BDB Law wts

DU-BALADAO AND ASSOCIATES

SIGNIFICANT DECISIONS OF THE COURT OF TAX APPEALS
November 2013

VAT Refund

1. **Failure to indicate zero-rated sales in the VAT returns does not furnish a ground for the outright denial of claim for tax credit or refund.**

One of the requirements in a claim for refund of input taxes is that the input taxes are attributable to zero-rated or effectively zero-rated sales. But in this specific claim for refund, the VAT return filed by the taxpayer did not indicate zero-rated sales. Citing the case of *Southern Philippines Power Corporation vs. Commissioner of Internal Revenue, G.R. No. 179632, October 19, 2011*, the Court ruled that this is not sufficient reason to deny claim for tax credit or refund when there are other documents from which the CTA can determine the veracity of the claim. The taxpayer submitted its schedule of zero-rated sales and collections from its client which were duly supported by zero-rated official receipts, credit advices, bank statements and certificate from the bank. It was able to prove that it actually generated zero-rated sales. ***(Harte-Hanks Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8234, November 04, 2013)***

2. **Conditions for an export sale to qualify as VAT zero-rated.**

In order for an export sale to qualify as VAT zero-rated, the following conditions must be present:

a. There was sale and actual shipment of goods from the Philippines to a foreign country;
b. The sale was made by a VAT-registered person;
c. The sale was paid for in acceptable foreign currency or its equivalent in goods or services; and
d. The payment was accounted for in accordance with the rules and regulations of the BSP.

Any VAT-registered person claiming VAT zero-rated direct export sales must present at least three (3) types of documents, namely:

a. Sales invoice as proof of sale of goods;
b. Export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and
c. 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.

Only export sales supported by these documents shall qualify for VAT zero-rating under Section 106(A)(2)(a)(1) of the NIRC of 1997. ***(Philex Mining Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8424, November 12, 2013)***

3. **Input taxes on the importation of goods and on the purchase of services should be claimed in the quarter in which the VAT was paid.**

In the claim for refund of unutilized input taxes attributable to zero-rated sales for the 4th quarter of 2009, the claim included input taxes supported by Bureau of Customs official receipts, bank official receipts and/or import entry and internal revenue declarations dated in the 2nd and 3rd quarters of 2009 as well as by VAT official receipts on domestic purchases of services dated in the 3rd quarter of 2009 and 1st quarter of 2010.

In disallowing these input taxes, the Court ruled that the input tax on the importation of goods shall be creditable to the importer upon payment of the VAT prior to the release of the goods from the custody of the Bureau of Customs, that is, upon the issuance of the Bureau of Customs or bank official receipt. Likewise, the input tax on the purchase of services is creditable to the purchaser upon payment of the VAT on the services, that is, upon issuance by the seller of the VAT official receipt evidencing receipt of the payment for services performed or yet to be performed. Therefore, it is indubitable on the part of the taxpayer to declare the input taxes on the importation of goods and purchase of services in the taxable quarter when the payment for the VAT on the importation and purchase of services was made. ***(Philex Mining Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8424, November 12, 2013)***

Income Taxes/Refund of Income Taxes

4. **In determining the activity or project that is registered with the BOI, what is controlling is the Specific Terms and Conditions which forms part of the Certificate of Registration.**

This involves an income tax refund claim for income taxes paid on income from water delivery to NIA. As a BOI registered company, the taxpayer claims that this income is included in its income tax holiday (ITH) incentive. The BIR argued that the taxpayer's ITH entitlement was granted solely on the operation of hydro-electric power plant. Nowhere is it provided that it is exempt from the payment of income tax on water diversion and irrigation system. The certificate of ITH entitlement issued by BOI did not mention water diversion and irrigation system as taxpayer's registered capacities. The taxpayer, on the other hand, argued that the Specific Terms and Conditions of its BOI registration clearly show that its registration as a pioneer enterprise includes water diversion and irrigation system. The Court ruled that in determining the activity or project which is registered with the BOI and consequently entitled to the ITH incentive, what is controlling is the Specific Terms and Conditions which forms part of the Certificate of Registration. While it is true that the certificate of entitlement issued by the BOI did not mention water diversion and irrigation system as registered capacities, what is controlling is the specific terms and conditions which form part of the certificate of registration. ***(Commissioner of Internal Revenue vs. CE Casecnan Water and Energy Company, Inc., CTA EB No. 967, November 04, 2013)***

5. **Failure to support the discrepancy between the amount of income subjected to withholding taxes and the amount of income reported in the return will result in the denial of a claim for refund of unutilized creditable withholding taxes.**

Taxpayer filed its income tax return (ITR) for the year 2006 showing creditable taxes withheld during the year in the amount of P4,327,568. As this was not used against the income tax due for the year, taxpayer exercised the option 'To be issued a tax credit certificate'. It then applied for refund of the said unutilized CWTs. Evidence presented showed that the CWT of

P4,327,568 pertains to the taxes withheld by various insurance companies on the income payments to the taxpayer in the total amount of P43,275,680, as shown in the various Certificates of Creditable Tax Withheld at Source. The substantiated CWT amounted to a total of P3,853,147.41, which was withheld from gross income payment of P41,379,378.31. The total revenues, however, as presented in the 2006 annual ITR of the taxpayer amounts to P44,216,619. According to the taxpayer, the discrepancy was due to the timing difference between the booking of taxpayer's income and the insurance companies' recognition of the expense they pay and the corresponding income tax liability. There are also instances where the billed amounts are disputed, in which case, the insurance companies pay less than the billed amounts. Further, there are entities that do not issue CWT certificates for withheld amounts on payments to the taxpayer. Taxpayer also presented its annual ITR and reconciling schedule to prove that the income payments from which the CWT sought to be refunded were withheld were declared as part of its income.

One of the requisites in order that a claim for refund of unutilized creditable withholding taxes can be refunded is that "it is shown in the return of the recipient that the income payment received was declared as part of the gross income". The Court En Banc found that this requisite was not satisfied and denied the claim for refund. According to the Court, the taxpayer failed to support the discrepancy. Records are bereft of evidence to reconcile the discrepancy and to prove that the income payments related to the claimed creditable withholding taxes formed part of the taxable gross income in the 2006 annual ITR. ***(Commissioner of Internal Revenue vs. Winebrenner & Inigo Insurance Brokers, Inc. CTA EB Case No. 856, November 04, 2013)***

6. **An application for tax refund of capital gains tax addressed to the Commissioner but coursed through the Chief of the International Tax Affairs Division of the BIR is proper.**

LAWL Pte. Ltd. ("LAWL") is a corporation organized and existing under the laws of Singapore. On February 09, 2006, it sold its shares in Maynilad Water Services, Inc. ("Maynilad"). On March 6, 2009, LAWL filed with BIR RDO No. 39 a capital gains tax return indicating that it is availing of the tax exemption under the Philippines-Singapore Tax Treaty. It likewise applied for tax treaty relief with the International Tax Affairs Division of the BIR ("BIR-ITAD") on March 25, 2009. LAWL paid the capital gains tax on July 6, 2009 to secure the issuance of Certificate Authorizing Registration on the sale of shares. The BIR issued BIR No. ITAD 102-11 dated April 4, 2011, denying LAWL's application for tax treaty relief for lack of legal basis. LAWL filed a letter requesting a review of the said ruling on May 18, 2011 with the Secretary of Finance, who affirmed the ruling of the BIR.

On June 14, 2011, LAWL filed its administrative claim with the BIR-ITAD for the refund of the capital gains tax paid. The written claim was addressed to the Commissioner of Internal Revenue but coursed through the Chief of ITAD. A petition for review was likewise filed with the CTA on July 06, 2011, while the administrative claim and review of BIR Ruling No. ITAD 102-11 were pending. One of the defences of the BIR is that LAWL is not entitled to refund for failure to file a timely and appropriate written claim for refund as required by Section 229 in relation to Section 204 of the 1997 NIRC. According to the BIR, ITAD is not given authority to receive or process application and/or claims for tax refund/credit certificates. It should have filed its administrative claim with RDO No. 39 where it is registered and where it filed the tax returns.

The Court ruled that LAWL complied with Sections 204(C) and 229 of the NIRC when it filed its written claim with the Commissioner. It also ruled that under Paragraph III(E)(2.3) of Revenue Administrative Order No. 11-00, ITAD, specifically its Tax Treaty Implementation and Exchange Information Section, shall process claims for tax credit/refund of erroneously

collected internal revenue taxes arising from the application of tax treaty provisions including requests for exemptions. Thus, LAWL has properly filed its administrative claim before the BIR-ITAD. ***(LAWL Pte. Ltd., vs. Commissioner of Internal Revenue, CTA Case No. 8307, November 07, 2013)***

7. **Maynilad's concession assets consist partly of real property (immovable property) and party movable property.**

In relation to the refund claim mentioned in the preceding number, LAWL based its exemption from tax on Article 13 of the Philippines – Singapore tax treaty which provides that any gains from the alienation of shares of a company, the property of which consists principally of immovable property situated in a Contracting State may be taxed in that State. And as defined in RR 04-86, principally means more than 50% of the entire assets in terms of value. Thus, it became necessary to ascertain whether Maynilad's real property interest as of December 31, 2008 is less or more than 50% of its total assets. Related to this is the determination whether the service concession assets are considered real property/real property in interest. The BIR had already considered in BIR Ruling No. ITAD 102-11 that the Concession Agreement is a contract for public works.

According to the Court, "contracts for public works" in Article 415(10) of the Civil Code can be construed as referring to all fixed works constructed for public use or fixed public infrastructures for the use of the public. It denotes that there are works conducted, i.e., construction and maintenance of infrastructure facilities such as national highways, flood control, water resources development systems, etc. Applying this definition, the Concession Agreement is a "contract for public works" with respect to its obligation to make the necessary constructions. It is not solely a contract for public works since Maynilad is not required to make the necessary fixed works but is likewise mainly required to perform its service obligations, i.e., water supply services, sewerage services, etc. ***(LAWL Pte. Ltd., vs. Commissioner of Internal Revenue, CTA Case No. 8307, November 07, 2013)***

Excise Taxes

8. **Toilet waters are subject to excise taxes regardless of the essential oil contents.**

Taxpayer paid 20% excise taxes imposed on perfumes and toilet waters under Section 150 of the National Internal Revenue Code of 1997. Taxpayer claims that since the essential oil content of its splash and body spray products is not more than 3% by weight, these products are not subject to the excise tax on toilet waters under Section 150 of the NIRC of 1997. It invokes the provision of Revenue Regulations No. 8-84, which requires that the product must have a minimum essential oil content of more than 3% by weight in order to be considered toilet waters. Claiming that it had erroneously paid the tax, the taxpayer filed for a refund. The BIR, on the other hand, argued that the more recent definition rulings of the BIR, specifically BIR Ruling No, 043-2000, should apply. Said ruling defines colognes and toilet waters as "scented alcohol-based liquid used as perfume, after-shave, lotion, or deodorant."

Ruling in favour of the BIR, the Court held that RR 8-84 had been repealed by the amendments to the law. Since the framer of the law is presumed to know about RR 8-84 and its enumeration of cosmetic products but still chose not to include certain items in the current amendment, the omission is deemed to be deliberate pursuant to the doctrine of *causus omissus pro omisso habendus est.* Since the prevailing issuance, BIR Ruling No. 043-2000, subjects toilet waters to excise tax regardless of their essential oil content by weight, splash colognes and body sprays are subject to the 20% excise tax even if they contain essential oils of 3% or less in weight. ***(Avon Products Manufacturing, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 978, November 11, 2013).***

Assessments

9. **The creditable income taxes and creditable input taxes can be applied as credits against the assessed taxes due even if these creditable taxes had been carried over to the following quarters.**

In the assessment issued against taxpayer for the year 2006, the BIR excluded the amounts of creditable withholding taxes carried over to the succeeding periods as credits against the recomputed income taxes due. Likewise, the BIR did not include the input taxes carried over to the succeeding quarters as credit against the recomputed/assed value added taxes due. The disallowances were made presumably to recapture the tax benefit realized by the taxpayer in carrying the said amounts to the succeeding year.

The Court disagreed with the disallowance and ruled that it is improper for the BIR to disallow the excess tax credits because any tax benefit derived by the taxpayer from the carry-over redounds to the succeeding year. Since the tax benefit will be in the succeeding year, at most, taxpayer may only be assessed in the said succeeding year. ***(Filpride Resources Incorporated vs. Commissioner of Internal Revenue, CTA Case No. 8233, November 12, 2013)***

10. **Issuance of the formal letter of demand/assessment notice without giving the taxpayer opportunity to respond to the preliminary assessment notice makes the assessment void.**

A preliminary assessment notice (PAN), dated December 16, 2010, was issued by the BIR finding the taxpayer liable to pay deficiency taxes for the taxable year 2007. A formal letter of demand (FLD), dated January 10, 2011, and assessment notice were likewise issued by the BIR finding the taxpayer liable for deficiency taxes. Rerecords would show that both the PAN and the FLD/assessment notice were received by the taxpayer on January 18, 2011. Taxpayer timely filed its protest against the FLD. When the assessment reached the Court, one of the taxpayer's contention is that the assessment is invalid and illegal because the BIR issued the FLD/assessment notice without giving the taxpayer an opportunity to answer the PAN, which is a violation of due process.

In ruling in favour of the taxpayer, the Court held that based on RR 12-99[1] if there exists sufficient basis to assess the taxpayer for any deficiency tax, a PAN shall be issued and sent to the taxpayer. The taxpayer is then given 15 days to make a reply and is also permitted to examine the records and present his argument in writing. If the taxpayer fails to respond to the PAN, the taxpayer shall then be sent an FLD/assessment notice. The BIR failed to comply with these procedural requirements. The PAN and the FLD were both received by the post office on January 17, 2011. Also, the PAN, FLD and assessment notice were all received by the taxpayer on January 18, 2011. Thus, the FLD and assessment notice were issued without giving the taxpayer the opportunity to protest the PAN. Under Section 228 of the NIRC of 1997, in relation to Section 3.1.2 of Revenue Regulations No. 12-99, it is mandated that the taxpayer shall be required to respond to the PAN within 15 days from the date of receipt of the PAN. As such, it is considered to be part of the due process requirement in the issuance of deficiency tax assessment. In issuing the FLD at the time when the PAN was not yet received by the taxpayer, the BIR effectively disregarded taxpayer's right to be notified of the PAN as well as the right to respond to the said PAN. Thus, the BIR's failure to give the taxpayer opportunity to respond to the PAN makes the assessment issued void. ***(Yumex Philippines Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8331, November 28, 2013)***

[1] Note that this rule is based on RR 12-99, prior to the amendment made by RR No. 18-2013.