REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1909** (CTA Case No. 8804)
- versus –	
CORAL BAY NICKEL CORPORATION, *Respondent.*	

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CORAL BAY NICKEL CORPORATION, *Petitioner,*	**CTA EB NO. 1910** (CTA Case No. 8804)
	Present:
- versus –	Del Rosario, *P.J.*, Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, Manahan, Bacorro-Villena, and Modesto-San Pedro, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: SEP 05 2019 9:55 am

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DECISION

CASTAÑEDA, JR., _J.:_

This is a consolidation of respective Petitions for Review filed by Coral Bay Nickel Corporation (Coral Bay) and the Commissioner of Internal Revenue (CIR), assailing the Decision dated November 23, 2017 (Assailed Decision)[1] and the Resolution dated July 27, 2018, (Assailed Resolution)[2] both promulgated by the Third Division of this Court (Court in Division)[3] in CTA Case No. 8804.

The respective dispositive portions of the Assailed Decision and Resolution are quoted hereunder:

Assailed Decision:

> "**WHEREFORE**, the Petition for Review filed by Coral Bay Nickel Corporation on April 14, 2014, is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner the amount of **₱11,873,651.48** representing its unutilized input VAT attributable to its zero-rated sales for the period January 1, 2012 to December 31, 2012.
>
> **SO ORDERED.**"

Assailed Resolution:

> "**WHEREFORE**, petitioner's Motion for Partial Reconsideration filed on December 13, 2017 and respondent's Motion for Reconsideration (Re: Decision dated 23 November 2017), are hereby **DENIED**, for lack of merit.
>
> **SO ORDERED.**" ge

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[1] CTA EB No. 1909 Docket, pp. 27-50.
[2] *Id.*, pp. 51-65.
[3] Composed of Associate Justice Lovell R. Bautista as Chairperson, Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Ma. Belen M. Ringpis-Liban as members.

THE FACTS

As found by the Court in Division in its Decision dated November 23, 2017, the facts of the present case are as follows:[4]

> "Petitioner Coral Bay Nickel Corporation is a domestic corporation registered with and licensed by the Securities and Exchange Commission to engage in the manufacture and exportation of nickel/cobalt mixed sulfide, with principal office address at Barangay Rio Tuba, Municipality of Bataraza, Palawan. It is a VAT-registered entity with BIR Certificate of Registration No. OCN 8RC0000035523 and Taxpayer's Identification Number (TIN) 005-961-540-000. It is also registered with the Philippine Economic Zone Authority (PEZA) as evidenced by its PEZA Registration Certificate No. 02-072 dated December 27, 2002.
>
> Respondent Commissioner of Internal Revenue (CIR), on the other hand, is the head of the Bureau of Internal Revenue (BIR), with the power to act on and approve claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Diliman, Quezon City.
>
> On September 1, 2004, petitioner entered into an Off-Take Agreement for the export of its nickel cobalt mixed sulfide with Sumitomo Metal Mining Co., Ltd. (SMMC), a corporation organized and existing under the laws of Japan.
>
> During the taxable year (TY) 2012, petitioner exported to SMMC its nickel cobalt mixed sulfide in the aggregate amount of ₱13,745,668,226.82. In the same period, it purchased goods and services which were consumed and rendered outside the PEZA Zone, to which it incurred input VAT in the aggregate amount of ₱22,577,290.53.
>
> As a VAT-registered entity, petitioner filed all its Monthly and Quarterly VAT Returns for TY 2012, and amendments thereto, through the Electronic Filing and Payment System (eFPS) of the BIR.
>
> On November 28, 2013, petitioner filed with the Large Taxpayers Excise Audit Division I (LTEAD I) of the BIR an administrative claim for refund for its alleged unutilized input VAT for TY 2012 in the amount of ₱22,577,290.53, attaching

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[4] CTA EB No. 1909 Docket, pp. 27-32 (Citations omitted).

thereto an Application for Tax Credits/Refunds (BIR Form No. 1914) and all supporting documents.

On April 14, 2014, petitioner, citing respondent's inability to act on its administrative claim for refund/tax credit, filed the instant Petition for Review.

In his Answer, respondent argues that petitioner's claim for refund/tax credit has neither factual nor legal basis. He claims Revenue Memorandum Circular (RMC) No. 42-2003, particularly Paragraphs Q-5 and A-5 thereof, clarified that claims for input VAT based on invoices/receipts issued upon the effectivity of RMC No. 74-99 filed by PEZA-registered companies, regardless of the type or class of PEZA registration, should be denied.

Paragraph Q-3 of the same RMC further provides that in cases where despite the BIR's approval of application for zero-rating of the supplier of exporters-claimant, this supplier still issued VAT invoices which became the basis of the claim for tax credit, the claim for input tax credit by the exporter-claimant should be denied without prejudice to the latter's right to seek reimbursement of the VAT paid, if any, from the supplier. Thus, exporter-claimant must be vigilant that the invoices and receipts issued by its supplier do not carry any VAT component because with approved zero-rating from the BIR, such supplier will report its sales as zero-rated, says respondent.

The Pre-Trial Order was issued on September 16, 2014, terminating the pre-trial conference.

To substantiate its claim for refund/tax credit, petitioner presented: (1) John S. Barrientos, the QS/CSR Manager of SMCC Philippines, Inc.; (2) Engr. Zosimo Oliver P. Villa, a Geodetic Engineer; (3) Allen Roy T. Catacutan, its Tax and Audit Officer; and (4) Joseph Cedric V. Calica, the Court-commissioned Independent Certified Public Accountant (ICPA).

John S. Barrientos testified that he is the QS/CSR Manager of SMCC Philippines, Inc. (SMCC) whom petitioner engaged to construct the following: (1) Laborers Row House; (2) Bus Terminal; (3) JTA Dormitory; (4) RTN Runway; and (5) Foreman's Duplex.

In its billing for the projects, SMCC imputed VAT as the goods and services provided by it were consumed and performed outside the PEZA zone. Petitioner paid the VAT as shown in the receipts/invoices he identified in court.

Geodetic Engineer Zosimo Oliver P. Villa, declared that petitioner engaged his services to plot the coordinates in order to determine whether its construction projects, *viz.*, Laborer's Row House, Bus Terminal, JTA Dormitory, RTN Runway, and Foreman's Duplex, were outside the Rio Tuba Economic Processing Zone as specified in Presidential Proclamations Nos. 304 and 1352. As requested, he conducted an ocular inspection and prepared a plan for the said projects. Based on the Garmin Etrex GPS, which is commonly used by Geodetic Engineers, petitioner's construction projects were outside the PEZA Zone.

Petitioner's Tax and Audit Officer **Allen Roy T. Catacutan**, testified that he reviews the computations, remittances, and payments of petitioner's tax liabilities with the BIR as well as submits reportorial requirements to other government agencies like the PEZA, thus, he is in custody of all the tax returns and documents filed by petitioner with them. He likewise oversees the claims for refund of petitioner and the corresponding BIR audit as a result thereof, if any.

He opined that as an export-oriented enterprise, petitioner is entitled to refund of its unutilized input VAT attributable to its zero-rated sales for TY 2012. Petitioner incurred the said excess and unutilized input VAT from its domestic purchases of goods and services which were consumed and rendered outside the Rio Tuba Export Processing Zone. He added that the goods and services were used to construct housing facilities and roads located outside the PEZA Zone. The said facilities were necessary in the production of petitioner's export products under its PEZA registered activities. Since the goods and services were consumed outside the PEZA Zone, the suppliers of these goods and services subjected their sales to petitioner to VAT.

Witness Catacutan continued to state that petitioner has unutilized input VAT since its exportation of nickel cobalt mixed sulfide with SMMC qualifies as VAT zero-rated sales in accordance with Section 106(A)(2)(a) of the National Internal Revenue Code (NIRC) of 1997, as amended. Petitioner was not able to utilize its input VAT for the four (4) quarters of TY 2012 in the total amount of ₱22,577,290.53, as shown in petitioner's quarterly VAT Returns for 2012 and 2013 which he presented before Court. *gc*

ICPA **Joseph Cedric V. Calica** testified that per his examination and verification of the voluminous documents supporting petitioner's claim for refund, petitioner has unutilized input VAT in the total amount of P21,091,927.38.

With the issuance of the Resolutions dated November 26, 2015 and June 7, 2016, petitioner rested its case.

To support his defense, respondent presented his lone witness, Revenue Officer III **Malik Dimakuta**, who testified that he was one of the Revenue Officers (ROs) authorized to examine the books of accounts and other accounting records of petitioner for TY 2012 relative to its claim for refund of unutilized input VAT. After their audit examination, they prepared a Memorandum dated January 16, 2014, recommending the denial of petitioner's claim for refund for lack of legal and factual bases.

In the letter dated June 4, 2014 which was served to petitioner on June 10, 2014, respondent denied petitioner's claim for refund of unutilized input VAT.

On September 8, 2016, respondent was deemed to have rested his case upon the admission of all his documentary exhibits.

After the parties filed their respective memoranda, the instant case was deemed submitted for decision on November 24, 2016."

On November 23, 2017, the Court in Division rendered the Assailed Decision partially granting Coral Bay's Petition for Review.

Unsatisfied with the Assailed Decision, Coral Bay filed a Motion for Partial Reconsideration on December 13, 2017 and also a Supplemental Motion for Reconsideration (Re: Decision dated November 23, 2017) on January 12, 2018. The CIR likewise filed his own Motion for Reconsideration (Re: Decision dated 23 November 2017) on December 18, 2017. All of these were denied by the Court in Division in the Assailed Resolution.

Within the extended period granted by the Court *En Banc*,[5] the CIR filed on August 31, 2018, its Petition for Review[6] docketed as CTA EB No. 1909 based on the following sole ground:

[5] Minute Resolution dated August 16, 2018, CTA EB No. 1909 Docket, p. 6.
[6] CTA EB No. 1909 Docket, pp. 7-20.

> "The Honorable Court in Division erred in ruling that respondent is partially entitled to refund or issuance of tax credit certificate of its alleged unutilized input VAT attributable to its zero-rated sales for the period January 1, 2012 to December 31, 2012."[7]

Likewise within the extended period duly granted by the Court *En Banc*,[8] Coral Bay filed its Petition for Review[9] via registered mail on August 31, 2018 docketed as CTA EB No. 1910 with the following assignments of error:[10]

> "ASSIGNMENTS OF ERROR
>
> A. The Honorable Third Division erred in ruling that Petitioner has not fully established the existence of part of the Input VAT which it seeks to refund in the amount of P2,579,748.17; and
>
> B. The Honorable Third Division erred in ruling that Petitioner is not entitled to an additional input tax refund in the aggregate amount of Ten Million Seven Hundred Three Thousand Six Hundred Thirty Nine Pesos and 5/100 (₱10,703,639.05) on top of the tax refund in the amount of Eleven Million Eight Hundred Seventy Three Thousand Six Hundred Fifty One Pesos and 48/100 (₱11,873,651.48) previously granted by the CTA in its Decision dated November 23, 2017, and affirmed in a Resolution dated July 27, 2018 on the ground that they are not attributable to Petitioner's zero-rated sales of goods and services."

Both Petitions for Review were consolidated in a Minute Resolution issued by the Court *En Banc* on September 6, 2018.[11]

In a Resolution dated October 9, 2018,[12] the Court *En Banc* directed the parties to file their respective Comments within ten (10) days from receipt thereof. Within the extended period granted by the Court *En Banc*,[13] Coral Bay filed its Comment (To Commissioner of Internal Revenue's Petition for Review of the Decision Promulgated on November 23, 2017 and the Resolution Promulgated on July 27, 2018) on November 19, 2018.[14] The

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[7] *Id.*, p. 9.
[8] CTA EB No. 1910 Docket, p. 7.
[9] *Id.*, pp. 8-47.
[10] *Id.*, p. 13.
[11] CTA EB No. 1909 Docket, p.87.
[12] *Id.*, pp. 89-90.
[13] Minute Resolution dated November 12, 2018, CTA EB No. 1909 Docket, p. 96.
[14] CTA EB No. 1909 Docket, pp. 97-105.

CIR, on the other hand, failed to file his Comment on Coral Bay's Petition for Review as per the Records Verification report dated November 28, 2018[15] issued by the Judicial Records Division of this Court. In a Resolution dated December 14, 2018,[16] the Court *En Banc* gave due course to both Petitions for Review and required the parties to submit their respective memoranda within thirty (30) days from receipt thereof.

On January 28, 2019, the CIR filed his Memorandum.[17] Within the extended period duly granted by the Court *En Banc*,[18] Coral Bay filed its Memorandum[19] on March 7, 2019. With the submission of the parties' respective Memoranda, the Court *En Banc* submitted the case for decision in a Resolution dated March 28, 2019.[20]

THE COURT *EN BANC*'S RULING

CTA EB No. 1909

In his Petition, the CIR primarily argues that sales of goods and services by VAT-registered enterprise to Coral Bay, a PEZA-registered entity, are subject to zero-rated value-added tax (VAT).[21] To support its position, the CIR cited Coral Bay's PEZA Certificate of Registration,[22] Revenue Memorandum Circular (RMC) No. 42-2003[23] as well as the Supreme Court case of *Commissioner of Internal Revenue v. Toshiba Information Equipment (Phils.), Inc.*[24] The CIR also takes exception to Coral Bay's contention that the latter's domestic purchases of services attributable to its zero-rated sales shall be subject to 12% VAT because these services were rendered and consumed outside the PEZA zone.[25] The CIR is of the view that, citing RMC No. 74-99, the sale of goods or services made by VAT-registered suppliers to a registered enterprise operating in the ECOZONE is not subject to output VAT. Consequently, respondent's claim for input tax credit should be denied, without prejudice to its right to seek reimbursement thereof from its suppliers.[26] The CIR also submits that Coral Bay's alleged input tax is not attributable to its zero-rated sales.[27] ge

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[15] *Id.*, p. 106.
[16] *Id.*, pp. 108-109.
[17] *Id.*, pp. 110-122.
[18] Minute Resolution dated February 11, 2019, CTA EB No. 1909 Docket, p. 130.
[19] CTA EB No. 1909 Docket, pp. 131-163.
[20] *Id.*, pp. 165-166.
[21] *Id.*, pp. 9-14.
[22] Exhibits "P-1 to P-5", Division Docket Vol. III, pp.1302-1316.
[23] Clarifying Certain Issues Raised Relative to the Processing of Claims for Value-Added Tax (VAT) Credit/Refund, Including Those Filed with the Tax and Revenue Group, One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, Department of Finance (OSS) by Direct Exporters (Dated July 15, 2003).
[24] G.R. No. 150154, August 9, 2005, 466 SCRA 224 ("*Toshiba*").
[25] CTA EB No. 1909 Docket, pp. 13-14
[26] *Id.*
[27] *Id.*, pp. 15-16.

Coral Bay, on the other hand, maintains that the sale of goods and services by a VAT-registered entity to a PEZA-registered entity which are consumed, used, or rendered within the customs territory is subject to twelve percent (12%) VAT.[28] Furthermore, Coral Bay asserts that its input tax is attributable to its zero-rated sales.[29]

After careful study of the facts, issues, and arguments presented by the parties vis-à-vis the relevant laws, rules and regulations, and jurisprudence on the matter, the Court *En Banc* finds merit to the CIR's position and accordingly, the present Petition for Review docketed as CTA EB No. 1909 shall be granted.

The Court *En Banc* agrees with the CIR that the sale of services made by a VAT-registered enterprise from the customs territory to a PEZA-registered enterprise operating within the ECOZONE is subject to VAT at zero percent (0%) rate. Specifically, such transaction is subject to effectively zero-rated VAT by virtue of Section 108(B)(3) of the National Internal Revenue Code of 1997, as amended (1997 NIRC). The said provision reads as follows:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* -
>
> xxx xxx xxx
>
> (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:
>
> xxx xxx xxx
>
> (3) **Services rendered to persons or entities whose exemption under special laws** or international agreements to which the Philippines is a signatory **effectively subjects the supply of such services to zero percent (0%) rate;**" *(Emphasis supplied)*

To qualify for VAT zero-rating, the above-quoted provision requires that a sale of service must satisfy the following:

1. Sale of service is performed in the Philippines; ge

[28] *Id.*, pp. 98-100.
[29] *Id.*, pp. 100-102.

2. Service is performed by a VAT-registered person; and

3. Service is rendered to persons or entities exempted under special laws or international agreement to which the Philippines is a signatory.

Revenue Regulations (RR) No. 16-05, as amended, issued by the Secretary of Finance to implement the VAT provisions of the 1997 NIRC, echoes the wording of Section 108(B)(3) of the 1997 NIRC as it also provides that effectively zero-rated sale of services shall be performed in the Philippines. Section 4.108-5 of the said revenue issuance, in part, reads:

> "**SECTION 4.108-5.** ***Zero-Rated Sale of Services.*** -
>
> **(a)** ***In general.*** - A zero-rated sale of service (by a VAT-registered person) is a taxable transaction for VAT purposes, but shall not result in any output tax. However, the input tax on purchases of goods, properties or services related to such zero-rated sale shall be available as tax credit or refund in accordance with these Regulations.
>
> (b) ***Transactions Subject to Zero Percent (0%) VAT Rate.*** - The following **services performed in the Philippines by a VAT-registered person** shall be subject to zero percent (0%) VAT rate:
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> xxx xxx xxx
>
> (3) **Services rendered to persons or entities whose exemption under special laws** or international agreements to which the Philippines is a signatory **effectively subjects the supply of such services to zero percent (0%) rate**;" *(Emphasis supplied)*

RR No. 16-05, as amended, further defines "effectively zero-rated sale of service" as follows:

> "**SECTION 4.108-6.** ***Effectively Zero-Rated Sale of Services.*** - The term **'effectively zero-rated sales of services'** shall refer to the local sale of services by a VAT-registered person to a person or entity who was granted indirect tax exemption under special laws or international agreement." *(Underscoring supplied)* ga

Corollary to the foregoing, it must be remembered that in *Toshiba*, the Supreme Court had ruled that by virtue of Section 8 of RA No. 7916, as amended, PEZA-registered enterprises, which would necessarily be located within ECOZONEs, are considered VAT-exempt entities. By being VAT-exempt entities, no output VAT may be passed on to them. According to the Supreme Court in *Toshiba*, the exemption of these entities from the imposition of VAT flows from the legal fiction established in the said law that deemed ECOZONEs as foreign territories. As explained by the Supreme Court in the said decision:

> "**This Court agrees, however, that <u>PEZA-registered enterprises, which would necessarily be located within ECOZONES, are VAT-exempt entities</u>**, not because of Section 24 of Rep. Act No. 7916, as amended, which imposes the five percent (5%) preferential tax rate on gross income of PEZA-registered enterprises, in lieu of all taxes; but, rather, **because of Section 8 of the same statute which establishes the fiction that ECOZONES are foreign territory.**
>
> It is important to note herein that respondent Toshiba is located within an ECOZONE. An ECOZONE or a Special Economic Zone has been described as
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> > . . . [S]elected areas with highly developed or which have the potential to be developed into agro-industrial, industrial, tourist, recreational, commercial, banking, investment and financial centers whose metes and bounds are fixed or delimited by Presidential Proclamations. An ECOZONE may contain any or all of the following: industrial estates (IEs), export processing zones (EPZs), free trade zones and tourist/recreational centers.
>
> The national territory of the Philippines outside of the proclaimed borders of the ECOZONE shall be referred to as the Customs Territory.
>
> Section 8 of Rep. Act No. 7916, as amended, mandates that the PEZA shall manage and operate the ECOZONES as a separate customs territory; thus, creating the fiction that the ECOZONE is a foreign territory. As a result, sales made by a supplier in the Customs Territory to a purchaser in the ECOZONE shall be treated as an exportation from the Customs Territory. Conversely, sales made by a supplier from the ECOZONE to a purchaser in the Customs Territory shall be considered as an importation into the Customs Territory." *(Emphasis and underscoring supplied and citations omitted)* gc

It also bears stressing that in *Toshiba*, the Supreme Court took into account the BIR's issuance of RMC No. 74-99 on 15 October 1999 which categorically established from said date onwards the rule that **any** sale by a VAT-registered supplier from the Customs Territory to a PEZA-registered enterprise shall be considered as export sale and subject to zero percent (0%) VAT. The relevant portions of *Toshiba* read as follows:

> "The Philippine VAT system adheres to the Cross Border Doctrine, according to which, no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Hence, actual export of goods and services from the Philippines to a foreign country must be free of VAT; while, those destined for use or consumption within the Philippines shall be imposed with ten percent (10%) VAT.
>
> **Applying said doctrine to the sale of goods, properties, and services to and from the ECOZONES, the BIR issued Revenue Memorandum Circular (RMC) No. 74-99, on 15 October 1999.** Of particular interest to the present Petition is Section 3 thereof, which reads:
>
>> SECTION 3. **Tax Treatment of Sales Made by a VAT Registered Supplier from the Customs Territory, to a PEZA Registered Enterprise. –**
>>
>> (1) If the Buyer is a PEZA registered enterprise which is subject to the 5% special tax regime, in lieu of all taxes, except real property tax, pursuant to R.A. No. 7916, as amended:
>>
>> (a) **Sale of goods (*i.e.*, merchandise)**. This shall be treated as indirect export hence, considered subject to zero percent (0%) VAT, pursuant to Sec. 106(A)(2)(a)(5), NIRC and Sec. 23 of R.A. No. 7916, in relation to ART. 77(2) of the Omnibus Investments Code.
>>
>> (b) **Sale of service.** This shall be treated subject to zero percent (0%) VAT under the ***'cross border doctrine'*** of the VAT System, pursuant to VAT Ruling No. 032-98 dated Nov. 5, 1998.
>>
>> (2) If Buyer is a PEZA registered enterprise which is not embraced by the 5% special tax regime, hence, subject to taxes under the NIRC, e.g., Service gc

Establishments which are subject to taxes under the NIRC rather than the 5% special tax regime:

(a) **Sale of goods (*i.e.*, merchandise).** This shall be treated as indirect export hence, considered subject to zero percent (0%) VAT, pursuant to Sec. 106(A)(2)(a)(5), NIRC and Sec. 23 of R.A. No. 7916 in relation to ART. 77(2) of the Omnibus Investments Code.

(b) **Sale of Service.** This shall be treated subject to zero percent (0%) VAT under the *'cross border doctrine'* of the VAT System, pursuant to VAT Ruling No. 032-98 dated Nov. 5, 1998.

(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 suppliers from the Customs Territory, shall be treated effectively subject to the 0% VAT, pursuant to Section 108(B)(3), NIRC, in relation to the provisions of R.A. No. 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 the issuance of this Circular.

Indubitably, no output VAT may be passed on to an ECOZONE enterprise since it is a VAT-exempt entity. The VAT treatment of sales to it, however, varies depending on

whether the supplier from the Customs Territory is VAT-registered or not.

Sales of goods, properties and services by a VAT-registered supplier from the Customs Territory to an ECOZONE enterprise shall be treated as export sales. If such sales are made by a VAT-registered supplier, they shall be subject to VAT at zero percent (0%). In zero-rated transactions, the VAT-registered supplier shall not pass on any output VAT to the ECOZONE enterprise, and at the same time, shall be entitled to claim tax credit/refund of its input VAT attributable to such sales. Zero-rating of export sales primarily intends to benefit the exporter (*i.e.*, the supplier from the Customs Territory), who is directly and legally liable for the VAT, making it internationally competitive by allowing it to credit/refund the input VAT attributable to its export sales.

Meanwhile, sales to an ECOZONE enterprise made by a non-VAT or unregistered supplier would only be exempt from VAT and the supplier shall not be able to claim credit/refund of its input VAT.

xxx xxx xxx

The rule that any sale by a VAT-registered supplier from the Customs Territory to a PEZA-registered enterprise shall be considered an export sale and subject to zero percent (0%) VAT was clearly established only on 15 October 1999, upon the issuance of RMC No. 74-99. Prior to the said date, however, whether or not a PEZA-registered enterprise was VAT-exempt depended on the type of fiscal incentives availed of by the said enterprise. This old rule on VAT-exemption or liability of PEZA-registered enterprises, followed by the BIR, also recognized and affirmed by the CTA, the Court of Appeals, and even this Court, cannot be lightly disregarded considering the great number of PEZA-registered enterprises which did rely on it to determine its tax liabilities, as well as, its privileges.

According to the old rule, Section 23 of Rep. Act No. 7916, as amended, gives the PEZA-registered enterprise the option to choose between two sets of fiscal incentives: (a) The five percent (5%) preferential tax rate on its gross income under Rep. Act No. 7916, as amended; and (b) the income tax holiday provided under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, as amended.

xxx xxx xxx

This old rule clearly did not take into consideration the Cross Border Doctrine essential to the VAT system or the fiction of the ECOZONE as a foreign territory. It relied totally on the choice of fiscal incentives of the PEZA-registered enterprise. Again, for emphasis, the old VAT rule for PEZA-registered enterprises was based on their choice of fiscal incentives: (1) If the PEZA-registered enterprise chose the five percent (5%) preferential tax on its gross income, in lieu of all taxes, as provided by Rep. Act No. 7916, as amended, then it would be VAT-exempt; (2) If the PEZA-registered enterprise availed of the income tax holiday under Exec. Order No. 226, as amended, it shall be subject to VAT at ten percent (10%). **Such distinction was abolished by RMC No. 74-99, which categorically declared that all sales of goods, properties, and services made by a VAT-registered supplier from the Customs Territory to an ECOZONE enterprise shall be subject to VAT, at zero percent (0%) rate, regardless of the latter's type or class of PEZA registration; and, thus, affirming the nature of a PEZA-registered or an ECOZONE enterprise as a VAT-exempt entity.**" *(Emphasis and underscoring supplied and citations omitted)*

Note that RMC No. 74-99 as quoted by the Supreme Court in *Toshiba*, made reference to Section 108(B)(3) of the 1997 NIRC as the specific legal provision governing the tax treatment of the sale of services made by VAT-registered suppliers from the customs territory to PEZA-registered enterprises.

In addition, *Commissioner of Internal Revenue v. Seagate Technology (Philippines)*[30] a case also involving a PEZA-registered enterprise and which directly dealt with the question of VAT treatment thereof, the Supreme Court gave another reason why PEZA-registered enterprises are considered as VAT-exempt entities and thus, their purchases of goods and/or services from VAT-registered enterprises located in the customs territory are effectively VAT zero-rated. The relevant portions of the said decision are quoted below:

"Applying the special laws we have earlier discussed, **respondent as an entity is exempt from internal revenue laws and regulations.**

This exemption covers *both* direct and indirect taxes, stemming from the very nature of the VAT as a tax on consumption, for which the direct *liability* is imposed on one Jc

[30] G.R. No. 153866, February 11, 2005, 451 SCRA 132 ("*Seagate*").

person but the indirect *burden* is passed on to another. Respondent, as an exempt entity, can neither be directly charged for the VAT on its sales nor indirectly made to bear, as added cost to such sales, the equivalent VAT on its purchases. *Ubi lex non distinguit, nec nos distinguere debemus*. Where the law does not distinguish, we ought not to distinguish.

Moreover, the exemption is both express and pervasive for the following reasons:

First, **RA 7916 states that 'no taxes, local and national, shall be imposed on business establishments operating within the ecozone.'[31] Since this law does not exclude the VAT from the prohibition, it is deemed included.** *Exceptio firmat regulam in casibus non exceptis*. An exception confirms the rule in cases not excepted; that is, a thing not being excepted must be regarded as coming within the purview of the general rule.

Moreover, even though the VAT is not imposed on the entity but on the transaction, it may still be passed on and, therefore, indirectly imposed on the same entity -- a patent circumvention of the law. That no VAT shall be imposed directly upon business establishments operating within the ecozone under RA 7916 also means that no VAT may be passed on and imposed indirectly. *Quando aliquid prohibetur ex directo prohibetur et per obliquum*. When anything is prohibited directly, it is also prohibited indirectly.

Second, **when RA 8748 was enacted to amend RA 7916, the same prohibition applied, except for real property taxes that presently are imposed on land owned by developers. This similar and repeated prohibition is an unambiguous ratification of the law's intent in not imposing local or national taxes on business enterprises within the ecozone.** x x x" *(Emphasis and underscoring supplied; Citations omitted)*

In connection with the above *Seagate* ruling, the Court *En Banc* noted that PEZA Certificate of Registration No. 02-072[32] issued to Coral Bay on December 27, 2002, duly conferred its status as an ECOZONE Export Enterprise. Notably, one of the incentives explicitly granted to Coral Bay as an ECOZONE Export Enterprise was "VAT zero-rating of local purchases

[31] Citing **Section 24, Chapter III of RA No. 7916, as amended.**
[32] Exhibit "P-1", Division Docket Vol. III, p. 1302.

subject to compliance with BIR and PEZA requirements".[33] Even after the lapse of its income tax holiday (ITH), Coral Bay was expressly exempted from national and local taxes and in lieu thereof, it was merely required to pay 5% final tax on gross income.[34] All of the foregoing shows that Coral Bay, as an ECOZONE Export Enterprise operating within an ECOZONE, must be treated as a VAT-exempt entity.

In the present case, however, Coral Bay was harping on the fact that the services it purchased from a VAT-registered enterprise operating within the customs territory were rendered outside of Rio Tuba Export Processing Zone, the particular ECOZONE wherein Coral Bay was located. Correspondingly, it vehemently argues that such sale of services is not subject to VAT zero-rating but to the regular 12% VAT and that the amount of input VAT it allegedly paid therefor shall be subject to refund or tax credit.

Coral Bay's position lacks merit.

If the destination principle or cross-border doctrine were to be strictly applied, it appears that Coral Bay's purchase of services from VAT-registered enterprises operating within the customs territory and which were rendered (and therefore, purportedly consumed) outside of the ECOZONE may not be treated as an export sale. Nevertheless, such purchase of services is still subject to effectively VAT zero-rating under Section 108(B)(3) of the 1997 NIRC because Coral Bay, as an ECOZONE Export Enterprise operating within an ECOZONE, is a VAT-exempt entity.

The distinction between automatically VAT zero-rated transactions and effectively VAT zero-rated transactions as explained by the Supreme Court in *Seagate* is enlightening to the present controversy, to wit:

> "Although both are taxable and similar in effect, zero-rated transactions differ from effectively zero-rated transactions as to their source.
>
> **Zero-rated transactions generally refer to the <u>export</u> <u>sale</u> of goods and supply of services.** The tax rate is set at zero. When applied to the tax base, such rate obviously results in no tax chargeable against the purchaser. The seller of such transactions charges no output tax, but can claim a refund of or a tax credit certificate for the VAT previously charged by suppliers. 9e

[33] Exhibit "P-5", Division Docket Vol. III, pp. 1315-1316.
[34] *Id.*

> **Effectively zero-rated transactions, however, refer to the sale of goods or supply of services to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such transactions to a zero rate.** Again, as applied to the tax base, such rate does not yield any tax chargeable against the purchaser. The seller who charges zero output tax on such transactions can also claim a refund of or a tax credit certificate for the VAT previously charged by suppliers.
>
> xxx xxx xxx
>
> **Applying the *destination principle* to the exportation of goods, <u>automatic zero rating is primarily intended to be enjoyed by the seller who is directly and legally liable for the VAT</u>, making such seller internationally competitive by allowing the refund or credit of input taxes that are attributable to export sales. <u>Effective zero rating, on the contrary, is intended to benefit the purchaser who, not being directly and legally liable for the payment of the VAT, will ultimately bear the burden of the tax shifted by the suppliers</u>.** xxx" *(Emphasis and underscoring supplied; Citations omitted)*[35]

As stated earlier, to qualify for VAT zero-rating under Section 108(B)(3) of the 1997 NIRC, the said provision merely requires that a sale of service must satisfy the following:

1. Sale of service is performed in the Philippines;

2. Service is performed by a VAT-registered person; and

3. Service is rendered to persons or entities exempted under special laws or international agreement to which the Philippines is a signatory.

The sale of service subject of the present case undoubtedly meets all of the foregoing requirements. *First*, the services purchased, *i.e.*, the construction of Coral Bay's row houses for its laborers, bus terminal, dormitory, runway, and foreman's duplex, were all performed within the Philippines.[36] *Second*, the services were performed by SMCC Philippines, *gc*

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[35] G.R. No. 153866, February 11, 2005, 451 SCRA 132, 143-144.
[36] Exhibit "P-55", Division Docket Vol. III, pp. 1184-1191; Exhibit "P-61", Division Docket Vol. III, pp. 1212-1221; Exhibit "P-56", Division Docket Vol. III, pp. 1175-1183.

Inc., a VAT-registered person.[37] And *third*, the services were all rendered to Coral Bay which is, as extensively discussed above, a VAT-exempt entity.

It bears pointing out that the requirement under Section 108(B)(3) of the 1997 NIRC that services must be performed within the Philippines before the same may qualify for effectively VAT zero-rating is in consideration of the rule that the tax situs of a zero-rated service is the place where the service is rendered. As aptly discussed by the Supreme Court in *Commissioner of Internal Revenue v. American Express International, Inc. (Philippine Branch)*,[38] viz.:

> ***"Tax Situs of a Zero-Rated Service***
>
> The law neither makes a qualification nor adds a condition in determining the tax situs of a zero-rated service. **Under this criterion, the place where the service is rendered determines the jurisdiction to impose the VAT. Performed in the Philippines, such service is necessarily subject to its jurisdiction, for the State necessarily has to have 'a substantial connection' to it, in order to enforce a zero rate.** The place of payment is immaterial; much less is the place where the output of the service will be further or ultimately used." *(Emphasis and underscoring supplied; Citations omitted)*

The import of the above ruling is that the services must be performed within the Philippines in order for the latter to acquire jurisdiction to subject the sale transaction to VAT. It certainly does not say that the place where the service is rendered will be the determining factor as to whether to impose VAT on the sale of service at zero percent (0%) or at the regular rate of twelve percent (12%). To reiterate, it is for the purpose of acquiring jurisdiction to impose VAT that Section 108(B) of the 1997 NIRC requires the performance of service by VAT-registered persons be done in the Philippines before such transaction may qualify for VAT zero-rating.

At any rate, the Court *En Banc* takes guidance from the Supreme Court's 2016 ruling in *Coral Bay Nickel Corporation v. Commissioner of Internal Revenue*[39] which, as it happens, also involved the same taxpayer as the present case. The Supreme Court held:

> "x x x Verily, **if petitioner had paid the input VAT, the CTA was correct in holding that the petitioner's proper recourse**

[37] Exhibits "P-29" to "P-40-a", Division Docket Vol. III, pp. 1401-1429.
[38] G.R. No. 152609, June 29, 2005, 462 SCRA 197, 219.
[39] G.R. No. 190506, June 13, 2016, 793 SCRA 199, 200 ("*Coral Bay*").

> **was not against the Government but against the seller who had shifted to it the output VAT** following RMC No. 42-03, which provides:
>
> > In case the supplier alleges that it reported such sale as a taxable sale, the substantiation of remittance of the output taxes of the seller (input taxes of the exporter-buyer) can only be established upon the thorough audit of the suppliers' VAT returns and corresponding books and records. It is, therefore, imperative that the processing office recommends to the concerned BIR Office the audit of the records of the seller.
> >
> > In the meantime, the claim for input tax credit by the exporter-buyer should be denied without prejudice to the claimant's right to seek reimbursement of the VAT paid, if any, from its supplier.
>
> We should also take into consideration the nature of VAT as an indirect tax. Although the seller is statutorily liable for the payment of VAT, the amount of the tax is allowed to be shifted or passed on to the buyer. **However, reporting and remittance of the VAT paid to the BIR remained to be the seller/supplier's obligation. Hence, the proper party to seek the tax refund or credit should be the suppliers, not the petitioner.**" *(Emphasis and underscoring supplied; Citations omitted)*

Consistent with the above ruling, the Court *En Banc* holds that Coral Bay is not the proper party to seek the present judicial claim for tax refund and/or credit. In the event that Coral Bay actually paid the said input tax, its recourse is to seek reimbursement thereof against its supplier and not against the Government.

CTA EB No. 1910

In its Petition, Coral Bay argues that the Court in Division erred in ruling that it has not fully established the existence of part of the input VAT which it seeks to refund in the amount of ₱2,579,748.17.[40] Corollarily, Coral Bay contends that the Court in Division erred in ruling that it is not entitled to an additional input tax refund in the amount of ₱10,703,639.05 on top of the tax refund in the amount of ₱11,873,651.48 previously granted by the CTA in its Decision dated November 23, 2017, and affirmed in a Resolution dated July 27, 2018 on the ground that they are not attributable to Coral Bay's zero-rated sales of goods and services.[41]

[40] CTA EB No. 1910 Docket, pp. 13-39.
[41] *Id.*, pp. 39-40.

In light of the above discussion, however, it is evident that there is no need to discuss the merits of Coral Bay's petition. The Petition for Review docketed as CTA EB No. 1910 must perforce be denied.

WHEREFORE, the Petition for Review filed by the Commissioner of Internal Revenue docketed as CTA EB No. 1909 is **GRANTED**. The Decision dated November 23, 2017 as well as the Resolution dated July 27, 2018 of the Third Division of this Court in CTA Case No. 8804 are both **REVERSED**. Accordingly, Coral Bay Nickel Corporation's claim for refund or issuance of tax credit allegedly representing its unutilized input value-added tax (VAT) from its purchases of goods and services attributable to its VAT zero-rated sales for the period January 1, 2012 to December 31, 2012 is **DENIED**.

On the other hand, the Petition for Review filed by Coral Bay Nickel Corporation docketed as CTA EB No. 1910 is **DENIED** for lack of merit.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

With due respect, please see Concurring and Dissenting Opinion
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

I concur with Separate Opinion
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

CORAL BAY NICKEL CORPORATION,
Respondent.

CTA EB NO. 1909
(CTA Case No. 8804)

x - x

CORAL BAY NICKEL CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1910
(CTA Case No. 8804)

Present:
DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
SEP 05 2019 9:55am

x- -x

CONCURRING & DISSENTING OPINION

RINGPIS-LIBAN, *J.*:

I concur in the *ponencia* in denying the Petition for Review filed by Coral Bay Nickel Corporation ("Coral Bay") in CTA EB No. 1910 for lack of merit.

I do not agree, however, with the majority in granting the Petition for Review filed by the Commissioner of Internal Revenue ("CIR") in CTA EB No. 1909, and denying Coral Bay's claim for refund or issuance of tax credit certificate representing its unutilized input Value-added tax ("VAT") from its purchases of goods and services attributable to its VAT zero-rated sales for the period January 01, 2012 to December 31, 2012.

It is my humble belief that sale of goods and services made by a VAT-registered enterprise from the customs territory to a PEZA-registered enterprise, which are consumed, used or rendered outside the ecozone (*i.e.*, within the customs territory) is subject to twelve percent (12%) VAT. As such, the input VAT thereon is valid.

The Philippines adheres to the cross border doctrine and destination principle for VAT.[1]

Under the **cross border doctrine**, no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Whereas under the **destination principle**, goods and services are taxed only in the country where these are consumed.[2]

Corollary, actual export of goods and services from the Philippines to a foreign country is free of VAT. While, those destined for use or consumption within the Philippines shall be imposed with VAT.[3] In other words, in our jurisdiction, exports are zero-rated but imports are taxed.

In relation to entities which are registered with Philippine Economic Zone Authority ("PEZA"), the import of these two tenets on VAT imposition are profound.

Section 8 of Republic Act No. 7916[4] mandates that PEZA shall manage and operate export processing zones (*i.e.*, ecozones) as a separate customs territory from the rest of the Philippines. Thus, for tax purposes, the ecozones are effectively considered as foreign territory separate and distinct from the customs territory.

Because of the fiction that an ecozone is considered a foreign territory, no VAT should be passed on to that entity in that "foreign territory" in the same

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1 Coral Bay Nickel Corporation v. Commissioner of Internal Revenue, G.R. No. 190506, June 13, 2016 *citing* Section 2 of Revenue Memorandum Circular No. 74-99.

2 *See* Commissioner of Internal Revenue v. Seagate Technology (Philippines), G.R. No. 153866, February 11, 2005.

3 *See* Commissioner of Internal Revenue v. Toshiba Information Equipment (Phils.), Inc., G.R. No. 150154, August 09, 2005.

4 The Special Economic Zone Act of 1995.

way as any exports made to another country. Sales by suppliers from the customs territory to those inside the ecozones will be considered as exports and should have no VAT component. Instead, sales of goods, properties, and services by persons from the customs territory to PEZA-registered enterprises shall be subject to VAT at zero percent (0%). In zero-rated transactions, the VAT-registered supplier shall not pass on any output VAT to the PEZA-registered entity, and at the same time, shall be entitled to claim tax credit/refund of its input VAT attributable to such sales.[5]

This rule however presumes that the purchases made by the PEZA-registered entities shall be consumed inside the ecozone. This is because VAT is ultimately a tax on consumption.[6]

Thus, in *Coral Bay Nickel Corporation v. Commissioner of Internal Revenue*[7], the Supreme Court ruled that sale of goods and services by a VAT-registered supplier from the customs territory to a PEZA-registered enterprise, which are consumed, used or rendered inside the ecozone is subject to zero percent (0%) VAT:

> "As such, the purchases of goods and services by the petitioner that were **<u>destined</u> <u>for</u> <u>consumption</u> <u>within</u> <u>the</u> <u>ECOZONE</u> should be free of VAT; hence, no input VAT should then be paid on such purchases**, rendering the petitioner not entitled to claim a tax refund or credit."[8]

Moreover, the Bureau of Internal Revenue (BIR) has a similar stance when it issued Revenue Memorandum Circular ("RMC") No. 50-2007[9] outlining the tax treatment of sale, barter or exchange of goods or properties or sale or exchange of services made by suppliers from the customs territory to registered freeport zone enterprises:

> "SECTION 3. Clarificatory Questions and Answers. —
>
> xxx xxx xxx
>
> Q5: **What is the coverage of VAT zero-rating?**

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5 Commissioner of Internal Revenue v. Toshiba Information Equipment (Phils.), Inc., G.R. No. 150154, August 09, 2005.

6 Commissioner of Internal Revenue v. Magsaysay Lines, Inc., Baliwag Navigation, Inc., FIM Limited of the Marden Group (HK) And National Development Company, G.R. No. 146984, July 28, 2006.

7 G.R. No. 190506, June 13, 2016.

8 *Emphasis and underscoring supplied.*

9 July 30, 2007.

> A5: The zero-rating will cover sale, barter, exchange or lease of all goods, properties and/or services by a VAT-registered seller/contractor from the Customs Territory to a Freeport Zone-registered enterprise and shall include, among others, the following:
>
> a. The sale/supply of ordinary cars, vehicles, automobiles, specialized vehicles or other transportation equipment, provided that these are used exclusively within the subject special Freeport Zones;
>
> b. The lease of properties by VAT-registered lessors, provided that such properties are located within the subject Freeport Zones;
>
> c. The sale/supply of electricity by the National Power Corporation ("NPC") or by any other VAT-registered seller/supplier from the Customs Territory, to any registered Freeport Zone enterprise engaged in the distribution of power or electricity within the subject Freeport Zones; and
>
> d. **The sale/supply of services, provided such services are <u>rendered</u> <u>or</u> <u>performed</u> <u>within</u> <u>the</u> <u>Freeport</u> <u>Zone</u>.**"[10]

From the discussion above, it follows therefore that when the purchases are consumed outside the ecozone, the same is not subject to zero-rated VAT, but is subject to the regular twelve percent (12%) VAT.

On this score, I adopt the ruling in the Assailed Decision stating that Coral Bay is entitled to claim for refund or issuance of tax credit certificate for its unutilized input VAT on local purchases of goods and services consumed and rendered outside the PEZA zone:

> "**In fine, petitioner was able to establish that its local purchases of goods and services from SMCC were consumed and rendered outside the PEZA zone**. Hence, the input VAT relative to such purchases may be refunded by petitioner in line with the Destination Principle which provides that the destination of the goods determines its taxation or exemption from tax. **Ergo, petitioner's purchases of goods and services from SMCC, which were <u>consumed</u> <u>outside</u> <u>the</u> <u>PEZA</u> <u>zone</u>, do not qualify for VAT zero-rating, and accordingly, <u>are</u> <u>subject</u> <u>to</u> <u>12%</u> <u>VAT</u>**.

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[10] *Emphasis and underscoring supplied.*

> Since these goods and services were subjected to 12% VAT, petitioner paid the input VAT thereon. Hence, petitioner is entitled to claim for refund or issuance of TCC for its unutilized input VAT on local purchases of goods and services consumed and rendered outside the PEZA zone."[11]

All told, I vote to **AFFIRM** the November 23, 2017 Decision and July 27, 2018 Resolution of the Third Division. I also vote for the **DENIAL** of the Petitions for Review filed by both Coral Bay and the CIR.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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11 *Emphasis and underscoring supplied.*

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 1909
(CTA Case No. 8804)

-versus-

CORAL BAY NICKEL CORPORATION,
Respondent.

x- -x

CORAL BAY NICKEL CORPORATION,
Petitioner,

CTA EB. NO. 1910
(CTA Case No. 8804)

-versus-

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 05 2019 9:55 AM

x---x

SEPARATE OPINION

MANAHAN, J.:

Majority of my esteemed colleagues reversed the Decision dated November 23, 2017 promulgated by the Third Division of this Court (Court in Division) and consequently denied the claim for refund of Coral Bay Nickel Corporation (Coral Bay) pertaining to its alleged excess/unutilized input value-added tax (VAT) for the taxable period 2012.

With all due respect to the position of the majority, allow me to submit a separate opinion and propose a different approach in the denial of the claim for refund filed by Coral Bay.

The claim for refund was anchored on the provisions of Section 112 (A) of the 1997 NIRC quoted below:

> "SEC. 112. *Refunds 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 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 sale and also in taxable or exempt sale of goods of 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: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.
>
> xxx xxx xxx

Based on the foregoing provision of Section 112 (A) of the 1997 NIRC, in order to be entitled to a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales, the following requisites must be satisfied:[1]

1. that the taxpayer is VAT-registered;
2. that there must be zero-rated or effectively zero-rated sales;
3. that input taxes were incurred or paid;
4. that input taxes claimed are attributable to zero-rated or effectively zero-rated sales;
5. that input taxes have not been applied against any output VAT liability; and
6. that the claim was filed within the prescribed periods both in the administrative and judicial levels.

xxx xxx xxx

The records of the case reveal that the claimed input VAT were allegedly incurred by Coral Bay on its purchases of goods and services which were consumed and rendered outside the Philippine Economic Zone Authority (PEZA) zone and within the customs territory. Coral Bay is a duly registered PEZA enterprise as evidenced by its PEZA Registration Certificate No. 02-072 dated December 27, 2002.

The purchases were used to construct the row house and dormitory for Coral Bay's laborers as well as the foreman's duplex and airport runway, all located outside of the PEZA zone.

One important requisite for a claim for refund of excess or unutilized input VAT under the aforequoted Section 112 (A) is that the input taxes claimed are attributable to zero-rated or effectively zero-rated sales.

This Court finds that Coral Bay failed to comply with this basic requisite because the input taxes that were incurred were not at all related to its zero-rated sales.

In the decision promulgated by the Court in Division, Coral Bay was described as a domestic corporation engaged in the manufacture and exportation of nickel/cobalt mixed sulfide. The Decision further narrated that during taxable year 2012, Coral Bay

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[1] *San Roque Power Corporation vs. Commissioner of Internal Revenue*, G.R. No. 180345, November 25, 2009.

exported its nickel cobalt mixed sulfide to Sumitomo Metal Mining Co., Ltd. (SMMC), a corporation organized and existing under the laws of Japan.

It is clear from the records of this case as well as the aforequoted narration that the sales of Coral Bay are qualified to be zero-rated under "export sales" in accordance with Section 106 (A) (2) of the 1997 NIRC.

However, it is also clear that the input taxes that were incurred were used for transactions or activities that are not related to its nature as a zero-rated taxpayer.

One of the incentives granted by law is that any unutilized or excess input VAT may be refunded to VAT zero-rated taxpayers provided that these are attributable or used in the manufacture or exportation of its zero-rated sales which in the case of Coral Bay is the exportation of nickel cobalt and mixed sulfide to SMMC located in Japan. Section 110 (B) of the 1997 NIRC clearly provides, thus:

> Section 110. *Tax Credits.*-
>
> xxx xxx xxx
>
> (B) Excess Output or Input Tax – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. **Provided, however, That any input tax attributable to zero-rated sales by a VAT registered person may at his option be refunded or credited against any other internal revenue taxes, subject to the provisions of Section 112.** (emphasis supplied)

Coral Bay categorically admitted that the goods and services were consumed outside of the Rio Tuba Export Processing Zone and were used to construct the laborer's row houses, dormitories and foreman's duplex etc., which I find to be unrelated to the said export sales. The Supreme Court has already ruled that any unutilized input VAT *attributable* to zero-rated sales may be claimed as refund or tax credit.[2] The tax refund embodied in Section 112 (A) of the 1997 NIRC is intertwined with the essence of the incentives granted to enterprises that engage in exportation of local goods and services: that instead of imposing the regular VAT rate of 12% they are subject to VAT but at zero-rate. However, since exportations of

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[2] Team Sual Corporation (formerly Mirant Sual Corporation), G.R. No. 194105, February 5, 2014.

this nature do not incur output VAT, the input VAT that is passed on to them cannot be credited thus it is accumulated either as excess input VAT and/or remains unutilized. Thus, the payment of input VAT and the resulting refund under Section 112 is not premised on an erroneous payment but is a privilege or an option inherent in the incentive granted by law. The provisions of Section 112 of the 1997 NIRC provides a solution whereby the excess or unutilized input VAT may now be claimed as refund or applied as a tax credit so as not to negate the essence of the incentive. However, there are requisites for its entitlement. Whether applied as a refund or tax credit, the requisite of attribution to the zero-rated sales remain consistent, otherwise, it is not covered by the provisions of Section 112 (A) and the claim for refund should not prosper. This is illustrated further by the proportional allocation of the input taxes if the claimant taxpayer is engaged in both zero-rated or effectively zero-rated and taxable or exempt sales as clearly provided in the afore-quoted Section 112 (A) of the 1997 NIRC because the law would clearly want to preserve or restrict the refund incentive only to those which are directly attributable to the zero-rated sales.

I humbly believe that if the claimant taxpayer is only engaged in zero-rated sales and does not generate output taxes against which to offset the input taxes incurred outside of its zero-rated sales, then the provisions of Section 112 of the 1997 NIRC will not apply and refund is not an option while the business exists.

The requisites already mentioned in claiming a refund of excess or unutilized input VAT under Section 112 of the 1997 NIRC have been affirmed and applied by a myriad of cases, the most recent of which is my position embodied in an *En Banc* case involving the same parties.[3]

In view of the foregoing reasons, I vote to deny the entire claim for refund of alleged excess/unutilized input VAT for taxable year 2012.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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[3] CIR vs. Coral Bay Nickel Corporation; Coral Bay Nickel Corporation vs. CIR, CTA EB Nos. 1735 and 1737, July 18, 2019.