REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILEX MINING CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE
Respondent.

C.T.A CASE NO. 4872

Promulgated:
MAR 16 1995

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D E C I S I O N

This is an assessment case involving alleged unpaid excise tax liability of Petitioner in the amount of P123,821,982.52 inclusive of surcharge and interest covering the 2nd quarter of 1991 to the 2nd quarter of the 1992.

Petitioner, a domestic corporation, is engaged in the business of mining, exporting and/or selling on a zero-rated basis, gold, copper concentrates and other mining products.

On August 12, 1992, Petitioner received a letter of demand from the Respondent dated August 5, 1992 enjoining the former "to settle your current tax liabilities in the total amount of P123,821,982.52 computed as follows:

PERIOD COVERED	BASIC TAX	25% SURCHARGE	INTEREST	TOTAL EXCISE TAX DUE
2nd Qtr., 1991	12,911,124.60	3,227,781.15	3,378,116.16	19,517,021.91
3rd Qtr., 1991	14,994,749.21	3,748,687.30	2,978,409.09	21,721,845.60
4th Qtr., 1991	19,406,480.13	4,851,620.03	2,631,837.72	26,889,937.88
	47,312,353.94	11,828,088.48	8,988,362.97	68,128,805.39
1st Qtr., 1992	23,341,849.94	5,835,462.49	1,710,669.82	30,887,982.25
2nd Qtr., 1992	19,671,691.76	4,917,922.94	215,580.18	24,805,194.88
	43,013,541.70	10,753,385.43	1,926,250.00	55,693,177.13
	90,325,895.64	22,581,473.91	10,914,612.97	123,821,982.52

(CTA Records, pp. 34-35)

Said letter also denied the collective letter of five mining corporations (including this Petitioner) requesting that their current excise tax payable be settled by way of offsetting the same against their VAT tax credit claims currently under process in the Bureau of Internal Revenue. Said, the Respondent:

> "Please be informed that tax credit claims filed and still undergoing process for determination as to the validity of the amounts claimed cannot be accepted and applied as payment for any outstanding internal revenue tax liability. The procedure in your request is unprecedented and contrary to existing guidelines/procedures prescribed in the use of tax credits as payments for tax liabilities. Approval in the form of a Tax Credit Certificates (BIR Form 23200 issued to a claimant/taxpayer in acknowledgement of the tax credit, is a condition precedent before it can be validly used as payment to settle an internal revenue tax liability.

It is therefore with regret that your request cannot be granted and is hereby denied."
(ibid.)

On August 20, 1992, Petitioner, in a letter of even date, asked the BIR to reconsider the denial of its request "due to serious financial illiquidity problems we are now facing. To sustain our right to the offset would greatly aid our company in particular and the mining industry in general and thus, prevent stoppage of work, suspension or even closure of our operations. Needless to state, our company and the mining industry are substantial foreign exchange earners, employ thousands of workers and contribute substantial tax revenues." (CTA Records, p. 38) At the same time, "we protest the demand for payment of the excise tax including surcharges, interests and penalties. We respectfully submit that the offset was proper and is supported by law." (ibid.)

On October 9, 1992, Petitioner received a letter from the Respondent dated September 7, 1992 denying the protest and reiterating the demand for Petitioner to pay the amount of P123,821,982.52. For easy reference, the full text of the Respondent's letter of denial is hereby quoted, thus:

September 7, 1992

Mr. Girard H. Brimo
President Philex Mining Corporation
Philex Bldg., Brixton and Fairlance Sts.
Pasig, Metro Manila

S i r :

This refers to your letter dated August 20, 1992 protesting our demand for payment of the amount of P123,821,982.52, inclusive of surcharge and interest, representing your company's excise tax liability for the period from 2nd quarter 1991 to 2nd quarter of 1992, alleging that the offset of the company's claim for tax credit/refund of VAT input against said excise tax obligation was proper and supported by law.

In reply thereto, please be informed that we find no merit to your contention that there is no doubt your company is entitled to the refund or credit of the input VAT considering that your claim is still under investigation and/or verification to ascertain its validity. This in not to mention the question on whether your company is entitled to VAT exemption on the sales of gold to the Central Bank which is presently under review before the Court of Tax Appeals, the same being the subject matter of C.T.A. Case Nos. 4446, 4468 and 4707. These cases involve your company's claim for VAT refund/credit for the years 1988 to 1991 and needless to state, their disposition is now within the jurisdiction of said Tax Court.

Furthermore, we cannot subscribe to your averment what the offset made by your company was in accordance with the Itogon-Suyoc case for the reason that in said case, the overpayment of tax made was duly admitted and there was no question as to the right of the taxpayer to refund the same. Whereas in your case, the claims for the refund or credit are yet to be established and determined not only by this Office but also by the Court of Tax

> Appeals where your claims are now being ventilated.
>
> In view thereof, your protest is hereby denied and we urge you to pay the amount of P123,821,982.52 representing your company's excise tax liability for the 2nd quarter of 1991 to 2nd quarter of 1992, plus interest incident to delinquency within thirty (30) days from receipt hereof.
>
> This is our final decision on the matter.
>
> Very truly yours,
>
> (Sgd.) JOSE U. ONG
> Commissioner of Internal Revenue"

Hence, this appeal.

In the meantime, on November 17, 1992, the Respondent issued a Tax Credit Certificate SN 001795 in the amount of P13,144,313.88 (Exhibit "FF"). This tax credit was applied to the excise taxes claimed by the BIR against the Petitioner for the second and third quarter of 1991 (see Exhs. "GG" and "HH").

The singular issue in this case is: whether or not Petitioner's excise tax liability may be off-set by its standing claim for VAT refund still pending litigation before Us.

We answer in the negative.

Compensation takes place by operation of law whereby two obligations are balanced in order to extinguish them to the extent that the value of one obligation is covered by the value of the other (8 Manresa 401); it involves a figurative operation of weighing two obligations simultaneously in order to extinguish them to the extent in which the amount of one is covered by the other (ibid., 366) "It cannot be disputed that BIR and Philex are creditors and debtors of each other in their own right. BIR is a creditor of Philex with respect to the excise tax while Philex is a creditor of BIR with respect to its claim for VAT refund. Both debts consist in a sum of money over neither of which there is any retention or controversy" (Petitioner for Review, p. 6). It is this line of argument that Petitioner is trying to impress upon this Court, but which, We refuse to adhere because in order that compensation may be proper, it is necessary:

> 1) <u>That each one of the obligors be bound principally and that he be at the same time a principal creditor of the other;</u>
>
> 2) That both debts consist in a sum of money, or if the things due are consumable, they be of the same kind, and also of the same quality if the latter has been stated;
>
> 3) That the two debts be due;
>
> 4) <u>That they be liquidated and demandable</u>.
>
> 5) That over neither of them there be any retention or controversy, commenced by

> third persons and communicated in due time to the debtor.
> (Art. 1279, Civil Code of the Philippines; Underscoring supplied).

Thus, for legal compensation to take place, both obligations must be liquidated and demandable. "Liquidated" debts are those where the exact amount has already been determined (PARAS, Civil Code of the Philippines, Annotated, Vol. IV, Ninth Edition, p. 259). In the instant case, the claims of the Petitioner for VAT refund is still pending litigation, and still has to be determined by this Court (C.T.A. Case No. 4707). A fortiori, the *liquidated debt* of the Petitioner to the government cannot, therefore, be set-off against the *unliquidated claim* which Petitioner conceived to exist in its favor (see **Compañia General de Tabacos vs. French and Unson**, No. 14027, November 8, 1918, 39 Phil. 34). And as succinctly put in the case of **Solinap vs. Del Rosario**, (No. L-50638, July 25, 1983, 123 SCRA 640):

> The petition is devoid of merit. Petitioner contends that respondent judge gravely abused her discretion in not declaring the mutual obligations of the parties extinguished to the extent of their respective amounts. He relies on Article 1278 of the Civil Code to the effect that compensation shall take place when two persons, their own right, are creditors and debtors of each other. The argument fails to consider Article 1279 of the Civil Code which provides that compensation can take place only if both obligations are liquidated. In the case at bar, petitioner's

> claim against the respondent Luteros in Civil Case No. 12379 is still pending determination by the court. While it is not for Us to pass upon the merits of the plaintiffs' cause of action in that case, it appears that the claim asserted therein is disputed by the Luteros on both factual and legal grounds. More, the counterclaim interposed by them, if ultimately found to be meritorious, can defeat petitioner's demand. Upon this premise, his claim in that case cannot be categorized as liquidated credit which may properly be set-off against his obligation. As this Court ruled in **Miable vs. Halili**, "compensation cannot take place where one's claim against the other is still the subject of court litigation. It is a requirement, for compensation to take place, that the amount involved be certain and liquidated.

And since the Petitioner's claim for refund is still pending litigation before Us, to submit to the Petitioner is virtually handing over to said Petitioner a favorable decision in a case which is still to be determined --- a case of "putting-the-horse-before-the-cart" situation. We cannot do that. We cannot preempt and put Ourselves in such a fix and absurd situation. We can at the utmost, only sympathize with the Petitioner in its continuing quest for economic survival. We could only wish We could go further. If only this Court can put this case in the archives and wait until such time that the claim for refund of the Petitioner, is already ripe for decision. If only We can consolidate this case with the refund case of the Petitioner. But again, We cannot.

This is so since "taxes being the chief source of revenue for the Government to keep it running must be paid immediately and without delay (**Collector of Internal Revenue vs. Yuseco**, L-12518, October 28, 1961, 3 SCRA 313); taxes are the lifeblood of the government and their prompt and certain availability is an imperious need" (**Commissioner of Internal Revenue vs. Pineda**, L-22734, September 15, 1967, 21 SCRA 105).

The case, of **Commissioner of Internal Revenue vs. Itógon-Suyoc Mines, Inc.**, 28 Phil. 867 and **Commissioner of Internal Revenue vs. Esso Standard Eastern Inc.**, 172 SCRA 367) cited by the Petitioner wherein the Supreme Court upheld the validity of a set-off between the taxpayer and the government, do not apply to the case at bar. In both cases, the claims of the taxpayers therein were *certain and liquidated*. The claims were *certain* since there were no doubts or disputes as to their refundability. In fact the government admitted the fact of overpayment. Those claims were also *liquidated* since the amounts are already *determined*. But it is not so in this particular case as the amounts allegedly to be refunded are contested by the Respondent and still under litigation; hence, uncertain and unliquidated. Thus, legal compensation or set-off as prayed for by the Petitioner cannot be sustained by this Court.

Another reason is that, taxes cannot be subject of set-off or compensation since claim for taxes is not a debt or contract as enunciated in the case of Cordero vs. Gonda, 18 SCRA 333. In that case, the Supreme Court ruled, thus:

> In another case (Republic vs. Mambulao Lumber Co., L-17725, February 28, 1962), upon the premise that forest charges "are in the coffers of the government as taxes collected", the pronouncement was that internal revenue taxes cannot be the subject of compensation. The reason is that the government and taxpayer "are *not* mutually creditors and debtors of each other" under Article 1278 of the Civil Code and a "claim for taxes is not such a debt, demand, *contract* or judgment as is allowed to be set-off." This decision inferentially takes forest charges out of the *Barreto* rule, because they are taxes - *not* "in a sense contractual in origin."

And in the latter case of **Francia vs. Intermediate Appellate Court,** 162 SCRA 755, the Supreme Court also ruled, thusly:

> This principal contention of the petitioner has no merit. We have consistently ruled that there can be no off-setting of taxes against the claims that the taxpayer may have against the government. A person cannot refuse to pay a tax on the ground that the government owes him an amount equal to or greater than the tax being collected. The collection of tax cannot await the results of a lawsuit against the government. In the case of *Republic vs.*

> *Mambulao Lumber Co.* (4 SCRA 622), this Court ruled that Internal Revenue Taxes can not be the subject of set-off or compensation. We stated that: "A claim for taxes is not such a debt, demand, contract or judgment as is allowed to be set-off under the statutes of set-off, which are construed uniformly, in the light of public policy, to exclude the remedy in an action or any indebtedness of the state or municipality to one who is liable to the state or municipality for taxes. Neither are they a proper subject of recoupment since they do not arise out of the contract or transaction sued on. xxx (80 C.J.S., 73-74). 'The general rule based on grounds of public policy is well-settled that no set-off is admissible against demands for taxes levied for general or local governmental purposes. The reason on which the general rule is based, is that taxes are not in the nature of contracts between the party and party but grow out of duty to, and are the positive acts of the government to the making and enforcing of which, the personal consent of individual taxpayer is not required. xxx'"

The Tax Credit Certificate (Exh. "FF") however amounting to P13,144,313.88, which has been automatically set-off by the Petitioner and was properly debited by the Respondent (Exhs. "GG" and "HH") should be deducted from its assessed liability of P123,821,982.52. Thus, Petitioner has only a liability of P110,677,668.70.

In all the foregoing, this Petition for Review is hereby **DENIED** for lack of merit and Petitioner is hereby **ORDERED** to **PAY** the Respondent the amount of P110,677,668.52 representing excise tax liability for the period from the 2nd quarter of 1991 to the 2nd quarter of 1992 plus 20% annual interest from August 6, 1994 until fully paid pursuant to Sections 248 and 249 of the Tax Code, as amended.

SO ORDERED.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among 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