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

***EN BANC***

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| COMMISSIONER OF INTERNAL REVENUE, Petitioner, | CTA EB No. 1579 (CTA Case No. 7890) |
| | Present: |
| -versus- | DEL ROSARIO, *PJ,* CASTAÑEDA, JR., UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.* |
| CE LUZON GEOTHERMAL POWER COMPANY, INC., Respondent. | Promulgated: AUG 15 2018 2:55 p.m. |

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**DECISION**

***FABON-VICTORINO, J.:***

Assailed in this Petition for Review[1] filed by the Commissioner of Internal Revenue (CIR), are the Decision and Resolution dated July 22, 2016 and December 22, 2016, respectively, rendered by the Court in Division, partially granting respondent CE Luzon Geothermal Power Company, Inc.'s claim for refund or issuance of tax credit certificate (TCC) of its unutilized input value-added tax (VAT) paid on its domestic purchases of non-capital goods and services, services rendered by non-residents, and importation of non-capital goods attributable to its zero-rated sales to the Philippine National Oil Company-Energy Development

[1] *En Banc* Docket, pp. 7-26.

Corporation (PNOC-EDC) for the four quarters of calendar year (CY) 2007.

## THE FACTS AND THE PROCEEDINGS

Petitioner is the Commissioner of the Bureau of Internal Revenue (BIR), 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. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent CE Luzon Geothermal Power Company, Inc. is a domestic corporation with principal place of business at Ormoc City, Leyte. It is registered with the Bureau of Internal Revenue (BIR), as a VAT taxpayer, with Taxpayer's Identification No. (TIN) 003-924-356-000.

Respondent is engaged in the business of power generation through geothermal energy and sale thereof to PNOC-EDC pursuant to an Energy Conversion Agreement (ECA). It was issued a Certificate of Accreditation to that effect (OSAC 94-12) by the Department of Energy (DOE) on June 15, 1994.

Respondent filed with the BIR its Original Quarterly VAT Returns for the first quarter to the fourth quarter of CY 2007 on the following dates:

| Taxable Quarter | Date of Filing |
|---|---|
| First | April 23, 2007 |
| Second | July 25, 2007 |
| Third | October 25, 2007 |
| Fourth | January 24, 2008 |

On February 12, 2009, respondent filed an administrative claim for the refund or issuance of a TCC for its unutilized input VAT with the Large Taxpayers Audit and Investigation Division I of the BIR, in the total amount of P10,895,847.59 for the four quarters of CY 2007.

Since petitioner failed to act on the said administrative claim for refund or issuance of a TCC, and in order to suspend the running of the two-year prescriptive period to seek judicial review, respondent filed with the Court in Division a Petition for Review on March 30, 2009. The case was docketed as CTA Case No. 7890.

In his Answer filed on May 8, 2009, petitioner averred that respondent's claim for refund is subject to BIR's investigation/examination, in which case, it has the burden of proving compliance with the applicable laws and rules for entitlement to the prayed for refund/tax credit. However, petitioner failed as it prematurely sought judicial intervention through its Petition for Review filed with the CTA, thereby depriving the Court of jurisdiction to entertain the case.

On July 22, 2016, the Court in Division rendered the assailed Decision[2], disposing the case as follows:

> **WHEREFORE**, premises considered, the present Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of **NINE MILLION FIVE HUNDRED FORTY-FOUR THOUSAND FOUR HUNDRED SIXTY-FIVE PESOS AND 52/100 (P9,544,465.52)**, representing petitioner's unutilized input VAT attributable to its zero-rated sales for the four quarters of calendar year 2007.
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> **SO ORDERED**.

On August 10, 2016, petitioner moved for the reconsideration of the adverse Decision but it was denied in the equally assailed Resolution of December 22, 2016[3].

Unfazed, petitioner elevated the case to the Court *En Banc*[4] on February 3, 2017, raising the following issues:

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[2] *En Banc* Docket, pp. 30-62
[3] *En Banc* Docket, pp. 63-70.
[4] Per *En Banc* Resolution dated January 16, 2017, *en banc* docket, p. 6A.

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1. Whether or not respondent's unutilized input VAT for the period from the 1st quarter to the 4th quarter of CY 2007 amounting to P10,895,847.59 is substantiated by documentary evidence in the form of invoices and official receipts.

2. Whether or not respondent's unutilized input VAT for the period from the 1st quarter of CY 2007 amounting to P10,895,847.59 was applied or credited against any output VAT of the respondent in the subsequent quarter or quarters.

3. Whether or not respondent is entitled to a refund of and/or issuance of a TCC for its unutilized input VAT amounting to P10,895,847.59, which input VAT: (i) arose from respondent's domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods; and (ii) are all attributable to respondent's zero-rated sales of generated power to EDC.

4. Whether or not this Honorable Court has jurisdiction to act on the instant Petition for Review.

Petitioner's allegations in this appeal are basically a reiteration of his Answer filed with the Court in Division. He repeats that the burden of proof to establish entitlement to refund/tax credit rests upon respondent who must prove compliance with the requisites mandated by law and applicable rules and regulations. Respondent however failed to do so as it was unable to comply with the invoicing and accounting requirements laid down in Sections 113, 114 and 236 of the National Internal Revenue Code (NIRC) of 1997, as amended, and as implemented by Revenue Regulations (RR) No. 16-2005. Finally, no valid administrative claim for refund/tax credit was filed by respondent since it failed to submit to the BIR supporting documents required under Revenue Memorandum Order (RMO) No. 53-98 and other existing rules and regulations. Such infirmity deprived the Court in Division of jurisdiction to entertain its case.

Petitioner further claims that respondent prematurely sought judicial review in violation of Section 112(C) of the NIRC of 1997, as amended. Allegedly, respondent filed its administrative claim for refund on February 19, 2009 then filed its Petition for Review with the Court in Division on March 30, 2009, or barely thirty-nine (39) days from the filing of the administrative claim for refund.

Finally, petitioner invokes the tenet that claims for refund of taxes are construed strictly against claimants for they partake of the nature of tax exemptions.

In rejecting petitioner's averments, respondent counter-argues[5] as follows: 1) the grounds relied upon by petitioner are mere rehash of the arguments in his Motion for Reconsideration; 2) contrary to petitioner's claim, it submitted relevant and complete documents in support of its administrative claim for refund/tax credit; 3) the alleged premature filing of its judicial claim for refund falls within the exception period to the mandatory and jurisdictional 120+30 days period under Section 112(C) of the Tax Code; and 4) a claim for refund, like any other ordinary civil case, needs only a preponderance of evidence to substantiate the case.

In the Resolution dated September 13, 2017[6], the instant case was submitted for decision after respondent's filing of its Memorandum on August 1, 2017[7] and petitioner's filing of his Memorandum on August 2, 2017[8].

## THE RULING OF THE COURT *EN BANC*

The critical issue in the present appeal is whether respondent was able to prove all the requisites for its entitlement to the refund/tax credit of its alleged unutilized input VAT incurred during the periods covering the four quarters of CY 2007 in the amount of P10,895,847.59.

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[5] *En Banc* Docket, pp. 89-100.
[6] *En Banc* Docket, pp. 163-164.
[7] *En Banc* Docket, pp. 122-138.
[8] *En Banc* Docket, pp. 144-160.

Section 112 of the NIRC of 1997, as amended, pertinently provides, as follows

> 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, 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
>
> (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 Subsections (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. xxx

Under the foregoing provision, respondent must satisfy the following requisites to be entitled to the tax refund/tax credit of its alleged unutilized input VAT prayed for, to wit:

1) that the taxpayer-claimant must be VAT-registered;

2) that there must be zero-rated or effectively zero-rated sales;

3) that input taxes were incurred or paid;

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

5) that the input taxes were not applied against any output VAT liability; and

6) that the claim for refund was filed within the two-year prescriptive period.

BIR Certificate of Registration No. 8RC0000017026 and TIN 003-924-356-000 issued in favor of respondent sufficiently show that it is a VAT-registered entity.

Anent the timeliness of filing of the claim for refund, the Court *En Banc* agrees with the Court in Division that the Petition for Review was timely filed with the Court in Division. While it may be true that the 120-day period provided under Section 112(C) of the NIRC of 1997, as amended, is mandatory and jurisdictional, an exception was however declared by no less than the Final Arbiter when it applied the doctrine of equitable estoppel in the consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation*; *Taganito Mining Corporation v. Commissioner of Internal Revenue; and Philex Mining Corporation v. Commissioner of Internal Revenue*[9] (San Roque case). In ruling in favor of the taxpayer-applicant, the Supreme Court recognized BIR Ruling No. DA-489-03, a general interpretative rule, as an exception to the strict compliance with the 120+30-day periods provided under Section 112 of the NIRC of 1997, as amended. Thus, all taxpayers need not wait for the 120-day period to lapse before it can seek judicial review by virtue of BIR Ruling No. DA-489-03. The Supreme Court ruled that all taxpayers can rely on the said BIR Ruling No. DA-489-03 from the time of its issuance on December 10, 2003 up to its reversal on October 6, 2010.

The said exception to the 120+30-day mandatory period was echoed in the latter case of *Commissioner of*

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[9] G.R. Nos. 187485, 196113 and 197156, February 12, 2013.

*Internal Revenue v. Toledo Power Company*[10] (Toledo case), *viz.*:

> Pursuant to Section 112 (A) and (D) of the NIRC, a taxpayer has two (2) years from the close of the taxable quarter when the zero-rated sales were made within which to file with the CIR an administrative claim for refund or credit of unutilized input VAT attributable to such sales. The CIR, on the other hand, has 120 days from receipt of the complete documents within which to act on the administrative claim. Upon receipt of the decision, a taxpayer has 30 days within which to appeal the decision to the CTA. However, if the 120-day period expires without any decision from the CIR, the taxpayer may appeal the inaction to the CTA within 30 days from the expiration of the 120-day period.
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> In *Commissioner of Internal Revenue v. San Roque Power Corporation*, we said that the 120+30-day period must be strictly observed **except from the date of issuance of BIR Ruling No. DA-489-03 on December 10, 2003, which allowed taxpayers to file a judicial claim without waiting for the end of the 120-day period, up to the date of promulgation of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.* on October 6, 2010, where we declared that compliance with the 120+30-day period is mandatory and jurisdictional.**

The record shows that respondent filed its administrative claim for refund/tax credit of its unutilized input VAT for the four quarters of CY 2007 on February 12, 2009. Pursuant to Section 112 (C) of the NIRC of 1997, as amended, respondent had until July 13, 2009[11], within which to file its judicial claim for the four quarters of CY 2007, in the event of petitioner's inaction. Respondent, however, filed its judicial claim for the four quarters of CY 2007 as early as March 30, 2009.

While it may appear that respondent had breached the rule on the timeliness of filing of an appeal mandated under Section 112 of the NIRC of 1997, as amended, when it filed its Petition for Review barely thirty-nine (39) days from the

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[10] G.R. Nos. 196415 & 196451, December 02, 2015.
[11] July 12, 2009 being a Sunday.

filing of the administrative claim for refund, such infirmity was rendered innocuous by virtue of the pronouncement of the Supreme Court in the above cited cases. As correctly ruled by the Court in Division, the Petition for Review filed by respondent, although prematurely filed, must be allowed pursuant to BIR Ruling No. DA-489-03, which provides that "taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review." In other words, respondent's administrative and judicial claims for refund/tax credit of its alleged input VAT paid on its domestic purchases of non-capital goods and services, services rendered by non-residents, and importation of non-capital goods attributable to its zero-rated sales to the PNOC-EDC for the four quarters of CY 2007 were timely filed.

Respondent was also able to prove that its sales of electricity to PNOC-EDC qualify for VAT zero-rating, in accordance with Section 108 (B)(7) of the NIRC of 1997[12], as amended, and as implemented by Section 4.108-5(b)(7) of Revenue Regulations No. 16-2005[13]. To qualify for VAT

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12 Section 108 (B)(7) of the NIRC of 1997, as amended, states:

SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. –
(A) xxx xxx xxx

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) xxx xxx xxx
xxx xxx xxx
(7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.

13 Section 4.108-5(b)(7) of Revenue Regulations No. 16-2005, states:

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

zero-rating, the taxpayer must prove that it is a generation company and that it derives sales from power generation.

Per its Certificate of Registration, respondent is engaged in the generation, collection and distribution of electricity. It was likewise issued a Certificate of Compliance (COC) as a generation company by the Energy Regulatory Commission (ERC). Plainly, respondent is engaged in the business of power generation.

With respect to petitioner's argument that respondent's claim for refund/tax credit was not properly substantiated by documentary evidence in the form of invoices and official receipts, again, the Court *En Banc* is one with the Court in Division in its finding that respondent submitted in evidence sales invoices and official receipts issued to its customer, PNOC-EDC, during the four quarters of CY 2007.

Examination however unveils a discrepancy between the total amount of zero-rated sales as reflected in the official receipts issued by respondent to PNOC-EDC vis-à-vis respondent's total zero-rated sales as reflected in its Quarterly VAT Returns for CY 2007. It appears that only the amount of P2,879,806,717.70 representing respondent's sale of electricity to PNOC-EDC qualifies for VAT zero-rating.

As regards petitioner's complaint that respondent was unable to submit complete and relevant documents to substantiate its administrative claim for refund/tax credit, the ruling of the Supreme Court in the case of *Pilipinas Total Gas, Inc. v. Commissioner of Internal Revenue*[14], is instructive, thus:

> " ... Thus, taking the foregoing changes to the law altogether, it becomes apparent that, **for purposes of determining when the supporting documents have been completed it is the taxpayer who ultimately determines when complete documents have been submitted for the purpose of commencing and continuing the running of the 120-day period.** After all, he may have

[14] G.R. No. 207112, December 8, 2015.

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already completed the necessary documents the moment he filed his administrative claim, in which case, the 120-day period is reckoned from the date of filing. The taxpayer may have also filed the complete documents on the 30th day from filing of his application, pursuant to RMC No. 49-2003. He may very well have filed his supporting documents on the first day he was notified by the BIR of the lack of the necessary documents. In such cases, the 120-day period is computed from the date the taxpayer is able to submit the complete documents in support of his application.

Then, except in those instances where the BIR would require additional documents in order to fully appreciate a claim for tax credit or refund, **in terms of what additional document must be presented in support of a claim for tax credit or refund - it is the taxpayer who has the right and the burden of providing any and all documents that would support his claim for tax credit or refund. After all, in a claim for tax credit or refund, it is the taxpayer who has the burden to prove his cause of action. As such, he enjoys relative freedom to submit such evidence to prove his claim**.

The foregoing conclusion is but a logical consequence of the due process guarantee under the Constitution. Corollary to the guarantee that one be afforded the opportunity to be heard, it goes without saying that the applicant should be allowed reasonable freedom as to when and how to present his claim within the allowable period.

Thereafter, whether these documents are actually complete as required by law – is for the CIR and the courts to determine. Besides, as between the taxpayer-applicant, who seeks the refund of his creditable input tax and the CIR, it cannot be denied that the former has greater interest in ensuring that the complete set of documentary evidence is provided for proper evaluation of the State.

> Lest it be misunderstood, the benefit given to the taxpayer to determine when it should complete its submission of documents is not unbridled. Under RMC No. 49-2003, if in the course of the investigation and processing of the claim, additional documents are required for the proper determination of the legitimacy of the claim, the taxpayer-claimants shall submit such documents within thirty (30) days from request of the investigating/processing office. Again, notice, by way of a request from the tax collection authority to produce the complete documents in these cases, is essential. (Emphases supplied).

To reiterate, the term "complete documents" under Section 112(C) of the NIRC of 1997 should be understood to refer to those documents that are necessary to support the application for refund or tax credit certificate, as determined by the taxpayer. The BIR examiner can require the taxpayer to submit additional documents but the examiner cannot demand what type of supporting documents should be submitted by the taxpayer-claimant. Otherwise, the taxpayer-claimant will be at the mercy of the examiner, who may require the production of documents that it cannot submit. Moreover, it is basic that respondent ought to know the tax records of all taxpayers.[15]

The Court *En Banc* cannot also agree more with the Court in Division in concluding that subject input VAT paid or incurred were attributable to respondent's zero-rated sales. Per evaluation of respondent's various suppliers' invoices, official receipts, import entry and internal revenue declarations, Bureau of Customs' official receipts and BIR Form No. 1600, respondent's valid input VAT claim amounts to P9,544,465.52, computed as follows:

| | | |
|---|---|---|
| Amount of Input VAT Claim | | P10,895,847.59 |
| Less: Disallowances | | |
| per ICPA Report | P852,810.66 | |
| per this Court's Findings | 498,571.41 | 1,351,382.07 |
| Substantiated Input VAT | | P9,544,465.52 |

[15] *Diageo Philippines, Inc. v. Commissioner of Internal Revenue*, CTA Case Nos. 7846 and 7865, January 16, 2012.

Considering that respondent's sales for the four quarters of CY 2007 were all VAT zero-rated, the substantiated input VAT of P9,544,465.52 is entirely attributable thereto.

Lastly, evidence show that respondent has no output VAT liability against which the substantiated amount of P9,544,465.52 may be applied or credited. This requisite has been settled and discussed by the Court in Division, in the following fashion:

> A perusal of petitioner's Quarterly VAT Returns for CY 2007 shows that it has no output VAT liability against which the substantiated input VAT of P9,544,465.52 may be applied or credited. Even though the claimed input VAT was carried over by petitioner to the succeeding four quarters of CY 2008, the same remained unutilized as petitioner had no output VAT liability for the said period. Moreover, the substantiated input VAT of P9,544,465.52 formed part of the P10,895,847.59 input VAT deducted as "VAT Refund/TCC claimed" from the total available input tax of P12,632,770.05 in the Quarterly VAT Return for the fourth quarter of CY 2008. Consequently, the claimed input taxes for the four quarters of CY 2007 could not have been carried over or utilized in the succeeding first quarter of 2009.

All stated, petitioner failed to present arguments which would warrant the modification much less the reversal of the assailed Decision and Resolution of the Court in Division.

On the other hand, respondent was able to sufficiently establish that it is entitled to its claimed VAT refund/tax credit corresponding to its unutilized input VAT paid on its domestic purchases of non-capital goods and services, services rendered by non-residents, and importation of non-capital goods attributable to its zero-rated sales to the PNOC-EDC for the four quarters of CY 2007, albeit in the reduced amount of P9,544,465.52.

**WHEREFORE**, the Petition for Review filed by petitioner Commissioner of Internal Revenue and posted on February 3, 2017, is hereby **DENIED** for lack of merit. Consequently, the Decision dated July 22, 2016 and the Resolution dated December 22, 2016, both rendered by the Court in Division, are **AFFIRMED**.

**SO ORDERED.**

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

## 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 among the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice