REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ROHM APOLLO SEMICONDUCTOR PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6534

HONORABLE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 2 7 2004

x - x

DECISION

This is a judicial claim for refund or issuance of a tax credit certificate in the amount of P30,359,615.40 allegedly representing unutilized input value-added taxes paid on capital goods purchased for the months of July and August, 2000.

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission. On May 10, 2000, it was registered with the Bureau of Internal Revenue (BIR) as a value-added tax (VAT) taxpayer (*Exhibit C*). On September 18, 2000, petitioner was likewise registered with the Philippine Economic Zone Authority (PEZA) as an "Ecozone Export Enterprise" pursuant to the provisions of Republic Act No. 7916, to engage in the manufacture of semiconductor products, particularly microchip transistors and tantalium capacitors at the People's Technology Complex - Special Economic Zone, Bo. Maduya, Carmona, Cavite (*Exhibits D & E*).

Petitioner started its commercial operations on September 1, 2001, as shown in the "Notice of Approval of SCO No. 2002-014" issued by PEZA on June 20, 2002 (*Exhibit F*). However, prior to said date, or on about June 2000, petitioner contracted the services of Shimizu Philippine Contractors, Inc. (hereinafter referred to as "Shimizu") for the construction of its factory building (*Exhibit H*).

For services rendered by Shimizu, petitioner made initial payments on July 7, 2000 and August 3, 2000 in the respective amounts of P198,551,884.28 and P132,367,923.58 [both inclusive of 10% VAT and net of 1% withholding tax] (*Exhibits I to L*).

Believing that the aforesaid payments qualify as capital goods purchases, petitioner filed an application for tax credit/refund of the input VAT payments corresponding thereto in the sum of P30,359,615.40 with the BIR on December 11, 2000 (*Exhibit X*).

On August 6, 2001, petitioner sent a follow-up letter to the BIR reiterating its request for the refund/tax credit of the alleged unutilized input VAT of P30,359,615.40 (*Exhibit Y*).

Again, on August 29, 2001, petitioner sent another letter to the BIR informing the latter that it was submitting the necessary documents relative to its refund claim (*Exhibit Z*).

Since respondent had not acted on its claim and the two-year prescriptive period for filing a judicial claim was about to lapse, petitioner instituted the present appeal on September 11, 2002.

Respondent, in his Answer filed on October 11, 2002, interposed by way of Special and Affirmative Defenses the following:

4. Petitioner being allegedly registered with the Philippine Economic Zone Authority is exempt from all taxes, including value-added tax, pursuant to Section 24 of Republic Act No. 7916. Hence, petitioner is not entitled to refund of input tax on capital goods pursuant to Sections 4.106-1 and 4.103-1 of Revenue Regulations

No. 7-95. Its alleged registration as a VAT taxpayer was, therefore, erroneous;

5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by respondent's Bureau;

6. The amount of P30,359,615.40 being claimed by petitioner as alleged unutilized input taxes paid in the purchase of capital goods for the period July and August 2000 was not properly documented;

7. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

8. Petitioner must show that it has complied with the provisions of Sections 204(C) and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit; and

9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)** and as such, they are looked upon with disfavor (**Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211**).

On October 30, 2002, petitioner filed a Reply to respondent's Answer, refuting the latter's assertions.

In their Joint Stipulation of Facts and Statement of Issues filed on December 5, 2002 and approved by this court on December 12, 2002, the parties presented the following issues for resolution:

1. Whether or not the purchase of services by the petitioner from Shimizu falls within the purview of "purchase of capital goods" in relation to Section 112(B) of the 1997 Tax Code;

2. Whether or not the petitioner availed of the benefits (5% gross income tax) under Section 24 of Republic Act No. 7916, otherwise known as Special Economic Zone Act of 1995;

3. Whether or not the petitioner was granted an income tax holiday under Section 6, Rule XV of the Rules and Regulations to Implement R.A. 7916;

4. Whether or not the amount of PESOS: THIRTY MILLION THREE HUNDRED FIFTY NINE THOUSAND SIX HUNDRED FIFTEEN AND 40/100 (P30,359,615.40) being claimed by the petitioner as refund and/or issuance of TCC is correct and properly documented; and

5. Whether or not the petitioner is entitled to a refund or issuance of TCC under the circumstances.

To support its claim, petitioner presented documentary and testimonial evidence. Respondent, on the other hand, submitted his case for decision without presenting any evidence *(CTA Records, page 139)*.

After the parties had filed their respective memorandum, the case was submitted for decision on November 12, 2003.

We find it appropriate to first discuss the second and third issues as the resolution of the same predetermines whether or not the other issues still deserve our consideration.

In his Answer to the Petition for Review and Memorandum, respondent argued that petitioner, being a PEZA-registered enterprise, is not subject to VAT pursuant to Section 24 of R.A. 7916, which provides in part, thus:

> **"SECTION 24.** ***Exemption from Taxes Under the National Internal Revenue Code***. --- Any provision of existing laws, rules and regulations to the contrary notwithstanding, no taxes, local and national, shall be imposed on business establishments operating within the ECOZONE. In lieu of paying taxes, five percent (5%) of the gross income earned by all businesses and enterprises within the ECOZONE shall be remitted to the national government. x x x"

According to respondent, petitioner is exempt from VAT because the exemption from national and local taxes in the above provision of Section 24 of R.A. 7916 includes VAT. Consequently, petitioner's transactions, being exempt from internal revenue taxes by virtue of R.A. 7916 fall under the phrase "Transactions which are exempt under special laws." under Section 103(q) of the Tax Code [prior to its amendment under the Tax Reform Act of 1997], to wit:

> "**SECTION 103.** ***Exempt Transactions.*** - The following shall be exempt from the value-added tax:
>
> xxx xxx xxx
>
> (q) Transactions which are exempt under special laws, except those granted under Presidential Decree Nos. 66, 529, 972, 1491, and 1590, and non-electric cooperatives under Republic Act No. 6938, or international agreements to which the Philippines is a signatory."

Respondent averred that since petitioner's business is not subject to VAT, the capital goods it purchased are considered not used in VAT taxable business, and therefore, it is not entitled to refund of input taxes on such capital goods pursuant to Section 4.106-1 and 4.103-1 of Revenue Regulations No. 7-95. Respondent further alleged that petitioner's VAT registration was erroneous and did not confer upon it any right to recognize input tax credit.

Upon the other hand, petitioner, in its Reply to respondent's Answer, maintained that:

> 3. xxx, it is a fact that petitioner-corporation is a VAT registered entity as shown in its BIR Certificate of Registration attached as Annex "C" in the Petition. And it is also a fact that petitioner-corporation is a Philippine Economic Zone Authority (PEZA) registered entity as shown by Annex "D" attached to the Petition. **However, it is not true that petitioner availed of the benefits offered by Section 24 of Republic Act No. 7916 (The Special Economic Zone Act of 1995). Instead, petitioner opted to avail of the benefits of Section 6, Rule XV of the Rules and Regulations to Implement Republic Act 7916 in relation to PEZA Memorandum Circular No. 2002-007 and PEZA Board Resolution No. 01-161;**
>
> 3.1 With the advent of R.A. 7916 which took effect on June 12, 1995, newly registered or expanding PEZA enterprises were allotted to avail first of the Income Tax Holiday if qualified and then the 5% preferential tax which is based on

gross income earned and is in lieu of any national or local taxes;

3.2 Paragraph 7 of PEZA Board Resolution No. 01-161 states that: "*For purposes of availment of ITH incentives under these guidelines, certification of the PEZA Director General on the date of the start of commercial operations (SCO) shall be sufficient*.: (italics and underscoring supplied);

3.3 The Certification of the PEZA Director General on the date of the start of commercial operations issued to the petitioner-corporation is attached in the Petition as Annex "F";

3.4 In VAT ruling 037-98, BIR ruled that: "x x x. *In accordance with DPDI's PEZA Certificate of Registration and its concomitant Registration Agreement with the PEZA, DPDI has been granted Income Tax Holiday for a period of four (4) years; that, after this 4-year Income Tax Holiday, it shall henceforth be exempt from all national and local taxes and, in lieu thereof, it shall be subject to tax at the rate of five percent (5%), based on gross income earned. In view, thereof, please be informed that during this 4-year Income Tax Holiday, DPDI shall only be exempt from income tax. However, DPDI shall be subject to other internal revenue taxes provided under the National Internal Revenue Code, such as but not limited to, value-added tax, x x x*" (italics and underscoring supplied);

3.5 Again in VAT Ruling 027-99, BIR ruled that: "*x x x, please be informed that since GOJI is enjoying the Income Tax Holiday incentive and not the 5% final tax on gross taxable income earned in lieu of all taxes under Section 24 of R.A. 7916 (PEZA Law), it follows that for tax purposes, GOJI is still governed by the provisions of the National Internal Revenue Code (NIRC). Therefore, the VAT provisions of the Code are applicable to it. x x x. GOJI's purchase of services from its VAT-registered building contractor, for the construction of its factory building comes within the purview of a purchase of capital goods, hence, GOJI may apply for the issuance of a tax credit certificate or refund of the input taxes passed on by the said contractor, pursuant to Section 112(B), NIRC of 1997, provided such application is made within two (2) years after the close of the taxable quarter in which such purchase was made, provided, further, that such input taxes have not been* *applied against GOJI's output taxes.*"(italics and underscoring supplied);

3.6 Even assuming arguendo that petitioner-corporation opted to avail of the benefits of Section 24 of R.A. 7916, and not the benefits of the Income Tax Holiday, petitioner can still be considered as engaged in VAT taxable business. VAT is a form of indirect tax. But there is no existing provision under R.A. 7916 that PEZA-registered enterprises, maybe considered exempt from "indirect taxes." The 5% tax on such enterprises, in lieu of all taxes otherwise directly due therefrom, is a direct tax in character. (VAT Ruling 055-98);

3.7 In other words, as a PEZA-registered entity, petitioner-corporation was not divested of its character as VAT-registered. It is not erroneous to allege therefore, that petitioner is a VAT-registered entity in contrast with the allegation under Paragraph 4 of the respondent's "Answer".

Proceeding now to the issue of whether or not petitioner availed of the benefits (5% gross income tax) under Section 24 of Republic Act No. 7916, otherwise known as Special Economic Zone Act of 1995, this court rules in the negative.

Although it is provided under Section 24 of RA No. 7916 that PEZA registered enterprises are subject to 5% tax on gross income in lieu of national and local taxes including VAT, it is incorrect for the respondent to automatically assume that petitioner is subject to the 5% tax on gross income. This court had already ruled on several occasions that there are two sets of fiscal incentives available to a PEZA registered enterprise, namely: 1) incentives under Presidential Decree No. 66, as amended, and Section 24 of RA No. 7916, which include the 5% preferential tax rate on gross income earned in lieu of national and local taxes; and 2) incentives under Book VI of Executive Order (EO) No. 226, as amended, which include income tax holiday for 4 to 6 years, depending on whether the enterprise is registered as pioneer or non-pioneer. These two sets of incentives are in the alternative and cannot be availed of at the same time by a PEZA registered enterprise (***Hitachi Computer***

***Products Asia (Asia) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5943, August 6, 2001 as affirmed by the Court of Appeals in Commissioner of Internal Revenue vs. Hitachi Computer Products (Asia) Corporation, CA-G.R. SP. No. 66342, April 25, 2003*).**

In the present case, petitioner availed of the income tax holiday incentive effective September 1, 2001 as can be seen from the Notice of Approval of SCO No. 2002-014 dated June 20, 2002 issued by PEZA to petitioner (*Exhibit F*). Hence, it is only exempt from income tax and is still liable to pay other national internal revenue taxes as may be imposed upon it by law. Inasmuch as petitioner is registered as a VAT entity, it is subject to VAT. Contrary to respondent's claim, petitioner's VAT registration was not erroneous and petitioner may claim refund/tax credit of the unutilized input VAT it paid on capital goods purchased upon compliance with certain requirements provided for by law.

We now determine whether or not petitioner's purchase of services from Shimizu falls within the purview of "purchase of capital goods" under Section 112(B) of the National Internal Revenue Code (NIRC) of 1997.

Section 4.106-1(b) of Revenue Regulations No. 7-95 in implementing said Section 112(B) defines capital goods as follows:

> "Capital goods or properties" refer to goods or properties <u>with estimated useful life greater than one year</u> and which are <u>treated as depreciable assets</u> under Section 29 (f), <u>used directly or indirectly in the production or sale of taxable goods or services</u>. (Underlining ours.)

It has already been settled that the cost of services is within the scope and meaning of the term "capital goods" if the same forms part of the cost of a capital asset. In the case of ***Hopewell Power (Philippines) Corp. vs. Commissioner of Internal Revenue, CTA Case No. 5389, January 4, 1999 [affirmed by the Court of***

Appeals in the case of Commissioner of Internal Revenue vs. Hopewell Power (Phils.) Corp., CA-G.R. SP No. 51617, March 17, 2001], this court ruled that the purchases made by Hopewell consisting mostly of engineering and structural services for the construction of its power plant are considered as capital goods. In determining what constitutes capital goods, courts will look to the origin and character of the expenditure to determine whether it is a capital asset. This court found that Hopewell expended for engineering and structural services for the purpose of constructing power plant facilities needed in the production of electricity, which is Hopewell's main product. Thus, it was held that said expenses are necessary and should form part of the cost of the power plant facilities.

The present petition is no different from the aforecited case. The Construction Letter of Intent *(Exhibit H)*, billings dated May 20, 2000 and July 24, 2000 *(Exhibits I & K)* as well as the official receipts *(Exhibits J & L)* from Shimizu proved that the services paid for by petitioner to the former pertained to the construction of its factory building. Undoubtedly, the said construction services shall form part of the cost of the factory building. Pursuant to Section 4.106.1(b) of Revenue Regulations 7-95, the factory building falls within the definition of capital goods because: 1) it has an estimated useful life of more than one year; 2) it is to be used by petitioner in its manufacture of microchip transistors and titalium products *(TSN, January 16, 2003, page 19)* and 3) it is subject to depreciation under Section 34(F) of the NIRC of 1997.

Anent the fourth and fifth issues, Section 112(B) of the 1997 Tax Code reads as follows:

"**SEC. 112.** ***Refunds or Tax Credits of Input Tax.*** –

"(B) *Capital Goods*. - A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made."

Relative thereto, Sections 4.106-1(b) and 4.104-5 of Revenue Regulations No. 7-95 state, thus:

"**SEC. 4.106-1.** ***Refunds or tax credits of input tax.*** - (a) xxx

(b) ***Capital Goods***. — Only a VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased. The refund shall be allowed to the extent that such input taxes have not been applied against output taxes. The application should be made within two (2) years after the close of the taxable quarter when the importation or purchase was made.

Refund of input taxes on capital goods shall be allowed only to the extent that such capital goods are used in VAT taxable business. If it is also used in exempt operations, the input tax refundable shall only be the ratable portion corresponding to the taxable operations.

"**SEC. 4.104-5. Substantiation of claims for input tax credit.** — (a) Input taxes shall be allowed only if the domestic purchase of goods, properties or services is made in the course of trade or business. The input tax should be supported by an invoice or receipt showing the information as required under Section 108 (a) and 238 of the Code. Input tax on purchases of real property should be supported by a copy of the public instrument i.e. deed of absolute sale, deed of conditional sale, contract/agreement to sell, etc., together with the VAT receipt issued by the seller.

xxx xxx xxx

(b) Input tax on importations shall be supported with the import entry or other equivalent document showing actual payment of VAT on the imported goods."

Clearly, from the foregoing provisions, in order to be entitled to a refund/tax credit of input VAT paid on capital goods purchased, petitioner must prove that:

1) it is a VAT registered entity;

2) it paid input VAT on capital goods purchased;
3) its input VAT payments on capital goods are duly supported by VAT invoices and/or official receipts;
4) it did not offset or apply the claimed input VAT payments on capital goods against any output VAT liability; and
5) the claim for refund was filed within the two-year prescriptive period both in the administrative and judicial levels (***Telecommunications Technologies Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6018, November 24, 2003***).

As stated earlier, petitioner is a VAT registered entity. Likewise, it was shown that the claimed input VAT payment of P30,359,615.40 was duly covered by valid VAT official receipts issued by Shimizu to petitioner on July 7 and August 3, 2000. The factory building, for which the said input VAT of P30,359,615.40 was incurred/paid, falls within the definition of capital goods under Section 4.106-1(b) of Revenue Regulations No. 7-95, as earlier discussed. Also, it was established that petitioner's claim for refund/tax credit was timely filed both in the administrative and judicial levels.

In compliance with the fourth requisite, petitioner submitted in evidence its Monthly Value-Added Tax Declarations for July, August, October and November, 2000 (*Exhibits O, P, R & S*) and Quarterly Value-Added Tax Returns for the third and fourth quarters of 2000 (*Exhibits Q & T*) which reflected no output VAT liability against which the claimed input VAT of P30,359,615.40 may be applied or credited. However, this court finds the preceding documents insufficient. It is to be emphasized that during the aforesaid periods, petitioner had no output VAT liability simply because it had not started its commercial operations. Petitioner should have submitted at the very least its VAT return for the third quarter of 2001, considering that the effectivity date of its commercial operations was on September 1, 2001, in order for this court to verify with certainty that it did not carry-over/apply the claimed input taxes to the said quarter or other succeeding quarters. Moreover, this court noted that the claimed excess input VAT for the third quarter of 2000 was forwarded to the succeeding fourth quarter of 2000 (*Exhibits Q & T*). Although under Section 110(B) of the NIRC of 1997, petitioner is allowed to carry-over the excess input VAT of a given quarter to the succeeding quarter(s), petitioner should have deducted the claimed input taxes from its accumulated input VAT as of the quarter when it opted to file a claim therefor as provided under Section 110(C) of the NIRC of 1997, to wit:

> **"SEC. 110.** ***Tax Credits.*** **– xxx**
>
> xxx xxx xxx
>
> "(C) *Determination of Creditable Input Tax.* – The <u>sum of the excess input tax carried over from the preceding month or quarter and the input tax creditable to a VAT-registered person during the taxable month or quarter shall be reduced by the amount of claim for refund or tax credit for value-added tax</u> and other adjustments, such as purchase returns or allowances and input tax attributable to exempt sale.
>
> "The claim for tax credit referred to in the foregoing paragraph shall include not only those filed with the Bureau of Internal Revenue but also those filed with other government agencies, such as the Board of Investments and the Bureau of Customs." (Underlining supplied)

The reason for the deduction is to assure that the claimed input VAT shall not be applied against any future output VAT liability. To grant petitioner's claim for refund, without proof of deduction of the corresponding amount, would be dangerous and tantamount to granting twice the refund herein sought to be refunded, to the prejudice of the Government (***BASF Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6175, March 20, 2002; Intel Philippines Manufacturing, Inc. vs. Commissioner of Internal Revenue, CTA Case Nos. 5760 & 5902, February 5, 2002; AMI Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case***

No. 5304, January 20, 1998; AMI Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case Nos. 5187 & 5199, October 2, 1997).

IN VIEW OF ALL THE FOREGOING, the instant petition for review is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

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 Justice