Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
****

PHILEX MINING CORPORATION,
Petitioner,

C.T.A. CASE NO. 7426

- versus -

Members:

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 02 2008 ; 10:00 am

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DECISION

CASANOVA, J.:

Before Us is a Petition for Review filed by herein petitioner, **Philex Mining Corporation**, seeking that judgment be issued ordering respondent to refund or issue a tax credit certificate in favor of petitioner for the total amount of P9,411,327.74. The amount claimed allegedly represents unutilized input Value Added Tax ("VAT") arising from petitioner's importations of goods and local purchases of goods and services which are attributable to zero-rated sales of mineral products for the 1st quarter of 2004.

THE FACTS

Petitioner, **Philex Mining Corporation** ("Philex"), is a corporation organized and existing under the laws of the Philippines with office address at 27 Brixton St., Pasig City. It is engaged in mining business, including the exploration and operation of mine minerals and the commercial production and marketing of mine products and is a VAT-registered taxpayer.[1]

Respondent is the duly appointed Commissioner of Internal Revenue, with authority, among others, to decide, approve and grant claims for refund or tax credit of internal revenue taxes, with office address at the Bureau of Internal Revenue National Office Building, Agham Road, Diliman, Quezon City.

On April 23, 2004, Philex filed its VAT return for the 1st quarter of 2004. It later amended the said return on February 21, 2005 and reflected therein total zero-rated sales of P976,434,850.24, domestic purchases of goods of P325,527.40 with input tax of P32,552.74, and importation of goods of P93,787,750.00 with input tax of P9,378,775.00.[2]

On May 9, 2005, petitioner filed before the Bureau of Internal Revenue its Application for Tax Credit/Refund of VAT[3] for the period January to March 2004 in the amount of P9,411,327.74 representing excess input VAT for the 1st Quarter of 2004.[4]

On June 22, 2005, petitioner also filed its claim for refund or tax credit with the One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center ("OSSC") of the Department of Finance per Application No. 48831[5] in the amount of P9,411,327.74.[6]

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[1] *1st and 2nd Pars. of Joint Stipulation of Facts and Issues ("JSF"), Rollo, pp. 47-50, duly approved by this Court in a Resolution dated August 16, 2006, Rollo, p. 52.*
[2] *4th Par. of JSF, Ibid; Exhibit "H-9".*
[3] *Rollo. 17.*
[4] *6th Par. of JSF, Id.*
[5] *Rollo. p. 18.*
[6] *7th Par. of JSF, Id.*

Respondent did not grant the refund or tax credit certificate to Philex for the amount being claimed.[7]

On March 31, 2006, Philex filed the instant petition for review before this Court pursuant to Sec. 4.106-2(c) of Revenue Regulations No. 7-95 and Sections 112(D) and 229 of the 1997 Tax Code in order to protect its right and interest and alleging, *inter alia*, that the continuing inaction of the OSSC, which includes the respondent Commissioner, is tantamount to a denial of the application, to the damage and prejudice of petitioner.

Respondent, in her Answer[8] filed on June 5, 2006, interposed the following Affirmative and Special Defenses:

> "6. The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund or issuance of tax credit certificate;
>
> 8. The grant of claim for refund tan[t]amounts to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
>
> 9. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

THE ISSUES

The parties jointly stipulated the following issues[9] 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 1st quarter of 2004 are duly supported by documentary evidence.

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[7] *8th Par. of JSF, Id.*

[8] *Rollo, pp. 28-29.*

[9] *JSF, Statement of the Issues, Rollo, p. 49.*

2. Whether or not the accumulated or excess input VAT was not utilized or applied by Petitioner against output VAT in the 1st quarter of 2004 or in the succeeding quarters or taxable years.

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.

4. Whether or not Petitioner is entitled to the refund of the excess input taxes in the total amount of P9,411,327.74 for the 1st quarter of 2004 due to Petitioner being an exporter of mineral products."

During trial, petitioner presented documentary and testimonial evidence. On the other hand, respondent's counsel manifested he has no evidence to present and is dispensing with the submission of a Memorandum and thus, submitted the case for decision without the same.[10]

On January 11, 2008, petitioner filed its Memorandum.[11] Hence, on January 15, 2008, the Court submitted the case for decision. [12]

THE COURT'S RULING

The main issue to be resolved is whether or not petitioner-Philex is entitled to a refund in the amount of P9,411,327.74 representing excess input taxes for the 1st quarter of 2004.

It is important to note that Section 112 (A) of the 1997 Tax Code[13] provides:

"SEC.112. Refunds or Tax Credits of Input Tax—

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[10] *Rollo, p. 137.*
[11] *Rollo. pp. 143-162.*
[12] *Rollo. p. 164.*
[13] *1997 National Internal Revenue Code.*

> **(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 sales 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 provisions of Section 112 (A), in order to be entitled to a refund/ tax credit of unutilized input VAT, the following requisites must be complied with:

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 its shipment and sale of gold to Johnson Matthey of London, England is VAT zero-rated pursuant to Section 106(A)(2)(a)(1) of the 1997 Tax Code. Also, petitioner alleges that its sales of copper concentrates to Philippine Associated Smelting and Refining Corporation (PASAR), a PEZA registered enterprise, are subject to zero percent (0%) VAT citing as legal bases therefor Sections 106(A)(2)(a)(5) of the 1997 Tax Code and Section 23 of R.A. No. 7916, in relation to Art. 77(2) of the Omnibus Investments Code as well as RMC No. 74-99 and VAT Review Committee Ruling No. 026-2001.

The Commissioned Independent CPA, Mr. Albert G. Alba, in his report[14] submitted to this Court, noted that petitioner's zero-rated export sales amounting to US$17,395,989.00 with peso value equivalent of P976,434,850.24, as reported in petitioner's amended VAT return for the 1st quarter of 2004[15], were as follows:

Particulars		**Amount**
Current Quarter's Shipments:		
Direct export of gold to England	US$	48,517
Indirect exports of copper to PASAR		17,269,513
	US$	17,318,030
Previous Quarters' Shipments		
Adjustment to correct previous billings		77,959
Total Zero-Rated Sales		**US$17,395,989**

To substantiate its export sales for the 1st quarter of taxable year 2004 and that the foreign currency proceeds thereof were duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP), petitioner proffered before this Court its sales invoices[16], export

[14] *Exhibit "I"*
[15] *Exhibit "H-9"*
[16] *Exhibits "D-1" to "D-13"*

declaration[17], bills of lading/airway bills[18], bank certifications[19] and entries in petitioner's passbooks in local banks of the payments received[20].

Petitioner's direct export of gold to England 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, 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 prescribes that a VAT registered person like petitioner, shall for every sale, issue an invoice or receipt which must contain the following information:

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

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17 *Exhibit "D-1-a"*
18 *Exhibits "D-1-b to D-13-b"*
19 *Exhibits "E-1" to "E-3"*
20 *Exhibits "E-1-a" to "E-3-f"*

(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.

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, 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 provisions, any person claiming VAT zero-rated direct export sales must present at least three documents, to wit: a) the sales invoice as proof of sale of goods; b) 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 c) 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. In other words, only export sales supported by these documents shall qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the 1997 Tax Code.

Furthermore, the sales invoices supporting the export sales must comply with the invoicing requirements under the law and regulations, i.e., they must contain all the required information namely; a) the imprinted word "zero-rated"; b) the taxpayer's TIN-VAT number; and c) BIR Authority to Print or BIR Permit number.[21]

As earlier stated, petitioner's direct export sale pertains to its transaction with Johnson Matthey of London, England amounting to $48,517.00.

A scrutiny of the sales invoice supporting petitioner's direct export sale of gold to England in the amount of US$46,966.94[22](lower than the reported amount of $48,517.00) shows that the same are not duly registered with the BIR as there was no BIR Permit number reflected thereon and that 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 and Section 4.108-1 of Revenue Regulations No. 7-95. The said invoice was different in form as compared to the other invoices petitioner issued. The Court noted that petitioner was given authority to print invoices by virtue of BIR Permit No. OCN3AU0000030052, dated April 19, 1999, covering Pads (100 x 4) PX2101 – PX2500. Petitioner's issuance of invoice for its export sale to England is not within the authority given.

Furthermore, the airway bill[23] supporting the said export sale to England cannot be given evidentiary value for being mere photocopy and also, petitioner failed to present the original thereof for comparison, in violation of the Best

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[21] *Taganito Mining Corporation vs. Commissioner of Internal Revenue, CTA E.B. No. 7 (CTA Case No. 6384), January 31, 2006.*
[22] *Exhibit "D-1"*
[23] *Exhibit "D-1-b"*

Evidence Rule. Such exhibit was one of those whose admission into evidence was denied by the Court in a Resolution[24] dated October 19, 2007.

Considering the above discussions, petitioner's direct export sale of gold to England in the reported amount of $48,517.00 cannot qualify for VAT zero-rating.

With respect to petitioner's indirect export sales to PASAR in the amount of US$17,269,513.00, petitioner cites Section 106(A)(2)(a)(5) of the NIRC of 1997, as amended, which states:

> "**SEC. 106.** ***Value-added Tax on Sale of Goods or Properties.*** —
>
> (A) xxx
>
> (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.

It is worthy to note that sales by a VAT taxpayer from the Customs Territory to a PEZA entity are considered export sales under **Executive Order (E.O.) No. 226**, otherwise known as the Omnibus Investments Code of 1987, the relevant portions of which read as follows:

> "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

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[24] *Rollo, p. 135.*

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 exporter thereof shall be entitled to the benefits allowed by law for such transaction.**" (*Emphasis supplied*)

Further, in RMC 74-99, the BIR stated the following, viz:

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

xxx xxx xxx

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."

Clearly, from the foregoing 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, **indirect exports** made by a VAT taxpayer, like herein petitioner, to a PEZA registered entity are legally entitled to the zero percent (0%) VAT.

Nonetheless, petitioner must substantiate its indirect exports to PASAR by proper VAT sales invoices. Evidence forwarded to this Court shows that the sales invoices[25] covering petitioner's indirect exports to PASAR in the amount of US$17,269,513.00 fall outside the subject period of claim, which is for the 1st quarter of 2004, the invoices pertain instead to the 2nd and 3rd quarters of 2004. Thus, petitioner's reported indirect export sales to PASAR in the amount of US$17,269,513.00 also cannot qualify for VAT zero-rating.

To recapitulate, petitioner failed to prove that its reported direct and indirect export sales in the amount of P976,434,850.24 with US dollar equivalent of US$17,395,989.00 qualifies for VAT zero-rating.

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[25] *Exhibits "D-2" to "D-13"*

In view thereof, the Court finds it no longer necessary to discuss the other issues raised by the parties.

Well-settled is the rule that tax refunds are in the nature of tax exemptions and as such they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming it.[26]

WHEREFORE, for failure of petitioner to properly substantiate its claimed zero-rated sales, the Petition for Review is **DISMISSED**. Accordingly, petitioner's refund claim in the amount of P9,411,327.74 is hereby **DENIED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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[26] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332; and Commissioner of Customs vs. Court of Tax Appeals, 328 SCRA 822*

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