REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PHILEX MINING CORPORATION, Petitioner,	C.T.A. CASE NO. 7495
	Members:
- versus -	CASTAÑEDA, JR., *Chairperson* UY, *and* PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 20 2009 4:02 p.m.

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AMENDED DECISION

UY, J.:

For resolution is petitioner's **"MOTION FOR RECONSIDERATION/NEW TRIAL"** filed on January 22, 2009, seeking a reconsideration of this Court's Decision promulgated on January 9, 2009, dismissing the instant petition for review of lack of merit, or in the alternative, to order a new trial to afford petitioner an opportunity to adduce in evidence the provisional invoices discussed in the said *Motion*.

The above Motion was set for hearing on February 26, 2009 but had to be reset to March 18, 2009 due to absence of respondent's counsel. On said date, the Court granted petitioner's *Motion for New Trial* in open court, and allowed petitioner to present its witness in the person of Guadaflor C. Malonzo, who testified on direct examination by way of judicial affidavit.

Witness Malonzo testified that he is the Marketing Coordinator of petitioner, and that he executed a Judicial Affidavit[1] which states, among others, that he handles/supervises all the copper concentrates shipments thereof to its buyers, including the complete documentation of the shipments, such as the issuance of provisional invoices and final invoices; that for each shipment, petitioner initially issued a provisional invoice, reflecting the estimated value of the shipment and the ninety percent (90%) of such estimated value, which the buyer is required to pay; that for the same shipment, petitioner subsequently issued a final invoice, covering the value thereof, as determined by the parties and a third party or umpire assay, less the ninety percent (90%) provisional payment; and that the final invoice though dated much later covers the same shipment that was covered by the provisional invoice.[2] Respondent's counsel did not cross-examine said witness.

Thereafter, petitioner filed its "*Supplemental Offer of Evidence*" on March 26, 2009,[3] offering in evidence Exhibits "K" to "S", inclusive of sub-markings[4] and were admitted in the Resolution dated May 21, 2009.[5] In the same Resolution, the parties were required to file their simultaneous memoranda within fifteen (15) days from receipt thereof.

On June 4, 2009, petitioner filed its "*Memorandum for the Petitioner*"[6] while respondent failed to file the required memorandum. In the Resolution dated July 20, 2009,[7] petitioner's "*Motion for Reconsideration/New Trial*" was deemed submitted for resolution sans memorandum of respondent.

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[1] Exhibit "S", Docket, pp. 237-242.
[2] Transcript of Stenographic Notes, March 18, 2009.
[3] Docket, pp. 251-257
[4] Docket, pp. 258-271
[5] Docket, p. 272
[6] Docket, pp. 275-282
[7] Docket, p. 283

"GROUNDS FOR THE MOTION

I.

THE HONORABLE COURT ERRED IN RULING THAT PETITIONER'S DIRECT EXPORT SALE OF COPPER CONCENTRATES TO JAPAN DO NOT QUALIFY FOR VAT ZERO-RATING BECAUSE THE SALES INVOICES THAT COVERED THE SAME PERTAIN TO THE 4TH QUARTER OF 2004 AND FALL OUTSIDE THE PERIOD OF THE CLAIM IN THE PETITION. THE FACT IS THAT SAID SALES INVOICES PERTAIN TO THE PERIOD OF THE CLAIM.

II.

THE HONORABLE COURT ERRED IN RULING THAT PETITIONER'S INDIRECT EXPORT SALES TO PASAR ALSO DO NOT QUALIFY FOR VAT ZERO-RATING BECAUSE THE SALES INVOICES THAT COVERED THE SALES FALL OUTSIDE THE PERIOD OF THE CLAIM IN THE PETITION. THE FACT IS THAT SAID SALES INVOICES ALSO PERTAIN TO THE PERIOD OF THE CLAIM.[8]"

As regards the first ground, petitioner explains that in its direct exports of copper concentrates, there are two periods when pricing or valuation of a shipment is made. First, a **provisional pricing or valuation** of the shipment is made by the petitioner **upon shipment** based on weight (dry and wet weight) and moisture as determined by petitioner and also based on petitioner's provisional assays showing copper, gold and silver content. Second, **upon arrival of the concentrates at the port of unloading**, the weight and the moisture content are determined. Assays are also made for copper, gold and silver content. After these are done and settled, **a final concentrate value is arrived at.**

Petitioner points out that the considered date of the sale transaction is at the time of the delivery of the shipment to the carrier. However, the sales contract with its buyer, Pan Pacific Copper Co., Ltd. of Tokyo, Japan[9], requires a provisional payment from the latter to petitioner of 90% of the estimated value of a shipment and

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[8] Motion for Reconsideration/New Trial, p. 3, Docket, p.208
[9] Exhibit "B".

a final payment based on final settlement of weights, assays and quotations. This is allegedly the reason why petitioner issues a provisional invoice for the 90% estimated value of a shipment and a final invoice for the payment of the final balance after final settlement of the weight, assays and quotations are completed. This also allegedly explains why the final invoices carry dates much later than the date when the sale or shipment was made.

Section 106(A)(2)(a)(1) of the National Internal Revenue Code (NIRC) of 1997 provides as follows:

> "**SEC. 106.** ***Value-added Tax on Sale of Goods or Properties.—***
>
> (A) *Rate and Base of Tax.—* There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a value-added tax equivalent to ten percent (10%) 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
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> (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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> xxx xxx xxx

Based on the foregoing, to be considered an export sale, there must be, not only a sale, but also an actual shipment of goods from the Philippines to a foreign country. Thus, such actual shipment of the goods, to be considered as an *"export sale"* for purposes of the application of the zero percent (0%) VAT rate, must be made also in the quarter the sale was made.

During the presentation of petitioner's additional evidence, its witness Guadaflor Malonzo identified, among others, Provisional Invoice Nos. PX-2381, dated June 3, 2004, marked as Exhibit "L"[10] and PX-2386 dated July 7, 2004, marked as Exhibit "M"[11] both issued to Pan Pacific Copper Co., Ltd., for the 2nd quarter of 2004 . With the presentation of the said Provisional Invoice No. PX-2381, petitioner was able to prove that the sales covered by Final Invoice No. PX-2402 dated October 4, 2004[12] amounting to US$4,749,732.00 with peso equivalent of ₱ 265,054,064.97, as computed below, qualifies for VAT zero-rating under Section 106(A)(2)(a)(1) of the NIRC of 1997.

Declared Zero-Rated Sales in	Ph₱	939,237,698.67
		÷
Divided by Declared Zero-Rated Sales in	US$	16,831,009.00
Average peso to dollar rate		55.8040043036
Multiplied by Substantiated Zero-rated		x
Sales in	US$	4,749,732.00
Substantiated Zero-Rated Sales in	**Ph₱**	**265,054,064.97**

However, the amount of US$4,944,801.00 shall be denied, because the covering provisional invoice thereon, Provisional Invoice No. PX-2386 [13], and the corresponding bill of lading[14], show that the copper concentrates were *"shipped on July 6, 2004"* or outside the period of the subject claim.

As to petitioner's indirect export sales to PASAR for the 2nd quarter of 2004 in the amount of US$7,414,752.00, petitioner likewise presented the corresponding

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[10] Docket, p. 259.
[11] Docket, p. 260.
[12] Exhibit "F-1".
[13] Exhibit "M", Docket, p. 260.
[14] Exhibit "F-2-b".

Provisional Invoices it issued to PASAR[15]. These documents prove that petitioner actually made indirect exports to PASAR. Such indirect export sales with peso equivalent of ₱ 413,772,852.52, as computed below, are subject to zero percent (0%) VAT pursuant to 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:

Declared Zero-Rated Sales in	Ph₱	939,237,698.67
		÷
Divided by Declared Zero-Rated Sales in	US$	16,831,009.00
Average peso to dollar rate		55.8040043036
Multiplied by Substantiated Zero-rated		x
Sales in	US$	7,414,752.00
Substantiated Zero-Rated Sales in	**Ph₱**	**413,772,852.52**

To recapitulate, out of the 2nd quarter 2004 reported zero-rated sales of US$16,831,009.00, only the following export sales in the total amount of US$12,164,484.00 with peso equivalent of ₱ 678,826,917.49 qualify for VAT zero-rating, to wit:

	In US Dollars	In Phil Peso
Direct Exports of Copper to Japan	4,749,732.00	265,054,064.97
Indirect Exports of Copper to PASAR	7,414,752.00	413,772,852.52
Total	**12,164,484.00**	**678,826,917.49**

We now proceed to the determination of whether petitioner's input taxes in connection with its zero-rated sales for the 2nd quarter of 2002 are duly substantiated.

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[15] Exhibits "N", "O", "P", "Q" and "R", Docket, pp. 261-265..

In its VAT return for the 2nd quarter of 2004[16], petitioner reflected an input VAT of ₱ 28,237.41 on domestic purchases and an input VAT of ₱ 14,451,358.00 on importations totaling to ₱ 14,479,595.41, as shown below:

	Purchases	Input Tax
Domestic Purchases - Capital Goods	₱ 282,374.10	₱ 28,237.41
Importations - Goods other than Capital Goods	144,513,580.00	14,451,358.00
Total	**₱ 144,795,954.10**	**₱ 14,479,595.41**

With regard to the input taxes on domestic purchases, the Court-commissioned ICPA, Albert G. Alba, in his Report dated January 4, 2007, submitted the following findings[17]:

Particulars	Amount
a. Original VAT official receipts that are in the name of Petitioner	
-Receipts dated in the current quarter	₱ 15,519.53
-Out-of-period receipts dated 3rd quarter of 2004	2,284.82
b. No supporting VAT official receipts presented	8,051.37
c. No supporting VAT official invoices presented	2,381.69
TOTAL	**₱ 28,237.41**

Based on the above findings, only the input VAT of ₱ 15,519.53 *(item a.1)* represents petitioner's valid claim while the remaining amount of ₱ 12,717.88 *(items a.2, b, and c)* should be denied for the above-stated reasons.

As regards the input VAT payment of ₱ 14,451,358.00 on petitioner's importations, the ICPA also presented the following findings[18]:

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16 Exhibit J-10.
17 Exhibit E, page 5.
18 Exhibit E, page 4.

	Particulars	Amount
	Input taxes paid on importation of:	
1	Capital goods	₱ 10,420,574.00
2	Other than capital goods	3,799,362.00
3	Input tax payments with no supporting documents	231,422.00
	TOTAL	**₱ 14,451,358.00**

After careful scrutiny of the documents presented supporting the input taxes on importations, We find that, out of the said amount of ₱ 14,451,358.00, only the amount of ₱ 12,918,001.00 is duly substantiated, while the remaining amount of ₱ 1,533,357.00 shall be disallowed for the following reasons:

	Items Imported	Exhibit No.		Input VAT
1	**Input VAT on importation of capital goods supported by documents dated outside the period of claim**			
	200 pcs adapter and tooth loader	H-1	H-1-a	₱ 110,227.00
	5 units axial fan	H-9	H-9-a	171,940.00
				₱ 282,167.00
2	**Input VAT on importation of goods other than capital goods supported by documents dated outside the period of claim**			
	2 pcs parts for boring machine	H-10	H-10-a	69,635.00
	3 containers valve control	H-11	H-11-a	38,677.00
	1 container bolthing cloth	H-12	H-12-a	36,897.00
	1 container control valve	H-13	H-13-a	37,240.00
	1 container parts for raise climber	H-14	H-14-	50,771.00
	55 pallets cartons cupels & crucible	H-15	H-15-a	33,877.00
	1 crate stc 3 pcs socket, cast bronze	H-16	H-16-a	38,469.00
	12 pcs screen sieve bend	H-17	H-17-a	63,789.00
	4 rolls tip top repair material	H-18	H-18-a	41,225.00
	3 pallets litharge	H-19	H-19-a	56,508.00
	parts for crusher machine	H-20	H-20-a	18,092.00
	1 case screen panel	H-21	H-21-a	44,937.00
	5 cases screen woven wire	H-22	H-22-a	98,106.00
	1 package parts for crusher	H-23	H-23-a	94,293.00
	1 package crusher parts	H-24	H-24-a	89,721.00
	1 container spare parts	H-25	H-25-a	61,821.00
	5 pallets hookfiber	H-26	H-26-a	33,643.00
	parts for rock drill	H-27	H-27-a	24,972.00
	1 container parts for machine engine	H-28	H-28-a	87,095.00
				1,019,768.00

3	**No supporting documents presented**	
	IEIRD No.51656035	2,500.00
	IEIRD No.53742873	63,139.00
	IEIRD No.52984915	1,997.00
	IEIRD No.53742875	44,404.00
	IEIRD No.52893224	21,524.00
	IEIRD No.51657322	4,355.00
	IEIRD No.90165336	19,789.00
	IEIRD No.5298503	2,082.00
	IEIRD No.6215	2,340.00
	IEIRD No.54207754	69,292.00
		231,422.00
	Total	**P 1,533,357.00**

However, a portion of the substantiated input VAT of ₱ 12,918,001.00 shall be applied against petitioner's reported output VAT liability of ₱ 23,182.00[19], which was not paid. Hence, only the remaining input VAT of ₱ 12,894,819.00 can be attributed to the entire zero-rated sales of ₱ 939,237,698.67 declared by petitioner and only the input VAT of ₱ 9,319,632.55 is attributable to the substantiated zero-rated sales of ₱ 678,826,917.49, as computed below:

Substantiated input VAT	₱	12,918,001.00
Less: Output Tax		23,182.00
Excess input VAT	**₱**	**12,894,819.00**

Substantiated Zero-rated Sales	678,826,917.49
Divided by Total Reported Zero-Rated Sales	÷939,237,698.67
Multiplied by Substantiated Excess Input VAT	x 12,894,819.00
Excess Input Tax Attributable to Substantiated Zero-Rated Sales	**₱ 9,319,632.55**

In sum, out of the claimed input VAT of ₱ 14,479,595.41 for the second quarter of taxable year 2004, only the input VAT in the total amount of **₱ 9,335,152.08** which are attributable to its zero-rated sales can be a proper subject of a claim for refund or tax credit, determined as follows:

[19] Item 19B, Exhibit J-10.

Substantiated Input VAT on domestic purchases	₱	15,519.53
Substantiated Input VAT claim on importations		9,319,632.55
Total Substantiated Input VAT	**₱**	**9,335,152.08**

As evidenced by its Quarterly VAT Returns[20] from the 3rd quarter of 2004 to the 2nd quarter of 2005, petitioner was able to prove that the input VAT of ₱ 9,335,152.08 was not applied against any output VAT in the succeeding quarters.

Finally, petitioner's claim for refund was timely filed within the two-year prescriptive period both in the administrative and judicial levels. In the recent case entitled *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.),*[21] the Supreme Court held that the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under Section 112(A) of the NIRC of 1997 starts 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.

The present claim pertains to input VAT incurred for the 2nd quarter of 2004. Counting from June 30, 2004, the end of the 2nd qtr of 2004, petitioner had until June 30, 2006 within which to file its claim both in the administrative and judicial levels. Hence, petitioner's administrative claim filed on November 25, 2005[22] and the Petition for Review filed on June 29, 2006 were well within the two-year prescriptive period.

WHEREFORE, in light of the foregoing, petitioner's Motion for Reconsideration is hereby **PARTIALLY GRANTED** and the assailed Decision promulgated on January 9, 2009 is hereby **MODIFIED.** Accordingly, the Petition for

[20] Exhibits J-11 to J-14.
[21] G.R. No. 172129, September 12, 2008.
[22] Paragraph 7, Summary of Facts Admitted, Stipulation of Facts and Issues, Docket, p. 36.

Review filed on June 29, 2006 is **PARTIALLY GRANTED** and respondent is hereby **ORDERED TO REFUND** petitioner the amount of **NINE MILLION THREE HUNDRED THIRTY FIVE THOUSAND ONE HUNDRED FIFTY TWO PESOS AND 08/100 (₱ 9,335,152.08)**, representing its unutilized input VAT for the second quarter taxable year 2004.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

I hereby certify that the Amended Decision was reached after due consultation with the members of the division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice