CTA Form No. 8 (For DCC)

19-000613-0082

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

CTA CASE NOS. 10236, 10271, 10294 & 10359

MELCO RESORTS LEISURE (PHP) CORPORATION,
Petitioner,

- versus -

NOTICE OF RESOLUTION

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:

OFFICE OF THE SOLICITOR GENERAL
134 Amorsolo Street, Legazpi Village
Makati City

ATTY. MARVEEN B. DE LA PAZ
Bureau of Internal Revenue
Room 703, Litigation Division
BIR National Office Building
Senator Miriam P. Defensor-Santiago Avenue
Diliman, Quezon City

LAYUG CELICIOUS-SY AND VILLAPANDO
Unit 503, 5th Floor, The Linden Suites
37 San Miguel Avenue, Ortigas Center
1600 Pasig City

GREETINGS:

You are hereby notified by these presents that on **July 11, 2024**, a Resolution was rendered in the above-entitled case, copy of which is attached hereto.

Quezon City, Philippines, **July 12, 2024.**

Atty. Maria Johoanna F. Chan-Te
Executive Clerk of Court II

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

MELCO RESORTS LEISURE (PHP) CORPORATION,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case Nos. 10236, 10271, 10294 & 10359

Members:

DEL ROSARIO, *P.J., Chairperson,*
MANAHAN, *and*
REYES-FAJARDO, *JJ.*

Promulgated:

JUL 11 2024 1:30PM

x -x

RESOLUTION

MANAHAN, *J.:*

For resolution are the following:

1. Respondent's *Motion for Partial Reconsideration (Re: Decision dated 5 February 2024)* filed on February 27, 2024 with petitioner's *Opposition [To Respondent's Motion for Partial Reconsideration dated February 27, 2024]* filed on March 25, 2024; and,

2. Petitioner's *Motion for Reconsideration [of Decision dated February 5, 2024]* filed on March 1, 2024 without respondent's comment.[1]

Both parties move for the reconsideration of the Court's Decision dated February 5, 2024 which partially granted petitioner's claim for refund of input value-added tax (VAT) for the four (4) taxable quarters of taxable year (TY) 2018, the dispositive portion of which is quoted below:

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[1] Records Verification dated March 26, 2024.

> "**WHEREFORE**, in light of the foregoing considerations, the consolidated Petitions for Review filed by petitioner Melco Resorts Leisure (PHP) Corporation, is **PARTIALLY GRANTED**.
>
> Accordingly, respondent is hereby **ORDERED TO REFUND** or **ISSUE A TAX CREDIT CERTIFICATE (TCC)** to petitioner the reduced amount of P3,720,321.72, representing the input tax paid on importation of goods for the four (4) quarters of 2018.
>
> **SO ORDERED.**"

<u>Respondent's Motion for Partial Reconsideration</u>

Respondent questions the partial grant of refund pertaining to the VAT on importation on the ground that as a mere licensee of PAGCOR, it is not entitled to the tax exemption granted to the latter by virtue of Presidential Decree (P.D.) No. 1869.

Citing Section 13(2)(b) of P.D. 1869, respondent stresses that the tax exemption granted to PAGCOR extends only to entities which provide necessary services to the latter in relation to its gaming operations and do not include licensees whose operation and management is not under the control of PAGCOR such as herein petitioner.

Even granting that petitioner is exempt from the payment of VAT, respondent asserts that the claim for refund still cannot prosper because in zero-rated or effectively zero-rated sales, no output VAT should have been passed on to the seller engaged in said zero-rated sales. In such a scenario, respondent contends that the seller's recourse is not a claim for refund against the government but against the seller/s who shifted the input VAT to them. Respondent then argues that the petitioner has no legal personality to claim for the refund of erroneously or illegally paid passed on VAT on its alleged purchases of goods (other than capital goods) and purchase of services, hence, the entire claim for refund should have been denied by the Court.

In its Opposition to respondent's motion, petitioner dismisses the arguments therein as mere rehash of the previous ones that have already been resolved by the Court but stresses that the Court has already affirmed that it is exempt from taxes under Section 13(2) of P.D. 1869, hence, there should be no question as to its entitlement to the refund of VAT paid on its importation.

Petitioner's Motion for Reconsideration

Petitioner proffers the following arguments in support of its Motion for Reconsideration, to wit:

A. Petitioner is exempt from input VAT on purchases that are attributable to its gaming operations pursuant to Section 13(2)(b) in relation to Section 13(2)(a) of PD 1869. Hence, it should be entitled to the refund of input VAT erroneously passed on by its suppliers.

B. Petitioner is allowed to claim a tax refund as PD 1869 clearly grants PAGCOR and its licensees, to which the economic burden of the tax is shifted, an exemption from both direct and indirect taxes, such as the VAT.

C. Under the principle of *solutio indebiti,* the Government has to restore to petitioner the sums representing erroneous payments of taxes.

D. The Statement of Settlement of Duties and Taxes (SSDT), even without the Single Administrative Document (SAD), is sufficient proof of the payment of VAT on importation, hence, entitled to the full refund of the input VAT on importation of goods.

E. The input taxes from purchases of services rendered by non-residents in the amount of Php799,680.22 should also be refunded to the petitioner.

RULING OF THE COURT

On respondent's Motion for Partial Reconsideration

Respondent expresses his disagreement with the portion of the Decision that granted the refund of input VAT on importation on the ground that it has no factual and legal bases as petitioner is not exempt from taxes and cannot use the provisions of P.D. 1869 as legal support. Further, since petitioner is not engaged in VAT-zero-rated sales, respondent echoes the Court's ruling that it cannot claim the refund of its alleged unutilized input VAT and maintains that this same principle equally applies to the VAT paid on importation.

The argument of respondent lacks merit.

The portion of the claim for refund pertaining to VAT paid by petitioner on importation is covered by its tax-exempt status under P.D. 1869. This was astutely discussed in the assailed Decision in this manner, and we quote:

> "Section 107 (A) of the 1997 NIRC, as amended, imposes upon the importer the liability to pay the 12% VAT on the importation of goods. Accordingly, since the herein petitioner (as importer and one who directly paid the VAT) is exempt from doing so under the clear provisions of Section 13 (2) of the PAGCOR Charter, it is entitled to the refund of the amount paid."

This Court finds that respondent did not raise any convincing argument that would warrant a modification of the above ruling.

On petitioner's Motion for Reconsideration

Most of the above arguments raised by petitioner have been exhaustively resolved by the Court not only in the assailed Decision but in several Decisions and Resolutions involving the same parties and issues. Be that as it may, it is still worthy to stress that one of the essential requirements for a refund of excess/unutilized input VAT is that the taxpayer-claimant must be engaged in zero-rated or effectively zero-rated sales. While this Court agrees with petitioner's contention that the benefits extended to PAGCOR under its Charter inure to the benefit of its licensees and contractees including exemption from taxes, such conclusion cannot be applied to a different set of circumstances such as a claim for refund of input VAT.

The law provides a distinction between claims for refund of *erroneously paid or illegally collected tax* under Section 229 of the 1997 National Internal Revenue Code (NIRC), as amended, and a refund of unutilized input VAT based on zero-rated sales under Section 112 of the same Code. We quote below Section 229 and Section 112 of the 1997 NIRC, as amended, thus:

"SEC. 229. *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, of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid. (*Emphasis supplied*)

"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 of 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: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

B. *Cancellation of VAT Registration.* – A person whose registration has been cancelled due to retirement from or cessation of business, or due to changes in or

> cessation of status under Section 106(C) of this Code may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax which may be used in payment of his other internal revenue taxes.
>
> C. *Period within which Refund or Tax Credit of Input Taxes shall be Made.* — In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof:
>
> xxx xxx xxx
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period, appeal the decision or the undated claim with the Court of Tax Appeals."

Based on the foregoing, Section 229 of the 1997 NIRC, as amended, provides for the remedy of refund in cases of erroneously paid or illegally collected tax while Section 112(A) does not contemplate an erroneous payment or illegally collected tax. The Supreme Court in a case decided in 2013,[2] had already emphasized this distinction when it ruled that "the input VAT is not "excessively collected" as understood under Section 229 because at the time the input VAT is collected the amount is correct and proper." Corollarily, the Supreme Court in the case of *Commissioner of Internal Revenue vs. Filminera Resources Corporation,*[3] encapsulated the conditions before a claim for refund of input VAT may be granted, to wit:

1. The taxpayer is VAT-registered;

2. The claim must be filed within two years after the close of the taxable quarter when such sales were made;

3. The taxpayer is engaged in zero-rated or effectively zero-rated sales;

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[2] *Commissioner of Internal Revenue vs. San Roque Power Corporation; Taganito Mining Corporation vs. Commissioner of Internal Revenue; Philex Mining Corporation vs. Commissioner of Internal Revenue,* G.R. Nos. 187485, 196113, and 197156, February 12, 2013.

[3] G.R. No. 236325, September 16, 2020.

4. The creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax. xxx xxx xxx

Records reveal that petitioner is engaged in the business of developing and operating tourist facilities, including hotel casino entertainment complexes with hotel, retail and amusement areas and themed development components, without being engaged in retail trade, and in casino gaming activities.[4] These activities are not considered zero-rated or effectively zero-rated sales under the relevant provisions of the 1997 NIRC, as amended, thus cannot be the basis of the instant claim for refund.

In CTA *En Banc* case No. 2608 involving the same parties,[5] the Court *En Banc*, in affirming the decision of the First Division's Decision in CTA Case No. 9811,[6] ruled thus:

> "Therefore, as aptly found by the Court in Division, petitioner's refund or tax credit claim under Section 112 of the NIRC of 1997, as amended, fails. **There is no showing that petitioner is engaged in zero-rated sales or effectively zero-rated sales to comply with the fourth requisite and entitle it to a refund or tax credit of its input VAT attributable to its purported zero-rated sales**." (*Emphasis supplied*)

Even the indirect tax exemption invoked by petitioner arising from its status as a PAGCOR licensee, cancels out the possibility of claiming the alleged excess input VAT because the input VAT attributable to an exempt transaction is neither creditable nor refundable.

Nonetheless, the Court adopts a different view on petitioner's claim for refund pertaining to the input VAT paid on importation of goods other than capital goods and affirms that this should be refunded to petitioner. However, in its instant *Motion for Reconsideration*, petitioner takes exception to the disallowance of a portion of the amount corresponding to the VAT paid on importation and asserts that the submission of the

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[4] Exhibit "P-1" – Petitioner's Certificate of Filing of Amended Articles of Incorporation dated May 30, 2017.
[5] *Melco Resorts Leisure (PHP) Corporation vs. Commissioner of Internal Revenue* dated July 11, 2023.
[6] *Melco Resorts Leisure (PHP) Corporation vs. Commissioner of Internal Revenue,* October 28, 2021.

document called SSDT, even without the SAD, is sufficient proof of the payment of VAT on importation, hence, entitled to the full refund of the input VAT on importation of goods.

We disagree with petitioner.

The SSDT and the SAD contain different details and information that one without the other will fail to convince the Court that payment of the VAT was indeed paid and that the goods imported are related to petitioner's business. The SSDT proves the actual payment of the VAT on importation while the SAD contains a description of the goods imported. Without the SAD, the Court cannot ascertain the nature of the goods imported by petitioner, i.e., whether or not the goods imported are related to the business of petitioner.

As regards the argument of petitioner that the Court should have granted the VAT input taxes from purchases of services rendered by non-residents in the amount of Php799,680.22, this Court rules otherwise because the refund in this case is similarly anchored on the existence of a VAT-zero-rated or effectively VAT zero-rated sale. One of the essential requirements for a sale to be VAT zero-rated or effectively VAT zero rated sale under Section 108(B)(2) of the 1997 NIRC, as amended, is that the supplier of said service is VAT-registered. We quote Section 108(B)(3) of the 1997 NIRC, as amended, thus:

> "Section 108. **Value-Added Tax on Sale of Services and Use or Lease of Properties.** -
>
> (B) *Transactions Subject to Zero-Percent (0%) Rate.* The following services performed in the Philippines by **VAT-registered persons** shall be subject to zero percent (0%) rate:
>
> xxx xxx xxx
>
> (3) **Services rendered to persons or entities whose exemption under special laws** or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate." (*Emphases supplied*)

There is no showing that the non-residents who rendered such service to petitioner are VAT-registered, hence, the VAT withheld from said payments cannot be refunded. *[initials]*

From all the foregoing, the Court finds no cogent reason to reverse or modify the Court's Decision dated February 5, 2024.

WHEREFORE, premises considered, respondent's *Motion for Partial Reconsideration (Re: Decision dated 5 February 2024)* filed on February 27, 2024 and petitioner's *Motion for Reconsideration [of Decision dated February 5, 2024]* filed on March 1, 2024 are **DENIED** for lack of merit.

Accordingly, the Decision of the Court in the above-captioned case dated February 5, 2024 is hereby **AFFIRMED**.

SO ORDERED.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

(See Separate Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Marian Ivy F. Reyes-Fajardo
(With due respect, I reiterate my Dissenting Opinion)
MARIAN IVY F. REYES-FAJARDO
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. 10236, 10271, 10294 & 10359

Members:

DEL ROSARIO, *P.J.*, Chairperson,
MANAHAN, and
REYES-FAJARDO, *JJ.*

Promulgated:

JUL 11 2024; 1:30 PM

x - x

SEPARATE CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the denial of petitioner's Motion for Reconsideration.

In its Motion for Reconsideration,[1] **petitioner argues that like the input VAT on importation of goods, the Value-added Tax (VAT) withheld and paid on services rendered by non-resident foreign (NRF) suppliers should be refunded**. In rejecting petitioner's argument, the *ponencia* holds that petitioner failed to comply with the requirements under Section 108(B)(3) of the NIRC of 1997, as amended, particularly with the requirement that the seller of service is VAT-registered, stating that "[t]here is no showing that non-residents who rendered service to petitioner are VAT-registered, hence, the VAT withheld from said payments cannot be refunded."

Section 108(B)(3) of the National Internal Revenue Code (NIRC) of 1997, as amended, reads:

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[1] CTA Docket Vol. II, pp. 1104-1117.

"SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –

x x x

(B) *Transactions Subject to Zero Percent (0%) Rate* – **The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate.**

x x x

(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate xxx."

I submit that the above-cited provision is inapplicable in this case. Neither petitioner nor the NRF suppliers assert that the sales of services on which the VAT was withheld qualify for zero-rating. Simply put, petitioner does not seek zero-rating of such sales to claim any input tax attributable thereto. **The subject transactions are purchases, not sales, of petitioner**. Hence, it is improper to require petitioner to prove compliance with the requisites of Section 108(B)(3) of the NIRC of 1997, as amended.

To be clear, petitioner seeks a refund of erroneously withheld VAT on the services rendered by NRF suppliers to petitioner pursuant to Section 229 of the NIRC of 1997, as amended. Consequently, the only relevant questions to be asked in this particular claim are (1) whether petitioner is exempt from VAT; and, (2) whether petitioner erroneously withheld and paid VAT on the services rendered by NRF suppliers.

With respect to the first question, the *ponencia* aptly confirmed that the benefits of tax exemption under Section 13(2) of Presidential Decree (PD) No. 1869, as amended, or the Charter of the Philippine Amusement and Gaming Corporation (PAGCOR), inures to the benefit of petitioner as a PAGCOR licensxee. Thus, petitioner is exempt from VAT.

As for the second question, it is necessary to determine whether petitioner provided sufficient substantiation of the VAT allegedly erroneously withheld and paid.

The VAT withheld and paid on services rendered by NRF suppliers is passed on to the resident withholding agent. Thus, the resident withholding agent is the one liable for VAT. Section 4.114-2 of Revenue Regulations No. 16-2005[2] states that:

> "**VAT withheld and paid for the non-resident recipient** (remitted using BIR Form No. 1600), **which VAT is passed on to the resident withholding agent by the non-resident recipient of the income**, may be claimed as input tax by said VAT-registered withholding agent upon filing his own VAT Return, subject to the rule on allocation of input tax among taxable sales, zero-rated sales and exempt sales. The duly filed BIR Form No. 1600 is the proof or documentary substantiation for the claimed input tax or input VAT."

The afore-cited provision confirms that the VAT, which may be refunded pursuant to Section 112 of the NIRC of 1997, as amended, is actually passed on to the resident taxpayer. Under the same afore-cited provision, a duly filed BIR Form No. 1600 is sufficient proof to substantiate input VAT on services rendered by NRF suppliers. These, however, apply only to refund claims based on Section 112 of the NIRC of 1997, as amended.

I submit that for cases filed pursuant to Section 229, such as the present case, BIR Form No. 1600 is not sufficient to establish entitlement to VAT refund. It is incumbent upon petitioner to prove that it was erroneously passed on with VAT by its NRF suppliers, which fact cannot be established solely by the submitted BIR Form No. 1600.

If the VAT was borne by the NRF supplier (i.e., the VAT was not passed on to the resident buyer, and was simply withheld on the sale proceeds), there is no erroneous payment of VAT which may be refunded. Allowing the resident buyer to claim a refund of VAT that was borne by the NRF supplier will result in unjust enrichment.

In this case, petitioner submitted only the BIR Form No. 1600. Without submitting documents such as billing statements, service contracts or agreements, or other documents that demonstrate the passing on of VAT to petitioner, the Court cannot verify whether the VAT, although withheld and remitted by petitioner, was borne by the latter, and thus, should be refunded to it.

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[2] Consolidated Value-Added Tax Regulations of 2005, September 1, 2005.

ALL TOLD, I *VOTE* to **DENY** petitioner's Motion for Reconsideration for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice