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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BURMEISTER AND WAIN SCANDINAVIAN CONTRACTOR MINDANAO, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6022

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUN 20 2001

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DECISION

The case at bar seeks the refund of the amount of P1,464,723.55 representing Petitioner's alleged erroneously paid value-added tax (VAT) for the period covering the month of January, 1998.

As represented, Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Philippines. It is registered with the Securities and Exchange Commission (SEC) and with the Bureau of Internal Revenue (BIR) as a VAT entity.

Burmeister and Wain Scandinavian Contractor, a Danish Corporation (BWSC, for (brevity), Mitsui Engineering and Shipbuilding, Ltd. (MES) and Mitsui & Co., Ltd., (MITSUI), both Japanese corporations, entered into a Consortium Agreement with the National Power Corporation (NAPOCOR, for brevity) for the operation and maintenance of the latter's two power barges. Having been appointed by the Consortium as its

Coordination Manager, BWSC established Burmeister and Wain Scandinavian Contractors, Mindanao, Inc. (BWSCMI), herein Petitioner, which subcontracted the actual operations and maintenance of the two power barges, as well as the performance of other works, which will necessarily have to be done in the Philippines.

The Consortium pays herein Petitioner BWSCMI for its services in foreign currency inwardly remitted to the Philippines through the banking system. NAPOCOR pays the capacity and energy fees due under the agreement to the consortium in a mixture of currencies. The freely convertible non-Peso component of the fees is paid directly to the consortium's bank accounts in Denmark and Japan and since the peso component is not freely convertible and cannot be remitted and held overseas, it is deposited in a separate and especially designated bank account in the Philippines. NAPOCOR deposits the peso component directly into the bank account and BWSCMI assists in its subsequent conversion to foreign currency for remittance to the consortium's bank account in Denmark.

In order to be certain about the tax status of its transactions, BWSCMI filed with the BIR a letter dated January 14, 1994, requesting for clarification of the tax implications of the contracts described above. In BIR Ruling No. 023-95 dated February 14, 1995, the BIR ruled that if BWSCMI chooses to register as a VAT person and the consideration for its services is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Central Bank of the Philippines, the aforesaid services shall be subject to VAT at zero-rate.

On February 25, 1998, herein Petitioner BWSCMI filed VAT declaration for the month of January, 1998 and paid VAT amounting to One Million Four Hundred Sixty Four Thousand Seven Hundred Twenty Three Pesos and Fifty Five Centavos (P1,464,723.55), covering its alleged zero-rated sales of services to the consortium.

On the belief that its sales of services are not subject to 10% value-added tax but are zero-rated pursuant to Section 108(B)(2) of the Tax Code and BIR Ruling No. 023-95, Petitioner filed an administrative claim for refund with the Bureau of Internal Revenue on April 22, 1999 in the amount of P1,464,723.55 representing Petitioner's alleged erroneously paid VAT for January, 1998.

As no affirmative action has been taken by Respondent on the claim for refund, Petitioner, on February 24, 2000, filed with this Court the instant Petition for Review.

On March 15, 2000, Respondent filed his Answer and advanced the following Special and Affirmative Defenses:

"5. Petitioner's alleged claim for tax credit is subject to administrative routinary investigation/examination by respondent's Bureau;

6. The tax sought to be refunded was collected and paid pursuant to law and pertinent BIR implementing rules and regulations, hence, not refundable.

7. Petitioner's allegation that its transactions qualify as zero-rated does not *ipso facto* warrant the credit. Petitioner has the burden of proving that it is indeed entitled to the credit sought as it is a well-settled rule that claims for tax refund/tax credit are construed in "*strictissimi juris*" against the taxpayer (Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, 30 January 1979, 31 SCRA 95). This is due to the fact that claims for refund/credit partake the nature of an exemption from tax. Thus, it is incumbent upon the petitioner to prove that it is indeed entitled to the refund/credit sought. Failure on the part of he petitioner to prove the same is fatal to its claim for tax credit. He who claims exemption must

be able to justify his claim by the clearest grant of organic or statutory law. An exemption from the common burden cannot be permitted to exist upon vague implications. (Asiatic Petroleum Co. vs. Llamas, 49 Phil. 466)

8. Moreover, petitioner must prove that it has complied with the provision of Section 229 of the Tax Code, as amended.

In its Memorandum, Petitioner repleads its contentions as stated in its Petition for Review and maintains that since it is a VAT-registered entity and the consideration for its services rendered to the consortium were made in acceptable foreign currency and inwardly remitted to the Philippines and accounted for in accordance with the existing regulations of the Central Bank of the Philippines, Petitioner's sale of services are not subject to the 10% value-added tax but instead subject to zero percent (0%), pursuant to Section 108(B)(2) of the Tax Code, which reads:

> **Section 108.** ***Value-added tax on sale of services and use or lease of Properties.*** - x x x
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> (B) *Transactions Subject to Zero Percent (0%) Rate.* - The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate;
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> (1) x x x x x x x x x
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> (2) Services other than those mentioned in the preceding paragraph, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).
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> x x x x x x x x x

Petitioner submits that since the above transactions were subject to zero-rate VAT, thus, the VAT taxes paid for January, 1998, in the amount of P1,464,723.55, is in the nature of erroneous payment, hence, refundable to it.

On the other hand, Respondent argues that since Petitioner's services are not destined to be consumed abroad, they are not of the same class or of the same nature as "project studies, information services, engineering and architectural designs and other similar services", mentioned in Section 4.102-(b)(2) of Revenue Regulations No. 5-96, which are destined to be consumed abroad. As such, they cannot legally qualify for zero-rated VAT but rather are subject to the regular VAT rate of 10%.

The issue that comes to fore for our consideration is whether or not the sale of services by the Petitioner to the Consortium qualify as zero-rated, pursuant to Section 108(B)(2) of the Tax Code, thus, it is entitled to the amount sought to be refunded.

We rule in the affirmative.

The above issue was settled by this Court in CTA Case No. 5376 involving the same parties in a decision promulgated on August 4, 1999. Thus, the Court is compelled to reassert what it had ruled earlier. Pertinent portions of the said decision are quoted below, thus:

> "A mere glance at Section 102(a)(2) of the Tax Code would readily reveal that to qualify as zero-rated, the sale of services must comply with the following requirements, to wit:
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> 1.) Payment of the service fees must be in acceptable foreign currency;

2.) Inward remittance of the foreign currency into the Philippines; and

3.) The inward remittance is accounted for in accordance with the rules and regulations of the Central Bank of the Philippines (now Bangko Sentral ng Pilipinas).

With reference to the first and second requirements, there was ample compliance since records of this case reveal that the sub-contract fees for the services rendered by the Petitioner to the Consortium involving the actual operation and maintenance of NAPOCOR's two power barges for the period January 1, 1994 to December 31, 1994, amounting to DKK 26,990,000.00 (Danish Kroner) with peso equivalent of P113.001.715.00, were billed to BWSC-Denmark, being the Consortium coordinator, as shown by Petitioner's sales invoices (Exhs. Q to Q-10, inclusive). Thus, in effect, We reject Respondent's contention of non-foreign currenc inward remittance for it failed to present convincing evidence, other than its own baseless speculation, that the same foreign currency inwardly remitted to BWSC-MI by virtue of the subcontract agreement is the same foreign currency outwardly remitted back to the Consortium by the Petitioner under the Operations and Maintenance Agreement. What is quite evident in this case is that the payments received by the Petitioner from the Consortium for the subcontract services which the former rendered to the latter and the Petitioner's collection/remittance as collection agent of the Consortium for the services which the Consortium renders to NAPOCOR are two distinct and separate transactions. We simply cannot give more weight to Respondent's conjectures over that of Petitioner's documentary exhibits. Conformably, We hold that there was indeed foreign currency inward remittance to the Petitioner for its sale of services under the Subcontract Agreement.

As regards the last requirement, We likewise agree with the Petitioner that the sub-contract fees in foreign currency were inwardly remitted and accounted for in accordance with the rules and regulations of Bangko Sentral ng Pilipinas since it was evidenced by the bank credit memos/certifications from the Bank of the Philippine Islands and Hongkong and Shanghai Bank (Exhs. R to R-4, inclusive)"

The fact that Petitioner's services to the Consortium were paid in acceptable foreign currency inwardly remitted to the Philippines and accounted for by the Bangko Sentral ng Pilipinas was clearly established by Petitioner when it presented to the Court, Ms. Grace

Belisario, its Chief Accountant. Her testimony likewise established that they were granted two (2) BIR rulings expressly declaring that the subcontractor's fees it received from the Consortium is subject to VAT at zero rate and that on January, 1998, Petitioner erroneously paid to Respondent a VAT amounting to P1,464,723.55 (TSN, July 13, 2000). To shore up its position, Petitioner presented in evidence the various Bank Credit Memos (Exhs. I to K) and the certification issued by the Branch Manager of the Bank of the Philippine Islands (BPI), Davao Lanang Branch (Exhs. CC and CC-1), to prove that Petitioner is being paid in US dollars which is an acceptable foreign currency accounted for in accordance with the rules and regulations of the BSP and that the amounts appearing in the various Bank Credit Memos were remitted as subcontractor's fees and were duly accounted for in accordance with the BSP regulations. The above exhibits and other exhibits of Petitioner were not controverted by Respondent, hence, the Court finds that Petitioner falls squarely within the ambit of Section 108(B)(2) of the Tax Code, *supra*, thus subject to Vat at zero percent (0%) rate, and therefore entitled to the claimed refundable amount in accordance with Section 112(A) of the Tax Code, which states, to wit:

> **Section 112. *Refunds or tax credits of input tax.* -**
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> *(A) Zero-rated or Effectively Zero-rated Sales.* - Any VAT-registered person, whose sales are 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 regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

IN THE LIGHT OF ALL THE FOREGOING, the instant petition for review is hereby **GRANTED**. Respondent is hereby **ORDERED** to **REFUND** or **ISSUE** a **TAX CREDIT CERTIFICATE** in the amount of P1,464,723.55 in favor of herein Petitioner, representing the latter's erroneously paid VAT for January, 1998.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding 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