REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CATERPILLAR MOTOREN GmbH
& CO. KG (Philippine Branch),
Petitioner,

- versus -

C.T.A. CASE NO. 6290

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 18 2003

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DECISION

This case involves a claim for the refund of alleged erroneously paid output and input VAT in the respective amounts of P1,968,224.68 (for the first quarter of 1999) and P9,256,822.06 (for the period January 1, 1999 to September 30, 1999). The petition for review alternatively prays that the case be treated as a claim for refund of overpaid corporate income tax in the amount of P3,054,751.28 for the calendar year 1999.

Petitioner is a resident foreign corporation organized and existing under the laws of Germany and duly licensed by the Securities and Exchange Commission to do business in the Philippines through a Philippine branch, with office address at the 20th Floor, Tower 1, The Enterprise Center, 6766 Ayala Avenue, Makati City, Metro Manila *(Paragraph 1, Stipulation of Facts, CTA records, page 71)*. It is licensed to engage in the business of acting as manager or managing agent of persons, corporations and other entities within the areas of power generation and transmission of other systems thereof,

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whether nuclear, hydroelectric or conventional, and providing consulting services such as project management, investment and technical advice for commercial, industrial, manufacturing and other kinds of enterprises engaged in the aforementioned areas *(Paragraph 8, Stipulation of Facts, CTA records, page 72).*

Petitioner was previously registered with the Securities and Exchange Commission on August 15, 1997 as "MAK MOTEREN GmbH" but has changed its name to "Caterpillar Motoren GmbH & Co. KG" under its amended SEC License No. A-1997-14239 dated March 6, 2001 *(Paragraph 7, Stipulation of Facts, CTA records, page 72; Exhibit A).* It is registered with the Bureau of Internal Revenue as a VAT taxpayer with Taxpayer Identification No. 005-373-681-V based on its BIR Certificate of Registration issued on August 22, 1997 *(Paragraph 9, Stipulation of Facts, CTA records, page 73; Exhibit B).*

On January 22, 1999, petitioner entered into a contract with CIP II Power Corporation (CIP II, for brevity), a company incorporated in the Philippines with principal office at Carmelray Industrial Park II, Barangay Punta, Calamba, Laguna, for the engineering, erection, construction, installation, completion, testing and commissioning of Phase 1 of a 52 mega-watt diesel power station of the latter in Calamba, Laguna *(Exhibit D).*

For the month of January 1999, petitioner recorded its sales from CIP II based on progress billings in the amount of P25,546,477.27 with a corresponding 10% output VAT of P2,554,647.73. Petitioner tried to pass on the 10% VAT to CIP II but the latter refused to pay alleging that it is a PEZA-registered Ecozone Utilities Enterprise *(Exhibits V and W)* and as such, it is exempt from payment of value-added tax under the 5% special tax

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incentive (which is in lieu of local and national taxes) granted under Republic Act No. 8748.

Petitioner claims that at the time that the dispute with CIP II arose, it was aware that its sales to CIP II may qualify as effectively zero-rated sales and VAT should not be due thereon provided that a prior application for zero-rating was filed with the Bureau of Internal Revenue pursuant to Section 4.107-1(d) of Revenue Regulations No. 7-95, as amended. However, it allegedly chose not to file said application because it was the policy of the BIR at the time to deny applications for effective zero-rating relative to sales to PEZA-registered enterprises which are not directly engaged in export activities. Instead, petitioner took a conservative approach to report its sales to CIP II as VAT taxable sales subject to 10% output VAT.

For the period November 1998 to August 1999, petitioner assumed and paid the 10% VAT on its sales to CIP II, to wit:

DATE	Exh.	Invoice Number	Fees Billed (in Pesos)	10% VAT (in Pesos)	Total Amount Billed
11-11-98	F-1	135	P 25,546,477.00	P2,554,648.00	P 28,101,125.00
02-22-99	F-2	151	10,407,635.00	1,040,763.00	11,448,398.00
04-15-99	F-3	154	5,982,172.00	598,217.00	6,580,389.00
05-07-99	F-4	155	9,230,312.91	923,031.29	10,153,344.20
05-27-99	F-5	156	15,011,052.48	1,501,105.25	16,512,157.73
06-16-99	F-6	158	8,016,638.06	801,663.80	8,818,301.86
07-08-99	F-7	159	9,061,832.89	906,183.29	9,968,016.18
08-09-99	F-8	160	9,772,123.30	977,212.33	10,749,335.63
10-18-99	F-9	164	6,092,297.92		6,092,297.92
09-20-99	F-10	165	10,641,023.61		10,641,023.61
12-31-99	F-11	167	12,773,238.60		12,773,238.60
12-31-99	F-12	169	82,166.32		82,166.32
12-31-99	F-13	170	5,115,413.41		5,115,413.41
Total			P127,732,383.50	P9,302,823.96	P137,035,207.46

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Consequently, petitioner filed its Quarterly Value-Added Tax Returns for the period January 1, 1999 to September 30, 1999, reflecting its taxable sales and accumulated input VAT payment and credits as follows:

1999	Exh.	Taxable Sales	VATOutput Tax	VAT Input Domestic	Monthly VAT Payment	Excess Input VAT Payment
1st Qtr.	H	P25,546,480.00	P2,554,648.00	P 4,541,740.31	P1,968,224.68	P 3,955,316.99
2nd Qtr.	I	39,417,490.50	3,941,749.05	3,473,182.71	-	3,486,750.65
3rd Qtr.	J	-	-	3,101,794.74	-	6,588,545.39
Totals		P64,963,970.50	P6,496,397.05	P 11,116,717.76	P1,968,224.68	

On September 15, 1999, upon advice that the BIR will soon issue clarificatory guidelines with respect to the VAT treatment of sales to PEZA registered enterprises, petitioner filed its Application/Certificate for Zero-Rate with the BIR regarding its contract with CIP II *(Annex G, Petition for Review).* The said application was approved by the BIR on the same day.

On October 15, 1999, the BIR issued Revenue Memorandum Circular No. 74-99 declaring that any sale of goods, property or services made by a VAT-registered supplier from the Customs Territory to any PEZA-registered enterprise, regardless of the class or type of the latter's PEZA registration, is legally entitled to the zero percent (0%) VAT.

On April 17, 2000, petitioner filed its 1999 Annual Income Tax Return *(Exhibit O).*

On April 20, 2001, on the basis of the aforementioned RMC 74-99, petitioner simultaneously amended its quarterly VAT returns for the first three quarters of 1999, reflecting the following data:

1999	Exh.	Taxable Sales	VAT Output Tax	VAT Input Domestic	VAT Refund TCC Claimed	Excess Input VAT Payment
1st Qtr.	L	P25,546,480.00	-	P 4,541,740.31	P3,049,259.89	P1,492,480.42
2nd Qtr.	M	39,417,490.50	-	3,473,182.71	3,441,221.88	1,524,441.25
3rd Qtr.	N	-	-	3,101,794.74	2,766,340.29	1,859,895.70
Totals		P64,963,970.50	-	P11,116,717.76	P9,256,822.06	

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On April 23, 2001, petitioner filed an Application for Tax Credits/Refunds with Revenue Region No. 8, Makati of the Bureau of Internal Revenue, together with a letter-claim for refund in the total amount of P11,225,046.74, broken down as follows: *(Exhibit C, inclusive of submarkings)*:

Erroneously paid output VAT	P 1,968,224.68
Creditable input taxes attributable to purchases made in 1999 in connection with its services to CIP II	9,256,822.06
Total	P11,225,046.74

On April 24, 2001, petitioner filed the instant petition for review in order to toll the running of the two-year prescriptive period under the law.

In his Answer filed through registered mail on August 10, 2001, respondent raised the following Special and Affirmative Defenses:

3. Revenue Memorandum Circular No. 74-99 has no retroactive application and petitioner's alleged registration with the BIR as effectively zero-rated taxpayer is also not retroactive;

4. Petitioner's claim is partially barred by the statute of limitations;

5. The issue raised by petitioner in Paragraph 23.3 deals on matters different from the issues in this case and not included in the petitioner's administrative claim for refund, hence, irrelevant;

6. Petitioner failed to show compliance with the substantiation requirements under the provision of Section 16(c)(3) of Revenue Regulations No. 5-87, as amended by Revenue Regulations No. 3-88;

7. Petitioner failed to show that the alleged VAT input taxes were not applied to the output tax for the period covered in its claim or on any succeeding period;

8. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 35);

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9. One who claims to be exempt from payment of a particular tax must do so under clear and unmistakable terms found in the statute (Asiatic Petroleum vs. Llanes, 49 Phil. 466; Union Garment Co. vs. Court of Tax Appeals, 4 SCRA 304);

10. In action for refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund;

11. It is incumbent upon petitioner to show compliance with the provisions of Section 229 of the National Internal Revenue Code; and

12. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.

The issues to be resolved by the court as jointly stipulated by the parties are the following:

(a) Whether or not petitioner's gross receipts for services rendered to CIP II Power Corporation during the first three quarters of 1999 qualify as zero-rated sales under Section 108(B)(3), NIRC and Revenue Memorandum Circular No. 74-99;

(b) Whether or not, as a result of such zero-rated sales, the petitioner erroneously paid output VAT of P1,968,224.68 on its gross receipts from services to CIP II Power Corporation for the first quarter of 1999;

(c) Whether or not petitioner has excess or unused input VAT of P9,256,822.06 for the first three quarters of 1999 based on domestic purchases from various suppliers of goods and services attributable to such zero-rated sales of services to CIP II Power Corporation;

(d) Whether or not petitioner's claim for VAT refund is properly supported and substantiated; and

(e) Whether or not petitioner's administrative claim for refund with the BIR and the Petition for Review were filed within the 2-year prescriptive period under the NIRC.

Anent the first issue, petitioner asserts that its sales to CIP II are subject to VAT at 0% pursuant to Section 108(B)(3) of the Tax Code which provides:

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

(A) Rate and Base of Tax. xxx.
(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;
(1) xxx;
(2) xxx;
(2) 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;

Petitioner further cited as basis Revenue Memorandum Circular No. 74-99 dated October 15, 1999 which pertinently declared in part, thus:

3. In the final analysis, any sale of goods, property or services made by a VAT registered supplier from the Customs Territory to any registered enterprise operating in the ecozone, regardless of the class or type of the latter's PEZA registration, is actually qualified and thus legally entitled to the zero percent (0%) VAT. Accordingly, all sales of goods or property to such enterprise made by a VAT registered supplier from the Customs Territory shall be treated subject to 0% VAT, pursuant to Sec. 106(A)(2)(a)(5), NIRC, in relation to ART. 77(2) of the Omnibus Investments Code, while <u>all sales of services to the said enterprises, made by VAT registered suppliers from the Customs Territory, shall be treated effectively subject to the 0% VAT, pursuant to Section 108(B)(3), NIRC, in relation to the provisions of R.A. 7916 and the "Cross Border Doctrine" of the VAT system</u>.

This Circular shall serve as a sufficient basis to entitle such supplier of goods, property or services to the benefit of the zero percent (0%) VAT for sales made to the aforementioned ECOZONE enterprises and shall serve as sufficient compliance to the requirement for prior approval of zero-rating imposed by Revenue Regulations No. 7-95 <u>effective as of the date of the issuance of this Circular</u>. *(Underlining supplied)*.

Based on the foregoing provisions, petitioner now seeks the refund of input VAT it paid during the period January 1, 1999 to September 31, 1999 in accordance with Section 112(A) of the Tax Code, to quote:

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> 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 proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP); *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

Respondent, in his Answer, avers that RMC No. 74-99 dated October 15, 1999 and petitioner's approved application for zero-rating dated September 15, 1999 have no retroactive application. It follows then that since petitioner's claim for refund covers the period January 1, 1999 to September 30, 1999, RMC 74-99 dated October 15, 1999 or the approved application for zero-rating dated September 15, 1999 (which categorically stated "Valid only for sale of goods from SEP 15 1999 up to DEC 31 1999 xxx") cannot be applied retroactively.

There is no argument that while petitioner is aware that its sales to CIP can only be subject to 0% rate of VAT once it has secured approved application for zero-rating, it nevertheless invoked good faith as its reason for not obtaining the required approval for zero-rating. Petitioner further posits that the absence of approved application for effective zero-rating does not alter the fact that its sales to CIP II, a PEZA-registered Ecozone Utilities Enterprise, is subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code and as declared in RMC No. 74-99 dated October 15, 1999.

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Hence, the court is tasked to resolve the corollary issue of whether or not RMC No. 74-99 can be applied retroactively to petitioner's situation.

We answer in the negative.

While under Section 246 of the Tax Code, any revocation, modification or reversal of any of the rules and regulations promulgated may be given retroactive application if the same will be beneficial to the taxpayers, the rule cannot be applied to petitioner's case inasmuch as Revenue Regulations No. 7-95 was still in effect during the time covered by this petition and was not declared invalid. Thus, the requirements imposed by said regulations should be met. It is to be noted that RMC No. 74-99 itself provides that it shall be effective only as of the date of its issuance. Clearly, at the time the transactions covered by this petition took place, the applicable law was Revenue Regulations No. 7-95. Hence, prior approval for zero-rating must be obtained by a person other than engaged in actual export before it can subject its sale to 0% VAT pursuant to Section 4.107.1 of Revenue Regulations No. 7-95, thus:

> SECTION 4.107-1. *Registration of Value Added Taxpayers. (a) xxx*
>
> (d) Application for effective zero-rating.-Except for actual export sale, other cases of zero-rated sales in Sec. 4.100-3 and Sec. 4.102-2 (c) shall require prior application with the Revenue District Office for effective zero-rating. Without an approved application for effective zero-rating, the transaction otherwise entitled to zero-rating shall be considered exempt.

This was emphasized by the Court of Appeals in the case of ***Mirant (Navotas II) Corporation (Southern Energy Navotas II Power, Inc. [formerly Hopewell Energy Philippines] Corporation) vs. Commissioner of Internal Revenue, CA-G.R. SP No. 64811, dated October 9, 2002,*** wherein it ruled this wise:

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> "While there is no question that on March 1, 1996 petitioner Mirant applied for effective zero-rating with the Revenue District Office No. 51 in Pasay City, the fact remains that in 1999 when petitioner Mirant asked for a refund of its input VAT, it still had no approved application for zero-rating since the BIR had yet to act on its application. Petitioner Mirant's argument that said requirement constitutes an improper exercise of the Secretary of Finance's rule-making power is not well-taken. In the first place, prior to its appeal, petitioner Mirant did not question the legality or validity of this requirement. However, considering that the BIR did not act on the application for zero-rating due consideration must be given to their case. **But what is important is that the requirement is not improper rule-making. Requiring VAT-registered entities to first apply for zero-rating is needed to ensure that only those which are qualified should be entitled to refund their input VAT. Given their complexity and their ability to confuse even the experts, this Court cannot leave the interpretation of our tax laws, i.e., on who is entitled to zero-rating and who is not, entirely to the taxpayer. Thus, in this case the taxpayer, petitioner Mirant, cannot alone determine for itself if it is a zero-rated entity, no matter how accurate that determination might be. It must still secure the approval or recognition of the government that it is in fact, a zero-rated entity.** *(Emphasis supplied).*

In the aforementioned case, the Court of Appeals favored Mirant even it has no approved application for zero-rating. However, it bears stressing that petitioner's case does not fall squarely with the factual milieu of Mirant case. In the case of Mirant, petitioner had a long pending application for effective zero-rating dated March 1, 1996 which BIR failed to act upon until it opted for a judicial recourse. Contrariwise, in the present case, petitioner chose not to file an application for zero-rating and took a conservative approach to treat its sales to CIP II as VAT taxable transaction. Necessarily, these dissimilarities of facts lead to a different conclusion.

Foremost, the requirement of securing a prior approval for zero-rating under Revenue Regulations No. 7-95 is not an improper rule-making. Secondly, in its own volition, petitioner did not apply for effective zero-rating. Thirdly, petitioner took a conservative approach to treat its sales to CIP II as subject to VAT at 10%. Lastly, there was an absence of an attempt or initiative on the part of petitioner to secure an approved application for zero-rating. Petitioner should, therefore, be firm in its position to treat its sales to CIP II as subject to VAT at 10%. This action of petitioner is bound by Article 1431 of the Civil Code which provides that through estoppel an admission or representation is rendered conclusive upon the person making it and cannot be denied or disproved as against the person relying thereon.

Likewise, Section 2, Rule 131 of the Rules of Court states that-

> Conclusive presumptions.-The following are instances of conclusive presumptions:
>
> (a) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

The filing of a VAT return is *prima facie* evidence that a taxpayer duly engaged in business is complying with the mandate of the law. The declaration made by the taxpayer in such return creates a conclusive presumption that he was knowledgeable of the facts stated therein and had made the same in accordance with the provisions of the Tax Code.

Therefore, this court affirms that petitioner correctly reported its sales to CIP II as VAT taxable sales for the period January 1, 1999 to September 30, 1999 and that RMC Circular No. 74-99 dated October 15, 1999 should be given prospective application. Petitioner having been properly recorded its sales to CIP II as subject to VAT at 10%, the claim for refund for input and output VAT as well as its alternative prayer for refund of corporate income tax cannot be granted. Accordingly, this court finds it unnecessary to delve on the other issues raised.

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WHEREFORE, in view of the foregoing, the petition for review is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

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

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