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. 7275

Members:

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

Promulgated:
APR 28 2008 3:40 pm

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DECISION

ACOSTA, *P.J.*:

This case seeks the refund of the amount of **FIVE MILLION THREE HUNDRED TWENTY-EIGHT THOUSAND THREE HUNDRED NINETY-TWO AND 64/100 PESOS (P5,328,392.64)**, allegedly representing petitioner Philex Mining Corporation's unutilized input VAT paid on its purchases of goods and services attributable to zero-rated sales of mineral products for the Second Quarter of the year 2003.

Philex Mining Corporation (petitioner) is a domestic corporation organized under Philippine laws, with principal office at 27 Brixton St., Pasig City.[1] It is engaged in the mining business, which includes the exploration, development, and operation of mining properties for commercial production, and the marketing of

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

mine products such as gold and copper ore.[2] Petitioner is a value-added tax (VAT)-registered taxpayer as evidenced by VAT Registration Certificate No. 35-6-00731[3], effective October 29, 1997 and Certificate of Registration using BIR Form No. 2003, bearing Control No. 8RC0000016497[4] dated January 31, 1997.

Respondent, on the other, hand, is the government official charged with the administration and enforcement of the national internal revenue tax 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 Bureau of Internal Revenue (BIR) National Office, Diliman, Quezon City.[5]

In connection with the marketing of its mine products, petitioner had entered into contracts with three buyers, namely:

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, petitioner entered into Contract No. 7002 with Johnson Matthey of Orchard Road, Royston Hertfordshire, England[6] covering the delivery by petitioner to Johnson Matthey of gold for refining at the latter's refinery at Royston, England. While the contract appears to be merely a "refining agreement", it is also a sales agreement because after the delivered gold bars are assayed, refined, and their correct value is determined, Johnson Matthey buys the refined gold.[7] During

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[2] Par. 1, Stipulation of Facts and Issues, *Rollo* p. 51.
[3] Annex "A", Petition for Review, *Rollo*, p. 6.
[4] Annex "A-1", Petition for Review, *Rollo*, p. 7.
[5] Petition for Review, *Rollo* p. 1.
[6] Exhibit "D".
[7] TSN of March 6, 2007 hearing, pp. 15-16.

the Second Quarter of 2003, petitioner made one shipment of gold bars to Johnson Matthey with a gross dollar value of US$78,295.00.[8]

On March 22, 2002, petitioner entered into a contract[9] with Nippon Mining of Tokyo, Japan, covering the sale of copper concentrates. By virtue of an Assignment dated July 1, 2002[10], Nippon Mining assigned all its rights and obligations under the contract between it and petitioner to Pan Pacific Copper Co. Ltd. (Pan Pacific) effective July 1, 2002. Petitioner made two shipments of copper concentrates to Pan Pacific during the Second Quarter of 2003 with gross value of US$7,974,635.00.[11]

On April 25, 2003, petitioner and PASAR entered into a letter agreement[12] spelling out the terms and conditions for PASAR's purchase and petitioner's sale of copper concentrates for the period from April 1, 2003 to March 31, 2005. PASAR is a Philippine Economic Zone Authority (PEZA)-registered enterprise. During the Second Quarter of 2003, petitioner made eight shipments of copper concentrates to PASAR with a gross value of US$8,960,092.00.[13]

Petitioner filed its Original VAT Return for the Second Quarter of 2003 on July 24, 2003[14] and its Amended VAT Return on September 24, 2004[15], which reflected the following information:

Input Tax carried over from previous quarter		P 64,813,681.83
Input Tax on domestic purchases	**P 890,224.64**	
Input Tax on Importations	**4,438,168.00**	**5,328,392.64**
Total Available Input Tax		70,142,074.47
Less: Output Tax due for the quarter		74,349.73
VAT Payable/Excess Input Tax		P 70,067,724.74

[8] Exhibits "H", "H-3", "H-3-a", "H-3-b", and "G".
[9] Exhibit "E".
[10] Exhibit "E-2".
[11] Exhibits "H", "H-1", "H-2", "H-1-a", "H-1-b", "H-2-a", "H-2-b".
[12] Exhibit "F-1".
[13] Exhibits "H", "H-4" to "H-11", "H-4-b" to "H-11-b".
[14] Exhibit "A".
[15] Exhibit "A-1".

On September 23, 2004, petitioner filed with the BIR its Application for Tax Credit/Refund of VAT Paid for the period covering April 1 to June 30, 2003 in the amount of P5,328,392.64, representing the sum of input taxes on its domestic purchases in the amount of P890,224.64 and importation of goods in the amount of P4,438,168.00.[16]

Likewise, petitioner filed its claim for refund or tax credit with the One-Stop-Shop Center of the Department of Finance (DOF) on November 10, 2004 as evidenced by its Application No. 48827[17] in the amount of P5,328,392.64, representing the same excess input VAT for the Second Quarter of 2003 as reflected in the VAT Return filed by petitioner for the said quarter.

Since no action has been taken by respondent, petitioner filed this instant Petition for Review on June 28, 2005, pursuant to Sections 112(D) and 229 of the NIRC of 1997, as amended.

On August 8, 2005, respondent filed his Answer raising the following Special and Affirmative Defenses:[18]

> "6. The claim for refund is still under examination by the respondent's Bureau;
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> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;
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> 8. The grant of a claim for refund tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
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> 9. 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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[16] Par. 4, Summary of Facts Admitted, Stipulation of Facts and Issues, *Rollo*, p.51.
[17] Par. 5, Summary of Facts Admitted, Stipulation of Facts and Issues, *Rollo*, p.52.
[18] *Rollo*, p. 23.

During the hearing of this case, petitioner presented several testimonies and various pieces of documentary evidence. Meanwhile, during the hearing on August 23, 2007, respondent, through counsel, manifested that he is submitting the case for decision without further presentation of evidence due to the failure of the DOF One-Stop-Shop Center to give the report on petitioner's claim for refund.

On November 13, 2007, the case was submitted for decision after petitioner filed its Memorandum on October 19, 2007, sans respondent's Memorandum.

The issues[19] 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 2nd 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 same 2nd 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 P5,328,392.64 for the 2nd quarter of 2003, due to Petitioner being an exporter of mineral products."

The stipulated issues boil down to the single issue of whether or not petitioner is entitled to its claim of VAT refund in the amount of P5,328,392.64, representing excess input taxes for the Second Quarter of 2003.

The applicable 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 states:

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[19] Issues to be Resolved, Stipulation of Facts and Issues, *Rollo*, p. 53.

"**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:

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.

Regarding the first requisite, petitioner claims that its shipments and sales of gold to Johnson Matthey of London, England and of copper concentrates to Nippon Mining/Pan Pacific of Tokyo, Japan, are VAT zero-rated, pursuant to Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended. Petitioner likewise asserts that its sales of copper concentrates to PASAR 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[20], 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[21] that petitioner's zero-rated sales as shown in the Schedule of Direct and Indirect Export Sales for the Second Quarter of taxable year 2003 consist of the following items:

Particulars		**2nd Quarter**
Current Quarter's Shipments:		
Direct exports of:		
Copper to Japan	US$	7,974,635.00
Gold to England		78,295.00
Indirect Exports of copper to PASAR		8,960,092.00
	US$	17,013,022.00
Previous Quarters' Shipments		
Adjustment to correct previous billings		(228,277.00)
Total Zero-Rated Sales		**US$16,784,745.00**

In order to substantiate its export sales for the Second Quarter of taxable year 2003 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[22], bills of lading/airway bills[23], export declarations[24], bank certifications[25] and entries in petitioner's passbooks in local banks of the payments received[26].

A review of these documents reveals that petitioner's direct exports of copper concentrates and gold to Japan and England, respectively, may fall within those

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[20] The Special Economic Zone Act of 1995.
[21] Exhibit "G".
[22] Exhibits "H-1" to "H-11".
[23] Exhibits "H-1-b" to "H-11-b".
[24] Exhibits "H-1-a" to "H-3-a".
[25] Exhibits "I-1" to "I-3".
[26] Exhibits "I-1-a" to "I-3-e".

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 provides:

"**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)."

However, Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended should be read in conjunction with Section 113(A) of the same Code and as implemented by Section 4.108-1 of Revenue Regulations No. 7-95. These provisions prescribe that a VAT-registered person like petitioner, shall for every sale, issue an invoice or receipt containing 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.

xxx xxx xxx

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."

In addition, such invoice or receipt must be duly registered with the Bureau of Internal Revenue as required 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"

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"**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"

Based on 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 be duly registered with the Bureau of Internal Revenue or must have BIR Authority to Print. As earlier stated, petitioner's direct export sales consisted of the following:

Direct exports of:	
Copper to Japan	US$7,974,635.00
Gold to England	78,295.00

A closer examination of the sales invoice[27] supporting petitioner's direct export sales of gold to England indicates the amount of US$78,215.11 instead of the reported amount of US$78,295 by petitioner. In addition, it was ascertained that the sales invoice pertaining to the sale of US$78,215.11, bearing invoice number Pad-

[27] Exhibit "H-3"

Aurex 106, is not within the range of serial numbers authorized by the BIR to be printed. The other sales invoices[28] of petitioner show that its BIR Authority to Print No. OCN3AU0000030052 allows the printing of 4 pads (100x4) ranging from PX2101-PX2500. The sales invoice of Pad-Aurex 106 clearly shows that it is outside petitioner's authority to print. This logically leads to the conclusion that it was not duly registered with the BIR, in violation of Sections 113, 237 and 238 of the NIRC of 1997 and Section 4.108-1 of Revenue Regulations No. 7-95. Therefore, the sales of US$78,215.11 cannot be considered zero-rated sales.

Anent petitioner's direct export sales of copper concentrates to Japan in the amount of US$7,974,635.00, records reveal that this amount is evidenced by sales invoices bearing nos. 2308 and 2311, with respective gross sales amounts of U$3,918,905.00 and US$4,055,730.00.[29] However, petitioner's Summary of Sales and Remittances[30] shows that these invoices pertain to the Third Quarter of taxable year 2003 and fall outside the subject period of the instant Petition.

As regards petitioner's indirect export sales to PASAR in the amount of US$ 8,960,092.00, 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 ready 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:

[28] Exhibit "H-1", "H-2", "H-4", "H-5", "H-6", "H-7", "H-8", "H-9", "H-10", "H-11".
[29] Exhibits "H-1" and "H-2"
[30] Exhibit "I"

(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 in part, thus:

"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*)

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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.-*
>
> 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 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*)

The cited provisions arrive at the conclusion that "indirect exports" made by a VAT taxpayer, such as petitioner, to a PEZA-registered entity are technically entitled to the benefits of zero percent (0%) VAT. Nonetheless, to fully qualify, petitioner must still substantiate its indirect exports to PASAR by proper VAT sales invoices.

The sales invoices[31] covering petitioner's indirect exports to PASAR in the amount of US$8,960,092.00 again indicate that they fall outside the subject period

[31] Exhibits "H-4" to "H-11"

of claim. Thus, petitioner's reported indirect export sales to PASAR cannot qualify for VAT zero-rating.

The laws and jurisprudence are clear, claims for tax refunds and/or tax credits are frowned upon by law. Strict compliance with the requirements must be complied with before claimants are deemed entitled thereto and inability to prove such compliance negates any claim for refund or issuance of a tax credit certificate. Petitioner's failure to prove its right through proper invoicing required by law and circulars renders its claim baseless.

In summary, petitioner failed to prove that its reported direct and indirect export sales in the amount of P880,220,879.81, with US dollar equivalent of US$16,784,745.00, met the criteria for zero-rated VAT. Hence, taxes of P5,328,392.64 paid corresponding thereto cannot be claimed as refundable.

WHEREFORE, petitioner's claim for tax refund in the amount of **FIVE MILLION THREE HUNDRED TWENTY-EIGHT THOUSAND THREE HUNDRED NINETY-TWO AND 64/100 PESOS (P5,328,392.64)** is hereby **DENIED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate 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
Chairman, First Division