REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TOLEDO POWER, INC.,
Respondent.

C.T.A. EB No. 321
(C.T.A. Case Nos. 6805 & 6851)

Present:
Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

Promulgated:

MAY 0 7 2008

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D E C I S I O N

CASTAÑEDA, JR., J.:

This is a Petition for Review filed before the Court of Tax Appeals *En Banc* assailing the Decision dated May 17, 2007 and the Resolution dated October 15, 2007 issued by the First Division of this Court in the case entitled, *"Toledo Power, Co. vs. Commissioner of Internal Revenue,"* docketed as CTA Case Nos. 6805 & 6851.

The assailed Decision PARTIALLY GRANTED the petition seeking the refund of unutilized input Value Added Tax (VAT) representing respondent's input VAT paid on its domestic purchases of taxable goods and services, as well as importation of goods for the third and fourth quarters of 2001 attributable to respondent's zero-rated sales of electricity pursuant to the Electric Power Industry Reform Act of 2001 (EPIRA).

THE FACTS

The facts of the case as found by the Court in Division are as follows:

> Petitioner is a general partnership duly organized and existing under Philippine Laws, with principal office at Sangi, Toledo City, Cebu. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC), Cebu Electric Cooperative III (CEBECO), Atlas Consolidated Mining and Development Corporation, Atlas Fertilizer Corporation and Cebu Industrial Park Development, Inc., and is registered with the Bureau of Internal Revenue (BIR) as a Value Added Tax taxpayer in accordance with Section 236 of the National Internal Revenue Code (NIRC) with Tax Identification No. 003-883-626-VAT and BIR Certificate of Registration bearing RDO Control No. 94-083-000300.
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> On June 20, 2002, petitioner filed an application with the Energy Regulatory Commission (ERC) for the issuance of a Certificate of Compliance pursuant to the Implementing Rules and Regulations of R.A. 9136, otherwise known as the "Electric Power Industry Reform Act of 2007" (EPIRA).
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> On October 25, 2001, petitioner filed with the BIR Revenue District Office (RDO) No. 83 at Toledo City, Province of Cebu, its Quarterly VAT Return for the third quarter of 2001 declaring, among others, the following:

Zero Rated Sales/Receipts	P143,000,032.37
Taxable Sales-Sale of Scrap/Others	378,651.74
Output Tax	34,422.89
Less: Input Tax	
On Domestic Purchases	4,765,458.58
On Importation of Goods	1,242,792.00
Total Available Input Tax	6,008,250.58
Excess Input Tax & Overpayment	(P 5,973,827.69)

> However, an amended Quarterly VAT Return for the same quarter of 2001 was filed on November 22, 2001. The amended return shows unutilized input VAT credits of P5,909,588.96 arising from petitioner's taxable purchases for the third quarter of 2001 and the following other information:

Zero Rated Sales/Receipts	P143,000,032.37
Taxable Sales-Sale of Scrap/Others	378,651.74
Output Tax	34,422.89
Less: Input Tax	
On Domestic Purchases	4,718,099.85
On Importation of Goods	1,225,912.00
Total Available Input Tax	5,944,011.85
Excess Input Tax & Overpayment	**(P 5,909,588.96)**

Thus, for the third quarter of 2001, petitioner allegedly has unutilized input VAT in the total amount of P5,909,588.96 on its domestic purchase of taxable goods and services and importation of goods, which purchases and importations are all attributable to its zero-rated sale of power generation services to NPC, CEBECO, Atlas Consolidated Mining and Development Corportion, Atlas Fertilizer Corporation and Cebu Industrial Park Development, Inc. Said input VAT of P5,909,588.96 paid by petitioner on its domestic purchase of goods and services for the third quarter of 2001 allegedly remained unutilized against output VAT liability in said period or even in subsequent quarters.

On January 25, 2002, petitioner filed with the BIR RDO No. 83 at Toledo City, Province of Cebu, its quarterly VAT Return for the fourth quarter of 2001 declaring, among others, the following:

Zero Rated Sales/Receipts	P127,259,720.44
Taxable Sales-Sale of Scrap/Others	309,697.50
Output Tax	28,154.33
Less: Input Tax	
On Domestic Purchases	1,374,608.64
On Importation of Goods	1,873,327.00
Total Available Input Tax	3,247,935.64
Excess Input Tax & Overpayment	**(P 3,219,781.31)**

Thus, petitioner allegedly had an excess input VAT credits of P3,219,781.31 for the fourth quarter of 2001 which remained unutilized against output VAT liability in said period or even in the subsequent quarters.

For the third and fourth quarters of 2001, petitioner incurred and accumulated input VAT from its domestic purchase of goods and services, which are all attributable to its zero-rated sales of power generation services to NPC, CEBECO, Atlas Consolidated Mining and Development Corporation, Atlas Fertilizer Corporation and Cebu Industrial Park Development, Inc. in the total amount of P9, 129,370.27. Said excess and unutilized input VAT was allegedly not utilized against any output VAT liability in the subsequent quarters nor carried over to the succeeding taxable quarters.

On September 30, 2003, pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed with the BIR RDO No. 83, an administrative claim for refund of unutilized input VAT for the third and fourth quarters of 2001 in the amounts P5,909,588.96 and P3,219,781.31, respectively, or the aggregate amount of P9,129,370.27.

Respondent has not ruled upon petitioner's administrative claim and in order to preserve its right to file a judicial claim for the refund or issuance of a tax credit certificate of its unutilized input VAT, petitioner filed a Petition for Review to suspend the running of the two-year prescriptive period under Section 112(D) of the 1997 NIRC and Section4.106-2(c) of Revenue Regulations No. 7-95, as amended. On October 24, 2003 petitioner filed a Petition for Review for the refund or issuance of a tax credit certificate in the amount of P5,909,588.96 for the third quarter of 2001, docketed as CTA Case No. 6805 and on January 22, 2004, filed another Petition for Review for the refund or issuance of tax credit certificate in the amount of P3,219,781.31 for the fourth quarter of 2001, docketed as CTA Case No. 6851, both for its unutilized input VAT paid by petitioner on its domestic purchases of goods and services and importation of goods attributable to zero-rated sales.

On January 30, 2004, petitioner filed a Motion for Consolidation CTA Case Nos. 6805 and 6851, since these cases involve the same parties, same facts, and issues. The said Motion was granted in open court on February 27, 2004 and confirmed in a Resolution dated March 8, 2004.

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After presenting its testimonial and documentary evidence, petitioner formally offered its evidence on February 16, 2006. On March 24, 2006, this Court promulgated a Resolution admitting all the exhibits offered by petitioner. Respondent, on the other hand, failed to adduce any evidence.

In a Resolution dated July 6, 2006, this consolidated case was ordered submitted for decision with only petitioner's Memorandum, as respondent failed to file one within the period given by the Court.

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Acting on the Petition, the First Division of this Court issued a Decision on May 17, 2007 which is now the subject of appeal. The dispositive portion of the said Decision reads, as follows:

> IN VIEW OF THE FOREGOING, the Petition for Review is **PARTIALLY GRANTED.** Respondent is hereby **ORDERED** to refund or to issue tax credit certificate in favor of petitioner in the reduced amount of P8,553,050.44 representing the substantiated unutilized input VAT for the third and fourth quarters of 2001.
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> **SO ORDERED.**

The respondent (herein petitioner) filed a Motion for Reconsideration of the Decision dated May 17, 2007 against the petitioner (herein respondent). In a Resolution dated October 15, 2007, the First Division denied the Motion for lack of merit.

Hence, this Petition for Review *En Banc.*

THE ISSUE

Petitioner submits this sole issue for the Court's consideration:

Whether or not the Respondent is entitled to a tax refund/credit in the amount of P8,553,050.44 allegedly representing unutilized input value-added taxes paid on purchases of goods and services and importation of goods, all of which are allegedly attributable to zero-rated sales for the third and fourth taxable quarters of 2001.

PETITIONER'S ARGUMENTS

Petitioner argues that the respondent failed to comply with the invoicing requirements necessary to prove entitlement to the refund/issuance of tax credit certificate. The word "zero-rated" appearing on the VAT invoices/official receipts presented by respondent in support of its claim was just stamped thereon, not preprinted together with the receipt. [1]

Moreover, some of the invoices presented by petitioner in support of its claim do not pertain to goods and services which are attributable to its alleged zero-rated sales. The VAT paid thereon were not in payment of

[1] *Rollo, page 12.*

taxable goods and services relative to its zero-rated sales, hence, should be disallowed.[2]

In addition, Petitioner challenges the jurisdiction of the First Division to entertain the petition for review for failure on the part of the respondent to comply with the provisions of Section 112 (D) of the 1997 Tax Code.

RESPONDENT'S COMMENT

Respondent reiterates the findings of the independent Certified Public Accountant ("independent CPA") commissioned by this Court as stated in the Report dated May 30, 2005 that the zero-rated sales were supported by the official receipts with printed "TIN VAT" and stamped "VAT-zero rated".

As regards the issue on jurisdiction, respondent counters that judicial claim for refund was made to toll the two-year prescriptive period. It timely filed its judicial claim for refund before the end of the two-year period.

COURT'S RULING

The petition is without merit.

The judicial claim for refund was made to toll the two-year prescriptive period.

We shall first discuss the issue on jurisdiction.

There is no merit on petitioner's argument that the First Division of this Court has no jurisdiction to entertain the petition for review. Petitioner argues that the respondent should have waited for the decision of the Commissioner of the Bureau of Internal Revenue (BIR) or for the

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[2] *Rollo, page 14.*

expiration of the 120-day period if the claim is unacted before filing a petition before this Court. Petitioner further argues that the specific provision of law governing the periods for filing judicial claims for excess unutilized input taxes attributable to VAT zero-rated sales is Section 112(D) and not Section 229 of the National Internal Revenue Code of 1997 (NIRC of 1997). Section 112 of NIRC of 1997 provides:

> "SEC. 112. *Refunds or Tax Credits of Input Tax.* -
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> (A) *Zero-Rated or Effectively Zero-Rated Sales.* - any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of 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.
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> (D) *Period within which Refund or Tax Credit of Input Taxes Shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.-
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It is true that Section 112(D) of the abovementioned provision applies to the present case. However, what the petitioner failed to consider is Section 112(A) of the same provision. The respondent is also covered by the two (2) year prescriptive period. We have repeatedly held that the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period.[3]

Accordingly, the Supreme Court held in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* [4] that the two-year prescriptive period for filing a claim for input tax is reckoned from the date of the filing of the quarterly VAT return and payment of the tax due. If the said period is about to expire but the BIR has not yet acted on the application for refund, the taxpayer may interpose a petition for review with this Court within the two year period.

In the case of *Gibbs vs. Collector*,[5] the Supreme Court held that if, however, the Collector (now Commissioner) takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector.

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[3] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc.,* 22 SCRA 12 (1968).
[4] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[5] L-13453, February 29, 1960, 107 Phil. 232.

Furthermore, in the case of *Commissioner of Customs and Commissioner of Internal Revenue vs. The Honorable Court of Tax Appeals and Planters Products, Inc.,*[6] the Supreme Court held that the taxpayer need not wait indefinitely for a decision or ruling which may or may not be forthcoming and which he has no legal right to expect. It is disheartening enough to a taxpayer to keep him waiting for an indefinite period of time for a ruling or decision of the Collector (now Commissioner) of Internal Revenue on his claim for refund. It would make matters more exasperating for the taxpayer if we were to close the doors of the courts of justice for such a relief until after the Collector (now Commissioner) of Internal Revenue, would have, at his personal convenience, given his go signal.

This Court ruled in several cases[7] that once the petition is filed, the Court has already acquired jurisdiction over the claims and the Court is not bound to wait indefinitely for no reason for whatever action respondent (herein petitioner) may take. At stake are claims for refund and unlike disputed assessments, no decision of respondent (herein petitioner) is required before one can go to this Court.

Respondent sufficiently complied with the substantiation and/or invoicing requirements under the Tax Code.

This Court has consistently ruled that in order for sales to be considered zero-rated for VAT purposes, taxpayer must establish that it has complied with the substantiation requirements provided under Section

[6] G.R. No. 82618, March 16, 1989 citing the case of *Paracale-Gamaus vs. Biaquera* (CTA Case No. 211, Resolution of August 22, 1956).
[7] *Greenfields Development Corporation v. Commissioner of Internal Revenue,* CTA Case Nos. 4669 and 4867, January 30, 1996, *Philam Fund Management vs. CIR*, CTA Case No. 5562, March 24, 1999 and *Columbian Motors South Super, Inc. vs. CIR*, October 5, 1999.

113(A) in relation to Section 237 of the NIRC of 1997 and Section 4.108-1 of Revenue Regulations (RR) No. 7-95.

The pertinent provisions are provided as follows:

> SEC. 113. *Invoicing and Accounting Requirements for VAT-Registered Persons.* -
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> (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:
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> (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.
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> 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: *Provided, however,* That in the case of sales, receipts or transfers in the amount of One hundred pesos (P100.00) or more, or regardless of the amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees, receipts or invoices shall be issued which shall show the name, business style, if any, and address of the purchaser, customer or client: *Provided, further,* That where the purchaser is a VAT-registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer Identification Number (TIN) of the purchaser.
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Likewise, Section 4.108.1 of RR No. 7-95 provides:

> "Section 4.108-1. Invoicing Requirements – All VAT-registered persons shall, for every sale or lease of goods or properties or

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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. (underlining ours)

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Based on the foregoing, the imprinting of the word "zero-rated" on official receipts/invoices is a requirement set by the implementing rule issued by the BIR. In determining the relevance of this requirement, the Court *En Banc* discussed the rationale in the case of *Mirant (NAVOTAS II) Corporation (Formerly: Southern Energy Navotas II Power, Inc.) vs. Commissioner of Internal Revenue*.[8] The imprinting of "zero-rated" is necessary to distinguish sales subject to 10% VAT, those that are subject to 0% VAT (zero-rated) and exempt sales, to enable the BIR to properly implement and enforce the other provisions of the 1997 NIRC on VAT. In addition, the imprinting of zero-rated sales primarily seeks to avert the incidence of fictitious claims for refund or the issuance of tax credit certificate of input VAT actually unpaid on the sale of goods or services rendered by the taxpayer, simply because the transaction involved is zero-rated.[9]

After re-examination of the records of the case, there is no dispute that the word "zero-rated" appeared on the VAT invoices/official receipts

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[8] CTA EB No. 226, September 11, 2007, citing the case of *Kepco Philippines Corporation vs. Commissioner of Internal Revenue*, CTA EB No. 107, June 29, 2007.
[9] Ibid.

presented by respondent in support of its claim for refund. However, what is being argued by the petitioner is that the phrase was just stamped thereon, not preprinted.

Considering the rationale behind the imprinting of the word "zero-rated" on official receipts, this Court finds sufficient compliance in the invoicing requirements pursuant to Section 113(A) of NIRC of 1997 in relation to Section 237 of the same code and Section 4.108.1 of the RR No. 7-95.

With regard to the petitioner's allegation that some of the invoices presented by respondent do not pertain to goods and services which are attributable to its zero-rated sales, We rule for the respondent. These invoices and official receipts pertain to transactions necessary in the conduct of respondent's business.

However, after re-examination of the records of this case, out of the alleged Zero-rated sales amounting to P 270,259,752.81, only the amount of P 248,989,191.87 is fully substantiated. Therefore, respondent is entitled to the refund or issuance of tax credit certificate in the amount of P 8,088,151.07 computed as follows:

Total Available Input	P 9,191,947.49
Less: Disallowed Input VAT	
(P20,696.34+P52,363.64+P277,207.50	350,267.48
Substantiated available input VAT	P 8,841,680.01
Less: Output VAT	62,577.22
Substantiated Unutilized Input VAT	P 8,779,102.79

Multiply by the ratio of substantiated zero-rated sales to the total zero-rated sales

Substantiated zero-rated sales	248,989,191.87
Total zero-rated sales	270,259,752.81

Refundable Input VAT	P 8,088,151.07

WHEREFORE, premises considered, the Petition for Review *En Banc* is **DENIED** for lack of merit. Accordingly, the Decision dated May 17, 2007 and Resolution dated October 15, 2007 are **AFFIRMED with MODIFICATION**. Petitioner is hereby **ORDERED to REFUND** to respondent the sum of **EIGHT MILLION EIGHTY EIGHT THOUSAND ONE HUNDRED FIFTY ONE PESOS AND SEVEN CENTAVOS (P8,088,151.07)** only for the third and fourth quarters of taxable year 2001.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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