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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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DISSENTING OPINION

CARPIO, *J.*:

I dissent. I reiterate my view that petitioner is not entitled to a refund or credit of any input VAT, as explained in my dissenting opinions in *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue,*[1] involving an input VAT refund of ₱347,741,695.74 and raising the same legal issue as that raised in the present case.

The majority grants petitioner an 8% transitional input VAT refund or credit of **₱359,652,009.47** in relation to petitioner's output VAT for the first quarter of 1997. Petitioner argues that there is nothing in Section 105 of the old National Internal Revenue Code (NIRC) to support the Court of Appeals' conclusion that prior payment of VAT is required to avail of a refund or credit of the 8% transitional input VAT.

Petitioner's argument has no merit.

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[1] G.R. Nos. 158885 & 170680, 2 April 2009, 583 SCRA 168; G.R. Nos. 158885 & 170680, 2 October 2009, 602 SCRA 159.

It is hornbook doctrine that a taxpayer cannot claim a refund or credit of a tax that was never paid because the law never imposed the tax in the first place, as in the present case. A tax refund or credit assumes a tax was previously paid, which means there was a law that imposed the tax. The source of the tax refund or credit is the tax that was previously paid, and this previously paid tax is simply being ***returned*** to the taxpayer due to double, excessive, erroneous, advance or creditable tax payment.

Without such previous tax payment as source, the tax refund or credit will be an expenditure of public funds for the exclusive benefit of a specific private individual or entity. This violates the fundamental principle, as ruled by this Court in several cases,[2] that public funds can be used only for a public purpose. Section 4(2) of the Government Auditing Code of the Philippines mandates that "***Government funds or property shall be spent or used solely for public purposes***." Any tax refund or credit in favor of a specific taxpayer for a tax that was never paid will have to be sourced from government funds. This is clearly an expenditure of public funds for a ***private*** purpose. Congress cannot validly enact a law transferring government funds, raised through taxation, to the pocket of a private individual or entity. A well-recognized inherent limitation on the constitutional power of the State to levy taxes is that taxes can only be used for a ***public*** purpose.[3]

Even if only a tax credit is granted, it will still be an expenditure of public funds for the benefit of a private purpose in the absence of a prior tax payment as source of the tax credit. The tax due from a taxpayer is a public fund. If the taxpayer is allowed to keep a part of the tax as a tax credit even in the absence of a prior tax payment as source, it is in fact giving a public

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[2] *Francisco v. Toll Regulatory Board*, G.R. No. 166910, 19 October 2010, 633 SCRA 470; *Yap v. Commission on Audit*, G.R. No. 158562, 23 April 2010, 619 SCRA 154; *Strategic Alliance Development Corporation v. Radstock Securities Limited*, G.R. No. 178158, 4 December 2009, 607 SCRA 412; *Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960).

[3] *Planters Product, Inc. v. Fertiphil Corporation*, G.R. No. 166006, 14 March 2008, 548 SCRA 485; *Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960).

fund to a private person for a private benefit. This is a clear violation of the constitutional doctrine that taxes can only be used for a public purpose.

Moreover, such refund or credit without prior tax payment is an expenditure of public funds without an appropriation law. This violates Section 29(1), Article VI of the Constitution, which mandates that "***No money shall be paid out of the Treasury except in pursuance of an appropriation made by law***." Without any previous tax payment as source, a tax refund or credit will be paid out of the ***general funds of the government***, a payment that requires an appropriation law. The Tax Code, particularly its provisions on the VAT, is a revenue measure, not an appropriation law.

The VAT is a tax on transactions. The VAT is levied on the value that is added to goods and services at every link in the chain of transactions. However, a tax credit is allowed for taxes **previously paid** when the same goods and services are sold further in the chain of transactions. The purpose of this tax crediting system is ***to prevent double taxation*** in the subsequent sale of the same product and services that were already previously taxed. Taxes previously paid are thus allowed as input VAT credits, which may be deducted from the output VAT liability.

The VAT is paid by the seller of goods and services, but the amount of the VAT is passed on to the buyer as part of the purchase price. Thus, the tax burden actually falls on the buyer who is allowed by law a tax credit or refund in the subsequent sale of the same goods and services. The 8% transitional input VAT was introduced to ease the transition from the old VAT to the expanded VAT system that included more goods and services, requiring new documentation not required under the old VAT system. To simplify the transition, the law allows an 8% presumptive input VAT on goods and services newly covered by the expanded VAT system. In short,

the law grants the taxpayer an 8% input VAT ***without need of substantiating the same***, ***on the legal presumption that the VAT imposed by law prior to the expanded VAT system had been paid***, ***regardless of whether it was actually paid.***

Under the VAT system, a tax refund or credit requires that a previous tax was paid by a taxpayer, or in the case of the transitional input tax, that the tax imposed by law is presumed to have been paid. Not a single centavo of VAT was paid, or could have been paid, by anyone in the sale by the National Government to petitioner of the Global City land for two basic reasons. *First*, the National Government is not subject to any tax, including VAT, when the law authorizes it to sell government property like the Global City land. *Second*, in 1995 the old VAT law did not yet impose VAT on the sale of land and thus no VAT on the sale of land could have been paid by anyone.

Petitioner bought the Global City land from the National Government in 1995, and this sale was of course exempt from any kind of tax, including VAT. The National Government did not pass on to petitioner any previous sales tax or VAT as part of the purchase price of the Global City land. Thus, petitioner is not entitled to claim any transitional input VAT refund or credit when petitioner subsequently sells the Global City land. **In short, since petitioner will not be subject to double taxation on its subsequent sale of the Global City land, petitioner is not entitled to a tax refund or credit under the VAT system**.

Section 105 of the old NIRC provides that a taxpayer is "allowed input tax on his beginning inventory x x x equivalent to 8% x x x, ***or the actual value-added tax paid*** x x x, whichever is higher." The 8% transitional input VAT in Section 105 assumes that a previous tax was imposed by law, whether or not it was actually paid. **This is clear from the**

phrase "or the *actual* value-added tax paid, whichever is higher," which necessarily means that the VAT was already imposed on the previous sale. The law creates a presumption of payment of the transitional input VAT without need of substantiating the same, provided the VAT is imposed on the previous sale. ***Thus, in order to be entitled to a tax refund or credit, petitioner must point to the existence of a law imposing the tax for which a refund or credit is sought***. Since land was not yet subject to VAT or any other input business tax at the time of the sale of the Global City land in 1995, the 8% transitional input VAT could never be presumed to have been paid. Hence, petitioner's argument must fail since the transitional input VAT requires a transaction where a tax has been imposed by law.

Moreover, the *ponente* insists that no prior payment of tax is required to avail of the transitional input tax since it is not a tax refund *per se* but a tax credit. The *ponente* claims that in filing a claim for tax refund the petitioner is simply applying its transitional input tax credit against the output VAT it has paid.

I disagree.

Availing of a tax credit and filing for a tax refund are alternative options allowed by the Tax Code. The choice of one option precludes the other. A taxpayer may either (1) apply for a tax refund by filing for a written claim with the BIR within the prescriptive period, or (2) avail of a tax credit subject to verification and approval by the BIR. A claim for tax credit requires that a person who becomes liable to VAT for the first time must submit a list of his inventories existing on the date of commencement of his status as a VAT-registered taxable person. Both claims for a tax refund and credit are in the nature of a claim for exemption and should be construed in *strictissimi juris* against the person or entity claiming it. The burden of proof to establish the factual basis or the sufficiency and competency of the

supporting documents of the claim for tax refund or tax credit rests on the claimant.

In the present case, petitioner actually filed with the BIR **a claim for tax refund** in the amount of ₱347,741,695.74. In filing a claim for tax refund, petitioner has the burden to show that **prior tax payments** were made, or at the very least, that there is an existing law imposing the input tax. Similarly, in **a claim for input tax credit**, a VAT taxpayer must submit his beginning inventory showing **previously paid business taxes** on his purchase of goods, materials and supplies. In both claims, prior tax payments should have been made. **Thus, in claiming for a tax refund or credit, prior tax payment must be clearly established and duly proven by a VAT taxpayer in order to be entitled to the claim.** In **a claim for *transitional* input tax credit**, as in the present case, the VAT taxpayer must point to a **law imposing the input VAT**, without need of proving such input VAT was actually paid.

Petitioner further argues that RR 7-95 is invalid since the Revenue Regulation (1) limits the 8% transitional input VAT to the value of the improvements on the land, and (2) violates the express provision of Section 105 of the old NIRC, in relation to Section 100, as amended by RA 7716.

Petitioner's contention must again fail.

Section 4.105-1 of RR 7-95[4] and its Transitory Provisions[5] provide that the basis of the 8% transitional input VAT is the value of the ***improvements*** on the land and not the value of the taxpayer's land or real

[4] SEC. 4.105-1. *Transitional input tax on beginning inventories.* – x x x
However, in the case of real estate dealers, the basis of the presumptive input tax shall be the improvements, such as buildings, roads, drainage systems, and other similar structures, constructed on or after the effectivity of E.O. 273 (1 January 1988). x x x

[5] TRANSITORY PROVISIONS. x x x
(b) Presumptive Input Tax Credits – x x x
(iii) For real estate dealers, the presumptive input tax of 8% of the book value of improvements constructed on or after January 1, 1988 (the effectivity of E.O. 273) shall be allowed. x x x

properties. This Revenue Regulation finds **statutory basis** in Section 105 of the old NIRC, which provides that input VAT is allowed on the taxpayer's "**beginning inventory of goods, materials and supplies**." Thus, the presumptive input VAT refers to the input VAT paid on "**goods, materials or supplies"** sold by suppliers to the taxpayer, which the taxpayer **used to introduce improvements on the land**.

Under RA 7716 or the Expanded Value-Added Tax Law, the VAT was expanded to include land or real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business. Before this law was enacted, only improvements on land were subject to VAT. Since the Global City land was not yet subject to VAT at the time of the sale in 1995, the Global City land ***cannot*** be considered as part of the beginning inventory under Section 105. **Clearly, the 8% transitional input tax credit should only be applied to improvements on the land but not to the land itself**.

There is no dispute that if the National Government sells today a parcel of land, the sale is completely tax-exempt. The sale is not subject to VAT, and the buyer cannot claim any input VAT from the sale. Stated otherwise, a taxpayer like petitioner cannot claim any input VAT on its purchase today of land from the National Government, **even when VAT on land for real estate dealers is already in effect**. With greater reason, petitioner cannot claim any input VAT for its 1995 purchase of government land **when VAT on land was still non-existent** and petitioner, as a real estate dealer, was still not subject to VAT on its sale of land. In short, if petitioner cannot claim a tax refund or credit if the same transaction happened today when there is already a VAT on sales of land by real estate developers, then with more reason petitioner cannot claim a tax refund or credit when the transaction happened in 1995 when there was still no VAT on sales of land by real estate developers.

In sum, granting 8% transitional input VAT in the amount of **₱359,652,009.47** to petitioner is fraught with grave legal infirmities, namely: (1) violation of Section 4(2) of the Government Auditing Code of the Philippines, which mandates that public funds shall be used only for a public purpose; (2) violation of Section 29(1), Article VI of the Constitution, which mandates that no money in the National Treasury, which includes tax collections, shall be spent unless there is an appropriation law authorizing such expenditure; and (3) violation of the fundamental concept of the VAT system, as found in Section 105 of the old NIRC, that before there can be a VAT refund or credit there must be a previously paid input VAT that can be deducted from the output VAT because the purpose of the VAT crediting system is to prevent double taxation.

Accordingly, I vote to **DENY** the petition and **AFFIRM** the 7 July 2006 Decision of the Court of Appeals in CA-G.R. SP No. 61436.

ANTONIO T. CARPIO
Associate Justice