REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MIRANT SUAL CORPORATION (formerly Southern Energy Pangasinan, Inc.),

Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

C.T.A. EB NO. 364
(C.T.A. CASE NO. 6958)

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COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

- versus -

TEAM SUAL CORPORATION (Formerly Mirant Sual Corporation, Southern Energy Pangasinan, Inc.)

Respondent.

C.T.A. EB NO. 387
(C.T.A. CASE NO. 6958)

Present:

Acosta, *P.J.,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

Promulgated:

JAN 2 9 2009

x---x

DECISION

CASTAÑEDA, JR., *J.*:

Before Us are two Petitions for Review filed pursuant to Section 18 of Republic Act No. 1125 as amended by Section 11 of Republic Act No. 9282. Jr

The first petition docketed as C.T.A. EB No. 364 filed by Mirant Sual Corporation seeks to reverse and set aside the Amended Decision dated January 18, 2008 issued by the First Division of this Court (the Court in Division) in the case entitled "Mirant Sual Corporation (*formerly* Southern Energy Pangasinan, Inc.) vs. Commissioner of Internal Revenue", docketed as C.T.A. Case 6958. On the other hand, the second petition docketed as C.T.A EB No. 387 was filed by Commissioner of Internal Revenue which likewise seeks to set aside the Decision dated August 29, 2007, Amended Decision dated January 18, 2008 and Resolution dated April 11, 2008 of the First Division of this Court. Since both Petitions for Review involve the same parties and subject matter, this Court deemed it necessary to consolidate the aforementioned petitions.

THE FACTS

The facts of the case as found by the Court in Division are as follows:

> Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at Bo. Pangascasan, Sual, Pangasinan. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate, Transfer ("BOT") Scheme. It is registered with the Bureau of Internal Revenue (BIR) as a value-added tax (VAT) taxpayer in accordance with Section 107 of the Old Tax Code [now Section 236 of the National Internal Revenue Code of 1997] with Tax Identification No. 003-841-103 as shown on its BIR Certificate of Registration bearing RDO Control No. 05-0181. It was originally registered with the Securities and Exchange Commission (SEC) under the name "Pangasinan Electric Corporation", and later on changed to "Southern Energy Pangasinan, Inc." on August 17, 1999. Subsequently, on June 28, 2001, it made another change of name from "Southern Energy Pangasinan, Inc.," to "Mirant Sual Corporation" as shown by its SEC Certificate of Filing of Amended Articles of Incorporation.
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> Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue who is duly appointed and empowered to perform the duties of his office, including, among

others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On December 7, 2001, petitioner filed with the BIR Revenue District Office No. 5, at Alaminos City, Pangasinan, an application for Effective Zero-Rate of its supply of electricity to the NPC, which was subsequently approved.

Afterwards, as a duly registered VAT taxpayer, petitioner filed its quarterly VAT returns for the four quarters of the taxable year 2002 as follows:

Quarter	Date filed
1st	April 25, 2002
2nd	July 25, 2002
3rd	October 25, 2002
4th	January 27, 2003

However, on July 25, 2003, petitioner filed amended VAT returns for the said quarters declaring zero-rated sales in the amount of 13,385,579,184.65, and domestic purchases of goods and services as well as importation of goods (including capital goods) and services in the amount of P1,328,347,934.70 with the related input VAT of P132,834,793.47, detailed as follows:

2002 SALES

EXH	PERIOD	TAXABLE	ZERO-RATED	TOTAL
C	1st Qtr	P 30,817,316.85	P 3,325,573,078.57	P 3,356,390,395.42
D	2nd Qtr	39,484,860.23	3,215,203,895.43	3,254,688,755.66
E	3rd Qtr	107,622,829.58	3,372,259,263.68	3,479,882,093.26
F	4th Qtr	9,177.66	3,472,542,946.97	3,472,552,124.63
	TOTAL	P 177,934,184.32	**P13,385,579,184.65**	P 13,563,513,368.97

2002 PURCHASES

EXH	PERIOD	DOMESTIC	IMPORTATION	TOTAL	INPUT VAT
C	1st Qtr	P 222,700,334.90	P 246,827,857.60	P 469,528,192.50	P 46,952,819.25
D	2nd Qtr	106,856,781.60	118,957,810.00	225,814,591.60	22,581,459.16
E	3rd Qtr	134,382,449.10	124,639,400.40	259,021,849.50	25,902,184.95
F	4th Qtr	156,520,880.40	217,462,420.70	373,983,301.10	37,398,330.11
	TOTAL	P 620,460,446.00	P 707,887,488.70	***P 1,328,347,934.70***	***P132,834,793.47***

On December 23, 2003, pursuant to the prescribed procedure in Revenue Regulations No. 7-95, as amended,

> petitioner filed its administrative claim for refund of the alleged unutilized input VAT attributable to effectively zero-rated sales for the said quarters of taxable period 2002 with the aforesaid District Officer of the Bureau of Internal Revenue at Alaminos City, West Pangasinan. It invoked Section 112(A), as amended, in relation to Section 112 (D) of the 1997 National Internal Revenue Code as basis for its claim.
>
> Due to respondent's inaction and in order to suspend the running of the two-year (2) prescriptive period under Section 229 of the 1997 National Internal Revenue Code, as amended, petitioner filed on April 22, 2004 a Petition for Review praying for refund of its alleged unutilized input VAT for the four quarters of calendar year 2002.
>
> Respondent, in his Answer filed on June 25, 2004, interposed the following Special and Affirmative Defenses, xxx:
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> xxx xxx xxx xxx
>
> To support its claim, petitioner presented documentary and testimonial evidence. On the other hand, respondent did not present any. After which, the parties were required to submit their respective memoranda.
>
> On March 29, 2007, respondent filed his memorandum. On the other hand, petitioner filed its memorandum on April 27, 2007. Hence, on May 9, 2007 the case was submitted for decision.

On August 29, 2007, this Court rendered a Decision partially granting the petition ordering the Commissioner of Internal Revenue (herein Commissioner) to refund Mirant Sual Corporation (herein Mirant) the amount of P 95,228,409.81 out of the total P132,834,793.47 representing unutilized input VAT paid by petitioner on its domestic purchases of goods and services and importation of goods attributable to its zero-rated sales for the four quarters of the year 2002.

The dispositive portion of the assailed Decision dated August 29, 2007 reads:

> **WHEREFORE**, in the light of the foregoing, the instant petition is **PARTIALLY GRANTED**. Respondent is **ORDERED** to

> **REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P95, 228,409.81 representing unutilized input VAT paid on its domestic purchases of goods and services which are attributable to effectively zero-rated sale of services for the four quarters of 2002.

On September 17, 2007, Commissioner filed a "Motion for Partial Reconsideration" of the abovementioned Decision while on September 25, 2007 Mirant likewise filed its "Motion for Partial Reconsideration" of the same Decision. On October 1, 2007, Commissioner filed an Opposition to Mirant's Motion dated September 25, 2007.

On January 18, 2008, the Court in Division issued an Amended Decision partially granting the Motion for Partial Reconsideration filed by Mirant ordering the Commissioner to refund the former in an increased amount of P96,747,998.87. The dispositive portion of the said Amended Decision states:

> "**WHEREFORE**, respondent's "Motion for Partial Reconsideration" is hereby **DENIED** for lack of merit and petitioner's "Motion for Partial Reconsideration" is hereby **PARTIALLY GRANTED**. The Court's Decision promulgated on August 29, 2007 in the instant case is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or in the alternative, to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the increased amount of P96, 747,998.87 representing unutilized input VAT paid on its domestic purchases of goods and services attributable to effectively zero-rated sale of services for the four quarters of 2002.
>
> **SO ORDERED.**

On February 19, 2008, Commissioner filed a "Motion for Partial Reconsideration" of the Amended Decision. This motion was denied by the Court in Division in a Resolution dated April 11, 2008.

Both parties assailed the abovementioned Amended Decision, hence, these Petitions for Review.

THE ISSUES

The following are the issues raised by the parties in their respective Petitions for Review:

C.T.A EB No. 364
Mirant Sual Corporation (formerly Southern Energy Pangasinan, Inc.) vs. Commissioner of Internal Revenue

1. The First Division of the Honorable Court erred in holding that the petitioner failed to substantiate its claim for input VAT in the amount of P6,784,415.12.
2. The First Division of the Honorable Court erred in holding that the output VAT of P17,793,418.43 shall be deducted from the substantiated input VAT of P114,541,417.30.

C.T.A EB No. 387
Commissioner of Internal Revenue vs. Team Sual Corporation (formerly Mirant Sual Corporation, Southern Energy Pangasinan, Inc.)

Respondent is not entitled to a refund or issuance of tax credit certificate for excess or unutilized input VAT for calendar year 2002 in the amount of P132,834,793.47.

COURT'S RULING

Commissioner, in its Petition for Review, prays for the denial of Mirant's claim for the entire amount of P132,834,793.47. However, Commissioner only argued on two points, the allegedly unsubstantiated input VAT of P P6,824,402.12 and the output VAT of P17,793,418.43. As to the P96,747,998.87 granted in the Amended Decision dated

January 18, 2008, the Commissioner raised no issue. Hence, the Court *en banc* will only proceed to tackle the issue on the disallowance of the alleged unsubstantiated input VAT and output VAT.

The first issue pertains to whether or not the respondent was able to substantiate the input VAT of P6,784,415.12 out of the alleged unsubstantiated input VAT of P18,293,376.17. In a tabulated form We shall illustrate the composition of P6,784,415.12 based on the Independent Certified Public Accountant's Report [1], to wit:

	Reference	Amount (Php)
Input taxes on purchases of goods		
Invoices issued in the former name of the company	Annex 6	169,726.88
Input taxes on purchases of services		
ORs issued in the former name of the company	Annex 7	3,589.24
Input taxes claimed on importations		
Supported by bank or BOC ORs issued in the former name of the company	Annex 18	21,292.00
Supported by informal IEDs certified by the BOC and bank or BOC ORs	Annex 16	3,980.00
Supported by IEDs certified by BOC only	Annex 25	17,566.00
Supported by IEDs certified by BOC, <u>photocopied</u> BOC ORs and bank debit advices	Annex 26	6,568,261.00
TOTAL		**6,784,415.12** [2]

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[1] *Rollo*, pages 358-361.
[2] From the original amount of P 6,824,402.12, this was reduced by P 39,987.00 (the amount which complied with the substantiation requirement per Amended Decision dated January 18, 2008.)

With regard to Annexes 6, 7, 16 and 18, the Court *en banc* sustains the findings of the Court in Division when it aptly observed that the invoices and official receipts were issued in the former name of Mirant, hence, cannot be refunded for failure to comply with the substantiation requirement. This is in accord with Section 113 of the National Internal Revenue Code of 1997 in relation to Section 237 of the same Code. These provisions read as follows:

> **SEC. 113. *Invoicing and Accounting Requirements for VAT-Registered Persons. -***
>
> **(A) *Invoicing Requirements.*** - A VAT-registered person shall, for every sale, issue an invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:
>
> xxx xxx xxx
>
> **SEC. 237. Issuance of Receipts or Sales or Commercial Invoices. -** All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service: *Provided, however*, That in the case of sales, receipts or transfers in the amount of One hundred pesos (P100.00) or more, or regardless of the amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees, receipts or invoices shall be issued which shall show the name, business style, if any, and address of the purchaser, customer or client: *Provided, further,* That where the purchaser is a VAT-registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer Identification Number (TIN) of the purchaser.
>
> xxx xxx xxx
>
> The Commissioner may, in meritorious cases, exempt any person subject to internal revenue tax from compliance with the provisions of this Section. (*underlining ours*)

The law is clear. For every sale transaction, a VAT-registered person shall issue a VAT invoice or receipt containing, among others, the name of the purchaser, customer or client. It is only under meritorious cases may the Commissioner exempt a person from compliance with the aforequoted provisions.

In the present case, We noted that Mirant changed its name as early as June 28, 2001. From the said period until the year under consideration, it has at least six months to inform its suppliers and service providers of the change of name in compliance with the requirements set by law. Hence, the Court *en banc* sees no reason to make an exception to the provision of law.

Mirant argues that no issue, factual or otherwise, was raised during the trial as to the stipulation that Southern Pangasinan, Inc and Mirant Sual Corporation are one and the same corporate entity. This argument must fail. It is of no moment that the parties stipulated that the former name of Mirant was Southern Pangasinan, Inc. because the binding effect of the facts applies only to the parties in agreement and not upon this Court especially when, as in this case, the law was misapplied.

As regards Annexes 25 and 26, Mirant reiterates its position that it submitted Import Entry Declarations (IEDs) allegedly certified by the Bureau of Customs (BOC) and other pieces of documentary evidence such as photocopied BOC official receipts (ORs) and bank debit advices. As correctly pointed out by the Court in Division, these IEDs do not contain any machine validation showing actual payment. Although there were IEDs supported by BOC ORs and bank debit advices but these were mere photocopies. Considering that the contents of these documents are also in issue, the best evidence applies. Hence, only the original documents (which were not presented at all) are the best evidence of the fact of Mirant's payment. In the absence of such document, Mirant's arguments must fail.

On the second issue of whether or not the output VAT of P17,793,418.43 should be deducted from the substantiated input VAT of P114,541,417.30, once again the Court rules for the Commissioner.

Upon re-examination of the records of the case, it was very clear that the amount P17,793,418.43 which represents Mirant's output VAT for CY 2002 was not deducted from P132,834,793.47, the amount being claimed as unutilized input VAT for CY 2002. Mirant argues that it has unutilized input VAT carried over from the previous quarter in the amount of P346,034,254.80 from which the 2002 output VAT may be deducted applying the principle of "first in, first out" (FIFO method). In addition, Mirant cites the *Gorones Development Corporation vs. Commissioner of Internal Revenue*[3] (herein *Gorones*) wherein the Second Division of this Court affirmed the validity of applying the output VAT against the input VAT carried over from the previous quarters first before utilizing the input VAT from the current quarter.

The argument of Mirant is misplaced.

In the *Gorones* case, the Second Division of this Court applied the FIFO method after it verified the unutilized input VAT carried over from the previous years has complied with the VAT invoicing requirements. In the said case, Gorones submitted invoices and official receipts to support its accumulated input VAT for the years 1998-1999. In other words, there was proper substantiation in the said case.

[3] C.T.A. Case No. 6363, September 1, 2006.

The FIFO method cannot be applied in the present case. The Court cannot simply allow Mirant to deduct the output VAT against the unsubstantiated carried over input VAT from the previous year. The alleged carried over input VAT has to be substantiated and must be sufficiently established to convince the Court in its determination that the output tax was properly deducted from verified input VAT of the previous year. This is consistent with the provision of law under Section 110 of the NIRC of 1997 which states that if the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter/s. Accordingly, an input tax shall be creditable against output tax when supported by VAT invoice or official receipt. The pertinent provision reads:

> **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:
>
> xxx xxx xxx
>
> **(B) Excess Output or Input Tax.** - If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the Vat-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. any input tax attributable to the purchase of capital goods or to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112.
>
> xxx xxx xxx

Thus, if Mirant chose to deduct the 2002 output VAT against the alleged carried over input VAT from the previous quarter, it is only proper to substantiate the said input VAT with VAT official receipt or invoice.

In this case, Mirant's failure to present sufficient evidence to prove its claim for refund is fatal to its cause. After all, it is axiomatic that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. Tax refunds, like tax exemptions, are construed strictly against taxpayer.[4]

WHEREFORE, in light of the foregoing laws and jurisprudence, C.T.A. EB No. 364 and C.T.A. EB No. 387 are hereby **DISMISSED**. The Amended Decision dated January 18, 2008, and Resolution dated April 11, 2008 are **AFFIRMED**. Accordingly, Commissioner is hereby **ORDERED to REFUND** or in the alternative, to **ISSUE A TAX CREDIT CERTIFICATE** in favor of Mirant in the amount of P96,747,998.87 representing unutilized input VAT attributable to effectively zero-rated sale of service for the four quarters of 2002.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

[4] *Paseo Realty & Development Corporation vs. Court of Appeals*, G.R. No. 119286, October 13, 2004, 440 SCRA 235, citing the case of *Citibank, N.A. v. Court of Appeals*, 345 Phil. 695; 280 SCRA 459 (1997); *Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd.*, 314 Phil. 220; 244 SCRA 332 (1995).

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice