REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

CBK POWER COMPANY LIMITED, *Petitioner,*	**CTA CASE NO. 7887**
-versus-	**Members:** **BAUTISTA,** Chairperson; **FABON-VICTORINO, RINGPIS-LIBAN,** ***JJ.***
COMMISSIONER OF INTERNAL REVENUE *Respondent.*	**Promulgated:** JUN 06 2017 10:50 p.m.

x--x

DECISION

RINGPIS-LIBAN, J.:

The Case

This case involves a Petition for Review[1] filed on March 27, 2009 by CBK Power Company Limited to seek the issuance of tax credit certificate (TCC) in the amount of ₱58,802,851.18, allegedly representing its unutilized input value-added tax (VAT) on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to its zero-rated sales for the period January 1, 2007 to December 31, 2007 ("taxable year 2007"), pursuant to Section 112(A) of the National Internal Revenue Code ("NIRC") of 1997, as amended.

The Facts

Petitioner CBK Power Company Limited is a partnership duly organized and existing under and by virtue of the laws of the Philippines, with principal office at the NPC Compound, Kalayaan, Laguna.[2] It is a special purpose entity, the sole purpose of which is to engage in all aspects of (a) the design, financing,

---

[1] Docket, vol. I, pp. 4-17.
[2] Par. 1, Facts Admitted, Joint Stipulation of Facts and Issues (JSFI), docket, vol. I, p. 209.

construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna, and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna.[3]

Petitioner is registered as a VAT entity with the Bureau of Internal Revenue (BIR) with Taxpayer Identification Number (TIN)/VAT No. 205-760-474-000. It was issued BIR Certificate of Registration No. OCN 1RC0000050243 dated April 10, 2000 by the BIR Revenue District Office (RDO) No. 55-San Pablo City, Laguna, which was updated on May 11, 2005 and was issued BIR Certificate of Registration No. OCN 1RC0000195405.[4]

On the other hand, respondent is the duly appointed Commissioner of the BIR who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the NIRC or other laws or portions thereof administered by the BIR. He holds office at 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On September 20, 2000, petitioner entered into a Second Accession Undertaking[5] with the National Power Corporation (NPC), Industrias Metalurgicas Pescarmona S.A. (IMPSA), and CBK Power Corporation, wherein petitioner became a party to the Build-Rehabilitate-Operate-Transfer (BROT) Agreement[6] dated November 6, 1998. By virtue of the Second Accession Undertaking, petitioner shall assume and undertake the responsibility to rehabilitate, construct, operate, and maintain the Caliraya, Botocan, and Kalayaan hydroelectric power plants and other civil structures for the purpose of generating electricity for NPC. In consideration thereof, NPC shall pay petitioner Capital Recovery Fees, Operation and Maintenance Fees and other amounts specified in the BROT Agreement.

Consequently, petitioner entered into an Agreement with IMPSA Construction Corporation designated as Turnkey Contract[7] dated August 18, 2000, whereby IMPSA Construction Corporation as Contractor represented itself to be technically and financially capable of undertaking the design, engineering, procurement, supply of all plant and materials, rehabilitation, construction, commissioning, testing, completion, and handover of such power

---

[3] Par. 4, Facts Admitted, JSFI, docket, vol. I, p. 210.
[4] Par. 5, Facts Admitted, JSFI, docket, vol. I, pp. 210-211.
[5] Exhibit "D".
[6] Exhibit "C".
[7] Exhibit "E".

plants, together with the civil structures, access roads, and other works as specified in the BROT Agreement, on a fixed price, turnkey basis.

On March 26, 2009, petitioner filed with the BIR RDO No. 55 an administrative claim[8] for the issuance of TCC in the amount of ₱58,802,851.18, allegedly representing its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents; which were all attributable to its zero-rated sales for taxable year 2007, pursuant to Section 112(A) of the NIRC of 1997, as amended.[9]

Due to respondent's inaction, petitioner filed the present Petition for Review on March 27, 2009. On May 4, 2009, respondent filed his Answer[10], interposing the following Special and Affirmative Defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

Respondent hereby re-pleads and re-alleges the foregoing admissions and denials and further states that:

4. Petitioners' claim for tax refund is subject to administrative investigation and/ or examination by respondent.

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

   a.) The registration requirements of a value-added taxpayer in compliance with Section 9.236-1(a) of Revenue Regulations No. 16-2005, and Section 236 of the Tax Code, as amended;

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

   c.) Proof of compliance with the prescribed checklist of requirements to be submitted involving claims for VAT refund pursuant to Section 9.236-1(a) of Revenue Regulations No. 16-2005 and Revenue Memorandum Order No. 53-98. It is worthy of emphasis that Section 112 (D) of the Tax Code, as

---

[8] Exhibits "A" and "A-2".
[9] Par. 6, Facts Admitted, JSFI, docket, vol. I, p. 211.
[10] Docket, vol. I, pp. 165-173.

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 the dismissal of the petition for review.

d.) That petitioner's administrative claim for tax refund was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 112 (A) and (D) of the Tax Code, as amended.

6. Taxes paid and collected by the Bureau of Internal Revenue are presumed to have been made in accordance with law, rules and regulations, and the burden to prove otherwise is upon the petitioner.

7. Republic Act No. 9337 otherwise known as the 'New Expanded Value-Added Tax' states the following transactions are subject to zero percent (0%) rate, to wit:

> '(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:
>
> (1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);
>
> (2) Services other than those mentioned in the preceding paragraph rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed, the consideration for which is paid for in acceptable foreign currency and accounted for

/v/

in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate;

(4) Services rendered to persons engaged in international shipping or international air transport operations, including leases of property for use thereof;

(5) Services performed by subcontractors and/or contractors in processing, converting, or manufacturing goods for an enterprise whose export sales exceed seventy percent (70%) of total annual production;

(6) Transport of passengers and cargo by air or sea vessels from the Philippines to a foreign country; and

(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.'

Proof is necessary that all their VAT sale should strictly comply with the provisions provided by law.

8. Petitioner also seeks tax exemption under the guise that the same was granted under a special law. However, 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 tax refund/credit. This is so because exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from the common burden cannot be permitted to exist upon vague implications.

9. On March 26, 2009, petitioner filed its administrative claim. Petitioner filed its judicial claim on the same day. Not even a day had lapsed from the filing of the administrative claim to the filing of the judicial claim. Section 112 of the 1997 Tax Code states that:

'Section **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.

xxx xxx xxx

(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 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) and (B) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on 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. –'

10. Accordingly, respondent had 120 days to resolve petitioner's administrative claim for refund starting from March 26, 2009 before petitioner can file a judicial claim. The petition was definitely filed prematurely, as both the administrative claim and judicial claim was filed on the same day. Hence, the petition for review should be dismissed for lack of jurisdiction.

11. The resort to judicial review is premised on a full or partial denial of the administrative claim for refund. Taxpayers may no longer pursue the case if it is convinced of the reasons propounded by respondent in the full denial of the claim for refund. In the case, at bar, there was absolutely no opportunity for administrative proceedings to be conducted by the CIR when petitioner filed their Petition for Review making a mockery of the provision of Section 112 of the 1997 Tax Code. The filing of the administrative claim seems to be a mere afterthought as a precursor to the filing of the petition for review.

12. As penned by no less than the Honorable Court Presiding Justice Ernesto D. Acosta in his Concurring and Dissenting Opinion, he states that:

> 'Clearly, the afore-quoted section applies to refunds or tax credits of input taxes. Subsections (B) and (D) thereof categorically applies to the instant case. A persusal of Sub-section (B) in relation to Sub-section (D) would show that a taxpayer has **two years after the close of the taxable quarter to apply for refund.** The Commissioner shall grant the refund or issue tax credit certificate within 120 days from the date of the submission of complete documents. In case

of denial or inaction on the part of the Commissioner within 120 days, the taxpayer may appeal to this Court.

Nowhere in the afore-quoted section can you find the indispensable requirement that a taxpayer may appeal to this Court even without the expiration of the 120-day period if the two-year period under Section 229 is about to expire. It must be remembered that Section 229, hereunder reproduced, applies to recovery of taxes erroneously or illegally assessed or collected:

'**SEC. 229. Recovery of Tax Erroneously or Illegally Collected.-** <u>no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or colleted, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund no credit has been duly filed with the Commissioner</u>, but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

Section 229 has no application in the case at bar being claimed for refund or issuance of tax credit certificate for excess or unutilized input VAT. Rather, it is Section 112 that must be applied. As correctly put by the petitioner in his Petition for Review before this Court sitting *en banc*, the applicable rule is *generalia specialibus non degorant*. Where there is in the same statute a particular or special provision, and also a general one which in its most comprehensive sense would include what is embraced in the special or particular provision, the latter must be operative, and the general provision. In other words, Section 112 (D) of the NIRC of 1997, a specific provision on claims for refund of input tax, must be operative and Sections 204 and 229 of the same, both more general provisions, can only govern those cases outside the ambit of Section 112 (D).'

13. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation and liberally in favor of the taxing authority.

14. Based on the foregoing, petitioner's claim for tax refund and/or credit has no basis in fact and in law, hence the instant petition should be dismissed for absence of cause of action."

The case was set for Pre-Trial Conference on June 4, 2009.[11] Respondent's Pre-Trial Brief[12] and petitioner's Pre-Trial Brief[13] were both filed on May 29, 2009. The parties filed their Joint Stipulation of Facts and Issues[14] on July 27, 2009, which was approved by the Court in the Resolution[15] dated July 30, 2009.

During trial, petitioner presented documentary and testimonial evidence to support its claim. Petitioner presented the following witnesses: (1) Chief Financial Officer, Mr. Fernando J. Dela Paz;[16] (2) Accounting Manager, Mr. Joey L. Polintan;[17] and (3) Independent Certified Public Accountant (ICPA), Ms. Myra Celeste O. Dabalos.[18] Thereafter, petitioner filed its Formal Offer of Evidence[19] on June 17, 2010; while respondent filed his Comment (Re: Petitioner's Formal Offer of Evidence)[20] on July 2, 2010.

In the Resolution[21] dated August 10, 2010, the Court partially admitted petitioner's Formal Offer of Evidence. Hence, petitioner filed a Manifestation and Motion for Partial Reconsideration[22] on August 26, 2010; while respondent filed a Comment (Re: Petitioner's Manifestation and Motion for Partial Reconsideration)[23] on September 13, 2010. Petitioner also filed its Reply (On Respondent's Comment on Petitioner's Manifestation and Motion for Partial Reconsideration)[24] on September 21, 2010.

---

[11] Notice of Pre-Trial Conference, docket, vol. I, p. 174.
[12] Docket, vol. I, pp. 175-179.
[13] Docket, vol. I, pp. 180-200.
[14] Docket, vol. I, pp. 209-213.
[15] Docket, vol. I, p. 215.
[16] Minutes of the hearing dated September 14, 2009, docket, vol. I, p. 239.
[17] Minutes of the hearing dated May 5, 2010, docket, vol. I, p. 347.
[18] Minutes of the hearing dated February 22, 2010 and June 9, 2010, docket, vol. I, p. 307 and 411, respectively.
[19] Docket, vol. I, pp. 414-457.
[20] Docket, vol. I, pp. 458-460.
[21] Docket, vol. I, pp. 462-465.
[22] Docket, vol. I, pp. 467-477.
[23] Docket, vol. I, pp. 499-502.
[24] Docket, vol. I, pp. 506-510.

In the Resolution[25] dated November 17, 2010, the Court granted petitioner's Manifestation and Motion for Partial Reconsideration. Meanwhile, respondent filed a Motion to Dismiss[26] on December 6, 2010 and petitioner filed its Comment On/Opposition to Respondent's Motion to Dismiss[27] on December 17, 2010. Respondent, however, failed to file its reply on petitioner's Comment On/Opposition to Respondent's Motion to Dismiss.[28]

In the Resolution[29] dated January 28, 2011, the Court granted respondent's motion and dismissed the petition for having been prematurely filed, as follows:

> "**WHEREFORE**, premises considered, respondent's '**Motion to Dismiss**' is hereby **GRANTED**. Accordingly, the ***Petition for Review*** filed in the above-captioned case is hereby **DISMISSED** for having been prematurely filed.
>
> **SO ORDERED**."

Aggrieved, petitioner filed its Motion for Reconsideration[30] on February 14, 2011; while respondent filed his Comment[31] on February 23, 2011. The Court, however, denied the motion for lack of merit in the Resolution[32] dated April 5, 2011.

On May 6, 2011, petitioner filed its Petition for Review[33] with the Court *En Banc*. Respondent filed his Comment[34] on June 9, 2011. Petitioner filed its Memorandum[35] on July 14, 2011; while respondent merely adopted the arguments in his Comment as his Memorandum.[36]

In the Decision[37] dated February 1, 2012, the Court *En Banc* dismissed the petition and affirmed the Resolutions dated January 28, 2011 and April 5, 2011, as follows:

> "**WHEREFORE**, on the basis of the foregoing considerations, the Petition for Review *En Banc* is **DISMISSED**.

---

[25] Docket, vol. I, pp. 512-513.
[26] Docket, vol. I, pp. 514-518.
[27] Docket, vol. I, pp. 522-539.
[28] Records Verification dated January 6, 2011, docket, vol. I, p. 540.
[29] Docket, vol. I, pp. 542-546.
[30] Docket, vol. I, pp. 553-573.
[31] Docket, vol. I, pp. 576-580.
[32] Docket, vol. I, pp. 582-586.
[33] Docket, vol. I, pp. 621-650.
[34] Docket, vol. I, pp. 674-682.
[35] Docket, vol. I, pp. 689-712.
[36] Manifestation filed on July 19, 2011, docket, vol. I, pp. 713-715.
[37] Docket, vol. II, pp. 721-741.

> Accordingly, the Resolutions of CTA Third Division dated January 28, 2011 and April 5, 2011 are hereby **AFFIRMED**.
>
> **SO ORDERED**."

Petitioner filed its Motion for Reconsideration[38] on February 22, 2012; while respondent filed his Comment[39] on March 27, 2012. In the Resolution[40] dated May 24, 2012, the Court *En Banc* denied the motion for lack of merit.

On July 16, 2012, petitioner filed its Petition for Review on Certiorari under Rule 45 of the Revised Rules of Court[41] with the Supreme Court, docketed as G.R. No. 202066. In the Decision[42] dated September 30, 2014, the Supreme Court granted petitioner's Petition for Review on Certiorari and accordingly remanded the same to this Court for the determination and computation of the amounts valid for refund or issuance of TCC, to wit:

> "**WHEREFORE**, the petitions docketed as G.R. Nos. 202066 and 205353 are **GRANTED**. Accordingly, the Court of Tax Appeals En Banc's February 1, 2012 decision and May 24, 2012 resolution assailed in the petition docketed as G.R. No. 202066, and the Court of Tax Appeals En Banc's October 4, 2012 decision and January 15, 2013 resolution assailed in the petition docketed as G.R. No. 205353, are **REVERSED** and **SET ASIDE**.
>
> The consolidated cases are **REMANDED** to the Court of Tax Appeals for the determination and computation of the amounts valid for refund or the issuance of a tax credit certificate.
>
> **SO ORDERED**."

In the Resolution[43] dated January 25, 2016, this Court set the case for the initial presentation of respondent's evidence. Respondent manifested, however, that he has no evidence to present since there was no report of investigation.[44] Thus, both parties were given thirty (30) days within which to file their respective memoranda.

---

[38] Docket, vol. II, pp. 746-782.
[39] Docket, vol. II, pp. 786-794.
[40] Docket, vol. II, pp. 796-802.
[41] Docket, vol. II, pp. 908-979.
[42] Docket, vol. III, pp. 1246-1259.
[43] Docket, vol. III, pp. 1261-1263.
[44] Minutes of the hearing dated April 11, 2016, docket, vol. III, p. 1264.

The Memorandum for the Petitioner[45] was filed on May 5, 2016; while respondent filed his Memorandum[46] on May 20, 2016. Hence, the case was declared submitted for decision on June 22, 2016.[47]

The Issues

The parties submitted the following issues for the Court's resolution:[48]

1. Whether or not Petitioner's sale of services to the National Power Corporation (NPC) for the period January 1, 2007 to December 31, 2007 qualify as zero-rated sales;

2. Whether or not unutilized input taxes of ₱58,802,851.18 on its local purchases and/or importation of goods and services for the period January 1, 2007 to December 31, 2007, were all attributable to Petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the NIRC of 1997, as amended;

3. Whether or not Petitioner has duly substantiated its claim for the issuance of tax credit certificate for ₱58,802,851.18 for its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to Petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the NIRC of 1997, as amended;

4. Whether or not the unutilized input taxes of ₱58,802,851.18 for its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to Petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the Tax Code of 1997, as amended, have not been applied and/or utilized against any output tax;

5. Whether or not Petitioner had timely and duly filed its administrative and judicial claims for the issuance of a tax credit certificate for ₱58,802,851.18 for its unutilized input taxes on its

---

[45] Docket, vol. III, pp. 1268-1286.
[46] Docket, vol. III, pp. 1299-1306.
[47] Resolution dated June 22, 2016, docket, vol. III, p. 1308.
[48] JSFI, docket, vol. I, pp. 211-213.

local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to Petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the Tax Code of 1997, as amended; and

6. Whether or not Petitioner is entitled to a tax credit certificate amounting to ₱58,802,851.18 for its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to Petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the Tax Code of 1997, as amended.

Discussion/Ruling

Petitioner's administrative and judicial claims were timely filed.

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

"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.

xxx xxx xxx

(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.

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."

Pursuant to the above-quoted Section 112(A), the administrative claim for the issuance of TCC or refund of input VAT must be filed with the BIR within two (2) years after the close of the taxable quarter when the zero-rated or effectively zero-rated sales were made. Thus, petitioner's last day for filing of its administrative claim for the four (4) quarters of taxable year 2007 fell on the following dates:

Period covered	**Last day of the Two-year period**
January to March 2007 (1st Quarter)	March 31, 2009
April to June 2007 (2nd Quarter)	June 30, 2009
July to Sept. 2007 (3rd Quarter)	September 30, 2009
October to Dec. 2007 (4th Quarter)	December 31, 2009

Petitioner filed its administrative claim for the issuance of TCC in the amount of ₱58,802,851.18 with the BIR RDO No. 55 on March 26, 2009. Evidently, petitioner's administrative claim was filed well within the two (2)-year prescriptive period.

Anent the timeliness of the judicial appeal, suffice it to say that the Supreme Court had already ruled in petitioner's favor that its judicial claim was timely filed.[49] As held by the Supreme Court:

[49] CBK Power v. CIR, G.R. Nos. 202066 and 205353, September 30, 2014.

> "...[P]etitioner filed its judicial claim on March 27, 2009, only a day after it had filed its administrative claim on March 26, 2009... Clearly, petitioner failed to comply with the 120-day waiting period, the time expressly given by law to the Commissioner of Internal Revenue to decide whether to grant or deny its application for tax refund or credit.
>
> **Nevertheless, since the judicial claims were filed within the window created in *San Roque*, the petitions are exempted from the strict application of the 120-day mandatory period.**" (*Emphasis supplied*)[50]

Thus, the Court shall now proceed to determine the merits of petitioner's claim for the issuance of TCC in the amount of ₱58,802,851.18, allegedly representing its unutilized input VAT for taxable period 2007, pursuant to Section 112(A) of the NIRC of 1997, as amended.

Petitioner is engaged in zero-rated sales. Sale of electricity generated through hydropower, is among the transactions subject to zero percent (0%) VAT.

Petitioner contends that its sales of electricity generated through hydropower to the NPC for the period January 1, 2007 to December 31, 2007 are subject to zero percent VAT, pursuant to Section 108(B)(7) of the NIRC of 1997, as amended.

The Court agrees with petitioner.

Section 108(B)(7) of the NIRC of 1997, as amended by Republic Act (RA) No. 9337, provides that sale of power generated through renewable sources of energy is among the transactions subject to zero percent (0%) VAT, as follows:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
>
> xxx xxx 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:

---

[50] Docket, vol. III, pp. 1255.

xxx xxx 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."

Section 4.108-5(b)(7) of Revenue Regulations (RR) No. 16-2005, which implements the above-quoted provision, qualifies the applicability of such zero-rating as follows:

"SECTION 4.108-5. *Zero-Rated Sale of Services.* –

xxx xxx xxx

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

xxx xxx xxx

(7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal and steam, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels; *Provided, however*, that zero-rating shall apply strictly to the sale of power or fuel generated through renewable sources of energy, and shall not extend to the sale of services related to the maintenance or operation of plants generating said power."

Corollary to the above provisions, Section 4.108-3(f) of Revenue Regulations No. 16-2005 states:

"SECTION 4.108-3. *Definitions and Specific Rules on Selected Services.* –

xxx xxx xxx

(f) Sale of electricity by generation, transmission, and distribution companies shall be subject to 10% VAT on their gross receipts: *Provided*, That 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 sources using technologies such as fuel cells and hydrogen fuels shall be subject to 0% VAT.

'*Generation companies*' refers to persons or entities authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility pursuant to the provisions of the R.A. No. 9136 (EPIRA). They shall include all Independent Power Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities."

It is noteworthy that petitioner is a special purpose entity, the sole purpose of which is to engage in all aspects of (a) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped- storage hydroelectric power plant, the New Caliraya Spillway, and other assets located in the Province of Laguna, and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna.

It must be recalled that petitioner entered into a Second Accession Undertaking with NPC, IMPSA, and CBK Power Corporation on September 20, 2000, wherein petitioner became a party to the BROT Agreement dated November 6, 1998. Under the Second Accession Undertaking and the BROT Agreement, petitioner shall assume and undertake the responsibility to rehabilitate, construct, operate, and maintain the Caliraya, Botocan, and Kalayaan hydroelectric power plants and other civil structures for the purpose of generating electricity for NPC. In consideration thereof, NPC shall pay petitioner Capital Recovery Fees, Operation and Maintenance Fees and other amounts specified in the BROT Agreement.

In performing its obligations under the Second Accession Undertaking and the BROT Agreement, petitioner entered into an Agreement with IMPSA Construction Corporation designated as Turnkey Contract dated August 18, 2000, whereby IMPSA Construction Corporation as Contractor represented itself to be technically and financially capable of undertaking the design, engineering, procurement, supply of all plant and materials, rehabilitation, construction, commissioning, testing, completion and handover of such power plants, together with the civil structures, access roads and other works as specified in the BROT Agreement, on a fixed price, turnkey basis.

Petitioner generates electricity through its Caliraya, Botocan and Kalayaan I and Kalayaan II hydroelectric power plants. The plants generate electricity by drawing water from an upstream reservoir, passing the water through a penstock, and in the process utilizing the force of gravity to rotate the turbines. The turbines in turn rotate the generators, thereby generating electricity.[51]

Petitioner's Caliraya, Botocan, Kalayaan I and Kalayaan II power plants were found by the Energy Regulatory Commission (ERC) to be compliant with the pertinent rules and regulations as evidenced by the Certificates of Compliance (COCs)[52] issued by the ERC to petitioner pursuant to the Implementing Rules and Regulations of RA No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA). Moreover, the BIR issued BIR Ruling No. DA-146-2006[53] dated March 17, 2006, confirming that the billings of petitioner, an entity engaged in hydropower generation, to NPC for the sale of electricity generated through hydropower are subject to VAT at zero percent under Section 108(B)(7) of the NIRC of 1997, as amended by RA No. 9337.

For these reasons, petitioner's sales of power generated through hydropower qualify for VAT zero-rating under Section 108(B)(7) of the NIRC of 1997, as amended.

Petitioner is not entitled to input VAT. Petitioner's purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities and the whole process of exploring and developing renewable energy sources up to its conversion into power are zero-rated.

There is no doubt that petitioner is engaged in zero-rated sales for its sales of electricity generated through hydropower to NPC. Nevertheless, petitioner's purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities, as well as the whole process of exploring and developing renewable energy sources up to its conversion into power, are also zero-rated.

Section 15(g) of RA No. 9513 or the Renewable Energy Act of 2008, which was approved on December 16, 2008, provides:

---

[51] Exhibit "J", Affidavit, No. 20, docket, vol. I, p. 232.
[52] Exhibits "F" to "I".
[53] Exhibit "B".

"CHAPTER VII
GENERAL INCENTIVES

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 xxx 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 NIRC of 1997, as amended by Republic Act No. 9337.

All RE Developers shall be entitled to zero-rated value added tax on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities.

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." (*Emphasis supplied*)

The same is implemented by Part III, Rule 5, Section 13(G)(b) of DOE Circular No. DC2009-05-0008 issued by the Department of Energy (DOE) on May 25, 2009, which provides as follows:

"PART III.
Incentives for Renewable Energy Projects and Activities

RULE 5.
General Incentives and Privileges for Renewable Energy Development

SECTION 13. *Fiscal Incentives for Renewable Energy Projects and Activities*

DOE-certified existing and new RE Developers of RE facilities, including Hybrid Systems, in proportion to and to the extent of the RE component, for both Power and Non-Power Applications, shall be entitled to the following incentives:

xxx xxx xxx

G. *Zero Percent Value-Added Tax Rate*

The following transactions/activities shall be subject to zero percent (0%) value-added tax (VAT), pursuant to the NIRC of 1997, as amended by Republic Act No. 9337:

(a) Sale of fuel from RE sources 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;

(b) Purchase of local goods, properties and services **needed for the development, construction, and installation of the plant facilities** of RE Developers; and

(c) **Whole process of exploration and development of RE sources up to its conversion into power**, including, but not limited to, the services performed by subcontractors and/or contractors." *(Emphasis supplied)*

In the case of *Bloomberry Resorts and Hotels, Inc. vs. Bureau of Internal Revenue*[54], the Supreme Court held that:

"We adhere to the cardinal rule in statutory construction that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. As has been our

[54] G.R. No. 212530, August 10, 2016.

consistent ruling, where the law speaks in clear and categorical language, there is no occasion for interpretation; there is only room for application."

As such, as an RE developer, petitioner is entitled to zero-rated VAT on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities and to the whole process of exploring and developing renewable energy sources up to its conversion into power.

Consequently, no output VAT shall be shifted to or passed on to RE developers, such as herein petitioner, in connection with their purchases of goods and services needed for the development, construction, and installation of their plant facilities as well as to the whole process of exploration and development of RE sources up to its conversion into power. Conversely, no input VAT shall be paid by RE developers on these transactions. There being no input VAT to be paid by RE developers, it necessarily follows that they are not entitled to refund, or issuance of TCC from the said purchases.

Simply stated, petitioner could not have paid input taxes on its purchases of goods and services from VAT-registered suppliers because such purchases being zero-rated, *i.e.*, no output tax was paid by the suppliers, no input tax was shifted or passed on to petitioner. It must be stressed that VAT is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services.[55]

The present case is analogous to the case of *Coral Bay Nickel Corp. vs. Commissioner of Internal Revenue*[56], wherein the Court of Tax Appeals *En Banc* affirming the Decision[57] of the Court in Division ruled that an entity located within the Ecozone cannot seek from the BIR a refund of its unutilized input taxes because under the law and the Cross Border Doctrine of the VAT system, sales of goods and services to PEZA-registered entities such as Coral Bay Nickel Corporation, are subject to zero percent (0%) VAT. The Court *En Banc* further held that in instances when petitioner Coral Bay paid input VAT, notwithstanding that under the law it is subject to VAT at zero percent rate, Coral Bay's recourse is not against the government, but against the seller who shifted to it the output VAT. Pertinent portions of the Decision reads:

> "xxx, all sales of goods or property to PEZA-registered enterprises made by VAT registered suppliers from the customs territory shall be subject to 0% VAT, pursuant to *Sec. 106(A)(2)(a)(5), of the NIRC, of 1997, as amended,* in relation to *Article*

[55] Section 105, NIRC of 1997, as amended.
[56] CTA EB No. 403 (CTA Case No. 7022), May 29, 2009.
[57] CTA Case No. 7022, March 10, 2008.

77(2) of the Omnibus Investments Code. While all sales of services to PEZA-registered enterprises, made by VAT registered suppliers from the customs territory, shall be subject to 0% VAT, pursuant to *Section 108(B)(3) of the NIRC of 1997, as amended,* in relation to the provisions of *RA 7916* and the 'Cross Border Doctrine' of the VAT system.

xxx xxx xxx

The Cross Border Doctrine provides that no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority (*Section 2, Revenue Memorandum Circular No. 74-99*).

Since, an ECOZONE is regarded as a foreign territory by *RA 7916*, the sales of goods and services therefore by VAT registered enterprises to PEZA-registered enterprises are subject to VAT at zero percent rate. Accordingly, no output VAT shall be shifted to or passed on to PEZA-registered enterprises; conversely, no input VAT shall be paid by PEZA-registered enterprises from said purchases. There being no input VAT paid by PEZA-registered enterprises, it necessarily follows that they are not entitled to refund, or issuance of tax credit certificate from their purchases of goods and services.

Records show that petitioner is a PEZA registered entity, as evidenced by its PEZA Certificate of Registration No. 02-072 (*Exhibit 'C'*). Applying the foregoing doctrine, petitioner is therefore subject to VAT at zero percent rate. Accordingly, no output VAT shall be shifted to it; hence, petitioner is not entitled to refund or issuance of tax credit certificate from its domestic purchases of goods and services.

It bears stressing that in the aforecited *Toshiba case*, the Supreme Court, citing *Revenue Memorandum Circular No. 42-03*, categorically stated that 'for invoices/receipts issued upon the effectivity of RMC No. 74-99, the claims for input VAT by PEZA-registered companies, regardless of the type or class of PEZA-registration; should be denied'. Since petitioner's claim for refund or issuance of tax credit certificate pertains to input VAT on its domestic purchases of goods and services for the period May 1, 2002 to December 31, 2002 (*Exhibits 'W-1' to W-241'*), which is after the effectivity of *Revenue Memorandum Circular No. 74-99*, petitioner is therefore not entitled to refund, pursuant to the *Toshiba case* and *Revenue Memorandum Circular No. 42-03.*

To allow petitioner a refund or issuance of tax credit certificate of input VAT on its domestic purchases of goods and services, when there is no right to demand it against the government, since its purchases are zero-rated, would unduly enrich petitioner at the expense of the government. Under the law, no one shall unjustly enrich himself at the expense of another. *'Niguno non deue enriquecerse tortizamente condano de otr' (Ong Yong, et al. vs. David S. Tiu, et al., 375 SCRA 640).* Said ruling is equally true in the field of taxation, particularly in cases involving claims for refunds.

In instances when petitioner paid input VAT, notwithstanding that under the law it is subject to VAT at zero percent rate, petitioner's recourse is not against the government, but against the seller who shifted to it the output VAT. *Revenue Memorandum Circular No. 42-03* is clearly instructive on this matter:

> **'In the meantime, the claim for input tax credit by the exporter-buyer should be denied without prejudice to the claimant's right to seek reimbursement of the VAT paid, if any, from its supplier.'**

Pursuant to *Revenue Memorandum Circular No. 42-03*, petitioner's recourse for those purchases of goods and services where it paid VAT is not a claim for refund against the government, or the issuance of a tax credit certificate; but to seek reimbursement of the input VAT paid from its suppliers of goods and services.

For all the foregoing, this Court therefore rules that petitioner, being a PEZA registered enterprise, is not entitled to refund or issuance of a tax credit certificate of its claim for unutilized input VAT, in the amount of P50,124,086.75, attributable to its domestic purchases of goods, other than capital goods, and services for the period May 1, 2002 to December 31, 2002." (*Emphasis supplied*)

The afore-quoted ruling was affirmed in the case of *Coral Bay Nickel Corporation vs. Commissioner of Internal Revenue*[58], wherein the Supreme Court held that the proper party to seek the tax refund or credit should be the suppliers, not the petitioner (Coral Bay), as follows:

[58] G.R. No. 190506, June 13, 2016.

> "We should also take into consideration the nature of VAT as an indirect tax. Although the seller is statutorily liable for the payment of VAT, the amount of the tax is allowed to be shifted or passed on to the buyer. However, reporting and remittance of the VAT paid to the BIR remained to be the seller/supplier's obligation. Hence, the proper party to seek the tax refund or credit should be the suppliers, not the petitioner."

In the same vein, petitioner's recourse for its purchases of goods and services where it paid VAT is not a claim for refund against the BIR, but to seek reimbursement of its alleged input VAT paid from its suppliers of goods and services since its purchases of local goods, properties and services needed for the development, construction and installation of the plant facilities as well as its purchases of goods, properties and services for 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 or contractors, are subject to zero percent VAT under RA No. 9513.

In view of the foregoing, the Court rules that petitioner is not entitled to the issuance of TCC for unutilized input VAT in the amount of ₱58,802,851.18, allegedly representing its unutilized input taxes paid on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to its zero-rated sales for the period January 1, 2007 to December 31, 2007.

WHEREFORE, premises considered, the Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division's 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.

ROMAN G. DEL ROSARIO
Presiding Justice