REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CARMEN COPPER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9954

Members:

DEL ROSARIO, *P.J., Chairperson,*
MANAHAN, and
BACORRO-VILLENA,[1] *JJ.*

Promulgated:

MAY 31 2022 8:05 am

x - x

RESOLUTION

DEL ROSARIO, *P.J.*:

For resolution is respondent's **MOTION FOR PARTIAL RECONSIDERATION (Re: Amended Decision promulgated 16 December 2021)** filed on February 24, 2022,[2] with petitioner's **COMMENT (To Respondent's Motion for Partial Reconsideration) [Re: Amended Decision promulgated 16 December 2021]** filed on March 28, 2022,[3] praying for the partial reversal and setting aside of this Court's Amended Decision dated December 16, 2021,[4] the dispositive portion of which reads as follows:

> "**WHEREFORE**, in light of the foregoing considerations, petitioner's *Motion for Leave of Court to Reopen the Case for the Recall of a Witness*, is **DENIED** for lack of merit.
>
> However, petitioner['s] *Motion for Reconsideration* is **PARTIALLY GRANTED.** Accordingly, the Court's

[1] Designated as Special Member per Memorandum dated January 7, 2021.
[2] Docket, pp. 605 to 615.
[3] Docket, pp. 731 to 736.
[4] Docket, pp. 583 to 604.

Decision dated February 2, 2021, is hereby amended to read as follows:

'**WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is **PARTIALLY GRANTED**.

Respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** to petitioner Carmen Copper Corporation the total amount of **₱28,927,621.59,** representing petitioner's excess and unutilized input VAT on importations attributable to zero-rated sales for the 2nd quarter of taxable year 2016, broken down as follows:

(i) **₱20,041,479.05**, granted per Letter dated September 19, 2018 of Ms. Erlinda A. Simple, Assistant Commissioner of Internal Revenue; and,

(ii) **₱8,886,142.54**, pertaining to the difference between the amount of ₱28,927,621.59, representing the duly substantiated excess and unutilized input VAT on petitioner's importation of goods attributable to petitioner's zero-rated sales for the 2nd quarter of taxable year 2016 as found by the Court, and the amount of ₱20,041,479.05 as indicated in *(i)*.

SO ORDERED.'

SO ORDERED."

In his *Motion*, respondent opines that this Court erred in ruling that petitioner is entitled to refund in the reduced amount of ₱28,927,621.59, representing alleged excess and unutilized input value-added tax (VAT) for the second quarter of taxable year 2016. He argues that the law requires that only *"creditable input taxes"* that are *"directly attributable"* may be refunded; that no attributability was established between the input tax on purchases *vis-à-vis* the zero-rated sales of petitioner; and that this is a claim for refund and petitioner must establish its claim by the required quantum of evidence and not by assumption.

Furthermore, respondent invokes a supposed *"British Government Guide"* to support his stand that *"as it is in Europe, not all input tax from purchases by a business is creditable as input tax"* and *"(o)nly those 'related' to the supplies made can be claimed."*

For its part, petitioner counter-argues that it was able to prove that its sole activity is the export of minerals upon which all its purchases are directly related to; that the facts were not only uncontroverted, but effectively admitted by respondent; that respondent's motion failed to grasp the concept of *"creditability"* under the VAT law; that *"creditable"* input tax, as the name implies, pertains to an input tax that had already passed the test of creditability under Section 110, Tax Code of 1997; and that the Tax Code of 1997 does not require that only input taxes that are *"directly attributable"* could be *"creditable"* and the subject of a claim for refund.

THE COURT'S RULING

Respondent's *Motion for Partial Reconsideration* lacks merit, and thus, must be denied.

Upon failure of respondent to timely plead and prove before this Court the defenses or objections that he is raising in the subject *Motion for Partial Reconsideration*, respondent is deemed to have waived the same.

In *Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue*,[5] the Supreme Court held as follows:

> "Rule 9, Section 1 of the Rules of Court provides:
>
> > SECTION 1. *Defenses and objections not pleaded.* – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute

---

[5] G.R No. 157594, March 10, 2010.

> of limitations, the court shall dismiss the claim.
>
> The CIR did not argue straight away in his Answer in CTA Case No. 5762 that Toshiba had no right to the credit/refund of its input VAT payments because the latter was VAT-exempt and its export sales were VAT-exempt transactions. The Pre-Trial Brief of the CIR was equally bereft of such allegations or arguments. The CIR passed up the opportunity to prove the supposed VAT-exemptions of Toshiba and its export sales when the CIR chose not present any evidence at all during the trial before the CTA. He missed another opportunity to present the said issues before the CTA when he waived the submission of a Memorandum. The CIR had waited until the CTA already rendered its Decision dated October 16, 2000 in CTA Case No. 5762, which granted the claim for credit/refund of Toshiba, before asserting in his Motion for Reconsideration that Toshiba was VAT-exempt and its export sales were VAT-exempt transactions.
>
> The CIR did not offer any explanation as to why he did not argue that VAT-exemptions of Toshiba and its export sales before and during the trial held by the CTA, only doing so in his Motion for Reconsideration of the adverse CTA judgment. Surely, said defenses or objections were already available to the CIR when the CIR filed his Answer to the Petition for Review of Toshiba in CTA Case No. 5762.
>
> **It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.** xxx." *(Emphasis added)*

In this case, respondent is raising new issues which by due diligence could have been raised in previous pleadings.

It is noteworthy that respondent did not argue straight away in his *Answer*[6] that no attributability was established between the input tax on purchases *vis-à-vis* the zero-rated sales of petitioner, and that the law requires that only *"creditable input taxes"* that are *"directly attributable"* may be refunded. This is despite the fact that the BIR has already examined and partially granted the administrative claim for refund of petitioner. Notably, the results of the BIR's findings do *not* disclose that petitioner's input VAT is not attributable to its zero-rated sales for the subject period, and that the same is not creditable. In other words, respondent has impliedly admitted the said input

---

[6] Docket, pp. 167 to 174.

VAT's attributability to petitioner's zero-rated sales, and as to its creditability.

Furthermore, *Respondent's Pre-Trial Brief*[7] is equally bereft of such allegations or arguments. In fact, respondent manifested therein that he *"will submit this case on pure question of jurisdiction and therefore will no longer present any witness"*, thereby disclosing his stance that there is no issue or objection regarding the said attributability and creditability. Moreover, respondent passed up the opportunity to prove the supposed absence of attributability and creditability when he chose not to present any evidence at all during the trial. Respondent missed another opportunity to present the said issues when he, in his *Memorandum*,[8] merely reiterated *verbatim* his objections or defenses, as stated in his *Answer*. Respondent had to wait, not only after this Court's Decision dated February 2, 2021, but after the promulgation of the assailed Amended Decision dated December 16, 2021, before asserting, in the present *Motion for Partial Reconsideration*, the subject defenses or objections.

Clearly, respondent has effectively waived the said defenses or objections. Thus, respondent cannot now argue against the attributably and creditability of petitioner's input VAT.

Nevertheless, even granting that this Court may allow respondent to raise new issues at this late stage, respondent's argument that the law requires that only *"creditable input taxes"* that are *"directly attributable"* may be refunded is erroneous. The National Internal Revenue Code (NIRC) of 1997, as amended, says otherwise.

Section 112(A) of the NIRC of 1997, as amended, does not require that the refundable creditable input VAT must be "directly attributable" to zero-rated sales. Furthermore, the same law states that the input VAT on importation is creditable.

Section 112(A) of the NIRC of 1997, as amended by Republic Act (RA) No. 9337,[9] provides, in part, as follows:

---

[7] Docket, pp. 185 to 187.
[8] Docket, pp. 481 to 488.
[9] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113,

ovn

"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 <u>attributable</u> to such sales**, except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx *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 **<u>cannot be directly and entirely attributed</u> to any one of the transactions**, it shall be allocated proportionately on the basis of the volume of sales: xxx." *(Emphasis and underscoring added)*

A plain reading of the foregoing provision reveals that the law merely states that the creditable input VAT should only be *"attributable"* to the zero-rated or effectively zero-rated sales. In other words, nowhere does the above-quoted Section 112(A) say that the refundable creditable input VAT should be *"**directly** attributable"* to such sales. It is elementary that where the law does not distinguish, none must be made. *Ubi lex non distinguit nec nos distingere debemos.*[10]

While, admittedly, the words *"directly...attributed"* were used under the aforequoted provision, the same merely relate to a situation where the creditable input VAT cannot be *"directly...attributed"* to any transaction. It does **not**, in any way, qualify the preceding sentences of the said Section 112(A) which will have the effect of restricting the refundable input VAT to only those which are *"directly attributable"* to zero-rated or effectively zero-rated sales.

Consistent with Section 112(A), Section 110(A)(3) of the NIRC of 1997, as amended by RA No. 9337, reads as follows:

"SEC. 110. *Tax Credits.* –

114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

[10] *Commissioner of Internal Revenue vs. Commission on Audit, etseq.*, G.R. Nos. 101976 and 102258, January 29, 1993.

OWI

(A) *Creditable Input Tax. –*

xxx xxx xxx

(3) A VAT-registered person who is also engaged in transactions not subject to the value-added tax shall be allowed tax credit as follows:

(a) Total input tax which can be directly attributed to transactions subject to value-added tax; and

(b) A ratable portion of any input tax **which <u>cannot</u> be directly attributed to either activity**.

xxx xxx xxx." *(Emphasis and underscoring added)*

Based on the foregoing provision, it is clear that input VAT may still be credited to the output VAT even when it *"cannot be directly attributed to either activity."* In other words, the law recognizes that an input VAT may still be credited even when the same is **not** *directly* attributable to the zero-rated sales of a VAT-registered person.

Thus, there is no legal basis for respondent's stand that the fact of *"direct attributability"* must be established for input VAT to be refundable.

Furthermore, the same Section 110(A)(2) provides as follows:

"SEC. 110. *Tax Credits. –*

(A) *Creditable Input Tax. –*

xxx xxx xxx

(2) **The input tax on** domestic purchase or **importation of goods or properties by a VAT-registered person <u>shall be creditable</u>**:

(a) **To the purchaser** upon consummation of sale and **on importation of goods or properties**; and

(b) **To the importer upon payment of the value-added tax prior to the release of the goods from the custody of the Bureau of Customs**.

xxx xxx xxx

The term 'input tax' means the value-added tax due from or paid by a VAT-registered person in the course of his trade or business on importation of goods or local purchase of goods or services, including lease or use of property, from a VAT-registered person. xxx."

Based on the foregoing provisions, it is clear that the input VAT on, *inter alia*, importation of goods or properties by a VAT-registered person shall be creditable, to the purchaser, on importation of goods or properties, or to the importer, upon payment of the value-added tax prior to the release of the goods from the custody of the Bureau of Customs.

In this case, it is already settled that only the portion of the input VAT arising from petitioner's importations shall be taken into account in determining the refundable input VAT amount.

Correspondingly, in the Decision dated February 2, 2021, the Court found and ruled as follows, *viz.*:

"Based on the examination conducted by the ICPA, out of petitioner's total input tax for the period amounting to ₱42,574,800.49, the amount of ₱41,259,296.89 pertains to importation of goods, which are either classified as capital goods exceeding ₱1 Million or non-capital goods, as shown below:

Amortization of input tax on capital goods exceeding ₱1M	₱ 18,610,258.89
Input tax on importation of goods other than capital goods	22,649,038.00
Total	**₱41,259,296.89**

Anent the amortization of input tax on importation of capital goods exceeding ₱1 Million in the amount of ₱18,610,258.89, the Court notes the following exceptions found by the ICPA amounting to ₱155,898.37, which shall be disallowed for failure to meet the substantiation requirements under the previously mentioned law and regulations:

ICPA's findings	Reference to ICPA Report/ Exhibit Nos.	Input VAT Amount
Amortization of input tax deferred on importation of capital goods properly supported only by photocopied Statement of Settlement of Duties	Annex B-24 (Exhibits 'P-60-1A' to 'P-60-1C')	₱ 17,735.85

M

and Taxes ("SSDT")/ Bank/Bureau of Customs ("BOC") official receipts ("ORs") and BOC Import Entry & Internal Revenue Declarations ("IEIRD") and/or invoices		
Amortization of input tax deferred on importation of capital goods without supporting documents	Annex B-25	138,162.62
Rounding Difference		(0.10)
Not Properly Substantiated		**₱155,898.37**

Consequently, only the amortization of input tax on importation of capital goods exceeding ₱1 Million amounting to ₱18,454,360.52 was duly supported by SSDTs, IEIRDs and invoices.

As regards the input tax on importation of goods other than capital goods in the amount of ₱22,649,038.00, the Court finds the same as valid input tax credit, being duly supported by SSDTs, IEIRDs, and/or invoices."[11] *(Emphasis added)*

Verily, as shown above, there is no question that the subject importations of petitioner were properly substantiated, and thus, are creditable against its output VAT, pursuant to Section 110(A)(2) of the NIRC of 1997, as amended.

WHEREFORE, in light of the foregoing considerations, respondent's **MOTION FOR PARTIAL RECONSIDERATION (Re: Amended Decision promulgated 16 December 2021)** is **DENIED** for lack of merit.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

[11] Citations omitted. Decision dated February 2, 2021, pp. 41 to 42; Docket, pp. 538 to 539.

WE CONCUR:

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice