REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AVON RIVER POWER HOLDINGS CORPORATION [Formerly Avon River Holdings Corporation],
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 715
(C.T.A. Case No. 7467)

Members:

ACOSTA, *PJ*
CASTAÑEDA, JR.
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

APR 26 2012 [illegible] 11:30 a.m.

x- x

DECISION

Fabon-Victorino, J.:

Submitted for decision is the Petition for Review[1] filed by petitioner Avon River Power Holdings Corporation (*formerly* Avon River Holdings Corporation) on December 30, 2010, praying that

[1] En Banc docket, pp. 1-26.

the Decision[2] promulgated on March 2, 2010 and the Resolution[3] dated December 13, 2010, both issued by the Special First Division of the Court be annulled and set aside and a new one rendered directing the respondent Commissioner of Internal Revenue (CIR) to refund and/or issue a tax credit certificate in the amount of Php57,790,589.73, representing its unutilized input taxes for the four (4) quarters of 2004.

The antecedent facts as found by the Court in Division are as follows:

> *Avon River Power Holdings Corporation is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at 7th Floor, CTC Building, 2232 Roxas Boulevard, Pasay City, Metro Manila. It was originally registered with the Securities and Exchange Commission under the name "Avon River Holdings Corporation", which was subsequently changed to its present name "Avon River Power Holdings Corporation" on February 19, 2004. It is principally engaged in the business of acquiring, holding, owning, and operating power generation assets for lighting and power purposes and whole selling the electric power to the National Power Corporation (NPC), private electric utilities and electric cooperatives, and for the carrying on of all businesses incident thereto. Petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer in accordance with Section 236 of the National Internal Revenue Code (NIRC) of 1997, as amended, with Tax Identification Number 223-606-641-000, as evidenced by its BIR Certificate of Registration bearing OCN 9RC0000123988.*
>
> *Respondent is the Commissioner of the Bureau of Internal Revenue who is duly appointed and empowered to perform the duties of his office, including, among*

[2] En Banc docket, pp. 31-41.
[3] Id. pp. 43-49.

others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

For the four quarters of taxable year 2004, petitioner filed with the BIR its Quarterly VAT Returns, including the amendments thereto on the following dates:

Period Covered (2004)	Original Return Filed On	Exhibit	Amended Return Filed On	Exhibit
1st Quarter	April 26, 2004	E	July 26, 2004	F
			January 28, 2005	G
			January 23, 2006	H
2nd Quarter	July 26, 2004	I	January 28, 2005	J
			January 23, 2006	K
3rd quarter	October 25, 2004	L	January 28, 2005	M
			January 23, 2006	N
4th Quarter	January 25, 2005	O	April 25, 2005	P
			January 31, 2006	Q

The said Quarterly VAT Returns of petitioner likewise reflected the following:

Quarters	**Input VAT**		**Total Input VAT**
1st Quarter	Domestic Purchases - Capital Goods	P 4,372,001.59	P 4,372, 001.59
2nd Quarter	Domestic Purchases - Capital Goods	13,651,732.74	P 14,437,827.38
	Domestic Purchases - Goods Other than Capital Goods	499,143.10	
	Domestic Purchases – Services	286,951.54	
3rd Quarter	Domestic Purchases - Capital Goods	18,095,527.54	P 19,423,355.67
	Domestic Purchases - Goods Other than Capital Goods	285,577.88	
	Domestic Purchases – Services	166,115.25	
	Importations - Capital Goods	876,135.00	
4th Quarter	Domestic Purchases - Capital Goods	18,429,265.31	P 19,557,405.09
	Domestic Purchases - Goods Other than Capital Goods	120,713.68	
	Domestic Purchases – Services	114,725.10	
	Importations - Capital Goods	P 892,701.00	
Total			**P57,790,589.73**

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed an administrative claim for refund or issuance of tax credit certificate of unutilized input VAT with Revenue District

Office No. 51-Pasay City on December 29, 2005 in the total amount of P57,790,589.73 for taxable year 2004.

Due to respondent's inaction and in order to suspend the running of the two-year prescriptive period within which to file a judicial claim for refund/issuance of tax credit certificate, petitioner filed with this Court a Petition for Review on April 24, 2006.

Respondent interposed the following counter-arguments in his Answer to the Petition for Review:

> *"4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;*
>
> *5. The amount of P57,790,589.73 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of capital goods and services consisting of power generation assets and domestic purchases and importation of goods and services attributable to zero-rated sales for the four 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 Sections 112 and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit.*
>
> *8. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and as such, they are looked upon with disfavor (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)."*

Pre-Trial was held on September 15, 2006. In a Resolution dated October 25, 2006, the Court approved

> *the parties' Joint Stipulation of Facts and Issues filed on October 20, 2006; hence, Pre-Trial was terminated and the parties were ordered to proceed with the trial.*

On March 2, 2010, the Court in Division rendered the assailed Decision denying petitioner's claim for refund for failure to present its Energy Regulatory Commission (ERC) Registration and Certificate of Compliance ("CoC"). The Court in Division held that in the absence of evidence that petitioner is a generation company, all of the reported sales in the amount of Php38,278,231.01 cannot qualify for VAT zero-rating under R.A. No. 9136, otherwise known as the EPIRA Law. Consequently, the input VAT allegedly attributable thereto in the amount of Php57,790,589.73 cannot be subject of refund.

On March 25, 2010, petitioner filed an *Urgent Motion to Reopen Case for Trial and for Leave of Court to Present Additional Evidence with Ad Cautelam Motion for Reconsideration (of the Decision dated 02 March 2010)*. Respondent registered her *Opposition* on April 16, 2010, to which petitioner filed a *Reply* on May 4, 2010.

In a Resolution dated April 30, 2010, the Court in Division granted petitioner's *Urgent Motion to Reopen Case for Trial and* *for Leave of Court to Present Additional Evidence* holding in abeyance the resolution of petitioner's *Motion for Reconsideration*.

On June 15, 2010, petitioner presented its Legal Secretary Niadel N. Adaguio-Esguerra, who testified by way of Judicial Affidavit that petitioner was issued a CoC with number 05-10-GN09-13351 on October 6, 2005, to expire on October 6, 2010. The said CoC, was amended/revised and re-issued by the ERC on August 31, 2007 to include the additional capacity of petitioner's Generation Facilities from 13.39MW to 20.0MW as well as the 500KW Blackstart Generator Set. As petitioner's legal Secretary, she has custody of these documents and is familiar with them.

On August 26, 2010, the Court in Division, acting on petitioner's *Supplemental Offer of Evidence* filed on June 25, 2010 to which no comment was filed by respondent, admitted Exhibits "BBB", "BBB-1", "CCC" and "DDD". Thereafter, the parties were granted time to submit their respective memoranda on the pending incident.[4]

[4] En Banc docket, pp. 925-926.

On December 13, 2010, the Court denied petitioner's *Motion for Reconsideration* holding that during the period covered by the claim for refund, petitioner had no CoC to be considered as a generation company defined under R.A. No. 9136 since the CoC was issued only on October 6, 2005.

Hence, this appeal with the lone issue for the resolution of the Court, as follows:

> "WHETHER IT IS NECESSARY FOR PETITIONER TO PROVE ITS STATUS AS A GENERATION COMPANY ON OR BEFORE THE TAXABLE YEAR 2004 IN ORDER TO ENTITLE IT TO ITS CLAIM FOR REFUND AND/OR ISSUANCE OF TAX CREDIT CERTIFICATE IN THE AMOUNT OF PHP57,790,589.73."

Petitioner claims that it is not necessary for it to prove that it is a generation company during the period of its claim to qualify for VAT zero-rating under RA No. 9136, much more present an ERC CoC dated on or before the taxable year 2004 because of the stipulation made by the parties in their Joint Stipulation of Facts and Issues approved by the Court. The parties stipulated that, per petitioner's Articles of Incorporation, it is principally engaged in the business of acquiring, holding, owning, and operating power generation assets for lighting and power purposes and whole selling the electric power to the National Power Corporation, private electric utilities and electric cooperatives, and for the carrying on of all business incident thereto. Moreover, its status as a generation company was not an issue in the parties' Joint Stipulation of Fact s and Issues.

To promote its theory, petitioner cites the cases of *Panay Power Corporation vs. Commissioner of Internal Revenue*[5] and the *Mirant Sual Corporation vs. Commissioner of Internal Revenue*[6], where the Court allegedly ruled that the stipulation of the parties contained in their Joint Stipulation of Facts and Issues is sufficient to establish that the subject entity is a generation company. Petitioner therefore should not be penalized for relying on the principle laid down in the cited cases.

Besides, the presentation of its Articles of Incorporation in which its primary purpose of engaging in the business of power generation is indicated is sufficient to prove that it is a generation company given that it was not controverted by respondent. And with the approval of the said Articles of Incorporation by the Securities and Exchange Commission (SEC),

[5] C.T.A. Case No. 6807, October 30, 2006.
[6] C.T.A. Case Nos. 7299 and 7230, February 6, 2009.

the endorsement/s of relevant government agencies is deemed secured.

Petitioner further argues that pursuant to the EPIRA, its sales are VAT zero-rated upon the effectivity of the law regardless of the actual date of issuance of its CoC. Section 6 of R.A. No. 9136 bespeaks of two (2) types of generation companies, both of which are entitled to VAT zero rated sales on their sales of generated power. The first and to which it belongs, are those existing at the time the EPIRA took effect, which already have authority issued by the ERC to operate facilities in the generation of electricity. The other type are those new or established after the passage and effectivity of the law, to which CoC must be issued by the ERC upon application their before operation. Only this type of generation company is required, under Section 4(a)(i) of the Rules Implementing R.A. No. 9136, to obtain a CoC.

Finally, the filing of the application for CoC together with its certificate of DOE/NPC accreditation, three-year operational history and general company profile should be deemed substantial compliance with the requirements of Section 4(a)(i) of Rule 5 of the IRR, despite issuance of the CoC only on October

6, 2005. According to petitioner, the issuance of CoC to an existing generation company is mandatory and ministerial on the part of the ERC.

In her *Comment (Re: Petition for Review dated 30 December 2010)* dated March 11, 2011, respondent counters that the burden of proof rest upon petitioner which must establish that it is a generation company as defined by R.A. No. 9136. The non-presentation of petitioner's CoC is fatal to its claim for refund pursuant to Section 6 of the law. She rejects petitioner's contention that the presentation of petitioner's Articles of Incorporation is sufficient to prove that petitioner is a generation company. For respondent, evidence not formally offered is inadmissible and has no probative value.

Petitioner reiterates its arguments in its *Reply* dated April 1, 2011, that the requirement to obtain a CoC from the ERC prior to operation applies only to a new generation company and not to an existing one like it. Further, Rule 5, Section 6 of the IRR provides that VAT zero-rating of generation companies begins upon the effectivity of the EPIRA. Petitioner as well puts premium on the admission by the Court in Division of its Articles of Incorporation and CoC issued on October 6, 2005. Petitioner insists that it should not be even required to prove that it was issued a CoC by the ERC since this is subject to mandatory judicial notice.

Ruling of the Court En Banc

The Petition for Review must fail.

Section 6 of R.A. No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA), provides that sales of generated power by generation companies shall be VAT zero-rated effective June 26, 2001, thus:

> "SECTION 6. *Generation Sector.* - Generation of electric power, a business affected with public interest shall be competitive and open.
>
> xxx xxx xxx
>
> 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.**" *(Emphasis supplied)*

This provision was applied in the case of *Visayas Geothermal Power Company vs. Commissioner of Internal Revenue*,[7] where this Court ruled:

> ". . . Section 6 of the EPIRA Law provides that "sales of generated power by generation companies shall be value-added tax zero-rated". Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated companies from ten (10%) percent to zero (0%) percent.
>
> **As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: 1) it is a generation company, and 2) it derived sales from power generation.**" (*Emphasis supplied*)

Hence, to qualify for VAT zero-rating on its sales, petitioner **must prove** that it is a generation company and that it derived its sales from power generation. The twin-requirements must be substantiated with sufficient proof to justify grant of prayed for refund.

Section 4, Rule 5 of the Rules and Regulations to Implement Republic Act No. 9136 provides, viz:

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[7] CTA Case Nos. 6790 and 6838, dated January 18, 2007.

"Section 4. Obligations of a Generation Company. —

(a) **A COC shall be secured from the ERC before commercial operation of a new Generation Facility**. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

(i) **A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC**, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. **Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility**." (*Emphasis supplied*)

Plain from the foregoing provision that a power generation entity must first secure an authority from the ERC to operate a generation facility for it to be considered as a generation company. The provision creates no distinction as to the said requirement indicating that it applies to **both the new and existing generation facilities.**

It is worth to note that the Court in Division denied petitioner's claim for refund for failure to present its ERC registration and CoC to prove that it is authorized by the ERC to operate facilities for generation of electricity. To save the day, petitioner, on March 25, 2010, filed an *Urgent Motion to Re-open Case for Trial and for Leave of Court to Present Additional Evidence with Ad Cautelam Motion for Reconsideration (of the Decision dated 02 March 2010)* citing inadvertence for attaching to the petition its Certificate of Registration with the Bureau of Internal Revenue, instead of its ERC CoC with No. 05-10-GN09-13351, as intended.

With utmost leniency, the Court in Division, granted the motion on April 30, 2010 and held in abeyance the Resolution of petitioner's motion for reconsideration.

During the reception of proposed additional evidence for petitioner on June 15, 2010, petitioner presented Niadel N. Adaguio-Esguerra, who identified the following exhibits, all formally offered through a *Supplemental Formal Offer of Evidence* filed on June 25, 2010, and admitted by the Court in Division on August 26, 2010:

Exhibit	Description
"BBB"	Judicial Affidavit of Ms. Niadel N. Adaguio-Esguerra dated June 10, 2010
"BBB-1"	Portion of exhibit "BBB" appearing on page 3 showing the signature of Ms. Niadel N. Adaguio-Esguerra
"CCC"	Petitioner's ERC CoC No. 05-10-GN09-13351 issued on October 6, 2005
"DDD"	Petitioner's ERC CoC No. 05-10-GN09-13351 issued on August 31, 2007 revising the capacity of petitioner's Generation Facilities

On December 13, 2010, the Court in Division denied petitioner's *Motion for Reconsideration,* ruling in this wise:

> In the instant case, a perusal of Exhibits "CCC" and "DDD" showed that petitioner was issued a Certificate of Compliance only on October 6, 2005, or after taxable year 2004, which is the year covered by the claim for refund subject of this case. Petitioner shall, therefore, be strictly considered a generation company only as of the date of issuance of the said COC; considering that upon the effectivity of R.A. No. 9136 on June 26, 2001, the same law requires that "any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance." Petitioner is covered by the requirement of securing a COC pursuant to Section 4, Rule 5 of the Implementing Rules and Regulations of R.A. No. 9136, which was cited in the Decision and herein reiterated, to wit: xxx xxx xxx

Petitioner assails the Decision of March 2, 2010 as well as the Resolution of December 13, 2010, claiming that the Court in Division erred when it denied its petition for refund and/or tax credit on the ground that it failed to prove that it is generation company qualified for VAT zero-rated sales of power generation services under the EPIRA since it was issued a CoC only on October 6, 2005, or subsequent to the period of its refund claim. It is the theory of petitioner that there was no need to present a CoC to prove that it is a generation company in view of the stipulation of the parties in their Joint stipulation of facts which was duly approved by the Court in Division.

The Court *En Banc* cannot sustain petitioner's submission.

Undeniably, the parties made the following stipulation, thus:

> <u>Admitted Facts</u>
>
> 1. x x x.
>
> 2. x x x.
>
> 3. Petitioner, as stated in the primary purpose of its Article of Incorporation, is principally engaged in the business of acquiring, holding, owning, and operating power generation assets for lighting and power purposes and whole selling the electric power to the National Power Corporation, private electric utilities and electric cooperative, and for the carrying on of all business incident thereto.

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However, a closer examination reveals that the stipulation was only to the effect that petitioner is principally engaged in the business of power generation for sale to the National Power Corporation, private electric utilities and electric cooperatives, as stated in its Articles of Incorporation. There is no admission on the part of respondent that petitioner is a generation company qualified for VAT zero-rated sales of power generation services under the EPIRA, which incidentally is the very law invoke by petitioner in the present claim for refund. If at all, the admission is only to the effect that petitioner is into power generation for sale to the National Power Corporation, private electric utilities and electric cooperatives, as stated in its Article of Incorporation - and definitely not as defined and referred to in the EPIRA.

Assuming *in gratia argumenti,* that there was such a stipulation in the parties' Joint Stipulation of Facts and Issues, the same was seriously contradicted and overturned by petitioner's own evidence showing that its CoC No. 05-10-GN09-13351 was issued only on October 6, 2005 or after taxable year 2004, which is the year covered by the claim for refund subject of the present petition.

The Court *En Banc* agrees with petitioner that admission by the parties at the pre-trial conference must be treated as a judicial admission under Section 4, Rule 129 of the Rules of Court,[8] which requires no proof,[9] this however is not without exception. The admission may be contradicted by a showing that it was made through palpable mistake or that no such admission was made as in the case at bar. Likewise to prevent manifest injustice, the admissions made by the parties during the pre-trial may be disregarded by the court.[10] When petitioner presented the additional evidence to qualify it for zero-rated sales, the alleged judicial stipulation as to the status of petitioner as a generation company no longer existed as the same was contradicted by the very same documents.

Further, a judicial stipulation of facts is conclusive between the parties as long as it stands and such fact is not subject to contradiction by showing the fact to be otherwise than as agreed upon. However, the binding effect of the fact applies only to the

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[8] Section 4, Rule 129 of the Rules of Court provides:
SEC. 4. Judicial admissions. — An admission, verbal or written, made by a party in the course of the proceedings in the same case, does not require proof. The admission may be contradicted only by a showing that it was made through palpable mistake or that no such admission was made.

[9] Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue, G.R. No. 157594, March 9, 2010.

[10] Sese vs. Intermediate Appellate Court, G.R. No. 66186, July 31, 1987.

parties in agreement; it is no more binding on the Court than any other evidence in the case.[11]

On a final note, tax refunds are in the nature of tax exemptions. As such they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption,[12] such as petitioner.

WHEREFORE, the Petition for Review dated December 30, 2010, filed by petitioner is hereby **DENIED,** for lack of merit. The assailed Decision of March 2, 2010 and the Resolution of December 13, 2010, are **AFFIRMED** *in toto*.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

[11] Oceanic Wireless Network, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 76, June 22, 2006, citing Ireland vs. Stalaum, 162 Neb. 630, 77 N.W. 2d 155 (1956).
[12] Commissioner of Internal Revenue v. SC Johnson & Son, Inc., 368 Phil. 388, 411, June 25, 1999; Magsaysay Lines, Inc. v. Court of Appeals, 329 Phil. 310, 324, August 12, 1996; Commissioner of Internal Revenue v. Tokyo Shipping Co., Ltd., 314 Phil. 220, 228, May 26, 1995.

(On Wellness Leave)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

(On Wellness Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Wellness Leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice