

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

SPECIAL FIRST DIVISION

PHILEX MINING CORPORATION,
Petitioner,

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

C.T.A. CASES NOS. 7528 & 7564

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

FEB 09 2010, 9:30 a.m.

X-----X

AMENDED DECISION

CASANOVA, JJ.:

For resolution is petitioner's Motion for Reconsideration¹ filed on August 28, 2009, seeking reconsideration of this Court's Decision² (the "Assailed Decision") promulgated on August 10, 2009, the dispositive portion of which reads:

"WHEREFORE, premises considered, the Petitions for Review are hereby **DENIED** and **DISMISSED** on the ground that the claim had prescribed.

SO ORDERED."


¹ Docket, pp. 208-223

² Ibid, pp. 186-198

Petitioner anchors its Motion for Reconsideration on the following grounds³:

"(1) The Honorable Court erred in ruling, in effect, that the two-year prescriptive period in Section 112(A) of the NIRC of 1997 covers both the administrative claim before the BIR and the judicial claim before the Court of Tax Appeals. The fact is that said two-year prescriptive period in Section 112(A) covers only the administrative claim.

(2) The Honorable Court erred in misreading the Supreme Court decision in Mirant and in misapplying it to this present case. The fact is that the claim for refund in Mirant was ruled by the Supreme Court as having already prescribed because the application therefor was filed with the BIR more than fourteen months after the lapse of the two-year prescriptive period provided by Section 112(A) of the NIRC. In these present cases of PHILEX, the creditable input taxes are for the 3rd and 4th quarters of 2004 ending September 30, 2004 and December 31, 2004, for which the administrative claims were filed on November 25, 2005 and March 2, 2006, which are well within the two-year prescriptive period set in Section 112(A).

(3) The Honorable Court erred in not applying Section 112(D) of the NIRC of 1997 and Section 4106-2(C) of Revenue Regulations No. 7-95 for the purpose of determining whether or not petitioner's judicial claim is barred by prescription."

The grounds may be summarized as follows: whether or not petitioner's claim for refund of unutilized input value-added tax in the amount of P13,665,856.60, for the third and fourth quarters of 2004, is barred by prescription in light of the Supreme Court ruling in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation* (the "Mirant case")⁴.

In Our Decision dated August 10, 2009, We ruled that petitioner's entire claim for refund of its unutilized input VAT had already prescribed pursuant to the ruling of the Supreme Court in the aforementioned Mirant case. Under this 

³ Motion for Reconsideration, Docket, pp. 208-209

⁴ G.R. No. 172129, September 12, 2008

latest ruling the High Tribunal enunciated that the two-year prescriptive period for filing a claim for refund/issuance of tax credit certificate should be "reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not."

Under the earlier case of Atlas Consolidated Mining and Development Corporation (the "Atlas case")⁵, however, the Supreme Court held that the counting of the two-year prescriptive period is reckoned from the filing of the quarterly VAT returns.

The question that now arises is which of these two conflicting Supreme Court decisions should be applied to resolve the issues/grounds in the instant Motion for Reconsideration?

After a careful and thorough evaluation and consideration of the facts as well as jurisprudence on the matter this Court finds petitioner's Motion to be partly meritorious.

While it is true that in the Mirant case the Supreme Court had ruled that the claim for refund of unutilized input VAT payments must be filed within two (2) years from the close of the taxable quarters when the relevant sales were made the same, however, should be applied prospectively in accordance and consistent with the numerous rulings⁶ of the Supreme Court. 

⁵ G.R. Nos. 141104 and 148763, June 8, 2007

⁶ Sps. Benzonan vs. Court of Appeals, G.R. No. 97998, January 27, 1992; Co vs. Court of Appeals, G.R. No. 100776, October 28, 1993; Columbia Pictures, Inc. vs. Court of Appeals, G.R. No. 110318, August 28, 1996

The Supreme Court, in *Columbia Pictures, Inc. vs. Court of Appeals*⁷, elucidated on the prospective application of judicial decisions in this wise:

"Interpreting the aforequoted correlated provisions of the Civil Code and in light of the above disquisition, this Court emphatically declared in *Co vs. Court of Appeals*, et al., that the principle of prospectivity applies not only to original or amendatory statutes and administrative rulings and circulars, but also, and properly so, to judicial decisions. Our holding in the earlier case of *People vs. Jabinal* echoes the rationale for this judicial declaration, viz:

Decisions of this Court, although in themselves not laws, are nevertheless evidence of what the laws mean, and this is the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system'. The interpretation upon a law by this Court constitutes, in a way, a part of the law as of the date that the law was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the law thus construed intends to effectuate. The settled rule supported by numerous authorities is a restatement of the legal maxim "legis interpretatio legis vim obtinet" – the interpretation placed upon the written law by a competent court has the force of law. x x x, but when a doctrine of this Court is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted in good faith. x x x. (Stress supplied)

In the more recent case of *Ejercito vs Sandiganbayan* (Special Division)⁸ the Supreme Court reiterated and cited this same doctrine stating thus:

"While judicial interpretations of statutes, such as that made in *Marquez* with respect to R.A. No. 6770 or the Ombudsman Act of 1989, are deemed part of the statute as of the date it was originally passed, the rule is not absolute.

⁷ G.R. No. 110318, August 28, 1996

⁸ G.R. No. 157294-95, November 30, 2006

Columbia Pictures, Inc. vs. Court of Appeals teaches:

'It is consequently clear that a judicial interpretation becomes a part of the law as of the date that law was originally passed, subject only to the qualification that when a doctrine of this Court is overruled and a different view is adopted, and more so when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith.' (Emphasis and italics supplied)

When this Court construed the Ombudsman Act of 1989, in light of the Secrecy of Bank Deposits Law in *Marquez*, that x x x, it was, in fact reversing an earlier doctrine found in *Banco Filipino Savings and Mortgage Bank vs. Purisima*."

x x x x x x x x x

Marquez, on the other hand, practically reversed this ruling in *Banco Filipino* despite the fact that the subpoena power of the Ombudsman under RA 6770 was essentially the same as that under P.D. 1630. Thus Section 15 of R.A. 6770 empowers the Office of the Ombudsman to (8) Administer oaths, x x x.

x x x x x x x x x

The *Marquez* ruling that there must be a pending case in order for the Ombudsman to validly inspect bank records in camera thus reversed a prevailing doctrine. Hence, it may not be retroactively applied." (Underscoring supplied)

Therefore, applying the doctrine laid down by the Supreme Court in the
aforecited and quoted decisions, the prescriptive period that should be applied in
the instant case is still the period enunciated in the *Atlas* case where it was held
that the counting of the two-year prescriptive period is reckoned from the filing
of the quarterly VAT returns. To apply the ruling in the *Mirant* case would be in a

contravention of the Supreme Court pronouncement that "When a doctrine of this Court is overruled and a different view is adopted and, more so, when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith."⁹ (Underscoring supplied)

Counting from October 25, 2004¹⁰, the date when petitioner filed its quarterly VAT return for the third quarter of 2004, both the administrative claim filed on November 25, 2005¹¹ and the Petition for Review filed on October 3, 2006¹² are well within the two-year prescriptive period. Likewise, the claim for refund for the fourth quarter of 2004 was timely filed considering that petitioner filed its quarterly VAT return for the 4th quarter of 2004 on April 6, 2005¹³; the administrative claim was filed on March 2, 2006¹⁴ and the Petition for Review filed on January 9, 2007¹⁵.

Having thus determined that petitioner's claims were seasonably filed, We will now proceed to determine whether or not petitioner's claims qualify for refund/tax credit certificate. 

⁹ People vs. Jabinal, L-30061, February 27, 1964

¹⁰ Exhibit "N-11"

¹¹ Annex "C" and "C-1", Division Docket, pp. 18-19 and Stipulation of Facts and Issues, Division Docket (CTA Case No. 7528), p. 44

¹² Division Docket, pp. 1-5 (CTA Case No. 7528)

¹³ Exhibit "N-12"

¹⁴ Annex "C" and "C-1", Division Docket, pp. 19-20 and Stipulation of Facts and Issues, Division Docket (CTA Case No. 7564), p. 43

¹⁵ Division Docket, pp. 1-5 (CTA Case No. 7564)

Pursuant to the provision of Section 112(A) of the Tax Code of 1997 and, as laid down by the Supreme Court in the case of *Intel Technology Philippines vs. CIR*¹⁶, to be entitled to a claim for refund/tax credit certificate for input taxes attributable to zero-rated or effectively zero-rated transactions, a taxpayer must have complied with the following requisites, to wit:

- (1) the taxpayer is engaged in sales which are zero-rated or effectively zero-rated;
- (2) the taxpayer is VAT-registered;
- (3) the claim must be filed within two years after the close of the taxable quarters when such sales were made;
- (4) the creditable input tax due or paid must be attributable to such sales and were not applied against output VAT liability;
- (5) the foreign currency exchange proceeds thereof had been duly accounted for in accordance with BSP rules and regulations.

As to the first requisite, petitioner claims that its sales and shipments of gold to Johnson Mathey of London, England and, of copper concentrates to Pan Pacific Copper Co. of Tokyo, Japan are all VAT zero-rated pursuant to Section 106(A)(2)(a)(1) of the Tax Code of 1997 in relation to RMC 74-99 and VAT-Review Committee Ruling No. 026-2001.

In his Report dated February 21, 2008, the commissioned Independent CPA, Mr. Albert Alba, noted that petitioner's export sales amounting to US\$15,334,755.00 and US\$23,240,404.00 with peso value equivalent to 

¹⁶ G.R. No. 166732, April 27, 2007

P857,716,670.95¹⁷ and P1,308,488,112.74,¹⁸ respectively, were reported in petitioner's VAT returns for the 3rd and 4th quarters of 2004, as follows:

<u>Particulars</u>	<u>3rd Qtr.</u> <u>2004</u>	<u>4th Qtr.</u> <u>2004</u>
Current Quarter's Shipments		
Direct exports of gold to England	US\$ 45,107.00	
Direct Exports of copper to Japan	10,685,784.00	
Indirect exports of copper to PASAR	4,518,716.00	US\$22,378,248.00
	US\$15,249,607.00	US\$22,378,248.00
Previous Quarter's Shipments		
Adjustment to correct Previous billings	85,148.00	862,156.00
Total Zero-Rated Sales XXX	US\$15,334,755.00	US\$23,240,404.00

Petitioner offered its sales invoices,¹⁹ airway bills/bills of lading,²⁰ export declarations,²¹ certificates of remittances of local banks,²² and passbook pages showing amounts and dates of remittances²³ to substantiate its export sales for the 3rd and 4th quarters of taxable year 2004 and to prove that the foreign exchange proceeds thereof were duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

Petitioner's direct exports of copper concentrates and gold to Japan and England, respectively, admittedly fall under those transactions referred to as

¹⁷ Exhibit "N-11"

¹⁸ Exhibit "N-12"

¹⁹ Exhibits "F-1" to "F-6" and "G-1" to "G-6"

²⁰ Exhibits "F-1-b" to "F-6-b" (for the 3rd quarter) and "G-1-a" to "G-6-a" (for the 4th quarter)

²¹ Exhibits "F-1-a" to "F-3-a"

²² Exhibits "H-1" to "H-4" and "I-1" to "I-6"

²³ Exhibits "H-1-a" to "H-4-e" and "I-1-a" to "I-6-d"

subject to zero percent (0%) VAT under Section 106(A)(2)(a)(1) of the 1997 Tax Code which provides thus:

"SEC. 106. Value-Added Tax on Sale of Goods or Properties –

(A) Rate and Base of Tax. – x x x

x x x x x x x x x

(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)."

The above-quoted provision, however, should be read in conjunction with Section 113 of the same Code as implemented by Section 4.108-1 of Revenue Regulations No. 7-95 (RA 7-95). Section 113 requires that a VAT registered person like petitioner shall, for every sale, issue an invoice or receipt which must contain the following information:

"SEC 113. Invoicing and Accounting Requirements for VAT-Registered Persons. –

(A) Invoicing Requirements. – A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:



(1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax."

Section 4.108.1 of Revenue Regulations 7-95, on the other hand, provides:

"SEC. 4.108-1. Invoicing Requirements – All VAT-registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:

1. the name, TIN and address of seller;
2. date of transaction;
3. quantity, unit cost and description of merchandise or nature of service;
4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
5. the word "zero-rated" imprinted on the invoice covering zero-rated sales; and
6. the invoice value or consideration."

x x x x x x x x x

Only VAT-registered persons are required to print their TIN followed by the word "VAT" in their invoice or receipts and this shall be considered as a "VAT Invoice". All purchases covered by invoices other than "VAT Invoice" shall not give rise to any input tax.

If the taxable person is engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations.

A "VAT Invoice" shall be issued only for sales of goods, properties or services subject to VAT imposed in Section 100 and 102 of the Code."

In addition to the above requirements, the invoices or receipts must be duly registered with the BIR as prescribed under Section 237 in relation to Section 238 of the Tax Code of 1997, to wit: 

"SEC. 237. *Issuance of Receipts or Sales or Commercial Invoices.* – All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service. xxx."

"SEC. 238. *Printing of Receipts or Sales or Commercial Invoices.* – All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same.

No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner."

Thus, from the foregoing provisions, any person claiming VAT-zero-rated direct export sales must present at least three (3) documents, to wit:

- (a) the sales invoice as proof of sale of goods;
- (b) the export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and
- (c) bank credit advice, certificate of bank remittance or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services.

The sales invoices supporting the export sales must further comply with the invoicing requirements under the law and regulations, i.e. they must be duly registered with the BIR and contain all the required information, namely:

- (a) the imprinted word "zero-rated"
- (b) the taxpayer's TIN-VAT number
- (c) BIR Authority to Print or BIR Permit Number 

In the instant case, petitioner's direct export sales consisted of the following:

	<u>3rd Quarter</u>	<u>4th Quarter</u>
Direct exports of gold to England	US\$ 45,107.00	-
Direct exports of copper to Japan	US\$10,685,784.00	-

A close examination of the sales invoice²⁴ supporting petitioner's direct export sales of gold to England in the amount of US\$45,107.00 for the 3rd quarter of 2004 shows that the same is not duly registered with the BIR. Per BIR Permit No. OCN3AU0000030052 dated April 19, 1999, petitioner is authorized to print sales invoices bearing serial nos. PX2101 to PX2500²⁵. The invoice supporting petitioner's direct export sales of gold to England, however, bears serial no. Aurex 111, which is outside the authority to print granted to petitioner. Also, the word "VAT" after petitioner's TIN was not imprinted on the said invoice. Thus, not being supported by proper sales invoices in accordance with Sections 113, 237 and 238 of the Tax Code of 1997 and Section 4.108-1 of Revenue Regulations No. 7-95, petitioner's claimed direct export sales of gold to England in the amount of US\$45,107.00 for the third quarter of 2004 **cannot** qualify for VAT-zero rating.

Anent petitioner's direct export sales of copper concentrates to Pan Pacific Copper Co. Ltd. of Japan for the third quarter of 2004 in the amount of 

²⁴ Exhibit "F-1"

²⁵ Reflected in final sales invoices marked as Exhibits "F-2" to "F-6" and "G-1" to "G-6"

Thus, petitioner's direct export sales of copper concentrate to Pan Pacific Copper Co. Ltd. of Japan for the 3rd quarter of 2004 in the amount of US\$10,685,784.00 with peso equivalent to P597,686,437.05 as computed below, **qualifies** for VAT zero rating under Section 106(A)(2)(a)(a) of the 1997 Tax Code, as amended.

	3 rd Quarter
Declared Zero-Rated Sales in Php	857,716,670.95
Divided by Declared Zero-Rated Sales in US\$	÷ <u>15,334,755.00</u>
Average peso to dollar rate	55.9328578089
Multiplied by Substantiated Zero-Rated Sales in US\$	x <u>10,685,784.00</u>
Substantiated Zero-Rated Sales in Php	597,686,437.05

With regard to petitioner's indirect export sales to Philippine Associated Smelting and Refining Corporation (PASAR), a PEZA-registered entity, for the third and fourth quarters of 2004 in the respective amounts of US\$4,518,716.00 and US\$22,378,248.00, petitioner cited Section 106(A)(2)(a)(5) of the 1997 Tax Code, as amended, which provides as follows:

"SEC. 106. Value-Added Tax on Sale of Goods or Properties. –

(A) x x x

(1) x x x

(2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:

(a) **Export Sales.** – The term 'export sales' means:

(5) Those considered export sales under Executive Order No. 226, otherwise known as the 

Omnibus Investment Code of 1987, and other special laws."

Under Executive Order (E.O.) No. 226, otherwise known as the Omnibus Investment Code of 1987, sales by a VAT taxpayer from the Customs Territory to a PEZA entity are considered export sales. The relevant portions of E.O. No. 226 read as follows:

"ARTICLE 23. 'Export Sales' shall mean the Philippine port F. O. B. value, determined from invoices, bills of lading, inward letters of credit, landing certificates, and other commercial documents, of export products exported directly by a registered export producer or the net selling price of export product sold by a registered export producer to another export producer, or to an export trader that subsequently exports the same: Provided, That sales of export products to another producer or to an export trader shall only be deemed export sales when actually exported by the latter as evidenced by landing certificates of similar commercial documents: Provided, further, That without actual exportation the following shall be considered "constructively exported" for purposes of this provision: (1) sales to bonded manufacturing warehouses of export-oriented manufacturers; (2) sales to export processing zones; . . ." (emphasis supplied)

"ARTICLE 77. Tax Treatment of Merchandise in the Zone. - (1) Except as otherwise provided in this Code, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise whether directly or indirectly related in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the provisions of law to the contrary notwithstanding. *a*

US\$10,685,784.00, the same is subject to zero percent (0%) VAT. In support of said sales, petitioner presented final sales invoices²⁶, bills of lading²⁷, export declarations²⁸, and bank certificates of inward remittances²⁹ and passbook pages showing amounts and dates of remittances³⁰.

Although the final invoices submitted by petitioner bear dates which are much later than the dates of shipment indicated in the bills of lading, petitioner explained that, in its direct exports of copper concentrates, it issues two invoices to the buyer: the first invoice (the Provisional Invoice) which petitioner issues upon shipment covering 90% of the estimated value of the shipment; and, the second invoice (the Final Invoice) which petitioner issues only after the petitioner and its buyer have reached an agreement regarding the final settlement weights, assays and quotations or final value of the shipment,³¹ which are done or determined after the arrival of the shipment at the port of loading. In other words, the considered date of the sale transactions is the shipment date indicated in the bill of lading. Since the bills of lading covering the export sales of US\$10,685,784.00 are all dated within the third quarter of 2004, the related final invoices which carry dates much later than the dates when the sales were made, are deemed valid. 

²⁶ Exhibits “F-2” and “F-3”

²⁷ Exhibits “F-2-b” and “F-3-b”

²⁸ Exhibits “F-2-a” and “F-3-a”

²⁹ Exhibits “H-2” and “H-3”

³⁰ Exhibits “H-2-a” and “H-3-d”

³¹ Exhibit “B”; Long Term Gold and Copper Concentrates Sales Agreement; Clause 9

- (2) Merchandise purchased by a registered zone enterprise from the customs territory and subsequently brought into the zone, shall be considered as export sales and the exporter thereof shall be entitled to the benefits allowed by law for such transaction."

Further, in RMC 74-99, the BIR stated thus:

"SEC. 3. Tax Treatment of Sales Made by a VAT Registered Supplier from the Customs Territory, to a PEZA Registered Enterprise. –

X X X X X X X X X

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 for 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 supplies from the Customs Territory, shall be treated effectively subject to 0% VAT, pursuant to Section 108(B)(3), NIRC, in relation to the provisions of R.A. 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 issuance of this Circular."

Clearly, from the aforequoted provisions of Section 106(A)(2)(a)(5) in relation to Articles 23 and 77(2) of the Omnibus Investments Code and as 

clarified under RMC No. 74-99, indirect exports made by a VAT taxpayer, like herein petitioner, to a PEZA registered entity are legally entitled to the zero percent (0%) VAT.

Petitioner presented the corresponding Final Invoices³² as proof that it actually made indirect exports to PASAR for the 3rd and 4th quarters of 2004 in the amounts of US\$4,518,716.00 and US\$22,378,248.00, respectively. The Final Invoices as well as the bills of lading presented are all valid except for the zero-rated sales for the 4th quarter of 2004 in the aggregate amount of US\$10,198,555.00, as detailed below, since the final invoices and bills of lading presented were dated outside the subject period of claim.

<u>Zero-Rated Sales</u>	<u>Exhibit No.</u>
US\$ 5,383,260.00	G-3/G-3-a
1,600,890.00	G-4/G-4-a
1,629,969.00	G-5/G-5-a
<u>1,584,436.00</u>	G-6/G-6-a
US\$10,198,555.00	

The said sales for the 3rd and 4th quarters of 2004 with peso equivalent to P252,744,699.51 and P685,744,684.44, respectively, as computed below, qualify for VAT zero rating under Section 106(A)(2)(a)(1) of the 1997 Tax Code.

	<u>3rd Qtr.</u>	<u>4th Qtr.</u>
Declared Zero-Rated Sales in Php	P857,716,670.95	P1,308,488,112.74
Divided by Declared Zero-Rated Sales in US\$	÷ <u>15,334,755.00</u>	÷ <u>23,240,404.00</u> 

³² Exhibits "F-4" to "F-6"; "G-1" to "G-6"

Average peso to dollar rate	55.9328578089	56.3022963258
Multiplied by Substantial Zero-Rated Sales in US\$	x <u>4,518,716.00</u>	x <u>12,179,693.00</u>
Substantiated Zero-Rated Sales in Php	252,744,699.51	685,744,684.44

With regard to the 3rd and 4th quarters' catch up adjustments to petitioner's prior quarter's shipments amounting to US\$85,148.00 and US\$862,156.00, respectively, the same are denied VAT zero-rating due to petitioner's failure to present supporting documents.

In sum, out of the US\$15,334,755.00 zero-rated sales reported for the 3rd quarter of 2004, only the export sales of US\$15,204,500.00 with peso equivalent to P850,431,136.56 qualify for VAT zero-rating. While for the 4th quarter of 2004, out of the US\$23,240,404.00 reported zero-rated sales, only the export sales of US\$12,179,693.00 with peso equivalent to P685,744,684.44 qualify for VAT zero-rating, to wit:

	<u>3rd Quarter</u>		<u>4th Quarter</u>	
	<u>In US Dollars</u>	<u>In Phil Peso</u>	<u>In US Dollars</u>	<u>In Phil Peso</u>
Direct Exports of Copper to Japan	10,685,784.00	597,686,437.05	-	-
Indirect Exports of Copper to PASAR	<u>4,518,716.00</u>	<u>252,744,699.51</u>	<u>12,179,693.00</u>	<u>685,744,684.44</u>
Total	<u>15,204,500.00</u>	<u>850,431,136.56</u>	<u>12,179,693.00</u>	<u>685,744,684.44</u>

Thus, We now proceed in the determination of whether or not petitioner incurred input taxes in connection with its zero-rated export sales for the third and fourth quarters of 2004. 

In its VAT return for the third quarter of 2004,³³ petitioner reflected an input VAT of P521,207.81 on domestic purchases and an input VAT of P11,051,001.00 on importations totaling to P11,572,208.81; while for the fourth quarter of 2004,³⁴ petitioner's VAT return reflected an input VAT of P23,570.79 and P2,070,077.00 on domestic purchases and importations, respectively, in the total amount of P2,093,647.79, as shown below:

	<u>3rd Quarter</u>		<u>4th Quarter</u>	
	<u>Purchases</u>	<u>Input Tax</u>	<u>Purchases</u>	<u>Input Tax</u>
Domestic Purchases –				
Capital Goods	P 5,212,078.10	P 521,207.81	P 235,707.90	P 23,570.79
Importations – Goods				
other than Capital				
Goods	<u>110,510,010.00</u>	<u>11,051,001.00</u>	<u>20,700,770.00</u>	<u>2,070,077.00</u>
Total	<u>P115,722,088.10</u>	<u>P11,572,208.81</u>	<u>P20,936,477.90</u>	<u>P2,093,647.79</u>

To determine the accuracy of petitioner's declaration, the Court commissioned an independent CPA (the "ICPA") to examine the voluminous documents submitted by petitioner in support of its claim for refund.

As regards the input taxes on domestic purchases, the ICPA, in his Report dated February 21, 2008,³⁵ noted the following:

<u>Particulars</u>	<u>3rd Qtr.</u> <u>Exhibit L</u>	<u>4th Qtr.</u> <u>Exhibit M</u>
a. Original VAT official receipts that are in the name of petitioner		
1. Receipts dated in the current quarter	P 22,927.21	P 20,116.45
2. Out-of-period receipts	5,404.27	711.27

³³ Exhibit "N-11"

³⁴ Exhibit "N-12"

³⁵ Exhibit "E", p. 6

b. No supporting VAT official receipts presented	2,269.17	1,054.88
c. No supporting VAT official invoices presented	1,688.64	1,688.19
d. No documents presented to support upward adjustments	488,918.52	
Total	P521,207.81	P23,570.79

Based on the above findings, this Court holds that only the input VAT of P22,927.21 and P20,116.45 (item a.1) for the third and fourth quarter, respectively, represent petitioner's valid claim while the remaining amounts of P498,280.60 and P3,454.34 (items a.2.b, c, and d above) for the third and fourth quarter, respectively, should be denied for the reasons therein stated. However, even if the amounts of P22,927.21 and P20,116.45, which were considered as valid claims, were duly substantiated by VAT invoices and official receipts, the said amounts are still not allowable as input tax pursuant to the provision of Section 3 of Revenue Memorandum Order No. 9-00.

Section 3 of Revenue Memorandum Order No. 9-00 provides that:

"SECTION 3. Sales of goods, properties or services made by a VAT registered supplier to a BOI registered exporter shall be accorded automatic zero-rating, i.e., without necessity of applying for and securing approval of the application for zero-rating as provided in Revenue Regulations No. 7-95, subject to the following conditions:

- (1) The supplier must be VAT-registered;
- (2) The BOI-registered buyer must likewise be VAT-registered;
- (3) The buyer must be a BOI-registered manufacturer/producer whose products are 100% exported. For this purpose, a Certification to this effect must be issued by the Board of Investments (BOI) and

which certification shall be good for one year unless subsequently re-issued by the BOI;

(4) The BOI-registered buyer shall furnish each of its suppliers with a copy of the aforementioned BOI Certification which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers; and

(5) The VAT-registered supplier shall issue for each sale to BOI-registered manufacturer/exporters a duly registered VAT invoice with the words "zero-rated" stamped thereon in compliance with Sec. 4.108-1(5) of the Revenue Regulations No. 7-95. The supplier must likewise indicate in the VAT-invoice the name and BOI-registry number of the buyer."

In the instant case, record shows that petitioner was issued a certification by the BOI attesting to the fact that petitioner is a BOI registered entity with 100% exports. The said BOI Certification was presented as evidence of its zero-rated sales on its previous case entitled *Philex Mining Corporation vs. Commissioner of Internal Revenue*.³⁶

Under Section 3.4 of RMO-9-00, said Certification shall serve as authority for the local suppliers of petitioner to avail of the benefits of zero-rating on their sales to petitioner covering the period January 1, 2004 to December 31, 2004. Therefore, no output tax should be shifted by the local suppliers to petitioner. Thus, in the absence of clear and convincing proof that petitioner's local suppliers passed on or shifted the VAT on such domestic purchases to petitioner,

³⁶ Annex B of Exhibit "K", CTA Case No. 7391

it cannot claim the amounts of P22,927.21 and P20,116.45 as input tax credits on its domestic purchases for the 3rd and 4th quarters of taxable year 2004.

Anent the input VAT payments of P11,051,001.00 and P2,070,077.00 on petitioner's importations for the 3rd and 4th quarters of 2004, the ICPA noted the following findings:³⁷

<u>Particulars</u>	<u>1st Qtr</u>	<u>2nd Qtr</u>
Input taxes paid on importation of:		
1 Capital goods	P 8,070,401.00	P 1,359,650.00
2 Other than capital goods	2,237,890.00	599,918.00
3 Input tax payments – no supporting documents	742,710.00	110,509.00
TOTAL	P11,051,001.00	P2,070,077.00

Thus, this Court finds that for the third and fourth quarters of 2004, only the respective amount of P9,758,165.00 and P1,959,568.00 are valid claims considering that these were directly paid to the Bureau of Customs and are duly covered by official receipts and IEIRDs. The remaining amounts of P1,292,836.00 and P110,509.00 are disallowed for the following reasons:

<u>Items Imported</u>	<u>Exhibit No.</u>	<u>Input VAT</u>	
		<u>3rd Qtr</u>	<u>4th Qtr</u>
1			
Input VAT on importation of capital goods supported by IEIRDs which are not machine validated.			
1 case parts for drilling machine	J-8-a	95,050.00	
2 case parts for drilling machine	J-12-a	129,354.00	
2 cases parts for pump	J-15-a	175,916.00	
		<u>400,320.00</u>	-
2			
Input VAT on importation of goods other than capital goods supported by IEIRDs			

³⁷ Exhibit "E", p. 5

which are not machine validated.

2 bundles screen woven wire	J-19-a	149,806.00
		<u>149,806.00</u>

3

No supporting documents presented

IEIRD No. 53742902	2,035.00	
IEIRD No. 54786141	42,185.00	
IEIRD No. 89329438	3,748.00	
IEIRD No. 54095386	27,846.00	
IEIRD No. 54094311	37,983.00	
IEIRD No. 54094887	47,581.00	
IEIRD No. 54286307	23,211.00	
IEIRD No. 5478542	51,760.00	
IEIRD No. 85933294	1,538.00	
IEIRD No. 54545242	89,155.00	
IEIRD No. 56384587	14,543.00	
IEIRD No. 55604981	78,484.00	
IEIRD No. 55984862	58,155.00	
IEIRD No. 56149371	38,664.00	
IEIRD No. 56505273	36,283.00	
IEIRD No. 56437665	122,590.00	
IEIRD No. 56505273	43,939.00	
IEIRD No. 55606634	4,105.00	
IEIRD No. 55606345	18,905.00	
IEIRD No. 56147734		34,701.00
IEIRD No. 56280917		4,352.00
IEIRD No. 117556941		3,535.00
IEIRD No. 117385161		9,120.00
IEIRD No. 58430172		20,849.00
IEIRD No. 55386143		37,952.00
	<u>742,710.00</u>	<u>110,509.00</u>
Total	<u>1,292,836.00</u>	<u>110,509.00</u>

Recapitulating, out of the total input tax on importations of P11,051,001.00 for the third quarter of 2004, only the amount of P9,758,165.00 is duly substantiated by valid supporting documents. While for the fourth quarter of 2004, out of the total input tax on importations of P2,070,077.00 only the amount of P1,959,568.00 is duly substantiated by valid supporting documents.

A portion, however, of the aforementioned substantiated input VAT shall be applied against petitioner's respective reported output VAT liabilities of P1,302.76³⁸ and P469,115.08³⁹. Hence, for the third quarter of 2004, only the remaining input VAT of P9,756,862.40 can be attributed to entire zero-rated sales declared by petitioner in the amount of P857,716,670.95 and only the input VAT of P9,673,986.60 is attributable to the substantiated zero-rated sales of P850,431,136.56. While for the 4th quarter of 2004, only the remaining input VAT of P1,490,452.92 can be attributed to entire zero-rated sales declared by petitioner in the amount of P1,308,488,112.74 and only the input VAT of P781,107.72 can be attributed to the substantiated zero-rated sales of P685,744,684.44, as computed below:

	<u>3rd Qtr</u>	<u>4th Qtr</u>
Substantiated input VAT	P 9,758,165.00	P 1,959,568.00
Less: Output Tax	1,302.60	469,115.08
Excess input VAT	P 9,756,862.40	P 1,490,452.92
	<u>3rd Qtr</u>	<u>4th Qtr</u>
Substantiated Zero-Rated Sales	850,431,136.56	685,744,684.44
Divided by Total Reported		
Zero-Rated Sales	857,716,670.95	1,308,488,112.74
Multiplied by Substantiated		
Excess Input VAT	9,756,862.40	1,490,452.92
Excess Input Tax Attributable to Substantiated Zero-Rated Sales	<u>9,673,986.60</u>	<u>781,107.72</u>

³⁸ Exhibit "N-11" – Item 19

³⁹ Exhibit "N-12" – Item 19

In fine, petitioner was able to prove, through its Quarterly VAT Returns from the 1st quarter of 2005 to 2nd quarter of 2006,⁴⁰ that the input VAT of P9,673,986.60 and P781,107.72 were not applied against any output VAT in the succeeding quarters.

IN VIEW OF THE FOREGOING, the Petition for Review is hereby **PARTIALLY GRANTED**. Respondent is hereby **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** to petitioner in the reduced amounts of **P9,673,986.60** and **P781,107.72**, representing its unutilized input VAT for the 3rd and 4th quarters of taxable year 2004, respectively; or, in the aggregate amount of **P10,455,094.32**.

SO ORDERED.

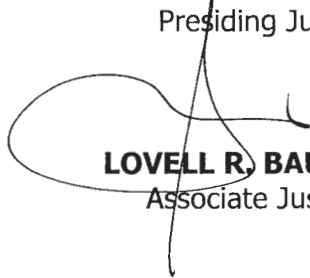


CAESAR A. CASANOVA
Associate Justice

WE CONCUR:



(with Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice



LOVELL R. BAUTISTA
Associate Justice

⁴⁰ Exhibits "N-13" to "N-18"

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's Division.


ERNESTO D. ACOSTA
Presiding Justice
Chairman, First Division