REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT PAGBILAO CORPORATION
(Formerly SOUTHERN ENERGY QUEZON, INC.),
Petitioner,

- versus -

C.T.A. CASE NO. 6183

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

FEB 18 2004

x - x

DECISION

This case involves a claim for refund or issuance of tax credit certificate of alleged unutilized input value-added tax (VAT, for brevity) on domestic purchases and importation of goods and services attributable to zero-rated sales in the total amount of P75,727,426.61 for the quarters ended September 30, 1998 and December 31, 1998.

Petitioner is a domestic corporation existing under and by virtue of the laws of the Philippines with principal office located at Pagbilao Grande Island, Pagbilao, Quezon. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate, Transfer (BOT) Scheme *(pars. 1 & 2, Stipulation of Facts)*.

Petitioner is registered with the Bureau of Internal Revenue as a VAT taxpayer with Certificate of Registration bearing RDO Control No. 96-600-002498 *(Exhibit C)*. It was originally registered with the Securities and Exchange Commission under the name "Hopewell Power (Philippines), Corporation" but was later changed to "Southern Energy Quezon, Inc." and finally to Mirant Pagbilao Corp. *(Exhibits A, B and page 164, CTA records)*.

On December 1, 1997, petitioner, through its counsel SGV & Co, filed with the BIR Revenue District Office No. 60 in Lucena City a letter-request for approval of petitioner's application for effective zero rating of its sales of services to National Power Corporation for the building and operation of the latter's power station under the Build Operate Transfer scheme *(Exhibit D)*. The inaction of the said office on petitioner's application and request compelled it to seek a confirmatory ruling with the VAT Review Committee of the BIR National Office on January 28, 1999, with respect to the question of whether or not the energy and capacity fees it received from NPC for the supply of electricity under the BOT scheme are effectively zero rated for VAT purposes pursuant to Sections 106(A)(2)(c) and 108(B)(3) of the 1997 Tax Code *(Exhibit E)*.

On May 13, 1999, respondent issued VAT Ruling No. 052-99 where it ruled that "the supply of electricity by petitioner to the NPC shall be subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the National Internal Revenue Code of 1997 *(paragraph 8, Joint Stipulation of Facts, page 148, CTA records)*.

For the third and fourth quarters of 1998, petitioner seasonably filed its quarterly Value-Added Tax Returns on October 26, 1998 and January 25, 1999 *(Annexes F and G, Petition for Review, pages 20 to 23, CTA records)*. These VAT returns were simultaneously amended on November 25, 1999, reflecting zero rated sales in the total amount of P4,254,134,092.21 for the third and fourth quarters of 1997 with the corresponding input taxes in the aggregate amount of P75,727,426.61 for the same period *(Exhibits H, H-2, H-4, I, I-2, and I-4)*.

Believing that it is entitled to the refund of input VAT attributable to its sales of services to NPC, petitioner, on December 20, 1999, filed two separate applications for refund with RDO No. 60 of the Bureau of Internal Revenue. The first administrative claim for refund covers the period July 1, 1998 to September 30, 1998 in the amount of P17,958,855.99 and the second is for the period October 1, 1998 to December 31, 1998 in the amount of P57,768,570.62 *(Exhibits F and G)*.

On October 18, 2000, petitioner filed the instant petition for review in order to toll the running of the two-year prescriptive period under the law.

Respondent, in his Answer filed on December 7, 2000, raised the following as Special and Affirmative Defenses:

> 7. Petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the respondent's Bureau;
>
> 8. Since petitioner does not have an approved application for zero rating, its transaction otherwise entitled to zero percent VAT shall only be considered exempt from VAT pursuant to Revenue Regulation (*sic*) No. 7-95. Hence, it is not entitled to refund of input tax;
>
> 9. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;
>
> 10. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable;
>
> 11. Petitioner must be able to prove that its alleged purchases are covered by the provision of Section 112(A);
>
> 12. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to adduce sufficient proof is fatal to the action for tax refund/credit;

13. Moreover, petitioner must show compliance with the provisions of Section (*sic*) 204(C) and 229 of the Tax Code, as amended; and

14. Finally, there is no way to dispute the cardinal rule in taxation that tax exemptions are highly disfavored in law and he who claims tax exemption must be able to justify his claim or right. The exemption cannot be established by mere implication but it must be clearly expressed. (Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, et. al., 64 SCRA 555).

The issues as jointly stipulated by the parties are as follows:

1. Whether or not petitioner has unapplied or unutilized creditable input VAT for the third and fourth quarters of 1998 arising from its domestic purchases and importation of goods and services in the amounts of P17,958,855.99 and P57,768,570.62 which are proper objects of claims for refund pursuant to Section 108(B)(3) and Section 112(A) of the National Internal Revenue Code of 1997;

2. Whether or not the creditable input VAT of petitioner for the third and fourth quarters of 1998 are substantiated by documentary evidence in the form of invoices and official receipts; and

3. Whether or not the unutilized creditable input VAT for the third and fourth quarters of 1998 were applied against any of the VAT output tax of the petitioner in the subsequent quarters.

Before we dwell on the above-stipulated issues, it is important to discuss first the corollary legal issue of whether or not the power generation services rendered by petitioner to NPC are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code.

For easy reference Section 108(B)(3) of the Tax Code is hereby quoted as follows:

SEC. 108. ***Value-Added Tax on Sale of Services and Use or Lease of Properties.*** - x x x

(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;

(1) xxx.
(2) xxx.
(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate;

Petitioner anchored its claim for refund on the above-quoted provision as well as Section 112(A) of the same code 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: *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 regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

On the other hand, respondent in his Answer argues that petitioner is not entitled to the refund of input tax because it does not have an approved application for zero-rating. Thus, its transaction otherwise entitled to zero percent VAT shall only be considered exempt from VAT pursuant to Revenue Regulations No. 7-95.

We find respondent's contention without merit.

While records show that petitioner failed to secure from the Bureau of Internal Revenue an approval of its application for zero-rating due to the latter's inaction, its failure to secure said approval cannot deter petitioner from claiming for a refund of its unutilized input VAT. In the case of ***Ernesto M. Maceda vs. Hon. Catalino Macaraig, Jr., G. R. No. 88291, May 31, 1991***, the total exemption of National Power Corporation (NPC) from all kinds of taxes, whether direct or indirect, was already settled by the Supreme Court. The NPC's exemption from all kinds of taxes was further explicated by the High Court in its Resolution dated June 8, 1993 resolving the same issue in a motion for reconsideration in this manner, thus:

> A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes — direct or indirect.
>
> One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$4 billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved.

The above pronouncement of the Supreme Court became the basis of the Secretary of the Department of Finance's Memorandum dated January 28, 1998, addressed to the Commissioner of Internal Revenue, with respect to the total exemption of NPC from all kinds of taxes and further ruled that purchases by NPC of electricity from independent power producers are subject to VAT at 0%. Pertinent portions of said memorandum read as follows:

> As explained by the Supreme Court, the rationale for the NPC's tax exemption is to ensure cheaper power. If the BIR's recent view is to be implemented, the VAT, being an indirect tax, may be passed on by the seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rate to the consumers. Estimates show that a 10% VAT on electricity which is purchased by NPC from its independent power producers will increase power cost by about P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional charge of P0.059 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the ultimate benefit of the Filipino consumer.
>
> In view of the foregoing and using the power of review granted to the Secretary of Finance under Section 4 of Republic Act No. 8424, the DOF upholds the ruling of the Supreme Court that the NPC is exempt under its charter and subsequent laws from all direct and indirect taxes on its purchases of petroleum products and electricity. Thus, the purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate. *(Underlining supplied).*

The rulings made by the Supreme Court and the Secretary of Finance regarding NPC's exemption from all kinds of taxes are enough bases for this court to rule that petitioner's sale of electricity to NPC is subject to 0% VAT. Moreover, in numerous VAT and BIR rulings, the respondent had already acknowledged that purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate (VAT Ruling Nos. 015-99, 022-99, 052-99, 067-99, 099-99, 018-00, 095-02, BIR Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA209-04-04-99). Therefore, the payments received by petitioner for the services rendered in generating and selling of electricity to NPC are subject to VAT at zero percent ***(Mirant (Phils.) Mobile Corp. (formerly Southern Energy Mobile, Inc.) vs. Commissioner of Internal Revenue, CTA Case Nos. 5935 & 5969, January 15, 2002[1]; Southern Energy Quezon, Inc. (formerly Hopewell***

[1] With CTA Entry of Judgment dated April 25, 2002.

Power (Phils.) Corp.) vs. Commissioner of Internal Revenue, CTA Case Nos. 5933 & 5984, January 15, 2002; Mirant Navotas Corp. (formerly Southern Energy Navotas, Inc.) vs. Commissioner of Internal Revenue, CTA Case Nos. 5936 & 5968, January 16, 2002[2]; Mirant (Navotas II) Corp. (formerly Southern Energy Navotas II Power, Inc.) vs. Commissioner of Internal Revenue, CTA Case Nos. 5944 & 5963, January 21, 2002[3]; Magellan Cogeneration, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5765, February 26, 2002[4]; Mirant Pagbilao Corp. (formerly Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 6041, March 5, 2002); Magellan Cogeneration, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5938, May 28, 2002;[5] Mirant (Navotas II) Corp. (formerly Southern Energy Navotas II Power, Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 6043, July 5, 2002[6]; and Mirant Navotas Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6044, October 16, 2002.[7])

Moreover, the Court of Appeals in the case of **Commissioner of Internal Revenue vs. Mirant Navotas Corporation (formerly Southern Energy Navotas, Inc.), CA-G.R. SP. No. 69114, promulgated on June 27, 2002,** had already affirmed our

---

[2] With CTA Entry of Judgment dated August 16, 2002 and Writ of Execution dated March 5, 2003.

[3] With CTA Entry of Judgment dated March 14, 2002 and Writ of Execution dated June 19, 2002.

[4] With CTA Entry of Judgment dated April 25, 2002 and Writ of Execution dated July 18, 2002.

[5] With CTA Entry of Judgment dated August 9, 2002 and Writ of Execution dated November 8, 2002.

[6] With CTA Entry of Judgment dated September 30, 2002 and Writ of Execution dated November 27, 2002.

[7] With CTA Entry of Judgment dated January 17, 2003 and Writ of Execution dated January 17, 2003.

ruling with regard to granting of refund of input taxes attributable to zero rated sale of electricity of the independent power producer (which has a pending application for zero rating) to NPC.

The legal issue having been settled, we shall now proceed to the jointly stipulated issues of the case.

Records show that petitioner received capacity and energy fees from the National Power Corporation for the period July to December 1998 in the aggregate amount of P4,254,134,092.21 *(Exhibits H-7 and I-7)*. After verification, this court noted that the said fees were all supported by invoices and/or official receipts and were declared in petitioner's amended third and fourth quarterly VAT returns for the year 1998 *(Exhibits I-4, H-4, R-23 to R-46, and S-25 to S-54)*. Since the services of petitioner are subject to VAT at 0% based on the aforementioned rulings, it can, therefore, claim for the refund of input taxes attributable thereto. However, petitioner must still prove its claimed input taxes in the total amount of P75,727,426.61 by valid VAT invoices and official receipts.

In his report dated August 29, 2001, the commissioned independent CPA of the court, Mr. Ruben R. Rubio, representing the auditing firm SGV & Company, submitted the following observations: *(Exhibit O)*

"Based on the procedures we performed, we present below our findings:

Findings	3rd Quarter	4th Quarter	Total
I. Input Taxes Claimed on Local Purchases of Services:			
1. Supported by Documents Other than VAT ORs *(See Annex A)*	P 3,000.48	P 2,545,863.17	P 2,548,863.65

2. Double Claimed Input Taxes *(See Annex B)*		1,507,156.22	1,507,156.22
3. Erroneously Computed *(See Annex C)*		47,593.39	47,593.39
II. Input Taxes Claimed on Local Purchases of Goods:			
1. Supported by Documents Other than VAT Invoices *(See Annex D)*		44,269.54	44,269.54
2. Supported by Stamped/ Handwritten TIN-VAT *(See Annex E)*		7,560.90	7,560.90
3. Double Claimed Input Taxes *(See Annex F)*		4,950.25	4,950.25
4. Supported by Invoices Stamped with TIN-NV *(See Annex G)*		1,221.81	1,221.81
5. Supported by VAT Invoice Without Pre-printed BIR Permit *(See Annex H)*		1,022.73	1,022.73
III. Input Taxes on Purchases of Goods and Services and on Importations the Supporting Documents of which are Not Available *(See Annex I)*	6,820,976.59	38,731,876.70	45,552,853.29
Total	P6,823,977.07	P42,891,514.71	P49,715,491.78"

Subsequently, petitioner, on April 21, 2003, moved for the reopening of the trial to adduce additional evidence *(pages 271 to 274, CTA records)*. There being no objection on the part of the respondent, the court granted the motion of petitioner in the hearing held on May 23, 2003 *(page 280, CTA records)*. As a consequence, petitioner on August 8, 2003, filed a Supplemental Formal Offer of Evidence, offering some documents which were not available during the CPA examination *(Exhibits O-2 and O-2-1)* and will support some of its input taxes claimed *(Exhibits X, X-1, Y, Y-1, Z, Z-1, AA, AA-1, BB, BB-1, CC, and CC-1)*.

After a careful evaluation and verification of the report of the commissioned independent CPA, the documents in the Formal Offer of Evidence as well as in the Supplemental Formal Offer of Evidence, the court found that petitioner was able to prove input taxes in sum of P43,949,131.51, computed as follows:

	3rd Quarter	4th Quarter	Total
Input Taxes Claimed	P17,958,855.99	P 57,768,570.62	P75,727,426.61
Less: Disallowed Input Taxes Per CPA Report	P 6,823,977.07	P 42,891,514.71	P49,715,491.78
Less: Supported by Documents per Supplemental Formal Offer of Evidence	6,214,655.96	11,722,540.72	17,937,196.68
Disallowance per Court Verification	P 609,321.11	P 31,168,973.99	P31,778,295.10
Amount Refundable	P17,349,534.88	P 26,599,596.63	P43,949,131.51

Finally, the court also ascertained that the input taxes claimed for the third and fourth quarters of 1998 in the gross amount of P75,727,426.61 were already deducted by petitioner from the accumulated input taxes as of September 30, 2000 as evidenced by the 2000 third Quarterly VAT Return *(Exhibits J, J-3, and J-5; pages 12 to 30, TSN, June 18, 2001)*. This means that the input taxes sought to be refunded were not applied by petitioner against its output VAT liability as of September 30, 2000 and can no longer be used as credit against its future output VAT liability.

WHEREFORE, in view of the foregoing, the petition for review is hereby *PARTIALLY* ***GRANTED***. Respondent is **ORDERED to REFUND or ISSUE A TAX CREDIT CERTIFICATE** in the amount of P43,949,131.51 in favor of petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

JUANITO C. CASTANEDA, JR.
Associate Judge

LOVELL R. BAUTISTA
Associate Judge

C E R T I F I C A T I O N

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge