REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE MINING SERVICE CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5725

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUL 25 2002

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DECISION

The instant Petition for Review is an appeal for the cancellation and withdrawal of the deficiency income tax, value-added tax and excise tax assessments issued by the respondent against petitioner for the fiscal year ended April 30, 1995 in the aggregate amount of P130,305,575.00.

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office located at the 11th Floor, Allied Bank Center, Ayala Avenue, Makati City (par. 1, Joint Stipulation of Facts)

On July 7, 1980, Petitioner entered into a service contract with Dolomite Mining Corporation (DMC), the lessee of Mining Lease Contract No. MRD-224 granted in its favor on March 5, 1980 by the Philippine government covering a total area of 571.1970 hectares of mining claims located in Alcoy and Dalaguete, Cebu (Exhibit V).

Among the provisions included in the said contract are:

384

1.) Petitioner shall act as DMC's exclusive mining service contractor to explore, develop, exploit, mine, manage and operate the mining claims, process, ship, and market the products thereof, and otherwise perform and provide any and all such service as shall be required of it under the contract (Section 1, Chapter 1, Basic Agreement);

2.) As operating expenses, all costs and expenses actually incurred by petitioner in the production of dolomite and in the operation of the dolomite project shall be reimbursed to petitioner by DMC every month, subject to reconciliation at the end of each fiscal year of petitioner (Section 15, Chapter III, Operating Expenses and Service Fee);

3.) Operating expenses shall include, but not limited to, management and marketing fees and the cost of assigning personnel within or without the Philippines, and shall be itemized in the project accounting books of petitioner as follows:

   a) direct operating costs
   b) mine overhead
   c) administration
   d) depreciation and amortization
   e) interests of borrowed funds for dolomite project
   f) duties, taxes, fees and other charges paid in connection with dolomite project
   g) miscellaneous (Section 16, Chapter III, Operating Expenses and Service Fee);

4.) DMC shall pay petitioner every year on or before the last day of the month following the end of each fiscal year of DMC, a service fee which shall be equal to forty per cent (40%) of the net proceeds of the operations, before tax, of the dolomite project, provided, however, that petitioner may, in its exclusive discretion, reduce the service fee from time to time if the economics of the project or compliance with laws, regulations and guidelines on the matter would require or necessitate the reduction of the said service fee (Section 17, Chapter III, Operating Expenses and Service Fee);

5.) It is a special condition of the contract that the proceeds of the sale of products derived from operations of the dolomite project shall be the only source of funds for reimbursement and payment of the operating expenses and the service fee due to petitioner, and that DMC's maximum liability or responsibility for such reimbursement and payment of the operating expenses and service fee shall not in any event extend beyond the totality of the proceeds derived from operations of the dolomite project (Section 18, Chapter III, Operating Expenses and Service Fee);

385

6.) Petitioner shall have the exclusive right to purchase all the dolomite ore produced from the mining claims under such terms and conditions as shall be agreed upon between DMC and petitioner, subject to domestic requirements (Section 30, Chapter IX, Sale of Dolomite Ore).

On December 5, 1997, the BIR sent a letter to petitioner informing the latter that a report of investigation on its income and business tax returns has been submitted to Revenue District Officer Hernani S. Arboleda for appropriate action. Attached thereto were the report of investigation and the memorandum of Revenue Officer Celestino Mejia recommending, among others, the issuance of an assessment notice for the following alleged deficiency taxes (par. 3, Joint Stipulation of Facts; pages 425 to 433 & 537, BIR records):

a)	Deficiency income tax			
		Basic tax due	P 43,315,584.48	
		Surcharge	10,828,896.12	
		Interest	26,621,036.29	P 80,765,516.89
b)	Deficiency output VAT			
	1.) On collection of reimbursements			
		Basic tax due	P 4,701,347.99	
		Surcharge	1,175,337.00	
		Interest	3,246,092.59	
			P 9,122,777.58	
	2.) On understated revenues			
		Basic tax due	P 7,940,530.12	
		Surcharge	1,985,132.53	
		Interest	5,128,259.03	
			P 15,053,921.68	24,176,699.26
c)	Deficiency Excise Tax			
		Basic tax due	P 2,714,672.63	
		Surcharge	1,357,336.31	
		Interest	2,103,871.28	6,175,880.22
				P 111,118,096.37

On April 8, 1998, petitioner received Pre-Assessment Notices assessing petitioner of the following (par. 4, Joint Stipulation of Facts; pages 437-438, BIR records):

386

a)	Deficiency income tax		
	Basic tax due	P 51,672,590.06	
	Surcharge	12,918,147.51	
	Interest	31,165,030.87	95,755,768.44
b)	Deficiency Excise Tax		
	Basic tax due	P 2,714,672.63	
	Surcharge	1,357,336.31	
	Interest	2,134,954.28	6,206,963.22
c)	Deficiency VAT		
	Basic tax due	P 12,641,878.11	
	Surcharge	3,160,469.53	
	Interest	8,567,803.43	24,370,151.07
			P 126,332,882.73

On April 13, 1998, petitioner received from the respondent's office various assessment notices (Nos. 02-175-FY95B-98-B2-410 and LA 85955-FY95-410) all dated April 6, 1998, assessing petitioner for alleged deficiency income tax, value added tax, and excise tax for fiscal year ending April 30, 1995 in the aggregate amount of P130,305,575.00, inclusive of surcharge and interest, broken down as follows (par. 5, Joint Stipulation of Facts; pages 439, 444 & 447, BIR records):

a.	Deficiency Income Tax		
	Basic Tax Due	P 51,672,590.06	
	Surcharge	12,918,147.51	
	Interest	34,233,090.91	P 98,823,828.48
b.	Value-Added Tax		
	Basic Tax Due	P 12,641,878.11	
	Surcharge	3,160,469.53	
	Interest	9,279,544.59	25,081,892.23
c.	Excise Tax		
	Basic Tax Due	P 2,714,672.63	
	Surcharge	1,357,336.31	
	Interest	2,327,845.35	6,399,854.29
			P130,305,575.00

387

The various assessment notices merely contained the amounts of alleged deficiency income tax, value added tax and excise tax petitioner was being assessed of without any showing as to how said amounts were arrived at or computed (par. 6, Joint Stipulation of Facts).

On May 12, 1998, petitioner filed with the BIR a protest letter dated May 9, 1998 against the alleged deficiency income tax, value-added tax and excise tax assessments and requested that the same be withdrawn and cancelled (par. 7, Joint Stipulation of Facts; pages. 473 to 479, BIR records).

On June 4, 1998, petitioner filed a supplemental protest dated June 2, 1998 with the BIR (par. 8, Joint Stipulation of Facts; pages 506 to 507, BIR records)

Subsequently, Revenue Officer Mejia modified his findings as to the amount of alleged liability of petitioner but reiterated his recommendation for the issuance of an assessment notice (par. 9, Joint Stipulation of Facts; pages 510 to 517 & 530-534, BIR records).

No subsequent notice of Formal Assessment, however, was issued incorporating the new findings of Revenue Officer Mejia and modifying the earlier assessments made by the BIR (par. 10, Joint Stipulation of Facts).

Respondent failed to act on the case or resolve the protest and supplemental protest filed by petitioner within the period of one hundred eighty (180) days from July 11, 1998 or until January 7, 1999. Hence, Petitioner filed the instant Petition for Review on January 29, 1999 or within thirty (30) days from the last day of the aforesaid 180 day period (pars. 11 & 12, Joint Stipulation of Facts).

388

Respondent, in his Answer filed through registered mail on March 4, 1999, interposed the following Special and Affirmative Defenses:

> "6. The adjustments to net income as addition thereto per findings of the Examiner are in order;
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> 7. The assessments in question were made and issued in accordance with existing laws, rules and regulations;
>
> 8. That petitioner failed to submit documents to controvert the assessment;
>
> 9. All presumptions are in favor of the correctness of the tax assessment (Interprovincial Autobus, Inc. vs. Collector of Internal Revenue, 98 Phil. 290)."

As jointly stipulated by the parties, the issues to be resolved by this Court are:

1. Whether or not the assessments for the alleged deficiency income tax and value-added tax are valid;

2. Whether or not petitioner has properly paid the excise tax in accordance with law; and

3. Whether or not petitioner's right to due process was violated in the issuance of the aforesaid assessments.

Before we delve on the first and second issues, we find it appropriate to discuss first the third issue of whether there was non-compliance with Section 228 of the 1997 Tax Code in the issuance of the assessments resulting to violation of petitioner's right to due process.

Section 228 of the 1997 Tax Code, provides among others, that "the taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void." As well enunciated by the petitioner in its memorandum, this is in consonance with the due process requirement of the 1997 Philippine Constitution, which provides that "No person shall be deprived of his property

389

without due process of law." The taxpayer needs to know the nature of the examiner's findings in order to be able to refute the same and provide an explanation regarding the proposed assessments.

It is undisputed that on December 5, 1997, the BIR sent a letter to the petitioner informing the latter that a report of investigation on its income and business tax returns had been submitted to Revenue District Officer Hernani S. Arboleda for appropriate action. Attached thereto were the report of investigation and the memorandum of Revenue Officer Celestino Mejia recommending, among others, the issuance of an assessment notice for the alleged deficiency taxes (par. 3, Joint Stipulation of Facts). The attached investigation report of Revenue Officer Celestino Mejia (pages 425 to 433, BIR records) contained the detailed findings made by the latter, the facts and the law on which the recommended assessments were based. The recommended assessments were basically the same amounts that were finally assessed against petitioner. They differed only because of the period covered for the imposition of interest charges. Moreover, in its protest letters dated May 9, 1998 and June 2, 1998, petitioner was able to effectively contest the subject assessments and submit documents to support its claim that the assessments were erroneous. Indeed, at the time the assessments were issued, petitioner knew very well the law and the facts on which they were based. Since the requirement under Section 228 of the 1997 Tax Code that the "taxpayer shall be informed in writing of the law and the facts on which the assessment is based" has been sufficiently met, it follows then that the assessments dated April 6, 1998 were not null and void.

Likewise, we find no merit in petitioner's invocation of our decision in the case of *Sunnyvale Development Corporation vs. Commissioner of Internal Revenue, CTA Case*

399

No. 5730, dated January 4, 2001. The facts in the Sunnyvale case are different from the instant case. Unlike in the present case, the respondent in the Sunnyvale case did not submit any BIR records or evidence by which we can ascertain that Sunnyvale was informed in writing of the facts and the law from which the assessment issued against it was based.

We shall now proceed to the issue of whether the alleged deficiency income tax assessment of P98, 823,828.48 is valid or not.

The said assessment arose from: 1) the alleged understatement of petitioner's revenues from sale of dolomite ore in the amount of P87,345,831.30 and 2) the disallowance of the following expenses claimed by petitioner as deductions from its gross income for fiscal year 1995:

Interest Expense		P 6,225,703.00
Realized Foreign Exchange Loss		8,983,712.00
Alcoy Branch Administrative Expense		19,929,056.68
Taxes and Licenses Expense		1,274,758.00
	Total:	P 36,413,229.68

The BIR examiner computed the alleged understated dolomite sales of P87,345,831.30 by merely dividing the peso values of petitioner's beginning and ending inventories and purchases of dolomite ore for FY 1995 by the acquisition price thereof per wet metric ton (i.e. at P13 or P18) in order to arrive at the alleged volume of dolomite ore sold for the said year. The resulting volume of dolomite ore sold was then multiplied by the selling price of P210.00 and compared with the reported sales of P151,015,797.00 ending up with the alleged unreported sales of P87,345,831.30.

The Interest Expense of P6,225,703.00 was disallowed based on the BIR examiner's findings that the said amount was reimbursable under Chapter III, Section

480

16(e) of the notarized mining service contract between petitioner and DMC as the related loans were secured to finance petitioner's mining operations. Likewise, the BIR examiner reasoned out that: 1) there was no proof of loan contract between petitioner and the lenders, Kawatetsu Mining Co., Ltd. (KMC) and Philippine Sinter Corporation Retirement Plan (PSCRP) such that interest not stipulated in writing is not deductible and 2) Petitioner and KMC are related taxpayers as enumerated under Section 29(b)(ii) and Section 30(b)(3) of the 1994 Tax Code which provides that interests between related taxpayers are not deductible.

With respect to the disallowed Realized Foreign Exchange Loss of P8,983,712.00, the BIR examiner pointed out that the actual Realized Foreign Exchange Loss amounted only to P3,249,790.59 and that the remaining amount of P5,733,921.41 was a mere provision and has not been actually realized. Nevertheless, according to the BIR examiner, the entire amount of P8,983,712.00 should be disallowed as this expense was derived from loans used in petitioner's mining operations, thus, reimbursable under Chapter III, Section 16(g) of the notarized mining service contract between petitioner and DMC.

The Alcoy Branch Administrative Expense of P19,929,056.68 and Taxes and Licenses Expense of P1,274,758.00 were disallowed also on the basis that the same were allegedly reimbursable under Section 16(c) and (f) of the notarized mining service contract between petitioner and DMC, hence, not deductible.

Upon the other hand, Petitioner argued that the BIR examiner's computation of the alleged understated dolomite sales of P87,345,831.30 was erroneous since it did not take into account the additional processing costs incurred by petitioner in converting the

401

raw dolomite ore into its marketable state. Petitioner stated that in FY 1995 it was able to mine and extract for DMC 635,303 wet metric tons (wmt) of dolomite ore. Pursuant to the terms of the service contract, petitioner allegedly purchased all of the 635,303 wet metric tons of dolomite ore at P18 per wmt or the aggregate price of P11,435,454.00 (Exhibits MM to YY). Upon purchase of the raw dolomite ore from DMC, petitioner allegedly further processed the same incurring costs such as Hauling Cost, Plant Cost, G-Line Cost, Ex-Line Cost, Maintenance Cost and Electrical Cost amounting to P66,381,560.05 (Exhibit U-4). This alleged further processing cost of P66,381,560.05 as well as the purchase price of the raw dolomite ore of P11,435,454.00 formed part of petitioner's total production cost of P77,817,014.05 as shown in its Cost of Sales and Ending Inventory for FY 1995 (Exhibit U). Likewise, according to petitioner, the BIR examiner failed to consider in its computation that the peso values of the beginning and ending inventories of dolomite ore for FY 1995 also included further processing costs. Petitioner claimed that the further processing costs of P66,381,560.05 pertained to its independent operations and were not covered by its mining service contract with DMC, hence, the said additional costs were not reimbursed by DMC. Petitioner averred that the only mining costs and expenses reimbursed by DMC pursuant to the service contract amounted to P6,373,594.01.

Regarding the disallowed Interest Expense, Realized Foreign Exchange Loss, Alcoy Branch Administrative Expense and Taxes and License Expense in the aggregate sum of P36,413,229.68, petitioner maintained that the same were incurred during the processing of the raw dolomite ore into its marketable state and therefore are non-reimbursable by DMC.

402

A critical point in resolving the issue of whether or not the alleged deficiency income tax assessment is valid lies in the determination of whether or not the disallowed further processing costs of P66,381,560.05 that resulted to the alleged unreported dolomite sales of P87,345,831.30 and the disallowed expenses of P36,413,229.68 were reimbursed by DMC to petitioner.

As culled from the records, petitioner not only acted as the exclusive mining service contractor of DMC in the production/extraction of dolomite ore from the mining claims owned by the latter in Alcoy and Dalaguete, Cebu but also became the exclusive buyer of the raw dolomite ore it produced/mined for DMC (Section 30, Chapter IX of the Service Contract [Exhibit V]; Sales and Purchase Contract of Dolomite Ore, pages 524-530, BIR records). Thus, petitioner incurred two types of costs and expenses in its operations, namely; 1) those costs and expenses incurred by petitioner as a service contractor of DMC in mining and producing the dolomite ore which under the Service Contract (Exhibit V) were to be reimbursed by DMC; and 2) those incurred by petitioner in connection with the processing of the raw dolomite ore after buying them from DMC and before the same were sold to third parties. Only the costs and expenses under the first type were covered by the Service Contract and reimbursed by DMC to petitioner. The second type of costs and expenses pertained to petitioner's independent operations and were borne solely by petitioner.

Petitioner had shown through the various billings/letters, schedules (Exhibits A to E & T), official receipts (Exhibits X to BB) issued by petitioner to DMC and billing statements/invoices issued by DMC to petitioner (Exhibits CC to KK & MM to YY) that the only mining costs and expenses reimbursed by DMC to petitioner amounted to

P6,373,594.01. The further processing costs of P66,381,560.05 and various expenses amounting to P36,413,229.68 were not reimbursed by DMC to petitioner. Thus, it was erroneous on the part of the BIR examiner to exclude the further processing costs of P66,381,560.05 and various expenses of P36,413,229.68 as petitioner's deductions from gross income for FY 1995. It bears stressing that petitioner's mining service contract with DMC is considered terminated upon petitioner's purchase of the raw dolomite ore from DMC. Any costs/expenses incurred by petitioner in bringing the purchased raw dolomite ore into saleable state pertained to petitioner's own operations and outside of its service contract with DMC.

Based on the foregoing, we can only conclude that the deficiency income tax assessment was erroneous and without factual basis.

However, in his Memorandum (BIR Records, pp. 427-433, particularly at p. 430, Exhibit "2"), respondent's examiner, Revenue Officer Celestino M. Mejia, in addition to the allegation of reimbursement, raised the following grounds for the disallowance of interest expense:

> "b. There was no proof of loan contract between PMSC and KMC and PSCRP. Interest not stipulated in writing is not deductible;
>
> c. PMSC and KMC are related taxpayers as enumerated under Section 29 (b)(ii) in relation to Section 30(b)(3) of The Tax Code which provides that interests between related taxpayers are not deductible." (BIR Records, p. 430)

Also, in his aforementioned memorandum, respondent's examiner upon investigation noted that realized foreign exchange loss of the petitioner only amounted to P3,249,790.59 while the amount claimed as deduction was P8,983,712.00 or an over-statement of P5,733,921.41. (BIR Records, p. 430)

404

To refute the allegation that the loans contracted by PMSC with the Philippine Sinter Corporation Retirement Plan (PSCRP) and Kawatetsu Mining Co., Ltd (KMC) were undocumented, petitioner presented: (1) The "Promissory Note" dated April 30,1994 between PMSC as borrower and PSCRP as lender with maturity date of April 30,1996, and (2) The "Loan Agreement" between KMC as lender and PMSC as borrower (Exhibits "F" and "G", respectively).

As to the charge that PMSC and KMC are related taxpayers and that therefore, the interest expense should be disallowed under then Sections 29(b)(ii) and 30(b)(3) of the Tax Code, we find no legal basis for the disallowance of such expense under the aforementioned provisions of the Tax Code. Section 29(b)(ii) provides in pertinent part:

> **SEC. 29. Deductions from gross income.** – In computing taxable income subject to tax under Sections 21(a); 24(a), (b) and (c); and 25(a)(1), there shall be allowed as deductions the items specified in paragraphs (a) to (i) of this Section; x x x
>
> x x x
>
> (b) *Interest.* –
>
> (1) In general. – The amount of interest paid or accrued within a taxable year on indebtedness in connection with the taxpayer's profession, trade or business, except on indebtedness incurred or continued to purchase or carry obligation the interest upon which is exempt from taxation as income under this Title.
>
> (2) No deduction shall be allowed in respect of interest under the succeeding paragraphs:
>
> x x x
>
> (ii) If both the taxpayer and the person to whom the payment has been made or is to be made are persons specified under Section 30(b).

On the other hand, Section 30 (b)(3) of the Tax Code provides:

405

SEC. 30. Items not deductible. –

x x x

(b) *Losses from sales or exchanges of property.* – In computing net income, no deduction shall in any case be allowed in respect of losses from sales or exchanges of property directly or indirectly -

x x x

(3) Except in the case of distributions in liquidation, between two corporations more than fifty per centum in value of the outstanding stock of each of which is owned, directly or indirectly, by or for the same individual, if either one of such corporations, with respect to the taxable year of the corporation preceding the date or exchange was, under the law applicable to such taxable year, a personal holding company or a foreign personal holding company;

x x x [Emphasis supplied]

Other than the mere allegation that the petitioner and KMC are related taxpayers, respondent presented no proof that the taxpayers are related taxpayers pursuant to Section 30(b)(3) in relation to Section 29(b)(ii) of the Tax Code. There is nothing in the records to show that between the petitioner and KMC "more than fifty per centum in value of the outstanding stock of each of which is owned, directly or indirectly, by or for the same individual". Also, there is no evidence to show that either petitioner or KMC was a personal holding company or a foreign personal holding company.

It is true that as a general rule tax assessments are presumed to be correct. However, assessments should not be based on presumption no matter how reasonable or logical the presumption might be. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment

406

being a mere presumption cannot be made to rest on another presumption (*Collector of Internal Revenue vs. Benipayo*, **G.R. No. L-13656, January 31, 1962, 4 SCRA 182**).

For the above stated reasons, the disallowance of interest expense has no legal and factual basis. Consequently, the interest expense should be allowed as deduction.

With respect to the disallowance of unrealized foreign exchange loss in the amount of P5,733,921.41, we must sustain the findings of respondent's examiner. Upon investigation, respondent's examiner determined that petitioner's realized or actual foreign exchange loss amounted to only P3,249,790.59 while it claimed P8,983,712.00 as deduction. These findings were never refuted by the petitioner. Consequently, the rule that "tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise," must be applied here. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment (*Commissioner of Internal Revenue vs. Wyeth Suaco Laboratories, Inc. and The Court of Tax Appeals*, **G.R. No. 76281, September 30, 1991, 202 SCRA 125;** *Commissioner of Internal Revenue vs. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals*, **G.R. No. 104151, March 10, 1995;** *Atlas Consolidated Mining and Development Corporation vs. Court of Appeals, Commissioner of Internal Revenue and Court of Tax Appeals*, **G.R. No. 105563, March 10, 1995, 242 SCRA 289;** *Ferdinand R. Marcos II vs. Court of Appeals, The Commissioner of The Bureau of Internal Revenue and Herminia D. De Guzman*, **G.R. No. 120880. June 5, 1997, 273 SCRA 47;** *Cagayan Robina Sugar Milling Co. vs. Court of Appeals, Central Board of Assessment Appeals, Board of Assessment Appeals, and*

407

The Provincial Assessor of Cagayan, **G.R. No. 122451, October 12, 2000, 342 SCRA 663**).

As a result of the disallowance of unrealized foreign exchange loss of P5,733,921.41, petitioner is liable for deficiency income tax of P3,833,677.53, computed as follows:

Net income per return			P 25,243,859.00
Add:	Overstatement of Realized Foreign Exchange Loss		5,733,921.41
Adjusted net income			P 30,977,780.41
Income tax due thereon			P 10,842,223.14
Less:	Tax credits/payments	P 8,992,953.00	
	Less: Tax credit applied in FY 1996	157,603.00	8,835,350.00
Deficiency income tax			P 2,006,873.14
Add:	Surcharge	P 501,718.29	
	Interest (August 16, 1995 to April 6, 1998)	1,325,086.10	1,826,804.39
			P 3,833,677.53

With reference to the alleged deficiency VAT assessment of P25,081,892.23, the said assessment resulted from the imposition of VAT on: 1.) the alleged unreported sales of dolomite ore of P87,345,831.30 and 2) on petitioner's acquisition of dolomite ore inventories amounting to P77,817,014.00 representing reimbursement of expenses and collection of service fees.

Since we have earlier ruled that the alleged unreported sales of dolomite ore of P87,345,831.30 was erroneous and had no factual basis, it necessarily follows that the imposition of deficiency VAT thereon is devoid of merit. Thus, what is left to be determined is the validity of the deficiency VAT assessment on the alleged dolomite ore inventories amounting to P77,817,014.00 acquired by petitioner from DMC as payment for services rendered and reimbursement of expenses. The BIR examiner computed the amount of P77,817,014.00 as follows:

408

Cost of Goods Sold	P 83,759,339.00
Add: Dolomite Inventory, End	1,539,087.00
Total	P 85,298,426.00
Less: Dolomite Inventory, Beg.	7,481,412.00
Collection of Reimbursable Operating Expenses and service fees in kind (dolomite ore) for the year	P 77,817,014.00

The amount of P77,817,014.00 was further broken down into:

a.)	Reimbursable Mining Costs/Service Fees	P 11,435,454.00
b.)	Hauling Costs	25,922,649.20
c.)	Plant Costs	12,235,448.10
d.)	Glass Line Costs	5,116,468.78
e.)	Expansion Line Costs	17,351,594.45
f.)	Repairs and Maintenance Cost	3,982,693.98
g.)	Electrical Cost	1,772,705.54
	Total Collected Reimbursable Operating Costs and Service Fees in Kind (dolomite ore)	P 77,817,014.05

The examiner opined that the amount of P77,817,014.00 should form part of petitioner's gross receipts subject to 10% output VAT pursuant to Section 102 of the 1994 Tax Code, thus:

> "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 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;
>
> xxx xxx xxx
>
> The term "gross receipts" means the total amount of money or its equivalent representing the contract price compensation, service fee, rentals or royalty, including the amount charged for materials supplied with the services and deposits and advanced payments actually or constructively received during the taxable quarter for the services performed or to be performed for another person, excluding value-added tax."

Likewise, the examiner cited VAT Ruling No. 183-90 dated August 17, 1990, which states that if the contract calls for the contractor to supply both labor and materials, his total collection, excluding the 10% VAT, shall be constituted as his taxable gross

409

receipts. Hence, the examiner alleged that it may not legally be contended that only the portion of the total gross receipts viz., pertaining to labor component, shall be subject to VAT but rather the total amount received from such contract excluding VAT, is the taxable gross receipts. On reimbursement of expenses, the examiner alleged that BIR Ruling No. 163-88, VAT Ruling No. 258-89 and other rulings, state that reimbursable expenses are subject to VAT except receipts on reimbursable expenses which are in the name of the client. In the instant case, according to the examiner, petitioner's expenses were all in its own account name and even went to the extent of actually claiming all the corresponding input VAT from said expenses.

Petitioner, on its part, alleged in its protest letter dated May 9, 1998, that it properly declared all its gross receipts from sale of services and sales of dolomite ore. The bulk of its dolomite ore sales were allegedly export sales subjected to zero-percent VAT. To prove its allegation, petitioner presented in evidence its Quarterly VAT Returns for the second quarter of 1994 up to the second quarter of 1995 (Exhibits H, I, J, K, K-1, L & L-1).

We find petitioner liable for deficiency VAT on the reimbursed expenses of P1,920,474.61.

As can be seen from the examiner's computation, the total costs of P77,817,014.00 represents the sum of the purchase price of the raw dolomite ore of P11,435,454.00 and the further processing costs of P66,381,560.05 (Hauling Cost, Plant Cost, G-Line Cost, Ex-Line Cost, Maintenance Cost and Electrical Cost). Since we had earlier ruled that the further processing costs of P66,381,560.05 were not reimbursed by DMC to petitioner, the corresponding deficiency VAT thereon is devoid of merit.

410

With respect to the purchased dolomite ore of P11,435,454.00 which allegedly represents reimbursement of expenses and payment for service fees, the documents submitted by petitioner show that out of the reimbursed expenses of P6,373,594.01 (Exhibit T), the amount of P3,929,982.00 was offset against DMC's billings/invoices for petitioner's purchase of raw dolomite ore for the period of May, 1994 to January, 1995 (Exhibits CC to KK). The remaining reimbursed expenses of P2,443,612.01 were paid in cash by DMC to petitioner (Exhibits X, Y, Z, AA & BB) for the period of April, 1995 to September, 1995. Below is the breakdown of the reimbursed expenses of P6,373,594.01:

Reimbursed expenses which were offset against DMC's billings

Exhibit	Date	Amount
CC	1-May-94	P 435,699.60
DD	1-Jun-94	330,909.60
EE	1-Jul-94	348,096.00
FF	1-Aug-94	320,838.00
GG	1-Sep-94	409,096.80
HH	1-Oct-94	586,454.40
II	1-Nov-94	487,015.20
JJ	1-Dec-94	429,912.00
KK	1-Jan-95	581,960.40
	Subtotal:	P 3,929,982.00

Reimbursed expenses which were paid in cash by DMC

X	12-Apr-95	P 313,912.51
Y	12-Apr-95	567,649.44
Z	28-Apr-95	456,952.26
AA	1-Aug-95	453,892.36
BB	7-Sep-95	651,205.44
	Subtotal:	P 2,443,612.01
	Total:	P 6,373,594.01

Since petitioner failed to show that the receipts covering the reimbursed expenses for the period of May 1, 1994 to April 28, 1995 in the amount of P5,268,496.21 were not under its name, the same should form part of its taxable gross receipts for FY 1995 based on

411

the aforequoted definition of "gross receipts" under Section 102 of the 1994 Tax Code. Neither did petitioner establish that the amount of P5,268,496.21 formed part of its taxable gross receipts for FY 1995. Hence, petitioner should be assessed the corresponding deficiency output VAT. However, since the assessment was made on April 6, 1998, the 10% output VAT due on reimbursed expenses for May, 1994 to December, 1994 amounting to P3,348,021.60 had already prescribed. Therefore, only insofar as the remaining amount of P1,920,474.61 shall petitioner be held liable for deficiency VAT in the amount of P340,147.00 computed as follows:

	Exhibit	Reimbursed Expenses		
		Jan. 1995	April 1995	Total
	KK	P 581,960.40		
	X		P 313,912.51	
	Y		567,649.44	
	ZZ		456,952.26	
		P 581,960.40	P 1,338,514.21	P 1,920,474.61
Basic output VAT due		P 52,905.49	P 121,683.11	P 174,588.60
Surcharge		13,226.37	30,420.78	43,647.15
Interest	(April 18, 1995 to April 6, 1998)	39,316.75		39,316.75
	(July 21, 1995 to April 6, 1998)		82,594.49	82,594.49
		P 105,448.62	P 234,698.38	P 340,147.00

Finally, as to the issue of whether or not the deficiency excise tax assessment is valid, the BIR examiner argued that petitioner is the one liable for the payment of the extracted dolomite ore for it is the operator of the mining claims and the person having possession of the said ore as provided under Section 4 of Revenue Regulations No. 13-94 dated July 20, 1991, to wit:

> "SECTION 4. Persons liable. — All lessees, concessionaires, owners or operators of mines, processors of minerals, licensees or permittees of quarry/mines, producers or manufacturers of mineral products, whether natural or juridical persons, shall be liable to the payment of the excise tax due on minerals, mineral products and quarry resources removed from the minesite and/or place of production. Should minerals, mineral products or

412

> quarry resources be removed from the minesite and/or place of production without the payment of the tax, the owner or person having possession thereof shall be liable for the tax due thereon."

Moreover, according to the examiner, Section 16(f) of Chapter III of the notarized mining service contract states that petitioner is the one liable for the payment of said excise tax although subject to reimbursement by DMC

Petitioner, on the other hand, contended that its purchase of dolomite ore from DMC, the mining claims owner, is no longer subject to excise tax as the said tax had already been paid by DMC upon the extraction of the ore. Petitioner further averred that the Bureau of Internal Revenue has confirmed in BIR Ruling UN-04095 dated January 17, 1995 that petitioner is not liable for the excise tax on the purchase of the extracted dolomite ore from DMC as this has already been paid by the latter, thus:

xxx xxx xxx

> In reply thereto, please be informed that your opinion is hereby confirmed. The excise tax on minerals and mineral products shall be payable by lessees, concessionaires, owners or operators of mines, processors of minerals, licensees or permittees of quarry/mines, producers or manufacturers of mineral products, whether natural or juridical persons, upon removal from the minesite and/or place of production. Should minerals, mineral products or quarry resources be removed from the minesite and/or place of production without payment of the excise tax, the owner or person having possession thereof shall be liable for the tax due thereon. (Sec. 4, Revenue Regulations no. 13-94). If the taxpaid mineral or mineral products are subsequently sold by the producer, owner or lessee of the mining claims, it shall be subject only to the 10% VAT under Section 100 of the Tax Code, as amended. It is no longer subject to the additional ad valorem tax.
>
> Since as represented, DMC as the owner or lessee of the mining claims has already paid the excise tax on the dolomite ore, PMSC which purchases said dolomite ore for processing for the domestic and export market is no longer liable to the payment of additional excise tax.

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413

It is admitted that the BIR has not issued any subsequent ruling reversing the aforequoted BIR ruling (par.14, Joint Stipulation of Facts). Thus, petitioner maintained that it was erroneous on the part of the respondent to hold petitioner liable for excise taxes anew on its purchase of dolomite ores from DMC.

We concur with the petitioner.

It is clear from the aforequoted provisions of RR 13-94, implementing Section 151(a)(2) of the 1994 Tax Code, that either DMC, being the lessee of the mining claims or petitioner, being the operator or person in possession of the extracted dolomite ore could be held liable to pay the excise tax due thereon.

Records reveal that DMC paid the corresponding excise taxes due on the extracted dolomite ore as evidenced by the Quarterly Percentage Tax Returns/Excise Tax Returns of Mineral Removals filed by DMC with the BIR for the subject period of the assessment (Exhibits M, N, O, P, Q, R & S) and the related BIR official receipts (Exhibits M-1, N-1, O-1, P-1, Q-1, R-1 & S-1), computation schedules (Exhibits O-2, Q-2) and as testified to by Ms. Merlinda C. Velasco, DMC's Accountant (TSN, October 4, 1999). Inasmuch as DMC already paid the excise tax due on the extracted dolomite ore, petitioner is no longer liable to pay excise tax. Accordingly, the deficiency excise tax assessment of P6,399,854.29 issued against petitioner is erroneous.

WHEREFORE, in view of all the foregoing, the deficiency excise tax assessment of P6,399,854.29 for FY 1995 is hereby cancelled and/or withdrawn. However, petitioner is hereby **ORDERED TO PAY** to respondent the deficiency income tax of P3,833,677.53 and deficiency VAT of P340,147.00 in the aggregate sum of

414

P4,173,824.53 for FY 1995, inclusive of surcharge and deficiency interest, computed as follows:

	Deficiency Tax		
	Income	VAT	Total
Basic tax due	P 2,006,873.14	P 174,588.60	
Surcharge	501,718.29	43,647.15	
Interest	1,325,086.10	121,911.25	
	P 3,833,677.53	P 340,147.00	P 4,173,824.53

In addition, petitioner is **ORDERED TO PAY** to respondent 20% delinquency interest on P4,173,824.53 computed from May 9, 1998 until fully paid pursuant to Section 249(a)(c)(3) of the 1994 Tax Code.

SO ORDERED.

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

I CONCUR:

ERNESTO D. ACOSTA
Presiding 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

45