REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

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

- versus -

C.T.A. CASE NOS. 5936 & 5968

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JAN 16 2002

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DECISION

These two Petitions for Review seek the refund of unutilized input value-added tax (VAT, for brevity) on domestic purchases of goods and services in the total amount of P529,010.56 allegedly attributable to zero-rated sales of services for the third and fourth calendar quarters of 1997, broken down as follows:

CTA Case No.	Period Involved	Amount
5936	Third Quarter of 1997	P288,955.92
5968	Fourth Quarter of 1997	240,054.64
Total		P529,010.56

These two cases were consolidated pursuant to an order given in open court on January 8, 2000, upon written motion of Petitioner's counsel (see minutes of the session, January 8, 2000, CTA records, p. 55).

The facts of the case are briefly stated as follows:

Petitioner is a corporation duly existing under and by virtue of the laws of the Philippines with principal office address located at Suite 501, CTC building, 2232 Roxas Boulevard, Pasay City. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC) under the Build, Operate, Transfer (BOT) Scheme. It is registered with the Bureau of Internal Revenue as a VAT taxpayer with Certificate of Registration bearing RDO Control No. 96-051-005718 (Annex B). It was originally registered with the Securities and Exchange Commission under the name "Hopewell Energy (Philippines), Corp." and later was changed to "Southern Energy Navotas, Inc." (Exhibits A and A-1).

As early as March 1, 1996, Petitioner already filed with the BIR Revenue District Office No. 51 an Application for Effective Zero Rating with respect to its sales of services to National Power Corporation for the construction and operation of a gas turbine power station under the Build Operate Transfer (BOT) scheme (Exhibits B and B-1). This application remains unacted upon by the Revenue District Officer up to this time.

For the third and fourth quarters of 1997, Petitioner seasonably filed its quarterly Value-Added Tax Returns on October 20, 1997 and January 20, 1998 (Exhibits C, C-9, G, and G-9). These VAT returns were simultaneously amended on October 8, 1999, reflecting total zero rated sales in the amount of P139,979,228.70 for the third and fourth quarters of 1997 with the corresponding aggregate input taxes in the sum of P529,010.56 for the same period (Exhibits E, E-1, E-3, E-5, I, I-1, I-3, and I-5).

On June 30, 1999, Petitioner filed its administrative claim for refund with RDO No. 51 of the Bureau of Internal Revenue believing that its sales of services to the NPC are subject to VAT at 0% hence it is entitled to the refund of unutilized input VAT attributable thereto (Exhibits N, N-1 and N-2).

The inaction of Respondent on its claim for refund compelled Petitioner to file the instant petitions for review on September 29, 1999 and December 6, 1999 in order to toll the running of the two-year prescriptive period under the law. The petition for review for the third quarter of 1997 was docketed as CTA Case No. 5936 while the petition for review for the fourth quarter of 1997 was docketed as CTA Case No. 5968.

The consolidated issues to be resolved by the Court are as follows:

> 1. Whether or not the power generation services rendered by Petitioner for supply to NPC 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);
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> 2. Whether or not Petitioner has unapplied or unutilized creditable input value-added taxes for the third and fourth quarters of 1997 arising from its domestic purchases of goods and services which can be a proper object of a claim for refund pursuant to Section 108(B)(3) [formerly Section 102[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;
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> 3. Whether or not the said creditable input value-added taxes of Petitioner for the third and fourth quarters of 1997 were substantiated by documentary evidence;
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> 4. Whether or not the said unutilized creditable input value-added taxes for the third and fourth quarters of 1997 were carried over to the succeeding taxable quarter(s) and applied against any of the output value-added tax liability of the Petitioner for the said period; and

5. Whether or not the Petitioner complied with the requirements necessary for the refund of VAT input taxes of P288,955.92 and P240,054.64 representing its alleged unutilized input value added taxes for the third and fourth quarters of 1997, respectively.

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, quoted, thus:

> **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.

Based on the foregoing provision, Petitioner now seeks the refund of the input VAT it paid during the period July 1, 1997 to December 31, 1997 in accordance with Section 106(a) of the same code which provides:

> **SEC. 106**. *Refunds or tax credits of creditable input tax.* - (a) 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"

On the other hand, Respondent argues that Petitioner is not entitled to the refund because of its failure to present an approved application for zero-rating. He cites as basis this Court's ruling in the case of **ABB Power Generation Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 5270, dated March 3, 1999**[1]. Hereunder are excerpts of the aforementioned decision, thus:

> Moreover, granting *arguendo*, that petitioner's sale of services to the NPC are considered effectively zero-rated sales under Section 102(a)(3) of the Tax Code, supra, nevertheless, this Court has to deny the instant claim for refund as petitioner failed to comply with Section 8(d) of Revenue Regulations No. 5-87 which requires that any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application with the Commissioner of Internal Revenue justifying the imposition of zero-rate on said transactions. Quoted hereunder is Section 8(d) of Revenue Regulations No. 5-87, thus:
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> > (d) Application for zero rate. – Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero-rate on the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked.
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> (F)ailure to get an approval from the Commissioner for a zero-rating classification will make the said sale of services by Petitioner to NPC an EXEMPT transaction under paragraph (u) of Art. 103 of the Tax Code, thus, petitioner shall not be entitled to the refund of any input tax it paid on its purchase of goods and services during the period in question.

There is no argument that Petitioner failed to secure from the Bureau of Internal Revenue an approved application for effective zero-rating. However, records show that as early as March 1, 1996, Petitioner had already filed with the Revenue District Office

No. 51 of Pasay City an application for effective zero-rating regarding its sales of services to NPC but the latter office failed to process.

We shall resolve the issue based on the existing law, jurisprudence, and evidence on record.

In the case of **Ernesto M. Maceda vs. Hon. Catalino Macaraig, G. R. No. 88291, May 31, 1991,** the total exemption of National Power Corporation (NPC) from all kinds of taxes whether direct or indirect was already settled by the Supreme Court. The NPC's exemption from all kinds of taxes was further elucidated by the High Court in its Resolution dated June 8, 1993 resolving the same issue in the motion for reconsideration, and we quote, thus:

> A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes – direct or indirect.
>
> One common theme in all these laws is that the NPC must be enabled to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$4 Billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved.

In the light of the aforementioned decision, the Secretary of the Department of Finance issued a Memorandum dated January 28, 1998, addressed to the Commissioner of Internal Revenue, upholding the ruling of the Supreme Court with respect to the total exemption of NPC from all kinds of taxes and further ruled that purchases by NPC of

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[1] With Entry of Judgment, dated March 24, 1999.

electricity from independent power producers are subject to VAT at 0%. Pertinent portions of said memorandum read as follows.

> As explained by the Supreme Court, the rationale for the NPC's tax exemption is to ensure cheaper power. If the BIR's recent view is to be implemented, the VAT, being an indirect tax, may be passed on the by seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rated to the consumers. Estimates show that a 10% VAT on electricity which is purchased by NPC from its independent power producers will increase power cost by about P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional charge of P0.039 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the ultimate benefit of the Filipino consumer.
>
> In view of the foregoing and using the power of review granted to the Secretary of Finance under Section 4 of Republic Act No. 8424, the DOF upholds the ruling of the Supreme Court that the NPC is exempt under its charter and subsequent laws from all direct and indirect taxes on its purchases of petroleum products and electricity. Thus, the purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate. (Underlining supplied).

The affirmations of both the Supreme Court and the Secretary of Finance regarding NPC's exemption from all kinds of taxes should be enough bases for the Revenue District Officer of RDO No. 51 to approve the pending application of Petitioner. However, the said office chose to be silent on the matter (probably) because its approval would result to the granting of Petitioner's claim for refund.

It cannot be denied that Petitioner failed to secure an approved application for effective zero-rating with the RDO No. 51 of Pasay City. However, the inaction of the said office regarding the application should not be taken against Petitioner. We quote our Resolution dated December 12, 2001 in **Mirant (Navotas II) Corporation vs.**

Commissioner of Internal Revenue, CTA Case No. 5911, involving the same parties, as follows:

> "We note that as early as March 1, 1996, Petitioner filed with Respondent's Revenue District Office (RDO) No. 51 Pasay City an Application for Effective Zero Rating. However, up to this time, Respondent has failed to act upon said application. We believe that if Respondent had a valid ground to disapprove the application, he would have done so swiftly instead of "sitting on" the application for an interminable length of time to the detriment of the taxpayer's rights."

In fact, in numerous VAT and BIR rulings, the Respondent had already acknowledged that purchases of NPC of electricity from independent power producers are subject to VAT at zero-rate (VAT Ruling Nos. 015-99, 022-99, 052-99, 067-99, 018-00, BIR Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA209-04-04-99).

Records show that Petitioner is engaged in selling electricity to NPC, its sole client (TSN, April 25, 2000, p. 7). Consequently, the payments received by the Petitioner from NPC for the services rendered in the generation and sale of electricity are subject to VAT at zero percent.

The Court's ruling in the ABB case cannot be applied to the peculiar circumstances surrounding the present case. In the ABB case, Petitioner failed to file an application for effective zero-rating while Petitioner herein did. Thus, there was a total absence of effort on the part of Petitioner ABB in securing the needed approval. This is contrary to the present case where Petitioner, as early as March 1, 1996, had already filed its application.

The legal issue having been settled, we shall now proceed to the factual aspects of the case which are the remaining issues at bar.

Records disclose that Petitioner received capacity and energy fees from the National Power Corporation for the period July to December 1997 in the aggregate amount of P139,979,228.70 (Exhibits F, F-1, F-2, J, J-1, and J-2). These fees were all supported by invoices or official receipts and were declared in the respective third and fourth quarterly VAT returns (Exhibits X, X-1 to X-22, E-1, and I-1). Since the services of Petitioner are subject to VAT at 0% based on the aforementioned rulings, it is therefore entitled to the refund of input taxes attributable thereto. However, Petitioner must still prove that it has accumulated input taxes in the total amount of P529,010.56 by presenting valid VAT invoices and official receipts.

Due to the voluminous nature of evidence to be presented, Petitioner availed of the services of an independent Certified Public Accountant pursuant to CTA Circular No. 1-95, as amended. Consequently, Mr. Ruben R. Rubio, an Audit Partner of SGV & Co. was commissioned to examine and verify various receipts and invoices and other long accounts supporting Petitioner's claimed input taxes (TSN, August 2, 2000). Two reports dated December 8, 2000 and January 31, 2001 were submitted detailing the audit procedures performed and the findings arrived at after the examination (Exhibits V and W).

Detailed below is the gist of the auditor's findings, to wit:

Based on the procedures we performed, we present below our findings:

Findings	3rd Quarter	4th Quarter	Total
I. Input Taxes on Local Puchases of Services			
1. Supported by TIN OR (*Annex A*)		7,027.66	7,027.66
2. Supported by Non-VAT OR (*Annex B*)	1,065.91	1,929.54	2,995.45
3. Supported by TAN Non VAT OR (*Annex C*)		1,498.18	1,498.18
II. Input Taxes on Local Puchases of Goods			
1. Supported by Handwritten /Stamped TIN Invoices (*Annex D*)	1,079.55	10,909.09	11,988.64
2. Supported by TAN-VAT Invoice (*Annex E*)	2,427.27		2,427.27
3. Supported by VAT OR, not VAT Invoice (*Annex F*)	471.97	3,454.28	3,926.25
4. Supported by VAT Invoice not Dated within the period of Claim (*Annex G*)	901.68		901.68
III. Input Taxes on Local Purchases of Goods and Services Without Supporting Documents (*Annex H*)	5,001.20		5,001.20
Total	P 10,947.58	P 24,818.75	P 35,766.33

After verification of the above reports, the Court finds the same in order and hereby adopts the said findings. It was further ascertained that the input taxes claimed for the third and fourth calendar quarters of 1997 in the total amount of P529,010.56 were already deducted by Petitioner from its accumulated input taxes as of September 30, 1999 as evidenced by the 1999 third Quarterly VAT Return (Exhibits K, K-1 to K-8, and K-8-a).

The observation of Respondent in his memorandum that several invoices were dated beyond the period of the claim for refund is untenable. A verification of the specific documents enumerated by the Respondent reveals that said documents have corresponding official receipts which are within the period of the claim for refund except for Exhibit P-38. However, Exhibit P-38 was already considered by the independent CPA as a deduction in his report (Annex G of Exhibit V).

In sum, Petitioner is entitled to the claim for refund in a reduced amount of P493,244.23, computed as follows:

	3rd Quarter	4th Quarter	Total
Input Taxes Claimed	P288,955.92	P240,054.64	P529,010.56
Less: Exceptions Noted by the CPA	10,947.58	24,818.75	35,766.33
Refundable Input Taxes	P278,008.34	P215,235.89	P493,244.23

WHEREFORE, in view of the foregoing, the petitions for review are hereby partially **GRANTED**. Respondent is **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the amount of P493,244.23 in favor of Petitioner.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate 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