corporation vs. Jose U. Ong, Commissioner of Internal Revenue, CTA Case No. 4950, promulgated on July 23, 1996** that, legally speaking, petitioner's sales of copper concentrates to PASAR and pyrite to Philphos are deemed zero-rated export sales provided the requirements of Revenue Regulations No. 2-88, more particularly on the 70% plus export sales of BOI-registered firms, are complied with accordingly.

We note, however, that in the cases at bar, petitioner has relied totally on Revenue Regulations No. 2-88 in determining compliance with documentary requirements for a successful refund or issuance of tax credit. Unmentioned is the applicable and more specific amendment later introduced by Revenue Regulations No. 3-88 dated April 7, 1988 (issued barely after two months from the promulgation of Revenue Regulations No. 2-88 on February 15, 1988), which amended Section 16 of Revenue

Regulations No. 5-87 on refunds or tax credits of input tax. Thus:

> **Sec. 2.** Section 16 of Revenue Regulations 5-87 is hereby amended to read as follows:
>
> "**Sec. 16.** ***Refunds or tax credits of input tax.*** -
>
> xx xxx xxx
>
> (c) *Claims for tax credits/refunds.* - Application For Tax Credit/Refund of Value-Added Tax Paid (BIR Form No. 2552) shall be filed with the Revenue District Office of the city or municipality where the principal place of business of the applicant is located or directly with the Commissioner, Attention: VAT Division.
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> A photocopy of the purchase invoice or receipt evidencing the value added tax paid shall be submitted together with the application. The original copy of the said invoice/receipt, however, shall be presented for cancellation prior to the issuance of the Tax Credit Certificate or refund. In addition, the following documents shall be attached whenever applicable.
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> xxx xxx xxx
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> "3. ***Effectively zero-rated sale of goods and services.***
>
> "i) photo copy of approved application for zero rate if filing for the first time.
>
> "ii) sales invoice or receipt showing the name of the person or entity whom the sale of goods or services were delivered, date of delivery, amount of consideration, and description of goods or services delivered.
>
> "iii) evidence of actual receipt of goods or services.

4. ***Purchase of capital goods.***

"i) original copy of invoice or receipt showing the date of purchase, purchase price, amount of value-added tax paid and description of the capital equipment locally purchased.

"ii) with respect to capital equipment imported, the photocopy of import entry document for internal revenue tax purposes and the confirmation receipt issued by the Bureau of Customs for the payment of the value-added tax.

"5. In applicable cases, where the applicant's zero-rated transactions are regulated by certain government agencies, a statement therefrom showing the amount and description of sale of goods and services, name of persons or entities (except in case of exports) to whom the goods or services were sold, and date of transaction shall also be submitted.

In all cases, the amount of refund or tax credit that may be granted shall be limited to the amount of the value-added tax (VAT) paid directly and entirely attributable to the zero-rated transaction during the period covered by the application for credit or refund.

xxx xxx xxx

(Emphasis and underscoring supplied)

A thorough examination of the evidence submitted by the petitioner before this Court reveals outright the failure to satisfy the documentary requirements laid down under the abovecited regulations. Specifically, petitioner was not able to present the following documents, to wit:

a) sales invoices or receipts;

b) purchase invoices or receipts;

c) evidence of actual receipt of goods;

d) BOI statement showing the amount and description of sale of goods, etc.;

e) original or attested copies of invoice or receipt on capital equipment locally purchased; and

f) photocopy of import entry document and confirmation receipt on imported capital equipment.

There is the need to examine the sales invoices or receipts in order to ascertain the actual amount or quantity of goods sold and their selling price. Without them, this Court cannot verify the correctness of petitioner's claim inasmuch as the regulations require that the input taxes being sought for refund should be limited to the portion that is directly and entirely attributable to the particular zero-rated transaction. In this instance, the best evidence of such transaction are the said sales invoices or receipts.

Also, even if sales invoices are produced, there is the further need to submit evidence that such goods were actually received by the buyer, in this case, by CBP, Philphos and PASAR.

Moreover, its sales to PASAR and Philphos being regulated by BOI, a government agency, petitioner should have submitted in evidence a statement therefrom showing the amount and description of sale of goods, name of the persons or entities to whom the goods were sold and the date of transaction as required by the above regulation. This requirement bears importance when we try to relate it with the more than 70% export sales requirement imposed by Revenue Regulations No. 2-88 to BOI-registered enterprises i.e. Philphos and PASAR, in order that sellers of goods to them like the petitioner can avail of refund of input VAT.

Lastly, this Court cannot determine whether there were actual local and imported purchase of capital goods as well as domestic purchase of non-capital goods without the required purchase invoice or receipt, as the case may be, and confirmation receipts.

There is, thus, the imperative need to submit before this Court the original or attested photocopies of petitioner's invoices or receipts, confirmation receipts and import entry documents in order that a full ascertainment of the claimed amount may be achieved.

Petitioner should have taken the foresight to introduce in evidence all of the missing documents abovementioned. Cases filed before this Court are litigated *de novo*. This means that party litigants should endeavor to prove at the first instance every minute aspect of their cases strictly in accordance with the Rules of Court, most especially on documentary evidence.

Notwithstanding the fact that petitioner submitted in evidence two copies of certification dated June 9, 1995 and August 9, 1995, respectively, issued by Sycip, Gorres & Velayo & Co. ("SGV" for brevity), an independent certified public accountant together with the listings of petitioner's VAT documents (Exhibits "E" to "E-3" and "V-1" to "V-188"), this Court cannot rely on the same in view of the absence of the documents above enumerated.

Also, petitioner's evidence is self-destructive. The aforecited SGV certification shows the following report, thus:

> It is our understanding that the above procedures are sufficient for the purpose of the Company. We make no representation regarding the sufficiency of these procedures for such purpose. We did not compare the total of the input tax claimed for the quarter against the pertinent VAT returns and books of accounts. **The above procedures do not constitute an audit made in accordance with generally accepted auditing standards. Accordingly, we do not express an opinion on the Company's claim for input VAT refund or credit.** Had we performed additional procedures, or had we made an audit in accordance with generally accepted auditing standards, other matters might have come to our attention that we would have accordingly reported on.

With the opinion of SGV that the procedures used in coming up with said report do not constitute an audit made in accordance with generally accepted auditing standards; that the same is for the company purposes only; and that, SGV expresses no opinion on the Company's claim for input VAT, said certification is a mere scrap of paper and this Court has no alternative but to disregard such report together with its supporting lists of VAT documents.

Anent the sixth issue, this Court finds the petition at bar to be flawed on account of the claim's prescribed status and the lack of proper filing of an application for refund before the respondent as required by Section 230 of the Tax Code.

A look into the reckoning dates of the period which is counted from the first day after the close of the quarter that is the subject of herein refund up to the time of filing of the instant petition for review would demonstrate that the portion of the claim falling under Section 106 (b) of the Tax Code have all prescribed. Thus:

Quarter Involved	Filing of petition	Period elapsed	Status
January to March 31, 1992	April 20, 1994	2 yrs. & 20 days	Prescribed

This Court has already stated in **AMI Philippines, Inc. vs. Commissioner of Internal Revenue**, CTA Case Nos.

5187 and 5199, promulgated on October 2, 1997, pp. 8-11,. that the repealing clause under Section 29 of Executive Order No 273, which initially introduced the VAT provisions in the Tax Code in 1986, has amended or modified Section 230 of the Tax Code in so far as its inconsistency with Section 106 (a) of the same code is concerned. Similarly, this Court adopts the same rationale enunciated in the latter case to the case at bar. In such regard, Section 230 should be read to additionally include the phrase "after the close of the quarter when zero-rated or effectively zero-rated sales were made" for cases falling under Section 106 (b) and the phrase "after the expiration of two succeeding quarters following the quarter in which the importation or local purchase was made, or in the case of a VAT-registered person who is just commencing business, after 180 days from the date of registration or actual start of business operations, whichever comes later" for cases covered under Section 106 (c), aside from the phrases "date of payment" and "date of exportation" mentioned in said **AMI** case, when reckoning the starting date of the two year prescriptive period for claiming a refund.

With respect to the portion of the claim concerning purchase of capital goods under Section 106(c) of the Tax Code, this Court deems it futile to dwell on whether or not the same has prescribed in view of our finding above that petitioner has failed to submit copies of the invoices or receipts and confirmation receipts accompanying the purchase of local or imported capital goods. As a consequence of such failure, we cannot determine with exactitude whether a particular claim really constitutes purchase of capital goods or not. Under this circumstance, we are unable to consider the due filing before this Court of any particular claim on purchase of capital goods.

This Court, likewise, rejects any probative value of the Application for Tax Credit/Refund of VAT Paid (BIR Form No. 2552) [Exhibit "B"] formally offered in evidence by the petitioner on account of the fact that it does not bear the BIR stamp showing the date when such application was filed together with the signature or initial of the receiving officer of respondent's Bureau. Worse still, it does not show the date of application and the signature of a certain Ma. Paz R. Semilla indicated in the form who appears to be petitioner's authorized filer.

A review of the records reveal that the original of the aforecited application was lost during the time petitioner transferred its office (TSN, p. 6, Hearing of December 9, 1994). Attempt was made to prove that petitioner exerted efforts to recover the original copy, but to no avail. Despite this, however, We observe that petitioner completely failed to establish the missing dates and signatures abovementioned. On this score, said application has no probative value in demonstrating the fact of its filing within two years after the close of the quarter when petitioner's sales of goods were made as prescribed under Section 106(b) of the Tax Code. We believe thus that petitioner failed to file an application for refund in due form and within the legal period set by law at the administrative level. Hence, the case at bar has failed to satisfy the requirement on the prior filing of an application for refund with the respondent before the commencement of a judicial claim for refund, as prescribed under Section 230 of the Tax Code. This fact constitutes another one of the many reasons for not granting petitioner's judicial claim.

Delving into the last remaining issue, this Court believes that the petitioner failed to appreciate the importance of the requirement on "VAT Invoice" prescribed under Section 108 of the Tax Code and Section 21 of Revenue Regulations No. 5-87. Although We have stated above already that the instant claims lack sufficient evidence, We have decided to tackle briefly this particular issue for the sake of legal clarity.

Section 21 of Revenue Regulations No. 5-87 simply states that "...[a]ny invoice bearing the VAT registration number of the seller shall be considered as 'VAT Invoice'" and that "...[a]ll purchases covered by invoices other than 'VAT Invoice' shall not be entitled to input taxes." The rationale for the VAT registration number appearing on the purchase invoice is to ensure that the seller is a VAT registered entity subject to the 10% output VAT which is passed on to the buyer, in this case, the petitioner. Such output VAT becomes the input VAT once it is paid by the petitioner. Without the registration number imprinted on the receipt or invoice, respondent has no way of determining whether petitioner has indeed paid the output tax included in the goods purchased.

Further, petitioner should not have accepted invoices without the corresponding VAT registration number because the law is vivid under Section 108 of the Tax Code that every invoice or receipt arising from sale should contain a VAT registration number. To adhere to petitioner's point of view would run afoul to the intendment of the law.

WHEREFORE, in view of the foregoing, the instant claim for refund is hereby **DENIED** on the ground of prescription, insufficiency of evidence and failure to comply with Section 230 of the Tax Code, as amended. Accordingly, the petition at bar is hereby **DISMISSED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate 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