REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SOUTHERN ENERGY NAVOTAS II POWER, INC. [formerly Hopewell Tileman (Philippines) Corporation],
Petitioner,

- versus -

C.T.A. CASE NO. 5815

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAR 01 2001

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DECISION

This Petition for Review is seeking for the refund of the amount of P137,535.60 allegedly representing unutilized input value-added tax (VAT, for brevity) on domestic purchases of goods and services for the calendar quarter ended March 30, 1997.

The facts and issues as jointly stipulated by the parties and approved by the Court[1] are the following:

STIPULATION OF FACTS

1. Petitioner is a domestic corporation organized and existing under the laws of the Republic of the Philippines, with principal office at Suite 202, CTC Building, 2232 Roxas Boulevard, Pasay City (***admitted in paragraph 1, Answer; paragraph 1, Respondent's Pre-trial Brief***);

2. Respondent is the duly appointed Commissioner of Internal Revenue vested with the authority to exercise the functions of his office, among others, the power to act upon claims for refund (***admitted in paragraph 1, Answer***);

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[1]Resolution, dated July 23, 1999, CTA Records, p. 52.

3. Petitioner is engaged in the business of power generation and subsequent sale thereof (***admitted in paragraph 1, Answer; paragraph 2, Respondent's Pre-trial Brief***);

4. Petitioner is a registered Value-Added Tax (VAT) taxpayer in accordance with Section 107 of the Tax Code [now Section 236 of the National Internal Revenue Code of 1997], with the BIR Certificate of Registration bearing RDO Control No. 96-051-005717 (***admitted in paragraph 1, Answer; paragraph 4, Respondent's Pre-trial Brief***);

5. On March 1, 1996, Petitioner filed with the BIR Revenue District Office No. 51 at Pasay City an Application for Effective Zero Rating for its services of construction and operation of a gas turbine power station under the build operate and transfer (BOT) scheme with the National Power Corporation ("NPC") (***admitted in paragraph 1, Answer; paragraph 5, Respondent's Pre-trial Brief***);

6. Petitioner's first quarter VAT return for 1997 filed with the BIR reflected the amount of P137,535.60 as input tax paid for purchases of goods and services (***admitted in paragraph 2, and 4, Answer; paragraph 6, Respondent's Pre-trial Brief***);

7. On March 30, 1999, Petitioner filed with the Bureau of Internal Revenue an administrative claim for refund of unutilized input VAT in the amount of P137,535.60 for the first quarter of 1997 (***admitted in paragraph 4, Answer, paragraph 7, Respondent's Pre-trial Brief***);

8. The subject petition for review is being filed in order to suspend the running of the two-year prescriptive period under the law and to preserve its right to judicially claim the tax refund or tax credit (***admitted during the pre-trial hearing on July 13, 1999***);

STIPULATION OF THE ISSUES

a) Whether or not the services of power generation rendered by Petitioner for the supply of electricity to National Power Corporation are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997 (formerly Section 102(b)(3) of the Old Tax Code);

b) Whether or not Petitioner has unapplied or unutilized creditable value-added tax inputs as of March 31, 1997 arising from its domestic purchases of goods and services which is a proper object of a claim for refund pursuant to Section 108(B)(3) (formerly Section102 (b)(3) of the Old Tax Code) and Section 112(A) (formerly Section 106(b) of the Old Tax Code) of the National Internal Revenue Code, as amended;

c) Whether or not the said creditable value added tax inputs of Petitioner for the quarter ended March 31, 1997 are substantiated by documentary evidence in the form of invoices and official receipts; and

d) Whether or not said unapplied or unutilized creditable value-added tax inputs for the quarter ended March 31, 1997 were carried forward to the succeeding taxable quarter and applied against any of the value-added tax output of the Petitioner for said period.

Anent the first issue, Petitioner asserts that the services it rendered to the National Power Corporation are subject to 0% VAT pursuant to Section 102(b)(3) of the Tax Code, as amended, to wit:

Sec. 102. Value-added tax on sale of services and use or lease of properties. – (a) xxx

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

(1) xxx

(2) xxx

(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero rate.

Hence it is entitled to the refund of input VAT it paid during the period January 1, 1997 to March 31, 1997 pursuant to Section 106(a) of the same code.

On the other hand, Respondent argues that before Petitioner can claim that its sale of power generation services to the National Power Corporation is a zero-rated transaction, it must first comply with the condition provided under Section 8(d) of Revenue Regulations No. 5-87 that of securing from the Bureau of Internal Revenue an approved application for effective zero-rating on its sale of services to NPC. He further opines that the taxes sought to be refunded by Petitioner were not for purchases made in the course of its trade or business of power generation, thus it does not fall under the definition of the term "input tax" under the Tax Code to warrant a refund.

We agree with the first premise of the Respondent.

The records show that Petitioner failed to secure from the BIR an approved application for zero-rating. In fact, in its Memorandum, Petitioner admitted that such requirement is necessary for its claim for refund to prosper. However, Petitioner begged the indulgence of this Court to consider the peculiar circumstances surrounding its present appeal and lamentably the Court cannot rule in favor of the Petitioner.

It is true that Petitioner waited for a long time for the Respondent to act on its application for effective zero-rating considering that the application was filed on March 1, 1996, and until now there was no action from the Respondent. However, this scenario could have been prevented had Petitioner exercised its right to compel Respondent to act on its application. A petition for mandamus should have been resorted to by Petitioner to secure the much needed approval. This Court is of the impression that Petitioner did not exert an effort to follow-up its application with the BIR and waited this long for the Court to rule on it. Sad to say, such authority to rule on the application for zero-rating is only vested upon the Respondent.

As correctly pointed out by the Respondent, without an approved application for effective zero rating, the transaction otherwise entitled to zero rating shall be considered exempt (VAT Ruling Nos. 033-96, 012-97, 013-97, 037-97, 038-97, 023-98, 006-99, 015-99, 022-99, 052-99, and 063-99). Basic is the principle that VAT-exempt sales transactions are not entitled to input tax credits as provided in Section 9(a) of Revenue Regulations 5-87, thus:

> **SEC. 9.** *Exemptions.* – (a) In general exemption means that the sale of goods or services is not subject to value-added tax (output tax). The seller is not allowed any tax credit on VAT (input tax) previously paid. The person making the exempt sale of goods or services shall not separately bill any output tax on his customers because the said transaction is not subject to VAT.

The price of the goods and services procured is the sum total paid; and the amount added because of the tax is paid as part of the price to get the goods and services (**Philippine. Acetylene Co. vs. Commissioner of Internal Revenue, G.R. No. L-19707, August 17, 1967**).

This Court maintains that a VAT entity which failed to present an approved application for zero-rating as required by Section 8(d) of Revenue Regulations No. 5-87 will not be considered a zero-rated entity, hence, not entitled to the refund of input taxes paid (**ABB Power Generation Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 5270, March 3, 1999 and Kumagai-gumi Co. Ltd., vs. Commissioner of Internal Revenue, CTA Case No. 4670, July 29, 1997**).

WHEREFORE, in view of the foregoing, Petitioner's claim for refund is hereby **DENIED** for lack of merit.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge