REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

SECOND DIVISION

PANAY POWER CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7353

x --- x

PANAY POWER CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7401

Members:

CASTAÑEDA, JR., *Chairperson*
UY, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
MAY 15 2009
9:20 a.m.

x -- x

DECISION

PALANCA-ENRIQUEZ, *J.*:

The reckoning of the two-year prescriptive period for the filing of claims for refund or issuance of a TCC for input VAT under *Section 112(A) of the National Internal Revenue Code ("NIRC") of 1997,* as *amended*, commences from the close of the taxable quarter when the relevant sales were made, regardless of whether said tax was paid or not.

THE CASE

Before the Court are two consolidated Petitions for Review filed by Panay Power Corporation (hereafter "petitioner"), to wit: C.T.A. Case No. 7353 filed on October 26, 2005, which seeks the refund or issuance of a TCC of its unutilized input VAT from its domestic purchases of taxable goods and services attributable to its zero-rated sales of electricity to the National Power Corporation ("NPC") for the period covering the third quarter of calendar year 2003 in the amount of P2,321,820.10, and C.T.A. Case No. 7401 filed on January 18, 2006, which seeks the refund or issuance of a TCC of its unutilized input VAT from its domestic purchases of taxable goods and services attributable to its zero-rated sales of electricity to the NPC for the period covering the fourth quarter of calendar year 2003, in the amount of P6,916,039.97, or the total amount of P9,237,860.07.

THE PARTIES

Petitioner Panay Power Corporation is a corporation duly organized and existing under Philippine laws, with principal office at 2nd Floor, Benpres Building, Meralco Avenue, Pasig City. It is principally engaged in the business of generating power for lighting and power purposes and the wholesale of electric power to the NPC, private electric utilities and electric cooperatives, and for the carrying on of all businesses incident thereto, including but not limited to the sale of by-products of power generation. Petitioner is registered with and authorized by the Energy Regulatory Commission ("ERC") to operate facilities used in the generation of electricity *(Exhibit "B")*, and is likewise registered with the Bureau of Internal Revenue ("BIR") as a value-added tax ("VAT") taxpayer with Tax Identification Number ("TIN") 004-964-861-VAT *(Exhibit "C")*.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credit of erroneously or excessively paid taxes. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

Petitioner filed its Quarterly VAT Returns for calendar year 2003 on the following dates:

Periods	Date of Filing	Exhibit
3rd Quarter	October 27, 2003	*"E"*

4th Quarter – Original	January 26, 2004	*"F"*
Amended	February 20, 2004	*"G"*
Second Amended	July 28, 2004	*"H"*

On December 22, 2004, petitioner filed an administrative claim for refund of unutilized excess input VAT for the four (4) quarters of calendar year 2003 in the amount of P18,002,410.37 with the BIR Revenue District Office No. 043.

Since respondent has not acted on petitioner's administrative claim for refund, petitioner elevated its claim before this Court by way of two separate *Petitions for Review,* docketed as C.T.A. Case No. 7353 and 7401.

CTA Case No. 7353

In C.T.A. Case No. 7353, in his Answer, respondent alleged by way of special and affirmative defenses:

> "6. The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;
>
> 8. The grant of a claim for refund [is] tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
>
> 9. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with

ahl

> clear and unambiguous provision of law supporting the same."

CTA Case No. 7401

While in C.T.A. Case No. 7401, in his Answer, respondent alleged the following:

> "2. He SPECIFICALLY DENIES the allegations in paragraphs 1, 3, 4, 5, 10, 11 and 12 of the petition for lack of knowledge or information sufficient to form a belief as to the truth thereof;
>
> 3. He SPECIFICALLY DENIES the allegations in paragraphs 6, 7, 8, 9, 13 and 14 of the petition for being, as a whole, mere opinions, gratuitous assertions and erroneous conclusions or interpretations of fact and/or the law, the truth of the matter being those stated hereunder;
>
> 4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;
>
> 5. The amount of P6,916,039.97 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of goods and services for the fourth quarter of 2003 is not properly documented;
>
> 6. In an action for refund/credit, 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. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit;

> 8. 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 as such, they are looked upon with disfavor **(Western Minolco Corporation vs. Commissioner of Internal Revenue, 124 SCRA 1211).**"

On April 27, 2006, petitioner filed a *Motion for Consolidation*, praying for the consolidation of CTA Case No. 7401 with CTA Case No. 7353, the case bearing the lower docket number, which the Court granted in a Resolution dated May 26, 2006.

In view of the consolidation, on July 18, 2006, the parties filed their "Joint Stipulation of Facts and Issues" and stipulated the following facts:

> "1. Existence of VAT Ruling No. 050-03 dated December 1, 2003.
>
> 2. On 26 January 2004, petitioner filed its original quarterly VAT return for the fourth quarter of taxable year 2003. The said quarterly VAT return was amended and filed with the BIR on 20 February 2004 and 28 July 2004.
>
> 3. Existence of Sections 112(A) and (D) of the Tax Code.
>
> 4. To date, respondent has not favorably acted upon petitioner's administrative claim for refund."

Petitioner presented Reymonda Aida B. Obrero, its Senior Accounting Manager, Emmanuel Y. Mendoza, the Court-Commissioned

ehl

Independent Certified Public Accountant (CPA), and Ceara A. Cecilio, a Commercial Associate for Global Business Power Corporation, as witnesses, and documentary evidence, marked as *Exhibits "A"* to *"PP"*, inclusive of their submarkings, which were admitted by the Court, except for *Exhibits "A", "A-1", "D-2"* to *"D-6", "E-3"* to *"E-12", "I-5"* to *"I-19", "J-3"* to *"J-10", "M-3"* to *"M-14"*, and *"O-3"* to *"O-17"*, for failure to present their originals for comparison.

On August 4, 2008, the parties filed a "Joint Stipulation of Certain Documents" which the Court noted in a Resolution dated August 8, 2008.

On the other hand, respondent manifested on November 26, 2008, that he has no witness to present, thus he is submitting the case for decision based on the pleadings.

In a Resolution dated November 26, 2008, the Court required the parties to file their simultaneous memoranda, within thirty (30) days from November 26, 2008, afterwhich, the case shall be deemed submitted for decision.

Petitioner having filed its Memorandum on December 23, 2008, without respondent's Memorandum, the case was deemed submitted for decision on January 16, 2009.

Hence, this decision.

ISSUES

As stipulated upon by the parties, the following are the issues for the Court's consideration:

I

WHETHER OR NOT PETITIONER'S POWER GENERATION SERVICES FOR THE THIRD AND FOURTH QUARTERS OF CY 2003 ARE SUBJECT TO ZERO PERCENT (0%) VAT PURSUANT TO THE EPIRA AND ITS IMPLEMENTING RULES AND REGULATIONS.

II

WHETHER OR NOT PETITIONER HAS UNUTILIZED INPUT VAT FOR THE THIRD AND FOURTH QUARTERS OF CY 2003 IN THE TOTAL AMOUNT OF P9,237,860.07 ARISING FROM ITS DOMESTIC PURCHASES OF TAXABLE GOODS AND SERVICES AND IMPORTATION OF GOODS.

III

WHETHER OR NOT THE UNUTILIZED INPUT VAT ARE ATTRIBUTABLE TO ITS ZERO-RATED SALES OF POWER GENERATION SERVICES.

IV

WHETHER OR NOT PETITIONER'S INSTANT CLAIM FOR REFUND WAS SEASONABLY FILED.

V

WHETHER OR NOT THE UNUTILIZED CREDITABLE INPUT TAXES FOR THE THIRD AND FOURTH QUARTERS OF CY 2003 ARE PROPERLY

SUBSTANTIATED BY INVOICES AND OFFICIAL RECEIPTS.

VI

WHETHER OR NOT THE UNUTILIZED INPUT VAT PAYMENTS FOR THE THIRD AND FOURTH QUARTERS OF CY 2003 WERE CARRIED OVER TO AND UTILIZED IN THE SUCCEEDING TAXABLE QUARTER(S) OR APPLIED AGAINST ANY OF THE OUTPUT VAT LIABILITY OF THE PETITIONER.

VII

WHETHER OR NOT PETITIONER IS ENTITLED TO A REFUND AND/OR ISSUANCE OF TAX CREDIT CERTIFICATE FOR THE UNUTILIZED INPUT VAT PAYMENTS IN THE AMOUNT OF P9,237,860.07.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is entitled to refund or the issuance of a TCC in the amount P9,237,860.07, representing unutilized input VAT incurred from its domestic purchases of taxable goods and services attributable to its zero-rated sales of electricity to NPC for the third and fourth quarters of calendar year 2003.

THE COURT'S RULING

We deny the petition.

Petitioner's Quarterly VAT Returns for the third and fourth quarters of calendar year 2003 reflected the following details:

3rd Quarter of 2003	
Output Tax Due	9,336.37
Less: Input Tax	
Input Tax Carried Over from Previous Quarter	27,697,280.21
Domestic Purchases – Capital Goods	10,022.73
Domestic Purchases – Goods other than Capital Goods	1,697,021.62
Domestic Purchases – Services	472,393.12
Importations – Goods other than Capital Goods	151,719.00
Tax Payable/(Overpayment)	**(30,019,100.31)**

(Exhibit "E")

4th Quarter of 2003	
Output Tax Due	13,872.74
Less: Input Tax	
Input Tax Carried Over from Previous Quarter	30,019,100.31
Domestic Purchases – Capital Goods	262,333.07
Domestic Purchases – Goods other than Capital Goods	3,999,945.71
Domestic Purchases – Services	1,316,476.51
Importations – Goods other than Capital Goods	1,351,157.42
Tax Payable/(Overpayment)	**(36,935,140.28)**

(Exhibit "H")

From the foregoing, petitioner claims that it had unutilized input VAT in the amount of P2,321,820.10 for the third quarter and the amount of P6,916,039.97 for the fourth quarter of calendar year 2003.

Being a holder of a Certificate of Compliance issued by the Energy Regulatory Commission, as a Generation Company *(Exhibit "B")*, petitioner cited as basis of its claim for refund *R.A. No. 9136*, otherwise known as the *"Electric Power Industry Reform Act of 2001"* ("EPIRA"), particularly *Sections 4(x) and 6*, which provide:

"SEC. 4. *Definition of Terms:*

(x) '*Generation Company*' refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity."

> "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 implementation of retail competition and open access, the prices charged by a generation company for 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.
>
> 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."

However, in order for petitioner to be entitled to a refund or issuance of a TCC of its unutilized input VAT, it must satisfy the requirements prescribed by *Section 112(A) of the NIRC of 1997, as amended,* to wit:

> "**SEC. 112. Refunds or Tax Credits of Input Tax. -**
>
> **(A) Zero-rated or Effectively Zero-rated Sales.** – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two (2) years after the close of the taxable quarter when the sales were made**, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax; *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales." *(Emphasis supplied)*

Pursuant to the above provision, to be entitled to a refund or issuance of a TCC, petitioner must prove compliance with the following requisites:

1. that there must be zero-rated or effectively zero-rated sales;

2. that the input taxes were incurred or paid;

3. that such input taxes are directly attributable to zero-rated or effectively zero-rated sales;

4. that the input taxes were not applied against any output VAT liability; and

ev

5. that the claim for refund was filed within the two-year prescriptive period.

Prescription

We resolve first the issue on the timeliness of the filing of the instant claim.

Under *Section 112(A) of the NIRC of 1997, as amended*, a VAT registered taxpayer whose sale is 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 refund or issuance of a TCC of its creditable input tax due or paid attributable to such sales.

In the recent case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), G.R. No. 172129, September 12, 2008* (hereafter referred to as the "Mirant Case"), the Supreme Court settled the issue on the reckoning of the prescriptive period and the applicable provisions on claims for refund of input VAT attributable to zero-rated or effectively zero-rated sales, as follows:

> "The claim for refund or tax credit for the creditable input VAT payment made by MPC embodied in OR No. 0189 was filed beyond the period provided by law for such claim. Sec. 112(A) of the NIRC pertinently reads:
>
> (A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales

abl

> 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. (Emphasis ours.)

The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years **reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed."

From the foregoing, it is clear that the two-year prescriptive period provided in *Section 112(A) of the NIRC of 1997, as amended*, should be reckoned not from the payment of the tax, but from the close of the taxable quarter when the sales were made. Applying the provision of *Section 112(A) of the NIRC of 1997, as amended*, and the ruling in the Mirant Case, the following are the pertinent dates to petitioner's claim for refund:

Period (2003)	**Close of Taxable Quarter**	**Last Day for Filing theClaim**
3rd Quarter	September 30, 2003	September 30, 2005
4th Quarter	December 31, 2003	December 31, 2005

Record shows that petitioner filed its administrative claim for refund or issuance of a TCC for the four (4) quarters of 2003 on December 22, 2004 (*Exhibit "D"*), which is well within the prescriptive period.

On the other hand, as to its judicial claim, record shows that for the 3rd quarter of 2003, petitioner filed the Petition for Review on October 26, 2005 *(C.T.A. Case No. 7353 Original Docket, p. 1),* and for the fourth quarter of 2003, petitioner filed the Petition for Review on January 18, 2006 *(C.T.A. Case No. 7401 Original Docket, p. 1)*. Evidently, petitioner's judicial claim for refund/issuance of a TCC for its unutilized input VAT for the third and fourth quarters of calendar year 2003 were filed beyond the prescriptive period. Petitioner, therefore, is barred from claiming refund or issuance of a TCC of its input VAT for the 3rd and 4th quarters of 2003 in the aggregate amount of P9,237,860.07 due to prescription.

In view of the foregoing discussion, the Court finds it no longer necessary to discuss petitioner's compliance with the other requisites for refund of input taxes on its domestic purchases of taxable goods and services attributable to its zero-rated sales.

WHEREFORE, premises considered, the petition is hereby **DENIED DUE COURSE,** and accordingly, **DISMISSED**.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice