REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

CE CASECNAN WATER AND ENERGY COMPANY, INC.,
Respondent.

CTA EB NO. 967
(CTA Case No.7917)

Present:

DEL ROSARIO, *P.J.*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS,
RINGPIS-LIBAN, *JJ.*

Promulgated:
NOV 04 2013 awApolinario 9:05 a.m.

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DECISION

DEL ROSARIO, PJ:

THE CASE

This is a Petition for Review filed by the Commissioner of Internal Revenue pursuant to Section 18 of Republic Act (RA) No. 1125, as amended, in relation to Section 2(a)(1) of Rule 4 of the Revised Rules of the Court of Tax Appeals (RRCTA) seeking the nullification of the Decision[1] dated August 23, 2012 and the Resolution[2] dated November 19, 2012, rendered by the First Division of this Court (CTA-First Division) in CTA Case No. 7917, the respective dispositive portions of which read:

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[1] *Rollo*, pp. 16 to 35.
[2] *Rollo*, pp. 36 to 40.

Decision dated August 23, 2012:

> "**WHEREFORE**, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in the amount of **SIXTY-ONE MILLION FOUR HUNDRED FIFTY-SIX THOUSAND THREE HUNDRED FORTY-SIX and 70/100 PESOS (P61,456,346.70)** in favor of petitioner CE Casecnan Water and Energy Company, Inc., representing income tax payments for taxable year 2006.
>
> **SO ORDERED**."

Resolution dated November 19, 2012:

> "**WHEREFORE**, premises considered, respondent's Motion **for Reconsideration** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

THE ANTECEDENT FACTS

The antecedent facts, as found by the CTA-First Division, are as follows:

> "Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Pantabangan, Nueva Ecija. It was incorporated on September 21, 1994, the primary purpose of which is "(t)o design, develop, construct, erect, assemble, commission, finance, own and operate a combined irrigation and hydro-electric power project and related facilities in Central Luzon, Philippines for the conversion into electricity of water provided by and under contract with the National Irrigation Administration (NIA) and for the supply of water for agricultural purposes to the National Irrigation Administration (the "Project"); provided that, in no event shall the corporation itself engage in the general supply or distribution of electricity, in retail trade or in the business of a public utility, or furnish electricity to end-users or consumers, or provide a public service or engage in industries or activities reserved by the Constitution or by law to corporations wholly or partially owned by Filipino citizens (As amended on 26 October 1995)."
>
> Petitioner is registered with the Board of Investments (BOI) as a New Operator of Hydro-Electric Power Plant, having a pioneer status, pursuant to BOI Certificate of Registration No. 94-388 issued on September 30, 1994. On February 28, 2007, petitioner was issued a Certificate of ITH Entitlement by the BOI, whereby it was given an income tax holiday from December 11, 2001 to December 10, 2007. It

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is likewise a registered value-added tax (VAT) taxpayer with the Bureau of Internal Revenue (BIR), as evidenced by its Certificate of Registration No. 0000017028 dated July 1, 1998, with Tax Identification Number 004-500-931-000.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue, vested with authority to act as such, including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes. She may be served with summons, pleadings and other legal processes at her office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner filed its Quarterly Income Tax Returns for taxable year 2006, through the Electronic Filing Payment System (EFPS), on the following dates:

Exhibit	Period Covered	Date of Filling
"E"	January to March 2006	May 29, 2006
"G"	April to June 2006	August 29, 2006
"I"	July to September 2006	November 29, 2006

Likewise, petitioner filed through EFPS, its Annual Income Tax Return (AITR) for taxable year 2006, on April 13, 2007 with Reference 120700001569890.

On April 15, 2009, petitioner filed with respondent, through the Large Taxpayers Audit and Investigation Division I, the appropriate administrative claim for refund in the total amount of ₱61,456,346.70, representing its income tax payment for taxable year 2006, on its revenues derived from water delivery to the NIA, a government-owned or –controlled corporation (GOCC). As admitted by the parties, petitioner seasonably filed said administrative claim.

To date, respondent has not finally resolved petitioner's administrative claim for refund. Thus, petitioner filed the instant Petition for Review on April 16, 2009.

In her Answer filed on July 14, 2009, respondent interposes the following arguments and defenses:

> "7. He (She) reiterates and re-pleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses;
>
> 8. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau;
>
> 9. Petitioner failed to demonstrate that the tax subject [of] the case at bar was erroneously or illegally collected.

a. That the claim for refund in the amount of Sixty One Million Four Hundred Fifty Six Thousand Three Hundred Forty Six Pesos and 70/100 (61,456,346.70) representing erroneous income payments for taxable year 2006 was filed within two (2) years in accordance with [Sec.] 229 of the Tax Code of 1997, as amended;

b. That it has complied with the governing rules and regulations with regard to recovery of taxes as provided in Section 229 of the NIRC, as amended.

Section 229 of the NIRC of 1997 provides:

'Section 229. *Recovery of Tax Erroneously or Illegally Collected.* — 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 collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner xxx.'

10. Petitioner must likewise establish that:

a. It is duly registered with the Board of Investments (BOI) in accordance with the provision of the Omnibus Investment Code of 1987.

b. It is entitled to full exemption from Income Tax payments allegedly based on its Income Tax Holiday incentives granted on its registered activities pursuant to Section 39 of Executive Order No. 226 otherwise known as Omnibus Investment Code of 1987.

In relation thereto, Article 39 of Executive Order No. 226 provides:

'Article 39. Incentives to Registered Enterprises —

All registered enterprises shall be granted the following incentives to the extent engaged in a preferred area of investment;

(a) Income Tax Holiday. —
(1) For six (6) years from commercial operation for pioneer firms and four (4) years for non-pioneer firms, new registered firms shall be fully exempt from income taxes levied by the National government.

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Subject to such guidelines as may be prescribed by the Board, the income tax exemption will be extended for another year in each of the following cases. xxx'

c. That its supply/or delivery of water to the National Irrigation Authority (NIA) which resulted to the recognition of income for taxable year 2006 is part and parcel of its registered activities covered by provisions of E.O. No. 226 for purposes of its entitlement to the full exemption from the payment of income tax.

11. For a valid claim for refund should consist of the following:

a. There must be a written claim for refund filed by the taxpayer with the Commissioner of Internal Revenue. This is a mandatory requirement. Without this requirement, the CIR is without any authority to refund.

b. The claim for refund must be a categorical demand for reimbursement.

c. The claim for refund must be filed within two years from date of payment of the tax or penalty regardless of any supervening cause. In claims for refund, the thirty-day period to appeal should be within the two-year prescriptive period.

12. 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 refund.

13. Taxes collected are presumed to be in accordance with laws and regulations.

14. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation.

15. Basic is the rule that tax refunds are regarded as tax exemptions that are in derogation of the sovereign authority and are to be construed in strictissimi juris against the person or entity claiming the exemption *(Philippine Phosphate Fertilizer Corporation v. Commissioner of Internal Revenue, G.R. No. 141973, June 28, 2005)*. The law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted (Sea-Land Service Vs. Court of Appeals, 357 SCRA 444)."

> During trial, petitioner presented two (2) witnesses: Leilah Yasmin E. Alpad, the Head of its Tax Services, and the court commissioned Independent Certified Public Accountant (ICPA), Jerome Antonio B. Constantino, to establish its refund claim. On the other hand, counsels for respondent manifested during the hearing held on April 1, 2011, that respondent was not presenting evidence, and instead submitted the case for decision based on the pleadings. Thus, the parties were given a period of thirty (30) days from notice within which to submit their respective Memorand[a].
>
> In the Resolution dated August 24, 2011, this case was submitted for decision, considering respondent's Memorandum filed on July 28, 2011 and petitioner's Memorandum filed on August 18, 2011.
>
> Subsequently, petitioner filed a Motion with Leave of Court to Allow Presentation of Additional [sic] on November 14, 2011, seeking the Court's permission to present Erwin Ray D. Aragon, petitioner's Plant Manager to elaborate further on the nature and operational processes of hydro-electric power plant, to prove that the generation of electrical energy and delivery/transport of water to the NIA are part and parcel of its operation of the hydro-electric power plant. The reason, among others given by petitioner, was respondent's alleged failure to fully appreciate the nature and operational process of the hydro-electric power plant of petitioner.
>
> Respondent filed her Comment thereto on December 21, 2011 opposing said motion on the ground that petitioner's ground therefor cannot be considered as a valid and strong basis that would warrant the reopening of the case; and that the documents sought to be presented before the Court cannot be considered as newly-discovered evidence, warranting a trial de novo as the same has long been available, existing and within the custody of petitioner.
>
> The motion was denied in the Resolution dated January 18, 2012, as the facts and circumstances of the instant case do not warrant a liberal application of the rules of procedure." (Citations omitted)

As aforestated, the CTA-First Division rendered its Decision on August 23, 2012 granting the Petition for Review.

On September 18, 2012, a "Motion for Reconsideration" was filed by herein petitioner seeking reconsideration of the assailed Decision while herein respondent filed its "Comment/Opposition (on Respondent's Motion for Reconsideration of the August 23, 2012 Decision of the Honorable Court)" on October 11, 2012.

On November 19, 2012, the CTA-First Division issued the assailed Resolution denying herein petitioner's Motion for Reconsideration for lack of merit. The assailed Resolution was received by herein petitioner on November 27, 2012. om

On December 11, 2012, herein petitioner filed the instant Petition for Review[3] before this Court *En Banc*, raising the following issue for the Court *En Banc's* resolution:

ISSUE

> "WHETHER OR NOT RESPONDENT IS ENTITLED TO A TAX REFUND IN THE AMOUNT OF ₱61,456,346.70 ALLEGEDLY REPRESENTING INCOME TAX PAYMENTS FOR TAXABLE YEAR 2006."

The Court *En Banc* ordered herein respondent to file its comment within ten (10) days from receipt of its Resolution dated January 14, 2013.[4]

On February 4, 2013, respondent filed its "Comment/Opposition (To Petitioner's Petition for Review)".[5]

In the Resolution[6] dated February 14, 2013, the Court *En Banc* gave due course to the Petition for Review and directed both parties to file their simultaneous memoranda, within thirty (30) days from receipt of the said Resolution; thereafter, with or without such memoranda, the Petition for Review shall be deemed submitted for resolution.

On February 28, 2013, herein petitioner filed a Manifestation[7] stating that she is adopting the Petition for Review filed on December 11, 2012 as her Memorandum. On the other hand, herein respondent filed its Memorandum[8] on March 22, 2013.

On April 17, 2013, the Court *En Banc* issued a Resolution[9] submitting the case for decision.

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[3] *Rollo*, pp. 1-14.
[4] *Rollo*, pp. 48-49.
[5] *Rollo*, pp. 50 -54.
[6] *Rollo*, pp. 56-57.
[7] *Rollo*, pp. 58-59.
[8] *Rollo*, pp. 63-72.
[9] *Rollo*, pp. 74-75.

PETITIONER'S ARGUMENTS

Petitioner contends that a careful scrutiny of respondent's Income Tax Holiday (ITH) Entitlement would clearly show that the exemption from the payment of income tax was granted solely on respondent's operation of Hydro-Electric Power Plant. Petitioner argues that nowhere is it provided that respondent is exempt from the payment of income tax for water diversion and irrigation system. Moreover, petitioner emphasizes that the Certificate of ITH Entitlement No. 2007-000032 issued by the BOI on February 22, 2007, covering taxable year 2006, did not mention "water diversion and irrigation system" as respondent's registered capacities. According to petitioner, for purposes of determining whether the activity is entitled to ITH, what is controlling is the Certificate of ITH Entitlement, and not the Specific Terms and Conditions which is part of respondent's BOI Certificate of Registration No. 94-388.

Furthermore, petitioner argues that even on the assumption that both the Certificate of Registration and the Certificate of ITH Entitlement are of the same level, still, respondent's registered pioneer status activity is the operation of a hydro-electric power plant. The water diversion and irrigation system was merely stated in the registered capacity which is One Hundred (100) MW which merely indicates the amount of electricity the power plant can produce. Petitioner points out that the clause "irrigation and water delivery" is just an unnecessary rider as far as tax matters are concerned, and this is validated by the fact that in the Certificate of ITH Entitlement, the registered capacity is merely listed as 100 MW.

Lastly, petitioner posits that it is incumbent upon respondent to prove that it is entitled to the refund sought. Here, petitioner claims that respondent failed to discharge its burden of establishing its entitlement to the tax refund or tax credit.

RESPONDENT'S COUNTER-ARGUMENTS

Respondent avers that the Certificate of ITH Entitlement is a mere confirmation that respondent is registered with the Board of Investments (BOI) and entitled to ITH Incentive. Respondent elucidates that the Specific Terms and Conditions of its BOI registration clearly show that its registration as a pioneer enterprise includes water diversion and irrigation system. Thus, it is axiomatic that the water diversion and irrigation system is part and parcel of its registered activity which is entitled to the ITH incentive.

Respondent further expounds that by the very nature of its Hydro-Electric Power Project as well as the contract with the National Irrigation Administration (NIA), the conversion of water into electricity and the supply of water for agricultural purposes necessarily includes water diversion and irrigation system as part of the entire process. Respondent cites paragraph 2.9, Article 2 of its Build-Operate-Transfer (BOT) contract with NIA which provides that "the operator will transport water from the Casecnan Watershed to the Pantabangan Reservoir and, in the process of such transport, generate electrical energy, and NIA shall accept all electrical energy generated by the Project and all water delivered to the Pantabangan Reservoir by the Project." Respondent contends that petitioner failed to fully appreciate the nature and operational process of its hydro-electric power plant.

In addition, respondent asseverates that it has presented all the evidence, both testimonial and documentary, necessary to establish its entitlement to the refund or issuance of tax credit certificate for its erroneous income tax payments. On the other hand, petitioner has not presented any controverting evidence but merely relied on its bare, erroneous and self-serving conclusion that respondent's claim has no factual or legal basis.

THE COURT EN BANC'S RULING

The Court *En Banc* carefully evaluated the evidence presented by respondent consisting, among others, of respondent's BOI Certificate of Registration No. 94-388,[10] the corresponding General Terms and Conditions[11] and the Specific Terms and Conditions,[12] Amended General Terms and Conditions,[13] as well as its BOI Certificate of ITH Entitlement for taxable year 2006 with CE No. 2007-000032[14]. The Court *En Banc's* evaluation yielded a conclusion similar to that of the CTA-First Division, that is, respondent's registration with the BOI, as a new operator of hydro-electric power plant on a pioneer status, indeed includes "water diversion and irrigation system".

It is worthy to note that under paragraph 1 of the Specific Terms and Conditions of its BOI registration, respondent was directed to submit to the BOI the Final Contract with NIA covering the registered project. A careful perusal of the terms of the Amended and Restated Casecnan Project

[10] Exhibit "C".
[11] Exhibit "C-1".
[12] Exhibit "C-2".
[13] Exhibit "C-3"
[14] Exhibit 'N".

Agreement by and between respondent and NIA dated June 26, 1995[15] reveals that it covers not only the supply of energy generated by the project to NIA but also the delivery of water to the Pantabangan Reservoir. The BOI-registered project, therefore, clearly includes not only the supply of energy but the also the water diversion and irrigation system. The Court *En Banc* concurs with the findings of the CTA-First Division on this matter and thus quotes with approval the pertinent portions of the assailed Decision, to wit:

> "In the Specific Terms and Conditions, petitioner's status is "PIONEER", with registered capacity of "ONE HUNDRED (100) MW INCLUDING WATER DIVERSION AND IRRIGATION SYSTEM".
>
> Based on the said terms and conditions of registration, "water diversion and irrigation system" is included in its registered capacity. In Paragraph 1 of the said Specific Terms and Conditions, it was made a condition that:
>
> > '1. **The enterprise shall submit a copy of the Final Contract with NIA covering the registered project**. It is understood that the registration shall be automatically cancelled when the enterprise fails to secure the final contract with the government on this project.'
>
> The foregoing condition was complied with, as petitioner presented in evidence the Amended and Restated Casecnan Project Agreement by and between CE Casecnan Water and Energy Company, Inc. and National Irrigation Administration dated June 26, 1995.
>
> Paragraph 2.9, Article 2 of the Scope of Management portion of petitioner's contract with NIA states that:
>
> > **'2.9 ELECTRICAL ENERGY AND WATER DELIVERY. — The operator will transport water from the Casecnan Watershed to the Pantabangan Reservoir and, in the process of such transport, generate electrical energy, and NIA shall accept all electrical energy generated by the Project and all water delivered to the Pantabangan Reservoir by the Project** and shall pay to the Operator the fees provided in Part B of Article 7 and in the Fifth Schedule (Delivery of Water and Electrical Energy).'
>
> In the same contract, Paragraph 7.1, Article 7, Part A, Delivery of Electrical Energy and Water by Operator also provides that:
>
> > **'7.1 DELIVERY**. **NIA agrees to accept all water delivered from the Casecnan Watershed to the Pantabangan Reservoir by the Project and all electrical energy generated by the Project and to pay the fees as specified in the Fifth**

[15] Exhibit "RRR".

> **Schedule** (Delivery of Water and Electrical Energy). The Operator shall dedicate the entire electrical output of the Project (net of Project usage) to NIA and shall deliver all water diverted by the Project to the Pantabangan Reservoir.'
>
> In relation thereto, Paragraph 7.5, Article 7, Part B, Fees provides that NIA shall pay water delivery fee, guaranteed energy delivery fee and excess energy delivery fee to petitioner, to wit:
>
> '**7.5 FEES.** With respect to each Month, or part thereof, NIA shall pay to the Operator the Water Delivery Fee, the Guaranteed Energy Delivery Fee, and the Excess Energy Delivery Fee, as applicable, in each case calculated as provided in the Fifth Schedule (Delivery of Water and Electrical Energy), plus, to the extent a separate billing therefore is not permitted or advisable under Philippine law, any present or future value-added taxes or similar incremental Taxes payable or to be payable by the Operator in respect of such amounts, such that after the Operator has paid any and all value-added taxes or similar incremental Taxes required to be paid by it in respect of such amounts there remains a sum equal to the Water Delivery Fee, the Guaranteed Energy Delivery Fee, and the Excess Energy Delivery Fee, as applicable, for such month.'
>
> Evidently, the contract with NIA, which involved a "water diversion and irrigation system" contemplated by the specific terms and conditions of the registration, is covered by the registration as such 'pioneer enterprise'. *(Emphases supplied; Citations omitted)*

Anent petitioner's argument that the Certificate of ITH Entitlement is controlling in determining the registered activity which is covered by the ITH, the Court *En Banc* finds the same bereft of merit. The Court *En Banc* concurs with the CTA-First Division that in determining the activity or project which is registered with the BOI and consequently entitled to the ITH incentive, what is controlling is the Specific Terms and Conditions which forms part of the Certificate of Registration. The exhaustive discussion by the CTA-First Division on this matter is quoted hereunder:

> "While it is true that the Certificate of ITH Entitlement issued by the BOI for taxable year 2006 did not mention 'water diversion and irrigation system' as registered capacities, what is controlling is the specific terms and conditions which formed part of the Certificate of Registration No. 94-388 issued by the BOI on September 30, 1994. The said Certification, including the specific terms and conditions thereof, has not been shown to have been cancelled, modified, or amended. In fact, said Certificate of ITH Entitlement referred to the original registration of petitioner under Certificate of Registration No. 94-388 dated September 30, 1994, which is the registration document of petitioner as a 'pioneer enterprise'.

Respondent's argument that the business operation of a hydro-electric power plant, on one hand, and the supposed operation of an irrigation project of petitioner, on the other hand, should be distinguished, is untenable because petitioner's 'pioneer status' specifically covers 'water diversion and irrigation system', and the contract with NIA has been categorically mentioned or contemplated by the issuance of the said Certificate of Registration as such pioneer enterprise.

Clearly, the water diversion supports the business of petitioner as a hydro-electric power company. If such diversion or supply of water also serves NIA for agricultural purposes, this circumstance should not be the cause to limit the exemption of petitioner as a 'pioneer enterprise'. To do so would be to render nugatory the purposes envisioned by the BOI incentives granted to pioneer enterprises.

Under the Specific Terms and Conditions of its registration, petitioner is entitled to the following incentives:

> '4. The enterprise shall be entitled to the following incentives:
>
> a. Exemption from all income taxes imposed by the Republic of the Philippines for a minimum period of six (6) years from the commencement of the Cooperation Period (the date of actual commercial operation, currently estimated to occur no later than December 31, 1998) under the project agreement, with the right to apply for extension allowable under the law;
>
> b. Full exemption from custom duties and national internal revenue taxes (including Value Added Tax) on importation of all capital equipment and spare parts necessary to develop, construct, start-up, test and operate the Power Plant (in accordance with E.O. 226, as amended by R.A. 7369) through December 31, 1994 or such later date as may be provided by law, provided the tax exemption privilege can only be availed of if the firm is registered before the date of implementation of the Expanded VAT Law (RA 7716), provided further, that CE Casecnan is in compliance with the provisions of the law granting such extension; (Importation of capital equipment will only be allowed upon submission of DOE Accreditation);
>
> c. Tax credits equivalent to 100% of custom duties and national internal revenue taxes for locally supplied equipment necessary to develop, start-up, test and operate the Power Plant through December 31, 1994, or such later date as may be determined by law, provided the tax exemption privilege can only

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> be availed of if the firm is registered before the date of implementation of the Expanded VAT Law (RA7716), provided further that the provisions of any such law granting such extension are complied with by CE Casecnan;
>
> d. Exemption from custom duties and national internal revenue taxes for the importation and unrestricted use of the consigned equipment for the development, construction, start-up, testing and operation of the Power Plant; and
>
> e. Employment of foreign nationals."
>
> Consequently, petitioner's income from the delivery of water to NIA is covered by the income tax exemption." *(Citations omitted)*

It is clear from the Specific Terms and Conditions of respondent's BOI registration that water diversion and irrigation system is part of respondent's BOI-registered activity, and respondent's income therefrom is covered by its ITH incentive.

While the Court *En Banc* agrees with the conclusions reached by the CTA-First Division that the BOI-registered project includes not only the supply of energy but also the water diversion and irrigation system, the Court *En Banc* finds that respondent was remiss in its duty of substantiating by sufficient evidence its entitlement to the claim for refund or issuance of tax credit certificate. The Court En Banc finds respondent's failure to prove the filing of its application for ITH availment and to establish the corresponding amount of income tax exemption approved by the BOI for the taxable year 2006 fatal to its claim for refund or issuance of tax credit certificate.

Section 3 of Rule III of the 2007 Revised Rules and Regulations in the Availment of Income Tax Holiday (*"2007 Revised Rules and Regulations"*) issued by the BOI[16] provides that "all new and expanding enterprises registered under Executive Order (E.O.) No. 226, as amended by RA No. 7918, that were issued Certificates of Entitlement by the BOI and claimed income tax exemptions in their Income Tax Returns (ITR) are required to file their applications for ITH incentive with the Board."

Moreover, Section 4 of Rule III of the *2007 Revised Rules and Regulations* states that "applications for ITH shall be filed in the prescribed form within thirty (30) days from the date of filing of the annual ITR with

[16] Published in Manila Times on March 30, 2007.

the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes earlier." Section 2, Rule IV of the *2007 Revised Rules and Regulations* provides for the procedural steps to be followed by enterprises availing of ITH incentive, to wit:

> "SECTION 2. **Procedural Steps. — Enterprises availing of the ITH incentive shall observe the following procedural steps**:
>
> 1. The applicant enterprise shall secure a Certificate of ITH Entitlement (CE) from the BOI before filing the ITR with the BIR.
>
> 2. The applicant enterprise shall file the ITR with BOI-issued CE and ITH claim to the BIR. For large taxpayers filing on-line, submission of CE shall be done manually. Date of filing of ITR if done on-line shall be the date of e-filing.
>
> 3. **Within thirty (30) days from the date of filing of the annual ITR with the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes later, applicant enterprise shall file with the BOI duly-accomplished application form together with all the supporting documents enumerated under the preceding Section**.
>
> 4. The staff of the Incentives Department of the BOI checklists and/or pre-evaluates the application as to the applicant's eligibility and completeness of documents. **Application being filed after six (6) months (180 days) from the date of filing of the annual ITR with the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes later, or without the Certificate of Entitlement shall not be accepted and the BIR shall be informed of the forfeiture of the ITH incentive for the taxable year**.
>
> 5. Stamping shall be done by the Incentives Department (ID) of the BOI with "OK FOR ACCEPTANCE" for applications with complete documents or with "FOR PROVISIONAL ACCEPTANCE" for applications with incomplete documents that have submitted at least a basic application with ITR, CE and AFS and a notarized undertaking to submit deficiencies within fifteen (15) working days from date of provisional acceptance. **Deficiencies not submitted within six (6) months (180 days) from the date of filing of the annual ITR with the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes later, shall mean the forfeiture of the ITH incentive for the taxable year**.
>
> 6. The staff of the Incentives Department's Director shall issue the Order of Payment for the filing fee. The official filing of the application shall be done at the Records Section of the BOI after paying the corresponding filing fee. BOI's Record Section stamps the Date of Official Filing and the Application Number on the application and transmits it to the BOI's Incentives Department.

7. Within one year from receipt of the application/s, the BOI shall process, review and endorse to the Assessment Service of the BIR National Office, copy furnished the concerned Revenue District Office, all applications for ITH incentive, including dockets bearing on the evaluation thereof, financial statements, schedules and supporting documents attached thereto.

8. **The staff of the Incentives Department of the BOI shall evaluate the application and notify applicant of any problems/issues encountered during evaluation process.** The applicant shall be given a deadline to comply with the additional requirements, if any. In the event an ITH application cannot be processed and evaluated within the prescribed one-year period due to policy and/or legal issues, the BOI shall immediately inform the BIR within one (1) month after the end of the said one-year period so as not to prejudice the duty of the latter to make an assessment within the three (3)-year period prescribed under Section 203 of the Tax Reform Act of 1997.

9. **The staff shall prepare an evaluation report showing the firm's eligibility to avail of the ITH incentive, its rate of exemption and the actual amount of income tax exemption for approval and signature of the Incentives Department Director.**

10. **The evaluation report shall be presented to the TSG Executive Director for approval and then to the Board of Governors for confirmation.**

11. **The Incentives Department shall prepare an endorsement to the Assessment Service (Main Office) of the BIR signed by the BOI Executive Director and a <u>letter of advice</u> to the registered enterprise signed by the BOI Incentives Department Director informing them of the BOI's action on the firm's ITH application.**

12. The letter of advice to the registered enterprises shall be released to the Records Section for mailing or for pick-up by the proponent while the endorsement to the BIR including a complete set of application and evaluation report shall only be released to the Records Section of the BOI for delivery/mailing to the BIR Office after compliance with prior release requirements such as submission of reports, proof of payment of issuance fee, etc. The firm shall be furnished a copy of such endorsement.

13. Prior to the end of the prescriptive period provided under Section 203 of R.A. No. 8424, the BIR, through the Assessment Service in the BIR National Office, shall post-audit/review the dockets bearing the ITH incentive availment endorsed by the BOI.

14. If any deficiency tax assessment arises from the post-audit/review, the Assessment Service shall transmit its findings and the corresponding dockets to the concerned RDOs who shall enforce the immediate collection thereof, including increments accruing thereon.

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> 15. The BIR shall defer issuance of Letter of Authority (LOA)/Letter Notice (LN)/Tax Verification Notice (TVN) to applicant enterprises whose operations are 100% registered with the BOI/BOI-ARMM, until after the completion of BOI evaluation of ITH application but not to exceed one and a half (1 1/2) years from the last day prescribed by law for the filing of the annual ITR.
>
> However, for applicant enterprises, with mixed operations (i.e., registered and unregistered activities), the above deferment shall only be for one (1) year from the last day prescribed by law for the filing of the annual ITR.
>
> Applicant enterprises described above may be entitled to the above deferment, except those falling under any of the following instances:
>
> a. Cases handled by the BIR under the Run After Tax Evader (RATE) Program;
>
> b. Persons under investigation as a result of verified information filed by a Tax Informer under Section 282 of the NIRC, duly processed and recorded in the BIR Official Registry Book;
>
> c. Cases involving claims for tax refund; and
>
> d. Cases in which Letter Notices (LNs) were issued, where the discrepancy in sales exceeds 30% of sales of base year or the discrepancy in purchases exceeds 30% of the purchases of the base year." (Emphases supplied)

Based on the foregoing, the application for ITH shall be evaluated by the BOI and an **evaluation report shall be issued showing the firm's eligibility to avail of the ITH incentive, its rate of exemption and the actual amount of income tax exemption**. The evaluation report shall be approved by the TSG Executive Director and confirmed by the BOI Board of Governors. Thereafter, a **letter of advice** to the BOI-registered enterprise informing them of the BOI's action on the ITH application, signed by the BOI Incentives Department Director, shall be released to the taxpayer.

The Court *En Banc* is mindful that respondent's claim for refund or issuance of tax credit certificate involves the year 2006. The afore-stated requirement to submit an application for ITH incentive with the BOI is not, however, novel. In the case of **Apo Cement Corporation vs. Commissioner of Internal Revenue**,[17] the then Second Division of this

[17] CTA Case No. 6710, July 31, 2006; Apo Cement Corporation filed a Petition for Review on February 9, 2007 before the Court *En Banc* appealing the Decision dated July 31, 2006 of the then Second Division in CTA Case No. 6710; Taking note of Apo Cement Corporation's manifestation that it availed of the Tax Amnesty Program, the Court *En Banc* issued a Resolution dated February 12, 2009, to wit: "**IN VIEW OF THE**

Court already emphasized the importance of complying with the rules and regulations relative to the availment of income tax holiday. Pertinent pronouncement of the then Second Division of this Court reads:

> "Moreover, the terms and conditions mentioned in petitioner's Certificate of Registration are those similarly provided for under Sections 3 to 7 of Rule III of the BOI Rules and Regulations In the Availment of Income Tax Holiday, specifically the following provisions:
>
> "RULE III. RULES IN THE AVAILMENT OF INCOME TAX HOLIDAY
>
> xxx xxx xxx
>
> Section 4. When Application should be filed. *Applications for ITH shall be filed in the prescribed form within one (1) month from the filing of the Annual Income Tax Return (ITR) with the BIR.* For companies which filed tentative ITRs, the filing of the application shall be done within one (1) month from the filing of the final ITR or within one (1) month after the lapse of the two (2) year period within which to file the final ITR.
>
> xxx xxx xxx
>
> Section 7. Penalty Provision. All applications for income tax exemption, covering taxable year 2002 and onwards, which are filed beyond the prescribed period provided in Section 4 hereof shall be imposed penalty to be computed as follows:
>
> a. Minimum Penalty
>
> | | | | |
> |---|---|---|---|
> | No. of day delay | 31-180 | 181-300 | Over 300 |
> | Amount | P1,000 | P5,000 | P10,000 |
>
> b. For delays of 365 days or less the following formula shall be used:
>
> $$\text{Penalty} = \frac{\text{No. of days delay}}{\text{365 days}}$$
>
> c. For delays of more than 365 days
>
> Penalty = Amount of ITH x % Penalty (1.75 for exempt income tax of more than P100M and 1.5% for P100M or less)

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FOREGOING, petitioner's "Petition for Review" filed on February 9, 2007 is deemed **WITHDRAWN**, and the afore-entitled case is considered **CLOSED** and **TERMINATED**." On March 3, 2009, Entry of Judgment was issued by this Court.

> d. Maximum Penalty = P2Million per taxable year
>
> Applications covering taxable year prior to 2002 shall be imposed penalty using the rates approved by the Board on November 6, 1998. *Provided, that applications filed beyond two and a half (2 1/2) years from the lapse of the period for filing the income tax return for income eligible for ITH shall no longer be accepted"* (Emphasis Ours).
>
> **Petitioner as a registered new enterprise with the BOI, is clearly bound by the aforequoted rules and regulations, insofar as availment of the income tax holiday is concerned.** Its non-compliance with any of the specific terms and conditions set forth in its certificate of registration, more particularly, the filing of an application for the availment of the ITH incentive within the period prescribed therein, will result to, either: (a) imposition of fines and penalties, including possible forfeiture of incentives; or (b) non-acceptance of the said application.
>
> **Consequently, petitioner's failure to file within the required period, its incentive application with the BOI, and its continuous failure to do so up to this time, did not only make it susceptible to the payment of fines and penalties, but also, the possible deprivation of its right to avail of the ITH incentive pursuant to its certificate of registration.**" (Emphases supplied)

In other words, the requirement to submit an application for ITH incentive is not being given retroactive effect as this requirement has been in existence prior to 2007.

Similar to Section 3 of Rule III of the 2007 Revised Rules and Regulations, Section 3 of Rule III of the old Rules and Regulations in the Availment of Income Tax Holiday ("*Old Rules and Regulations*") also states that *"[all] new and expanding enterprises registered under E.O. 226 as amended by RA 7918 that claimed income tax exemptions in their income tax returns are required to file their applications for Income Tax Holiday (ITH) incentive with the Board."* Moreover, Section 2 of Rule IV of the *Old Rules and Regulations* also provides that the application for ITH incentive shall be evaluated by the Incentives Department of the BOI and a letter of advice shall be issued stating the firm's eligibility to avail of the ITH incentive, its rate of exemption and the actual amount of income tax exemption.

With regard to the period for filing the application for ITH incentive, both the *2007 Revised Rules and Regulations* and the *Old Rules and Regulations* provide that the application for ITH incentive should be filed within thirty (30) days or within one month from the filing of the Annual Income Tax Return (ITR), to wit:

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Section 4 of Rule III of the Old Rules and Regulations	Section 4 of Rule III of the 2007 Revised Rules and Regulations
Section 4. When Application Should be Filed. Applications for ITH shall be filed in the prescribed form <u>within one (1) month from the filing of the Annual Income Tax Return (ITR) with the BIR</u>. For companies which filed tentative ITRs, the filing of the application shall be done within one (1) month from the filing of the final ITR or within one (1) month after the lapse of the two (2) year period within which to file the final ITR.	**Section 4. When Application Should be Filed.** Applications for ITH shall be filed in the prescribed form <u>within thirty (30) days from the date of filing of the annual ITR with the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes later</u>. For companies which filed tentative ITRs, the application shall be done within thirty (30) days from the filing of the final ITR or within thirty (30) days after the lapse of the three (3) year period within which to file the final ITR.

Thus, as a BOI-registered enterprise, respondent is required to file an application for ITH with the BOI within thirty (30) days from the filing of respondent's annual ITR with the BIR or from the last day prescribed by law for the filing of the ITR, whichever comes later.

Based on the above-stated rules and regulations, to be entitled to avail of the ITH incentive, it is indispensable that the BOI, in a corresponding letter of advice, has confirmed that respondent is eligible to avail of the ITH incentive, its rate of exemption and the actual amount of income tax exemption.

While it may be true that the non-presentation of respondent's application for ITH incentive was not specifically raised by petitioner as one of the bases in denying respondent's claim for refund or issuance of tax credit certificate, it bears stressing that paragraph 2 of Section 1, Rule 14 of the RRCTA states that "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case".

Here, to resolve the issue on whether or not respondent is entitled to the claim for refund or issuance of tax credit certificate, the Court *En Banc* deems it necessary for respondent to present the application for ITH to prove its entitlement to the afore-said claim for refund or issuance of tax credit certificate. After all, cases filed before this Court are litigated *de novo* and party-litigants should prove every minute aspect of their cases.[18] Since tax

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[18] Rafael Arsenio S. Dizon vs. Court of Tax Appeals and Commissioner of Internal Revenue, G.R. No. 140944, April 30, 2008.

refunds partake of the nature of tax exemptions, which are construed *strictissimi juris* against the taxpayer, **evidence in support of a claim must likewise be *strictissimi* scrutinized and duly proven.**[19] The taxpayer has the burden to present convincing evidence to substantiate a claim for refund,[20] and a taxpayer's "**[e]ntitlement to a tax refund is for the taxpayer to prove and not for the government to disprove.**"[21]

In view of respondent's failure to prove the filing of its application for ITH availment and to establish the corresponding amount of income tax exemption approved by the BOI for the taxable year 2006, the Court *En Banc* finds respondent's evidence inadequate to sustain its claim that it is entitled to a tax refund or tax credit certificate in the amount of ₱61,456,346.70. In this regard, the assailed Decision of the CTA-First Division ordering the refund or issuance of tax credit certificate in the amount of ₱61,456,346.70 in favor of respondent, allegedly representing its erroneously paid income tax for taxable year 2006, should be reversed and set aside.

WHEREFORE, premises considered, the Petition for Review is hereby **GRANTED**. Accordingly, the assailed Decision promulgated on August 23, 2012 and the impugned Resolution dated November 19, 2012 are hereby **REVERSED** and **SET ASIDE**. The Petition for Review filed by respondent in CTA Case No. 7917 is hereby **DENIED**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

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[19] Commissioner of Internal Revenue vs. Far East Bank & Trust Company (Now Bank of the Philippines Islands), G.R. No. 173854, March 15, 2010, citing Philippine Long Distance Telephone Company v. Commissioner of Internal Revenue, G.R. No. 157264, January 31, 2008, 543 SCRA 329, 33.
[20] Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637/162004, December 14, 2005.
[21] *Supra,* note 19.

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice