

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

EN BANC

**COMMISSIONER OF INTERNAL
REVENUE,**

Petitioner,

**C.T.A. E.B. No. 459
(C.T.A. CASE No. 6788)**

-versus-

**MINDANAO I GEOTHERMAL
PARTNERSHIP,**

Respondent.

Present:

Acosta, P.J.

Castañeda, Jr.

Bautista,

Uy,

Casanova,

Palanca-Enriquez, JJ.

Promulgated:

JAN 06 2010

*Gr. Apolinario
10:20 A.M.*

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DECISION

CASTAÑEDA, Jr., JJ.

Before us is a petition for review *en banc* filed on February 25, 2009 by petitioner Commissioner of Internal Revenue ("CIR", for brevity/respondent in the division level) seeking that the assailed Amended *Je*

Decision dated September 23, 2008 and the Resolution dated January 20, 2009 by the First Division of this Court (Court in division) in C.T.A. Case No. 6788 entitled "*Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue*" be reversed and set aside and a new one be rendered dismissing and denying the claim for the issuance of tax credit certificate of Mindanao I Geothermal Partnership ("MGP" for brevity).

The dispositive portion of the assailed amended decision states:

WHEREFORE, the *Petition for Review* is hereby **PARTIALLY GRANTED** and this Court's Decision promulgated on October 13, 2005 in the instant case is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED to ISSUE TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **FOUR MILLION SIXTY SEVEN THOUSAND EIGHT HUNDRED SEVENTY SIX 53/100 PESOS (P4,067,876.53)**, representing unutilized input VAT incurred for the third and fourth quarters of taxable year 2001.

SO ORDERED.

The dispositive portion of the assailed resolution reads, as follows:

WHEREFORE, premises considered, respondent's *Motion for Partial Reconsideration* is hereby **DENIED** for lack of merit.

SO ORDERED.

The Facts

As found by the Court in Division, the following are the facts of this

case: *gr*

Petitioner¹ is a partnership duly registered with the Securities and Exchange Commission (SEC), with principal address at 26th Floor, Citibank Tower, Valero St., Salcedo Village, Makati City. It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer engaged in the business of generation, collection, and distribution of electricity, steam, and hot water supply.

Sometime in December 1994, petitioner entered into a Build-Operate-Transfer (BOT) contract with the Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC) for the finance, design, construction, testing, commissioning, operation, maintenance, and repair of a 47-megawatt geothermal plant. By virtue of the BOT contract, PNOC-EDC shall supply and deliver steam to petitioner at no cost. In turn, petitioner will convert the steam into electric capacity and energy for PNOC-EDC and shall subsequently supply and deliver the same to National Power Corporation (NPC) for and in behalf of PNOC-EDC.

Respondent² is the duly appointed Commissioner of the 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 4th Floor, BIR National Office Building, Agham Road, Quezon City.

Petitioner's 47-megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Private Sector Generation Facility, pursuant to the provisions of Executive Order No. 215 as early as June 15, 1995.

On June 26, 2001, Republic Act (R.A.) No. 9136 took effect, and the relevant provisions of the National Internal Revenue Code (NIRC) of 1997 were deemed modified. R.A. No. 9136, also known as the "Electric Power Industry Reform Act of 2001" (EPIRA), was enacted by Congress to ordain reforms in the electric power industry, highlighting, among others, the importance of ensuring the reliability, security and affordability of the supply of electric power to end-users. Under the provisions of this Republic Act and its implementing rules and regulations, the delivery and supply of electric energy by generation companies became VAT zero-rated, which previously were subject to ten percent (10%) VAT. In relation thereto, Section 6 of Chapter II and Section 6 of Rule 5 of its Implementing Rules and Regulations state that:

"Republic Act No. 9136

Electric Power Industry Reform Act of 2001 (EPIRA) *je*

¹ Respondent in this *en banc* case.

² Petitioner in this *en banc* case.

CHAPTER II

Organization and Operation of the Electric Power Industry

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XXX

XXX

SEC. 6. *Generation Sector* – Generation of electric power, a business affected with public interest shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements." (*Emphasis supplied*)

"Rules and Regulations to Implement Republic Act No.9136, entitled 'Electric Power Industry Reform Act of 2001'

RULE 5 Generation Sector

XXX

XXX

XXX

SECTION 6. *Generation Charges and VAT.* –

XXX

XXX

XXX

(b) **Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a** 

Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOE, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these rules." (*Emphasis supplied*)

The amendment of the NIRC of 1997 modified the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero percent (0%). Thus, petitioner adopted the VAT zero-rating of the EPIRA in computing for its VAT payable when it filed its VAT Returns, on the belief that its sales qualify for VAT zero-rating.

For the third and fourth quarters of taxable year 2001, petitioner filed its VAT Returns on October 24, 2001 and January 24, 2002, respectively, declaring accumulated unutilized excess input VAT in the amount of P4,417,437.97 as of the fourth quarter of taxable year 2001, allegedly attributable to its zero-rated sales to PNOC-EDC for the same period.

On June 24, 2002, petitioner filed an administrative claim for the issuance of a tax credit certificate in the amount of P4,417,437.97, corresponding to its alleged unutilized excess input taxes as of the fourth quarter of 2001.

Alleging inaction on the part of respondent, petitioner elevated its claim before this Court on September 30, 2003.

Respondent filed his *Answer* on November 17, 2003.

After trial on the merits, this case was submitted for decision on July 19, 2005, considering petitioner's Memorandum *sans* respondent's Memorandum.

The Court in a *Decision* dated October 13, 2005 denied the *Petition for Review* for insufficiency of evidence, particularly, for petitioner's failure to submit Certificates of Creditable Tax Withheld at Source and machine validated Monthly VAT Declarations showing its VAT payments for the months of July and August 2001. The Court declared that without these supporting documents, the VAT credits/payments in the amount of P4,603,669.24 and P2,569,962.08 cannot be applied against the output VAT liability of P8,417,414.07. Hence, there would be no excess input VAT to refund. *ju*

On November 17, 2005, petitioner filed a *Motion for New Trial* to further substantiate its claim for issuance of tax credit certificate, which the Court granted in open court during the hearing on February 24, 2006.

Petitioner made a *Supplemental Offer of Documentary Evidence*; while respondent, through counsel, submitted the case for decision based on the pleadings.

The case was submitted for decision on November 13, 2007, without the respective Memorandum of the parties.

On September 23, 2008, the Court in division promulgated the assailed Amended Decision which modified its October 13, 2005 Decision and partially granted the petition for review by ordering CIR to issue tax credit certificate in favor of MGP in the reduced amount of P4,067,876.53, representing unutilized input VAT incurred for the third and fourth quarters of taxable year 2001.

On January 20, 2009 Resolution, the Court in division denied CIR's *Motion for Partial Reconsideration* filed on October 14, 2008.

On February 10, 2009, the Court *en banc* granted CIR's "*Motion for Extension of Time to File Petition for Review*" filed on February 6, 2009. Within the period granted, CIR's "*Petition for Review*" was filed on February 25, 2009.

On March 10, 2009, the Court *en banc* promulgated a resolution ordering MGP to file a Comment within ten (10) days from receipt of the said resolution. Upon the submission of the Comment or the expiration of 

the period for filing the same, the petition shall be deemed submitted for decision unless the Court *en banc* decides to require the parties to submit simultaneous memoranda. However, no Comment was filed as per verification of the Records as of April 2, 2009.

On April 13, 2009 Resolution, the parties were required to submit their respective Memoranda within a non-extendible period of thirty (30) days from receipt of the said resolution, after the said period, the Court *en banc* will consider the Petition for Review submitted for decision with or without such memoranda. On May 15, 2009, CIR filed a "Manifestation" that the statement of facts of the case, issues, and discussion specifically declared in the petition for review filed on February 25, 2009 shall be adopted as petitioner's Memorandum. On May 18, 2009, MGP filed its Memorandum. On May 29, 2009, CIR's "Manifestation" was duly noted by the Court and this case was submitted for decision.

Hence, this decision.

ISSUE

WHETHER OR NOT RESPONDENT IS ENTITLED TO THE CLAIM FOR THE ISSUANCE OF TAX CREDIT CERTIFICATE³ OF THE UNUTILIZED INPUT VAT INCURRED FOR THE THIRD AND FOURTH QUARTERS OF TAXABLE YEAR 2001 *je*

³ Claim for refund was stated in CIR's Petition for Review but it should be claim for the issuance of tax credit certificate

THIS COURT'S RULING

The petition is denied.

In this case, We reiterate the undisputed finding of the Court in division that MGP satisfied the twin requirements for VAT zero-rating under Republic Act No. 9136⁴ that: (1) it is a generation company; and (2) it derived sales from power generation.

Pertinent to this claim for the issuance of tax credit certificate is Section 112 (A) of the National Internal Revenue Code of 1997 which provides:

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: xxx xxx xxx.

Based on the foregoing, We agree with the Court in division that MGP must comply with the following requisites to be entitled to a claim for the issuance of tax credit certificate:

1. there must be zero-rated or effectively zero-rated sales;
2. that the input taxes were incurred or paid; 

⁴ Electric Power Industry Reform Act of 2001 (EPIRA).

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.

It is also undisputed that MGP complied with the first, second, third, and fifth requisites. In effect, the core issue in this appeal pertains to the fourth requisite, that is whether the input VAT payments subject of this case were not applied against any output VAT liability.

*There was formal offer
of evidence*

CIR argues that the Court in division erred in holding that MGP has sufficiently proved its entitlement to a tax credit or refund. CIR alleges that MGP failed to present or formally offer its Certificates of Creditable Tax Withheld at Source supporting the reported creditable output VAT withheld at source in the amount of P4,603,669.24, and its machine validated Monthly VAT Declarations showing its VAT payments for the month of July and August 2001 in the amount of P2,569,962.08 which are the best and 

competent evidence at the time of the trial to establish that such VAT input taxes credits/payments can be applied against the output VAT liability in the amount of P8,417,414.07. CIR further alleges that it is imperative for MGP to prove that its VAT input taxes payments/credits were not applied against any output VAT liability.

On the other hand, MGP alleges that it made a formal offer of all additional evidence presented through its *Supplemental Offer of Documentary Evidence* and this fact was admitted by CIR in the Petition for Review. MGP stressed that the records show that CIR did not contest or even make a comment on the said *Supplemental Offer*.

The allegation of CIR is bereft of merit. As correctly pointed out by MGP, the records show that the additional documentary evidence (Certificates of Creditable Tax Withheld at Source supporting the reported creditable output VAT withheld at source in the amount of P4,603,669.24, and its machine validated Monthly VAT Declarations showing its VAT payments for the month of July and August 2001 in the amount of P2,569,962.08) were formally offered by MGP without objection from CIR.

Motion for New Trial
Correctly granted 

CIR argues that the Court in division erred in granting MGP's *Motion for New Trial* and allowing it to submit belatedly its VAT credits/payments of input taxes to establish the legal and legal basis of its claim for a tax credit or refund. CIR submits that there is no merit to the reasoning of MGP that the non-submission of input VAT payments before the Court in division was due to its confidently reliance on the independent CPA's opinion that it was unnecessary to attach to the foregoing documents to his letter report dated October 25, 2004 and on his competence, integrity, and independence to determine the propriety and validity of its claim for refund. CIR alleges that this does not constitute excusable negligence which would warrant the re-opening of a new trial in accordance with Section 1, Rule 37 of the Revised Rules of Court.

In its Memorandum, MGP argues that the Court in division correctly granted its *Motion for New Trial* based on honest mistake and properly took judicial notice of relevant evidence in the present case.

We agree that the Court in division correctly granted its *Motion for New Trial*. In this case, counsel for the CIR made no objection of the said motion.⁵ In its *Motion for New Trial*, mistake is the ground cited by MGP. *gc*

⁵ March 9, 2006 Resolution of the First Division, p. 255, Division Docket.

Mistake is some unintentional act, omission or error arising from ignorance, surprise, imposition or misplaced confidence.⁶

We agree that in this case, there was "mistake" arising from misplaced confidence because MGP had honestly relied in good faith on the Report⁷ of Independent CPA, who was commissioned by the Court.

In this case, the Certificates of Creditable VAT Withheld At Source issued by the PNOC-EDC and the machine-validated monthly VAT Return showing MGP's VAT payment were not attached to the said Report because the Independent CPA believed that it was unnecessary to attach the said documents as it was already referred in the detailed findings.⁸

As correctly argued by MGP, its submission of additional evidence merely confirmed the findings of the said Report which was already offered and admitted in evidence.

*Judicial Notice
is part of the Court's
judicial function*

CIR alleges that the Court in division erred in taking judicial notice of the Quarterly VAT Returns of MGP in three separate cases involving claims for refund of input taxes docketed as (1) CTA Case No. 6906 for the period 

⁶ Herrera, O., *Remedial Law*, 2000 Edition, p.193 citing *Black's Law Dictionary*, Fifth Edition, p.903.

⁷ Exhibit "H".

⁸ Division Docket, p. 236.

from January to December 2002; (2) CTA Case No. 7228 for the period from January to March 2003; and (3) CTA Case No. 7286 for the period from April to June 2003 that are pending before it in order to resolve the issue if MGP's excess input tax credits for taxable year 2001 was actually applied against output VAT in the succeeding quarters of taxable years 2002 and 2003, without allowing CIR to be heard on the above matters which is decisive of a material issue in the case.

MGP alleges that the taking of judicial notice is part of the court's judicial functions, thus, it is discretionary under Rule 129, Section 2 of the Rules of Court and does not require any hearing. Accordingly, it alleges that Rule 129, Section 3 of the same Rules is inapplicable to the present case thereby dispensing the need for any hearing.

We agree with the contention of MGP.

In the case of *Calamba Steel Center, Inc. vs. Commissioner of Internal Revenue*⁹, the Supreme Court ruled that CTA could have taken judicial notice of the contested document attached to another case pending before it, pertinent portion of this case reads:

Prior to rendering its Decision on January 12, 2000, the CTA was already well-aware of the existence of another case pending before it, involving the same subject matter, parties and causes of action. Because of the close connection of that case with the matter in controversy, the 

⁹ G.R. No. 151857, April 28, 2005, 457 SCRA 482.

CTA could have easily taken judicial notice of the contested document attached in that other case. (*Citations Omitted*).

Likewise, in the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*¹⁰, the Supreme Court ruled that by reason of its judicial function, CTA should have taken judicial notice¹¹ of the fact of filing and the pendency of petitioner's subsequent claim for a refund of excess creditable taxes withheld for 1998, which is quoted hereunder as follows:

Fifth, the CTA should have taken **judicial notice** of the fact of filing and the pendency of petitioner's subsequent claim for a refund of excess creditable taxes withheld for 1998. **The existence of the claim ought to be known by reason of its judicial functions.** Furthermore, it is decisive to and will easily resolve the material issue in this case. If only judicial notice were taken earlier, the fact that there was no carry-over of the excess creditable taxes withheld for 1997 would have already been crystal clear. (*Emphasis Supplied; Citation omitted*)

Section 2 of Rule 129 of the Rules of Court provides:

SEC. 2. Judicial notice, when discretionary. – A court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions.

Based on the foregoing, when judicial notice is discretionary, no hearing is necessary.

The Court in division correctly took judicial notice of the Quarterly VAT Returns for the second quarter of taxable year 2002 to the second

¹⁰ G.R. Nos. 156637/162004, December 14, 2005, 477 SCRA 761.

¹¹ Section 2, Rule 129 of the Rules of Court.

quarter of taxable year 2003 which were attached to the Petitions for Review in three separate cases as enumerated by CIR. The existence of the said succeeding returns in the subsequent claims for refund of input taxes in those cases pending before the court was known by reason of its judicial function.

Based on the foregoing, We reiterate pertinent portion of the assailed Amended Decision, as follows:

Thus, in the interest of justice, the Court takes judicial notice of the Quarterly VAT Returns filed by petitioner in other cases that are pending before it. And a perusals thereof appeared that petitioner could not have utilized the said input VAT in the succeeding quarters, as the entries showed that the input VAT in the amount of P4,417,437.97, subject of the present case, was not carried over to the second quarter of taxable year 2002 until the second quarter of taxable year 2003.

We likewise note the following finding in the assailed Resolution,

Xxx Equally noteworthy is the fact that the Quarterly VAT Returns from the second quarter of 2002 to the second quarter of 2003 were not the sole basis for granting petitioner's claim. **They merely corroborated the fact that petitioner had excess input tax credit for taxable year 2001 and had not utilized the same in the succeeding quarters.** (*Emphasis Supplied*).

It is a fact that MGP formally offered the Amended Quarterly Value-Added Tax Return for the 1st Quarter of the year 2002 (Exhibit "D") deleting the carry over of the accumulated excess input tax (Line 22B) for the 3rd and 4th quarters of the year 2001. This proof alone is enough that MGP has not utilized the excess input tax subject of this case. Thus, the 

Quarterly VAT returns from the second quarter of 2002 to the second quarter of 2003 merely corroborates the fact that MGP's excess input tax credit for taxable year 2001 had not been applied against output VAT liability.

We, thus, agree with the finding of the Court in division, as follows:

In sum, the Court finds petitioner entitled to the claim for issuance of tax credit certificate, representing unutilized input VAT for the third and fourth quarters of taxable year 2001, but in the reduced amount of P4,067,876.53, computed as follows:

Excess Input VAT Per Petitioner's Claim	P	4,417,437.97
Less: Disallowances		
a) Per report of the Commissioned Independent CPA		202,995.31
b) Per this Court's further verification		<u>146,566.13</u>
Refundable Excess Input VAT	P	<u><u>4,067,876.53</u></u>

WHEREFORE, premises considered, the petition for review is hereby **DENIED**. Accordingly, We **AFFIRM** the September 23, 2008 Amended Decision and the January 20, 2009 Resolution promulgated by the First Division of this Court.

SO ORDERED.

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

We concur:


ERNESTO D. ACOSTA
Presiding Justice

*SEE ATTACHED DISSENTING
OPINION*


(With Dissenting Opinion)
ERLINDA P. UY
Associate Justice

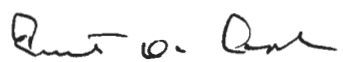

LOVELL R. BAUTISTA
Associate Justice


CAESAR A. CASANOVA
Associate Justice

*See attached Separate Dissenting
Opinion*
(With Separate Dissenting Opinion)
OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

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


ERNESTO D. ACOSTA
Presiding Justice