REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PHILEX MINING CORPORATION, Petitioner,	**C.T.A. CASE NO. 7115**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **UY,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** MAY 05 2008 2:00 p.m.

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DECISION

CASTAÑEDA, JR., *J*.:

This case seeks the refund of the amount of **FOUR MILLION TWO HUNDRED SIX THOUSAND EIGHT HUNDRED TWELVE AND 84/100 PESOS (P4,206,812.84)**, allegedly representing petitioner Philex Mining Corporation's excess input value-added tax on its importations and domestic purchases attributable to its zero-rated sales for the fourth (4th) quarter of the taxable year 2002.

Philex Mining Corporation (petitioner) is a corporation organized under Philippine laws with principal office at 27 Brixton St., Pasig City. It is engaged in the mining business, which includes the exploration and operation of mine properties and the commercial production and marketing of mine products.[1] Petitioner is registered as a value-added tax (VAT) taxpayer under VAT Registration Certificate No. 35-6-000731 dated October 29, 1987.

On the other hand, Commissioner of Internal Revenue (respondent) is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected, and other refundable or creditable taxes under the National Internal Revenue Code (NIRC). He holds office at the Bureau of Internal Revenue (BIR) National Office, Diliman, Quezon City.

For the 4th quarter of the taxable year 2002, petitioner filed its Quarterly and Amended Quarterly VAT Returns on January 27, 2003 and May 24, 2004,[2] respectively.

On May 3, 2004, petitioner filed an Application for Tax Credit/Refund of VAT Paid (BIR Form 2552) for the period covering from October 1, 2002 to December 31, 2002 in the total amount of P4,206,812.84, representing excess input VAT for the 4th quarter of the taxable year 2002, as reflected in the VAT returns petitioner filed for said quarter.

Petitioner likewise filed within the two (2)-year prescriptive period, or on July 24, 2004, its claim for refund or issuance of a tax credit certificate with the One-Stop-Shop-Center of the Department of Finance under Application No. 48824 in the amount of P4,206,812.84 representing the excess input VAT

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[1] Pars. 1 and 2, Stipulation of Facts and Issues, Docket, p. 41.
[2] Par. 3, Stipulation of Facts and Issues, Docket, p. 41.

for the 4th quarter of the taxable year 2002, as reflected in the VAT returns filed by petitioner for said quarter.[3]

Inasmuch as petitioner has yet to receive a favorable response from respondent and before it could be barred by prescription, petitioner then filed this instant Petition for Review on December 28, 2004, pursuant to Sections 112(D) and 229 of the NIRC of 1997.

Respondent filed his Answer on February 2, 2005, raising the following as his Special and Affirmative Defenses:

> "4. Claims for refund are strictly construed against the taxpayer as the same partakes the nature of a tax exemption;
>
> 5. The taxpayer has the burden to show that the taxes were erroneously or illegally paid. Failure on the part of the Petitioner to prove the same is fatal to its cause of action;
>
> 6. The Petitioner should prove its legal basis for claiming for the amount being refunded."

Upon receipt of petitioner's Memorandum, sans respondent's, this case was submitted for Decision on December 21, 2007.

The issues[4] as stipulated by the parties are as follows:

> "1. Whether Petitioner's domestic purchases and importations of goods which are attributable to its direct and indirect export sales for the 4th quarter of 2002 are duly supported by documentary evidence.
>
> 2. Whether the accumulated or excess input VAT was not utilized or applied by Petitioner against output VAT in the same 4th quarter of 2002 or in the succeeding taxable year.
>
> 3. Whether or not the export sales were paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas.

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[3] Par. 5, Stipulation of Facts and Issues, Docket, p. 41.

[4] Stipulation of Facts and Issues, Issues to be resolved, Docket, pp. 42-43.

4. Whether or not Petitioner is entitled to the refund of the excess input taxes in the total amount of P4,206,812.84 for the 4th quarter of 2002, due to Petitioner being an exporter of mineral products."

Since the main issue to be resolved is whether or not petitioner is entitled to a refund in the amount of P4,206,812.84, representing alleged excess input taxes for the 4th quarter of the taxable year 2002, the Court shall discuss the stipulated issues jointly.

The pertinent provision on claims for refund of input taxes attributable to zero-rated or effectively zero-rated sales is Section 112(A) of the NIRC, which provides:

> "SEC.112. *Refunds or Tax Credits of Input Tax—*
>
> (A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

Based on the afore-quoted provision, in order for a taxpayer to be entitled to a refund or issuance of a tax credit certificate of its unutilized input VAT, the following requisites must be satisfied:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are directly attributable to zero-rated sales or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability during and in the succeeding quarters; and
5. that the claim for the refund was filed within the two-year prescriptive period.

Anent the first requisite, petitioner claims that its shipments and sales of copper concentrates and gold to Nippon of Tokyo, Japan and the *Bangko Sentral ng Pilipinas* (BSP), respectively, are VAT zero-rated pursuant to Sections 106(A)(2)(a)(1) and (a)(4) of the NIRC of 1997. Likewise, petitioner alleges that its sales of copper concentrates to Philippine Associated Smelting and Refining Corporation (PASAR), a PEZA-registered enterprise, are subject to VAT at zero percent (0%), citing as legal bases Section 106(A)(2)(a)(5) of the same Code, in relation to Revenue Memorandum Circular No. 74-99 and BIR VAT Review Committee Ruling No. 026-2001.

The Court-commissioned Independent CPA, Mr. Albert G. Alba, noted in his Report that petitioner's zero-rated export sales amounting to US$19,457,362.00 with peso value equivalent of P1,045,848,710.49, as reported in petitioner's Amended VAT return for the 4th quarter of 2002[5], were as follows:

Particulars	Amount
Current Quarter's Shipments:	
Direct exports of copper to Japan:	**US$ 8,923,926.00**
Indirect Exports of:	
Copper to PASAR	10,222,431.00
Gold to Bangko Sentral ng Pilipinas (BSP)	82,336.00
	US$ 19,228,693.00
Previous Quarters' Shipments	
Adjustment to correct previous billings	228,669.00
Total Zero-Rated Sales	**US$ 19,457,362.00**

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[5] Exhibit "A-1-a".

In order to substantiate its export sales for the 4th quarter of taxable year 2002 and the allegation that the foreign currency proceeds thereof were duly accounted for in accordance with the rules and regulations of the BSP; petitioner offered in evidence its sales invoices, export declarations, bills of lading/airway bills, reception notes, bank certifications, entries in petitioner's passbooks in local banks of the payments received and bank validated deposit slips.[6]

Petitioner's direct export sales of copper concentrates to Japan and of gold to the BSP may fall within those transactions referred to as subject to zero percent (0%) VAT under Sections 106(A)(2)(a)(1) and (a)(4) of the NIRC of 1997, which states that:

"SEC 106. *Value-Added Tax on Sale of Goods or Properties.*—

(A) *Rate and Base of Tax.* — xxx

xxx xxx xxx

(2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:

(a) *Export Sales.* — The term 'export sales' means:

(1) The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

[6] Exhibits "K-1" to "K-10," "K-1-a" to "K-2-a," "K-1-b" to "K-8-b," "K-9-b" to "K-10-b," "L-1" to "L-3," "L-1-a" to "L-3-B" and "L-4-a" to "L-4-c".

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(4) Sale of gold to the Bangko Sentral ng Pilipinas (BSP)"

However, Section 106(A)(2)(a)(1) and (a)(4) of the NIRC of 1997 should not be read in isolation, but in conjunction with Section 113 of the same Code and as implemented by Section 4.108-1 of Revenue Regulations No. 7-95; which prescribe that a VAT-registered person like petitioner, shall for every sale, issue an invoice or receipt which must contain the following information:

> "SEC. 113. *Invoicing and Accounting Requirements for VAT-Registered Persons.—*
>
> (A) *Invoicing Requirements.* — A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:
>
> (1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and
>
> (2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax."
>
> "SECTION 4.108-1. *Invoicing Requirements* – All VAT registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:
>
> 1. the name, TIN and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
> 5. the word 'zero-rated' imprinted on the invoice covering zero-rated sales; and
> 6. the invoice value or consideration.

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> Only VAT-registered persons are required to print their TIN followed by the word 'VAT' in their invoice or receipts and this shall be considered as a 'VAT Invoice'. All purchases covered by invoices other than 'VAT Invoice' shall not give rise to any input tax.
>
> If the taxable person is engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations. A 'VAT Invoice' shall be issued only for sales of goods, properties or services subject to VAT imposed in Section 100 and 102 of the Code."

Likewise, there is a requirement that the invoice or receipt issued must be duly registered with the Bureau of Internal Revenue as prescribed under Section 237, in relation to Section 238, of the NIRC of 1997, to wit:

> "SEC 237. *Issuance of Receipts or Sales or Commercial Invoices.*— All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service. xxx"
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> "SEC 238. *Printing of Receipts or Sales or Commercial Invoices.* — All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same.
>
> No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner."

Clearly from the foregoing, any taxpayer claiming VAT zero-rated direct export sales must present at least three documents, namely: (1) the sales invoice as proof of sale of goods; (2) the export declaration and bill of lading/airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and (3) bank credit advice, certificate of bank remittance or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services.

Furthermore, the sales invoices supporting the export sales must comply with the invoicing requirements under the law and regulations, *i.e.*, the same must be duly registered with the Bureau of Internal Revenue and must contain all the required information, namely: (1) the imprinted word "zero-rated"; and (2) the taxpayer's TIN-VAT number. In other words, only export sales supported by these documents may qualify for VAT zero-rating under Section 106(A)(2)(a)(1) and (a)(4) of the NIRC of 1997.[7]

A careful scrutiny of the documents submitted in evidence by petitioner shows that the sales invoices supporting its direct export sales of copper concentrates to Japan amounting to US$8,923,926.00[8] are not qualified to substantiate petitioner's claim of VAT zero-rating for its export sales. Per petitioner's Summary of Sales and Remittances[9], it is indicated that the invoices corresponding to the export sales amount of US$8,923,926.00 are two sales invoices bearing numbers 2239 and 2255 with the amounts of U$4,418,152.00 and US$4,505,774.00, respectively, as "gross sales". It must

[7] Taganito Mining Corporation vs. Commissioner of Internal Revenue, CTA EB No. 7 (CTA Case No. 6384), January 31, 2006; Intel Technology Philippines, Inc. vs. CIR, CTA EB No. 28 (CTA Case No. 6039(, September 14, 2005.
[8] Exhibits "K-1" to "K-2".
[9] Exhibit "L".

be pointed out that petitioner failed to present said invoices. What petitioner submitted were invoices numbered as 2265 dated February 27, 2003, indicating a "gross sales" of US$4,088,110.47, and 2273 dated April 9, 2003, reflecting gross sales amounts of US$4,170,684.29, or total of US$8,258,794.76.[10] Apparently, the invoices submitted by petitioner pertain to the 1st and 2nd quarters of 2003 and fall outside the instant petition's period of claim. Moreover, the airway bills supporting the said sales[11] cannot be given evidentiary value for being mere photocopies, in violation of the Best Evidence Rule. This Court, in fact, denied the admission of the said documentary evidence.[12] Without the required supporting documents, petitioner's direct export sales of copper to Japan in the amount of US$8,923,926.00 cannot qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the NIRC of 1997.

As regards petitioner's indirect export sales of gold to the *Bangko Sentral ng Pilipinas* in the amount of US$82,336.00, the same likewise cannot qualify for VAT zero-rating.

The sales invoices[13] submitted in evidence to show petitioner's indirect export sales are not duly registered with the Bureau of Internal Revenue (BIR) in violation of Section 238 of the NIRC of 1997. Per BIR Permit No. OCN3AU0000030052 dated April 19, 1999, petitioner is authorized to print sales invoices bearing serial numbers from PX2101 to PX2500.[14] However, the invoices supporting petitioner's indirect export sales of gold in the amount

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[10] Exhibits "K1" and "K2".
[11] Exhibits "K-1-b" and "K-2-b".
[12] Docket, p. 196.
[13] Exhibits "K9" and "K10".
[14] Reflected in sales invoices marked as Exhibits "K1", "K2", "K3", "K4, "K5", "K6", "K7" and "K8".

of US$82,336.00 bear serial numbers Aurex 103 and Aurex 104, which are outside the authority to print granted to petitioner. Additionally, sales invoice number AU-104[15] bears date covered within the 1st quarter of 2003; thus, falling outside this petition's period of claim. Accordingly, petitioner's failure to substantiate its indirect export sales of gold to the BSP in the amount of US$82,336.00 with proper VAT sales invoices is fatal to its claim.

Anent petitioner's indirect export sales to PASAR in the amount of US$10,222,431.00, the provisions of Section 106(A)(2)(a)(5) in relation to Articles 23 and 77(2) of the Omnibus Investments Code and as clarified under RMC No. 74-99, are applicable. Section 106(A)(2)(a)(5) is quoted hereunder for ready reference, to wit:

> "SEC. 106. *Value-added Tax on Sale of Goods or Properties.* —
>
> (A) xxx
>
> (1) xxx
>
> (2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (a) *Export Sales.* — The term '*export sales*' means:
>
> (5) Those considered export sales under **Executive Order No. 226**, otherwise known as the Omnibus Investment Code of 1987, and other special laws." (*Emphasis supplied*)

Executive Order (E.O.) No. 226, otherwise known as the Omnibus Investments Code of 1987 provides in part, thus:

> "ARTICLE 23. 'Export Sales' shall mean the Philippine port F.O.B. value, determined from invoices, bills of lading,

[15] Exhibit "K10".

inward letters of credit, landing certificates, and other commercial documents, of export products exported directly by a registered export producer or the net selling price of export product sold by a registered export producer to another export producer, or to an export trader that subsequently exports the same: *Provided*, That sales of export products to another producer or to an export trader shall only be deemed export sales when actually exported by the latter, as evidenced by landing certificates of similar commercial documents: *Provided, further*, That without actual exportation the following shall be considered "constructively exported" for purposes of this provision: (1) sales to bonded manufacturing warehouses of export-oriented manufacturers; **(2) sales to export processing zones**; . . ." (*Emphasis supplied*)

"ARTICLE 77. *Tax Treatment of Merchandise in the Zone.* — (1) Except as otherwise provided in this Code, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise whether directly or indirectly related in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the provisions of law to the contrary notwithstanding.

(2) Merchandise purchased by a registered zone enterprise from the customs territory and subsequently brought into the zone, shall be considered as export sales and the exported thereof shall be entitled to the benefits allowed by law for such transaction." (*Emphasis supplied*)

Lastly, Section 3 of RMC 74-99 states that:

"SECTION 3. *Tax Treatment of Sales Made By A VAT Registered Supplier from the Customs Territory, To A PEZA Registered Enterprise.-*

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3. In the final analysis, any sale of goods, property or services made by a VAT registered supplier from the Customs Territory to any registered enterprise operating in the ecozone,

> regardless of the class or type of the latter's PEZA registration, is actually qualified and thus legally entitled to the zero percent (0%) VAT. **Accordingly, all sales of goods or property to such enterprise made by a VAT registered supplier from the Customs Territory shall be treated subject to 0% VAT, pursuant to Sec. 106(A)(2)(a)(5), NIRC , in relation to Art. 77(2) of the Omnibus Investments Code**, while all sales of services to the said enterprises, made by VAT registered supplies from the Customs Territory, shall be treated effectively subject to 0% VAT, pursuant to Section 108(B)(3), NIRC, in relation to the provisions of R.A. 7916 and the 'Cross Border Doctrine' of the VAT system.
>
> This Circular shall serve as a sufficient basis to entitle such supplier of goods, property or services to the benefit of the zero percent (0%) VAT for sales made to the aforementioned ECOZONE enterprises and shall serve as sufficient compliance to the requirement for prior approval of zero-rating imposed by Revenue Regulations No. 7-95 effective as of the date of issuance of this Circular." (*Emphasis supplied*)

As earlier discussed, findings that petitioner's indirect export sales may qualify for VAT zero-rating will not mean that the requirement for substantiation will be disregarded. In other words, in any claim for VAT zero-rating, petitioner must still substantiate its indirect exports by proper VAT sales invoices.

Evidence presented by the petitioner shows that the sales invoices covering petitioner's indirect exports to PASAR in the amount of US$10,222,431.00 fall outside the subject period of claim. Thus, petitioner's reported indirect export sales to PASAR in the amount of US$10,222,431.00 cannot qualify for VAT zero-rating.

In addition, the supporting documents for catch up adjustments to prior quarter's shipments amounting to US$228,669.00 were not presented before this Court; thus, the said export sales adjustments shall also be denied VAT zero-rating.

To recapitulate, petitioner failed to prove that its reported direct and indirect export sales in the amount of P1,045,848,710.49 with US Dollar equivalent of US$19,457,362.00 qualifies for VAT zero-rating.

WHEREFORE, premises considered, this instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice