Republic of the Philippines
**COURT OF TAX APPEALS**
Quezon City

***EN BANC***

| | |
|---|---|
| **CE LUZON GEOTHERMAL POWER COMPANY, INC.,** *Petitioner,* | **CTA EB Case No. 591** (CTA Case No. 7558) |
| -versus- | *For: Refund or Issuance of a Tax Credit Certificate* |
| **COMMISSIONER OF INTERNAL REVENUE,** *Respondent.* | |

x-----------------------------------------------x

| | |
|---|---|
| **COMMISSIONER OF INTERNAL REVENUE,** *Petitioner,* | **CTA EB Case No. 628** (CTA Case No. 7558) |
| -versus- | Present: ACOSTA, P.J., CASTAÑEDA, JR. BAUTISTA UY CASANOVA PALANCA-ENRIQUEZ FABON-VICTORINO MINDARO-GRULLA COTANGCO-MANALASTAS, JJ. |
| **CE LUZON GEOTHERMAL POWER COMPANY, INC.,** *Respondent.* | Promulgated: OCT 0 4 2011 *Apolinario 9:00 a.m.* |

x----------------------------------------------------------------------------------x

# DECISION

***MINDARO-GRULLA, J.:***

Submitted for decision are two (2) consolidated Petitions for Review before the Court *En Banc*, separately filed by the respective parties on February 24, 2010[1] and May 12, 2010[2] under *Section 2(a)(1), Rule 4*, in relation to *Section 4(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended*, of the Decision[3] and Amended Decision[4] dated June 24, 2009 and January 19, 2010, respectively, rendered by the Former Second Division of this Court.

CE Luzon Geothermal Power Company, Inc. ("CE Luzon") prays for the Court *en banc* to reverse and to set aside the Amended Decision dated January 19, 2010 insofar as the Court *a quo* disallowed the unutilized input VAT in the amount of P3,268,066.40; and to issue a Decision granting in full its claim for refund or issuance of a TCC for its unutilized input VAT for the four (4) quarters of CY 2005 in the total amount of P20,546,004.87.

On the other hand, the Commissioner of Internal Revenue ("CIR") prays for the Court *en banc* to reverse and to set aside the Amended Decision dated January 19, 2010 and Resolution dated April 22, 2010

[1] Filed by CE Luzon Geothermal Power Company, Inc. within the extended period of time granted by *En Banc* in a Resolution dated February 10, 2010, docketed as CTA EB No. 591.
[2] Filed by Commissioner of Internal Revenue, docketed as CTA EB No. 628.
[3] Penned by Associate Justice Olga Palanca-Enriquez and concurred in by Associate Justices Juanito C. Castañeda, Jr. and Erlinda P. Uy, CTA EB No. 591, Docket, pp. 59-83.
[4] Penned by Associate Justice Olga Palanca-Enriquez and concurred in by Associate Justices Juanito C. Castañeda, Jr. and Erlinda P. Uy, CTA EB No. 591, Docket, pp. 85-103.

and to issue another Decision denying CE Luzon's entire claim for refund.

The antecedent facts as culled from the Decision of the Court *a quo* dated June 24, 2009 are as follows:

**"THE PARTIES**

Petitioner 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 Ayala Avenue, Makati City.

Respondent, 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 decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes. He may be served with summons, pleadings and other legal processes at his office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

**THE FACTS**

The antecedent facts of the case are as follows:

Petitioner is engaged in the business of power generation for which it was accredited and certified to as such by the Department of Energy, as evidenced by its DOE Certificate of Accreditation (OSAC94-12) issued on June 15, 1994 *(Exhibit "B")*. Petitioner is a registered value added tax (VAT) taxpayer with the Bureau of Internal Revenue evidenced by its Certificate of Registration with Tax Identification Number 003-924-356-000 *(Exhibit "C")*.

On the following dates, petitioner filed with the BIR its Original Quarterly VAT Returns for the first to fourth quarters of 2005, respectively:

| Taxable Quarter | Date of Filing of Original Return |
|---|---|
| 1st | April 25, 2005 |
| 2nd | July 25, 2005 |
| 3rd | October 25, 2005 |
| 4th | January 25, 2006 |

ℓ

On the following dates, petitioner filed with the BIR its Amended Quarterly VAT Returns for the first to fourth quarters of 2005, reflecting excess or unutilized VAT credits arising from petitioner's domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods:

| 2005 Taxable Quarter | Date of Filing of Amended Return | Excess/Unutilized VAT Credits | | | | Total (P) |
|---|---|---|---|---|---|---|
| | | Domestic Purchases Goods Other than Capital Goods (P) | Domestic Purchases Services (P) | Services Rendered by Non-Residents (P) | Importation – Goods Other than Capital Goods (P) | |
| 1st | January 12, 2006 | 534,507.06 | 5,957,152.09 | 460,519.69 | 176,684.00 | 7,128,862.84 |
| 2nd | January 12, 2006 | 1,213,592.81 | 2,179,539.80 | 30,471.40 | 319,222.00 | 3,742,826.01 |
| 3rd | January 12, 2006 | 1,091,122.97 | 2,690,938.31 | 0 | 1,306,800.00 | 5,088,861.28 |
| 4th | April 10, 2006 | 965,895.81 | 2,514,421.72 | 337,660.21 | 767,477.00 | 4,585,454.74 |
| Total | | 3,805,118.65 | 13,342,051.92 | 828,651.30 | 2,570,183.00 | 20,546,004.87 |

On November 30, 2006, petitioner filed its administrative claim for refund of unutilized input VAT for the four quarters of taxable year 2005.

In view of respondent's inaction, on January 3, 2007, petitioner filed its judicial claim for refund with this Court, docketed as C.T.A. Case No. 7558.

In his Answer, respondent alleged by way of special and affirmative defenses:

> '4. Petitioner's claim for refund is subject to administrative investigation/examination by the Bureau;
>
> 5. The amount of P20,546,004.87 being claimed by petitioner as alleged unutilized input VAT from its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods for the first to fourth quarters of taxable year 2005 was not properly documented;

6. 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;

7. 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 National Internal Revenue Code of 1997 (NIRC of 1997);

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 NIRC of 1997;

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 P20,546,004.87 allegedly paid by the petitioner on its purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods for the first to fourth quarters of 2005 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 quarter or 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) of the NIRC of 1997;

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 NIRC of 1997, and in pursuance to Section 4.104-5 (a) and (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);

8. The petition for review is premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112 (D) of the NIRC of 1997, the 120-day period starts to run on 30 November 2006, the date when it filed its administrative claim for refund. The said period is yet to expire on 10 March 2007. Hence, the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 9 April 2007. This being so, this Honorable Court

> has no jurisdiction to act on the instant petition for review.
>
> 9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and such, they were looked upon with disfavor *(Western Minolco Corp., vs. Commissioner of Internal Revenue, 124 SCRA 1211)*.'

> Petitioner presented Leilah Yasmin E. Alpad and Jerome Antonio B. Constantino, as witnesses, and documentary evidence, marked as Exhibits "A" to "AAA", inclusive of their submarkings, which were all admitted by the Court.
>
> On the other hand, respondent's counsel manifested that he will not be presenting evidence and submitted the case for decision.
>
> Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice, afterwhich the case shall be deemed submitted for decision.
>
> Both parties having complied thereto, the petition was deemed submitted for decision on July 25, 2008.
>
> However, on August 29, 2008, petitioner filed a "Motion to Admit Reply Memorandum" and its "Reply Memorandum (To Respondent's Memorandum dated July 18, 2008", which the Court granted in a Resolution dated September 4, 2008."[5]

On June 24, 2009, the Former Second Division of this Court rendered a Decision[6] partially granting CE Luzon's claim for unutilized input VAT refund/credit in the reduced amount of P14,879,312.65 for the four (4) quarters of calendar year 2005. In partially granting the petition, the Court *a quo* held that CE Luzon sufficiently complied with

[5] CTA EB No. 591, Docket, pp. 60-65.
[6] *Supra* note 3.

the requisites under Sections 110(B) and 112(A) of the National Internal Revenue Code (NIRC) of 1997, as amended, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the present Petition for Review is **PARTLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **FOURTEEN MILLION EIGHT HUNDRED SEVENTY NINE THOUSAND THREE HUNDRED TWELVE AND 65/100 (P14,879,312.65)**, representing unutilized input VAT paid on its domestic purchases of non-capital goods and services rendered by non-residents and importation of non-capital goods which are attributable to zero-rated sales for calendar year 2005.
>
> **SO ORDERED.**"

Both parties filed their Motions for Partial Reconsideration dated July 14, 2009[7] and July 16, 2009[8], respectively.

In an Amended Decision[9] dated January 19, 2010, the Former Second Division of this Court denied for lack of merit CIR's Motion for Partial Reconsideration; while CE Luzon's Motion for Partial Reconsideration was partly granted insofar as it has sufficiently proven its entitlement to additional input VAT in the amount of P2,398,625.82. The dispositive portion of the said Amended Decision reads:

> "**WHEREFORE**, premises considered:

---

[7] Filed by Commissioner of Internal Revenue.
[8] Filed by CE Luzon Geothermal Power Company, Inc.
[9] *Supra* note 4.

1) As regards petitioner CE Luzon Geothermal Power Company, Inc.'s "Motion for Partial Reconsideration" – the same is hereby **PARTLY GRANTED**. Accordingly, the dispositive portion of our Decision dated June 24, 2009 is hereby **AMENDED** to read, as follows:

> "**WHEREFORE**, premises considered, the present Petition for Review is **PARTLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner the reduced amount of **SEVENTEEN MILLION TWO HUNDRED SEVENTY SEVEN THOUSAND NINE HUNDRED THIRTY EIGHT and 47/100 PESOS (P17,277,938.47)**, representing unutilized input VAT paid on its domestic purchases of goods and services which are attributable to zero-rated sales for calendar year 2005.
>
> **SO ORDERED**.'; and

2) As regards respondent Commissioner of Internal Revenue's "Motion for Partial Reconsideration" – the same is hereby **DENIED** for lack of merit.

**SO ORDERED**."

Undaunted, CIR filed a Motion for Partial Reconsideration[10] of the aforesaid Amended Decision; while CE Luzon filed a Petition for Review[11] before the Court *En Banc*.

In a Resolution dated April 22, 2010,[12] the Court *a quo* denied CIR's Motion for Partial Reconsideration for lack of merit. Thereafter, CIR filed a Petition for Review[13] before the Court *En Banc*.

[10] Dated February 9, 2010.
[11] Dated February 24, 2010.
[12] CTA EB No. 628, Docket, pp. 40-41.
[13] Dated May 12, 2010.

Hence, these consolidated Petitions for Review.

CE Luzon submits the issues, as follows:

1. The CTA-Division erred when it failed to consider in evidence petitioner's documents supporting input VAT on payments to non-resident suppliers of services;

2. The CTA-Division erred when it failed to consider in evidence the certified true copies of the official receipts and invoices issued by petitioner's suppliers;

3. The CTA-Division erred when it ruled that some of petitioner's official receipts and invoices supporting its unutilized input VAT did not comply with the invoicing requirements of the National Internal Revenue Code of 1997 (the "Tax Code"). The CTA-Division failed to appreciate the legal ramifications of *Intel* relative to the rules on substantiation of input VAT;

4. The CTA-Division erred when it failed to consider that respondent was deemed to have waived or abandoned any objection with respect to the alleged failure of petitioner's supporting documents to comply with invoicing requirements. Respondent failed to raise such issue during trial;

5. The CTA-Division erred when it increased the burden of proof in civil cases from a mere preponderance of evidence to a much higher standard.[14]

On the other hand, the CIR proffers the sole issue, which states:

> The Former Second Division erred in granting respondent's claim for refund in the reduced amount of P17,277,938.47 allegedly representing unutilized input VAT paid on its domestic purchases of non-capital goods and services rendered by non-residents and importation of non-capital goods which are attributable to zero-rated sales for calendar year 2005 because respondent has not sufficiently proved its

---

[14] CTA EB No. 591, Docket, pp. 19-20.

> entitlement to refund and that the claim was not filed in accordance with the procedure prescribed by law.[15]

Based on the foregoing issues raised, the principal issue is whether or not CE Luzon is entitled to its claim for refund/credit in the amount of P20,546,004.87, representing unutilized input VAT paid on its domestic purchases of non-capital goods and services rendered by non-residents and importation of non-capital goods which are attributable to zero-rated sales for calendar year 2005.

However, the Court shall first rule on the issue of premature filing of the petition for review raised by the CIR.

The CIR vigorously argues, among others, that CE Luzon's petition for review filed before the Court *a quo* was premature for failure to adhere with the one hundred twenty (120)-day period provided under Section 112(D) of the NIRC of 1997, as amended. The CIR maintains that CE Luzon can only appeal before this Court within thirty (30) days reckoned from the expiration of the 120-day period granted by law or from receipt of the decision denying the claim for refund. Hence, in view of CE Luzon's failure to submit the complete documents in support of its administrative claim for refund, the 120-day period started to run

---

[15] CTA EB No. 628, Docket, p. 4.

on the date of its filing of administrative claim, *i.e.* November 30, 2006, and to expire on March 10, 2007. Thus, the judicial appeal may be resorted to only within 30 days from March 10, 2007 or until April 9, 2007. Considering that CE Luzon filed its judicial appeal on January 3, 2007, the CIR concludes that the Court has no jurisdiction over the instant case, pursuant to Section 112 (D) of the 1997 NIRC.

In opposition, CE Luzon asserts that Section 112 (D) of NIRC of 1997, as amended, does not require that the CIR should be given the full 120-day period within which to decide on the administrative claim for refund before a taxpayer can seek judicial remedy. Instead, CE Luzon avers that the prevailing jurisprudence at the time it filed its judicial claim for refund is that a taxpayer has a full two (2)-year period reckoned from the date of payment of tax within which to file both its administrative and judicial claims for VAT refund. Hence, it should not be faulted for adhering to the provisions of law, as well as prevailing jurisprudence on the matter.

We rule in favor of CIR.

Suffice it to say that the afore-mentioned issue raised by the CIR is no longer novel as the same was squarely raised and passed upon in the recent case of ***Commissioner of Internal Revenue v. Aichi Forging*** C

***Company of Asia, Inc.***[16] *(the "Aichi Case")*, wherein the Supreme Court finally laid to rest the issue of prescription insofar as the filing of an administrative claim for unutilized input VAT refund/credit before the CIR and its subsequent judicial appeal before the CTA, pursuant to Section 112 of NIRC of 1997, as amended.[17] The pertinent portion of the said decision reads:

> "The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [G.R. No. 172129, September 12, 2008, 565 SCRA 154]*, where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.
>
> x x x
>
> x x x To be clear, **Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period should be reckoned from the close of the taxable quarter when the sales were made.**
>
> x x x
>
> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.
>
> There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two years** after the close of the taxable quarter when the sales were made, **apply for the issuance of a tax**

[16] G.R. No. 184823, October 6, 2010.

[17] In a Resolution dated December 6, 2010, the First Division of the Supreme Court denied with finality the Motion for Reconsideration filed by Aichi Forging Company of Asia, Inc. in the case entitled: Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc, *supra* note 16.

> **credit certificate or refund** of creditable input tax due or paid attributable to such sales." **The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA.** This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)" within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. **The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA.** As we see it then, **the 120-day period is crucial in filing an appeal with the CTA.**
>
> With regard to *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc. [130 Phil. 12 (1968)]* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.
>
> In fine, **the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA."** [Emphasis supplied.]

Significantly, it is emphasized that the Supreme Court, in interpreting Section 112 of NIRC of 1997, as amended, distinguished the prescriptive period for filing an administrative claim for unutilized input VAT refund/credit before the CIR from the consequent judicial appeal before this Court. To recapitulate, the filing of an administrative claim for unutilized input VAT refund/credit before the CIR must be made within two (2) years after the close of the taxable quarter when the sales were made pursuant to Section 112(A) of NIRC of 1997, as amended;[18] while the filing of a Petition for Review with this Court must be made within thirty (30) days reckoned from either the receipt of the CIR's decision denying the claim or after the expiration of the 120 day-period for the CIR to act on the claim in accordance with Section 112(D) of the NIRC of 1997, as amended.[19]

The Supreme Court clearly and categorically ruled that failure on the part of the taxpayer to adhere with the 120-day period under

---

[18] SEC. 112 (A). *Zero-rated or Effectively Zero-rated Sales.* –

> Any VAT registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: x x x

[19] SEC. 112 (D). *Period within which Refund or Tax Credit of Input Taxes shall be Made.*

> In proper cases, **the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes <u>within one hundred twenty (120) days</u> from the date of submission of complete documents in support of the application** filed in accordance with Subsection (A) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may, <u>within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period,</u> appeal the decision or the unacted claim with the Court of Tax Appeals.** [Emphasis supplied.]

Section 112(D) of the NIRC of 1997, as amended, is crucial in filing his/her judicial appeal before this Court and therefore warrants a dismissal of the petition. Simply put, **"the premature filing of taxpayer's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA."**[20]

Applying the foregoing precepts in the instant case, it is undisputable that CE Luzon timely filed its administrative claim for unutilized input VAT refund/credit for the four (4) quarters of calendar year 2005 before the CIR on November 30, 2006 as the same was filed within two (2) years reckoned from the close of the taxable quarter when the sales were made pursuant to Section 112(A) of the NIRC of 1997, as amended. However, as to the timeliness of CE Luzon's filing of judicial appeal, records disclosed that it prematurely filed its Petition for Review before this Court on January 3, 2007 or merely 34 days after it filed its application for refund before the CIR.

Clearly then, CE Luzon failed to heed on the mandatory period of 120 days, which is crucial in filing an appeal with the CTA, as held in the *Aichi Case*. Hence, the filing of CE Luzon's claim for unutilized input VAT refund/credit before the Court *a quo* was premature as there was

[20] Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc, *supra*, emphasis supplied.

yet no decision of the CIR for this Court to review nor was there inaction on the part of the CIR after the lapse of the 120-day period provided under Section 112(D) of the NIRC of 1997, as amended. Therefore, following the rule laid down in *Aichi Case*, the petition for review filed before this Court warrants a dismissal inasmuch as no jurisdiction was acquired by the Court *a quo* to take cognizance of the case.

Time and again, jurisprudence is replete with cases holding that the Court of Tax Appeals is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.[21] Pursuant to *Section 7 of Republic Act (R.A.) No. 9282, amending R.A. No. 1125, otherwise known as the Law Creating the Court of Tax Appeals, and Section 3, Rule 4 and Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals,* it is evidently clear that "the jurisdiction of the Court of Tax Appeals has been expanded to include not only decisions or rulings but inaction as well of the Commissioner of Internal Revenue."[22] More importantly, "*<u>the decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal</u>*,"[23] provided it is filed within 30 days after the receipt of such decision or

[21] *Rizal Commercial Banking Corp. vs. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007, 522 SCRA 144.
[22] *Id.*
[23] *Id.*

ruling, or within 30 days after the expiration of the 120-day period prescribed under Section 112 (D) of the NIRC of 1997 for the Commissioner to act on the claim for tax refund/credit.[24]

Anent CE Luzon's reliance on *Atlas Consolidated Mining Development Corporation v. Commissioner of Internal Revenue*[25] (*the "Atlas Case"*) where the Supreme Court, in resolving a claim for refund/credit of unutilized input VAT on its purchases of capital goods and on its zero-rated sales covering the taxable years 1990 and 1992, harmonized the provisions under Sections 106 and 230 of the 1977 Tax Code, as amended, (now Sections 112 and 229 of NIRC of 1997, as amended) and held that "*it is more practical and reasonable to count the two-year prescriptive period for filing a claim for refund/credit of input VAT on zero-rated sales from the date of filing of the return and payment of the tax due xxx*"[26] is misplaced.

A careful analysis of the *Atlas Case* reveals that the doctrine set forth therein is not applicable in the instant case as it was an interpretation by the Supreme Court of the provisions under the NIRC of

[24] *See Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., supra.*
[25] G.R. Nos. 141104 & 148763, June 8, 2007.
[26] *Id.*

1977, as amended, prior to its amendment by R.A. No. 7716[27] which substantially amended several provisions of the NIRC of 1977, as amended, including Section 106 thereof. Notably, it must be underscored that prior to the passage of R.A. 7716, there was no specific provision on judicial claim for unutilized input VAT refund/credit under Section 106 of the 1977 NIRC, as amended. Hence, this explains the rationale for the need by the Supreme Court in the *Atlas Case* to harmonize the provisions on Refunds or Tax Credits of Input Tax under Section 106 (now Section 112) with the two-year prescriptive period for instituting a suit or proceeding for the Recovery of Tax Erroneously or Illegally Collected under Section 230 (now Section 229) of the NIRC of 1977, as amended.

Accordingly, with the passage of R.A. No. 7716, as amended by R.A. No. 8424[28] and R.A. No. 9337[29], whereby the Legislature clearly and specifically provided for the prescriptive period in filing an administrative claim and a judicial appeal for unutilized input VAT

---

[27] An Act Restructuring the Value-Added Tax (Vat) System, Widening its Tax Base and Enhancing its Administration, And For These Purposes Amending and Repealing The Relevant Provisions of the National Internal Revenue Code, as Amended, and for Other Purposes.
[28] An Act Amending The National Internal Revenue Code, As Amended, And For Other Purposes.
[29] An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, As Amended, and For Other Purposes.

refund/credit under Section 112 of the 1997 NIRC, as amended, the need to harmonize the provisions under Sections 112 and 229 of the NIRC of 1997, as amended, (formerly Sections 106 and 230) is no longer applicable.

As to *Gibbs v. Collector of Internal Revenue*[30] and *College of Oral & Dental Surgery v. Court of Tax Appeals, et al.*[31] similarly relied upon by CE Luzon, We find the same equally inapplicable as the tax provision involved in those cases is Section 306 of the NIRC (now Section 229 of the NIRC of 1997, as amended). The Supreme Court held in the Aichi Case that Section 229 of the NIRC of 1997, as amended, does not apply to claims for refunds/credits of unutilized input VAT under Section 112 of the NIRC of 1997, as amended.

Settled is the rule that "tax refunds are in the nature of tax exemptions which are construed *strictissimi juris* against the taxpayer and liberally in favor of the government."[32] Hence, strict compliance with tax laws, specifically with the requisites set forth under Section 112 (D) of the NIRC of 1997, should be applied in this jurisdiction.

[30] G.R. No. L-13453, February 29, 1960.
[31] G.R. No. L-10446, January 28, 1958.
[32] *Commissioner of Internal Revenue v. Acosta*, G.R. No. 154068, August 3, 2007.

considering that taxes are the lifeblood of the government and the price we pay for civilization.

In view of this Court's finding that the Court *a quo* acquired no jurisdiction over the instant case, We find no cogent reason to further discuss the other issues raised by both parties in their respective Petitions for Review.

**WHEREFORE,** premises considered, the Petition for Review filed by the Commissioner of Internal Revenue is hereby **GRANTED**; while the Petition for Review filed by CE Luzon Geothermal Power Company, Inc. is hereby **DENIED**. Accordingly, the Decision dated June 24, 2009 and the Amended Decision dated January 19, 2010 are hereby **SET ASIDE.** The Petition for Review docketed as CTA Case No. 7558 is hereby **DISMISSED** for having been prematurely filed.

**SO ORDERED.**

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

WE CONCUR:

*(with Concurring and Dissenting Opinion)*
**ERNESTO D. ACOSTA**
Presiding Justice

(with Separate Opinion)

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

(concurs with Presiding Justice Acosta)

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

(concurs with Presiding Justice Acosta)
**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Resolution were reached in consultation among the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court *En Banc*.

**ERNESTO D. ACOSTA**
Presiding Justice

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

**EN BANC**

**CE LUZON GEOTHERMAL POWER COMPANY, INC.**
Petitioner,

-versus-

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

CTA EB NO. 591
(CTA Case No. 7558)

x ------------------------------------------- x.

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

-versus-

**CE LUZON GEOTHERMAL POWER COMPANY, INC.**
Respondent.

CTA EB NO. 628
(CTA Case No. 7558)

Present:

**ACOSTA, *PJ.***
**CASTAÑEDA, Jr.,**
**BAUTISTA,**
**UY,**
**CASANOVA,**
**PALANCA-ENRIQUEZ,**
**FABON-VICTORINO,**
**MINDARO-GRULLA,**
**COTANGCO-MANALASTAS, *JJ.***

**Promulgated:**
OCT 0 4 2011 9:00 a.m.

x- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

## CONCURRING AND DISSENTING OPINION

***Acosta, PJ:***

Although I concur in the final disposition of the case, I respectfully dissent to the ground relied upon by the majority Decision, penned by the Honorable Justice Cielito N. Mindaro-Grulla, in granting the Commissioner Internal Revenue's (CIR)

Petition for Review; consequently, denying the one filed by CE Luzon Geothermal Power Company, Inc. (CE Luzon). With all due respect to my esteemed colleagues, I cannot subscribe to their position that the Court has no jurisdiction over a prematurely filed judicial claim for a refund covering unutilized input Value Added Tax (VAT) attributable to zero-rated or effectively zero-rated sales under Section 112 of the National Internal Revenue Code (NIRC). It is my humble opinion that this Court has jurisdiction to entertain such a refund case for excess/unutilized input VAT albeit prematurely elevated from the administrative level.

Be that as it may, I vote in favor of the CIR's petition mainly due to the fact that CE Luzon failed to establish that it is a *VAT-registered person, whose sales are zero-rated or effectively zero-rated*, and is thus entitled to a refund or tax credit of its unutilized input VAT under Section 112 of the NIRC.

As found by the Court in Division, CE Luzon is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines. It is engaged in the business of power generation and is registered as a VAT taxpayer with the Bureau of Internal Revenue (BIR). It anchors its VAT-zero rating status on paragraph, Section 6 of the Electric Power Industry Reform Act of 2001 (EPIRA). Said Section reads:

> **SEC. 6. Generation Sector.** – Generation of electric power, a business affected with public interest, shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity

Ea

engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

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

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

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

Under the EPIRA, clearly, the VAT-zero rating not only attaches to the product sold but also to the nature of the taxpayer. In order for sales of generated power to be VAT zero-rated, the sale should be effected by a **generation company.**

Although CE Luzon, by virtue of a Certification of Accreditation from the Department of Energy (DOE), has been engaged in the business of power generation even prior to the effectivity of the EPIRA on 26 June 2001, it must first be considered a "generation company' under the law and its implementing rules in order for it to qualify for the VAT zero-rating under the aforequoted section of the EPIRA.

Per the EPIRA and its implementing rules, a *generation company* refers to any person or entity authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. Section 4, Rule 5 of the law's Implementing Rules and Regulations also provides that—

**Section 4. Obligations of a Generation Company**

(a) A [Certificate of Compliance (COC)] shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

Em

(i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility.

(ii) A Generation Facility which has been previously issued a COC shall not be required to secure a COC even if acquired by a new owner: *Provided*, That such new owner shall register with the ERC as specified above. Upon registration, such Person shall be deemed authorized to operate such Generation Facility.

xxx

(Underscoring supplied.)

Thus it is essential for CE Luzon to have first secured a COC under the implementing rules and regulations of the EPIRA before it can be considered a generation company and entitled to the VAT zero-rating.

Based from the facts of the case, CE Luzon only has the certification from the DOE, which is merely one of the requirements, as stated in the aforequoted section above, for a COC from the ERC. It is not the COC required by the rules. The VAT therefore attributable to the sale of generated power by CE Luzon cannot be considered as zero-rated or effectively zero-rated under the EPIRA and Section 112 of the NIRC; and thus any input VAT due therefrom can only be credited against output tax, or any excess thereof be carried over to the succeeding quarter or quarters, as provided under Section 110[1] of the NIRC. Consequently, a claim for refund, administrative or judicial, cannot prosper.

---

[1] **Section 110.** *Tax Credits.* –

A. *Creditable Input Tax.* –

(1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax:

xxx

Ein

Nonetheless, I maintain this position only for CE Luzon's claim covering the first three quarters and a portion of the last quarter of 2005. For the said period, CE Luzon cannot refund its excess input VAT because its sales were **not qualified for VAT zero-rating under the EPIRA**. For the last quarter of the year 2005, particularly after 01 November 2005, when the NIRC was amended by Republic Act No. 9337, whereas I still vote for the denial of the refund claim, I do so however on the ground that **the claim failed to state a cause of action**, the judicial claim having been prematurely filed.

In view of the promulgation of Republic Act No. 9337 on 01 November 2005, which expressly repealed[2] the VAT zero-rating for generation companies and instead placed the VAT zero-rating on the *sale of power or fuel generated through renewable sources of energy*, under the NIRC[3], a portion of CE Luzon's fourth quarter sales for 2005 of generated power thus became zero-rated.

---

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 or quarters. 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.

[2] **SEC. 24.** *Repealing Clause.* - The following laws or provisions of laws are hereby repealed and the persons and/or transactions affected herein are made subject to the value-added tax subject to the provisions of Title IV of the National Internal Revenue Code of 1997, as amended:

...(B) Section 6, fifth paragraph of R.A. No. 9136 on the zero VAT rate imposed on the sales of generated power by generation companies; and

xxx.

[3] **SEC. 108.** *Value-added Tax on Sale of Services and Use or Lease of Properties.* –

xxx

(B) *Transactions Subject to Zero Percent (0%) Rate.* - The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate

xxx

(7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.

Eh

All the same, this portion of CE Luzon's petition should still be dismissed as its Petition for Review was prematurely filed per Section 112 (C). CE Luzon's failure to exhaust the administrative remedy available thereto is fatal to its claim before this Court.

The Petition for Review before the Court in Division was filed on 03 January 2007, thirty four days after its timely administrative claim with the BIR on 30 November 2006. From the bare facts, it is evident that the judicial claim was filed before the issuance of an adverse decision by the BIR, or the lapse of the one hundred twenty (120) day period mandated by Section 112 (C) of the NIRC, which covers refund claims of this nature, *viz*:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* –
>
> ...(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.
>
> <u>In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.</u>
>
> xxx
>
> (Underscoring supplied.)

In not joining the majority in this matter, I advance the view that the failure of petitioner to comply with the above subsection does not rob this Court of jurisdiction over the claim for refund as such merely constitutes a violation of the doctrine of exhaustion of administrative remedies.

Em

The rule on exhaustion of administrative remedies before resorting to the courts means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiar within the competence of the administrative agency, avoidance of interference with functions of such administrative agency by withholding judicial action until the administrative process has run its course, and prevention of attempts to swamp the courts by a resort to them in the first instance.[4] A party seeking an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to court action.[5]

The non-exhaustion of administrative remedies is however *not at all times fatal* to the claimant.

In the case of *Castro vs. Gloria*, GR No. 132174, 20 August 2001, the Supreme Court, citing the case of *Vidad vs. RTC of Negros Oriental*, Branch 42[6], declared that—

> Non-exhaustion of administrative remedies implies absence of cause of action. Where a remedy is available within the administrative machinery, this should be resorted to before recourse can be made to the courts. The doctrine of primary jurisdiction does not warrant a court to arrogate unto itself the authority to resolve a controversy the jurisdiction over which is initially lodged with an administrative body of special competence. (Underscoring supplied.)

The failure to exhaust available administrative remedies will not rob the courts of its jurisdiction over a case as the same is tantamount only to a judicial

---

[4] *Abe-Abe vs. Manta*, L-4827, 31 May 1979.
[5] *Commissioner of Internal Revenue vs. Rosemarie Acosta*, GR No. 154068, 03 August 2007.
[6] 227 SCRA 221.

Em

petition *lacking a cause of action*. In our jurisdiction, the defense of lack of cause of action is not jurisdictional in nature and may be deemed waived if not timely raised in a Motion to Dismiss or in the Answer.[7]

In the case of *Iloilo City Zoning Board of Adjustment and Appeals vs. Gegato Abecia Funeral Homes, Inc.*, GR No. 157118, 08 December 2003, the Supreme Court established that the premature invocation of the court's intervention is thus only fatal to *one's cause of action*. The case though is susceptible of dismissal for such failure to state a cause of action absent any finding of waiver or estoppel, *viz*:

> The settled rule is that before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. <u>The premature invocation of the court's intervention is fatal to one's cause of action.</u>
>
> Accordingly, absent <u>any finding of waiver or estoppels the case is susceptible of dismissal for failure to state a cause of action.</u> This doctrine of exhaustion of administrative remedies is not without practical and legal reasons, for one thing, availment of administrative remedy entails lesser expenses and provides for a speedier disposition of controversies. It is no less true to state that courts of justice for reasons of comity and convenience will shy away from a dispute until the system of administrative redress has been completed and complied with so as to give the administrative agency concerned every opportunity to correct its error and to dispose of the case.[8]

Notably, in the instant case, there was the absence of waiver by respondent of the defense of non-exhaustion of administrative remedies or the lack of a cause of action, as she raised the issue of petitioner's premature filing of the Petition for Review in her Special and Administrative Defenses contained in her Answer, *viz*:

---

[7] Sec. 1, Rule 9 of the Rules of Court.
[8] Citing *Paat v. Court of Appeals*, 334 Phil. 146, 152–153 (1997)

> ...(8) The petition for review is premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112(D) of the NIRC of 1997, the 120-day period starts to run on 30 November 2006, the date when it filed its administrative claim for refund. The said period is yet to expire on 10 March 2007. Hence the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 9 April 2007. This being so, this Honorable Court has no jurisdiction to act on the instant petition for review.

Without touching on this Court's jurisdiction, the premature filing of the Petition for Review exposes it to an attack that it lacks or fails to state a cause of action, which defense is waivable at the election of the opposing party. Upon a finding that there was no waiver of said defense or estoppel, the petition is susceptible of dismissal.

Since there was clearly no waiver or estoppel in the instant case, the portion of the petition, covering claims after 01 November 2005, should likewise be properly dismissed on the ground that it states no cause of action.

**ERNESTO D. ACOSTA**
Presiding Justice

We concur:

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**AMELIA COTANGCO- MANALASTAS**
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

*EN BANC*

**CE LUZON GEOTHERMAL POWER COMPANY, INC.,**
Petitioner,

-versus-

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**CTA EB NO. 591**
(CTA Case No. 7558)

x------------------------------------------------x

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

-versus-

**CE LUZON GEOTHERMAL POWER COMPANY, INC.,**
Respondent.

**CTA EB NO. 628**
(CTA Case No. 7558)

Present:
*Acosta, P.J.*
*Castañeda, Jr.,*
*Bautista,*
*Uy,*
*Casanova,*
*Palanca-Enriquez,*
*Fabon-Victorino,*
*Mindaro-Grulla, and*
*Cotangco-Manalastas, JJ.*

Promulgated:
OCT 04 2011 CwApolinario 9:07 a.m.

x------------------------------------------------------------------------------------------------x

## *SEPARATE OPINION*

*BAUTISTA, J.:*

While I am in harmony with the Court in granting the Petition for Review filed by the Commissioner of Internal Revenue, and thus dismissing the Petition for Review filed by CE Luzon Geothermal Power Company, Inc., I am compelled to vary from the basis of the said opinion of the Court.

Settled is the rule that a claim for refund is in the nature of a claim for exemption; hence, it should be construed in *strictissimi juris* against the taxpayer.[1] Therefore before any claim for refund is allowed, a taxpayer must sufficiently prove that it has complied with all the requirements.

Pursuant to Section 112(A) of the 1997 NIRC, CE Luzon must comply with the following requisites to be entitled to a refund of its input tax, *viz.*:

1. That 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 or effectively zero-rated sales;
4. That the input VAT payments were not applied against any output VAT liability; and
5. That the claim for refund was filed within the two-year prescriptive period.

Following the above-enumerated requirements, a determination must be made whether the generation services rendered by CE Luzon to Philippine National Oil Company - Energy Development Corporation ("PNOC-EDC") for the four quarters of 2005 qualified for VAT zero-rating.

Once a court acquires jurisdiction over a case, it has wide discretion to look upon matters which, although not raised as an issue, would give life and meaning to the law.[2] In light of the foregoing, this Court has the authority to revisit the issue of whether or not petitioner's sales qualify for zero-rated VAT transaction.

---

[1] Commissioner of Internal Revenue v. Tokyo Shipping Co., Ltd., *et al.*, G.R. No. L-68252 May 26, 1995, 244 SCRA 332.
[2] Comilang *v.* Burcena, G.R. No. 146853, February 13, 2006, 482 SCRA 342.

By CE Luzon's own disclosure, it is in the business of power generation for which it has the requisite Department of Energy ("DOE") Certification of Accreditation.[3]

In order for its sale of electricity as a power generation company qualify for VAT zero-rating, it must fall under Section 6 of Republic Act ("R.A.") No. 9136, also known as the "Electric Power Industry Reform Act of 2001," ("EPIRA"), which states:

> SEC. 6. *Generation Sector.* – Generation of electric power, a business affected with public interest shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.
>
> Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.
>
> Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

In the case of *Mindanao I Geothermal Partnership v. Commissioner of Internal Revenue*,[4] this Court, in applying the provisions of R.A. No. 9136, specified the conditions to qualify for VAT zero-rating of power generating companies, *viz*:

---

[3] *Exhibit "B."*

> xxx it is undisputed that Republic Act No. 9136 otherwise known as the "Electric Power Industry Reform Act of 2001" provided for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001. Thus, the pertinent provisions of the National Internal Revenue Code of 1997 are deemed amended by the provisions of R.A. No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.
>
> To qualify for VAT zero-rating under R.A. No. 9136, petitioner must prove that: **1) it is a generation company and 2) it derived sales from power generation**. *(Boldfacing supplied)*

From the above quoted decision, for a power generation company to qualify for VAT zero-rating in accordance with R.A. No. 9136, petitioner must prove the twin requirements of being a generation company and of deriving its sales from power generation.

Notwithstanding the repeal of *RA 9136* under *RA 9337*, which took effect on November 1, 2005, petitioner's sale of generated power continued to be VAT zero-rated under Section 108(B)(7) of the 1997 NIRC, as amended by RA 9337.

[4] CTA Case 6788, October 13, 2005.

f

According to the records, CE Luzon owns and operates a 180-megawatt power plant facility located in Mahanagdong, Province of Leyte, which has been accredited by the Department of Energy, as a Block Power Production Facility (BPPF), since June 15, 1994. It is engaged in the business of power generation and the subsequent sale of generated power to PNOC-EDC. Before the Court can conclude that CE Luzon is a generation company based upon the above cited case and provision of law, a comprehensive study of the entire law and its implementing rules and regulation must be conducted.

Under Section 4(x) of the EPIRA, the term "generation company" is defined as follows:

> **Section 4.** *Definition of Terms.* –
>
> xxx xxx xxx
>
> (x) "Generation Company" refers to any person or entity authorized by the ERC[5] to operate facilities used in the generation of electricity; xxx

Corollary thereto, Section 4 of Rule 5 of the Implementing Rules and Regulations ("IRR") of the EPIRA provides the following:

> **Section 4.** *Obligations of a Generation Company.*
>
> (a) A COC[6] shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

---

[5] Energy Regulatory Commission.
[6] Certificate of Compliance.

(i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by ERC to operate such existing Generation Facility.

Under the EPIRA, part of the obligations of a "generation company" includes the submission within the period ninety (90) days from the effectivity of the Rules to ERC, when applicable, a certificate of DOE[7]/NPC[8] accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. Upon completion of these requirements, the said generation company shall be issued a COC by ERC to operate such existing generation facility.

Thus, the authority to operate a generation facility as a generation company referred to in the preceding provisions pertains to the duly issued COC which must be secured by both a new generation company and an existing generation company to operate a new and existing generation facility, respectively.

In the case of *Toledo Power Company v. Commissioner of Internal Revenue*,[9] the Court ruled that failure of the claimant to submit proof of its approved COC will lead to the disqualification for VAT zero-rating of its sales of generated power under the EPIRA.

---

[7] Department of Energy.
[8] National Power Corporation.
[9] CTA Case No. 6961, November 11, 2009

Again in *GBH Power Resources, Inc. [Formerly: Mirant (Philippines) Island Generation Corporation] v. Commissioner of Internal Revenue,*[10] the Court held that GBH failed to establish that it was a generation company under Section 4(x) in relation to Section 6 of the Electric Power Industry Reform Act of 2001. Petitioner therein failed to submit its ERC registration and Certificate of Compliance, thus it cannot qualify for VAT zero-rating under the EPIRA.

Based on the records of the case, CE Luzon has been accredited and certified by the DOE, as evidenced by its Certificate of Accreditation (OSAC94-12) issued on June 15, 1994[11]. The Court, however, finds the said certificate to be insufficient.

The DOE Certificate of Accreditation is merely one of the requirements mentioned earlier in order to obtain the necessary COC for CE Luzon's sales to qualify for VAT zero-rating.

CE Luzon in its Prefatory Statement itself invokes the provisions of the EPIRA Law. It is asking the Court to recognize that its sale transactions are zero-rated, based on the fact that it has a DOE Certification of Accreditation in accordance with the said law. It would only be logical to determine the eligibility of the said sales transactions based on the requirements set in the EPIRA Law itself. Petitioner must comply with Section 4(a)(i) of Rule 5 of the IRR of the same law, which particularly provides for the required COC to be considered a generation company.

Therefore, for failure to present or even secure a COC duly issued by the ERC, petitioner's sale of generated power cannot qualify for VAT zero-rating under the

---

[10] CTA Case No. 7462, March 26, 2010
[11] *Exhibit "B."*

EPIRA Law.[12] The burden of proof to present this particular document lies within the responsibility of the petitioner to successfully support its claim for refund.

Where the taxpayer claims a refund, the Court as a court of record is required to conduct a formal trial (*trial de novo*) to prove every minute aspect of the claim.[13] In addition, the rule is that the best evidence under the circumstance must be adduced to prove the allegations in a complaint, petition, or protest.

Considering that there is no record showing that CE Luzon has been duly issued with a COC by the ERC, the Court *En Banc* finds it unnecessary to further discuss the other issues raised CE Luzon, and the issues raised by the CIR in its Petition for Review.

In sum, I have no recourse but to deny CE Luzon's claim for refund/tax credit, and therefore, grant the prayer of the CIR.

Accordingly, I vote to **GRANT** the Petition for Review filed by the Commissioner of Internal Revenue, and thus, **DENY** the Petition for Review filed by CE Luzon Geothermal Power Company, Inc.

**LOVELL R. BAUTISTA**
Associate Justice

---

[12] Toledo Power Company *v.* Commissioner of Internal Revenue, CTA Case Nos. 7233 & 7294, December 15, 2009.
[13] Commissioner of Internal Revenue *v.* Manila Mining Corporation, G.R. No. 153204, August 31, 2005, 469 SCRA 571.