REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

CORAL BAY NICKEL CORPORATION,
Respondent.

CTA *EB* NO. 1735
(CTA Case No. 8905)

x- x

CORAL BAY NICKEL CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 1737
(CTA Case No. 8905)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

JUL 18 2019
2:32 p.m.

x- x

D E C I S I O N

MANAHAN, J.:

Before the Court of Tax Appeals *En Banc* are the consolidated Petitions for Review filed by Coral Bay Nickel

Corporation ("Coral Bay") and Commissioner of Internal Revenue (CIR) assailing the Decision dated June 2, 2017 (assailed Decision) and the Resolution (assailed Resolution) dated October 19, 2017 both promulgated by the Third Division of this Court (Court in Division) in CTA Case No. 8905.

The dispositive portions of the assailed Decision and Resolution are quoted hereunder:

Decision dated June 2, 2017

> "**WHEREFORE,** the instant Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, respondent Commissioner of Internal Revenue is hereby **DIRECTED TO REFUND** in favor of petitioner Coral Bay Nickel Corporation the reduced amount of P122,250.00, representing its unutilized input value-added tax related to its VAT zero-rated sales for the 1st quarter of 2013.
>
> **SO ORDERED.**

Resolution dated October 19, 2017

> "**WHEREFORE**, finding no compelling reason to modify, much more depart from the Decision of June 2, 2017, petitioner's Motion for Partial Reconsideration and respondent's Motion for Partial Reconsideration, both dated June 27, 2017 are **DENIED** for lack of merit.
>
> **SO ORDERED."**

THE FACTS

The facts, as found by the Court in Division in its Decision dated June 2, 2017, are as follows:

> "Petitioner is a domestic corporation with principal office at Barangay Rio Tuba, Municipality of Bataraza, Palawan. It is registered with the Securities and Exchange Commission (SEC) to do business in the Philippines and was issued Company Registration No. A200205418.
>
> Petitioner is principally engaged in the business of owning, holding, selling, exchanging, leasing, mortgaging or

otherwise disposing of dealing in, and operating plants for processing, reducing, concentrating, smelting, converting, refining, preparing for market, or otherwise treating metals, minerals and mined products to be used in the production of mixed sulfide of nickel and cobalt, and any and all ingredients, products and by-products of any thereof, and to produce, manufacture, process, refine, treat, sell, use, deal in, distribute, market and otherwise turn to account or dispose of mixed sulfide of nickel and cobalt, and any and all ingredients, products, and by-products of any thereof.

Petitioner is also registered with the Bureau of Internal Revenue (BIR) with Taxpayer's Identification Number (TIN) 005-961-540-000 and with Philippine Economic Zone Authority (PEZA) as an Ecozone Export Enterprise engaged in the manufacture of nickel/cobalt mixed sulfide at the Rio Tuba Export Processing Zone, with Certificate of Registration No. 02-072 issued on December 27, 2002.

On the other hand, respondent is the Commissioner of Internal Revenue (BIR), with authority to approve or deny claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On September 1, 2004, petitioner entered into an Offtake Agreement with Sumitomo Metal Mining Co., Ltd. (SMM), a Japanese corporation, for the export of its nickel cobalt mixed sulfide, which transaction qualified for VAT zero-rating unde Section 106 (A) (2) (a) of the National Internal Revenue Code (NIRC) of 1997, as amended.

During its operation, petitioner continued to accumulate input VAT from its domestic purchase of taxable goods and services rendered and used outside the Rio Tuba Export Processing Zone, it however did not incur output VAT from its exportation of nickel cobalt mixed sulfide, against which to offset its accumulated input VAT.

On May 13, 2014, petitioner filed with the BIR's Large Taxpayer Excise Audit Division I (LTEAD I), Revenue District Office No. 121 an administrative claim for refund of its alleged unutilized input VAT for the first quarter of taxable year (TY) 2013 in the amount of Php1,575,051.81.

On October 9, 2014, petitioner filed the instant Petition for Review on the ground of inaction on the part of respondent.

On December 9, 2014, respondent posted his Answer alleging that petitioner's claim for refund/TCC of alleged unutilized input taxes lacks factual and legal bases on the following grounds specified under his special and affirmative defenses, i.e., tax collected are presumed to be in accordance with law, rules and regulations; petitioner must first prove its entitlement to the refund/TCC sought; that there is a need to ascertain the veracity of petitioner's claim for refund/TCC; petitioner has the burden of proof but failed to discharge the same; and petitioner's claim for refund/TCC is construed strictly against it.

In addition, respondent claims that under Section 3 (3) of Revenue Memorandum Circular (RMC) No. 74-99, all sales of goods or services to PEZA-registered enterprise by a VAT-registered supplier from the customs territory shall be subject to VAT at zero percent (0%) rate. Hence, no output VAT shall be shifted to or passed on the PEZA-registered enterprises; conversely, no input VAT shall be paid by PEZA-registered enterprises from the said purchases. There being no input VAT paid by PEZA-registered enterprises, it necessarily follows that they are not entitled to refund or issuance of tax credit certificate from their purchases of goods and services. Precisely, under paragraph A-5 (1) of RMC No. 42-2003, a claim for input VAT by a PEZA-registered claimant based on invoices/receipts issued upon the effectivity of earlier cited RMC No. 74-99, should be denied.

Further, RMC No. 42-2003 clarifies that only PEZA-registered entities availing of income tax holidays are allowed to claim for tax refund/credit to the extent of the input tax shifted to the PEZA-registered buyer prior to the implementation of RMC No. 74-99.

In instances where the taxpayer-claimant paid input VAT, notwithstanding that under the law it is subject to VAT at 0% rate, the recourse of the taxpayer-claimant is not against the government, but against the seller who shifted to it the output VAT.

In its Reply, petitioner argues that: 1) disputable presumptions are satisfactory only if uncontradicted; 2) administrative claims for refund are not subject to indefinite examination/investigation; and 3) it is applying for a refund pursuant to Section 112 (A) of the NIRC of 1997, as amended, and Section 4.112-1 of Revenue Regulations (RR) No. 16-2005.

On June 8, 2015, a Pre-Trial Order was issued, but it was amended at the instance of petitioner on August 11, 2015.

To establish its cause, petitioner presented as witnesses (1) Allen Roy T. Catacutan; (2) John S. Barrientos;

(3) Engineer Zosimo Oliver P. Villa and (4) Joseph Cedric V. Calica."

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In the assailed Decision[1], promulgated on June 2, 2017, the Court in Division partially granted the Petition for Review and ordered the respondent (CIR) therein to refund in favor of petitioner the reduced amount of P122,250.00 representing its unutilized input value-added tax related to its VAT zero-rated sales for the first quarter of 2013.

Aggrieved, both CIR and Coral Bay filed *Motions for Partial Reconsideration* on June 28, 2017 and Coral Bay on June 27, 2017, respectively.

The Court in Division denied both Motions for lack of merit in the assailed Resolution.

The CIR then filed a Petition for Review with the Court *En Banc* on November 23, 2017 docketed as CTA *EB* No. 1735.

Coral Bay likewise filed a Petition for Review with the Court *En Banc* on the same date, November 23, 2017 docketed as CTA *EB* No. 1737.

Both Petitions for Review were consolidated in a Minute Resolution dated November 28, 2017.[2]

In a Resolution dated January 9, 2018, the Court *En Banc* ordered both parties to file their respective Comments to the Petitions for Review.[3]

On February 12, 2018, Coral Bay filed its *Comment/Opposition* to CIR's Petition for Review while the CIR failed to file his Comment to Coral Bay's Petition for Review.

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[1] EB Docket, pp. 19-49.
[2] EB Docket, page 63.
[3] EB Docket, pp. 65-66.

In a Resolution dated March 27, 2018, the Court *En Banc* ordered both parties to file their respective Memoranda within the period provided therein.[4]

On May 16, 2018, Coral Bay filed its Memorandum while CIR failed to file his Memorandum within the prescribed period based on the Records Verification Report of the Judicial Records Division dated June 5, 2018. With the submission of Coral Bay's Memorandum, the Court *En Banc* submitted the case for decision in a Resolution dated July 19, 2018.

ISSUES

CTA *EB No.* 1737

In its Petition for Review, Coral Bay raised a sole issue for consideration by the Court, quoted as follows:

> "Petitioner is entitled to an additional input tax refund in the aggregate amount of Seven Hundred Ninety Three Thousand Five Hundred Twenty Four Pesos (P793,524.07) on its unutilized input VAT attributed to its zero-rated sales, for the period of January 1, 2013 to March 31, 2013, on top of the amount of One Hundred Twenty Two Thousand Fifty Pesos (Php 122,250.00) previously granted by the Court in its Decision dated June 2, 2017."

CTA *EB* No. 1735

In its Petition for Review, CIR raised the following issues quoted as follows:

1. No output VAT shall be shifted to or passed on to the PEZA-registered enterprises; conversely, no input VAT shall be paid by PEZA-registered enterprises from said purchases.

2. Respondent failed to present evidence that will prove that the input taxes were directly attributable to zero-rated or effectively zero-rated sales.

RULING OF THE COURT EN BANC

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[4] EB docket, pp. 89-90.

CTA EB NO. 1737

In its Petition for Review, Coral Bay argues that the Court in Division erroneously excluded input VAT in the total amount of Seven Hundred Ninety Three Thousand Five Hundred Twenty Four Pesos and 7/100 (Php793,524.00) from the amount granted in the Decision dated June 2, 2017. It claims that the Court in Division disallowed the aforesaid amount based on its findings that the same were allegedly consumed within the Philippine Export Processing Zone Authority or PEZA zone and as such the remedy would have been to ask for reimbursement from its suppliers/sellers and not from the government. Coral Bay, although not directly disputing the theory of the Court regarding reimbursement from suppliers, alleges that such input VAT did not pertain to goods and services consumed within the PEZA zone but were in fact consumed outside, hence must be allowed.

Coral Bay then directs the attention of the Court to the information indicated in the official receipts which readily show that the goods and services were rendered and consumed at the 24th Floor Pacific Star Building, Gil Puyat Avenue, Makati City which is outside a PEZA zone. The details of these receipts corresponding to the disallowed amount were outlined by Coral Bay in its Petition for Review allegedly showing that such expenses were consumed outside the ecozone and therefore must be included in the Decision granting petitioner's claim for tax refund.

Another significant amount excluded by the Court is the input VAT pertaining to the expenses incurred in building the ground lighting of the airport runway by Everbuild Global Development Corporation which is located outside the Rio Tuba Export Processing Zone. Petitioner argues that input VAT allowed by the Court in Division referred to the construction of the laborer's row house, bus terminals, dormitory and foreman's duplex and there is no reason why the input VAT pertaining to the construction of the lighting of the airport runway should be excluded as these were likewise rendered/consumed outside the PEZA zone.

Coral Bay continues its discourse by mentioning that the sale of automobiles to registered ecozone enterprise are not entitled to VAT zero rating and are subject to VAT therefore the related input taxes pertaining to its purchase of said automobiles must also be included in the amount to be granted by the Court.

Lastly, Coral Bay emphasizes that the sales made during the taxable period concerned (first quarter of 2013) were purely zero-rated sales and that the input VAT incurred are entirely attributable thereto.

CTA *EB* No. 1735

The CIR, in its Petition for Review, lays down the basic principle that sales by a VAT registered supplier to a PEZA registered enterprise or an ecozone enterprise are treated as export sales subject to zero percent VAT. From this premise, the CIR argues that there being no input VAT to be paid, the VAT registered supplier/seller shall not pass on any input VAT to the ecozone enterprise, hence, Coral Bay is not entitled to refund. He cites the case of *Coral Bay Nickel Corporation vs. CIR*[5] where it was allegedly ruled that the remedy of such taxpayers is to seek reimbursement or refund from its suppliers and not from the Bureau of Internal Revenue (BIR).

CIR also raises the issue that Coral Bay failed to present evidence that will prove that the input taxes claimed are directly attributable to zero-rated or effectively zero-rated sales. He finds that the Court in Division erroneously ruled that the input taxes claimed by Coral Bay bears a direct or indirect connection to its zero-rated sales because Section 112 (A) of the 1997 NIRC provides quite clearly the requirements to be entitled to refunds of such nature. The CIR maintains that records show that the input taxes claimed by Coral Bay pertain to the construction of its laborer's row houses, bus terminals, dormitory, airport runway and foreman's duplex, all of which are not related to its zero-rated sales. CIR concludes that Coral Bay failed to introduce evidence to prove that such input taxes were attributable to its zero-rated sales hence the entire claim for refund must be denied.

[5] G.R. No. 190506, June 13, 2016.

In its *Comment/ Opposition* to the CIR's Petition for Review, Coral Bay takes exception to the allegation of the CIR that its proper remedy would be to seek reimbursement from its suppliers and not from the BIR because its sales were VAT zero-rated hence the suppliers should not have passed any of its output VAT. Instead of arguing against the theory of the CIR in running after the suppliers, Coral Bay shifted its opposition to the fact that the sales referred to in the instant case are not VAT zero-rated but were subject to 12% VAT because the goods/services were consumed outside the PEZA zone. The contention then of the CIR in directing Coral Bay to seek refund from its suppliers is not applicable to the instant case. It emphasizes that in many rulings issued by the BIR, it is already settled that purchases of goods and services that were consumed and rendered outside the PEZA zone are not entitled to VAT zero-rating but are subject to 12% VAT under Section 108 (a) of the Tax Code of the 1997 NIRC, as amended.

Coral Bay also disputes the allegation of the CIR that it was not able to prove that the input VAT claimed are attributable to its zero-rated sales by stating categorically that the Court in Division already found that the entirety of its sales for the first quarter of 2013 are purely zero-rated sales, as such the onus of proving otherwise rests upon the CIR. Coral Bay opines that the CIR failed to prove this particular allegation therefore it should not be given credence by the Court.

As the issues in these Petitions for Review are interrelated, this Court shall proceed to issue a consolidated ruling on both cases.

The Court in Division partially granted the claim for refund based on the following findings, and we quote in part as follows:

> "By virtue of the foregoing, the sale of goods, properties, and services by VAT-registered enterprises to PEZA-registered enterprises are subject to VAT at zero percent rate, no output VAT shall be shifted to or passed on to PEZA-registered enterprises; conversely, no input VAT shall be paid by PEZA-registered enterprises from said purchases. Since no input VAT is paid by PEZA-registered enterprises, it necessarily follows that they are not entitled to a refund or issuance of tax credit certificate from their domestic purchases of goods, properties and services.
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> xxx xxx xxx

> It must however be noted that the VAT zero-rating on the sales of goods, properties or services by a VAT-registered entity to a PEZA-registered entity applies when such goods, properties or services are consumed, used or rendered within the Customs Territory, i.e., outside the Ecozone, such sales by a VAT registered entity to a PEZA-registered entity shall be subject to twelve percent (12%) VAT.
>
> While it is true that petitioner is a PEZA-registered entity located at the Rio Tuba Export Processing Zone, petitioner's Tax and Audit Officer, Allen Roy T. Catacutan, testified that petitioner's excess and unutilized input VAT was incurred from the VAT passed on by petitioner's suppliers on its purchases of goods and services which were consumed and rendered outside the Rio Tuba Export Processing Zone, xxx xxx xxx
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> xxx xxx xxx
>
> All said, petitioner is entitled to a refund corresponding to its unutilized excess input VAT paid for the 1st quarter of 2013 in relation to its purchases of services from SMCC, and which were rendered outside the Rio Tuba Export Processing Zone and were attributable to its zero-rated sales for the same period, but in the reduced amount of Php122,250.00."

In its Petition for Review, Coral Bay essentially agreed with the legal basis of the Court's conclusion but took exception to the partial grant on factual grounds, i.e., that it duly proved that all of its sales covered by the claim for refund were rendered outside the ecozone.

CIR disputed the assailed Decision because the sets of input VAT being claimed were not proven to be attributable to Coral Bay's zero-rated sales and that it was erroneous on the part of the Court to grant the claim for refund, albeit partially.

We find for the CIR.

The claim for refund was anchored on the provisions of Section 112 (A) of the 1997 NIRC quoted below:

> "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 sale and also in taxable or exempt sale of goods of 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: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

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Based on the foregoing provision of Section 112 (A) of the 1997 NIRC, in order to be entitled to a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales, the following requisites must be satisfied:[6]

1. that the taxpayer is VAT-registered;
2. that there must be zero-rated or effectively zero-rated sales;
3. that input taxes were incurred or paid;
4. that input taxes claimed are attributable to zero-rated or effectively zero-rated sales;
5. that input taxes have not been applied against any output VAT liability; and
6. that the claim was filed within the prescribed periods both in the administrative and judicial levels.

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The records of this case and as adjudged by the Court in Division, show that the sets of input VAT were incurred on Coral Bay's purchases of goods and services which were consumed and rendered outside the PEZA zone and within the customs territory. Further, the Court in Division acknowledged that such purchases were used to construct the row house and

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[6] *San Roque Power Corporation vs. Commissioner of Internal Revenue,* G.R. No. 180345, November 25, 2009.

dormitory for Coral Bay's laborers as well as the foreman's duplex and airport runway, all located outside of the PEZA zone.

One important requisite for a claim for refund of excess or unutilized input VAT under the aforequoted Section 112 (A) is that the input taxes claimed are attributable to zero-rated or effectively zero-rated sales.

This Court finds that Coral Bay failed to comply with this basic requisite because the input taxes that were incurred were not at all related to its zero-rated sales.

In the assailed Decision, the Court in Division described Coral Bay's business as follows:

> Petitioner is principally engaged in the business of owning, holding, selling, exchanging, leasing, mortgaging or otherwise disposing of dealing in, and operating plants for processing, reducing, concentrating, smelting, converting, refining, preparing for market, or **otherwise treating metals, minerals and mined products to be used in the production of mixed sulfide of nickel and cobalt, and any and all ingredients, products and by-products of any thereof, and to produce, manufacture, process, refine, treat, sell, use, deal in, distribute, market and otherwise turn to account or dispose of mixed sulfide of nickel and cobalt, and any and all ingredients, products, and by-products of any thereof."** (emphasis supplied).

In paragraphs 12 and 13 of its Petition for Review with the Court *En Banc,* Coral Bay described its business (related to its claim for refund) as follows:

> "12. During the first quarter of taxable year of 2013. Petitioner exported nickel cobalt and mixed sulfide, which are considered VAT zero-rated sales, to Sumitomo Metal Mining Co. Ltd., a corporation organized and existing under the laws of Japan, as shown by the Supplemental Off Take Agreement executed between Sumitomo Metal Mining Co., Ltd. and Petitioner on March 9, 2005, which qualifies as VAT zero-rated sales in accordance with Section 106 (A) (2) (a) of the 1997 National Internal Revenue Code (NIRC), as amended.
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> 13. As a result, while petitioner continued to accumulate input VAT from its domestic purchases of taxable goods and services rendered and used outside the Rio Tuba Export Processing Zone, it does not incur output VAT from its exportation of nickel cobalt mixed sulfide, against which to offset the input VAT."

It is clear from the records of this case as well as the aforequoted narration of Coral Bay that its sales are qualified to be zero-rated under "export sales" in accordance with Section 106 (A) (2) of the 1997 NIRC.

However, it is also clear that the input taxes that were incurred were used for transactions or activities that are not related to its nature as a zero-rated taxpayer.

One of the incentives granted by law is that any unutilized or excess input VAT may be refunded to VAT zero-rated taxpayer provided that these are attributable or used in the manufacture or exportation of its zero-rated sales which in the case of Coral Bay is the exportation of nickel cobalt and mixed sulfide to Sumitomo Metal Mining Co., Ltd. located in Japan. Section 110 (B) of the 1997 NIRC clearly provides, thus:

> Section 110. *Tax Credits.-*
>
> xxx xxx xxx
>
> (B) Excess Output or Input Tax – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. **Provided, however, That any input tax attributable to zero-rated sales by a VAT registered person may at his option be refunded or credited against any other internal revenue taxes, subject to the provisions of Section 112.** (emphasis supplied)

In the Memorandum filed by Coral Bay with the Court *En Banc*, it categorically stated that the purchases of goods and services were consumed outside of the Rio Tuba Export Processing Zone and were used to construct the laborer's row houses, dormitories and foreman's duplex etc. which this Court finds to be unrelated to the said export sales. The Supreme Court has already ruled that any unutilized input VAT *attributable* to zero-rated sales may be claimed as refund or tax credit.[7] The tax refund embodied in Section 112 (A) of the 1997 NIRC is intertwined with the essence of the incentives granted to enterprises that engage in exportation of local goods and

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[7] Team Sual Corporation (formerly Mirant Sual Corporation), G.R. No. 194105, February 5, 2014.

services: that instead of imposing the regular VAT rate of 12% they are subject to VAT but at zero-rate. However, since exportations of this nature do not incur output VAT, the input VAT that is passed on to them cannot be credited thus it is accumulated either as excess input VAT and/or remains unutilized. Thus, the payment of input VAT and the resulting refund under Section 112 is not premised on an erroneous payment but is a privilege or an option inherent in the incentive granted by law. The provisions of Section 112 of the 1997 NIRC provides a solution whereby the excess or unutilized input VAT may now be claimed as refund or applied as a tax credit so as not to negate the essence of the incentive. However, there are requisites for its entitlement. Whether applied as a refund or tax credit, the requisite of attribution to the zero-rated sales remain consistent, otherwise, it is not covered by the provisions of Section 112 (A) and the claim for refund should not prosper. This is illustrated further by the proportional allocation of the input taxes if the claimant taxpayer is engaged in both zero-rated or effectively zero-rated and taxable or exempt sales as clearly provided in the afore-quoted Section 112 (A) of the 1997 NIRC because the law would clearly want to preserve or restrict the refund incentive only to those which are directly attributable to the zero-rated sales.

What if the claimant taxpayer is only engaged in zero-rated sales and does not generate output taxes against which to offset the input taxes incurred outside of its zero-rated sales? Then the provisions of Section 112 of the 1997 NIRC will not apply and refund is not an option while the business exists.

The requisites already mentioned in claiming a refund of excess or unutilized input VAT under Section 112 of the 1997 NIRC have been affirmed and applied by a myriad of cases through the years and this Court is not about to deviate from sound doctrine.

Tax refunds and tax exemptions are exceptions rather than the rule and for this reason are highly disfavored. Hence, in evaluating a claim for refund, the rule of strict interpretation applies.[8] It bears to emphasize that tax refunds or tax credits are strictly construed against the taxpayer, the latter having the

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[8] CIR vs. United Cadiz Sugar Farmers Association Multi-Purpose Cooperative, G.R. No. 2097761, December 7, 2016.

burden to prove *strict compliance with the conditions for the grant of the tax refund or credits.*[9]

In light of the foregoing considerations, the Petition for Review filed by Coral Bay Nickel Corporation in CTA EB No. 1737 should be **DENIED** for lack of merit while the Petition for Review filed by the CIR in CTA EB No. 1735 should be **GRANTED**.

Accordingly, the claim for refund of Coral Bay in the total amount of Php1,575,051.81 representing its unutilized input VAT for the first quarter of 2013 should be **DENIED.**

However, Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503, provides:

> "Section 2. *Sitting En Banc or Division; Quorum; Proceedings.*
>
> xxx xxx xxx
>
> **The affirmative vote of five (5) members of the Court en banc shall be necessary to reverse a decision of a Division but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division,** as the case may be, shall be necessary for the rendition of a decision or resolution in the Division level." (emphasis supplied)

Likewise, Section 3, Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA) states that the presence at the deliberation and the affirmative votes of at least five (5) members of the Court *En Banc* shall be necessary to reverse a decision of a Division. Where the necessary majority vote cannot be had in appealed cases, the judgment or order appealed from shall stand affirmed, thus:

> Section 3. *Court en banc; quorum and voting.* – The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of five (5) justices of the Court shall constitute a quorum for its session *en banc*. **The presence at the deliberation and the affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division xxx Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all**

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[9] Sitel Philippines Corp. vs. CIR, G.R. No. 201326, February 8, 2017.

incidental matters, the petition or motion shall be denied. (emphasis supplied)

In the deliberation of the instant case, only Associate Justice Juanito Castañeda, Jr., Associate Justice Erlinda P. Uy, and Associate Justice Cielito N. Mindaro-Grulla concurred with the opinion of the ponente that the Petition for Review filed by Coral Bay Nickel Corporation in CTA EB No. 1737 should be denied and the Petition for Review filed by the CIR in CTA EB No. 1735 be granted. The aforementioned Justices also concurred in the denial of the claim for refund of Coral Bay Nickel Corporation in the total amount of Php1,575,051.81 representing its unutilized input VAT for the first quarter of 2013.

On the other hand, Presiding Justice Roman G. Del Rosario expressed his concurrence to the denial of the Petition for Review filed by Coral Bay Nickel Corporation in CTA *EB* No. 1737 but maintained that the Petition for Review filed by the CIR in CTA *EB* No. 1735 should be denied. Overall, Presiding Justice Roman G. del Rosario voted to affirm the Decision and Resolution of the Court in Division together with Associate Justice Esperanza R. Fabon-Victorino. Associate Justice Ma. Belen M. Ringpis-Liban is currently on leave and did not participate in the deliberations.

WHEREFORE, considering that the required affirmative votes of five (5) members of the Court *En Banc* was not obtained in the instant case, pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the RRCTA, the Decision of the Court in Division promulgated on June 2, 2017 and the Resolution dated October 19, 2017 are deemed **AFFIRMED.**

Accordingly, the CIR is hereby **DIRECTED** to **REFUND** in favor of Coral Bay Nickel Corporation the reduced amount of P122,250.00, representing its unutilized input VAT related to its VAT zero-rated sales for the 1st quarter of 2013.

SO ORDERED.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

(with Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

(I maintain my position as discussed in the assailed Decision of June 2, 2017)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(on leave)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(took no part)
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(took no part)
MARIA ROWENA G. MODESTO-SAN PEDRO
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 cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

<u>*EN BANC*</u>

COMMISSIONER OF INTERNAL REVENUE, Petitioners, - versus - **CORAL BAY NICKEL CORPORATION,** Respondent.	**CTA EB NO. 1735** (CTA Case No. 8905)

x - x

CORAL BAY NICKEL CORPORATION, Petitioner, - versus - **COMMISSIONER OF INTERNAL REVENUE,** Respondent.	**CTA EB NO. 1737** (CTA Case No. 8905) *Present*: DEL ROSARIO, *PJ.,* CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, <u>*JJ.*</u> Promulgated: JUL 18 2019 2:32 p.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, *PJ.*:

I concur in the denial of the Petition for Review filed by Coral Bay Nickel Corporation (Coral Bay) in CTA EB No. 1737.

With utmost respect to my esteemed colleague, the Honorable Associate Justice Catherine T. Manahan, I cannot give my assent to the *ponencia* granting the Petition for Review filed by the Commissioner of Internal Revenue (CIR) in CTA EB No. 1735 reversing and setting aside the June 2, 2017 Decision and October 19, 2017 Resolution of the Court in Division which partially granted Coral Bay's refund claim in the amount of ₱122,250.00.

Contrary to the *ponencia*, I submit that the Court in Division correctly ruled that Coral Bay is entitled to partial refund.

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The CIR mainly argues that Coral Bay failed to present evidence that will prove that the input taxes were **directly** attributable to its zero-rated or effectively zero-rated sales. The *ponencia* ruled in favor of the CIR denying Coral Bay's refund claim upon a finding that "the input taxes that were incurred were used for transactions or activities that are not related to its nature as a zero-rated taxpayer".[1] Consequently, the *ponencia* concluded that Coral Bay is not entitled to refund as it failed to comply with the requirement that the input taxes claimed be attributable to zero-rated or effectively zero-rated sales.

With due respect, the grant of refund is proper. Firstly, Section 112(A) of the NIRC of 1997, as amended[2], the basis of Coral Bay's refund claim, has been complied with, there being preponderant evidence showing that the input taxes claimed for refund is attributable to its zero-rated sales that is the exportation of nickel/cobalt mixed sulphide to Sumitomo Metal Mining Co. Ltd. in Japan. As aptly found by the Court in Division, the entirety of Coral Bay's sales for the first quarter of 2013 are purely zero-rated sales based on the submitted

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[1] Page 13 of the *ponencia*.
[2] "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 zerorated 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 sale 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. xxx"

pieces of evidence.[3] Thus, its entire substantiated input taxes are attributed thereto.

Secondly, Coral Bay sufficiently explained how the input taxes pertaining to its purchase of services from SMCC Philippines, Inc. rendered outside the Rio Tuba Export Processing Zone in the construction of its laborer's row house, bus terminal, JTA dormitory, RTN runway and foreman duplex are attributable to its zero-rated sales.[4] Parenthetically, the construction of aforestated facilities is indispensable in the pursuit of its registered activity, moreso, as Coral Bay's plant is located in a far-flung area, where public transport is scarce.[5]

Thus, I submit that Coral Bay is entitled to the refund of its input taxes, albeit partially.

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In its Petition for Review, Coral Bay claims that the disallowed portion of its refund claim amounting to ₱793,524.07 should be included in the order granting its refund considering that 1) on the face of the official receipts, it can be readily seen that the goods and services were rendered and consumed at 24/F Pacific Star Building, Gil Puyat Avenue, Makati City; 2) by the nature of the service, it can only be rendered or consumed outside the Ecozone; 3) the services and goods rendered and consumed in the RTN Runway is outside Rio Tuba Economic Processing Zone; and 4) the sales of automobiles to registered Ecozone are not entitled to VAT-zero rating and thereby subject to VAT.

Coral Bay's claim is flawed. The official receipts[6] and documents presented in support of such claim, by themselves alone, are not sufficient to prove what goods and services were consumed and rendered and that indeed, these goods and services were consumed and rendered outside the Rio Tuba Export Processing Zone. Note, that

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[3] Decision, *En Banc* Docket, p.37.
[4] Decision, *En Banc* Docket, pp.43-48.
[5] Exhibit "P-57", CTA Case No. 8905 Docket Vol. II, p. 1062.
[6] Exhibits "P-101-22", "P-101-150", "P-101-253", "P-101-157", "P-101-158", "P-101-267", "P-101-29", "P-101-30", "P-101-31", "P-101-32", "P-101-159", "P-101-39", "P-101-278", "P-101-252", "P-101-149", "P-101-61 to P-101- 63", "P-101-148", "P-101-155 to P-101-156", "P-101-160", "P-101-164" to "P-101-165", "P-101-264" to "P-101-266", "P-101-272 to "P-101-274", "P-101-25" to "P-101-27", "P-101-154", "P-101-262" to "P-101-263", "P-101-153", "P-101-23" to "P-101-24", "P-101-151" to "P-101-152", "P-101-174" to "P-101-175", "P-101-258" to "P-101-261", "P-101-281" to "P-101- 282", "P-101-28", "P-101" page 12, and "P-4".

when goods and services are consumed and rendered inside the Ecozone, such sales to Coral Bay shall be subject to 0% VAT. Thus, its refund claim based on these documents cannot be granted.

In view of the foregoing discussion, I submit that there is no cogent reason to reverse or set aside the assailed Decision and Resolution of the Court in Division.

All told, I VOTE to (1) DENY the Petitions for Review filed by the Commissioner of Internal Revenue and Coral Bay Nickel Corporation for lack of merit; and (2) AFFIRM the June 2, 2017 Decision and October 19, 2017 Resolution of the Court in Division.

ROMAN G. DEL ROSARIO
Presiding Justice