REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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ORICA PHILIPPINES, INC., Petitioner,	**CTA EB NO. 2367** (CTA Case No. 9647)
	Present:
- versus -	**DEL ROSARIO,** P.J., **CASTAÑEDA, JR.,** **UY,** **RINGPIS-LIBAN,** **MANAHAN,** **BACORRO-VILLENA,** **MODESTO-SAN PEDRO,** **REYES-FAJARDO,** *and* **CUI-DAVID,** JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** FEB 03 2022 11:30am

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DECISION

UY, J.:

Before the Court *En Banc* is a *Petition for Review*[1] filed on November 18, 2020 by petitioner, Orica Philippines, Inc., against respondent, Commissioner of Internal Revenue (CIR), praying that the Decision dated June 4, 2020[2] and the Resolution dated October 13, 2020[3], both rendered by the Second Division of this Court (Court in Division) in CTA Case No. 9647, entitled *"Orica Philippines, Inc., Petitioner, versus Commissioner of Internal Revenue", Respondent,*

[1] EB Docket, pp. 6 to 19.

[2] Penned by Associate Justice Jean Marie A. Bacorro-Villena, and concurred by Associate Justice Juanito C. Castañeda, Jr., and Retired Associate Justice Cielito N. Mindaro-Grulla, EB Docket, pp. 23 to 44.

[3] EB Docket, pp. 45 to 55.

be set aside. The dispositive portions thereof respectively read as follows:

Decision dated June 4, 2020:

> "**WHEREFORE**, the foregoing premises considered, the instant Petition for Review is **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Resolution October 13, 2020:

> "**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration (Re: 4 June 2020 Decision of the Honorable Court of Tax Appeals – Second Division) is **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

Petitioner is a corporation registered with the Securities and Exchange Commission (SEC) and Bureau of Internal Revenue (BIR) with Taxpayer's Identification Number (TIN) 000-059-661-000. It is primarily engaged in the manufacture and sale of industrial explosives, nitro glycerin, ammonium nitrate, black powder, nitrocellulose, including gun cotton, detonators, detonating fuses, safety fuses, and other substances.

Respondent, on the other hand, is the duly appointed CIR vested with authority, among others, to decide, approve and grant applications for refund and/or issuance of tax credit certificate (TCC) representing a taxpayer's excess internal revenue tax payments.

For the second quarter of fiscal year ending 2015 (FY 2015) or for the period of January 1, 2015 to March 31, 2015, petitioner generated a total sales amounting to ₱596,472,847.10. Out of the total sales for the said covered period, ₱335,657,670.35 were treated as sales subject to zero percent value-added tax (VAT) since they were revenues earned from goods sold to non-resident foreign corporations or manufacturers/producers registered with the Board of Investments (BOI), whose products are 100% exported. Considering that the zero-rated sales comprised a large portion of petitioner's total revenue for the period, the input VAT relating to the said sales allegedly remained unutilized.

On March 30, 2017, petitioner filed, with the BIR's Large Taxpayers Service, Excise Large Taxpayers Audit Division I, a claim for refund or issuance of a TCC, representing the unutilized input VAT amounting to ₱18,021,462.87.

On July 10, 2017, petitioner received an undated letter from the Large Taxpayers Service, Excise Large Taxpayers Audit Division I, denying its refund application.

On August 9, 2017, petitioner filed before the Court in Division a *Petition for Review*, docketed as CTA Case No. 9647, praying for a refund or for the issuance of a TCC in the amount of ₱18,021,462.87.

On November 6, 2017, respondent filed his *Answer (To the Petition for Review dated August 9, 2017)*, with the following special and affirmative defenses: that petitioner's claim was properly denied for petitioner's failure to comply with Sections 112 and 113 of the National Internal Revenue Code (NIRC) of 1997, as amended. According to respondent, petitioner failed to submit the Certification from the Bureau of Customs (BOC) that petitioner have not filed similar claim covering the same period and non-submission of importation documents; as well as the complete bank credit memos to prove inward receipts of foreign currency for export sales and dollar remittance reconciliation of export sales and dollar remittance in violation of Section 112 of the NIRC of 1997, as amended. Likewise, respondent contends that petitioner failed to comply with invoicing requirements under Section 113 of the NIRC of 1997, as amended. Respondent further added that petitioner has outstanding liabilities and that the issuance of a TCC cannot be given due course until the delinquency assessments have been resolved or paid.

After the Pre-Trial Conference held on February 15, 2018, the parties filed their *Joint Stipulation of Facts and Issues* (JSFI) on March 2, 2018. The Court in Division approved said JSFI and terminated Pre-Trial in the Resolution dated March 12, 2018.

During trial, petitioner presented as first witness its Tax Analyst, Jesson P. Cortes. On the witness stand, he testified on the circumstances leading to the filing of the tax refund application. As Tax Analyst, he also stated his responsibilities and they included the preparation, review and filing of tax returns. As such, he was made aware that more than 50% of petitioner's revenues were export sales and sales to entities registered with the BOI. Hence, at least 50% of the input VAT attributable to the said transactions remained to be unutilized. He likewise identified petitioner's documentary exhibits.

Petitioner's second witness, Mikhail J. Escoto, the Senior Consultant of Isla Lipana & Co., testified on petitioner's outstanding liabilities for income tax and VAT and its application for compromise settlement, the approval of which was still pending at the time he executed his Judicial Affidavit.

Petitioner's third witness, Emmanuel Y. Mendoza, is the Court-commissioned Independent Certified Public Accountant (ICPA). He testified on the result of his examination of petitioner's documents from which he concluded that petitioner had zero-rated sales for the second quarter of FY 2015 and these were from the (1) direct exportation and (2) domestic sale to BOI-registered companies of industrial explosives. Likewise, these zero-rated sales were reported for VAT purposes and duly substantiated.

On July 20, 2018, petitioner filed its *Formal Offer of Evidence with Manifestation*[4].

In the Resolution[5] dated October 10, 2018, the Court in Division admitted some of petitioner's exhibits but denied the others.

Respondent, for his part, presented his lone witness, Revenue Officer Edalyn Naty Dayacap (RO Dayacap). She testified on petitioner's administrative claim for refund and the procedure she undertook in evaluating the claim.

On November 26, 2018, respondent filed his *Formal Offer of Evidence*.

Meanwhile, on November 5, 2018, petitioner filed an *Urgent Motion for Extension of Time to File Motion for Reconsideration (RE:*

[4] Division Docket (CTA Case No. 9647) – Vol. I, pp. 270 to 281.
[5] Division Docket (CTA Case No. 9647) – Vol. I, pp. 331 to 338.

Resolution on the Formal Offer of Evidence with Manifestation dated 10 October 2018)[6], praying for an additional period of fifteen (15) days to file its motion for reconsideration on the Resolution dated October 10, 2018.

On November 20, 2018, petitioner filed an *Urgent Motion for Reconsideration with Motion for Leave of Court for the Admission of Evidence*[7], stating, among others, that it inadvertently excluded some of the documents examined and marked by the ICPA from the voluminous documents submitted to the Court in Division; that certain exhibits which were noted by the Court in Division to have discrepancies and those which the exhibit number marking are not visible in the scanned copy submitted to the Court are substantial to support its position. Thus, petitioner moved that the Court in Division instruct the ICPA to resubmit the documents denied for not being found in the records of the case and to rectify the submission of document noted by the Court to have discrepancies; that it be allowed to recall its witness, Jesson P. Cortes; and that the Court admits the exhibits which were denied admission for failure to identify because of the defective judicial affidavit. Petitioner likewise moved for a commissioner's hearing for the comparison and marking of the exhibits which were not marked although found in the records of the case.

In the Resolution[8] dated January 15, 2019, the Court in Division ruled as follows: (1) petitioner's *Urgent Motion for Extension of Time to File Motion for Reconsideration (RE: Resolution on the Formal Offer of Evidence with Manifestation dated 10 October 2018) was granted;* (2) petitioner's *Urgent Motion for Reconsideration with Motion for Leave of Court for the Admission of Evidence* was admitted; and (3) resolution of respondent's *Formal Offer of Evidence* was deferred until after the resolution of petitioner's *Urgent Motion for Reconsideration with Motion for Leave of Court for the Admission of Evidence.*

In the Resolution[9] dated April 2, 2019, the Court in Division granted petitioner's prayer to recall its witness, Jesson P. Cortes and directed petitioner to submit the revised and compliant judicial affidavit. In the same Resolution, the Court in Division ordered the

[6] Division Docket (CTA Case No. 9647) – Vol. I, pp. 339 to 342.
[7] Division Docket (CTA Case No. 9647) – Vol. I, pp. 353 to 367.
[8] Division Docket (CTA Case No. 9647) – Vol. I, pp. 395 to 397.
[9] Division Docket (CTA Case No. 9647) – Vol. I, pp. 400 to 403.

ICPA to resubmit the readable copies of Exhibits "P-17-47" and "P-20-363 to P-20-407".

On April 16, 2019, petitioner filed its *Compliance*[10], submitting the *Judicial Affidavit of Jesson P. Cortes*[11].

On May 6, 2019, petitioner filed its *Supplemental Formal Offer of Evidence.*[12]

In the Resolution[13] dated June 28, 2019, the Court in Division partially granted petitioner's *Urgent Motion for Reconsideration with Motion for Leave of Court for the Admission of Evidence*, admitting some of its exhibits but denying Exhibits "P-4-A", "P-5-A", "P-13", "P-13-A", and "P-13-B". In the same Resolution, the Court in Division admitted all of respondent's exhibits; and ordered the parties to file their respective memoranda within thirty (30) days from notice.

In view of the filing of respondent's *Memorandum* on July 18, 2019; and petitioner's *Memorandum* on August 5, 2019, CTA Case No. 9647 was submitted for decision in the Resolution dated August 9, 2019.

On June 4, 2020, the Court in Division rendered the assailed Decision[14] denying the *Petition for Review* in CTA Case No. 9647 for lack of merit.

On June 22, 2020, petitioner filed a *Motion for Reconsideration (Re: 4 June 2020 Decision of the Honorable Court of Tax Appeals - Second Division)*[15]. Respondent filed his *Comment/Opposition Re: Petitioner's Motion for Reconsideration*[16] on July 14, 2020.

In the Resolution[17] dated October 13, 2020, the Court in Division denied petitioner's *Motion for Reconsideration.*

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[10] Division Docket (CTA Case No. 9647) – Vol. I, pp. 408 to 409.
[11] Division Docket (CTA Case No. 9647) – Vol. I, pp. 410 to 419.
[12] Division Docket (CTA Case No. 9647) – Vol. II, pp. 502 to 506.
[13] Division Docket (CTA Case No. 9647) – Vol. II, pp. 538 to 544.
[14] EB Docket, pp. 23 to 44; Division Docket (CTA Case No. 9647) – Vol. II, pp. 581 to 602.
[15] Division Docket (CTA Case No. 9647) – Vol. II, pp. 603 to 615.
[16] Division Docket (CTA Case No. 9647) – Vol. II, pp. 618 to 624.
[17] EB Docket, pp. 45 to 55; Division Docket (CTA Case No. 9647) – Vol. II, pp. 631 to 641.

On November 3, 2020, petitioner filed before the Court *En Banc*, an *Urgent Motion for Extension of Time to File Petition for Review*[18], praying for an extension of fifteen (15) days from November 3, 2020 or until November 18, 2020 to file its *Petition for Review*. The same was granted by the Court *En Banc* on November 4, 2020[19].

Petitioner then filed the instant *Petition for Review*[20] before the Court *En Banc* on November 18, 2020.

In the Resolution[21] dated December 16, 2020, respondent was directed to file his comment on the instant *Petition for Review* within ten (10) days from receipt thereof. On January 4, 2021, respondent filed his *Comment/Opposition Re: Petitioner's Petition for Review.*[22]

On January 12, 2021, the instant case was submitted for decision.[23] Hence, this Decision.

THE ISSUES

Petitioner filed the present *Petition for Review* on the basis of the following assignment of errors:[24]

"**ASSIGNMENT OF ERRORS**

A. Whether the CTA – 2nd Division erred in not granting the Petitioner's motion to allow the re-opening of its case for purposes of presenting and offering the pieces of evidence deemed lacking per 4 June 2020 Decision by the Honorable CTA – 2nd Division;

B. Whether the CTA – 2nd Division erred in dismissing Petitioner's claim for the refund of its excess and/or unutilized input VAT amounting to Pesos: **Eighteen Million Twenty-One Thousand Four Hundred**

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[18] EB Docket, pp. 1 to 4.
[19] Minute Resolution, EB Docket, p. 5.
[20] EB Docket, pp. 6 to 19.
[21] EB Docket, pp. 57 to 58.
[22] EB Docket, pp. 59 to 65.
[23] EB Docket, pp. 68 to 69.
[24] *Petition for Review*, EB Docket, p. 9.

> **Sixty-two & 87/100 (₱18,021,462.87)**, representing its unutilized input VAT attributable to its export sales for the second quarter of FY ended 30 September 2015 or the period 01 January 2015 to 31 March 2015."

Petitioner's arguments:

Petitioner argues that there was a mistake on the representation of the Court-commissioned ICPA that all the necessary and relevant documents were submitted to the Court; and, that its reliance on the ICPA Report constitutes excusable negligence. According to petitioner, while the ICPA, as an officer of the Court, enjoys the presumption of regularity in the performance of its function, the ICPA's recommendation, however, is not conclusive upon the Court.

Further, petitioner asserts that it satisfactorily proved the inward remittance of foreign currency payments by providing the necessary bank statements. Allegedly, under Revenue Memorandum Circular (RMC) No. 47-2019, what is now required is any documentary proof of inward remittance of foreign currency which could be any of the following: passbook, bank statement, bank credit memo; and bank certification, among others.

In addition, petitioner contends that it was able to prove that its sales to BOI-registered entities, particularly to Carmen Copper Corporation (or Carmen Copper) and Oceanagold (Philippines), Inc. (or Oceanagold), are correctly supported by valid BOI Certifications.

Respondent's counter-arguments:

Respondent counter-argues that the instant *Petition* raised no points of contention that would warrant the reversal of the assailed Decision.

Respondent claims that petitioner has outstanding liabilities and that the issuance of a TCC cannot be given due course until the deficiency assessments have been resolved.

Moreover, it is respondent's position that the subject claim for refund was properly denied for petitioner's failure to comply with Sections 112 and 113 of the NIRC of 1997, as amended.

Finally, respondent maintains that the reopening of the case after the Decision had been rendered would never put an end to litigation. According to respondent, petitioner had several opportunities to present its case and to prove its claim.

THE COURT *EN BANC'S* RULING

The reopening of trial is not proper.

Petitioner argues that the Court in Division erred in denying its *Motion* to reopen the instant case for purposes of presenting pieces of evidence which were ruled to be lacking in the assailed Decision. Allegedly, there was a mistake on the representation of the ICPA that all the necessary and relevant documents were submitted to the Court and that its reliance on the ICPA Report constitutes excusable negligence.

The Court finds petitioner's arguments untenable.

In *Republic of the Philippines vs. Sandiganbayan (Fourth Division), et al.*,[25] the Supreme Court said:

> "The basis for a motion to reopen a case to introduce further evidence is Section 5, Rule 30 of the Rules of Court, which reads:
>
>> Sec. 5. Order of trial. - Subject to the provisions of section 2 of Rule 31, and unless the court for special reasons otherwise directs, the trial shall be limited to the issues stated in the pre-trial order and shall proceed as follows:
>>
>> xxx xxx xxx

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[25] G.R. No. 152375, December 13, 2011.

> (f) The parties may then respectively adduce rebutting evidence only, unless the court, for good reasons and in the furtherance of justice, permits them to adduce evidence upon their original case [.] [emphases ours]
>
> **Under this rule, a party who has the burden of proof must introduce, at the first instance, all the evidence he relies upon and such evidence cannot be given piecemeal. The obvious rationale of the requirement is to avoid injurious surprises to the other party and the consequent delay in the administration of justice.**
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> **A party's declaration of the completion of the presentation of his evidence prevents him from introducing further evidence; but where the evidence is rebuttal in character, whose necessity, for instance, arose from the shifting of the burden of evidence from one party to the other; or where the evidence sought to be presented is in the nature of newly discovered evidence, the party's right to introduce further evidence must be recognized.** Otherwise, the aggrieved party may avail of the remedy of certiorari." (Emphases and underscoring supplied.)

It is clear from the foregoing, that the party who has the burden of proof must introduce, at the first instance, all the evidence he relies upon and such evidence cannot be given piecemeal. Further, when a party declares the completion of the presentation of his evidence, he is prevented from introducing further evidence, except in instances where the evidence is rebuttal in nature, or newly discovered evidence. The Court may thus allow a party-litigant to present rebuttal evidence or newly discovered evidence, even after the completion of the presentation of the party's evidence.

Relative thereto, in *Cabarles vs. Maceda*,[26] the Supreme Court clarified that the motion to reopen a case may be filed, even after promulgation but before finality of judgment, subject to certain conditions, to wit:

[26] G.R. No. 161330, February 20, 2007.

> "A motion to reopen a case to receive further proofs was not in the old rules but it was nonetheless a recognized procedural recourse, deriving validity and acceptance from long, established usage. . . .
>
> xxx xxx xxx
>
> Generally, after the parties have produced their respective direct proofs, they are allowed to offer rebutting evidence only. However, **the court, <u>for good reasons, in the furtherance of justice</u>, may allow <u>new evidence</u> upon their original case, and its ruling will not be disturbed in the appellate court where no abuse of discretion appears.** A motion to reopen may thus properly be presented only after either or both parties had formally offered and closed their evidence, but before judgment is rendered, and **<u>even after promulgation but before finality of judgment and the only controlling guideline governing a motion to reopen is the paramount interest of justice.</u>** This remedy of reopening a case was meant to prevent a miscarriage of justice." (Emphases and underscoring supplied)

Based on the foregoing, the Court may allow the presentation of additional evidence even after judgment but before finality of the case, for good reasons, and in the furtherance of justice.

In view of the foregoing jurisprudential pronouncements, a party's right to introduce further evidence is allowed (1) when the evidence is rebuttal in character or is a newly discovered evidence; (2) for good reasons; and (3) in the paramount interest of justice.

Generally, a rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.[27] Evidence is rebuttal in character, whose necessity

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[27] *The Heirs of Emilio Santioque, represented by Felimon W. Santioque, vs. The Heirs of Emilio Calma, Fabian Calma, Agatona Calma, and Demetria Calma, represented by Lope Akol and Lucia Calma-Akol, and the Register of Deeds of the Province of Tarlac*, G.R. No. 160832, October 27, 2006.

arose from the shifting of the burden of evidence from one party to the other.[28]

In this case, petitioner's prayer for the reopening of the case to submit additional evidence was primarily based on the findings of the Court in Division that it failed to satisfy the documentary requirements for claiming a refund of unutilized input VAT. Considering that the burden of proof to substantiate its refund claim rests on petitioner, the evidence sought to be presented does not fall within the purview of a rebuttal evidence.

Likewise, it bears noting that petitioner did not specify the additional evidence it seeks to present. Thus, petitioner failed to discharge its burden of establishing that the same are newly discovered evidence.

The Court likewise finds that petitioner has not established any good reason why a decree for reopening the case should be granted by this Court. The failure of petitioner to discharge the burden of proof to substantiate its claim for refund cannot be considered as a good reason to allow the re-opening of this case.

Additionally, petitioner also failed to show that the paramount interest of justice would be served in granting its motion to reopen the case.

As regards petitioner's assertion that there was a mistake on the representation of the ICPA and that its reliance on the ICPA Report constitutes excusable negligence, the same deserves scant consideration.

We agree with the Court in Division that it is ultimately the taxpayer who determines the documents it will subject for verification to substantiate its claims. Although the ICPA is tasked to examine voluminous documents in claims for refund, it is, however, the burden of the taxpayer-claimant to ensure that the evidence submitted for the ICPA's examination comply with the documentary requirements provided by law. Indeed, it must be stressed that in tax refund cases filed before this Court, it is incumbent upon the taxpayer-claimant to prove every minute aspect of his claim.[29]

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[28] *Republic of the Philippines vs. Sandiganbayan (Fourth Division), et al.*, G.R. No. 152375, December 13, 2011.

[29] *KEPCO Philippines Corporation vs. Commissioner of Internal Revenue*; G.R. No. 179356, December 14, 2009.

Moreover, it bears emphasis that petitioner have been given every opportunity to present its case before the Court *a quo*. During trial, the Court in Division permitted petitioner to present its testimonial and documentary evidence and after which, petitioner was able to offer the same via its *Formal Offer of Evidence*[30] filed on July 20, 2018. The Court in Division then acted thereon and ruled on the admissibility and inadmissibility of petitioner's evidence as shown in the Resolution dated October 10, 2018.[31] In addition, the Court in Division even allowed petitioner to recall its witness[32] and to file a *Supplement Formal Offer of Evidence*[33]. Thus, petitioner cannot claim any injustice committed during the trial of the instant case.

Accordingly, We sustain the denial of petitioner's *Motion* for the reopening of the case.

Petitioner failed to prove that the foreign currency proceeds derived from its direct export sales were inwardly remitted.

In the assailed Decision, the Court in Division ruled that petitioner's direct export sales amounting to ₱192,628,598.28 do not qualify for VAT zero-rating for its failure to sufficiently prove that the foreign currency proceeds derived therefrom were inwardly remitted.

Petitioner, however, insists that it satisfactorily proved the subject inward remittance by providing the necessary bank statements.

We are not persuaded.

Upon careful examination of the subject bank statements[34] , We agree with the Court in Division's findings that the total deposits reflected therein do not tally with the total dollar amount of export sales as evidenced by the VAT zero-rated invoices. Hence, the Court cannot ascertain whether the amount credited in the bank statements actually pertain to the subject export sales of petitioner.

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[30] Division Docket (CTA Case No. 9647) – Vol. I, pp. 270 to 281.
[31] Division Docket (CTA Case No. 9647) – Vol. I, pp. 331 to 338.
[32] Division Docket (CTA Case No. 9647) – Vol. I, pp. 400 to 403.
[33] Division Docket (CTA Case No. 9647) – Vol. II, pp. 502 to 506.
[34] Exhibit "P-16-40"

At this juncture, it must be stressed that the findings of fact by the Court in Division are **not** to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties.[35]

Further, even assuming *arguendo* that the said bank statements establish the fact of inward remittance, the same is insufficient to prove that the foreign currency proceeds have been duly accounted for in accordance with Bangko Sentral ng Pilipinas (BSP) rules and regulations as required under Sections 106 (A)(2)(a)(1) and 112 (A) of the NIRC of 1997, as amended, to wit:

> "**SEC. 106.** ***Value-Added Tax on Sale of Goods or Properties.*** –
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> ***(A) Rate and Base of Tax***. - There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, value-added tax equivalent to twelve percent (12%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.
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> xxx xxx xxx
>
> (2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> ***(a) Export Sales***. - The term "***export sales***" means:
>
> (1) The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and **paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas** (BSP);"

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[35] *Republic of the Philippines, represented by the Commissioner of Internal Revenue vs. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation)*, G.R. No. 188016, January 14, 2015 citing *Sea-Land Service, Inc. vs. Court of Appeals,* G.R. No. 122605, April 30, 2001, 357 SCRA 441, 445-446. Refer also to *Rhombus Energy, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 206362, August 1, 2018.

> ***"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."

In the instant case, the Court *En Banc* finds that the bank statements are insufficient to establish that the proceeds from petitioner's direct export sales were paid for in acceptable foreign currency and that the same are duly accounted for in accordance with the rules and regulations of the BSP.

As regards petitioner's contention that the said document has been verified by the ICPA, hence should be considered by the Court, the same is specious.

Section 3, Rule 13 of the Revised Rules of the Court of Tax Appeals (RRCTA) provides that the findings and conclusions of the ICPA shall not be conclusive upon the Court, *to wit*:

> "SEC. 3. *Findings of independent CPA.* — The submission by the independent CPA of pre-marked documentary exhibits shall be subject to verification and

comparison with original documents, the availability of which shall be the primary responsibility of the party possessing such documents and, secondarily, by the independent CPA. **The findings and conclusions of the independent CPA** may be challenged by the parties and **shall not be conclusive upon the Court**, which may, in whole or in part, adopt such findings and conclusions subject to verification." (Emphases supplied)

Based on the foregoing, the Court may rely on, but is not bound by the ICPA's findings, because the same are subject to verification by the Court, as to its accuracy, veracity and merit. In other words, the Court can make its own determination apart from the findings and conclusions of the ICPA.

In view thereof, the Court sustains the Court in Division's findings that petitioner's direct export sales amounting to ₱192,628,598.28 do not qualify for VAT zero-rating.

The Court in Division erred in ruling that petitioner's sales to Carmen Copper and Oceanagold are not subject to VAT zero-rating.

In the assailed Decision, the Court in Division disallowed for VAT zero-rating petitioner's sales to Carmen Copper and Oceanagold on the ground that the validity period of the BOI Certifications presented by petitioner is outside the subject period of claim in the instant case, *i.e. January 2015 to March 2015.*

Petitioner, however, claims that the BOI Certifications issued to Carmen Copper and Oceanagold stating that the said entities "*exported 100% of its total sales volume/value for the period covering January 1 to December 31, 2015*" is sufficient to qualify the subject sales for VAT zero-rating.

We agree with petitioner.

In the recent case of *Commissioner of Internal Revenue vs. Filminera Resources Corporation*[36] (or "***2020 Filminera case***"), the Supreme Court clarified that in order to qualify the sales made to a BOI-registered buyer as zero-rated sales, it must be shown that the said BOI-registered buyer ***actually exported its entire product during the period when the sales were made***, *to wit*:

> "The CTA *En Banc* noted that the certification was valid from January 1 to December 31, 2010. Considering that the period of the claim for refund (January 1 to June 30, 2010) was within the validity period of the certification, the CTA *En Banc* concluded that Filminera Resources' sales for the third and fourth quarters of FY 2010 were zero-rated.
>
> We do not agree.
>
> *First*. A plain reading of the certification shows that PGPRC exported a total of 3,820,982.5 grams, or 100% of its total sales volume/value, from January 1 to December 31, 2009. However, nothing in the certification shows that PGPRC similarly exported its entire products for the third and fourth quarters of FY 2010, or from January 1 to June 30, 2010. **Without the certification from the BOI that the products sold to PGPRC during the third and fourth quarters of FY 2010 were *actually exported and consumed in a foreign country,* the sales cannot be considered export sales.**
>
> *Second*. The validity period of the BOI certification should not be confused with the period identified in the certification when the buyer actually exported 100% of its products. It must be remembered that taxpayers with zero-rated sales may claim a refund or tax credit for the VAT previously charged by the suppliers (*i.e.*, the input tax) because the sales had no output tax. However, to be entitled for the refund or tax credit, the taxpayer must not only prove the existence of zero-rated sales, but must also prove that the zero-rated sales were issued valid invoice or official receipts pursuant to Sections 113 (A) and (B), and 237 of the 1997 NIRC, in relation to Section

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[36] G.R. No. 236325, September 16, 2020.

4.113-1(B) of RR No. 16-2005. In Revenue Memorandum Circular No. 42-2003, the BIR clarified that if the claim for refund or tax credit is based on the existence of zero-rated sales by the taxpayer but it fails to comply with the invoicing requirements in the issuance of sales invoices, *e.g.* the term "zero-rated sale" shall be written or printed prominently on the invoice or receipt, the claim for refund or tax credit shall be denied.

To ensure compliance with invoicing requirements, Section 3 of RMO No. 09-00 requires the BOI-registered buyer to furnish its suppliers with a copy of the BOI Certification attesting that it exported 100% of its products. The certification having been issued by the BOI, there is a presumption that it was issued in the regular performance of official duties. Thus, the supplier can rely on the certification and accord zero-rating status to sales made to the BOI-registered buyer while the BOI certification is valid. Consequently, the seller would be able to comply with the invoicing requirements. **The BOI-registered buyer must, however, *actually export* its products.** To be sure, the certification contains a *proviso* that the attestation of 100% exportation by the BOI-registered buyer will be revoked in case of non-compliance with any of the specified grounds, particularly, the failure to export its entire products:

> **This Certification is valid from January 01 to December 31, 2010 unless sooner revoked by the BOI Governing Board for any or all of the following grounds:** (a) Failure of the herein registered enterprise to comply with any of its BOI registration terms, commitment, and conditions; (b) **Failure to export 100% in any of the instances set forth in Section 2 of RMO No. 9-2000;** (c) Submission of fraudulent documents; and (d) Failure to submit Audited Financial Statements, Annual Income Tax Return and Annual Report on Actual Operations. (Emphasis supplied.)

Indeed, while the BOI certification allows the seller to accord VAT zero-rating status to sales made to the BOI-registered buyer during the extended

period of the certification, <u>this must be pre-empted by the condition that the BOI-registered buyer *actually and eventually exported* such products</u>. This is consistent with the Cross Border Doctrine and Destination Principle of the Philippine VAT system. To hold otherwise would render nugatory the principle that goods are taxed only in the country where these are consumed and that no VAT shall form part of the cost of products which are destined for consumption outside of the territorial border of the Philippines.

Third. **The validity period of the certification is intended to accord zero-rating status to sales made during the extended period, but not as proof that PGPRC exported its entire products during the same period.** This is logical since the BOI can attest to the actual exportation only *after* the end of the taxable year. As in this case, the certification issued by the BOI on January 27, 2010 is not relevant for purposes of treating the sales made to PGPRC from January 1 to December 31, 2009 zero-rated. When the certification was issued on January 27, 2010, Filminera Resources had *already* classified its sales as zero-rated. Instead, the certification serves as authority for Filminera Resources to accord zero-rating status to sales made to PGPRC *within one year from validity,* or from January 1 to December 31, 2010. The BOI Certification is clear:

> Since the [firm's] accounting reporting period ends every 30th day of June, its succeeding application should be filed within fifteen (15) days from the end of the said fiscal year period **in order that the BOI Certification to be issued shall be valid for a period of one (1) year effective from the date of the start of the new fiscal year.**

<u>In order for the sales made to PGPRC during the third and fourth quarters of FY 2010 qualify as zero-rated sales, the BOI must still certify that PGPRC actually exported its entire product from January 1 to December 31, 2010</u>. The BOI Certification dated January 27, 2010 failed to ascertain this fact.

Fourth. We stress that the taxpayer-claimant has the burden of proving the legal and factual bases of its claim for tax credit or refund. After all, tax refunds partake the nature of exemption from taxation, and as such, must be looked upon with disfavor. It is regarded as in derogation of the sovereign authority, and should be construed in *strictissimi juris* against the person or entity claiming the exemption. The taxpayer who claims for exemption must justify his claim by the clearest grant of organic or statute law and should not be permitted to stand on vague implications. The burden of proof rests upon the taxpayer to establish by sufficient and competent evidence its entitlement to a claim for refund.

Under Section 112(A) of the 1997 NIRC, the seller may claim a refund or tax credit for the input VAT attributable to its zero-rated sales subject to the following conditions: (1) the taxpayer is VAT-registered; (2) the taxpayer is engaged in zero-rated or effectively zero-rated sales; (3) the claim must be filed within two years after the close of the taxable quarter when such sales were made; (4) the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax; and (5) in case of zero-rated sales under Section 106(A)(2)(a)(l) and (2),Section 106(B)and Section 108(B)(l) and (2) of the 1997 NIRC, the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with *Bangko Sentral ng Pilipinas* rules and regulations.

The first and third requisites have been established before the CTA. Filminera Resources is a VAT-registered taxpayer that filed administrative and judicial claims for refund within the period prescribed by law. Meanwhile, the fifth requisite is not applicable.

As for the second requisite, Filminera Resources failed to prove that its sales to PGPRC for the third and fourth quarters of FY 2010 are export sales. **We reiterate that without the certification from the BOI attesting actual exportation by PGPRC of its entire products from January 1 to June 30, 2010, the sales made during that period are not zero-rated export sales.** The second requisite not having been met, there is no need for us to discuss the fourth requirement." (*Citations omitted; Emphasis and underscoring supplied.)*

At issue in the foregoing case is whether the sales made by Filminera Resources Corporation (or Filminera) to PGPRC, a BOI-registered entity, for the 3rd and 4th quarters of FY 2010, or from January 1 to June 30, 2010, qualify for VAT zero-rating. To prove that the said sales are zero-rated, Filiminera presented the BOI Certification issued to PGPRC certifying that PGPRC exported 100% of its total sales for the period January 1 to December 31, 2009; and with validity period from January 1 to December 31, 2010. Details are as follows:

Period of sales to PGPRC, a BOI-registered entity	**BOI Certification issued to PGPRC**	
	Period of validity	**Period of coverage (i.e., attesting that PGPRC exported 100% of its total sales)**
January 1 to June 30, 2010	January 1 to December 31, 2010	January 1 to December 31, 2009

The Supreme Court, however, noted that the said Certification only attested that PGPRC exported 100% of its total sales volume/value from January 1 to December 31, 2009; and, that there is nothing therein which indicates that PGPRC similarly exported its entire products for the 3rd and 4th quarters of FY 2010, or from January 1 to June 30, 2010.

The Supreme Court then ruled that the sales made by Filminera to PGPRC from January 1 to June 30, 2010 cannot qualify for VAT zero-rating since the BOI Certification only showed that PGPRC exported 100% of its total sales volume/value from January 1 to December 31, 2009; and not the BOI Certification attesting that PGPRC exported its entire products for the 3rd and 4th quarters of FY 2010, or from January 1 to June 30, 2010. The Supreme Court stressed that **<u>without the certification from the BOI that the products sold to PGPRC during the 3rd and 4th quarters of FY 2010 were actually exported and consumed in a foreign country, the sales cannot be considered zero-rated export sales.</u>**

From the above ruling of the Supreme Court, it is apparent that what was crucial for purposes of treating Filminera's sales as zero-rated sales is the certification from the BOI that the products sold to PGPRC were actually exported and consumed in a foreign country during the same period when the sales were made. Thus, it can be inferred that it is the period of coverage indicated in the BOI Certification which is controlling for purposes of qualifying the sales as zero-rated sales; and **not** the validity period of the said Certification.

Applying the foregoing jurisprudential pronouncements to the instant case, in order for the sales made by petitioner to Carmen Copper and Oceanagold for the 2nd quarter of FY 2015, or from January to March 2015, to qualify for VAT zero-rating, it must be established that Carmen Copper and Oceanagold actually exported its entire product during the same period.

Upon careful perusal of the BOI Certifications issued to Carmen Copper[37] and Oceanagold[38], it is shown that while the said Certifications are valid from January 1 to December 31, 2016, the same, however, expressly state that Carmen Copper and Oceanagold *exported 100% of its total sales volume/value* ***for the period covering January 1 to December 31, 2015***. Details are as follows:

Period of sales to Carmen Copper and Oceanagold	**BOI Certifications**	
	Period of validity	**Period of coverage (i.e., attesting that Carmen Copper and Oceanagold exported 100% of its total sales)**
January 1 to March 30, 2015	January 1 to December 31, 2016	January 1 to December 31, 2015

Correspondingly, considering that the BOI Certifications attest that Carmen Copper and Oceanagold exported 100% of its products for the period January 1 to December 31, 2015, the sales made by petitioner to the said entities for the 2nd quarter of FY 2015 or from January to March 2015, qualify for VAT zero-rating.

Hence, in light of the pronouncement in the ***2020 Filminera case***, the Court *En Banc* finds that the Court in Division erred in disallowing the zero-rated sales of petitioner to Carmen Copper and Oceanagold.

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[37] Exhibit "P-17-171".
[38] Exhibit "P-17-174".

In view thereof, the *Court En Banc* deems it proper to remand the instant case to the Court in Division for a complete determination of the refund claim of petitioner.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is hereby **PARTIALLY GRANTED**. The Court in Division's Decision and Resolution promulgated on June 4, 2020 and October 13, 2020, respectively, are hereby **REVERSED AND SET ASIDE**. The case is **REMANDED** to the Court in Division for the determination of the amount of refund due to petitioner, if any.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

I join the Separate Concurring Opinion of A.J. Villena
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

(With Separate Concurring Opinion)
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(I join the Separate Concurring Opinion of Associate Justice Jean Marie A. Bacorro-Villena)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ORICA PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 2367
(CTA Case No. 9647)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO, *and*
CUI-DAVID, *JJ.*

Promulgated:
FEB 03 2022 11:30am

x - x

SEPARATE CONCURRING OPINION

BACORRO-VILLENA, J.:

I concur with the *ponencia* of our esteemed colleague, Honorable Associate Justice Erlinda P. Uy.

The Supreme Court's recent ruling in *Commissioner of Internal Revenue v. Filminera Resources Corporation*[1] (**Filminera**), uploaded to the Supreme Court's database on 26 January 2021, clarified the issue of zero-rating of a Board of Investments (**BOI**)-registered entity's transaction *vis-à-vis* the validity of the BOI Certification. Given that it was settled in *Filminera* that the period covered in the certification and not its validity period controls for considerations of value-added tax (**VAT**) zero-rating, I submit to the Supreme Court's findings on the matter. As a result, the holding in the assailed Decision of 04 June 2020 and the Resolution of 13 October 2020,

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1 G.R. No. 236325, 16 September 2020.

respectively, only insofar as the said issue is concerned, should henceforth be vacated.

However, I take exception with the wordings of the dispositive portion of the *ponencia* which states:

> ...
>
> **WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is hereby **PARTIALLY GRANTED**. The Court in Division's Decision and Resolution promulgated on June 4, 2020 and October 13, 2020, respectively, are hereby **REVERSED AND SET ASIDE**. The case is **REMANDED** to the Court in Division for the determination of the amount of refund due to petitioner, if any.
>
> **SO ORDERED.**
>
> ...

It appears in the *ponencia* that it maintained the Division's findings insofar as it considered petitioner's direct export sales in the amount of ₱192,628,598.28 was not qualified for VAT zero-rating. As mentioned in the *ponencia*, petitioner failed to prove that its income in foreign currency supposedly derived through its export sales were actually internally remitted. As a result, the instant petition was only partially granted.

It is clear in the disquisitions in the *ponencia* that this Court no longer seeks a re-opening of the above issue. What is only being remanded to the Division is the determination of petitioner's right to refund excess input VAT as regards its export sales to Carmen Copper and Oceanagold for the 2nd quarter fiscal year (**FY**) 2015 are concerned seeing as its BOI Certification covers the period of 01 January 2015 to 31 December 2015.

To my mind, a partial grant of petitioner's prayer (which in a way is also a partial denial thereof) is inconsistent with a pronouncement to "**REVERSE**" and "**SET ASIDE**" the Division's Decision and Resolution promulgated on 04 June 2020 and 13 October 2020, respectively.

With due respect, it is my opinion that the assailed Decision and Resolution promulgated on 04 June 2020 and 13 October 2020 **should only be modified** and not entirely reversed or abandoned given the fact that *only* the aspect of the case affected by the promulgation of *Filminera* is being remanded to the Division. Otherwise, an entire reversal of the assailed Decision and Resolution would subject other settled issues to re-litigation.

Thus, I vote to partially grant the petition and deem as **MODIFIED** the Assailed Decision of 04 June 2020 and Resolution of 13 October 2020, respectively, and accordingly **REMAND** to the Court in Division the determination of the amount of refund due petitioner if any.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice