REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION
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MIRANT PAGBILAO CORPORATION
(formerly SOUTHERN ENERGY QUEZON, INC.),
Petitioner,

- versus -

C.T.A. CASE NO. 6262

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

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DECISION

This case seeks for the refund or issuance of a tax credit certificate of the alleged unutilized input value-added taxes paid on domestic purchases and importations of goods and services attributable to zero-rated sales for the first, second, third and fourth quarters of the taxable year 1999, in the total amount of **SEVENTY FIVE MILLION NINE HUNDRED EIGHTY NINE THOUSAND FOUR HUNDRED SEVENTY NINE PESOS AND 84/100 (P75,989,479.84).**

Petitioner is a domestic corporation duly organized and existing by virtue of Philippine laws, with principal address at Pagbilao Grande Island, Pagbilao, Quezon (*par 1, Joint Stipulation of Facts and Issues*). It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation under a Build, Operate, and Transfer (BOT) scheme. It is registered with the Bureau of Internal Revenue as a value-added tax taxpayer (VAT) in accordance with Section 107 of the Tax Code (now Section 236 of the National Internal Revenue Code of 1997), as evidenced by BIR Certificate of Registration bearing RDO Control No. 96-600-002498 *(par 3 & 4, Joint Stipulation of Facts and Issues).*

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Petitioner was originally registered with the Securities and Exchange Commission (SEC) under the name of "Hopewell Power (Philippines), Corporation". On September 22, 1999, petitioner's name was officially changed to "Southern Energy Quezon, Inc." as shown by the SEC Certificate of Filing of Amended Articles of Incorporation bearing the same date *(par 5, Joint Stipulation of Facts and Issues).* Finally, on June 28, 2001, the SEC issued another Certificate of Filing of Amended Articles of Incorporation approving the application of herein petitioner for a change of its corporate name to "Mirant Pagbilao Corporation".

On December 1, 1997, petitioner filed with the BIR Revenue District Office No. 60 at Lucena City an Application for Effective Zero-Rating for the construction and operation of a power station in Pagbilao, Quezon under the BOT scheme *(par. 6, Joint Stipulation of Facts and Issues).* Due to the inaction of the BIR office, petitioner, on January 28, 1999, refiled the said application with the VAT Review Committee of the BIR National Office *(par 7, Joint Stipulation of Facts and Issues).* On May 13, 1999, respondent issued VAT Ruling No. 052-99 (*par 8, Joint Stipulation of Facts and Issues*), the pertinent provision is quoted below for easy reference:

> In reply thereto, please be informed that, in BIR Ruling No. 003-98 dated January 15, 1998, this Office held that the sale of electricity made by the San Pascual Cogeneration Co., to the NPC, shall be subject to the 10% VAT pursuant to Section 102 of the old NIRC (now, Sec. 108, NIRC of 1997). The NPC requested the Department of Finance to review and reconsider the said ruling, in view of its impact on the national interest considering that the cost of the 10% VAT will translate into higher cost of electricity to the public. In a Memorandum to the Commissioner of Internal Revenue dated January 26, 1998, the then Hon. Secretary of Finance Roberto F. de Ocampo, in the exercise of his power to review rulings issued by the BIR under Section 4 of the Tax Code of 1998, held that:
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> > *"The Department has consistently held the view that NPC's purchase of electricity should be treated in the same manner as its purchase of petroleum products. This is in recognition of the broad and comprehensive tax exemption privilege granted to NPC by Congress. The*

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> *NPC Charter clearly provides for NPC's exemption from all taxes - direct and indirect. No less than the Supreme Court ruled that it has been the lawmakers intention that the NPC is completely exempt from all taxes. The Department of Justice and the Office of the Solicitor General have also issued opinions supporting the full tax exemption of NPC. Even the BIR has ruled that NPC is exempt from direct and indirect taxes.*
>
> *As explained by the Supreme Court, the rationale for the NPC's tax exemption is to ensure cheaper power. If the BIR's recent view is to be implemented, the VAT, being an indirect tax, may be passed on by the seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rate to the consumers. Estimates show that a 10% VAT on electricity which is purchased by NPC from its independent power producers will increase power costs by about P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional charge of P0.059 per kilowatt hour. The recognition of NPC's broad privilege will ensure to the ultimate benefit of the Filipino consumer.*
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> *In view of the foregoing and using the power of review granted to the Secretary of Finance under Section 4 of Republic Act No. 8424, the DOF upholds the ruling of the Supreme Court that the NPC is exempt under its charter and subsequent laws from all direct and indirect taxes on its purchases of petroleum products and electricity. Thus, the purchases of NPC of electricity from independent power producers are subject to VAT at zero-rate".*
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> Accordingly, please be informed that, based on the said ruling, the supply of electricity by HOPEWELL PHIL., to the NPC, shall be subject to zero percent (0%) VAT, pursuant to Section 108(B)(3) of the National Internal Revenue Code of 1997.

Consequently, petitioner's application for zero-rating for the sale of power generation services to the National Power Corporation (NPC) under the BOT scheme for the period from May 13, 1999 to December 31, 1999 was approved by respondent (*par 9, Joint Stipulations of Facts and Issues*).

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For the four quarters of the taxable year 1999, petitioner filed the following quarterly VAT returns:

Taxable Quarter of the year 1999	Date Filed	Input Tax
First	April 26, 1999	P 13,249,405.92
Second	July 23, 1999	P 19,071,203.40
Third	October 14, 1999	P 15,530,501.47
Fourth	January 25, 2000	P 28,138,369.05
Total		**P 75,989,479.84**

(par 10 & 11, Joint Stipulation of Facts and Issues)

However, on the separate dates of December 8, 2000 and July 23, 1999, petitioner filed its Amended Quarterly VAT Returns for the first and second quarters, respectively, of the taxable year 1999, to appropriately indicate its zero-rated sales for the said quarters. Likewise, on April 25, 2000, its fourth quarter VAT return for the taxable year 1999 was amended *(Exhibits C, D & F)*.

Relying mainly on the provisions of Republic Act No. 6395, otherwise known as the National Power Corporation Charter, more specifically, Section 13, and on the pronouncement made by the Honorable Supreme Court in the case of Maceda vs. Macaraig, *infra*, that the NPC is exempt from both direct and indirect taxes, petitioner then concluded that its power generation services to NPC is subject to zero-rate for VAT purposes.

Moreover, petitioner cited the provision of the 1997 National Internal Revenue Code, more particularly, Section 108(B)(3), which provides:

> "**Section 108**. x x x
>
> (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
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to

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> which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate."

Thus, on February 14, 2001, petitioner filed an administrative claim for refund with the Bureau of Internal Revenue of the allegedly unutilized input VAT for the taxable year 1999 in the total amount of P75,989,479.84.

Without any response from the respondent, petitioner then filed this instant Petition for Review on March 30, 2001, in order to toll the running of the two-year prescriptive period as provided for by law.

To refute petitioner's claims, respondent filed his Answer on April 18, 2001, stating the following as his Special and Affirmative Defenses:

7. Petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the respondent's Bureau;

8. Since petitioner does not have an approved application for zero-rating, its transaction otherwise entitled to zero percent VAT shall only be considered exempt from VAT pursuant to Revenue Regulation No. 7-95. Hence, it is not entitled to refund of input tax;

9. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;

10. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable;

11. Petitioner must be able to prove that its alleged purchases are covered by the provisions of Section 112 (A);

12. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to adduce sufficient proof is fatal to the action for tax refund/credit;

13. Moreover, petitioner must show compliance with the provisions of Section 204(C) and 229 of the Tax Code, as amended;

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14. Finally, there is no way to dispute the cardinal rule in taxation that tax exemptions are highly disfavored in law and he who claims tax exemption must be able to justify his claim or right. The exemption cannot be established by mere implication but it must be clearly expressed (Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, et al., 64 SCRA 555).

Both parties having filed their respective Memorandum, this case was deemed submitted for decision on June 9, 2004.

The parties have jointly stipulated that the following are the issues to be resolved by the court:

1. Whether or not the power generation services rendered by petitioner to NPC are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997 (formerly Section 102[b][3] of the Old Tax Code);

2. Whether or not petitioner has unapplied or unutilized creditable input VAT for the four (4) quarters of 1999 arising from its domestic purchases or goods and services in the total amount of PhP75,989,479.84 that can be a proper object of a claim for refund pursuant to Section 108(B)(3) (formerly Section 102[b][3] of the Old Tax Code) and Section 112 (A) (formerly Section 106[b] of the Old Tax Code) of the National Internal Revenue Code, as amended;

3. Whether or not the unutilized creditable input taxes for the four (4) quarters of 1999 are substantiated by proper invoices and official receipts; and

4. Whether or not the said unutilized creditable input VAT for the four (4) quarters of 1999 were carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of the petitioner for the said period.

The legal issue raised is not one of first impression. In a number of cases, involving the same parties and issues, though for different taxable years [**Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc) vs. Commissioner of Internal Revenue, CTA Case No. 6133, March 18, 2003; Mirant Pagbilao Corporation (formerly Southern**

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Energy Quezon, Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 6041, March 5, 2002; Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 5933 & 5984, January 15, 2002 affirmed in CA-G.R. SP No. 69115, April 29, 2004], this court had already settled this legal issue and ruled favorably for the petitioner.

In the above mentioned cases, this court had, in every opportunity given, not only cited but relied on the well-established ruling in the case of **Maceda vs. Macaraig, G.R. No. 88291, May 31, 1991**, where the Honorable Supreme Court had pronounced that:

> "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:
>
> > **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 he Philippines through the development of power from all sources to meet the need of rural electrification are primary objectives of the nation which shall be pursued coordinately and supported by all instrumentalities and agencies of the government including its financial institutions.
>
> xxx xxx xxx
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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. x x x" However, the amendment under Republic Act No.6395 enumerated the details covered by the exemptions. Subsequently, P.D. No. 380, made ever 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 emended the tax exemption by simplifying the same law in general terms. It succinctly exempts

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> 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 of its operation, for expansion. x x x
>
> xxx xxx xxx
>
> It is evident from the provisions of P.D. No. 938 that its purpose of to maintain the tax exemption of NPC from all form 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."

Furthermore, as correctly hinged on by petitioner, Republic Act No. 6395, or the National Power Corporation Charter, exempts the NPC from the payment of all forms of taxes, duties, fees and imposts. Section 13 of R.A. 6395 provides that:

> **Section 13. Non-profit Character of the Corporation; Exemption from all Taxes, Duties, Fees, 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 and effective implementation of the policy enunciated in Section one of this Act, the Corporation, is hereby declared exempt:
>
> a. From the payment of all forms of taxes, duties, fees, imposts, charges, costs and service fees in any court or administrative proceedings, in which it may be a party, restrictions and duties to the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities;
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> b. From all income taxes, franchise taxes and realty taxes to be paid to the National Government, its provinces, cities, municipalities, and other government agencies and instrumentalities;
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> c. From all import duties, compensating taxes and advanced sales tax and wharfage fees on import of foreign goods required for its operations and projects; and

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d. From all taxes, duties, fees, impost, and all other charges imposed by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the Corporation in the generation, transmission, utilization and sale of electric power."

Respondent, however, argued that the petitioner's approved application for zero-rating was only effective for the period covering from May 13, 1999 to December 31, 1999. Thus, petitioner's claim for refund or tax credit for the total amount representing the four quarters of the taxable year 1999 is in violation of the principle of solutio indebiti and contrary to the dictates of justice and equity.

This court is not convinced.

It is of no question that one of the stipulated facts of the parties is that petitioner's approved application for zero-rating had a specific date attached to it, which in this case, was to cover the period from May 13, 1999 to December 31, 1999. However, based on the circumstances surrounding the case, this court believes that it would be absurd to even consider that petitioner's being subject to zero-rated would only cover a portion of the taxable year when the power generation services extended by said petitioner to its clients cover or is unvarying for the whole year round. In other words, petitioner's services which were offered from the beginning of the taxable year have not in any way showed a discrepancy in the succeeding months of the same year. In fact, it is not disputed that petitioner is principally engaged in the business of power generation, which it subsequently sells to NPC. Moreover, the tax exemption of NPC from all forms of taxes, duties, fees, imposts and other charges have been granted to it under P.D. 938 covers all forms of taxes including those that were imposed directly or indirectly on petroleum products used in its operations. Therefore, to limit the period of applicability of petitioner's being subject to zero-rate to cover only the months from May 13,

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1999 to December 31, 1999 is like limiting the tax exemption granted to NPC to cover only the said months for the year 1999, which is clearly erroneous.

Since the legal issue of this case has already been settled, this court now will determine the factual issue of whether or not petitioner's claim for refund or tax credit is substantiated by pertinent documents.

After a comprehensive evaluation of the evidence forwarded, this court finds the initial report of the commissioned independent Certified Public Accountant with regard to petitioner's zero-rated sales to NPC to be in order. Likewise, the subject zero-rated sales were properly supported by VAT invoices and official receipts *(Exhibits "S-1" to "S-40", "T-1" to "T-38", "U-1" to "U-36" and "V-1" to "V-38").* Although there were discrepancies in the amounts of sales per "Summary of Zero-Rated Sales" and sales per official receipts or bank credit advises, the same were satisfactorily accounted for by petitioner's other supporting documents *(Exhibits "AA" and "BB").*

Petitioner likewise submitted documents *(Exhibits W-1 to W-570, X-1 to X-1681, Y-1 to Y-2341, Z-1 to Z-2069 and MMMM-1 to MMMM-57)* to prove the contents and accuracy of the amounts appearing in its "Summary List of Purchases for the Four Quarters of 1999" *(Exhibits "Q-1" to "Q-77").* Upon verification of the said "Summary List of Purchases for the Four Quarters of 1999", this court disallows the amount of P3,172,165.23 from the total claim of petitioner for being not properly supported by documents. The contents of the subject findings are presented below:

	Findings	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I.	Input Taxes on Purchases of Services:					
1.	Supported by Non-VAT Official Receipts					

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(Exhibit A-1)	-	P 6,079.55	P 21,553.61	P 954.75	P 28,587.91
2. Supported by Ors Without TIN-VAT (Exhibit A-2)	P 8,223.83	-	2,324.12	39,011.84	49,559.79
3. Supported by ORs with Stamped/Handwritten TIN-VAT (Pre-printed after July 31, 1991) (Exhibit A-3)	-	-	1,965.56	10,070.93	12,036.49
4. Supported by Documents Other than VAT ORs (Exhibit A-4)	7,708.21	25,633.28	87,448.93	138,283.55	259,073.97
5. Supported by ORs without BIR Permit (Exhibit A-5)	1,413.78	-	-	218,852.33	220,266.11
6. Supported by ORs with TIN only (Exhibit A-6)	-	-	17,545.46	1,461.33	19,006.79
7. Supported by Photocopied VAT ORs (Exhibit A-7)	-	-	1,580.00	-	1,580.00
8. Supported by ORs with TAN VAT (Exhibit A-8)	-	-	35,218.19	-	35,218.19
9. Supported by ORs with VAT Registration # but without TIN (Exhibit A-9)	-	-	-	2,801.00	2,801.00
10. Supported by ORs Issued Not in the Company's Name (Exhibit A-10)	16,313.20	34,099.27	35,749.96	1,827.23	87,989.66
11. Erroneously Computed (Exhibit A-11)	-	-	15,580.90	4,008.72	19,589.62
12. Not Subject to VAT (Exhibit A-12)	16,382.07	-	-	-	16,382.07
13. Reimbursable Charges Without Third Party Documents (Exhibit A-13)	-	2,786.81	-	-	2,786.81

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14.	Payments to Transportation Contractors Supported by ORs with Stamped TIN only (Exhibit A-14)	-	-	2,461.37	-	2,461.37
II.	Input Taxes on Purchases of Goods:					
1.	Supported by Non-VAT Invoices (Exhibit B-1)	-	1,457.28	22,761.83	4,133.43	28,352.54
2.	Supported by Invoices Without TIN/VAT (Exhibit B-2)	3,660.00	-	-	-	3,660.00
3.	Supported by Invoices with Stamped/Handwritten TIN-VAT (Pre-printed after July 31, 1991) (Exhibit B-3)	13,424.55	21,647.15	31,215.58	18,526.46	84,813.74
4.	Supported by Documents Other that VAT Invoices (Exhibit B-4)	1,965.25	5,904.38	5,738.64	2,485.02	16,093.29
5.	Supported by Invoices without BIR Permit (Exhibit B-5)	22,045.46	2,636.37	5,949.55	122,078.58	152,709.96
6.	Supported by Invoices with TIN only (Exhibit B-6)	5,085.73	-	8,147.75	250.00	13,483.48
7.	Supported by Photocopied VAT Invoices (Exhibit B-7)	28,936.37	2,362.37	3,184.91	1,177.28	35,660.93
8.	Supported by Invoices with TAN TAN VAT (Exhibit B-8)	3,610.55	19,099.55	83,509.07	237,956.92	344,176.09
9.	Supported by Invoices with VAT Registration Number but without TIN (Exhibit B-9)	-	-	132,990.56	-	132,990.56

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10. Supported by Invoices Issued Not in the Company's Name (Exhibit B-10)	58,264.41	91,510.70	43,183.74	38,391.62	231,350.47
11. Erroneously Computed (Exhibit B-11)	-	-	6,196.18	400.00	6,596.18
12. Not Subject to VAT VAT not Claimable per RR No. 7-95 (Exhibit B-12)	-	769,090.91	1,038.35	-	770,129.26
III. Input Taxes Claimed on Purchases of Goods and Services Without Supporting Documents (Exhibit C-1)	118,157.71	284,128.71	172,657.20	19,865.33	594,808.95
Total	**P 305,191.12**	**P1,266,436.33**	**P 738,001.46**	**P 862,536.32**	**P3,172,165.23**

Finally, based on the evidence presented *(Exhibits "G", "H", "I", "J", "K" and "M")*, petitioner was able to prove that despite the carry-over of the total claimed input VAT payments of P75,989,479.84 for the taxable year 1999 to its succeeding quarterly VAT returns, which was until the second quarter of the taxable year 2001, the same was nevertheless deducted from the total available input tax as of the second quarter of the taxable year 2001. Thus, petitioner can validly claim for a refund or issuance of a tax credit certificate for its claimed unapplied or unutilized input value-added taxes for the year 1999, but subject to certain deductions, computed as follows:

Amount claimed	P 75,989,479.84
Less: Disallowance per commissioned Independent CPA report)	3,172,165.23
TOTAL	**P 72,817,314.61**

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IN VIEW OF THE FOREGOING, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner, the total amount of **SEVENTY TWO MILLION EIGHT HUNDRED SEVENTEEN THOUSAND THREE HUNDRED FOURTEEN PESOS AND 61/100 (P72,817,314.61)** representing unapplied or unutilized input value-added tax for the taxable year 1999.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

I CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice
Chairman, First Division

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