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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:

JANUARY 22, 2013

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DISSENTING OPINION

CARPIO, J.:

I vote to grant the motion for reconsideration filed by the Commissioner of Internal Revenue.

The Decision dated 4 September 2012 grants to petitioner a **cash refund** of **₱359,652,009.47**.¹ This **cash refund** is supposed to be reimbursement for **excess transitional input tax** under Section 105 of the old NIRC [now Section 111(A)].

I base my argument on four grounds: *first*, petitioner is not entitled to any refund of input VAT since the sale by the National Government of the Global City land to petitioner was not subject to any input VAT; *second*, the Tax Code does not allow any cash refund of input VAT, only a tax credit; *third*, even for zero-rated or effectively zero-rated VAT-registered taxpayers, the Tax Code does not allow any cash refund or credit of transitional input tax; and *fourth*, the cash refund, not being supported by any prior actual tax

¹ The dispositive portion of the 4 September 2012 Decision states:

“WHEREFORE, the petition is hereby GRANTED. The assailed Decision dated July 7, 2006 of the Court of Appeals in CA-G.R. SP No. 61436 is REVERSED and SET ASIDE. Respondent Commissioner of Internal Revenue is ordered to refund to petitioner Fort Bonifacio Development Corporation the amount of ₱359,652,009.47 paid as output VAT for the first quarter of 1997 in light of the transitional input tax credit available to petitioner for the said quarter, or in the alternative, to issue a tax credit certificate corresponding to such amount.”

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payment, is unconstitutional since public funds will be used to pay for the refund which is for the exclusive benefit of petitioner, a private entity.

Petitioner has no input VAT

In the present case, the law never imposed an input VAT on the sale of the Global City land by the National Government to petitioner. Not a single centavo of input VAT was paid, or could have been paid, by anyone in the sale of the Global City land since (1) 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; and (2) in 1995, the old VAT law did not yet impose VAT on the sale of land and thus no VAT on the sale of the Global City land could have been paid by anyone.

Thus, since petitioner does not have any input VAT from its purchase of the Global City land, it cannot ask for refund or credit of any input VAT from the same transaction.

No tax refund or credit unless there is actual or assumed tax payment

A tax refund or credit of input VAT assumes a tax was previously paid, or in the case of the transitional input tax, that the tax is assumed to have been paid, whether actually paid or not. In either case, there must be a law imposing the input VAT. This can be inferred from the provision in Section 105 that a taxpayer is “allowed input tax on his beginning inventory . . . equivalent to 8% . . ., **or the actual value-added tax paid . . ., whichever is higher.**” The phrase “*actual* value-added tax paid” means there was a law imposing the VAT.

Thus, the 8% transitional input tax credit in Section 105 assumes that a previous tax was paid, which in turn assumes there was a law imposing the tax. Since there was still no VAT on the sale of land at the time, indisputably there could not have been any actual tax payment of input VAT on the sale of the Global City land. **Without a law imposing VAT on the sale of the Global City land, there is no possibility of an actual or even assumed tax payment of input VAT on such sale.** Hence, there can be no refund or credit of input VAT for no input VAT was, or could have been, paid.

No cash refund of input VAT, only tax credit

The Tax Code does not allow a cash refund of input VAT, only a tax credit of input VAT. Section 110 of the Tax Code provides:

Sec. 110. Tax Credits -

(A) *Creditable Input Tax* – x x x

(B) *Excess Output or Input Tax* - If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. **If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters:** *Provided, however,* that any input tax attributable to zero-rated sales by a VAT-registered person may at its option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112. (Emphasis supplied)

Thus, any excess input tax can *only* be carried over to the “succeeding quarter or quarters.” Unlike a tax refund or credit under Section 229 of the Tax Code, the input tax under the VAT system is not an erroneously, illegally or improperly collected tax but a correctly collected tax. Being a correctly collected tax, the taxpayer has no right to refund or credit unless expressly allowed by law. Section 110(B) does not allow a cash refund, but merely a credit of the input VAT against output VAT, and any excess of the input VAT can only be carried over to succeeding quarters until totally credited or used up. To repeat, the Tax Code does not allow a cash refund of excess input VAT, a cash refund that the Decision of 4 September 2012 actually erroneously granted to petitioner.

Transitional input tax expressly not subject to refund or credit

The **transitional input tax** is a tax assumed to have been paid, whether actually paid or not. The Tax Code always requires substantiation for any refund or credit of a tax, that is, the taxpayer must prove that he actually paid the tax. The only exception is the transitional input tax, which is assumed to have been paid, whether actually paid or not. The transitional input tax is credited against output tax **in the concept of a reduction of tax liability**,² either to minimize the tax burden or as a tax incentive. However, the transitional input tax cannot be refunded in cash because such cash refund will be a use of public funds for a private purpose. If the taxpayer has no output tax, the taxpayer cannot ask a tax credit for the unused transitional input tax because the transitional input tax merely serves to reduce the output tax, if there is any. Thus, the Tax Code expressly prohibits any cash refund or tax credit of **transitional input tax** in the case of zero-rated or effectively zero-rated VAT registered taxpayers, **who do not have any output VAT**. Section 112(A) of the Tax Code:

² This is akin to a tax credit for income taxes paid to a foreign government. The law allows the foreign income taxes as tax credit against Philippine income tax, but the taxpayer cannot ask the Philippine government to refund such unused or excess tax credit. The Philippine government never received the taxes paid to the foreign government. *See* Section 34(c)(3)(a) of the Tax Code.

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: x x x. (Emphasis supplied)

The law is clear: a transitional input tax, which is merely an assumed payment of tax and not an actual payment of tax, cannot give rise to a cash refund, or even to a tax credit where the taxpayer has no output tax. The reason is plain common sense. A taxpayer who has not actually paid a tax cannot ask for its refund or credit. Likewise, a taxpayer who has no output tax to offset a tax credit arising from an assumed tax payment cannot ask the government for a cash refund or credit, for to do so will require the government to actually pay out public funds for a private purpose.

Public funds can only be used for a public purpose

Without any previous tax payment as source of the tax refund or credit, the tax refund or credit will be an expenditure of public funds for the exclusive benefit of a specific private individual or entity. As ruled by this Court in several cases,³ this violates the fundamental principle 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.⁴

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***

³ *Francisco Jr. 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 413; *Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960).

⁴ *Planters Product, Inc. v. Fertiphil Corporation*, G.R. No. 166006, 14 March 2008, 548 SCRA 485; *Pascual v. Secretary of Public Works*, supra.

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.

In sum, the grant of **cash refund** in the amount of **P359,652,009.47** to petitioner is not authorized by law based on four grounds: *first*, petitioner is not entitled to any refund or credit of input VAT since the sale by the National Government of the Global City land to petitioner was not subject to any input VAT; *second*, the Tax Code does not allow a cash refund of excess input VAT, only a tax credit; *third*, even for zero-rated or effectively zero-rated VAT-registered taxpayers, the Tax Code does not allow any cash refund or credit of transitional input tax; and *fourth*, the cash refund, not being supported by any prior actual tax payment, is unconstitutional since public funds will be used to pay for the refund which is for the exclusive benefit of petitioner, a private entity.

Accordingly, I vote to **GRANT** the motion for reconsideration.



ANTONIO T. CARPIO
Associate Justice