EN BANC

G.R. No. 173425 --- **FORT BONIFACIO DEVELOPMENT CORPORATION,** *Petitioner*, ***versus*** **COMMISSIONER OF INTERNAL REVENUE and REVENUE DISTRICT OFFICER, REVENUE DISTRICT NO. 44, TAGUIG and PATEROS, BUREAU OF INTERNAL REVENUE,** *Respondents*.

Promulgated:

SEPTEMBER 04, 2012

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CONCURRING OPINION

ABAD, *J.*:

I fully concur in Justice Mariano C. Del Castillo's *ponencia* and disagree with Justice Antonio T. Carpio's points of dissent.

In 1992 Congress enacted Republic Act (R.A.) 7227 creating the Bases Conversion Development Authority (BCDA) for the purpose of raising funds through the sale to private investors of military lands in Metro Manila. To do this, the BCDA established the Fort Bonifacio Development Corp. (FBDC), a registered corporation, to enable the latter to develop the 214-hectare military camp in Fort Bonifacio, Taguig, for mix residential and commercial purposes. On February 8, 1995 the Government of the Republic of the Philippines ceded the land by deed of absolute sale to FBDC for ₱71.2 billion. Subsequently, cashing in on the sale, BCDA sold at a public bidding 55% of its shares in FBDC to private investors, retaining ownership of the remaining 45%.

In October 1996, after the National Internal Revenue Code (NIRC) subjected the sale and lease of real properties to VAT, FBDC began selling and leasing lots in Fort Bonifacio. FBDC filed its first VAT return covering those sales and leases and subsequently made cash payments for output VAT due. After which, FBDC filed a claim for refund representing transitional input tax credit based on 8% of the value of its beginning inventory of lands or actual value-added tax paid on its goods, whichever is higher, that Section 105 of the NIRC grants to first-time VAT payers like FBDC.

Because of the inaction of the Commissioner of Internal Revenue (CIR) on its claim for refund, FBDC filed a petition for review before the Court of Tax

Appeals (CTA), which court denied the petition. On appeal, the Court of Appeals (CA) affirmed the denial. Both the CTA and the CA premised their actions on the fact that FBDC paid no tax on the Government's sale of the lands to it as to entitle it to the transitional input tax credit. Likewise, citing Revenue Regulations 7-95, which implemented Section 105 of the NIRC, the CTA and the CA ruled that such tax credit given to real estate dealers is essentially based on the value of improvements they made on their land holdings after January 1, 1988, rather than on the book value of the same as FBDC proposed.

FBDC subsequently appealed the CA decision to this Court by petition for review in G.R. 158885, "*Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*." Meantime, similar actions involving subsequent FBDC sales subject to VAT, including the present action, took the same route—CTA, CA, and lastly this Court—because of the CIR's refusal to honor FBDC's claim to transitional input tax credit.

On April 2, 2009 the Court *En Banc* rendered judgment in G.R. 158885,[1] declaring FBDC entitled to the transitional input tax credit that Section 105 of the NIRC granted. In the same decision, the Court also disposed of G.R. 170680, "*Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*," which was consolidated with G.R. 158885. The Court directed the CIR in that case to refund to FBDC the VAT which it paid for the third quarter of 1997. Justice Tinga penned the decision with the concurrence of Justices Martinez, Corona, Nazario, Velasco, Jr., De Castro, Peralta, and Santiago. Justices Carpio, Quisumbing, Morales, and Brion dissented. Chief Justice Puno and Justice Nachura took no part.

The CIR filed a motion for reconsideration but the Court denied the same with finality on October 2, 2009.[2] Justice De Castro penned the resolution of denial with the concurrence of Justices Santiago, Corona, Nazario, Velasco, Jr., Nachura, Peralta, Bersamin, Del Castillo, and Abad. Justices Carpio and Morales dissented. Chief Justice Puno took no part. Justices Quisumbing and Brion were on leave.

Since the Court's April 2, 2009 decision and October 2, 2009 resolution in G.R. 158885 and G.R. 170680 had long become final and executory, they should foreclose the identical issue in the present cases (G.R. 173425 and G.R. 181092) of whether or not FBDC is entitled to the transitional input tax credit granted in Section 105 of the NIRC. Indeed, the rulings in those previous cases may be regarded as the law of the case and can no longer be changed.

Justice Del Castillo's *ponencia* in the present case reiterates the Court's rulings on exactly the same issue between the same parties. But Justice Carpio's dissent would have the Court flip from its landmark ruling, take FBDC's tax credit back, and hold that the Court grossly erred in allowing FBDC, still 45%

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[1] *Fort Bonifacio Development Corp. v. Commissioner of Internal Revenue*, 583 SCRA 168.
[2] *Fort Bonifacio Development Corp. v. Commissioner of Internal Revenue*, G.R. Nos. 158885 and 170680, 602 SCRA 159.

government-owned, to get an earlier refund of the VAT payments it made from the sale of Fort Bonifacio lands.

A value added tax is a form of indirect sales tax paid on products and services at each stage of production or distribution, based on the value added at that stage and included in the cost to the ultimate consumer.[3]

To illustrate how VAT works, take a lumber store that sells a piece of lumber to a carpentry shop for ₱100.00. The lumber store must pay a 12% VAT or ₱12.00 on such sale but it may charge the carpentry shop ₱112.00 for the piece of lumber, passing on to the latter the burden of paying the ₱12.00 VAT.

When the carpentry shop makes a wooden stool out of that lumber and sells the stool to a furniture retailer for ₱150.00 (which would now consists of the ₱100.00 cost of the lumber, the ₱50.00 cost of shaping the lumber into a stool, and profit), the carpentry shop must pay a 12% VAT of ₱6.00 on the ₱50.00 value it added to the piece of lumber that it made into a stool. But it may charge the furniture retailer the VAT of ₱12.00 passed on to it by the lumber store as well as the VAT of ₱6.00 that the carpentry shop itself has to pay. Its buyer, the furniture retailer, will pay ₱150.00, the price of the wooden stool, and ₱18.00 (₱12.00 + ₱6.00), the passed-on VAT due on the same.

When the furniture retailer sells the wooden stool to a customer for ₱200.00, it would have added to its ₱150.00 acquisition cost of the stool its mark-up of ₱50.00 to cover its overhead and profit. The furniture retailer must, however, pay an additional 12% VAT of ₱6.00 on the ₱50.00 add-on value of the stool. But it could charge its customer all the accumulated VAT payments: the ₱12.00 paid by the lumber store, the ₱6.00 paid by the carpentry shop, and the other ₱6.00 due from the furniture retailer, for a total of ₱24.00. The customer will pay ₱200.00 for the stool and ₱24.00 in passed-on 12% VAT.

Now, would the furniture retailer pay to the BIR the ₱24.00 VAT that it passed on to its customer and collected from him at the store's counter? Not all of the ₱24.00. The furniture retailer could claim a credit for the ₱12.00 and the ₱6.00 in input VAT payments that the lumber store and the carpentry shop passed on to it and that it paid for when it bought the wooden stool. The furniture retailer would just have to pay to the BIR the output VAT of ₱6.00 covering its ₱50.00 mark-up. This payment rounds out the 12% VAT due on the final sale of the stool for ₱200.00.

When the VAT law first took effect, it would have been unfair for a furniture retailer to pay all of the 10% VAT (the old rate) on the wooden stools in its inventory at that time and not be able to claim deduction for any tax on sale that the lumber store and the carpentry shop presumably passed on to it when it bought those wooden stools. To remedy this unfairness, Section 105 of the NIRC granted those who must pay VAT for the first time a transitional input tax credit of 8% of

[3] Webster's New World College Dictionary, Third edition, p. 1474.

the value of the inventory of goods they have or actual value-added tax paid on such goods when the VAT law took effect. The furniture retailer would thus have to pay only a 2% VAT on the wooden stools in that inventory, given the transitional input VAT tax credit of 8% allowed it under the old 10% VAT rate.

In the case before the Court, FBDC had an inventory of Fort Bonifacio lots when the VAT law was made to cover the sale of real properties for the first time. FBDC registered as new VAT payer and submitted to the BIR an inventory of its lots. FBDC sought to apply the 8% transitional input tax credit that Section 105 grants first-time VAT payers like it but the CIR would not allow it. The dissenting opinion of Justice Carpio echoes the CIR's reason for such disallowance. When the Government sold the Fort Bonifacio lands to FBDC, the Government paid no sales tax whatsoever on that sale. Consequently, it could not have passed on to FBDC what could be the basis for the 8% transitional input tax credit that Section 105 provides.

The reasoning appears sound at first glance. But Section 105 grants all first-time VAT payers such transitional input tax credit of 8% without any precondition. It does not say that a taxpayer has to prove that the seller, from whom he bought the goods or the lands, paid sales taxes on them. Consequently, the CIR has no authority to insist that sales tax should have been paid beforehand on FBDC's inventory of lands before it could claim the 8% transitional input tax credit. The Court's decision in G.R. 158885 and G.R. 170680 more than amply explains this point and such explanation need not be repeated here.

But there is a point that has apparently been missed. When the Government sold the military lands to FBDC for development into mixed residential and commercial uses, the presumption is that in fixing their price the Government took into account the price that private lands similarly situated would have fetched in the market place at that time. The clear intent was to privatize ownership of those former military lands. It would make no sense for the Government to sell the same to intended private investors at a price lesser than the price of comparable private lands. The presumption is that the sale did not give undue benefit to the buyers in violation of the anti-graft and corrupt practices act.

Moreover, there is one clear evidence that the former military lands were sold to private investors at market price. After the Government sold the lands to FBDC, then wholly owned by BCDA, the latter sold 55% of its shares in FBDC to private investors in a public bidding where many competed. Since FBDC had no assets other than the lands it bought from the Government, the bidding was essentially for those lands. There can be no better way of determining the market price of such lands than a well-publicized bidding for them, joined in by interested *bona fide* bidders.

Thus, since the Government sold its lands to investors at market price like they were private lands, the price FBDC paid to it already factored in the cost of sales tax that prices of ordinary private lands included. This means that FBDC, which bought the lands at private-land price, should be allowed like other real

estate dealers holding private lands to claim the 8% transitional input tax credit that Section 105 grants with no precondition to first-time VAT payers. Otherwise, FBDC would be put at a gross disadvantage compared to other real estate dealers. It will have to sell at higher prices than market price, to cover the 10% VAT that the BIR insists it should pay. Whereas its competitors will pay only a 2% VAT, given the 8% transitional input tax credit of Section 105. To deny such tax credit to FBDC would amount to a denial of its rights to fairness and to equal protection.

The Court was correct in allowing FBDC the right to be refunded the VAT that it already paid, applying instead to the VAT tax due on its sales the transitional input VAT that Section 105 provides.

Justice Carpio also argues that if FBDC will be given a tax refund, it would be sourced from public funds, which violates Section 4(2) of the Government Auditing Code that government funds or property cannot be used in order to benefit private individuals or entities. They shall only be spent or used solely for public purposes.

But the records show that FBDC actually paid to the BIR the amounts for which it seeks a BIR tax refund. The CIR does not deny this fact. FBDC was forced to pay cash on the VAT due on its sales because the BIR refused to apply the 8% transitional input VAT tax credits that the law allowed it. Since such tax credits were sufficient to cover the VAT due, FBDC is entitled to a refund of the VAT it already paid. And, contrary to the dissenting opinion, if FBDC will be given a tax refund, it would be sourced, not from public funds, but from the VAT payments which FBDC itself paid to the BIR.

Like the previous cases before the Court, the BIR has the option to refund what FBDC paid it with equivalent tax credits. Such tax credits have never been regarded as needing appropriation out of government funds. Indeed, FBDC concedes in its prayers that it may get its refund in the form of a Tax Credit Certificate.

For the above reasons, I concur with Justice Del Castillo's *ponencia*.

ROBERTO A. ABAD
Associate Justice