SECOND DIVISION

[G.R. NOS. 134587 & 134588, August 08, 2005]

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. BENGUET CORPORATION, RESPONDENT.

D E C I S I O N

TINGA, J.:

This is a petition for the review of a consolidated Decision of the Former Fourteenth Division of the Court of Appeals[1] ordering the Commissioner of Internal Revenue to award tax credits to Benguet Corporation in the amount corresponding to the input value added taxes that the latter had incurred in relation to its sale of gold to the Central Bank during the period of 01 August 1989 to 31 July 1991.

Petitioner is the Commissioner of Internal Revenue ("petitioner") acting in his official capacity as head of the Bureau of Internal Revenue (BIR), an attached agency of the Department of Finance,[2] with the authority, *inter alia,* to determine claims for refunds or tax credits as provided by law.[3]

Respondent Benguet Corporation ("respondent") is a domestic corporation organized and existing by virtue of Philippine laws, engaged in the exploration, development and operation of mineral resources, and the sale or marketing thereof to various entities.[4] Respondent is a value added tax (VAT) registered enterprise.[5]

The transactions in question occurred during the period between 1988 and 1991. Under Sec. 99 of the National Internal Revenue Code (NIRC),[6] as amended by Executive Order (E.O.) No. 273 s. 1987, then in effect, any person who, in the course of trade or business, sells, barters or exchanges goods, renders services, or engages in similar transactions and any person who imports goods is liable for output VAT at rates of either 10% or 0% ("zero-rated") depending on the classification of the transaction under Sec. 100 of the NIRC. Persons registered under the VAT system[7] are allowed to recognize input VAT, or the VAT due from or paid by it in the course of its trade or business on importation of goods or local purchases of goods or service, including lease or use of properties, from a VAT-registered person.[8]

In January of 1988, respondent applied for and was granted by the BIR zero-rated status on its sale of gold to Central Bank.[9] On 28 August 1988, Deputy Commissioner of Internal Revenue Eufracio D. Santos issued VAT Ruling No. 3788-88, which declared that "*[t]he sale of gold to Central Bank is considered as export sale subject to zero-rate pursuant to Section 100*[[10]] *of the Tax Code, as amended by Executive Order No. 273.*" The BIR came out with at least six (6) other issuances[11] reiterating the zero-rating of sale of gold to the Central Bank, the

latest of which is VAT Ruling No. 036-90 dated 14 February 1990.[12]

Relying on its zero-rated status and the above issuances, respondent sold gold to the Central Bank during the period of 1 August 1989 to 31 July 1991 and entered into transactions that resulted in input VAT incurred in relation to the subject sales of gold. It then filed applications for tax refunds/credits corresponding to input VAT for the amounts[13] of P46,177,861.12,[14] P19,218,738.44,[15] and P84,909,247.96.[16] Respondent's applications were either unacted upon or expressly disallowed by petitioner.[17] In addition, petitioner issued a deficiency assessment against respondent when, after applying respondent's creditable input VAT costs against the retroactive 10% VAT levy, there resulted a balance of excess output VAT.[18]

The express disallowance of respondent's application for refunds/credits and the issuance of deficiency assessments against it were based on a BIR ruling-BIR VAT Ruling No. 008-92 dated 23 January 1992-that was issued subsequent to the consummation of the subject sales of gold to the Central Bank which provides that sales of gold to the Central Bank shall not be considered as export sales and thus, shall be subject to 10% VAT. In addition, BIR VAT Ruling No. 008-92 withdrew, modified, and superseded all inconsistent BIR issuances. The relevant portions of the ruling provides, thus:

> 1. In general, for purposes of the term "export sales" only direct export sales and foreign currency denominated sales, shall be qualified for zero-rating.
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> . . . .
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> 4. Local sales of goods, which by fiction of law are considered export sales (e.g., the Export Duty Law considers sales of gold to the Central Bank of the Philippines, as export sale). This transaction shall not be considered as export sale for VAT purposes.
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> . . . .
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> [A]ll Orders and Memoranda issued by this Office inconsistent herewith are considered withdrawn, modified or superseded." (Emphasis supplied)

The BIR also issued VAT Ruling No. 059-92 dated 28 April 1992 and Revenue Memorandum Order No. 22-92 which decreed that the revocation of VAT Ruling No. 3788-88 by VAT Ruling No. 008-92 would not unduly prejudice mining companies and, thus, could be applied retroactively.[19]

Respondent filed three separate petitions for review with the Court of Tax Appeals (CTA), docketed as CTA Case No. 4945, CTA Case No. 4627, and the consolidated cases of CTA Case Nos. 4686 and 4829.

In the three cases, respondent argued that a retroactive application of BIR VAT Ruling No. 008-92 would violate Sec. 246 of the NIRC, which mandates the non-retroactivity of rulings or circulars issued by the Commissioner of Internal Revenue

that would operate to prejudice the taxpayer. Respondent then discussed in detail the manner and extent by which it was prejudiced by this retroactive application. [20] Petitioner on the other hand, maintained that BIR VAT Ruling No. 008-92 is, firstly, not void and entitled to great respect, having been issued by the body charged with the duty of administering the VAT law, and secondly, it may validly be given retroactive effect since it was not prejudicial to respondent.

In three separate decisions,[21] the CTA dismissed respondent's respective petitions. It held, with Presiding Judge Ernesto D. Acosta dissenting, that no prejudice had befallen respondent by virtue of the retroactive application of BIR VAT Ruling No. 008-92, and that, consequently, the application did not violate Sec. 246 of the NIRC.[22]

The CTA decisions were appealed by respondent to the Court of Appeals. The cases were docketed therein as CA-G.R. SP Nos. 37205, 38958, and 39435, and thereafter consolidated. The Court of Appeals, after evaluating the arguments of the parties, rendered the questioned *Decision* reversing the Court of Tax Appeals insofar as the latter had ruled that BIR VAT Ruling No. 008-92 did not prejudice the respondent and that the same could be given retroactive effect.

In its Decision, the appellate court held that respondent suffered financial damage equivalent to the sum of the disapproved claims. It stated that had respondent known that such sales were subject to 10% VAT, which rate was not the prevailing rate at the time of the transactions, respondent would have passed on the cost of the input taxes to the Central Bank. It also ruled that the remedies which the CTA supposed would eliminate any resultant prejudice to respondent were not sufficient palliatives as the monetary values provided in the supposed remedies do not approximate the monetary values of the tax credits that respondent lost after the implementation of the VAT ruling in question. It cited

Manila Mining Corporation v. Commissioner of Internal Revenue,[23] in which the Court of Appeals held[24] that BIR VAT Ruling No. 008-92 cannot be given retroactive effect. Lastly, the Court of Appeals observed that R.A. 7716, the "The New Expanded VAT Law," reveals the intent of the lawmakers with regard to the treatment of sale of gold to the Central Bank since the amended version therein of Sec. 100 of the NIRC expressly provides that the sale of gold to the Bangko Sentral ng Pilipinas is an export sale subject to 0% VAT rate. The appellate court thus allowed respondent's claims, decreeing in its dispositive portion, viz:

> WHEREFORE, the appealed decision is hereby REVERSED. The respondent Commissioner of Internal Revenue is ordered to award the following tax credits to petitioner.
> 1) In CA-G.R. SP No. 37209 – P49,611,914.00
> 2) in CA-G.R. SP No. 38958 - P19,218,738.44
> 3) in CA-G.R. SP No. 39435 - P84,909,247.96[25]

Dissatisfied with the above ruling, petitioner filed the instant *Petition for Review* questioning the determination of the Court of Appeals that the retroactive application of the subject issuance was prejudicial to respondent and could not be applied retroactively.

Apart from the central issue on the validity of the retroactive application of VAT Ruling No. 008-92, the question of the validity of the issuance itself has been touched upon in the pleadings, including a reference made by respondent to a Court of Appeals *Decision* holding that the VAT Ruling had no legal basis.[26] For its part, as the party that raised this issue, petitioner spiritedly defends the validity of the issuance.[27] Effectively, however, the question is a non-issue and delving into it would be a needless exercise for, as respondent emphatically pointed out in its *Comment*, "unlike petitioner's formulation of the issues, the only real issue in this case is whether VAT Ruling No. 008-92 which revoked previous rulings of the petitioner which respondent heavily relied upon . . . may be legally applied retroactively to respondent."[28] This Court need not invalidate the BIR issuances, which have the force and effect of law, unless the issue of validity is so crucially at the heart of the controversy that the Court cannot resolve the case without having to strike down the issuances. Clearly, whether the subject VAT ruling may validly be given retrospective effect is the *lis mota* in the case. Put in another but specific fashion, the sole issue to be addressed is whether respondent's sale of gold to the Central Bank during the period when such was classified by BIR issuances as zero-rated could be taxed validly at a 10% rate after the consummation of the transactions involved.

In a long line of cases,[29] this Court has affirmed that the rulings, circular, rules and regulations promulgated by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to the taxpayers. In fact, both petitioner[30] and respondent[31] agree that the retroactive application of VAT Ruling No. 008-92 is valid only if such application would not be prejudicial to the respondent– pursuant to the explicit mandate under Sec. 246 of the NIRC, thus:

> Sec. 246. Non-retroactivity of rulings.- Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Section or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers except in the following cases: (a) where the taxpayer deliberately misstates or omits material facts from his return on any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different form the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith. (Emphasis supplied)

In that regard, petitioner submits that respondent would not be prejudiced by a retroactive application; respondent maintains the contrary. Consequently, the determination of the issue of retroactivity hinges on whether respondent would suffer prejudice from the retroactive application of VAT Ruling No. 008-92.

We agree with the Court of Appeals and the respondent.

To begin with, the determination of whether respondent had suffered prejudice is a factual issue. It is an established rule that in the exercise of its power of review, the Supreme Court is not a trier of facts. Moreover, in the exercise of the Supreme Court's power of review, the findings of facts of the Court of Appeals are conclusive and binding on the Supreme Court.[32] An exception to this rule is when the findings

of fact a quo are conflicting,[33] as is in this case.

VAT is a percentage tax imposed at every stage of the distribution process on the sale, barter, exchange or lease of goods or properties and rendition of services in the course of trade or business, or the importation of goods.[34] It is an indirect tax, which may be shifted to the buyer, transferee, or lessee of the goods, properties, or services.[35] However, the party directly liable for the payment of the tax is the seller.[36]

In transactions taxed at a 10% rate, when at the end of any given taxable quarter the output VAT exceeds the input VAT, the excess shall be paid to the government; when the input VAT exceeds the output VAT, the excess would be carried over to VAT liabilities for the succeeding quarter or quarters.[37] On the other hand, transactions which are taxed at zero-rate do not result in any output tax. Input VAT attributable to zero-rated sales could be refunded or credited against other internal revenue taxes at the option of the taxpayer.[38]

To illustrate, in a zero-rated transaction, when a VAT-registered person ("taxpayer") purchases materials from his supplier at P80.00, P7.30[39] of which was passed on to him by his supplier as the latter's 10% output VAT, the taxpayer is allowed to recover P7.30 from the BIR, in addition to other input VAT he had incurred in relation to the zero-rated transaction, through tax credits or refunds. When the taxpayer sells his finished product in a zero-rated transaction, say, for P110.00, he is not required to pay any output VAT thereon. In the case of a transaction subject to 10% VAT, the taxpayer is allowed to recover both the input VAT of P7.30 which he paid to his supplier and his output VAT of P2.70 (10% the P30.00 value he has added to the P80.00 material) by passing on both costs to the buyer. Thus, the buyer pays the total 10% VAT cost, in this case P10.00 on the product.

In both situations, the taxpayer has the option not to carry any VAT cost because in the zero-rated transaction, the taxpayer is allowed to recover input tax from the BIR without need to pay output tax, while in 10% rated VAT, the taxpayer is allowed to pass on both input and output VAT to the buyer. Thus, there is an elemental similarity between the two types of VAT ratings in that the taxpayer has the option not to take on any VAT payment for his transactions by simply exercising his right to pass on the VAT costs in the manner discussed above.

Proceeding from the foregoing, there appears to be no upfront economic difference in changing the sale of gold to the Central Bank from a 0% to 10% VAT rate provided that respondent would be allowed the choice to pass on its VAT costs to the Central Bank. In the instant case, the retroactive application of VAT Ruling No. 008-92 unilaterally forfeited or withdrew this option of respondent. The adverse effect is that respondent became the unexpected and unwilling debtor to the BIR of the amount equivalent to the total VAT cost of its product, a liability it previously could have recovered from the BIR in a zero-rated scenario or at least passed on to the Central Bank had it known it would have been taxed at a 10% rate. Thus, it is clear that respondent suffered economic prejudice when its consummated sales of gold to the Central Bank were taken out of the zero-rated category. The change in the VAT rating of respondent's transactions with the Central Bank resulted in the twin loss of its exemption from payment of output VAT and its opportunity to