

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

SPECIAL FIRST DIVISION

PHILEX MINING CORPORATION,
Petitioner,

C.T.A CASE NO. 7329

Members:

- versus -

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

**COMMISSIONER OF INTERNAL
REVENUE,**
Respondent.

Promulgated:

MAR 08 2010, 9:15 am

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AMENDED DECISION

BAUTISTA, J.:

For this Court's resolution is petitioner's *Motion for Reconsideration/New Trial* filed on June 3, 2008, seeking the reconsideration and setting aside of this Court's *Decision* dated May 16, 2008, which denied the *Petition for Review*; or in the alternative, the granting of a new trial to afford petitioner the opportunity to adduce in evidence the provisional invoices attached to the *Motion*.

Petitioner seeks the reconsideration of the assailed *Decision* by enumerating a lengthy assignment of errors, which are quoted as follows:

"I

THE HONORABLE COURT ERRED IN RULING THAT PETITIONER'S
DIRECT EXPORT SALES OF GOLD TO ENGLAND ARE NOT ZERO-

P

RATED BECAUSE THE SALES INVOICES THAT COVERED THE SAME WERE NOT REGISTERED WITH THE BIR, AND THE WORD 'VAT' WAS NOT PRINTED AFTER PETITIONER'S TIN NUMBER, SUPPOSEDLY IN VIOLATION OF SECTIONS 113, 237 AND 238 OF THE TAX CODE, AND SECTION 4.108-1 OF REVENUE REGULATIONS (RR) NO. 7-95.

II

THE HONORABLE COURT ERRED IN RULING THAT PETITIONER'S DIRECT EXPORT SALES OF COPPER CONCENTRATES TO JAPAN DO NOT QUALIFY FOR VAT ZERO-RATING BECAUSE THE SALES INVOICES THAT COVERED THE SAME PERTAIN TO THE FOURTH QUARTER OF 2003 AND FALL OUTSIDE THE PERIOD OF THE CLAIM IN THE PETITION. THE FACT IS THAT SAID SALES INVOICES PERTAIN TO THE PERIOD OF THE CLAIM.

III

THE HONORABLE COURT ERRED IN RULING THAT PETITIONER'S INDIRECT EXPORT SALES TO PASAR ALSO DO NOT QUALIFY FOR VAT ZERO-RATING BECAUSE THE SALES INVOICES THAT COVERED THE SALES FALL OUTSIDE THE PERIOD OF THE CLAIM IN THE PETITION. THE FACT IS THAT SAID SALE INVOICES ALSO PERTAIN TO THE PERIOD OF THE CLAIM."

In a *Resolution* promulgated on August 11, 2008, this Court found the first assigned error unmeritorious but granted the prayer for new trial and allowed petitioner to present to the Court the originals of the documents attached to its *Motion* as Annexes "A" to "H" for evaluation and consideration. Consequently, the resolution of the second and third assigned errors was held in abeyance.

This case was then set for a Commissioner's hearing for the marking of petitioner's additional documentary evidence. Petitioner presented Exhibits "K" to "S", which are all faithful reproductions of the original documents.¹

¹ Docket, p. 282



Petitioner submitted its *Supplemental Formal Offer of Evidence*² on October 27, 2008, consisting of Exhibits "K" to "T", inclusive of submarkings, *sans* respondent's comment. Hence, this *Amended Decision*.

Inasmuch as the first assigned error was already found by this Court as untenable in the *Resolution* dated August 11, 2008, only the afore-quoted second and third grounds will be resolved.

Petitioner explains that in its direct exports of copper concentrates, there are two periods when pricing or valuation of a shipment is made. First is **upon shipment** where petitioner makes a **provisional pricing or valuation** based on weight (dry and wet weight) and moisture as determined by it and also based on its provisional assays showing copper, gold, and silver content. Second is **upon arrival of the concentrates at the port of unloading**, where the weight and the moisture content are determined. Assays are also made for copper, gold, and silver content. After these are done and settled, **a final concentrate value is computed**.

Petitioner points out that the considered date of the sale transaction is at the time of the delivery of the shipment to the carrier. However, the sales contract with its buyer, Nippon Mining and Metals Co. Ltd of Tokyo, Japan³ requires a provisional payment from the latter to petitioner of ninety percent (90%) of the estimated value of a shipment and a final payment based on final settlement of weights, assays, and quotations. This is allegedly the reason why petitioner issues a provisional invoice for the 90% estimated value of a shipment and a final invoice for the payment of

² Docket, pp. 296-302

³ Exhibit "C"



the final balance after final settlement of the weight, assays, and quotations are completed. This also supposedly explains why the final invoices carry dates much later than the date when the sale or shipment was made.

In support of its *Motion*, petitioner presented and formally offered in evidence the Provisional Invoices⁴ it issued to Pan-Pacific Copper Co., Ltd., the assignee of Nippon Mining and Metals Co. Ltd.⁵, for the Third Quarter of 2003. With the presentation of the said Provisional Invoices, petitioner proved that the final sales invoices⁶ supporting its export sales of copper concentrates to Nippon, Japan in the amount of US\$8,372,880.00 are valid and that the said sales with peso equivalent of Php461,033,014.59, as computed below, qualify for value-added tax (VAT) zero-rating under Section 106(A)(2)(a)(1) of the National Internal Revenue Code (NIRC) of 1997.

Declared Zero-Rated Sales in Peso ⁷	P 45,006,447.22
Divided by Declared Zero-Rated Sales in US\$ ⁸	15,346,271.00
Average peso to dollar rate	55.0626564082
Multiplied by Substantiated Zero-rated Sales in US\$	8,372,880.00
Substantiated Zero-Rated Sales in Peso	P461,033,014.59

As to petitioner's indirect export sales to Philippine Associated Smelting and Refining Corporation (PASAR) in the amount of US\$6,936,328.00, petitioner likewise presented the corresponding Provisional Invoices it issued to PASAR.⁹ These documents proved that petitioner actually made indirect exports to PASAR in the amount of US\$6,936,328.00. Such indirect export sales with peso equivalent of

⁴ Exhibits "L" and "M"

⁵ Exhibit "C-2"

⁶ Exhibits "F-1" and "F-2"

⁷ Exhibit "A-1-a"

⁸ Exhibit "E", page 3

⁹ Exhibits "N" to "S"



P381,932,645.40 are subject to zero percent (0%) VAT pursuant to Section 106(A)(2)(a)(5) of the NIRC of 1997, in relation to Articles 23 and 77(2) of the Omnibus Investments Code and Revenue Memorandum Circular (RMC) No. 74-99. The amount of P381,932,645.40 is computed as follows:

Declared Zero-Rated Sales in Peso	845,006,447.22
Divided by Declared Zero-Rated Sales in US\$	15,346,271.00
Average peso to dollar rate	55.0626564082
Multiplied by Substantiated Zero-rated Sales in US\$	6,936,328.00
Substantiated Zero-Rated Sales in Peso	381,932,645.40

In sum, out of the reported zero-rated sales of US\$15,346,271.00 for the Third Quarter of 2003, only the following export sales in the total amount of US\$15,309,208.00, with peso equivalent of P842,965,659.99, qualify for VAT zero-rating:

	In US Dollars	In Phil. Peso
Direct Exports of Copper to Japan	8,372,880.00	461,033,014.59
Indirect Exports of Copper to PASAR	6,936,328.00	381,932,645.40
Total	15,309,208.00	842,965,659.99

The Court now proceeds to determine whether petitioner's input taxes in connection with its zero-rated sales for the Third Quarter of 2003 are duly substantiated.

In its VAT Return for the Third Quarter of 2003¹⁰, petitioner reflected an input VAT of P1,469,084.79 on domestic purchases and an input VAT of P1,553,197.00 on importations totaling to P3,022,281.79, as shown below:

¹⁰ Exhibits "A-1" and "J-7"



	Purchases	Input Tax
Domestic Purchases - Goods other than Capital Goods	P 14,690,847.90	P 1,469,084.79
Importations - Goods other than Capital Goods	15,531,970.00	1,553,197.00
Total	P30,222,817.90	P3,022,281.79

In order to check the accuracy of petitioner's declaration, the Court commissioned an Independent Certified Public Accountant (CPA) to examine petitioner's voluminous documents submitted in support of its claim for refund.

With regard to the input taxes on domestic purchases, the Independent CPA, in his Report¹¹ dated September 15, 2006, made the following findings on petitioner's input VAT on domestic purchases for the Third Quarter of 2003:

Particulars	Amount
a. Original VAT official receipts that are in the name of Petitioner	
1. Receipts dated in the current quarter	P 23,539.39
2. Undated receipt	2,922.49
b. No supporting VAT official receipts presented	5,909.91
c. Original VAT invoices that are in the name of Petitioner but out of the period of claim	249,926.61
d. No supporting VAT invoices presented	1,186,944.57
e. Negative input VAT	(158.18)
TOTAL	P 1,469,084.79

Based on the above findings, only the input VAT of P23,539.39 (*item a.1*) represents petitioner's valid claim; while the remaining amount of P1,445,545.40 should be denied for the above-stated reasons (*items a.2, b, c, d, and e*).

However, pursuant to Section 3 of Revenue Memorandum Order (RMO) No. 9-00, sales of goods, properties or services made by a VAT-registered supplier to a Board of Investments (BOI)-registered entity whose products are one hundred

¹¹ Exhibit "E", page 6



percent (100%) exported, shall be accorded automatic VAT zero-rating, subject to the following reportorial and documentary requirements:

"SECTION 3. *Sales of goods, properties or services made by a VAT-registered supplier to a BOI registered exporter shall be accorded automatic zero-rating, i.e., without necessity of applying for and securing approval of the application for zero-rating as provided in Revenue Regulations No. 7-95, subject to the following conditions:*

- (1) The supplier must be VAT-registered;
- (2) The BOI-registered buyer must likewise be VAT-registered;
- (3) The buyer must be a BOI-registered manufacturer/producer whose products are 100% exported. For this purpose, a Certification to this effect must be issued by the Board of Investments (BOI) and which certification shall be good for one year unless subsequently re-issued by the BOI;
- (4) The BOI-registered buyer shall furnish each of its suppliers with a copy of the aforementioned BOI Certification which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers; and
- (5) The VAT-registered supplier shall issue for each sale to BOI-registered manufacturer/exporters a duly registered VAT invoice with the words 'zero-rated' stamped thereon in compliance with Sec. 4.108-1(5) of RR No. 7-95. The supplier must likewise indicate in the VAT invoice the name and BOI-registry number of the buyer."

In the case **GST Philippines, Inc. vs. Commissioner of Internal Revenue**¹², GST Philippines, Inc. sold its products partly to herein petitioner and claimed that sales to petitioner are zero-rated because petitioner is a BOI-registered enterprise whose products are 100% exported. A BOI Certification was submitted to prove the said claim. Under Section 3.4 of RMO 9-00, said Certification shall serve as authority for the local suppliers of petitioner to avail of the benefits of zero-rating

¹² CTA Case No. 7016, September 7, 2007



on their sales to petitioner covering the period January 1, 2003 to December 31, 2003. On the basis of said Certification, no output tax should be shifted by the local suppliers to petitioner. Hence, in the absence of clear and convincing proof that petitioner's local suppliers passed on or shifted the VAT on such domestic purchases to petitioner, it cannot claim the amount of P23,539.39 as input tax credits on its domestic purchases for the Third Quarter of taxable year 2003.

Anent the input VAT payment of P1,553,197.00 on petitioner's importations, the Independent CPA noted the following findings¹³:

	Particulars	First Quarter
a.	Input taxes paid on importation of capital goods	P 42,991.00
b.	No supporting documents	1,510,206.00
	TOTAL	P1,553,197.00

On April 16, 2007, the Independent CPA submitted a Supplemental Report¹⁴ to this Court, amending the Report dated September 15, 2006¹⁵ to reflect the results of his examination of the eleven (11) Bureau of Customs Official Receipts (BCORs), which petitioner subsequently presented as additional support to its input VAT on importations. Petitioner's input VAT payment on importations totaling P1,510,206.00 was previously disallowed because no supporting documents were presented to support its claim. Thus, by presenting the additional documents¹⁶, the amount of P1,349,684.00 was duly substantiated by the required evidence under Sections 110(A) and 113(A) of the NIRC of 1997, as implemented by Sections 4.104-1, 4.104-

¹³ Exhibit "E", page 5

¹⁴ Exhibit "E-2"

¹⁵ Exhibit "E"

¹⁶ Exhibits "H-2" to "H-12"



5, and 4.108-1 of Revenue Regulations No. 7-95. Accordingly, the same can be proper subject of a claim for refund or tax credit, detailed as follows:

Items Imported	Exhibit No.	Input VAT
Conveyor belt	H-12	P 177,325.00
92 drums grinding balls	H-11	260,158.00
3 ctns sodium isobutyl xanthane	H-2	199,308.00
1 ctn reagent frother	H-3	134,798.00
80 drums DK froth	H-4	136,594.00
80 drums DK froth	H-5	115,949.00
402 drums sodium isobutyl xanthate	H-6	201,962.00
DK froth	H-7	1,545.00
Dowfroth	H-8	1,726.00
Sodium Isobutyl xanthane	H-9	2,265.00
80 drums Dowfroth	H-10	118,054.00
Total		P 1,349,684.00

However, the remaining amount of P203,513.00 would be denied due to the following reasons:

	Items Imported	Exhibit No.	Input VAT
a.	Supported by IEIRD without machine validation		
	Parts of loader	H-1	H-1a P 42,991.00
			P 42,991.00
b.	No supporting documents presented		
	1 ctn reagent frother		11,276.00
	Geotechnical instruments		6,696.00
	Bolts		18,552.00
	Sodium Isobutyl xanthate		4,903.00
	Importation dated 3/27/03		18,116.00
	1 ctn filter cloth		4,608.00
	Importation dated 4/27/03		15,182.00
	1 ctn motor		23,514.00
	1 plt motor		9,612.00
	1 ctn motor HYD		11,097.00
	1 ctn filter cloth		5,974.00
	Importation dated 7/07/03		5,552.00
	Importation dated 7/11/03		8,005.00
	Importation dated 7/22/03		1,366.00

	Importation dated 8/07/03			1,603.00
	Importation dated 8/21/03			5,800.00
	Importation dated 9/29/03			8,666.00
				160,522.00
	TOTAL			P 203,513.00

A portion of the substantiated input VAT of P1,349,684.00 shall be applied however against petitioner's reported output VAT liability of P52,413.13.¹⁷ Consequently, only the remaining input VAT of P1,297,270.87 can be attributed to the entire zero-rated sales declared by petitioner in the amount of P845,006,447.22; and only the input VAT of P1,294,137.81 is attributable to the substantiated zero-rated sales of P842,965,659.99, as computed below:

Substantiated input VAT	P 1,349,684.00
Less: Output Tax for 1 st	52,413.13
Excess input VAT	P1,297,270.87

Substantiated Zero-rated Sales	P 842,965,659.99
Divided by Total Reported Zero-Rated Sales	÷ 845,006,447.22
Multiplied by Substantiated Excess Input VAT	X 1,297,270.87
Excess Input Tax Attributable to Substantiated Zero-Rated Sales	P 1,294,137.81

As evidenced by its Quarterly VAT Returns¹⁸ from the Fourth Quarter of 2003 to the Second Quarter of 2005, petitioner was able to prove that the input VAT of P1,294,137.81 was not applied against any output VAT in the succeeding quarters. Although petitioner carried over the claimed unutilized input VAT for the Third Quarter of taxable year of 2003 to the succeeding Fourth Quarter of 2003 until the Second Quarter of 2005, the same was deducted as "Any VAT Refund/TCC

¹⁷ Exhibit "A-1"

¹⁸ Exhibits "J-8" to "J-14"

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Claimed"¹⁹ from the total available input tax of P69,903,758.37 in the Second Quarter of 2005. In other words, the subject claim no longer formed part of the excess input VAT of P18,495,294.37²⁰ as of the Second Quarter of 2005, which was to be carried over/applied to the succeeding Third Quarter of 2005.

Finally, as to the timeliness of the filing of the instant claim, it has been held that the two-year prescriptive period for the filing of VAT refund claims is reckoned from the date of filing of the corresponding Quarterly VAT Returns.²¹ The present claim pertains to input VAT incurred for the Third Quarter of 2003. Counting from October 27, 2003, the date of filing of the Quarterly VAT Return for the Third Quarter of 2003,²² petitioner had until October 27, 2005 within which to file its claim, both in the administrative and judicial levels. Therefore, the original administrative claim filed on November 14, 2004²³ and the *Petition for Review* filed on September 30, 2005, fell within the two-year prescriptive period.

In view of the foregoing, petitioner's claim for refund of its unutilized input VAT for the Third Quarter of taxable year 2003 shall be granted, but in the reduced amount of P1,294,137.81.

WHEREFORE, premises considered, petitioner's *Motion for Reconsideration/New Trial* is hereby **PARTIALLY GRANTED** and this Court's *Decision* dated May 16, 2008 is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED TO REFUND** the amount of **ONE MILLION TWO HUNDRED**

¹⁹ Line 25A, Exhibit "J-14-a"

²⁰ Line 31, Exhibit "J-14"

²¹ Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 141104 and 148763, June 7, 2007

²² Exhibit "A"

²³ Annex "D", *Petition for Review*, docket, p. 17



NINETY FOUR THOUSAND ONE HUNDRED THIRTY SEVEN PESOS AND 81/100 (P1,294,137.81) in favor of petitioner, representing petitioner's unutilized input VAT for the Third Quarter of taxable year 2003.

SO ORDERED.



LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:



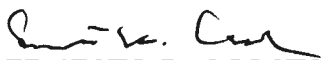
(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice



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