REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

LEPANTO CONSOLIDATED MINING COMPANY,
Petitioner,

- versus -

C.T.A. CASE NOS. 4445, 4629 & 4874

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 21 1998

x -- x

DECISION

These consolidated cases involve claims for refund/tax credit in the total amount of ₱37,771,651.25 representing excess VAT input tax payments allegedly paid by Petitioner from May 1, 1988 to January 31, 1992.

The factual backdrop of the case are as follows:

Petitioner is a domestic corporation organized and existing under the laws of the Republic of the Philippines. It is engaged in the business of exploration, mining, production and sale of calcines, which is the roasted copper concentrates, to the Philippine Associated Smelting and Refining Corporation (PASAR) and of gold to the Central Bank of the Philippines (CB). It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer under VAT Registration No. 32-9-000357 [Exh. W (CTA Case No. 4445), Exh. S (CTA Case No. 4629), Exh. M (CTA Case No. 4874)]. It is likewise registered with the Board of Investments as a preferred non-pioneer enterprise under Certificates of Registration Nos. 69-86, 69-32 and DP 91-184 [Exhs. B, C, D (CTA Case No. 4445), Exhs. Z, AA, BB (CTA Case No. 4629), Exhs. T, T-1, T-2 (CTA Case No. 4874)] and with the Export Processing Zone Authority as a Zone Export Enterprise under Certificate of Registration No. 85-21 [Exh. A (CTA Case No. 4445), Exh. CC (CTA Case No. 4629), Exh. S (CTA Case No. 4874)].

From January 1, 1988 to January 31, 1992, Petitioner filed its quarterly VAT returns reflecting zero-rated sales and net creditable input tax, as follows:

CTA Case No. 4445

Exh.	Period Covered	Zero-rated sales	Net Creditable Input Tax
Y	Jan. 1 - Apr. 20, 1988	₱407,320,132.12	₱ 8,053,369.06
Z	May 1 - July 31, 1988	247,102,604.95	10,089,771.63
AA-2	Aug. 1 - Oct. 31, 1988	416,941,715.10	8,233,812.26
BB-2	Nov. 1 - Jan. 31, 1989	322,406,387.41	8,014,765.91
CC-2	Feb. 1 - Apr. 30, 1989	337,580,639.66	8,747,935.69
DD-2	May 1 - July 31, 1989	230,883,614.07	9,588,061.48
EE-2	Aug. 1 - Oct. 31, 1989	303,502,660.46	9,666,557.94

CTA Case No. 4629

Exh.	Period Covered	Zero-rated sales	Net Creditable Input Tax
U	Nov. 1 - Jan. 31, 1990	₱299,841,164.28	₱ 9,149,646.99
V	Feb. 1 - Apr. 30, 1990	342,712,041.25	8,726,881.76
W	May 1 - July 31, 1990	357,543,941.25	12,012,256.01
X	Aug. 1 - Oct. 31, 1990	429,376,734.73	10,444,207.77
Y	Nov. 1 - Jan. 31, 1991	342,474,123.93	12,933,921.86

CTA Case No. 4874

Exh.	Period Covered	Zero-rated sales	Net Creditable Input Tax
O	Feb. 1 - Apr. 30, 1991	₱275,170,218.75	₱11,772,407.01
P	May 1 - July 31, 1991	270,194,506.06	11,116,212.21
Q	Aug. 1 - Oct. 31, 1991	285,626.945.80	5,803,343.69
R	Nov. 1 - Jan. 31, 1992	260,347,561.01	7,385,071.40

Subsequently, Petitioner filed applications for tax credit/refund of excess input Value-Added Taxes (VAT) paid for the aforementioned periods, on the basis of Section 106(b) of the Tax Code, which provides:

> (b) Zero-rated or effectively zero-rated sales. - Any person, except those covered by paragraph (a) x x x whose sales are zero-rated or are effectively zero-rated may, within two years after the close of the quarter when such sales were made, apply for the issuance of a tax credit certificate or refund of the input taxes attributable to such sales to the extent that such input tax has not been applied against output tax."

These applications were acted upon favorably by the Revenue Officers who conducted the examinations by recommending the issuance of tax credit certificates in favor of Petitioners totalling ₱82,222,867.90, broken down as follows:

1/1/88 - 4/20/88	SN 00028	₱ 6,330,566.83
5/1/88 - 7/31/88	Exh. SS-4	6,293,600.94
8/1/88 - 10/31/88	Exh. SS-5	5,208,040.76
11/1/88 - 1/31/89	Exh. E	5,643,041.44
2/1/89 - 1/31/90	Exh. B, B-2	5,455,287.02
2/1/90 - 1/31/91	Exh. A	42,740,589.45
2/1/91 - 1/31/92	Exh. EE	10,551,741.46
		₱82,222,867.90

484

These favorable recommendations, however, were already net of deductions made, such as failure to meet invoicing requirements, penalties, input tax allocable to exempt sales, sales to PASAR and Central Bank.

Petitioner then elevated these Petitions before Us on April 20, 1990 (CTA Case No. 4445), July 8, 1991 (CTA Case No. 4629) and on November 11, 1992 (CTA Case No. 4874) to toll the running of the two year prescriptive period. In these Petitions, Petitioner seeks only to refund the input taxes attributable to sales to PASAR and Central Bank totalling ₱37,771,647.25, detailed as follows:

5/1/88 - 7/31/88	₱ 818,392.06	CB
	1,713,797.85	PASAR
8/1/88 - 10/31/88	1,658,432.85	PASAR
11/1/88 - 1/31/89	1,419,963.54	PASAR
2/1/89 - 1/31/90	3,263,583.79	CB
	8,148,077.27	PASAR
2/1/90 - 1/31/91	6,898,833.71	PASAR
	2,451,854.79	CB
2/1/91 - 1/31/92	1,986,244.46	CB
	9,412,466.93	PASAR
	₱37,771,647.25	

The input taxes pertaining to sales to CB were disallowed due to the issuance of BIR VAT Ruling No. 8-92 and RMO No. 22-92 which considered sales of gold to the CB as local sales subject to the 10% VAT rate and was made retroactive to January 1, 1988 by VAT Ruling No. 59-92. Upon the other hand, portions of the input taxes

485

pertaining to sales to PASAR were deducted against Petitioner's claim if the sales are not 100% exported.

Since these aforementioned cases involve the same parties and similar questions of law and fact, Petitioner's "Motion to Consolidate" these cases was granted on April 21, 1995 (p. 493, CTA Records, CTA Case No. 4445).

There being no controversy as to the amount of sales made by Petitioner to Central Bank and to PASAR and other export sales, the issues are narrowed down to:

a. The validity of VAT Ruling No. 008-92 in connection with -

1. The applicability of 10% VAT rating with regard to sales of calcines to PASAR.

2. The applicability of 10% VAT on sale of gold to CB.

b. The validity of VAT Ruling No. 59-92 which retroactively applied VAT Ruling No. 008-92, dated January 23, 1992;

c. The applicability of Revenue Regulations No. 2-88 which requires the purchaser (direct exporter) to export more than 70% of its total sales in order to qualify the sales made by its supplier (petitioner herein) to 100% VAT zero rate.

These cases were originally submitted for decision on November 21, 1996 but in a Resolution, dated March 4, 1997, this Court resolved to hold in abeyance the decision in these cases pending adjudication of a similar issue by the Court of Appeals in cases pending before it. Now that the Court of Appeals has promulgated decisions touching on the very heart of the issue confronting Us, We have decided to resolve said issue in the light of these decisions.

As to the sales of calcine made by Petitioner to PASAR, Petitioner offered the following in evidence to support its claim:

a. RR No. 2-88, dated February 15, 1988, which states that sales of raw materials to BOI-registered enterprises whose export sales under rules and regulations of the Board of Investments, exceed seventy percent (70%) of total annual production, shall be subject to zero-rate x x x (Exh. K);

b. VAT Ruling No. 271-88, dated June 24, 1988, which provides that the sale of merchandise, raw materials, etc. to export processing zones when purchased by an EPZA registered enterprise is considered an export sale which is subject to zero-rate (Exh. L).

c. Letter of the Bureau of Internal Revenue to PASAR which provides in part that:

"x x x please be informed that insofar as the raw materials supplied to PASAR by the above-named companies are concerned, their application for zero-rated status is hereby approved; that the said mining companies need not pay the 10% VAT covering sales of copper concentrates and calcines to PASAR; and that consequently PASAR does not have to file a claim for refund of the said VAT payments." (Exh. M).

Regarding its sales of gold to Central Bank, it is worthy to note that during the periods covered in these cases (May 1, 1988 to January 31, 1992) up to January 23, 1992 when VAT Ruling No. 008-92 was issued, sales of gold to Central Bank were treated as export sales which under Section 100 of the Tax Code are zero-rated. Hence, pursuant to Section 106(a) of the Tax Code, the input taxes attributed to such sales of gold can be refunded. Said provision was further amplified by the following rulings and circulars offered in evidence by herein Petitioner:

a. VAT Ruling No. 100-000-00-378-88 dated August 23, 1988, which states that the sale of gold to the Central Bank is considered as an export sale subject to zero-rating (Exh. E);

b. Revenue Memorandum Circular No. 59-88, dated December 14, 1988 which states that the sale of gold to the Central Bank, if made by a VAT-registered firm (such as Petitioner), is zero-rated (Exh. F);

c. CB Circular No. 960 (Sec. 169) which states that gold producers shall qualify as export-oriented firms even if their entire output is sold to the Central Bank and CB Circular No. 1301 which states that all sales of gold to the CB are considered constructive exports (Exh. H);

d. CB Circular No. 1301 which states that all sales of gold to the Central Bank are considered constructive exports;

e. CB Circular No. 1318 which states that all gold sold to Central Bank are considered constructive exports.

However, due to the issuance of VAT Ruling No. 8-92 which considered sales of gold to the CB as local sales subject to the 10% VAT rate and was given retroactive effect by VAT Ruling No. 59-92, the treatment previously accorded to Petitioner as a zero-rated export seller was changed.

In the case of **Atlas Consolidated Mining and Development Corporation versus Court of Tax Appeals and Commissioner of Internal Revenue, CA-G.R. SP No. 34152, promulgated last February 6, 1998,** the Court of Appeals said:

> "In equipoise with the Central Bank's policy of conserving gold (Section 162, CB Circular No. 960), certain gold producers are required to sell their entire gold production to the Central Bank (Section 171, CB Circular 960). Moreover, no person shall export or bring out, or attempt to export or bring out of the Philippines, gold and/or gold-bearing materials, in any shape, form and quantity without prior approval from the CB Export Department. (Section 107, CB Circular No. 1318) Prescinding from the aforesaid policy, gold producers are given incentives, such as considering their sales to the Central Bank as "exports".

484

According to settled jurisprudence, circulars of the Central Bank are neither statute nor law, but being issued for the implementation of the law authorizing its issuance, it has the force and effect of law (People vs. Que Po Lay, 94 Phil. 640). All that is required is that the regulation should be germane to the objects and purposes of the law; that the regulation be not in contradiction with it, but conform to the standards that the law prescribes (United States vs. Tupasi Molina, 29 Phil. 119). A su converso, should the regulation conflict with the law, the validity of the regulation cannot be sustained (Director of Forestry v. Munoz, 23 SCRA 1183, Hijo Plantation, Inc. v. Central Bank, 164 SCRA 194).

The Department of Justice, in Opinion No. 47, S. 1992 (dated April 14, 1992) expressed the view that:

> "x x x With regard to sales of gold to the Central Bank, existing jurisprudence recognizes that Central Bank Circulars issued for the implementation of the law authorizing its issuance [have] the force and effect of law (People vs. Que Po Lay, 94 Phil. 640), and therefore C.B. Circulars [sic] Nos. 960 and 1301 can be recognized as special laws within the ambit of Section 100(a)(2) of the Tax Code." (Underscoring supplied) (pages 112-113 of the CTA Record)

Based on the foregoing, the conclusion is inevitable that VAT Ruling No. 008-92 (dated January 23, 1992) is bereft of legal basis in removing the VAT zero-rating treatment previously recognized on sale of gold to the Central Bank, including constructive export sales to BOI-registered enterprises.

Indeed, the BIR has already recognized and admitted that said transactions are zero-rated (paragraph 3, pages 1-2 of the Joint Stipulation of Facts; page 40-41 of the CTA Records). Said stance is demonstrated in the following acts of the BIR:

490

a. The grant of petitioner's application for zero-rating of sales to PASAR and PHILPHOS (Annexes "A" and "B", Joint Stipulation of Facts; pages 56-57 of the CTA Record);

b. Revenue Regulation No. 2-88, wherein it recognized sales to BOI-registered enterprises which export over 70% of its sales as zero-rated, subject to certain conditions (Annex "H", Joint Stipulation of Facts; pages 70-71 of the CTA Record);

c. VAT Ruling No. 271-88 (dated June 24, 1988), wherein it was recognized that sales to PHILPHOS are zero-rated (Annex "I", Joint Stipulation of Facts; page 72 of the CTA Record);

d. Letter dated April 18, 1988, whereby it recognized that sales of copper concentrates to PASAR are zero-rated (Annex "J", Joint Stipulation of Facts; page 73 of the CTA Record); and

e. VAT Ruling No. 008-92, which states that the sale of raw materials to BOI-registered enterprises can qualify for zero-rating (Annex "N", Joint Stipulation of Facts; pages 79-82 of the CTA Record).

Insofar as the sales of gold to the Central Bank is concerned, the following official acts showed that the BIR had consistently considered the same as effectively zero-rated:

a. The grant of petitioner's application for zero-rating (Annex "A", Joint Stipulation of Facts; page 56 of the CTA Records);

b. VAT Ruling No. 100-000-000-378-88 (dated August 23, 1988) which states that the sale of gold to the Central Bank is considered as an export sale subject to zero-rating (Annex "P", Joint Stipulation of Facts; page 90 of the CTA Records); and

c. Revenue Memorandum Circular No. 59-88 (dated December 14, 1988) which states that the sale of gold to the Central Bank if made by a VAT-registered firm (such as petitioner) is

> zero-rated (Annex "T", Joint Stipulation of Facts; page 96 of the CTA Records).
>
> Clearly, the respondent court improperly deviated from its former position notwithstanding its legal bases. Ostensibly, the respondent opted to apply certain provisions of the law which buttressed its present position while being impervious of the salient provisions that would yield a contrary conclusion. Consequently, respondent has applied Section 100(a) in a manner which negates fealty to axiom "Interpretare et concordare leges legibus, est optimus interpretandt modus" (The best method of interpretation is that which makes laws consistent with other laws).
>
> Prescinding from the foregoing, VAT Ruling No. 008-92 (dated January 23, 1992) is devoid of legal bases in imposing the 10% VAT on petitioner's sales of gold to the Central Bank."

As to whether VAT Ruling No. 059-92, dated April 20, 1992, which was made retroactive to January 1, 1988 (date of effectivity of the VAT law), is valid which would in effect subject Petitioner to 10% VAT, We rule in the negative.

In **Manila Mining Corporation versus Commissioner of Internal Revenue, CA G.R. SP No. 38287, dated June 5, 1997**, the Court of Appeals ruled that:

> "The applicable law is Section 246 of the National Internal Revenue Code which provides:
>
> > "Sec. 246.-*Non-retroactivity of rulings.* - *Any* revocation, modification, or reversal of any rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner of

> Internal Revenue shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or c) where the taxpayer acted in bad faith."

The law is clear. VAT Ruling 008-92 issued on January 23, 1992 and Revenue Memorandum Order No. 22-92 cannot be applied retroactively to petitioner's sales to the Central Bank from July 1, 1990 to December 31, 1990.

In the recent case of *Commissioner of Internal Revenue vs. Court of Appeals*, et al., G.R. No. 117982, February 6, 1997, the Supreme Court citing the cases of Commissioner of Internal Revenue v. Telefunken Semiconductor Philippines, Inc., G.R. No. 103915, 23 October 1995, 249 SCRA 401; Bank of America v. CA, G.R. No. 103092, 21 July 1994, 234 SCRA 302; Commissioner of Internal Revenue v. CTA, No. L-44007, 20 March 1991, 195 SCRA 444; Commissioner of Internal Revenue v. Mega General Merchandising Corp., G.R. No. 69136, 30 September 1988, 166 SCRA 166; Commissioner of Internal Revenue v. Burroughs, G.R. No. 66653, 19 June 1986, 142 SCRA 324; ABS-CBN v. CTA, G.R. No. 52306, 12 October 1981, 108 SCRA 142, in no uncertain terms, pronounced, " well-entrenched is the rule that *rulings and circulars, rules and regulations promulgated by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to the taxpayers.*"

Revenue Memorandum Circular No. 59-88, dated December 14, 1988, and BIR Ruling No. 036-90, dated February 14, 1990 considered sales of gold by a VAT registered firm to the Central Bank as export sales subject to zero

493

> rate pursuant to E.O. 581 and Section 1690 of CB Circular No. 960.
>
> The retroactive application of VAT Ruling No. 008-92 deprived petitioner not only of its claim for refund but worse, made petitioner liable for deficiency VAT in the amount of P8,012,213.47.

Then, in the recently decided cases of **Atlas Consolidated Mining and Development Corporation versus Court of Tax Appeals and Commissioner of Internal Revenue**, hereinbefore cited, and **Benguet Corporation versus Commissioner of Internal Revenue**, CA-G.R. SP Nos. 37205, 38958 and 39435, dated July 10, 1998, the Court of Appeals reiterated its position that VAT Ruling No. 008-92 cannot be given retroactive application. The Atlas case concluded that VAT Ruling No. 008-92, in imposing 10% VAT on sales of gold to the Central Bank, lacks legal basis, hence, of no effect. Furthermore, said case treated VAT Ruling No. 059-92 (dated April 20, 1992) which applies retroactively to January 1, 1988 VAT Ruling No. 008-92 (dated January 23, 1992) as contrary to law.

Finally, in the aforementioned Benguet case, the Court of Appeals stated:

> "The applicable provision of law is Section 246 of the NIRC quoted earlier. Under this provision, a ruling cannot be given retroactive effect if such application will be "prejudicial to the taxpayers". So, the important query is: does the retroactive application of VAT Ruling No. 008-92 cause undue prejudice to the petitioner?

494

The term "prejudice" means "to injure by some action or judgment; to damage" (Sibal, Philippine Legal Encyclopedia (1986), p. 750). Patently, petitioner will suffer substantial prejudice and injury if VAT Ruling No. 008-92 is applied retroactively.

Previous to the issuance of VAT Ruling No. 008-92 on 23 January 1992, sales of gold to the CB were deemed export sales subject to a 0% rate of VAT. However, upon the issuance of VAT Ruling 008-92, said sales of gold to the CB were deemed local sales and imposed a 10% VAT rate. What caused injury and damage to petitioner is the issuance of VAT Ruling No. 59-92 providing for a retroactive application of VAT Ruling No. 008-92 to the year 1988. The imposition of a higher VAT rate on petitioner's sales of gold to the CB (10% VAT rate instead of 0%) in effect reduced petitioner's income. This must be so because when petitioner's claims for tax credits were denied citing VAT Ruling No. 008-92 and VAT Ruling 59-92, petitioner suffered financial damage equivalent to the sum of the disapproved claims. Had petitioner known that such sales were deemed local sales and subject to the 10% VAT rate (which rate was not the prevailing rate in 1988) it would have (as it was within its rights to do so) passed on the cost of the input taxes (representing actual payments, costs or expenses in the purchase of goods and services) to the CB. Petitioner did not do that since it relied on the VAT rulings then in effect that the transactions in question were deemed export sales and subject to the 0% VAT rate. The reduction in income is the injury and damage to petitioner which is well within the meaning of the provision herein cited."

x x x

"Pertinently, it may be observed that the amendment of the VAT Law entitled "The New Expanded VAT Law" (Republic Act No. 7716) is revealing. Section 2 thereof amends Section 100 of the NIRC. The amended version of Section 100 of the NIRC, specifically Section 100 (a) (2) (A) (iv), expressly provides that "Sale of gold to the Bangko Sentral ng Pilipinas (BSP)" is an export sale subject to the 0% VAT rate."

495

The deduction made by Respondent of Petitioner's sales of calcine to PASAR is likewise bereft of legal basis. Revenue Regulation No. 2-88, which recognized sales to BOI-registered enterprises which export over 70% of its sales as zero-rated, is crystal clear. It does not require that 100% of its sales be actually exported. For as long as an enterprise exports over 70% of its sales, as in the case of herein Petitioner, then 100% of the net input taxes paid may be refunded. In the aforecited Atlas case, CA- G.R. SP. No. 34152, dated February 6, 1998, the Court of Appeals ruled on this particular issue in this manner:

> It should be stressed that "it is not the person enjoying tax exemption privilege under special law or international agreement which is given the privilege of enjoying zero-rating under the VAT law, but the sales (by suppliers) to such persons or entities which may be subject to zero-rate." (BIR Ruling No. 077, March 4, 1988). Only direct export sales can be zero-rated pursuant to Section 100 (a) (2). Under Section 2 of Revenue Regulations No. 2-88, zero rating can only be extended to the suppliers of raw materials to BOI-registered export producer exporting at least 70% of its annual production."

Respondent's act of allowing a refund only to the extent of actual export sales is contrary to law.

Thus, the issues on the validity of VAT Ruling No. 8-92 and 59-92 and RMO No. 22-92 having been resolved, We rule in favor of Petitioner.

496

ACCORDINGLY, Respondent Commissioner of Internal Revenuer is hereby **ORDERED** to **REFUND,** or in the alternative, **ISSUE** a TAX CREDIT CERTIFICATE in favor of Petitioner the amount of ₱37,771,647.25 representing excess input tax payments from May 1, 1988 to January 31, 1992.

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 the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

497