REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PANAY POWER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6956

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

MAR 2 4 2009
9:00 a.m.

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DECISION

UY, J.:

Before Us is a Petition for Review seeking the refund or issuance of a tax credit certificate in the amount of P14,293,560.91 allegedly representing excess/unutilized input value-added tax (VAT) from domestic purchases of taxable goods and services for the four quarters of taxable year 2002, attributable to petitioner's alleged zero-rated sales of electricity pursuant to Section 4(x) in relation to Section 6 of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA).

THE FACTS

Petitioner is a corporation duly organized and existing under Philippine laws, with principal office at 2nd Floor Benpres Building, Meralco Avenue, Pasig City.[1] It is principally engaged in the business of power generation for lighting and power purposes, wholesale of electric power to the National Power Corporation (NAPOCOR), private electric utilities and electric cooperatives, and carrying on of all business incident thereto, including but not limited to the sale of by-products of power generation. It is registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity.[2]

Furthermore, it is registered with the Bureau of Internal Revenue (BIR) as a Value-added Tax (VAT) taxpayer in accordance with Section 107 of the National Internal Revenue Code of 1977, as amended (now Section 236 of the National Internal Revenue Code of 1997 [NIRC of 1997]), with Tax Identification No. 004-964-861-VAT.[3]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City.[4]

Petitioner filed its Quarterly VAT Return for the first quarter of taxable year 2002 on April 22, 2002. It declared no output VAT on its receipts from the sale of electricity to Panay Electric Cooperative (PECO); however, it declared an input VAT incurred for the quarter in the amount of

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[1] Par. 1, Admitted Facts, Joint Stipulations of Facts and Issues (JSFI), Docket, p. 82.
[2] Annex "B", Petition for Review; Pars. 3 and 4, Admitted Facts, JSFI, Docket, pp. 82-83.
[3] Annex "C", Petition for Review; Par. 5, Admitted Facts, JSFI, Docket, p. 83.
[4] Par. 2, Admitted Facts, JSFI, Docket, p. 82.

P6,947,925.81, and input VAT carried over from the previous quarter in the amount of P4,639,169.00, or a total input VAT of P11,587,094.81.[5]

For the second quarter of taxable year 2002, petitioner allegedly accumulated input VAT in the amount of P3,036,810.16, but declared no output VAT on its receipt from the sale of generated electricity. In the same Quarterly VAT Return for the second quarter of taxable year 2002, petitioner also declared the input VAT carried over from the previous quarters in the amount of P11,587,094.81, giving a total of P14,623,904.97 input VAT for the second quarter of taxable year 2002.[6]

On October 18, 2002, petitioner filed its third quarter VAT Return where it again declared no output VAT, but declared an input VAT in the amount of P2,217,445.69 for the third quarter or a total of P16,841,350.66 as input VAT incurred.[7]

For the fourth quarter of taxable year 2002, petitioner declared an output VAT of P30,656.36 on its taxable receipts, an input VAT of P2,122,035.61, and input VAT from the previous quarters in the amount of P16,841,350.66. Hence, as of the end of the fourth quarter of taxable year 2002, petitioner declared a total accumulated input VAT credit of P18,932,729.91.[8]

Relying on BIR Ruling dated May 13, 2002, which confirmed that the sale of electricity by the Power Sector Assets and Liabilities Management Corporation (PSALM) is subject to zero percent (0%) VAT by virtue of EPIRA

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[5] Exhibit "B"; Par. 1, Jointly Stipulated Facts, JSFI, Docket, p. 83.
[6] Exhibit "C"; Par. 2, Jointly Stipulated Facts, JSFI, Docket, p. 83.
[7] Exhibit "D"; Par. 3, Jointly Stipulated Facts, JSFI, Docket, p. 84.
[8] Exhibit "E"; Par. 4, Jointly Stipulated Facts, JSFI, Docket, p. 84.

and Revenue Regulations (R.R.) No. 7-95, as amended, petitioner filed on December 23, 2003 an administrative claim for refund of its unutilized input VAT in the total amount of P14,293,560.91, covering the four quarters of taxable year 2002.[9]

Claiming inaction on the part of the respondent on its claim and in order to suspend the running of the two-year prescriptive period under Section 112(D) of the National Internal Revenue Code (NIRC) of 1997 and Section 4.106-2(c) of Revenue Regulations No. 7-95, as amended, petitioner filed the instant Petition for Review on April 21, 2004.

In respondent's Answer filed on June 4, 2004,[10] he averred the following Special and Affirmative Defenses:

> "6. The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;
>
> 8. The grant of a claim for refund (is) tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
>
> 9. The taxes sought to he refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

After trial on the merits, without respondent presenting any evidence, this case was deemed submitted for decision on May 23, 2008,[11] considering petitioner's Memorandum filed on May 19, 2008.

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[9] Annex "H", Petition for Review; Par. 6, Jointly Stipulated Facts, JSFI, Docket, p. 84.
[10] Docket, pp. 60-62.
[11] Ibid., at p. 439.

THE ISSUES

The parties have jointly stipulated on the following issues for this Court's resolution:

> "1. Whether or not the power generation services rendered by Petitioner to PECO are subject to zero percent (0%) VAT pursuant to the EPIRA and its implementing rules and regulations;
>
> 2. Whether or not Petitioner has unutilized input VAT for the four quarters of CY 2002 in the amount of P14,293,560.91 arising from its domestic purchases of taxable goods and services and importation of goods;
>
> 3. Whether or not the unutilized input VAT are attributable to its zero-rated sales of electricity to PECO;
>
> 4. Whether or not the administrative claim for refund was seasonably filed;
>
> 5. Whether or not the unutilized creditable input taxes for the four quarters of CY 2002 are properly substantiated by invoices and official receipts;
>
> 6. Whether or not the unutilized input VAT payments for the four quarters of CY 2002 were carried over to and utilized in the succeeding taxable quarter(s) or applied against any of the output VAT liability of the Petitioner; and
>
> 7. Whether or not Petitioner is entitled to a refund and/or issuance of tax credit certificate for the unutilized input VAT payments in the amount of P14,293,560.91."[12]

THE COURT'S RULING

The controversy presented before Us is not a novel one. As a matter of fact, in a similar case involving the same parties, entitled ***Panay Power Corporation vs. Commissioner of Internal Revenue***,[13] this Court has

[12] Pars. 1 to 7, Jointly Stipulated Issues, JSFI, Docket, pp. 85-86.

[13] Panay Power Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6807, Decision dated October 30, 2006, with Writ of Execution issued on December 12, 2008 (affirmed in CTA EB Case No. 286, Decision dated October 18, 2007; and in G.R. No. 180170, Resolution dated June 23, 2008, with Entry of Judgment dated August 27, 2008).

extensively discussed the nature of the taxability of power generation services rendered by generation companies. Thus, We shall resolve the present case in the same manner.

The first issue, which is a legal issue, is resolved in the affirmative.

When Republic Act (R.A.) No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) took effect on June 26, 2001, petitioner's sales of generated power to PECO became subject to zero percent (0%) VAT, pursuant to Section 6 of Chapter II of EPIRA and Section 6 of Rule 5 of its Implementing Rules and Regulations (IRR).[14] Effectively, the corresponding provisions of the NIRC of 1997 were deemed amended by the provisions of 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%). Otherwise stated, petitioner's power generation services are no longer subject to 10% VAT as provided under the NIRC of 1997, but are now subject to 0% VAT by virtue of the amendatory provision of the EPIRA.

Said provisions of the EPIRA and its IRR state as follows:

"Republic Act No. 9136
Electric Power Industry Reform Act of 2001 (EPIRA)

CHAPTER II
Organization and Operation of the
Electric Power Industry
xxx xxx xxx

SEC. 6. *Generation Sector* – Generation of electric power, a business affected with public interest shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health,

[14] Took effect on March 22, 2002.

safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.

<u>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</u>.

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements" *(Emphasis and underscoring Ours)*

"<u>Rules and Regulations to Implement Republic Act No. 9136, entitled 'Electric Power Industry Reform Act of 2001'</u>

RULE 5
Generation Sector
xxx xxx xxx
SECTION 6. Generation Charges and VAT. —
xxx xxx xxx

(b) Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these rules."

It bears stressing that the EPIRA was formulated by the legislature to ordain reforms in the electric power industry, highlighting, among others, the importance of ensuring the reliability, security and affordability of the supply of electric power to end-users. And under the aforequoted provisions of the EPIRA and its IRR, the delivery and supply of electric energy by generation companies became VAT zero-rated, which prior thereto, were subject to ten (10%) percent VAT.

Now, considering that all the remaining issues refer to whether or not petitioner was able to comply with the legal requirements in the substantiation of its claim for refund or issuance of a tax credit certificate arising from its alleged unutilized input VAT for the four quarters of calendar year 2002 in the total amount of P14,293,560.91 arising from its domestic purchases of taxable goods and services and importation of goods, We shall discuss them jointly for convenience and brevity.

In order to qualify for VAT zero-rating under R. A. No. 9136, petitioner must prove that: (1) it is a generation company; and (2) it derived sales from power generation.

Anent the first requisite, it was jointly stipulated by the parties in their Joint Stipulation of Facts and Issues that petitioner is principally engaged in the business of generating power for lighting and power purposes and whole selling the electric power to the NAPOCOR, private electric utilities and electric cooperatives, and for the carrying on of all business incident thereto, including but not limited to the sale of the by-products of power generation; and that it is registered with and authorized by the ERC to operate facilities used in the generation of electricity.[15] Thus, petitioner satisfies the first legal requirement.

[15] Pars. 3 and 4, Admitted Facts, JSFI, Supra.

Anent the second requisite, a scrutiny of petitioner's Quarterly VAT Returns for taxable year 2002[16] reveals that petitioner did not declare any gross receipts for the first three quarters of taxable year 2002. As mentioned earlier, R.A. No. 9136 mandates that to qualify for zero-rating, petitioner must prove that it derived sales from power generation. Since petitioner did not declare any amount of gross receipts for the said first three quarters of 2002, there are no zero-rated sales to speak of. Accordingly, petitioner's alleged input VAT for the first, second, and third quarters of taxable year 2002 in the amounts of P6,947,925.81, P3,036,810.16, and P2,217,445.69, respectively, or in the aggregate amount of P12,202,181.66, cannot be refunded.

However, for the fourth quarter of taxable year 2002, petitioner reflected zero-rated sales/receipts in the amount of P167,141,267.52 in its VAT Return. The same gross receipts were derived from petitioner's power generation services rendered to PECO which were found to be duly covered by VAT zero-rated official receipts. Nonetheless, it is noted that petitioner's reported gross receipts for the period should be P169,230,688.38 instead of P167,141,267.52, as shown below:

Exhibit	Year 2002	ZERO-RATED SALES/RECEIPTS		
		Per VAT Return	Per ORs	Underdeclaration
RR-10	October	-	59,333,036.76	
RR-11	November	-	53,787,709.52	
RR-12	December		56,109,942.10	
E	4th quarter	**P 167,141,267.52**	**P 169,230,688.38**	**P 2,089,420.86**

While there is an under-declaration of P2,089,420.86, petitioner's declared gross receipts for the fourth quarter of taxable year 2002 in the

[16] Exhibits "B", "C", "D", and "E" (admitted in the Resolution dated January 3, 2008; Docket, pp. 401-402.

amount of P167,141,267.52 qualifies for zero percent VAT and petitioner may claim refund/tax credit of the proportionate amount of unutilized input VAT attributable thereto, in accordance with Section 112(A) of the NIRC of 1997, quoted hereunder as follows:

> "**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."

We now proceed to determine whether or not petitioner was able to substantiate its claimed excess input VAT in the amount of P2,091,379.25, pertaining to the fourth quarter of taxable year 2002.

Upon examination of the suppliers' invoices and official receipts[17] submitted by petitioner to support the claimed excess input VAT for the fourth quarter of taxable year 2002 in the amount of P2,091,379.25, the Court-commissioned Independent Certified Public Accountant (ICPA) in his Report[18] dated August 9, 2005, noted the following exceptions:

[17] Exhibits "NN-663" to "NN-864".
[18] Exhibit "W", pp. 5 to 7.

Findings	Attached to Exhibit W as	Exhibit No.	Input VAT
Input VAT on domestic purchases of services supported by documents other than VAT ORs	Annex A-29	NN-840 to NN-852	P 5,449.73
Input VAT on domestic purchases of goods supported by documents other VAT invoices	Annex A-30	NN-853 to NN-854	231.54
Input VAT on domestic purchases of services supported by ORs with pre-printed "TIN NVAT"	Annex A-31	NN-855	13,730.18
Input VAT on domestic purchases of goods supported by invoices with pre-ptinted "TIN NON-VAT"	Annex A-32	NN-856	2,863.62
Input VAT on domestic purchases of services supported by ORs with printed "TIN" only	Annex A-33	NN-857	2,049.09
Input VAT on domestic purchases of services supported by invoices with printed "TIN" only	Annex A-34	NN-858 to NN-860	7,486.63
Input VAT on domestic purchases of goods supported by invoices with printed "TIN NON-VAT" and stamped "TIN VAT"	Annex A-35	NN-861	12,180.00
Input VAT with no available supporting documents	Annex A-37		86,816.60
Total			**P 130,807.39**

It is noteworthy that the ICPA disallowed the input VAT of P86,816.60 due to lack of supporting documents. Although petitioner subsequently submitted documents to support P15,954.55 of the total disallowed amount, upon examination of the supporting official receipt,[19] only the amount of P10,314.05[20] was satisfactorily substantiated. Thus, out of the total claimed excess input tax for the fourth quarter of taxable year 2002 in the amount of P2,091,379.25, only the amount of P1,970,885.91, as computed hereunder, is duly substantiated in accordance with Sections 110(A) and 113(A) of the NIRC of 1997, and Sections 4.104-1, 4.104-5 and 4.108-1 of R.R. No. 7-95:

Amount of Excess Input VAT Claim		P2,091,379.25
Less: Disallowances per CPA report	P130,807.39	
Less: Input tax for which the corresponding OR was subsequently submitted	10,314.05	120,493.34
Substantiated Excess Input VAT		**P1,970,885.91**

[19] Exhibits "OOO-13"; "NNN" to "NNN-3".
[20] P113,454.55/11.

Although petitioner carried over the claimed unutilized excess input VAT for the fourth quarter of taxable year 2002 to the succeeding taxable quarters until the second quarter of taxable year 2004,[21] the same was not applied against any output VAT liability during those quarters. Moreover, in its VAT Return for the second quarter of taxable year 2004,[22] petitioner deducted the said input VAT as "Any VAT Refund/TCC Claimed" from the "Total Available Input Tax". In other words, the substantiated claim of P1,970,885.91 for the fourth quarter of taxable year 2002 did not form part of the excess input tax of P35,729,549.83 as of the end of the second quarter of taxable year 2004, which was to be carried over/applied to the succeeding third quarter of taxable year 2004.

Lastly, as to the timeliness of the filing of petitioner's claim of its unutilized excess input VAT for the fourth quarter of taxable year 2002, the Supreme Court recently held in the case of ***Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)***[23] that Section 112(A) of the NIRC of 1997 provides for the period within which to file the claim for refund or tax credit of unutilized input VAT attributable to zero-rated or effectively zero-rated sales. The pertinent portion of the High Court's Decision reads:

> "The claim for refund or tax credit for the creditable input VAT payment made by MPC embodied in OR No. 0189 was filed beyond the period provided by law for such claim. Sec. 112(A) of the NIRC pertinently reads:

[21] Exhibits "F", "G", "H", "J", "L" and "LLL".
[22] Exhibit "LLL".
[23] G.R. No. 172129, September 12, 2008.

> (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: xxx. (Emphasis ours.)

> **The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. **The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid**. xxx" (*Emphasis Ours*)

From the foregoing, the reckoning of the prescriptive period shall commence from the close of the taxable quarter when the relevant sales were made, whether or not the input VAT was paid.

The substantiated claim involves petitioner's input VAT incurred for the fourth quarter of taxable year 2002. Counting from the close of said taxable quarter, which is December 31, 2002, petitioner had until December 31, 2004 within which to file its claim both in the administrative and judicial levels.

Records reveal that considering the administrative claim for the fourth quarter of taxable year 2002 was filed on December 23, 2003,[24] while the Petition for Review covering said claim was filed on April 21, 2004, this Court finds that both fell within the two-year prescriptive period; hence, filed on time.

In sum, petitioner is entitled to the refund or issuance of tax credit certificate corresponding to its unutilized input VAT only for the fourth quarter of taxable year 2002 in the amount of P1,946,552.20, computed as follows:

Substantiated Excess Input VAT		P 1,970,885.91
Multiply by the Ratio:		
Declared Gross Receipts Per Return	P167,141,267.52	
Total Gross Receipts per Official Receipts	P169,230,688.38	0.987653
Refundable Excess Input VAT		**P1,946,552.20**

WHEREFORE, in view of the foregoing considerations, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** or, in the alternative, **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner the reduced amount of **ONE MILLION NINE HUNDRED FORTY SIX THOUSAND FIVE HUNDRED FIFTY TWO PESOS AND 20/100** (P1,946,552.20) representing unutilized input VAT for the fourth quarter of taxable period 2002.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

[24] Exhibit "A-2".

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.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ERNESTO D. ACOSTA
Presiding Justice