REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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PHILEX MINING CORPORATION ,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6828

Members:

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

Promulgated:

APR 25 2008 ; 9:20AM

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DECISION

BAUTISTA, *J.*:

The instant **"Petition for Review"** seeks the refund of the amount of **TEN MILLION SIX HUNDRED NINETY-TWO THOUSAND TWO HUNDRED FORTY-FIVE AND 07/100 PESOS (P10,692,245.07)**, allegedly representing petitioner's excess input taxes on importations and domestic purchases attributable to its zero-rated sales for the fourth quarter of taxable year 2001.

Philex Mining Corporation (petitioner) is a corporation organized under Philippine laws, with principal office at 27 Brixton St., Pasig City.[1] It is engaged in the mining business, including the exploration and operation of mine properties and

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[1] Petition for Review, *Rollo*, p. 1.

the commercial production and marketing of mine products.[2] Petitioner is value-added tax (VAT)-registered taxpayer, with VAT Registration Certificate No. 35-6-000731 effective October 29, 1987[3], and under Bureau of Internal Revenue (BIR) Form No. 2303 as of Jan. 31, 1997[4]. It likewise had its Application for Zero Rate, pursuant to Sec. 4.100-3 of Revenue Regulations No. 7-95, approved on April 21, 1988[5].

Respondent, on the other hand, is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected, and other refundable or creditable taxes under the National Internal Revenue Code (NIRC). He holds office at the BIR National Office, Diliman, Quezon City.[6]

On September 1 and 12, 2003, petitioner filed with the BIR its Applications for Tax Credit/Refund of excess input VAT paid for the periods covering July 1 to September 30, 2001 and October 1 to December 31, 2001 in the respective amounts of P10,887,119.19 and P10,692,245.07, for the third and fourth quarters of taxable year 2001, as reflected in the VAT returns filed by petitioner for those periods.[7]

On September 17, 2003 and October 28, 2003, petitioner likewise filed its claims for refund or tax credit with the One-Stop-Shop Center of the Department of Finance via Application Nos. 42272 and 42826, in the respective amounts of

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[2] Par. 1, Summary of Facts Admitted, Consolidated Stipulation of Facts and Issues, *Rollo*, p. 48.
[3] Exhibit "A".
[4] Exhibit "A-2".
[5] Exhibit "A-1".
[6] Petition for Review, *Rollo*, p. 1.
[7] Par. 4, Summary of Facts Admitted, Consolidated Stipulation of Facts and Issues, *Rollo*, p. 48.

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P10,887,119.19 and P10,692,245.07, representing the excess input VAT for the third and fourth quarters of 2001, respectively.[8]

On September 22, 2003, petitioner filed with this Court a Petition for Review praying that judgment be rendered granting its claim for VAT refund of its alleged excess or unutilized input taxes for the third quarter of 2001. The same was later docketed as CTA Case No. 6778.

Even after filing the Petition for Review, petitioner continued to pursue the administrative claim that it had filed with the One-Stop-Shop Center of the Department of Finance covering the same excess or unutilized input taxes for the third quarter of 2001.

On December 3, 2003, petitioner filed with this Court another Petition for Review docketed as CTA Case No. 6828; this time praying the refund of its alleged excess input VAT for the fourth quarter of 2001 in the amount of P10,692,245.07.

On January 22, 2004, respondent filed his Answer raising the following Special and Affirmative Defenses:

> "7. The claim for refund is still under examination by the respondent's Bureau;
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> 8. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;
>
> 9. The grant of a claim for refund tantamount to an exemption from taxation which is considered strictly against the claimant and in favor of the taxing authority;
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> 10. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

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[8] Par. 5, Summary of Facts Admitted, Consolidated Stipulation of Facts and Issues, *Rollo*, p. 48.

On April 26, 2004, the parties filed a "Joint Motion to Consolidate"[9] CTA Case No. 6778 and CTA Case No. 6828; considering that these two cases involved the same parties and issues. The Court granted the said Motion in a Resolution promulgated on May 20, 2004.[10]

On February 10, 2005, petitioner filed a "Motion to Withdraw Petition for Review in CTA Case No. 6778"[11] on the ground that the One-Stop-Shop Center of the Department of Finance and the BIR have issued to petitioner Tax Credit Certificate No. R-013557 dated January 26, 2005, covering petitioner's application for tax credit for the third quarter of 2001 in the amount of P6,292,721.87; which respondent did not oppose. The Court granted the said Motion in open court on February 22, 2005.[12]

Trial proceeded and both parties presented their respective testimonial and documentary evidence. The case was submitted for decision on September 4, 2007 after considering petitioner's Memorandum filed on August 21, 2007, sans respondent's Memorandum.

The issues[13] as stipulated by the parties are as follows:

> "1. Whether Petitioner's domestic purchases and importations of goods which are attributable to its direct and indirect export sales for the 3rd and 4th quarters of 2001 are duly supported by documentary evidence.
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> 2. Whether the accumulated or excess input VAT was not utilized or applied by Petitioner against output VAT in the same 3rd and 4th quarters of 2001 or in the succeeding taxable year.

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[9] *Rollo,* pp. 36-37
[10] *Rollo*, p. 40.
[11] *Rollo,* pp. 80-82.
[12] *Rollo*, p. 128.
[13] Issues to be Resolved, Consolidated Stipulation of Facts and Issues, *Rollo*, pp. 49-50.

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 P10,887,119.19 and P10,692,245.07 for the 3rd and 4th quarters of 2001, due to Petitioner being an exporter of mineral products."

The issues raised boil down to the lone issue of whether or not petitioner is entitled to a refund in the amount of P10,692,245.07, representing excess input taxes for the fourth quarter of 2001.

The pertinent provision on claims for refund of input taxes attributable to zero-rated or effectively zero-rated sales is Section 112(A) of the NIRC of 1997, as amended, which 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 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."

Based on the afore-quoted provision, in order for a taxpayer to be entitled to a refund or issuance of a tax credit certificate of its unutilized input VAT, the following requisites must be satisfied:

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

Anent the first requisite, petitioner claims that it made shipments and sales of gold to Johnson Matthey of London, England and of copper concentrates to Nippon of Tokyo, Japan, which are VAT zero-rated, pursuant to Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended. Also, petitioner alleges that its sales of copper concentrates to Philippine Associated Smelting and Refining Corporation (PASAR), a Philippine Economic Zone Authority (PEZA)-registered enterprise, are subject to zero percent (0%) VAT; citing as legal bases Section 106(A)(2)(a)(5) of the NIRC of 1997, as amended, Section 23 of Republic Act (RA) No. 7916[14], Article 77(2) of the Omnibus Investments Code, Revenue Memorandum Circular (RMC) No. 74-99, and VAT Review Committee Ruling No. 026-2001.

The Court-commissioned Independent Certified Public Accountant (ICPA), Mr. Albert G. Alba, noted in his Report[15] that petitioner declared in its Amended VAT Return for the fourth quarter of 2001 that it had zero-rated export sales in the amount of US$14,145,171.00, with peso value equivalent of P732,929,200.74, as follows:

Particulars	**Amount**
Current Quarter's Shipments:	
Direct exports of:	
Copper to Japan	US$ 7,098,848.00
Gold to England	638,086.00

[14] The Special Economic Zone Act of 1995.
[15] Exhibits "S" and "S-2"; Report to the Court of Tax Appeals, *Rollo*, pp. 83-93.

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Indirect Exports of copper to PASAR	6,281,929.00
	US$ 14,018,863.00
Previous Quarters' Shipments	
Adjustment to correct previous billings	126,308.00
Total Zero-Rated Sales	**US$ 14,145,171.00**

In order to substantiate its export sales for the fourth quarter of taxable year 2001 and the claim 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 submitted to this Court its sales invoices, bills of lading/airway bills, export declarations, bank certifications, and entries in petitioner's passbooks in local banks of the payments received.[16]

An examination of these documents reveals that 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, as amended, 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

[16] Exhibits "O-1" to "O-7", "O-1-a" to "O-5-a", "O-1-b" to "O-7-b", "P-1" to "P-4", and "P-1-a" and "P-3-h".

> 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)."

Nevertheless, Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended must be read in conjunction with Section 113(A) of the same Code and Section 4.108-1 of Revenue Regulations No. 7-95; which require that a VAT-registered person, shall for every sale, issue an invoice or receipt indicating 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."

Furthermore, 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, as amended, 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.

xxx xxx xxx"

Clearly from the foregoing, any taxpayer claiming VAT zero-rated direct export sales must present at least three documents, namely: (1) the sales invoice as proof of sale of goods; (2) the export declaration and bill of lading/airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and (3) 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.

Moreover, the sales invoices supporting the export sales must abide by the invoicing requirements under the law and regulations, *viz.*, the same must be duly registered with the Bureau of Internal Revenue and must contain all the mandatory information, namely: (1) the imprinted word "zero-rated"; and (2) the taxpayer's TIN-VAT number. In other words, only export sales supported by these documents may qualify for VAT zero-rating under Section 106(A)(2)(a)(1).

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

Direct exports of:	
Copper to Japan	US$7,098,848.00
Gold to England	638,086.00

A careful examination of the sales invoices[17] supporting petitioner's direct export sales of gold to England in the amount of US$638,086.00 shows that the same are not duly registered with the BIR in violation of Section 238 of the NIRC of 1997, as amended. Per BIR Permit No. OCN3AU0000030052 dated April 19, 1999, petitioner is only authorized to print sales invoices bearing serial numbers from PX2101 to PX2500[18]. However, the sales invoices supporting petitioner's direct export sales of gold to England bear serial numbers Aurex 092[19], Aurex 093[20], and

[17] Exhibits "O3", "O4", and "O5".
[18] Reflected in sales invoices marked as Exhibits "O1", "O2", "O6", and "O7".
[19] Exhibit "O3".
[20] Exhibit "O4".

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Aurex 094[21], which are outside the authority to print granted to petitioner. Likewise, the word "VAT" after petitioner's TIN number was not imprinted; a clear violation of the invoicing requirements under Sections 113, 237, and 238 of the NIRC of 1997, as amended, and Section 4.108-1 of Revenue Regulations No. 7-95. Equally noteworthy is the fact that the airway bills[22] supporting the said sales cannot be given evidentiary value for being mere photocopies, in violation of the Best Evidence Rule. The Court, in fact, denied the admission of the said documentary evidence.[23] Accordingly, without the prescribed supporting documents, petitioner's direct export sales of gold to England in the amount of US$638,086.00 cannot qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended.

Petitioner's direct export sales of copper concentrates to Japan in the amount of US$7,098,848.00 are also not eligible for VAT zero-rating. Based on petitioner's Summary of Sales and Remittances[24], it is indicated that the invoices corresponding to the export sales in the amount of US$7,098,848.00 are represented by two sales invoices bearing nos. 2193 and 2197 with respective gross sales amounting to U$3,630,984.00 and US$3,467,864.00. These sales invoices were not presented by petitioner. What petitioner submitted were sales invoice no. 2202 dated January 29, 2002 and sales invoice no. 2205 dated March 22, 2002; reflecting gross sales in the amounts of US$3,153,229.94 and US$2,926,425.15, respectively or in the sum of US$6,079,655.09[25]. Apparently, these invoices pertain to the first quarter of 2002 and fall outside the subject period of the instant Petition. In addition, the bills of

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[21] Exhibit "O5".
[22] Exhibits "O3b", "O4b", and "O5b".
[23] *Rollo*, p. 213.
[24] Exhibit "P".
[25] Exhibits "O1" and "O2".

lading[26] submitted by petitioner to prove actual shipment/exportation of its copper concentrates to Japan were denied admission by this Court for being mere photocopies. These bills of lading are without probative value because of petitioner's failure to present either the originals or certified true copies thereof. Inasmuch as petitioner failed to substantiate its direct export sales of copper to Japan in the amount of US$7,098,848.00 with proper VAT sales invoices and bills of lading, the same will be denied the benefits of VAT zero-rating.

As regards petitioner's indirect export sales to PASAR in the amount of US$6,281,929.00, the 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, are applicable. Section 106(A)(2)(a)(5) is quoted hereunder for easy reference, to wit:

"**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." (*Emphasis supplied*)

Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, provides:

[26] Exhibits "O1b" and "O2b".

"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 exporter thereof shall be entitled to the benefits allowed by law for such transaction." (*Emphasis supplied*)

Lastly, RMC 74-99 provides that:

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

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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 suppliers 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." (*Emphasis supplied*)

Based on the afore-quoted provisions, petitioner's indirect export sales may qualify for VAT zero-rating. Nonetheless, this does not mean that the requirement for substantiation will be disregarded. Petitioner must still substantiate its indirect exports by proper VAT sales invoices.

Evidence forwarded to this Court shows that the sales invoices covering petitioner's indirect exports to PASAR in the amount of US$6,281,929.00 falls outside the subject period of claim. Hence, petitioner's reported indirect export sales to PASAR cannot qualify for VAT zero-rating.

Additionally, the supporting documents for catch up adjustments to prior quarter's shipments amounting to US$126,308.00 were not presented before this Court; hence, the said export sales adjustments shall also be denied VAT zero-rating.

In sum, since petitioner failed to prove its alleged zero-rated and effectively zero-rated sales via proper substantiation, its claim for refund cannot be granted.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

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

CAESAR A. CASANOVA
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