REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

SUMISETSU PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1352
(CTA Case No. 8062)

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner ,

- versus -

SUMISETSU PHILIPPINES, INC.,
Respondent.

CTA EB NO. 1354
(CTA Case No. 8062)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN , *and*
MANAHAN, *JJ.*

Promulgated:

MAY 25 2017 4:24 p.m.

x--x

DECISION

RINGPIS-LIBAN, *J.*:

Before the Court *En Banc* are consolidated[1] Petitions for Review separately filed by Sumisetsu Philippines, Inc. (Sumisetsu), petitioner in CTA EB No. 1352 *(Sumisetsu Philippines, Inc. v. Commissioner of Internal Revenue),* and

[1] CTA EB 1354 was consolidated with CTA EB 1352, the case bearing the lowest docket number per Minute Resolution issued on October 2, 2015.

by the Commissioner of Internal Revenue (CIR), petitioner in CTA EB No. 1354 *(Commissioner of Internal Revenue v. Sumisetsu Philippines, Inc.)*.

In CTA EB No. 1352, petitioner Sumisetsu seeks to partially annul, reverse and set aside the Decision dated May 27, 2015 (Assailed Decision) and the Resolution dated August 13, 2015 (Assailed Resolution) promulgated by the Special Second Division (Second Division) insofar as they partially deny Sumisetsu's claim for a refund or issuance of a tax credit certificate (TCC) for its unutilized Input Value-Added Tax (Input VAT) attributed to its zero-rated export sales for the taxable year ending December 31, 2008 (CY 2008).

In CTA EB No. 1354, on the other hand, petitioner CIR is seeking the reversal and nullification of the Assailed Decision and Resolution and praying that another one be rendered denying the entire claim for refund.

THE PARTIES

Sumisetsu is a corporation duly organized under Philippine laws, with principal office at the 8th Floor GC Corporate Plaza, 150 Legaspi Street, Legaspi Village, Makati City.[2] It is a VAT registered entity with Certificate of Registration No. 8RC0000019261,[3] engaged in the business of providing electrical and mechanical services for electrical transmission and distribution systems, air conditioning and ventilation systems, telephone and communications systems and other allied services.[4]

The CIR is the Commissioner of the Bureau of Internal Revenue (BIR), duly appointed to exercise the powers and perform the duties of his office including, inter alia, the power to decide disputed assessments, refunds of internal revenue taxes, fees, other charges, and penalties imposed in relation thereto, or other matters arising under the Tax Code. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

THE COURT'S JURISDICTION

On May 27, 2015, Sumisetsu received a copy of the Assailed Decision partially granting its Petition for Review in CTA Case No. 8062.

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[2] Par. 2, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 109.
[3] Par. 4, Stipulation of Facts, JSFI, Docket, p. 109.
[4] Par. 1, Stipulation of Facts, JSFI, Docket, p. 108.

On June 11, 2015, Sumisetsu filed a Motion for Partial Reconsideration of the Assailed Decision. Thereafter, on August 14, 2015, Sumisetsu received the Assailed Resolution denying its Motion for Partial Reconsideration. Under Section 3(b), Rule 8 of the Revised Rules of the Court o Tax Appeals (A.M. No. 05-11-07-CTA),[5] Sumisetsu had fifteen (15) days from receipt of the Resolution or until August 29, 2015, within which to file a Petition for Review with the Court *En Banc*. As August 29, 2015 fell on a Saturday, and the following Monday was a holiday, the Petition filed on September 1, 2015 was timely filed.

On May 27, 2015, the CIR received a copy of the Assailed Decision. On June 11, 2015, within the period of appeal, he filed a Motion for Reconsideration. Thereafter, on August 17, 2015, he received the Assailed Resolution denying his motion. Under Section 3(b), Rule 8 of the Revised Rules of the CTA (A.M. No. 05-11-07-CTA),[6] the CIR had fifteen (15) days from receipt of the said Resolution, or until September 1, 2015, within which to appeal to the Court *En Banc* by way of a Petition for Review.

On September 1, 2015, the CIR filed his "Motion for Extension of Time to File Petition for Review" by registered mail which the Court received on September 20, 2015, requesting for an extension of fifteen (15) days or until September 16, 2015 within which to file his Petition for Review. This was granted by the Court via Minute Resolution on September 15, 2015. As the CIR's Petition for Review was filed on September 16, 2015 via registered mail which the Court received on September 24, 2015, it is likewise timely filed.

THE FACTS[7]

Sumisetsu filed its quarterly Value Added Tax (VAT) Returns for the taxable year 2008 on the following dates:[8]

Exhibits	Quarter (2008)	Date of Filing of Return
"I"	1st	April 24, 2008
"J"	2nd	July 24, 2008
"K"	3rd	October 23, 2008
"L"	4th	January 26, 2009

[5] Dated November 22, 2005, and which took effect starting December 15, 2005.
[6] *Id.*
[7] As found by the Second Division, *Rollo*, pp. 24-61, and as culled from the records of the case.
[8] Pars. 5, 7, 9 and 11, Stipulated Facts, JSFI, Docket, pp. 109-110.

On February 22, 2010, Sumisetsu filed with the BIR an administrative claim for refund and/or tax credit of excess input VAT in the amount of ₱38,654,939.61, attributable to its sale of services to Philippine Economic Zone Authority (PEZA)-registered entities for the period covering January 1, 2008 to December 31, 2008.[9] On March 24, 2010, Sumisetsu filed an amended claim with the BIR, increasing the amount from ₱38,654,939.61 to ₱39,355,139.27.[10]

However, the CIR failed to act on Sumisetsu's administrative claim. Thus, on March 31, 2010, Sumisetsu filed its Petition for Review.

In his Answer,[11] the CIR raised the following Special and Affirmative Defenses:

> **"SPECIAL AND AFFIRMATIVE DEFENSES**
>
> 11. The petition for review should be dismissed on the following grounds:
>
> **(a) Lack of cause of action on the part of the petitioner for non-exhaustion of administrative remedies.**
>
> Under Section 112(C) of the National Internal Revenue Code (NIRC), respondent has 120 days from the date of submission of complete documents, within which to rule on an application for tax refund or credit. And only after the lapse of this period without any action on his part or receipt of his adverse decision that the aggrieved party may, within 30 days elevate the case to the Honorable Court.
>
> Petitioner filed its administrative claim for refund of its alleged unutilized input VAT for the four (4) quarters of 2008 in the amount of ₱39,355,139.27 on March 24, 2010. Thus, respondent had until July 22, 2010, within which to make a ruling. Thereafter, petitioner had 30 days or until August 21, 2010, to challenge his adverse ruling or inaction with the Honorable Court.

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[9] Exhibit "F"; Par. 13, Stipulated Facts, JSFI, Docket, p. 110.
[10] Exhibit "G"; Par. 14, Stipulated Facts, JSFI, Docket, p. 110.
[11] Docket, pp. 58-64.

Petitioner sprinted to the Honorable Court and prematurely filed the instant Petition for Review on March 31, 2010, or before the 120-day period granted unto the respondent lapsed, effectively depriving the respondent of the opportunity to rule on the claim for refund. The failure of the petitioner to exhaust all available administrative remedies, justifies the dismissal of the instant petition.

xxx xxx xxx

12. Petitioner's sales of services to PEZA-registered enterprises to qualify as effectively zero-rated sales, the latter should have availed of the 5% preferential tax; otherwise, they are subject to 12% VAT under Section 108 of the NIRC.

It bears stressing that under Section 23 of Republic Act No. 7916, two different fiscal incentives are granted to an ecozone enterprise, to wit:

> "SEC. 23. Fiscal Incentives – Business establishments operating within the ECOZONE shall be entitled to the fiscal incentives as provided for under the Presidential Decree No. 66, the law creating the Export Processing Zone Authority, or those provided for under Book VI of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987."

Based on the aforequoted Section 23 of Republic Act (RA) No. 7916, a PEZA registered enterprise has the option to choose between two sets of fiscal incentives. One, is that provided for under Presidential Decree No. 66, as amended, and Section 24 of RA 7916 which includes the 5% preferential tax on gross income earned which is in lieu of national and local taxes, and second, as those provided for under Book VI of Executive Order No. 226, including but not limited to an income tax holiday (ITH) of 4 to 6 years depending on whether or not an entity is registered as a pioneer or non-pioneer enterprise. If an ecozone enterprise chooses the 5% preferential tax, it is exempt from payment of all national and local taxes. However, if an ecozone enterprise chooses the income tax holiday, it is only exempt from payment of the income tax but still subject to other national internal revenue taxes including the value-added tax.

It must be pointed out that an ecozone enterprise cannot avail of these two sets of fiscal incentives at the same time. This was explained by the Bureau of Internal Revenue in VAT Ruling Nos. 037-98; 043-98; 027-99; and 063-99 *(Read-Rite Philippines, Inc. (Formerly Sunward Technologies Phils., Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 5659, September 29, 2000).* Thus, if the petitioner's PEZA-registered enterprises clients have availed of the fiscal incentives under Executive Order No. 226, that is, an income tax holiday, they are [became] *(sic)* subject to value-added tax. Therefore, petitioner's sales of goods, property and services to them shall be subject to 12% VAT.

Under Sections 4.100-3 and 4.102-2 of Revenue Regulations No. 7-95, implementing Sections 100(a)(2)(C) and 100(b)(3) of the old National Internal Revenue Code (NIRC) [now Sections 106(A)(2)(c) and 108(B)(3) of the NIRC of 1997], as amended, the term 'effectively zero-rated sale of goods, property and services' shall only apply to sales made by a VAT-registered person to a person or entity who is exempt from indirect tax, pursuant to the provisions of a special law or international agreement in which the Philippines is a signatory.

The special law in this case is R.A. No. 7916, otherwise known as the Special Economic Zone Act of 1995. There is no existing provision under this law that a PEZA-registered enterprise is exempt from indirect tax. Hence, petitioner's PEZA-registered clients are only exempt from income taxes during their Income Tax Holiday. Even after the expiration of the Income Tax Holiday, petitioner's PEZA-registered clients shall only be exempt from all national and local taxes. However, all these taxes to which petitioner's PEZA-registered clients shall enjoy exemption refer to direct taxes. On the other hand, the 12% VAT imposed on its purchases of goods, property, or services are direct taxes in the hands of the supplier (petitioner in this case) but indirect taxes in the hands of petitioner's PEZA-registered clients since the same are passed-on as part of the cost of its purchases.

Accordingly, PEZA-registered enterprises' suppliers of services (petitioner in this case) cannot qualify for zero percent (0%) VAT, hence, shall be subject to 12% VAT on their sales to such PEZA-registered enterprises pursuant to Section 108 of the NIRC of 1997.

xxx xxx xxx"

In support of its claim, Sumisetsu presented the following witnesses: Leonard Lyle M. Tabalon[12] -- petitioner's Business Control Division Assistant Manager, Marichu M. Go[13] -- petitioner's Accounting Assistant in its Finance Department, Cecilia S. Magalona[14] -- petitioner's Finance and Accounting Division Manager, and Antonio B. Constantino[15] -- the Court Commissioned Independent Certified Public Accountant (ICPA).

Sumisetsu likewise formally offered[16] its pieces of evidence, which were all admitted by the Court in the Resolution[17] dated June 1, 2011.

On the other hand, due to the absence of an Investigation Report, the counsel of the CIR submitted the case for decision. As such, the Court directed both parties to submit their memoranda.[18]

Sumisetsu filed its Memorandum[19] on August 10, 2011 while the CIR failed to file the same. The case was submitted for decision on August 31, 2011.[20]

In the Decision[21] dated October 11, 2011, this Court dismissed the Petition for lack of jurisdiction. The dispositive portion thereof reads:

"**WHEREFORE**, the instant Petition for Review is hereby **DISMISSED** for lack of jurisdiction.

SO ORDERED".

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[12] Affidavit, Docket, pp. 124-127; Minutes of the Hearing dated September 29, 2010, Docket, p. 128.
[13] Affidavit, Docket, pp. 154-157; Minutes of the Hearing dated October 18, 2010, Docket, p. 158.
[14] Affidavit, Docket, pp. 163-172; Minutes of the Hearing dated November 22, 2010, Docket, p. 193.
[15] Affidavit of Mr. Jerome Antonio B. Constantino (In Question and Answer Form), Docket, pp. 209-218; Minutes of the Hearing dated January 26, 2011, Docket, p. 220.
[16] Formal Offer of Documentary Evidence, Docket, pp. 232-256.
[17] Docket, pp. 261-262.
[18] Minutes of the Hearing dated July 11, 2011, Docket, p. 264.
[19] Docket, pp. 265-284.
[20] Resolution, Docket, p. 287.
[21] Docket, pp. 289-301.

On November 3, 2011, Sumisetsu filed its Motion for Reconsideration[22] which the Court denied in the Resolution[23] dated December 26, 2011. The dispositive portion of the said Resolution reads:

> "**WHEREFORE**, premises considered, petitioner's **"Motion for Reconsideration"** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**".

On January 17, 2012, Sumisetsu elevated its case to the Court *En Banc* via a Petition for Review[24] under Rule 8, Section 3(b) of the 2005 Revised Rules of the Court of Tax Appeals, as amended. In the Decision[25] dated May 17, 2013, the Court *En Banc* granted the Petition, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant *Petition for Review* is hereby **GRANTED**. The *Resolution* dated December 26, 2011 and the *Decision* dated October 18, 2011 enunciated by the Second Division of this Court, which dismissed the Petition for Review docketed as CTA Case No. 8062, are **REVERSED AND SET ASIDE**.
>
> Accordingly, CTA Case No. 8062 is hereby **REMANDED** to the court of origin for further proceedings.
>
> **SO ORDERED**".

The CIR filed his Motion for Reconsideration[26] of the aforesaid Decision, which was denied by the Court *En Banc* in the Resolution[27] dated November 6, 2013. The dispositive portion thereof reads:

> "**WHEREFORE**, premises considered, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit.

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[22] Docket, pp. 304-322.
[23] Docket, pp. 326-331.
[24] Docket, pp. 332-349.
[25] Decision dated May 17, 2013, penned by Associate Justice Amelia R. Cotangco-Manalastas, Docket, pp. 404-419.
[26] Docket, pp. 425-430.
[27] Docket, pp. 435-440.

SO ORDERED".

The Decision of the Court *En Banc* became final and executory on June 5, 2013.[28] Thus, upon remand to the Court in Division, the case was set for presentation of Sumisetsu's additional evidence.[29] Meanwhile, upon manifestation of Sumisetsu that it would no longer be presenting additional evidence, the Court directed the parties to submit their memoranda. Sumisetsu submitted its memorandum on July 23, 2014, while respondent failed to file the same. Hence, the case was submitted for decision on July 31, 2014.

The Court in Division partially granted the Petition for Review with the dispositive portion providing, thus:

> "**WHEREFORE**, in view of the foregoing, the instant Petition for Review is **PARTIALLY GRANTED.** Accordingly, let a tax refund or a tax credit certificate be issued in favor of petitioner in the amount of ₱6,891,038.03 representing petitioner's excess and unutilized input taxes attributable to zero-rated sales for the taxable year 2008.
>
> **SO ORDERED**."

The parties timely filed their Motions for Partial Reconsideration[30] which the Court in Division resolved on August 13, 2015. Finding no merit in the motions for partial reconsideration and no valid justification to compel a modification or reversal of the Assailed Decision, the Resolution denied both motions.

As recounted in the earlier portion of this Decision, the parties timely filed their respective appeals via Petition for Review with the Court *En Banc*.

In a Resolution dated September 21, 2015, the Court ordered the CIR to file his Comment on the Petitions for Review in CTA EB No. 1352.[31]

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[28] Entry of Judgment, Docket, p. 444.
[29] Resolution dated May 22, 2014, Docket, pp. 447-448.
[30] Sumisetsu filed its "Motion for Partial Reconsideration" on June 11, 2015 while the CIR filed his "Motion for Partial Reconsideration" through registered mail on June 11, 2015 which the Court received on June 25, 2015.
[31] *Id.*, pp. 90-91.

On October 2, 2015, CTA EB No. 1354 was consolidated with CTA EB No. 1352, the case bearing the lowest docket number by way of Minute Resolution.

In a Resolution dated February 11, 2016[32], the Court noted the CIR's failure to file Comment within the period given, as evidenced by the Records Verification Report by the Judicial Records Division on November 23, 2015. In that same Resolution, Sumisetsu was also ordered to file Comment on the CIR's Petition for Review in CTA EB. No. 1354 which it did on March 4, 2016.[33]

The Petitions for Review were given due course in a Resolution dated April 19, 2016, and the parties were ordered to submit their respective memorandum within thirty (30) days from receipt of the Resolution.[34]

Sumisetsu submitted its Memorandum on May 30, 2016[35] while the the CIR failed to submit his Memorandum as per Records Verification Report of the Judicial Records Division dated June 15, 2016.[36]

In a Resolution dated June 23, 2016, the consolidated cases were submitted for decision.[37]

ISSUE

Is Sumisetsu entitled to refund or credit for its Input VAT payments attributable and allocated to zero-rated sales of services for the year 2008 in the aggregate amount of ₱20,785,932.12?

THE ARGUMENTS OF THE PARTIES

In CTA EB 1352, Sumisetsu argues that the Court in Division erroneously disallowed as zero-rated sales services rendered by Sumisetsu to certain entities, *i.e.* Nanox Philippines, Inc. (Nanox), Penta-Shimizu TOA Joint Venture (Penta-Shimizu), and Sanyo Capacitor Philippines Corporation (Sanyo). The Court ought to have given probative value to the respective certified true copies of the Clark Freeport Zone (CFZ) Certification, and the

[32] *Id.*, pp. 95-97.
[33] *Id.*, pp. 98-106.
[34] *Id.*, pp. 108-110.
[35] *Id.*, pp. 162-180.
[36] *Id.*, p. 131.
[37] *Id.*, pp. 133-134.

Subic Bay Freeport Enterprise (SBFE) Certificates of Registration in accordance with *Corpuz v. People of the Philippines*[38].

Sumisetsu further argues that it has proven payment of input VAT noted by the ICPA as exceptions since supporting documents were submitted to the ICPA for review and were duly reported in Sumisetsu's VAT returns. Since the ICPA Final Report clearly showed that Sumisetsu did not claim the unutilized input VAT for 2008 as credits against its output VAT liability for the subsequent years 2009 and the 1st to 2nd quarters of 2010, it should be allowed to claim in full the input VAT attributable to zero-rated sales which have already been paid.

Lastly, Sumisetsu argues that the ICPA's conclusion that Sumisetsu has properly substantiated excess input tax attributable to VATable sales carried over to CY 2008 from the fourth quarter of CY 2007 in the amount of ₱2,480,067.72, as well as the ICPA's finding that Sumisetsu's input tax for the end of the CY 2007 is greater than its output tax should have been given more weight by the Court.

On the other hand, in CTA EB 1354, the CIR's sole argument is that Sumisetsu's sale of services that do not qualify for VAT zero-rating must be included in the adjusted VATable sales of Sumisetsu.

The CIR propounds that under the VAT Law, a sale may either be 12% VATable, VAT-Exempt, or Zero (0%)-rated. Since the Court in Division found that an amount of ₱75,797,717.53 does not qualify for zero-rating, and as the same amount does not pertain to VAT-exempt transactions, then the amount should be included in the adjusted VATable sales of Sumisetsu. Since the corresponding 12% VAT of ₱75,797,717.53 is ₱9,117,566.10, the substantiated excess input taxes of ₱6,891,038.03 is then much lower than the output VAT liability and, consequently, there is no more excess input VAT that may be refunded to Sumisetsu.

THE RULING OF THE COURT

A judicious review of the arguments raised by the parties in the consolidated Petitions for Review shows that they merely rehashed the very same arguments in their previous pleadings all of which have been thoroughly discussed and passed upon by the Court in Division in the Assailed Decision of May 26, 2015, and in the similarly Assailed Resolution of August 13, 2015. The Court *En Banc* sees no compelling reason to deviate from the ruling of the Court in Division or even modify its findings.

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[38] G.R. No. 180016, April 29, 2014.

Disallowance as Zero Rated Sales Services Rendered by Sumisetsu to Certain Entities was Proper

Sumisetsu assails the finding of the Court in Division that denied the refund of input VAT attributable to the zero-rated sales of services to Nanox, Penta-Shimizu, and Sanyo.

As regards Nanox, the Court in Division did not give probative value to the CFZ certification as it found the authority of the certifying officer to be unknown. Relying on the case of *Manuel G. Villatuya v. Atty. Bede S. Tablingcos*[39], Sumisetsu propounds that as documents certified by the NSO were given the presumption of regularity in that case, so it must be in the case at bar.

We fail to be persuaded. As discussed in the assailed Resolution, the Revised Rules of Court, specifically Sections 19 and 24 of Rule 132, mandates how public documents are proven.

> "'Sec. 19. *Classes of Documents* - For the purpose of their presentation in evidence, documents are either public or private.
>
> Public documents are:
>
> (a) **The written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country;**
>
> (b) Documents acknowledged before a notary public except last wills and testaments; and
>
> (c) Public records, kept in the Philippines, of private documents required by law to be entered therein.

[39] A.C. No. 6622, July 10, 2012.

> All other writings are private.' (Emphasis supplied)
>
> 'Sec. 24. *Proof of official record* - The record of public documents referred to in paragraph (a) of section 19, when admissible for any purpose, **may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy** xxx' (Emphasis supplied)

Under the above-quoted provision of the Rules, public documents consist of written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country, among others. These documents may be evidenced by (1) official publication thereof, or (2) copy attested by the officer having the legal custody of the record.

In the instant case, petitioner failed to show that the subject certification was attested to by the officer having legal custody of the record. x x x"

As regards the certifications issued to Penta-Shimizu and Sanyo, the Court in Division did not give probative weight to the facsimile copy of the SBFE Certification of Registration of the former and the photocopy of the certified true copy of the Certification of Registration of the latter for being in violation of the Best Evidence Rule citing *Republic of the Philippines v. Regional Trial Court*[40]which held that:

> "The Best Evidence Rule provides that the court shall not receive any evidence that is merely substitutionary in its nature, such as photocopies, as long as the original evidence can be had. Absent a clear showing that the original writing has been lost, destroyed or cannot be produced in court, **the photocopy must be disregarded, being unworthy of any probative value and being an inadmissible evidence.**" *(Emphasis supplied)*

[40] G.R. No. 172931, June 18, 2009.

Sumisetsu cites *Corpuz v. People of the Philippines*[41] wherein the Supreme Court allowed a photocopy of a receipt into evidence to support its argument, thus:

> "According to petitioner, the CA erred in affirming the ruling of the trial court, admitting in evidence a receipt dated May 2, 1991 marked as Exhibit 'A' and its submarkings, although the same was merely a photocopy, thus, violating the best evidence rule. However, the records show petitioner never objected to the admissibility of the said evidence at the time it was identified, marked and testified upon in court by private complainant. The CA also correctly pointed out petitioner also failed to raise an objection in his Comment to the prosecution's formal offer of evidence and even admitted having signed the said receipt. The established doctrine is when a party failed to interpose a timely objection to evidence at the time they were offered in evidence, such objection shall be considered as waived."

Sumisetsu further argues that the Court in Division erroneously relied on *Republic of the Philippines v. Regional Trial Court*[42] which held that a mere photocopy is unworthy of any probative value and is inadmissible in evidence as the *Republic* case was decided in 2009, prior to *Corpuz*, which was decided in 2014. Sumisetsu claims that as *Corpuz* is the later pronouncement by the Supreme Court, it effectively overturned *Republic*.

However, in *Rommel C. Arnado v. Commission on Elections and Florante Capitan*[43], a more recent case than *Corpus* decided by the Supreme Court *En Banc* in 2015, the High Tribunal held:

> "In maintaining that Arnado used his Philippine passport in travelling abroad in the first quarter of 2010, J. Leonen relies on the copy thereof attached to the rollo of the Maquiling case. But said copy of Arnado's Philippine passport[44] is a mere 'CERTIFIED TRUE COPY **FROM THE MACHINE COPY ON FILE**' as attested to by Rosario P. Palacio, Records Officer III of the Comelec.[45] This is clearly stamped on aforesaid copy of Arnado's Philippine passport. **A machine copy or photocopy is a mere secondary evidence.**[46] **As**

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[41] G.R. No. 180016, April 29, 2014.
[42] G.R. No. 172931, June 18, 2009.
[43] G.R. No. 210164, August 18, 2015.
[44] Citing Rollo (G.R No. 195649), pp. 242-245.
[45] Emphasis supplied.
[46] Country Bankers Insurance Corporation v. Lagman, 669 Phil. 205, 216 (2011).

> **such, it cannot be admitted in evidence until and unless the offeror has proven the due execution and the subsequent loss or unavailability of the original.**[47] In this case, however, Arnado's Philippine passport is not missing. Thus, said photocopy of Arnado's Philippine passport cannot sway us to depart from the uncontroverted certification of the Bureau of Immigration that Arnado used his US passport on January 12, 2010 and March 23, 2010." *(Emphasis in the original and supplied)*

Sumisetsu goes on to argue that the case cited by the Court in Division, *Rommel Atienza v. Board of Medicine and Editha Siosion*[48]which stated that "probative value refers to the question of whether or not it proves an issue"[49], the Supreme Court admitted the questioned exhibits and recognized that these could be considered in resolving the case. Since in the instant case, the CIR did not object to the admissibility of the subject certificates of registration which have, in fact, been admitted[50], they should be given probative value if it will prove an issue.

Sumisetsu's argument does not hold sway. Once the claim or refund has been elevated to the Court, the admissibility, materiality, relevancy, probative value and weight of evidence presented therein become subject to the *Rules of Court*;[51]and the question of whether or not the evidence submitted by a party is sufficient to warrant the grant of a claim for refund lies within the sound discretion and judgment of the Court.[52]

There is a difference in the admissibility and probative value of evidence as discussed by the Court in Division citing the *Atienza* case. In that case, the Supreme Court said:

> "Admissibility of evidence refers to the question of whether or not the circumstance (or evidence) is to be considered at all. On the other hand, the probative value of evidence refers to the question of whether or not it proves an issue."[53]

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[47] Citibank, NA. Mastercard v. Teodoro, 458 Phil. 480,489 (2003).
[48] G.R. No. 177407, February 9, 2011.
[49] Assailed Decision, p. 17.
[50] *Docket*, pp. 261-262.
[51] Pilipinas Total Gas, Inc. v. Commissioner of Internal Revenue, G.R. No. 207112, December 8, 2015.
[52] *Id.*
[53] *Id.* at Note 51, citing PNOC Shipping and Transport Corporation v. Court of Appeals, 358 Phil. 38, 59 (1988).

While the aforementioned exhibits have been admitted in evidence, *We* come to the same conclusion with the Court in Division that, in terms of evidentiary standards as ascribed by the *Rules of Court*, the same have been found insufficient. Hence, no probative value can be accorded to them.

Exceptions Noted by the ICPA and the Court in Division Remain to be Exceptions

Sumisetsu argues that the exceptions noted in the Final Report of the ICPA[54] and in the findings of the Court in Division amounting to ₱2,794,079.66[55] should be considered for the reasons it cited below and that the full amount of paid input tax being claimed should be refunded to them.

Exception	Amount of Input VAT	Reason
Input taxes on purchase of goods supported by invoices dated outside the period of claim	64,244.72[56]	The input taxes can be claimed as refund provided these are attributable to zero-rated sales for the period covered by the claim for refund and have not been applied against output taxes.
Input taxes on purchase of services supported by official receipts but VAT is not separately indicated therein	1,040,220.56[57]	In BIR Ruling DA-(VAT-081) 519-09, it was held the official receipt issued by the supplier of the taxpayer was presumed to have included the VAT in the total invoice amount since the VAT is not shown as a separate item. Thus, since the VAT was presumed included in the gross amount, which can be easily computed by simple mathematical computation, Sumisetsu should not be faulted in the failure of its supplier to separately indicate the input taxes on its purchases.
Input VAT on domestic	1,073,407.13[58]	The input taxes can be

[54] Exhibit "SS", pp. 12-27.
[55] *Rollo*, CTA EB No. 1352, pp. 10-12.
[56] *Id.* at p. 31.
[57] *Id.* at p. 34.
[58] See Exhibit "SS", p. 22, Item 16; *Rollo*, p. 44.

purchases of goods supported by VAT invoices dated outside the period of claim		claimed as refund provided these are attributable to zero-rated sales for the period covered by the claim for refund and have not been applied against output taxes.
Input VAT on domestic purchases of services supported by VAT official receipts dated outside the period of claim	616,207.25	The input taxes can be claimed as refund provided these are attributable to zero-rated sales for the period covered by the claim for refund and have not been applied against output taxes[59]

For the second exception noted by Sumisetsu, it further claims that while the Court in Division stated in its Resolution that "BIR Ruling DA-(VAT-081) 519-09 which is based on RR 16-2005, is applicable only to sale, barter, or exchange of goods or properties or real properties. It does not apply to sale of services, as in this this case"[60], it should still be allowed to claim input VAT even if it pertains to sale of services in line with the spirit of the law.

All in all, Sumisetsu claims that the principle of *solutio indebiti* should govern since the BIR received something it was not entitled to as the exceptions pertain to input taxes already paid by it during CY 2008.

These arguments have been already advanced by Sumisetsu in its Motion for Partial Reconsideration in the proceedings in the Court in Division and have been examined, considered and thoroughly discussed in the Assailed Resolution.

As regards, Sumisetsu's input VAT on domestic purchases of services or goods supported by VAT official receipts dated outside the period of claim, the Court in Division properly denied the same as no proof has been presented by Sumisetsu that these are attributable to zero-rated sales for the period covered by the claim for refund. It is as simple as that.

This Court is mindful of the fact that sometimes there are circumstances that result in a situation wherein although a zero-rated sale/transaction is done during the period claimed, the invoice is dated

[59] See Note 2, Docket, Vol. II, pp. 523-524.
[60] *Rollo*, CTA EB No. 1352, p. 72.

outside the period of the claim. In fact, in *Philex Mining Corporation v. Commissioner of Internal Revenue*[61] (PMC Case), the Second Division of this Court partially granted the taxpayer's claim for refund even when the final invoices submitted by the taxpayer bear dates much later than the dates of shipment indicated in the bills of lading and provisional invoices.

However, in the *PMC* case, the taxpayer was able to sufficiently explain that in its direct exports of copper concentrates, it issues two (2) invoices to the buyer, *viz.: (1)* a Provisional Invoice covering ninety percent (90%) of the estimated value of the shipment, issued upon shipment, and *(2)* a Final Invoice, issued when the parties reach an agreement regarding the final settlement weights, assays and quotations and the final price of the shipment. In the face of proof, the Second Division held that the actual shipment date of the mineral products, as appearing in the bills of lading, should be regarded as the actual date when the export sales took place. As earlier discussed, no proof has been provided by Sumisetsu to merit that consideration in the case at bar.

Sumisetsu's exhortation that the "Spirit of the Law" must prevail in construing BIR Ruling DA-(VAT-081) 519-09 must likewise fail. As noted by the Court in Division, in the case of *Chevron Holdings, Inc. [formerly Caltex (Asia) Limited] v. Commissioner of Internal Revenue*[62], the Court has already construed the ruling to be applicable *only to sale, barter, or exchange of goods of real properties subject to VAT,* thus:

> "As for the amount of Php24,598,395.58 representing petitioner's input VAT claim which was disallowed because the VAT official receipts and sales invoice do not indicate VAT as a separate item, the Court *En Banc* finds no merit in petitioner's arguments. Petitioner recognizes that the law states that VAT should be indicated as a separate item under Republic Act No. 9337, but cites Revenue Regulation ("RR") No. 16-2005 which deems the selling price to be inclusive of VAT if not billed separately, and BIR Ruling [DA-(VAT- 081) 519-09] which also deems the selling price to be inclusive of VAT if not billed separately.
>
> However, **the provision which petitioner cites in RR No. 16-2005, which was also the basis in BIR Ruling [DA-(VAT-081) 519-09]** states that:

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[61] CTA Case No. 8228, May 31, 2012.

[62] CTA EB No. 940 (CTA Case Nos. 7776 & 7813), October 28, 2014, penned by Associate Justice Lovell R. Bautista.

> 'SECTION 4.106-4. Meaning of the Term "Gross Selling Price". - The term 'gross selling price' means the total amount of money or its equivalent which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods or properties, excluding VAT. The excise tax, if any, on such goods or properties shall form part of the gross selling price.
>
> In the case of sale, barter or exchange of **real property** subject to VAT, gross selling price shall mean the consideration stated in the sales document or the fair market value whichever is higher. xxx"
>
> **It is clear from the quoted portion of RR No. 16-2005 that the provision petitioner cited only pertains to sale, barter or exchange of real property subject to VAT.** Thus, the Court En Banc cannot accept petitioner's theory and therefore must uphold the disallowance of Php24,598,395.58. The law is clear in that the amount of tax shall be shown as a separate item in the invoice or receipt. (Emphasis supplied)"

Given the foregoing, *We* find no error in the Court in Division's finding that "BIR Ruling DA-(VAT-081) 519-09 which is based on RR 16-2005 is applicable only to sale, barter or exchange of goods or properties or real properties. It does not apply to sale of services, as in this case."[63]

ICPA Findings are Merely Persuasive, Not Conclusive on the Court

Sumisetsu's final argument is that the ICPA's conclusion that it has properly substantiated excess input tax attributable to VATable sales carried over to CY 2008 from the fourth quarter of CY 2007 in the amount of ₱2,480,067.72 should be accorded weight and credence and should not have been disallowed by the Court in Division.

Section 3, Rule 13 of the 2005 Revised Rules of the CTA, as amended, provides:

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[63] *Rollo*, CTA EB No. 1352, p. 71.

"SEC. 3. *Findings of 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. **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.**" *(Emphasis supplied)*

As noted in the Assailed Decision and Resolution, the Court found, upon its own verification, that Sumisetsu's output taxes for the subject taxable period as declared in its quarterly VAT returns exceeded its input taxes. Hence, the Court in Division's conclusion that Sumisetsu has no excess input taxes to be carried over to the taxable year 2008 is upheld.

The CIR's Proposal Re: Sumisetsu's Sale of Services that Do Not Qualify for VAT Zero-rating

The CIR propounds in its Petition that since the Court in Division found that Sumisetsu's zero-rated sales amounting to ₱75,979,717.53 do not qualify for zero-rated sales, then the said amount should be subjected to 12% VAT and must be deducted from the substantiated input taxes.

This contention has already been thoroughly considered and addressed by the Court in Division, thus:

"The Court finds respondent's argument specious.

In the case of *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*[64], the Supreme Court held that:

"If the taxpayer is found liable for taxes other than the erroneously paid 5% final tax, the amount of the taxpayer's liability should be computed and deducted from the refundable amount.

[64] G.R. No. 175410, November 12, 2014.

> **Any liability in excess of the refundable amount, however, may not be collected in a case involving solely the issue of the taxpayer's entitlement to refund. The question of tax deficiency is distinct and unrelated to the question of petitioner's entitlement to refund. Tax deficiencies should be subject to assessment procedures and the rules of prescription. The court cannot be expected to perform the BIR's duties whenever it fails to do so either through neglect or oversight. Neither can court processes be used as a tool to circumvent laws protecting the rights of taxpayers.'** (Emphasis supplied)

In the *SMI-ED* case, the petitioner therein sought to refund the taxes paid representing 5% preferential tax. Upon review by this Court, however, petitioner was found to be liable to 6% capital gains tax instead of the 5% preferential tax. **In upholding the Court, the Supreme Court ruled that the CTA has no assessment powers.** However, when the determination of the proper category of tax to be paid is intertwined to the issue of entitlement to claim for refund, the CTA may properly determine if a taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid. Accordingly, the determination of the proper category of tax that petitioner should have paid is an incidental matter necessary for the resolution of the principal issue, which is whether petitioner was entitled to a refund.[65]

In the instant case, respondent wants this Court to impose 12% VAT on petitioner's sales of services to show that petitioner's input taxes will not exceed its output taxes that may be the proper subject of a claim for refund. **However, following the ruling of the Supreme Court in SMI-ED case, this does not involve the determination of the proper category of tax that should be imposed upon petitioner. Instead, this involves the imposition of 12% VAT to petitioner's sale of services which is equivalent to respondent's power of assessment that the Court does not possess.**

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[65] *Id.*, citing Collector of Internal Revenue v. Lacson, 107 Phil. 945, 947-948 (1960).

> In other words, **the Court is not empowered to collect any liability in excess of petitioner's refundable amount where the sole issue involved is its entitlement to refund**. Verily, it is not within the Court's jurisdiction to impose 12% VAT on petitioner's subject sale of services." *(Emphasis supplied)*

We find that the CIR has advanced no argument persuasive enough to disturb this finding.

WHEREFORE, the Petition for Review of Sumisetsu Philippines, Inc. in CTA EB No. 1352 and the Petition for Review of the Commissioner of Internal Revenue in CTA EB No. 1354 are both **DENIED** for lack of merit.

Accordingly, the Assailed Decision dated May 26, 2015 and the Assailed Resolution dated August 13, 2015 of the Court's Special Second Division in CTA Case No. 8062 are **AFFIRMED** *in toto.*

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CATHERINE T. MANAHAN
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 this Court.

ROMAN G. DEL ROSARIO
Presiding Justice