**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

## ***FIRST DIVISION***

**MELCO RESORTS LEISURE (PHP) CORPORATION,**
*Petitioner,*

*-versus-*

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**CTA Case No. 9811**

Members:

**DEL ROSARIO**, *Chairperson,*
**MANAHAN,** and
**REYES-FAJARDO,** JJ.

Promulgated:

OCT 28 2021 11:13am

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## DECISION

***MANAHAN, J.:***

This is a Petition for Review filed by Melco Resorts and Leisure Corporation praying for the refund or issuance of a tax credit certificate in the amount of ₱81,119,005.84, representing its alleged erroneously or illegally collected excess and unutilized input value-added taxes (VAT) on its purchases of capital goods, domestic purchases of goods (other than capital goods) and services, importation of goods (other than capital goods) and purchase of services rendered by non-residents, which are attributable to zero-rated sales for the first (1st) quarter of taxable year 2016.[1]

### THE PARTIES

Petitioner Melco Resorts Leisure (PHP) Corporation [formerly, "MCE Leisure (Philippines) Corporation"] is a

[1] Statement of the Case, Pre-Trial Order dated March 26, 2019, Docket, p. 259.

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domestic corporation organized and existing under the laws of the Philippines. It is engaged in the business of developing and operating tourist facilities, including hotel casino entertainment complexes with hotel, retail and amusement areas and themed development components, without being engaged in retail trade, and to engage in casino gaming activities.[2] Petitioner is a VAT-registered taxpayer under TIN/VAT Registration No. 008-362-871-00000.[3]

Respondent Commissioner of Internal Revenue (CIR) is charged with the assessment and collection of all national internal revenue taxes, fees and charges, and enforcement of all forfeitures, penalties and fines connected therewith, including the approval of compromise settlement and claims for refund among others. He may be served with summons and other court processes at the Bureau of Internal Revenue (BIR), National Office Building, Agham Road, Diliman, Quezon City.[4]

## THE FACTS

On January 28, 2013, the Philippine Amusement and Gaming Corporation (PAGCOR) issued an Amended Certificate of Affiliation & Provisional License to petitioner with other co-licensees, as a consortium, in accordance with Presidential Decree (PD) No. 1896, as amended. The said Amended Certificate of Affiliation & Provisional License applies to casino(s) located in the Bagong Nayong Pilipino Manila Bay Entertainment City, Parañaque City, and in the Newport City Integrated Resort, Pasay City.[5]

Subsequently, also in accordance with PD No. 1896, as amended, PAGCOR issued the Gaming License dated April 29, 2015 and the Gaming License (Amended) dated August 8, 2017, valid until July 11, 2033, in favor of petitioner with other co-licensees, as a consortium, applicable to casino(s) located in the Entertainment City, Parañaque City, and in the Newport City

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[2] Exhibits "P-3" and "P-4, Docket, pp. 529 to 555.
[3] Facts Admitted, *Joint Manifestation*, Docket, p. 228; Par. 1, Facts, *Pre-Trial Order* dated March 26, 2019, Docket, p. 260.
[4] Par. 2, Facts, *Pre-Trial Order* dated March 26, 2019, Docket, p. 260.
[5] Exhibit "P-5", Docket, p. 556.

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Integrated Resort, Pasay City, specifically to the licensees' casinos located along Asean Avenue and Roxas Boulevard, Tambo, Parañaque City, with the brand name of City of Dreams Manila.[6]

On April 25, 2016, petitioner filed with the BIR, through the Electronic Filing and Payment System (eFPS), its quarterly VAT return (BIR Form No. 2550-Q) for the 1st quarter of taxable year 2016. Subsequent thereto, it amended the aforesaid return on December 19, 2016, March 23, 2017, and June 22, 2017.[7]

Petitioner then filed on December 19, 2017 an administrative claim for refund with the Large Taxpayers Service of the BIR.[8]

On March 13, 2018, petitioner received the letter dated February 26, 2018 from the BIR,[9] informing the former that its application for tax credit certificate/refund cannot be given due course based on the provisions of Revenue Memorandum Circular (RMC) No. 33-2013 dated April 17, 2013 which allegedly states that income derived from operations related to gaming activities as well as other income are subject to VAT at 12% and therefore not entitled to refund of creditable input tax.

Petitioner filed the present Petition for Review on April 12, 2018.[10] The case was initially raffled to this Court's Third Division.

On July 10, 2018, respondent filed his *Answer* to the Petition for Review.[11]

On August 14, 2018, respondent submitted the BIR Records of the case consisting of one (1) folder with sixty (60) pages.[12]

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[6] Exhibit "P-5", Docket, p. 557.
[7] Facts Admitted, *Joint Manifestation*, Docket, pp. 228 to 229; Par. 3, Facts, *Pre-Trial Order* dated March 26, 2019, Docket, p. 260.
[8] Facts Admitted, *Joint Manifestation*, Docket, p. 229; Par. 4, Facts, *Pre-Trial Order* dated March 26, 2019, Docket, p. 260.
[9] Exhibit "P-14", Docket, p. 594.
[10] Docket, pp. 10 to 36.
[11] Docket, pp. 86 to 93.
[12] *Compliance* dated August 13, 2018, Docket, pp. 100 to 101.

In an Order dated September 25, 2018,[13] the instant case was transferred to this Court's First Division.

The Pre-Trial Conference was initially set on October 16, 2018,[14] but was reset to, and held on, January 24, 2019.[15] Respondent's Pre-Trial Brief was filed on January 17, 2019,[16] while the Pre-Trial Brief for Petitioner was submitted on January 18, 2019.[17]

On February 21, 2019, the parties filed their Joint Manifestation.[18] Subsequently, the Court issued the Pre-Trial Order dated March 26, 2019,[19] deeming the termination of the Pre-Trial.

During trial, petitioner presented its documentary and testimonial evidence. It offered the testimonies of the following individuals, namely: (1) Ms. Shirley B. Sanchez,[20] petitioner's Tax Manager; (2) Mr. Rafael B. Taladtad, Jr.,[21] Senior Manager of the Casino Control and Compliance of petitioner, formerly the latter's Gaming Audit Manager; and (3) Ms. Madonna Mia S. Dayego,[22] the Court-commissioned Independent Certified Public Accountant (ICPA).[23]

On August 15, 2019, the ICPA report was submitted.[24]

During the hearing held on September 17, 2019, respondent's counsel manifested that he will no longer present evidence in support of this case.[25]

Petitioner filed its Formal Offer of Exhibits [With Motion to Allow Submission of Copies of Exhibits "P-232-64", "P-242-4",

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[13] Docket, p. 104.
[14] *Notice of Pre-Trial Conference* dated July 11, 2018, Docket, pp. 95 to 96.
[15] *Resolution* dated October 28, 2018, Docket, p. 107; Minutes of the hearing held on, and Order dated, January 24, 2019, Docket, pp. 217 to 219, and 224 to 225, respectively.
[16] Docket, pp. 109 to 112.
[17] Docket, pp. 114 to 126.
[18] Docket, pp. 228 to 231.
[19] Docket, pp. 259 to 267.
[20] Exhibit "P-15", Docket, pp. 132 to 140; Minutes of the hearing held on, and Order dated, March 26, 2019, Docket, pp. 254 to 256; Exhibit "P-24", Docket, pp. 366 to 369; Minutes of the hearing held on, and Order dated, August 20, 2019, Docket, pp. 445 to 448.
[21] Exhibit "P-16", Docket, pp. 205 to 210; Order dated, May 28, 2019, Docket, p. 268.
[22] Exhibit "P-249", Docket, pp. 461 to 466; Minutes of the hearing held on, and Order dated, September 17, 2019, Docket, pp. 470 to 475.
[23] *Oath of Commission* dated July 16, 2019, Docket, p. 328; Minutes of the hearing held on, and Order dated, July 16, 2019, Docket, pp. 325 to 327 and 329, respectively.
[24] Exhibit "P-248", Docket, pp. 383 to 444.
[25] Minutes of the hearing held on, and Order dated, September 17, 2019, Docket, pp. 470 to 475.

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and "P-242-5"], on October 2, 2019.[26] Respondent then submitted his Comment (Re: Petitioner's Formal Offer of Evidence) on October 7, 2019.[27]

In the Resolution dated November 6, 2019,[28] the Court granted petitioner's Motion to Allow Submission of Copies of Exhibits "P-232-64", "P-242-4", and "P-242-5"], and thus, admitted the compact disc (CD) containing the scanned copies thereof, as part of the records of this case.

In a Resolution dated March 2, 2020,[29] the Court admitted petitioner's exhibits, *except* for: (1) Exhibit "P-200-15", on the ground that the exhibit formally offered do not correspond with the document actually marked; and (2) Exhibits "P-203-130", "P-209-132", "P-209-378", and "P-209-380", for not being found in the records of the case.

Petitioner then filed its Motion A. For Reconsideration of Resolution dated March 2, 2020 B. To Hold in Abeyance the Filing of Memorandum for Petitioner until after Resolution of the Instant Motion, on June 15, 2020.[30] Respondent failed to file his comment to the said Motion.[31] In the Resolution dated October 7, 2020, [32] the Court granted the same Motion, and admitted Exhibits "P-200-15", "P-203-130", "P-209-132", "P-209-378", and "P-209-380", as part of petitioner's evidence.

On June 19, 2020, respondent submitted his Memorandum;[33] while the Memorandum for Petitioner was filed on October 29, 2020.[34]

The present case was submitted for decision on November 11, 2020.[35]

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[26] Docket, pp. 480 to 516.
[27] Docket, pp. 607 to 609.
[28] Docket, pp. 616 to 617.
[29] Docket, pp. 635 to 637.
[30] Docket, pp. 644 to 652.
[31] Records Verification dated September 18, 2020 issued by the Judicial Records Division of this Court, Docket, p. 676.
[32] Docket, pp. 679 to 681.
[33] Docket, pp. 664 to 670.
[34] Docket, pp. 682 to 724.
[35] Resolution dated November 11, 2020, Docket, p. 727.

## THE ISSUE

The sole issue presented to the Court for resolution is as follows:

> "Whether petitioner is entitled to the refund or the issuance of a tax credit certificate in the total amount of Php81,119,005.84, representing its alleged erroneously or illegally collected excess and unutilized input value-added tax (VAT) on its purchases of capital goods, domestic purchase of goods (other than capital goods) and services, importations of goods (other than capital goods) and purchases of services rendered by non-residents, which are attributable to zero-rated sales for the 1st Quarter of taxable year 2016."[36]

**Petitioner's arguments:**

Petitioner argues that, as a PAGCOR licensee, it is entitled to the refund or tax credit of its excess or unutilized input VAT attributable to its revenues from its gaming operations, which are allegedly considered zero-rated sales under the 1997 National Internal Revenue Code (NIRC), as amended. It claims that the input taxes it incurred are attributable to such zero-rated sales during the 1st quarter of 2016 and have not been applied against any output VAT. Additionally, petitioner avers that the administrative and judicial claims for refund were filed within the period prescribed by Section 112 (A) of the 1997 NIRC, as amended.

To bolster its contention on the zero-rated nature of the revenues gained from its gaming operations, petitioner quotes Section 108 (B) (3) of the 1997 NIRC, as amended, and cites the Court's decision in the case of *South Entertainment Gallery, Inc. vs. CIR*[37] which supposedly ruled that as a PAGCOR licensee/grantee, South Entertainment Gallery, Inc., is subject to VAT at zero-percent in accordance with said Section 108 (B) (3). Similarly situated as a PAGCOR licensee, petitioner claims that it is likewise zero-rated.

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[36] Issue, *Pre-Trial Order* dated March 26, 2019, Docket, pp. 260 to 261.
[37] CTA Case No. 8286, April 14, 2014.

Even assuming *arguendo* that its revenues from gaming operations do not originate from zero--rated sales, petitioner asserts that as a PAGCOR licensee, it is, nonetheless, exempt from indirect tax, and hence, entitled to the refund or tax credit of input VAT erroneously paid or illegally passed on to, and collected for purchases attributable to gaming revenues. Petitioner cites PD No. 1869, as amended, which allegedly grants PAGCOR and its licensees (to which the economic burden of the tax is shifted), an exemption from both direct and indirect taxes, such as VAT, thus, strengthening its position that it is entitled to a tax refund or issuance of a tax credit certificate for its excess and unutilized input VAT.

Petitioner then submits that based on this alternative legal theory, both the administrative and judicial claims for refund were filed within the two-year period in accordance with Sections 204 and 229 of the 1997 NIRC, as amended.

**Respondent's counter-arguments:**

Respondent contravenes the contentions of petitioner and maintains that the subject sales transactions are not among those considered zero-rated transactions under the 1997 NIRC, as amended. According to respondent, RMC No. 33-2013 provides that PAGCOR's income derived from its operations and licensing of gambling casinos and other similar recreation or amusement places are subject to the corporate income tax under the 1997 NIRC, as amended, which includes, among others, the following:

A. Income from casino operations;
B. Income from dollar pit operations;
C. Income from regular bingo operations; and
D. Income from mobile bingo operations operated by it, with agents on commission basis. Provided, however, that the agents' commission income shall be subject to regular income tax and consequently, to withholding tax under existing regulations.

Likewise, respondent maintains that PAGCOR's contractees and licensees authorized to operate gambling casinos, gaming clubs and similar recreation or amusement places are subject to income tax and value-added tax.

Even granting without admitting that petitioner's revenues from gaming operations were derived from zero-rated transactions, respondent alleges that petitioner failed to comply with the requirements provided under Section 4.11.2 of Revenue Regulations (RR) No. 16-2005, as amended, which requires among others, that the input taxes which have already been applied to the output tax must be excluded from the amount being claimed as refund and that the application for refund should be filed within two (2) years after the close of the taxable quarter when such sales were made.

In concluding his arguments, respondent cites the oft-repeated doctrine that claims for refund are construed strictly against the claimant because the same partakes of the nature of exemption from taxation and that in claims for refund involving input VAT attributable to zero-rated or effectively zero-rated sales, the claimant must prove compliance with the requisites already established by jurisprudence, to wit:

1) That there must be zero-rated or effectively zero-rated sales;
2) That input taxes were incurred or paid;
3) That such input taxes are directly attributable to zero-rated or effectively zero-rated sales;
4) That the input taxes were not applied against any output tax; and
5) That the claim for refund was filed within the two-year prescriptive period.

Respondent submits that petitioner failed to satisfactorily prove compliance with the above requisites for the entitlement to the instant claim for refund.

## THE COURT'S RULING

This Court shall first determine the timeliness of the filing of petitioner's claim for refund with the Court.

The claim for refund of alleged excess or unutilized input VAT attributable to zero-rated sales is governed by Section 112

(A) and (C) of the 1997 NIRC, as amended,[38] which we quote below :

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

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(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."** (emphasis supplied)

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[38] Pre-TRAIN Law Provision.

Records show that petitioner filed an application for a tax credit/refund of alleged excess input VAT for the first quarter of taxable year 2016 on December 19, 2017.[39]

On March 13, 2018, petitioner received a letter from respondent dated February 26, 2018, denying its application for tax credit certificate/refund stating categorically that it is not entitled to the refund of creditable input tax.[40]

Reckoned from the receipt of the letter-denial on March 13, 2018, petitioner had thirty (30) days from receipt thereof or until April 12, 2018 within which to file its judicial claim for refund with this Court.

On April 12, 2018, petitioner filed the present Petition for Review with the Court, which is within the thirty (30) day period provided under the afore-cited Section 112 (C) of the 1997 NIRC, as amended.

Correspondingly, petitioner timely filed its judicial claim for refund.

The Court will now proceed to resolve the substantive merits of petitioner's claim for refund.

Petitioner contends that the privileges granted to PAGCOR under its charter specifically PD No. 1869, inures to the benefit of its licensees and contractees such as exemption from taxes including income tax and VAT. Simply put, petitioner claims that as a licensee of PAGCOR, it enjoys tax exemptions similarly granted to the latter under its charter.

Petitioner presents the alternative theory that the activities which generated its revenues from gaming operations are considered zero-rated sales under the 1997 NIRC, as amended, hence, it is entitled to the refund or tax credit of the excess or unutilized input VAT attributable to said activities.

In light of the relevant VAT provisions of the 1997 NIRC, as amended,[41] in relation to the provisions of PD 1869 or the PAGCOR charter, we shall discuss the two legal theories of petitioner conjointly.

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[39] Ibid. see footnote No. 8.
[40] Ibid. see footnote No. 9.
[41] Pre-TRAIN law provisions.

Section 13 of PD 1869 or the PAGCOR Charter provides, in part, as follows:

> "SEC. 13. *Exemptions.* —
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> (2) *Income and other taxes.* — (a) Franchise Holder: No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.
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> (b) Others: The exemptions herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, **shall inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator.**
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> The fee or remuneration of foreign entertainers contracted by the Corporation or operator in pursuance of this provision shall be free of any tax.
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> xxx xxx xxx." (emphasis supplied)

Based on the foregoing provision of PD No. 1869, it is clear that PAGCOR is exempt from the payment of any tax, whether national or local, except for a franchise tax at the rate of five percent (5%) of the gross revenues or earnings derived from its operations and that said tax exemption inures to the benefit of and extends to the following:

1) Corporations, associations, agencies, or individuals with whom PAGCOR or operator has any contractual relationship in connection with the operation of casino(s) authorized under PD No. 1869; and
2) To those receiving compensation or other remuneration from PAGCOR or operator as a result of essential facilities furnished and/or technical services rendered to PAGCOR or operator.

In other words, PD No. 1869 provides for the imposition of a five percent (5%) franchise tax of the gross revenues or earnings derived by PAGCOR from its operations conducted under the franchise, which shall be due and payable *in lieu* of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial or national government authority.[42] Since the payment of the said five percent (5%) franchise tax shall be "in lieu of all kinds of taxes", the tax exemption privilege being enjoyed by PAGCOR is dependent on such payment.

As a corollary, in case of non-payment of the same five percent (5%) franchise tax by PAGCOR, and thus, no tax exemption privilege is bestowed on the latter, it follows that PAGCOR's contractees and licensees shall neither be entitled to any tax exemption. As the old adage goes, the spring cannot rise higher than its source.[43] In *Bloomberry Resorts and Hotels, Inc. vs. Bureau of Internal Revenue,*[44] the Supreme Court emphasized the significance of the payment of the said five percent (5%) franchise tax to entitle PAGCOR and all its contractees and licensees to the tax exemption to be enjoyed by them, and we quote:

> "As the PAGCOR Charter states in unequivocal terms that exemptions granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, ***shall inure to the benefit of and extend to*** corporation(s), association(s), agency(ies), or individual(s) with whom the PAGCOR or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this

[42] Refer to *Philippine Amusement and Gaming Corporation (PAGCOR) vs. The Bureau of Internal Revenue, et al.*, G.R. No. 215427, December 10, 2014.
[43] *Heirs of Maximo Labanon, et al. vs. Heirs of Constancio Labanon*, G.R. No. 160711, August 14, 2007.
[44] G.R. No. 212530, August 10, 2016.

> Franchise, **so it must be that all contractees and licensees of PAGCOR, upon payment of the 5% franchise tax, shall likewise be exempted from all other taxes, including corporate income tax realized from the operation of casinos.**
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> xxx xxx xxx
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> Plainly, too, **upon payment of the 5% franchise tax, petitioner's income** from its gaming operations of gambling casinos, gaming clubs and other similar recreation or amusement places, and gaming pools, defined within the purview of the aforesaid section, is not subject to corporate income tax." (emphasis supplied).

There is no question then that the benefits extended to PAGCOR under its Charter inure to the benefit of its licensees and contractees including exemption from taxes subject to the condition that the 5% franchise tax is paid.

While this Court agrees with the petitioner that it similarly enjoys tax exemption granted to PAGCOR under its charter, it is significant to point out that the instant case is a claim for refund of alleged excess input taxes attributable to zero-rated sales.[45] This is clear from the wordings of the stipulated issue presented to the Court for resolution -"Whether petitioner is entitled to the refund or the issuance of a tax credit certificate in the total amount of Php81,119,005.84, representing its alleged erroneously or illegally collected excess and unutilized input value-added tax (VAT) on its purchases of capital goods, domestic purchase of goods (other than capital goods) and services, importations of goods (other than capital goods) and purchases of services rendered by non-residents, which are attributable to zero-rated sales for the 1st Quarter of taxable year 2016."[46]

As distinguished from an exemption from taxes, petitioner is seeking the refund of input VAT supposedly passed on to it by its suppliers/sellers which are allegedly attributable to its zero-rated sales.

The relevancy of the contention of petitioner that the exemptions granted to PAGCOR under its Charter inures to the

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[45] See Petition for Review, Court Docket, pp. 10 to 32.
[46] Ibid, see footnote No. 36.

benefit of the licensee is somehow diminished, if not blotted out by the much larger issue of whether or not the sales of petitioner are considered zero-rated because refunds of input VAT under the 1997 NIRC, as amended, are subject to strict conditions and requirements such as those enumerated by the Supreme Court in the case of *Luzon Hydro Corporation vs. CIR,*[47], and we quote:

> A claim for refund or tax credit for unutilized input VAT may be allowed only if the following requisites concur, namely: (a) the taxpayer is VAT-registered; (b) the taxpayer is engaged in zero-rated or effectively zero-rated sales; (c) the input taxes are due or paid; (d) the input taxes are not transitional input taxes;(e) the input taxes have not been applied against output taxes during and in the succeeding quarters; (f) the input taxes claimed are attributable to zero or effectively zero-rated sales ; (g) for zero-rated sales under Section 106 (A)(2) (1) and (2); 106 (B) ; and 108 (B) (1) and (2), the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas ; (h) where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales , and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume; and (i) the claim is filed within two years after the close of the taxable quarter when such sales were made."

Note that one of the essential requirements for a refund of excess/unutilized input VAT is that the taxpayer must be engaged in zero-rated or effectively zero-rated sales.

Section 112 (A) (quoted earlier) and (B)[48] of the 1997 NIRC, as amended, in relation to Section 110 (B) of the same code,[49] provides that the option of refund or tax credit of

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[47] G.R. No. 188260, November 13, 2013.

[48] "Section 112. **Refunds or Tax Credits of Input Tax. –**

(B) *Cancellation of VAT Registration.* – **A person whose registration has been cancelled due to retirement from or cessation of business,** or due to changes in or cessation of status under Section 106 (C) of this Code **may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax which may be used in payment of his other internal revenue taxes."** (emphasis supplied)

[49] "Section 110. **Tax Credits.-**

(A) *Creditable Input Tax.* –

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(B) *Excess Output or Input Tax.* – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters: **Provided, however, That any input tax attributable to zero-rated sales by a VAT-registered person may at his option be refunded or credited against any other internal revenue taxes, subject to the provisions of Section 112."** (emphasis supplied) excess/unutilized input VAT is allowed in two instances: a) when it is attributable to zero-rated or effectively zero-rated sales[50] and/or (b) when the business or the corporation has been dissolved, i.e., cessation from business. In quoting Sections 110 (B) and 112 of the 1997 NIRC, as amended, the Supreme Court, in the case of *Coca-Cola Bottlers Philippines, Inc. vs. CIR,*[51] affirmed that the option of refund or issuance of a tax credit certificate is available to a VAT-registered taxpayer if such input taxes are attributable to zero-rated or effectively zero-rated sales, and we quote:

> "A plain and simple reading of the afore-quoted provision reveals that if and when the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. **It is only when the sales of a VAT-registered person are zero-rated or effectively zero-rated that he may have the option of applying for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales."** (emphasis supplied).

Since petitioner has not been dissolved nor in the process of dissolution at the time the instant claim for refund was filed with the BIR, we shall focus on the issue of whether or not the sales made by petitioner during the taxable period involved, can be categorized as zero-rated or effectively zero-rated sales.

Section 106 of the 1997 NIRC, as amended,[52] provides for the sale of goods or properties that are considered zero-rated or effectively zero-rated sales, thus :

> **'SEC. 106.** *Value-Added Tax on Sale of Goods or Properties.* –
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> xxx xxx xxx
>
> (2) The following sales by VAT-registered persons **shall be subject to zero percent (0%) rate:**
>
> **(a) Export Sales.** - The term '***export sales***' means:

[50] Section 112 (A) of the 1997 NIRC, as amended.
[51] G.R. No, 222428, February 19,2018.
[52] Pre-TRAIN Law provisions.

(1) The sale and actual shipment of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported and paid for in acceptable foreign currency or its equivalent in goods or services, and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

(2) Sale of raw materials or packaging materials to a nonresident buyer for delivery to a resident local export-oriented enterprise to be used in manufacturing, processing, packing or repacking in the Philippines of the said buyer's goods and paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

(3) Sale of raw materials or packaging materials to export-oriented enterprise whose export sales exceed seventy percent (70%) of total annual production;

(4) Sales of gold to the Bangko Sentral ng Pilipinas (BSP);

(5) Those considered export sales under Executive Order NO. 226, otherwise known as the 'Omnibus Investment Code of 1987', and other special laws; and

(6) The sale of goods, supplies, equipment and fuel to persons engaged in international shipping or international air transport operations.

**(b) Foreign Currency Denominated Sale.** – The phrase 'foreign currency denominated sale' means sale to a nonresident of goods, except those mentioned in the Section 149 and 150, assembled or manufactured in the Philippines for delivery to a resident in the Philippines, paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

(c) Sales to persons or entitles whose exemption under special laws or international agreements which the Philippines is a signatory effectively subjects such sales to zero rate.'

Section 108 of the 1997 NIRC, as amended,[53] enumerates the services/activities that are considered zero-rated or effectively zero-rated sales, and we quote:

"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.* – **The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:**

(1) Processing, manufacturing or repacking goods for other persons doing business outside of the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

(2) Services other than those mentioned in the preceding paragraph rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services. Are performed, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance wuth the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

(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 percent (0%) rate**;"

(4) Services rendered to persons engaged in international shipping or international air transport operations, including leases of property for use thereof;

(5) Services performed by subcontractors and/or contractors in processing, converting or manufacturing goods

[53] Pre-TRAIN Law Provisions.

for an enterprise whose export sales exceed seventy percent (70%) of total annual production.

(6) Transport of passengers and cargo by air or sea vessels from the Philippines to a foreign country, and

(7) 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 energy sources using technologies such as fuel cells and hydrogen fuels. (emphasis supplied)

The records of the case show that petitioner is engaged in the business of developing and operating tourist facilities, including hotel casino entertainment complexes with hotel, retail and amusement areas and themed development components, without being engaged in retail trade, and to engage in casino gaming activities.[54]

Nowhere in the records of the case, particularly in the evidence adduced by petitioner, does it show that it is engaged in the sale of goods or services or in transactions other than the aforementioned activities.

Even PAGCOR's sales from whom it secured its license to engage in gaming operations are not considered zero-rated but VAT exempt under PD 1869 and Section 108 (B) (3) of the 1997 NIRC, as amended. PAGCOR's tax exemption from the payment of taxes including VAT which inures to the benefit of its licensees and contractees, does not entitle the latter to claim the input VAT that may have been passed on to it by its suppliers/sellers as discussed earlier, because such privilege belongs only to those which are engaged in VAT zero-rated and not VAT-exempt sales.

Relative thereto, Section 109(1)(K) of the 1997 NIRC, as amended by Republic Act (RA) No. 9337, reads:

"SEC. 109. *Exempt Transactions.* –(1) Subject to the provisions of Subsection (2) hereof, **the following transactions shall be <u>exempt</u> from the value-added tax:**

xxx xxx xxx

(K) **Transactions which are exempt** under international agreements to which the Philippines is a

[54] Ibid., see footnote 2.

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> signatory or **under special laws**, except those under Presidential Decree No. 529;
>
> xxx xxx xxx
>
> (2) A VAT-registered person may elect that Subsection (1) not apply to its sale of goods or properties or services: *Provided,* That an election made under this Subsection shall be irrevocable for a period of three (3) years from the quarter the election was made." (Emphasis supplied)

Thus, since PD No. 1869 is a special law, the treatment under Section 109(1)(K) of the 1997 NIRC, as amended, of PAGCOR's sales is one of VAT exemption, and not one of VAT-zero rating. Parenthetically, an exempt transaction is defined as one involving goods or services, which by their nature, are specifically listed in and expressly exempted from the VAT, under the 1997 NIRC, as amended, without regard to the tax status of the party in the transaction.[55] To be sure, PAGCOR's tax privilege on its *sales* is a VAT exempt transaction.

The said VAT exemption of PAGCOR was affirmed in the case of *Philippine Amusement and Gaming Corporation (PAGCOR) vs. The Bureau of Internal Revenue, et al.,*[56] where the Supreme Court *En Banc*, in no uncertain terms, declared:

> "[PAGCOR] is exempt from the payment of VAT because PAGCOR's charter, P.D. No. 1869, is a special law that grants [PAGCOR] exemption from taxes."

Moreover, a cursory reading of the aforequoted Section 13(2) of PD No. 1869 would reveal that PAGCOR was not given any VAT zero-rating treatment on its sales. Thus, no such treatment shall "inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise".

Petitioner's reliance on Section 108 (B) (3) of the 1997 NIRC, as amended, as one of its legal basis for claiming a VAT

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[55] *Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc.*, G.R. No. 168129, April 24, 2007, citing *Commissioner of Internal Revenue vs. Seagate Technology (Philippines)*, G.R. No. 153866, February 11, 2005; and *Commissioner of Internal Revenue vs. Toshiba Information Equipment (Phils.), Inc.*, G.R. No. 150154, August 9, 2005.
[56] G.R. No. 172087, March 15, 2011.

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zero-rated status is misplaced. As quoted earlier, Section 108 (B) (3) provides that "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 percent (0%) rate;"

Seen in the perspective of PAGCOR being exempt under a special law, it is apparent that the proper party to seek the subject tax refund or credit should be petitioner's suppliers because it is the latter's supply of services to a VAT exempt entity (PAGCOR and/or its licensees) that are considered effectively zero-rated.

The term *"effectively zero-rated sales of services"* shall refer to the local sale of services by a VAT-registered person to a person or entity who was granted indirect tax exemption under special laws or international agreement.[57] It is clear that the right to claim a refund of excess or unutilized input VAT does not belong to petitioner because its sales are not considered zero-rated nor effectively zero-rated based on the relevant afore-quoted provisions.

The term *"effectively zero-rated sales of services"* shall refer to the local sale of services by a VAT-registered person **to <u>a person or entity</u> who was granted indirect tax exemption under special laws** or international agreement.[58] Effective zero rating is **intended to benefit <u>the purchaser</u>** who, not being directly and legally liable for the payment of the VAT, will ultimately bear the burden of the tax shifted by the suppliers.[59]

In conclusion, the claim for refund of alleged excess/unutilized input tax incurred by petitioner during the first quarter of 2016 cannot be refunded because the latter is not engaged in zero-rated activities pursuant to the relevant afore-quoted provisions of the 1997 NIRC, as amended.

With the foregoing findings and conclusions, it becomes unnecessary to address the other arguments respectively raised by the parties.

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[57] Section 4.108-6, Revenue Regulations No. 16-2005.
[58] Section 4.108-6, Revenue Regulations No. 16-2005.
[59] *Commissioner of Internal Revenue vs. Seagate Technology (Philippines)*, G.R. No. 153866, February 11, 2005.

Well-settled is the rule that tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the refund.[60] Petitioner has the burden of proof to establish the factual and legal bases of its claim for tax refund. Having failed to discharge the said burden of proof, the instant refund claim must perforce be denied

**WHEREFORE**, in light of the foregoing considerations, the instant Petition for Review filed by Melco Resorts Leisure (PHP) Corporation, is **DENIED** for lack of merit.

**SO ORDERED.**

Catherine T. Manahan

**CATHERINE T. MANAHAN**
Associate Justice

**WE CONCUR:**

(See Concurring Opinion)
**ROMAN G. DEL ROSARIO**
Presiding Justice

Marian Ivy F. Reyes-Fajardo
**MARIAN IVY F. REYES-FAJARDO**
Associate Justice

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[60] *Commissioner of Internal Revenue vs. S.C. Johnson & Son, Inc.*, G.R. No. 127105, June 25, 1999.

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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's Division.

**ROMAN G. DEL ROSARIO**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

# FIRST DIVISION

| | |
|---|---|
| **MELCO RESORTS LEISURE (PHP) CORPORATION,** Petitioner, | **CTA CASE NO. 9811** |
| | Members: |
| -versus- | DEL ROSARIO, *P.J.*, Chairperson<br>MANAHAN, and<br>REYES-FAJARDO, JJ. |
| **COMMISSIONER OF INTERNAL REVENUE,** Respondent. | PROMULGATED:<br>OCT 28 2021 11:13am |

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# CONCURRING OPINION

***DEL ROSARIO, P.J.:***

I concur in the denial of petitioner's refund claim for lack of merit. I, however, wish to expound on the value-added tax (VAT) implications of **petitioner's sales of service** *vis-à-vis* the VAT implications of **petitioner's purchases of goods and services from its suppliers**.

*The Commissioner of Internal Revenue vs. Acesite (Philippines) Hotel Corporation*[1] categorically declares that Philippine Amusement and Gaming Corporation (PAGCOR) is exempt from the payment of direct and indirect taxes, like VAT, pursuant to Presidential Decree (PD) No. 1869, and **such exemption extends to PAGCOR's contractees and licensees**.

In *Acesite, supra,* Acesite (Philippines) Hotel Corporation (APHC), as the owner and operator of the Holiday Inn Manila Pavilion Hotel, leases 6,768.53 square meters of the hotel's premises to

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[1] G.R. No. 147295, February 16, 2007; cited also in Philippine Amusement and Gaming Corporation (PAGCOR) vs. The Commissioner of Internal Revenue, et al. / Commissioner of Internal Revenue vs. Philippine Amusement and Gaming Corporation (PAGCOR), G.R. Nos. 210689-90 and 210704 & 210725, November 22, 2017.

PAGCOR for casino operations; and, caters food and beverages to PAGCOR's casino patrons. For the period January 1996 to April 1997, APHC incurred VAT amounting to Php30,152,892.02 from its rental income and sale of food and beverages to PAGCOR. **APHC tried to shift the said taxes to PAGCOR by incorporating it in the amount billed to PAGCOR but the latter refused to pay the taxes on account of its tax exempt status.** PAGCOR paid the amount due to APHC less the amount of Php30,152,892.02 representing the VAT being shifted by APHC to PAGCOR. APHC paid 10% (now 12%) output VAT to the Commissioner of Internal Revenue (CIR) as it feared the legal consequences of non-payment of the tax. Later on, APHC belatedly arrived at the conclusion that its transaction with PAGCOR was subject to VAT at 0% as PAGCOR was a tax-exempt entity. APHC filed an administrative claim for refund with the CIR but the latter failed to resolve the same. Thus, APHC filed a petition with the Court of Tax Appeals (CTA). The CTA partially granted APHC's claim for refund and the Court of Appeals affirmed *in toto* the decision of the CTA. The CIR filed an appeal before the Supreme Court which the latter denied in this wise:

> **"PAGCOR is exempt from payment of indirect taxes**
>
> It is undisputed that P.D. 1869, the charter creating PAGCOR, grants the latter an exemption from the payment of taxes. Section 13 of P.D. 1869 pertinently provides:
>
> > Sec. 13. Exemptions. —
> >
> > xxx xxx xxx
> >
> > (2) Income and other taxes. — (a) Franchise Holder: **No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation,** except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise. Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.
> >
> > xxx xxx xxx
> >
> > (b) Others: The **exemptions herein granted for earnings derived from the operations conducted under the franchise specifically from the payment of any tax, income or otherwise, as well as any form of charges, fees or levies, <u>shall</u>**

> **inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under this Franchise** and to those receiving compensation or other remuneration from the Corporation or operator as a result of essential facilities furnished and/or technical services rendered to the Corporation or operator. (Emphasis supplied.)

Petitioner contends that the above tax exemption refers only to PAGCOR's direct tax liability and not to indirect taxes, like the VAT.

We disagree.

A close scrutiny of the above provisos clearly gives PAGCOR a blanket exemption to taxes with no distinction on whether the taxes are direct or indirect. We are one with the CA ruling that PAGCOR is also exempt from indirect taxes, like VAT, as follows:

> Under the above provision [Section 13 (2) (b) of P.D. 1869], the term 'Corporation' or operator refers to PAGCOR. Although the law does not specifically mention **PAGCOR's exemption from indirect taxes, PAGCOR is undoubtedly exempt from such taxes because the law exempts from taxes persons or entities contracting with PAGCOR in casino operations.** Although, differently worded, the provision clearly exempts PAGCOR from indirect taxes. **In fact, it goes one step further by granting tax exempt status to persons dealing with PAGCOR in casino operations.** The unmistakable conclusion is that PAGCOR is not liable for the P30,152,892.02 VAT and neither is Acesite as the latter is effectively subject to zero percent rate under Sec. 108 B (3). R.A. 8424. (Emphasis supplied.)

Indeed, by extending the exemption to entities or individuals dealing with PAGCOR, the legislature clearly granted exemption also from indirect taxes. It must be noted that the indirect tax of VAT, as in the instant case, can be shifted or passed to the buyer, transferee, or lessee of the goods, properties, or services subject to VAT. Thus, by extending the tax exemption to entities or individuals dealing with PAGCOR in casino operations, it is exempting PAGCOR from being liable to indirect taxes.

**The manner of charging VAT does not make PAGCOR liable to said tax**

It is true that VAT can either be incorporated in the value of the goods, properties, or services sold or leased, in which case it is computed as 1/11 of such value, or charged as an additional 10% to the value. Verily, the seller or lessor has the option to follow either way in charging its clients and customer. In the instant case, Acesite

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followed the latter method, that is, charging an additional 10% of the gross sales and rentals. Be that as it may, the use of either method, and in particular, the first method, does not denigrate the fact that PAGCOR is exempt from an indirect tax, like VAT.

**VAT exemption extends to Acesite**

Thus, while it was proper for PAGCOR not to pay the 10% VAT charged by Acesite, the latter is not liable for the payment of it as it is exempt in this particular transaction by operation of law to pay the indirect tax. Such exemption falls within the former Section 102 (b) (3) of the 1977 Tax Code, as amended (now Sec. 108 [b] [5] of R.A. 8424), which provides:

> Section 102. Value-added tax on sale of services — (a) Rate and base of tax — There shall be levied, assessed and collected, a value-added tax equivalent to 10% of gross receipts derived by any person engaged in the sale of services . . . ; Provided, that the following services performed in the Philippines by VAT-registered persons shall be subject to 0%.
>
> xxx xxx xxx
>
> (b) Transactions subject to zero percent (0%) rated. —
>
> xxx xxx 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 (0%) rate (emphasis supplied).

The rationale for the exemption from indirect taxes provided for in P.D. 1869 and the extension of such exemption to entities or individuals dealing with PAGCOR in casino operations are best elucidated from the 1987 case of Commissioner of Internal Revenue v. John Gotamco & Sons, Inc., where the absolute tax exemption of the World Health Organization (WHO) upon an international agreement was upheld. We held in said case that the exemption of contractee WHO should be implemented to mean that the entity or person exempt is the contractor itself who constructed the building owned by contractee WHO, and such does not violate the rule that tax exemptions are personal because the manifest intention of the agreement is to exempt the contractor so that no contractor's tax may be shifted to the contractee WHO. Thus, the proviso in P.D. 1869, extending the exemption to entities or individuals dealing with PAGCOR in casino operations, is clearly to proscribe any indirect tax, like VAT, that may be shifted to PAGCOR."

Clearly, petitioner's contention that its gross receipts from its gaming operations are subject to 0% VAT is incorrect. **Petitioner, as a licensee of PAGCOR, is exempt from VAT on its gross receipts**

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**from gaming operations.** Simply put, petitioner is not liable for either the 12% VAT or 0% VAT on its gross receipts from gaming operations.

With respect to petitioner's suppliers of goods and services, the **VAT implication of their sales to petitioner** is governed by Section 108 (B) (3) of the National Internal Revenue Code (NIRC) of 1997, as amended, which states:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
>
> xxx
>
> (B) Transactions Subject to Zero Percent (0%) Rate – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (1) xxx
>
> xxx
>
> (2) **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 percent (0%) rate**;
>
> xxx." *(Boldfacing supplied)*

By reason of petitioner's VAT exemption privilege, its suppliers of goods and services are entitled to VAT zero-rating on their sales to petitioner. Similar to APHC in *Acesite, supra*, **it was thus erroneous for the suppliers of petitioner to shift or pass on 12% VAT on their sales to petitioner. Petitioner, on the other hand, erred in not refusing to pay the 12% VAT shifted to it by its suppliers of goods and services**.

Considering that petitioner's income from gaming operations are exempt from VAT, petitioner cannot claim refund of the input VAT erroneously passed on or shifted to it by its suppliers of goods and services. As elucidated in the *ponencia*, the NIRC prescribes the instances when input VAT may be refunded, *viz.*: (i) when the claimant's input VAT are attributable to zero-rated sales; and, (ii) when the claimant's VAT registration is cancelled due to retirement from or cessation of nosiness or due to changes in or cessation of status from VAT to non-VAT.

None of the foregoing situations is obtaining in the present case. To reiterate, petitioner's gross receipts from its gaming operations are not subject to VAT at 0% but are VAT-exempt. As such, the input VAT paid by petitioner would form part of the costs of purchasing the goods and services from its suppliers;[2] hence, petitioner's input VAT is not refundable.

All told, I **CONCUR** with the *ponencia*.

**ROMAN G. DEL ROSARIO**
Presiding Justice

[2] Malayan Insurance Company, Inc. vs. St. Francis Square Realty Corporation, G.R. Nos. 198916-17, July 23, 2018 and St. Francis Square Realty Corporation vs. Malayan Insurance Company, Inc., G.R. Nos. 198920-21, July 23, 2018, citing The National Internal Revenue Code Annotated, Vol. II, Hector S. De Leon and Hector M. De Leon, Jr. (2016), p. 5; and further citing Value Added Tax in the Philippines, Victorino C. Mamalateo, 2013, p. 13.