REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

DCCD ENGINEERING CORPORATION,
Petitioner,

-versus -

C.T.A. CASE NO. 4333

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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7/16/91

D E C I S I O N

This involves a claim for a tax credit in the amount of three hundred ninety three thousand eight hundred three pesos and thirty six centavos (P393,803.36) representing the contractor's tax and value-added tax allegedly collected erroneously or illegally for the period from October 15, 1986 to July 7, 1988.

It appears from the records of the case that in a letter dated December 23, 1988 petitioner, through its Chief Accountant, Mr. Virgilio A. Saur, filed the subject claim for tax credit with respondent, Commissioner of Internal Revenue, on July 3, 1980. It alleged that the contractor's tax and value-added tax were either erroneously withheld by the Economic Support Fund Secretariat (ESFS) or erroneously paid by it directly to the

BIR. As legal basis, Petitioner presented BIR Ruling No. 101-000-00513-88 dated October 21 1988 signed by former Commissioner Bienvenido A. Tan Jr. The dispositive portion of the ruling states as follows:

> "In reply, please be informed that pursuant to the RP-US Military Bases Agreement and the bilateral agreement between the two governments exempting the Economic Support Fund (ESF) proceeds from the Philippine government tax and other impositions, the use of the fund to finance government projects which are paid directly from said fund are within the purview of effectively zero-rated transactions contemplated under Section 100(a)(2) and 102(a)(3) of the Tax code. In other words, billings by the seller of goods or services who executed the projects funded by ESF shall not include the value-added tax: Provided, however that the seller of said goods or services shall first apply for zero rating in accordance with Section 8(d) of Revenue Regulation No. 5-87.

Petitioner inferred that in view of the said ruling its gross receipts from the Economic Support Fund (ESF) are likewise exempt from contractor and value-added taxes. Petitioner presented certifications from the Economic Support Fund Council, copies of the corresponding withholding tax returns, percentage tax returns, value-added tax returns and the corresponding BIR payment orders and Central Bank confirmation receipts to prove the fact of payment of said taxes.

In addition, Petitioner also asked for attorney's fee in the amount of P75,000.00. To date, Respondent has not acted upon petitioner's claim for tax credit. Hence, this instant Petition for Review.

Respondent in his answer admits the existence of the Economic Support Fund Secretariat and its tax exempt status and the BIR Ruling No. 101-000-00513-88 dated October 21, 1988 but denies all other allegations of the Petitioner pertaining to its claim. By way of special and affirmative defenses, he alleges that Petitioner must show that the taxes were erroneously or illegally collected; that claims for amounts remitted to the Bureau of Internal Revenue prior to February 3, 1987 have prescribed and that Petitioner failed to show that it had first applied for zero rating in accordance with Section 8(d) of Revenue Regulation No. 5-87. Also, he alleges that cost of suits and damages cannot be awarded against the government; tax refunds are construed strictly against the claimant and that the amount of P393,803.36 sought to be refunded was paid in accordance with law and regulations on the matter.

Petitioner made its Formal Offer of Evidence to prove its claim for tax credit to which this

Court after notice to respondent and hearing admitted. Respondent on his part failed to present his own evidences in support of his case. This case is submitted for decision based on the pleadings and petitioner's evidence.

The issues presented to this court for resolution are as follows;

> (1) Whether or not the gross receipts of a contractor of the Secretariat of the Economic Support Fund Council paid out of the proceeds from the Economic Support Fund are exempted from the contractor's tax under the National Internal Revenue Code prior to the introduction of the value-added tax and presently are considered effectively zero-rated transactions pursuant to Section 100(a)(2) and 102(a)(3) of the present National Internal Revenue Code?
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> (2) Whether or not Petitioner is entitled to the attorney's fees being prayed against the respondent?

Before this court can resolve the first issue, it is necessary to quote hereunder the legal basis upon which the Bureau of Internal Revenue issued the questioned BIR ruling, especially considering that the said ruling touched only on the VAT aspect of the claim for refund;

Section B. 4(a) of the Standard Annex attached to all Grant Agreements entered into by and between the Government of the Philippines and the U.S. Government provides as follows:

> "This Agreement and the funds pursuant to it will be free from any taxation or fees imposed under laws in effect in the territory of the Government of the Philippines."

Based on the above, the Bureau of Internal Revenue in its aforequoted Ruling No. 101-000-00513-88 considered direct payments from the ESF proceeds to finance government projects, within the purview of effectively zero rated transactions under Section 100(a)(2) and 102(a)(3) of the Tax Code.

It is indisputable that pursuant to the above BIR Ruling petitioner's gross receipts derived from the proceeds of the ESF for services rendered in the construction of government projects are subject only to zero rate of the value-added tax. However, we find without merit petitioner's contention that its gross receipts from the same proceeds should have been likewise exempted from contractor's tax in line with the said ruling since the said proceeds are exempt from Philippine Government taxes. In the case of the value-added tax on the sale of services, paragraph (3) of Section 102(a) specifically provides for subjecting to zero rate, services performed for persons or entities exempted under special laws or international agreements to which the Philippines is a signatory as follows:

> Sec. 102. Value-added tax on sale of services.- (a) Rate and base of tax. - There shall be levied, assessed and collected a value added tax equivalent to 10% of gross receipts derived by any person engaged in the sale of services. x x x . Provided, That the following services performed in the Philippines by VAT-registered persons shall be subject to 0%.
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> (1) x x x
>
> (2) 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 rate.

There is no similar provision for the contractor's tax under Section 170 (now repealed) of the National Internal Revenue Code. The <u>contractor's tax is a tax on the contractor on the sale of services and not on the person for whom the services are rendered</u>. Hence, petitioner, the contractor here, cannot claim exemption from contractor's tax just because the ESF proceeds out of which his services are paid are exempt from any Philippine government tax or imposition.

It may be argued that although the contractor's tax is a tax payable by the contractor, it is an indirect tax in the sense that it can be passed on to the buyer of the services, which in the case at bar is the ESFS thus resulting in the indirect taxation of the latter's fund. Even so, it has been held in a case involving sales tax, a tax which is payable by the manufacturer or producer but can be passed on to the purchaser that:

> "'The phrase passed the tax on is inaccurate as obviously the tax is laid and remains on the manufacturer and on him alone. The purchaser does not really pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. x x x . The price is the sum total paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price x x x.' **[Lash's Products v. United States** 278 U.S. 175(1928).]
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> "It may indeed be that the incidence of the tax ultimately settles on the purchaser, but it is not for that reason alone that one may validly argue that it is a tax on the purchaser. x x x. But the tax burden may not even be shifted to the purchaser at all. A decision to absorb the burden of the tax is largely a matter of economics. Then it can no longer be contended that a sales tax is a tax on the purchaser." **(Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue,** 20 SCRA 1056)

The same observation holds true for contractor's tax on the sale of services which may also be shifted to the buyer of the services. Thus applied to the instant case, the fact that petitioner may add the contractor's tax to its billings to the ESFS for services rendered to the latter does not make the contractor's tax a tax on the ESF proceeds. For petitioner to be exempted from the payment of contractor's tax on its gross receipts from the ESF proceeds there must have been a specific provision of law to that effect as in the case of the value-added tax on the sale of services. Exemptions from taxation are highly disfavored in law; and he who claims an exemption must be able to justify his claim by the clearest grant of organic or statute law. An exemption from a common burden cannot be permitted to exist upon vague implication. (Asiatic Petroleum Co. vs. Llanes, 49 Phil. 466; House vs. Posadas, 53 Phil. 338.) Exemptions in tax statutes are never presumed. Exemptions in taxation are construed in "strictissimi juris" against the taxpayer and liberally in favor of the taxing authority. (Esso Standard Eastern, Inc. vs. Commissioner of Customs, 18 SCRA 488.) Clearly, petitioner's claim for tax credit, representing contractor's tax erroneously paid/withheld in the total amount of P379,538.36, should be denied.

As regards the claim for tax credit for erroneously paid value-added tax in the amount of

P14,265.00, as adverted to earlier, petitioner is entitled thereto by virtue of BIR Ruling No. 101-000-00513-88. Respondent avers that petitioner's claim should be denied for its failure to show that it had first applied for zero-rating in accordance with Section 8(d) of Revenue Regulations No. 5-87 which reads as follows:

> "(d) Application for the imposition of zero rate. - Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero rate on the said transactions. Upon approval, his status as zero-rated taxpayer shall remain valid until revoked."

The evidence presented by petitioner shows that the said value-added tax was paid to the BIR on September 20, 1988 (Exhs. T, T-1 to T1-9, pp. 91-93, CTA records.) The aforesaid BIR Ruling No. 101-000-00513-88 holding that direct payments from the ESF proceeds for services rendered are subject to zero rate of the value-added tax, was issued only on October 21, 1988 after petitioner had already paid the value-added tax in question. Petitioner cannot therefore be faulted for not having first applied for the abovementioned zero rating since its payment of the value-added tax then indicates that petitioner was not aware that it was subject to zero rate until after the issuance of the BIR ruling. Accordingly, the claim for the erroneously paid value-added tax must be granted.

Finally, with respect to petitioner's claim for attorney's fees in the amount of P75,000.00 and the recovery of costs of suit, the rule is well-settled that costs of suit are not recoverable against government entities and officers when they are sued purely in their official capacity as was respondent in this case. And there being no showing that as such he acted in evident bad faith, the award of attorney's fees would be unjustified. (Philippine Veterans Affairs Office vs. Anover, 125 SCRA 354; Section 1, Rule 142, Rules of Court.)

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to grant a tax credit in favor of petitioner in the amount of P14,265.00, representing erroneously paid value-added tax. However, this court denies the claim for tax credit involving alleged erroneously paid contractor's tax in the amount of P379,538.36, as well as the P75,000 attorney's fee.

No pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, July 16, 1991.

ERNESTO D. ACOSTA
Associate Judge

WE CONCUR:

ALEX Z. REYES
Presiding Judge

CONSTANTE C. ROAQUIN
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ALEX Z. REYES
Presiding Judge
Court of Tax Appeals