REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

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

- versus -

C.T.A. CASE NO. 5376

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 04 1999

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DECISION

Before Us for consideration is a Petition for Review filed on April 18, 1996, seeking for a refund in the sum of **FOUR MILLION ONE HUNDRED FIFTY THOUSAND ONE HUNDRED AND FIFTY FIVE PESOS AND EIGHTY SEVEN CENTAVOS** (₱4,150,155.87) or in the alternative, the issuance of a Tax Credit Certificate for the said amount, representing alleged input value –added tax paid on Petitioner's domestic purchases of taxable goods and services directly attributable to its zero-rated sales.

The antecedent facts of this case are undisputed.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Philippines. It is a VAT-registered entity whose primary purpose is to construct, operate, rehabilitate and/or manage industrial and power-generating plants and related facilities for the conversion into electricity of coal and other fuel provided by and

183

under contract with the Government of the Republic of the Philippines or any of its agencies.

Records of this case reveal that Burmeister and Wain Scandinavian Contractors, Denmark (BWSC-Denmark, for brevity), Mitsui Engineering and Shipbuilding, Ltd. (MES) and Mitsui & Co. Ltd. (Mitsui) entered into a Consortium Agreement with the National Power Corporation (NAPOCOR, for brevity) for the operation and maintenance of the latter's two 100-megawatt power barges for a fifteen year term. Having been appointed by the Consortium as its Coordination Manager, BWSC-Denmark organized Burmeister and Wain Scandinavian Contractors, Mindanao, Inc. (BWSCMI), herein Petitioner, which subcontracted the actual operations and maintenance of the two power barges, as well as other work under the agreement, which will necessarily have to be performed in the Philippines.

For the period covering March to December, 1994, Petitioner allegedly generated and recorded the following zero-rated sales:

First Quarter	₱ 18,646,650.00
Second Quarter	18,826,875.00
Third Quarter	34,452,070.00
Fourth Quarter	41,070,120.00
Total	₱113,001,715.00

During the same period, Petitioner allegedly paid VAT input taxes amounting to P4,150,155.87 on its domestic purchases of taxable goods and services which were all directly attributable to Petitioner's zero-rated sales.

On the belief that its sales of services are not subject to 10% value-added tax but are zero-rated, pursuant to Section 102 (a) (2) of the Tax Code and Section 8 (c) (3) of Revenue Regulations No. 5-87, as well as BIR Ruling No. 022-95, Petitioner filed an

184

administrative claim for refund with the Bureau of Internal Revenue on February 23, 1995 in the amount of ₱4,150,155.87, representing the alleged Vat input taxes paid on domestic purchases of taxable goods and services for the four (4) quarters of taxable year 1994.

As no affirmative action has been taken by Respondent on the claim for refund, Petitioner filed the instant Petition for Review.

On May 30, 1996, Respondent filed its Answer and advanced the following Special and Affirmative Defenses:

> 10. The present petition is premature because:
>
> a) petitioner's claim/application for refund/tax credit is pending investigation and consideration before the office of the respondent;
>
> b) there is no decision rendered on the aforesaid claim for refund/tax credit of the petitioner;
>
> 11. Petitioner failed to substantiate by proper documents its alleged zero-rated sales of services to serve as basis for its claim for refund of excess input tax;
>
> 12. Petitioner likewise failed to show that it had strictly complied with the requirement of Section 204 in relation to Section 230, of the Tax Code, as amended. The burden is imposed upon petitioner to show compliance with these requirements since a claim for refund and/or tax credit which is construed strictly against the claimant. (Raisins, Inc. vs. Auditor General 25 SCRA 754; Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 351).

In a Resolution, dated October 21, 1998, after the parties have filed their respective memorandum, this case was considered submitted for decision.

185

The controversy boils down to the sole issue of whether or not the sale of services rendered by the petitioner to BWSC-Denmark qualify as zero-rated, pursuant to Section 102 (a) (2) of the Tax Code.

In its Memorandum, Petitioner repleads its contentions as stated in its Petition for Review. It maintains that since it is a VAT-registered entity and the consideration for its services rendered to the consortium were made in acceptable foreign currency and inwardly remitted to the Philippines and accounted for in accordance with the existing regulations of the Central Bank of the Philippines, Petitioner's sale of services are not subject to the 10% value-added tax but instead subject to zero percent (0%), pursuant to Section 102 (a) (2) of the Tax Code, which reads;

> "Sec. 102. **Value-Added tax on sale of services- (a) Rate and base of tax**.-There shall be levied, assessed and collected, a value-added tax equivalent to 10% of the gross receipts derived by any person engaged in the sale of services. The phrase "sale of services" means the performance of all kinds of services for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; x x x: Provided, That the following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> (1) x x x;
>
> (2) Services other than those mentioned in the preceding sub-paragraph, the consideration for which is paid for in acceptable foreign currency which is inwardly remitted to the Philippines and accounted for in accordance with rules and regulations of the Central Bank of the Philippines;
>
> (3) x x x."

(ﬂu)

Thus, Petitioner submits that since its sale of services are zero-rated, the same will not result to any output VAT liability.

On the other hand, Respondent's principal bone of contention is that there was in fact no foreign currency inward remittance because of the scheme employed by the Petitioner in the manner of making payments. Respondent speculates that there would actually be no inward remittance subject to zero percent VAT since there is the possibility that the same foreign currency inwardly remitted to BWSC-MI by virtue of the subcontract agreement would be outwardly remitted back to the Consortium through BWSC-Denmark, when BWSC-MI remits in foreign currency the peso equivalent paid by NAPOCOR under the Operations and Maintenance Agreement.

We find for the Petitioner.

For the proper resolution of the issue at hand, this Court deems it proper to lay down the events which occurred during the implementing phase of the agreement between the Consortium and the NAPOCOR, i.e., the designation of Petitioner as the collection agent of the Consortium as provided in the Addendum to Subcontract Agreement; the change in the form of payment from Danish Kroner to three different currencies, namely, Peso, Yen and Danish Kroner, and the payment by NAPOCOR to Petitioner instead of directly paying to BWSC-Denmark. To the Respondent's view, the sudden change in the manner of payment as represented in the Consortium's and Petitioner's request for a clarification of the tax implications on a contract between the Consortium and the NAPOCOR is violative of BIR Ruling 023-95, which was issued based on the fact that all payments due under the Consortium Agreement shall be paid directly to BWSC-Denmark and not to BWSC-Mindanao; thus, in this scheme,

187

Respondent is of the view that the payment in foreign currency received by the Petitioner from BWSC-Denmark under the Subcontract Agreement is the same foreign currency which the Petitioner remits as collection agent to BWSC-Denmark. Analyzing carefully, Respondent's position, there is actually no foreign currency inwardly remitted subject to zero percent (0%) under Section 102 (a) (2) of the Tax Code but instead, the Petitioner shall be subject to 10% value-added tax for its sale of services provided for under the same Section of the same Code.

We are not persuaded.

A mere glance at Section 102 (a) (2) of the Tax Code would readily reveal that to qualify as zero-rated, the sale of services must comply with the following requirements, to wit:

1) Payment of the service fees must be in acceptable foreign currency;

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

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

With reference to the first and second requirements, there was ample compliance since records of this case reveal that the sub-contract fees for the services rendered by the Petitioner to the Consortium involving the actual operation and maintenance of NAPOCOR'S two power barges for the period January 1, 1994 to December 31, 1994, amounting to DKK 26,990,000.00 (Danish Kroner) with peso equivalent of ₱113,001,715.00, were billed to BWSC-Denmark, being the Consortium coordinator, as shown by Petitioner's sales invoices (Exhs. Q to Q-10, inclusive). Thus, in effect, We reject Respondent's contention of non-foreign currency inward remittance for it failed to present convincing evidence, other than its own baseless speculation, that the same foreign currency inwardly remitted to BWSC-MI by virtue of the subcontract agreement is the same foreign currency outwardly remitted back to the Consortium by the Petitioner under the Operations and Maintenance Agreement. What is quite evident in this case is that the payments received by the Petitioner from the Consortium for the subcontract services which the former rendered to the latter and the Petitioner's collection/remittance as collection agent of the Consortium for the services which the Consortium renders to NAPOCOR *are two distinct and separate transactions*. We simply cannot give more weight to Respondent's conjectures over that of Petitioner's documentary exhibits. Conformably, We hold that there was indeed foreign currency inward remittance to the Petitioner for its sale of services under the Sub-Contract Agreement.

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

Further, the zero-rating of Petitioner's sale of services was even confirmed by respondent's witness, to wit:

> "ATTY. BISDA
> Q. Now, you mentioned earlier that BWSC Mindanao was formed specifically to operate power barges in behalf of the consortium and BWSC Denmark. Now in the course of your investigation, would you say that for the services rendered by BWSC Mindanao it was paid for foreign currency inwardly remitted to the Philippines and duly accounted for and for the CB Rules and Regulations, Madam Witness?

189

MS. GALLINERO
A. According to the representation made upon request of the BIR ruling, Ma'am.

ATTY. BISDA
Q. But what I am asking is, did you examine the documents in the BWSC Mindanao, Davao Office showing that it was paid for by BWSC Denmark in foreign currency and inwardly remitted to the Philippines, Madam Witness?

MS. GALLINERO
A. Yes, Ma'am.

ATTY. BISDA
Q. So you would say that BWSC Mindanao was paid for the services rendered in the Philippines by the BWSC Denmark by foreign currency duly remitted, Madam Witness?

MS. GALLINERO
A. Yes, Ma'am."

Thus, inasmuch as Petitioner's sale of services qualified as zero-rated, accordingly, Petitioner's VAT input taxes paid on its domestic purchases of goods and services which are directly attributable to its zero-rated sales must be refunded or applied as tax credit as provided for under Section 106 (b) of the Tax Code, viz:

> Section 106. Refunds or tax credits of input tax.
>
> x x x
>
> (b) Zero-rated or effectively zero rated sales .-Any person, except those covered by paragraph (a) above, whose sales are zero-rated or effectively zero-rated, may within two (2) years after the close of the taxable quarter when such sales were made, apply for the issuance of a

170

> tax credit certificate or refund of input taxes attributable to such sales except transitional input tax to the extent that such input tax has not been applied against output tax. xxx

Proceeding now to Petitioner's evidence on its claim for refund of its VAT input taxes, a thorough scrutiny of the records reveal that Petitioner's summary of VAT input taxes paid for the period March 1, 1994 to December 30, 1994 amounting to ₱4,150,155.85 (Exhs. O-2, O-2-A to O-2-D, Annex A, to A4, inclusive) were properly supported by Petitioner's supplier's invoices and/or offical receipts (Exhs. P to P-800, inclusive), except the amount of ₱134,109.53 as summarized in Annex C of the Punongbayan and Araullo Report (Exh. O).

A further review of the above-mentioned summary and the aforestated Petitioner's supplier's invoices and/or official receipts shows that the supporting invoices/official receipts of the following purchases do not have VAT Registration Numbers and, thus, disallowed, to wit:

Supplier	Exh.	Inv. No.	Inv. Date	OR No.	OR Date	Amount	Input Tax
Lindo's Gen. Mdse.	P-203	8532	08/08/94			₱ 42,434.03	₱ 4,243.40
South Sea Dive & Travel	P-244, P-245	754	08/11/94	383	08/26/94	3,925.09	392.51
Lindo's Gen. Mdse.	P-205	8535	08/15/94			41,066.45	4,106.65
Philux, Inc.	P-324,P-321	735	09/06/94	728	09/26/94	12,500.00	1,250.00
Philux, Inc.	P-323, P-322	734	09/06/94	731	09/26/94	3,181.82	318.18
South Sea Dive & Travel	P-515			397	10/07/94	318,490.91	31,849.09
South Sea Dive & Travel	P-685	1089	12/02/94	1724	12/02/94	3,636.36	363.64
WM H. Reynolds Co., Inc.	P-780	33712	12/15/94			26,345.45	2,634.55
Total						₱451,580.11	₱45,158.02

Hence, Petitioner's input VAT tax credit claim is recomputed as follows:

Amount of Input Tax Credit Recommended by Punongbayan & Araullo (Exh. O)	₱ 4,016,046.32
Less: Disallowances found by the Court	45,158.02
Allowable Input Tax Credit	₱ 3,970,888.30

191

WHEREFORE, in view of all the foregoing, Respondent is hereby **ORDERED** to **REFUND** or **ISSUE** a Tax Credit Certificate in favor of the Petitioner in the amount of **THREE MILLION NINE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED EIGHTY EIGHT AND THIRTY CENTAVOS** (P3,970,888.30) representing Petitioner's VAT input taxes for taxable year 1994.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this 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
Court of Tax Appeals

192