REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

VISAYAS GEOTHERMAL POWER COMPANY, Petitioner,	**CTA EB No. 1343** (CTA Case Nos. 6790 & 6838)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA,** and **RINGPIS-LIBAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** NOV 21 2016 3:45 p.m.

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DECISION

UY, *J*.:

Before the Court *En Banc* is a Petition for Review filed by petitioner Visayas Geothermal Power Company on August 27, 2015[1] against respondent Commissioner of Internal Revenue, seeking the setting aside of the Amended Decision dated March 25, 2015[2] and Resolution dated July 24, 2015,[3] both rendered by the Special First Division of this Court (Court in Division) in CTA Case Nos. 6790 and 6838, entitled *"Visayas Geothermal Power Company Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent"*, the dispositive portions of which respectively read:

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[1] EB Docket, pp. 7 to 35.

[2] EB Docket, pp. 43 to 92; Ponencia of Associate Justice Lovell R. Bautista, and concurred by Associate Justice Caesar A. Casanova.

[3] EB Docket, pp. 38 to 41.

Amended Decision dated March 25, 2015:

> "**WHEREFORE,** premises considered, CIR is hereby **ORDERED to REFUND or ISSUE a TAX CREDIT CERTIFICATE** to VGPCI in the amount of Php8,515,421.11 representing unutilized input VAT covering the period from October 1, 2001 to December 31, 2002.
>
> **SO ORDERED.**"

Resolution dated July 24, 2015:

> "**WHEREFORE,** premises considered, the 'Motion for Partial Reconsideration (Re: Amended Decision Dated March 25, 2015)' is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

Petitioner is a partnership duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal address located at Barangay Tongonan, Ormoc City, Province of Leyte. Its purpose is to invest in, acquire, finance, complete, construct, develop, improve, operate, maintain and hold that certain partially constructed power production geothermal electrical engineering facility in Malibog, Leyte Province, Philippines (Project), and other property incidental thereto, for the production and sale of electricity from geothermal resources, to sell or otherwise dispose of the Project and such other property, and to engage in any other activities related or incidental thereto.

Respondent is the duly appointed government official vested with the authority, among others, to grant refunds of unutilized input value-added taxes (VAT) paid pursuant to the provisions of the National Internal Revenue Code (NIRC) with office address at the Fifth Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On June 15, 1994, petitioner was accredited and certified by the Department of Energy (DOE), to own and operate a power plant facility comprising of three (3) steam turbine-generating units and related equipments, with a total capacity of 216 Megawatts situated in Malibog, Leyte Province.

On January 23, 1996, petitioner was registered as a VAT taxpayer with the Bureau of Internal Revenue (BIR) Revenue District Office (RDO) No. 89, Ormoc City and was issued Taxpayer's Identification No. 003-832-538-VAT.

For the third and fourth quarters of 2001 and all four (4) quarters of 2002, petitioner allegedly incurred input VAT amounting to ₱20,213,044.50 on its domestic purchases of goods and services and importation of goods used in its power generation activities.

According to petitioner, effective June 26, 2001, its sales of generated power are no longer subject to VAT at 10% but at 0% rate, pursuant to Republic Act No. 9136, or the Electric Power Industry Reform Act (EPIRA) in 2001, hence, it was not able to fully utilize the input VAT incurred in the subject period to the succeeding periods.

Petitioner purported unutilized input VAT are reflected in its original and amended Quarterly VAT Returns for the third, fourth quarters of 2001 and the four (4) quarters of 2002 filed with the BIR.

In the belief that it is entitled to the said unutilized input VAT, petitioner filed on June 26, 2003 with the RDO No. 89, Ormoc City, a letter requesting for the refund of the amount of ₱1,142,666.32, allegedly representing its unutilized input VAT for the third quarter of 2001. A few days later, petitioner elevated its claim to this Court via a Petition for Review filed on September 30, 2003 and was docketed as CTA Case No. 6790.

On December 18, 2003, during the pendency of CTA Case No. 6790, petitioner filed with the same RDO, another letter-request for refund, this time for the alleged unutilized input VAT covering the fourth quarter of 2001 and the four (4) quarters of 2002 in the sum of ₱19,070,378.18. The next day, December 19, 2003, petitioner filed a Petition for Review before this Court covering the said claim and docketed as CTA Case No. 6838.

On January 30, 2004, the Court in Division granted in open court petitioner's oral motion to consolidate CTA Case Nos. 6790 and 6838, involving the total claim of ₱20,213,044.50, as follows:

CTA Case No.	Period Covered	Amount of Claim	
6790	Sept. 2001	₱1,142,666.32	₱1,142,666.32
6838	Oct. - Dec. 2001	₱3,416,244.61	
	Jan. - Mar. 2002	1,476,820.27	
	Apr. - June 2002	1,566,888.66	
	July - Sept. 2002	1,881,712.91	
	Oct. - Dec. 2002	10,728,711.73	₱19,070,378.18
	Total:		₱20,213,044.50

In his Answer respondent interposed special and affirmative defenses, alleging, among others, that petitioner's claim for refund is subject to administrative investigation/examination by the CIR; that to support its claim, it is imperative for petitioner to prove compliance with requirements under the law; that 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 to the claim for refund/credit; and that claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation.

On July 6, 2006, the consolidated cases were submitted for decision by the Court in Division sans respondent's memorandum.

The Court in Division rendered its Decision dated January 18, 2007, the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the consolidated Petitions for Review are hereby ***PARTIALLY GRANTED.*** Accordingly, respondent is hereby **ORDERED to REFUND** or **ISSUE a TAX CREDIT CERTIFICATE** to the petitioner in the amount of P16,355,749.74 representing unutilized input VAT covering the period September 1, 2001 to December 31, 2002.
>
> **SO ORDERED.**"[4]

The Court in Division ruled that: a) the EPIRA Law is applicable to petitioner, therefore its sales of generated power shall be subject to VAT at zero-rated; b) out of the total claimed amount of ₱20,213,044.50, only the amount of ₱16,355,749.74 was properly substantiated by the required documents in accordance with Section 110 of the NIRC in relation to Section 4.104-5 of Revenue Regulations No. 7-95 as unutilized input VAT that can be applied

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[4] Division Docket (CTA Case No. 6790), p. 229.

against any output VAT liability in the succeeding taxable quarters in 2001 and 2002 and thereafter; and c) the reckoning of the two-year reglementary period for filing both the administrative and judicial claims for input VAT refund is from the date of filing the corresponding quarterly VAT return.

The CIR filed her Motion for Partial Reconsideration on February 15, 2007, while petitioner filed its Opposition (to the Motion for Partial Reconsideration dated February 14, 2007) on March 30, 2007. In the Resolution dated May 17, 2007, the Court in Division denied respondent's Motion for Partial Reconsideration for lack of merit.

Unfazed, the CIR appealed before the Court *En Banc* by filing a Petition for Review on June 26, 2007. On August 16, 2007, petitioner filed its Comment (To Petitioner's Petition For Review dated June 12, 2007).

On October 9, 2007, after considering the issues raised by both parties in their respective pleadings, the Court *En Banc* resolved to submit the case for decision.

Subsequently, on November 20, 2007, the Court *En Banc* promulgated its Decision, concurring with the Court in Division's findings that petitioner satisfied the following requisites in its claim for refund or issuance of a tax credit certificate on its claim of unutilized input VAT payments that are directly attributable to zero-rated or effectively zero-rated sales, as follows: 1) that the sales generated are zero-rated or effectively zero-rated sales; 2) that the input VAT were incurred or paid; 3) that such input VAT payments are directly attributable to zero-rated or effectively zero-rated sales; 4) that the input VAT payments were not applied against any output VAT liability; and 5) that the claim for refund or tax credit was filed within the two-year prescriptive period. The dispositive portion of the said Decision states:

> "**WHEREFORE**, premises considered, the Petition is hereby **DISMISSED** for lack of merit. The assailed Decision dated January 18, 2007 and the Resolution dated May 17, 2007 are **AFFIRMED.**
>
> **SO ORDERED.**"[5]

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[5] Division Docket (CTA Case No. 6790), p. 365.

Not contented with the ruling of the Court *En Banc*, respondent filed a Motion for Reconsideration on December 5, 2007, assailing the said Decision of the Court *En Banc*.

In the Resolution dated January 9, 2008, the Court *En Banc* denied respondent's Motion for Reconsideration, finding that the arguments raised by respondent have been extensively discussed and passed upon in the assailed Decision.

On March 3, 2008, respondent filed a Petition for Review on Certiorari under Rule 45 with the Supreme Court. The case was docketed as G.R. No. 181276 (CTA EB No. 282), entitled *"The Commissioner of Internal Revenue vs. Visayas Geothermal Power Company, Inc."*

On June 2, 2008, petitioner filed its Comment (Re: Petition for Review dated February 26, 2008).

After the grant of extension of time to file reply, respondent filed his Reply on November 21, 2008.

On February 16, 2009, the Supreme Court, after giving due course to the Petition for Review on Certiorari, required both parties to submit their respective memoranda within thirty (30) days from notice thereof.

Petitioner filed its Memorandum on May 26, 2009, while respondent filed his Memorandum on June 29, 2009.

On November 11, 2013, the Supreme Court promulgated a Decision, the dispositive portion of the Supreme Court's Decision reads:

> "**WHEREFORE**, the petition is partly **GRANTED**. The November 20, 2007 Decision and the January 9, 2008 Resolution of the Court of Tax Appeals En Banc are hereby **REVERSED** and **SET ASIDE** and the claim for refund with respect to CTA Case No. 6790 is **DENIED**. However, the claim pertaining to CTA Case No. 6838 is remanded to the CTA for the proper determination of the refundable amount due to Respondent.
>
> **SO ORDERED.**"

Feeling aggrieved with the Supreme Court's Decision, both parties filed their respective Motions for Partial Reconsideration. However, both Motions were denied with finality in the Resolution dated April 23, 2014.

On June 16, 2014, an Entry of Judgment of the said Decision of the Supreme Court has been entered.

Accordingly, on March 25, 2015, the Court in Division rendered the assailed Amended Decision,[6] ordering respondent to refund or issue a tax credit certificate to petitioner in the amount of ₱8,515,421.11, representing unutilized input VAT covering the period from October 1, 2001 to December 31, 2002.

Petitioner filed its Motion for Partial Reconsideration (Re: Amended Decision dated March 25, 2015) on April 15, 2015.[7] In its Resolution dated July 24, 2015,[8] the Court in Division denied petitioner's Motion for Partial Reconsideration for lack of merit.

On August 27, 2015, petitioner filed its Petition for Review before the Court *En Banc.*[9]

In the Resolution dated October 14, 2015,[10] the Court *En Banc* directed respondent to file his Comment, within ten (10) days from receipt thereof. Respondent filed his Comment on November 10, 2015.[11]

Subsequently, the Court *En Banc*, in the Resolution dated December 9, 2015,[12] submitted the instant Petition for Review for decision.

Hence, this Decision.

THE ISSUE

Petitioner, in effect, raises this sole issue, to wit:[13]

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[6] Division Docket (CTA Case No. 6790), pp. 717 to 766; EB Docket, pp. 43 to 92.
[7] Division Docket (CTA Case No. 6790), pp. 769 to 795.
[8] Division Docket (CTA Case No. 6790), pp. 803 to 806; EB Docket, pp. 38 to 41.
[9] EB Docket, pp. 7 to 30.
[10] EB Docket, pp. 94 to 95.
[11] EB Docket, pp. 96 to 100.
[12] EB Docket, pp. 103 to 104.
[13] EB Docket, p. 13.

Whether or not petitioner is entitled to the refund of excess input VAT for the 4th quarter of CY 2001 to the 4th quarter of CY 2002 in the amount of ₱15,502,045.80.

Petitioner's arguments:

Petitioner submits the following arguments:

It is entitled to the refund of excess input VAT for the 4th quarter of CY 2001 to the 4th quarter of CY 2002 amounting to ₱15,502,045.80, and not the reduced amount of ₱8,515,421.11 as stated in the assailed Amended Decision of the Court in Division. It contends that the Court in Division failed to provide sufficiently compelling justification for abandoning the Original Decision.

The conclusion that it is entitled to the refund of ₱16,355,749.74 was confirmed twice by the Court in Division and further validated twice by the Court *En Banc*. Petitioner claims that in rendering their Decisions and Resolutions, the Court in Division and the Court *En Banc* were guided by their judicious examination of various documents presented by petitioner to substantiate its claimed input taxes. Moreover, petitioner stresses that the findings of the Independent Certified Public Accountant (ICPA) regarding the amount of duly substantiated input taxes as reflected in her reports were adopted by the Court in Division and upheld by the Court *En Banc*. Petitioner emphasizes that having examined the same pieces of documentary evidence in light of the same statutory provisions and administrative rules, there is no cogent reason for the Amended Decision to contain substantially different conclusion from the Original Decision.

The re-examination of the proper refundable amount in CTA Case No. 6838 was not warranted in view of the conclusive factual finding on the same issue in the Original Decision. Petitioner submits that the rendition of the Amended Decision which radically changed the Original Decision is not the only way to implement the Supreme Court's directive. It maintains that the Supreme Court, in its Decision dated November 11, 2013, did not order the re-opening or re-litigation of the factual issues in CTA Case No. 6838. Instead, the Supreme Court merely wanted to determine the proper refundable amount in CTA Case No. 6838 in view of its decision to deny the claim for refund in CTA Case No. 6790.

A plain reading of the Supreme Court's Decision readily suggests that it merely annulled the CTA *En Banc*'s Decision and Resolution insofar as it upheld the grant of the refund claim in CTA Case No. 6790. It notes that the Supreme Court did not disturb the CTA *En Banc*'s decision to uphold the conclusion that petitioner is entitled to the refund of excess input taxes paid or incurred in the 4th quarter of CY 2001 to the 4th quarter of CY 2002, which taxes are subject of CTA Case No. 6838.

In the Petition for Review before the Supreme Court, respondent did not assail the findings of the Court in Division and Court *En Banc* regarding the duly substantiated input taxes. Instead, respondent limited her argument to the alleged lack of jurisdiction of the Court in Division owing to the alleged premature filing of the judicial claim for refund. Further, petitioner maintains that nowhere in the Supreme Court's decision did it order the re-examination of the evidence presented by petitioner, which evidence was already examined by the Court in Division in the Original Decision. On the contrary, petitioner submits that the Court in Division was duty-bound to respect and adopt its findings in the Original Decision with respect to the proper amount refundable to petitioner, especially since these findings were upheld by the CTA *En Banc* and not disturbed by the Supreme Court.

The Original Decision was an established point of law which the Court in Division was bound to respect and apply. The finding in the Original Decision should have been respected and re-affirmed by the Court in Division, in accordance with the doctrine of "law of the case".

Respondent's counter-arguments:

On the other hand, respondent counter-argues as follows:

It is clear from the Entry of Judgment issued by the Supreme Court on July 16, 2014 that CTA Case No. 6838 is remanded to this Court for the proper determination of the refundable amount. This being so, this Court is not bound to uphold the refundable amount in the Original Decision.

Respondent agrees with the assailed Resolution of the Court in Division that the latter did not exceed its authority as all the records and pertinent laws were considered in arriving at such determination; that when the Court *a quo* found that the refundable amount was in the amount of ₱8,515,421.11, the ruling was in conformity with what was decreed by the Supreme Court in the dispositive portion of its

Decision dated November 11, 2013; and that in the absence of any showing that the Court *a quo* has gravely abused its discretion in arriving at the refundable amount of the claim for CTA Case No. 6838, there is no reason to reconsider the ruling.

It is allegedly incumbent upon petitioner to prove that it is entitled to the refund sought. Failure to prove the same is fatal to its claim for tax refund. Respondent likewise submits that it is well-settled principle in taxation that claims for refund are construed strictly against the claimant as they partake the nature of an exemption from tax and it is incumbent upon Petitioner to prove that it is entitled thereto under the law. Respondent claims that in the case at bar, petitioner failed to discharge its burden of establishing its claim for a tax refund or credit.

THE COURT *EN BANC*'S RULING

The instant Petition for Review must fail.

The dispositive portion of the Supreme Court's Decision dated November 11, 2013 rendered in G.R. No. 181276 is **very clear**. For easy reference, quoted anew is the said dispositive portion, viz:

> "**WHEREFORE**, the petition is partly **GRANTED**. The November 20, 2007 Decision and the January 9, 2008 Resolution of the Court of Tax Appeals En Banc are hereby **REVERSED** and **SET ASIDE** and the claim for refund with respect to CTA Case No. 6790 is DENIED. However, the claim pertaining to CTA Case No. 6838 is remanded to the CTA for the proper determination of the refundable amount due to Respondent.
>
> **SO ORDERED.**" *(Underscoring supplied)*

Based on the foregoing, it is plain that the November 20, 2007 Decision and the January 9, 2008 Resolution of this Court, sitting *En Banc*, in CTA EB No. 282, have been reversed and set aside by the Supreme Court, the dispositive portions of which respectively state as follows:

November 20, 2007 Decision:

> "**WHEREFORE**, premises considered, the Petition is hereby **DISMISSED** for lack of merit. The assailed Decision dated January 18, 2007 and the Resolution

dated May 17, 2007 are **AFFIRMED.**

SO ORDERED."[14]

January 9, 2008 Resolution:

"**WHEREFORE**, premises considered, the Motion is hereby **DENIED** for lack of merit.

SO ORDERED."[15]

Such being the case, the said November 20, 2007 Decision, affirming the Decision dated January 18, 2007 and the Resolution dated May 17, 2007, both rendered by the Court in Division in CTA Case Nos. 6790 and 6838, would be deemed to have no effect whatsoever, simply because they have been overturned. In other words, the said Decision and Resolution cannot be considered as to have been affirmed by this Court, sitting *En Banc*. More particularly, the Decision dated January 18, 2007 and the Resolution dated May 17, 2007, ordering respondent to refund or issue a tax credit certificate to petitioner in the amount of ₱16,355,749.74, supposedly representing unutilized input VAT covering the period September 1, 2001 to December 31, 2002, cannot be given effect, as they were not considered affirmed by this Court *En Banc*, in view of the Supreme Court's reversal and setting aside of the latter Court's November 20, 2007 Decision and January 9, 2008 Resolution.

Correspondingly, and since the claim for refund with respect to CTA Case No. 6790 has been definitely denied by the Supreme Court, the necessity to remand the claim pertaining to CTA Case No. 6838 to this Court *"for the proper determination of the refundable amount due to"* petitioner was called for or warranted under the premises. The Court in Division then is justified to look anew the evidence *a quo* and segregate the said evidence pertaining to the claim for refund in CTA Case No. 6790 with that of the claim for refund in CTA Case No. 6838.

In this connection, We do not subscribe to petitioner's contention that the process should have been a simple and straight-forward mathematical computation, *i.e.*, deducting the refund claim granted pertaining to CTA Case No. 6790 from the total amount of ₱16,355,749.74 granted in the Decision dated January 18, 2007. This is so because if it was that simple in the eyes of the High Court,

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[14] Division Docket (CTA Case No. 6790), p. 365.
[15] Division Docket (CTA Case No. 6790), p. 395.

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the latter could have easily done it. The fact that it did not, signifies that what is to be done is more than a simple and straight-forward mathematical computation.

Verily, the Court in Division is correct in re-examining and verifying the documents offered in evidence in compliance with the directive of the Supreme Court in G.R. No. 181276 to properly determine the amount of refund in CTA Case No. 6838.

Anent petitioner's claim that the Original Decision, *i.e.*, the Decision dated January 18, 2007, should have been respected and re-affirmed by the Court in Division, in accordance with the doctrine of "law the case", We are of the view that the said doctrine does not apply to the present case.

In *Padillo vs. Court of Appeals*,[16] the Supreme Court had occasion to explain this principle, to wit:

> "xxx. *Law of the case* has been defined as the opinion delivered on a former appeal. More specifically, it means that whatever is **once irrevocably established as the controlling legal rule or decision between the same parties in the same case** continues to be the law of the case, *whether correct on general principles or not*, **so long as the facts on which such decision was predicated continue to be the facts of the case before the court.** As a general rule, a decision on a prior appeal of the same case is held to be the law of the *case whether that question is right or wrong*, the remedy of the party deeming himself aggrieved being to seek a rehearing." *(Emphasis supplied)*

Further, in the case of *Villa vs. Sandiganbayan, et al., etseq.,*[17] the Supreme Court expounded the doctrine of the law of the case, to wit:

> "The doctrine has been defined as 'that principle under which **determination of questions of law** will generally be held to govern a case throughout all its subsequent stages **where such determination has already been made on a prior appeal to a court of last resort**. **It is merely a rule of procedure and <u>does not go to the power of the court</u>, and will not be adhered to where its application will result in an unjust**

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[16] G.R. No. 119707, November 29, 2001.
[17] G.R. Nos. 87186, 87281, 87466, and 87524, April 24, 1992.

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decision. It relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the same case.'" *(Emphasis and underscoring supplied)*

Based on the foregoing, the law of the case doctrine applies when there is a prior determination on questions of law which will govern the case throughout its subsequent stages. Cleary, the doctrine is not applicable to cases where the issue involved is factual in nature. Correspondingly, the case before Us is outside the ambit of the said doctrine.

Furthermore, the law of the case doctrine applies when there is an irrevocably established rule that has been passed upon by the appellate court. In this connection, it must be emphasized that the only issue resolved by the Supreme Court relates to the prescriptive period of the appeal, **not** on petitioner's compliance with the substantiation requirements for the refund claim is concerned.

Finally, actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[18] Specifically, tax refunds in relation to the VAT are in the nature of such exemptions.[19] In this case, petitioner failed to prove that it is entitled to the entire amount sought to be refunded in view of its non-compliance with the substantiation requirement of input VAT. Accordingly, this Court finds no reason to deviate from the factual findings of the Court in Division.

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is **DENIED** for lack of merit. Accordingly, the Amended Decision dated March 25, 2015 and Resolution dated July 24, 2015 of the Court in Division in CTA Case Nos. 6790 & 6838, are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[18] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.
[19] *Panasonic Communication Imaging Corporation of the Philippines vs. Commissioner of Internal Revenue*, G.R. No. 178090, February 8, 2010.

WE CONCUR:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

VISAYAS GEOTHERMAL POWER COMPANY, *Petitioner,*	**CTA EB NO. 1343** (CTA Case Nos. 6790 & 6838)
	Present: **DEL ROSARIO**, PJ, **CASTAÑEDA, JR.**, **BAUTISTA**, **UY**, **CASANOVA**, **FABON-VICTORINO**, **MINDARO-GRULLA**, *and* **RINGPIS-LIBAN**, JJ.
-versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: NOV 21 2016 3:45 p.m.

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DISSENTING OPINION

DEL ROSARIO, PJ.:

I respectfully dissent with the *ponencia* in denying the Petition for Review filed by Visayas Geothermal Power Company (VGPC) and in holding that the Court in Division properly re-examined VGPC's documentary evidence in compliance with the directive of the Supreme Court in G.R. No. 181276 as to the determination of the refundable amount due to VGPC in **CTA Case No. 6838**.

The present controversy involves the proper implementation of the dispositive portion of the decision of the Supreme Court in *The Commissioner of Internal Revenue v. Visayas Geothermal Power Company, Inc.*,[1] *viz.*:

[1] G.R. No. 181276, November 11, 2013.

> "WHEREFORE, the petition is partly GRANTED. The November 20, 2007 Decision and January 9, 2008 Resolution of the Court of Tax Appeals En Banc are hereby REVERSED and SET ASIDE and the claim for refund with respect to CTA Case No. 6790 is DENIED. However, the claim pertaining to CTA Case No. 6838 is remanded to the CTA for the proper determination of the refundable amount due respondent.
>
> SO ORDERED."

Records show that the Court in Division's Decision dated January 18, 2007 in CTA Case Nos. 6790 & 6838 and the Court *En Banc*'s Decision dated November 20, 2007 in CTA EB No. 1343, *in esse* declared that VGPC is entitled to a refund or issuance of tax credit certificate in the total amount of **Php16,355,749.74** representing unutilized input VAT covering the period September 1, 2001 to December 31, 2002.[2]

In the Petition for Certiorari assailing the aforestated decisions filed with the Supreme Court, docketed as G.R. No. 181276, the Commissioner of Internal Revenue (CIR) averred as ground thereof that: *"The Court of Tax Appeals erred in assuming jurisdiction and giving due course to VGPCI's petition despite the latter's failure to file an application for refund in due course before the BIR and observe the proper prescriptive period provided by law before filing an appeal before the CTA."*[3]

Confining itself to the determination of the sole issue of the timeliness of VGPC's judicial claims for refund or issuance of tax credit certificate, the Supreme Court in G.R. No. 181276 ruled that:

> "**The pivotal question in this case then is whether VGPCI failed to observe the proper prescriptive period** required by law for the filing of an appeal before the CTA because it filed its petition before the end of the 120-day period granted to the CIR to decide its claim for refund under Section 112 (D) of the National Internal Revenue Code (NIRC).
>
> Xxx xxx xxx.
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> Applying the abovementioned rules to the case at bench, the judicial claim filed on September 30, 2003 **(CTA Case No. 6790) was prematurely filed** and cannot be taken cognizance of because respondent failed to wait for the requisite 120 days

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[2] CTA Division Docket, pp. 220 to 230, 353 to 366.

[3] Petition for Certiorari, CTA Division Docket, p. 448.

> after the filing of its claim for refund with the BIR before elevating the case to the CTA. However, the judicial claim filed on December 19, 2003 **(CTA Case No. 6838)**, which was made after the issuance of BIR Ruling DA-489-03, **can be considered** by the CTA despite its hasty filing only one day after the application for refund was first lodged with the BIR." (Boldfacing supplied)

In other words, the doctrinal pronouncement of the Supreme Court in G.R. No. 181276 is confined only to the issue on prescription, that is - - to a declaration on the <u>pre-maturity</u> of the judicial claim filed on September 30, 2003 anent CTA Case No. 6790, and the <u>timely filing</u> of the judicial claim filed on December 19, 2003 with respect to CTA Case No. 6838. No factual review was made, much more, a pronouncement, that pertains to the correctness of the amount of refund as decreed in the Court in Division's Decision dated January 18, 2007 and as affirmed by the Court *En Banc* in its Decision dated November 20, 2007.

Considering that the correctness of the total amount to be refunded to VGPC was not the subject of the Supreme Court Decision in G.R. No. 181276, and since there was no further proceedings conducted where the parties presented additional evidence, **it is not justified for the Court in Division and the Court *En Banc* to <u>modify</u> their previous factual determination of the amount refundable to VGPC**. The Court in Division and the Court *En Banc* are bound by the factual findings as contained in the Court in Division's Decision dated January 18, 2007 and as affirmed by the Court *En Banc* in its Decision dated November 20, 2007, specifically with respect to the refundable amount for the 4th quarter of CY 2001 up to the 4th quarter of CY 2002.

Truth to tell, the Court in Division and the Court *En Banc* have previously made a determination on VGPC's entitlement to a refund, and the amount thereof, after appreciating the very same pieces of evidence upon which the Amended Decision dated March 25, 2015 is based. I submit that the proper implementation of the aforequoted dispositive portion of the Supreme Court Decision is to simply exclude from the refundable amount, as previously granted, the amount pertaining to the claim in CTA Case No. 6790.

The dispositive portion of the Supreme Court Decision must be related to its *ratio decidendi* and must reasonably be

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construed to mean that "the proper determination of the refundable amount due [to VGPC]" is confined to the exclusion of the amount pertaining to VGPC's premature claim *i.e.* input taxes for the 3rd quarter of CY 2001.

Incidentally, the rationale behind the dispositve portion of the Supreme Court Decision in G.R. No. 181276 in not simply deducting the claim pertaining to CTA Case No. 6790 from the total amount of Php16,355,749.74, as granted in the Court in Division's Decision dated January 18, 2007, is beyond this Court to speculate. **The fact remains that there is nothing in the aforestated Supreme Court Decision that declares, even remotely, that the factual findings of the Court in Division in its Decision dated January 18, 2007 (with respect to the refundable amount in CTA Case No. 6838) are erroneous that needed re-evaluation.**

In fine, I vote to grant VGPC's Petition for Review. Accordingly, the Commissioner of Internal Revenue should be ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE in the amount of ₱15,502,045.80 in favor of Visayas Geothermal Power Company representing its unutilized input taxes for the period from 4th quarter CY 2001 to 4th quarter CY 2002, computed as follows:

CTA Case No.	**6790**	**6838**					
	2001-Sept	**2001-4Q**	**2002-1Q**	**2002-2Q**	**2002-3Q**	**2002-4Q**	**Total**
Purchase of Goods	₱208,996.34	₱329,441.87	₱384,990.24	₱538,096.78	₱668,824.76	₱353,587.83	**₱2,483,937.82**
Purchase of Services	631,510.61	859,214.07	339,758.12	475,643.36	274,719.73	7,585,767.79	**10,166,613.68**
Importations	9,400.00	-	-	26,266.00	229,127.00	318,997.00	**583,790.00**
Non-Residents	7,744.33	1,413,788.41	22,560.84	154,955.67	77,602.43	1,520,381.90	**3,197,033.58**
Per ICPA Report[4]	**857,651.28**	**2,602,444.35**	**747,309.20**	**1,194,961.81**	**1,250,273.92**	**9,778,734.52**	**16,431,375.08**
Multiply by the ratio of the zero-rated sales of ₱21,686,928.42 over the total gross receipt of ₱4,711,992,658.82	0.004602496224	0.004602496224	0.004602496224	0.004602496224	0.004602496224	0.004602496224	**0.004602496224**
CTA disallowance	(3,947.34)	(11,977.74)	(3,439.49)	(5,499.81)	(5,754.38)	(45,006.59)	**(75,625.34)**
Total	**₱853,703.94**	**₱2,590,466.61**	**₱743,869.71**	**₱1,189,462.00**	**₱1,244,519.54**	**₱9,733,727.93**	**₱16,355,749.74**

4 Exhibit "BB", Annexes 4, 4-1, 4-2, 4-3 and 4-4.

Refund claim granted in the Original Decision (Decision promulgated on January 18, 2007)	₱ 16,355,749.74
Less: Claim pertaining to CTA Case No. 6790	(853,703.94)
Claim pertaining to CTA Case No. 6838	**₱ 15,502,045.80**

ROMAN G. DEL ROSARIO
Presiding Justice