REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE GEOTHERMAL, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5541

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 21 1999

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DECISION

This is a Petition seeking for the refund or issuance of a tax credit certificate amounting to Thirty Nine Million Three Hundred Twenty Eight Thousand Seven Hundred Seventy Five and 41/100 (P39,328,775.41), allegedly representing erroneously paid value-added taxes for the period September 1995 to February 1996.

The factual backdrop of the case are as follows:

Petitioner is a resident foreign corporation licensed by the Securities and Exchange Commission (SEC) to engage in the exploration, development, and exploitation of geothermal energy and resources in the Philippines (Exhibit A). In September, 1971, it entered into a service contract with the National Power Corporation (NPC) for the supply of steam which the latter will use in the production of electricity (Exhibit AA).

For the period September 1995 to February 1996, Petitioner billed NPC the 10% VAT on its supply of steam which was not paid by NPC but was allegedly remitted by Petitioner to the BIR amounting to P39,328,775.41, detailed as follows:

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Exhibits	Period covered	Date of Payment	VAT Paid
C	7/95 - 9/95	10/18/95	P 8,977,117.26
H	10/95-12/95	1/18/96	11,248,194.31
M	11/95	12/13/95	8,243,090.27
S	1/96	2/19/96	5,213,400.45
W	2/96	3/18/96	5,646,973.12
Total			P 39,328,775.41

Citing Section 103, in relation to Section 99 of the National Internal Revenue Code, to wit:

"Section 103. Exempt transactions.-The following shall be exempt from the value-added tax:

x x x x x x x x x

(q) Transactions which are exempt under special laws, except those granted under Presidential Decree Nos. 66, 529, 972, 1491 and 1590, and non-electric cooperatives under Republic Act No. 6938, x x x ;"

Petitioner filed an administrative claim for refund with the Bureau of Internal Revenue on July 10, 1996 (Exhibit R). According to Petitioner, the NPC, by virtue of Fiscal Incentives Review Board (FIRB) Resolution 17-87 which was approved by President Aquino pursuant to Executive Order No. 93, is one of those entities expressly exempted from VAT.

As there was no action on the part of herein Respondent, Petitioner filed the instant Petition on July 2, 1997 in order to toll the running of the two-year prescriptive period.

Respondent, in his Answer, claimed by way of Special and Affirmative Defenses that:

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SPECIAL AND AFFIRMATIVE DEFENSES

4. The claim of petitioner Philippine Geothermal Incorporated (PGI for short) for Value-Added Tax refund has no legal basis.

5. Petitioner PGI contends that its supply of steam to the National Power Corporation (NPC) is exempt from Value-Added Tax. Allegedly, it is entitled to a refund on its purported erroneous payments of Value-Added Tax for the period from September 1995 to February 1996 in the total amount of P39,328,775.41.

6. Fiscal Incentives Review Board (FIRB) Resolution 17-87 specifically restored the tax and duty exemption privileges of the NPC, including those pertaining to its domestic purchases of petroleum and petroleum products granted under the terms and conditions of Commonwealth Act 120 as amended, effective March 10, 1987.

   However, the restoration of the tax and duty exemption privileges does not apply to importations of fuel oil (crude equivalents) and coal, commercially-funded importations (i.e. importations which include but are not limited to those foreign-based private financial institutions, etc.) and interest income derived from any source. Such exemption also does not include purchases of goods and services. Hence, any contracting services of NPC is not qualified for zero-rated VAT (VAT Ruling 250-89, October, 1989).

7. It is clear from the aforecited FIRB resolution that the tax exemption privilege granted to NPC does not include purchases of goods and services, such as the supply of steam to NPC.

8. Further, as held by the Honorable Supreme Court in the case of Philippine Acetylene Co. v. CIR, 20 SCRA 1056 (1967), the sales tax must be paid by the manufacturer or producer even if the sale is made to tax-exempt entities like the NPC, an agency of the Philippine Government and to the Voice of America an agency of the US Government.

9. The decision of the Honorable Supreme Court in the case of Maceda v. Macaraig, 223 SCRA 217, [1993] which states that the NPC is exempt from all taxes, duties, fees, imposts, charges and restrictions of the Republic of the Philippines and its provinces, cities and municipalities, is not applicable to this instant petition. What is being exempted in said decision is NPC per se and such exemption is not extended to the supplier or contractor such as the petitioner in the case at bar.

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10. The subject taxes have been paid and collected in accordance with law and regulation.

11. In a claim for refund, it is incumbent upon petitioner to show that it is indubitably entitled thereto. Petitioner's failure to establish the same is fatal to its claim for refund.

12. The present case is no exception to the basic rule that claims for refund are construed strictly against claimant for the same partake of the nature of exemption from taxation. (CIR vs. Ledesma, G.R. No. L-17509, 31 SCRA 95, January 30, 1970).

The sole issue to be resolved is whether or not Petitioner's supply of steam to NPC is a VAT-exempt transaction.

FIRB Resolution No. 17-87 dated June 24, 1987 upon which Petitioner anchors its claim for tax exemption provides that:

> "BE IT RESOLVED, AS IT IS HEREBY RESOLVED, That the tax and duty exemption privileges of the National Power Corporation, including those pertaining to its domestic purchases of petroleum and petroleum products, granted under the terms and conditions of Commonwealth Act No. 120 (Creating the National Power Corporation, defining its powers, objectives and functions, and for other purposes), as amended, are restored effective March 10, 1987, subject to the following conditions:

"1. The restoration of the tax and duty exemption privileges does not apply to the following:

> 1.1 Importation of fuel oil (crude equivalent) and coal;
>
> 1.2 Commercially-funded importations (i.e.,importations which include but are not limited to those financed by the NPC's own internal funds, domestic borrowings from any source whatsoever, borrowing from foreign-based private financial institutions, etc.); and

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1.3 Interest income derived from any source."

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According to Petitioner, this exemption was confirmed by the Supreme Court when it ruled in the case of Maceda v. Macaraig, Jr., 223 SCRA 217 (June 8, 1993), that:

> "It should be stated at this juncture that, as early as May 14, 1954, the Secretary of Justice rendered an opinion, wherein he stated and We quote:
>
> "x x x x x x x x x
>
> Republic Act No. 358 *exempts* the National Power Corporation from *all taxes, duties, fees, imposts, charges, and restrictions of the Republic of the Philippines and its provinces, cities, and municipalities*. This exemption is broad enough to include *all taxes, whether direct or indirect*, which the National Power Corporation may be required to pay, such as the specific tax on petroleum products. That it is indirect is of no moment, for it is the corporation that ultimately pays it. The view which refuses to accord the exemption because the tax is first paid by the seller disregards realities and gives more importance to form than substance. Equity and law always exalt over form."

We agree.

The pronouncement made by the Supreme Court in the above-mentioned case that NPC is exempted from both direct and indirect taxation is clear. Likewise, in said case, the High Court quoted:

> "Tax exemptions are undoubtedly to be construed strictly but not so grudgingly as to defeat their purpose. It is common knowledge that many impositions taxpayers have to pay are in the nature of indirect taxes. To limit the exemption granted the National Power Corporation to direct taxes notwithstanding the general and broad language of the statute will be to thwart the legislative intention in giving exemption

> from all forms of taxes and impositions without distinguishing between those that are direct and those that are not ."

Upon the other hand, the question as to who will shoulder these indirect taxes was answered by a ruling issued to Petitioner by Asst. Commissioner Alicia P. Clemeno of the Bureau of Internal Revenue on March 15, 1996 (Exh. Z), likewise citing the ruling of the Supreme Court in the above-mentioned Maceda v. Macaraig, Jr. case. Said ruling provides that:

> "In reply, please be informed that the Supreme Court has ruled in the case of Maceda v. Macaraig, 223 SCRA 217 (1993), on the issue as to "what kind of tax exemption privileges did NPC have?, to wit:
>
> "A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax exempt from all forms of taxes-direct and indirect."
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> It bears emphasis that in the decision on the same case, the Supreme Court noted that under R.A. No. 350, the exemption was worded in general terms, as to cover "all taxes, duties, fees, imposts, charges, etc. x x x." However, the amendment under R.A. No. 6395 enumerated the details covered by the exemptions. Subsequently, P.D. No. 380, made even more specific the details of the exemption of NPC to cover, among others, both direct and indirect taxes on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from all forms of taxes, duties, fees, imposts, as well as costs and service fees, including filing fees, appeal bonds, supersedeas bonds, in any Court or administrative proceedings. The use of the phrase "all forms" of taxes demonstrate the intention of the law to give NPC all the exemption it has been enjoying before. The rationale for this exemption is that being non-profit, the NPC "shall devote all its return from its capital investment as well as excess revenues from its operation, for expansion. x x x"
>
> In view of the foregoing, this Office is of the opinion as it hereby holds, that the supply of steam by your client, Philippine Geothermal for (PGI) to National Power Corporation NPC/NAPOCOR to be used in generating electricity is exempt from the value-added tax. (BIR Ruling No. 078-95 dated April 26, 1995)

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The supply of steam to NPC by Petitioner being a VAT-exempt transaction, neither Petitioner nor NPC is liable to pay VAT. Petitioner, therefore, may rightfully claim for a refund of the value-added tax paid.

We proceed to the amount to which Petitioner is entitled to refund on the basis of the evidence presented.

Petitioner alleges that for the period covering September 1995 to February 1996, Petitioner billed NPC the 10% VAT on its supply of steam but the latter did not pay and so Petitioner was obligated to pay the same in order to avoid any potential deficiency tax assessments in the future. However, a thorough examination of the evidence submitted by Petitioner revealed that out of the P39,328,775.41 being claimed by Petitioner as having advanced by it, only P9,012,310.11 or that portion pertaining to output tax paid during the month of September plus the interest on late payment on peso cash call (Exhibits Q, Q-1, Q-2 and Q-4) were not paid by NPC. As to the rest of Petitioner's claim, it appears that the official receipts issued by Petitioner to NPC included the VAT payable shown in the Summary of Payments Received from NPC for each production period, thus:

Particulars	Exhibits	Official Receipts	Gross Amount	Output Tax	Amount Paid
November					
95-09 SF	P, P-1	6350	80,413,807.10	8,041,380.71	
95-06 SF-A MPA	N	6351	1,158,924.95	115,892.50	
95-07 SF-A MPA	O, O-1	6351	506,242.13	50,624.21	
					8,243,090.27
December					
95-10 SF	K, K-1	6352	62,073,641.54	6,207,364.15	
95-09 SF-FX	J, J-1	6353	24,952.17	2,495.22	
95-11 SF	L, L-1	6354	45,890,798.43	4,589,079.84	
95-08 to 95-10SF (Plant D)	I, I-1	6355	4,492,551.03	449,255.10	
					11,248,194.31

January 1996					
95-08 SF-A MPA	T, I-1	6356	21,135.48	2,113.55	
95-09 SF-A MPA	U, T-1	5356	160,493.29	16,049.33	
95-12 SF	V, V-1	6357	51,952,375.66	5,195,237.57	
					5,213,400.45
February 1996					
95-10 SF-A SF		6358	(16,611.19)	(1,661.12)	
96-01 SF	X, X-1	6358	56,486,342.41	5,648,634.24	
					5,646,973.12

From the above, therefore, We may infer that it was not Petitioner who shouldered the VAT but NPC and so Petitioner may claim a refund only for P9,012,310.11 as there was no showing of payment made by NPC of said amount.

WHEREFORE, in the light of the foregoing, **RESPONDENT** is hereby **ORDERED** to **REFUND** or in the alternative, ISSUE A TAX CREDIT CERTIFICATE to **PETITIONER** the sum of P9,012,310.26 representing erroneously paid value added-tax.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals