REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MITSUBISHI CORPORATION, TOKYU CONSTRUCTION CO. LTD., A.M. ORETA & CO., INC. and BF CORPORATION, OPERATING as MTOB CONSORTIUM
Petitioners,

- versus -

C.T.A. CASE NO. 5757

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Promulgated:

JAN 15 2002

x - x

DECISION

This case involves a claim for refund in the amount of *one hundred thirty one million eight hundred thirteen thousand three hundred six pesos and twenty six centavos* (P131,813,306.26) allegedly representing unutilized creditable VAT withheld for the four quarters of taxable year 1997.

Petitioner is an unincorporated consortium of Mitsubishi Corporation (MC), Tokyu Construction Co., LTD. (TCCL), A.M. Oreta & Co., Inc. (AMOC) and BF Corporation (BFC), formed for the purpose of undertaking the NAIA Terminal 2 Development Project, with principal office address at the 14th Floor, Locsin Building, Ayala Avenue, Makati City. MC and TCCL are resident foreign corporations organized and existing under the laws of Japan and are duly licensed to do business in the

Philippines whereas AMOC and BFC are domestic corporations organized and existing under the laws of the Philippines. It is duly registered with the Bureau of Internal Revenue (BIR) as a Value-Added taxpayer and withholding agent. (pars. 1-6, Joint Stipulation of Facts).

On November 9, 1995, Petitioner entered into a contract with the Manila International Airport Authority (MIAA), a government corporation, for the construction of the NAIA Terminal 2 Development Project (Exhibit A).

For the four quarters of taxable year 1997, MIAA allegedly withheld 8.5% creditable VAT in the total amount of P112,875,963.59 from the income payments it made to Petitioner relative to the construction of the NAIA Terminal 2 Development Project.

In its 1997 amended quarterly VAT returns filed on September 1, 1998, Petitioner failed to utilize the said creditable VAT withheld of P112,875,963.59 as its accumulated input VAT payments on domestic purchases of goods/services were more than sufficient to cover its output VAT liabilities for each of the four quarters of 1997 as shown below:

			Input VAT			
Exh	1997	Output VAT (A)	Carried over fr. previous qtr (B)	This quarter (C)	Accumulated Excess Input VAT (B) + (C) - (A)	Creditable VAT Withheld
C	1st qtr	P15,612,376.16	P 24,688,110.78	P 16,785,001.56	P 25,860,736.18	P 8,054,483.05
E	2nd qtr	17,231,267.11	25,860,736.18	26,854,934.89	35,484,403.96	23,159,456.94
G	3rd qtr	23,160,064.96	35,484,403.96	29,745,361.76	42,069,700.76	23,017,043.64
I	4th qtr	42,349,556.63	42,069,700.76	44,459,237.64	44,179,381.77	58,644,979.96
		P98,353,264.86		P117,844,535.85		P112,875,963.59

Consequently, on February 17, 1999, Petitioner filed an administrative claim for refund corresponding to the alleged unutilized 1997 creditable VAT withheld of P112,875,963.59 (Exhibit KK). Since there was no action on the part of herein Respondent as to the aforesaid claim, the instant Petition for Review was filed on March 30, 1999 pursuant to the following provisions of Sections 204(3) [now 204(C)] and 230 [now 229] of the Tax Code, as amended, thus:

> "**SEC. 204.** ***Authority of the Commissioner to compromise, abate and refund/credit taxes.*** —The Commissioner may –
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> xxx xxx xxx
>
> "(3) Credit or refund taxes erroneously or illegally received, penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: x x x "
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> "**SEC. 230.** ***Recovery of tax erroneously or illegally collected.*** — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; x x x."
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> "In any case, no such suit or proceeding shall be filed after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: x x x."

Respondent, in his Answer to the Petition for Review, interposed the following Special and Affirmative Defenses:

"5. The Petition states no cause of action as it does not allege the dates when the taxes sought to be refunded were actually paid;

6. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Company vs. Commissioner of Internal Revenue, 67 SCRA 35);

7. One who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute (Asiatic Petroleum vs. Llanes, 49 Phil. 466; Union Garment Co. vs. Court of Tax Appeals, 4 SCRA 304);

8. In an action for tax refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund; and

9. It is incumbent upon Petitioner to show compliance with the provisions of Section 112 in relation to Section 229 both of the National Internal Revenue Code."

In their Joint Stipulation of Facts and Issues dated July 14, 1999 (CTA records, pp. 67-69), the parties submitted the following issues for this Court's resolution:

1. Whether or not the Petitioner had any output value-added tax liability for the 1^{st}, 2^{nd}, 3^{rd} and 4^{th} quarters of taxable year 1997;

2. Whether or not the amount of P112,875,963.59 was withheld from income payments made to the Petitioner by the Manila International Airport Authority for services rendered relative to the NAIA Terminal 2 Development Project;

3. Whether or not the creditable withholding value-added tax for the 1^{st}, 2^{nd}, 3^{rd} and 4^{th} quarters of taxable year 1997 in the total amount of P112,875,963.59 was applied against any output value-added tax liability;

4. Whether or not the Petitioner is entitled to the refund/tax credit of the amount of P112,875,963.59 under the law.

During the initial hearing of the case, the independent auditing firm, C.C. Jao & Associates, through its Head, Mr. Charlie Jao, was commissioned by this Court pursuant to CTA Circular 1-95, as amended, to examine and verify the voluminous documents supporting Petitioner's claim. Thereafter, C.C. Jao & Associates submitted an initial and final report dated March 15, 2000 and April 18, 2000, (Exhibits LL & MM), respectively, relative to its verification of Petitioner's claim for refund. In its final report, C. C. Jao & Associates reported that Petitioner's unutilized creditable VAT withheld for 1997 amounted to P131,813,306.26, which is higher than the amount of P112,875,963.59 being claimed in the instant Petition.

In conformity with the findings of C.C. Jao & Associates, Inc., Petitioner amended its 1997 quarterly VAT returns and filed the same with the BIR on April 19, 2000 (Exhibits NN to QQ, inclusive) reflecting an increased total creditable VAT withheld of P131,813,306.26 as follows:

			Input VAT			
Exh	1997	Output VAT (A)	Carried over fr. previous qtr (B)	This quarter (C)	Accumulated Excess Input VAT (B) + (C) – (A)	Creditable VAT Withheld
NN	1st qtr	P 20,906,097.25	P24,688,110.78	P 16,785,001.56	P 20,567,015.09	P 15,431,616.79
OO	2nd qtr	25,059,847.00	20,567,015.09	26,854,934.89	22,362,102.98	21,300,869.50
PP	3rd qtr	27,455,572.00	22,362,102.98	29,745,361.76	24,651,892.74	23,337,236.00
QQ	4th qtr	63,945,118.84	24,651,892.74	44,459,237.64	5,166,011.54	71,743,583.97
		P137,366,635.09		P 117,844,535.85		P131,813,306.26

Likewise, on May 30, 2000 and July 11, 2000, Petitioner filed an amended administrative claim (Exhibit RR) and a Supplement to the Petition for Review (CTA

Records, pp. 143-148), respectively, praying for the refund of the unutilized creditable VAT withheld of P131,813,306.26 as found by C.C. Jao & Associates.

Petitioner, to support its claim, presented testimonial and documentary evidence. Respondent, on the other hand, was declared to have waived his right to present evidence due to his repeated failure to appear in Court (CTA records, page 491).

After a careful review of the evidence adduced solely by Petitioner, the applicable laws and rulings in this case, this Court grants Petitioner's claim.

The legal basis of the withholding of the creditable VAT is Section 110(c) [now Section 114(C)] of the Tax Code, as amended, to wit:

> "c) ***Withholding of Creditable Value-Added Tax.*** — The government or any of its political subdivisions, instrumentalities or agencies, including government-owned or controlled corporations (GOCCs) shall, before making payment on account of its purchase of goods from sellers and services rendered by contractors which are subject to the value-added tax imposed in Sections 100 and 102 of this Code, deduct and withhold the value-added tax due at the rate of three percent (3%) of the gross payment for the purchase of goods and six percent (6%) on gross receipts for services rendered by contractors on every sale or installment payment which shall be creditable against the value-added tax liability of the seller or contractor: *Provided, however*, That in the case of government public works contractors, the withholding rate shall be eight and one-half percent (8.5%): *Provided, further*, That the payment for lease or use of properties or property rights to non-resident owners shall be subject to ten percent (10%) withholding tax at the time of payment. For this purpose, the payor or person in control of the payment shall be considered as the withholding agent.
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> The value-added tax withheld under this section shall be remitted within ten (10) days following the end of the month the withholding was made."

Corollary thereto, Section 102 of the Tax Code, as amended, provides:

"**Section 102.** ***Value-added tax on sale of services and use or lease of properties***. – (a) Rate and base of tax. – There shall be levied, assessed and collected a value-added tax equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties.

"The phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; x x x x."

To further strengthen its case, Petitioner, in its memorandum (CTA records, pp. 503-504), cited the following pertinent portions of VAT Review Committee Ruling No. 024-00, dated July 27, 2000 wherein the BIR held that Petitioner is not subject to the withholding of 8.5% creditable VAT and that Petitioner is entitled to the refund of excess creditable VAT withheld pursuant to RMC No. 42-99, thus:

"It is represented that the MTOB Consortium consists of Tokyu Construction Co., Ltd. (Tokyu), Mitsubishi Corporation (Mitsubishi), BF Corporation (BF) and AM Oreta & Co., Inc. (AMO); that Tokyu and Mitsubishi are corporations duly organized and existing under the laws of Japan and duly licensed to do business in the Philippines, while BF and AMO are both domestic corporations engaged in construction business; that the Consortium won the bid for and was awarded the NAIA Terminal 2 Project which is funded by a Loan from the Overseas Economic Cooperation Fund of Japan (OECF) and which loan is covered by an Exchange of Notes executed by and between the Government of Japan and of the Government of the Republic of the Philippines; that on November 9, 1995, the Consortium and MIAA executed an agreement for the performance of the Project which is 75% funded by the OECF and with 25% counterpart fund in pesos by the Philippine Government.

It is further represented that all payments made by MIAA to the Consortium were subjected to the 10% VAT; that initially, MIAA withheld the 8.5% creditable VAT on all its payments to the Consortium pursuant to Section 114(C) of the Tax Code of 1997 and paid the same to the BIR from the counterpart fund from the Philippine Government; that as a result of the

8.5% VAT withholding, the Consortium generated a substantial amount of unutilized creditable VAT since the 8.5% creditable VAT withholding and its input VAT credits far exceeded the Consortium's output VAT liability; that on June 2, 1999, RMC 42-99 was issued providing for the exemption of Japanese contractors undertaking OECF funded projects from the 8.5% creditable VAT imposed under Section 114(C) of the Tax Code, income tax, and from the 1% withholding tax imposed under Section 2.57.2(E) of Revenue Regulations No. 2-98 implementing Section 57(B) of the Tax Code.

x x x x

The fact that the NAIA Terminal 2 Project is being undertaken by a consortium composed of both Japanese and Filipino corporations will not invalidate the tax-free treatment of the loan. Verily, the above-cited first clause of the Exchange of Notes is particularly directed towards the non-utilization of the loan amount in the payment of taxes and is not dependent upon the nationality of the project contractor concerned. Hence, this Office is of the opinion, and so holds, that, MIAA could properly recognize the non-imposition of the 8.5% VAT withholding from the invoice billing of the MTOB Consortium.

x x x x

Finally, since the MIAA initially subjected the payments made to the MTOB Consortium to the 8.5% creditable VAT withholding, the latter is entitled to claim for refund of its excess VAT credits. As clarified under RMC 42-99, if the VAT returns of the Japanese contractors show that there are still excess VAT payments, after applying the 8.5% creditable VAT previously withheld from the VAT due, then such excess VAT payment constitutes taxes erroneously paid and received. Pursuant to Section 204(C) of the Tax Code of 1997, such excess tax payment shall be refunded or credited to the MTOB Consortium, either in cash or Tax Credit Certificate as the case may be, at the option of the claimant subject, however, to the filing of the corresponding claim with the Commissioner or with the Court of Tax Appeals within the two year prescriptive period mandated by law."

It is clear from the aforequoted provisions of Section 110(c) [now 114(C)] of the Tax Code, as amended, that the VAT withheld from the payments of MIAA to Petitioner shall be creditable against the latter's output VAT liability. However, it is evident from

Petitioner's 1997 amended quarterly VAT returns (Exhibits NN to QQ, inclusive) that its accumulated excess input VAT payments on domestic purchases of goods/services were more than enough to offset its output VAT liabilities in each of the four quarters of 1997. As of the fourth quarter of 1997, Petitioner had accumulated excess input VAT payments of P5,166,011.54 on its domestic purchases of goods/services (Exhibit QQ). Although the commissioned auditing firm, C.C. Jao & Associates, recommended for a disallowance of P1,653,608.20 [P117,844,535.85 less P116,190,927.65] (Exhibit LL) on Petitioner's 1997 reported input VAT payments, there still remains a balance of P3,512,403.34 (P5,166,011.54 less P1,653,608.20) accumulated excess input VAT as of the fourth quarter of 1997. Since Petitioner had no more output VAT liability against which the claimed creditable VAT withheld of P131,813,306.26 may be applied or credited, the same appears to be excessively paid and refundable in accordance with Section 204(3) [now 204(C)] in relation to Section 230 [now 229] of the Tax Code, as amended. Moreover, the BIR has confirmed the refundability of the said excess creditable VAT withheld in VAT Review Committee Ruling No. 024-00, dated July 27, 2000 as aforecited.

A scrutiny of the Certificates of Creditable Tax Withheld at Source as well as the supporting MIAA Interim Certificates of Payment and Petitioner's official receipts attached as Annexes 1 to 14-1 to the report of C.C. Jao & Associates (Exhibit MM) shows that the claimed 1997 creditable VAT of P131,813,306.26 was actually withheld by MIAA.

It was also established that Petitioner complied with the two-year prescriptive period provided under Sections 204(3) and 230 in relation to Section 110(a) of the Tax Code, as amended. Counting from April 20, 1997, the considered date of filing of the 1997 first quarterly VAT return (Exhibit B), Petitioner had until April 20, 1999 within which to file a claim for refund. Thus, both the administrative and judicial claims for refund filed on February 17, 1999 (Exhibit KK) and March 30, 1999, respectively, fall within the two-year prescriptive period.

In sum, this Court finds Petitioner to have sufficiently established its entitlement to the refund sought for.

WHEREFORE, in view of the foregoing premises, the instant Petition for Review is **GRANTED.** Respondent is hereby **ORDERED TO REFUND** the amount of **ONE HUNDRED THIRTY ONE MILLION EIGHT HUNDRED THIRTEEN THOUSAND THREE HUNDRED SIX & 26/100 PESOS (P131,813,306.26)** in favor of Petitioner representing unutilized creditable VAT withheld for the four quarters of taxable year 1997

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

AMANCIO Q. SAGA
Associate Judge

JUANITO C. CASTAÑEDA, JR.
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