REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ZIPPY COMMERCIAL CORPORATION,
Petitioner,

- versus -

C.T.A. CASES NOS. 4476 & 4477

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

8/20

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D E C I S I O N

These are two (2) consolidated cases (CTA Cases Nos. 4476 & 4477) concerning claims for refund of value-added tax alleged to be erroneously paid to respondent in the amount of P180,000 covering Case No. 4476 and P163,636.36 for the Case No. 4477. In addition, a refund for the sum of P900,000 representing excise tax paid on locally manufactured "Marlboro King" cigarettes exported by petitioner under CTA Case No. 4477.

As borne out by the pleading and evidence presented, petitioner is a newly registered domestic corporation and is engaged in the business of buying locally manufactured cigarettes with foreign brands from local manufacturers for export to foreign buyers. Petitioner is a registered VAT taxpayer with the Bureau of Internal Revenue on January 1, 1988 and as a new trader registered with the Board of Investments on January 4, 1988 (Annexes "A" & "B" Petition for Review, p. 4, CTA records).

The case at bar has been submitted for decision based on the pleadings and the records of the Bureau of Internal Revenue with the parties submitting their respective memorandum.

C.T.A. CASE NO. 4476

It appears from the records of the case that petitioner on August 29, 1988, purchased from La Suerte Cigar and Cigarettes Factory 450 cases of Marlboro Cigarettes in the amount of P1,800,000.00 with VAT included on the invoice value (Annex "C" Petition for Review, CTA Case No. 4476). Petitioner on August 31, 1988 exported the 450 cases of Marlboro Cigarettes to Hongkong (Exhibit "A", BIR records) and received from Green Dragon Trading Company of Hongkong through (SolidBank) The Consolidated Bank & Trust Corporation US$65,925.00 (pp. 6, 7 & 32 of BIR records).

Petitioner, on November 29, 1988 filed a claim for refund of the value-added tax in the amount of P180,000.00 (Annex "D" Petition for Review, p. 7, CTA Case 4476 records) which was denied by respondent in a letter dated January 25, 1990. Hence, petitioner appealed to this court on August 1, 1990 and the case herein was docketed as CTA Case No. 4476.

C.T.A. CASE NO. 4477

In the other case, CTA Case No. 4477, petitioner in the case at bar filed a claim for the refund of P163,636.36 for alleged erroneously paid value-added tax, and the sum of P900,000.00 excise tax payment on locally manufactured cigarettes which petitioner exported to Hongkong.

It appears from the records that petitioner was issued a permit by the respondent on September 10, 1987, to purchase from local cigarette manufacturers quantities of cigarettes for export without prepayment of specific tax (Exh. "J", p. 68(a)-69, BIR rec., folder 1, CTA Case No. 4477).

Petitioner on the basis of said permit tried to purchase 450 cases of Marlboro King Cigarettes from La Suerte Cigar and Cigarettes Factory without prepayment of specific tax but said company refused to sell to petitioner any quantity of cigarettes without prepayment of excise tax (p. 73 BIR recs., folder 1, CTA Case No. 4477). On November 29, 1988 petitioner made another purchase of 450 cases of Marlboro King Cigarettes from the same manufacturer for the same purchase price of P1,800,000.00 inclusive of the ad-valorem tax in the amount of P900,000.00 and value-added tax in the amount of P163,636.36 (p.17, folder 1, BIR rec., CTA Case No. 4477).

The records show that all of the 450 cases of Marlboro King Cigarettes were actually exported to Green Dragon Trading Co. of Hongkong which generated foreign exchange payment in the amount of $65,925.00 as confirmed by (SolidBank) The Consolidated Bank and Trust Corporation (pp. 13, 16, 21 and 22, folder 1, BIR rec., CTA Case No. 4477). Subsequently, in a letter dated December 21, 1988 petitioner filed a claim for refund of the ad-valorem tax in the amount of P900,000.00; and in a separate letter dated April 3, 1989, the petitioner also filed a claim for refund of the value-added tax in the amount of P163,636.36 (p. 25, folder 1, BIR rec., CTA Case No. 4477). Respondent in a letter decision dated May 22, 1990 denied the claim for refund of the ad-valorem tax of petitioner in the sum of P900,000.00 (Exh. 4, pp. 159, 160, folder 1, BIR rec., CTA Case No. 4477). Likewise, respondent denied the claim of petitioner for the refund of P163,636.36 representing VAT payments in a letter dated January

25, 1990 (p. 27, folder 11, BIR rec., CTA Case No. 4477).

Hence this appeal filed by petitioner on August 1, 1990 docketed as CTA Case No. 4477.

The issues in these two cases are as follows:

1. Whether or not petitioner is entitled to the refund of value-added tax.

2. Whether or not petitioner, as export trader is exempt or entitled to the refund of excise taxes paid on goods exported.

The legal bases for the petitioner's claim for VAT refund in both Cases Nos. 4476 and 4477 is Section 100(a)(1) in relation to Sec. 106(a) of the National Internal Revenue Code (NIRC) of 1986, as amended by Executive Order No. 273. The pertinent portion of which are quoted in order below:

> "Sec. 100. Value added tax on sale of good. - (a) Rate and base of tax. - There shall be levied, assessed and collected on every sale, barter or exchange of goods, a value-added tax equivalent to 10% of the gross selling price or gross value in money of the goods sold, bartered or exchanged, such tax to be paid by the seller or transferor: Provided, that the following sales by VAT-registered persons shall be subject to 0%:
>
> (1) export sales; and
>
> xxx xxx xxx

> Sec. 106. Refunds or tax credits of input tax. - (a) Export sales. - An exporter who is a VAT-registered person may within two years from the date of exportation, apply for the issuance of a tax credit certificate or refund of the input tax attributable to the goods exported, to the extent that such input tax has not been applied to output tax and upon presentation of proof that the foreign exchange proceeds has been accounted for in accordance with the regulations of the Central Bank of the Philippines."

There appears to be no legal dispute that pursuant to the above-mentioned provisions of law, petitioner is entitled to the refund of value-added tax on two occasions of purchases of Marlboro King cigarettes from La Suerte Cigar and Cigarette Factory and its exportation to Hongkong which generated an inward remittance of foreign currency, so that, what remains to be resolved is the factual basis for the grant of the refund.

Petitioner is a newly organized export-trading firm. As of November 29, 1988, it had issued only three (3) sales invoices. The first Sales Invoice No. 001 was issued on December 15, 1987; the second Sales Invoice No. 002 was issued on August 31, 1988 for the first export shipment of 450 cases of Marlboro King cigarettes; and the third Sales Invoice No. 003 issued on November 29, 1988 for the second shipment of the same quantity of cigarettes which was also exported. The testimony of VAT Division Revenue Officer Edmund Caluag (TSN dated December 6, 1990, pp. 7 to 9), indicates that the reason the petitioner's claim for refund of the VAT portion under Sales Invoice Nos. 002 and 003 was denied is that Sales Invoice No. 001 was never presented by petitioner. This factual matter, however, poses no obstacle for petitioner's claim for refund considering that it is admitted by the said Revenue Officer in his testimony that even without such invoice having been submitted it would not have materially affected the petitioner's claim for VAT refund under Sales Invoice Nos. 002 and 003 (Testimony of VAT Division Revenue Officer Edmund Caluag, TSN dated December 6, 1990 pp. 10 to 15). In other words, Invoice No. 001 is not at all a requirement in the petitioner's claim for VAT refund under Invoice Nos. 002 and 003. Further, Sales Invoice No. 001 could not be materially affected the claim for refund since it was issued even before the implementation of the VAT, having been issued for transactions as far back as December 15, 1987.

Respondent further alleges that the other claim for VAT refund covered by Sales Invoice No. 003 was denied because said invoice was missing from respondent's records. The same Sales Invoice No. 003, however, is clearly in the records of the case as Exhibit "G" (p. 21 under CTA Case No. 4476).

In Case No. 4476, it appears that per Annex "C" of the petition, in the sales invoice issued by La Suerte Cigar and Cigarette Factory, the tax was not billed separately in the total purchase price of P1,800,000.00. The value-added tax refundable as far as Case No. 4476 is concerned should therefore be computed on the basis of Section 102(2) of the Tax Code and should accordingly be reduced to the amount of P163,636.36 instead of P180,000.00. On the other hand, no such reduction should be made on the claim for refund of the VAT in Case No. 4477 as the refundable amount has been computed to be P163,636.36 considering that the tax has not also been billed separately in the total purchase price.

The more significant legal issue is the claim for refund of ad valorem tax in the amount of P900,000.00. Petitioner's claim is based on Section 127(d) of the National Internal Revenue Code as amended by Executive Order No. 273, which provides:

> "Sec. 127. Payment of excise tax on domestic products -
>
> xxx xxx xxx
>
> (d) Credit for excise tax on goods actually exported. - When goods locally produced or manufactured are removed and actually exported without returning to the Philippines, whether so exported in their original state or as ingredients or parts of any manufactured goods or products, any excise tax paid thereon shall be credited or refunded upon submission of the proof of actual exportation and upon receipt of the corresponding foreign exchange payment: Provided, that the excise tax on mineral products, except coal and coke, imposed under Section 151, shall not be creditable or refundable even if the mineral products are actually exported."

Petitioner contends that on September 10, 1987, respondent, in reply to petitioner's query dated June 16, 1987, approved the projected export sale of petitioner net of excise tax and ruled:

> "From the provisions of Section 109 and 110(d) of the Tax Code, as amended by Executive Order No. 22, it can be safely inferred that locally produced articles which are removed and actually exported without returning to the Philippines will not be subject to excise tax, if there is proof of actual exportation and receipt of the corresponding foreign exchange.
>
> In reply, please be informed that permit is hereby granted to you to export locally produced cigarettes without the prepayment of the excise tax, subject to the following conditions:"

On September 15, 1988, respondent issued BIR

Ruling No. 127(d)-000-87-442-88, the pertinent portion of which states:

> "Reply, please be informed that pursuant to Section 127(d) of the tax Code, as amended, when goods locally produced or manufactured are removed and actually exported without returning to the Philippines, whether as exported in their original state or as ingredients or part of any manufactured goods or products, any excise tax paid thereon shall be credited or refunded upon submission of proof of actual exportation and receipt of the corresponding foreign exchange payment. Accordingly, you may purchase locally manufactured tax paid cigarettes from any source and export the same; and upon submission of proof of exportation and receipt of the corresponding foreign exchange payment; this Office, upon your request will refund the excise tax element or issue a corresponding tax credit certificate which can be used in payment of your other internal revenue tax liabilities."

Based on the foregoing rulings of the respondent, petitioner argues that it is entitled to the refund of the excise tax element on its local purchase and subsequent exportation of 450 cases of Marlboro King cigarettes covered by Invoice No. 003 made on November 29, 1988. The court has been made to understand that the excise tax portion on the first purchase and exportation of the same quantity of cigarettes under Invoice No. 002 issued on August 31, 1988 had been refunded to the taxpayer.

On the other hand, respondent contends that Section 127(d) of the Tax Code, which authorized the refund of the excise tax to exporters, refers only to exporters who are themselves manufacturers or producers of the goods exported. Thus, since the petitioner is a trade-exporter, it is not entitled to claim a refund citing unnumbered BIR Ruling dated June 7, 1989 in the case of Shell Gas Philippines, Inc. (p. 134, Folder I, BIR rec., CTA Case No. 4477), which reads -

> "A reading of the provision of the law cited by you (Sec. 127(d) of the Tax Code), however, limits the credibility and/or refundable of the taxes paid on the exported articles only to those actually produced or manufactured by the exporter-taxpayer and does not extend to and include local sales.
>
> When the law (Section 127(d)) says: When goods locally manufactured are removed and exported, xxx it means that the removal should be followed by exportation. In other words, to be exempt from the payment of the specific tax and <u>ad valorem</u> taxes, the exporter should be manufacturer of the exported goods."

However, We are inclined to agree with the theory of the petitioner when he argues that:

> "xxx It must be emphasized that when the law does not distinguish we should not make any distinction <u>Ubi Lex Non Distinguit Nec Nos Distinguere Debemos.</u> (Tanada v. Yulo, 61 Phil. 515 ¤1935¤)
>
> "Section 127(d) of the National

Internal Revenue Code makes no mention that it is applicable only to manufacturers or producers. xxx"

In fact, the law even states that it redounds to the benefit of all exporters considering that it mandates that "goods locally produced or manufactured... whether so imported in their original state or as ingredients or parts of any manufactured goods or products, any excise tax paid thereon shall be credited or refunded."

"The law applies to manufactured goods or products, meaning a product not in its original state. Hence, even where a second, third, fourth, etc. sale after manufacture or production is involved prior to exportation, exemption from excise tax is mandated. xxx"

"The law further states that "any excise tax paid thereon shall be credited or refunded", meaning any and all excise taxes paid, without distinction as to who paid it, shall be credited or refunded. In the final analysis, the end purchaser who bears a burden of any excise tax paid, in this case paid by the petitioner, should be entitled to the credit or refund."

"It must be borne in mind that the Chief Executive, in enacting E.O. No. 22 dated June 25, 1987, is presumed to have amended the NIRC to add significant changes and not merely adding words in vain or leaving part of the enactment devoid of sense or meaning."

xxx xxx xxx

Our agreement with the petitioner is based on the clear provision of the law involved Section 127(d), quoted above.

In accordance with the said provision of law, for locally or manufactured goods to be entitled to credit or refund of excise tax paid thereon, there are three (3) requisites which should be met, namely:

(a) the said goods are actually exported either in their original state or as ingredients or part of any manufactured goods or products;

(b) proof of actual exportation should be submitted;

(c) there should be proof of receipt of the corresponding foreign exchange payment.

Nowhere in the provision of the applicable law is there any express mention that the manufacturer of the exported goods on which excise tax has been paid should be the exporter; nor is it stated that removal should immediately be followed by exportation. For a better understanding and interpretation of the law, we find it necessary to present the provision of the code prior to its amendment by E.O. 22. Section 127(d) was previously part of Section 109 (now Section 126) of the National Internal Revenue Code. The pertinent portion of which is read as follows:

> "Excise taxes apply to articles manufactured or produced in the Philippines for domestic sale or consumption or for any disposition and to things imported, <u>but not to anything locally produced or manufactured which shall be removed for exportation and is actually exported in its original state or as an ingredient or part of any manufactured articles or products</u>. xxx" (Underscoring supplied).

Please note that prior to the amendment there was an outright exemption from excise tax of exported goods. When Executive Order No. 22 was promulgated two significant changes were introduced, namely (1) excise tax has to be paid first (2) tax refund or credit shall be granted upon proof of actual exportation and receipt of foreign exchange payment. Obviously, the intention is to ensure that the foreign exchange payment for the export is inwardly remitted as a means of discouraging salting of foreign exchange on export proceeds. Nowhere in the amendments introduced by the said Executive Order can we infer that the tax incentive is only restricted to manufacturer or producer. Considering the continuing policy of the government which is to encourage exportation, the more correct way of interpretation will be that the incentive will be extended to every exporter subject only to the conditions aforementioned.

It may be argued by respondent that the BIR Ruling issued on June 7, 1989 is the controlling rule, being the latest on the case. But, before the BIR Ruling of June 7, 1989, the BIR had, as already adverted to, issued on September 15, 1988 BIR Ruling No. 127(d)-000-87-442-88 holding the opposite view. Much earlier, on September 10, 1987, petitioner had depended on respondent's favorable answer to its query (Annex "A", Petition for Review, CTA 4477) to the effect that "locally produced articles which are removed and actually exported without returning to the Philippines will not be subject to excise tax, if there is proof of actual exportation and receipt of the corresponding foreign exchange." The problem posed, therefore, is whether the seeming modification or reversal by respondent of its answer-to-query of September 10, 1987 and BIR Ruling Mo. 127(d)-000-87-442-88 through the BIR Ruling dated June 7, 1989 can be made to operate retroactively against petitioner, who had depended on such previous ruling/opinion, in the light of Section 246 of the NIRC of 1986 (formerly Section 327 of the 1977 NIRC).

Section 246 provides that:

> Section 246. Non-retroactivity of rulings - Any revocation, modification or

> reversal of any of the rules and regulation promulgated by the Commissioner shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith.

The guiding element in the provision, therefore, is that, any ruling promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayer. Applied to the instant case, it is clear that the application of the BIR ruling of June 7, 1989 to petitioner, in its transactions of August 29, 1988 and November 29, 1988 would work injustice upon said taxpayer. Even if We were to grant for the sake of argument that the BIR ruling of June 7, 1989 is the correct interpretation of the law, its retroactive application to cover past transactions will surely, cost prejudice to petitioner, an injury precisely sought to be avoided by the enactment of provision on non-retroactivity of rulings (See ABS-CBN Broadcasting Corporation v. Court of Tax Appeals G.R. No. L-52306, October 12, 1981, 108 SCRA 142, 148).

In an American case, the aforestated theory was formulated in this wise:

> "In such circumstances a taxpayer cannot be convicted for taking the tax authorities at their word". (International Business Machines Corporation v. U.S. 343F 2d 914, 923 (1965)"

Our Supreme Court did have the occasion to cite the same rule in the case of ABS-CBN Broadcasting Corporation v. Court of Tax Appeals, supra saying:

> "The Commissioner or Collector is precluded from adapting a position inconsistent with one previously taken where injustice would result therefrom, or where there has been as misrepresentation to the taxpayer."

More to the point, Commissioner of Internal Revenue v. Burroughs Ltd. and the Court of Tax Appeals (G.R. No. 66653 - June 19, 1986, 142 SCRA 324, 328), under analogous circumstances as the case at hand, further confirmed the effects of Section 246 and held that:

> "Petitioner's aforesaid contention is without merit. What is applicable in the case at bar is still the Revenue Ruling of January 21, 1980 because private respondent Burroughs Ltd. paid

> the branch profit remittance tax in question on March 14, 1979. Memorandum Circular No. 8-82 dated March 17, 1982 cannot be given retroactive effect in the light of Section 327 of the National Internal Revenue Code xxx."

Here, on the other hand, petitioner was made to believe that the transaction which it had described in its query will not be subject to excise tax, and was issued a permit on September 10, 1987 to sell cigarettes to foreign buyers. Petitioner's belief was further reinforced by the revenue ruling of September 15, 1988, which although not issued to petitioner reiterated respondent's previous statement of September 10, 1987. The exports of cigarettes were made on August 31, 1988 and November 29, 1988 or after the BIR rulings of September 10, 1987 and September 15, 1988. So that, petitioner had reason to believe that said BIR rulings were prevailing at the time of the transaction. In point of time, therefore, the BIR permit and ruling of September 15, 1988 are the applicable ruling and not the BIR ruling of June 7, 1989 considering Section 246 of the 1986 Tax Code. The exception under Section 246 have not been alleged and do not appear to be applicable against petitioner.

WHEREFORE, the respondent should and is hereby ordered to refund or credit to petitioner:

a) the amount of P163,636.36 paid as value-added-tax in C.T.A. Case No. 4476 and P163,636.36 also paid as value-added-tax in C.T.A. Case No. 4477.

b) the amount of P900,000.00 paid as ad valorem tax in CTA Case No. 4477.

SO ORDERED.

Quezon City, Metro Manila, August 20, 1991.

ERNESTO D. ACOSTA
Associate Judge

WE CONCUR:

ALEX Z. REYES
Presiding Judge

(On Leave)
CONSTANTE C. ROAQUIN
Associate Judge

C E R T I F I C A T I O N

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