REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

TOLEDO POWER COMPANY, *Petitioner,*	**CTA CASE NO. 9307** For: Refund
-versus-	Members: CASTAÑEDA, JR., *Chairperson,* MINDARO-GRULLA, and BACORRO-VILLENA, *JJ.*
COMMISSIONER OF INTERNAL REVENUE *Respondent.*	Promulgated: OCT 09 2019 3:27 pm

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision on November 5, 2018 is a Petition for Review[1] filed by petitioner Toledo Power Company on March 21, 2016, praying for the refund of the amount of ₱6,971,071.10, allegedly representing petitioner's erroneously paid deficiency value-added tax (VAT) for the taxable year (TY) 2011.

Petitioner is a partnership, duly organized and existing under Philippine law, with principal office address at Sangi, Toledo City, Cebu.[2] It is engaged in the business of acquiring, owning, rehabilitating, maintaining and operating coal-fired and oil-fired electrical generation facilities.[3] It was granted by the Energy Regulatory Commission (ERC) the authority to operate its generation facilities under Certificate of Compliance (COC) No. 04-06 GXT 61-

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[1] Docket, volume (vol.) I, pp. 12-24.
[2] Paragraph (Par.) 2, I. Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), vol. I, p. 473.
[3] Exhibit "P-2", Docket, vol. II, p. 593.

0066, which was subsequently renewed by the ERC under COC No. 09-11-GXT-61-0066.[4]

It is registered with the Bureau of Internal Revenue (BIR) with Certificate of Registration (COR) No. 2RC0000074406 VAT and Taxpayer Identification Number (TIN) 003-223-626-000 VAT.[5]

Respondent Commissioner of Internal Revenue (CIR), on the other hand, is sued in his official capacity, having been duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund as provided by law. He may be served with summons, notices and other court processes at his office at the BIR National Office Building, Diliman, Quezon City.[6]

Respondent issued a Letter of Authority (LOA) on April 5, 2013, which was received by petitioner on April 11, 2013, authorizing the investigation and verification of supporting documents and/or pertinent records of petitioner for taxable year 2011.[7]

On July 30, 2015, petitioner received a Preliminary Assessment Notice (PAN) dated July 28, 2015, with attached Details of Discrepancies, assessing petitioner, among others, basic deficiency VAT, in the amount of ₱4,025,642.60.[8] Said amount is allegedly attributed to petitioner's sale of electric power to Carmen Copper Corporation (CCC), which is registered with the Board of Investment (BOI) as manufacturer-exporter with 100% export sales.[9]

On the basis of the PAN, petitioner paid the assessed deficiency VAT on its sale of power to CCC on September 4, 2015, in the amount of ₱4,025,642.60, plus interest of ₱2,945,428.50 or a total of ₱6,971,071.10.[10]

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[4] Exhibit "P-3", Docket, vol. II, pp. 631-634.
[5] Exhibit "P-302", Docket, vol. II, p. 794.
[6] Par. 1, I. Summary of Admitted Facts, JSFI, p. 472.
[7] Exhibit "R-1", BIR Records.
[8] Exhibit "P-19", Docket, vol. I, p. 261.
[9] Exhibits "P-31" and "P-32", Docket, vol. II, pp. 734-739.
[10] Par. 2, I. Summary of Admitted Facts, JSFI, *supra*; Exhibits "P-20" to "P-23", Docket, vol. II, pp. 659-662.

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On March 18, 2016, petitioner filed with the BIR Large Taxpayers Service (LTS) – Cebu an administrative claim for the erroneously paid deficiency VAT assessment.[11]

In response to the Petition for Review, respondent filed his Answer on June 15, 2016,[12] interposing the following Special and Affirmative Defenses:

> "4. Respondent reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defense.
>
> ***THE DENIAL OF PETITIONER'S CLAIM FOR REFUND/TAX CREDIT HAS BASES IN FACT AND LAW***
>
> 5. Petitioner applied for refund/tax credit of deficiency value-added tax paid in the amount of P6,971,071.10 pertaining to sale of electricity to Carmen Copper Corporation (hereinafter referred to as "CCC") during the year 2011.
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> 6. Petitioner contends that its sales of electric power in 2011 to CCC, allegedly a BOI-registered enterprise, are considered zero-rated sales.
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> 7. However, petitioner's claim for refund/tax credit was properly denied through a letter dated 15 March 2016.
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> 8. Under Section 4.106-5 of Revenue Regulations No. 16-2005:
>
>> Section 4.106-5. Zero-Rated Sales of Goods and Properties. –
>>
>> The following sales by VAT-registered persons shall be subject to zero-percent (0%) rate:
>>
>> a. Export sales. – 'Export sales' shall mean:
>>
>> Xxx xxx

[11] Exhibits "P-24" to "P-26", Docket, vol. I, pp. 268-281.
[12] Docket, vol. I, pp. 113-123.

> (5) Transactions considered export sales under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and other special laws.
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> Xxx xxx
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> For purposes of zero-rating, the export sales of registered export traders shall include commission income. The exportation of goods on consignment shall not be deemed export sales until the export products consigned are in fact sold by the consigned are in fact sold by the consignee and Provided, finally, that the sales of goods, properties or services made by VAT-registered supplier to a BOI-registered manufacturer/producer whose products are 100% exported are considered export sales. A certification to this effect must be good for one year unless subsequently re-issued by the BOI.

9. The rationale of Revenue Memorandum Circular No. 74-99 (RMC 74-99) and Revenue Memorandum Order No. 9-2000 (RMO 9-2000) on the cross border doctrine of the VAT system – that no VAT shall form part of the cost component of the products which are destined for consumption outside the territorial border of the Philippines was considered. Hence, the assessed amount of deficiency VAT on the sale of electricity to CCC did not include any amount corresponding to the electricity used as part of its direct cost.

10. Noteworthy to state that only petitioner's sale of electricity intended for general and administrative use of CCC was subject to the 12% output tax by respondent.

11. Petitioner's claim that the electricity supplied to CCC was entirely used for mining and ore processing activities has not been established by sufficient proof.

12. The alleged certification issued by CCC was not considered for being self-serving considering that the VAT implication on CCC's purchases of electricity from petitioner would ultimately be CCC's burden as the assessed VAT shall be passed on the buyer/consumer.

13. Moreover, based on the Summary List of Sales of petitioner, there is an output VAT due on the portion of its sales to CCC in 2011.

14. As explained in the Memorandum recommending the denial of petitioner's claim for refund:

1. The certification issued by CCC is self-serving considering that any VAT implication on its purchases from TPC [petitioner] would ultimately be CCC's burden;

   The allegation that the electricity supplied by TPC to CCC were entirely used for mining and ore processing activities has not been established with concrete proof. Hence, as a matter of course, the use of the best evidence rule was used, CCC's Audited FS for the same taxable year was being utilized to obtain a reasonable proportionate equation;

2. If TPC claims all the power supplied to CCC should be zero-rated, they have contradicted its own submission in its Summary List Sales whereby they paid output vat of the portion of its sales to CCC amounting to P5,750,841.50;

3. The deficiency taxes were paid after the service of the Preliminary Assessment Notice without any qualification that such payment was under protest. Also taxpayer failed to file a reply to PAN within the period afforded to them.

15. From the foregoing, petitioner cannot deny the fact that the electricity it supplied to CCC was not entirely used for mining an ore processing activities of CCC, and that a portion of the electricity it supplied was used by CCC for general and administrative purposes which is subject to 12% VAT.

16. To reiterate, only the cost component of the products which are destined for consumption outside the Philippines is not subject to VAT. *Expressio unius est exclusion alterius.* Hence, those used for general and administrative purposes are subject to 12% VAT.

17. Thus, the factual findings of respondent merit her denial of petitioner's claim for refund.

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THERE IS NO ERRONEOUS OR ILLEGALLY COLLECTED TAX IN THE INSTANT CASE.

18. Petitioner cannot refund the deficiency value-added tax in the amount of P6,971,071.10 that was paid on 4 September 2015. As mentioned in Section 204(C) and 229 of the Tax Code:

> "(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer filed in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
>
> xxx xxx"
>
> "**SEC. 229. Recovery of Tax Erroneously or Illegally Collected.** – no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
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> xxx xxx"

19. Here, there is no erroneous or unlawful payment of VAT by petitioner. In fact, the deficiency VAT for 2011 was correctly and lawfully paid.

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20. Settled is the rule that claims for refund are construed against the claimant.

21. "[W]e reiterate our consistent ruling that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven."

22. Petitioner's allegation that there was erroneous and illegal collection of deficiency VAT involved was not proved by sufficient evidence.

23. "The basic rule is that he who alleges must prove his case." Thus, petitioner has the burden of proving its allegations.

24. As discussed above, the electricity that petitioner supplied to CCC was not entirely used for mining and ore processing activities of CCC, considering that the portion of the electricity it supplied was used by CCC for general and administrative purposes, which is properly subject to 12% VAT.

25. Further, petitioner's liability for deficiency VAT for 2011 pertaining to its sale of electricity to CCC attributable to its general and administrative purpose was clearly explained in the Preliminary Assessment Notice (PAN) dated 28 July 2015 after which petitioner made payment of its liability stated therein.

26. Note that petitioner voluntarily paid the assessed taxes on 31 July 2015, and on 4 September 2014 it paid the deficiency VAT pertaining to its sales to CCC attributable to general and administrative purposes, without protesting to the same.

27. Clearly, petitioner's payment of the assessments implies that it abandoned or waived its question on the validity of assessment for deficiency VAT pertaining to its sales to CCC for taxable year 2011.

28. The said payment shows positive act of petitioner which concludes its admission of its own tax liabilities for taxable year 2011, hence, it voluntarily performed its legal obligation to pay the tax due.

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29. Petitioner's allegation that the deficiency VAT involved was illegally and erroneously collected is contrary to its own action of paying its tax liabilities.

30. Clearly, petitioner is estopped from contesting the legality and validity of the collection for deficiency VAT pertaining to the sales to CCC attributable to its general and administrative purposes. Respondent submits that, as compared to the validity of waiver, the validity of collection for deficiency VAT is likewise affirmed where petitioner made payment of the assessment against it, thus estopped from questioning its validity. As held in RCBC vs. CIR, G.R. No. 170257, Sept. 7, 2011:

> Under Article 1431 of the Civil Code, the doctrine of estoppel is anchored on the rule that an admission or representation is conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon. A party is precluded from denying his own acts, admissions or representations to the prejudice of the other party in order to prevent fraud and falsehood.
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> Estoppel is clearly applicable to the case at bench. RCBC, through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers. Had petitioner truly believed that the waivers were invalid and that the assessments were issued beyond the prescriptive period, then it should not have paid the reduced amount of taxes in the revised assessment. RCBCs subsequent action effectively belies the insistence that the waivers are invalid. The records show that on December 6, 2000, upon receipt of the revised assessment, RCBC immediately made payment on the uncontested taxes. Thus, RCBC is estopped from questioning the validity of the waivers. To hold otherwise and allow a party to gainsay its own act or deny rights which it had previously recognized would run counter to the principle of equity which this institution holds dear.

31. Moreover, petitioner's allegation that the collection of tax payment on the assessed amount is unauthorized and erroneous due to absence of Final Assessment Notice (FAN) /

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Formal Letter of Demand (FLD) is clearly erroneous and misplaced.

32. Respondent submits that FAN and FLD are immaterial in the case at bar.

33. Note that after respondent issued Preliminary Assessment Notice (PAN) dated 28 July 2015 which was received by petitioner on 30 July 2015, petitioner failed to file a reply to the PAN within the period prescribed, and it voluntarily paid the deficiency taxes on 31 July 2015, and on 4 September 2015, it paid the deficiency VAT pertaining to sales to CCC, without protesting to the same.

34. Petitioner's failure to file a reply to the PAN within fifteen (15) days from its receipt of PAN on 30 July 2015 caused respondent to initially draft a FAN and FLD, however, since petitioner paid the assessed deficiency VAT on 4 September 2014, FAN and FLD need not be issued.

35. Considering the foregoing, it is respondent's position that *solutio indebiti* is not applicable in the instant case.

36. The Honorable Supreme Court held in CBK POWER COMPANY LIMITED vs. COMMISSIONER OF INTERNAL REVENUE, G.R. Nos. 198729-30, January 15, 2014:

> "Also devoid of merit is the applicability of the principle of *solutio indebiti* to the present case. According to this principle, if something is received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises. In that situation, a creditor-debtor relationship is created under a quasi-contract, whereby the payor becomes the creditor who then has the right to demand the return of payment made by mistake, and the person who has no right to receive the payment becomes obligated to return it. The quasi-contract of *solutio indebiti* is based on the ancient principle that no one shall enrich oneself unjustly at the expense of another.
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> There is *solutio indebiti* when:
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> (1) Payment is made when there exists no binding relation between the payor, who has no duty to pay, and

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the person who received the payment; and

(2) Payment is made through mistake, and not through liberality or some other cause.

Though the principle of *solutio indebiti* may be applicable to some instances of claims for a refund, the elements thereof are wanting in this case.

First, there exists a binding relation between petitioner and the CIR, the former being a taxpayer obligated to pay VAT.

Second, the payment of input tax was not made through mistake, since petitioner was legally obligated to pay for that liability. The entitlement to a refund or credit of excess input tax is solely based on the distinctive nature of the VAT system. At the time of payment of the input VAT, the amount paid was correct and proper."

37. Hence, the amount paid by petitioner is correct and proper. Hence, it cannot claim solutio indebiti to warrant its claim for refund.

IT IS INCUMBENT UPON PETITIONER TO PROVE THAT IT IS ENTITLED TO THE REFUND SOUGHT

38. As a matter of course, a claim for refund is subject to investigation as it involves removal of accrued revenue from the coffers of the Government. It has been held by the Supreme Court that a claim for refund is not *ipso fact* granted because the Commissioner of Internal Revenue still has to investigate and ascertain the veracity of the claim.

39. Finally, claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation and as such, they are looked upon with disfavor. Basic is the rule that tax refunds are regarded as tax exemptions that are in derogation of the sovereign authority and are to be construed in *strictissimi juris* against the person or entity claiming the exemption. The law does not look with favor on tax exemptions and that he who would seek to

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be thus privileged must justifiy it by words too plain to be mistaken and too categorical to be misinterpreted.

40. Based on the foregoing, petitioner's claim for refund has no bases in fact and in law. Thus, the instant petitioner should be denied for lack of merit."

On July 14, 2016, respondent filed his Pre-Trial Brief,[13] while petitioner's Pre-Trial Brief was filed on July 15, 2016[14]. The Pre-Trial Conference was held on July 21, 2016.[15]

In compliance with the order of the Court during the Pre-Trial Conference, the parties filed their Joint Stipulation of Facts and Issues on August 5, 2016,[16] which the Court approved in its Pre-Trial Order dated August 12, 2016.[17]

During trial, petitioner presented Mr. Fernando A. Rimando, Chief Financial Officer (CFO) of CCC[18] and Atty. Clifford Chua, the Court-commissioned Independent Certified Public Accountant (ICPA)[19] as its witnesses.

After presentation, marking and identification, petitioner formally offered its documentary evidence. The exhibits were admitted by the Court, except for Exhibits "P-216" and "P-303". [20]

Petitioner's admitted documentary evidence are as follows:

Exhibit:	Description:
P-1	Certificate of Filing of Amended Agreement of General Partnership dated January 20, 2003 of Toledo Power Company
P-2	Amended Agreement of General Partnership of Toledo Power Company

[13] Docket, vol. I, pp. 139-141.
[14] Docket, vol. I, pp. 145-152.
[15] Order, Docket, vol. I, p.430.
[16] Docket, vol. I, pp. 472-478.
[17] Docket, vol. I, pp. 479-483.
[18] Minutes of the Hearing dated November 9, 2016, Docket, vol. II, p. 508.
[19] Minutes of the Hearing dated January 23, 2017, Docket, vol. II, p. 545.
[20] Resolutions dated September 25, 2017 and August 3, 2018, Docket, vol. II, pp. 811-813 and 915-918, respectively.

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P-3	ERC Certificate of Compliance with COC No. 09-11-GTX 61-0066, issued to Toledo Power Company
P-5	Excerpts of petitioner's Books of Account for Taxable Year 2011
P-6	BIR Form 2550M for the month of January 2011 with Reference No. 091100004519882
P-7	BIR Form 2550M for the month of February 2011 with Reference No. 091100004600102
P-8	BIR Form 2550Q for the period of January 1, 2011-March 31, 2011 with Reference No. 101200005794762
P-9	BIR Form 2550M for the month of April 2011 with Reference No. 091100004784484
P-10	BIR Form 2550M for the month of May 2011 with Reference No. 091100004878800
P-11	BIR Form 2550Q for the period April 1, 2011-June 30, 2011 with Reference No. 101200005795039
P-12	BIR Form 2550M for the month of July 2011 with Reference No. 091100005048828
P-13	BIR Form 2550M for the month of August 2011 with Reference No. 091100005139050
P-14	BIR Form 2550Q for the period of July 1, 2011 – September 30, 2011 with Reference No. 101200005797973
P-15	BIR Form 2550M for the month of October 2011 with Reference No. 091100005300570
P-16	BIR Form 2550M for the month of November 2011 with Reference No. 101200005798221
P-17	BIR Form 2550Q for the period of October 1, 2011-December 31, 2011 with Reference No. 101200005798221
P-18	Letter of Authority No. LOA-123-2013-00000001 dated April 5, 2013
P-19	Preliminary Assessment Notice (PAN) dated July 28, 2015
P-19-1	Annotation on PAN indicating date of receipt by petitioner on July 30, 2015 and signature of recipient

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P-20	BIR Form No. 0605, dated September 4, 2015
P-21	Print out of eFPS Payment Details
P-22	Print out of eFPS Filing Reference
P-23	Print out of eFPS Payment Acknowledgment
P-24	Petitioner's Letter Request for Administrative Claim for Refund with the BIR LTPD-Cebu dated October 22, 2015 in the amount of Php6,971,071.10
P-24-1	Signature of Elisa T. Zarate in the last page of the Letter Request for Administrative Claim for Refund dated October 22, 2015
P-24-2	BIR Stamp "Received" dated October 26, 2015 on the first page of the Letter Request for Administrative Claim for Refund dated October 22, 2015
P-25	Petitioner's Letter Request for Administrative Claim for Refund with BIR LTPD-Cebu dated March 17, 2016 in the amount of Php6,971,071.10
P-25-1	Signature of Elisa T. Zarate in the last page of the Letter Request for Administrative Claim for Refund dated March 17, 2016
P-25-2	BIR Stamp "Received" dated March 18, 2016 on the first page of the Letter Request for Administrative Claim for Refund dated March 17, 2016
P-26	Petitioner's Application for Tax Credit/Refund (BIR Form No. 1914) of erroneous excise tax payments in the amount of P6,971,071.10
P-26-1	Signature of Eliza T. Zarate on the bottom of BIR Form No. 1914
P-26-2	BIR Stamp "Received" dated March 18, 2016 on BIR Form No. 1914
P-27	CCC's Amended Articles of Incorporation
P-28	CCC's SEC Certificate of Filing of Amended Articles of Incorporation
P-29	CCC's BIR Certificate of Registration No. 8RC0000048993
P-30	Audited Financial Statements of CCC for the year 2011

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P-31	BOI Certificate of Registration No. 2011-029, issued on January 21, 2011
P-32	BOI Certificate of Registration No. 2012-012, issued on January 30, 2012
P-33	Certificate of Inward Remittances for 2011
P-33-1	Certificate of Inward Remittances for 2010
P-34	BIR Form 2550Q for the period of January 1, 2011-March 31, 2011
P-35	BIR Form 2550Q for the period of April 1, 2011 – June 30, 2011
P-36	BIR Form 2550Q for the period of July 1, 2011-September 31, 2011
P-37	BIR Form 2550Q for the period of October 1, 2011-December 31, 2011
P-38	Sales Invoice No. 0039, dated February 4, 2011
P-39	Sales Invoice No. 0040, dated June 21, 2011
P-40	Sales Invoice No. 0041, dated June 21, 2011
P-41	Sales Invoice No. 0042, dated June 21, 2011
P-42	Sales Invoice No. 0043, dated July 18, 2011
P-43	Sales Invoice No. 0044, dated May 17, 2011
P-44	Sales Invoice No. 0045, dated May 26, 2011
P-45	Sales Invoice No. 0046, dated June 21, 2011
P-46	Sales Invoice No. 0047, dated June 21, 2011
P-47	Sales Invoice No. 0048, dated July 18, 2011
P-48	Sales Invoice No. 0049, dated July 28, 2011
P-49	Sales Invoice No. 0050, dated August 17, 2011
P-50	Sales Invoice No. 0151, dated August 17, 2011
P-51	Sales Invoice No. 0152, dated September 16, 2011
P-52	Sales Invoice No. 0153, dated May 30, 2011
P-53	Sales Invoice No. 0155, dated September 16, 2011
P-54	Sales Invoice No. 0156, dated October 10, 2011
P-55	Sales Invoice No. 0157, dated October 31, 2011

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P-56	Sales Invoice No. 0158, dated November 23, 2011
P-57	Sales Invoice No. 0159, dated November 23, 2011
P-58	Sales Invoice No. 0160, dated December 7, 2011
P-59	Sales Invoice No. 0161, dated December 7, 2011
P-60	Sales Invoice No. 0162, dated September 20, 2011
P-61	Bill of Lading No. ES-1 dated January 4, 2011
P-62	Bill of Lading No. MCPH-1 dated January 9, 2011
P-63	Bill of Lading No. TS-1 DATED January 22, 2011
P-64	Bill of Lading No. SAN-ONS 001 dated February 28, 2011
P-65	Bill of Lading No. TDS1104-01 dated March 15, 2011
P-66	Bill of Lading No. E01-11 dated March 31, 2011
P-67	Bill of Lading No. DA-02 dated April 12, 2011
P-68	Bill of Lading No. TS-01 dated April 23, 2011
P-69	Bill of Lading No. RS-01 dated May 14, 2011
P-70	Bill of Lading No. SP-01 dated May 27, 2011
P-71	Bill of Lading No. FA-01 dated June 17, 2011
P-72	Bill of Lading No. SB-01 dated June 30, 2011
P-73	Bill of Lading No. TT1102-01 dated July 24, 2011
P-74	Bill of Lading No. AM-01 dated July 28, 2011
P-75	Bill of Lading No. RC-01 dated August 13, 2011
P-76	Bill of Lading No. TS1114-2 dated September 27, 2011
P-77	Bill of Lading No. OS-01 dated October 21, 2011
P-78	Bill of Lading No. TS10-01 dated October 26, 2011
P-79	Bill of Lading No. TS112-A dated August 25, 2011
P-80	Bill of Lading No. CCC-TH01 dated September 16, 2011
P-81	Bill of Lading No. SPS4CD2132011
P-82	CCC's Export Declaration No. 1203016887
P-83	CCC's Export Declaration No. 1221018051

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P-84	CCC's Export Declaration No. 103000003
P-85	CCC's Export Declaration No. 120000732
P-86	CCC's Export Declaration No. 217002448
P-87	CCC's Export Declaration No. 308003406
P-88	CCC's Export Declaration No. 325004451
P-89	CCC's Export Declaration No. 407005321
P-90	CCC's Export Declaration No. 411000020
P-91	CCC's Export Declaration No. 511006590
P-92	CCC's Export Declaration No.520007140
P-93	CCC's Export Declaration No. 609903279
P-94	CCC's Export Declaration No. 824009982
P-95	CCC's Export Declaration No. 712016967
P-96	CCC's Export Declaration No. 125000954
P-97	CCC's Export Declaration No. 721911455
P-98	CCC's Export Declaration No. 816512338
P-99	CCC's Export Declaration No. 823912016
P-100	CCC's Export Declaration No. 908018729
P-101	CCC's Export Declaration No. 323014545
P-102	CCC's Export Declaration No. 1070316270
P-103	CCC's Export Declaration No. 1020313788
P-104	CCC's Export Declaration No. 715011105
P-105	CCC's BOI Certificate of Registration No. 2006-158
P-106	Petitioner's Sales Invoice No. 1126
P-107	Petitioner's Sales Invoice No. 1141
P-108	Petitioner's Sales Invoice No. 1125
P-109	Petitioner's Sales Invoice No. 1140
P-110	Petitioner's Sales Invoice No. 0955
P-111	Petitioner's Sales Invoice No. 1114
P-112	Petitioner's Sales Invoice No. 1115
P-113	Petitioner's Sales Invoice No. 1120

P-114	Petitioner's Sales Invoice No. 1121
P-115	Petitioner's Sales Invoice No. 1144
P-116	Petitioner's Sales Invoice No. 1143
P-117	Petitioner's Sales Invoice No. 1132
P-118	Petitioner's Sales Invoice No. 1133
P-119	Petitioner's Sales Invoice No. 1142
P-120	Petitioner's Sales Invoice No. 1158
P-121	Petitioner's Sales Invoice No. 1160
P-122	Petitioner's Sales Invoice No. 1150
P-123	Petitioner's Sales Invoice No. 1155
P-124	Petitioner's Sales Invoice No. 1170
P-125	Petitioner's Sales Invoice No. 1171
P-126	Petitioner's Sales Invoice No. 1162
P-127	Petitioner's Sales Invoice No. 1163
P-128	Petitioner's Sales Invoice No. 1177
P-129	Petitioner's Sales Invoice No. 1175
P-130	Petitioner's Sales Invoice No. 1176
P-131	Petitioner's Sales Invoice No. 1190
P-132	Petitioner's Sales Invoice No. 1186
P-133	Petitioner's Sales Invoice No. 1187
P-134	Petitioner's Sales Invoice No. 1207
P-135	Petitioner's Sales Invoice No. 1193
P-136	Petitioner's Sales Invoice No. 1199
P-137	Petitioner's Sales Invoice No. 1200
P-138	Petitioner's Sales Invoice No. 1217
P-139	Petitioner's Sales Invoice No. 1216
P-140	Petitioner's Sales Invoice No. 1206
P-141	Petitioner's Sales Invoice No. 1236
P-142	Petitioner's Sales Invoice No. 1237
P-143	Petitioner's Sales Invoice No. 1238

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P-144	Petitioner's Sales Invoice No. 1223
P-145	Petitioner's Sales Invoice No. 1252
P-146	Petitioner's Sales Invoice No. 1251
P-147	Petitioner's Sales Invoice No. 1249
P-148	Petitioner's Sales Invoice No. 1250
P-149	Petitioner's Sales Invoice No. 1235
P-150	Petitioner's Sales Invoice No. 1274
P-151	Petitioner's Sales Invoice No. 1275
P-152	Petitioner's Sales Invoice No. 1268
P-153	Petitioner's Sales Invoice No. 1267
P-154	Petitioner's Sales Invoice No. 1269
P-155	Petitioner's Sales Invoice No. 1259
P-156	Petitioner's Sales Invoice No. 1287
P-157	Petitioner's Sales Invoice No. 1278
P-158	Petitioner's Sales Invoice No. 1279
P-159	Petitioner's Sales Invoice No. 1284
P-160	Petitioner's Sales Invoice No. 1285
P-161	Petitioner's Sales Invoice No. 1299
P-162	Petitioner's Sales Invoice No. 1303
P-163	Petitioner's Sales Invoice No. 1286
P-164	Petitioner's Sales Invoice No. 1300
P-165	Petitioner's Sales Invoice No. 1301
P-166	Petitioner's Sales Invoice No. 1302
P-167	Toledo Power Company Official Receipt No. 2286
P-168	Petitioner's Official Receipt No. 2287
P-169	Toledo Power Company Official Receipt No. 2286
P-170	Petitioner's Official Receipt No. 2287
P-171	Toledo Power Company Official Receipt No. 2284
P-172	Petitioner's Official Receipt No. 2182
P-173	Toledo Power Company Official Receipt No. 2291

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P-174	Petitioner's Official Receipt No. 2290
P-175	Toledo Power Company Official Receipt No. 2289
P-176	Petitioner's Official Receipt No. 2537
P-177	Toledo Power Company Official Receipt No. 2536
P-178	Toledo Power Company Official Receipt No. 2293
P-179	Toledo Power Company Official Receipt No. 2293
P-180	Petitioner's Official Receipt No. 2294
P-181	Toledo Power Company Official Receipt No. 2292
P-182	Toledo Power Company Official Receipt No. 2549
P-183	Toledo Power Company Official Receipt No. 2550
P-184	Toledo Power Company Official Receipt No. 2299
P-185	Toledo Power Company Official Receipt No. 2300
P-186	Toledo Power Company Official Receipt No. 2298
P-187	Toledo Power Company Official Receipt No. 2298
P-188	Toledo Power Company Official Receipt No. 2187
P-189	Toledo Power Company Official Receipt No. 2258
P-190	Toledo Power Company Official Receipt No. 2302
P-191	Toledo Power Company Official Receipt No. 2567
P-192	Toledo Power Company Official Receipt No. 2568
P-193	Toledo Power Company Official Receipt No. 2305
P-194	Toledo Power Company Official Receipt No. 2304
P-195	Petitioner's Official Receipt No. 2582
P-196	Toledo Power Company Official Receipt No. 2308
P-197	Toledo Power Company Official Receipt No. 2307
P-198	Toledo Power Company Official Receipt No. 2306
P-199	Toledo Power Company Official Receipt No. 2310
P-200	Toledo Power Company Official Receipt No. 2595
P-201	Toledo Power Company Official Receipt No. 2606
P-202	Toledo Power Company Official Receipt No. 2309
P-203	Toledo Power Company Official Receipt No. 2312

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P-204	Toledo Power Company Official Receipt No. 2312
P-205	Toledo Power Company Official Receipt No. 2313
P-206	Toledo Power Company Official Receipt No. 2315
P-207	Toledo Power Company Official Receipt No. 2311
P-208	Toledo Power Company Official Receipt No. 2316
P-209	Petitioner's Official Receipt No. 2314
P-210	Toledo Power Company Official Receipt No. 2631
P-211	Toledo Power Company Official Receipt No. 2630
P-212	Toledo Power Company Official Receipt No. 2315
P-213	Toledo Power Company Official Receipt No. 2318
P-214	Toledo Power Company Official Receipt No. 2317
P-215	Petitioner's Official Receipt No. 2317
P-217	Toledo Power Company Official Receipt No. 2320
P-218	Toledo Power Company Official Receipt No. 2319
P-219	Toledo Power Company Official Receipt No. 2705
P-220	Petitioner's Audited Financial Statements
P-221	Independent CPA Report
P-221-1	Annex A of Independent CPA Report
P-221-2	Annex B of Independent CPA Report
P-221-5	Annex D of Independent CPA Report
P-222	Judicial Affidavit of Atty. Clifford E. Chua dated 18 January 2017
P-223	Judicial Affidavit of May Ann C. Vergara dated 19 July 2016
P-224	Judicial Affidavit of Fernando A. Rimando dated 19 July 2016
P-300	Certificate issued by CCC to TPC stating that 100% of the power purchased from TPC was used in the production and processing of the exported goods
P-300-1	Signature of Rodrigo C. Cal, the Vice President and Resident Manager of CCC, on the Certificate issued by CCC to TPC stating that 100% of the power

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	purchased from TPC was used in the production and processing of the exported goods
P-302	Petitioner's BIR Certificate of Registration as stipulated in open Court

During the hearing on August 29, 2018, respondent presented Revenue Officer Pamela G. Echavez and was allowed to make an oral formal offer of evidence. The Court ruled to admit all of respondent's exhibits and granted the parties thirty (30) days to file their respective memoranda.[21]

Respondent's documentary evidence are the following:

Exhibit:	Description:
R-1	Letter of Authority
R-2	Summary List of Sales of petitioner for the year 2011
R-3	Memorandum Report
R-4	Letter dated March 15, 2016
R-5	LBC Official Receipt

Respondent filed his Memorandum on September 27, 2018,[22] whereas petitioner filed its Memorandum on October 29, 2018[23].

The case was then submitted for decision as of November 5, 2018.[24]

THE ISSUES[25]

The parties submitted the following issues for this Court's resolution:

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[21] Minutes of the Hearing, Docket, vol. II, pp. 923-924.
[22] Docket, vol. II, pp. 928-938.
[23] Docket, vol. II, pp. 945-969.
[24] Resolution, Docket, vol. II, pp. 971.
[25] III. Summary Statement of the Issue, JSFI, *supra*, p. 473.

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1. Whether petitioner is entitled to a refund or tax credit amounting to Six Million Nine Hundred Seventy-One Thousand Seventy-One Pesos and 10/100 (₱6,971,071.10) representing the alleged erroneously paid deficiency VAT for taxable year 2011.

2. Petitioner likewise raised the following issues:

   Whether petitioner's payment of the assessed VAT based on the PAN alone is erroneous.

   Whether petitioner's sale of power to Carmen Copper Corporation is subject to zero-rated VAT.

Relative to the resolution of the instant case are Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, *to wit*:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> x x x x x x x x x
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund **within two (2) years after the payment of the tax or penalty**: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund."
>
> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been

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excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." (Emphasis ours)

Based on the foregoing, the requirements for the refund of taxes erroneously paid or illegally collected are as follows:

1. That the taxpayer should file a written claim for refund or tax credit with the BIR Commissioner within two (2) years from the date of payment of the tax or penalty;

2. That in case of denial or inaction on the part of the BIR within said period, the petition for refund shall be filed with Court of Tax Appeals (CTA) within thirty (30) days from receipt of the denial, or the lapse of the said period, and within said two (2)-year period from the said date of payment of the tax regardless of any supervening cause;

3. The claim for refund must be a categorical demand for reimbursement;

4. There must be proof of payment of the erroneously or illegally collected taxes; and

5. No refund shall be given resulting from availment of incentives granted to special laws for which no actual payment was made.

As stated in the Details of Discrepancies, respondent's verification revealed that petitioner subjected to zero-rating (0%) its total sales to CCC, which is not fully in accordance with Section 4.106-5 of Revenue Regulations (RR) No. 16-2005, which specifically identifies that only

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sale of raw materials and packaging materials sold to an export-oriented enterprise shall be subject to zero-rating.

However, based on Revenue Memorandum Circular (RMC) No. 74-99 and Revenue Memorandum Order (RMO) No. RMO 9-2000, the cross-border doctrine of the VAT system provides that "no VAT shall form part of the cost component of the products which are destined for consumption outside the territorial border of the Philippines".

It is understood that the cost of power necessary to produce the product to be exported is part of the direct cost and thus shall likewise be subject to zero-rating. Hence, only the amount of sale of power pertaining to general and administrative cost of the said customer shall be subjected to 12% VAT, which is computed on the ratio of direct cost and general and administrative expenses, as shown hereunder:[26]

CARMEN COPPER CORP – FS 2011			TPC – SALE OF POWER		
POWER COST	AMOUNT	Ratio	SALES	VAT Rate	VAT DUE – Basic
POWER – Direct Cost	1,990,055,552.00	98%	1,643,804,062.86	0%	₱ -
POWER – Gen. & Admin	32,578,515.00	2%	33,547,021.69	12%	4,025,642.60
TOTAL	**₱2,022,634,067.00**	100%	**₱1,677,351,084.55**		**₱4,025,642.60**

As evidenced by BIR Form No. 0605 and eFPS payment confirmation,[27] petitioner paid the above assessed basic deficiency VAT of ₱4,025,642.60 plus interest of ₱2,945,428.50, or in the total amount of ₱6,971,071.10, on September 4, 2014.

On October 22, 2015[28] and March 18, 2016 petitioner filed with the BIR National Office and BIR Large Taxpayers Service – Cebu, respectively, a request for the cancellation of the VAT deficiency assessment and refund accordingly, to the tax it erroneously paid in the total amount of ₱6,971,071.10.

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[26] *Id.* at p. 261.
[27] Exhibits "P-20 to P-23", *supra.*
[28] Exhibit "P-24", *supra.*

Petitioner's claim for refund was denied through a letter dated March 15, 2016, which was sent to petitioner's address on April 6, 2015.[29]

Considering that the petition was filed on March 21, 2016, both administrative and judicial claims were filed within the two (2)-year period, pursuant to Section 229 of the NIRC of 1997, as amended.

Petitioner posits that the assessment has no basis on the following grounds:

1. Petitioner's sales of power to CCC is subject to zero-rated VAT pursuant to RMO No. 9-2000; and,

2. Petitioner's payment of VAT based on the PAN alone is erroneous.

The Court shall address each argument raised by petitioner.

RMO No. 9-2000 clarifies the tax treatment of sales of goods, properties, and services made by VAT-registered suppliers to BOI-registered manufacturers/exporters with 100% export sales. Section 3 thereof provides the conditions to be entitled to VAT zero-rated sales, to wit:

> "SECTION 3. *Sales of goods, properties or services made by a VAT-registered supplier to a BOI registered exporter shall be accorded automatic zero-rating, i.e., without necessity of applying for and securing approval of the application for zero-rating as provided in Revenue Regulations No. 7-95, subject to the following conditions:*
>
> (1) The supplier must be VAT-registered,
>
> (2) The BOI-registered buyer must likewise be VAT-registered;
>
> (3) The buyer must be a BOI-registered manufacturer/producer whose products are 100% exported. For this purpose a

[29] Exhibits "R-4" and "R-5", BIR Records, pp. 48-50.

> Certification to this effect must be issued by the Board of Investments (BOI) and which certification shall be good for one year unless subsequently re-issued by the BOI;
>
> (4) The BOI-registered buyer shall furnish each of its suppliers with a copy of the aforementioned BOI Certification which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers; and;
>
> (5) The VAT-registered supplier shall issue for each sale to BOI-registered manufacturer/exporters a duly-registered VAT invoice with the words "zero-rated" stamped thereon in compliance with Sec. 4.108-1(5) of RR 7-95. The supplier must likewise indicate in the VAT invoice the name and BOI-registry number of the buyer."

The supplier and the BOI-registered buyer are VAT-registered.

As already mentioned, petitioner, the supplier herein, is a partnership duly registered with the Securities and Exchange Commission (SEC) with Company Registration No. APO94-900.[30] It is engaged in the business of acquiring, owning, rehabilitating, maintaining and operating coal-fired and oil-fired electrical generation facilities.[31]

Petitioner is a VAT-registered entity as evidenced by its BIR COR No. 8RC0000578336, with TIN No. 003-883-626-000 issued on January 1, 1997.[32]

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[30] Exhibit "P-2", *supra.*
[31] *Id.*, p. 596.
[32] Exhibit "P-302", *supra.*

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Likewise, CCC, the buyer in this case, is a VAT-registered entity as evidenced by its BIR COR No. 8RC0000048993 with TIN No. 233-903-100-000 issued on October 5, 2004.[33]

The buyer is a BOI-registered manufacturer/producer whose products are 100% exported. A Certification to this effect is issued by the BOI and is good for one year. A copy of which is furnished to the supplier which serves as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers.

Records show that CCC is registered with the BOI as a new producer of copper concentrate with COR No. 2006-158 issued on December 13, 2006.[34] On January 21, 2011, the BOI issued a Certification[35] in favor of CCC attesting that the latter is registered with the BOI and that based on the information given, CCC exported 100% of its total sales volume/value for the calendar years covering January 1 to December 31, 2010, and the same has been issued pursuant to the Guidelines on the issuance of BOI Certification per RMO No. 9-2000 entitled "Tax Treatment of Sales of Goods, Properties and Services made by VAT-registered Suppliers to BOI-registered Manufacturers-Exporters with 100% Export Sales." The said Certification also states that the same is valid from January 1 to December 31, 2011, unless sooner revoked, and is issued in accordance with Section 3.3 of RMO No. 9-2000.

Following Section 3(4) of RMO No. 9-2000, the subject BOI Certification shall serve as authority for petitioner, being a local supplier of CCC, "to avail of the benefits of zero-rating" on its sales to the latter covering TY 2011. Considering that there is no showing that the subject BOI Certification was revoked, then, petitioner's sale of electricity to CCC should qualify for VAT zero-rating, and thus, no output tax should be shifted by petitioner to CCC.

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[33] Exhibit "P-29", Docket, vol. II, p. 679.
[34] Exhibit "P-105", Docket, vol. II, p. 874.
[35] Exhibit "P-31", Docket, vol. II, pp. 871 to 873.

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A duly-registered VAT invoice with the words "zero-rated" stamped thereon should be issued by the VAT-registered supplier issued for each sale to BOI-registered manufacturer/ exporters. The name and BOI-registry number of the buyer should likewise be indicated in the VAT invoice.

To prove its compliance with the fifth condition under the RMO No. 9-2000, petitioner submitted its sales invoices[36] and official receipts (OR)[37] issued to CCC during the taxable year 2011.

As can be gleaned from respondent's assessment, petitioner's total zero-rated sales to CCC for taxable year 2011 amounted to ₱1,677,351,084.55, as reproduced below:

CARMEN COPPER CORP – FS 2011			TPC – SALE OF POWER		
POWER COST	AMOUNT	Ratio	SALES	VAT Rate	VAT DUE – Basic
POWER – Direct Cost	1,990,055,552.00	98%	1,643,804,062.86	0%	₱ -
POWER – Gen. & Admin	32,578,515.00	2%	33,547,021.69	12%	4,025,642.60
TOTAL	**₱2,022,634,067.00**	100%	**₱1,677,351,084.55**		**₱4,025,642.60**

These zero-rated sales to CCC amounting to ₱1,677,351,084.55 were accordingly declared by petitioner, among others, in its Quarterly VAT Returns for TY 2011[38] as follows:

	Quarterly VAT Returns (TY 2011)				
Customer	**1st Quarter**	**2nd Quarter**	**3rd Quarter**	**4th Quarter**	**Total**
CCC	*₱ 337,639,337.95*	*₱ 431,491,887.34*	*₱ 434,044,680.91*	*₱ 474,175,178.36*	*₱ 1,677,351,084.56*
Balamban Enerzone Corp	69,139,504.54	23,606,064.99	21,268,073.78	25,688,152.04	139,701,795.35
Panay Energy Devt Corp	10,821,895.02				10,821,895.02
CEBECO III	29,020,246.07	44,490,558.37	39,136,570.12	32,561,011.00	145,208,385.56
Total Zero-Rated Sales	**₱446,620,983.58**	**₱499,588,510.70**	**₱494,449,324.81**	**₱532,424,341.40**	**₱1,973,083,160.49**

[36] Exhibits "P-106 to P-166".
[37] Exhibits "P-167 to P-215" and "P-217 to P-219".
[38] Exhibits "P-8", "P-11", "P-14", and "P-17", Docket, vol. II, pp. 639, 645, 651, and 657.

Upon scrutiny, the Court finds that the ORs supporting the sales of electricity to CCC is in compliance with the invoicing requirements under Sections 113(A)(2), (B)(1), (2)(c) and (3) of the NIRC of 1997,[39] as amended, as implemented by Sections 4.113-1(A)(2), B(1) and (2)(c) of RR No. 16-05,[40] as amended. Additionally, petitioner

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[39] ***Section 113. Invoicing and Accounting Requirements for VAT-Registered Persons.*** -

(A) ***Invoicing Requirements.*** - A VAT-registered person shall issue:

(1) A VAT invoice for every sale, barter or exchange of goods or properties; and

xxx xxx xxx

(B) ***Information Contained in the VAT Invoice or VAT Official Receipt.*** - The following information shall be indicated in the VAT invoice or VAT official receipt:

(1) A statement that the seller is a VAT-registered person, followed by his Taxpayer's Identification Number (TIN); and

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax. Provided, That:

xxx xxx xxx

(c) If the sale is subject to zero percent (0%) value-added tax, the term **"zero-rated sale"** shall be written or printed prominently on the invoice or receipt.

xxx xxx xxx

(3) The date of transaction, quantity, unit cost and description of the goods or properties or nature of the service; and

xxx xxx xxx

[40] ***Section. 4.113-1. Invoicing Requirements.*** -

(A) A VAT-registered person shall issue:-

(1) A VAT invoice for every sale, barter or exchange of goods or properties; and

xxx xxx xxx

Only VAT-registered persons are required to print their TIN followed by the word 'VAT' in their invoice or official receipts. Said documents shall be considered as a 'VAT invoice' or 'VAT Official Receipt.' All purchases covered by invoices/receipts other than VAT Invoice/VAT Official Receipt shall not give rise to any input tax.

VAT invoice/official receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records.

(B) Information contained in VAT invoice or VAT official receipt. -The following information shall be indicated in VAT invoice or VAT official receipt:

(1) A statement that the seller is a VAT-registered person, followed by his TIN;

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indicated in the ORs the name of CCC and its BOI Registry No. 2006-158, as specifically required by RMO No. 9-2000.

In fine, the Court finds that petitioner fully complied with the conditions laid down under RMO No. 9-2000, hence, its sales of electricity to CCC is subject to VAT zero-rating. As such, petitioner is not liable for deficiency VAT over said sales to CCC for taxable year 2011. This makes the payment of deficiency VAT amounting to ₱6,971,071.10 made by petitioner on September 4, 2015 without basis.

Petitioner also claims that its voluntary payment of VAT based on the PAN alone entitles it to refund. Considering that respondent did not issue a FAN, the assessment is not final and therefore, petitioner should recover the amount it erroneously paid.

Respondent, on the other hand, asserts that the payment shows positive act petitioner which concludes its admission of its own tax liabilities for taxable year 2011. He submits that the issuance of FAN and FLD are immaterial considering that after the issuance of PAN, petitioner failed to file a reply and voluntarily paid.

An "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property not subject to taxation or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.[41] Section 229 of the NIRC of 1997, as amended, allows the recovery of taxes which were erroneously or illegally collected. Erroneously paid taxes may come in the form of amounts that should not have been paid.[42]

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(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the VAT; Provided, That:

xxx xxx xxx

(c) If the sale is subject to zero percent (0%) VAT, the term "zero-rated sale" shall be written or printed prominently on the invoice or receipt;

[41] *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012.
[42] *SMI-ED Philippines Technology, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 188497, November 12, 2014.

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The Supreme Court, in the case of *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*,[43] held that:

> "A notice of assessment is:
>
> [A] declaration of deficiency taxes issued to a [t]axpayer who fails to respond to a Pre-Assessment Notice (PAN) within the prescribed period of time, or whose reply to the PAN was found to be without merit. The Notice of Assessment shall inform the [t]axpayer of this fact, and that the report of investigation submitted by the Revenue Officer conducting the audit shall be given due course.
>
> The formal letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, otherwise the formal letter of demand and the notice of assessment shall be void.
>
> Section 228 of the NIRC provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. To implement the provisions of Section 228 of the NIRC, RR No. 12-99 was enacted. Section 3.1.4 of the revenue regulation reads:
>
> 3.1.4. Formal Letter of Demand and Assessment Notice. – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. The same shall be sent to the taxpayer only by registered mail or by personal delivery.
>
> It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. xxx"

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[43] G.R. No. 166387, January 19, 2009.

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Bearing the above in mind, a FAN should have been issued by respondent against petitioner when it failed to respond to PAN within the 15-day period, or if it replied to the PAN but without merit. Besides the FAN that should have been issued shall inform petitioner of the assessment which is based on facts and law. FLD shall call for the payment of the deficiency tax. Both the FAN and FLD are mandatory and part of due process.

Apparently, what the law demands is the issuance of the FAN which should be formally protested to by a taxpayer, otherwise, the same shall become final and executory.[44]

Consequently, the service of the FAN to the taxpayer is vital as it is the start of the taxpayer's obligation to pay the amount assessed and demanded.[45] An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and protests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer.[46]

This Court has already ruled in the case of *3M Philippines, Inc. vs. Commissioner of Internal Revenue*[47] that, "if jurisprudence and the law have stringent requirements as regards the form in which the FAN is to be issued for due process to be followed, **the omission of the FAN itself**, especially when it has been specifically requested by petitioner, **is an obvious indication that the tax was collected without basis**". Thus, the non-issuance of FAN against petitioner is fatal.

In like manner, respondent highlights the fact that after he issued the PAN dated July 28, 2015 which was received by petitioner on July 30, 2015, petitioner failed to file a reply to the PAN within the period prescribed and it voluntarily paid the deficiency VAT pertaining to sales to CCC on September 4, 2015, without protesting to the same.

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[44] *Ibid.*
[45] *Callanta, et. al. vs. Office of the Ombudsman*, et al., G.R. Nos. 115253-74, January 30, 1998.
[46] *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation*, G.R. No. 128315, June 29, 1999.
[47] CTA Case No. 8147, Amended Decision, June 10, 2015.

In view of the foregoing factual circumstance, it can be deduced that petitioner only had until August 14, 2015, within which to reply to the PAN. Since it failed to reply within the said period, the FAN should have been issued by respondent. It is noteworthy that the voluntary payment was made by petitioner on September 4, 2015, which is twenty-one (21) days from the expiration of the period to reply to PAN.

Considering that no FAN was issued, the payment was not based on an assessment which became final and executory. Further, the payment was not supposed to be collected pursuant RMO No. 9-2000. Accordingly, such erroneous payment made by petitioner based on the PAN alone may be recovered.

WHEREFORE, in view of the foregoing, the instant Petition for Review is **GRANTED**. Accordingly, respondent is **ORDERED** to refund or issue a tax credit certificate in favor of petitioner in the amount of **₱6,971,071.10**, representing erroneously paid deficiency VAT for TY 2011.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

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

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

ATTESTATION

I attest 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
2nd Division Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice