REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT (PHILIPPINES) MOBILE CORPORATION [formerly SOUTHERN ENERGY MOBILE, INC.],
Petitioner,

- versus -

C.T.A. CASE NOS. 5935 & 5969

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JAN 15 2002
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DECISION

These two Petitions for Review are seeking for the refund or issuance of a tax credit certificate of alleged unutilized input value-added tax (VAT, for brevity) on domestic purchases of goods and services in the total amount of P19,823,393.39 broken down as follows:

CTA Case No.	Period Involved	Amount
5935	Third Quarter of 1997	P16,934,405.66
5969	Fourth Quarter of 1997	2,888,987.73
T o t a l		P19,823,393.39

These two cases were consolidated per resolution of this Court during the hearing held on March 3, 2000 upon written motion of the counsels for the Petitioner (see Minutes of the session, March 3, 2000, CTA records, p. 44).

The facts of the case are briefly stated as follows:

Petitioner is a corporation duly existing under and by virtue of the laws of the Philippines with office address located at Suite 202, CTC Building, 2232 Roxas Boulevard, Pasay City. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation under a Rehabilitate, Operate, Transfer (ROT) Scheme. It is registered with the Bureau of Internal Revenue as a VAT taxpayer with Certificate of Registration bearing RDO Control No. 96-051-005719. It was originally registered with the Securities and Exchange Commission under the name "Hopewell Mobile Power Systems Corporation".

On March 1, 1996, Petitioner filed with the BIR Revenue District Office No. 51 an Application for Effective Zero Rating of its sale of services to the National Power Corporation for the operation and maintenance of the latter's power barges under the ROT scheme. Likewise, it sought a confirmatory ruling with the VAT Review Committee of the BIR National Office on September 17, 1998, to seek the latter's opinion on whether or not the fixed operating and management fees and energy fees it received from NPC for the supply of electricity are effectively subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997.

On March 11, 1999, Petitioner received VAT Ruling No. 022-99 from the Respondent confirming the view that the fixed operating and management fees and energy fees received from NPC for its sale of electricity are subject to zero (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997.

For the third and fourth quarters of 1997, Petitioner seasonably filed its quarterly Value-Added Tax Returns. These VAT returns were simultaneously amended on October 15, 1999, reflecting zero rated sales in the amount of P156,860,270.58 for the third and fourth quarters of 1997 with a corresponding aggregate input taxes of P19,823,393.39 for the same period (Exhibits "A" and "B").

On June 30, 1999, Petitioner filed its administrative claim for refund with the Bureau of Internal Revenue based on its theory that its sales of services to the NPC are subject to VAT at 0% hence it is now entitled to the refund of unutilized input VAT attributable thereto (see Consolidated Joint Stipulation of Facts and Issues, paragraph no. 7).

The inaction of Respondent on its claim for refund compelled Petitioner to file the instant petitions for review on September 29, 1999 and December 6, 1999 in order to toll the running of the two-year prescriptive period under the law. The petition for review for the third quarter of 1997 was docketed as CTA Case No. 5935 while the petition for review for the fourth quarter of 1997 was docketed as CTA Case No. 5969.

The consolidated issues to be resolved by the Court are as follows:

1. Whether or not Petitioner is a value-added tax (VAT) taxpayer;

2. Whether or not the operation and maintenance of power barges for the supply of electricity to the National Power Corporation is subject to zero percent (0%) VAT pursuant to Section 102(b)(3) of the Old Tax Code (now Section 108(B)(3) of the National Internal Revenue Code of 1997);

3. Whether or not Petitioner has unapplied or unutilized creditable input value-added taxes for the third and fourth quarters of 1997 arising from its domestic purchases of goods and services which are attributable to its zero-rated sales and proper object of a claim for refund pursuant to Section 108(B)(3) (formerly Sec. 102(b)(3) of the Old Tax Code) and Section 112(A) (formerly Section 106(b) of the Old Tax Code) of the National Internal Revenue Code of 1997;

4. Whether or not the said unapplied or unutilized creditable input value-added taxes for the third and fourth quarters of 1997 were carried forward to the succeeding taxable quarters and applied against any of the output value-added tax of Petitioner; and

> 5. Whether or not Petitioner complied with the requirements necessary for the refund of VAT input taxes amounting to P16,934,405.66 and P2,888,987.73 representing its alleged unutilized input value-added tax for the third and fourth quarters of 1997, respectively.

The fact that Petitioner is a VAT-registered taxpayer is not disputed. The parties had already stipulated that Petitioner is a VAT-registered taxpayer with BIR Certificate of Registration bearing RDO Control No. 96-051-005719 (see, Consolidated Joint Stipulation of Facts and Issues, paragraph no. 2, CTA records, p. 64).

We now proceed to the second issue.

Petitioner asserts that the services it rendered to the National Power Corporation are subject to 0% VAT pursuant to Section 102(b)(3) of the Tax Code, as amended, quoted, thus:

> **Sec. 102. Value-added tax on sale of services and use or lease of properties**. – (a) xxx
>
> (b) **Transactions subject to zero-rate**. – The following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> (1) xxx
>
> (2) xxx
>
> (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 rate.

In line with the foregoing provision of the Tax Code as reference, Petitioner now seeks the refund of the input VAT it paid during the period July 1, 1997 to December 31, 1997 in accordance with Section 106(a) of the Tax Code, which provides:

> **SEC. 106**. *Refunds or tax credits of creditable input tax*. - (a) 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.

On the other hand, Respondent argues that Petitioner is not entitled to the refund because of its failure to present an approved application for zero-rating. He cites as basis the ruling of this Court's in the case of **ABB Power Generation Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 5270, dated March 3, 1999**[1]. Hereunder are excerpts of the aforementioned decision, thus:

> Moreover, granting *arguendo*, that petitioner's sale of services to the NPC are considered effectively zero-rated sales under Section 102(a)(3) of the Tax Code, supra, nevertheless, this Court has to deny the instant claim for refund as petitioner failed to comply with Section 8(d) of Revenue Regulations No. 5-87 which requires that any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application with the Commissioner of Internal Revenue justifying the imposition of zero-rate on said transactions. Quoted hereunder is Section 8(d) of Revenue Regulations No. 5-87, thus:
>
> > (d) Application for zero rate. – Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero-rate on the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked.
>
> (F)ailure to get an approval from the Commissioner for a zero-rating classification will make the said sale of services by Petitioner to NPC an EXEMPT transaction under paragraph (u) of Art. 103 of the Tax Code, thus, petitioner shall not be entitled to the refund of any input tax it paid on its purchase of goods and services during the period in question.

We shall therefore resolve the issue based on existing law, jurisprudence, and evidence on record.

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[1] With Entry of Judgment, dated March 24, 1999.

It is not disputed that Petitioner failed to secure from the Bureau of Internal Revenue an approved application for effective zero-rating. However, records show that as early as March 1, 1996, Petitioner had already filed with the Revenue District Office No. 51 of Pasay City an application for effective zero-rating with respect to its sales of services to NPC but the latter office failed to process the same.

In the case of **Ernesto M. Maceda vs. Hon. Catalino Macaraig, G. R. No. 88291, May 31, 1991,** the total exemption of National Power Corporation (NPC) from all kinds of taxes whether direct or indirect was already settled by the Supreme Court. The NPC's exemption from all kinds of taxes was further elucidated by the High Court in its Resolution dated June 8, 1993 resolving the same issue in the motion for reconsideration, and we quote, thus:

> 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$4 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.

In the light of the aforementioned decision, the Secretary of the Department of Finance issued a Memorandum dated January 28, 1998, addressed to the Commissioner of Internal Revenue, upholding the ruling of the Supreme Court with respect to the total exemption of NPC from all kinds of taxes and further ruled that purchases by NPC of electricity from independent power producers are subject to VAT at 0%. Pertinent portions of said memorandum read as follows:

> 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 P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional charge of P0.059 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the ultimate benefit of the Filipino consumer.
>
> 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, <u>the purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate</u>. (Underlining supplied).

The affirmations of both the Supreme Court and the Secretary of Finance regarding NPC's exemption from all kinds of taxes should be enough bases for the Revenue District Officer of RDO No. 51 to approve the pending application of Petitioner. However, the said office chose to be silent on the matter (probably) because its approval would result to the granting of Petitioner's claim for refund.

It cannot be denied that Petitioner failed to secure an approved application for effective zero-rating with the RDO No. 51 of Pasay City. However, the inaction of the said office regarding the application should not be taken against Petitioner. In fact, the Respondent had already issued VAT Ruling No. 022-99 confirming Petitioner's view that the fixed operating and management fees and energy fees received from NPC for the sale of electricity are subject to zero percent (0%) VAT pursuant to Section 109(B)(3) of the Tax Code of 1997. (see also VAT Ruling Nos. 015-99, 052-99, 067-99, 018-00; BIR

Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA209-04-04-99). Clearly, Petitioner is legally entitled to the refund sought.

Records show that Petitioner is engaged in selling electricity to NPC. Consequently, the payments received by the Petitioner from NPC for the services rendered in the generation and sale of electricity are subject to VAT at zero percent.

The Court's ruling in the ABB case cannot be applied to the peculiar circumstances surrounding the present case. In the ABB case, Petitioner failed to file an application for effective zero-rating while Petitioner herein did. Thus, there is a total absence of effort on the part of Petitioner ABB in securing the needed approval. This is contrary to the present case where Petitioner, as early as March 1, 1996, had already filed its application.

In a case involving a similar issue entitled **Mirant (Navotas II) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5911 promulgated in December 18, 2001**, this Court ruled that the failure of Respondent to act on a pending application for zero-rating should not be the sole basis for denying the claim for refund and we quote, thus:

> "We note that as early as March 1, 1996, Petitioner filed with Respondent's Revenue District Office (RDO) No. 51 Pasay City an Application for Effective Zero Rating. However, up to this time, Respondent has failed to act upon said application. We believe that if Respondent had a valid ground to disapprove the application, he would have done so swiftly instead of "sitting on" the application for an interminable length of time to the detriment of the taxpayer's rights.
>
> With this in mind, this Court had decided to study the factual aspects of the claim for refund instead of dismissing the same based on a technicality." (Underlining supplied)

The legal issue having been settled, we shall now proceed to the factual aspects of the case which are the remaining issues at bar.

Records disclose that Petitioner received capacity and energy fees from the National Power Corporation for the period July to December 1997 in the aggregate amount of P156,860,270.58 (Exhibits M-3 and N-3). These fees were all supported by invoices or official receipts and were declared in Petitioner's third and fourth quarterly VAT returns (Exhibits A-1, B-1, J-1 to J-106, and K-1 to K-77), respectively. Since the services of Petitioner are subject to VAT at 0% based on the aforementioned rulings, it is therefore entitled to the refund of input taxes attributable thereto. However, Petitioner must still prove with substantial evidence the accumulated input taxes in the total amount of P19,823,393.39 for the period July 1, 1997 to December 31, 1997.

A comparison of the report of the commissioned independent CPA with the submitted VAT invoices and official receipts, discloses that the input taxes in the amount of P708,599.80 should be disallowed for the following reasons: (Exhibits G to G-3)

Findings	3rd Quarter	4th Quarter	Total
I. Input Taxes on Local Puchases of Services			
1. Supported by TAN-VAT ORs (*Annex A*)	P 11,843.55	P 30,564.72	P 42,408.27
2. Supported by Stamped/Handwritten TIN-V ORs (*Annex B*)	1,909.09	6,727.28	8,636.37
3. Supported by Non-VAT ORs (*Annex C*)	26,590.92	9,039.63	35,630.55
4. Supported by Undated Ors (*Annex D*)	4,778.00	2,452.51	7,230.51
5. Supported by VAT Invoices, not VAT ORs (*Annex E*)	55,851.37	95,563.79	151,415.16

II. Input Taxes on Local Purchases of Goods			
1. Supported by Stamped TIN-V Invoices *(Annex F)*		5,154.61	5,154.61
2. Supported by TIN Invoices (*Annex G*)	1,601.05	2,518.18	4,119.23
3. Supported by TAN-VAT Invoice *(Annex H)*	727.27		727.27
4. Supported by VAT Ors, Not VAT Invoices (*Annex I*)		24,871.46	24,871.46
III. Input Taxes on Local Purchases of Goods and Services Without Supporting Documents (*Annex K*)	58,470.91	369,935.46	428,406.37
Total	P161,772.16	P546,827.64	P708,599.80

It was further ascertained that the input taxes claimed for the third and fourth calendar quarters of 1997 in the total amount of P19,823,393.39 were already deducted by Petitioner from the accumulated input taxes as of September 30, 1999 as evidenced by the 1999 third Quarterly VAT Return (Exhibits C, C-1, C-2, and C-3).

In sum, Petitioner is entitled to the claim for refund in a reduced amount of P19,114,793.59, computed as follows:

	3rd Qtr 1996	4th Qtr 1996	Total
Input Taxes Claimed	P16,934,405.66	P2,888,987.73	P19,823,393.39
Less: Exceptions Noted by the independent CPA	161,772.16	546,827.64	708,599.80
Refundable Input Taxes	P16,772,633.50	P2,342,160.09	P19,114,793.59

WHEREFORE, in view of the foregoing, the petitions for review are hereby partially **GRANTED**. Respondent is **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the amount of P19,114,793.59 in favor of Petitioner.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge