REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

LUZON HYDRO CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6669

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

MAY 0 2 2008

9:00 a.m.

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DECISION

UY, *J.*:

Before Us is a Petition for Review filed on April 14, 2003 by petitioner Luzon Hydro Corporation, against respondent Commissioner of Internal Revenue, for the refund or issuance of a tax credit certificate in the amount of P9,795,427.88 allegedly representing unutilized input value-added tax (VAT) paid on its domestic purchases of goods and services which are attributable to its effectively zero-rated sales to the National Power Corporation (NPC) for the four quarters of 2001. Subsequently, petitioner filed an Amended Petition for Review on May 5, 2005[1], reducing petitioner's claim for refund/issuance of a tax credit certificate from P9,795,427.88 to P2,920,665.16 allegedly

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[1] Docket, pp. 155-162.

representing its unutilized input VAT incurred and paid from the first to fourth quarters of 2001.

THE FACTS

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Philippines, with principal office address at Poblacion Alilem, Ilocos Sur. It is registered with the Bureau of Internal Revenue as a VAT taxpayer under Taxpayer Identification Number (TIN) 004-266-526.[2]

Respondent 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 and approve claims for refund or tax credit as provided by law, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City, where he may be served with summons and other court processes.[3]

Petitioner was formed by a consortium of four corporations, namely: Northern Mini Hydro Corporation, Aboitiz Equity Ventures, Inc., Ever Electrical Manufacturing, Inc. and Pacific Hydro Limited.[4] Pursuant to a Power Purchase Agreement with NPC[5], the electricity produced by petitioner in its operation of the Bakun Hydroelectric Power Plant will be sold solely to the NPC.

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[2] Joint Stipulation of Facts and Issues (JSFI), Summary of Admitted Facts, par. 1, Docket, p. 51.
[3] JSFI, Summary of Admitted Facts, par. 2, ibid.
[4] Exhibits "A1-a" to "A1-e" & "A2-c".
[5] Exhibit "A".

Relative to its sale of electricity to NPC, petitioner has been granted by the respondent an approved Application/Certificate for Zero Rate for VAT purposes for the following periods:[6]

3.1 For January 1, 2000 to December 31, 2000 – filed with RDO2 Vigan

3.2 For February 1, 2000 to December 31, 2000 with Certificate No. Z-162-2000

3.3 For January 2, 2001 to December 31, 2001 with Certificate No. Z-2001-269

For the four quarters of 2001, petitioner allegedly incurred input VAT in the amount of P9,795,427.89 on its domestic purchases of goods and services which were used in its generation and sale of electricity to NPC.

In its amended VAT returns for the four quarters of 2001, petitioner declared the alleged input VAT amount of P9,795,427.89, as follows:

Exhibit	Date Filed	Period Covered	Input VAT
F	May 25, 2001	1st qtr-2001	P 1,903,443.96
I	July 23, 2001	2nd qtr-2001	2,166,051.96
L	July 23, 2002	3rd qtr-2001	1,598,482.39
O	July 24, 2002	4th qtr-2001	4,127,449.58
			P 9,795,427.89

On November 26, 2001, petitioner filed a written claim for refund/application for Tax Credit Certificate of its unutilized input VAT for the period from October 1999 to October 2001 in the amount of P14,557,004.38.[7]

[6] Petition for Review, Annexes A, B & C; JSFI, Summary of Admitted Facts, par. 3, Docket, p. 51.
[7] JSFI, Summary of Admitted Facts, par. 11, Docket, p. 53.

On July 24, 2002, petitioner filed an amended written claim for refund/application for Tax Credit Certificate of its unutilized input VAT to cover the period from October 1999 to May 2002 for a total amount of P20,609,047.56.[8]

The Bureau of Internal Revenue through Revenue Examiner Felicidad Mangabat, Revenue Officer III of RDO No. 2 Vigan City has already concluded an investigation and made a recommendation over the claim for refund of petitioner for the period January 1, 2001 to December 31, 2001 contained in a report dated August 19, 2002.[9]

The Commissioner of Internal Revenue has not yet finally acted on the claim for refund of the petitioner despite the aforementioned recommendation.[10] Hence, on April 14, 2003, petitioner filed a Petition for Review before this Court praying for the refund or issuance of a tax credit certificate corresponding to its alleged unutilized input VAT payment for the four quarters of 2001 in the amount of P9,795,427.88.

Respondent, in his Answer filed through registered mail on May 16, 2003, raised the following Special and Affirmative Defenses:

7. The petitioner has failed to demonstrate that the taxes sought to be refunded were erroneously or illegally collected;

8. In an action for tax refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund;

[8] Ibid., par. 12, Docket, p. 53.
[9] Id., par. 13, Docket, p. 53.
[10] Id., par. 14, Docket, p. 53.

9. It is incumbent upon petitioner to show compliance with the provisions of Section 112 and Section 229, both of the National Internal Revenue Code, as amended;

10. Claims for refund are constructed (*sic*) strictly against the claimant for the same partakes the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95) and as such they are looked upon when (*sic*) disfavor (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121);

11. Taxes paid and collected are presumed to have been made in accordance with the law and regulations, hence, not refundable.

In the parties' Joint Stipulation of Facts and Issues filed on October 30, 2003 and approved by this Court in a Resolution dated November 10, 2003, the main issue posed for this Court's resolution is whether or not petitioner is entitled to the refund. Corollary thereto, the following issues were raised:

1. Whether or not the input value added tax being claimed by petitioner is supported by sufficient documentary evidence;

2. Whether petitioner has excess and unutilized input VAT from its purchases of domestic goods and services, including capital goods in the amount of Php 9,795,427.88;

3. Whether or not the input VAT being claimed by petitioner is attributable to its zero-rated sale of electricity to the NPC;

4. Whether or not the operation of the Bakun Hydroelectric Power Plant is directly connected and attributable to the generation and sale of electricity to NPC, the sole business of Petitioner; and

5. Whether or not the claim filed by the petitioner was filed within the reglementary period provided by law.

While the case was pending trial, respondent, through the Assistant Commissioner for Assessment Services, informed petitioner in a letter dated March 3, 2005, that the subject claim for refund has been granted in the amount of P6,874,762.72, net of disallowances of P2,920,665.16.[11] Enclosed in the said letter is the Tax Credit Certificate (TCC No. 00002618) in the amount of P6,874,762.72.[12]

Due to the partial grant of refund, petitioner filed on May 3, 2005, a Motion for Leave of Court to Amend Petition for Review. The said motion was granted in open court on May 11, 2005[13] and the Amended Petition for Review praying for the reduced amount of P2,920,665.16, was admitted as part of the records of this case.[14] Furthermore, respondent was directed to file Supplemental Answer within ten (10) days therefrom.

As no Supplemental Answer was filed within the given period, the Answer filed on May 16, 2003 was considered as respondent's answer to petitioner's Amended Petition for Review.[15]

To support its claim, petitioner presented testimonial and documentary evidence. Respondent, on the other hand, submitted the case for decision based on the pleadings as there was no report of investigation in this case.[16]

On May 2, 2007, the case was submitted for decision sans the memorandum of respondent.

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[11] Docket, p. 175.
[12] Ibid., at p. 176.
[13] Id., at pp. 146-151.
[14] Id., at p. 177.
[15] Id., at p. 178.
[16] Id., at p. 309.

THE ISSUE

The sole issue presented before this Court is whether or not petitioner is entitled to the unapproved balance of its claim for refund/issuance of a tax credit certificate for the four quarters of 2001 in the amount of P2,920,665.16.

THE COURT'S RULING

Petitioner anchors its claim on Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, which provides as follows:

> "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)."

From the foregoing, in order to be entitled to a refund or tax credit of input VAT payments directly attributable to zero-rated or effectively zero-rated sales, the following requisites must be complied with:

1) there must be zero-rated or effectively zero-rated sales;
2) that input taxes were incurred or paid;
3) that such input VAT payments are directly attributable to zero-rated sales or effectively zero-rated sales;
4) that the input VAT payments were not applied against any output VAT liability; and
5) that the claim for refund was filed within the two-year prescriptive period.

Anent the first requisite, there is no argument that the sale of electricity by a VAT registered taxpayer, like herein petitioner, to the NPC is subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the NIRC of 1997. This issue has been well-settled in the case of ***Maceda vs. Macaraig, G.R. No. 88291, May 31, 1991***, where the Supreme Court held that:

> "The NPC is a non-profit public corporation created for the general good and welfare, wholly owned by the government of the Republic of the Philippines. From the very beginning of its corporate existence, the NPC enjoyed preferential tax treatment, 'to enable the Corporation to pay the indebtedness and obligation and in furtherance and effective implementation of the policy enunciated in Section one of Republic Act No. 6395' xxx
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> xxx xxx xxx
>
> Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from '<u>all forms of taxes</u>, duties, fees, imposts, as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings'.
>
> The use of the phrase 'all forms' of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before. The rationale for this exemption is that being non-profit the NPC 'shall devote all its returns from its capital investment as well as excess revenues of its operation, for expansion. xxx'
>
> xxx xxx xxx
>
> It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from <u>all forms of taxes</u> <u>including indirect taxes</u> as provided for under R.A. No. 6395 and P.D. No. 380 if it is to attain its goals." *(Underscoring supplied)*

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The Secretary of Finance, in his Memorandum to the CIR dated January 26, 1998, upheld NPC's exemption from both direct and indirect taxes, and said that purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate.

Considering that petitioner was formed for the sole purpose of generating power for the subsequent sale thereof to NPC, a tax exempt entity under a Power Purchase Agreement.[17] Thus, the sale of electricity by petitioner to NPC is subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the NIRC of 1997, which states:

> **"SEC. 108. *Value-Added Tax on Sale of Services and Use or Lease of Properties.***
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> xxx xxx xxx
>
> (3) <u>Services rendered to persons or entities whose exemption under special laws</u> or international agreements to which the Philippines is a signatory <u>effectively subjects the supply of such services to zero percent (0%) rate;</u>" *(Underlining supplied).*

The respondent, through Nora C. Villanueva, Chief Audit Information, Tax Exemption & Incentives Division, recognized this when she approved petitioner's Application for Effective Zero-Rate, and which approval provides that the same is valid only for sale of electricity from January 2, 2001 to December 31, 2001.[18]

Additionally however, it is incumbent upon petitioner to prove that it actually generated sales from power generation services rendered to NPC for

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[17] Exhibit "A".

[18] Petition For Review, Annexes A, B & C, Docket, pp. 11-13.

the period January 1, 2001 to December 31, 2001 through the presentation of VAT official receipts which must contain all the necessary information, such as petitioner's TIN-VAT number and the imprinted word "zero-rated", as provided under Section 113 of the NIRC of 1997, as implemented by Section 4.108-1 of Revenue Regulations No. 7-95, We quote below:

> **"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:
> (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."
>
> **"SEC. 4.108-1. Invoicing Requirements**. — All VAT-registered persons shall, for every sale or lease of goods or properties or services, **issue duly registered** receipts or **sales or commercial invoices** which must show:
> 1. the name, TIN, and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
> 5. **the word 'zero-rated' imprinted on the invoice covering zero-rated sales; and**
> 6. the invoice value or consideration.
>
> xxx xxx xxx
>
> Only VAT-registered persons are required to print their **TIN followed by the word 'VAT'** in their invoices or receipts and this shall be considered as a 'VAT Invoice'. All purchases covered by invoices other than "VAT Invoice" shall not give rise to any input tax." *(Emphasis supplied)*

Such official receipts must be duly registered with the Bureau of Internal Revenue as prescribed under Section 237 of the NIRC of 1997, to wit:

> **"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 x x x." *(Emphasis supplied)*

In petitioner's VAT returns for the four quarters of 2001[19], no amount of zero-rated sales was declared. Likewise, petitioner did not submit any VAT official receipt proving actual receipt of payments for services rendered to NPC. The only proof submitted by petitioner is a letter from Regional Director Rene Q. Aguas, Revenue Region No. 1, stating that the financial statements and annual income tax return constitute sufficient secondary proof of effectively zero-rated sales and that based on their examination and evaluation of the financial statements and annual income tax return of petitioner for taxable year 2000, it had annual gross receipts of P187,992,524.00.[20] This Court cannot give credence to the said letter as it refers to taxable year 2000, while the instant case refers to taxable year 2001.

Without zero-rated sales for the four quarters of 2001, the input VAT payments of P9,795,427.88 (including the present claim of P2,920,665.16) allegedly attributable thereto cannot be refunded. It is clear under Section 112(A) of the NIRC of 1997 that the refund/tax credit of unutilized input VAT is premised on the existence of zero-rated or effectively zero-rated sales.

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[19] Exhibits "F", "I", "L" & "O".
[20] Exhibits "Q" & "Q-1".

While respondent's Assistant Commissioner for Assessment Service, Ms. Nora E. Tamayo, found petitioner partially entitled in the amount of P6,874,762.72 and that a TCC for the said amount has been issued to petitioner, such finding is not binding upon this Court. Tax refunds are in the nature of such exemptions.[21] Accordingly, the claimants of those refunds bear the burden of proving the factual basis of their claims.[22] Herein petitioner failed to discharge that burden.

Moreover, the TCC amount of P6,874,762.72 may still be subject to post-audit as stated in the letter dated March 3, 2005 issued by the Assistant Commissioner for Assessment Service, Ms. Nora E. Tamayo, to wit:

> "The approved report on the said claim may be subjected to post-audit by a higher authority upon the directive of the Commissioner or Deputy Commissioner, Operations Group. Should there be material findings upon post-audit, an assessment notice to be approved and signed by the Commissioner may be issued to you for the collection of any deficiency tax or excess tax credit previously granted."

For petitioner's non-compliance with the first requisite of proving that it had effectively zero-rated sales for the four quarters of 2001, the claimed unutilized input VAT payments of P2,920,665.16 cannot be granted.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[21] BPI Leasing Corp. vs. CA, 416 SCRA 4, 14, November 18, 2003
[22] Paseo Realty & Development Corp. vs. CA, G.R. No. 119286, October 13, 2004.

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ERNESTO D. ACOSTA
Presiding Justice