REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7506

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

MAY 12 2009 3:30 pm

x - x

DECISION

BAUTISTA, *J.*:

This is a Petition for Review filed by Mindanao I Geothermal Partnership to seek the issuance of tax credit certificate in the amount of P6,199,278.90, representing alleged excess and unutilized creditable input taxes for the second quarter up to the fourth quarter of taxable year 2004.

Mindanao I Geothermal Partnership (Petitioner) is a partnership duly registered with the Securities and Exchange Commission, whose principal address is at 36th Floor, Tower 1, The Enterprise Center, 6766 Ayala Avenue, Makati City. It is also a duly registered Value-added Tax (VAT) taxpayer, with Tax Identification Number (TIN) 004-712-984-000.[1]

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[1] Exhibit "C"

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau Internal Revenue (BIR) empowered to perform the duties of his office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law. He holds office at the 4th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner entered into a Build-Operate-Transfer contract with the Philippine National Oil Company-Energy Development Corporation (PNOC-EDC) for the finance, design, construction, testing, commissioning, operation, maintenance, and repair of a 47-megawatt geothermal power plant, provided that PNOC-EDC shall supply and deliver steam to petitioner at no cost. In turn, petitioner shall convert the steam into electric capacity and energy for PNOC-EDC and shall deliver the same to the National Power Corporation (NPC) for and in behalf of PNOC-EDC. Its 47-megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Private Sector Generation Facility, pursuant to the provision of Executive Order No. 215 and evidenced by Certificate of Accreditation No. 95-03-07[2]. In order to facilitate the operations and management of the said geothermal plant, it entered into an Operations and Maintenance Agreement with Marubeni Energy Services Corporation (MESC).[3]

For the second to fourth quarters of taxable year 2004, petitioner filed its Quarterly VAT Returns on the following dates:[4]

Quarter	Date filed	Date Amended
Second	July 22, 2004	June 22, 2005
Third	October 22, 2004	June 22, 2005
Fourth	January 25, 2005	June 22, 2005

[2] Exhibit "B"
[3] Exhibit "A"
[4] Pars. 6 to 8, Joint Stipulation of Facts and Issues (JSFI), Docket, pp. 83-84

On August 16, 2005, petitioner filed a letter-request for the issuance of tax credit certificate with the BIR Large Taxpayers Service arising from its excess and unutilized creditable input taxes in the amount of P9,470,500.39, accumulated from the first to fourth quarters of taxable year 2004.[5] However, said application for issuance of tax credit certificate remains unacted upon by respondent despite the lapse of the one hundred twenty (120)-day period provided under Section 112(D) of the National Internal Revenue Code (NIRC) of 1997, as amended.

On July 21, 2006, petitioner filed the instant Petition for Review, praying for the issuance of tax credit certificate in the amount of P6,199,278.90 instead of the amount of P9,470,500.39, which covers merely the second to fourth quarters of taxable year 2004.

On September 18, 2006, respondent filed his Answer interposing the following counter-arguments:

> "4. Petitioner's claim for refund is subject to administrative investigation by the Bureau;
>
> 5. Petitioner must prove that it paid the alleged VAT input taxes for the period in question;
>
> 6. Petitioner must prove that the same alleged input VAT was not utilized against any output VAT liability;
>
> 7. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112 (A) of the Tax Code of 1997;
>
> 8. Petitioner must prove that the alleged VAT input taxes for the period in question are attributable to its alleged VAT zero-rated sales;
>
> 9. Petitioner must prove that the claim was filed within period prescribed by law;

[5] Exhibit "S"

10. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;

11. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption of taxation."

On October 9, 2007, petitioner filed its Formal Offer of Evidence; while respondent did not present any after he was considered to have waived his right to present evidence.[6] On June 2, 2008, respondent filed his Memorandum; while petitioner filed its Memorandum on July 7, 2008. On August 1, 2008, this case was deemed submitted for decision.[7]

Hence, this Decision.

The parties have jointly stipulated the following issues[8] for this Court's resolution:

"1. Whether or not petitioner's administrative claim was timely filed.

2. Whether or not petitioner's judicial claim was timely filed.

3. Whether or not petitioner's sale of generated power qualifies as VAT zero-rated sales under the NIRC, as amended, and the EPIRA Law.

4. Whether or not the amount of P6,199,278.90 represents the accumulated excess and unutilized creditable input taxes paid by petitioner within the 2nd, 3rd, and 4th Quarters of the Year 2004 directly attributable to its primary source of revenue which is VAT zero-rated.

5. Whether or not petitioner's excess and unutilized creditable input taxes for the Year 2004 is duly supported by pertinent documents, such as VAT invoices and official receipts.

6. Whether or not the accumulated unutilized and/or excess input taxes paid by petitioner within the Year 2004 in the total amount of P6,199,278.90 remains unutilized.

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[6] Resolution dated April 28, 2008, Docket, p. 275
[7] Resolution, Docket, p. 340
[8] Issues, JSFI, Docket, p. 84

7. And in sum, whether or not petitioner is entitled to the claim for refund or issuance of tax credit certificate in the accumulated amount of P6,199,278.90 representing its excess and unutilized creditable input taxes for the Year 2004 directly attributable to the primary source of revenue which is VAT zero-rated."

The issues will be resolved in *seriatim*.

As regards the first and second issues of whether petitioner's administrative and judicial claims were seasonably filed, Section 112(A) of the NIRC of 1997 requires that the taxpayer's claim for issuance of tax credit certificate or refund of excess and unutilized creditable input VAT arising from its VAT zero-rated sales must be filed within two years from the close of the taxable quarter when the sales were made.

In the case of **Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)**[9], the Honorable Supreme Court declared that the reckoning date when counting the two-year prescriptive period should be the end of the quarter when the pertinent sales or transaction is made, regardless when the input VAT is actually paid.

In the instant case, the earliest period involved is the second quarter of taxable year 2004. Considering that the last day of the second quarter of taxable year 2004 is June 30, 2004, it is from this date that the two-year prescriptive period is counted. Therefore, petitioner had until June 30, 2006 within which to file its administrative and judicial claims. Having filed its administrative claim on August 16, 2005,[10] the same is well within the prescriptive period. However, since the judicial claim was only filed on July 21, 2006, the second quarter claim falls outside the two-

[9] G.R. No. 172129, September 12, 2008
[10] Exhibit "S"

year period, and is therefore barred. Accordingly, the claimed excess and unutilized creditable input taxes for the second quarter of taxable year 2004 in the amount of P3,080,947.87 (input tax of P3,545,552.89 minus output tax of P464,605.02) will be excluded. Only the claims for the third and fourth quarters in the respective amounts of P1,350,538.89 and P1,767,792.14 shall be considered, to wit:

Period Covered	Input VAT	Output VAT	Excess Input VAT
3rd qtr	P1,829,459.10	P478,920.21	P1,350,538.89
4th qtr	2,133,864.63	366,072.49	1,767,792.14
Total	**P3,963,323.73**	**P 844,992.70**	**P 3,118,331.03**

Anent the third issue, it is undisputed that Republic Act (R.A.) No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001 (EPIRA)", provides that sales of generated power by generation companies shall be VAT zero-rated. Consequently, effective June 26, 2001, the pertinent provisions of the NIRC of 1997 are deemed amended by R.A. No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten percent (10%) to zero percent (0%).

In order to qualify for VAT zero-rating under R.A. No. 9136, petitioner must prove the following:

1. it is a generation company; and
2. it derived sales from power generation.

Based on the Certificate of Accreditation issued by Department of Energy[11] and the letter issued by PNOC-EDC[12], petitioner was able to prove that it is engaged in the sale of power generation services to PNOC-EDC. Likewise, for the same period covering April 1, 2004 to December 31, 2004, petitioner presented its

[11] Exhibit "B"
[12] Exhibit "E"

generated gross receipts from power generation services rendered to PNOC-EDC in the total amount of P634,924,190.30, which was properly declared in its VAT Returns for the second to fourth quarters of taxable year 2004[13] and duly supported by VAT invoices and official receipts[14]. Nevertheless, considering that the claimed input VAT related to the zero-rated sales amounting to P209,479,490.69 is covered by the quarter ending June 30, 2004 and is barred by prescription, the Court shall consider only the amount of P425,444,699.61 reflected in its VAT returns, which is computed as follows:

Exhibit No.	Period Covered (2004)	Zero-Rated Sales per VAT Returns
J	3rd qtr	P 209,866,067.34
N	4th qtr	215,578,632.27
Total		**P 425,444,699.61**

Having shown that it is a generation company and it derived sales from power generation, petitioner's alleged total unutilized input VAT for the period covering the third and fourth quarters of taxable year 2004 in the total amount of P3,118,331.03 may be a proper subject of a claim for issuance of tax credit certificate under Sections 110(B) and 112(A) of the NIRC of 1997, as amended, which read:

"**SEC. 110. Tax Credits. —**

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."

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[13] Exhibits "H", "J", and "N"
[14] Exhibits "AA-1" to "AA19-a"

"**SEC. 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."

The Court will now tackle the issue of whether or not the input VAT arising from petitioner's purchases of goods and services attributable to zero-rated sales covering the period from July 1 to December 31, 2004 are duly supported by pertinent documents.

Petitioner submitted the Independent Certified Public Accountant's (ICPA) Report[15] dated January 16, 2007, with summary list of input VAT claimed from second to fourth quarters of taxable year 2004 and the related suppliers' invoices/ official receipts[16]. Based on the further examination and evaluation of the related supplier's invoices/official receipts and ICPA's findings, out of the excess/unutilized input VAT of P3,118,331.03, only the amount of P2,279,821.99 was duly supported by proper VAT invoices/official receipts, in accordance with the invoicing requirements under Section 110(A) and 113(A) of the NIRC of 1997, as implemented by Sections 4.104-5 and 4.108-1 of Revenue Regulations No. 7-95; while the

[15] Exhibit "W"
[16] Exhibits "Z" to "Z-580"

remaining amount of P838,509.04 should be disallowed due to the following reasons:

	Vendor Name	Exhibit No.	Input VAT	
a)	**Input VAT on purchase of services supported by VAT ORs issued not in the Company's name**			
	Far Travel Inc.	Z-179-a	P 28.18	
	Far Travel Inc.	Z-179-a	28.18	
	Globe Telecom	Z-182	105.12	
	Globe Telecom	Z-183-a	69.99	
	PLDT	Z-208-a	126.73	
	Innove Communications Inc	Z-184	591.19	
	Innove Communications Inc	Z-185	527.65	**P 1,477.04**
b)	**Input VAT on purchase of services which are supported by TIN-VAT Official Receipt dated not within the period of claim**			
	Burgmann Phils., Inc.	Z-370	3,500.00	
	Dan B. Borras Repairs and Services	Z-493	254.55	
	Marubeni Energy Services	Z-536-a	497,456.91	
	Marubeni Energy Services	Z-536-a	104,737.38	
	Marubeni Energy Services	Z-536-a	39,059.79	
	Marubeni Energy Services	Z-536-a	74,079.37	
	Pacubas General Services	Z-546-a	2,346.63	
	Pacubas General Services	Z-546-a	2,346.63	
	Pacubas General Services	Z-546-a	682.69	**724,463.95**
c)	**Input VAT on purchase of goods supported by documents other than VAT Invoices**			
	Davao Unicar Corp.	Z-312-a	707.75	
	Tomas Electrical Supply Corp.	Z-361	2,110.91	
	Davao Diamond Industrial Supply	Z-410	3,348.45	
	Davao Diamond Industrial Supply	Z-416-a	818.18	
	Tomas Electrical Supply	Z-472	533.40	**7,518.69**
d)	**Input VAT on purchase of service supported by NON-VAT Official Receipts**			
	Petron Corp.	Z-206-a	7,978.39	**7,978.39**
e)	**Input VAT on purchases of services supported by OR without preprinted TIN VAT number**			
	Pilipinas Makro Inc.	Z-207	554.18	**554.18**
f)	**Input VAT on purchases of goods and services without supporting documents**			
	Innove Communications Inc		3,380.40	
	Innove Communications Inc		861.69	
	Innove Communications Inc		3,349.20	

Globe Telecom		454.55	
Globe Telecom		138.50	
Globe Telecom		1,174.00	
Innove Communications Inc.		3,351.00	
Southern Motors of Davao Inc.		2,286.91	
Motormall Davao Corp.		400.00	
Veterans Phils. Scout Agency		15.27	
DC Tech Micro Services Inc.		1,044.55	**16,456.07**
g) BIR Authority to print not indicated in the invoice or official receipts			
Global Commercial Trading Corp.	Z-327-a	13,288.06	
Global Commercial Trading Corp.	Z-246	15,951.67	
Global Commercial Trading Corp.	Z-181	12,710.80	
Global Commercial Trading Corp.	Z-379-a	12,758.46	
Global Commercial Trading Corp.	Z-435-a	18,181.50	
Yokogawa Philippines Inc.	Z-483	7,170.23	**80,060.72**
TOTAL			**P 838,509.04**

Accordingly, the input taxes in the amount of P2,279,821.99 which are attributable to its zero-rated sales can be a proper subject of claim for issuance of tax credit certificate.

Anent the issue of whether petitioner's accumulated excess input tax remains unutilized and/or unapplied, the Court again finds for petitioner. Even though petitioner carried over the claimed input VAT for the third and fourth quarters of taxable year 2004 to the succeeding first quarter of taxable year 2005[17], the same was deducted as "Excess Input tax carried over to succeeding quarter, if this is an amended return"[18] from the total available input tax of P12,747,650.70 in the said quarter of taxable year 2005. In other words, the subject claim no longer formed part of the excess input VAT of P2,808,123.13 as of the first quarter of 2005, which was to be carried over/applied to the succeeding second quarter of taxable year 2005.

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[17] Exhibits "R"
[18] Exhibit "R-2"

In view of the foregoing, petitioner is entitled to the issuance of tax credit certificate in the amount of P2,279,821.99.

WHEREFORE, petitioner's claim for issuance of tax credit certificate is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of P2,279,821.99, representing its excess and unutilized input VAT for the period covering the third and fourth quarters of taxable year 2004.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division