REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

C.T.A. EB No. 474
(C.T.A. Case Nos. 6792 & 6837)

Present:

-versus-

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

CE LUZON GEOTHERMAL POWER COMPANY, INC.,
Respondent.

Promulgated:
SEP 0 1 2009 1:30 p.m.

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review[1] filed on April 8, 2009, assailing the Decision[2] dated November 25, 2008 of the Second Division of the Court ("Court in Division") in C.T.A. Case Nos. 6792 and 6837, ordering the

[1] *Rollo*, C.T.A. EB No. 474 (C.T.A. Case Nos. 6792 & 6837), pp. 7 - 53 with Annexes.
[2] Penned by Associate Justice Olga Palanca-Enriquez and concurred in by Associate Justice Juanito C. Castañeda, Jr. Associate Justice Erlinda P. Uy was on leave.

petitioner to refund or issue a tax credit certificate in favor of respondent in the reduced amount of Thirteen Million Nine Hundred Twenty-Six Thousand Six Hundred Ninety-Seven and 51/100 Pesos (P13,926,697.51), representing respondent's unutilized input VAT attributable to zero-rated sales for the third and fourth quarters of 2001 and all four quarters of 2002; and the Resolution dated March 9, 2009, denying the "Motion for Partial Reconsideration" of herein petitioner.

Antecedent Facts

The antecedent facts, as narrated by the Court in Division in its Decision, are as follows:

> Petitioner[3] CE Luzon Geothermal Power Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at the 24th Floor, 6750 Bldg., 6750 Ayala Avenue, Makati City.
>
> Respondent,[4] on the other hand, is the duly appointed Commissioner of Internal Revenue, vested with authority to act as such, including, among others, the power to grant refunds of unutilized input value added taxes, pursuant to the provisions of the National Internal Revenue Code. He may be served with summons and other legal processes of this Honorable Court at his office located at the Fifth Floor, BIR, National Office Building, Agham Road, Diliman, Quezon City.
>
> Petitioner is engaged in the business of power generation for which it is accredited and certified to as such by the Department of Energy, as evidenced by its DOE Certificate of Accreditation (OSAC91-12) issued on June 15, 1994. Petitioner is a registered value added taxpayer (VAT) with the Bureau of Internal Revenue, as evidenced by its Certificate of Registration with Tax Identification Number 047-003-924-336-VAT.

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[3] Herein Respondent.
[4] Herein Petitioner.

On June 26, 2001, R.A. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (hereafter *"EPIRA Law"*) took effect. The EPIRA Law is a legislative act which ordained reforms in the electric power industry, amending for the purpose certain laws and for other purposes. As a consequence of the effectivity of the EPIRA Law, petitioner, as one of the generating companies recognized by the DOE, treated the delivery and supply of electric energy to PNOC-EDC as VAT zero-rated. Prior to the effectivity of the EPIRA Law, such transactions were subject to 10% VAT and petitioner paid the corresponding output tax.

For the third quarter of taxable year 2001, petitioner declared zero-rated sales in its amended quarterly VAT return in the amount of P661,007,570.05 and unutilized input VAT in the amount of P2,921,085.31. Its original quarterly VAT returns for the third and fourth quarters of taxable year 2001 was filed on October 25, 2001 and January 10, 2002, respectively, and its amended quarterly VAT returns for the third quarter of taxable year 2001 was filed on November 12, 2001.

Petitioner likewise filed its original and amended quarterly VAT returns for the first, second, third and fourth quarters of taxable year 2002 on April 10, 2002, May 15, 2003, May 15, 2003 and April 1, 2003, respectively.

On September 26, 2003, petitioner filed its administrative claim for refund of unutilized input VAT for the third quarter of taxable year 2001. While the administrative claim for refund of unutilized input VAT for taxable year 2002 was filed on December 18, 2003.

Alleging inaction of respondent, petitioner filed a Petition for Review with this Court on September 30, 2003 for unutilized input VAT for the third quarter of taxable year 2001, docketed as C.T.A. Case No. 6792. On December 19, 2003, petitioner filed another Petition for Review with this Court, docketed as C.T.A. Case No. 6837 for unutilized input VAT for the fourth quarter of taxable year 2001 and for all the quarters of 2002 for the zero rated sales of petitioner.

In C.T.A. Case No. 6792, in her Answer, respondent alleged by way of special and affirmative defenses:

> "4. Petitioner's claim for refund is subject to administrative investigation/examination by the respondent;

5. To support its claim, it is imperative for petitioner to prove, the following, viz.:

a. The registration requirements of a value-added taxpayer in compliance with Section 6 (a) and (b) of the Revenue Regulations No. 6-97 in relation to Section 4.107-1(a) of Revenue Regulations No. 7-95, and Section 236 of the Tax Code, as amended;

b. The invoicing and accounting requirements for VAT registered persons, as well as the filing and payments of VAT in compliance with the provisions of Sections 113 and 114 of the Tax Code, as amended;

c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, otherwise, there would be no sufficient compliance with the filing of administrative claim for refund which is a condition sine qua non prior to the filing of judicial claim in accordance with the provision of Section 229 of the Tax Code, as amended. It is worthy of emphasis that Section 112 (D) of the Tax Code, as amended, requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review;

d. That the input taxes of P1,142,666.32 and P19,070,378.18 allegedly paid by the petitioner on its purchases of goods and services for the third quarter of taxable year 2001 and the fourth quarter of 2001 up to the fourth quarter of 2002, respectively, were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) and 229 of the Tax Code, as amended;

f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase Journal, showing that it actually paid VAT in accordance with Sections 110(A) (2) and 113 of the Tax Code as amended, in pursuance to Section 4.104-5 (a) & (b) of Revenue Regulations No. 7-95 (Re: Substantiation of Claims of Input Tax Credit);

g. The requirements as enumerated under Section 4.104-2 of the Revenue Regulations 7-95 (Re: Persons who can avail of the Input Tax Credits);

6. 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 common burden cannot be permitted to exist upon vague implications (Asiatic Petroleum Co. {P.I.} v. Lanes, 49 Phil. 466 cited in Collector of Internal Revenue vs. Manila Jockey Club, Inc., 98 Phil. 670); and

7. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

In C.T.A. Case No. 6837, respondent raised the same special and affirmative defenses.

On January 30, 2004, petitioner orally moved for the consolidation of both cases, which was granted by the First Division in a Resolution dated March 1, 2004.

On July 21, 2004, in view of the consolidation, petitioner and respondent submitted the following Joint Stipulation of Facts:

> "JOINT STIPULATION OF FACTS AND ISSUES
>
> PETITIONER and RESPONDENT, through their respective counsels, to this Honorable Court with its order during the pre-trial conference held on June 11, 2004, respectfully submit the following Joint Stipulation of Facts and Issues:
>
> I. STIPULATION OF FACTS
>
> The parties agree to the following stipulation of facts;
>
> 1. Respondent is the duly appointed Commissioner of Internal Revenue, vested with the authority to act as such, including, among others, the power to grant refunds of unutilized input value added taxes pursuant to the provisions of the National Internal Revenue Code. He may be served with summons and other legal processes of this Honorable Court at his office located at the Fifth Floor, BIR, National Office Building, Agham Road, Diliman, Quezon City.
>
> 2. Section 110 of the Tax Code provides:
>
> 'Section 110. Tax Credits. –
>
> xxx xxx xxx
>
> (B) Excess output or input tax – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter. Any input tax attributable to the purchase of

capital goods or to zero rated sales by a VAT registered person may at his option be refunded or credited against other internal revenue taxes subject to the provisions of Section 112.'

4. The Supreme Court, in the case of Commissioner of Internal Revenue vs. Victorias Milling Co., Inc., 22 SCRA 12, held that:

'The claim for refund with the Bureau of Internal Revenue and the subsequent appeal to the Court of Tax Appeals must be filed within the two year period. If however, the 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 said Collector.'

5. Petitioner is a corporation duly organized and existing under and by virtue of Philippine laws;

6. Petitioner is registered as a value-added taxpayer with the Bureau of Internal Revenue;

7. Authenticity and due execution of Petitioner's BIR Certificate of Registration, dated June 25, 2004;

8. For the third quarter of taxable year 2001, Petitioner declared zero-rated sales in its amended quarterly VAT return in the amount of P661,007,570.05;

9. For the third quarter of taxable year 2001, petitioner declared unutilized input VAT in the amount of P2,921,085.31; and declared the same in its quarterly VAT return for the third quarter of taxable year 2001;

11. Authenticity, due execution and filing with the Bureau of Internal Revenue of the Petitioner's original quarterly VAT returns for third and fourth quarters of taxable year 2001 filed on October 25, 2001 and January 10, 2002, respectively,

and Petitioner's amended quarterly VAT returns for the third quarter of taxable year 2001 filed on November 12, 2001;

12. Authenticity, due execution and filing of the Petitioner's original and amended quarterly VAT returns for the first, second, third and fourth quarters of taxable year 2002 filed on April 10, 2002, May 15, 2003, May 15, 2003 and April 1, 2003, respectively;

13. Authenticity and due execution of the Petitioner's administrative claims for refund and/or Tax Credit Certificate (TCC) of unutilized input VAT for the third quarter of taxable year 2001, dated September 25, 2003 which was filed on September 26, 2003;

14. The administrative claim for refund of unutilized input VAT dated December 11, 2003 was filed on December 18, 2003;

15. The present claims for refund with this Honorable Court for unutilized input VAT were both filed on September 30, 2003 and December 19, 2003.

Petitioner presented Ma. Mary Ann C. Capuchino, as witness, and documentary evidence, marked as Exhibits *"A"* to *"JJJ"*, inclusive of their submarkings, which were all admitted by the Court.

On the other hand, respondent presented Luzviminda G. Sabile, as witness, and Exhibits *"1"* to *"8,"* inclusive of their submarkings, which were all admitted by the Court.

On May 24, 2007, petitioner manifested that he will not present rebuttal evidence, and instead filed a Motion to Present Additional Evidence, which the Court granted. As additional witness, petitioner presented Trinity Gatuz, and after the completion of her testimony, moved for fifteen days until May 31, 2007 to file a Supplemental Offer of Evidence, which the Court granted. Respondent was granted fifteen (15) days from notice to file her comment.

In a Resolution dated July 9, 2007, the Court admitted the additional exhibits, marked as Exhibits *"KKK"* to *"PPP,"* inclusive of their submarkings, and both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.

Both parties having complied thereto, the consolidated petitions were deemed submitted for decision on November 28, 2007.[5]

The Ruling of the Court in Division

The following issues were submitted by the parties for resolution by the Court in Division:

I

WHETHER OR NOT PETITIONER[6] GENERATED ZERO-RATED SALES FOR THE THIRD AND FOURTH QUARTERS OF TAXABLE YEAR 2001 AND FOR EACH OF THE FOUR QUARTERS OF TAXABLE YEAR 2002 AS A RESULT OF THE APPLICABILITY OF THE EPIRA LAW.

II

WHETHER OR NOT PETITIONER INCURRED UNUTILIZED INPUT VAT, AS A RESULT OF ITS VAT ZERO-RATED SALES, AS FOLLOWS: FOR THE THIRD QUARTER OF TAXABLE YEAR 2001 IN THE AMOUNT OF P2,921,085.31; FOR THE FOURTH QUARTER OF TAXABLE YEAR 2001 AND FOR ALL THE FOUR QUARTERS OF TAXABLE YEAR 2002 IN THE AMOUNT OF P21,229,990.80.

III

WHETHER OR NOT THE UNUTILIZED INPUT VAT SOUGHT TO BE REFUNDED HEREIN WERE APPLIED AGAINST ANY OUTPUT VAT LIABILITY IN SUCCEEDING TAXABLE QUARTERS IN 2001 AND IN 2002 AND THEREAFTER.

IV

WHETHER OR NOT THE CLAIMS FOR REFUND OF THE UNUTILIZED INPUT VAT FOR THE THIRD AND FOURTH QUARTERS OF TAXABLE YEAR 2001 AND FOR ALL THE FOUR

[5] *Rollo*, pp. 22 - 30.
[6] Herein Respondent.

QUARTERS TAXABLE YEAR 2002 WITH THE BUREAU OF INTERNAL REVENUE WERE FILED BY PETITIONER WITHIN THE TWO-YEAR PERIOD PROVIDED BY LAW.

V

WHETHER OR NOT BOTH THE PRESENT PETITIONS FOR REVIEW FILED BY THE PETITIONER WITH THIS HONORABLE COURT WERE FILED WITHIN THE TWO-YEAR PERIOD PROVIDED BY LAW.[7]

The Court in Division summed up the issues as: whether or not respondent is entitled to a refund or the issuance of a tax credit certificate in the aggregate amount of P24,151,076.11, representing unutilized excess input VAT paid on its domestic purchases of goods and services which are attributable to zero-rated sales for the third and fourth quarters of 2001 and for all four quarters of 2002.

It then determined whether respondent complied with the requisites set out in Section 112 (A) of the National Internal Revenue Code of 1997 ("NIRC"), namely: (1) there must be zero-rated or effectively zero-rated sales; (2) that input taxes were incurred or paid; (3) that such input VAT payments are directly attributable to zero-rated sales; (4) that the input VAT payments were not applied against any output VAT liability; and (5) that the claim for refund was filed within the two year prescriptive period.

After a careful examination of the evidence, the Court in Division ruled that respondent complied with the first requirement. Records show that respondent is engaged in the business of power generation, and that it owns and operates a 180-megawatt power plant facility located in Mahanagdong, Province

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[7] *Rollo*, pp. 31 - 32.

of Leyte, which was accredited by the Department of Energy, as a Block Power Production Facility since June 15, 1994. Records also show that for the period commencing from July 1, 2001 to December 31, 2002, respondent generated gross receipts from the sales of power generation services rendered to Philippine National Oil Company-Energy Development Corporation ("PNOC-EDC"), as evidenced by sales invoices and official receipts by respondent to PNOC-EDC for the period.

As to the amount of the substantiated zero-rated receipts for the third quarter of 2001 to the fourth quarter of 2002, the Court-Commissioned Independent CPA reported that there was a discrepancy in the amounts of the gross receipts from sales of generated power as reflected in the VAT returns and as shown in the official receipts.

Upon further examination, the Court in Division found that the P24,344,630.25 difference in the zero-rated sales, covering the period of July 1, 2001 to September 30, 2001, represents the 4% value-added tax ("VAT") and the service fees and capital/operating cost recovery collected by respondent from PNOC-EDC, which were not reported in the VAT returns for the said period. According to the Court in Division, although the respondent was correct in not declaring the 4% VAT collected by respondent from PNOC-EDC in the amounts of P14,348,174.14 and P265,736.22, as these do not form part of the taxable gross receipts, the service fees and capital/recovery costs collected by respondent from PNOC-EDC, in the amounts of P4,419,912.45 and P5,310,807.48 or in the aggregate amount of P9,730,719.93, should have been included as part of its zero-rated receipts for the third quarter of 2001. Respondent's failure to declare the amount of P9,730,719.93 as part of its zero-rated sales receipts for the third quarter of 2001 resulted in an underdeclaration.

For the fourth quarter of 2001 to the fourth quarter of 2002, the Court in Division considered the amount of P4,850,680,562.55 as respondent's valid zero-rated receipts for the said period, instead of the declared amount of P5,318,146,689.21. It found the amount of P467,466,126.66 to be an overstatement of respondent's zero-rated receipts for the said period.

Hence, respondent's substantiated zero-rated receipts amounted to P5,511,688,132.60, computed as follows:[8]

	July 1, 2001 to Sept. 30, 2001	Oct. 1, 2001 to Dec. 31, 2002	Total
Zero-Rated Receipts Per Ors	P670,738,289.98	P4,850,680,562.55	P5,521,418,852.53
Less: Undeclared Portion	9,730,719.93		9,730,719.93
Substantiated Zero-Rated Receipts	**P661,007,570.05**	**P4,850,680,562.55**	**P5,511,688,132.60**

Anent the second and third requirements, the Court in Division declared that out of the reported input VAT of P25,749,880.18 only the amount of P15,550,088.76 was substantiated. The Court in Division denied the amount of P10,199,791.42 for failure to meet the substantiation requirements prescribed under Sections 110 (A) and 113 (A) of the NIRC, as implemented by Sections 4.104-1, 4.104-5 & 4.108-1 of Revenue Regulations No. 7-95. Below is the breakdown of the P15,550,088.76 input taxes, representing respondent's valid claim:[9]

Findings	Reference (Annexed to Exhibit Y)	Valid Input VAT
1. Input taxes claimed on purchases of goods and services and	Annex 4	P14,654,160.66

[8] *Rollo*, p. 38.
[9] *Id.*, at pp. 41 – 42.

	importation of goods which are properly substantiated for VAT purposes		
2.	Input taxes claimed on importation of goods which are supported by the following documents:		
	a. Importation of goods supported by a photocopy of Import Entry Internal Revenue Declaration (IEIRD) and an original BOC OR	Annex 5	614,732.00
	b. Importation of goods supported by original IEIRDs but with no BOC Ors	Annex 6	201,774.00
	c. Importation of goods supported by a photocopy of IEIRD and an original LBP OR	Annex 8	77,231.00
	d. Input tax on brokerage and other service fees paid to brokerage companies supported by a TIN-VAT OR	Annex 32	2,191.10
Total Valid Input VAT			**P15,550,088.76**

The Court in Division then proceeded to determine whether the substantiated input VAT of P15,550,088.76 was applied against any output VAT. It ruled that:

> A perusal of petitioner's[10] Quarterly VAT Returns for the subject period of claim shows that it was only in the third quarter of 2001 that petitioner incurred an output tax liability in the amount of P36,534,775.90 on taxable sales of P365,347,759.00. Such output tax was partially offset by petitioner against its reported creditable VAT withheld in the amount of P21,920,865.53 and VAT payment for July 2001 in the amount of P13,015,106.29.
>
> To prove the actual withholding of the creditable VAT withheld of P21,920,865.53, petitioner presented Certificates of Creditable Tax Withheld at Source issued by PNOC-EDC for the months of July, August and September 2001, which reflected creditable VAT withheld in the amount of P33,684,203.31 which is higher than the reported amount of P21,920,865.53, as shown below:

	Per VAT Return (Exhibits G, G-8)	Per Supporting Documents **(Exhibits II,KK,LL)**
6% VAT withheld by PNOC-EDC		
July	P21,522,261.20	P21,588,154.66
August	398,604.33	11,697,444.32
September	-	398,604.33
Total 6% VAT withheld by PNOC-EDC	**P21,920,865.53**	**P33,684,203.31**

[10] Herein Respondent.

> Since petitioner did not file an amended VAT return to reflect the higher creditable VAT withheld of P33,684,203.31, this Court shall consider the amount of P21,920,865.53 as the basis for the computation of petitioner's claim.
>
> As regards the VAT payment of P13,015,106.29, petitioner was able to prove actual payment thereof through the presentation of the machine validated Monthly VAT Declaration for July 2001 and corresponding bank official receipt *(Exhibits "II-1" & "JJ-1")*.
>
> After applying the creditable VAT withheld of P21,920,865.53 and monthly VAT payment of P13,015,106.29 totalling to P34,935,971.82 against petitioner's output tax liability of P36,534,775.90, there still remains an output tax due of P1,598,804.08, which shall be offset against the substantiated input VAT of P15,550,088.76. Thus, only the net input VAT amount of P13,951,284.68 is unutilized or unapplied, as of the fourth quarter of 2002.
>
> Although petitioner carried-over the subject claim to the succeeding taxable quarters until the fourth quarter of 2003 *(Exhibits "R" to "U", inclusive of submarkings)*, the same remained unapplied as petitioner had no output VAT liability during those quarters. Moreover, in its VAT return for the third and fourth quarters of 2003 *(Exhibits "T-4" & "U-4")*, petitioner deducted the said input VAT as "Any VAT Refund/TCC Claimed" from the "Total Available Input Tax." This means that the substantiated claim of P13,951,284.68 can no longer be used as credit against petitioner's future output VAT liability.[11]

Since both administrative and judicial claims were found to have been filed well within the two-year prescriptive period, the Court in Division found respondent to have complied with all the requirements set forth in Section 112 (A) of the NIRC. Accordingly, the Court in Division declared respondent entitled to a refund or issuance of a tax credit certificate, representing unutilized input VAT attributable to zero-rated sales for the third and fourth quarters of

[11] *Rollo*, pp. 42 - 44.

2001 and all the four quarters of 2002, but in the reduced amount of P13,926,697.51, computed as follows:[12]

Output VAT		P36,534,775.90
Less: Tax credits/payment		
Creditable VAT Withheld	P21,920,865.53	
VAT payment – July 2001	13,015,106.29	34,935,971.82
Output VAT still due		P 1,598,804.08
Less: Substantiated Input VAT		15,550,088.76
Excess Input VAT Attributable to Zero-Rated Receipts		P13,951,284.68
Multiply by the ratio of:		
Substantiated Zero-rated Receipts	5,511,688,132.60	
Divided by: Total Zero-Rated Receipts	÷5,521,418,852.53	0.998237641
Refundable Excess Input VAT Attributable to Zero-Rated Receipts		**P13,926,697.51**

Thus, the Court in Division disposed of the case in this wise:

> **WHEREFORE**, premises considered, the present Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent[13] is hereby **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner[14] the reduced amount of **THIRTEEN MILLION NINE HUNDRED TWENTY-SIX THOUSAND SIX HUNDRED NINETY-SEVEN AND 51/100 PESOS (P13,926,697.51),** representing the unutilized input VAT attributable to zero-rated sales for the third and fourth quarters of 2001 and all four quarters of 2002.
>
> SO ORDERED.[15]

On December 12, 2008, respondent filed a "Motion for Partial Reconsideration."[16]

Subsequently thereafter, on December 15, 2008, the petitioner filed by registered mail his "Motion for Partial Reconsideration,"[17] to which respondent filed its "Comment/Opposition."[18]

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[12] *Rollo,* p. 46.
[13] Herein Petitioner.
[14] Herein Respondent.
[15] *Rollo,* p. 46.
[16] *Records,* C.T.A. Case Nos. 6792 & 6837, pp. 860 - 876.
[17] *Id.,* at pp. 879 – 886.
[18] *Id.,* at pp. 890 - 902.

On March 9, 2009, the Court in Division denied both "Motions for Partial Reconsideration" for lack of merit.[19]

The Issues

Hence, the instant Petition for Review where the petitioner alleges that:

> THE HONORABLE SECOND DIVISION OF THE COURT OF TAX APPEALS ERRED IN RESOLVING THAT RESPONDENT IS ENTITLED TO A PARTIAL REFUND OF ITS UNUTILIZED EXCESS INPUT VALUE-ADDED TAX ATTRIBUTABLE TO ITS ZERO-RATED SALES FOR THE PERIOD 3RD AND 4TH QUARTER OF 2001 AND ALL FOUR QUARTERS OF 2002.
>
> PETITIONER[20] HAS FILED THIS PETITION FOR REVIEW PREMATURELY IN VIOLATION OF SECTION 112 (D) OF THE NIRC.[21]

Petitioner's Arguments

Petitioner contends that although the respondent filed administrative claims for refund, the same are considered merely *pro forma* as the respondent failed to submit before the petitioner all the necessary documentary evidence to prove its entitlement thereto. Petitioner also points out respondent's alleged failure to prove compliance with the prescribed checklist of requirements to be submitted involving claims for VAT refund pursuant to Revenue Memorandum Order No. 53 -98 ("RMO No. 53 - 98"), which to the mind of petitioner is a condition *sine qua non* prior to the filing of a judicial claim in accordance with the provision of Section 112 of the NIRC.

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[19] *Rollo*, pp. 48 – 50.
[20] Herein Respondent.
[21] *Rollo*, pp. 10 and 15.

Petitioner also argues that the filing of the Petition for Review with the Court in Division was premature, as the petitioner had 120 days within which to process claims for refund of unutilized input tax, pursuant to Section 112 (D) of the NIRC.

Respondent's Counter-Arguments

For its part, respondent counters that it satisfactorily proved by competent evidence its right to claim for a refund. It maintains that it duly complied with the requirements in filing its administrative claims for refund with the Bureau of Internal Revenue ("BIR"), including the submission of necessary and relevant documents in support of its administrative claims for refund. It argues that the alleged non-submission of relevant documents does not bar respondent from resorting to judicial review. According to respondent, Section 112 (D) of the NIRC does not state that non-submission of the necessary and relevant documents before the BIR will bar the taxpayer seeking a refund of its excess and/or unutilized input VAT from resorting to available judicial remedies. As to the petitioner's allegation that respondent failed to prove its compliance with the prescribed checklist of requirements under RMO No. 53-98, respondent argues that the Court has its own rules in determining respondent's entitlement to its claim for a refund.

In addition, respondent avers that the petitioner cannot change his theory on appeal. Petitioner is estopped from arguing that Section 112 of the NIRC prevails over Section 229 of the same Code, when he himself invoked that respondent's administrative and judicial claims for refund must be filed within the prescribed period provided under the two provisions.

Finally, respondent asserts that the doctrine of exhaustion of administrative remedies is not an absolute rule. Such rule may be relaxed when its application may cause great and irreparable damage, which cannot otherwise be prevented except by taking the opportune appropriate court action.

The Ruling of the Court En Banc

The Petition for Review is bereft of merit.

The Court *En Banc* shall first resolve the issue of whether respondent's non-submission of relevant documents in the administrative level is fatal to its claim.

Non-submission of supporting documents in the administrative level is not fatal to a claim for refund

Section 112 (D)[22] of the NIRC provides:

> **SEC. 112.** ***Refunds of Tax Credits of Input Tax. –***
>
> xxx xxx xxx
>
> **(D) Period within which Refund or Tax Credit of Input of 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

[22] Now Section 112 (C) of the NIRC, as amended by RA 9337.

> 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 the Court of Tax Appeals.
>
> xxx xxx xxx

A careful reading of the above-quoted provision reveals that although the submission of the complete supporting documents is necessary for the granting of refund or tax credit certificate, the non-submission of the same with the petitioner does not make the administrative claim for refund or tax credit certificate invalid or *pro forma,* the effect of which makes the judicial appeal dismissible for lack of jurisdiction. What is clearly required is that the taxpayer must elevate its claim before the Court within 30 days from receipt of the denial of its claim for refund/tax credit or after the expiration of the 120-day period granted to respondent to decide on the taxpayer's, which must all be done within two years from payment of the tax or penalty.[23]

In the same light, respondent's non-compliance with the requirements listed under RMO No. 53-98 is not fatal. The requirements listed under RMO No. 53-98 refer mainly to the requirements for refund of tax credit in the administrative level for purposes of establishing the authenticity of a taxpayer's claim for refund or tax credit. However, in the judicial level or when the case is elevated to the Court, the Rules of Court governs.[24] In this connection, it may not be amiss to mention that the question of whether or not the evidence submitted

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[23] Commissioner of Internal Revenue v. CE Cebu Geothermal Power Company, Inc., C.T.A. EB No. 435 (C.T.A. Case Nos. 7181 & 7278), May 5, 2009, *citing CE Cebu Geothermal Power Company, Inc. v. Commissioner of Internal Revenue, C.T.A. Case Nos. 6791 and 6836, October 6, 2008.*

[24] Commissioner of Internal Revenue v. Visayas Geothermal Power Company, Inc., C.T.A. EB Case No. 282 (C.T.A. Case Nos. 6790 & 6838), November 20, 2007, *citing Jideco Manufacturing Corporation v. Commissioner of Internal Revenue, C.T.A. Case No. 6552, September 16, 2004.*

by a party is sufficient to warrant the granting of its prayer lies within the sound discretion and judgment of the Court.[25]

Having settled the first issue, the Court *En Banc* shall now proceed to resolve the issue of whether the Petition for Review was prematurely filed before the Court in Division.

The Petition for Review was not prematurely filed before the Court in Division

Records show that respondent filed its administrative and judicial claims for the refund of its unutilized VAT for the third quarter of taxable year 2001, on September 26 and 30, 2003, respectively, and its administrative and judicial claims for the refund of its unutilized VAT for the fourth quarter of 2001 and for all the quarters of 2002, on December 18 and 19, 2003, respectively.[26]

As the Court *En Banc* sees it, the mere fact that the judicial claims for refund were filed by respondent barely a day or a few days after it filed its administrative claims for refund does not make the administrative claims *pro forma*.

In the case of "*Commissioner of Internal Revenue v. CE Cebu Geothermal Power Company, Inc., and vice versa,*"[27] the Court *En Banc* already explained that the use of the word "may" in Section 112 (D) indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is

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[25] El Greco Ship Manning and Management Corporation v. Commissioner of Customs, C.T.A. EB No. 172 (C.T.A. Case No. 6618), March 14, 2007.
[26] *Rollo*, pp. 24 – 25.
[27] C.T.A. EB Nos. 426 & 427 (C.T.A. Case Nos. 6791 & 6836), May 29, 2009.

within the 2-year prescriptive period under Section 229[28] of the NIRC. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect. Simply put, the taxpayers need not wait for the lapse of the 120-day period before lodging their judicial claim.

It bears stressing that when the 2-year period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue ("CIR") has not been acted upon, for the protection of the interest of the taxpayer, he should file a Petition for Review with the Court of Tax Appeals ("CTA") within the said 2-year period; otherwise, if the decision of the CIR is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the CTA.[29]

Moreover, a taxpayer cannot be faulted for taking advantage of the full two-year period set by law for filing his claim for refund for there is no provision in the NIRC requiring that the claim for refund be filed at the earliest instance in order to give the CIR an opportunity to rule on it and the CTA to review the ruling of the CIR on appeal.[30]

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[28] SECTION 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.

[29] Commissioner of Internal Revenue v. San Roque Power Corporation, C.T.A. EB No. 408 (C.T.A. Case No. 6647), March 25, 2009.

[30] Commissioner of Internal Revenue v. Mitsubishi Motors Philippines Corporation, C.T.A. EB No. 296, (C.T.A. Case No. 6426), December 18, 2007.

In view of the foregoing, the Court *En Banc* finds no reason to disturb the findings and conclusion of the Court in Division, as these are supported by the evidence on record and are consistent with prevailing laws and jurisprudence. As the Court *En Banc* has consistently declared, in the absence of abuse or improvident exercise of authority, findings of facts made by the Court in Division, especially if supported by the evidence, must be accorded deference and respect.[31]

WHEREFORE, the instant Petition for Review is hereby **DISMISSED**. Accordingly, the Decision dated November 25, 2008 and the Resolution dated March 9, 2009 are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

[31] Union Refinery Corporation v. Commissioner of Customs, C.T.A. EB No. 149 (C.T.A. Case No. 5917), January 15, 2007.

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 this Court.

ERNESTO D. ACOSTA
Presiding Justice