REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PHILEX MINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. 7528 & 7564
Members:

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

Promulgated:
AUG 10 2009; 10:45 am

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for the 3rd and 4th quarters of 2004 in the total amount of P13,665,856.60 broken down as follows:

CTA Case No.	Period Covered	Amount
7528	3rd Quarter 2004	P11,572,208.81
7564	4th Quarter 2004	2,093,647.79
	TOTAL	P13,665,856.60

Petitioner is a corporation organized under Philippine laws with principal office at 27 Brixton St., Pasig City. It is engaged in the mining business including the exploration and operation of mine properties and the commercial production and marketing of mine products.[1]

Respondent is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or the credit of taxes erroneously or illegally collected, other refundable or creditable taxes under the Tax Code, with address at the BIR National Office, Diliman, Quezon City, where they may be served with summons.[2]

Petitioner is VAT-registered with VAT Registration Certificate No. 35-6-000731 effective October 29, 1997 (under BIR Form No. 2303 as of January 31, 1997). Petitioner, likewise, had its Application for Zero-Rate, pursuant to Sec. 4, 100-3 of Revenue Regulations No. 7-95, approved effective April 12, 1998.[3]

The facts of the case, as culled from the records, are as follows:

[1] Petition for Review, par. 2 Docket, p. 1; Stipulation of Facts and Issues (SFI), Docket, p. 43 (Case No. 7528)
[2] Ibid, par. 3, Docket, p. 1 (Case No. 7528)
[3] Id, par. 3, SFI, Docket, p. 43 (Case No. 7528)

Petitioner entered into Contract No. 7002 on October 29, 2001 with Johnson Mathey Public Limited Company (Johnson Mathey) of Orchard Road, Royston, Herts, SG 8 5HE England, for the delivery by petitioner to Johnson Mathey of "gold dore" in the form of bars for refining at Johnson Mathey's refinery at Royston, England and the subsequent sales of the refined gold to Johnson Mathey. Petitioner made one (1) shipment of gold bars to Johnson Mathey during the 3rd quarter of 2004 with a dollar value of US $45,061.[4]

On March 11, 2004, petitioner entered into a Long Term Gold and Copper Concentrates Sales Agreement[5] with Pan Pacific Copper Co., Ltd. Of Tokyo, Japan for the sale of copper concentrate by petitioner to Pan Pacific starting April 1, 2004. Petitioner made two (2) shipments of copper concentrates to Pan Pacific during the 3rd quarter of 2004 with a gross value of US $10,685,784.[6]

By virtue of a letter agreement[7] entered into on April 25, 2003, whereby petitioner shall sell and Philippine Associated Smelting and Refining Corporation (PASAR) shall buy copper concentrates for the period from April 1, 2003 to March 31, 2004 and April 1, 2004 to March 31, 2005, petitioner made three (3) shipments of copper concentrates to PASAR during the 3rd quarter of 2004 with a gross value of US $4,518,716 and six (6) shipments for the 4th quarter of 2004 with a gross value of US $22,378,248.[8]

[4] Memorandum for the Petitioner, par. 8-9, Docket, p. 157-158 (Case No. 7528)
[5] Exhibit "B"
[6] Ibid, par. 1, Docket, p. 158 (Case No. 7528)
[7] Exhibit "A"
[8] Id, par. 2 & 3, Docket, p. 158 (Case No. 7528)

Petitioner filed its original and amended VAT returns for the 3rd quarter of 2004 on October 25, 2004 and February 21, 2005[9], respectively, which reflected the following:

Total zero-rated sales		P857,716,670.95
Domestic purchases of goods		5,212,078.10
Input Tax	P 521,207.81	
Importation of goods		110,510,010.00
Input Tax	11,051,001.00	

Petitioner filed its original and amended VAT returns for the 4th quarter of 2004 on January 21, 2005 and April 6, 2005, respectively, reflecting the following information[10]:

Total zero-rated sales		P1,308,488,112.74
Domestic purchases of goods		235,707.90
Input Tax	P 23,570.79	
Importation of goods		20,700,770.00
Input Tax	2,070,077.00	

Petitioner filed its administrative claim for refund/tax credit for the 3rd quarter of 2004 on November 25, 2005 with the One Stop Shop Center of the Department of Finance in the amount of P11,572,208.81 per Application No. 52488[11] and, on March 2, 2006 for the 4th quarter of 2004 in the amount of P2,093,647.79 per Application No. 52740.[12]

Due to respondent's inaction on petitioner's claims for refund/tax credit certificates and, in order to protect its rights and interest, petitioner filed these two petitions on October 3, 2006, for the claim covering the 3rd quarter of 2004 in the amount of P11,572,208.81 docketed as CTA Case No. 7528 and, on a

[9] Stipulation of Facts and Issues (SFI), par. 5, Docket, p. 43 (Case No. 7528)
[10] Stipulation of Facts and Issues (SFI), par.1, Docket, p. 43 (Case No. 7564)
[11] SFI, par. 1, Docket, p. 44 (Case No. 7528
[12] SFI, par. 2, Docket, p. 43 (Case No. 7564)

January 9, 2007, covering the 4th quarter of 2004 in the amount of P2,093,647.79 docketed as CTA Case No. 7564.

Respondent, in the Answers, interposed the following Special and Affirmative defenses:

FOR CTA CASE NO. 7528:[13]

> "6. The claim for refund is still under examination by the Respondent's Bureau;
>
> 7. Claims for refund are strictly construed against the taxpayer as the same partake the nature of a tax exemption. The grant of the claim for refund is tantamount to an exemption;
>
> 8. The taxpayer has the burden to show that the taxes were erroneously or illegally paid. Failure on the part of the Petitioner to prove the same is fatal to its cause of action;
>
> 9. The taxes sought to be refunded were paid in accordance with law;
>
> 10. The Petitioner should prove that its legal basis for claiming for the amount being refunded.

FOR CTA CASE NO. 7564:[14]

> "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 tantamount 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

[13] Docket, p. 26 (Case No. 7528)
[14] Docket, p. 30 (Case No. 7564)

> upon petitioner-claimant to show with clear and unambiguous provision of law supporting the same.

On September 28, 2007, petitioner filed a Motion to Consolidate[15] CTA Case Nos. 7528 and 7564 as the issues to be tried and resolved in both cases are similar; the same witnesses will testify on similar facts and issues; and the same documentary evidence will be presented as exhibits.

On October 9, 2007, the Court promulgated a Resolution[16] granting petitioner's Motion to Consolidate.

After presentation of its testimonial and documentary evidence, petitioner filed its Formal Offer of Evidence[17] on April 11, 2008, which was admitted by the Court per Resolution[18] dated June 5, 2008.

On August 26, 2008, petitioner filed its Memorandum[19] and, thereafter, the case was submitted for resolution on September 22, 2008, sans respondent's memorandum.

The parties have jointly stipulated on the following issues for resolution of this Court:

CTA Case No. 7528[20]

1. Whether or not petitioner's importation of capital goods, and domestic purchases and importation of goods which are attributable to its export sales for the 3rd quarter of 2004, are supported by documentary evidence.

[15] Docket, pp. 125-126 (Case No. 7528)
[16] Ibid, p. 129
[17] Ibid, pp. 142-147
[18] Ibid, pp. 150-151
[19] Ibid, pp. 156-183
[20] Stipulation of Facts and Issues (SFI), Docket, pp. 43-45 (Case No. 7528)

2. Whether or not the accumulated or excess input VAT was not utilized or applied by petitioner against output VAT in the 3rd 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 P11,572,208.81 for the 3rd quarter of 2004 paid for the purchase of capital goods and/or non-capital goods and services due to petitioner being a producer and exporter of mineral products.

CTA Case No. 7564[21]

1. Whether or not petitioner's importation of capital goods, and domestic purchases and importation of goods which are attributable to its export sales for the 4th quarter of 2004, are duly supported by documentary evidence.

2. Whether petitioner made direct and indirect exports of mineral products during the same period.

3. Whether or not the accumulated or excess input VAT was not utilized or applied by petitioner against output VAT in the 4th quarter of 2004 or in the succeeding quarters or taxable years.

4. 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.

5. Whether or not petitioner is entitled to the refund of the excess input taxes in the total amount of P2,093,647.79 for the 4th quarter of 2004 paid for the purchase of capital goods and/or non-capital goods and services due to petitioner being a producer and exporter of mineral products.

The issues may be simplified as follows:

"Whether or not petitioner is entitled to its claim for refund/tax credit certificate of excess input taxes attributable to its export/zero-rated

[21] SFI, Docket, pp. 42-45 (Case No. 7564)

sales for the 3rd and 4th quarters of 2004 in the amount of P11,572,208.81 and P2,093,647.79, respectively."

Petitioner's claim is anchored on Section 112(A) of the Tax Code of 1997 which allows the tax refund/credit of unutilized input VAT attributable to zero-rated or effectively zero-rated sales. Section 112(A) reads:

> **"Sec. 112. Refundable or Tax Credits of Input Tax.**
>
> (A) Zero-rated or Effectively Zero-rated Sales. –
>
> Any VAT-registered person whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or 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 sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributable to anyone of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

Based on the afore-quoted provision and, as laid down by the Supreme Court in the case of *Intel Technology Philippines vs. CIR*,[22] a taxpayer engaged in zero-rated or effectively zero-rated transactions may claim a refund/tax credit certificate for input taxes attributable to such sales upon compliance with the following requisites:

> (1) the taxpayer is engaged in sales which are zero-rated or effectively zero-rated;

[22] Intel Technology Philippines vs. CIR, G.R. No. 166732, April 27, 2007

> (2) the taxpayer is VAT registered;
>
> (3) the claim must be filed within two years after the close of the taxable quarters when such sales were made;
>
> (4) the creditable input tax due or paid must be attributable to such sales and were not applied against output VAT liability;
>
> (5) the foreign currency exchange proceeds thereof had been duly accounted for in accordance with BSP rules and regulations.

Petitioner contends that it has been able to satisfy the above requisites/conditions.

As to its zero-rated sales, petitioner presented in evidence final sales invoices covering its direct and indirect export sales of gold and copper concentrates, export declarations,[23] bills of lading and airway bills.[24] It was, likewise, stipulated by the parties in their Stipulation of Facts and Issues,[25] approved by the Court, that petitioner's sales of its mine products are all zero-rated pursuant to Sec. 106(A)(2)(a)(1) and (5) of the Tax Code.

Anent the second and third requisite, the same were also part of the admitted facts in the Stipulation of Facts and Issues.[26]

Regarding the fourth requisite of non-utilization, the Audit Report[27] of the Independent Certified Public Accountant (ICPA), Mr. Albert Alba, was presented and admitted in evidence and reported thus:

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[23] Exhibit "F-1a" to "F-3-a
[24] Exhibit "F-1-b" to "F-6-b" (for the 3rd quarter); Exhibit "G-1-a" to "G-6-a" (for the 4th quarter)
[25] SFI, Docket, pp. 43-45 (Case No. 7528); SFI, Docket, pp. 42-45 (Case No. 7564)
[26] Summary of Facts Admitted, pars. 2 & 7, SFI, Docket, pp. 43-44 (Case No. 7528)
[27] Exhibit "E"

"**Value-Added Tax Returns – Exhibit N**

22. Petitioner's value-added tax returns from the 1st quarter of 2002 to the 2nd quarter of 2006 (Exhibits N-1 to N-18) were reviewed to determine whether or not the excess input tax for the 3rd and 4th quarters of 2004 which are the subject matter of the claims in CTA Case 7528 and 7564 were subsequently utilized to pay Petitioner's output tax liabilities.

23. As shown in the table on page 8, the excess input taxes paid for the 3rd and 4th quarters of 2004 totaling P11,572,208.81 and P2,093,647.79, respectively, were carried over to the subsequent quarters (up to the 2nd quarter of 2005 for excess input taxes paid in the 3rd quarter of 2004 and up to the 2nd quarter of 2006 for excess input tax paid in the 4th quarter of 2004) but that during these periods the said excess input taxes were not sued to pay Petitioner's output tax liabilities. xx xx xx"[28]

The tabulation[29] mentioned in Item #23 of the Audit Report shows the following:

Quarter	Output Tax Due	Input Tax Paid	Excess Input Tax From/To Prior Quarter	Next Quarter
2002				
First quarter	₱ 63,884.28	₱2,880,805.37	₱ -	₱ 2,816,921.09
Second quarter	129,390.91	4,238,224.13	2,816,921.09	6,925,754.31
Third quarter	144,768.38	9,322,964.05	6,925,754.31	16,103,949.98
Fourth quarter	171,745.04	4,206,812.85	16,103,949.98	20,139,017.79
2003				
First quarter	216,649.51	5,766,462.11	20,139,017.79	25,688,830.39
Sub-total		26,415,268.51		
Second quarter	74,349.73	5,328,392.64	25,688,830.39	30,942,873.30
Third quarter	52,413.13	3,022,281.79	30,942,873.30	33,912,741.96
Fourth quarter	35,228.90	7,594,657.61	33,912,741.96	41,472,170.67
2004				
First quarter	213,975.00	9,411,327.74	41,472,170.67	50,669,523.41
Second quarter	23,182.00	14,479,595.41	50,669,523.41	65,125,936.82
Sub-total		39,836,255.19		
Total	1,125,586.88	66,251,523.70		65,125,936.82
VAT refund/ TCC Claimed	**(1,125,586.88)**	**(26,415,268.51)**		**(25,289,681.63)**

[28] Ibid, p. 7
[29] Id, p. 8

For carry over – 3rd quarter 2004	**-**	***39,836,255.19***		***39,836,255.19***
Third quarter	1,302.76	11,572,208.81	39,836,255.19	51,407,161.24
Sub-total		51,408,464.00		
Fourth quarter	469,115.08	2,093,647.79	51,407,161.24	53,031,693.95
2005				
First quarter	540,087.49	9,403,417.40	53,031,693.95	61,895,023.86
Second quarter	-	6,332,598.23	61,895,023.86	68,227,622.09
Sub-total		17,829,663.42		
Total	1,010,505.33	69,238,127.42		68,227,622.09
VAT Refund/ TCC Claimed	**(1,010,505.33)**	**(51,408,464.00)**		**(50,397,958.67)**
For carry over – 3rd quarter 2005	**-**	***17,829,663.42***		***17,829,663.42***
Third quarter	-	23,956,732.44	17,829,663.42	41,786,395.86
Sub-total		41,786,395.86		
Fourth quarter	-	10,591,686.58	41,786,395.86	52,378,395.86
2006				
First quarter	-	10,188,692.14	52,378,082.44	62,566,774.58
Second quarter	-	11,970,602.23	62,566,774.58	74,537,376.81
Sub-total		32,750,980.95		
		74,537,376.81		
VAT Refund/ TCC Claimed	**-**	**(41,786,395.87)**		**(41,786,395.87)**
For carry over – 3rd quarter 2006	**-**	***₱32,750,980.95***		***₱32,750,980.95***

And lastly, on the requisite of due accounting of foreign exchange proceeds of the sale in accordance with BSP rules and regulations, the Audit Report presented the following:

> **"Summaries of Sales and Remittances – Exhibits H and I**
>
> 9. x x x x x x x x x
>
> 10. The export sales shown in the summaries are paid in US dollars or its equivalent in Philippine peso thru the banking system in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP) as shown on page 4.

Particulars	3rd Quarter	4th Quarter
Gross Sales per Summary	US$15,334,755	US$23,240,404
Adjustment for marketing charges	(1,636,234)	(2,293,936)
Net Sales	13,698,521	20,946,468

Receivables:

At beginning of quarter	6,021,870	2,568,661
At end of quarter	(2,568,661)	(3,373,080)
Gross Remittances	17,151,730	20,142,049
Withholding taxes and bank charges	(115,247)	(39,775)
Net Remittances	17,036,483	20,102,274
Difference	24	7
Actual Remittances Received	US$17,036,507	US$20,102,281

Petitioner, likewise, offered in evidence documents to comply with the fifth requisite such as certification of bank remittances[30] and entries in its passbooks[31].

DISCUSSION

Despite the petitioner's arguments, the instant petition for Review must still fail.

Petitioner's claims for refund or tax credit for its unutilized input value-added tax, relative to its zero-rated direct and indirect sales of gold and/or copper concentrate, covering the third and fourth quarters of 2004 in the total amount of P13,665,856.60, were filed beyond the prescriptive period provided under Section 112(A) of the NIRC, the provisions of which were herein earlier quoted.

The Supreme Court had, in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*,[32] ruled as follows:

> "The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must

[30] Exhibits "H-1", "H-2", "H-3" and "H-4" (for the 3rd quarter); Exhibits "I-1" to "I-6" (for the 4th quarter)
[31] Exhibits "H-1-a" to "H-1-h"; "H-3-a" to "H-3-d" and "H-4-a" to "H-4-c" (for the 3rd quarter) and "I-1-a" to "I-3-a"; "I-5-a" to "I-5-b"; and "I-6-a" to "I-6-a" (for the 4th quarter)
[32] Commissioner of Internal Revenue vs. Mirant Pagbilao Corp., G.R. No. 172129, Sept. 12, 2008

> be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not." (Underscoring supplied)

The periods involved in the claims subject of these consolidated cases are the third and fourth quarters ending September 30, 2004 and December 31, 2004, respectively. Petitioner's claims (both in the administrative and judicial levels) should have been filed on or before October 2, 2006[33] and January 2, 2007.[34] While the original administrative claims were filed within the two-year prescriptive period on November 25, 2005[35] and March 2, 2006,[36] respectively, the Petitions for Review (Case Nos. 7528 and 7564) filed with this Court on October 3, 2006 and January 9, 2007, for the 3rd and 4th quarters of 2004, respectively, fall beyond the period prescribed by law.

Thus, petitioner's entire claim/s must necessarily fail due to prescription.

WHEREFORE, premises considered, the Petitions for Review are hereby **DENIED** and **DISMISSED** on the ground that the claim/s had prescribed.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

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[33] September 30, 2006 fell on a Saturday
[34] October 31, 2006 and January 1, 2007 were non-working holidays
[35] Summary of Facts Admitted, Par. 5,Docket, p. 44 (Case No. 7528); Annexes "C" & "C-1", Petition for Review
[36] Summary of Facts Admitted, Par. 5,Docket, p. 43 (Case No. 7564); Annexes "C" & "C-1", Petition for Review

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice