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WHEREFORE, premises considered, the instant petition is **GRANTED**. Respondent Edmundo L. Macarubbo is hereby ordered **REINSTATED** in the Roll of Attorneys.

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Peralta, Bersamin, del Castillo, Abad, Villarama, Jr., Perez, Mendoza, Reyes, and *Leonen, JJ.,* concur.

Brion, J., on leave.

EN BANC

[G.R. No. 173425. January 22, 2013]

FORT BONIFACIO DEVELOPMENT CORPORATION, *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE and REVENUE DISTRICT OFFICER, REVENUE DISTRICT NO. 44, TAGUIG and PATEROS, BUREAU OF INTERNAL REVENUE,** *respondents.*

SYLLABUS

1. TAXATION; VALUE ADDED TAX (VAT); TRANSITIONAL INPUT TAX CREDIT; PRIOR PAYMENT OF TAXES IS NOT NECESSARY BEFORE A TAXPAYER COULD AVAIL OF THE 8% TRANSITIONAL INPUT TAX CREDIT.— [P]rior payment of taxes is not necessary before a taxpayer could avail of the 8% transitional input tax credit. This position is solidly supported by law and jurisprudence, *viz:* [S]ection 105 of the old National Internal Revenue Code (NIRC) clearly provides that for a taxpayer to avail of the 8% transitional input tax credit, all that is required from the taxpayer is to file a beginning inventory with the Bureau of Internal Revenue (BIR). It was never mentioned in Section 105 that prior payment of taxes is a requirement. x x x [S]ince the law (Section 105 of the NIRC) does not provide for prior payment of taxes, to require it now

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would be tantamount to judicial legislation which, to state the obvious, is not allowed.

2. ID.; ID.; ID.; A TRANSITIONAL INPUT TAX CREDIT IS NOT A TAX REFUND *PER SE* BUT A TAX CREDIT; TAX REFUND AND TAX CREDIT, DISTINGUISHED.— A transitional input tax credit is not a tax refund *per se* but a tax credit. Logically, prior payment of taxes is not required before a taxpayer could avail of transitional input tax credit. As we have declared in our September 4, 2012 Decision, "[t]ax credit is not synonymous to tax refund. Tax refund is defined as the money that a taxpayer overpaid and is thus returned by the taxing authority. Tax credit, on the other hand, is an amount subtracted directly from one's total tax liability. It is any amount given to a taxpayer as a subsidy, a refund, or an incentive to encourage investment."

3. ID.; ID.; ID.; 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 TAX, IS NOT PROHIBITED; TRANSITIONAL INPUT TAX CREDITS AND CREDITABLE INPUT TAXES, DISTINGUISHED.— [S]ection 112 of the Tax Code speaks of zero-rated or effectively zero-rated sales. Notably, the transaction involved in this case is not zero-rated or effectively zero-rated sales. [A] careful reading of Section 112 of the Tax Code would show that it allows either a cash refund or a tax credit for input VAT on zero-rated or effectively zero-rated sales. x x x. Contrary to the Dissent, Section 112 of the Tax Code does not prohibit 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. The phrase "except transitional input tax" in Section 112 of the Tax Code was inserted to distinguish creditable input tax from transitional input tax credit. Transitional input tax credits are input taxes on a taxpayer's beginning inventory of goods, materials, and supplies equivalent to 8% (then 2%) or the actual VAT paid on such goods, materials and supplies, whichever is higher. It may only be availed of once by first-time VAT taxpayers. Creditable input taxes, on the other hand, are input taxes of VAT taxpayers in the course of their trade or business, which should be applied within two years after the close of the taxable quarter when the sales were made.

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4. ID.; ID.; ID.; A TAXPAYER WHO ERRONEOUSLY OR EXCESSIVELY PAYS HIS OUTPUT TAX IS STILL ENTITLED TO RECOVER THE PAYMENTS HE MADE EITHER AS A TAX CREDIT OR A TAX REFUND.— [A]s regards Section 110, while the law only provides for a tax credit, a taxpayer who erroneously or excessively pays his output tax is still entitled to recover the payments he made either as a tax credit or a tax refund. In this case, since petitioner still has available transitional input tax credit, it filed a claim for refund to recover the output VAT it erroneously or excessively paid for the 1st quarter of 1997. Thus, there is no reason for denying its claim for tax refund/ credit.

5. ID.; ID.; ID.; THE COMMISSIONER OF INTERNAL REVENUE HAS THE OPTION TO RETURN THE AMOUNT CLAIMED EITHER IN THE FORM OF TAX CREDIT OR REFUND.— [S]ignificantly , the dispositive portion of our September 4, 2012 Decision directed the respondent Commissioner of Internal Revenue (CIR) to **either** refund the amount paid as output VAT for the 1st quarter of 1997 or to issue a tax credit certificate. We did not outrightly direct the cash refund of the amount claimed x x x. [N]otably, in the earlier case of *Fort Bonifacio*, we likewise directed the respondent to either refund or issue a tax credit certificate. It bears emphasis that this Decision already became final and executory and entry of judgment was made in due course. x x x. Clearly, the CIR has the option to return the amount claimed either in the form of tax credit or refund.

6. ID.; ID.; ID.; GRANT OF A REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE IN CASE AT BAR IS NOT IN CONTRAVENTION OF THE MANDATE THAT GOVERNMENT FUNDS OR PROPERTY SHALL BE SPENT OR USED SOLELY FOR PUBLIC PURPOSES.— [I]t is argued that the refund or issuance of tax credit certificate violates the mandate in Section 4(2) of the Government Auditing Code of the Philippines that "Government funds or property shall be spent or used solely for public purposes." Again, this is inaccurate. On the contrary, the grant of a refund or issuance of tax credit certificate in this case would not contravene the above provision. The refund or tax credit would not be unconstitutional because it is precisely pursuant to Section 105 of the old NIRC which allows refund/tax credit.

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CARPIO, *J.*, *dissenting opinion:*

1. TAXATION; VALUE ADDED TAX (VAT); INPUT VAT; PETITIONER IS NOT ENTITLED TO A REFUND OR CREDIT OF ANY INPUT VAT SINCE THE SALE BY THE NATIONAL GOVERNMENT OF THE GLOBAL CITY LAND TO PETITIONER IS NOT SUBJECT TO ANY TAX, INCLUDING 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.

2. ID.; ID.; ID.; ID.; ID.; THERE CAN BE NO REFUND OR CREDIT OF INPUT VAT WHERE THERE WAS NO ACTUAL OR ASSUMED TAX PAYMENT; ABSENT A LAW IMPOSING VAT ON THE SALE OF THE GLOBAL CITY LAND, THERE IS NO ACTUAL OR ASSUMED TAX PAYMENT OF INPUT VAT ON SUCH SALE.— 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

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no refund or credit of input VAT for no input VAT was, or could have been, paid.

3. ID.; ID.; ID.; CASH REFUND OF EXCESS INPUT VAT IS NOT ALLOWED, BUT MERELY A CREDIT OF 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.— 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. 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.

4. ID.; ID.; ID.; TRANSITIONAL INPUT TAX, EXPLAINED; A TRANSITIONAL INPUT, 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 **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

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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**, 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:. 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. 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.

5. ID.; ID.; ID.; ANY TAX REFUND OR CREDIT IN FAVOR OF SPECIFIC TAXPAYER FOR A TAX THAT WAS NEVER PAID IS AN EXPENDITURE OF PUBLIC FUNDS FOR A PRIVATE PURPOSE, IN VIOLATION OF THE FUNDAMENTAL PRINCIPLE THAT PUBLIC FUNDS CAN BE USED ONLY 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

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several cases, 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.

6. ID.; ID.; ID.; A TAX REFUND OR CREDIT WITHOUT PRIOR TAX PAYMENT IS AN EXPENDITURE OF PUBLIC FUNDS WITHOUT AN APPROPRIATION LAW.— 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 V I 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.

APPEARANCES OF COUNSEL

Estelito P. Mendoza and *Lorenzo G. Timbol* for petitioner.
Alberto R. Bomediano for respondents.

R E S O L U T I O N

DEL CASTILLO, *J.*:

This resolves respondents' Motion for Reconsideration.[1] Respondents raise the following arguments: "1) Prior payment of tax is inherent in the nature and payment of the 8% transitional

[1] Temporary *rollo*, unpaginated.

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input tax;[2] 2) Revenue Regulations No. 7-95 providing for 8% transitional input tax based on the value of the improvements on the real properties is a valid legislative rule;[3] 3) For failure to clearly prove its entitlement to the transitional input tax credit, petitioner's claim for tax refund must fail in light of the basic doctrine that tax refund partakes of the nature of a tax exemption which should be construed *strictissimi juris* against the taxpayer."[4]

We deny with finality the Motion for Reconsideration filed by respondents; the basic issues presented have already been passed upon and no substantial argument has been adduced to warrant the reconsideration sought.

In his *Dissent*, Justice Carpio cites four grounds as follows: "*first*, petitioner is not entitled to any refund of input [Value-added tax] 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 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."[5]

At the outset, it must be pointed out that all these arguments have already been extensively discussed and argued, not only during the deliberations but likewise in the exchange of comments/ opinions.

Nevertheless, we will discuss them again for emphasis.

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[2] Motion for Reconsideration, p. 2; temporary *rollo*, unpaginated.

[3] *Id.* at 19; *id.*

[4] *Id.* at 26; *id.*

[5] Dissenting Opinion, pp. 1-2.

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First argument: "[P]etitioner 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[.]"[6]

Otherwise stated, it is argued that prior payment of taxes is a prerequisite before a taxpayer could avail of the transitional input tax credit.

This argument has long been settled. To reiterate, prior payment of taxes is not necessary before a taxpayer could avail of the 8% transitional input tax credit. This position is solidly supported by law and jurisprudence, *viz:*

First. Section 105 of the old National Internal Revenue Code (NIRC) clearly provides that for a taxpayer to avail of the 8% transitional input tax credit, all that is required from the taxpayer is to file a beginning inventory with the Bureau of Internal Revenue (BIR). It was never mentioned in Section 105 that prior payment of taxes is a requirement. For clarity and reference, Section 105 is reproduced below:

> SEC. 105. *Transitional input tax credits.* – **A person who becomes liable to value-added tax** or **any person who elects to be a VAT-registered person** shall, subject to the filing of an inventory as prescribed by regulations, **be allowed input tax on his beginning inventory of goods, materials and supplies equivalent to 8% of the value of such inventory** or **the actual value-added tax paid on such goods, materials and supplies**, whichever is higher, which shall be creditable against the output tax. (Emphasis supplied.)

Second. Since the law (Section 105 of the NIRC) does not provide for prior payment of taxes, to require it now would be tantamount to judicial legislation which, to state the obvious, is not allowed.

Third. A transitional input tax credit is not a tax refund *per se* but a tax credit. Logically, prior payment of taxes is not

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[6] *Id.* at 1.

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required before a taxpayer could avail of transitional input tax credit. As we have declared in our September 4, 2012 Decision,[7] "[t]ax credit is not synonymous to tax refund. Tax refund is defined as the money that a taxpayer overpaid and is thus returned by the taxing authority. Tax credit, on the other hand, is an amount subtracted directly from one's total tax liability. It is any amount given to a taxpayer as a subsidy, a refund, or an incentive to encourage investment."[8]

Fourth. The issue of whether prior payment of taxes is necessary to avail of transitional input tax credit is no longer novel. It has long been settled by jurisprudence. In fact, in the earlier case of *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*,[9] this Court had already ruled that—

> x x x. If the intent of the law were to limit the input tax to cases where actual VAT was paid, it could have simply said that the tax base shall be the actual value-added tax paid. Instead, the law as framed contemplates a situation where a transitional input tax credit is claimed even if there was no actual payment of VAT in the underlying transaction. In such cases, the tax base used shall be the value of the beginning inventory of goods, materials and supplies.[10]

Fifth. Moreover, in *Commissioner of Internal Revenue v. Central Luzon Drug Corp.*,[11] this Court had already declared that prior payment of taxes is not required in order to avail of a tax credit.[12] Pertinent portions of the Decision read:

> While a tax liability is essential to the *availment or use* of any *tax credit*, prior tax payments are not. On the contrary, for the

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[7] *Rollo*, pp. 763-779.

[8] *Id.* at 771.

[9] G.R. Nos. 158885 & 170680, April 2, 2009, 583 SCRA 168.

[10] *Id.* at 201.

[11] 496 Phil. 307 (2005).

[12] *Id.* at 322.

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existence or grant solely of such credit, neither a tax liability nor a prior tax payment is needed. The Tax Code is in fact replete with provisions granting or allowing *tax credits*, even though no taxes have been previously paid.

For example, in computing the *estate tax due*, Section 86(E) allows a *tax credit*subject to certain limitationsfor estate taxes paid to a foreign country. Also found in Section 101(C) is a similar provision for donor's taxes–again when paid to a foreign country–in computing for the *donor's tax due*. The *tax credits* in both instances allude to the prior payment of taxes, even if not made to our government.

Under Section 110, a VAT (Value-Added Tax)-registered person engaging in transactions–whether or not subject to the VAT–is also allowed a *tax credit* that includes a ratable portion of any input tax not directly attributable to either activity. This input tax may *either* be the VAT on the purchase or importation of goods or services that is merely due from–not necessarily paid by–such VAT-registered person in the course of trade or business; *or* the transitional input tax determined in accordance with Section 111(A). The latter type may in fact be an amount equivalent to only eight percent of the value of a VAT-registered person's beginning inventory of goods, materials and supplies, when such amount–as computed–is higher than the actual VAT paid on the said items. Clearly from this provision, the *tax credit* refers to an input tax that is either due only or given a value by mere comparison with the VAT actually paid–then later prorated. No tax is actually paid prior to the availment of such credit.

In Section 111(B), a one and a half percent input *tax credit* that is merely presumptive is allowed. For the purchase of primary agricultural products used as inputs–either in the processing of sardines, mackerel and milk, or in the manufacture of refined sugar and cooking oil–and for the contract price of public work[s] contracts entered into with the government, again, no prior tax payments are needed for the use of the *tax credit*.

More important, a VAT-registered person whose sales are zero-rated or effectively zero-rated may, under Section 112(A), apply for the issuance of a *tax credit* certificate for the amount of creditable input taxes merely due–again not necessarily paid to–the government and attributable to such sales, to the extent that the input taxes have not been applied against output taxes. Where a taxpayer is engaged

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in zero-rated or effectively zero-rated sales and also in taxable or exempt sales, the amount of creditable input taxes due that are not directly and entirely attributable to any one of these transactions shall be proportionately allocated on the basis of the volume of sales. Indeed, in availing of such *tax credit* for VAT purposes, this provision–as well as the one earlier mentioned–shows that the prior payment of taxes is not a requisite.

It may be argued that Section 28(B)(5)(b) of the Tax Code is another illustration of a *tax credit* allowed, even though no prior tax payments are not required. Specifically, in this provision, the imposition of a final withholding tax rate on cash and/or property dividends received by a nonresident foreign corporation from a domestic corporation is subjected to the condition that a foreign *tax credit* will be given by the domiciliary country in an amount equivalent to taxes that are merely deemed paid. Although true, this provision actually refers to the *tax credit* as a *condition* only for the imposition of a lower tax rate, not as a *deduction* from the corresponding tax liability. Besides, it is not our government but the domiciliary country that credits against the income tax payable to the latter by the foreign corporation, the tax to be foregone or spared.

In contrast, Section 34(C)(3), in relation to Section 34(C)(7)(b), categorically allows as credits, against the income tax imposable under Title II, the amount of income taxes merely incurred–not necessarily paid–by a domestic corporation during a taxable year in any foreign country. Moreover, Section 34(C)(5) provides that for such taxes incurred but not paid, a *tax credit* may be allowed, subject to the condition precedent that the taxpayer shall simply give a bond with sureties satisfactory to and approved by petitioner, in such sum as may be required; and further conditioned upon payment by the taxpayer of any tax found due, upon petitioner's redetermination of it.

In addition to the above-cited provisions in the Tax Code, there are also tax treaties and special laws that grant or allow *tax credits*, even though no prior tax payments have been made.

Under the treaties in which the *tax credit* method is used as a relief to avoid double taxation, income that is taxed in the *state of source* is also taxable in the *state of residence*, but the tax paid in the former is merely allowed as a credit against the tax levied in the latter. Apparently, payment is made to the *state of source*, not the *state of residence*. No tax, therefore, has been *previously* paid to the latter.

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Under special laws that particularly affect businesses, there can also be *tax credit* incentives. To illustrate, the incentives provided for in Article 48 of Presidential Decree No. (PD) 1789, as amended by Batas Pambansa Blg. (BP) 391, include *tax credits* equivalent to either five percent of the net value earned, or five or ten percent of the net local content of export. In order to avail of such credits under the said law and still achieve its objectives, no prior tax payments are necessary.

From all the foregoing instances, it is evident that prior tax payments are not indispensable to the availment of a *tax credit*. Thus, the CA correctly held that the availment under RA 7432 did not require prior tax payments by private establishments concerned. However, we do not agree with its finding that the carry-over of *tax credits* under the said special law to succeeding taxable periods, and even their application against internal revenue taxes, did not necessitate the existence of a tax liability.

The examples above show that a tax liability is certainly important in the *availment or use*, not the *existence or grant*, of a *tax credit*. Regarding this matter, a private establishment reporting a *net loss* in its financial statements is no different from another that presents a *net income*. Both are entitled to the *tax credit* provided for under RA 7432, since the law itself accords that unconditional benefit. However, for the losing establishment to immediately apply such credit, where no tax is due, will be an improvident usance.[13]

Second and third arguments: "[T]he Tax Code does not allow any cash refund of input VAT, only a tax credit"; and "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."[14]

Citing Sections 110 and 112 of the Tax Code, it is argued that the Tax Code does not allow a cash refund, only a tax credit.

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[13] *Id.* at 322-325.

[14] Dissenting Opinion, p. 1.

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This is inaccurate.

First. Section 112 of the Tax Code speaks of zero-rated or effectively zero-rated sales. Notably, the transaction involved in this case is not zero-rated or effectively zero-rated sales.

Second. A careful reading of Section 112 of the Tax Code would show that it allows either a cash refund or a tax credit for input VAT on zero-rated or effectively zero-rated sales. For reference, Section 112 is herein quoted, *viz*:

> 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.)

Third. Contrary to the Dissent, Section 112 of the Tax Code does not prohibit 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. The phrase "except transitional input tax" in Section 112 of the Tax Code was inserted to distinguish creditable input tax from transitional input tax credit. Transitional input tax credits are input taxes on a taxpayer's beginning inventory of goods, materials, and supplies equivalent to 8% (then 2%) or the actual VAT paid on such goods, materials and supplies, whichever is higher. It may only be availed of once by first-time VAT taxpayers. Creditable input taxes, on the other hand, are input taxes of VAT taxpayers in the course of their trade or business, which should be applied within two years after the close of the taxable quarter when the sales were made.

Fourth. As regards Section 110, while the law only provides for a tax credit, a taxpayer who erroneously or excessively pays his output tax is still entitled to recover the payments he made either as a tax credit or a tax refund. In this case, since

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petitioner still has available transitional input tax credit, it filed a claim for refund to recover the output VAT it erroneously or excessively paid for the 1st quarter of 1997. Thus, there is no reason for denying its claim for tax refund/credit.

Fifth. Significantly, the dispositive portion of our September 4, 2012 Decision[15] directed the respondent Commissioner of Internal Revenue (CIR) to **either** refund the amount paid as output VAT for the 1st quarter of 1997 or to issue a tax credit certificate. We did not outrightly direct the cash refund of the amount claimed, thus:

> **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.
>
> **SO ORDERED.**[16]

Sixth. Notably, in the earlier case of *Fort Bonifacio*, we likewise directed the respondent to either refund or issue a tax credit certificate. It bears emphasis that this Decision already became final and executory and entry of judgment was made in due course. The dispositive portion of our Decision in said case reads:

> WHEREFORE, the petitions are GRANTED. The assailed decisions of the Court of Tax Appeals and the Court of Appeals are REVERSED and SET ASIDE. Respondents are hereby (1) restrained from collecting from petitioner the amount of ₱28,413,783.00 representing the transitional input tax credit due it for the fourth quarter of 1996; and (2) directed to refund to petitioner the amount of ₱347,741,695.74 paid as output VAT

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[15] *Rollo*, pp. 763-779.

[16] *Id.* at 777-778.

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for the third quarter of 1997 in light of the persisting transitional input tax credit available to petitioner for the said quarter, or to issue a tax credit corresponding to such amount. No pronouncement as to costs.[17]

Clearly, the CIR has the option to return the amount claimed either in the form of tax credit or refund.

Fourth argument. "[T]he 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."[18]

Otherwise stated, it is argued that the refund or issuance of tax credit certificate violates the mandate in Section 4(2) of the Government Auditing Code of the Philippines that "Government funds or property shall be spent or used solely for public purposes."

Again, this is inaccurate. On the contrary, the grant of a refund or issuance of tax credit certificate in this case would not contravene the above provision. The refund or tax credit would not be unconstitutional because it is precisely pursuant to Section 105 of the old NIRC which allows refund/tax credit.

Final Note

As earlier mentioned, the issues in this case are not novel. These same issues had been squarely ruled upon by this Court in the earlier *Fort Bonifacio* case. This earlier *Fort Bonifacio* case already attained finality and entry of judgment was already made in due course. To reverse our Decision in this case would logically affect our Decision in the earlier *Fort Bonifacio* case. Once again, this Court will become an easy target for charges of "flip-flopping."

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[17] *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*, *supra* note 9, at 198-199.

[18] Dissenting Opinion, pp. 1-2.

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ACCORDINGLY, the Motion for Reconsideration is **DENIED** with **FINALITY**, the basic issues presented having been passed upon and no substantial argument having been adduced to warrant the reconsideration sought. No further pleadings or motions shall be entertained in this case. Let entry of final judgment be made in due course.

SO ORDERED.

Velasco, Jr., Leonardo-de Castro, Peralta, Bersamin, Abad, Villarama, Jr., Perez, Mendoza, and *Reyes, JJ.*, concur.

Sereno, C.J., Perlas-Bernabe, and *Leonen, JJ.,* join the dissent of *J.* Carpio.

Carpio, J., see dissenting opinion.

Brion, J., on official leave.

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)].

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[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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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 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.

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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

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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:

> 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)

[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.

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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]

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[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*.

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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.

In sum, the grant of **cash refund** in the amount of **₱359,652,009.47** 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.