Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

ABOITIZ CONSTRUCTION GROUP, INC. (formerly: GORONES DEV. CORP.),
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

EB CASE NO. 257
(CTA Case No. 6363)

Members:
ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

AUG 0 7 2007

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DECISION

CASANOVA, J.:

This is an appeal to the Court of Tax Appeals (CTA) *En Banc* by way of a verified Petition for Review, filed by herein petitioner, **Aboitiz Construcion Group, Inc. (formerly: Gorones Development Corporation)**, under Section 18 of R.A. 9282. The petition is praying that the Decision[1] (*Assailed Decision*) dated September 1, 2006 rendered by the Second Division of this Court (*CTA Second Division*) in CTA Case No. 6363 entitled, "***Aboitiz Construction Group Inc., (formerly: Gorones Development Corporation) vs. Commissioner of Internal Revenue***" as well as the Resolution[2] (*Assailed Resolution*) dated January 11, 2007 also of the Second Division be reconsidered and consequently grant its claim for refund. The Assailed Decision and Resolution denied

[1] *Division Rollo., pp. 320-377.*
[2] *En Banc Rollo., 41-48.*

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petitioner's claim for refund or issuance of a tax credit in the amount of P787,260.07.

THE FACTS

The facts of the case, as culled from the records, are as follows:

Petitioner is a corporation organized and existing under Philippine laws and is engaged mainly in construction business and leasing of heavy equipments, with principal office address at 3rd Floor, Chua Tiam Building, A. Del Pilar Street, Guizo, Mandaue City.

Sometime in January 1995, petitioner entered into a Contract Agreement with the DPWH for the construction/improvement of arterial roads and causeway of Metro Cebu Development Project Phase II. On August 15, 1996, another Agreement was executed between petitioner and the DPWH for the construction/restoration of Cebu Transcentral Road, Contract Package No. 06, Highway Management Project. The third Contract and Agreement was executed between the same parties on January 23, 1997 for the Implementation of Civil Works for Contract Package V, Buenavista-Talibon Section, Bohol Province, under the Arterial Road Development Project, Phase I (Bohol Circumferential Road Improvement Project). These government contracts allegedly gave rise to unutilized creditable withholding VAT in the amounts of P590,826.75 and P196,433.32, which were remitted on December 29, 1999 and January 10, 2000.

For the period October 1, 1999 to January 31, 2000, petitioner filed its Quarterly Value-Added Tax Return and Monthly Value-Added Tax Declaration reflecting an aggregate excess input tax in the amount of P40,565,046.99, as of January 31, 2000.

Petitioner believed that it has overpaid its output value-added tax (VAT) liability for the period October 1, 1999 to January 31, 2000 inasmuch as its monthly VAT declaration shows an excess input tax in the amount of

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P40,565,046.99 and part of it is the amount of P787,260.07 as creditable input VAT withheld by the DPWH.

Hence, on the basis thereof, petitioner filed on two separate occasions written applications for claim for refund or issuance of tax credit certificate with the Commissioner of Internal Revenue (hereafter "respondent"). The first application was filed on January 10, 2000 in the amount of P22,160,072.75 which included the sum of P590,826.75, while the second application was filed on January 8, 2001 in the amount of P2,328,098.30 which included the sum of P196,433.32.

On September 8, 2000, petitioner changed its corporate name from Gorones Development Corporation to Aboitiz Construction Group, Incorporated, as certified by the Securities and Exchange Commission through the Certificate of Filing of Amended Articles of Incorporation dated October 24, 2000.

On December 6, 2001, petitioner filed a Petition for Review with this Court in order to toll the running of the two-year prescriptive period under the law. The case was raffled to the *Second Division* of the CTA.

On January 10, 2002, respondent filed his Answer alleging by way of Special and Affirmative Defenses that the petitioner has failed to demonstrate that the taxes sought to be refunded were erroneously or illegally collected; that in an action for tax refund/credit, the burden of proof is upon the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit; that it is incumbent upon the petitioner to show that it has complied with the provision of *Section 204 in relation to Section 229 of the Tax Code, as amended*; and that claims for refund are construed strictly against the claimant for the same partakes of the nature of exemption from taxation.

Petitioner presented Luis Canete, Jimmy Bacalso, and Marichu Durangparang, as witnesses, and submitted documentary exhibits, which were admitted by the Court, with the exception of *Exhibits "C", "C-18, "D", and "D-18"*.

On the other hand, respondent submitted the case for decision, without presenting any evidence.

Thereafter, both parties were ordered to file their respective memoranda, within thirty (30) days from notice. Considering that only petitioner filed its Memorandum on March 12, 2004, the case was deemed submitted for decision on March 24, 2004.

On September 9, 2004, petitioner filed a "Motion To Reopen the Case For Further Presentation of Evidence", and there being no opposition from the respondent, the Court granted the said motion.

Petitioner presented Marichu Durangparang, Ramoncito Ona, Narciso Laguerta, Maria Soledad Maddela, Fe Caling, Ferrari Llamson, Jonathan Pecoro, as additional witnesses, and additional documentary exhibits, marked as *Exhibits "V", "VI"," W"," X"," Y"," Z"," AA", "BB"," CC", and "CC-1"*, which were admitted by the Court, with the exception of *Exh. "Y"*, for failure of petitioner to present the original document for comparison.

Thereafter, respondent was granted thirty (30) days from January 23, 2006 to file his Memorandum, while petitioner was given twenty (20) days from notice to file its Memorandum, afterwhich the case shall be deemed submitted for decision.

Considering that only the petitioner filed its "Supplemental Memorandum" on February 23, 2006, the case was deemed submitted for decision on March 23, 2006.

On September 1, 2006, the *Second Division* rendered the assailed Decision. The *Second Division* found that the subject claim for refund in the

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amount of P787,206.07, representing creditable VAT withheld, "had already been utilized by the petitioner based on [the Court's] evaluation" as of June 30, 2000 using the First-In-First-Out Rule. Consequently, petitioner's claim for refund was dismissed for lack of merit.

On September 19, 2006, petitioner filed a Motion for Reconsideration of the abovementioned Decision. The same was denied for lack of merit in a Resolution dated January 11, 2007.

Hence, this Petition for Review before the Court *En Banc* filed on February 19, 2007.

THE ASSIGNED ERRORS

Petitioner submits the following grounds in support of the Petition for Review for the resolution of the Court *En Banc*, to wit:

> "1. The Honorable *Second Division* disallowed petitioner's accrued excess input VAT which is not subject of the action and although the same has been validated by previous BIR investigation and such input VAT was not controverted by the Respondent.
>
> 2. RMC No. 42-99 and the ruling of this Honorable Court in Mitsubishi Corporation Tokyu Construction Co., LTD, A.M. Oreta & Co., Inc. and BF Corporation, operating as MTOB Consortium vs. Commissioner of Internal Revenue, CTA Case No. 6037 are applicable to the case at bar.
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> 3. Petitioner is entitled to the refund of the value added tax it has paid in favor of the BIR considering that the funds used [were] exempt from value added tax and from the 8.5[%] withholding VAT, thereby rendering the withholding illegal and thus refundable."

THE COURT EN BANC'S RULING

We find no merit in the petition.

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A careful and closer look at the arguments set forth by the petitioner in the instant petition would readily reveal that the grounds relied upon and the matters raised herein are mere restatements of petitioner's previous arguments raised before the Court in Division which had already been exhaustively discussed and passed upon in its assailed Decision and Resolution promulgated on September 1, 2006 and January 11, 2007, respectively.

Be that as it may, with the end view of further clarifying the matter, We shall discuss the grounds raised by petitioner.

As for the first ground, petitioner is claiming that the disallowed accrued excess input VAT is not the subject of the action and that the same has been validated by the respondent.

The Court *En Banc* does not agree.

An analysis of this case will reveal that the amount being claimed for refund or for the issuance of tax credit certificate in the amount of P787,260.07 represents overpaid *output VAT* on government contracts entered into by petitioner and the DPWH.

It is not enough for the petitioner to show that it erroneously paid its VAT obligations through excessive payment of creditable withholding VAT. Petitioner must also show that the said creditable withholding VAT remains unutilized or unapplied. The amounts claimed in the quarterly VAT returns, whether input tax, output tax or creditable withholding VAT, must be sufficiently established, as this will guide the Court in its verification if the creditable withholding VAT is indeed excessive.

Upon examination and evaluation of the quarterly VAT returns for the year 1998 and 1999, the Court *En Banc* agrees with the *Second Division*, that petitioner's creditable *input taxes earned during the respective quarters* were not fully substantiated and were not adequate to pay its *output VAT liability for the* *like quarters*[3] using the First-In First-Out Rule[4]. Hence, the applications of creditable VAT withheld during the said periods were made.

While it is true that petitioner had an excess creditable VAT withheld as of December 31, 1999 in the amount of P8,657,447.74[5], said sum was carried over by petitioner to the succeeding quarters, i.e., from the first quarter of 2000 to the fourth quarter of 2002 forming part of the "Total Available Input Taxes" in the corresponding quarterly VAT Returns[6] and which was utilized as tax payment for output tax as of June 30, 2000, reproduced here in table form:

Period Involved	Output VAT Liability	Excess Input VAT Credits	Remaining Input VAT
1st Qtr. 2000	3,329,666.22	**8,657,447.74**	5,327,781.52
2nd Qtr. 2000	5,401,278.83	5,327,781.52	(73,497.31)

The application of creditable VAT withheld as payment against output tax for the quarters ended March 31, 2000 and June 30, 2000 was in line with petitioner's option to carry over the said excess payment as available credit to the succeeding taxable calendar quarters' output tax.

It is clear therefore that petitioner has no cause of action when it filed the Petition for Review before the *Second Division* on December 6, 2001 because its alleged creditable VAT withheld had already been utilized as of June 30, 2000 based on *Our* examination.

As correctly stated by the *Second Division*, the amount of P787,260.07 sought to be refunded was only deducted in the fourth quarter of 2002[7] when the case was already filed with the Second Division on December 6, 2001. This clearly shows that as of December 6, 2001 when the Petition for Review before the Second Division was filed, the *alleged erroneously paid* creditable withholding

[3] *Pp. 17-18 of Assailed Decision.*
[4] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, 477 SCRA 779-780.*
[5] *Pp. 17-18 of Assailed Decision.*
[6] *Exhibits B-10, to B-18, O, R and T.*
[7] *Exhibit T-1*

VAT was still being claimed by petitioner as tax credit against output tax, while at the same time claiming it as excess payment. Such act is not legally allowable.

Furthermore, petitioner's claim that respondent has already validated the subject of the action is astray. The pieces of evidence[8] presented by petitioner pertain to the assessment of internal revenue taxes and not for the purposes of VAT refund. Respondent's determination of petitioner's tax liabilities for the years 1996 and 1997 will not in any way affect the Court's independent evaluation of petitioner's claim for refund.

As for the *second ground*, petitioner's reliance to RMC No. 42-99 as used in CTA Case No. 6037 is misplaced because the facts of this case is not similar in all fours. In CTA Case No. 6037, the Court ruled in favor of the petitioner[9] therein because it "was able to establish that the amount sought to be refunded was *neither utilized* in the year 1998 *nor carried over* to the succeeding taxable years 1999 and 2000 as evidenced by the amended quarterly VAT returns for the same years". Here, as *We* have mentioned earlier, petitioner *has already carried over* the excess creditable VAT withheld *and utilized* the same as tax payment for output tax as of June 30, 2000.

As for the *third ground*, this was well discussed and disposed with by the *Second Division* in the assailed Resolution dated January 11, 2007 being also the third issue in the Motion for Reconsideration filed by petitioner on September 19, 2006. After a careful study of the arguments raised by petitioner, the Court *En Banc* agrees with the findings of the Court *a quo*.

To reiterate, it should be stressed that nowhere in the standard clauses of Exchange of Notes between the Japanese Government and the Republic of the Philippines is there a provision that exempts the transaction of Japanese firms and nationals engaged in the funded project of the Overseas Economic

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[8] *Exhibits V, W, X, Z, CC, and the testimonies of Ramonicito Ona, Narciso Laguerter, Maria Soldedad Maddela, Fe Galing and Ferrari Llamson.*
[9] *Mitsubishi Corporation Tokyu Construction Co., Ltd., A.M. Oreta & Co., Inc. and BF Corporation, operating as MTOB Consortium.*

Cooperation Fund (OECF) from payment of *output value added tax*. The clauses merely prohibit the use of the fund in paying fiscal levies. This was clarified in BIR Ruling (DA-176-03), dated June 5, 2003, as follows:

> "The rule now is that no 8.5% VAT withholding will be imposed on JBIC-funded projects irrespective of the nationality of the contractor. **However, it should be clarified that notwithstanding the non-imposition of the advance VAT withholding, both Japanese and Filipino or non-Japanese contractors engaged in JBIC-funded projects <u>remain subject to the normal 10% VAT by way of output tax</u>. xxx"**

In sum, petitioner failed to prove before the Court *En Banc* its entitlement for the refund being sought here in this Petition. Hence, *We* cannot reverse or modify the assailed Decision and Resolution.

WHEREFORE, the instant Petition for Review is hereby **DENIED DUE COURSE** and **DISMISSED** for lack of merit. Accordingly, the September 1, 2006 Decision and January 11, 2007 Resolution of the *CTA Second Division* are hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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

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