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[G.R. No. 173425. September 4, 2012]

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; TRANSITIONAL INPUT TAX CREDIT OF 8%; TO AVAIL THEREOF, PRIOR PAYMENT OF TAXES IS NOT REQUIRED; SUSTAINED. — To require prior payment of taxes, as proposed in the Dissent is not only tantamount to judicial legislation but would also render nugatory the provision in Section 105 of the old NIRC that the transitional input tax credit shall be "8% of the value of [the beginning] inventory or the actual [VAT] paid on such goods, materials and supplies, whichever is higher" because the actual VAT (now 12%) paid on the goods, materials, and supplies would always be higher than the 8% (now 2%) of the beginning inventory which, following the view of Justice Carpio, would have to exclude all goods, materials, and supplies where no taxes were paid. Clearly, limiting the value of the beginning inventory only to goods, materials, and supplies, where prior taxes were paid, was not the intention of the law. Otherwise, it would have specifically stated that the beginning inventory excludes goods, materials, and supplies where no taxes were paid. x x x Moreover, prior payment of taxes is not required to avail of the transitional input tax credit because it is not a tax refund *per se* but a tax credit. Tax 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. Thus, unlike a tax refund, prior payment of taxes is not a prerequisite to avail of a tax credit. In fact, in *Commissioner of Internal Revenue v. Central Luzon Drug Corp*., we declared that prior payment of taxes is not required in

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order to avail of a tax credit. x x x In filing a claim for tax refund, petitioner is simply applying its transitional input tax credit against the output VAT it has paid. Hence, it is merely availing of the tax credit incentive given by law to first time VAT taxpayers. As we have said in the earlier case of *Fort Bonifacio*, the provision on transitional input tax credit was enacted to benefit first time VAT taxpayers by mitigating the impact of VAT on the taxpayer. Thus, contrary to the view of Justice Carpio, the granting of a transitional input tax credit in favor of petitioner, which would be paid out of the general fund of the government, would be an appropriation authorized by law, specifically Section 105 of the old NIRC.

2. ID.; ID.; ID.; LIMITATION IN THE APPLICATION THEREOF TO THE VALUE OF IMPROVEMENTS ON REAL PROPERTIES IS A NULLITY; CLARIFIED; APPLICATION IN CASE AT BAR. — As regards Section 4.105-1 of RR 7-95 which limited the 8% transitional input tax credit to the value of the improvements on the land, the same contravenes the provision of Section 105 of the old NIRC, in relation to Section 100 of the same Code, as amended by RA 7716, which defines "goods or properties," x x x In fact, in our Resolution dated October 2, 2009, in the related case of *Fort Bonifacio*, we ruled that Section 4.105-1 of RR 7-95, insofar as it limits the transitional input tax credit to the value of the improvement of the real properties, is a nullity. x x x As we see it then, the 8% transitional input tax credit should not be limited to the value of the improvements on the real properties but should include the value of the real properties as well. In this case, since petitioner is entitled to a transitional input tax credit of ₱5,698,200,256, which is more than sufficient to cover its output VAT liability for the first quarter of 1997, a refund of the amount of ₱359,652,009.47 erroneously paid as output VAT for the said quarter is in order.

ABAD, *J.*, *concurring opinion*:

1. TAXATION; VALUE ADDED TAX (VAT); 8% TRANSITIONAL INPUT TAX CREDIT; THE GRANT THEREOF TO ALL FIRST-TIME VAT PAYERS IS WITHOUT ANY PRECONDITION, DENIAL THEREOF WOULD AMOUNT TO A DENIAL OF THE RIGHT TO FAIRNESS AND EQUAL PROTECTION; CLARIFIED IN CASE AT BAR. — A value added tax is a form of indirect sales tax paid on products and services at each stage of production

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or distribution, based on the value added at that stage and included in the cost to the ultimate consumer. x x x 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. x x x 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.

2. ID.; ID.; ID.; ID.; REFUND OF THE VAT ALREADY PAID, PROPER. — 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. x x x FBDC was forced to pay cash on the VAT due on its sales because the BIR refused to apply the 8% transitional

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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.

CARPIO, *J., dissenting opinion*:

1. TAXATION; VALUE ADDED TAX; 8% TRANSITIONAL INPUT TAX CREDIT; TAX REFUND OR TAX CREDIT; SOURCE THEREOF IS THE TAX THAT WAS PREVIOUSLY PAID. — 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.

2. ID.; ID.; ID.; ID.; GRANT THEREOF WITHOUT PREVIOUS TAX PAYMENT AS SOURCE WILL VIOLATE THE FUNDAMENTAL PRINCIPLE THAT PUBLIC FUNDS CAN BE USED ONLY FOR A PUBLIC PURPOSE; RATIONALE. — 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, 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. Even if only a tax credit is granted, it will still be an expenditure of public funds for the benefit of a private purpose

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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 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.

3. **ID.; ID.; ID.; ID.; GRANT THEREOF WITHOUT PRIOR TAX PAYMENT IS AN EXPENDITURE OF PUBLIC FUNDS WITHOUT AN APPROPRIATION LAW. —** [R]efund 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.

4. **ID.; ID.; ID.; ID.; PURPOSE OF TAX CREDITING SYSTEM, EXPLAINED; DOUBLE TAXATION, NOT PRESENT IN CASE AT BAR. —** 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. x x x [T]he 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

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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**.

5. ID.; ID.; ID.; ID.; BOTH ARE IN THE NATURE OF CLAIM FOR EXEMPTION AND SHOULD BE CONSTRUED IN *STRICTISSIMI JURIS* AGAINST THE PERSON OR ENTITY CLAIMING IT. — 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.

APPEARANCES OF COUNSEL

Estelito P. Mendoza and Lorenzo G. Timbol for petitioner.

The Solicitor General and *Alberto R. Bomediano* for respondents.

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D E C I S I O N

DEL CASTILLO, *J.*:

Courts cannot limit the application or coverage of a law, nor can it impose conditions not provided therein. To do so constitutes judicial legislation.

This Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assails the July 7, 2006 Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 61436, the dispositive portion of which reads:

WHEREFORE, the instant petition is hereby **DISMISSED. ACCORDINGLY,** the Decision dated October 12, 2000 of the Court of Tax Appeals in CTA Case No. 5735, denying petitioner's claim for refund in the amount of Three Hundred Fifty-Nine Million Six Hundred Fifty-Two Thousand Nine Pesos and Forty-Seven Centavos (₱359,652,009.47), is hereby **AFFIRMED.**

SO ORDERED.[2]

Factual Antecedents

Petitioner Fort Bonifacio Development Corporation (FBDC) is a duly registered domestic corporation engaged in the development and sale of real property.[3] The Bases Conversion Development Authority (BCDA), a wholly owned government corporation created under Republic Act (RA) No. 7227,[4] owns 45% of petitioner's issued and outstanding capital stock; while the Bonifacio Land Corporation, a consortium of private domestic corporations, owns the remaining 55%.[5]

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[1] *Rollo*, pp. 317-333; penned by Associate Justice Monina Arevalo-Zenarosa and concurred in by Associate Justices Renato C. Dacudao and Rosmari D. Carandang.

[2] *Id.* at 332.

[3] *Id.* at 318.

[4] BASES CONVERSION AND DEVELOPMENT ACT of 1992.

[5] *Rollo*, p. 318.

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On February 8, 1995, by virtue of RA 7227 and Executive Order No. 40,[6] dated December 8, 1992, petitioner purchased from the national government a portion of the Fort Bonifacio reservation, now known as the Fort Bonifacio Global City (Global City).[7]

On January 1, 1996, RA 7716[8] restructured the Value-Added Tax (VAT) system by amending certain provisions of the old National Internal Revenue Code (NIRC). RA 7716 extended the coverage of VAT to real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business.[9]

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[6] IMPLEMENTING THE PROVISIONS OF REPUBLIC ACT NO. 7227 AUTHORIZING THE BASES CONVERSION AND DEVELOPMENT AUTHORITY (BCDA) TO RAISE FUNDS THROUGH THE SALE OF METRO MANILA MILITARY CAMPS TRANSFERRED TO BCDA TO FORM PART OF ITS CAPITALIZATION AND TO BE USED FOR THE PURPOSE STATED IN SAID ACT.

[7] *Rollo*, p. 319.

[8] AN ACT RESTRUCTURING THE VALUE ADDED TAX (VAT) SYSTEM, WIDENING ITS TAX BASE AND ENCHANCING ITS ADMINISTRATION AND FOR THESE PURPOSES AMENDING AND REPEALING THE RELEVANT PROVISIONS OF THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, AND FOR OTHER PURPOSES.

[9] Section 2 of Republic Act No. 7716 provides:

> Sec. 2. Section 100 of the National Internal Revenue Code, as amended, is hereby furthere amended to read as follows:
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> "Section 100. Value-added-tax on sale of goods or properties.— (a) Rate and base of tax.— There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a valued-added tax equivalent to 10% of the gross selling price or gross value in money of the goods, or properties sold, bartered or exchange, such tax to be paid by the seller or transferor.
>
> "(1) The term 'goods or properties' shall mean all tangible and intangible objects which are capable of pecuniary estimation and shall include;
>
> (A) Real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business."
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> x x x x x x x x x

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On September 19, 1996, petitioner submitted to the Bureau of Internal Revenue (BIR) Revenue District No. 44, Taguig and Pateros, an inventory of all its real properties, the book value of which aggregated ₱71,227,503,200.[10] Based on this value, petitioner claimed that it is entitled to a transitional input tax credit of ₱5,698,200,256,[11] pursuant to Section 105[12] of the old NIRC.

In October 1996, petitioner started selling Global City lots to interested buyers.[13]

For the first quarter of 1997, petitioner generated a total amount of ₱3,685,356,539.50 from its sales and lease of lots, on which the output VAT payable was ₱368,535,653.95.[14] Petitioner paid the output VAT by making cash payments to the BIR totalling ₱359,652,009.47 and crediting its unutilized input tax credit on purchases of goods and services of ₱8,883,644.48.[15]

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[10] *Rollo*, p. 320.

[11] CTA *rollo*, p. 4.

[12] Now Section 111 (A) of the NATIONAL INTERNAL REVENUE CODE OF 1997 which provides:

SEC 111. *Transitional/Presumptive Input Tax Credits*. —

(A) *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 according to rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, be allowed input tax on his beginning inventory of goods, materials and supplies equivalent to two percent (2%) 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. [As amended by Republic Act No. 9337- An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, as amended, and for other purposes.]

[13] *Rollo*, p. 319.

[14] *Id.* at 320.

[15] *Id.* at 320-321.

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Realizing that its transitional input tax credit was not applied in computing its output VAT for the first quarter of 1997, petitioner on November 17, 1998 filed with the BIR a claim for refund of the amount of ₱359,652,009.47 erroneously paid as output VAT for the said period.[16]

Ruling of the Court of Tax Appeals

On February 24, 1999, due to the inaction of the respondent Commissioner of Internal Revenue (CIR), petitioner elevated the matter to the Court of Tax Appeals (CTA) *via* a Petition for Review.[17]

In opposing the claim for refund, respondents interposed the following special and affirmative defenses:

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8. Under Revenue Regulations No. 7-95, implementing Section 105 of the Tax Code as amended by E.O. 273, the basis of the presumptive input tax, in the case of real estate dealers, is the improvements, such as buildings, roads, drainage systems, and other similar structures, constructed on or after January 1, 1988.

9. Petitioner, by submitting its inventory listing of real properties only on September 19, 1996, failed to comply with the aforesaid revenue regulations mandating that for purposes of availing the presumptive input tax credits under its Transitory Provisions, "an inventory as of December 31, 1995, of such goods or properties and improvements showing the quantity, description, and amount should be filed with the RDO no later than January 31, 1996. x x x"[18]

On October 12, 2000, the CTA denied petitioner's claim for refund. According to the CTA, "the benefit of transitional input tax credit comes with the condition that business taxes should have been paid first."[19] In this case, since petitioner acquired the

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[16] CTA *rollo*, p. 5.

[17] *Id.* at 1-12.

[18] *Id.* at 44.

[19] *Rollo*, p. 148.

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Global City property under a VAT-free sale transaction, it cannot avail of the transitional input tax credit.[20] The CTA likewise pointed out that under Revenue Regulations No. (RR) 7-95, implementing Section 105 of the old NIRC, the 8% transitional input tax credit should be based on the value of the improvements on land such as buildings, roads, drainage system and other similar structures, constructed on or after January 1, 1998, and not on the book value of the real property.[21] Thus, the CTA disposed of the case in this manner:

WHEREFORE, in view of all the foregoing, the claim for refund representing alleged overpaid value-added tax covering the first quarter of 1997 is hereby **DENIED** for lack of merit.

SO ORDERED.[22]

Ruling of the Court of Appeals

Aggrieved, petitioner filed a Petition for Review[23] under Rule 43 of the Rules of Court before the CA.

On July 7, 2006, the CA affirmed the decision of the CTA. The CA agreed that petitioner is not entitled to the 8% transitional input tax credit since it did not pay any VAT when it purchased the Global City property.[24] The CA opined that transitional input tax credit is allowed only when business taxes have been paid and passed-on as part of the purchase price.[25] In arriving at this conclusion, the CA relied heavily on the historical background of transitional input tax credit.[26] As to the validity of RR 7-95,

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[20] *Id.* at 149.

[21] *Id.* at 149-150.

[22] *Id.* at 150.

[23] CA *rollo,* pp. 7-66.

[24] *Rollo,* p. 330.

[25] *Id.* at 329.

[26] *Id.* at 325-328.

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which limited the 8% transitional input tax to the value of the improvements on the land, the CA said that it is entitled to great weight as it was issued pursuant to Section 245[27] of the old NIRC.[28]

Issues

Hence, the instant petition with the principal issue of whether petitioner is entitled to a refund of ₱359,652,009.47 erroneously paid as output VAT for the first quarter of 1997, the resolution of which depends on:

3.05.a. Whether Revenue Regulations No. 6-97 effectively repealed or repudiated Revenue Regulations No. 7-95 insofar as the latter limited the transitional/presumptive input tax credit which may be claimed under Section 105 of the National Internal Revenue Code to the "improvements" on real properties.

3.05.b. Whether Revenue Regulations No. 7-95 is a valid implementation of Section 105 of the National Internal Revenue Code.

3.05.c. Whether the issuance of Revenue Regulations No. 7-95 by the Bureau of Internal Revenue, and declaration of validity of said Regulations by the Court of Tax Appeals and Court of Appeals, [were] in violation of the fundamental principle of separation of powers.

3.05.d. Whether there is basis and necessity to interpret and construe the provisions of Section 105 of the National Internal Revenue Code.

3.05.e. Whether there must have been previous payment of business tax by petitioner on its land before it may claim

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[27] SEC. 245. *Authority of Secretary of Finance to promulgate rules and regulations.* — The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code. x x x (Now Section 244 of the National Internal Revenue Code of 1997.)

[28] *Rollo,* pp. 331-332.

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the input tax credit granted by Section 105 of the National Internal Revenue Code.

3.05.f. Whether the Court of Appeals and Court of Tax Appeals merely speculated on the purpose of the transitional/ presumptive input tax provided for in Section 105 of the National Internal Revenue Code.

3.05.g. Whether the economic and social objectives in the acquisition of the subject property by petitioner from the Government should be taken into consideration.[29]

Petitioner's Arguments

Petitioner claims that it is entitled to recover the amount of ₱359,652,009.47 erroneously paid as output VAT for the first quarter of 1997 since its transitional input tax credit of ₱5,698,200,256 is more than sufficient to cover its output VAT liability for the said period.[30]

Petitioner assails the pronouncement of the CA that prior payment of taxes is required to avail of the 8% transitional input tax credit.[31] Petitioner contends that there is nothing in Section 105 of the old NIRC to support such conclusion.[32] Petitioner further argues that RR 7-95, which limited the 8% transitional input tax credit to the value of the improvements on the land, is invalid because it goes against the express provision of Section 105 of the old NIRC, in relation to Section 100[33] of the same Code, as amended by RA 7716.[34]

Respondents' Arguments

Respondents, on the other hand, maintain that petitioner is not entitled to a transitional input tax credit because no taxes

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[29] *Id.* at 23-24.

[30] *Id.* at 82.

[31] *Id.* at 84.

[32] *Id.* at 87.

[33] Now Section 106 of the National Internal Revenue Code of 1997.

[34] *Rollo,* pp. 47-61.

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were paid in the acquisition of the Global City property.[35] Respondents assert that prior payment of taxes is inherent in the nature of a transitional input tax.[36] Regarding RR 7-95, respondents insist that it is valid because it was issued by the Secretary of Finance, who is mandated by law to promulgate all needful rules and regulations for the implementation of Section 105 of the old NIRC.[37]

Our Ruling

The petition is meritorious.

The issues before us are no longer new or novel as these have been resolved in the related case of *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*.[38]

Prior payment of taxes is not required for a taxpayer to avail of the 8% transitional input tax credit

Section 105 of the old NIRC reads:

> 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.)

Contrary to the view of the CTA and the CA, there is nothing in the above-quoted provision to indicate that prior payment of taxes is necessary for the availment of the 8% transitional input tax credit. Obviously, all that is required is for the taxpayer to file a beginning inventory with the BIR.

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[35] *Id.* at 367.

[36] *Id.* at 357.

[37] *Id.* at 378.

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

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To require prior payment of taxes, as proposed in the Dissent is not only tantamount to judicial legislation but would also render nugatory the provision in Section 105 of the old NIRC that the transitional input tax credit shall be "8% of the value of [the beginning] inventory or the actual [VAT] paid on such goods, materials and supplies, whichever is higher" because the actual VAT (now 12%) paid on the goods, materials, and supplies would always be higher than the 8% (now 2%) of the beginning inventory which, following the view of Justice Carpio, would have to exclude all goods, materials, and supplies where no taxes were paid. Clearly, limiting the value of the beginning inventory only to goods, materials, and supplies, where prior taxes were paid, was not the intention of the law. Otherwise, it would have specifically stated that the beginning inventory excludes goods, materials, and supplies where no taxes were paid. As retired Justice Consuelo Ynares-Santiago has pointed out in her Concurring Opinion in the earlier case of *Fort Bonifacio*:

> 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.[39]

Moreover, prior payment of taxes is not required to avail of the transitional input tax credit because it is not a tax refund *per se* but a tax credit. Tax 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.[40] Tax credit, on the other hand, is an amount subtracted directly from one's total tax liability.[41] It is any amount given to a taxpayer as a subsidy, a refund, or an incentive to encourage investment. Thus, unlike a tax refund, prior payment of taxes is not a prerequisite to avail of a tax credit. In

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[39] *Id.* at 201.

[40] Garner, *Black's Law Dictionary,* 7th Edition, p. 1475.

[41] *Id.* at 1473.

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fact, in *Commissioner of Internal Revenue v. Central Luzon Drug Corp.*,[42] we declared that prior payment of taxes is not required in order to avail of a tax credit.[43] 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 *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.
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> For example, in computing the *estate tax due*, Section 86(E) allows a *tax credit* — subject to certain limitations — for 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.
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> 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.
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> 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

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[42] 496 Phil. 307 (2005).

[43] *Id.* at 322.

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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 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.

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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.

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.[44]

In this case, when petitioner realized that its transitional input tax credit was not applied in computing its output VAT for the 1st quarter of 1997, it filed a claim for refund to recover the output VAT it erroneously or excessively paid for the 1st quarter of 1997. In filing a claim for tax refund, petitioner is simply applying its transitional input tax credit against the output VAT it has paid. Hence, it is merely availing of the tax credit incentive given by

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

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law to first time VAT taxpayers. As we have said in the earlier case of *Fort Bonifacio*, the provision on transitional input tax credit was enacted to benefit first time VAT taxpayers by mitigating the impact of VAT on the taxpayer.[45] Thus, contrary to the view of Justice Carpio, the granting of a transitional input tax credit in favor of petitioner, which would be paid out of the general fund of the government, would be an appropriation authorized by law, specifically Section 105 of the old NIRC.

The history of the transitional input tax credit likewise does not support the ruling of the CTA and CA. In our Decision dated April 2, 2009, in the related case of *Fort Bonifacio,* we explained that:

> If indeed the transitional input tax credit is integrally related to previously paid sales taxes, the purported causal link between those two would have been nonetheless extinguished long ago. Yet Congress has reenacted the transitional input tax credit several times; that fact simply belies the absence of any relationship between such tax credit and the long-abolished sales taxes. Obviously then, the purpose behind the transitional input tax credit is not confined to the transition from sales tax to VAT.
>
> There is hardly any constricted definition of "transitional" that will limit its possible meaning to the shift from the sales tax regime to the VAT regime. Indeed, it could also allude to the transition one undergoes from not being a VAT-registered person to becoming a VAT-registered person. Such transition does not take place merely by operation of law, E.O. No. 273 or Rep. Act No. 7716 in particular. It could also occur when one decides to start a business. Section 105 states that the transitional input tax credits become available either to (1) a person who becomes liable to VAT; or (2) any person who elects to be VAT-registered. The clear language of the law entitles new trades or businesses to avail of the tax credit once they become VAT-registered. The transitional input tax credit, whether under the Old NIRC or the New NIRC, may be claimed by a newly-VAT registered person such as when a business as it commences operations. If we view the matter from the perspective of a starting entrepreneur, greater clarity emerges on the continued utility of the transitional input tax credit.

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[45] *Supra* note 38 at 192-193.

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Following the theory of the CTA, the new enterprise should be able to claim the transitional input tax credit because it has presumably paid taxes, VAT in particular, in the purchase of the goods, materials and supplies in its beginning inventory. Consequently, as the CTA held below, if the new enterprise has not paid VAT in its purchases of such goods, materials and supplies, then it should not be able to claim the tax credit. However, it is not always true that the acquisition of such goods, materials and supplies entail the payment of taxes on the part of the new business. In fact, this could occur as a matter of course by virtue of the operation of various provisions of the NIRC, and not only on account of a specially legislated exemption.

Let us cite a few examples drawn from the New NIRC. If the goods or properties are not acquired from a person in the course of trade or business, the transaction would not be subject to VAT under Section 105. The sale would be subject to capital gains taxes under Section 24 (D), but since capital gains is a tax on passive income it is the seller, not the buyer, who generally would shoulder the tax.

If the goods or properties are acquired through donation, the acquisition would not be subject to VAT but to donor's tax under Section 98 instead. It is the donor who would be liable to pay the donor's tax, and the donation would be exempt if the donor's total net gifts during the calendar year does not exceed ₱100,000.00.

If the goods or properties are acquired through testate or intestate succession, the transfer would not be subject to VAT but liable instead for estate tax under Title III of the New NIRC. If the net estate does not exceed ₱200,000.00, no estate tax would be assessed.

The interpretation proffered by the CTA would exclude goods and properties which are acquired through sale not in the ordinary course of trade or business, donation or through succession, from the beginning inventory on which the transitional input tax credit is based. This prospect all but highlights the ultimate absurdity of the respondents' position. Again, nothing in the Old NIRC (or even the New NIRC) speaks of such a possibility or qualifies the previous payment of VAT or any other taxes on the goods, materials and supplies as a pre-requisite for inclusion in the beginning inventory.

It is apparent that the transitional input tax credit operates to benefit newly VAT-registered persons, whether or not they previously paid taxes in the acquisition of their beginning inventory of goods, materials and supplies. During that period of transition from non-VAT to VAT

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status, the transitional input tax credit serves to alleviate the impact of the VAT on the taxpayer. At the very beginning, the VAT-registered taxpayer is obliged to remit a significant portion of the income it derived from its sales as output VAT. The transitional input tax credit mitigates this initial diminution of the taxpayer's income by affording the opportunity to offset the losses incurred through the remittance of the output VAT at a stage when the person is yet unable to credit input VAT payments.

There is another point that weighs against the CTA's interpretation. Under Section 105 of the Old NIRC, the rate of the transitional input tax credit is "8% of the value of such inventory or the actual value-added tax paid on such goods, materials and supplies, whichever is higher." If indeed the transitional input tax credit is premised on the previous payment of VAT, then it does not make sense to afford the taxpayer the benefit of such credit based on "8% of the value of such inventory" should the same prove higher than the actual VAT paid. This intent that the CTA alluded to could have been implemented with ease had the legislature shared such intent by providing the actual VAT paid as the sole basis for the rate of the transitional input tax credit.[46]

In view of the foregoing, we find petitioner entitled to the 8% transitional input tax credit provided in Section 105 of the old NIRC. The fact that it acquired the Global City property under a tax-free transaction makes no difference as prior payment of taxes is not a pre-requisite.

Section 4.105-1 of RR 7-95 is inconsistent with Section 105 of the old NIRC

As regards Section 4.105-1[47] of RR 7-95 which limited the 8% transitional input tax credit to the value of the improvements

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[46] *Id.* at 190-193.

[47] Sec. 4.105 –1. Transitional input tax on beginning inventories. – Taxpayers who became VAT-registered persons upon effectivity of RA No. 7716 who have exceeded the minimum turnover of ₱500,000.00 or who voluntarily register even if their turnover does not exceed ₱500,000.00 shall be entitled to a presumptive input tax on the inventory on hand as of December 31, 1995 on the following: (a) goods purchased for resale in their present condition; (b) materials purchased for further processing, but which have not yet undergone

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on the land, the same contravenes the provision of Section 105 of the old NIRC, in relation to Section 100 of the same Code, as amended by RA 7716, which defines "goods or properties," to wit:

SEC. 100. *Value-added tax on sale of goods or properties.* – (a) Rate and base of tax. – There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a value-added tax equivalent to 10% of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.

(1) The term "goods or properties" shall mean all tangible and intangible objects which are capable of pecuniary estimation and shall include:

(A) Real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business; x x x

In fact, in our Resolution dated October 2, 2009, in the related case of *Fort Bonifacio*, we ruled that Section 4.105-1 of RR 7-95, insofar as it limits the transitional input tax credit to the value of the improvement of the real properties, is a nullity.[48] Pertinent portions of the Resolution read:

As mandated by Article 7 of the Civil Code, an administrative rule or regulation cannot contravene the law on which it is based. RR 7-95 is inconsistent with Section 105 insofar as the definition of the term "*goods*" is concerned. This is a legislative act beyond the

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processing; (c) goods which have been manufactured by the taxpayer; (d) goods in process and supplies, all of which are for sale or for use in the course of the taxpayer's trade or business as a VAT-registered person.

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 EO 273 (January 1, 1988).

The transitional input tax shall be 8% of the value of the inventory or actual VAT paid, whichever is higher, which amount may be allowed as tax credit against the output tax of the VAT-registered person. x x x (Emphasis supplied.)

[48] *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue,* G.R. Nos. 158885 & 170680, October 2, 2009, 602 SCRA 159.

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authority of the CIR and the Secretary of Finance. The rules and regulations that administrative agencies promulgate, which are the product of a delegated legislative power to create new and additional legal provisions that have the effect of law, should be within the scope of the statutory authority granted by the legislature to the objects and purposes of the law, and should not be in contradiction to, but in conformity with, the standards prescribed by law.

To be valid, an administrative rule or regulation must conform, not contradict, the provisions of the enabling law. An implementing rule or regulation cannot modify, expand, or subtract from the law it is intended to implement. Any rule that is not consistent with the statute itself is null and void.

While administrative agencies, such as the Bureau of Internal Revenue, may issue regulations to implement statutes, they are without authority to limit the scope of the statute to less than what it provides, or extend or expand the statute beyond its terms, or in any way modify explicit provisions of the law. Indeed, a quasi-judicial body or an administrative agency for that matter cannot amend an act of Congress. Hence, in case of a discrepancy between the basic law and an interpretative or administrative ruling, the basic law prevails.

To recapitulate, RR 7-95, insofar as it restricts the definition of "*goods*" as basis of transitional input tax credit under Section 105 is a nullity.[49]

As we see it then, the 8% transitional input tax credit should not be limited to the value of the improvements on the real properties but should include the value of the real properties as well.

In this case, since petitioner is entitled to a transitional input tax credit of ₱5,698,200,256, which is more than sufficient to cover its output VAT liability for the first quarter of 1997, a refund of the amount of ₱359,652,009.47 erroneously paid as output VAT for the said quarter is in order.

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

[49] *Id.* at 166-167.

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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.

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

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

Abad, J., with concurring opinion.

Carpio, J., see dissenting opinion.

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

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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

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[1] *Fort Bonifacio Development Corp. v. Commissioner of Internal Revenue*, 583 SCRA 168.

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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% 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

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

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

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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

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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 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

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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.

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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*.

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

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

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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.

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

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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).

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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 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***

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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

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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

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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 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

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[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

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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.