REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MIRANT NAVOTAS CORPORATION
(formerly: Southern Energy Navotas, Inc.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6960

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

AUG 1 1 2009; 3:50pm

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AMENDED DECISION

BAUTISTA, *J.*:

For resolution is respondent's *Motion for Reconsideration* filed on December 8, 2008; with petitioner's *Comment (on Respondent's Motion for Reconsideration)* filed on January 23, 2009.

Respondent seeks the reconsideration of this Court's *Decision* promulgated on November 13, 2008, the dispositive portion of which states:

> "**WHEREFORE**, with the foregoing disquisitions, the *Petition for Review* is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of P2,220,608.01, representing its unutilized input VAT for taxable year 2002.
>
> **SO ORDERED**."

In his *Motion for Reconsideration*, respondent cites the following ground:

> "THE HONORABLE COURT ERRED IN RULING THAT PETITIONER IS ENTITLED TO REFUND OR ISSUANCE OF A TAX CREDIT CERTIFICATE IN THE AMOUNT OF TWO MILLION TWO HUNDRED

> TWENTY THOUSAND SIX HUNDRED EIGHT AND 01/100 PESOS **(P2,220,608.01)** BECAUSE THE CLAIM WAS NOT FILED IN ACCORDANCE WITH THE PROCEDURE PRESCRIBED BY LAW."

He argues that the judicial claim for the first quarter of 2002 was filed beyond the period allowed by law, which effectively removes this Court's jurisdiction over the same. Respondent adds that there was no showing that petitioner's claim for refund was properly documented in the administrative proceedings, which means that petitioner is not entitled to the relief sought.

On the other hand, petitioner opposes respondent's *Motion* on the ground that respondent filed the present *Motion* beyond the period as prescribed under Section 1 of Rule 15 of the Revised Rules of the Court of Tax Appeals.

The Court will address first the opposition of petitioner inasmuch as on its resolution will depend the necessity of resolving respondent's *Motion for Reconsideration*.

Section 1 of Rule 15 of the Revised Rules of the Court of Tax Appeals prescribes the period within which an aggrieved party may file a Motion for Reconsideration or New Trial, to wit:

"RULE 15

MOTION FOR RECONSIDERATION OR NEW TRIAL

> **SECTION 1.** *Who may and when to file motion.* – Any aggrieved party may seek a reconsideration or new trial of any decision, resolution, or order of the Court. He shall file a motion for reconsideration or new trial within fifteen days from the date he received notice of the decision, resolution or order of the Court in question."

Based on the foregoing, respondent has fifteen days from receipt of the *Notice of Decision* within which to file its *Motion*. Counting fifteen days from his date of receipt or from November 21, 2008, respondent had until December 6, 2008, within which to file its *Motion*. December 6, 2008, however, fell on a

Saturday. Considering Section 1 of Rule 22 of the Revised Rules of Court, the last day within which respondent may file its *Motion* was on December 8, 2008. Hence, the *Motion for Reconsideration* posted December 8, 2008 was filed within the reglementary period.

The Court now proceeds to resolve respondent's *Motion for Reconsideration*.

Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, which is the controlling provision as regards the prescription period for filing claims for refund of input VAT, provides that applications for refund or issuance of tax credit certificate must be made within two (2) years from the close of the taxable quarter when the sales were made. Section 112(A) is hereunder quoted, to wit:

> "**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: xxx."

The Supreme Court in the recent case of **Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)**[1] provided the correct interpretation and application of Section 112(A) of the NIRC of 1997, explaining that the reckoning frame of the two-year prescriptive period would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Pertinent portions of the *Mirant* case are quoted hereunder for ready reference, thus:

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[1] G.R. No. 172129, September 12, 2008.

"The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years **reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Section 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed."

Applying the foregoing rule to the present case, not all the period claimed by petitioner for tax refund or issuance of tax credit certificate fall within the two-year prescriptive period for the filing of the suit in court. A perusal of the records shows the following dates relevant to the case:

2002 Quarter	**Close of the Quarter**	**End of Two-Year Period**	**Date Filed Administrative Claim**	**Date Filed Judicial Claim**
First	March 31, 2002	March 31, 2004	December 23, 2003	April 22, 2004
Second	June 30, 2002	June 30, 2004	December 23, 2003	April 22, 2004
Third	September 30, 2002	September 30, 2004	December 23, 2003	April 22, 2004
Fourth	December 31, 2002	December 31, 2004	December 23, 2003	April 22, 2004

The above table readily shows that petitioner's administrative and judicial claims for refund of input VAT on its zero-rated sales for the second, third, and fourth quarters of 2002 were filed within the two-year prescriptive period. However, with regard to the first quarter of 2002 ending March 31, 2002, although the administrative claim may have been filed on December 23, 2003, which is well within the two-year prescriptive period; the *Petition for Review* was only filed on

April 22, 2004, which falls beyond the period prescribed by law. Consequently, the claimed excess and unutilized creditable input VAT for the first quarter of 2002 is barred by prescription.

The Court stated in the assailed *Decision* that petitioner's sales of power generation services to the National Power Corporation are subject to zero percent (0%) VAT pursuant to Section 108(B) of the NIRC of 1997. It can therefore claim refund of input taxes attributable thereto, in accordance with Section 112(A) of the same Code. The Court likewise declared that the substantiated input VAT amounted to P2,221,335.28, computed as follows:

	Findings	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I.	Input taxes on domestic purchases of goods that are supported by VAT invoices and purchases of services that are supported by VAT ORs *(Annex 6)*	P 677,206.28	P 822,330.01	P 403,139.20	P 258,505.79	P 2,161,181.28
II.	Input tax on an importation of goods that is supported by original bank OR and photocopied IED certified as true copy of the BOC *(Annex 7)*	60,154.00				60,154.00
	Total	**P737,360.28**	**P822,330.01**	**P403,139.20**	**P258,505.79**	**P2,221,335.28**

As earlier discussed, the claim for the first quarter is already barred by prescription. Accordingly, the input VAT of P737,360.28 shall be further disallowed, leaving a refundable excess input VAT of P1,483,975.00; which are all attributable to petitioner's zero-rated sales for the second, third, and fourth quarters of taxable year 2002.

Anent respondent's allegation that petitioner is not entitled to the relief sought since there is no showing that petitioner's refund claim was properly documented in the administrative proceedings, the Court finds the same untenable.

The necessity of submitting supporting documents to the claim for refund lies on petitioner. It cannot be left to the discretion of respondent for in doing so would leave petitioner's case at the mercy of the whims of respondent.[2] Stated differently, it is for petitioner to determine which documents are necessary to obtain a favorable decision from respondent considering that it is the affected party in this case.

WHEREFORE, premises considered, respondent's *Motion for Reconsideration* is hereby **PARTIALLY GRANTED** and the *Decision* dated November 13, 2008 is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner the reduced amount of P1,483,975.00, representing petitioner's unutilized input VAT for taxable year 2002.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

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[2] Solidbank Corporation (now: First Metro Investment Corporation) vs. Commissioner of Internal Revenue, CTA Case No. 6557, May 5, 2005

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.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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FIRST DIVISION

MIRANT NAVOTAS CORPORATION (formerly: Southern Energy Navotas, Inc.),
Petitioner,

~ versus ~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 6960

Member:

Acosta, *PJ,*
Bautista, *and*
Casanova, *JJ.*

Promulgated:

AUG 11 2009; 3:50pm

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CONCURRING AND DISSENTING OPINION

Foremost, I subscribe to the opinion of the majority members of this Court that respondent's 'Motion for Reconsideration' was filed within the reglementary period provided in Rule 15 of the Revised Rules of the Court of Tax Appeals in relation to Section 1, Rule 22 of the Revised Rules of Court.

Likewise, I agree with the opinion of the majority that the administrative claim for refund of petitioner's excess and unutilized creditable input tax attributable to zero-rated sales for the first, second, third and fourth quarters of 2002 was filed within the two-year prescriptive period provided in Section 112(A) of the 1997 National Internal Revenue Code (NIRC) reckoned from the close of the taxable quarter when the relevant sales were made. Nevertheless, I disagree with their opinion that petitioner's claim for the first quarter of 2002 is already barred by prescription because the Petition for Review was only filed on April 22, 2004 beyond the period prescribed by law. With due respect to the opinion of my esteemed colleagues may I state the provisions of the NIRC.

Section 229 of the NIRC,[1] which has been present even prior to the introduction of the VAT law (Executive Order No. 273), cannot support the questionable view of the majority because the said provision of the Tax Code deals only with the recovery of tax erroneously or illegally collected. It is already settled rule that the erroneous, illegal, or wrongful payment angle does not enter the equation as regards the refund for any unutilized creditable input VAT.[2]

Refund or tax credits of input tax attributable to zero-rated sales is specifically governed by Sections 112(A) and (D) of the 1997 NIRC, *viz*:

> "**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, <u>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, 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.
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> xxx xxx xxx

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[1]Sec. 229. *Recovery of Tax Erroneously or Illegally Collected.* - no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[2] Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, G.R. No. 172129, September 12, 2008 (Supreme Court Third Division). Respondent's Motion for Partial Reconsideration was denied in a Resolution dated November 26, 2008 by the Supreme Court Second Division.

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> **(D)** ***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 Subsections (A) and (B) 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)*

Unlike Section 229, which provides that the judicial action must be made within the two year prescriptive period, Section 112 provides that a VAT-registered person may **apply** for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated sales within two years after the close of the taxable quarter and that an **appeal** may be made to the CTA within thirty (30) days from receipt of the decision of the Commissioner denying the claim or after the expiration of the one hundred twenty day-period without action on the part of the Commissioner.

In the present case, the 120-day period provided in the NIRC ends on April 21, 2004 reckoned from petitioner's application for refund or tax credit with the Bureau of Internal Revenue on December 23, 2003, which is presumably the date petitioner submitted the supporting documents together with the aforesaid application for refund. After the lapse of the said 120-day period, petitioner was able to file its Petition for Review on April 22, 2004, which is within the thirty day period provided in same section of the NIRC.

Therefore, I vote to deny the Motion for Reconsideration for lack of merit. I would like to reiterate my position that petitioner is entitled to a refund or issuance of a tax credit certificate in the amount of P2,220,608.01 representing its unutilized input tax for taxable year 2002.

ERNESTO D. ACOSTA
Presiding Justice