Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

MIRANT PAGBILAO CORPORATION
[Formerly SOUTHERN ENERGY
QUEZON, INC.],
Petitioner,

C.T.A. CASE NO. 6417

Members:

- versus -

Castañeda, Jr., *Chairman*
Uy, and
Palanca-Enriquez, *JJ*.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

AUG 3 1 2005

x - x

DECISION

UY, *J*.:

This Petition for Review seeks the refund or the issuance of the tax credit certificate in the amount of One Hundred Twenty Seven Million One Hundred Forty Thousand Three Hundred Thirty One Pesos and 85/100 (P127,140,331.85) allegedly representing unutilized input valued added tax paid on domestic purchases of goods, services and importation of goods attributable to zero-rated sales covering the taxable year 2000.

THE FACTS

Petitioner Mirant Pagbilao Corporation, previously known as Hopewell Power (Philippines) Corporation and Southern Energy Quezon, Inc., is a corporation organized and existing under the laws of the Republic of the Philippines. It is primarily engaged in the generation and distribution of electricity to the National Power Corporation ("NPC") under a Build, Operate, Transfer ("BOT") scheme, and registered under RDO Control No. 96-600-002498 and Taxpayer Identification No. 0001-726-870 with address at Pagbilao Grande Island, Pagbilao, Quezon.[1]

On the other hand, respondent is the Commissioner of Internal Revenue, duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or tax credit as provided by law, with office address at the BIR National Office Building, Diliman, Quezon City.[2]

[1] Joint Stipulation of Facts and Issues, pars. 4, 5, 6 & 7
[2] *Ibid*, par. 1

The Bureau of Internal Revenue ("BIR") approved the application for Effective Zero-Rating dated November 26, 1999 for the construction and operation of the power plant.[3]

On April 25, 2000, July 25, 2000, October 24, 2000 and August 27, 2001[4], petitioner filed its quarterly Value Added Tax ("VAT") returns for the four quarters of taxable year 2000 showing excess input VAT paid on domestic purchases of goods, services and importation of goods for taxable year 2000 in the amount of One Hundred Twenty Seven Million One Hundred Forty Thousand Three Hundred Thirty One Pesos and 85/100 (P127,140,331.85), detailed as follows:

			INPUT VAT		
EXHIBIT	TAXABLE YEAR 2000	ZERO-RATED SALES	ON DOMESTIC PURCHASES	ON IMPORTATION	TOTAL
G	1st Quarter	2,415,714,387.94	24,531,376.33		24,531,376.33
H	2nd Quarter	2,440,549,290.06	34,122,619.83		34,122,619.83
I	3rd Quarter	2,568,092,829.35	29,084,228.67		29,084,228.67
J	4th Quarter	2,887,571,454.65	24,365,887.02	15,036,220.00	39,402,107.02
Aggregate Zero Rated Sales 10,311,927,962.00					**127,140,331.85**

[3] *Id.*, par. 8
[4] As amended

Thus, on March 11, 2002, petitioner instituted an administrative claim for refund before the BIR in the amount of P127,140,331.85 for the four (4) quarters of calendar year 2000.[5]

The inaction of the BIR on its claim for refund prompted petitioner to seek relief before this Court by filing a Petition for Review dated March 26, 2002[6] which was later amended to conform to evidence pursuant to a Motion For Leave of Court to Amend Petition for Review to Conform to Evidence filed by petitioner on June 10, 2003.

In his Answer dated April 30, 2002, respondent interposed the following Special and Affirmative Defenses:

> 4. *Petitioner's alleged claim for refund is subject to administrative routinary investigation by the Bureau;*
>
> 5. *Petitioner miserably failed to demonstrate that the taxes subject of the case at bar were erroneously or illegally collected;*
>
> 6. *The amount of P127,140,331.85 being claimed by petitioner as alleged unutilized input taxes paid on its domestic purchases of goods and services attributable to zero-rated sales for the four quarters of the year 2000 was not properly documented;*
>
> 7. *Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable;*
>
> 8. *In an action for refund the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal of refund/credit;*

NVb

[5] Joint Stipulation of Facts and Issues, par. 11
[6] Rollo, pp. 1 & 198

9. *It is incumbent upon petitioner to show that it has complied with the provisions of Sections 204(C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;*

10. *Well-settled is the rule that claims for tax refund/credit are construed in strictissimi juris against the taxpayer as they partake the nature of exemption from tax, and it is incumbent upon the petitioner to show that it is entitled thereto under the law.*[7]

Petitioner availed of the provisions of C.T.A. Circular No. 1-95, as amended, and the Court commissioned Ruben R. Rubio, an independent certified public accountant (CPA) to verify petitioner's voluminous documents. Mr. Rubio's report was made part of the records of this case.

After trial, petitioner filed its memorandum. Thereafter, the case was submitted for decision sans the memorandum of the respondent.

THE ISSUES

The parties stipulated the following issues for the consideration of 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;*

2. *Whether or not Petitioner has unutilized creditable input VAT for CY 2000 arising from its domestic purchases of goods and services amounting to P127,140,331.85 that can be a proper object of a claim for refund pursuant to Sections 108 (B)(3) and Section 112(A) of the Tax Code;*

[7] Rollo, pp. 51- 52

3. *Whether or not the unutilized creditable input taxes for the four (4) quarters of CY 2000 are substantiated by proper invoices and official receipts; and*

4. *Whether or not the unutilized creditable input VAT for CY 2000 were carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of the petitioner.*

THIS COURT'S RULING

The core of the controversy is petitioner's entitlement to a refund of excess input VAT payments on domestic purchases of goods, services and importation of goods attributable to zero-rated sales for taxable year 2000.

This first issue is a legal one as it pertains to whether or not the power generation services rendered by petitioner are subject to zero percent (0%) VAT?

Petitioner anchors its claim on the provisions of Section 108 (B)(3) of the NIRC.

> *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. – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:*
>
> *(1) x x x*
> *(2) x x x*

mb

> *(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 percent (0%) rate.*

Supplementary thereto is Section 112 (A) of the 1997 NIRC which provides for 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 such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax. x x x"*

This Court agrees with the petitioner that VAT at zero (0%) percent rate is imposed on the sale of services to the National Power Corporation ("NPC") on the basis that NPC's Revised Charter, Republic Act (R.A.) No. 6395, as amended, categorically exempting it from all kinds of taxes. To quote:

> *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 fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings. (Underscoring Ours)*

In the case of **Ernesto M. Maceda vs. Hon. Catalino Macaraig**,[8] the Supreme Court confirmed NPC's tax-exempt status, *viz*:

> *"A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes-direct or indirect.*
>
> *One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$5 billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved."*

Indeed, by virtue of NPC's exemption from direct and indirect taxes, petitioner's sale of services to NPC is subject to VAT at zero percent (0%) rate.

Moreover, the Secretary of Finance issued a memorandum addressed to the Commissioner of Internal Revenue dated January 28, 1998 espousing the Supreme Court's ruling that purchases by NPC of electricity from independent power producers are subject to VAT at zero (0%) percent.

> *"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 cost by about P1.30 billion a year. The effect on the consumer is an additional charge of P0.59 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the benefit of the Filipino consumer.*

---

[8] 223 SCRA 217

> *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 by NPC of electricity from independent power producers are subject to VAT at zero-rate."*[9]

The rest of the issues are factual as these refer to a determination of whether petitioner has unutilized creditable input VAT for CY 2000 arising from domestic purchases of goods and services, whether the same have been appropriately substantiated and whether there was a carry over to the succeeding taxable quarters of any unutilized input VAT and applied to any of the output VAT liability of the petitioner.

In resolving these factual issues, it is crucial to ascertain compliance by petitioner of the following requirements as a pre-condition to its claim for refund:

1. *Both the administrative and judicial claims for refund were filed within the two year prescriptive period;*

2. *The claimed input VAT payments are directly attributable to zero-rated sales;*

3. *The claimed input VAT payments are duly supported by VAT invoices or official receipts and;*

---

[9] Also cited in the case of Mirant Navotas Corp. vs. CIR, CTA Case No. 6044, October 16, 2002

Mb

4. *The claimed input VAT payments were not applied against any output tax carried over to the succeeding month(s).*[10]

Petitioner duly satisfied the first and second requirements.

Records show that petitioner filed the administrative and judicial actions on March 11 and March 26, 2002, respectively, both within the two (2)-year period reckoned from April 25, 2000, the date of the original first quarterly VAT return for year 2000 was filed.[11]

Petitioner's Quarterly VAT Returns for the four quarters of taxable year 2000 reflect the amount of declared zero-rated sales/receipts, in the amount of P10,311,927,962.00[12] representing energy and capacity fees paid by the NPC. Petitioner's VAT invoices and/or official receipts[13] supported said fees.

Anent the third requirement, petitioner failed to fully validate by VAT official receipts and invoices the excess payment of input taxes.

[10] Mirant (Navotas II) Corporation (Formerly Southern Energy Navotas II Power Inc.) vs. CIR, CTA Case No. 6043, July 5, 2002, citing the case of Taganito Mining Corporation vs. CIR, CTA Case No. 5983, Oct. 11, 2001
[11] Exhibit G, Magellan Cogeneration Inc. vs. CIR, CTA Case No. 6033, May 19, 2003; Telecommunications Technologies Philippines, Inc. vs. CIR, CTA Case No. 6018, November 24, 2003 and Atlas Consolidated Mining and Development Corporation vs. CIR, CTA Case No. 5296 (Resolution), July 20, 1998
[12] Exhibits G to J, inclusive of submarkings
[13] Exhibits W-1 to W-192

Out of the P2,130,363.80[14] claimed input taxes included in the findings of the independent CPA, the amount of P2,116,851.79 should be disallowed due to the following reasons[15]:

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I. Input Taxes on Purchases of Services:					
1. Supported by OR with "TIN-NV"	-	-	-	P 3,100.00	P 3,100.00
2. Supported by ORs with "TAN-VAT"	P 2,618.19	P 23,857.27	P 1,609.10	-	28,084.56
3. Supported by ORs with Stamped "TIN-VAT" (Printed after July 31,1991)	3,463.72	2,332.17	-	-	5,795.89
4. Supported by ORs without TIN	5,261.99	2,815.14	3,934.08	-	12,011.21
5. Supported VAT ORs Without BIR Permit	-	68,296.19	-	257,862.40	326,158.59
6. Supported by VAT ORs Issued by the Insurance Agents on Insurance Premiums	2,141.56	6,127.41	3,633.60	525.20	12,427.77
7. Supported by VAT ORs Issued not in the Company's	10,843.74	48,927.92	5,198.87	1,123.32	66,093.85

[14] The difference lies in the erroneous addition of the total disallowable input vat for the fourth quarter of 2001.
[15] Exhibits Y1 to Y49

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
name					
8. Erroneously Computed Input Taxes	-	-	-	8,469.98	8,469.98
8. Supported by Documents Other than VAT ORs	3,615.65	8,859.20	4,537.79	20,288.66	37,301.30
II. Input Taxes on Purchases of Goods:					
1. Supported by an Invoice with Stamped "TIN V" (Printed before July 31, 1991)	-	-	-	3,181.82	3,181.82
2. Supported by Invoices with TIN only	2,353.19	-	-	-	2,353.19
3. Supported by an Invoice with "TAN-VAT"	-	53,655.84	-	-	53,655.84
4. Supported by Cancelled VAT Invoices	-	-	9,918.20	-	9,918.20
5. Supported by VAT Invoices issued not in the Company's Name	8,097.75	611.17	49,210.52	-	57,919.44
6. Erroneously Computed	-	-	2,434.09	321.21	2,755.30
7. Supported by an Invoice with "TIN-NV"	-	-	143.64	-	143.64
8. Supported by Documents Other than VAT Invoices	-	4,767.10	528.00	9,818.18	15,113.28
III. Input Taxes Without	341,146.65	50,455.34	318,208.95	762,556.99	1,472,367.93

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Supporting Documents					
TOTAL	**P 379,542.44**	**P 270,704.75**	**P 399,356.84**	**P 1,067,247.76**[16]	**P 2,116,851.79**[17]

Further examination of the records discloses that additional amount of P6,274,478.51 of the input taxes claimed should be disapproved for failure to properly document the same, to wit:

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I. Input Taxes on Purchases of Services:					
1. Supported by Documents Other than VAT ORs [18]	1,023,798.10	P343,176.16	P796,333.68	P147,822.33	P2,311,130.27
2. Supported by "TIN-NON VAT" or "TIN-NV" Ors[19]	11,422.72	-	-	-	11,422.72
3. Supported by VAT OR Not in Company's Name[20]	244.79	-	-	20,544.00	20,788.79
4. Supported by VAT OR with No BIR Permit[21]	63,312.74	1,021.44	81,723.24	768.19	146,825.61
5. Supported by VAT OR with No Date[22]	63.64	27,905.71	25,846.15	62.06	53,877.56
6. Supported by	-	-	-	5,446.93	5,446.93

[16] Corrected figure. The figure in the Independent CPA's report is P1,080,759.77.
[17] Corrected total. The figure in the Independent CPA's report is P2,130,363.80.
[18] See Annex 1 of this Decision
[19] Annex 2
[20] Annex 3
[21] Annex 4
[22] Annex 5

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
"TAN" OR[23]					
II. Input Taxes on Purchases of Goods:					
1. Supported by Documents Other than VAT Invoice[24]	1,899.24	6,400.01	2,063.64	-	10,362.89
2. Supported by VAT Invoice with No BIR Permit[25]	11,708.24	18,807.88	33,279.52	2,250.88	66,046.52
3. Supported by "TAN-VAT" Invoice[26]	129,244.36	-	-	-	129,244.36
4. Supported by VAT Invoice dated beyond period of claim[27]	12,858.81	-	5,968.19	-	18,827.00
6. Supported by VAT Invoice with No Date[28]	-	1,370.45	2,291.48	2,012.50	5,674.43
III. Input Taxes Without Supporting Documents[29]	280,382.53	1,931,415.63	196,557.40	642,370.16	3,050,725.72
IV. Input Taxes on Purchases Not Subject to VAT[30]	289,090.92	-	-	128,719.85	417,810.77
V. Input Taxes on Reimbursements with no third party	23,122.82	-	-	-	23,122.82

[23] Annex 6
[24] Annex 7
[25] Annex 8
[26] Annex 9
[27] Annex 10
[28] Annex 11
[29] Annex 12
[30] Annex 13

ld

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
supporting documents[31]					
VI. Erroneous Computation[32]	-	1,423.24	-	-	1,423.24
VII. Unreadable Copy of Invoice or OR[33]	-	-	1,185.00	563.88	1,748.88
TOTAL	**P1,847,148.91**	**P2,331,520.52**	**P1,145,248.30**	**P950,560.78**	**P6,274,478.51**

The substantiation requirement is emphasized under Section 4.104-5 (a) and (b) of Revenue Regulations No. 7-95, to wit:

> *a) Input taxes shall be allowed only if the domestic purchase of goods, properties or services is made in the course of trade or business. The input tax should be supported by an invoice or receipt showing the information as required under Sections 108(a) and 238 of the Code. x x x*
>
> *b) Input tax on importation shall be supported with the import entry or other equivalent document showing actual payment of VAT on the imported goods.*

Finally, the input tax claimed for the four quarters of 2000 in the gross amount of P127,140,331.85 were already deducted by petitioner from the total available input VAT as of April 25, 2002 as evidenced by the 2002 first quarterly VAT return.[34] This was testified to by petitioner's Senior Accountant, Janet L. Lagula, during the direct examination conducted on November 27, 2002:

[31] Annex 14
[32] Annex 15
[33] Annex 16
[34] Exhibits O & O-4

DIRECT EXAMINATION BY ATTY. CELICIOUS

ATTY. CELICIOUS:
Q: MS. Witness, you previously testified during the hearing on October 17, 2002 that petitioner has unutilized input VAT for the four (4) quarters of 2000 amounting to P127,140,331.85 arising from domestic purchases of goods and services and importation of goods. What did the petitioner do with the input Vat generated during those (4) quarters?

MS.LAGULA:
A: We carried them forward to the succeeding quarter, on the first quarter of 2002.

ATTY. CELICIOUS:
Q: What is you proof of saying so?

MS. LAGULA:
A: VAT Returns for the four (4) quarters of the taxable year 2000 and 2001, and VAT Returns for the first quarter of 2002.[35]

Thus, the input taxes sought to be refunded were not applied by petitioner against its output VAT liability as of April 25, 2002 and can no longer be used as credit against its future output VAT liability.

WHEREFORE, premises considered, the Petition is hereby **PARTIALLY GRANTED.** Respondent is **ORDERED to REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the reduced amount of One Hundred Eighteen Million Seven Hundred Forty Nine Thousand One Peso and 55/100 (P118,749,001.55) computed as follows:

---

[35] TSN dated November 27, 2002, pp. 7-8

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Input taxes claimed	P24,531,376.33	P34,122,619.83	P 29,084,228.67	P 39,402,107.02	P 127,140,331.85
Less: Disallowance					
a) per Independent CPA	379,542.44	270,704.75	399,356.84	1,067,247.76	2,116,851.79
b) per Court's Verification	1,847,148.91	2,331,520.52	1,145,248.30	950,560.78	6,274,478.51
TOTAL	**P22,304,684.98**	**P31,520,394.56**	**P27,539,623.53**	**P37,384,298.48**	**P118,749,001.55**

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Chairman

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

I hereby certify that this Decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Chairman