L-18

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED MINING
AND DEVELOPMENT CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4831,
4859 & 4944

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 30 1997

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DECISION

These cases involve claims for refund/credit of excess input VAT paid during the second, third, and fourth quarters of 1990 in the following amounts:

Second Quarter-P54,014,722.04 (CTA Case No. 4831)
Third Quarter-P75,304,774.77 (CTA Case No. 4859)
Fourth Quarter-P43,829,766.10 (CTA Case No. 4944)

Petitioner is a corporation organized and existing under the laws of the Republic of the Philippines. It is engaged in the business of mining, production and sale of various mineral products, consisting principally of copper concentrates and gold. It is duly registered with the BIR as a VAT enterprise per its Registration No. 32-A-00224.

On April 21, 1988, the Bureau of Internal Revenue duly approved petitioner's applications for VAT zero-rating of the following sales:

a.) Gold to the Central Bank (CB),

b.) Copper concentrates to the Philippine Associated Smelting and Refining Corporation (PASAR);

c.) Pyrite to Philippine Phosphates, Inc. (Philphos);

d.) Export sales (pp. 8-11, TSN, January 25,1995; Vide: Exhibits A and B)

Petitioner then filed with the Bureau of Internal Revenue (BIR) Value Added Tax Returns on the following dates to wit:

Period	Date Filed	Exhibit
Second quarter of 1990	July 20, 1990	"C"
Third quarter of 1990	October 18, 1990	"D"
Fourth quarter of 1990	January 20, 1991	"E"

Contending that its sales of gold to the Central Bank as well as its sales of copper concentrates to Philippine Associated Smelting and Refining Corporation (PASAR) and pyrite to Philippine Phosphate Fertilizer Corporation (PHILPHOS) as transactions covered under zero-rated transactions defined under Section 100(a) of the National Internal Revenue Code, as amended, petitioner applied with the Bureau of Internal Revenue for the issuance of tax credit certificates/refund pursuant to Section 106 (b) of the Tax Code for the value added taxes paid detailed as follows:

Date Filed	Period Covered	Amount Applied For
August 21, 1990	April, 1990 to June, 1990	P54,014,722.04

November 2, 1990	July, 1990 to September, 1990	75,304,774.77
February 19, 1991	October, 1990 to December, 1990	43,829,766.10

As the aforesaid claims for refund/applications for the issuance of tax credit certificates have not been resolved by the respondent, petitioner filed petitions for review with the Court on July 20, 1992, October 9, 1992, and January 14, 1993, covering second, third and fourth quarters of 1990, respectively, the avowed purpose of which is allegedly to beat the two-year reglementary period within which a judicial claim should be filed under Section 230 of the Tax Code.

The issues are as follows:

a. Whether or not petitioner's sales of gold to Central Bank can be classified as zero-rated in accordance with Section 100(a)(2) of the Tax Code;

b. Whether or not petitioner's sales to PASAR and PHILPHOS should be considered as effectively zero-rated transactions under section 100(a)(2) of the Tax Code, as amended,

c. Whether or not VAT Ruling Nos. 008-92 and 59-92, both issued in 1992, which consider sale of gold to the Central Bank as a domestic sale can be retroactively applied to the year 1990; and

d. Whether or not petitioner is entitled to its claim for refund of excess input VAT paid during the second, third and fourth quarters of 1990.

On the first and second issues, petitioner contends that VAT Rulings No. 008-92 and 59-92, insofar as they treat sales of gold to the Central Bank (CB) and sales of copper concentrates and pyrite to PASAR and PHILPHOS, respectively, which are both EPZA-registered enterprises, as local sales and therefore can be zero-rated only if they meet the requirements of Section 100(a)(1) and Section 106 of the Tax Code, is null and void and therefore of no legal effect. Petitioner further argues that such sales, which are considered constructive exports under certain special laws, may nevertheless be deemed zero-rated under the provisions of Section 100(a)(2) of the Tax Code and as such, are not subject to any further qualifications in order to be zero-rated.

On the other hand, respondent in her memorandum, argued that petitioner's sales of gold to the Central Bank cannot be considered export sales pursuant to Section 100(a) of the Tax Code and therefore the sales are subject to the 10% value-added tax. With respect to petitioner's sales of copper and pyrite to PASAR and Philphos respectively, respondent is of the opinion that zero-rating can be applied only upon presentation of documents of liquidation evidencing the actual utilization of raw materials in the manufacture of goods at least 70% of which have been actually exported.

Respondent further contends that petitioner failed to present any evidence to this effect, hence the claim for refund must be denied.

The first two issues bring into focus the validity of VAT Ruling Nos. 008-92 and 59-92 which classified sales of gold to the Central Bank, copper concentrates to PASAR and pyrite to Philphos as local sales subject to the 10% VAT.

The validity of VAT Ruling Nos. 008-92 and 59-92 with respect to petitioner's sales of gold to the Central Bank has been upheld in several cases already decided by this Court, foremost among which is the majority opinion of this Court embodied in a resolution in the case entitled **Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4794, dated April 5, 1994,** where the majority categorically rejected petitioner's theory that sale of gold to the Central Bank can be classified as effectively zero-rated transactions under Section 100(a)(2) of the Tax Code. Portions of said resolution are quoted hereinbelow, thus:

> "We find petitioner's position untenable. There is nothing in the said VAT Rulings No. 008-92 and 59-92 which purports to limit the scope of Section 100(a) of the Tax Code only to "export sales" as this term is defined in said section, or which abolishes the second category of zero-rated transactions, i.e., those which

are "effectively zero-rated" under special laws. All that said rulings provide is that, insofar as Section 100(a)(1) is concerned, the general rule is that only those transactions which involve actual exportation of goods from the Philippines to another country and those which fall under the category of foreign currency denominated sales will be considered as "export sales" and therefore zero-rated. Any other kind of "export sales", including those considered as "constructive exports" under certain special laws, are not considered as zero-rated sales since these neither involve actual exportation or shipment of goods nor can they be considered foreign currency denominated sales. Thus:

> "1. In general, for purposes of the term 'export sales', only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating."
>
> The law strictly limits "export sales" only to direct export sales and foreign currency denominated sales, to be qualified for zero rating.
>
> It is a settled rule of statutory construction that the express mention of one person, thing or consequence implies the exclusion of all others. *Expressio unius est exclusio alterius.* Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. (**Hongkong & Shanghai Bank vs. Peters, 16 Phil. 824**)

Neither can we subscribe to petitioner's contention that its sales to the CB, PASAR and Philphos, being constructive exports under special laws, should be considered as "effectively zero rated" transactions under Section 100(a)(2) of the Tax Code. Under the said provision, only those sales made to "entitles whose exemption under special laws or international agreements to which the

> Philippines is a signatory effectively subjects such sales to zero rate" can be considered as being "effectively zero rated". Otherwise stated, for a sale to be considered effectively zero-rated, it must be shown that the buyer is entitled to an "exemption" under certain special laws or international agreements, and that such "exemption" effectively subjects the sale to zero rate.
>
> In the case at bar, the special laws cited by petitioner in support of its contention, are Section 169 of Central Bank Circular No. 960, as amended by CB Circular No. 1301, and Article 23, 39(k) and 77 of Executive Order No. 226 otherwise known as the Omnibus Investments Code. A close scrutiny of said provisions, however, readily shows that they fail to meet the qualifications prescribed by Section 100(a)(2) of the Tax Code. In respect of Section 169 of CB Circular 960, all that said provision states is that "gold producers shall qualify as export oriented firms even if their entire output is sold to the Central Bank." It does not, however, grant such producers any exemption in respect of internal revenue taxes due on its sales to the Central Bank. <u>Neither is there anything in the said provision which effectively subject sales of gold to the CB to a zero-VAT rate</u>. (Underscoring supplied)

This issue has already been rendered moot and academic with the passage of Republic Act No. 7716 by including within the definition of export sales, sale of gold to the Central Bank of the Philippines.

With respect to petitioner's sale of copper concentrates to PASAR and pyrite to Philphos, this Court upholds VAT Ruling No. 008-92 wherein it states in part, thus:

> "In general, for purposes of the term "export sales" only direct export sales and

foreign currency denominated sales, shall be qualified for zero-rating.

Exception - Sales of raw materials to export-oriented BOI-registered enterprises whose export sales, under rules and regulations of the Board of Investments, exceed seventy percent (70%) of total annual production, shall also be subject to zero-rate for VAT purposes, pursuant to Section 2 of Revenue Regulations No. 2-88."

Section 2 of Revenue Regulations No. 2-88 provides as follows:

SEC. 2. ***Zero-rating.*** (a) *Sales of raw materials to BOI-registered exporters.* Sales of raw materials to export-oriented 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 under the following conditions:

"(1) The seller shall file an application with the BIR, ATTN.: Division, applying for zero-rating for each and every separate buyer, in accordance with Section 8(d) of Revenue Regulations No. 5-87. The application should be accompanied with a favorable recommendation from the Board of Investments."

"(2) The raw materials sold are to be used exclusively by the buyer in the manufacture, processing or repacking of his own registered export product;

"(3) The words "Zero-Rated Sales" shall be prominently indicated in the sales invoice. The exporter (buyer) can no longer claim from the Bureau of Internal Revenue or any other government office tax credits on their zero-rated purchases;

xxx xxx xxx

Both PASAR and Philphos are EPZA registered enterprises, therefore sales of raw materials made to these two entities are classified as zero-rated transactions provided the aforequoted conditions are met. In the case entitled **Marcopper Mining Corporation vs. Jose U. Ong, Commissioner of Internal Revenue, CTA Case No. 4950, dated July 23, 1996**, this Court had the occasion to rule on this very issue when it declared, thus:

> "In a more recent case involving the same parties and under similar circumstances, the Court hereby follows and adopts its previous ruling in **Marcopper Mining Corporation vs. Jose U. Ong, Commissioner of Internal Revenue, CTA Case Nos. 4603 and 4607, October 3, 1995**, herein quoted as follows:
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> > "From the foregoing, it is indubitably clear that in order for the Petitioner to avail of 'zero-rating' of input taxes, the only requirement to be complied is for it to sell its 'raw materials t export oriented BOI-registered enterprises whose export sales ... exceed seventy percent (70%) of total annual production ...' In other words, the law does not require a one-hundred percent export sales. Hence, local sales in excess of the 70% requirement may be allowed, contrary to the contention of the Respondent. The above requirement, although also subject to the condition that 'the raw materials sold are to be used exclusively by the buyer in the manufacture, processing or repacking of his own registered export product yet, in this particular case, was satisfactorily established by the

> Petitioner through documentary and testimonial evidences. Hence, We cannot do otherwise but grant Petitioner's claim for refund."
>
> Likewise, in this case, Marcopper (a BOI registered enterprise) sold its copper concentrate to PASAR (also a BOI registered export producer) for the year 1991. These copper concentrates have been used as raw materials in the production of goods for export by PASAR. In addition, PASAR had actually exported 75.93% (Exh. I-1) of its manufactured goods in 1991 (Exhs. J and I). Thus, considering that the goods exported by PASAR exceeded 70% of the total annual production, then the sales of Marcopper to PASAR is subject to <u>zero-rate</u> pursuant to Section 2 of Revenue Regulations No. 2-88 (The Application of Zero Rate, Exemption on Certain Transactions Related to Exports and Refunds of Input Taxes). From the evidence presented by petitioner, there is no doubt that it had satisfactorily proven its case."

The third issue presented to Us by this case is the question of retroactivity of the aforementioned VAT Ruling Nos. 008-92 and 59-92 which We believe is the more essential issue as the present claim for refund involves input VAT allegedly paid in the taxable year 1990. Petitioner argues that various rulings issued by the BIR prior to the issuance of VAT Ruling Nos. 008-92 and 59-92 classified sale of gold to the Central Bank, copper to PASAR and pyrite to Philphos as zero-rated sales. In particular, VAT Ruling No. 100-000-00-378-88, dated August 23, 1988, expressly provided that the "sale of gold to the Central Bank is considered as export sale subject to zero-rate pursuant to Section 100 of the Tax

Code as amended by Executive Order No. 273", as a result, petitioner alleges, that in relying in said ruling, it did not collect the 10% output VAT from its buyers and to worsen the situation it cannot now claim for the refund of the input VAT it had already paid during the taxable period of 1990. Petitioner blames the retroactive application of the provisions found in VAT Ruling Nos. 008-92, 59-92 and Revenue Memorandum Order No. 22-92 for its present predicament and assails said retroactivity as being contrary to Section 246 of the Tax Code which provides:

> "Section 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."

Petitioner asserts that even assuming that VAT Ruling Nos. 008-92 and 59-92 are valid, it cannot be retroactively applied to the sales it made in 1990 because it will be clearly prejudicial on its part in contravention of the aforequoted Section 246 of the Tax Code. For purposes of discussion VAT Ruling No. 008-92 partly provides as follows:

> 1. In general, for purposes of the term "export sales" only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating.

In addition, VAT Ruling No. 59-92 declared that "local sales of gold to the Central Bank may not be legally considered export sales for purposes of Section 100(a), NIRC." Both these rulings were issued in 1992 and were made to apply even to those sales that were made prior to their issuance.

In the most recent case delving on the topic of retroactivity of said rulings, the Court of Appeals in the case entitled **Manila Mining Corporation vs. CIR, CA-G.R. SP No. 38287, dated June 5, 1997 with Final Entry of Judgment on October 2, 1997,** ruled that VAT Ruling No. 008-92 and Revenue Memorandum Order No. 22-92 cannot be retroactively applied to petitioner's sales to the Central Bank from July 1, 1990 to December 31, 1990 because it will surely cause serious prejudice to the petitioner in contravention of Section 246 of the Tax Code and We quote:

> "The Court of Tax Appeals, giving retroactive application to VAT Ruling 008-92

issued on January 23, 1992 and Revenue Memorandum Order No. 22-92 which classify the sale of gold to the Central Bank as local sale subject to 10% VAT, denied petitioner's claim for tax credit/refund.

The applicable law is Section 246 of the National Internal Revenue Code which provides:

> "Section 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."

<u>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.</u>

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 vs. Telefunken Semiconductor Philippines, Inc., G.R. No. 103915, 23 October 1995, 249 SCRA 401; Bank of America vs. CA, G.R. No. 103092, 21 July 1994, 234 SCRA 302; Commissioner of Internal Revenue vs. CTA, No. L-44007, 20 March 1991, 195 SCRA 444; Commissioner of Internal Revenue vs. Mega General Merchandising Corp., G.R. No. 69136, 30**

> September 1988, 166 SCRA 166; Commissioner of Internal Revenue vs. Burroughs, G.R. No. 66653, 19 June 1986, 142 SCRA 324; ABS-CBN vs. 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 sale subject to zero 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. (Underscoring supplied)

It should be noted that the aforecited Manila Mining case decided by the Court of Appeals specified that the prohibition against the retroactivity of these rulings apply to petitioner's sales of gold to the Central Bank, hence no mention was made on the issue of its sale of copper concentrates to PASAR and pyrite to Philphos. We find this appropriate because as regards these particular sales (copper to PASAR and pyrite to Philphos), the non-retroactivity rule does not apply because even prior to the issuance of the disputed VAT Ruling Nos. 008-92 and 59-92 and RMO 22-92, such sales were classified as zero-rated only if the conditions specified by Revenue Regulations No. 2-88, Section 2 (supra) were met, such as the requirement that the export sales of these export-oriented firms must exceed seventy percent of their total annual production. These conditions were present even during the taxable period of 1990, the period involved in the present claim for refund. The subsequent VAT Rulings (Nos. 008-92 and 59-92) merely reiterated that which is found in Revenue Regulations No. 2-88, thus these conditions existed during the year 1990 and it is incumbent upon the petitioner to prove by competent evidence its compliance with said Section 2 of Revenue Regulations No. 2-88, otherwise its claim for refund shall be denied.

We come now to the last issue in this case which focuses on the factual aspect of petitioner's claim for refund. In consideration of the foregoing discussion of the legal issues involved in this case, the Court is concerned on whether petitioner is entitled to the full amount being claimed as refund for the second, third and fourth quarters of 1990, specified as follows:

P54,014,722.04	(CTA Case No. 4831)
P75,304,774.77	(CTA Case No. 4859)
P43,829,766.10	(CTA Case No. 4944)

After a careful study of all the documents/exhibits presented, the Court finds that the subject claim for refund cannot be granted by virtue of prescription. The records reveal that the claim for refund was not filed within the reglementary period of two years pursuant to Section 106(b) in relation to paragraph (e) of the same Section of the National Internal Revenue Code which provides:

> **Section 106.** ***Refunds or tax credits of input tax.*** - a) *Export sales.* x x x
>
> b) *Zero-rated or effectively zero-rated sales.* - <u>Any person</u>, except those covered by paragraph (a) above, <u>whose sales are zero-rated or are effectively zero-rated may, within two years after the close of the quarter when such sales</u> were made, apply for the <u>issuance of a tax credit certificate or refund of the input taxes</u> attributable to such sales to the extent that such input tax has not been applied against output tax.
>
> c) x x x
>
> d) x x x
>
> e) *Period within which refund of input taxes maybe made by the Commissioner.* - The Commissioner shall refund input taxes within 60 days from the date the application for refund was filed with him or his duly authorized representative. <u>No refund of input taxes shall be allowed unless the VAT registered person files an application for refund within the period prescribed in paragraph (a), (b) and (c) as the case may be</u>. (Underscoring supplied).

It was held in the case of **Nichimen Corporation, Philippine Branch vs. Commissioner of Internal Revenue, CTA Case No. 4431, February 13, 1995**, that the two-year period provided for under Section 230 of the National

Internal Revenue Code should be read in conjunction with Section 106 of the same Code when it comes to the refund of input taxes. Thus, the matter is deemed to involve a mere computation of the period of two years from the date of the close of each quarter to the time the cases at bar were filed. The records reveal that petitioner filed applications for refund with the Commissioner of Internal Revenue on August 21, 1990, November 21, 1990 and February 19, 1991 respecting second, third and fourth quarters of 1990. It should also be noted that the judicial actions were filed on July 20, 1992, October 9, 1992 and January 14, 1993 respectively, the subject claims being the input taxes paid for the second, third and fourth quarters of 1990. Consequently, applying the aforesaid provisions of the law in the cases at bar, it appears that when petitioner filed its petitions for review, more than two years had elapsed from the close of each quarters. Clearly, the petitioner had already been barred by prescription from claiming the refund of input taxes in question as shown below:

CTA Case No.	Period Involved	End of the Quarter	Date Filed BIR	Date Filed CTA
4831	04.01.90 to 06.30.90	06.30.90	08.21.90	07.20.92
4859	07.01.90 to 09.30.90	09.30.90	11.02.90	10.09.92
4944	10.01.90 to 12.31.90	12.31.90	02.19.91	01.14.93

WHEREFORE, premises considered, finding the petitions unmeritorious for being filed beyond the two year reglementary period prescribed under Section 106(b), of the NIRC, the same are hereby **DISMISSED**. Accordingly, the claims for refund of input taxes corresponding to the second, third and fourth quarters of 1990 are **DENIED**.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate 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
Court of Tax Appeals