REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION (doing business under the name Atlas-Itochu Consortium),
Petitioner,

- versus - **C.T.A. Case No. 5671**

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

AUG 2 9 2002

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DECISION

Elevated before us by way of a Petition for Review is respondent's denial of the protest filed by petitioner seeking for the annulment and setting aside of the two (2) items of assessments issued by herein respondent in the amount of P20,237,010.84 and P311,000.00 representing the alleged deficiency value-added tax and the penalty for the non-filing of appropriate monthly VAT Declarations, quarterly VAT Returns and quarterly VAT Summaries, respectively, both of which involve taxable years 1993 and 1994.

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

Petitioner (Atlas–Itochu Consortium) is a consortium between Atlas Consolidated Mining and Development Corporation (ACMDC), a corporation organized and existing under Philippine laws and Itochu Corporation, a corporation organized and existing under the laws of Japan. It was organized for the limited purpose of submitting a bid to the

Department of Transportation and Communication (DOTC) and if the bid is accepted, for the purpose of signing and performing the contract *(Exhibit F, CTA records, pp. 317-324).*

On June 4, 1992, ACMDC and ACMDC Ventures, Inc., executed a Deed of Assignment whereby the former assigned all its rights, interests, obligations and responsibilities to the latter for the development of Mactan (Cebu) International Airport. The assignee is a wholly-owned subsidiary of the assignor engaged in the construction business. *(Exhibit H, Deed of Assignment, CTA records, pp. 328-329).*

On December 11, 1992, the DOTC of the Government of the Republic of the Philippines and Atlas-Itochu Consortium entered into a Form of Agreement *(Exhibit G, CTA records, pp. 325-327).* Under the said agreement, the former accepted the bid of the latter for the execution and completion of works and the remedying of any defects of the Mactan (Cebu) International Airport Development Project.

Petitioner is registered with the Bureau of Internal Revenue as value-added tax taxpayer with Taxpayer Identification Number 410-002-054-810 *(Exhibit L, CTA records, p. 408).*

On May 25, 1995, petitioner filed an application for tax refund of its excess VAT payments arising from the 6% withholding VAT on government project (DOTC) from the third quarter of 1993 up to the last quarter of 1994 in the amount of P14,714,148.85 *(Exhibits E, E-1 and E-2, CTA records, p. 316).* In response to petitioner's application for tax refund, respondent, on May 29, 1995, issued Letter of Authority No. 74817 *(Exhibit 6, CTA records, p. 492)* authorizing his representative to examine the books of

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accounts and other accounting records of the petitioner for value-added tax purposes – claim for refund. On November 13, 1995, Letter of Authority No. 95483 was issued by the respondent *(Exhibit 7, CTA records, p. 493),* cancelling Letter of Authority No. 95483, and again authorizing his representative to examine the books of accounts and other accounting records of the petitioner for value-added tax purposes – revalidation.

Instead of a favorable response from the BIR, petitioner received on April 20, 1998, assessment notices together with the corresponding demand letters for: (a) P311,000.00 for non-filing of monthly VAT Declarations, quarterly VAT Returns and quarterly VAT Summaries; and (b) P20,237,010.84 for deficiency VAT. The said deficiency VAT assessment was the result of the examiners' findings that:

1. The VAT invoices and/or official receipts supporting the input tax credits in the amount of P 14,275,559.21 did not show the name of the purchaser or was issued to ACMDC and not Atlas Itochu Consortium, in violation of Section 108 (a) of the Tax Code, as amended, in relation to Section 238 of the same Code;

2. There was a discrepancy between the sales as reported in the receipts and sales per VAT return in the amount of P65,575,968.01; and

3. Claim for refund in the amount of P14,714,148.88 was denied and instead treated as a deduction from VAT input taxes.

On May 20, 1998, petitioner, through counsel, protested the assessments *(Exhibits J & J-1, CTA records, pp.402-405)* alleging that the assessments should be set-aside on the ground that they were made beyond the three-year (3) prescriptive period. In addition, counsel for the petitioner submitted the following explanations:

1. **On the disallowance of VAT input taxes in the amount of P14,275,559.21**

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During the period in question, petitioner's sole project was the development and construction of the Mactan (Cebu) International Airport. This project was undertaken by ACMDC in joint venture with Itochu Consortium. Thus, all purchases whether made in Atlas-Itochu's name or ACMDC are entirely attributable to the project, for which input taxes may be claimed. xxx.

2. **On the discrepancy between the sales as per receipts and the total sales reported as per VAT returns in the amount of P65,575,968.04**

The contract with the Department of Transportation and Communications (DOTC) for the development of the Mactan International Airport is funded by the Overseas Economic Cooperative Fund (OECF). Payment on the project is in part made in Japanese currency. The discrepancy in sales as per receipts and the sales reported in the VAT returns may be attributable to the fact that a portion of the sales made were zero-rated and thus was not reported as sales in the VAT returns.

3. **On the disallowance of the claim for input VAT refund in the amount of P14,714,148.88**

xxx. The imposition of the creditable value-added tax resulted in input tax credits for which a refund in the amount of P14,714,148.88 was made. The VAT return filed for December of 1994 showed an excess input VAT in the amount of (sic) claimed as refund. The claim for refund is supported by Section 110 (B) which provides that any input tax attributable to the purchase of capital goods or to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112. Therefore, what should have been refunded to our client was instead deducted from the total input VAT credits and thereby increasing the alleged deficiency.

4. **On the assessment of P311,000.00 for alleged non-filing of monthly VAT returns and quarterly VAT summaries**

Our records show that Atlas-Itochu complied with all reportorial VAT requirements during the years in question. xxx.

On August 28, 1998, petitioner received respondent's denial of the protest (*Annex F, Petition for Review, CTA records, pp. 35 & 36).* In the said letter, petitioner was informed that the assessments issued have not yet prescribed because petitioner executed

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a waiver of the statute of limitations, as provided for in Section 223 of the Tax Code, for deficiency value-added tax, plus penalties and interest for 1993 to 1994. Details of respondent's response were as follows:

1. **Disallowance of input taxes in the amount of P14,275,559.21.**

   It is specifically stated in Section 108-1 of the value-added tax implementing regulations, that the **name**, tax identification number, business style, if any, and address of the VAT-registered purchaser, customer of client should be indicated in the duly registered receipts or sales or commercial invoices. Considering that the consortium of Atlas Consolidated Mining and Development Corporation (ACMDC) and Itochu Corporation had already been established, any purchase or importation of goods should indicate the consortium as purchaser, to avail of input tax credits, as set forth in Section 104-2 of the value-added tax implementing regulation.

2. **Discrepancy between Sales per VAT returns and per Financial Statement of P65,575,968.04.**

   The discrepancy between sales per VAT returns and per financial statement resulted from the failure of Atlas-Itochu Consortium (petitioner) to accurately accomplish the quarterly VAT returns, as well as to provide details of sales. Additional documentation should be furnished to support the taxpayer's (petitioner) claim of zero-rated sales, as provided for under Section 100-2 of the value-added tax implementing regulations.

3. **Disallowance of input taxes in the amount of P14,714,148.88.**

   Under Section 104-4 of the value-added tax implementing regulations, if at the end of any taxable quarter, the input tax exceeds the output tax, the excess shall be carried over to the succeeding months or quarters. Consequently, the excess input taxes of P14,714,148.88 for 1993 to 1994 cannot be applied to the deficiency value-added tax because it was credited against output taxes of the subsequent period, 1994 to 1995.

4. **Compromise penalty of P311,000.00 for non-compliance of reportorial requirements for the period in question.**

> Petitioner failed to file the appropriate VAT returns and summaries, as provided for under Section 254 and Revenue Regulation 6-89. This contradicts your earlier statement that all reportorial VAT requirements were complied with. In addition, with regard to the difficulty in the retrieval of your client's (petitioner) record, Section 235 of the NIRC states that all the books of accounts including the subsidiary books and other accounting records of corporations, partnerships, or persons shall be preserved by them for a period beginning from the last entry in each book until the last day prescribed by Section 203 within which the Commissioner is authorized to make an assessment. The said books shall be subject to examination and inspection of internal revenue officers.

Due to the negative answer made by the respondent, petitioner had no other relief but to elevate the matter before this Court by way of petition for review on September 25, 1998.

Respondent filed his Answer through registered mail on November 13, 1998, raising therein the following Special and Affirmative Defenses, thus:

1. That the assessment in the amount of P20,237,010.84, representing deficiency value-added tax for the period 93-94, and the amount of P311,000.00 as compromise penalty thereof, under Assessment Notice No. 41-84 dated April 7, 1998 was in accordance with law;

2. That the burden of proof is upon the taxpayer to show that the assessment was erroneous;

3. That the filing of the Petition for Review was premature on the ground that the alleged respondent's denial of the protest dated August 14, 1998 is not yet final, hence there is no cause of action.

Considering the averments and disquisitions of both parties, the issues to be resolved by this Court are as follows:

1. Whether or not the assessment for deficiency VAT in the amount of P20,237,010.84 was proper. Corollarily, the following issues should be addressed:

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- Whether or not the disallowance in the amount of P14,275,559.21 as creditable input taxes allegedly attributable to purchases of materials relative to Mactan International Airport Development Project was proper;

- Whether or not the output VAT imposed on the alleged discrepancy between the sales reflected in the VAT returns and the sales reflected on the official receipts was proper; and,

- Whether or not the disallowance of the excess input taxes for 1993 and 1994 in the amount of P14,714,148.85 against the total creditable input value-added tax was proper.

2. **Whether or not the assessment for non-compliance of the reportorial requirements during the periods in question was proper.**

Anent the first corollary issue, this court agrees with the respondent that the input taxes in the amount of P14,275,559.21 claimed by the petitioner as creditable input tax should be disallowed for failure to comply with VAT invoicing requirements. Section 2 of Revenue Regulations No. 6-89 provides:

> "**Section 2**. Section 21 (a) of Revenue Regulations No. 5-87 is hereby amended to read as follows:
>
> Section 21. *Invoicing requirements.* - Invoices and/or receipts.- All VAT-registered persons shall, for every sale of goods or services, issue an invoice or receipt which must show:
>
> 1. the VAT registration number of seller;
> 2. the ***name***, business style, if any, and address of the purchaser, customer or client;
> 3. the date of transaction;
> 4. quantity, unit cost and description of merchandise or nature of service;
>
> *(emphasis ours)*

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It is clear from the foregoing provision that the name of the VAT-registered purchaser must be specifically indicated in the duly registered receipts or sales or commercial invoices. Considering that the consortium between Atlas Consolidated Mining and Development Corporation (ACMDC) and Itochu Corporation had already been established, any purchase or importation of goods should indicate the consortium as the purchaser in order to be entitled to input tax credit.

Contrary to petitioner's assertion, BIR ruling No. 2-97 cannot be applied in the case at bar. The said BIR ruling actually involves a consortium, which consists of four member-corporations. As discussed therein, to be acceptable as a valid VAT invoice or VAT official receipt, the same must be issued in the name of the consortium member(s) with indication that it is part of the consortium, viz:

"Sold to *(name of consortium member)* as member of _____ Consortium."

To put it simply, if the invoice is issued in the name of one of the consortium members, it must be indicated therein that it is issued for the consortium. Thus, phrases such as *"....as member of the Consortium"*, *"....for the account of the Consortium"*, *"......in behalf of the Consortium"* or any other words of the same tenor are necessary in order to emphasize the fact that the invoice or receipt is issued for the consortium. Otherwise, it may open floodgates to fraud wherein a consortium member may find ways to maximize the use of said receipt by claiming tax credits twice for its own name separate from that of the consortium.

In the case at bar, we observed that there has been some adjustments made as to the name indicated in the receipts to make it appear that they were issued in the name of the consortium. Although it was indicated in the invoices/receipts for which input VAT were claimed that the purchaser is "ACMDC Ventures, Inc. *(which petitioner ACMDC claims to be its wholly-owned subsidiary assigned to perform the construction of the Mactan International Airport, TSN, October 26, 1999, pp.14-15)*/Atlas-Itochu," the same does not hold water. The said VAT invoices and official receipts submitted by petitioner were not issued in the name of the consortium (*Folders 1-19*). A circumspect examination of the business names stated in the receipts/invoices would reveal that the same have been altered to include Atlas-Itochu as one of the buyers. Petitioner merely inserted the name "Atlas-Itochu" to create an impression that the items purchased were for the account of the consortium. The typewritten and handwritten name "Atlas-Itochu" differed in the quality of the ink and penmanship, respectively, when compared to the typewritten and handwritten ACMDC. This fact alone casts a cloud of doubt on the veracity of the invoices and receipts presented by the petitioner. Furthermore, being a VAT-registered taxpayer, Atlas-Itochu Consortium should maintain and keep its own set of books of accounts and other accounting records to account properly its economic events, which records shall be preserved for a period beginning from the last entry in each book until the last day prescribed by Section 203 of the Tax Code within which Commissioner of Internal Revenue is authorized to make an assessment. Since petitioner failed to present its accounting records and those of ACMDC, we have no way of ascertaining whether or not the amounts reflected in the receipts/invoices were already booked by ACMDC and were utilized against its output VAT liability during the taxable years in question or in the succeeding taxable year. To allow the petitioner to credit the subject amount of P14,275,559.21 is susceptible to the danger of granting the input tax credits twice to two different business entities to the prejudice of the government.

With respect to the second corollary issue, the assessment for output VAT deficiency arose from the discrepancy between the sales reflected in the VAT returns and the sales reflected in the official receipts. According to petitioner, DOTC is withholding a 10% retention, which is equivalent to 10% of gross billings of petitioner as evidenced by various vouchers (*Folder A*), the amount of which was not received by the petitioner during the taxable years 1993 and 1994.

After evaluating the vouchers, this court is in accord with petitioner's stand. A perusal of the records would show that the 10% retention income withheld by DOTC was already reported and subjected to output VAT by the petitioner in later periods upon release of the retention. Thus, the assessment for output VAT deficiency should be cancelled.

Proceeding now to the third corollary issue, we are convinced that the disallowance of the claimed excess input taxes in the amount of P14,714,148.88 for taxable years 1993 and 1994 was proper. Petitioner failed to show that the aforesaid amount was not carried over to the succeeding taxable year. We could not rely on the report made by the independent CPA that the said amount claimed as VAT refund was not carried over in succeeding year 1995 based on the amended VAT return for 1995. The said 1995 VAT return was not offered and presented as evidence. We could not find

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any reason why such important document was not presented with this Court for verification purposes. Thus, we cannot ascertain whether the amount of P14,714,148.88 was not applied against the output VAT of the petitioner for taxable year 1995. It is worthy to reiterate that the burden of proof is upon the taxpayer to show that the assessment was erroneous.

Based on the above findings, the assessment of the respondent as to the deficiency VAT for taxable years 1993 and 1994 was in order but the amount should be reduced from P20,237,010.84 to P14,275,559.17, computed as follows:

Gross Sales/Receipts		451,169,974.93
Divide by		11
Output tax due		P 41,015,452.27
Less: Tax credits:		
Input tax:		
Per return (Annexes P – U)	P29,527,002.68	
Less: Disallowed Input Tax (VAT invoicing	14,275,559.21	
Creditable Input Tax	P15,251,463.47	
VAT Withheld per return	26,202,578.48	
Total	P41,454,041.95	
Less: Input Tax deemed Carried Forward in 1995	14,714,148.85	26,739,893.10
Deficiency VAT		P 14,275,559.17

As far as the second issue is concerned, petitioner presented various documents to prove that it complied with the reportorial requirements of filing monthly VAT Declarations and quarterly VAT Returns during the period in question. However, a thorough examination of the available documents would reveal that petitioner was not able to prove compliance insofar as the filing of VAT Declarations/Returns is concerned save for the months of November 1993, January and February 1994 (*Annexes M, N, O, Petition for Review*).

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The Monthly VAT Declarations for the months of April and May 1993 as well as the first and second quarterly VAT Returns for the year 1993 were not presented. In addition, the VAT Declarations for the months of July, August, and October 1993 although presented were not duly stamped and signed by the BIR or its duly authorized representative. Therefore, we cannot ascertain if those declarations were indeed filed. For its failure to file some of its returns and declarations, respondent argues that petitioner should be held liable under Section 254 (now Section 255) of the Tax Code, which provides:

> "***Section 254. Failure to file return, supply correct and accurate information, pay tax, withhold and remit tax and refund excess taxes withheld on Compensation.***- Any person required under this Code or by regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or regulations shall, in addition to other penalties provided by law, upon conviction thereof, be fined of not less than Ten Thousand pesos (P 10,000.00) and imprisonment of not less than one year but not more than ten years.
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> x x x x x x."

The other reportorial requirement, particularly the filing of quarterly VAT summaries, is stated in Section 3 of Revenue Regulations No. 6-89, thus:

> "***Section 3. -*** Section 23 of Revenue Regulations 5-87 is hereby amended by adding a new paragraph (c) to read as follows:
>
> (c) Summary Lists.- Except as herein otherwise provided, every person liable for the value-added tax, whose gross aggregate sales and receipts exceed P 2,500,000.00 a quarter, shall attach to his return a summary of his sales and purchases in separate lists. x x x
>
> The list must show the name, address and VAT number of each of his buyer and supplier and the amount of his sales and purchases by totals per buyer or supplier."

As to this requirement, records show that petitioner proved compliance only with respect to the second, third and fourth quarters of taxable year 1994, while the rest of the quarters were not proven. The VAT summary for the second quarter of 1993 was not included in the formal offer of evidence by the petitioner, hence, the same cannot be considered by the court. Although there were quarterly summaries of input taxes presented for the third and fourth quarters of 1993 and the first quarter of 1994, the court found that the amounts of input VAT for each of the summaries presented do not tally with the amounts of input taxes declared in the corresponding returns. The amounts of input tax per return are much higher than what appeared in the summaries. Hence, these summaries are of no probative value as they do not correctly reflect the amounts of input VAT as indicated in petitioner's VAT returns.

Because of the evident violation committed by the petitioner with regards to the reportorial requirement as provided in Section 254 of the Tax Code, involving non-filing of monthly VAT declarations, non-filing of quarterly VAT returns and non-filing of quarterly VAT summary, respondent imposed a corresponding compromise penalty for each violation. However, we cannot sustain the said compromise penalties. Section 254 of the Tax Code clearly provides that the penalties provided by law shall only be imposed upon <u>conviction</u>, which fact is wanting in the present case. Moreover, as facts would demonstrate, there is no showing that petitioner voluntarily entered into a compromise with the respondent. It even set up the defense that it has complied with the requirements, which, of course is belied by the documentary evidence available. It has been judicially held that compromise penalties being an imposition based upon mutual agreement or consent by petitioner, cannot be compulsorily imposed to those who do not agree to its imposition. Thus, as held by the Supreme Court in an old case entitled *The Philippine International Fair, Inc. vs. Collector, GR Nos. L-12928 and L-12932, March 31, 1962 (4 SCRA 774),*

> "This Court has no jurisdiction to compel a taxpayer to pay the sum (compromise penalty) because by its nature it implies a mutual agreement between the parties in respect to the thing or subject matter which is so compromised."

It can be inferred from the foregoing pronouncement that the imposition of the compromise penalty against a taxpayer presupposes consent on the part of both parties in the absence of which the compromise penalty is not binding nor cannot be mandatorily enforced. In the case at bar, it is evident that petitioner did not concur with the compromise penalty imposed by the respondent. Necessarily, this court cannot compel petitioner to pay the compromise penalty against its will.

However, it must be noted that in situations like this, respondent is not left without a remedy. Violation of the reportorial requirements prescribed by law carries with it criminal sanctions. The compromise penalty incident to the violation is suggested merely in lieu of criminal prosecution. As clearly worded in RMO 1-90, thus:

> "III. Guidelines and Instructions
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> (5) Since compromise penalties are only amounts suggested in settlement of criminal liability and may not therefore be imposed or exacted in the event that a taxpayer refuses to pay the suggested compromise penalty, the violation shall be referred for criminal action as above-mentioned."

WHEREFORE, in view of the above findings, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, petitioner is hereby **ORDERED** to

PAY the Bureau of Internal Revenue the amount of P14,275,559.17 representing deficiency VAT for taxable years 1993 and 1994. However, the assessment corresponding to the compromise penalty for non-compliance of reportorial requirement is hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

JUANITO C. CASTANEDA, JR.
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

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