REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT PAGBILAO CORPORATION
[formerly Southern Energy Quezon, Inc.],
Petitioner,

- versus -

C.T.A. CASE NO. 6041

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAR 05 2002

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DECISION

At bar is a claim for refund of alleged unapplied or unutilized input taxes in the amount of P8,974,159.66 arising from Petitioner's domestic purchases of goods and services attributable to its alleged zero-rated sale of power generation services to the National Power Corporation (NPC, for brevity) for the first quarter of 1998.

The antecedent facts are as follows:

Petitioner is a corporation organized and existing under and by virtue of the laws of the Philippines. On March 23, 1999, Petitioner amended its Articles of Incorporation to effect a change in its corporate name to Southern Energy Quezon, Inc., which was approved by the SEC under Certificate of Filing of Amended Articles of Incorporation issued by the SEC dated September 22, 1999. It is primarily engaged in the business of power generation and subsequent sale thereof to the NPC under a Build, Operate and Transfer scheme (paragraph 3, Joint Stipulation of Facts and Issues). It is also registered as a Value-Added Taxpayer pursuant to Section 107 of the NIRC bearing RDO Control No. 96-600-002498.

In its amended quarterly VAT return for the first quarter of 1998 filed on November 25, 1999, Petitioner reflected the amounts of P89,741,608.12 and P8,974,159.66 as total domestic purchases of goods and input taxes, respectively (Exhibits E-5 and E-6). On even date, Petitioner filed its amended quarterly VAT return for the second quarter of 1998 (Exhibit G) reflecting therein input taxes from domestic purchases of goods and services for the second quarter of 1998 in the amount of P148,003,047.62.

Likewise, on November 25, 1999, Petitioner filed its amended quarterly VAT return for the third and fourth quarters of 1998 reflecting therein input taxes in the amounts of P17,958,855.99 (Exhibit H-1) and P57,768,570.62 (Exhibit I-1), respectively.

Relying on Republic Act No. 6395 (NPC Charter) and on the pronouncement of the Supreme Court in the case of **Maceda vs. Macaraig, G.R. No. 88291, May 31, 1999,** declaring the NPC as exempt from the payment of both direct and indirect taxes, Petitioner concludes that its sale of power generation services to NPC is zero rated for VAT purposes.

Moreover, to support its stance, Petitioner cited Section 108 of the National Internal Revenue Code as its basis in its action for refund of alleged unutilized input taxes.

Considering that it has no output VAT liability in the first quarter and in the succeeding quarters, Petitioner asseverates that its input VAT on its domestic purchases of goods and services for the first quarter of 1998 remained unutilized.

On December 20, 1999, Petitioner filed an administrative claim for refund of its alleged unutilized input taxes for the first quarter of 1998 with the Bureau of Internal Revenue. To toll the running of the prescriptive period within which to file a claim for refund, Petitioner elevated its case to this Court on March 31, 2000, via Petition for Review.

Traversing Petitioner's contentions, Respondent, in his Answer filed on April 17, 2000 interposed the following by way of Special and Affirmative Defenses:

> "4. Petitioner's alleged claim for tax refund/tax credit is subject to administrative routinary investigation/examination by respondent's Bureau.
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> 5. The alleged refundable/creditable taxes were paid and collected pursuant to law and BIR implementing rules and regulations; hence, the same are not refundable.
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> 6. Claims for tax refund/tax credit are construed in "*strictissimi juris*" against the taxpayer (Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, 30 January 1979, 31 SCRA 95) as they partake the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the law. Failure on the part of the petitioner to prove the same is fatal to its claim for tax refund/credit.
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> 7. Moreover, petitioner must prove that it has complied with the governing rules with reference to tax recovery or refund, which are found in Sections 204(c) and 229 of the Tax Code, as amended, which are quoted as follows:

> "**Sec. 204**. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. - The Commissioner may – x x x
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> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered a written claim for credit or refund."
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> **Section 229.** ***Recovery of tax erroneously or illegally collected.*** - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
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> In any case, no such suit or proceeding shall be begun after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided*, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

On September 12, 2001, after the parties have submitted their respective memorandum, this case was considered submitted for decision.

The vortex of the controversy now lies on whether or not Petitioner was able to substantiate its claim for the first quarter of taxable year 1998.

Pertinent to the resolution of the issue at hand is the determination of whether or not Petitioner is legally entitled to the refund sought. Apropos to this are the provisions of Section 102 of the Old Tax Code (now Section 108) and Section 13 of Republic Act 6394, which provides, thus:

> "(b) *Transactions subject to zero rate.* - The following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> x x x x x x x x x
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero rate; x x x" (Underscoring supplied)

> **Section 13.** ***Non-profit Character of the Corporation: Exemption from All Taxes, Duties, Imposts and Other Charges by the Government and Government Instrumentalities.*** - The Corporation shall be non-profit and shall devote all its returns from its capital investment as well as excess revenues from its operations, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance of effective implementation of the policy enunciated in Section one of this Act, the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes, duties, fees, imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." (Underscoring supplied)

A thorough scrutiny of the aforecited provisions veer towards the conclusion that Petitioner is entitled to the refund sought. Coupled with the Supreme Court's pronouncement upholding NPC's exemption from the payment of direct and indirect taxes in the case of **Maceda vs. Macaraig, G.R. No. 88291, May 31, 1991,** there is no cloud of doubt that, legally, Petitioner is entitled to the refund of its unutilized input taxes, and We quote, thus:

> "The NPC is a non-profit public corporation created for the general good and welfare, wholly owned by the government of the Republic of the Philippines. From the very beginning of its corporate existence, the NPC enjoyed preferential tax treatment, to enable the Corporation to pay the indebtedness and obligation and in furtherance and effective implementation of the policy enunciated in Section one of "Republic Act No. 6395" which provides:
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> > "**Section 1.** ***Declaration of Policy.*** - Congress hereby declares that (1) the comprehensive development, utilization and conservation of Philippine water resources for all beneficial uses, including power generation, and (2) the total electrification of the Philippines through the development of power from all sources to heed the need of rural electrification are primary objectives of the nation which shall be pursued coordinately and supported by al instrumentalities and agencies of the government including its financial institutions.
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> From the changes made in the NPC charter, the intention to strengthen its preferential tax treatment is obvious.
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> x x x x x x x x x
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> It is noted that in the earlier law, R.A. No. 358 the exemption was worded in general terms, as to cover "all taxes, duties, fees, imposts, charges, etc...." However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemptions. Subsequently, P.D. No. 380, made even more specific the details of the exemption of NPC to cover, among others, both direct and indirect taxes on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from "all forms of taxes, duties, fees, imposts, as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings."
>
> The use of the phrase "all forms" of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before. The rationale for this exemption is that being non-profit the NPC "shall devote all

> its returns from its capital investment as well as excess revenues from its operation, for expansion. x x x.
>
> It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from all forms of taxes including indirect taxes as provided for under R.A. No. 6395 and P.D. No. 380 if it is to attain its goals. x x x"

Respondent argues that Petitioner is not entitled to the refund because of its failure to present an approved application for zero-rating. He cites as basis the ruling of this Court in the case of **ABB Power Generation Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 5270, dated March 3, 1999**[1]. Hereunder are excerpts of the aforementioned decision, thus:

> Moreover, granting *arguendo*, that petitioner's sale of services to the NPC are considered effectively zero-rated sales under Section 102(a)(3) of the Tax Code, supra, nevertheless, this Court has to deny the instant claim for refund as petitioner failed to comply with Section 8(d) of Revenue Regulations No. 5-87 which requires that any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application with the Commissioner of Internal Revenue justifying the imposition of zero-rate on said transactions. Quoted hereunder is Section 8(d) of Revenue Regulations No. 5-87, thus:
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> > (d) Application for zero rate. – Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero-rate on the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked.
>
> (F)ailure to get an approval from the Commissioner for a zero-rating classification will make the said sale of services by Petitioner to NPC an EXEMPT transaction under paragraph (u) of Art. 103 of the Tax

[1] With Entry of Judgment, dated March 24, 1999.

Code, thus, petitioner shall not be entitled to the refund of any input tax it paid on its purchase of goods and services during the period in question.

We shall therefore resolve the issue based on existing law, jurisprudence, and evidence on record.

It cannot be denied that Petitioner failed to secure an approved application for effective zero-rating with the RDO No. 60 of Lucena City. However, the inaction of the said office regarding the application should not be taken against Petitioner. In fact, the Respondent had already issued VAT Ruling No. 022-99 confirming Petitioner's view that the fixed operating and management fees and energy fees received from NPC for the sale of electricity are subject to zero percent (0%) VAT pursuant to Section 109(B)(3) of the Tax Code of 1997. (see also VAT Ruling Nos. 015-99, 052-99, 067-99, 018-00; BIR Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA209-04-04-99). Clearly, Petitioner is legally entitled to the refund sought.

Records show that Petitioner is engaged in selling electricity to NPC. Consequently, the payments received by the Petitioner from NPC for the services rendered in the generation and sale of electricity are subject to VAT at zero percent.

The Court's ruling in the ABB case cannot be applied to the peculiar circumstances surrounding the present case. In the ABB case, Petitioner failed to file an application for effective zero-rating while Petitioner herein did. Thus, there is a total absence of effort on the part of Petitioner ABB in securing the needed approval. This is contrary to the present case where Petitioner, as early as December 1, 1997, had already filed its application.

In a case involving a similar issue entitled **Mirant (Navotas II) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5911 promulgated in December 18, 2001**, this Court ruled that the failure of Respondent to act on a pending application for zero-rating should not be the sole basis for denying the claim for refund and we quote, thus:

> "We note that as early as March 1, 1996, Petitioner filed with Respondent's Revenue District Office (RDO) No. 51 Pasay City an Application for Effective Zero Rating. However, up to this time, Respondent has failed to act upon said application. <u>We believe that if Respondent had a valid ground to disapprove the application, he would have done so swiftly instead of "sitting on" the application for an interminable length of time to the detriment of the taxpayer's rights</u>.
>
> With this in mind, this Court had decided to study the factual aspects of the claim for refund instead of dismissing the same based on a technicality." (Underlining supplied)

The legal issue having been settled, we shall now proceed to the factual aspects of the case which are the remaining issues at bar.

This Court finds, as amply supported by preponderance of proof that Petitioner complied with the substantiation requirements.

A cursory evaluation of the evidence forwarded to this Court reveals that Petitioner's zero-rated sales to NPC were properly supported by documentary exhibits such as VAT invoices and official receipts (Exhibits N-1 to N-26, M-1 to M-222).

In respect of purchases of domestic goods and services, Petitioner was able to present VAT official receipts and invoices (Exhibits M and N, inclusive) to support its claim for refund. Absent any evidence to show that these documents are spurious or obtained through fraudulent means, We are inclined to extend credence to their authenticity and probative value except for those which were not properly documented as certified to by the commissioned independent CPA, computed as follows:

Findings		Total
I. Input Taxes on Local Purchases of Goods		
1. Supported by VAT invoices, without BIR Permit Number	P	21,378.77
2. Supported by Debit Note, not VAT invoice		592.73
II. Input Tax on Local Purchase of Services		
1. Supported by Debit Note, not VAT OR		6,100.00
Total	**P**	**28,071.50**

Likewise, this Court disallows the amount of P3,409.09 since We could not ascertain whether the said input tax was claimed only in the first quarter of 1998 and not in the fourth quarter of 1997.

Considering that the amount of input taxes sought to be refunded was never utilized or credited against any output tax liability and considering further the above disallowances, We therefore, extend the relief prayed for but in a reduced amount of P8,942,679.07, computed as follows:

Claimed Amount		P8,974,159.66
Less: Disallowance		
(a) Failure to comply with VAT invoicing requirements	P28,071.50	
(b) Unverifiable input tax	3,409.09	31,480.59
Refundable Amount		**P8,942,679.07**

WHEREFORE, in view of all the foregoing, the instant Petition for Review is hereby **GRANTED.** Accordingly, Respondent is hereby **ORDERED** to **REFUND** or in the alternative, to **ISSUE** a Tax Credit Certificate in the amount of P8,942,679.07, in favor of the Petitioner representing unutilized input taxes for the third and fourth quarters of 1997.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge