REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CARMEN COPPER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1461
(CTA Case No. 8418)

Present:

DEL ROSARIO, *P.J.;*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:

NOV 16 2017 9:20a.m.

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DECISION

Fabon-Victorino, J.:

This Petition for Review[1] filed by Carmen Copper Corporation on May 18, 2016, seeks to annul and set aside: (1) the Decision[2] dated June 30, 2015, which denied its Petition for Review for lack of merit; and (2) the Resolution[3] dated May 2, 2016, which denied its *Motion for Reconsideration* of the aforesaid Decision, both rendered by the Court in Division in CTA Case No. 8418.

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[1] *En Banc* docket, pp. 1-22.
[2] *En Banc* docket, pp. 27-56.
[3] *En Banc* docket, pp. 59-68.

THE FACTS AND THE PROCEEDINGS

The pertinent facts, as culled from the record, are as follows:

Petitioner Carmen Copper Corporation is a domestic corporation, with office address at the 9th Floor, Quad Alpha Centrum Building, 125 Pioneer Street, Mandaluyong City.[4] It is engaged in the business of mining[5] ores and other mineral resources. It is a Value Added Tax (VAT)-registered enterprise per Certificate of Registration No. OCN3RC0000281745[6] dated October 5, 2004. It is likewise registered with the Board of Investments (BOI) as a new producer of copper concentrate with non-pioneer status,[7] pursuant to Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1997.

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR), with authority to grant or deny claim refunds or tax credits of erroneously or excessively paid taxes as provided by law. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

For taxable year (TY) 2010, petitioner generated and recorded zero-rated sales of copper concentrates in the total amount of ₱8,430,348,537.29, as reflected in its amended Quarterly VAT Returns[8], as follows:

Period Covered (2010)	Total Amount of Zero-Rated Sales
First Quarter	₱ 2,085,424,388.18
Second Quarter	1,656,920,357.42
Third Quarter	2,257,474,234.90
Fourth Quarter	2,430,529,556.79
Total	**₱ 8,430,348,537.29**

For the same period, petitioner paid input VAT on its domestic purchases of goods, other than capital goods, and

[4] Exhibit "B".
[5] Exhibit "B-1".
[6] Exhibit "A".
[7] Exhibit "D".
[8] Exhibits "J", "K", "L", and "M".

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services and importation of capital goods in the amount of ₱1,620,048,658.90, which it claimed attributable to its zero-rated sales of ₱8,430,348,537.29.[9]

Thus, for the four (4) quarters of TY 2010, petitioner filed with respondent, through the BIR Large Taxpayers Service, administrative claims for refund/TCC of its alleged unutilized input VAT attributable to its zero-rated sales for the said periods, as follows:

Exhibit	Period (2010)	Date of Filing the Administrative Claim for Refund	Amount of Claim
N	1st Quarter	March 3, 2011	₱57,657,672.73
O	2nd Quarter	October 21, 2011	₱39,670,593.11
P	3rd Quarter	October 21, 2011	₱56,037,962.75
Q	4th Quarter	October 21, 2011	₱33,303,081.83

Respondent partially denied petitioner's claim for refund per Notice dated December 5, 2011.[10]

In the said Notice, respondent informed petitioner that only the amount of ₱117,443,756.22 may be recommended for issuance of TCC. As indicated in the Notice, its input VAT of ₱65,329,954.52 incurred from its importation of capital goods was disallowed:[11]

Total Claim for TCC/Refund		₱ 186,669,310.42
Less: None (sic) compliance with invoicing requirements	₱ 3,895,599.68	
Deferred Input Tax on Importations of Capital Goods exceeding ₱1M	65,329,954.52	69,225,554.20
Total Amount Recommended for TCC		**₱117,443,756.22**

On January 27, 2012, petitioner appealed respondent's decision before the Court in Division *via* a Petition for Review[12] assailing only the disallowed amount of ₱65,329,954.52, allegedly representing its excess and unutilized input VAT paid on importation of capital goods attributable to its zero-rated sales for TY 2010.

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[9] Par. 9, Statement of Material and Judicial Facts, Petition for Review dated January 27, 2012, *Rollo*, p. 8.
[10] Par. 7, JSFI, *Rollo*, p. 394.
[11] Par. 8, JSFI, *Rollo*, pp. 394-395.
[12] *Rollo*, pp. 6-18.

In his Answer[13], respondent argues that in an action for tax credit or refund, the burden is upon petitioner to prove that he is entitled thereto, and failure to discharge the said burden is fatal to the claim.

During the trial, both parties presented evidence in support of their respective positions.

On June 30, 2015, the Court in Division rendered the assailed Decision denying petitioner's Petition for Review for lack of merit. The Court in Division ruled that petitioner was unable to prove its entitlement to the amount sought for refund/TCC as it failed to present any bills of lading or airway bills to prove that there were actual shipments of its direct export sales from the Philippines to a foreign country as required under Section 106(A)(2)(a)(1) of the National Internal Revenue Code (NIRC) of 1997, as amended. The Court in Division found the BOI Certification dated January 14, 2011 did not sufficiently meet the legal requirement that there must be actual shipment of the goods from the Philippines to a foreign country.

Unconvinced, petitioner filed a Motion for Reconsideration[14] on July 24, 2015, praying for the Court in Division to reconsider the assailed Decision and order the refund of the amount of ₱65,329,954.52. In the alternative, it prayed for the reopening of the case for the presentation of additional evidence to prove its actual shipments of goods from the Philippines to a foreign country. Attached to its *Motion* are photocopies of bills of lading marked as Annexes "A-1" to "A-23".

Respondent filed his Comment/Opposition[15] thereto on August 18, 2015.

On October 29, 2015, the Court in Division granted petitioner's Urgent Motion to Set Case for Hearing (Re: Petitioner's Motion for Reconsideration). Thus, the case was set for hearing on December 10, 2015.[16]

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[13] *Rollo*, pp. 305-312.
[14] *Rollo*, pp. 915-925.
[15] *Rollo*, pp. 969-981.
[16] Resolution, *Rollo*, pp. 992-993.

During the hearing on December 10, 2015, petitioner presented its Port Operations Department Head, Rodrigo B. Guardario, who identified[17] export documents attached to petitioner's Motion for Reconsideration to prove actual export of petitioner's copper concentrates.

On January 14, 2016, respondent opted not to cross-examine petitioner's witness.

On May 2, 2016, the equally assailed Resolution denying petitioner's Motion for Reconsideration was issued. The Court in Division explained that the additional documents presented by petitioner were not formally offered, worse, they were mere photocopies. Consequently, they were not considered for lack of probative value and for being inadmissible in evidence.

Hence, this Petition for Review before the Court *En Banc* anchored on the following grounds:

(a) The BOI Certification proves actual export of goods from the Philippines as the issuance of the Certification was issued on the basis of existing bills of lading and other export documents duly presented;

(b) Petitioner offered the additional testimonial and documentary evidence in support of the Motion which were duly identified by testimony duly recorded in open court; and

(c) The testimony of Mr. Guardario, taken together with petitioner's other documentary evidence, is sufficient to prove actual export from the Philippines of its copper concentrates for TY 2010.

Petitioner insists that the BOI Certification is sufficient to prove actual export of its copper concentrates for TY 2010. Allegedly, the BOI Certification was issued pursuant to the regulatory issuances of two government agencies, to wit: (i)

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[17] *Rollo*, pp. 998-1007.

Revenue Memorandum Order (RMO) No. 9-2000 issued by the BIR; and (ii) the Guidelines on the Issuance of Certification to BOI-Registered Companies Pursuant to BIR Revenue Memorandum Order No. 9-2000 issued by the BOI. Under the BOI Guidelines, before a BOI Certification shall be issued, the applicant is required to submit a duly notarized Detailed Export Sales Report for the year immediately preceding showing the export invoice number, export declaration number, Air Way Bill/Bill of Lading No. and Date, product exported, sales volume and value. Thus, for petitioner, its BOI Certification which states that it "*exported 100% of its total sales volume/value for calendar year covering January 01 to December 31, 2010*" is sufficient to prove that it actually shipped its goods from the Philippines to a foreign country.

Further, pursuant to existing regulations of the BOI and the BIR, the BOI Certification in itself is sufficient evidence to prove actual export, thus, it should be adopted by the Court.

And contrary to the ruling of the Court in Division, the additional testimonial and documentary evidence should be admitted and allowed into evidence. Per petitioner, an examination of the Transcript of Stenographic Notes (TSN) of December 10, 2015 shows that it offered the additional testimonial and documentary evidence identified in open court by its witness Guardario. Therefore, even if the said documents were not formally offered in evidence, they should be considered as they were duly recorded and incorporated in the record of the case per Supreme Court's ruling in *Heirs of Romana Saves, et al. v. Heirs of Escolastico Saves, et al.*[18]

Although petitioner admits that the submitted documents are mere copies of the export documents, it claims that the originals of the said documents were presented and made available for comparison during the hearing on December 10, 2015.

Lastly, petitioner opines that even if the documents it presented and offered are inadmissible in evidence, the

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[18] G.R. No. 152866, October 6, 2010.

testimony of its witness Guardario is sufficient to prove actual export of its copper concentrates for TY 2010. Per petitioner, the testimony of witness Guardario that petitioner actually exported its copper concentrates to its customers located in China and Korea are within his personal knowledge being its Port Operations Department Head whose responsibility includes oversight of the loading operations of exported shipments.

By way of Comment, [19] respondent submits that petitioner's Petition for Review be dismissed for utter lack of merit. According to respondent, the export documents presented by petitioner must be denied admission for failure to formally offer the same and for being mere photocopies. Respondent points out that petitioner has the burden of proof to establish the factual basis of his claim for refund/TCC. After all, tax refunds, like tax exemptions, are construed *strictissimi juris* against the taxpayer.

With petitioner's filing of its Memorandum[20] on October 17, 2016, and considering respondent's Manifestation [21] dated September 6, 2016, stating that he is adopting his Comment to the Petition for Review filed on August 8, 2016 as his Memorandum, the instant Petition for Review was submitted for decision on November 14, 2016.[22]

RULING OF THE COURT *EN BANC*

The instant Petition for Review lacks merit.

The BOI Certification itself is not sufficient to prove that there was ***actual shipment*** *of petitioner's goods from the Philippines to the foreign country.*

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[19] *En Banc* docket, pp. 92-98.
[20] *En Banc* docket, pp. 114-136.
[21] *En Banc* docket, pp. 103-104.
[22] Resolution, *En Banc* docket, pp. 140-141.

Petitioner's claim that it has zero-rated or effectively zero-rated sales is anchored on Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended, which reads:

> SEC.106. *Value-Added Tax on Sale of Goods or Properties.* —
>
> (A) *Rate and Base of Tax.* — . . .
>
> 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). (*Emphases supplied*)

In the case of *Phil. Gold Processing and Refining Corp. vs. Commissioner of Internal Revenue,*[23] the Court ruled that for **direct export sales** to qualify as VAT zero-rated sale pursuant to Section 106 (A)(2)(a)(1) of the NIRC of 1997, as amended, the following conditions must be satisfied:

1. there was a sale and **actual shipment of goods from the Philippines to a foreign country**;

2. the sale was made by a VAT-registered person;

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[23] CTA EB No. 1082, November 26, 2014.

3. the sale was paid for in acceptable foreign currency; and

4. the payment was accounted for in accordance with the rules and regulations of the BSP.

Corollary thereto, Section 113(A)(1), (B)(1), (2)(c) and (3) of the NIRC of 1997, as amended, as implemented by Section 4.113-1(A)(1), B(1) and (2)(c) of Revenue Regulations (RR) No. 16-2005, as amended, prescribe that a VAT taxpayer, such as petitioner, shall, for every sale, barter or exchange of goods or properties, issue a VAT invoice.

Thus, to establish that there is a VAT zero-rated direct export sale, the VAT-registered taxpayer claiming VAT zero-rated direct export sales must present at least three (3) types of documents, to wit:

1. the sales invoice as proof of sale of goods;

2. 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

3. the bank credit advice, certificate of bank remittance or any other document proving payment of goods in acceptable foreign currency or its equivalent in goods and services.

In other words, to qualify for VAT zero-rating under Section 106 (A) (2) (a) (1) of the NIRC of 1997, as amended, at least the above documents must be presented and formally offered in evidence.

The Court *En Banc* concurs with the ruling of the Court in Division that "*the presentation of the Certification* from the Board of Investments *dated January 14, 2011, certifying that 100% of petitioner's sales volume/value for calendar year 2010 were by way of exports does not sufficiently meet the requirement of the law that there must be actual* *shipment of the goods from the Philippines to a foreign country."*[24] As required by Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended, there must be an actual shipment of the goods from the Philippines to a foreign country, **where the fact of actual shipment can be evidenced by the export declaration and bill of lading or airway bill.**

Further, it must be emphasized that the certification was issued "pursuant to the Guidelines on the issuance of BOI Certification per Revenue Memorandum Order (RMO) No. 9-2000 entitled 'Tax Treatment of Sales of Goods, Properties and Services made by VAT-registered Suppliers to BOI-registered Manufacturers-Exporters with 100% Export Sales' dated February 02, 2000". Section 3(4) of RMO No. 9-2000 shows that the **<u>BOI certification is furnished to the suppliers of BOI-registered buyer which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers</u>**.

Clearly, the BOI Certification in question was not issued to attest to petitioner's export sales in connection with its claim for input VAT refund, rather, the **said Certification serves as authority for the suppliers of petitioner to avail of the benefits of zero-rating** on their sales to petitioner.

Petitioner's additional evidence cannot be considered for failure to formally offer the same, and for being mere photocopies.

Petitioner maintains that it offered the additional documentary exhibits into evidence when it presented its witness Guardario, who allegedly identified the said exhibits in his testimony recorded and incorporated in the record of the case. Despite absence of formal offer of the additional exhibits, nevertheless, it substantially offered them as it specified the purpose for their presentation giving respondent the chance to object to their presentation.

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[24] Assailed Decision, p. 27.

The Court is not convinced.

The law is clear. Section 34, Rule 132 of the Rules of Court provides that *"the court shall consider no evidence which has not been formally offered."*

In *Heirs of Serapio Mabborang, et al. vs. Hermogenes Mabborang and Benjamin Mabborang,*[25] the Supreme Court discussed the significance and purpose of formal offer of evidence, as follows:

> Section 34, Rule 132 of the Rules of Court provides that "the court shall consider no evidence which has not been formally offered." This is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence. Also, it allows opposing parties to examine the evidence and object to its admissibility. A formal offer is necessary because judges are mandated to rest their findings of facts and judgment strictly and only upon the evidence offered by the parties at trial. Consequently, review by the appellate court is facilitated for it will not be required to review documents not previously scrutinized by the trial court. Hence, **strict adherence to this basic procedural rule is required, lest evidence cannot be assigned any evidentiary weight or value**:
>
> > <u>Thus, the trial court is bound to consider only the testimonial evidence presented and exclude the documents not offered. Documents which may have been identified and marked as exhibits during pre-trial or trial but which were not formally offered in evidence cannot in any manner be treated as evidence. Neither can such unrecognized proof be</u>

[25] G.R. No. 182805, April 22, 2015.

> <u>assigned any evidentiary weight and value</u>. It must be stressed that there is a significant distinction between identification of documentary evidence and its formal offer. The former is done in the course of the pre-trial, and trial is accompanied by the marking of the evidence as an exhibit; while the latter is done only when the party rests its case. **The mere fact that a particular document is identified and marked as an exhibit does not mean that it has already been offered as part of the evidence. It must be emphasized that any evidence which a party desires to submit for the consideration of the court must formally be offered by the party; otherwise, it is excluded and rejected**.

Truly, the rule admits an exception. However, the Court still cannot consider petitioner's additional evidence for being mere photocopies. Contrary to petitioner's claim, it failed to present the originals thereof for comparison. This can be easily deduced from the relevant portion of the TSN taken during the hearing on December 10, 2015, to wit:

> ATTY. SANTOS
>
> Q Mr. Guardario, in your Judicial Affidavit, you identified several exhibits more specifically Exhibits "WW-1" to "WW-23" and Exhibits "YY-1" to "YY-6" to "RRR-1" to "RRR-6". If shown copies of these documents, will you be able to identify the same?
>
> MR. GUARDARIO
>
> A Yes.

ATTY. SANTOS

Q Mr. Guardario, I am showing to you documents. What is the relation of these documents to the documents that you identified in your Judicial Affidavit?

MR. GUARDARIO

A **These are the certified true copies based on the original Bill of Ladings**.

Clearly, the documents shown to the witness were mere certified true copies of the originals. And petitioner failed to submit the originals for verification and comparison.

Thus, the Court *En Banc* agrees with the Court in Division in holding, thus:

> Although the rule admits an exception, petitioner's claim would still fail considering that not only did petitioner fail to formally offer the subject documents, it also failed to submit the originals thereof.

Likewise, the Court *En Banc* agrees with the Court in Division in not giving any evidentiary weight to the subject additional documentary exhibits. The Court *En Banc* quotes with approval the ruling of the Court in Division, as follows:

> **Best evidence rule applies**
>
> Under the best evidence rule, when the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself.
>
> In the case of *Philippine Banking Corporation vs. Court of Appeals and Leonilo Marcos*, the Supreme Court held that:

> "The Best Evidence Rule provides that the court shall not receive any evidence that is merely substitutionary in its nature, such as photocopies, as long as the original evidence can be had. Absent a clear showing that the original writing has been lost, destroyed or cannot be produced in court, the photocopy must be disregarded, being unworthy of any probative value and being an inadmissible piece of evidence."

In the case of *MCMP Construction Corp. vs. Monark Equipment Corp.*, the Supreme Court provided the requirements before a party may present secondary evidence to prove the contents of the original document whenever the original has been lost:

> Before a party is allowed to adduce secondary evidence to prove the contents of the original, the offeror must prove the following: (1) the existence or due execution of the original; (2) the loss and destruction of the original or the reason for its non-production in court; and (3) on the part of the offeror, the absence of bad faith to which the unavailability of the original can be attributed. The correct order of proof is as follows: existence, execution, loss, and contents.

However, in this case, petitioner failed to satisfy the requirements for the introduction of secondary evidence. It did not provide a plausible reason as to why the originals of the documents presented could not be produced before the court.

> Thus, the Court cannot give any evidentiary weight to the documents presented. (*Citations omitted*)

It is well-settled that procedural rules are designed to facilitate the adjudication of cases. Courts and litigants alike are enjoined to abide strictly by the rules. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to ensure an orderly and speedy administration of justice. Party litigants and their counsel are well advised to abide by, rather than flaunt, procedural rules for these rules illumine the path of the law and rationalize the pursuit of justice.[26]

WHEREFORE, the *Petition for Review* filed by Carmen Copper Corporation on May 18, 2016 is hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ON LEAVE
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[26] *Toshiba Information Equipment (Phils.), Inc. v. Commissioner of Internal Revenue*, 628 Phil. 430, 451 (2010).

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice