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. 6807

Members:

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

Promulgated:

OCT 3 0 2006

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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 P4,639,169.00 allegedly representing excess/unutilized input value-added tax from domestic purchases of taxable goods and services for the third and fourth quarters of taxable year 2001, 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).

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THE FACTS

Petitioner is a corporation duly organized and existing under Philippine laws with principal office at 2nd Floor Benpress Building, Meralco Avenue, Pasig City. It is principally engaged in the business of generating power for lighting and power purposes and whole selling the electric power to the National Power Corporation (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. It is registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity.

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 (1997 NIRC)], with Tax Identification No. 004-964-861-VAT.[1]

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 BIR National Office Building, BIR Road, Diliman, Quezon City.

It appears that sometime in September 2001, petitioner paid input VAT in the amount of P1,613,219.56 arising from its domestic purchases for said period, which were allegedly entirely attributable to its zero-rated sales of power generation services to Panay Electric Company (PECO).

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[1] Paragraphs 1, 3, 4 and 5, Joint Stipulation of Facts and Issues, Stipulation of Facts, Rollo, pp. 66-67.

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For the fourth quarter of 2001, petitioner allegedly accumulated input VAT in the amount of P3,025,949.44 arising from its domestic purchases attributable to its zero-rated sales of power generation to PECO. In its Quarterly VAT Returns for the third and fourth quarters of 2001 filed on October 25, 2001[2] and January 23, 2002,[3] respectively, petitioner declared, among others, the following:

2001	Exhibit	Output VAT	Input VAT Carried Over	Input VAT For the Qtr.	VAT Payable (Excess Input VAT)	Payment from Previous Mos.	Tax Payable (Overpayment)
3rd Qtr	D	10,594,535.03	-	1,965,846.06	8,628,688.97	10,241,908.53[4]	(1,613,219.56)
4th Qtr	G	-	1,613,219.56	3,025,949.44	(4,639,169.00)	No payment	(4,639,169.00)

Petitioner alleges that the said input VAT of P4,639,169.00 on its domestic purchases of goods and services for the third and fourth quarters of taxable year 2001 was not utilized against any output VAT liability in said quarters or even in subsequent quarters. Consequently, on January 30, 2002, pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed with the BIR RDO No. 043 separate administrative claims for refund of unutilized input VAT in the total amount of P1,613,219.56 for September 2001 and in the total amount of P3,025,949.44 for the fourth quarter of taxable year 2001.[5]

Claiming inaction on the part of the respondent on its claims and in order to suspend the running of the two-year prescriptive period under Section 112(D) of the 1997 NIRC and Section 4.106-2(c) of Revenue Regulations No.

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[2] Quarterly VAT Return for 3rd Quarter of 2001, Exhibit "D".
[3] Quarterly VAT Return for 4th Quarter of 2001, Exhibit "G".
[4] Per Official Receipts for BIR Payments issued by Equitable PCI Bank; Exhibits "B-5" and "C-5".
[5] Application for Tax Credit/Refund of VAT Paid, Exhibits "H" and "I".

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7-95, as amended, petitioner filed the instant Petition for Review on October 24, 2003.

In respondent's Answer filed through registered mail on December 1, 2003 and received by this Court on December 8, 2003, he averred the following Special and Affirmative Defenses:

> "6. The claim for refund is still under examination by respondent's Bureau;
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> 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; and
>
> 9. The taxes sought to be 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."[6]

THE ISSUES

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

1. Whether 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 petitioner has unutilized input VAT for the third and fourth quarters of calendar year 2001 in the amount of P4,639,169.00 arising from its domestic purchases of taxable goods and services;
3. Whether petitioner's unutilized input VAT for the third and fourth quarter of calendar year 2001 in the amount of P4,639,169.00 are attributable to its zero-rated sales of electricity to PECO;

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[6] Answer, Rollo, pp. 47-48.

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4. Whether the unutilized input VAT for the third and fourth quarters of calendar 2001 are properly substantiated by invoices and official receipts;

5. Whether the unutilized input VAT for the third and fourth quarter for calendar year 2001 were carried over to and utilized in the succeeding taxable quarter(s) or applied against any of the output VAT liability of the petitioner;

6. Whether petitioner's administrative claim for refund or tax credit was seasonably filed; and

7. Whether the petitioner is entitled to a refund or a tax credit of P4,639,169.00 representing unutilized input VAT which are attributable to its zero-rated sales of electricity to PECO.[7]

THE COURT'S RULING

The first issue, which is a legal issue, is resolved in the affirmative. All the remaining issues (from the second to the seventh) refer to whether or not petitioner was able to comply with 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 third and fourth quarters of calendar year 2001 in the total amount of P4,639,169.00.

Going back to the first issue, We hold that the power generation services rendered by petitioner to PECO are subject to zero (0%) percent VAT pursuant to Chapter II, Section 6 of Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) and Rule 5, Section 6 of its implementing rules and regulations. Said provisions read as follows:

"Republic Act No. 9136

Electric Power Industry Reform Act of 2001 (EPIRA)

[7] Paragraphs 1 to 7, Joint Stipulation of Facts and Issues, Stipulation of the Issues, Rollo, p. 68.

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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, 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.

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.

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 supplied)"*

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

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."

The EPIRA law 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 law and its implementing rules and regulations, the delivery and supply of electric energy by generation companies became VAT zero-rated, which prior thereto, were subject to ten (10%) percent VAT.

However, with the effectivity of R. A. No. 9136 on June 26, 2001, petitioner's sales of power generation to PECO became subject to zero (0%) percent VAT. Correspondingly, the pertinent provisions of the 1997 NIRC are 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 (10%) percent to zero (0%) percent. Otherwise stated, petitioner's power generation services are no longer subject to ten (10%) percent VAT as provided under the 1997 NIRC, but are now subject to zero (0%) percent VAT by virtue of the amendatory provision of the EPIRA.

We now look into whether or not petitioner was able to substantiate its subject claim in accordance with legal requirements provided by law.

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.

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As regards 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. Thus, petitioner complied with the first legal requirement.

As regards the second requisite, petitioner, in its VAT return for the third quarter of 2001,[8] reported an output VAT liability of P10,594,535.03, thereby indirectly declaring the related gross receipts in the amount of P105,945,350.30 (P10,594,535.03 x 10%). After careful verification, it appears that such gross receipts were derived from petitioner's sale of power generation services and were duly covered by valid VAT official receipts[9] as summarized in petitioner's Schedule of Gross Receipts from Zero-rated Sales.[10]

However, as correctly pointed out by the commissioned independent CPA, petitioner's reported gross receipts for the third quarter of 2001 should have been P196,555,092.31 instead of P105,945,350.30. Hence, there is an under-declaration of P90,609,742.01.[11] Nevertheless, petitioner's declared gross receipts for the third quarter of 2001 in the amount of P105,945,350.30

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[8] Quarterly VAT Return for 3rd Quarter of 2001, Exhibit "D".
[9] Official Receipts Nos. 0281, 0287, 0289, Exhibits "DD-1 to DD-3", respectively.
[10] Schedule of Gross Receipts from Zero Rated Sales, Exhibit "CC".
[11] Annex B, Report of the Commissioned Independent CPA; Exhibit "S".

qualifies for zero (0%) percent VAT and petitioner may claim for the refund/tax credit of the ***proportionate*** amount of unutilized input VAT attributable thereto in accordance with Section 112(A) of the 1997 NIRC, which states:

> "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."

With reference to petitioner's alleged zero-rated sales for the fourth quarter of 2001, a scrutiny of petitioner's VAT return for the said quarter[12] reveals that no amount of gross receipts was reported therein. As discussed earlier, under R. A. No. 9136, to qualify for zero-rating, aside from being a generation company, petitioner must prove that it derived sales from power generation. Since petitioner did not declare any amount of gross receipts for the fourth quarter of 2001, there are no zero-rated sales to speak of. Accordingly, petitioner's alleged related input VAT for the fourth quarter of 2001 in the amount of P3,025,949.44 cannot be refunded.

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[12] Exhibit "G".

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We now proceed to make a determination whether petitioner was able to substantiate its claimed excess input VAT in the total amount of P1,613,219.56 pertaining to the third quarter of 2001.

An examination of the report of the commissioned independent CPA[13] and the related supplier's invoices and official receipts presented by petitioner,[14] readily shows that out of the claimed excess input VAT for the third quarter of 2001 in the amount of P1,613,219.56, only the amount of P1,472,181.15 (as computed below) was duly substantiated by VAT invoices or official receipts in accordance with Section 110 of the 1997 NIRC, in relation to Section 4.104-5 of Revenue Regulations No. 7-95:

TOTAL CLAIM for the Third Quarter of 2001				**P1,613,219.56**
	Exhibit			
Disallowances per Commissioned Independent CPA's Report				
Services supported by documents other than VAT 'ORs	Annex A-3 of S	P21,957.66		
Goods supported by documents other than VAT Invoices.	Annex A-4 of S	63,618.00		
Services supported by 'Ors with printed NonVAT/NV.	Annex A-5 of S	220.60		
Goods supported by invoices with printed NonVAT/NV.	Annex A-6 of S	13,235.13		
No available supporting documents presented.	Annex A-7 of S	20,590.30	P119,621.69	
Additional Disallowances per this Court's further verification				
Input VAT supported by OR &/or Invoice bearing dates earlier than the covered quarter	BB-30	P 27.27		
	BB-143	2,283.45		
	BB-157&158	67.22		
	BB-181	409.09	2,787.03	
Over-claimed/overstated Input VAT				
Input VAT per Schedule	Annex A-1 of S	P21,265.84		
Input VAT per OR (P28,997.61/1.1)x10%	BB-134	2,636.15	18,629.69	**141,038.41**
Total Substantiated Amount				**P 1,472,181.15**

Although petitioner carried-over the claimed unutilized input VAT for the third quarter of 2001 to the succeeding taxable quarters until the fourth quarter of 2003,[15] the same was not applied against any output VAT liability

[13] Pages 4 to 6, Exhibit "S".
[14] Exhibits "BB-1 to BB-678".
[15] Quarterly Value-Added Tax Returns from 4th Qtr of CY 2001 until 4th Qtr of 2003, Exhibits "G, J, K, L, M, N, O, P and Q".

during those quarters. Moreover, in its VAT return for the first quarter of 2004,[16] 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 P1,472,181.15 for the third quarter of 2001 did not form part of the excess input tax of P37,089,332.46[17] as of the end of the first quarter of 2004, which was to be carried-over/applied to the succeeding second quarter of 2004.

In addition, the Court finds that petitioner's claim for the third quarter of 2001 was seasonably filed. The reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund starts from the date of filing of the corresponding quarterly VAT return. Counting from October 25, 2001, the date when petitioner filed its VAT return for the third quarter of 2001, both the administrative claim filed on January 30, 2002 and the judicial claim filed on October 24, 2003, fall within the two-year prescriptive period.

In fine, petitioner is entitled to the refund or issuance of a tax credit certificate corresponding to its unutilized input VAT for the third quarter of 2001 in the amount of P793,505.64, computed as follows:

Substantiated Claim		P 1,472,181.15
Multiply by the ratio of:		
Declared Gross Receipts per Return	105,945,350.30	
Total Gross Receipts per Official Receipts	196,555,092.31	0.539
Refundable Amount		**P 793,505.64**

[16] Quarterly Value-Added Tax Return for 1st Qtr of CY 2004, Exhibit "R".
[17] Exhibit "R-12".

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With respect however to petitioner's alleged zero-rated sales for the fourth quarter of 2001, petitioner's evidence would show that it did not report any amount of gross receipts in its VAT return for the said quarter. And as mentioned earlier, to qualify for zero-rating under R. A. 9136, aside from being a generation company, petitioner must prove that it derived sales from power generation. Since petitioner did not declare any amount of gross receipts for the fourth quarter of 2001, there are no zero-rated sales to speak of. Consequently, petitioner's alleged related input VAT for the fourth quarter of 2001 in the amount of P3,025,949.44 cannot be refunded.

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 in the reduced amount of P793,505.64 representing unutilized input VAT for the third quarter of 2001.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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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

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

ERNESTO D. ACOSTA
Presiding Justice

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