REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, ***Petitioner,***	**C.T.A. E.B. NO. 123** **(C.T.A. CASE NO. 6340)** Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
MIRANT (PHILIPPINES) OPERATIONS CORPORATION, ***Respondent.***	**Promulgated:** JAN 17 2006

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition For Review filed by the Commissioner of Internal Revenue (hereafter "petitioner CIR") under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals),* in relation to *Rule 43 of the Rules of Court,* which seeks the reversal of the Decision dated May 18, 2005 granting the Petition For

Review, but in the reduced amount of P38,620,427.00, and the Resolution dated September 22, 2005 denying both Mirant (Philippines) Operations Corporation's, "Motion For Partial Reconsideration" and the Commissioner of Internal Revenue's "Motion For Partial Reconsideration". The respective dispositive portions of the Decision and Resolution read as follows:

> "**IN VIEW OF ALL THE FOREGOING**, the instant Petition for Review is hereby **GRANTED** but in a reduced amount of P38,620,427.00. Accordingly, respondent is **ORDERED TO REFUND**, or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P38,620,427.00 representing unutilized creditable withholding taxes for taxable year 2000.
>
> **SO ORDERED**."
>
> "**WHEREFORE**, in view of the foregoing, both motions filed by petitioner and respondent are hereby **DENIED** for lack of merit and the pronouncement reached in the assailed DECISION is hereby **REITERATED**.
>
> **SO ORDERED**."

THE FACTS

The facts are not in dispute: Oul

Respondent Mirant (Philippines) Operations Corporation (hereafter "respondent Mirant") is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province (*par. 1, Stipulation of Facts*).

It secured with the Securities and Exchange Commission (SEC) its Certificate of Filing of Amended Articles of Incorporation, reflecting its change of name from Southern Energy Asia-Pacific Operations (Phils.), Inc. to Mirant (Philippines) Operations Corporation on April 30, 2001. Prior to its use of the name Southern Energy Asia-Pacific Operations (Phils.) Inc., it operated under the corporate names CEPA Operations (Philippines) Corporation, CEPA Tileman Project Management Corporation and Hopewell Tileman Project Management Corporation. The change of its corporate name from CEPA Operations (Philippines) Corp. to Southern Energy Asia-Pacific Operations (Phils.) Inc., from CEPA Tileman Project Management Corporation to CEPA Operations (Philippines) Corp. and from Hopewell Tileman Project Management Corp. to CEPA Tileman Project Management Corp. were approved by the

SEC on November 24, 2000, November 21, 1997 and July 29, 1994 respectively (*pars. 4-6, Stipulation of Facts*).

It is duly licensed to do business in the Philippines and is primarily engaged in the business of designing, constructing, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plants and related facilities for the conversion into electricity of coal, distillate and other fuel provided by and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government owned or controlled corporations or other entity engaged in the development, supply or distribution of energy (*par. 2, Stipulation of Facts*).

It then entered into Operating and Management Agreements with Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.) and Mirant Sual Corporation (formerly Southern Energy Pangasinan, Inc.) to provide these corporations with maintenance and management services in connection with the operation, construction and commissioning of the coal-fired power stations situated in Pagbilao, Province of Quezon and Sual, Province of Pangasinan, respectively.

On October 15, 1999, it filed with the Bureau of Internal Revenue (BIR) its income tax return for the fiscal year ended June 30, 1999 (*Exhibit "L"*) declaring a net loss of P235,291,064.00 and unutilized tax credits of P32,263,388.00, detailed as follows:

Gross Income	P (64,438,434.00)
Less: Deductions	170,852,630.00
Net Loss	P (235,291,064.00)
Income Tax Due	P -
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	P 32,263,388.00

It opted to have the excess amount of P32,263,388.00 refunded.

On April 17, 2000, respondent Mirant filed with the BIR an amended income tax return for fiscal year ended June 30, 1999 (*Exhibit "M"*) reporting an increased net loss amount of P379,324,340.00 but reporting the same unutilized tax credits of P32,263,388.00, which it opted to carry-over as tax credit to the succeeding taxable year, thus:

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Gross Income	P (131,113,036.00)
Less: Deductions	248,211,204.00
Net Loss	P (379,324,240.00)
Tax Due	P -
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	P 32,263,388.00

To synchronize its accounting period with those of its affiliates, respondent Mirant allegedly secured the approval of the BIR to change its accounting period from fiscal year (FY) to calendar year (CY), effective December 31, 1999. Thus, on April 17, 2000, it filed its income tax return for the interim period July 1, 1999 to December 31, 1999 (*Exhibit "N"*) declaring a net loss in the amount of P381,874,076.00 and unutilized tax credits of P48,626,793.00, computed as follows:

Gross Income	P (320,895,462.00)
Less: Deductions	60,978,614.00
Net Loss	P (381,874,076.00)
Tax Due	P -
Less: Prior Year's Excess Credits	32,263,388.00
Creditable Tax Withheld	
First Three Quarters	16,363,405.00
Fourth Quarter	-
Tax Overpayment	P 48,626,793.00

It indicated the excess amount of P48,626,793.00 as "To be carried over as tax credit next year/quarter".

On April 10, 2001, it filed with the BIR its income tax return for the calendar year ended December 31, 2000 (*Exhibit "O"*) reflecting a net loss of P56,901,850.00 and unutilized tax credits of P87,345,116.00, computed as follows:

Gross Income	P (4,080,541.00)
Less: Deductions	52,821,309.00
Net Loss	P (56,901,850.00)
Tax Due	P -
Less: Prior Year's Excess Credits	48,626,793.00
Creditable Tax Withheld	
First Three Quarters	25,336,971.00
Fourth Quarter	13,381,352.00
Tax Overpayment	P 87,345,116.00

It indicated the excess amount of P87,345,116.00 as "To be refunded".

On September 20, 2001, respondent Mirant filed with the BIR a letter claiming for the refund of the amount of P87,345,116.00 representing overpaid income tax for the FY ended June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 and CY ended December 31, 2000 (*Exhibit "GG"*).

As the two-year prescriptive period for the filing of a judicial claim under *Section 229 of the National Internal Revenue Code (NIRC) of 1997* was about to lapse without action on the part of petitioner CIR, on October 12, 2001, respondent Mirant filed a "Petition For Review" before the Court in Division, docketed as C.T.A. Case No. 6340.

In his Answer, petitioner CIR interposed the following special and affirmative defenses:

> "4. Petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the respondent's Bureau.
>
> 5. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.
>
> 6. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable.
>
> 7. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to adduce sufficient proof is fatal to the action for tax refund/credit.
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> 8. Moreover, petitioner must show compliance with the provisions of Sections 76, 204(C) and 229 of the Tax Code, as amended.
>
> 9. Finally, there is no way to dispute the cardinal rule in taxation that tax exemptions are highly disfavored in

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> law and he who claims tax exemption must be able to justify his claim or right. The exemption cannot be established by mere implication but it must be clearly expressed (Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, et al., 64 SCRA 555)."

After trial on the merits, the First Division of this Court rendered judgment in the terms earlier set forth.

Not satisfied, both Mirant (Philippines) Operations Corporation and the Commissioner of Internal Revenue filed their respective Motions For Partial Reconsideration, which the First Division denied in its Resolution dated September 22, 2005.

ISSUES

Hence, this Petition For Review raising the following grounds, to wit:

I

THE ADMINISTRATIVE CLAIM FOR REFUND FILED BY RESPONDENT IS MERE *PRO-FORMA*.

II

RESPONDENT FAILED TO PROVE THAT THE SUBJECT CLAIM FOR REFUND WAS FILED, ADMINISTRATIVELY AND JUDICIALLY, WITHIN THE STATUTORY PERIOD OF TWO (2) YEARS.

III

RESPONDENT FAILED TO PROVE THAT THE INCOME FROM WHICH THESE CREDITABLE TAXES WAS WITHHELD WAS DULY DECLARED AS PART OF RESPONDENT'S INCOME IN ITS ANNUAL INCOME TAX RETURNS.

IV

RESPONDENT FAILED TO PROVE THAT THE CREDITABLE WITHHOLDING TAXES AMOUNTING TO P38,620,427.00 ARE DULY SUPPORTED BY VALID CERTIFICATES OF CREDITABLE TAX WITHHELD AT SOURCE.

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THE REPORT OF THE INDEPENDENT CPA DATED FEBRUARY 21, 2003 SHOWS SEVERAL MATERIAL DISCREPANCIES.

VI

RESPONDENT FAILED TO DISCHARGE ITS BURDEN OF PROVING ITS ENTITLEMENT TO A REFUND.

On October 28, 2005, We required respondent Mirant to file its comment on the petition, within ten (10) days from notice. On December 15, 2005, it filed its "Comment (To Petitioner's Petition For Review)".

<u>THIS COURT *EN BANC'S* RULING</u>

The petition is without merit.

After a careful examination of the arguments raised in the instant petition, the Court *En Banc* finds that the six (6) grounds raised by petitioner CIR are a mere rehash of his Memorandum and Motion For Partial Reconsideration filed with the First Division of this Court and present no new arguments nor new matters which have not been considered and passed upon by the First Division in the assailed Decision and Resolution. Nevertheless, the Court *En Banc* will discuss them *in seriatim.*

As regards the first issue, petitioner CIR claims that respondent Mirant failed to prove compliance with the submission of documentary requirements, as prescribed in Revenue Memorandum Order No. 53-98 in connection with the filing of the administrative claim for refund. He further alleges that the judicial claim for refund was filed on October 12, 2001, barely several days after the respondent filed its administrative claim for refund on September 20, 2001. Thus, in a strict sense, there was no compliance with the condition precedent of filing an administrative claim for refund, it being considered a mere *pro forma* claim, prior to the filing of the judicial action for refund.

Petitioner CIR further contends that respondent Mirant likewise failed to submit to the BIR copies of the withholding tax certificates when it filed its claim for refund that would have shown its entitlement to the refund.

We disagree.

The law is explicit that when the two-year period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon, the taxpayer should file a Petition For Review with the Court of Tax Appeals within the prescribed two-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the two-year period, he can no longer appeal the same to the Court of Tax Appeals. The claim for refund with the Bureau of Internal Revenue and the subsequent appeal to the Court of Tax Appeals must therefore be filed within the two-year period. If, however, the Commissioner takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Commissioner (*Commissioner of Internal Revenue vs. Victorias Milling Co., Inc., 22 SCRA 12*).

Even granting that respondent Mirant failed to submit to the BIR copies of the withholding tax certificates when it filed its administrative claim for refund, the same is not a valid ground to dismiss the present petition. As aptly ruled by the First Division:

> "Second, let it be stressed that Revenue Memorandum Order (RMO) No. 53-98 dated June 1, 1998, entitled 'Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket' refers mainly to the requirements for refund/tax credit in the administrative level when the taxpayer is required to submit for audit all his/its pertinent documents/records for the purpose of establishing the veracity of his/its claim for refund/credit. However, in the judicial level, i.e., when the case is elevated to this Court, We are governed by Our own Rules of Court on the matter of proving a case.
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> Moreover, We have already laid down in a number of similar cases the three requisites which the taxpayer, in claiming for a refund of excess creditable withholding tax, must comply with which We have quoted earlier. These requisites were subsequently affirmed by the Supreme Court in the case of Citibank, N.A. vs. Court of Appeals, 280 SCRA 459 dated October 10, 1997."

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As to the next issue, We concur with the First Division of this Court that both respondent Mirant's administrative claim filed on September 19, 2001 (*Exhibit "GG"*) and Petition For Review filed on October 12, 2002 were timely filed. Respondent Mirant filed its income tax return for taxable year ended December 31, 2000 on April 10, 2001 (*Exhibit "O-1"*). Counting from this date, it had until April 10, 2003 within which to file its claim for refund/tax credit certificate both in the administrative and judicial levels. Clearly, respondent Mirant has complied with the two-year prescriptive period, prescribed under *Section 204(C),* in relation to *Section 229 of the NIRC of 1997, as amended.*

As regards petitioner CIR's contention that respondent Mirant was not able to establish that the income upon which the creditable withholding taxes were paid was included in respondent's Income Tax Returns, a perusal of the records reveals otherwise. The reported creditable taxes withheld of P38,718,323.00 were withheld from the services fees of P871,127,253.00 received by respondent from its affiliates, the Southern Energy Quezon, Inc. and the Southern Energy Pangasinan, Inc., pursuant to the Operating and Maintenance Service

Agreements entered into by respondent Mirant with said entities (*Exhibits "HH", "K", & "K-1"*). The gross income figure of P871,127,253.00 is the very same amount declared by respondent in its income tax return for taxable year 2000 (*Exhibits "O-11" & "O-12"*).

Contrary to petitioner CIR's contention, the fact of withholding was likewise established through respondent's presentation of the Certificates of Creditable Tax Withheld At Source, duly issued to it by Southern Energy Pangasinan, Inc. and Southern Energy Quezon, Inc., for the year 2000 (*Exhibits "Y"," Z", "AA" to "FF"*). These certificates were found by the duly commissioned independent CPA to be faithful reproductions of the original copies, as per his Supplementary Report dated March 24, 2003 (*Exhibit "RR"*).

As to petitioner CIR's contention that the Report of the independent CPA dated February 21, 2003 shows several discrepancies, We sustain the findings of the First Division. On direct examination, Mr. Ruben Rubio, the duly commissioned independent CPA, testified and explained that the discrepancy was merely brought about by: (1) the difference in foreign exchange (forex) rates at the time the certificates were recorded by respondent Mirant and the forex rates used at the time the certificates were issued by its customers; and (2) the timing difference between the point when respondent Mirant recognized or accrued its income and the time when the corresponding creditable tax was withheld by its customers. Thusly:

> "DIRECT EXAMINATION:
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> ATTY. ESPINAR:
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> Q. After you have conducted the audit, examination, evaluation, under the procedures that you have described, what are your additional findings and observations?
>
> MR. RUBIO:
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> A. As requested by the Honorable Court, we discussed the additional observations that we have reported in the Report and as requested by the Honorable Court, the Court requested us to give our comments on what is the impact of these observations in the claim.
>
> One observation is that, there is a difference between the amount of creditable withholding tax per Certificate and the amount of creditable withholding tax per General Ledger and Income Tax Return, which was the basis for the filing of claim for refund.
>
> As discussed in the said Report, these differences are accounted for by the differences in the exchange rate at the time that these Certificates were recorded, and

> the rate that is used by the customer in issuing the said Certificate. The amount per Certificate is higher than 520,127.00. In other words, the amount that is the subject matter of the claim is lower, considering that the petitioner used the lower exchange rates, since it was recorded earlier. In that sense, it has no effect in the amount of the claim for refund.
>
> The other contribution that we have is, the timing difference. As discussed in the Report, the company records the amount of creditable withholding tax at the time of accrual and the certificate that was issued by the customers consisting of Certificates coming from the current year and subsequent year because it is issued upon payment." (*TSN, May 20, 2003, pp. 12-14*)

As extensively discussed by the First Division:

> "The creditable withholding taxes of P40,600,971.79 reflected in the certificates were higher by P1,882,648.79 when compared with the creditable withholding taxes of P38,718,323.00 reported by petitioner in its income tax return for taxable year 2000 (*Exhibit 0-7*). As stated by SGV & Co. in its report dated February 21, 2003 (*Exhibit NN*), tax credits were claimed by petitioner in its income tax return for taxable year 2000 prior to its receipt of the certificates from the withholding agents. At the time it recognized and accrued its income, petitioner also reported the related creditable withholding taxes, which was prior to the receipt of the certificates from the withholding agents. Hence, the discrepancy of P1,882,648.79 in creditable withholding taxes was mainly brought about by the difference between the foreign exchange (forex) rates used at the time when petitioner recorded its income and the related tax credits and the forex rates used by the withholding agents at the time when income payments were made to petitioner and

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creditable taxes were withheld therefrom as summarized in *Exhibit QQ*. Considering that most of the forex rates used by the withholding agents were higher than those used by petitioner in reporting its tax credits, the same do not have a bearing on petitioner's total claim because the resulting increase in the amounts of creditable withholding taxes reflected in the certificates were not declared by the petitioner in its income tax return for the said year. However, for the creditable taxes withheld by Southern Energy Quezon, Inc. for the period October 1, 2000 to December 31, 2000 totalling P7,670,746.00 (which formed part of the creditable withholding taxes of P8,834,280.11 shown in the certificate marked as *Exhibit EE*), the same were based on forex rates which were lower than those used by petitioner in recognizing the tax credits of P7,763,742.00 for the same transactions. In other words, petitioner's claimed unutilized tax credits of P92,996.00 (P7,763,742.00 less P7,670,746.00) were not covered by the withholding tax certificate issued by Southern Energy, Quezon Inc. for the period October 1, 2000 to December 31, 2000 and should therefore be deducted from the total claim of P38,718,323.00. Below is the breakdown of the amount of P92,996.00:

Exhibits	Period Covered	Withholding Agent	Creditable Withholding Taxes Per Certificate (a)	Creditable Withholding Taxes Per ITR (b)	Overclaimed Tax Credits (b) - (a)
EE, QQ	10/01/00 - 12/31/00	Southern Energy Quezon, Inc.	P 4,298,892.00	P 4,350,327.00	P 51,435.00
			3,371,854.00	3,413,415.00	41,561.00
			P 7,670,746.00	P 7,763,742.00	P 92,996.00

The reconciliation schedule also shows that for the creditable taxes of P745,290.00 withheld by Southern Energy Quezon Inc. for the period October 1, 2000 to December 31, 2000 on petitioner's Philippine peso billings under Invoice No. 0015, the corresponding creditable taxes claimed by petitioner in

> its 2000 income tax return amounted to P750,190.00 which were higher by P4,900.00 than those reflected in the certificate. Accordingly, the amount of P4,900.00 shall be deducted from petitioner's total claim.
>
> In fine, this Court finds that of the total unutilized tax credits of P38,718,323.00 declared by petitioner in its 2000 income tax return, only the amount of P38,620,427.00 (P38,718,323.00 less P92,996.00 less P4,900.00) was duly substantiated by withholding tax certificates."

For all the foregoing, the Court *En Banc* finds respondent Mirant to have sufficiently substantiated its claimed creditable withholding taxes for taxable year 2000 in the amount of P38,620,427.00.

In sum, We see no reason to reverse the assailed Decision dated May 18, 2005 and Resolution dated September 22, 2005 of the First Division of this Court.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice