REPUBLIC OF THE PHILIPPINES

Court of Tax Appeals

QUEZON CITY

Special Third Division

HEDCOR SIBULAN, INC., *Petitioner,*	**CTA CASE NO. 8014** (CTA *EB* No. 987) (G.R. No. 212460)
-versus-	Members: ***Bautista,*** *Chairperson* ***Fabon-Victorino,*** *and* ***Ringpis-Liban,*** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: AUG 15 2017 3:00 p.m.

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AMENDED DECISION

BAUTISTA, J:

This is a Petition for Review filed by petitioner Hedcor Sibulan, Inc. praying for the refund or the issuance of a tax credit certificate ("TCC") in the amount of Php15,301,194.87 representing its unutilized input value-added tax ("VAT") on purchases of goods and services for the fourth quarter of calendar year ("CY") 2007, attributable to petitioner's zero-rated sales of generated power.

At the outset, the Court wishes to provide the following factual background of the case, commencing from the September 18, 2012 Decision of the Court.

CTA Third Division

On September 18, 2012, the Court promulgated a Decision[1] stating that no decision has yet been rendered by respondent, neither

[1] *Records, Vol. 2, CTA Case No. 8014, Decision,* pp. 803-816; penned by now retired Associate Justice Olga Palanca-Enriquez ("AJ Palanca-Enriquez"), and concurred to by now retired Associate Justice Amelia R. Cotangco-Manalastas ("AJ Cotangco-Manalastas"). Associate Justice Lovell R. Bautista

was there inaction on his part, as the one hundred and twenty (120)-day period to decide has not yet lapsed; and that, thus, the Court of Tax Appeals ("CTA") has not acquired jurisdiction over petitioner's claim for refund or credit of unutilized input VAT for the fourth quarter of CY 2007, for having been prematurely filed. Accordingly, the Petition for Review was dismissed for lack of jurisdiction.

Petitioner filed its Motion for Reconsideration[2] *via* registered mail on October 8, 2012; and its Supplemental Motion for Reconsideration[3] was thereafter filed on October 23, 2012. Respondent replied through a Comment/Opposition (Re: Petitioner's Motion for Reconsideration and Supplemental Motion for Reconsideration)[4] filed on November 16, 2012.

Thereafter, on February 13, 2013, the Court in Division issued a Resolution[5] denying the Motion for Reconsideration for lack of merit.

CTA *En Banc*

After being granted an extension[6] and on March 18, 2013, petitioner then filed before the CTA *En Banc* a Petition for Review[7], which was docketed as CTA *EB* No. 987. Respondent then filed his Comment[8] thereto on May 20, 2013.

The CTA *En Banc* promulgated a Decision[9] dated October 7, 2013 granting the Petition for Review and remanding the case to the Court for the proper and immediate determination of the propriety of the claim for refund or the issuance of a TCC; and consequently, the declaration of the specific amount to which petitioner is entitled, if any.

("AJ Bautista") dissented, voting for the Petition for Review to be given due course since the administrative and judicial claims were filed within the prescribed periods.

[2] *Records, Vol. 2, Motion for Reconsideration,* pp. 854-882.

[3] *Id., Supplemental Motion for Reconsideration,* pp. 889-893.

[4] *Id., Comment/Opposition (Re: Petitioner's Motion for Reconsideration and Supplemental Motion for Reconsideration),* pp. 906-924.

[5] *Id., Resolution,* pp. 926-929; penned by now retired AJ Cotangco-Manalastas, with AJ Bautista maintaining his dissent and Associate Justice Cielito N. Mindaro-Grulla ("AJ Mindaro-Grulla") concurring (as acting member for the purpose of attaining the majority concurrence of the members).

[6] *Records, Vol. 2, Motion for Extension of Time to File Petition for Review,* pp. 930-933; *Records, Vol. 2, Minute Resolution,* p. 934.

[7] *Records, Vol. 2, Petition for Review with the CTA En Banc,* pp. 935-965.

[8] *Id., Comment with the CTA En Banc,* pp. 1002-1008.

[9] *Id., Vol. 3, Decision of the CTA En Banc,* pp. 1106-1119; penned by Presiding Justice Roman G. Del Rosario, and concurred to by all the other Associate Justices.

On November 7, 2013, respondent filed a Motion for Reconsideration (Re: Decision promulgated on Oct. 7, 2013), which was denied by the CTA *En Banc* on April 29, 2014 for lack of merit.

Supreme Court

On June 27, 2014, respondent filed his Petition for Review on *Certiorari*[10] with the Supreme Court ("SC"), docketed as G.R. No. 212460, after praying[11] for and being granted[12] an extension.

In a Resolution dated July 23, 2014, the Second Division of the SC considered the allegations, issues, and arguments adduced in the Petition for Review on *Certiorari* assailing the Decision and the Resolution of the CTA *En Banc*. However, it denied respondent's Petition for Review on *Certiorari* for failure to show any reversible error in the assailed judgment to warrant the exercise by the SC of its discretionary appellate jurisdiction in the case.

The SC sent a Notice[13] to the CTA *En Banc via* registered mail on September 10, 2014, reiterating the contents of the July 23, 2014 Resolution.

On February 18, 2015, the CTA *En Banc* received a Letter of Transmittal[14] from the SC transmitting a photocopy of the Entry of Judgment[15]. The said Letter states that as of October 3, 2014, the July 23, 2014 Resolution has become final and executory and was recorded on the Book of Entries of Judgments.

On June 21, 2017, the Court ordered the parties to file their respective Manifestations regarding any supervening event that might affect the determination of petitioner's claim, for refund or for the issuance of a TCC, within a period of five (5) days from receipt thereof.[16]

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[10] *Records, Vol. 3, Petition for Review with the Supreme Court,* pp. 1124-1149.
[11] *Id., Motion for Extension of Time to File Petition for Review,* pp. 1120-1122.
[12] *Id., Minute Resolution,* p. 1150.
[13] *Id., Notice,* p. 1151.
[14] *Id., Letter of Transmittal,* pp. 1153-1154.
[15] *Id., Entry of Judgment,* p. 1155.
[16] *Records, Vol. 3, Resolution,* pp. 1161-1162.

After being granted an extension,[17] on July 12, 2017, petitioner filed its Manifestation[18], stating that there has been no development or supervening event that might affect the determination of petitioner's claim for refund or for issuance of a TCC. As to respondent, he failed to file his Manifestation.[19]

On July 31, 2017, the case was deemed submitted for decision;[20] hence this Amended Decision for the determination of the propriety of the claim for refund or for the issuance of a TCC; and of the specific amount to which petitioner is entitled, if any.

The Court will now proceed to address the issue of whether petitioner is entitled to its claim for tax refund or tax credit.

Petitioner anchors its claim for refund, of its unutilized input taxes attributable to its zero-rated sales, on *Sections 112(A) and (C) of the National Internal Revenue Code of 1997, as amended ("1997 NIRC")*, to wit:

> SEC. 112. *Refunds or Tax Credits of Input Tax.-*
>
> (A) *Zero-Rated or Effectively Zero-Rated Sales.* - <u>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</u>, except transitional input tax, <u>to the extent that such input tax has not been applied against output tax</u>: 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 of 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: Provided, finally, That for a person making sales that are

[17] *Records, Vol. 3, Motion for Extension of Time to File Manifestation,* pp. 1155-1160.
[18] *Id., Petitioner's Manifestation,* pp. 1161-1163.
[19] *Id., Records Verification Report,* p. 1164.
[20] *Id., Resolution,* pp. 1165-1167.

zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

xxx xxx xxx

(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof. In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.[21]

In sum, in order to be entitled to a refund or tax credit of unutilized input VAT attributable to zero-rated or effectively zero-rated sales, the following requisites must be complied with:

1. the claimant must be a VAT-registered person;

2. there must be zero-rated or effectively zero-rated sales;

3. input taxes were incurred or paid;

4. such input taxes are attributable to zero-rated or effectively zero-rated sales;

5. said input taxes were not applied against any output VAT liability; and

6. the administrative and judicial claims for refund were filed within the prescribed period.

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[21] Underscoring ours.

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Sixth Requisite: Petitioner's administrative and judicial claims were seasonably filed.

As discussed earlier and as declared by the SC, petitioner's administrative and judicial claims were seasonably filed.

First Requisite: Petitioner is a VAT registered entity.

It is undisputed that petitioner is registered with the BIR as a VAT taxpayer, as evidenced by its BIR Certificate of Registration No. OCN 2RC0000270228.[22]

Second Requisite: Petitioner failed to qualify for VAT zero-rating / without zero-rated sales.

On the second requisite, *Section 108(B)(7) of the 1997 NIRC* provides that the sale of power generated through renewable sources of energy is among the transactions subject to zero percent (0%) VAT, to wit:

> SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* - <u>The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate</u>:
>
> xxx xxx xxx
>
> (7) <u>Sale of power or fuel generated through renewable sources of energy</u> such as, but not limited to, biomass, solar, wind, <u>hydropower</u>, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.[23]

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[22] *Records, Vol. 2, Exhibit "B," Bureau of Internal Revenue Certificate of Registration,* p. 569.
[23] Underscoring ours.

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Further, *Section 4.108-5(b)(7) of Revenue Regulations ("RR") No. 16-2005,* implementing the foregoing provision, qualified the applicability of such zero-rating as follows:

> SECTION 4.108-5. *Zero-Rated Sale of Services. –*
>
> xxx xxx xxx
>
> (b) *Transactions Subject to Zero Percent (0%) VAT Rate. -* The following services performed in the Philippines by a VAT-registered person shall be subject to zero percent (0%) VAT rate:
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> xxx xxx xxx
>
> (7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal and steam, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels; Provided, however, that zero-rating shall apply strictly to the sale of power or fuel generated through renewable sources of energy, and shall not extend to the sale of services related to the maintenance or operation of plants generating said power.[24]

Correlated to the above provisions, *Section 4.108-3(f) of RR No. 16-2005* states:

> SECTION 4.108-3. *Definitions and Specific Rules on Selected Services. –*
>
> xxx xxx xxx
>
> (f) Sale of electricity by generation, transmission, and distribution companies shall be subject to 10% VAT on their gross receipts: Provided, That sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels shall be subject to 0% VAT.
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> "Generation companies" refers to persons or entities authorized by the Energy Regulatory Commission (ERC) to

[24] Underscoring ours.

> operate facilities used in the generation of electricity. For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility pursuant to the provisions of the R.A. No. 9136 (EPIRA). They shall include all Independent Power Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities.

It is clear for the above-stated provisions that to qualify for VAT zero-rating, petitioner must prove, by sufficient evidence, that it is engaged in the sale of power or fuel generated through renewable sources of energy.

Records reveal that petitioner was incorporated on December 2, 2005, with the primary purpose "to engage in the business of owning, developing, constructing, operating, repairing, and maintaining of hydroelectric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations."[25]

Further, petitioner's 42 MegaWatt ("MW") Sibulan Hydro Electric Power Plant consists of two (2) independent hydroelectric projects namely: *(1)* Upstream Plant A with installed capacity of about 16.5MW and *(2)* Downstream Plant B with installed capacity of about 26MW, which have been duly certified by the Department of Energy ("DOE") as consistent with the Power Development Plan of the Government.[26]

Moreover, pursuant to the Power Supply Agreement[27] ("PSA") executed between petitioner and Davao Light Power Company Inc. ("DLPCI") on March 7, 2007, the former undertook to supply the latter with its electricity requirements in its Franchise Area. Accordingly, the PSA shall expire on the twelfth (12th) year from Phase I Supply or from early commencement thereof.

While the above documents show that petitioner's sale of power generated through a renewable source of energy (hydroelectric power)

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[25] *Records, Vol. 1, Exhibit "A," Amended Articles of Incorporation,* p. 564.
[26] *Id., Vol. 2, Exhibit "C," Department of Energy Certificate of Endorsement,* p. 570.
[27] *Id., Exhibit "D," Power Supply Agreement,* pp. 571-679.

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may be subject to zero-rating, it failed to establish that it is a generation company as defined under *Section 4.108-3(f) of RR No. 16-2005.*

For an entity to be considered a generation company, it should be authorized by the Energy Regulatory Commission ("ERC") to operate the generation facility. Specifically, both new and existing generation facilities are required to secure a Certificate of Compliance ("COC") from the ERC before it can operate the facilities used for generation of electricity, as provided under *Rule 5, Section 4(a) of the Implementing Rules and Regulations* of *RA No. 9136*, to wit:

> SECTION 4. *Obligations of a Generation Company.* –
>
> (a) A COC shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.
>
> (i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility.[28]

However, upon perusal of petitioner's evidence, the Court finds that petitioner failed to submit its ERC Registration and COC. Nowhere in the records of the case was it shown that petitioner is duly authorized by the ERC to operate facilities used in the generation of electricity. Thus, in the absence of evidence that petitioner is a generation company, its sales cannot qualify for VAT zero-rating under *Section 108(B)(7) of the 1997 NIRC*, as amended by *RA No. 9337*, in relation to *Section 4.108-3 of RR No. 16-2005, and Section 4 of Rule 5 of the Implementing Rules and Regulations of RA No. 9136.*

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[28] Underscoring ours.

The Certificate of Endorsement[29] from the DOE is simply inadequate to sustain petitioner's claim that it is a generation company entitled to the refund or credit. In fact, the said endorsement states:

> In pursuance hereof, HEDCOR SIBULAN INC. shall be entitled to all the rights and privileges consistent with the laws, rules and regulations pertinent thereto <u>subject to compliance to the requirements of Energy Regulatory Commission</u>, Philippine Grid Code, Wholesale Electricity Spot Market and the DOE's PDP preparation.[30]

At this point, the Court finds the need to point out that tax refunds, being in the nature of tax exemptions, are construed *strictissimi juris* against the taxpayer and liberally in favor of the Government. Accordingly, it is a claimant's burden to prove the factual basis of a claim for refund or tax credit. In this case, petitioner failed to discharge this burden.

In addition, petitioner's Final Amended 4th Quarterly VAT Return for 2007[31] declared no zero-rated sales, it was only on March 2010 and the subsequent months that petitioner made its sale of generated power to its sole customer, DLPCI[32]. Thus, the claimed input VAT was not attributable to petitioner's zero-rated sales.

In view of the foregoing findings, the Court finds it superfluous to determine petitioner's compliance with the other requisites for refund or credit of input tax attributable to zero-rated sales.

WHEREFORE, premises considered, the Petition for Review filed by petitioner Hedcor Sibulan, Inc. is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

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[29] *Records, Vol. 2, Exhibit "C," Department of Energy Certificate of Endorsement,* p. 570.
[30] Underscoring ours.
[31] *Records, Vol. 2, Exhibit "G," Quarterly VAT Return, For the Year Ended December 2007, Line 17,* p. 682.
[32] *Exhibit "DDD", Supplemental Sworn Statement of Mr. Emmanuel Y. Mendoza, Answer to Question No. 11.*

WE CONCUR:

ESPERANZA R. FABON-VICTORINO Associate Justice	**MA. BELEN M. RINGPIS-LIBAN** Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to *Section 13 of Article VIII of the Constitution* and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice