REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

HEDCOR SIBULAN, INC.,
Petitioner,

CTA Case No. 8051

- versus-

Members:

Bautista, *Chairperson*
Cotangco-Manalastas, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JAN 29 2014 10:50 a.m.

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D E C I S I O N

COTANGCO-MANALASTAS, *J.:*

The case involves a Petition for Review filed by Hedcor Sibulan, Inc. to seek the refund or issuance of tax credit certificate in the amount of ₱9,379,866.27, allegedly representing unutilized input value-added tax (VAT) arising from its domestic purchases of goods and services attributable to its zero-rated sales of generated power during the first quarter of calendar year 2008.

FACTS

Petitioner Hedcor Sibulan, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office at Sta. Cruz, Davao del Sur. Its primary purpose is to "engage in the business of owning, developing, constructing, operating, repairing, and maintaining of hydro-electric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations".[1] Petitioner is a VAT-registered taxpayer with Taxpayer's Identification No. 005-633-984-000.[2]

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), vested with authority to act as such, including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner owns a hydro-electric power plant (42 MW Sibulan Hydro Electric Power Plant) consisting of two (2) independent hydro-electric projects namely, upstream Plant A with installed capacity of about 16 MW and downstream plant B with installed capacity of about 26 MW (the "Power Plant"). The said Power Plant has been duly certified by the Department of Energy (DOE) as consistent with the Power Development Plan (PDP) of the government, pursuant to the Implementing Rules and Regulations of Republic Act (R.A.) No. 9136.[3]

On March 7, 2007, petitioner entered into a Power Supply Agreement (PSA)[4] with Davao Light and Power Company, Inc. (DLPCI). Under the said Agreement, petitioner sells its generated power through hydro-electric power to DLPCI.

Petitioner filed its Amended Quarterly VAT Return for the first quarter of 2008 on May 20, 2008.[5]

On March 29, 2010, petitioner filed an administrative claim with the BIR Revenue Region No. 19, Revenue District Office No. 115, Digos City, Davao del Sur for the refund or issuance of tax credit certificate for its alleged unutilized input VAT in the amount of ₱9,379,866.27, attributable to its zero-rated sales of generated power covering the first quarter of 2008.[6] However, due to the inaction of respondent

[1] Exhibit "A".
[2] Exhibit "B".
[3] Exhibit "C".
[4] Exhibits "D" and "H".
[5] Exhibit "F".
[6] Exhibit "G".

Commissioner on petitioner's administrative claim, petitioner filed the instant Petition for Review on March 30, 2010.

In her Answer[7] filed on April 26, 2010, respondent, by way of special and affirmative defenses, averred, among others, that the claim for refund is subject to administrative routinary investigation/examination by the BIR; that the amount being claimed as unutilized input VAT on purchases of goods and services allegedly attributable to its zero-rated sales of generated power was not properly documented; that in an action for refund, the burden of proof is on the taxpayer to establish its right to refund; that the petition for review was prematurely filed; that there was no proof of compliance with the prescribed checklist of requirements to be submitted involving a claim for VAT refund pursuant to Revenue Memorandum Order No. 53-98; that since petitioner did not submit complete documents in support of its administrative claim for refund, the 120-day period started to run on March 29, 2010, the date when it filed its administrative claim for refund, hence, the said period is yet to expire on July 27, 2010, thus the Court has no jurisdiction to act on the instant petition for review; and that the petitioner's failure to submit documents supporting its claim for refund makes its administrative claim for refund pro-forma.

A Notice of Pre-Trial Conference was issued by the Court on April 27, 2010, setting the case for pre-trial conference on May 21, 2010.[8] Accordingly, Respondent's Pre-Trial Brief[9] was filed on May 6, 2010 while petitioner's Pre-Trial Brief[10] was filed on May 17, 2010.

On June 10, 2010, the parties filed their Joint Stipulation of Facts and Issues.[11] A Pre-trial Order[12] was accordingly issued by the Court on July 8, 2010.

On October 27, 2010, upon motion of petitioner, this Court commissioned Emmanuel Y. Mendoza, partner of Mendoza Querido & Co., as Independent Certified Public Accountant (CPA).[13]

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[7] Docket, pp. 162 to 169.
[8] Docket, p. 171.
[9] Docket, pp. 172 to 175.
[10] Docket, pp. 177 to 192.
[11] Docket, pp. 199 to 203.
[12] Docket, pp. 207 to 211.
[13] Minutes of Hearing dated October 27, 2010, docket, p. 276.

During trial, petitioner presented Arlene Galace, its General Accountant[14]; and Emmanuel Y. Mendoza[15], the Independent CPA.

Thereafter, petitioner filed on March 21, 2011 its Formal Offer of Evidence[16], submitting Exhibits "A" to "H-1", "BB-1" to "FF-1", and "AAA" to "EEE-1", inclusive of sub-markings; which were admitted by this Court in the Resolution[17] dated May 4, 2011, except Exhibit "E".

On the other hand, during the hearing held on July 18, 2011, counsel for respondent manifested that she will no longer be presenting evidence. Upon motion of the parties, the Court granted both parties thirty (30) days from said date to file their respective Memorandum.[18]

On September 7, 2011, this case was submitted for decision, considering respondent's Memorandum filed on July 28, 2011 and the Memorandum for Petitioner filed on September 1, 2011.[19]

On January 5, 2012, this Court[20] rendered a Decision[21] dismissing the petition on the ground of premature filing.

On January 25, 2012, petitioner filed a Motion for Reconsideration[22] of the said Decision, which was denied in the Resolution[23] dated March 28, 2012.

On April 30, 2012, petitioner filed a Petition for Review with the CTA *En Banc* [24] to assail the said Decision and Resolution. On the other hand, on July 2, 2012, respondent filed her Comment/ Opposition (Re: Petition for Review)[25].

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[14] Minutes of Hearing dated July 19, 2010, docket, p. 226.
[15] Minutes of Hearing dated December 8, 2010 and February 2, 2011, docket pp. 288 and 303.
[16] Docket, pp. 321 to 343.
[17] Docket, pp. 499 and 500.
[18] Minutes of Hearing dated July 18, 2011, docket, p. 504.
[19] Docket, p. 556.
[20] Formerly composed of Justice Lovell R. Bautista, Justice Olga Palanca-Enriquez (retired) and Justice Amelia Cotangco-Manalastas.
[21] Decision, docket, pp. 558 to 569.
[22] Docket, pp. 577 to 596.
[23] Docket, pp. 608 to 612.
[24] Docket, pp. 618 to 645.
[25] Docket, pp. 680 to 686.

On July 17, 2012, the CTA *En Banc* directed both parties to submit within thirty (30) days their respective memorandum.[26]

On September 25, 2012, the CTA *En Banc* submitted the case for decision considering respondent's Manifestation filed on August 10, 2012 and petitioner's Memorandum filed on September 10, 2012.[27]

On December 6, 2012, the CTA *En Banc* rendered a Decision[28] dismissing the Petition for Review for lack of merit and affirming the January 5, 2012 Decision and March 28, 2012 Resolution of this Court's Third Division.

Aggrieved by the CTA *En Banc* Decision, petitioner filed a Motion for Reconsideration[29] on January 2, 2013 through registered mail and received by the CTA *En Banc* on January 18, 2013.

Meanwhile, on February 12, 2013, the Supreme Court promulgated *Commissioner of Internal Revenue vs. San Roque Power Corporation, Taganito Mining Corporation vs. Commissioner of Internal Revenue, and Philex Mining Corporation vs. Commissioner of Internal Revenue* (*San Roque* case)[30], which reinforced the *Aichi* doctrine but recognized a period of exception to its applicability, *i.e.*, the period from the issuance of BIR Ruling No. DA-489-03 on December 10, 2003 to October 6, 2010 when the *Aichi* doctrine was adopted.

On May 30, 2013, the CTA *En Banc* issued an Amended Decision finding that petitioner's judicial claim was filed within the period of exception established by the *San Roque* case, thereby granting petitioner's Motion for Reconsideration, reversing and setting aside the CTA *En Banc's* Decision dated December 6, 2012, and remanding CTA Case No. 8051 to the Court in Division for complete determination of petitioner's full compliance with the other legal requirements relative to its claim for refund.[31]

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[26] Docket, pp. 689 and 690.
[27] Docket, pp. 830 and 831.
[28] Docket, pp. 833 to 844.
[29] Docket, pp. 868 to 885.
[30] G.R. Nos. 187485, 196113, and 197156, February 12, 2013.
[31] Docket, pp. 891 to 900.

On June 10, 2013, respondent filed her Motion for Reconsideration[32] praying that the CTA *En Banc's* Amended Decision dated May 30, 2013 be reversed and set aside and that another one be rendered denying petitioner's claim, which was denied in the Resolution[33] dated September 17, 2013.

Hence, this Court is now tasked to decide the case on the merits.

ISSUES

The following are the parties' jointly stipulated issues[34] submitted for this Court's resolution:

> "5.1. Whether or not the Honorable Court has jurisdiction to act on the instant petition for review; and
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> 5.2. Whether or not Petitioner is entitled to the refund of or the issuance of a TCC for its alleged unutilized input VAT amounting to Php9,379,866.27.
>
> 5.2.1 Whether or not Petitioner's unutilized input VAT for the 1st quarter of CY 2008 amounting to Php9,379,866.27 is duly substantiated by documentary evidence in the form of invoices and official receipts;
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> 5.2.2 Whether or not Petitioner's unutilized input VAT for the 1st quarter of CY 2008 amounting to Php9,379,866.27 was applied or credited against any output VAT of the Petitioner in the same quarter and subsequent taxable quarter or quarters;

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[32] Docket, pp. 908 to 921.
[33] Docket, pp. 942 to 946.
[34] Docket, pp. 201 to 202.

5.2.3 Whether or not the input VAT on Petitioner's domestic purchases of goods and services for the 1st quarter of CY 2008 is attributable to its zero-rated sales of generated power; and

5.2.4 Whether or not Petitioner's administrative and judicial claims for refund of or issuance of a TCC for its unutilized input VAT paid and incurred by Petitioner on its domestic purchases of goods and services attributable to its zero-rated sales of generated power were filed within the period prescribed under the National Internal Revenue Code of 1997, as amended."

The foregoing issues can be summarized as follows:

"Whether or not petitioner is entitled to a refund or issuance of tax credit certificate in the amount of ₱9,379,866.27, allegedly representing unutilized input VAT arising from its domestic purchases of goods and services attributable to its zero-rated sales of generated power during the first quarter of calendar year 2008."

DISCUSSION/RULING

Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, as amended, lays down the requisites for refunds or tax credits of input tax due or paid attributable to zero-rated or effectively zero-rated sales, *to wit*:

"SEC. 112. *Refunds or Tax Credits of Input Tax.* -

(A) *Zero-rated or Effectively Zero-rated Sales.* - **Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales**, except transitional input tax, to the extent that such input tax has not been applied against output tax:

> *Provided, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales." *(Emphasis supplied)*

Based on Section 112(A) of the NIRC of 1997, as amended, in order to be entitled to a refund or tax credit of unutilized input VAT attributable to zero-rated or effectively zero–rated sales, the following requisites must be satisfied:

1. that there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are attributable to zero-rated sales or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability during and in the succeeding quarters; and
5. that the claim for refund was filed within the two-year prescriptive period.

Anent the first requisite, it is clear that pursuant to Section 6 of R.A. No. 9136 or the "Electric Power Industry Reform Act of 2001" (EPIRA), sales of generated power by generation companies shall be VAT zero-rated effective June 26, 2001, thus:

> "SECTION 6. *Generation Sector.* – ...
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> xxx xxx xxx
>
> Pursuant to the objective of lowering electricity rates to end-users, **sales of generated power by generation companies shall be value added tax zero-rated**." *(Emphasis supplied)*

The pertinent provisions of the NIRC of 1997 were deemed amended by R.A. No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten percent (10%) to zero percent (0%). However, upon the enactment of R.A. No. 9337, certain amendments were introduced, particularly, on the Expanded VAT provisions of the NIRC. One of the relevant changes is the express repeal of the zero percent VAT rate imposed on the sales of generated power by generation companies under R.A. No. 9136, *to wit*:

> "SECTION 24. *Repealing Clause.* - The following laws or provisions of laws are hereby repealed and the persons and/or transactions affected herein are made subject to the value-added tax subject to the provisions of Title IV of the National Internal Revenue Code of 1997, as amended.
>
> xxx xxx xxx
>
> (B) Section 6, fifth paragraph of R.A. No. 9136 on the zero VAT rate imposed on the sales of generated power by generation companies; and"

Notwithstanding the said repeal, the sale of generated power or fuel through renewable source of energy continued to be VAT zero-rated under Section 108(B)(7) of the NIRC of 1997, as amended, which states:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* - ...
>
> xxx xxx xxx
>
> (7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels."

In relation thereto, Section 4.108-3(f) of RR No. 16-2005, as amended by RR No. 4-2007, provides:

"SECTION 4.108-3. *Definitions and Specific Rules on Selected Services.* –

xxx xxx xxx

(f) **Sale of electricity by generation**, transmission, and distribution **companies** shall be subject to twelve percent (12%) VAT on their gross receipts starting February 1, 2006; *Provided,* that **sale of power or fuel generated through renewable sources of energy** such as, but not limited to, biomass, solar, wind, **hydropower**, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels shall be **subject to 0% VAT**." *(Emphasis supplied)*

In other words, to be qualified for VAT zero-rating under the foregoing provisions, petitioner must be able to prove that it is a generation company and that it is engaged in the sale of power or fuel generated through renewable source of energy.

Based on its Amended Articles of Incorporation[35], petitioner is engaged in the "business of owning, developing, constructing, operating, repairing and maintaining of hydro-electric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations." To further prove that it is engaged in the generation, collection, and distribution of electricity which is subject to zero-rating, petitioner submitted its Certificate of Registration[36] issued by the BIR, Certificate of Endorsement[37] issued by the DOE, and the PSA[38] between petitioner and DLPCI.

While these documents show that petitioner's sale of power generated through a renewable source of energy (hydro-electric power) may be subject to zero-rating, it failed to establish that it is a generation company as defined under Section 4(x) in relation to Section 6 of the EPIRA and under Section 4.108-3(f) of RR No. 16-2005, *to wit:*

[35] Exhibit "A".
[36] Exhibit "B".
[37] Exhibit "C".
[38] Exhibit "D".

"REPUBLIC ACT NO. 9136

SECTION 4. *Definition of Terms.* –

xxx xxx xxx

(x) '**Generation Company**' refers to **any person or entity authorized by the ERC**[39] **to operate facilities used in the generation of electricity**;" *(Emphasis supplied)*

"REVENUE REGULATIONS NO. 16-2005

SECTION 4.108-3. *Definitions and Specific Rules on Selected Services.* –

xxx xxx xxx

(f) . . .

'Generation companies' **refers to persons or entities authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity.** For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility pursuant to the provisions of the RA No. 9136 (EPIRA). They shall include all Independent Power Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities." *(Emphasis supplied)*

Moreover, Section 4(a) of Rule 5 of the Implementing Rules and Regulations of R.A. No. 9136 provides:

"SECTION 4. *Obligations of a Generation Company.* -

(a) A COC[40] shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

[39] Energy Regulatory Commission.
[40] Certificate of Compliance.

> (i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility."

Based on the foregoing provisions, it is clear that the entity should be authorized by the ERC to operate the generation facility for it to be considered as a generation company. Specifically, both new and existing Generation Facilities are required to secure a Certificate of Compliance (COC) from the ERC before it can operate the facilities used for generation of electricity, as provided under the Implementing Rules and Regulations of R.A. No. 9136.

In the case of *Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue*[41], the CTA First Division ruled that without the COC, a person cannot be said to be a Generation Company. Hence, failure to submit proof of the approved COC will render the sales of generated power not qualified for VAT zero-rating. The pertinent portion of the Decision is quoted below:

> "Clearly, no person may engage in the generation of electricity as a new Generation Company unless such person has received a COC from the ERC to operate facilities used in the generation of electricity. Existing generation facility or a generation facility under construction is obligated to submit within ninety (90) days from effectivity of the Rules, to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that the ERC may require. Only upon complete submission of the foregoing requirements that the generation company shall be issued a COC by the ERC to operate such existing generation facility.
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> Thus, to be a Generation Company, it must have a duly issued COC from the ERC, without which it is not authorized to operate a generation facility. Simply put, without the COC, a person cannot be said to be a Generation Company.

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[41] CTA Case No. 7800, January 19, 2011.

> In the case of *Toledo Power Company v. Commissioner of Internal Revenue,* the Court ruled that failure to submit proof of the approved COC will render the sales of generated power not qualified for VAT zero-rating under R.A. No. 9136. The pertinent portion of the Decision is quoted hereunder:
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> > 'Pursuant to the above provisions, petitioner filed on June 20, 2002 an application for the issuance of a Certificate of Compliance with the Energy Regulatory Commission, **but it failed to submit proof of the approved Certificate of Compliance; thus, its sales of generated power cannot qualify for VAT zero-rating under the EPIRA.**' *(Emphasis supplied)*
>
> Quite recently, the Court in *GBH Power Resources, Inc. [Formerly: Mirant (Philippines) Island Generation Corporation] v. Commissioner of Internal Revenue*, ruled that while GBH proved that it actually derived sales from power generation, it, however, failed to establish that it is a generation company as defined under Section 4 (x) in relation to Section 6 of R.A. No. 9136. Petitioner therein failed to submit its ERC registration and COC, thus it cannot qualify for VAT zero-rating under R.A. No. 9136.
>
> Pursuant to the aforecited cases, there is a need for petitioner to establish that it is authorized to operate as a generation company, as defined under R.A. No. 9136, by presenting its COC from the ERC." *(Citations omitted)*

Based on the foregoing and upon perusal of petitioner's evidence, petitioner failed to submit its ERC registration and Certificate of Compliance. Nowhere in the records of the case is it shown that petitioner is duly authorized by the ERC to operate facilities used in the generation of electricity. Thus, in the absence of evidence that petitioner is a generation company, all of its sales cannot qualify for VAT zero-rating under Section 108(B)(7) of the NIRC of 1997, as amended by R.A. No. 9337, in relation to Section 4.108-3 of RR No. 16-2005, and Section 4 of Rule 5 of the Implementing Rules and Regulations of R.A. No. 9136.

In view of the foregoing finding, the Court will no longer determine petitioner's compliance with the other requisites for refund of input tax attributable to zero-rated sales.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CONCURS:

LOVELL R. BAUTISTA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice