Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8251
For*:* Refund

Members:
DEL ROSARIO, PJ, *Chairperson*
UY, and
MINDARO-GRULLA, JJ.

Promulgated:
FEB 27 2014 9:50 a.m.

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D E C I S I O N

MINDARO-GRULLA, J.:

This is a Petition for Review filed on March 31, 2011 by Mindanao II Geothermal Partnership as petitioner, against Commissioner of Internal Revenue as respondent for the Court in Division, pursuant to Section 7(a)(1) of Republic Act (RA) No. 1125, An Act Creating the Court of Tax Appeals, as amended[1], as well as Rule 4, Section 3(a)(2), in relation to Rule 8, Section 4(a) of the Revised Rules of the Court of Tax Appeals (RRCTA)[2], as amended.

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[1] Sec. 7. *Jurisdiction*. – The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
x x x x x x
(2) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds or internal revenue taxes, fees of other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;
x x x x x x

[2] Rule 4, Sec. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:

(a) Exclusive original over or appellate jurisdiction to review by appeal the following:
x x x x x x

Petitioner seeks the refund or issuance of tax credit certificate (TCC) in the total amount of Seven Million One Hundred Eighty-Six Thousand Five Hundred Eighty-Six Pesos (₱7,186,586.00), representing its excess income tax payments for calendar years 2008 and 2009.

Petitioner was a general partnership duly registered with the Securities and Exchange Commission (SEC), with principal address at 36th Floor, Tower I, The Enterprise Center, 6766 Ayala Avenue, Makati City. It was primarily engaged in the development, financing, construction, ownership, operation, maintenance, and transfer of geothermal electrical generation with plant located at the Mindanao Geothermal Reservation, North Cotabato. The general partners in petitioner were the following: Marubeni Pacific Energy Holdings Corporation (MPEHC) and Marubeni

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> (2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code or other applicable law provides a specific period for action: *Provided,* that in case of disputed assessments, the inaction of the Commissioner of Internal Revenue within the one hundred eighty day-period under Section 228 of the National Internal Revenue Code shall be deemed a denial for purposes of allowing the taxpayer to appeal his case to the Court and does not necessarily constitute a formal decision of the Commissioner of Internal Revenue on the tax case; *Provided, further,* that should the taxpayer opt to await the final decision of the Commissioner of Internal Revenue on the disputed assessments beyond the one hundred eighty day-period abovementioned, the taxpayer may appeal such final decision to the Court under Section 3(a), Rule 8 of these Rules;
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> x x x x x x

Rule 8. Sec. 4. *Where to appeal; mode of appeal.-*

> (a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.
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> x x x x x x

Pacific II Energy Holdings Corporation (MP2EHC).[3] Petitioner was one of the generation companies under Republic Act (RA) No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001, whose sales of generated power is value-added tax (VAT) zero-rated. It is a duly registered VAT taxpayer with Taxpayer's Identification No. (TIN) 004-766-953.[4]

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including, among others, the duty to act and decide upon and approve claims for refund or tax credit as provided by law. She holds office at the 4th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On December 22, 2009, the Board of Directors and Stockholders of Marubeni Energy Services Corporation (MESC), MPEHC, and MP2EHC approved their merger with Axia Power Holdings Philippines Corporation (APHPC) with the latter as the surviving entity. The merger was approved by the SEC on March 29, 2010.[5]

On account of the merger, MPEHC withdrew as general partner in petitioner on January 1, 2010.[6] The SEC has certified on March 29, 2010 that the Affidavit of Withdrawal executed by MPEHC's representative was presented to the SEC on March 17, 2010.[7]

On April 15, 2009, petitioner filed its Annual Corporate Income Tax Return (ITR) for calendar year (CY) 2008. The Annual ITR of petitioner for CY 2008 reported a gross income of ₱91,921,398.00, representing its income payment subject to creditable withholding tax. However, petitioner was not able to utilize these income taxes

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[3] Par. 1, Petition for Review, Docket, p. 1.
[4] Pars. 1 and 3, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 321; Exhibit "P".
[5] Exhibit "B".
[6] Exhibit "A-1".
[7] Exhibit "A".

withheld resulting in an excess income tax payments in the amount of ₱27,307,745.00.[8]

On April 12, 2010, petitioner filed its Annual Corporate Income Tax Return for CY 2009.[9]

On April 12, 2010, petitioner also filed with the BIR Revenue District Office (RDO) No. 108, Kidapawan, North Cotabato, a written application for issuance of tax clearance with a claim for refund or issuance of tax credit certificate for its excess creditable withholding tax.[10]

On April 15, 2010, petitioner filed with the Court its judicial claim for refund or tax credit of its excess creditable income taxes for CY 2007 in the total amount of ₱22,867,594.00, subject matter of CTA Case No. 8094 entitled "Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue".[11]

To date, no tax clearance was issued by the BIR RDO No. 108, Kidapawan, North Cotabato despite follow-ups. Thus, petitioner was constrained to file the present Petition for Review without waiting for the tax clearance from the BIR.[12]

Petitioner prays that the Court render a judgment ordering respondent to refund or to issue a tax credit certificate to petitioner in the total amount of ₱7,186,586.00, representing its excess income tax payments for calendar years 2008 and 2009.

On June 8, 2011, respondent filed her Answer[13] and averred the following special and affirmative defenses:

[8] Exhibit "H".
[9] Exhibit "N'.
[10] Exhibit "O.
[11] Exhibit "V".
[12] Pars. 11 and 12, Petition for Review, Docket, p. 7.
[13] Docket, pp. 293-297.

"SPECIAL AND AFFIRMATIVE DEFENSES

4. Petitioner should fully comply with the provisions stated in Revenue Regulations 6-85 and the requirements enumerated in the case of CIR vs. PERF Realty Corp., GR No. 163345 dated July 4, 2008, which states that:

'The CTA, citing Section 10 of Revenue Regulations 6-85 and Citibank, N.A. v. Court of Tax Appeals, determined the requisites for a claim for refund, thus:

1) That the claim for refund was filed within the two (2) year period as prescribed under Section 230 (now Section 229) of the National Internal Revenue Code;

2) That the income upon which the taxes were withheld was included in the return of the recipient;

3) That the fact of withholding is established by a copy of a statement (BIR Form 1743.1) duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom.

x x x

5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau.

6. The case of Ang Tibay vs. Court of Industrial Relations GR No. L-46496, states the primary rights which must be respected even in an administrative proceeding:

(1) **The first of these rights is the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof.** In the language of Chief Hughes, in *Morgan v. U.S.*, 304 U.S. 1, 58 S. Ct. 773, 999, 82 Law. ed. 1129, 'the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play.

(2) Not only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but the tribunal *must consider* the evidence presented. (Chief Justice Hughes in Morgan v. U.S. 298 U.S. 468, 56 S. Ct. 906, 80 law. ed. 1288.) In the language of this court in *Edwards vs. McCoy*, 22 Phil., 598, 'the right to adduce evidence, without the corresponding duty on the part of the board to consider it, is vain. Such right is conspicuously futile if the person or persons to whom the evidence is presented can thrust it aside without notice or consideration.'

(3) 'While the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of having something to support it is a nullity, a place when directly attached.' (Edwards vs. McCoy, *supra*.) This principle emanates from the more fundamental is contrary to the vesting of unlimited power anywhere. Law is both a grant and a limitation upon power.

(4) **Not only must there be some evidence to support a finding or conclusion** (City of Manila vs. Agustin, G.R. No. 45844, promulgated November 29, 1937, XXXVI O. G. 1335), **but the**

evidence must be 'substantial.' (Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 147, 57 S. Ct. 648, 650, 81 Law. ed. 965.) It means such relevant evidence as a reasonable mind accept as adequate to support a conclusion.' (Appalachian Electric Power v. National Labor Relations Board, 4 Cir., 93 F. 2d 985, 989; National Labor Relations Board v. Thompson Products, 6 Cir., 97 F. 2d 13, 15; Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F. 2d 758, 760.) . . . The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S. Ct. 563, 568, 48 Law. ed. 860; Interstate Commerce Commission v. Louisville and Nashville R. Co., 227 U.S. 88, 93 33 S. Ct. 185, 187, 57 Law. ed. 431; United States v. Abilene and Southern Ry. Co. S. Ct. 220, 225, 74 Law. ed. 624.) But this assurance of a desirable flexibility in administrative procedure does not go far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence. (Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206, 83 Law. ed. No. 4, Adv. Op., p. 131.)'

(5) **The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties**

affected. (Interstate Commerce Commission vs. L. & N. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 Law. ed. 431.) **Only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right to know and meet the case against them.** It should not, however, detract from their duty actively to see that the law is enforced, and for that purpose, to use the authorized legal methods of securing evidence and informing itself of facts material and relevant to the controversy. Boards of inquiry may be appointed for the purpose of investigating and determining the facts in any given case, but their report and decision are only advisory. (Section 9, Commonwealth Act No. 103.) The Court of Industrial Relations may refer any industrial or agricultural dispute or any matter under its consideration or advisement to a local board of inquiry, a provincial fiscal. a justice of the peace or any public official in any part of the Philippines for investigation, report and recommendation, and may delegate to such board or public official such powers and functions as the said Court of Industrial Relations may deem necessary, but such delegation shall not affect the exercise of the Court itself of any of its powers. (Section 10, *ibid.*)

(6) The Court of Industrial Relations or any of its judges, therefore, must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision. It may be that the volume of work is such that it is literally Relations personally to decide all controversies coming before them. In the United States the difficulty is solved with the enactment of statutory authority

> authorizing examiners or other subordinates to render final decision, with the right to appeal to board or commission, but in our case there is no such statutory authority.
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> (7) The Court of Industrial Relations should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered. The performance of this duty is inseparable from the authority conferred upon it. (Emphasis supplied)

Petitioner is mandated to present evidence to support its administrative claim and such evidence will be used as basis for the decision of the quasi-judicial body. If there is lack of evidence, then the decision will probably be contrary to petitioner. Only the evidence presented will be reviewed by the quasi-judicial body. An administrative claim is meant to expedite the proceedings where all relevant evidence is presented. Petitioner, however, instead chose not to submit any evidence to support its claim.

7. Sections 204 (c) and 229 of the Tax Code require the taxpayer to file a written claim for refund before he could file a judicial claim for refund:

> 'Section 204 (c) xxx 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 years after the payment of the tax or penalty xxx.'
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> 'Section 229. 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 or penalty it claimed to have been collected without authority, 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 xxx.'

8. Petitioner has already filed a similar action regarding the claim for refund from a dissolving corporation in CTA Case No. 8094 entitled 'Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue'. Petitioner has effectively divided a single cause of action into two. Therefore, petitioner should consolidate the instant case and CTA Case No. 8094.

9. Furthermore, in an action for refund the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit. This is so because exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from the common burden cannot be permitted to exist upon vague implications **(Asiatic Petroleum Co. vs. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue v. Manila Jockey Club, Inc., 98 Phil. 670.)**"

On June 9, 2011, the Court issued a Notice of Pre-Trial Conference requiring the parties to appear at the pre-trial conference on July 15, 2011 and to file with the Court their respective Pre-Trial Briefs at least three (3) days before the date of the pre-trial.[14] On July 8, 2011, petitioner filed its Pre-Trial Brief[15]; while respondent filed her Pre-Trial Brief[16] on July 11, 2011.

On July 15, 2011, during the pre-trial conference, the parties undertook to submit the Joint Stipulation of Facts and Issues within fifteen (15) days from July 15, 2011.[17]

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[14] Docket, p. 299.
[15] Docket, pp. 300-308.
[16] Docket, pp. 309-312.
[17] Minutes of the July 15, 2011 Pre-Trial Conference, Docket, p. 320.

The parties filed their Joint Stipulation of Facts and Issues[18] on August 1, 2011. Since the parties failed to indicate the list of documents to be presented, the names of their witnesses and the hearing dates agreed upon in their Joint Stipulation of Facts and Issues, the Court in a Resolution[19] dated August 9, 2011, ordered the parties to file a Supplemental Joint Stipulation of Facts and Issues within five (5) days from receipt of the Resolution stating the list of documents to be presented, the names of their witnesses, and the hearing dates agreed upon. On August 22, 2011, the parties submitted their Supplemental Joint Stipulation of Facts and Issues[20]. However, considering that petitioner failed to indicate again in the Joint Stipulation of Facts and Issues the list of documents to be presented, the Court in a Resolution[21] dated September 13, 2011, ordered the parties to file an Amended Supplemental Joint Stipulation of Facts and Issues.

Acting on the Joint Stipulation of Facts and Issues filed by the parties on August 1, 2011, the Supplemental Joint Stipulation of Facts and Issues filed on August 22, 2011, and the Amended Supplemental Joint Stipulation of Facts and Issues filed on September 21, 2011, the Court issued a Resolution[22] on September 30, 2011, approving the said Joint Stipulations, terminating the pre-trial, and ordering the parties to proceed with the trial.

During trial, petitioner presented documentary and testimonial evidence to substantiate its claim for refund. Petitioner presented Ivy P. Acosta, the Senior Accountant of Axia Power Holdings Philippines, Corporation and a former employee of Mindanao II Geothermal Partnership, as its lone witness.[23]

Petitioner formally offered the following exhibits:

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[18] Docket, pp. 321-323.
[19] Docket, p. 333.
[20] Docket, pp. 339-340.
[21] Docket, p. 366.
[22] Docket, pp. 397-398.
[23] TSN, November 3, 2011 Hearing; TSN, December 1, 2011 Hearing; TSN, January 31, 2012.

EXHIBIT	DESCRIPTION
"A" ("A" to "A-1")	Certification issued by the SEC dated March 29, 2010
"B" ("B-1" to "B-2")	Certification dated March 29, 2010 issued by the SEC
"B-1"	Articles of Merger by and between APHPC, MPEHC, MP2EHC, and MESC
"B-2"	Plan of Merger by and between APHPC, MPEHC, MP2EHC and MESC
"C" ("C1" to "C-3")	Certification dated October 14, 1997 issued by SEC
"D" ("D1" to "D2")	Third Quarter ITR (BIR Form No. 1702Q) for CY 2008 of petitioner M2GP
"D1"	Certificate of Creditable Tax Withheld at Source (BIR Form No. 2307) for the period July 1, 2008 to September 30, 2008 with petitioner M2GP as payee and PNOC-Energy Development Corporation (EDC) as payor
"D2"	Tax Withheld for the 3rd Quarter of CY 2008 in the amount of P1,961,238.11
"E" ("E1" to "E2")	Second Quarter ITR for CY 2008 of petitioner M2GP
"E-1"	Certificate of Creditable Tax Withheld at Source for the period April 1, 2008 to June 30, 2008 with petitioner M2GP as payee and PNOC-EDC as payor
"E-2"	Tax Withheld for the 2nd Quarter of CY 2008 in the amount of P1,885,874.95
"F" ("F1" to "F6")	First Quarter ITR for CY 2008 of petitioner M2GP
"F-1"	Certificate of Creditable Tax Withheld At Source for the period January 1, 2008 to March 31, 2008 with petitioner M2GP as payee and PNOC-EDC as payor
"F-2"	Tax Withheld for the 1st Quarter of CY 2008 in the amount of P1,210,892.09
"F-3"	Certificate of Creditable Tax Withheld At Source for the period January 1, 2008 to March 31, 2008 with petitioner M2GP as payee and Team Energy Corporation as payor
"F-4"	Tax Withheld for the 1st Quarter of CY 2008 in the amount of P25,537.28
"F-5"	Certificate of Creditable Tax Withheld At Source for the period January 1, 2008 to March 31, 2008 with petitioner M2GP as payee and Team Sual Corporation as payor
"F-6"	Tax Withheld for the 1st Quarter of CY 2008 in the amount of P25,537.28

"G"	Independent Auditor's Report to Accompany Income Tax Return dated March 17, 2009
"G-1"	Independent Auditor's Report dated March 17, 2009
"H" ("H-1" to "H-2")	2008 Annual ITR (BIR Form No. 1702) for CY 2008
"H-1"	Certificate of Creditable Tax Withheld At Source for the period October 1, 2008 to December 31, 2008
"H-2"	Tax Withheld for the 4^{th} Quarter of CY 2008 in the amount of P1,169,508.49
"I" ("I1" to "I2")	Third Quarter ITR for CY 2009 of petitioner M2GP
"I-1"	Certificate of Creditable Tax Withheld At Source for the period August 1, 2009 to August 31, 2009 with petitioner M2GP as payee and PNOC-EDC as payor
"I-2"	Tax Withheld for the 3^{rd} Quarter of CY 2009 in the amount of P331,213.44
"J" ("J1" to "J2")	Second Quarter ITR for CY 2009 of petitioner M2GP
"J-1"	Certificate of Creditable Tax Withheld At Source for the period April 1, 2009 to June 30, 2009 with petitioner M2GP as payee and PNOC-EDC as payor
"J-2"	Tax Withheld for the 2^{nd} Quarter of CY 2009 in the amount of P1,427,824.07
"K" ("K1" to "K2")	First Quarter ITR for CY 2009 of petitioner M2GP
"K-1"	Certificate of Creditable Tax Withheld At Source for the period January 1, 2009 to March 31, 2009 with petitioner M2GP as payee and PNOC–EDC as payor
"K-2"	Tax Withheld for the 1^{st} Quarter of CY 2009 in the amount of P987,388.80
"M"	Independent Auditor's Report to Accompany Income Tax Return dated January 30, 2010
"M-1"	Independent Auditor's Report dated January 30, 2010
"N" ("N-1" to "N-3")	2009 Annual ITR for CY 2009
"N-1"	Line 31 of 2009 Annual Income Tax Return
"N-2"	Line 32 of 2009 Annual Income Tax Return
"N-3"	Boxes marked "to be refunded" and "to be issued a tax credit certificate"
"O" ("O-1" to "O-2")	Letter of petitioner M2GP to the BIR for Cancellation of TIN and Issuance of Tax Credit Certificate/Tax Clearance (TCC/TCL) of M2GP with Claim for Refund of Excess input

	VAT and Income Tax Payments
"O-1"	Notation: Received, April 12, 2010
"O-2"	Name and Signature: Daisy C. Abenes
"P"	Certificate of Registration of petitioner M2GP with registration date October 2, 1997 issued by the BIR to petitioner M2GP
"Q"	Letter of Authority (LOA) No. 00008560 with attached list
"R"	Operations and Maintenance ("O & M") Agreement between Oxbox Power Services, Inc. ("Oxbox") and petitioner M2GP dated August 19, 1997
"R-1"	O & M Assignment Agreement dated June 6, 2000
"S"	Agreement for the Finance, Engineering, Supply, Installation, Construction, Testing, Commissioning, Operation and Maintenance of the 48.25-Megawatt Mindanao II Geothermal Power Plant under the Build-Operate-Transfer (BOT) Arrangement dated March 11, 1997
"T" ("T-1" to "T-25" with submarkings)	Reconciliation of Revenues per Audited Financial Statements (AFS) to Income per EDC Creditable Withholding Tax (CWT) as of December 31, 2008
"T-1"	Name and Signature of Ivy P. Acosta
"T-2"	Reconciliation of Revenues per AFS with Income per EDC CWTs as of December 31, 2008
"T-3" "T-3-a"	Billing Statement No. 011 dated February 5, 2008 with attached petitioner M2GP 2nd Half of 2007 – using June 2007 indices marked as Exhibit "T-3-a"
"T-4" "T-4-a" to "T-4-d"	Billing Statement No. 009 dated January 25, 2008 with attached (1) Billing Statement No. 008 dated January 25, 2008 which was cancelled, marked as Exhibit "T-4-a", (2) Payment Calculations marked as Exhibit "T-4-b", (3) Rate Sheet based on Energy Conversion Agreement marked as Exhibit "T-4-c", and (4) Forced Outage Hours Analysis marked as Exhibit "T-4-d"
"T-5" "T-5-a" to "T-5-d"	Billing Statement No. 013 dated February 21, 2008 with attached (1) Rate Sheet Based on Energy Conversion Agreement marked as "T-5-a", (2) Forced Outage Hours Analysis marked as Exhibit"T-5-b", and (3) Payment Calculations marked as Exhibit "T-5-c" and (4) marked as Exhibit "T-5-d"

"T-6" "T-6-a" to "T-6-f"	Billing Statement No. 014 dated February 27, 2008 with attached (1) Rate Sheet Based on Energy Development Conversion Agreement marked as Exhibit "T-6-a", (2) Forced Outage Hours Analysis marked as Exhibit "T-6-b", (3) Payment Calculations marked as Exhibit"T-6-c"; (4) Debit Memo dated March 12, 2008 of M2GP issued to EDC marked as Exhibit "T-6-d", (5) Letter of Mr. Francis Dolor dated March 10, 2008 to Mr. Ryukichi Kawaguchi of M2GP re: Notice of Dispute for M2GP of Invoice No. 014 marked as Exhibit "T-6-e", and Credit Memo dated March 12, 2008 issued by petitioner M2GP to PNOC-EDC marked as "T-6-f"
"T-7"	Billing Statement No. 015 dated March 12, 2008
"T-8" "T-8-a" To "T-8-c"	Billing Statement No. 016 dated March 26, 2008 with attached (1) Rate Sheet based on Energy Conversion Agreement marked as Exhibit "T-8-a", (2) Forced Outage Hours Analysis marked as Exhibit "T-8-b", and (3) Payment Calculation marked as Exhibit "T-8-c"
"T-9"	Billing Statement No. 17 dated April 28, 2008
"T-10"	Billing Statement No. 018 dated May 26, 2008
"T-11"	Billing Statement No. 019 dated June 25, 2008
"T-12"	Billing Statement No. 020 dated July 25, 2008
"T-13"	Billing Statement No. 021 dated August 27, 2008
"T-14"	Billing Statement No. 022 dated September 26, 2008
"T-15"	Billing Statement No. 023 dated August 27, 2008
"T-16"	Billing Statement No. 025 dated October 27, 2008
"T-17"	Billing Statement No. 026 dated November 26, 2008
"T-18"	Billing Statement No. 027 dated December 29, 2008
"T-19"	G/L Batch Listing – In Source and Functional Currency (GLBCHL2A) – Energy Number 00012, Entry Date 1/31/2008
"T-20"	G/L Batch Listing – In Source and Functional Currency (GLBCHL2A) – Batch 327 to 327
"T-21"	Forex Gain (Loss) from Receipts on EDC Revenues as of December 31, 2008

"T-22"	Outstanding Receivables from EDC as of December 31, 2008
"T-23"	PNOC Accrual December 26-31, 2007
"T-24"	PNOC Accrual December 25-31, 2008
"T-25" "T-25-a" to "T-25-b"	Summary of Proposed Adjusting Journal Entries, Audit December 31, 2008 with attached: (1) PNOC Accounts receivable (in USD) as of February 28, 2009 marked as Exhibit "T-25-a", and (2) G/L Batch Listing – In Source and Functional Currency (GLBCHL2A) - Batch No. 000092 to 000092 marked as Exhibit "T-25-b"
"U" "U-1" to "U-16" with submarkings	Reconciliation of Revenues per Audited Financial Statements (AFS) to Income per EDC Certificate of Creditable Withholding Tax for the CY 2009
"U-1"	Name and Signature of Ivy P. Acosta
"U-2"	Reconciliation of Revenues per AFS with Income per EDC CWT as of December 31, 2009
"U-3"	Billing Statement No. 028 dated January 26, 2009
"U-4"	Billing Statement No. 029 dated February 26, 2009
"U-5"	Billing Statement No. 030 dated March 26, 2009
"U-6"	Billing Statement No. 032 dated April 28, 2009
"U-7"	Billing Statement No. 034 dated May 6, 2009
"U-8"	Billing Statement No. 036 dated May 25, 2009
"U-9"	Billing Statement No. 040 dated May 25, 2009
"U-10"	G/L Posting Journals - In Source and Functional Currency (GLBCHL2A) – Batch Number 000005 to 000005
"U-11"	Forex Gain (Loss) from Receipts on EDC Revenues
"U-12"	Outstanding Receivables from EDC
"U-13"	G/L Posting Journals - in Source and Functional Currency (GLBCHL2A) – Batch Number 000157 to 000157
"U-14"	Letter dated June 17, 2009 of Mr. Danilo Catigtig to Mr. Ryukichi Kawaguchi of petitioner M2GP, Subject – Billing Adjustment Due to Change in Escalation Rates
"U-15"	PNOC Debit Note No. 09742 dated June 16, 2009
"U-16"	Additional CWT issued by EDC

"V"	Petition for Review for CTA Case No. 8094
"W"	Transmittal Letter dated July 14, 2010
"W-1"	Printed name and signature of Mr. Salahoden M. Cosain in the "Received by" section of the Transmittal dated July 14, 2010
"X"	Transmittal Letter dated July 7, 2011
"X-1"	Printed name and signature of Mr. Salahoden M. Cosain in the "Received by" section of the Transmittal dated July 7, 2011
"X-2"	Waybill Statement of Account No. 300013162565
"Y" "Y-1"	Affidavit of Ivy P. Acosta
"Y-1"	Name and signature of Ivy P. Acosta
"Z" "Z-1" Pages 000425 to 000435 of Court Docket	Supplemental Affidavit of Ivy P. Acosta
"Z-1"	Name and Signature of Ivy P. Acosta
"Z" (to be remarked as "Z-2")	Supplemental Affidavit of Ms. Ivy P. Acosta
"Z-1" (to be remarked as "Z-3")	Name and Signature of Ivy P. Acosta

In a Resolution[24] dated October 3, 2012, the Court denied Exhibits "T-3-a", "T-4-b", "T-4-c", "T-4-d", "T-5-a", "T-5-b", "T-5-c", "T-5-d", "T-6-a", T-6-b", T-6-c", T-6-d", T-6-e", T-6-f", T-8-a", T-8-b", and T-8-c".

On January 31, 2013, respondent manifested that she will no longer present evidence. The Court granted the parties a period of thirty (30) days from January 31, 2013 within which to file their memoranda.

On April 26, 2013[25], this case was submitted for decision upon the filing of petitioner's Memorandum[26] on March 4, 2013 and respondent's Memorandum[27] on April 1, 2013.

[24] Docket, pp. 1037-1038.
[25] Docket, p. 1143.
[26] Docket, pp. 1091-1127.
[27] Docket, pp. 1132-1140.

The parties submitted for the Court's resolution the following issues[28]:

> "1. Whether or not petitioner's administrative and judicial claims for refund or tax credit for its excess creditable withholding tax for the CYs 2008 and 2009 were timely filed within the two-year prescriptive period prescribed under Section 204(c) in relation to Section 229 of the 1997 Tax Code, as amended.
>
> 2. Whether or not petitioner has exhausted all administrative remedies before filing its Petition for Review.
>
> 3. Whether or not petitioner submitted complete documentary evidence when it filed its administrative claim for refund.
>
> 4. And in sum, whether or not petitioner is entitled to the claim for refund or issuance of TCC in the amount of ₱7,186,586.00, representing its unutilized creditable withholding taxes for the CYs 2008 and 2009."

Section 76 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides as follows:

> "SEC. 76. *Final Adjustment Return*. - Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due

[28] Pars. 1-4, Issues, Joint Stipulation of Facts and Issues, Docket, p. 322.

on the entire taxable income of that year, the corporation shall either:

(A) Pay the balance of tax still due; or
(B) Carry-over the excess credit; or
(C) Be credited or refunded with the excess amount paid, as the case may be.

In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor."

The above-quoted provision prescribes two (2) options to a taxable corporation whose quarterly income tax payments/credits in a given taxable year exceed its total income tax due. The taxpayer may either file a tax refund (either in the form of cash or tax credit certificate) or carry over the excess tax payments/credits to the succeeding taxable quarters. However, once the carry-over option is taken actually or constructively it becomes irrevocable for that taxable period.[29] The phrase "for that taxable period" refers to the taxable year when the excess income tax, subject of the option, was acquired by the taxpayer.[30]

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[29] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*, G.R. Nos. 156637/162004, December 14, 2005; *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 176290, September 21, 2007.
[30] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 178490, July 7, 2009.

In its Annual Income Tax Returns for taxable years 2008 and 2009, petitioner reflected the following income tax overpayments:

		2008	2009
		Exhibit "H"	Exhibit "N"
Sales/Revenues/Receipts		₱319,993,130.00	₱123,929,167.00
Less	Cost of Sales/Services	235,280,754.00	174,388,085.00
Gross Income from Operation		₱ 84,712,376.00	₱(50,458,918.00)
Add:	Non-Operating & Taxable Other Income	7,209,022.00	41,272,463.00
Total Gross Income		₱ 91,921,398.00	₱ (9,186,455.00)
Less:	Deductions	90,199,158.00	31,326,741.00
Taxable Income		₱ 1,722,240.00	₱(40,513,196.00)
Minimum Corporate Income Tax Due		₱ 1,838,428.00	₱ -
Less:	Tax Credits		
	Prior Year's Excess Credits	₱ 2,867,594.00	₱ 27,307,754.00
	Creditable Tax Withheld for the First Three Quarters	5,109,080.00	2,746,426.00
	Creditable Tax Withheld for the Fourth Quarter	1,169,508.00	
	Total Tax Credits	₱29,146,182.00	₱ 30,054,180.00
Overpayment		₱(27,307,754.00)	₱(30,054,180.00)

As can be seen in its 2008 Annual ITR, petitioner had total tax credits of ₱30,054,180.00 which consisted of the prior year's (2007) excess credits of ₱22,867,594.00 and creditable taxes withheld during the first three quarters and fourth quarter of 2008 in the respective amounts of ₱5,109,080.00 and ₱1,169,508.00 totaling ₱6,278,588.00. Since a separate petition[31] was filed with the Court docketed as CTA Case No. 8094 with respect to the prior year's excess credits in the amount of ₱22,867,594.00, the minimum corporate income tax (MCIT) due for 2008 in the amount of ₱1,838,428.00 was offset against the creditable taxes withheld during the year in the amount of ₱6,278,588.00 leaving an excess tax credit of ₱4,440,160.00 for the taxable year 2008. Thus, the income tax overpayment as of December 31, 2008 in the amount of ₱27,307,754.00 represents the sum of the prior year's (2007) excess credits

[31] Exhibit "V", Docket, pp. 996-1002.

of ₱22,867,594.00, [which as earlier noted is a subject of a separate judicial claim for refund or tax credit], and excess tax credits for the taxable year 2008 of ₱4,440,160.00.

In its 2009 Annual ITR, petitioner reported no income tax liability, hence, the creditable taxes withheld for the first three (3) quarters in the amount of ₱2,746,426.00 remained unutilized as of the end of the year 2009.

The excess tax credits for CYs 2008 and 2009 in the respective amounts of ₱4,440,160.00 and ₱2,746,426.00 or in the sum of ₱7,816,586.00 are the subject of the present claim.

While petitioner did not mark any chosen option in its Annual ITR for the taxable year 2008 as regards its income tax overpayment of ₱27,307,754.00 (including the subject claim of ₱4,440,160.00), however, petitioner reflected the said amount as "Prior Year's Excess Credits" in its Annual ITR for the taxable year 2009.

Based on Section 76 of the NIRC of 1997, petitioner can no longer claim a refund of the excess tax credits for the taxable year 2008 in the amount of ₱4,440,160.00 because it actually exercised its right to carry over the same to the succeeding taxable year 2009.

However, as an exception to the irrevocability rule of Section 76 of the NIRC of 1997, taxpayers who chose the option to "carry over" may still claim a tax refund provided that they have permanently ceased operations. It was in the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*[32], where the Supreme Court provided an exception to the irrevocability rule. The relevant portions of the case are as follows:

[32] G.R. No. 176290, September 21, 2007.

"Where, however, the corporation permanently ceases its operation before full utilization of the tax credits it opted to carry over, it may then be allowed to claim the refund of the remaining tax credits. In such a case, the remaining tax credits can no longer be carried over and the irrevocability rule ceases to apply."

In the event of cessation of business, petitioner may opt to claim for refund even if it previously chose the irrevocable carry-over option since there is no more opportunity for it to utilize such excess credits.

Nevertheless, it should be emphasized that for the exception to the irrevocability rule to apply, petitioner must prove that it has satisfied the requirements for cessation or dissolution. A corporation is considered dissolved only if it complies with Sections 52(C) and 235(e) of the NIRC of 1997, which state:

"SEC. 52. Corporation Returns. -

xxx xxx xxx

(C) *Return of Corporation Contemplating Dissolution or Reorganization*. - Every corporation shall, within thirty (30) days after the adoption by the corporation of a resolution or plan for its dissolution, or for the liquidation of the whole or any part of its capital stock, including a corporation which has been notified of possible involuntary dissolution by the Securities and Exchange Commission; or for its reorganization, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan and such other information as the Secretary of Finance, upon recommendation of the Commissioner, shall, by rules and regulations, prescribe.

The dissolving or reorganizing corporation shall, prior to the issuance by the Securities and Exchange Commission of the Certificate of Dissolution or

Reorganization, as may be defined by rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, secure a certificate of tax clearance from the Bureau of Internal Revenue which certificate shall be submitted to the Securities and Exchange Commission." *(Emphasis supplied)*

"SEC. 235. Preservation of Books of Accounts and Other Accounting Records. -

xxx xxx xxx

(e) xxx All corporations, partnerships or persons that retire from business shall, within ten (10) days from the date of retirement or within such period of time as may be allowed by the Commissioner in special cases, submit their books of accounts, including the subsidiary books and other accounting records to the Commissioner or any of his deputies for examination, after which they shall be returned. **Corporations and partnerships contemplating dissolution must notify the Commissioner and shall not be dissolved until cleared of any tax liability.**" *(Emphasis supplied)*

A dissolving corporation must abide by the requirements as stated in the afore-quoted provisions before it could be considered legally dissolved for tax purposes, *viz.,* (1) to secure a Certificate of Tax Clearance from the BIR, and (2) to secure a Certificate of Dissolution from the SEC.

The word "shall" in Section 52(C) of the NIRC of 1997 partakes of a mandatory nature that connotes a word of command.

In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. It has a preemptory meaning, and it is generally imperative or mandatory. It has the invariable significance of operating to impose a duty which may be enforced, *particularly if public policy is in favor of this meaning* or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.[33]

In the same vein, the words "shall not" in Section 235(e) of the NIRC of 1997 as a rule must also be regarded as mandatory.[34]

Thus, it is mandatory for a taxpayer who has previously chosen the option to "carry over" and who also contemplates dissolution to comply with the compulsory requirements above-mentioned.

The significance of a tax clearance from the BIR anent a dissolving corporation's claim for tax refund has been elucidated by the CTA *En Banc* in *Stablewood Philippines, Inc., [Formerly Rolls-Royce Philippines, Inc., (formerly Orca Energy, Inc.,)] vs. Commissioner of Internal Revenue*[35], *viz*:

> "Based on the foregoing, it is evident that if the corporation permanently ceases its operations before full utilization of the tax credits it opted to carry over, it may be allowed to claim the refund of the remaining tax credits as an exception to the irrevocability rule under Section 76 of the NIRC of 1997, as amended. However, the dissolving corporation must prove that the termination of its operations is permanent in nature and that it is cleared from any tax or other government liabilities before a tax refund may be granted. Therefore, a corporation contemplating dissolution must first secure a tax clearance certificate from the Commissioner of Internal Revenue (CIR), which

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[33] *Diokno vs. Rehabilitation Finance Corporation*, G.R. No. L-4712, July 11, 1952, citing *People vs. O' Rourke*, 13 P. 2d. 989, 992, 124 Cal. App. 752. (39 Words and Phrases, Permanent Ed., p. 90.).
[34] *McGee vs. Republic of the Philippines*, G.R. No. L-5387, April 27, 1954.
[35] CTA EB Case No. 794, October 8, 2012 Decision.

> certificate shall then be submitted to the Securities and Exchange Commission (SEC) for the issuance of the Certificate of Dissolution. Hence, compliance with Section 52 (C) and 235 of the NIRC of 1997, as amended, is necessary before a taxpayer may be issued a tax refund of its excess CWT. **It must be underscored that this is a safeguard devised by Congress in order to ensure that no corporation may escape payment of taxes and other government liabilities by simply opting to cease its operations and dissolve the corporation.**" (Emphasis supplied)

Indeed, it is mandatory for a taxpayer who has previously chosen the option to "carry over" and who also contemplates dissolution to comply with the compulsory requirements above-mentioned, particularly the imperative need to secure a BIR Tax Clearance in order to be entitled for a tax refund.

Unfortunately, petitioner failed to comply with the first requirement.

While petitioner was able to file with the BIR an application for cancellation of its BIR registration due to dissolution, there is no evidence of a Certificate of Tax Clearance ever presented showing that it has been cleared of, and/or has settled, any of its tax liability.

Absent a Certificate of Tax Clearance from the BIR, the Court cannot consider petitioner as already dissolved to remove it from the application of the irrevocability rule under Section 76 of the NIRC of 1997.

The excess tax credits of ₱27,307,754.00 as of December 31, 2008, which included the claimed amount of ₱4,440,160.00 having been carried over to the subsequent taxable year 2009 bars petitioner from claiming a refund of the amount of ₱4,440,160.00 in view of the application of the irrevocability rule.

As regards petitioner's excess tax credits for the taxable year 2009 in the amount of ₱2,746,426.00, the same may be refunded (in the form of cash or tax credit certificate) as petitioner marked the boxes corresponding to the options "To be refunded" and "To be issued a Tax Credit Certificate" in its 2009 Annual ITR.

Consistent with several Supreme Court Decisions[36] and related rules and regulations[37], petitioner must comply with the following requisites in order to be entitled to a refund of unutilized excess creditable taxes withheld at source:

1. That the claim for refund was filed within the two-year prescriptive period as provided under Section 204(C) in relation to Section 229 of the NIRC of 1997;

2. That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and

3. That the income upon which the taxes were withheld was included in the return of the recipient.

As to the timeliness of the claim for refund, the pertinent provisions are Sections 204(C) and 229 of the NIRC of 1997, which provide, thus:

> "SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. - The Commissioner may -

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[36] *Citibank N.A. vs. Court of Appeals, et al.*, G.R. No. 107434, October 10, 1997; *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al.*, G.R. No. 96322, December 20, 1991.
[37] Section 2.58, Revenue Regulations No. 2-98, as amended.

xxx xxx xxx

(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." *(Emphasis supplied)*

"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 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 supplied)*

The above-quoted provisions mandate that the administrative and the judicial remedies of filing a claim for refund of erroneously or excessively paid tax must be done within two (2) years from the date of payment of the tax. For actions for refund of excess corporate income tax, the Supreme Court held that the two-year prescriptive period should be counted from the filing of the final adjustment return or annual income tax return, because it is only during that date that the exact tax liability or refundability of the tax can be determined.[38]

Moreover, jurisprudence has it that when the two-year period is about to prescribe and the claim for refund with the BIR Commissioner has not been acted upon, for the protection of the interest of the taxpayer, he should file a Petition for Review with this Court within the said two-year period; otherwise, if the decision of the BIR Commissioner is adverse to the taxpayer and it was made after the two-year period he can no longer appeal the same to the Court of Tax Appeals.[39] Thus, it is not necessary for the BIR Commissioner to act unfavorably on the claim for refund before the Court may acquire jurisdiction because of the positive requirement of Section 229 and the doctrine that delay of the BIR Commissioner in rendering decision does not extend the peremptory period fixed by the statute. Neither is it required under the law that the claim for refund be filed at the earliest instance in order to give the BIR Commissioner an opportunity to rule on it and the Court to review the ruling of the BIR Commissioner on appeal. The law fixed the same period of two (2) years for filing an administrative claim for refund[40] with the BIR Commissioner and for filing suit[41] with the Court,[42] and as long as these

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[38] *Commissioner of Internal Revenue vs. TMX Sales, Inc. and the Court of Appeals*, G.R. No. 83736, January 15, 1992; *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al.*, G.R. No. 96322, December 20, 1991.

[39] *Commissioner of Internal Revenue vs. Hitachi Computed Products (Asia) Corporation*, CA-G.R. SP No. 63340, February 7, 2002, citing *Gibbs vs. Collector of Internal Revenue and Court of Tax Appeals*, 107 Phil 232, *Johnson Lumber Co. vs. CTA*, 101 Phil 151.

[40] Section 204(C) of the NIRC of 1997.

[41] Section 229 of the NIRC of 1997.

[42] Commissioner *of Internal Revenue vs. Bank of the Philippine Islands, as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals*, CA G.R. SP No. 34102, September 19, 1994.

two (2) acts fall within this period then, there is no legal impediment to the judicial claim for refund.[43]

In the instant case, petitioner filed its Annual ITR for CY 2009 on April 12, 2010.[44] Counting from this date, petitioner had until April 12, 2012 to file a claim for refund of its excess tax credits for the year 2009 both in the administrative and judicial levels. Therefore, petitioner seasonably filed its administrative claim for refund with respondent on April 12, 2010[45] and its subsequent appeal before this Court on March 31, 2011. Clearly, the *first requirement* has been satisfied.

Petitioner also complied with the *second requisite*. Petitioner submitted various Certificates of Creditable Tax Withheld at Source, showing that the creditable income taxes in the amount of ₱2,746,426.31 were withheld on contractor's fees received by petitioner from its clients for services rendered amounting to ₱137,321,315.50 for CY 2009, detailed as follows:

PERIOD COVERED	PAYOR	NATURE OF INCOME PAYMENT	AMOUNT OF INCOME PAYMENT	TAX WITHHELD	EXHIBIT
08/01/09 to 08/31/09	PNOC-EDC	Prime/Sub Contractors	16,560,672.00	331,213.44	"I-1" to "I-2"
04/01/09 to 06/30/09	PNOC-EDC	Prime/Sub Contractors	71,391,203.50	1,427,824.07	"J-1" to "J-2"
01/01/09 to 03/31/09	PNOC-EDC	Prime/Sub Contractors	49,369,440.00	987,388.80	"K-1" to "K-2"
		TOTAL	₱137,321,315.50	₱2,746,426.31	

We proceed to the *third requisite*.

It is observed that in petitioner's Annual ITR for the taxable year 2009, specifically under Schedules 1 and 4 thereof, or the "Schedule of Sales/Revenues/Receipts/Fees"

[43] *Manila Electric Company vs. The Commissioner of Internal Revenue*, CTA Case No. 5091, October 2, 1997.
[44] Exhibit "N", Docket, pp. 694-696.
[45] Exhibit "O", Docket, pp. 697-707.

and "Schedule of Non-Operating and Taxable Other Income", petitioner reported taxable amounts pertaining to "Sale of Goods/Properties" in the amount of ₱123,929,167.00, and "Non-Operating & Taxable Other Income" in the amount of ₱41,272,463.00, as well as "Creditable Withholding Tax" in the total amount of ₱2,746,426.00.[46] However, under the same Schedules, there is no entry whatsoever in the "Creditable Tax Withheld" columns.[47] This declaration, at the very least, can be taken to mean, that no part of the gross income reported therein were ever subjected to creditable withholding tax. Correspondingly, the supposed income payments to which taxes were allegedly withheld, cannot be said to have been declared as part of the gross income for the taxable year 2009. From this fact alone, it can be said that petitioner failed to comply with the *third requisite* that the income upon which the taxes were withheld was included in the return of the recipient.

It must be noted that in the recent case of *Philam Properties Corporation vs. Commissioner of Internal Revenue (CTA EB No. 885, August 22, 2013)* the Court *En Banc* held that in determining whether the requirement that the income payment subjected to withholding tax was declared as part of the gross income, the Annual ITR of the taxpayer must be closely examined and scrutinized. The pertinent portion of the said case reads:

> "Considering that the aforesaid second condition is to the effect that there must be a showing on the return of petitioner that the income payment subjected to withholding tax was declared as part of the gross income, it is logical that the first and foremost document to be closely examined and scrutinized is the Annual ITR of petitioner for CY 2006, particularly the information indicated therein. Thus, such examination and scrutiny must not only be confined to a particular entry or item in the said return, but must be made in its entirety."

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[46] Exhibit "N"
[47] Ibid.

Thus, the absence of any entry in the Creditable Withholding Tax column of petitioner's Annual ITR for the taxable year 2009 indicates that no part of the gross income reported was ever subjected to creditable withholding tax.

As cases filed before this Court are litigated de novo, party-litigants should prove every minute aspect of their cases.[48]

In view of petitioner's failure to comply with the *third requisite* for the refund or issuance of TCC for unutilized creditable withholding taxes as provided by law and jurisprudence, this Court is left with no recourse but to deny the instant claim for tax refund or issuance of TCC.

We 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.[49]

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

SO ORDERED.

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

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[48] *Dizon vs. Court of Tax Appeals, et. al.,* G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation*, G.R. No. 153204, August 31,2005.
[49] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

WE CONCUR:

(with Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

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

Pursuant to Article VIII, Section 13 of the Constitution, 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
Chairperson, 1st Division

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

MINDANAO II GEOTHERMAL PARTNERSHIP, Petitioner,	**CTA CASE NO. 8251**
	Members:
-versus-	**DEL ROSARIO,** *Chairperson* **UY,** *and* **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** FEB 27 2014 ; 9:50 a.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur in the *ponencia* of my esteemed colleague, the Honorable Associate Justice Cielito N. Mindaro-Grulla, which denies petitioner's claim for refund of excess tax credits for taxable year 2008 in the amount of ₱4,440,160.00, pursuant to the **irrevocability rule** under Section 76 of the National Internal Revenue Code (NIRC) of 1997. The *ponencia* likewise aptly mentioned the exception to the irrevocability rule wherein refund could still be allowed when a taxpayer permanently ceased operation, albeit the taxpayer initially opted to carry-over the excess tax credit to the succeeding quarters/years. This exception is subject, however, to certain conditions, like the presentation of a certificate of tax clearance from the Bureau of Internal Revenue (BIR). In the present case, since petitioner failed to present a tax clearance certificate from the BIR, the Court could not consider it dissolved for tax purposes so as to exempt it from the application of the irrevocability rule.

On the other hand, with utmost respect, I dissent in the denial of petitioner's claim for refund of its excess tax credits for taxable year 2009 in the amount of ₱2,746,426.00 in view of the alleged failure of petitioner to comply with the third requisite, *i.e., the income upon which the taxes were withheld was included in the return of the recipient*. The *ponencia* states that the absence of any entry in the *"Creditable Tax Withheld"* column in Schedules 1 and 4, page 2 of petitioner's Annual Income Tax Return (ITR) for taxable year 2009 indicates that no part of the gross income reported was ever subjected to creditable withholding tax.

There is neither law nor jurisprudence that states that a taxpayer's failure to fill up the entry in the *"Creditable Tax Withheld"* column in Schedules 1 and 4, page 2 of the Annual ITR would be fatal to its claim for refund. What Section 2.58.3 of RR No. 2-98[1] and the applicable jurisprudence require is that the taxpayer be able to declare as part of its gross income in the Annual ITR the income payment from which the withholding was made.

An entry into the *"Creditable Tax Withheld"* column found in page 2 of the Annual ITR (BIR Form 1702), specifically Schedule 1 or the *"Schedule of Sales/Revenues/Receipts/Fees"* and Schedule 4 or the *"Schedule of Non-Operating and Taxable Other Income"* may expedite the determination of petitioner's compliance with the requirement that the income payments from which the withholding of taxes were made formed part of petitioner's gross income declared in its Annual ITR. It does not, however, follow that the Court should immediately deny petitioner's claim for refund solely because petitioner failed to make such entry, without the Court looking into all the entries in the Annual ITR *vis-a-vis* the other evidence submitted by petitioner.

Stated otherwise, failure on the part of a taxpayer to make an entry in the *"Creditable Tax Withheld"* column found in page 2 of the Annual ITR, specifically Schedule 1 or the *"Schedule of Sales/Revenues/Receipts/Fees"* and Schedule 4 or the *"Schedule of Non-Operating and Taxable Other Income"* is not a sufficient basis to conclude outright that the taxpayer failed to comply with the requirement that *"the income upon which the taxes were withheld were included in the return of the recipient"* when the taxpayer has offered other evidence to establish its compliance with this requirement, which evidence consists, among others, of the following: (a) line 17C of its 2009 Annual ITR which shows that petitioner declared Sales/Revenues/Receipts/Fees in the amount of ₱123,929,167; (b) Reconciliation of Revenues per AFS to Income per Energy Development Corporation (EDC) CWTs; (c) G/L Batch Listing – In

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[1] "SECTION 2.58.3. Claim for Tax Credit or Refund. —

(A) The amount of creditable tax withheld shall be allowed as a tax credit against the income tax liability of the payee in the quarter of the taxable year in which income was earned or received.

(B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course only when it is shown that the income payment has been declared as part of the gross income and the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom.

Proof of remittance is the responsibility of the withholding agent.

Source and Functional Currency; (d) Billing Statement No. 028; (e) Schedule of Forex Gain (Loss) from Receipts on EDC Revenues as of December 31, 2009; (f) 2009 Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307); and, (g) the testimony of petitioner's witness, Ms. Ivy P. Acosta

Thus, with regard to the requirement to prove the inclusion of income upon which the taxes were withheld in the return, petitioner's witness, Ms. Ivy P. Acosta, testified that there is a discrepancy between the gross income/revenues from petitioner's sales of services as reflected in its Annual ITR for 2009 and those found in the Certificates of Creditable Tax Withheld at Source.[2] Petitioner's gross income from sales of services in the amount of ₱123,929,166.52 as reported in its 2009 Annual ITR is lower by ₱13,392,148.98 when compared with the gross income reflected per the Certificates of Creditable Tax Withheld at Source for the same year. To explain the discrepancy, Ms. Acosta identified the following reconciliation schedule:

Reconciliation of Revenues per AFS to Income per Energy Development Corporation (EDC) CWTs[3]		
As of December 31, 2009		
Revenue/Sales per AFS		₱123,929,166.52
Add(Deduct) Reconciling Items:		
M2GP Reversal of accrual of December 26-31, 2008 income from EDC	₱ 5,245,696.68	
Realized Forex Gain	479,965.90	
2009 outstanding receivables from EDC	(4,173.10)	
EDC Debit Notes (adjustment to billing due to change in escalation rates of OCR and SFR fees)	4,373,629.31	
Add'l. CWT issued by EDC in 2009	3,297,030.19	13,392,148.98
Income per EDC CWTs		₱137,321,315.50

Based on the reconciliation schedule above, certain income items were added to the ₱123,929,166.52 gross revenues/sales per petitioner's 2009 Annual ITR, indicating that these were subjected to creditable withholding tax but were not reported per petitioner's 2009 Annual ITR, namely:

1. M2GP reversal of accrual of December 26-31, 2008 income from EDC in the amount of ₱5,245,696.68;

2. Realized forex gain in the amount of ₱479,965.90;

3. EDC Debit Notes (adjustment to billing due to change in escalation rates) in the amount of ₱4,373,629.31; and, OM

[2] Exhibit "Y", CTA Docket, p. 1020.
[3] Exhibit "U", CTA Docket, pp. 1024-1027.

4. Additional CWT issued by EDC in 2009 in the amount of ₱3,297,030.19.

A scrutiny of petitioner's Reconciliation of Revenues per AFS with Income per EDC CWTs as of December 31, 2008,[4] G/L Batch Listing – In Source and Functional Currency (GLBCHL2A),[5] and Billing Statement No. 028[6] shows that the amount of ₱5,245,696.68 pertains to petitioner's gross income for December 26-31, 2008 which was recognized and reported in its Annual ITR for 2008 but which was billed and collected only in 2009. Consequently, the withholding of the corresponding tax was in the year 2009. In other words, petitioner properly accrued and reported its income of ₱5,245,696.68 in prior year 2008. The discrepancy of ₱5,245,696.68 was a mere result of the timing difference between the recognition/recording of the said income by petitioner in 2008 and the withholding of the corresponding tax in 2009 by its client PNOC-EDC.

As to the realized Forex gain of ₱479,965.90, petitioner submitted a schedule of Forex Gain (Loss) from Receipts on EDC Revenues as of December 31, 2009,[7] which enumerated its sales/receipts with the corresponding invoice numbers upon which it recognized net foreign exchange gain of ₱479,965.90. Petitioner, however, failed to establish that the amount of ₱479,965.90 formed part of the ₱40,358,573.00[8] declared by petitioner in its 2009 Annual ITR as "2008 unrealized forex gain realized in 2009".

With respect to the EDC Debit Notes (adjustment to billing due to change in escalation rates) of ₱4,373,629.31 and the income of ₱3,297,030.19 on the additional CWT issued by EDC in 2009, it appears from the records that petitioner received the said income payments from EDC upon which a corresponding income tax was withheld by EDC. The income payments of ₱4,373,629.31 and ₱3,297,030.19, however, were not reported in petitioner's 2009 Annual ITR.

In sum, petitioner sufficiently complied with the three requisites for refund of excess CWT for calendar year 2009 but only to the extent of ₱2,583,413.80 out of the total claim of ₱2,746,426.31, computed as follows:

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[4] Exhibits "T" to "T-2", CTA Docket, pp. 847-848.
[5] Exhibit "T-20", CTA Docket, p. 940.
[6] Exhibit "U-3", CTA Docket, pp. 958-961.
[7] Exhibit "U-11", CTA Docket, p. 987.
[8] Exhibit "N", Schedule 4 (Schedule of Non-Operating and Taxable Other Income), line 56, CTA Docket, pp. 694-696.

Amount of Claimed CWT			₱ 2,746,426.31
Less: CWT for which petitioner failed to report the related income payments			
	Income Payment	CWT (2%)	
a) Realized Forex gain	₱ 479,965.90	₱ 9,599.32	
b) EDC Debit Notes	4,373,629.31	87,472.59	
c) Additional CWT issued by EDC in 2009	3,297,030.19	65,940.60	
	₱ 8,150,625.40	₱163,012.51	163,012.51
Refundable CWT			**₱2,583,413.80**

Taxes are the lifeblood of the government. Without taxes, the government can neither exist nor endure.[9] Nonetheless, if the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments. When it is undisputed that a taxpayer is entitled to a refund, the State should not invoke technicalities to keep money not belonging to it. No one, not even the State, should enrich oneself at the expense of another.[10]

In view of the foregoing, I VOTE to PARTIALLY GRANT the Petition for Review. Respondent Commissioner of Internal Revenue should be ordered to refund or to issue a tax credit certificate in favor of petitioner Mindanao II Geothermal Partnership in the reduced amount of ₱2,583,413.80, representing petitioner's excess creditable withholding tax for taxable year 2009.

ROMAN G. DEL ROSARIO
Presiding Justice

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[9] National Power Corporation vs. City of Cabanatuan, G.R. No. 149110, 9 April 2003, 401 SCRA 259, 270.
[10] BPI-Family Savings Bank, Inc. vs. Court of Appeals, G.R. No. 122480, April 12, 2000, 330 SCRA 507.