REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT (NAVOTAS II) CORPORATION (Formerly Southern Energy Navotas II Power Inc.),
Petitioner,

- versus -

C.T.A. CASE NO. 6043

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 0 5 2002

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DECISION

This case involves a claim for refund or issuance of a tax credit certificate in the amount of P596,642.13 allegedly representing unutilized input value-added tax (VAT, for brevity) on domestic purchases of goods and services for the year 1998.

The facts of the case are briefly stated as follows:

Petitioner is a domestic corporation 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 *(par. 1, Stipulation of Facts)*. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation under a Build, Operate, and Transfer (BOT) Scheme. Petitioner is registered with the Bureau of Internal Revenue as a VAT taxpayer with Certificate of Registration bearing RDO Control No. 96-051-005717 dated January 30, 1996 *(pars. 4 & 5, Stipulation of Facts)*. It was originally registered with the Securities and Exchange Commission (SEC) under the name "Hopewell Tileman (Philippines) Corp." but effective

March 23, 1999, said name was changed to "Southern Energy Navotas II Power, Inc." by virtue of SEC Certificate of Filing of Amended Articles of Incorporation bearing the same date *(par. 3, Stipulation of Facts)*.

On December 1, 1997, petitioner filed with the BIR Revenue District Office No. 51 in Pasay City an Application for Effective Zero Rating of its sales of services to National Power Corporation for the construction and operation of the latter's 100MW gas turbine power station in Navotas, Metro Manila and its subsequent sale of electricity to NPC under the BOT scheme (*Exhibits B, B-1, and B-2*).

For the year 1998, petitioner seasonably filed its first, second, third and fourth Quarterly Value-Added Tax Returns on April 28, 1998, July 27, 1998, October 26, 1998, and January 25, 1999, respectively, reflecting no record of sales but with an aggregate input tax in the amount of P596,642.13 (*Exhibits C, E, G, and I, inclusive of submarkings*). These VAT returns were simultaneously amended on September 27, 1999 to reflect its total zero rated sales for the year 1998 in the gross amount of P283,481,153.41 (*Exhibits D, F, H and J, inclusive of submarkings*) representing sales of electricity to National Power Corporation.

Believing that it is entitled to the refund of input taxes attributable to its alleged zero-rated sales of electricity to NPC, petitioner, on December 22, 1999, filed its 1998 administrative claim for refund with the Bureau of Internal Revenue in the amount of P596,642.13 (*Exhibits K, K-1, and K-2*). Petitioner cited as legal basis therefor Section 108(B)(3) of the 1997 Tax Code in relation to Section 112(A) of the same Code.

The inaction of respondent on its request for refund compelled petitioner to file the instant petition for review on March 31, 2000 in order to toll the running of the two-year prescriptive period under Section 229 of the 1997 Tax Code. Petitioner relied on the provisions of Republic Act No. 6395, otherwise known as the "NPC Charter" and the pronouncement of the Supreme Court in the case of ***Maceda vs. Macaraig, Jr., G.R. No. 88291, May 31, 1991***, declaring the NPC as exempt from the payment of direct and indirect taxes, to prove that its sales of electricity to NPC are subject to VAT at zero rate; hence, it is entitled to the refund of its unutilized input VAT attributable to such sales.

In his Answer filed through registered mail on May 16, 2000, respondent raised the following special and affirmative defenses:

> " 4. The petition states no cause of action as it does not allege the dates when the taxes sought to be refunded were actually paid;
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> 5. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 35);
>
> 6. One who claims to be exempt from payment of a particular tax must do so under clear and unmistakable terms found in the statute (Asiatic Petroleum vs. Llanes, 49 Phil. 406; Union Garment Co. vs. Court of Tax Appeals, 4 SCRA 304);
>
> 7. In action (sic) for refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund;
>
> 8. It is incumbent upon petitioner to show compliance with the provisions of Section 229 of the National Internal Revenue Code;
>
> 9. Taxes paid and collected are presumed to have been made in accordance with the law and regulations, hence not refundable."

This case was submitted for decision on April 22, 2002, sans the evidence and memorandum of the respondent.

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

1. Whether or not the power generation services rendered by petitioner 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);

2. Whether or not petitioner has unapplied or unutilized creditable input VAT for the four (4) quarters of 1998 arising from its domestic purchases of goods and services in the total amount of P596,642.13 that can be a proper object of a claim for refund pursuant to Section 108(B)(3) [formerly Sec. 102(3)(b) 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;

3. Whether or not the unutilized creditable input taxes for the four (4) quarters of 1998 are substantiated by proper invoices and official receipts; and

4. Whether or not the said unutilized creditable input VAT for the four (4) quarters of 1998 were carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of petitioner for the said period.

Anent the first issue, We agree with the petitioner that its sale of services to the National Power Corporation is subject to VAT at 0% pursuant to the provisions of Section 108(B)(3) of the 1997 Tax Code, quoted, thus:

"**Section 108.** ***Value-added Tax on Sale of Services and Use or Lease of Properties.*** - x x x

(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
(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."

In the case of ***Ernesto M. Maceda vs. Hon. Catalina Macaraig,*** supra, 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 explicated by the High Court in its Resolution dated June 8, 1993, resolving the same issue in a 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 enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$5 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 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 by the seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rate 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 P0.059 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."

Consequently, respondent aknowledged that purchases by NPC of electricity from independent power producers are subject to VAT at 0% in a number of VAT and BIR Rulings (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 DA-209-04-04-99).

Moreover, in several analogous cases elevated before this Court, this legal issue had been resolved in favor of petitioner, namely:

1. *Mirant (Phils.) Mobile Corp. (formerly Southern Energy Mobile, Inc.) vs. Commissioner of Internal Revenue*, CTA Case Nos. 5935 & 5969, January 15, 2002;

2. *Southern Energy Quezon, Inc. (formerly Hopewell Power (Phils) Corp.) vs. Commissioner o f Internal Revenue*, CTA Case Nos. 5933 & 5984, January 15, 2002;

3. *Mirant Navotas Corp. (formerly Southern Energy Navotas, Inc.) vs. Commissioner of Internal Revenue*, CTA Case No. 5936, January 16, 2002;

4. *Mirant (Navotas II) Corp. (formerly Southern Energy Navotas II Power, Inc.) vs. Commissioner of Internal Revenue,* CTA Case No. 5963, January 21, 2002;

5. *Magellan Cogeneration, Inc vs. Commissioner of Internal Revenue*, CTA Case No. 5765, February 26, 2002; and

6. *Mirant Pagbilao Corp. (formerly Southern Energy Quezon, Inc.). vs. Commissioner of Internal Revenue*, CTA Case No. 6041, March 5, 2002)

We shall now proceed to the factual aspects of the case which are the remaining issues at bar.

Records show that petitioner received capacity and energy fees from the National Power Corporation for the year 1998 in the aggregate amount of P283,481,153.41 as evidenced by Citibank N.A. credit advices (*Exhibits Y-2, Y-4, Y-6, Y-8, Y-9, Z-2, Z-3, Z-5, Z-7, AA-2, AA-3, AA-6, AA-8, BB-2, BB-4, and BB-6*). The fees were verified by the Court to have been supported by petitioner's sales invoices (*Exhibits Y-1, Y-3, Y-5, Y-7, Z-1, Z-4, Z-6, AA-1, AA-5, AA-7, BB-1, BB-3, and BB-5*) and were all declared in their corresponding quarterly VAT returns (*Exhibits D-1, F-1, H-1, and J-1*). Since the services of petitioner are subject to VAT at 0% as discussed earlier, it is therefore entitled to the refund of input taxes attributable thereto pursuant to Section 112(A) of the 1997 Tax Code which provides:

> **Section 112.** ***Refunds or Tax Credits of Input Tax.*** -
>
> *(A) Zero-rated or Effectively Zero-rated Sales.* - Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided*, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

However, petitioner must still prove with substantial evidence the accumulated input taxes claimed in the total amount of P596,642.13.

In the case of ***Taganito Mining Corporation vs. Commissioner of Internal Revenue,*** **CTA Case No. 5983, dated October 11, 2001**, the Court laid down certain requirements that must be complied with by petitioner in order to be entitled to the refund sought, thus:

> 1. the claimed input VAT payments are duly supported by VAT invoices or official receipts in accordance with Section 4.104-5 of Revenue Regulations No. 7-95 in relation to Sections 113 and 237 of the Tax Code, as amended;
>
> 2. the claimed input VAT payments are directly attributable to zero-rated sales;
>
> 3. the claimed input VAT payments were not applied against any output tax nor carried over to the succeeding month(s); and
>
> 4. both the administrative and judicial claims for refund were filed within the two-year prescriptive period.

A verification of the report of the commissioned independent CPA (*Exhibits T and T-1*) against the submitted VAT invoices and official receipts (*Exhibits U-1 to U-97, V-1 to V-96, W-1 to W-122 and X-1 to X-115*) disclosed that input taxes in the amount of P110,284.50 should be disallowed for the following reasons (*pages 222-227, CTA Records)*

Findings	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I. Input Taxes on Purchases Of Services:					
1 Supported by Stamped/ Handwritten TIN VAT (Annex A)			P 30.00		P 30.00

2 From Transportation Contractors Subject to the 3% Percentage Tax (Annex B)	P24,613.66	P15,594.74	P22,207.31	P 9,273.78	71,689.49
3 From Brokers not Supported by Third Party ORs (Annex C)			669.11		669.11
II. Input Taxes on Purchases Of Goods:					
1 Supported by Invoices with TIN only (Annex D)				1,455.27	1,455.27
2 Double Claim (Annex E)	466.77				466.77
III. Input Taxes on Purchases of Goods and Services and on Importation Without Supporting Documents (Annex F)	1,231.64	3,299.96	7,712.90	23,729.36	35,973.86
Total	**P26,312.07**	**P18,894.70**	**P30,619.32**	**P34,458.41**	**P110,284.50**

Finally, it was ascertained that the input taxes claimed for the year 1998 in the gross amount of P596,642.13 were already deducted by petitioner from the accumulated input taxes as of September 30, 2000 as evidenced by the 2000 third Quarterly VAT Return (*Exhibit R, inclusive of submarkings*).

In sum, petitioner is entitled to the claim for refund in the reduced amount of P486,357.63, computed as follows:

Total amount sought to be refunded	P596,642.13
Less exceptions noted by the CPA and verified by the Court to be in order	110,284.50
Amount refundable	P486,357.63

WHEREFORE, in view of the foregoing, the petition for review is hereby partially **GRANTED**. Respondent is **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the amount of **P486,357.63** in favor of petitioner.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA
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