REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2045** (CTA Case Nos. 8450, 8512, 8547 & 8596)
	Present:
- versus -	**DEL ROSARIO, *P.J.*,** **CASTAÑEDA, JR.,** **UY,** **RINGPIS-LIBAN,** **MANAHAN,** **BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO, *JJ.***
TOLEDO POWER COMPANY, Respondent.	Promulgated: NOV 19 2020 3:15 p.m.

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DECISION

BACORRO-VILLENA, J.:

From four (4) consolidated cases, docketed as CTA Case Nos. 8450, 8512, 8547 & 8596, all entitled *Toledo Power Company v. Commissioner of Internal Revenue*, involving respondent Toledo Power Company's (**respondent's/Toledo's**) claim for refund with petitioner Commissioner of Internal Revenue (**petitioner/CIR**) for the first, second, third and fourth quarters of taxable year (**TY**) 2010, respectively, the instant Petition for Review[1] and Supplemental Petition for Review[2] were filed.

The Petition for Review seeks the reversal of the Second Division's Decision dated 09 June 2017[3] (**original Decision**) and the Special Second Division's Resolution dated 15 March 2019[4] (**first assailed Resolution/Amended Decision**) denying petitioner's Motion for Partial Reconsideration[5] (**MPR**) and granting respondent's Motion to Reopen Proceedings (with Motion for Reconsideration)[6] (**Motion to Reopen**). Essentially, the original Decision was amended. On the other hand, in the Supplemental Petition for Review, petitioner further seeks the reversal of the first assailed Resolution, insofar as it amended the original Decision, and the Special Second Division's Resolution dated 24 June 2019[7] (**second assailed Resolution**) denying petitioner's Motion for Reconsideration[8] (**MR**) and affirming the said first assailed Resolution.

As culled from the records, petitioner is duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims of refund, as provided by law.[9] Respondent, on the other hand, is a partnership duly registered with the Securities and Exchange Commission (**SEC**), engaged in the business of acquiring, owning, rehabilitating, maintaining and operating coal-fired and oil-fired electrical generation facilities.[10]

FACTS OF THE CASE

As a generation company, respondent was granted by the Energy Regulatory Commission (**ERC**) the authority to operate its generation facilities.[11]

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1 Filed 22 April 2019; *Rollo*, pp. 7-18.
2 Filed 29 July 2019; id., pp. 126-143.
3 Division Docket (CTA Case No. 8450), Volume V, pp. 2380-2418; Penned by Associate Justice Caesar A. Casanova, with Honorable Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Catherine T. Manahan, concurring.
4 Id., Volume VI, pp. 2874-2892.
5 Id., Volume V, pp. 2560-2568.
6 Id., pp. 2432-2453.
7 Id., Volume VI, pp. 3163-3166.
8 Id., pp. 2920-2936.
9 Joint Stipulation of Facts and Issues (JSFI), id., Volume I, p. 447.
10 Exhibits "A" and "B", id., Volume II, pp. 611-648.
11 Exhibits "C" and "C-1", id., pp. 649-652.

During the first to fourth (1st to 4th) quarters of TY 2010, respondent had the following transactions, as reflected in its Quarterly Value-Added Tax (**VAT**) Returns and summarized[12] below:

	Sales/Receipts	Output Tax
1st Quarter of 2010[13]		
Vatable Sales Receipts	₱ 323,285,336.68	₱ 38,794,240.40
Sales to Government	12,567,124.40	1,508,054.93
Zero-Rated Sales/Receipts	403,664,957.64	
Exempt Sales/Receipts	1,217,768.43	
	₱ 740,735,187.15	
2nd Quarter of 2010[14]		
Vatable Sales Receipts	₱ 254,653,568.27	₱ 30,558,428.19
Sales to Government	15,843,946.40	1,901,273.57
Zero-Rated Sales/Receipts	378,881,751.80	
Exempt Sales/Receipts	678,481.14	
	₱ 650,057,747.61	
3rd Quarter of 2010[15]		
Vatable Sales Receipts	₱ 269,413,258.33	₱ 33,329,591.00
Sales to Government	19,426,859.00	2,331,223.08
Zero-Rated Sales/Receipts	489,216,287.95	
Exempt Sales/Receipts	1,715,904.62	
	₱ 779,772,309.90	
4th Quarter of 2010[16]		
Vatable Sales Receipts	₱ 164,996,139.32	₱ 19,799,536.72
Sales to Government	15,062,327.60	1,807,479.31
Zero-Rated Sales/Receipts	523,898,827.74	
Exempt Sales/Receipts	1,576,163.82	
	₱ 705,533,458.48	

Throughout the same period, respondent likewise incurred input taxes, as likewise reported in its Quarterly VAT Returns and summarized[17] by it, to wit:

	Purchases	Input Taxes
1st Quarter of 2010[18]		
Vatable purchases for the quarter, excluding purchases of capital goods	₱ 378,705,825.58	₱ 45,444,699.07

12 Memorandum dated 10 December 2018, id., Volume VI, p. 2842.
13 Exhibits "J" and "K", id., Volume II, pp. 675-676.
14 Exhibit "L", id., p. 677.
15 Exhibits "M" and "N", id., pp. 678-679.
16 Exhibits "O" and "P", id., pp. 680-681.
17 Memorandum dated 10 December 2018, id., Volume VI, p. 2843.
18 Supra at note 13.

exceeding ₱1M[19]		
Input tax on purchases of capital goods amortized during the quarter		327,455.43
Total input taxes for the quarter		**₱ 45,772,154.50**
2nd Quarter of 2010[20]		
Vatable purchases for the quarter, excluding purchases of capital goods exceeding ₱1M[21]	₱ 390,772,630.24	₱ 46,892,715.63
Input tax on purchases of capital goods amortized during the quarter		327,455.41
Total input taxes for the quarter		**₱ 47,220,171.04**
3rd Quarter of 2010[22]		
Vatable purchases for the quarter, excluding purchases of capital goods exceeding ₱1M[23]	₱ 364,306,641.08	₱ 43,716,796.93
Input tax on purchases of capital goods amortized during the quarter		348,468.60
Total input taxes for the quarter		**₱ 44,065,265.53**
4th Quarter of 2010[24]		
Vatable purchases for the quarter, excluding purchases of capital goods exceeding ₱1M[25]	₱ 584,878,271.25	₱ 70,185,392.55
Input tax on purchases of capital goods amortized during the quarter		341,795.27
Total input taxes for the quarter		**₱ 70,527,187.22**

According to respondent, a portion of these input taxes incurred on its purchases were attributable to its zero-rated sales/receipts and the same were not fully utilized in the subject taxable quarters nor used against its output taxes in the subsequent periods. Thus, respondent filed four (4) separate administrative claims for refund, covering each quarter of TY 2010; all filed with the Large Taxpayer District Office (**LTDO**) – Cebu, Revenue District Office (**RDO**) No. 123, as shown below:

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19 Lines 21A/B, 21C/D, 21E/F, 21G/H and 21 I/J.
20 Supra at note 14.
21 Supra at note 19.
22 Supra at note 15.
23 Supra at note 19.
24 Supra at note 16.
25 Supra at note 19.

Taxable Period	Amount	Date Filed
First Quarter	6,126,105.97	29 November 2011[26]
Second Quarter	15,461,554.31	05 March 2012[27]
Third Quarter	10,540,887.95	30 May 2012[28]
Fourth Quarter	49,064,418.84	23 August 2012[29]

Due to petitioner's inaction to the said administrative claims for refund, respondent filed four (4) separate judicial claims, as likewise summarized below:

Taxable Period	Amount	Case No.	Division	Date Filed
First Quarter	6,126,105.97	8450	Second	30 March 2012
Second Quarter	15,461,554.31	8512	First	06 July 2012
Third Quarter	10,540,887.95	8547	Third	28 September 2012
Fourth Quarter	49,064,418.84	8596	Third	28 December 2012

In the First Division's Resolution of 16 November 2012[30], it ordered the consolidation of CTA Case No. 8512 with CTA Case No. 8450, the case bearing the lower case number.[31]

The Third Division, in its Resolution dated 07 February 2013[32], likewise ordered the consolidation of CTA Case No. 8547 with then CTA Case Nos. 8450 and 8512, pending with the Second Division.[33]

Thereafter, the Third Division, in its Resolution dated 15 February 2013[34], similarly ordered the consolidation of CTA Case No. 8596 with then already consolidated cases of CTA Case Nos. 8450, 8512 and 8547.[35]

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26 Exhibits "E" and "F", id., Volume II, pp. 654-663.
27 Exhibits "CC" and "DD", id., pp. 706-715.
28 Exhibits "EE" and "FF", id., pp. 716-726.
29 Exhibits "GG" and "HH", id., pp. 727-736.
30 Division Docket (CTA Case No. 8512), p. 153.
31 See also Resolution dated 04 December 2012, Division Docket (CTA Case No. 8450), Volume I, p. 204.
32 Division Docket (CTA Case No. 8547), p. 142.
33 See Resolution dated 11 February 2013, Division Docket (CTA Case No. 8450), Volume I, p. 226.
34 Division Docket, (CTA Case No. 8596), p. 106.
35 See Resolution dated 21 February 2013, Division Docket (CTA Case No. 8450), Volume I, p. 242.

With all the cases consolidated in the Second Division, the parties proceeded to submit their Joint Stipulation of Facts and Issues[36] (**JSFI**). A Pre-Trial Order[37] was issued and trial ensued thereafter.

After respondent presented its witnesses and filed its Formal Offer of Evidence[38] (**FOE**), it moved for the reopening of the cases.[39] The Second Division, despite petitioner's opposition[40] thereto, granted the same.[41] While petitioner moved for reconsideration[42] of the said grant, the Second Division nonetheless allowed respondent to present additional evidence.[43]

On 07 October 2014, respondent again moved for the reopening[44] of the case which the Second Division granted.[45] On 05 March 2015, respondent filed its Supplemental FOE.[46]

During the hearing on 20 April 2015, petitioner manifested that it would no longer present his evidence. The parties were then given a period of thirty (30) days within which to submit their respective memoranda.[47]

On 19 May 2015, respondent once again moved for the reopening[48] of the case which the Second Division similarly granted.[49]

Subsequently, respondent, despite the Second Division's directive for it to file its Supplemental FOE, instead filed a Motion to Defer the Filing of the FOE (with a Motion to Recall Joseph Cedric V. Calica).[50] After petitioner failed to file his comment thereto *per*

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36 Id., pp. 447-449.
37 Id., pp. 453-456.
38 Id., Volume II, pp. 576-610.
39 Motion to Reopen the Case dated 07 April 2014, id. pp. 860-864.
40 Opposition to Motion to Reopen Case dated 05 May 2014, id., pp. 877-882.
41 Resolution dated 19 June 2014, id. pp. 890-891.
42 Motion for Reconsideration dated 01 July 2014, id., pp. 904-911.
43 Resolution dated 07 July 2014, id., p. 916.
44 Motion to Reopen the Case, id., pp. 935-940.
45 Resolution dated 08 October 2014, id., pp. 956-957.
46 Id., Volume IV, pp. 2224-2233.
47 Resolution dated 20 April 2015, id., p. 2241.
48 Motion to Reopen the Case, id., pp. 2246-2252.
49 Resolution dated 23 July 2015, id., Volume V, pp. 2257-2258.
50 Id., pp. 2275-2279.

Records Verification[51] dated 20 October 2015, the Second Division resolved to grant the same in its Resolution dated 23 November 2015.[52]

Finally, on 22 February 2016, respondent filed its Supplemental FOE.[53] Thus, on 14 April 2016, the Second Division issued a Resolution giving the parties a period of thirty (30) days within which to file their respective memoranda.[54]

On 17 June 2016, respondent filed its Memorandum[55] while petitioner failed to file the same.[56]

On 09 June 2017, the Second Division promulgated the original Decision.[57] The dispositive portion thereof read:

> ...
>
> **WHEREFORE**, premises considered, the Petitions for Review docketed as CTA Case Nos. 8450, 8512, and 8547 covering petitioner's claims for refund for the first, second and third quarters, respectively, are **denied** for lack of merit.
>
> On the other hand, the Petition for Review docketed as CTA Case No. 8596 is **PARTIALLY GRANTED**. Accordingly, respondent is ordered to refund the amount of **₱3,612,740.75** in favor of petitioner representing the latter's excess input VAT attributable to zero-rated sales/receipts for the fourth quarter of CY 2010.
>
> **SO ORDERED.**
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> ...

On 29 June 2017, respondent filed yet another Motion to Reopen[58] the case alleging that: (1) there was a mistake in the representation of the commissioned Independent Certified Public Accountant (**ICPA**) that all the necessary documents were photocopied and submitted to the Court; (2) Exhibit "BBB-4493",

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51 Id., p. 2282.
52 Id., p. 2284.
53 Id., pp. 2310-2316.
54 Id., pp. 2336-2337.
55 Id., pp. 2344-2372.
56 *Per* Records Verification dated 20 June 2016, id., p. 2375.
57 Supra note 3.
58 Supra note 6.

which was reproduced in the said Motion to Reopen as "Annex D"[59] is compliant with the requirements of Sections 110(A)[60], 113(A) and (B)[61] of the National Internal Revenue Code (**NIRC**) of 1997, as amended, in relation to Sections 4.110-1[62], 4.110-8[63] and 4.113-1[64] of Revenue

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59 Division Docket (CTA Case No. 8450), Volume V, p. 2555.

60 **SEC. 110.** *Tax Credits.* -
(A) *Creditable Input Tax.* -
(1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax:
(a) Purchase or importation of goods:
(i) For sale; or
(ii) For conversion into or intended to form part of a finished product for sale including packaging materials; or
(iii) For use as supplies in the course of business; or
(iv) For use as materials supplied in the sale of service; or
(v) For use in trade or business for which deduction for depreciation or amortization is allowed under this Code.
(b) Purchase of services on which a value-added tax has been actually paid.
...

61 **SEC. 113.** *Invoicing and Accounting Requirements for VAT-Registered Persons.* -
(A) *Invoicing Requirements.* - A VAT-registered person shall issue:
(1) A VAT invoice for every sale, barter or exchange of goods or properties; and
(2) A VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services.
(B) *Information Contained in the VAT Invoice or VAT Official Receipt.* - The following information shall be indicated in the VAT invoice or VAT official receipt:
(1) A statement that the seller is a VAT-registered person, followed by his Taxpayer's Identification Number (TIN);
(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax. *Provided,* That:
(a) The amount of the tax shall be shown as a separate item in the invoice or receipt;
(b) If the sale is exempt from value-added tax, the term "**VAT-exempt sale**" shall be written or printed prominently on the invoice or receipt;
(c) If the sale is subject to zero percent (0%) value-added tax, the term "**zero-rated sale**" shall be written or printed prominently on the invoice or receipt.
(d) If the sale involved goods, properties or services some of which are subject to and some of which are VAT zero-rated or VAT exempt, the invoice or receipt shall clearly indicate the break-down of the sale price between its taxable, exempt and zero-rated components, and the calculation of the value-added tax on each portion of the sale shall be known on the invoice or receipt: *Provided,* That the seller may issue separate invoices or receipts for the taxable, exempt, and zero-rated components of the sale.
(3) The date of transaction, quantity, unit cost and description of the goods or properties or nature of the service; and
(4) In the case of sales in the amount of One thousand pesos (P1,000) or more where the sale or transfer is made to a VAT-registered person, the name, business style, if any, address and taxpayer identification number (TIN) of the purchaser, customer or client.
...

62 **SEC. 4.110-1.** ***Credits For Input Tax***. - "**Input tax**" means the VAT due on or paid by a VAT-registered person on importation of goods or local purchases of goods, properties, or services, including lease or use of properties, in the course of his trade or business. It shall also include the transitional input tax and the presumptive input tax determined in accordance with Sec. 111 of the Tax Code.

It includes input taxes which can be directly attributed to transactions subject to the VAT plus a ratable portion of any input tax which cannot be directly attributed to either the taxable or exempt activity.

Any input tax on the following transactions evidenced by a VAT invoice or official receipt issued by a VAT-registered person in accordance with Secs. 113 and 237 of the Tax Code shall be creditable against the output tax:
(a) Purchase or importation of goods
(1) For sale; or
(2) For conversion into or intended to form part of a finished product for sale, including packaging materials; or
(3) For use as supplies in the course of business; or
(4) For use as raw materials supplied in the sale of services; or
(5) For use in trade or business for which deduction for depreciation or amortization is allowed under the Tax Code,
(b) Purchase of real properties for which a VAT has actually been paid;
(c) Purchase of services in which a VAT has actually been paid;
(d) Transactions "deemed sale" under Sec. 106 (B) of the Tax Code;
(e) Transitional input tax allowed under Sec. 4.111 (a) of these Regulations;
(f) Presumptive input tax allowed under Sec. 4.111 (b) of these Regulations;
(g) Transitional input tax credits allowed under the transitory and other provisions of these Regulations.

63 **SEC. 4.110-8. *Substantiation of Input Tax Credits*. -**
(a) Input taxes for the importation of goods or the domestic purchase of goods, properties or services is made in the course of trade or business, whether such input taxes shall be credited against zero-rated sale, non-zero-rated sales, or subjected to the 5% Final Withholding VAT, must be substantiated and supported by the following documents, and must be reported in the information returns required to be submitted to the Bureau:
(1) For the importation of goods - import entry or other equivalent document showing actual payment of VAT on the imported goods.
(2) For the domestic purchase of goods and properties – invoice showing the information required under Secs. 113 and 237 of the Tax Code.
(3) For the purchase of real property – public instrument i.e., deed of absolute sale, deed of conditional sale, contract/agreement to sell, etc., together with VAT invoice issued by the seller.
(4) For the purchase of services – official receipt showing the information required under Secs. 113 and 237 of the Tax Code.

A cash register machine tape issued to a registered buyer shall constitute valid proof of substantiation of tax credit only if it shows the information required under Secs. 113 and 237 of the Tax Code.

(b) Transitional input tax shall be supported by an inventory of goods as shown in a detailed list to be submitted to the BIR.
(c) Input tax on "deemed sale" transactions shall be substantiated with the invoice required under Sec. 4-113-2 of these Regulations.
(d) Input tax from payments made to non-residents (such as for services, rentals and royalties) shall be supported by a copy of the Monthly Remittance Return of Value[-]Added Tax Withheld (BIR Form 1600) filed by the resident payor in behalf of the non-resident evidencing remittance of VAT due which was withheld by the payor.
(e) Advance VAT on sugar shall be supported by the Payment Order showing payment of the advance VAT.

64 **SEC. 4.113-1. *Invoicing Requirements*.** -
(A) A VAT-registered person shall issue: -
(1) A VAT invoice for every sale, barter or exchange of goods or properties; and
(2) A VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services.

Only VAT-registered persons are required to print their TIN followed by the word "VAT" in their invoice or official receipts. Said documents shall be considered as a "VAT Invoice" or "VAT Official Receipt." All purchases covered by invoices/receipts other than VAT Invoice/VAT Official Receipt shall not give rise to any input tax.

VAT invoice /official receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records.

Regulations (**RR**) No. 16-05[65], as amended, and is within the period of the claim; and, (3) respondent's sale of power to Cebu III Electric Cooperative (**CEBECO III**), which was eventually distributed to a Philippine Economic Zone Authority (**PEZA**)-registered entity and a Board of Investments (**BOI**)-registered 100% export entity, is subject to VAT zero-rating.

Similarly, petitioner filed his MPR[66] on 29 June 2017, also seeking the partial reconsideration of the first assailed Decision contending that: (1) respondent has no excess input taxes for the 4th quarter of the taxable year 2010 for failure to substantiate its claims; (2) respondent failed to prove that its alleged input taxes for the 4th quarter is directly attributable to its zero-rated sales; and, (3) respondent failed to prove that it had zero-rated or effectively zero-rated sales for the 4th quarter of TY 2010.

On 03 November 2017, the Second Division granted[67] respondent's Motion to Reopen and set the case for presentation of respondent's additional evidence (and held in abeyance the resolution of the parties' separate MRs).

On 15 March 2019, after reopening the proceedings and allowing additional reception of respondent's evidence, the Special Second

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(B) Information contained in VAT invoice or VAT official receipt. – The following information shall be indicated in VAT invoice or VAT official receipt:
(1) A statement that the seller is a VAT-registered person, followed by his TIN;
(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the VAT; *Provided*, That:
(a) The amount of tax shall be shown as a separate item in the invoice or receipt;
(b) If the sale is exempt from VAT, the term "VAT-exempt sale" shall be written or printed prominently on the invoice or receipt;
(c) If the sale is subject to zero percent (0%) VAT, the term "zero-rated sale" shall be written or printed prominently on the invoice or receipt;
(d) If the sale involves goods, properties or services some of which are subject to and some of which are VAT zero-rated or VAT-exempt, the invoice or receipt shall clearly indicate the break-down of the sale price between its taxable, exempt and zero-rated components, and the calculation of the VAT on each portion of the sale shall be shown on the invoice or receipt. The seller has the option to issue separate invoices or receipts for the taxable, exempt, and zero-rated components of the sale.
(3) In the case of sales in the amount of one thousand pesos (₱1,000.00) or more where the sale or transfer is made to a VAT-registered person, the name, business style, if any, address and TIN of the purchaser, customer or client, shall be indicated in addition to the information required in (1) and (2) of this Section.

65 Consolidated Value-Added Tax Regulations of 2005.
66 Supra at note 5.
67 Division Docket (CTA Case No. 8450), Volume V, pp. 2628-2632.

Division[68] issued the first assailed Resolution[69] denying petitioner's MPR and partially granting the reconsideration aspect of respondent's Motion to Reopen. The dispositive portion of the first assailed Resolution of 15 March 2019, read:

> ...
>
> **WHEREFORE**, premises considered, petitioner's **Motion for Reconsideration**, is **PARTIALLY GRANTED**, while respondent's **Motion for Partial Reconsideration Re: Decision dated 9 June 2017**, is **DENIED** for lack of merit. Accordingly, the dispositive portion of this Court's Decision dated June 9, 2017, is hereby amended to read as follows:
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> > "**WHEREFORE**, premises considered, the instant Petitions for Review are **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** to petitioner the amount of **₱46,872,156.51**, representing the latter's excess input VAT for the first to fourth quarters of CY 2010 attributable to its zero-rated sales/receipts.
> >
> > **SO ORDERED.**"
>
> **SO ORDERED.**
>
> ...

On such first assailed 15 March 2019 Resolution, petitioner filed an MR[70] on the grant of the reconsideration aspect of respondent's Motion to Reopen, contending that said first assailed Resolution ordered the amendment of the first assailed Decision. According to respondent, the amendment resulted in the promulgation of a new decision that could properly be a subject of an MR.

Insofar as the denial of his MPR is concerned, petitioner immediately filed the present Petition for Review to challenge the first assailed 15 March 2019 Resolution stating that the same is his only remedy since he cannot file a second MR on the denial of his MPR.

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68 The Second Division was reconstituted after the issuance of the CTA Administrative Circular No. 02-18 dated 18 September 2018 entitled "Reorganizing the Three (3) Divisions of the Court".
69 Supra at note 4.
70 Supra at note 8.

In compliance with the Court *En Banc*'s Resolution dated 21 May 2019[71], respondent filed its Comment/Opposition to the Petition for Review on 14 June 2019.[72]

The Court *En Banc* then issued a Resolution dated 05 July 2019[73], giving due course to the present Petition for Review and directed the parties to submit simultaneously their respective memoranda within thirty (30) days from receipt thereof.

Meanwhile, the Special Second Division issued the second assailed Resolution denying petitioner's MR. The dispositive portion of the same read:

> ...
>
> **WHEREFORE**, premises considered, respondent's **Motion for Reconsideration Re: Resolution dated 15 March 2019** is **DENIED** for lack of merit.
>
> **SO ORDERED.**
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> ...

Thus, on 29 July 2019, petitioner filed a Motion for Leave of Court to Admit Attached Supplemental Petition for Review[74] (**Motion for Leave**) with the attached Supplemental Petition for Review.[75] There, he stated that he deemed proper to file a supplemental to the present Petition for Review considering the events that transpired after its filing, citing Section 6, Rule 10 of the Rules of Court.[76]

On 14 August 2019, respondent filed a Motion for Extension of Time to File Memorandum[77] and requested for an additional period of

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[71] *Rollo*, pp. 83-84.
[72] Id., pp. 91-115.
[73] Id., pp. 117-118.
[74] Id., pp. 119-125.
[75] Id., pp. 126-143.
[76] **Sec. 6.** *Supplemental pleadings.* — Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him or her to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented. The adverse party may plead thereto within ten (10) calendar days from notice of the order admitting the supplemental pleading. *(As amended by A.M. No. 19-10-20-SC)*
[77] *Rollo*, pp. 211-214.

fifteen (15) days within which to file the same. The Court *En Banc* granted the same on 15 August 2019.[78]

Petitioner, on the other hand, filed a Manifestation and Motion to Defer Submission of Memorandum[79] since his Motion for Leave has yet to be resolved. Respondent effectively echoed the same when it filed its own Motion to Defer Filing of Memorandum.[80]

On 02 September 2019, the Court *En Banc* resolved to grant the Motion for Leave, admitting thus the Supplemental Petition for Review and ordering respondent to file its comment thereto within ten (10) days from receipt.[81] Likewise, on 16 September 2019, a Resolution was issued granting petitioner's Manifestation and Motion and respondent's Motion to Defer.[82]

On 07 October 2019, respondent filed its Comment/Opposition[83] to petitioner's Supplemental Petition for Review.

In the *interim*, petitioner's counsel filed a Withdrawal of Appearance which the Court *En Banc* noted on 24 September 2019.[84]

Thereafter, the Court *En Banc* issued a Resolution dated 14 November 2019[85], submitting the Petition for Review and Supplemental Petition for Review for decision.

ISSUES

In the instant Petition for Review, petitioner ascribes the following errors to the Court in Division's actions, to wit:

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78 Id., p. 215.
79 Id., pp. 216-220.
80 Id., pp. 221-226.
81 Id., pp. 228-229.
82 Id., pp. 231-232.
83 Id., pp. 241-267.
84 Id., pp. 238-240.
85 Id., pp. 269-270.

I.
THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT HAS EXCESS INPUT TAXES FOR THE FOURTH QUARTER OF TAXABLE YEAR 2010.

II.
THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT'S INPUT TAXES FOR THE FOURTH QUARTER OF TAXABLE YEAR 2010 IS DIRECTLY ATTRIBUTABLE TO ITS ZERO-RATED SALES.

III.
THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT HAD ZERO-RATED OR EFFECTIVELY ZERO-RATED SALES FOR THE FOURTH QUARTER OF TAXABLE YEAR 2010.

In support thereof, petitioner reiterates his arguments in his MPR as to why the Court in Division erred in granting respondent's claim for refund in the amount of ₱3,612,740.75.

In its Comment/Opposition, respondent counters that the Petition for Review is procedurally infirm; there was forum shopping and the Court *En Banc* had no jurisdiction considering that only after the resolution on the MR has been decided by the Court in Division that a Petition for Review may be entertained by the Court *En Banc*. Inasmuch as there was still a pending MR (at that time), the filing of the present Petition for Review was premature.

As to the merits of the case, respondent argues that the instant Petition for Review is a mere reiteration of issues that the Court in Division already ruled upon. Nevertheless, respondent maintains that the Court in Division properly granted its claim for refund because: (1) it is engaged in zero-rated sales; (2) its sales to power to CEBECO III are subject to VAT zero-rating; (3) it complied with the periods for claiming refund under Section 112(A) of the NIRC of 1997, as amended; and, (4) its purchases of goods and services are properly supported by original copies of appropriate VAT invoices (for purchases of goods) and VAT officials receipts (**ORs**) for purchases of services.

With respect to his Supplemental Petition for Review, petitioner additionally raises the following grounds in support thereof:

I.
THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT IS ENTITLED TO REFUND IN THE AMOUNT OF ₱46,872,156.51; AND,

II.
THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT'S SALES OF POWER TO CEBU III ELECTRIC COOPERATIVE (CEBECO III) ARE SUBJECT TO VAT ZERO RATING.

Petitioner claims that respondent should not have benefitted from its successive requests for reopening of the case; the additional documents presented when the case was reopened were actually forgotten evidence that the Court in Division should not have allowed.

In addition, petitioner asserts that the sales of power to CEBECO III are not subject to zero-rating because the latter is not registered with PEZA or BOI.

To counter petitioner's claims, respondent adds in its Comment/Opposition to the said Supplemental Petition for Review that, its sales of electricity to CEBECO III (which electric power is ultimately distributed a BOI-registered enterprise and a PEZA-registered enterprise) are considered as zero-rated sales pursuant to Revenue Memorandum Circular (**RMC**) No. 61-2005[86] in relation to Section 108(B)(3)[87] of the NIRC of 1997, as amended.

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86 Clarifying the VAT Provisions of R.A. 9337 Applicable to the Power Industry.

87 **SEC. 108.** *Value-added Tax on Sale of Services and Use or Lease of Properties.* –

...

(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.

...

(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[.]

...

RULING OF THE COURT *EN BANC*

After an assiduous review of the records of the case, the Court *En Banc* is constrained to dismiss the instant Petition for Review for having been prematurely filed and due to petitioner's breach of the rule prohibiting forum shopping.

As the records of the case show, as well as from petitioner's own admission, he filed the subject Petition for Review with the Court *En Banc* on 22 April 2019, despite the filing (and the pendency) of his MR on the second assailed Resolution with the Court in Division on 08 April 2019.

Based on the foregoing alone, it is clear that the subject Petition for Review was prematurely filed since petitioner did not await the resolution of his MR on the second assailed Resolution with the Court in Division, before resorting to appeal before Us pursuant to Section 3(b)[88], Rule 8 of the Revised Rules of the Court of Tax Appeals[89] (**RRCTA**).

In *Commissioner of Internal Revenue v. Sabre Travel Network (Philippines), (formerly) Abacus Distributions Systems Philippine, Inc.*[90], where petitioner therein similarly filed a Petition for Review with the Court *En Banc* while his MR on the Amended Decision was still awaiting resolution before the Court in Division, the Court *En Banc* ruled:

> ...
>
> It must be noted however that the decision or order which is appealable to the Court *En Banc* is that which has resolved the case with finality, and which, in effect, terminates or finally disposes of a

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88 **SEC. 3**. *Who may appeal; period to file petition.*

...

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

89 A.M. No. 05-11-07-CTA dated 22 November 2005.

90 CTA EB No. 1806 (CTA Case No. 8678), 08 April 2019; Emphasis in the original text.

case, as it leaves nothing to be done by the court as the case has finally been decided on the merits.

Considering that CIR's "Motion for Partial Reconsideration Re: Amended Decision dated February 15, 2018" was still pending resolution with the Second Division when CIR filed the instant Petition for Review, there still leaves something to be done by the Court *a quo* and the Amended Decision may not be subject of review under the afore-quoted RRCTA. The Amended Decision had not yet attained finality in view of the filed motion for reconsideration by CIR within the 15-day reglementary period allowed under the RRCTA, 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. (RCTA, Rule 13, sec. 1a)"

Note that under the RRCTA, the effect of the filing of a motion for reconsideration is to suspend the running of the period for the filing of an appeal. In other words, the motion must be resolved first, before an appeal is to be made:

> "SEC. 4. *Effect of filing the motion.* — **The filing of a motion for reconsideration** or new trial **<u>shall suspend the running of the period within which an appeal may be perfected</u>**. (RCTA, Rule 13, sec. 4a)"

The proper procedure that CIR should have taken in this case was to wait for the final termination of the proceedings before the Court in Division, prior to the filing of the instant Petition for Review, *i.e.*, issuance of a resolution on the motion for partial reconsideration. This rule is founded on considerations of orderly procedure, to forestall useless appeals and avoid undue inconvenience to the appealing party by having to assail orders as they are promulgated by the court, when all such orders may be contested in a single appeal.

...

In light of the foregoing considerations, the Court *En Banc* has no recourse but to dismiss this case.

...

As held in the said case, "**the decision or order which is appealable to the Court *En Banc* is that which has resolved the case with finality, and which, in effect, terminates or finally disposes of a case, as it leaves nothing to be done by the court as the case has finally been decided on the merits**". Herein, it is evident that what was appealed to the Court *En Banc* is not the Decision which has resolved the cases[91] with finality considering that petitioner filed an MR with the Court in Division (as a result of the issuance of an Amended Decision).

Thus, as similarly ruled in the aforementioned case, the Court *En Banc* has no choice but to dismiss the Petition for Review for having been filed prematurely. More importantly, in filing the subject Petition for Review while his MR is still pending with the Court in Division, petitioner likewise violated the proscription against forum shopping.

True, petitioner disclosed the pendency of his MR with the Court in Division in his Verification and Certification of Non-Forum Shopping[92] attached to the instant Petition for Review, as follows:

> ...
>
> 4. I certify that, except as to the pending Motion for Reconsideration on the Resolution dated 15 March 2019, filed by the CIR with the Honorable CTA Second Division, praying for the reconsideration of the 15 March 2019 Resolution in so far (sic) as it amended the 9 June 2019 (sic) Decision and granted respondent's claim for refund in the amount of P46,872,156.51, I have not commenced any other action or proceeding involving the same issue before this Honorable Court, or any Division thereof...
>
> ...

However, it bears stressing that compliance with the certificate of non-forum shopping is separate from and independent of the avoidance of the act of forum shopping itself. In *Bernardo S. Zamora v. Emmanuel Z. Quinan, Jr., et al.*[93] (**Zamora**), the Supreme Court recapitulated the rule on forum shopping, *viz*:

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[91] CTA Case Nos. 8450, 8512, 8547 and 8596.

[92] *Rollo*, p. 18.

[93] G.R. No. 216139, 29 November 2017; Citations omitted and emphasis supplied.

...

Though contained in the same provision of the 1997 Rules of Civil Procedure, the rule requiring the inclusion of a Certification against Forum Shopping is distinct from the rule against forum shopping. In *Korea Exchange Bank v. Gonzales*:

> **The general rule is that compliance with the certificate of forum shopping is separate from and independent of the avoidance of the act of forum shopping itself.** Forum shopping is a ground for summary dismissal of both initiatory pleadings without prejudice to the taking of appropriate action against the counsel or party concerned.

Top Rate Construction discussed the rationale for the rule against forum shopping as follows:

> **It is an act of malpractice for it trifles with the courts, abuses their processes, degrades the administration of justice and adds to the already congested court dockets. What is critical is the vexation brought upon the courts and the litigants by a party who asks different courts to rule on the same or related causes and grant the same or substantially the same reliefs and in the process creates the possibility of conflicting decisions being rendered by the different fora upon the same issues, regardless of whether the court in which one of the suits was brought has no jurisdiction over the action.**

Jurisprudence has recognized that forum shopping can be committed in several ways:

> **(1) filing multiple cases based on the same cause of action and with the same prayer, the previous case not having been resolved yet (where the ground for dismissal is *litis pendentia*)**; (2) filing multiple cases based on the same cause of action and the same prayer, the previous case having been finally resolved (where the ground for dismissal is *res judicata*); and (3) filing multiple cases based on the same cause of action but with different prayers (splitting of causes of action, where the ground for dismissal is also either *litis pendentia* or *res judicata*). (Emphasis in the original)

Similarly, it has been recognized that forum shopping exists "where a party attempts to obtain a preliminary injunction in another court after failing to obtain the same from the original court."

The test for determining forum shopping is settled. In *Yap v. Chua, et al.*:

> **To determine whether a party violated the rule against forum shopping, the most important factor to ask is whether the elements of *litis pendentia* are present, or whether a final judgment in one case will amount to *res judicata* in another; otherwise stated, the test for determining forum shopping is whether in the two (or more) cases pending, there is identity of parties, rights or causes of action, and reliefs sought.**

For its part, *litis pendentia* "refers to that situation wherein another action is pending between the same parties for the same cause of action, such that the second action becomes unnecessary and vexatious." For *litis pendentia* to exist, three (3) requisites must concur:

> **The requisites of *litis pendentia* are: (a) the identity of parties, or at least such as representing the same interests in both actions; (b) the identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) the identity of the two cases such that judgment in one, regardless of which party is successful, would amount to *res judicata* in the other.**

On the other hand, *res judicata* or prior judgment bars a subsequent case when the following requisites are satisfied:

> (1) the former judgment is *final*; (2) it is rendered by a court having *jurisdiction* over the subject matter and the parties; (3) it is a judgment or an order *on the merits*; (4) there is between the first and the second actions - *identity* of parties, of subject matter, and of causes of action. (Emphasis in the original)

These settled tests notwithstanding:

> **Ultimately, what is truly important to consider in determining whether forum-shopping exists or not is the vexation caused the courts and parties-litigant by a party who asks different courts and/or administrative agencies to rule on the same or related causes and/or to grant the same or substantially the same reliefs, in the process creating the possibility of conflicting decisions being rendered by the different fora upon the same issue.**

...

In this case, the Court *En Banc* finds that all the elements of *litis pendentia* concur and thus the finding of forum shopping from petitioner's end.

First, it cannot be disputed that the requisite of identity of parties is present (as the petitioner and respondent herein are the very same parties before the Court in Division).

Second, there is identity of rights asserted and reliefs prayed for by petitioner (in similarly seeking the reversal of the original Decision granting the request for refund, albeit the one covered by the second assailed Resolution is higher in amount as a result of the issuance of an Amended Decision).

Third, there is likewise identity of the two cases such that judgment in one, regardless of which party is successful, would amount to *res judicata* in the other. In the event that petitioner would prevail either in his MR or in the present Petition for Review, such judgment would constitute as *res judicata* insofar as respondent's non-entitlement to refund is concerned. On the other hand, in case either the Court in Division or the Court *En Banc* would rule in favor of respondent, the same would similarly constitute as *res judicata* with respect to its right to the refund being claimed.

In addition, petitioner's immediate resort of filing the present Petition for Review before the Court *En Banc* and the subsequent filing of an MR with the Court in Division opened the possibility of this

Court rendering contradictory or conflicting decision on the same subject matter.

Given petitioner's infraction, the Court *En Banc* is left with no choice but to summarily dismiss this instant Petition for Review. In *Zamora*, the Supreme Court ruled:

> ...
> **Thus, the CA did not commit an error in outrightly dismissing petitioner's petition.** It must be remembered that the acts of a party or his counsel, clearly constituting willful and deliberate forum shopping shall be ground for the summary dismissal of the case with prejudice, and shall constitute direct contempt, as well as be a cause for administrative sanctions against the lawyer. Also, SC Circular No. 28-91 states that the deliberate filing of multiple complaints by any party and his counsel to obtain favorable action constitutes forum shopping and shall be a ground for summary dismissal thereof and shall constitute direct contempt of court, without prejudice to disciplinary proceeding against the counsel and the filing of a criminal action against the guilty party. In *Spouses Arevalo v. Planters Development Bank*, **this Court further reiterated that once there is a finding of forum shopping, the penalty is summary dismissal not only of the petition pending before this Court, but also of the other case that is pending in a lower court.**[94]
> ...

Petitioner could not also take refuge from his subsequent filing of a Supplemental Petition for Review after the Court's Special Second Division has denied his MR. Certainly, the same will not cure the procedural infirmity of the Petition for Review he earlier filed.

In *Swagman Hotels and Travel, Inc. v. Hon. Court of Appeals, et al.*[95], the Supreme Court ruled that the defect cannot be cured or remedied by the acquisition or accrual of one while the action is pending and a supplemental complaint or an amendment setting up such after-accrued cause of action is not permissible. It further explained that:

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[94] Supra at note 93; Citations omitted and emphasis supplied.
[95] G.R. No. 161135, 08 April 2005; Citations omitted, emphasis in the original text and underscoring supplied.

...

It thus follows that a complaint whose cause of action has not yet accrued cannot be cured or remedied by an amended or supplemental pleading alleging the existence or accrual of a cause of action while the case is pending. Such an action is prematurely brought and is, therefore, a groundless suit, which should be dismissed by the court upon proper motion seasonably filed by the defendant. The underlying reason for this rule is that a person should not be summoned before the public tribunals to answer for complaints which are immature. As this Court eloquently said in *Surigao Mine Exploration Co., Inc. v. Harris*:

> It is a rule of law to which there is, perhaps, no exception, either at law or in equity, that to recover at all **there must be some cause of action at the commencement of the suit**. As observed by counsel for appellees, there are reasons of public policy why there should be no needless haste in bringing up litigation, and why people who are in no default and against whom there is yet no cause of action should not be summoned before the public tribunals to answer complaints which are groundless. We say groundless because if the action is immature, it should not be entertained, and an action prematurely brought is a groundless suit.
>
> It is true that an amended complaint and the answer thereto take the place of the originals which are thereby regarded as abandoned (Reynes vs. Compañia General de Tabacos [1912], 21 Phil. 416; Ruyman and Farris vs. Director of Lands [1916], 34 Phil., 428) and that "the complaint and answer having been superseded by the amended complaint and answer thereto, and the answer to the original complaint not having been presented in evidence as an exhibit, the trial court was not authorized to take it into account." (Bastida vs. Menzi & Co. [1933], 58 Phil., 188.) But in none of these cases or in any other case have we held that if a right of action did not exist when the original complaint was filed, one could be created by filing an amended complaint. In some jurisdictions in the United States what was termed an "imperfect cause of action" could be perfected by suitable amendment (Brown vs. Galena Mining & Smelting Co., 32 Kan., 528; Hooper vs. City of Atlanta, 26 Ga. App., 221) and this is virtually permitted in Banzon and Rosauro vs. Sellner ([1933], 58 Phil., 453); Asiatic Potroleum [sic] Co. vs. Veloso ([1935], 62 Phil., 683); and recently in Ramos vs.

> Gibbon (38 Off. Gaz., 241). **That, however, which is no cause of action whatsoever cannot by amendment or supplemental pleading** be converted into a cause of action: *Nihil de re accrescit ei qui nihil in re quando jus accresceret habet.*
>
> We are therefore of the opinion, and so hold, that **unless the plaintiff has a valid and subsisting cause of action at the time his action is commenced, the defect cannot be cured or remedied by the acquisition or accrual of one while the action is pending, and a supplemental complaint or an amendment setting up such after-accrued cause of action is not permissible**.

> Hence, contrary to the holding of the trial court and the Court of Appeals, the defect of lack of cause of action at the commencement of this suit cannot be cured by the accrual of a cause of action during the pendency of this case arising from the alleged maturity of two of the promissory notes on 7 August 1999 and 14 March 2000.
>
> ...

In the recent amendment[96] to Section 3, Rule 10 of the Rules of Court, the above judicial pronouncement was effectively codified. The pertinent provision now reads:

> ...
>
> **Section 3.** *Amendments by leave of court.* — Except as provided in the next preceding Section, substantial amendments may be made only upon leave of court. But such leave shall be refused if it appears to the court that the motion was made with intent to delay or confer jurisdiction on the court, or the pleading stated no cause of action from the beginning which could be amended. Orders of the court upon the matters provided in this Section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard.[97]
>
> ...

To reiterate, the Court *En Banc* ought to dismiss the instant Petition for Review for having been prematurely filed (and consequently, the Supplemental Petition for Review) and due to

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96 A.M. No. 19-10-20-SC (2019 Proposed Amendments to the 1997 Rules of Civil Procedure).
97 Underscoring in the original text.

petitioner's act of engaging in forum shopping. The Court *En Banc* deems it no longer necessary or useful to address the other issues raised by the parties.

WHEREFORE, with the foregoing, petitioner Commissioner of Internal Revenue's Petition for Review filed on 22 April 2019 and Supplemental Petition for Review filed on 29 July 2019 are **DENIED**. Accordingly, the Decision dated 09 June 2017, Resolution dated 15 March 2019 and Resolution dated 24 June 2019 in CTA Case Nos. 8450, 8512, 8547 and 8596, all entitled *Toledo Power Company v. Commissioner of Internal Revenue,* are hereby **AFFIRMED**.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

(On Leave)
MARIA ROWENA MODESTO-SAN PEDRO
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 before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice