REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

MINDANAO II GEOTHERMAL PARTNERSHIP, Petitioner,	**C.T.A. CASE NO. 7507**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **UY,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** AUG 1 2 2008 4:02 p.m.

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DECISION

CASTAÑEDA, JR., *J*.:

The instant "Petition for Review" seeks that judgment be rendered ordering respondent Commissioner of Internal Revenue to refund or to issue a tax credit certificate in favor of petitioner the amount of P7,167,005.84, representing unutilized creditable input taxes for the second, third, and fourth quarters of taxable year 2004.

Mindanao II Geothermal Partnership (petitioner) is a partnership duly registered with the Securities and Exchange Commission, with principal address at Barangay Ilomavis, Kidapawan City, North Cotabato. It is value-added tax (VAT)-registered taxpayer, with Tax Identification No. (TIN) 004-

766-953[1]. Petitioner is engaged in the production and sale of electricity as a generation company and sells electricity solely to the National Power Corporation, for and in behalf of the Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC) under a Build-Operate-Transfer (BOT) contract.[2]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law. She holds office at 4th Floor, BIR National Office Building, Agham Road, Quezon City.

Petitioner entered into a Build-Operate-Transfer contract with the PNOC-EDC for the finance, construction, design, testing, operation, maintenance and repair of a 48.25-megawatt geothermal power plant, provided that PNOC-EDC supplies and delivers steam to petitioner at no cost. In turn, petitioner converts the steam into electric capacity and energy and delivers it to the National Power Corporation for and in behalf of PNOC-EDC.[3] Further, its 48.25-megawatt geothermal power plant project has been accredited by the Department of Energy as a Block Power Production Facility under the Implementing Rules and Regulations of Executive Order No. 215, as amended.[4] Petitioner generated sales from its generated power and delivery of electric capacity and energy to NPC for and in behalf of PNOC-EDC.

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[1] Exhibit "B".
[2] Exhibits "C-3" and "L".
[3] Exhibit "L".
[4] Exhibit "C-1", "C-2", and "C-3".

On June 26, 2001, Republic Act (R.A.) No. 9136 took effect, and the relevant provisions of the National Internal Revenue Code (NIRC) of 1997 were deemed modified.

R.A. No. 9136, also known as the "Electric Power Industry Reform Act of 2001" (EPIRA), was enacted by Congress to ordain reforms in the electric power industry, highlighting, among others, the importance of ensuring the reliability, security and affordability of the supply of electric power to end-users. Under the provisions of this Republic Act and its implementing rules and regulations, the delivery and supply of electric energy by generation companies became VAT zero-rated, which previously were subject to ten percent (10%) VAT. In relation thereto, Section 6 of Chapter II and Section 6 of Rule 5 of its Implementing Rules and Regulations state that:

"Republic Act No. 9136

Electric Power Industry Reform Act of 2001 (EPIRA)

CHAPTER II

Organization and Operation of the Electric Power Industry

xxx xxx xxx

SECTION. 6. *Generation Sector* — Generation of electric power, a business affected with public interest shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

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

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

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

"Rules and Regulations to Implement Republic Act No. 9136, entitled 'Electric Power Industry Reform Act of 2001'

RULE 5

Generation Sector

xxx xxx xxx

SECTION 6. *Generation Charges and VAT.* —

xxx xxx xxx

(b) Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOE, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these rules."

The amendment of the NIRC of 1997 modified the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero percent (0%). Thus, petitioner adopted the VAT zero-rating of the

EPIRA in computing for its VAT payable when it filed its VAT Returns, on the belief that its sales qualify for VAT zero-rating.

Petitioner filed its Quarterly VAT Returns on the following dates[5]:

Date	Quarter	Taxable Year
July 26, 2004 and July 12, 2005	2nd	2004
Oct. 22, 2004 and July 12, 2005	3rd	2004
Jan. 25, 2005 and July 12,2005	4th	2004
Apr. 20, 2005	1st	2005

Petitioner filed an application for refund or issuance of tax credit certificate with the BIR's Revenue District Office at Kidapawan City on October 6, 2005 for the taxable year 2004.

Thereafter, it filed the corresponding Petition for Review on July 21, 2006 in order to comply with the prescriptive period required in Section 112(A) of the National Internal Revenue Code of 1997.

In her Answer, respondent interposed the following Special and Affirmative Defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue.
>
> 5. The amount of P7,167,005.84 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of goods and services attributable to zero-rated sales for the 2nd, 3rd and 4th quarters of 2004 is not properly documented;
>
> 6. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit;
>
> 7. Petitioner must show that it has complied with the provisions of Section 112 and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit. gr

[5] Joint Stipulation of Facts and Issues.

8. Claims for refund are construed against the claimant for the same partake the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and** as such, they are looked"[6]

After trial on the merits, this case was submitted for decision on February 11, 2008 after respondent filed her Memorandum sans petitioner's Memorandum.

The parties stipulated the following issues for this Court's resolution:

"1. Whether or not petitioner's administrative claim was timely filed.

2. Whether or not petitioner's judicial claim was timely filed.

3. Whether or not petitioner's sale of generated power qualifies as zero-rated sales under the NIRC, as amended, and the EPIRA Law.

4. Whether or not the amount of P7,167,005.84 represents the accumulated unapplied and unutilized creditable input taxes paid by petitioner within the 2nd, 3rd, and 4th Quarters of the Year 2004.

5. Whether or not petitioner's unapplied and unutilized creditable input taxes for the Year 2004 is duly supported by pertinent documents, such as VAT invoices and official receipts.

6. Whether not petitioner's unapplied and unutilized creditable input taxes for the Year 2004 were directly attributable to its only source of vatable revenue which is VAT zero-rated.

7. Whether or not the accumulated unapplied and unutilized input taxes paid by petitioner within the Year 2004 in the amount of P7,167,005.84 remains unutilized.

8. And in sum, whether or not petitioner is entitled to the claim for refund or issuance of tax credit certificate in the accumulated amount of P7,167,005.84 representing its excess and unutilized creditable input taxes for the Year 2004."[7]

[6] Answer, Docket, page 44.
[7] Joint Stipulation of Facts and Issues.

The issues stipulated by the parties may be summed up into one issue:

"Whether or not, based on the evidence presented, petitioner is entitled to refund or issuance of a tax credit certificate worth P7,167,005.84, representing its unutilized input VAT for the second, third and fourth quarters of taxable year 2004.

In order to resolve the issue of whether petitioner generated zero-rated sales for the second, third, and fourth quarters of taxable year 2004, petitioner must first qualify for VAT zero-rating under R.A. No. 9136 by proving that: (1) it is a generation company; and (2) it derived sales from power generation.

The above conditions are confirmed by this Court in the case of ***Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue***[8], to wit:

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

Perusal of the records of the case reveals that the primary operation of the petitioner is to convert the steam delivered or supplied to it by PNOC-EDC into electric energy to be delivered to NPC for and in behalf of the former. This is pursuant to the BOT contract with PNOC-EDC involving petitioner's Jc

[8] CTA Case No. 6788, October 13, 2005.

48-megawatt geothermal power plant which was accredited by the Department of Energy as a private generation facility on June 15, 1995 and thereafter.

The sale of generated power and delivery of electric capacity and energy of petitioner to NPC for and in behalf of PNOC-EDC is petitioner's only revenue-generating activity. Petitioner undoubtedly had sales of generated power as shown in their Quarterly VAT Returns for the second, third, and fourth quarters of taxable year 2004 that reflected only zero-rated sales/receipts.[9]

Clearly, petitioner satisfied these two requirements.

Having satisfied the twin requirements for VAT zero-rating under R.A. No. 9136, the Court will now determine whether petitioner is entitled to a refund or issuance of tax credit certificate, in accordance with Section 112(A) of the NIRC of 1997; which states 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 or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to

[9] Exhibits "G", "I", "J", "Y", and "Z".

any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

From the foregoing, petitioner must comply with the following requisites to be entitled to a refund:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input VAT payments are directly attributable to zero-rated sales or effectively zero-rated sales;
4. that the input VAT payments were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

Anent the first requisite, the Court commissioned Independent CPA, in his Report dated January 23, 2007[10], noted the following findings:

> **"Tests of M2GP's Sales Invoices and Official Receipts**
>
> The total operating revenues of **M2GP** were generated from the sale of energy to Philippine National Oil Company – Energy Development Corporation (PNOC – EDC). Under RA 9136 otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001, the sales of generated power by generation companies shall be VAT zero-rated. Hence, the sale of energy to PNOC-EDC are VAT zero-rated under the aforesaid EPIRA Law.
>
> The amount billed to PNOC-EDC is composed of Capacity Payments and Energy Payments. Capacity Payments is the sum of Capital Cost Recovery Fee (to be paid in US dollars), Fixed Operating Cost Recovery Fee (to be paid in US dollars) and Service Fee for Return on Investments (stated in US dollars but payable in equivalent Philippine Pesos using the prevailing exchange rate at the time of payment).
>
> My examination of the sales invoices and official receipts issued by **M2GP** shows that all receipts reported in the Schedule of Zero-rated Sales/Receipts (Annex B) are properly reported in the Quarterly VAT Returns and recorded in the books."

[10] Exhibit "T", pages 5 and 6.

This Court agrees with the above Report. Petitioner is a power generation company duly accredited by the Department of Energy.[11] Based on the invoices and official receipts[12] issued by petitioner to PNOC-EDC, its sole customer, petitioner's gross receipts from sale of electric power and energy for the second, third, and fourth quarters of taxable year 2004 amounted to P553,674,450.51.[13] Such gross receipts qualify for VAT zero-rating under R.A. 9136. Below is the breakdown of the amount of P553,674,450.51 as reflected in petitioner's Quarterly VAT Returns for the said period:

Exhibit	Period Covered	Zero-rated receipts
G	2nd quarter-2004	P 188,669,463.97
I	3rd quarter-2004	183,012,552.44
J	4th quarter-2004	181,992,434.10
		P 553,674,450.51

Concerning the second requisite, petitioner presented as evidence the suppliers' invoices, official receipts, and other relevant documents[14], to support its reported unutilized input tax for the second, third and fourth quarters of 2004 in the amount of P7,167,005.94, broken down as follows:

Exhibit	Period Covered	Input VAT
G	2nd quarter-2004	P1,487,437.21
I	3rd quarter-2004	4,488,238.22
J	4th quarter-2004	1,191,330.41
		P 7,167,005.84

[11] Exhibits "C-1", "C-1-a","C-2", and "C-3".
[12] Exhibits "W-1" to "W-11", with sub-markings.
[13] Docket. page 278.
[14] Exhibits "V" to "V-65", with sub-markings.

Upon examination of the aforesaid documents, the commissioned Independent CPA made the following findings[15]:

> **"Test of Supplier's Invoices, Official Receipts and Other Relevant Documents**
>
> Upon examination of the available supporting documents of **M2GP** and the schedules of input VAT on purchases, the following were noted:
>
> - **P369,803.01 / Annex D.1** – This represents input VAT claims from purchases of services which are supported by valid 2004 invoices but are paid in 2005 as shown in the dates indicated in the official receipts. As a rule, VAT on purchases/sales of services are recognized when these were paid/collected and not when these are accrued in the books.
>
> - **P131.09 / Annex D.2** – This represents input VAT claims from purchases supported by documents wherein the authority to print from the BIR is not indicated.
>
> - **P(52,856.00) / Annex D.3** – Although there were no supporting documents for this negative item, it was not considered in the total amount of exceptions explained under Note in Annex D. The non-inclusion of this item as an exception effectively reduces the amount of input VAT claim of **M2GP**.
>
> - **P3,543,278.45 / Annex D.4** – This input VAT claim, mainly from Mitsubishi Corporation, represents purchases of services but are not supported by official receipts. Input VAT claims reported on these purchases were considered an exception in arriving at the input VAT available for refund/ tax credit.
>
> - **P5,226.50 / Annex D.5** – Input VAT claimed on purchases of services from SGV & Company were incorrectly computed. I noted that the out-of-pocket expenses reimbursed by SGV & Company were included in the computation of input VAT.

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[15] Docket, page 273.

> The difference of input VAT claimed and the correct input VAT was considered as exception in arriving at the input VAT available for refund/tax credit.
>
> The total exceptions noted above amounted to P3,918,437.05 excluding the effect of negative input VAT as explained in the Note in Annex D.3. The rest of the input taxes paid are supported by original suppliers' invoices and/or official receipts with all the particulars indicated therein, such as but not limited to supplier's name, invoice numbers, TIN, official receipts number, BIR's permit to print, name of the customer and amounts are within the period covered, are correctly computed and the indicated buyer is **M2GP**."

This Court concurs with these findings except for the input VAT claim worth P3,543,278.45 relating to petitioner's purchases of services from Mitsubishi Corporation, which was disallowed by the commissioned Independent CPA because it was purportedly not supported by official receipt.[16] Records indicate that the input VAT claim of P3,543,276.45[17] was actually supported by VAT official receipt with serial number 1247 dated August 31, 2004.[18] Hence, the amount of P3,543,276.45 represents petitioner's valid input tax and only the input tax claim of P375,160.60[19] shall be disallowed.

As to the third requisite, the sale of generated power and delivery of electric capacity and energy of petitioner to NPC for and in behalf of PNOC-EDC is petitioner's only revenue-generating activity. This is evident in petitioner's Quarterly VAT Returns for the quarters covered by the instant Petition and in the succeeding quarters which reflected only zero-rated

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[16] Annex "D.4" of Exhibit "T".
[17] Per the voucher (Exhibit "V-32-B"), attached to the supporting official receipt (Exhibit "V-32-A"), the amount of input tax should be P3,543,276.45 and not P3,543,278.45 as reported by the Independent CPA.
[18] Exhibit "V-32-A".
[19] Annexes "D.1", "D.2", and "D.5" of Exhibit "T".

sales/receipts.[20] Therefore, the claimed input VAT is all attributable to petitioner's zero-rated sales/receipts for the second to the fourth quarters of taxable year 2004.

Regarding the fourth requisite, it was established that petitioner had no taxable sales during the quarters covered by the instant Petition and in the succeeding quarters. Thus, petitioner had no output VAT against which the claimed input VAT may be applied or credited. Moreover, petitioner did not carry-over the claimed input VAT in its VAT returns for the first and second quarters of taxable year 2005.[21]

Finally, as to the fifth requisite, the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund starts from the date of filing of the corresponding Quarterly VAT Return.[22] Counting from July 26, 2004, October 22, 2004 and January 25, 2005, the dates when petitioner filed its Quarterly VAT Returns for the second, third, and fourth quarters of taxable year 2004, respectively; both the administrative claim filed on October 6, 2005[23] and the judicial claim filed on July 21, 2006, fall within the two-year prescriptive period.

In sum, the Court finds petitioner entitled to a refund or issuance of tax credit certificate, representing unutilized input VAT for the second, third, and fourth quarters of taxable year 2004, but in the reduced amount of P6,791,845.24, computed as follows:

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[20] Exhibits "G", "I", "J", "Y", and "Z.
[21] Exhibits "Y" and "Z".
[22] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 141104 and 148763, June 8, 2007.
[23] Exhibit "L-2".

Amount of Input VAT Claim			
	2nd quarter - 2004	P1,487,437.21	
	3rd quarter - 2004	4,488,238.22	
	4th quarter - 2004	1,191,330.41	P 7,167,005.84
Less:	Disallowances		
	Annex D. 1 of Exhibit T	P 369,803.01	
	Annex D. 2 of Exhibit T	131.09	
	Annex D. 5 of Exhibit T	5,226.50	375,160.60
Refundable Input VAT Claim			P 6,791,845.24

WHEREFORE, the Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, respondent is hereby **ORDERED to REFUND or to ISSUE TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **SIX MILLION SEVEN HUNDRED NINETY ONE THOUSAND EIGHT HUNDRED FORTY FIVE 24/100 PESOS (P6,791,845.24)**, representing unutilized input VAT incurred for the second, third, and fourth quarters of taxable year 2004.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice