REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

DAVAO LIGHT and POWER COMPANY, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6307

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 2 3 2003

x - x

DECISION

This Petition for Review involves a claim for refund or issuance of tax credit certificate in the amount of P8,018,715.97 allegedly representing petitioner's unutilized input VAT for the months of June 1999 to December 1999.

As borne out by the records, the antecedent facts of the case are as follows:

Petitioner is a corporation organized and existing under Philippine laws, with principal office address at Aboitiz Complex Building, Banilad, Cebu City. It is actually engaged in the business of generating and/or selling electric light, heat and power *(paragraphs 1 and 5, Admitted Facts, Joint Stipulation of Facts and Issues).*

Petitioner was granted a legislative franchise under Act No. 3760 dated November 26, 1930, which was extended for another 25 years per National Electrification Administration (NEA) Resolution No. 134 dated September 16, 1976, and covers the following:

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> "xxx to construct, maintain and operate an electric light, heat and power, for sale within the limits of the Municipality of Davao (now Davao City) subject to the terms and conditions of Act No. 3636 (Model Electric Light and Power and Franchise dated September 7, 1929)" *(paragraph 3, Admitted Facts, Joint Stipulations of Facts and Issues).*

From June 1999 up to December 1999, petitioner made various purchases in the domestic market of utility poles, machineries, equipment and spare parts and contracted services and labor for the construction, operation and maintenance of its electric plant amounting to P88,205,875.67 and subjected to 10% value-added tax in the aggregate amount of EIGHT MILLION EIGHTEEN THOUSAND SEVEN HUNDRED FIFTEEN AND NINETY SEVEN (P8,018,715.97) *(paragraph 7, Petition for Review)*.

Petitioner alleges that it is exempt from the payment of value-added tax as established in Section 10 of Act No. 3636 otherwise known as Model Electric Light and Power Franchise Act dated December 7, 1929, which defines, among other things, taxes which petitioner shall be liable to pay, as well as those taxes which it is exempt from paying, which is also part of Act No. 3760. The pertinent portion thereof reads as follows:

> "**Sec. 10.** The grantee shall pay the same taxes as are now or hereafter be required by law from other individuals, copartnerships, private, public or quasi-public associations, corporations, or joint-stock companies, on his (its) real estate, buildings, plants, machinery and other personal property, except property declared exempt in this section. In consideration of the franchise and rights hereby granted, the grantee shall pay into the municipal treasury of the (of each) municipality in which it is supplying electric current to the public under this franchise, a tax equal to two per centum of the *gross earnings* from electric current sold or supplied under this franchise in said (each said) municipality. <u>Said tax</u> shall be due and payable quarterly and <u>shall be in lieu of any and all taxes of any kind, nature or description levied, established, or collected by any authority whatsoever</u>, municipal, provincial or insular, <u>now or in the future, or its</u>

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> poles, wires, insulators, switches, transformers and structures, installations, conductors, and accessories, placed in and over and under all public property, including public streets, and highways, provincial roads, bridges and public squares, and on its franchise, rights, privileges, receipts, revenues and profits, from which taxes the grantee is hereby expressly exempted." (Underlining ours) *(paragraph 6, Admitted Facts, Joint Stipulations of Facts and Issues).*

On June 13, 2001, petitioner filed a letter-claim, with the BIR Cebu City North, Revenue District Office No. 81 requesting for the refund of value added tax (VAT) it had erroneously paid *(paragraph 7, Admitted Facts, Joint Stipulation of Facts and Issues)*.

Failing to obtain an affirmative response from the respondent and fearing that its claim would be barred by the two-year prescriptive period within which to file a judicial claim for refund, petitioner filed a Petition for Review with this court on June 28, 2001.

Respondent in his Answer filed on August 9, 2001, raised the following Special and Affirmative Defenses, to wit:

1. The petitioner has failed to demonstrate that the taxes sought to be refunded were erroneously or illegally collected;

2. Moreover, it is provided under Section 4.103-1 of the Revenue Regulations No. 7-95 (Consolidated Value Added Tax Regulations) that "exemption means that the sale of goods or properties and/or services and the use or lease of properties is not subject to VAT (output tax) and the seller is not allowed any tax credit on VAT (input tax) previously paid;

3. In an action for tax refund/credit the burden of proof is upon the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit;

4. It is incumbent upon the petitioner to show that it has complied with the provision of Section 204 in relation to Section 229 of the Tax Code, as amended;

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

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(Commissioner of Internal Revenue vs. Ledesma, G. R. No. L-13509, January 30, 1970, 31 SCRA 95) and as such, they are looked upon with disfavor (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121); and

6. Taxes paid and collected are presumed to have been made in accordance with the law and regulations, hence, not refundable.

After trial on the merits, the case was submitted for decision on July 12, 2002, sans evidence from the respondent.

The parties agreed that the factual and legal issues which should be resolved in the trial are:

A. FACTUAL

1. How much supplies, machineries, equipment and services were purchased by the petitioner from the domestic market?

2. Are such purchases evidenced by VAT official receipts and/or for VAT sales invoices?

3. Has the petitioner already paid the sales price of such purchases?

4. Were such purchases made pursuant to its business of maintaining its electric power plants and the business of generating and/or distributing electric light, heat and power?

5. Were the supplies, machineries, equipment and services used in connection with the petitioner's business of generating and distributing electric light, heat and power?

B. LEGAL

1. Is the petitioner exempt from tax under its charter?

2. Are the sales of goods and services to the petitioner by its domestic suppliers subject to value added tax (VAT) at zero percent (0%) under the Tax Code?

3. Is the VAT charged and passed-on to the petitioner by its domestic suppliers illegal and/or erroneous?

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4. Is the Petitioner legally entitled to a refund/tax credit of the VAT passed-on to it by its domestic suppliers?

To us, the main question posed by the parties for determination is whether or not petitioner is legally entitled to the refund or tax credit of input VAT passed-on to it by its domestic suppliers.

It is the stand of petitioner that it is legally entitled to the claim for refund or tax credit by virtue of the provision of Section 229 of the 1997 Tax Code, which states, thus:

> **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, but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax of the tax or penalty regardless of any supervening cause that may arise after payment. *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which the payment was made, such payment appears clearly to have been erroneously paid.

According to petitioner, since it is exempt from the payment of both direct and indirect taxes under Section 10 of its franchise, it follows that its suppliers of goods and services cannot pass-on to it the ten percent (10%) VAT. Petitioner, having allegedly paid the 10% VAT shifted to it by the seller of goods and services, is therefore entitled to a refund.

We do not agree.

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For one thing, it is a rule in statutory construction that where there is a particular or special provision and a general provision in the same statute and the latter in its most comprehensive sense would overrule the former, the particular or special provision must be operative and the general provision must be taken to affect only the other parts of the statute to which it may properly apply. In other words, the particular or special provision is construed as an exception to the general provision. In this way, all the provisions are given effect *(Agpalo, Statutory Construction, 3rd ed. p. 200)*. Consequently, the applicable law in the case at bar is not Section 229 which refers to the recovery of any internal revenue tax, which is erroneously or illegally collected, rather, it is Section 112 of the Tax Code, which particularly deals on the refund or tax credits of input taxes.

> **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 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 is also in taxable or exempt sale of the goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributable to any one of the transactions, it shall be allocated proportionately on the basis of the volume of the sales.
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> (B) *Capital Goods.-* A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the

> extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made (Underscoring supplied).

By virtue of the above provision, we cannot subscribe to petitioner's claim that it is entitled to the refund or credit of input VAT. Firstly, it is clearly provided for by law that the applicant for the refund or tax credit must be a VAT-registered person. Petitioner in the case at bar is not a VAT-registered person. We consider such defect fatal to its claim.

Secondly, Section 112 of the Tax Code provides that refunds or tax credits of input tax are available only to zero-rated or effectively zero-rated sales and with respect to capital goods under certain conditions. Petitioner's transactions in the case at bar, can neither be classified as zero-rated sales nor effectively zero-rated sales. Revenue Regulations No. 7-95, particularly Section 4.100-2, provides that zero-rated sales cover export sales, foreign currency denominated sales, except those mentioned in Section 149 and 150 of the Tax Code and sales to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such sales to zero rate.

Further, Section 4.100-3 of the same Revenue Regulation provides that effectively zero-rated sales of goods and properties shall refer to the sale by a VAT-registered person to a person or entity who was granted indirect tax exemption under special laws or international agreements. Under these Regulations, effectively zero-rated transactions shall cover local sale of goods and properties to persons or entities who enjoy exemptions from indirect taxes under par. (a) no. (3), pars. (b) and (c) of the preceding section.

A perusal of the legislative franchise of the petitioner reveals that it does not subject the sale of its suppliers of goods and services to zero-percent rate. In other words, Section 10 of Act No.3636 does not exempt petitioner, the grantee of the legislative franchise, from the payment of the indirect tax. It follows that the 10% VAT passed on to the petitioner is proper.

Although petitioner's purchases can be considered as capital goods, it cannot successfully claim for refund, because as earlier mentioned, petitioner failed to register as Value-Added Tax (VAT)- taxpayer.

Likewise, it is worth mentioning Section 106 (A)(2)(c) and Section 108(B)(3) of the Tax Code, which provide that:

> **Sec. 106**. *Value-Added Tax on Sale of Goods or Properties.*
>
> (2) The following sales by VAT-registered person shall be subject to zero percent (0%) rate:
>
> > (c) Sales to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such sales to zero rate.
>
> **Sec. 108.** *Value-Added Tax on Sale of Services and Use or Lease of Properties.*
>
> (B) *Transactions Subject to Zero Percent (0%) Rate*. – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate;
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate.

It can be gleaned from the immediately cited provisions of the Tax Code that the supplier of goods and services to persons or entities whose exemption under special laws

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or international agreements to which the Philippines is a signatory, must effectively subject the supply of the goods and services to zero percent (0%) rate. Petitioner claimed that it had paid to its domestic suppliers of goods and services ten percent (10%) VAT. However, we opine that the input VAT should be included as part of its cost. The reason being, that petitioner cannot claim the refund of input tax with the Bureau of Internal Revenue, because it is not a VAT registered entity as required under Section 112 of the Tax Code.

In addition, the court finds support in ruling that petitioner is not entitled to the claim for refund, based on the decision of the Supreme Court in the case of *Borja vs. Collector of Internal Revenue and the Court of Tax Appeals, 113 Phil 568.* Petitioners in both cases anchored their claims on *Section 10 of Act No. 3636,* otherwise known as the *Model Electric Light and Power Franchise Act.* In interpreting the said provision, petitioner in *Borja case* and herein petitioner claimed that they are exempt from any and all taxes, compensating tax and value-added tax, inclusive according to the former and the latter, respectively, upon the payment of the franchise tax. Considering so, in this case, we find relevance in the declaration of the high tribunal in *Borja case* that unless it appears clearly and manifestly that an exemption is intended, the provision is to be construed strictly against the party claiming the exemption. Exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statute law. We reiterate, nothing in the provision of the legislative franchise mentions exemption of the grantee from the payment of indirect taxes such as the value-added tax.

Finally, in a parallel case, the Supreme Court held that the broad statement that the tax imposed on a public utility's earnings shall be "in lieu of all taxes and assessments of whatsoever nature" is not necessarily to be given a literal meaning when it will not be reasonable to assume that legislative body intended that the tax shall take the place of a tax of a kind not then known or in use *(Manila Electric Company vs. Vera, 67 SCRA 351)*.

It appearing that petitioner failed to qualify for the entitlement of refund or tax credit set forth under Section 112 of the Tax Code and on the basis of the finding that nothing in its legislative franchise provides for the exemption from indirect taxes, we believe that it is unnecessary to delve on the other factual and legal issues raised in the case.

IN THE LIGHT OF THE FOREGOING, it is recommended that the instant Petition for Review be **DENIED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Judge

I am inhibiting myself in this case. I was a former partner of the law firm of Petitioner's Counsel.
LOVELL R. BAUTISTA
Associate Judge

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CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

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