Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
****

PHILEX MINING CORPORATION,
Petitioner,

C.T.A. CASE NO. 7391

- versus -

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

MAY 21 2008 1:40 pm

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DECISION

CASANOVA, J.:

Before Us is a Petition for Review filed by herein petitioner, **Philex Mining Corporation**, seeking that judgment be issued ordering respondent to refund or issue a tax credit certificate in favor of petitioner for the total amount of P7,594,651.61. The amount claimed allegedly represents unutilized input Value Added Tax ("VAT") arising from petitioner's domestic purchases of goods and services which are attributable to zero-rated sales of mineral products for the 4th quarter of 2003.

THE FACTS

Petitioner, **Philex Mining Corporation** ("Philex"), is a corporation organized and existing under the laws of the Philippines with office address at 27 Brixton St., Pasig City. It is engaged in mining business, including the exploration and operation of mine minerals and the commercial production and marketing of mine products and is a VAT-registered taxpayer.[1]

Respondent is the duly appointed Commissioner of Internal Revenue, with authority, among others, to decide, approve and grant claims for refund or tax credit of internal revenue taxes, with office address at the Bureau of Internal Revenue National Office Building, Agham Road, Diliman, Quezon City.

In the conduct of its business, Philex entered into contracts with three buyers, to wit:

1. Johnson Matthey Public Limited Company ("Johnson Matthey");
2. Nippon Mining and Metals Co., Ltd. ("Nippon Mining"); and
3. Philippine Associated Smelting and Refining Corporation ("PASAR").

On January 29, 2001, Philex entered into Contract No. 7002[2] with Johnson Matthey of England covering the delivery by Philex of gold for refining at latter's refinery at Royston, England. According to the contract, Johnson Matthey, after it has assayed, refined and correct the value of the gold, has the option to buy the refined gold from Philex.[3] For the 4th Quarter of 2003, Philex made one (1) shipment of gold bars to Johnson Matthey with a gross value of US$33,296.00.[4]

On March 22, 2002, Philex entered into a contract[5] with Nippon Mining and Metals Co., Ltd., of Tokyo, Japan, covering the sale of copper concentrates for the period April 1, 2002 to March 31, 2003. By virtue of an Assignment

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[1] *1st and 2nd Pars. of Joint Stipulation of Facts and Issues ("JSF"), Rollo, pp. 65-67, duly approved by this Court in a Resolution dated June 6, 2006, Rollo, p. 69.*
[2] *Exhibit "E".*
[3] *TSN of January 9, 2007 hearing, p. 26.*
[4] *Exhibits "F", "F-2" and "F-2-a".*
[5] *Exhibit "C"*

Contract[6] dated July 1, 2002, Nippon Mining assigned all its rights and obligations pertaining to the aforementioned contract to Pan Pacific Copper Co. ("Pan Pacific") of Tokyo, Japan. Philex made one (1) shipment of copper concentrates to Pan Pacific during the 4th quarter with a gross value of US$4,941,848.00.[7]

On April 25, 2003, Philex and PASAR entered into a letter agreement[8] spelling out the terms and conditions for PASAR's purchase and Philex's sale of copper concentrates for the period April 1, 2003 to March 2004. Petitioner made thirteen (13) shipments of copper concentrates to PASAR during the 4th quarter of 2003 with a gross value of US$16,656,503.00.[9]

On January 26, 2004, Philex filed its VAT return[10] for the 4th quarter of 2003. On June 21, 2005, Philex amended the return[11] and reflected zero-rated sales of P1,209,176,550.97, domestic purchases of goods of P669,496.10 with input tax of P66,949.61, and importation of goods of P75,277,080.00 with input tax of P7,527,708.00.[12]

On May 9, 2005, Philex filed before the Bureau of Internal Revenue its Application for Tax Credit/Refund of VAT[13] for the period October to December 2003 in the amount of P7,594,657.61 representing excess input VAT for the 4th Quarter of 2003.[14]

On June 22, 2005, Philex also filed its claim for refund or tax credit with the One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center ("OSSC")

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[6] *Exhibit "D"*
[7] *Exhibits "F", "F-1", "F-1-a" and "F-1-b"*
[8] *Exhibit "A"*
[9] *Exhibits "F" and "F-3 to F-15"*
[10] *Annex B of Petition for Review, Rollo. pp. 12-15.*
[11] *Annex B-1, Ibid. pp. 16-19.*
[12] *3rd Par. of JSF.Ibid.*
[13] *Rollo. 20.*
[14] *4th Par. of JSF, Ibid.*

of the Department of Finance per Application No. 48830[15] in the amount of P7,594,657.61.[16]

Respondent has not granted the refund or tax credit certificate to Philex for the amount being claimed.[17]

Hence, on December 28, 2005, Philex filed the instant petition for review before this Court pursuant to Sec. 4.106-2(c) of Revenue Regulations No. 7-95 and Sections 112(D) and 229 of the 1997 Tax Code in order to protect its right and interest and alleging, *inter alia*, that the continuing inaction of the OSSC, which includes the respondent Commissioner, is tantamount to a denial of the application, to the damage and prejudice of petitioner.

Respondent, in her Answer[18] filed on February 16, 2006, interposed the following:

> "3. Petitioner's alleged claim for refund/tax credit is subject to administrative routinary examination/investigation by the Bureau thru the Department of Finance, One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (OSS for brevity).
>
> 4. Taxes paid and collected are presumed to have been paid in accordance with law; hence, not refundable.
>
> 5. In an action for tax refund/credit, the taxpayer has the burden to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund.
>
> 6. It is incumbent upon petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the 1997 Tax Code.
>
> 7. Well-established is the rule that refund/tax credits are construed strictly against the taxpayer as they partake the nature of exemption from tax.

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[15] *Rollo. p. 21.*
[16] *5th Par. of JSF, ibid.*
[17] *10th Par. of JSF, ibid.*
[18] *Rollo, pp. 29-32.*

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SPECIAL AND AFFIRMATIVE DEFENSES

8. Respondent hereby repleads and incorporates by way of reference the foregoing allegations insofar as material and relevant hereto further states that:

9. It is the contention of the Respondent that this Honorable Court has no jurisdiction to take cognizance of the petition on the ground of non exhaustion of administrative remedies. Petitioner miserably failed to comply with the administrative requirements necessary in the processing of its claim for refund or tax credit in the total amount of Php 7,594,651.61 as alleged excess or unutilized input VAT for the 4th quarter of 2003. This fact is glaring from the status report of Vat Credit Application of petitioner dated January 30, 2006 sent by OSS in reply to the BIR, Litigation Division's request on the status and progress of claim of the petitioner. A copy of the above status report of OSS is hereto attached as Annex "A", and made integral part hereof.

10. Further, the OSS status report stated that the OSS sent three (3) notices dated October 24, 2005, November 30, 2005 and December 27, 2005 thru registered mail informing the petitioner of the additional requirement/documents needed to expedite the processing of its claim. This notwithstanding, petitioner continued to ignore/fail to comply with said OSS notices."

THE ISSUES

The parties jointly stipulated the following issues[19] for this Court's resolution:

"1. Whether Petitioner's domestic purchases and importations of goods which are attributable to its direct and indirect export sales for the 4th quarter of 2003 are duly supported by documentary evidence.

2. Whether the accumulated or excess input VAT was not utilized or applied by Petitioner against output VAT in the

[19] *JSF, Issues to be Resolved, Rollo, p. 66.*

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same 4th quarter of 2003 or in the succeeding taxable quarters.

3. Whether or not the export sales were paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas.

4. Whether or not Petitioner is entitled to the refund of the excess input taxes in the total amount of P7,594,657.61 for the 4th quarter of 2003, due to Petitioner being an exporter of mineral products."

During trial, petitioner presented documentary and testimonial evidence. On the other hand, respondent's counsel manifested that she has not received any report of investigation and is submitting the case for decision.

On January 17, 2008, petitioner filed its Memorandum[20]. Respondent did not file her Memorandum despite due notice. Hence, on January 22, 2008, this case was submitted for decision. [21]

THE COURT'S RULING

The main issue to be resolved is whether or not petitioner-Philex is entitled to a refund in the amount of P7,594,651.61 representing excess input taxes for the 4th quarter of 2003.

Philex alleged that while the VAT return[22] for the 4th Quarter of 2003 reflected excess input tax in the total amount of P80,597,022.11, the administrative claim for refund filed included only the excess input tax for the current quarter, which is the 4th quarter of 2003, in the total amount of P7,594,657.61,[23] consisting of the input tax of P66,949.61 on its domestic purchases and input tax of P7,527,708.00 on its imported goods.

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[20] *Rollo. pp. 198-222.*
[21] *Rollo. p. 224.*
[22] *Ibid.*
[23] *Should be P7,594,651.61, as prayed for in the Petition for Review.*

It is important to note that Section 112 (A) of the 1997 Tax Code[23] provides:

"**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): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sales 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.

Based on the afore-quoted provisions of Section 112 (A), in order to be entitled to a refund/ tax credit of unutilized input VAT, 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 during and in the succeeding quarters; and

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[23] *1997 National Internal Revenue Code.*

5. that the claim for the refund was filed within the two-year prescriptive period.

Anent the *first* requisite, petitioner-Philex claims that its shipments and sales of gold to Johnson Matthey of London, England and of copper concentrates to Pan Pacific Copper Co. of Tokyo, Japan (Nippon Mining assigned all its right and obligations to Pan Pacific Copper Co. of Tokyo, Japan)[24] are VAT zero-rated pursuant to Section 106(A)(2)(a)(1) of the 1997 Tax Code. Also, Philex alleged that its sales of copper concentrates to PASAR, a PEZA registered enterprise, are subject to zero percent (0%) VAT citing as legal bases therefor Section 106(A)(2)(a)(5) of the 1997 Tax Code and Section 23 of R.A. No. 7916, in relation to Art. 77(2) of the Omnibus Investments Code as well as RMC No. 74-99 and VAT Review Committee Ruling No. 026-2001.

The Commissioned Independent CPA, Mr. Albert G. Alba, in his report[25] submitted to this Court, noted that petitioner's zero-rated export sales amounting to US$21,876,451.00 with peso value equivalent of P1,209,176,550.97, as reported in petitioner's amended VAT return for the 4th quarter of 2003, were as follows:

Particulars	Amount
Current Quarter's Shipments:	
Direct exports of copper to Japan	US$ 4,941,848.00
Direct export of gold to England	33,296.00
Indirect exports of copper to PASAR	16,656,503.00
	US$ 21,631,647.00
Previous Quarters' Shipments	
Adjustment to correct previous billings	244,804.00
Total Zero-Rated Sales	**US$21,876,451.00**

[24] Exhibits "C", "C-2" and "D".
[25] *Exhibit "K"*

To substantiate its export sales for the 4th quarter of taxable year 2003 and that the foreign currency proceeds thereof were duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP), petitioner proffered before this Court its sales invoices[26], export declarations[27], bills of lading/airway bills[28], certificates of remittances by local banks[29] and entries in petitioner's passbooks in local banks of the payments received[30].

Petitioner's direct exports of copper concentrates and gold to Japan and England, respectively, may fall within those transactions referred to as subject to zero percent (0%) VAT under Section 106(A)(2)(a)(1) of the NIRC of 1997, which states:

> **"SEC.106. Value-Added Tax on Sale of Goods or Properties.—**
>
> **(A)** ***Rate and Base of Tax.—*** xxx
>
> xxx xxx xxx
>
> **(2)** The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> **(a)** ***Export Sales.*** **—** The term 'export sales' means:
>
> **(1)** The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP)."

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[26] *Exhibit "F-1" to "F-15"*
[27] *Exhibit "F-1-a" to "F-2-a"*
[28] *Exhibit "F-1-b" to "F-15-b"*
[29] *Exhibit "G-1" to "G-5"*
[30] *Exhibit "G-1-a" to "G-5-d"*

However, Section 106(A)(2)(a)(1) of the NIRC of 1997 should not be read in isolation but in conjunction with Section 113 of the same Code and as implemented by Section 4.108-1 of Revenue Regulations No. 7-95, which prescribes that a VAT registered person like petitioner, shall for every sale, issue an invoice or receipt which must contain the following information:

"**SEC.113.** ***Invoicing and Accounting Requirements for VAT-Registered Persons.—***

(A) ***Invoicing Requirements.—***A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:

(1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax."

"**SECTION 4.108-1.** ***Invoicing Requirements*** **–** All VAT registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:

1. the name, TIN and address of seller;
2. date of transaction;
3. quantity, unit cost and description of merchandise or nature of service;
4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
5. the word "zero-rated" imprinted on the invoice covering zero-rated sales; and
6. the invoice value or consideration.

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> Only VAT-registered persons are required to print their TIN followed by the word "VAT" in their invoice or receipts and this shall be considered as a "VAT Invoice". All purchases covered by invoices other than "VAT Invoice" shall not give rise to any input tax.
>
> If the taxable person is engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations. A "VAT Invoice" shall be issued only for sales of goods, properties or services subject to VAT imposed in Section 100 and 102 of the Code.

Such invoice or receipt must be duly registered with the Bureau of Internal Revenue as prescribed under Section 237, in relation to Section 238 of the NIRC of 1997, to wit:

> "**SEC.237.** ***Issuance of Receipts or Sales or Commercial Invoices.***—All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service. xxx"
>
> "**SEC.238.** ***Printing of Receipts or Sales or Commercial Invoices.***-- All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same.
>
> No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner."

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Clearly, from the foregoing provisions, any person claiming VAT zero-rated direct export sales must present at least three documents, to wit: a) the sales invoice as proof of sale of goods; b) the export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country, and c) bank credit advice, certificate of bank remittance or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services. In other words, only export sales supported by these documents shall qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the 1997 Tax Code.

Furthermore, the sales invoices supporting the export sales must comply with the invoicing requirements under the law and regulations, i.e., they must contain all the required information namely; a) the imprinted word "zero-rated"; b) the taxpayer's TIN-VAT number; and c) BIR Authority to Print or BIR Permit number.[31]

As earlier stated, petitioner's direct export sales consisted of the following:

Direct exports of:	
Copper to Japan	US$ 4,941,848.00
Gold to England	33,296.00

A scrutiny of the sales invoice supporting petitioner's direct export sale of gold to England in the amount of US$33,296.00[32] shows that the same is not duly registered with the BIR as there was no BIR Permit number reflected thereon. Furthermore, the said invoice has the corresponding Number "Pad-Aurex 109" while Philex's BIR Permit No. OCN3AU0000030052 issued April 19, 1999 covers 4 pads (100 x 4) with numbers "PX2101 to PX2500", clearly it appears that the aforesaid invoice was not properly authorized by the BIR to be

[31] *Taganito Mining Corporation vs. Commissioner of Internal Revenue, CTA E.B. No. 7 (CTA Case No. 6384), January 31, 2006.*
[32] *Exhibit "F-2"*

printed. In addition, in the same invoice, the word "VAT" after Philex's TIN number was not imprinted. Hence, considering the existence of violations of the invoicing requirements under Sections 113, 237 and 238 of the NIRC of 1997 and Section 4.108-1 of Revenue Regulations No. 7-95, the sales of US$33,296.00 cannot be considered zero-rated sales.

As to petitioner's reported direct export sale of copper concentrates to Japan in the amount of US$4,941,848.00 (invoice amount is US$4,948,981.47) the same cannot also qualify for VAT zero-rating. Per petitioner's Summary of Sales and Remittances[33] it was indicated that the invoice corresponding to the export sale amount of US$4,941,848.00 is Invoice No. PX-2343.[34] Apparently, the invoice submitted by petitioner pertains to the 1st quarter of 2004 and falls outside the subject period of the instant Petition.

With respect to petitioner's indirect export sales to PASAR with reported total amount of US$16,656,503.00, petitioner cites Section 106(A)(2)(a)(5) of the NIRC of 1997, as amended, which states:

> "**SEC. 106.** ***Value-added Tax on Sale of Goods or Properties.*** —
>
> (A) xxx
>
> (1) xxx
> (2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (a) *Export Sales.* — The term '*export sales*' means:
>
> (5) Those considered export sales under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and other special laws.

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[33] *Exhibit "F"*
[34] *Exhibit "F-1"*

It is worthy to note that sales by a VAT taxpayer from the Customs Territory to a PEZA entity are considered export sales under **Executive Order (E.O.) No. 226**, otherwise known as the Omnibus Investments Code of 1987, the relevant portions of which read as follows:

> "ARTICLE 23. **'Export Sales'** shall mean the Philippine port F.O.B. value, determined from invoices, bills of lading, inward letters of credit, landing certificates, and other commercial documents, of export products exported directly by a registered export producer or the net selling price of export product sold by a registered export producer to another export producer, or to an export trader that subsequently exports the same: Provided, That sales of export products to another producer or to an export trader shall only be deemed export sales when actually exported by the latter, as evidenced by landing certificates of similar commercial documents: Provided, further, That without actual exportation the following shall be considered "constructively exported" for purposes of this provision: (1) sales to bonded manufacturing warehouses of export-oriented manufacturers; **(2) sales to export processing zones**; . . ." (*Emphasis supplied*)
>
> "ARTICLE 77. Tax Treatment of Merchandise in the Zone. — (1) Except as otherwise provided in this Code, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise whether directly or indirectly related in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the provisions of law to the contrary notwithstanding.
>
> (2) **Merchandise purchased by a registered zone enterprise from the customs territory and subsequently brought into the zone, shall be considered as export sales and the exported thereof shall be entitled to the benefits allowed by law for such transaction.**

Further, in RMC 74-99, the BIR stated the following, viz:

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"SECTION 3. **Tax Treatment of Sales Made By A VAT Registered Supplier from the Customs Territory, To A PEZA Registered Enterprise.**-

xxx xxx xxx

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 all sales of services to the said enterprises, made by VAT registered supplies from the Customs Territory, shall be treated effectively subject to 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.

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 effective as of the date of issuance of this Circular."

Clearly, from the foregoing provisions of Section 106(A)(2)(a)(5) in relation to Articles 23 and 77(2) of the Omnibus Investments Code and as clarified under RMC No. 74-99, **indirect exports** made by a VAT taxpayer, like herein petitioner, to a PEZA registered entity are legally entitled to the zero percent (0%) VAT.

Nonetheless, petitioner must substantiate its indirect exports to PASAR by proper VAT sales invoices. Evidence forwarded to this Court shows that the sales

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invoices[35] covering petitioner's indirect exports to PASAR in the amount of US$16,656,503.00 also fall outside the subject period of claim, which is for the 4th quarter of 2003, the invoices pertain instead to the 1st and 2nd quarters of 2004. Thus, petitioner's reported indirect export sales to PASAR in the amount of US$16,656,503.00 cannot qualify for VAT zero-rating.

To recapitulate, petitioner failed to prove that its reported direct and indirect export sales in the amount of P1,209,176,550.97 with US dollar equivalent of US$21,876,451.00 qualifies for VAT zero-rating.

In view thereof, the Court finds it no longer necessary to discuss the other issues raised by the parties.

Well-settled is the rule that tax refunds are in the nature of tax exemptions and as such they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming it.[36]

WHEREFORE, for failure of petitioner to properly substantiate its claimed zero-rated sales, the Petition for Review is **DISMISSED**. Accordingly, petitioner's refund claim in the amount of P7,594,651.61 is hereby **DENIED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

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[35] *Exhibits "F-3" to "F-15"*

[36] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332; and Commissioner of Customs vs. Court of Tax Appeals, 328 SCRA 822*

LOVELL R. BAUTISTA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PHILEX MINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE No. 7391

Members:

ACOSTA, ***Chairman,***
BAUTISTA, and
CASANOVA, ***JJ.***

Promulgated:

MAY 21 2008 1:40 pm

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Concurring and Dissenting Opinion

I assent with the majority that based on Section 112 (A) of the National Internal Revenue Code (NIRC), in order to be entitled to a refund or tax credit of unutilized input VAT , the following requisites must be complied with: there must be zero-rated or effectively zero-rated sales; that input taxes were incurred or paid; that such input taxes are directly attributable to zero-rated sales or effectively zero-rated sales; that the input taxes were not applied against any output VAT liability during and in the succeeding quarters; and that the claim for refund was filed within the two-year prescriptive period.

I likewise agree that petitioner's direct export sales of copper and gold concentrates to England and Japan the amount of US$33,296.00 and 4,941,848.00 cannot qualify for VAT zero-rating; since the sales invoice petitioner presented to substantiate its direct export sale of gold to England had the corresponding number reflected "Pad-Aurex 109" while Philex's BIR Permit No. OCN3AU0000030052 issued April 19, 1999 covers 4 pads (100x4) with numbers "PX2101 to PX2500". This clearly shows that the Bureau of Internal Revenue did not authorize the imprinting to the aforesaid invoice.

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I concur further with the holding of the majority that petitioner's export sales of copper concentrates to Japan cannot likewise qualify for zero-rating because the invoices submitted by petitioner pertains to the first quarter of 2004 and fall outside the period of the instant claim. I also agree that while petitioner's indirect export sales to Philippine Associated Smelting And Refining Company (PASAR) are considered export sales and subject to zero-percent (0%) VAT following Section 106(A)(2)(a)(5) of the NIRC, in relation to Executive Order 226, otherwise known as the Omnibus Investments Code of 1987; nonetheless, for failure of petitioner to substantiate the same by proper VAT sales invoices (the invoices it presented fall outside the period of the claim), the same cannot qualify for zero-rating.

Finally, while I partly agree with the majority opinion in so far as it finds the imprinting of the words "TIN" and "VAT" or any indication to that effect in the invoice and/or receipt significant for their validity, nevertheless, I am expressing my disagreement with their view that the sales invoices supporting exports sales must contain (a) the imprinted word "zero-rated"; (b) the taxpayer's TIN-VAT number; and (c) BIR Authority to Print of BIR Permit Number, and that their absence will outright render the invoices invalid, incompetent, irrelevant, and cause the denial of petitioner's valid claim for refund or tax credit corresponding thereto.

The relevant provisions of the NIRC, namely, **Section 113** in relation to **Section 237**, are hereunder quoted for ready reference:

> "**Section 113. Invoicing and Accounting Requirements for VAT registered persons – (A) Invoicing Requirements** – A VAT-registered person, shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:
>
> 1. A statement that the seller is a VAT-registered person followed by his taxpayer's identification number (TIN); and
>
> 2. The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax.
>
> xxx

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> "**Section 237. Issuance of Receipts or Sales of Commercial Invoices.** – All persons subject to an internal revenue tax shall, for each sale, or transfer of merchandise or for services rendered valued at Twenty five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service; Provided however, That in case of sales, receipts or transfers in the amount of One Hundred Pesos (P100.00) or more, regardless of amount where the sale or transfer is made by a person liable to value added tax to another person also liable to value added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations, or fees, receipts or invoices shall be issued which shall show the name, business style, if any, and address of the purchaser; customer or client: Provided further, That where the purchaser is a VAT registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer's Identification Number (TIN) of the purchaser. xxx".

From the clear wordings of the above-quoted provisions, the following are the only information that must be indicated in an invoice or official receipt:

(1) A statement that the seller is a VAT-registered person;
(2) The taxpayers identification number (TIN);
(3) The total amount which the purchaser pays or is obligated to pay to the seller indicating the inclusion of the value-added tax;
(4) Transaction date;
(5) Quantity of merchandise;
(6) Description of merchandise or nature of service;
(7) Unit cost;
(8) The name, business style, if any, and address of the purchaser, customer or client in the case of sales, receipts or transfers in the amount of One hundred pesos (P100.00) or more, or regardless of amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees; and
(9) The TIN of the VAT-registered purchaser.

Save for the "TIN" and "VAT", nothing in the law requires the imprinting of the term "TIN-VAT" on official receipts/invoices. The same holds true for the BIR Authority to Print or BIR Permit Number. This has been confirmed in the same landmark case of ***Intel Technology Philippines vs. Commissioner of Internal Revenue,***[1] where it was held, and I quote:

[1] *G.R. No. 166732, April 27, 2007.*

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"xxx **Only the following items are required to be indicated in the receipts or invoices:** (1) a statement that the seller is a VAT-registered entity followed by its TIN-V; (2) the total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax; (3) date of the transaction; (4) quantity of merchandise; (5) unit cost; (6) description of merchandise or nature of service; (7) the name, business style, if any, and address of the purchaser, customer or client in the case of sales, receipt or transfers in the amount of ₱100.00 or more, or regardless of the amount, where the sale or transfer is made by a person liable to VAT to another person also liable to VAT, or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees; and (8) the TIN of the purchaser where the purchaser is a VAT-registered person. xxx

xxx xxx xxx

In any case, the above cited provisions of law and revenue regulations do *not* provide that failure to reflect or indicate in the invoices or receipts the BIR authority to print, as well as the TIN-V, would result in the outright invalidation of these invoices or receipts. Neither is it provided therein that such omission or failure would result in the outright denial of a claim for tax credit/refund. Instead, Section 264 of the Tax Code imposes the penalty of fine and imprisonment for, among others, invoices or receipts that do not truly reflect or contain all the required information, to wit:

> **Section 264. Failure or Refusal to Issue Receipts or Sales or Commercial Invoices, Violations Related to the Printing of such Receipts or Invoices or Other Violations. –**
>
> (a) Any person who, being required under Section 237 to issue receipts or sales or commercial invoices, fails or refuses to issue such receipts or invoices, issues receipts or invoices that do not truly reflect and/or contain all the informations required to be shown therein or uses multiple or double receipts or invoices, shall, upon conviction for each act or omission, be punished by a fine of not less than One thousand pesos (P1,000) but not more than Fifty thousand pesos (P50,000) and suffer imprisonment of not less than two (2) years but not more than four (4) years.
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> (b) Any person who commits any of the acts enumerated hereunder shall be penalized in the same manner and to the same extent as provided for in this Section:

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> (1) Printing of receipts or sales or commercial invoices without authority from the Bureau of Internal Revenue; or
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> (2) Printing of double or multiple sets of invoices or receipts;
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> (3) Printing of unnumbered receipts or sales or commercial invoices, not bearing the name, business style, Taxpayer Identification Number, and business address of the person or entity. xxx" *(Emphasis Supplied)*

Applying the *Intel* case, the failure to print "TIN-VAT" or the BIR Authority to Print on an invoice is not absolutely necessary for it to be considered a "VAT invoice". Neither can such omission or failure result in the outright denial of a claim for tax credit/refund, since no provision allows such outright rejection. Instead, the erring taxpayer may only be held liable for the penalty of fine and imprisonment for, among others, invoices or receipts that do not truly reflect or contain all the required information under **Section 264** of the NIRC.

In fact, even the penal provisions of **Revenue Regulations No. 7-95**, as further amended by **Revenue Regulations No. 08-02**, particularly, **Sections 4.110-5 and 4.111-1**, exclude such harsh punishment of automatic denial of the claim for refund. These sections state:

> **"SECTION 4.110-5. Penalty Provision. – In accordance with the provisions of the Tax Code of 1997, a person who fails to file, keep or supply a statement, list, or information required herein on the date prescribed therefor shall pay, upon notice and demand by the Commissioner of Internal Revenue, an administrative penalty of One thousand pesos (P1,000) for each such failure, unless it is shown that such failure is due to reasonable cause and not to willful neglect. For this purpose, the failure to supply the required information for each buyer or seller of goods and services shall constitute a single act or omission punishable hereof. However, the aggregate amount to be imposed for all such failures during a taxable year shall not exceed Twenty-five thousand pesos (P25,000).**
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> In addition to the imposition of the administrative penalty, willful failure by such person to keep any record and to supply the correct and accurate information at the time or times as required herein, shall be

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subject to the criminal penalty under the relevant provisions of the Tax Code of 1997 (e.g., Sec. 255, Sec. 256, etc.,) upon conviction of the offender.

The imposition of any of the penalties under the Tax Code of 1997 and the compromise of the criminal penalty on such violations, notwithstanding, shall not in any manner relieve the violating taxpayer from the obligation to submit the required documents.

Finally, the administrative penalty shall be imposed at all times, upon due notice and demand by the Commissioner of Internal Revenue. A subpoena *duces tecum* for the submission of the required documents shall be issued on the second offense. A third offense shall set the motion for a criminal prosecution of the offender." (*Emphasis supplied*)

"**SECTION 4.111-1. Administrative and penal provisions. (a) Suspension of business operations. – In addition to other administrative and penal sanctions provided for in the Code and implementing regulations, the Commissioner or his duly authorized representative may order suspension or closure of a business establishment for a period of not less than five (5) days for any of the following violations**:

(1) Failure to issue receipts and invoices.
(2) Failure to file value-added tax return as required under the provisions of Section 110.
(3) Understatement of taxable sales or receipts by 30% or more of his correct taxable sales or receipts for the taxable quarter.
(4) Failure of any person to register as required under the provisions of Sec. 107.

(b) Surcharge, interest and other penalties. – The interest on unpaid amount of tax, civil penalties and criminal penalties imposed in Title XI of the Tax Code shall also apply to violations of the provisions of Title IV of the Code." (*Emphasis supplied*)

The Revenue Bureau, in **BIR Ruling DA-375-03** confirms this opinion, thus:

"xxx The fact that the official receipts issued by DITFI do not bear the information that DITFI is a VAT-registered taxpayer as required under Section 4.108-1 of Rev. Regs. No. 7-95, **does not *motu propio* invalidate the claim for input tax credit** of Stanfilco xxx.

"Finally, **the Revenue District Officer (RDO) concerned is hereby ordered to impose the corresponding penalty against DITFI as prescribed in Revenue Memorandum Order No. 56-2000, in relation to Section 264 of the Tax Code of 1997, for failure to issue the prescribed receipts.**" *(Emphasis supplied)*

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So even assuming *arguendo* that there was a violation of the supposed requirements to indicate the terms "TIN," and "VAT," as well as the BIR authority to print, such oversight does not automatically invalidate the sales invoices for purposes of proving the transactions made by petitioner. The sales invoices are still material, relevant and competent inasmuch as they still directly prove the amount of sales made by petitioner.

Accordingly, while I agree with the denial of petitioner's claim for its failure to substantiate the same, I disagree with the finding that for invoices to be considered valid, they must contain: a) the imprinted word "zero-rated"; b) taxpayer's "TIN-VAT" number, and c) BIR Authority to Print.

ERNESTO D. ACOSTA
Presiding Justice