REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

****

BURMEISTER AND WAIN SCANDINAVIAN CONTRACTOR MINDANAO, INC., Petitioner,	**C.T.A. CASE NO. 6220**
	Members:
- versus -	**ACOSTA,** *Chairperson* **BAUTISTA,** and **CASANOVA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 17 2008, 9:00 a.m.

x - x

DECISION

BAUTISTA, *J.*:

Through a Decision dated April 19, 2005, this case was remanded to Us by the Court of Appeals for the reception of petitioner's evidence, consisting of VAT invoices and receipts, in support of petitioner's claim for refund/issuance of tax credit certificate in the amount of P1,834,388.55, representing unutilized input VAT attributable to zero-rated sales of services for the fourth quarter of 1998.

Petitioner is a Filipino corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal business address at

1343

Daruma Building, Jose P. Laurel Avenue, Lanang, Davao City.[1] It was incorporated on November 23, 1993, primarily to construct, erect, assemble, commission, operate, maintain, rehabilitate and manage industrial and power-generating plants and related facilities for the conversion into electricity of coal distillate, and other fuel provided by and under contract with the Philippine Government, or any government-owned and controlled corporations, or other entities engaged in the development, supply or distribution of electricity.[2]

Records disclose that a consortium of non-resident foreign corporations (Consortium) composed of Burmeister and Wain Scandinavian Contractor A/S (BWSC Denmark), Mitsui Engineering and Shipbuilding, Ltd., and Mitsui Co., Ltd. entered into an Operations and Maintenance (O&M) Agreement with the National Power Corporation (NAPOCOR) for the operation and maintenance of the latter's two 100-Megawatt power barges. As the appointed Coordination Manager of the Consortium, BWSC Denmark established herein petitioner Burmeister and Wain Scandinavian Contractor, Mindanao, Inc. (BWSCMI) to subcontract the actual operation and maintenance of the two power barges and to perform the duties and acts which necessarily have to be done in the Philippines. In consideration for the services rendered by petitioner, the Consortium shall compensate and remunerate, by way of fees paid by inward remittance to petitioner in convertible foreign currency, the equivalent of all reasonable and legitimate expenses incurred by petitioner plus a certain fee. The subcontract agreement shall terminate on the date the power barges are returned to NAPOCOR under the O&M Agreement.[3]

---

[1] Par. 1, Summary of Admitted Facts, Joint Stipulation of Facts, Docket, p. 56
[2] Exhibit "P"
[3] TSN, June 4, 2001, pp. 6-7; Exhibit "P"

1344

On February 14, 1995, petitioner was issued BIR Ruling No. 023-95 which stated that:

> "3. BWSC-Mindanao, being a duly registered corporation engaged in trade or business in the Philippines, is subject to ordinary Philippine corporate income tax. Its gross receipts from the services it renders to the Consortium shall, however, be subject to VAT even if it fails to register as a VAT taxpayer. On the other hand, if it chooses to register as such, and the consideration for such services is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas, the aforesaid services shall be subject to zero-rate. (VAT Ruling No. 96-90 dated April 10, 1990)."

On May 26, 1995, petitioner registered as a value-added tax (VAT) taxpayer and was issued a Certificate of Registration bearing RDO Control No. 95-113-007556.[4]

On January 7, 1999, the Bureau of Internal Revenue (BIR) reconfirmed BIR Ruling No. 023-95 in its VAT Review Committee Ruling No. 003-99, declaring that: "(o)n this basis, BIR Ruling No. 023-95 dated February 14, 1995 is expressly reconfirmed insofar as it held that the services being rendered by BWSCMI is subject to zero percent (0%) VAT".

On January 21, 1999, petitioner filed its Quarterly VAT Return for the fourth quarter of 1998, reflecting zero-rated sales of P68,761,361.50 and input VAT of P1,834,388.55 paid on its domestic purchases of goods and services for the said quarter.[5]

Believing that its sales of services to the Consortium are VAT zero-rated, on July 21, 1999, petitioner filed an Application for Tax Credit/Refund of Value-Added Tax Paid for the period of July to December 1998 in the amount of P4,154,969.51.[6]

---

[4] Exhibit "C"
[5] Exhibit "B"
[6] Exhibit "A"

1345

Since respondent did not act on the aforesaid claim, petitioner filed the instant Petition for Review with this Court on January 9, 2001, praying for the refund or issuance of tax credit certificate in the amount of P1,834,388.55 representing alleged unutilized input VAT payment for the fourth quarter of 1998.

After trial on the merits, this Court rendered a Decision dated January 29, 2003, denying the Petition for Review due to insufficiency of evidence for petitioner's failure to submit the suppliers' invoices and official receipts verified by the Court-commissioned auditing firm, Punongbayan and Araullo.

On February 26, 2003, petitioner filed its Motion for Reconsideration of the Decision dated January 29, 2003, with prayer to admit the attached copies of suppliers' invoices and official receipts.

On August 26, 2003, this Court issued a Resolution denying petitioner's Motion for Reconsideration for lack of merit and upholding the January 29, 2003 Decision.

On October 3, 2003, petitioner filed a Petition for Review with the Court of Appeals (CA), docketed as CA-G.R. SP No. 79272, questioning the January 29, 2003 Decision and August 26, 2003 Resolution of this Court. In that Petition for Review, petitioner prayed that judgment be rendered either admitting in evidence the suppliers' invoices and official receipts subject of the commissioned independent CPA's report or allowing the formal presentation of said evidence.

Respondent filed his Motion to Admit Comment dated May 5, 2004. After which, petitioner filed its Reply on October 25, 2004.

In line with the Supreme Court's ruling in the case of **BPI-FAMILY SAVINGS BANK, Inc., vs. COURT OF APPEALS, COURT OF TAX APPEALS and the**

1346

COMMISSIONER OF INTERNAL REVENUE[7], the CA rendered a Decision dated April 19, 2005, remanding the case to this Court for the determination of petitioner's claim for refund and ordering that the VAT invoices and receipts attached to petitioner's Motion for Reconsideration be allowed and considered by this Court.

In compliance with the Decision of the CA, further proceedings in this case were performed for the presentation of the suppliers' official receipts and invoices.

On September 21, 2007, this case was submitted for decision after considering petitioner's Memorandum filed on July 6, 2007, sans respondent's Memorandum.

The issues as stipulated by the parties are as follows:

"1. Whether or not the payments for the services of BWSCMI qualify as zero-rated transactions;

2. Whether or not BWSCMI's claim for refund is substantiated by documentary evidence; and

3. Whether or not petitioner is entitled to the refund claim."

Petitioner anchors its claim on Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, which provides as follows:

> "**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). xxx"

[7] G.R. No. 122480, April 12, 2000

1347

Based on the foregoing, in order to be entitled to a refund or tax credit of input VAT paid or incurred attributable to zero-rated or effectively zero-rated sales, the following requisites must be complied with:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are directly attributable to zero-rated sales or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

As to the first requisite, petitioner maintains that its sales of services to the Consortium qualify for VAT zero-rating under Section 108(B)(2) of the NIRC of 1997, which states:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties*. -
>
> xxx xxx 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) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);
>
> (2) Services other than those mentioned in the preceding paragraph, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);"

To support its stance, petitioner invokes BIR Ruling No. 023-95 dated February 14, 1995 and VAT Review Committee Ruling No. 003-99 dated January 7, 1999, which confirmed that petitioner's sales of services to the Consortium are indeed subject to VAT at zero rate.

1348

Applicable to the present case is the earlier case of **COMMISSIONER OF INTERNAL REVENUE vs. BURMEISTER AND WAIN SCANDINAVIAN CONTRACTOR MINDANAO, INC.**[8], involving a claim for refund of erroneously paid output tax for taxable year 1996 involving the same parties. In that previous case, the Supreme Court declared that to avail of VAT zero-rating, petitioner's services must be rendered to persons doing business outside the Philippines, and further reasoned that:

> "The Tax Code not only requires that the services be other than 'processing, manufacturing or repacking of goods' and that payment for such services be in acceptable foreign currency accounted for in accordance with BSP rules. Another essential condition for qualification to zero-rating under Section 102 (b) (2) **is that the recipient of such services is doing business *outside* the Philippines**. While this requirement is not expressly stated in the second paragraph of Section 102 (b), this is clearly provided in the first paragraph of Section 102 (b) where the listed services must be **'for other persons doing business outside the Philippines.'** The phrase 'for other persons doing business outside the Philippines' not only refers to the services enumerated in the first paragraph of Section 102 (b), but also pertains to the general term 'services' appearing in the second paragraph of Section 102 (b). In short, services other than processing, manufacturing, or repacking of goods must likewise be performed for persons doing business outside the Philippines.
>
> This can only be the logical interpretation of Section 102 (b) (2). If the provider and recipient of the 'other services' are both doing business in the Philippines, the payment of foreign currency is irrelevant. Otherwise, those subject to the regular VAT under Section 102 (a) can avoid paying the VAT by simply stipulating payment in foreign currency inwardly remitted by the recipient of services. To interpret Section 102 (b) (2) to apply to a payer-recipient of services doing business in the Philippines is to make the payment of the regular VAT under Section 102 (a) dependent on the generosity of the taxpayer. The provider of services can choose to pay the regular VAT or avoid it by stipulating payment in foreign currency inwardly remitted by the payer-recipient. Such interpretation removes Section 102 (a) as a tax measure in the Tax Code, an interpretation this Court cannot sanction. A tax is a mandatory exaction, not a voluntary contribution.

---

[8] G.R. No. 153205, January 22, 2007

1349

When Section 102 (b) (2) stipulates payment in 'acceptable foreign currency' under BSP rules, the law clearly envisions the payer-recipient of services to be doing business outside the Philippines. Only those not doing business in the Philippines can be required under BSP rules to pay in acceptable foreign currency for their purchase of goods or services from the Philippines. In a domestic transaction, where the provider and recipient of services are both doing business in the Philippines, the BSP cannot require any party to make payment in foreign currency.

Services covered by Section 102 (b) (1) and (2) are in the nature of export sales since the payer-recipient of services is doing business outside the Philippines. Under BSP rules, 21 the proceeds of export sales must be reported to the *Bangko Sentral ng Pilipinas*. Thus, there is reason to require the provider of services under Section 102 (b) (1) and (2) to account for the foreign currency proceeds to the BSP. The same rationale does not apply if the provider and recipient of the services are both doing business in the Philippines since their transaction is not in the nature of an export sale even if payment is denominated in foreign currency.

Further, when the provider and recipient of services are **both** doing business in the Philippines, their transaction falls squarely under Section 102 (a) governing **domestic** sale or exchange of services. Indeed, this is a purely local sale or exchange of services subject to the regular VAT, unless of course the transaction falls under the other provisions of Section 102 (b).

Thus, when Section 102 (b) (2) speaks of **'[s]ervices other than those mentioned in the preceding subparagraph**,' the legislative intent is that only the services are different between subparagraphs 1 and 2. The requirements for zero-rating, including the essential condition that the recipient of services is doing business outside the Philippines, remain the same under both subparagraphs.

xxx xxx xxx

In this case, the payer-recipient of respondent's services is the Consortium which is a joint-venture doing business in the Philippines. While the Consortium's principal members are non-resident foreign corporations, **the Consortium itself is doing business in the Philippines**. This is shown clearly in BIR Ruling No. 023-95 which states that the contract between the Consortium and NAPOCOR is for a **15-year term**, thus:

xxx xxx xxx

1350

> Considering this length of time, the Consortium's operation and maintenance of NAPOCOR's power barges cannot be classified as a single or isolated transaction. The Consortium does not fall under Section 102 (b) (2) which requires that the recipient of the services must be a person doing business outside the Philippines. Therefore, respondent's services to the Consortium, not being supplied to a person doing business outside the Philippines, cannot legally qualify for 0% VAT."

Section 108(B)(2) of the NIRC of 1997, the law applicable in the present case, carries the same provisions on zero-rating of services under Section 102(b)(2) of the NIRC of 1977, as amended, quoted in the above Supreme Court ruling. Thus, in order for the supply of services to be VAT zero-rated under Section 108(B)(2) of the NIRC of 1997, the following requisites must be met: (1) the services must be other than processing, manufacturing or repacking of goods; (2) payment for such services must be in acceptable foreign currency accounted for in accordance with BSP rules and regulations; and (3) the recipient of such services is doing business outside the Philippines.

In the same case, the Supreme Court held that petitioner's services to the Consortium, not being supplied to a person doing business outside the Philippines, cannot legally qualify for 0% VAT under Section 108(B)(2) [then 102(b)(2)] of the NIRC of 1997. However, the Supreme Court stressed that the parties are still bound by BIR Ruling No. 023-95 and VAT Ruling No. 003-99 granting zero percent (0%) VAT on services rendered by petitioner to the Consortium because these BIR and VAT Rulings are deemed revoked effective only from March 2, 2000. The Supreme Court explained that:

> "Nevertheless, in seeking a refund of its excess output tax, respondent relied on VAT Ruling No. 003-99, which reconfirmed BIR Ruling No. 023-95 'insofar as it held that the services being rendered by BWSCMI is subject to VAT at zero percent (0%).' Respondent's reliance on these BIR rulings binds petitioner.

1351

> Petitioner's filing of his Answer before the CTA challenging respondent's claim for refund effectively serves as a revocation of VAT Ruling No. 003-99 and BIR Ruling No. 023-95. However, such revocation cannot be given retroactive effect since it will prejudice respondent. Changing respondent's status will deprive respondent of a refund of a substantial amount representing excess output tax. Section 246 of the Tax Code provides that any revocation of a ruling by the Commissioner of Internal Revenue shall not be given retroactive application if the revocation will prejudice the taxpayer. Further, there is no showing of the existence of any of the exceptions enumerated in Section 246 of the Tax Code for the retroactive application of such revocation.
>
> However, upon the filing of petitioner's Answer dated **2 March 2000** before the CTA contesting respondent's claim for refund, respondent's services **shall be subject to the regular 10% VAT.** Such filing is deemed a revocation of VAT Ruling No. 003-99 and BIR Ruling No. 023-95." (*Emphasis supplied*)

Since the present claim covering the fourth quarter of 1998 still falls within the effectivity of BIR Ruling No. 023-95 and VAT Ruling No. 003-99, petitioner's sales of services qualify for VAT zero-rating. However, as aptly noted by the Court-commissioned auditing firm, Punongbayan and Araullo, out of the reported zero-rated sales of P68,761,361.50, only the amount of P66,962,445.00 was duly paid for in acceptable foreign currency, *i.e.*, in US$1,604,914.00, as evidenced by the Certification/FCDU Credit Memos issued by the Bank of the Philippine Islands, Davao Lanang Branch[9], as well as VAT zero-rated invoices and official receipts issued by petitioner to BWSC Denmark[10]. The remaining amount of P1,798,916.50 which was paid for in unacceptable foreign currency, *i.e.*, in 275,000.00 Danish Kroner (DKK), cannot be subject to zero percent VAT.[11]

[9] Exhibits "K", "L", "M", "N", and "O"
[10] Exhibits "W" to "BB"
[11] Exhibit "P", Annex "C"

1352

Having generated VAT zero-rated gross receipts from services rendered to the Consortium in the amount of P66,962,445.00, petitioner may claim refund or issuance of tax credit certificate of the unutilized input VAT attributable thereto.

Petitioner presented its suppliers' VAT invoices and official receipts[12], which proved that it actually incurred input taxes in connection with the services it rendered to the Consortium for the fourth quarter of 1998. However, as correctly observed by the Court-commissioned CPA, out of the total unutilized input taxes of P1,834,388.55 reflected in its VAT Return[13] for the fourth quarter of 1998, only the amount of P1,556,913.68 represents petitioner's valid claim; while the remaining amount of P277,474.87 shall be disallowed for the following reasons:[14]

NATURE	AMOUNT
A. Exception on Zero Rated Revenues	
1. Input VAT offset against output VAT on gross receipts invoiced and remitted in unacceptable foreign currency (see Annex C)	P 163,537.87
B. Exception on VATable transactions	
1. Input VAT offset against output VAT on sales of motor vehicles which was inadvertently included in the Input VAT Summary (see Annex D)	54,640.21
C. Exceptions on Input Taxes Paid	
1. Dates of SIs and/or ORs were not within the period covered by the application (see Annex E)	56,341.02
2. Original SIs or ORs were not on file (see Annex F)	2,955.77
Total:	**P 277,474.87**

Inasmuch as petitioner had no other taxable sales for which it may be liable for output VAT, the substantiated input VAT of P1,556,913.68 remained unapplied as of the

---

12 Exhibits "R-1" to "R-132", "S-1" to "S-121", and "T-1" to "T-106"
13 Exhibit "B-2"
14 Exhibit "P-2"

1353

end of the fourth quarter of 1998. Likewise, the said input VAT had not been carried-over/applied to the succeeding quarters of 1999.[15]

It was also established that the administrative claim[16] filed on July 21, 1999 and the Petition for Review filed on January 9, 2001, fall within the two-year prescriptive period reckoned from January 21, 1999; the date when petitioner filed its Quarterly VAT Return for the fourth quarter of 1998.[17]

WHEREFORE, premises considered, the instant Petition For Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND or ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **ONE MILLION FIVE HUNDRED FIFTY SIX THOUSAND NINE HUNDRED THIRTEEN PESOS AND 68/100 (P1,556,913.68)**, representing unutilized input taxes which are attributable to zero-rated sales of services for the fourth quarter of 1998.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

---

15 Exhibits "FF", "II", "LL", and "OO"
16 Exhibit "A"
17 Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 141104 and 148763, June 8, 2007

1754

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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

1355