REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

****

MAIBARARA GEOTHERMAL, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case Nos. 8699, 8732, 8771, and 8811

Members:

DEL ROSARIO, *P.J., Chairperson,*
UY, and
MINDARO-GRULLA, *JJ.*

Promulgated:

AUG 18 2017 3:57 pm

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DECISION

UY, J.:

This case is a consolidation of four (4) *Petitions for Review* filed by Maibarara Geothermal, Inc., petitioner, against the Commissioner of Internal Revenue, respondent, seeking the refund of the total amount of ₱15,789,213.64, allegedly representing petitioner's unutilized input value-added tax (VAT) for the four taxable quarters of calendar year 2011 attributable to zero-rated sales, detailed as follows:

CTA Case No.	Period Covered	Amount of Claim
8699[1]	1st Quarter (January to March 2011)	₱ 10,095,979.46
8732[2]	2nd Quarter (April to June 2011)	3,134,942.99
8771[3]	3rd Quarter (July to September 2011)	1,534,692.20
8811[4]	4th Quarter (October to December 2011)	1,023,598.99
	TOTAL	**₱ 15,789,213.64**

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[1] Petition for Review, Docket (CTA Case No. 8699) – Vol. I, pp. 14 to 24.
[2] Petition for Review, Docket (CTA Case No. 8732), pp. 17 to 27.
[3] Petition for Review, Docket (CTA Case No. 8771), pp. 7 to 17.
[4] Petition for Review, Docket (CTA Case No. 8811), pp. 1 to 11.

THE FACTS

Petitioner Maibarara Geothermal, Inc. is a corporation duly registered under the laws of the Philippines, with business address at 7th Floor, JMT Building, ADB Avenue, Ortigas Center, Pasig City.[5] It is registered with the Securities and Exchange Commission (SEC) with Company Registration No. CS201012659.[6]

It is likewise a registered VAT taxpayer with the Bureau of Internal Revenue (BIR) under the Certificate of Registration No. OCN3RC0000483772 and Taxpayer's Identification Number (TIN) 007-843-328-000. Such registration was made on September 8, 2010.[7]

As stated in its Articles of Incorporation, the primary purpose for which the corporation was formed is to explore, extract, exploit, or otherwise obtain from the earth, store, hold, use, treat, reinject, prepare for market, buy, sell, distribute, exchange and transport geothermal steam and brine, and all their products, compounds and derivatives; to convert geothermal energy into electric power and to build, construct, erect, own, equip, install, operate, maintain, sell, lease power generation plants, facilities, machineries, equipment that utilize, geothermal energy; to sell, trade, transmit or distribute any electricity generated by such power plants; to utilize geothermal steam and brine for industrial, agricultural, health, tourism, mineral recovery and processing and other similar direct and indirect uses of geothermal steam and brine.[8]

Additionally, petitioner is also a registered Renewable Energy Developer of a 20 MW Maibarara Geothermal Power Generation Project in Batangas and Laguna under Certificate of Registration No. GRESC 2011-01-025 issued by the Department of Energy (DOE) and Certificate of Registration No. 2011-06 issued by the Board of Investments (BOI).[9]

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[5] Par. 2, Consolidated Joint Stipulation of Facts and Issues (CJSFI), Docket (CTA Case No. 8699) – Vol. II, p. 1451; Par. 2, Joint Stipulation of Facts and Issues (JSFI), Docket (CTA Case No. 8732), p. 586; Exhibit "P-1", Docket (CTA Case No. 8699) – Vol. III, p. 1746.

[6] Par. 7, JSFI, Docket (CTA Case No. 8732), p. 587; Exhibit "P-1", *Ibid.*

[7] Par. 9, JSFI, Docket (CTA Case No. 8732), p. 587; Exhibit "P-7", Docket (CTA Case No. 8699) – Vol. III, p. 1797.

[8] Par. 8, JSFI, Docket (CTA Case No. 8732), p. 587; Exhibit "P-2", Docket (CTA Case No. 8699) – Vol. III, p. 1747.

[9] Exhibits "P-3" and "P-4", Docket (CTA Case No. 8699) – Vol. III, p. 1786 and p. 1787, respectively.

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On the other hand, respondent Commissioner of Internal Revenue is sued in his capacity, having been duly appointed and empowered to perform duties of his office, including, among others, the duty to act on and approve claims for refund as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.[10]

The First (1st), Second (2nd), Third (3rd) and Fourth (4th) Quarterly VAT Returns of petitioner for taxable year 2011 were filed on April 25, 2011, on July 25, 2011, on October 19, 2011, and on January 20, 2012, respectively.[11]

Petitioner filed its administrative claims for refund for the alleged unutilized VAT input taxes for the 1st, 2nd, 3rd, and 4th quarters of taxable year 2011 in the respective amounts of ₱10,095,979.46, ₱3,134,942.99, ₱1,534,692.20, and ₱1,023,598.99, together with all the supporting documents on March 22, 2013, on June 24, 2013, on September 26, 2013, and on December 13, 2013, respectively, before the BIR Revenue District Office (RDO) No. 43A in Pasig City.[12]

Due to the inaction of respondent on petitioner's administrative claims and *Applications for Tax Credit/Refund* of unutilized input VAT for the 1st, 2nd, 3rd, and 4th quarters of taxable year 2011, petitioner filed the present *Petitions for Review* docketed as CTA Case Nos. 8699, 8732, 8771, and 8811 on August 16, 2013[13], on November 15, 2013[14], on February 21, 2014[15], and on April 30, 2014[16], respectively.

In the *Answer* filed on September 25, 2013 for CTA Case No. 8699,[17] respondent interposed the following special and affirmative defenses:

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

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[10] Par. 4, CJSFI, Docket (CTA Case No. 8699) – Vol. II, p. 1452; Par. 4, JSFI, Docket (CTA Case No. 8732), p. 587.
[11] Exhibits "P-17", "P-18", "P-19", and "P-20", CTA Case No. 8699, docket, vol. III, p. 1846, p. 1849, p. 1853, and p. 1857, respectively.
[12] Exhibits "P-9", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15", and "P-16", Docket (CTA Case No. 8699) – Vol. III, pp. 1818 to 1823, p. 1824, pp. 1825 to 1830, p. 1831, pp. 1832 to 1837, p. 1838, pp. 1839 to 1844, p. 1845, respectively.
[13] Docket (CTA Case No. 8699) – Vol. I, p. 14.
[14] Docket (CTA Case No. 8732), p. 17.
[15] Docket (CTA Case No. 8771), p. 7.
[16] Docket (CTA Case No. 8811), p. 1.
[17] Docket (CTA Case No. 8699) – Vol. I, pp. 78 to 81.

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5. Taxes paid and collected are presumed to have been in accordance with law and regulations, hence, not refundable;

6. Moreover, in order to validly claim for tax refund, it is imperative for petitioner to prove its compliance with the following, viz:

   a. The registration requirements of Value-Added taxpayer under the pertinent provision of the National Internal Revenue Code (NIRC) of 1997, as amended and its implementing revenue regulations;

   b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT pursuant to the provisions of Section 113 and 114 of the National Internal Revenue Code (NIRC) of 1997, as amended. Failure to comply with the invoicing requirements on the documents supporting the sale of goods and services will result in the disallowance of the claim for input tax of the taxpayer claimant (Revenue Memorandum Circular No. 42-2003).

   c. The submission of complete documents in support of the administrative claim for tax refund pursuant to Section 112 (C) of the National Internal Revenue Code (NIRC) of 1997, as amended, otherwise, there would be no sufficient compliance with regard to the filing of administrative claim for tax refund which is a condition sine qua non prior to the filing of such claim;

   d. That the input taxes of ₱10,095,979.46 allegedly representing excess and unutilized input taxes for the 1st Quarter of 2011, were:

      1. Paid by petitioner;
      2. Attributable to its zero-rated or effectively zero-rated sales;
      3. Such input taxes paid should not have been applied against any output tax.

   e. The petitioner's claim for tax refund allegedly representing excess and unutilized input taxes for the 1st Quarter of 2011 in the amount of

₱10,095,979.46 was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 112 (A) of the National Internal Revenue Code (NIRC) of 1997, as amended.

7. Accordingly, the claimants of those refunds bear the burden of proving the factual basis of their claims and of showing, by words too plain to be mistaken, that the legislature intended to exempt them;

8. And finally, basic is the rule that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the entity claiming the same. Moreover, statutes in derogation of sovereignty such as those containing exemption from taxation should be strictly construed in favor of the State. In this regard, taxation is the rule and exemption is the exception. The law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted."

Respondent also raised basically the same special and affirmative defenses in the *Answers*[18] filed in CTA Case Nos. 8732, 8771, and 8811 filed on December 9, 2013, on May 5, 2014, and on May 30, 2014, respectively, to wit:

"6. Paragraph (A) Section 112 of the 1997 National Internal Revenue Code, as amended lays down the criteria governing claims for VAT refund of unutilized input taxes attributable to zero-rated or effectively zero-rated sales, to wit:

'(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

[18] Docket (CTA Case No. 8732), pp. 93 to 97; Docket (CTA Case No. 8771), pp. 99 to 103 [Docket (CTA Case No. 8699) – Vol. I, pp. 608 to 612]; and Docket (CTA Case No. 8811), pp. 81 to 85.

> *not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (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; Provided, finally, That for a person making sales that are zero-rated under ratably between his zero-rated and non-zero rated sales.'*

7. Hence, the following are the criteria governing claims for refund under the foregoing section of the NIRC:

(1) That taxpayer is VAT registered;
(2) That taxpayer is engaged in zero-rated or effectively zero-rated sales;
(3) The input taxes are due or paid;
(4) The input taxes are not transitional input taxes;
(5) The input taxes have not been applied against output taxes during and in the succeeding quarters;
(6) The input taxes claimed are attributable to zero-rated or effectively zero-rated sales;
(7) For zero-rated sales under Section 106(A)(2)(1) and (2), 106(B) and 108(B)(1) and (2), the acceptable foreign currency exchange proceeds have been accounted for in accordance with BSP rules and regulations;
(8) Where there are both zero-rated or effectively zero-rated sales and taxable year or exempt sales, and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume;

(9) The claim is filed within two (2) years after the close of the taxable quarter when such sales were made.

(10) The following documents, among others must be presented:

(a) Sales invoices or receipts with the word 'zero-rated' imprinted to it;
(b) Purchase invoices or receipts from another VAT-registered taxpayer;
(c) Evidence of actual receipt of goods;
(d) BOI statement showing the amount and description of sale of goods, etc.
(e) Original or attested copies of invoice or receipt on capital equipment locally purchased; and
(f) Photocopy of import entry document and confirmation receipt on imported capital equipment.

8. Under criteria No. 10, the taxpayer has the burden of proof in proving his claim involving claims for refund and should be able to present the foregoing documents stated therein. 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;

9. Petitioner must prove that its export sale qualify as VAT zero-rated pursuant to Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended;

10. Petitioner must prove that it complied with the invoicing requirements provided in Section 113 of the NIRC of 1997, as amended;

11. Petitioner must also proves that it complied with the provisions of Section 4.110-8 of Revenue Regulations No. 16-05, as amended, as to the substantiation of Input Tax Credits;

12. Lastly, Petitioner must comply with the requirements provided under Revenue Memorandum Order No. 53-98;

13. Well-established is the rule that tax refunds/tax

credits are construed strictly against the taxpayer as they partake the nature of tax exemptions;

14. In *COMPAIGNIE FINCANCIERE SUCRES ET DENREES vs. COMMISSIONER OF INTERNAL REVENUE, GR No. 133834 August 28, 2006* the Honorable Supreme Court ruled, to wit:

> *'xxx Tax refunds are a derogation of the State's taxing power. Hence, like tax exemptions, they are construed strictly against the taxpayer and liberally in favor of the State. Consequently, he who claims a refund or exemption from taxes has the burden of justifying the exemption by words too plain to be mistaken and too categorical to be misinterpreted."*

On September 23, 2013, the Office of the Solicitor General filed a *Motion to be Excused as Counsel for the Bureau of Internal Revenue*[19] for CTA Case No. 8699, which the Court granted on December 4, 2013.[20] Thereafter, Atty. Arlyn T. Corro entered her appearance as counsel for respondent on January 16, 2014, which the Court noted.[21]

On April 3, 2014, petitioner moved to consolidate CTA Case Nos. 8732 and 8771, both pending before the Second Division of this Court, with CTA Case No. 8699 pending before the First Division of this Court. The *Motion to Consolidate* was granted on April 8, 2014[22] and on April 14, 2014[23].

Petitioner filed another motion[24] on May 20, 2014 to consolidate CTA Case No. 8811, pending before the Third Division, with CTA Case Nos. 8699, 8732, and 8771, pending before the First Division. As a result, a *Motion to Defer Hearing of CTA Case Nos. 8699, 8732, and 8771 Pending Resolution of Motion to Consolidate CTA Case No.*

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[19] Docket (CTA Case No. 8699) – Vol. I, pp. 83 to 86.
[20] Resolution dated December 4, 2013, Docket (CTA Case No. 8699) – Vol. I, pp. 93 to 94.
[21] Entry of Appearance, Docket (CTA Case No. 8699) – Vol. I, pp. 97 to 98; Minutes of the hearing held on January 20, 2014, Docket (CTA Case No. 8699) – Vol. I, p. 116.
[22] Resolution dated April 8, 2014, Docket (CTA Case No. 8699) – Vol. I, p. 593, and Docket (CTA Case No. 8771), p. 95, respectively.
[23] Resolution dated April 14, 2014, Docket (CTA Case No. 8699) – Vol. I, pp. 595 to 596.
[24] *Motion to Consolidate*, Docket (CTA Case No. 8811), pp. 74 to 77; Docket (CTA Case No. 8699) – Vol. I, pp. 655 to 659.

8811[25] was filed on May 26, 2014. The motion to defer hearing was granted on May 29, 2014.[26]

On July 11, 2014, CTA Case No. 8811 was consolidated with CTA Case No. 8699, which has the lower docket number.[27] The said consolidation was confirmed on July 22, 2014.[28]

Respondent's Pre-Trial Brief was filed on October 13, 2014;[29] while petitioner's Consolidated Pre-Trial Brief was filed on October 20, 2014.[30] Thereafter, the parties submitted their *Consolidated Joint Stipulation of Facts and Issues* (CJSFI) on November 26, 2014.[31] In the Resolution issued on December 18, 2014,[32] the Court approved the parties' CJSFI and terminated the pre-trial. On the basis thereof, the Court issued a Pre-Trial Order on February 9, 2015.[33]

During trial, petitioner presented Helenio B. Seraspi, Maria Victoria M. Olivar, Atty. Dan Dyonne Eminiano Q. Gonzales, and Atty. Clifford E. Chua as its witnesses, to prove its claim.

On the other hand, respondent's counsel manifested during the hearing held on May 31, 2016 that there was no report of the audit Investigation conducted by the different Revenue Officers in the Instant case, and respondent would no longer be presenting evidence. Thus, both counsels were directed to file their respective Memorandum.[34]

In view of the filing of respondent's *Memorandum* on June 29, 2016;[35] and petitioner's *Memorandum* on August 26, 2016,[36] these cases were submitted for decision on September 2, 2016.[37]

Hence, this Decision.

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[25] Docket (CTA Case No. 8699) – Vol. I, pp. 632 to 635.
[26] Docket (CTA Case No. 8699) – Vol. I, pp. 653 to 654.
[27] Docket (CTA Case No. 8699) – Vol. I, p. 670.
[28] Docket (CTA Case No. 8699) – Vol. I, pp. 672 to 673.
[29] Docket (CTA Case No. 8699) – Vol. II, pp. 1389 to 1393.
[30] Docket (CTA Case No. 8699) – Vol. II, pp. 1396 to 1408.
[31] Docket (CTA Case No. 8699) – Vol. II, pp. 1451 to 1459.
[32] Docket (CTA Case No. 8699) – Vol. II, p. 1462.
[33] Docket (CTA Case No. 8699) – Vol. II, pp. 1481 to 1490.
[34] Minutes of the hearing held on May 31, 2016, Docket (CTA Case No. 8699) – Vol. IV, pp. 2377 to 2378.
[35] Docket (CTA Case No. 8699) – Vol. IV, pp. 2388 to 2401.
[36] Docket (CTA Case No. 8699) – Vol. IV, pp. 2412 to 2444.
[37] Resolution, Docket (CTA Case No. 8699) – Vol. IV, p. 2446.

THE ISSUES

The parties stipulated the following issues to be resolved by the Court[38], to wit:

"1. Whether the Petitioner is entitled to the refund of the unutilized input VAT in the aggregate amount of Fifteen Million Seven Hundred and Eighty-Nine Thousand Two Hundred Thirteen Pesos & 64/100 (P15,789,213.64) for the whole taxable year 2011.

a. Whether the Petitioner is entitled to the refund of the unutilized input VAT it paid in the amount of Ten Million Ninety-Five Thousand Nine Hundred Seventy-Nine & 46/100 (P10,095,979.46) for the 1st Quarter of the taxable year 2011 **(CTA Case No. 8699)**;

b. Whether the Petitioner is entitled to the refund of the unutilized input VAT it paid in the amount of Three Million One Hundred Thirty-Four Thousand Nine Hundred Forty-Two & 99/100 (P3,134,942.99) for the 2nd Quarter of the taxable year 2011 **(CTA Case No. 8732)**;

c. Whether the Petitioner is entitled to the refund of the unutilized input VAT in the amount of One Million Five Hundred Thirty-Four Thousand Six Hundred Ninety-Two & 20/100 (P1,534,692.20) for the 3rd Quarter of the taxable year 2011 **(CTA Case No. 8771)**; and

d. Whether the Petitioner is entitled to the refund of the unutilized input VAT in the amount of One Million Twenty-Three Thousand Five Hundred Ninety-Eight and 99/100 Pesos (P1,023,598.99) for the 4th Quarter of taxable year 2011 **(CTA Case No. 8811)**."

Petitioner's arguments:

Petitioner contends that it is a VAT-registered entity and is engaged in zero-rated or effectively zero-rated sales and that it has complied with the provisions of Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended, regarding the

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[38] Statement of the Issue, CJSFI, Docket (CTA Case No. 8699) – Vol. II, p. 1452.

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prescriptive period for filing administrative and judicial claims for refund of unutilized input taxes.

Moreover, petitioner points out that the input taxes being claimed are due or paid; that the input taxes are due or paid and have not been applied against output taxes during the quarter and in the succeeding quarters; and that the input taxes being claimed are attributable to zero-rated sales.

Thus, it is allegedly entitled to a claim for refund or issuance of tax credit certificate of unutilized input taxes attributable to zero-rated sales/receipts for the taxable year 2011 in the total amount of ₱8,477,815.49.

Respondent's counter-arguments:

Respondent counter-argues that petitioner's claim for refund of its alleged input taxes it paid for purchases of goods and services are not attributable to zero-rated or effectively zero-rated sales, considering that petitioner is not yet selling its geothermal energy power.

According to respondent, petitioner failed to show proof that its input taxes have not been applied against its output taxes during and in the succeeding quarters as required by paragraph (B) of Section 110 of the NIRC of 1997, as amended. Allegedly, it is a well established rule that tax refunds/tax credits are construed strictly against the taxpayer as they partake the nature of tax exemptions.

THE COURT'S RULING

The consolidated *Petitions for Review* must be denied.

Section 112(A) of the NIRC of 1997, as amended, provides as follows:

> "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 of 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: *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."

Based on the afore-quoted provision, in order to be entitled to a refund or tax credit of excess input VAT attributable to zero-rated or effectively zero-rated sales, the following requisites must be satisfied:

a) the taxpayer is VAT-registered;
b) the taxpayer is engaged in zero-rated or effectively zero-rated sales;
c) the input taxes are due or paid;
d) the input taxes are not transitional input taxes;
e) the input taxes have not been applied against output taxes during and in the succeeding quarters;
f) **the input taxes claimed are attributable to zero-rated or effectively zero-rated sales;**
g) for zero-rated sales under Section 106(A)(2)(1) and (2); 106(B); and 108(B)(1) and (2), the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas;
h) where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales, and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume; and
i) **the claim is filed within two years after the close of the taxable quarter when such sales were made.**[39]

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[39] *San Roque Power Corporation vs. Commissioner of Internal Revenue*, G.R. No. 180345, November 25, 2009; *Luzon Hydro Corporation vs. Commissioner of Internal Revenue*, G.R. No. 188260, November 13, 2013.

It is clear from the foregoing requisites that the input VAT being refunded must be attributable to the zero-rated or effectively zero-rated sales of the taxpayer; and that the two-year prescriptive period for filing an administrative claim for refund or issuance of tax credit certificate begins to run from the close of the taxable quarter *"when the relevant sales were made"*, not from the time the input VAT was incurred.

In this case, an examination of the Quarterly VAT Returns[40] filed for taxable year 2011 reveals that petitioner had no sales declared during the said period. In fact, petitioner's Accounting Manager, Helenio B. Seraspi, confirmed that petitioner had no sales during taxable year 2011 and only started selling during the first quarter of 2014, to wit:[41]

> "33. Q: Why is that there were no sales during the taxable year 2011?
>
> A: This is because the Petitioner is still in the process of constructing its renewable plant energy. It usually takes some time in building an energy plant before it may be put into use. The Company is still in the pre-operation period. Meaning, significant portion of the expenses incurred are in connection to the development, construction and installation of the plant in order to make it operational so as to generate the electricity to be sold. The Company started selling on the first quarter of 2014.
>
> 34. Q: What are your proofs that the first commercial sale of the Petitioner was on the first quarter of 2014?
>
> A: Based on the 2010, 2011, 2012 and 2013 audited financial statements and Income Tax Return of Petitioner, there were no sales made. Moreover, the VAT returns as well as monthly VAT returns of the Company from 2010 to 2013 did not reflect any sales transactions. However, on the 1st quarter of

[40] Exhibits "P-17" to "P-20", Docket (CTA Case No. 8699) – Vol. III, pp. 1846 to 1857.
[41] Q&A Nos. 33 and 34 of Exhibit "P-347", Docket (CTA Case No. 8699) – Vol. III, pp. 2291 to 2292.

> 2014, sales pertaining to the transaction with Trans-Asia was reflected."

Evidently, there are no zero-rated sales yet unto which the input VAT can be attributed for the year 2011.

In *Luzon Hydro Corporation vs. Commissioner of Internal Revenue*,[42] the Supreme Court held as follows:

> "The petitioner did not competently establish its claim for refund or tax credit. **We agree with the CTA *En Banc* that the petitioner did not produce evidence showing that it had zero-rated sales for the four quarters of taxable year 2001. As the CTA *En Banc* precisely found, the petitioner did not reflect any zero-rated sales from its power generation in its four quarterly VAT returns, which indicated that it had not made any sale of electricity.** Had there been zero-rated sales, it would have reported them in the returns. Indeed, it carried the burden not only that it was entitled under the substantive law to the allowance of its claim for refund or tax credit but also that it met all the requirements for evidentiary substantiation of its claim before the administrative official concerned, or in the *de novo* litigation before the CTA in Division.
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> **Although the petitioner has correctly contended here that the sale of electricity by a power generation company like it should be subject to zero-rated VAT under Republic Act No. 9136, its assertion that it need not prove its having actually made zero-rated sales of electricity by presenting VAT official receipts and VAT returns cannot be upheld.** It ought to be reminded that it could not be permitted to substitute such vital and material documents with secondary evidence like financial statements." *(Emphases supplied)*

The thrust of the foregoing jurisprudence is the importance of having to show the presence of zero-rated or effectively zero-rates sales, to which the input VAT being refunded must be attributable. Simply put, when there is no zero-rated or effectively sales on the part of the refund claimant, input VAT is not refundable, or at the very least, is not yet refundable.

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[42] G.R. No. 188260, November 13, 2013.

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Correspondingly, in light of the foregoing legal requirements and jurisprudential pronouncements, the Court finds that petitioner's separately filed administrative claims for refund of its input VAT from the 1st to 4th quarters of taxable year 2011 filed with the BIR on March 22, 2013, on June 24, 2013, on September 26, 2013, and on December 13, 2013, respectively,[43] were prematurely filed. Consequently, the judicial claims, which are the subject of the consolidated *Petitions for Review*, cannot be given due course, since there was no zero-rated or effectively zero-rated sales during the subject periods.

WHEREFORE, premises considered, the instant *Petitions for Review* are **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson

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[43] Exhibits "P-9" to "P-16", Docket (CTA Case No. 8699) – Vol. III, pp. 1818 to 1845.

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- versus -

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CTA CASE Nos. 8699, 8732, 8771 and 8811

Members:

Del Rosario, *P.J., Chairperson,*
Uy, and
Mindaro-Grulla, *JJ.*

Promulgated:
AUG 18 2017 3:57 pm

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague, the Honorable Associate Justice Erlinda P. Uy, in denying the Petitions for Review filed by Maibarara Geothermal, Inc.

In its Petitions for Review, petitioner claims for a refund of input taxes generated for the four (4) quarters of 2011 in the total amount of ₱15,789,213.64 which are allegedly attributable to its zero-rated sales. Based on its Memorandum, however, petitioner prays for the refund of the reduced amount of ₱8,477,815.49, after taking into consideration the evidence submitted in support of its claim.

Records disclose that petitioner, a VAT-registered entity, is registered as a Renewable Energy Developer of a 20 MW Maibarara Geothermal Power Generation Project in Batangas and Laguna under Certificate of Registration No. GRESC 2011-01-05 issued by the Department of Energy (DOE) and Certificate of Registration No. 2011-06 issued by the Board of Investments.[1] In September 2011,

[1] Exhibits P-3 and PP-4.

petitioner entered into an Electricity Supply Agreement with Trans Asia Oil and Energy Development Corporation (Trans Asia) but the commencement of the agreement shall be when petitioner is capable of supplying power which shall be communicated by petitioner to Trans Asia thirty (30) days prior to such date.[2]

Petitioner generated input VAT for the four (4) quarters of 2011 from its: (i) local purchases of goods other than capital goods; (ii) local purchases of services; and (iii) importations of goods other than capital goods, relative to the development, construction and installation of its renewable energy facilities. Petitioner claims that the input taxes are attributable to petitioner's subsequent sale of power energy through renewable sources of energy, particularly, geothermal energy.

Petitioner avers that its eventual sales of power generated from geothermal energy to Trans Asia is subject to VAT at zero percent (0%) pursuant to Section 108(B)(7) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Input VAT from local supply of goods, properties and services

I am of the view that petitioner is not entitled to refund of input VAT arising from its local purchases of goods and services needed for the development, construction and installation of its renewable energy facilities since the same are subject to zero-rated VAT pursuant to Section15(g) of Republic Act (RA) No. 9513, which provides:

> "**Section 15. *Incentives for Renewable Energy Projects and Activities.*** - **RE developers** of renewable energy facilities, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, **as duly certified by the DOE**, in consultation with the BOI, shall be entitled to the following incentives: xxx
>
> (g) Zero Percent Value-Added Tax Rate. - The sale of fuel or power generated from 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, shall be subject to zero percent (0%) value-added tax (VAT), pursuant to the National Internal

[2] Exhibit P-41.

> Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337.
>
> **All RE Developers shall be entitled to zero-rated value added tax on <u>its</u> purchases of <u>local</u> supply of goods, properties and services needed <u>for the development, construction and installation of its plant facilities</u>.**
>
> This provision shall also apply to **the whole process of exploring and developing renewable energy sources up to its conversion into power**, including but not limited to the services performed by subcontractors and/or contractors. (Emphases supplied)

The provision is categorical in stating that RE Developers are entitled to zero-rated VAT on **their** *purchases* of **local** supply of goods, properties and services needed for the development, construction and installation of its plant facilities. Thus, it was erroneous for petitioner's suppliers to subject their sales to petitioner to 12% VAT. In the same vein, it is not correct for petitioner to recognize said passed-on VAT as input taxes.

Since petitioner's purchases are subject to zero-rated VAT, the 12% VAT passed-on by petitioner's local suppliers formed part of petitioner's purchase price. Petitioner is therefore precluded from claiming a refund of the input VAT passed on to it by its local suppliers.[3]

Input VAT from Importation of Goods (other than capital goods) and from Services Rendered by Non-Residents

I submit that the VAT zero-rating under Section 15(g) is confined only to RE Developer's *purchases* of **local** supply of goods, properties and services. It does not contemplate the grant of VAT zero-rating on **RE Developer's importation**, which is the subject of another specific provision or sub-paragraph in Section 15 of RA 9513.

The *third* paragraph of Section 15(g) merely expanded the coverage of "**zero-rated VAT on purchases of local supply of goods, properties and services**" of an **RE Developer.** Instead of limiting zero-rating to purchases of <u>local supply</u> that are needed for the development, construction and installation of plant facilities as provided in the *second* paragraph, zero-rating of purchases of <u>local</u>

[3] Revenue Memorandum Circular No. 43-2003 dated July 15, 2003.

supply extended to the whole process of exploration and development of renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors."

Parenthetically, the incentive pertaining to RE Developer's **importation** is incorporated in Section 15(b) of RA 9513, which reads:

> "SECTION 15. Incentives for Renewable Energy Projects and Activities. — RE Developers of renewable energy facilities, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, as duly certified by the DOE, in consultation with the BOI, shall be entitled to the following incentives:
>
> (a) Income Tax Holiday (ITH) — xxx xxx xxx.
>
> (b) **Duty-free Importation of RE Machinery, Equipment and Materials** — Within the first ten (10) years upon the issuance of a certification of an RE developer, **the importation of machinery and equipment, and materials and parts thereof, including control and communication equipment, shall not be subject to tariff duties**: *Provided, however,* That the said machinery, equipment, materials and parts are directly and actually needed and used exclusively in the RE facilities for transformation into energy and delivery of energy to the point of use and covered by shipping documents in the name of the duly registered operator to whom the shipment will be directly delivered by customs authorities: *Provided, further,* That endorsement of the DOE is obtained before the importation of such machinery, equipment, materials and parts is made.
>
> Endorsement of the DOE must be secured before any sale, transfer or disposition of the imported capital equipment, machinery or spare parts is made: *Provided,* That if such sale, transfer or disposition is made within the ten (10)-year period from the date of importation, any of the following conditions must be present:
>
> (i) If made to another RE developer enjoying tax and duty exemption on imported capital equipment;
>
> (ii) If made to a non-RE developer, upon payment of any taxes and duties due on the net book value of the capital equipment to be sold;
>
> (iii) Exportation of the used capital equipment, machinery, spare parts or source documents or those required for RE development; and
>
> (iv) For reasons of proven technical obsolescence.

> When the aforementioned sale, transfer or disposition is made under any of the conditions provided for in the foregoing paragraphs after ten (10) years from the date of importation, the sale, transfer or disposition shall no longer be subject to the payment of taxes and duties. (Boldfacing and underscoring supplied)

In other words, **RE Developers are entitled to duty-free <u>(but not VAT-free)</u> importation of RE machinery, equipment and materials**. Thus, insofar as those importations are concerned, RE Developers remain subject to 12% VAT

Considering that importation by RE Developers is not subject to zero-rated VAT, the VAT paid by petitioner from its importation of goods which are attributable to petitioner's zero-rated sales may be refunded pursuant to Section 112 of the NIRC, as amended.

The foregoing notwithstanding, petitioner is not entitled to the refund of its input VAT on importations for the taxable year **2011** as petitioner had no zero-rated sales in 2011 to which said input VAT can be attributed.

As eloquently elucidated in the ponencia of the Honorable Associate Justice Uy, citing *Luzon Hydro Corporation vs. Commissioner of Internal Revenue*,[4] it is essential for petitioner to show the existence of zero-rated or effectively zero-rated sales upon which the input VAT, which is sought to be refunded, must be attributable. The absence thereof is fatal to petitioner's cause.

All told, I VOTE to DENY the Petition for Review filed by Maibarara Geothermal, Inc. for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice

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[4] G.R. No. 188260, November 13, 2013.