REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

CBK POWER COMPANY LIMITED,
Respondent.

CTA EB No. 2913
(CTA Case No. 10157)

Present:

DEL ROSARIO, *P.J.*,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID,
FERRER-FLORES, and
ANGELES, *JJ.*

Promulgated:
SEP 01 2025 4:25 pm

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DECISION

FERRER-FLORES, J.:

The **Petition for Review**[1] filed by **Commissioner of Internal Revenue (petitioner/CIR)** on May 23, 2024 appeals the Amended Decision promulgated on December 12, 2023 (assailed Amended Decision),[2] and the Resolution dated April 16, 2024 (assailed Resolution)[3] in CTA Case No. 10157, whereby the Special Second Division of this Court partially granted respondent's *Motion for Reconsideration* and ordered the refund or issuance of tax credit certificate in favor of respondent **CBK Power Company Limited (respondent/CBK)** in the amount of **₱30,791,652.85**, representing

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1 *Rollo*, pp. 7 to 23.
2 *Id. at* 32 to 64. Penned by Associate Justice Jean Marie A. Bacorro-Villena and concurred in by Associate Justice Lanee S. Cui-David.
3 *Rollo*, pp. 66 to 72.

its excess and unutilized input value-added tax (VAT) attributable to its zero-rated sales from the second to the fourth quarters of calendar year 2017, the dispositive portions of the assailed Decision and the assailed Resolution read as follows:

Assailed Amended Decision:

> **WHEREFORE**, premises considered, the Motion for Reconsideration filed by petitioner CBK Power Company Limited on 13 July 2023 is **PARTIALLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner CBK Power Company Limited in the amount of **₱30,791,652.85**, representing its excess and unutilized input value-added tax attributable to its zero-rated sales from the second (2nd) to the fourth (4th) quarters of calendar year 2017.
>
> **SO ORDERED.**

Assailed Resolution:

> **WHEREFORE**, the "Motion for Partial Reconsideration [re: Decision dated 12 December 2023]" filed by respondent on 27 December 2023 is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**

PARTIES OF THE CASE[4]

Petitioner is the Commissioner of the Bureau of Internal Revenue (BIR), duly appointed to exercise the powers and perform the duties of her [*sic*] office including, inter alia, the power to decide disputed assessments, refunds of internal revenue taxes, fees, other charges, and penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) of 1997, as amended.

Respondent is a corporation duly organized and existing under the laws of the Philippines.

FACTUAL ANTECEDENTS

The facts as found by the Court in Division are as follows:[5]

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4 Parties, *Petition for Review*, *Rollo*, p. 8.
5 Facts of the Case, Decision dated June 29, 2023, Docket -- Vol. IV, pp.1491 to 1493.

On 06 November 1998, NPC and Industrias Metalúrgicas Pescarmona S.A. (IMPSA) entered into an Accession Undertaking for the rehabilitation and operation of the Caliraya, Botocan, and Kalayaan hydroelectric power plant complex (otherwise known as the CBK Project) under a Build-Rehabilitate-Operate-Transfer (BROT) scheme. Pursuant to this undertaking, IMPSA, as the contractor, agreed to generate and supply electricity to NPC during the duration thereof. In turn, NPC shall pay IMPSA the necessary fees, including the capital recovery fee and operation and maintenance (O&M) fees.

Later, another Accession Undertaking dated 18 February 1999 was forged, and a Supplemental Agreement dated 14 September 1999 was likewise entered into wherein CBK Power Corporation (CBK Power) took part and agreed to manage the CBK Project.

Subsequently, on 20 September 2000, NPC, IMPSA, CBK Power, and petitioner [herein respondent] executed a Second Accession Undertaking wherein the latter became a party to the BROT agreement. There, petitioner [herein respondent] assumed CBK Power's rights and obligations to operate the hydroelectric power plants. In addition to the Second Accession Undertaking, petitioner [herein respondent] also earlier executed a Turnkey Contract with IMPSA Construction Corporation with the same objective of transferring the operation of the power plant facilities. Ultimately, petitioner [herein respondent] managed the operations of the CBK Project and supplied electricity to NPC according to the terms of the executed agreements. As a result, it was petitioner [herein respondent] who then billed NPC for the necessary fees.

Thereafter, in 2006, petitioner [herein respondent] requested for an opinion from the BIR on the taxable consequences of the billed fees to NPC; particularly, if the sale of electricity generated through hydropower is subject to zero percent (0%) VAT pursuant to Section 108 (B) (7) of the NIRC of 1997, as amended. In response thereto, on 17 March 2006, respondent [herein petitioner] issued BIR Ruling [DA-146-06] which affirmed that petitioner's [herein respondent's] billings for its sale of electricity to NPC are subject to 0% VAT.

From the period of 01 April 2017 to 31 December 2017, petitioner [herein respondent] sold hydropower electricity to NPC. In the same period, it incurred creditable input taxes in the total amount of P37,978,467.96 from the domestic purchases of goods and services other than capital goods, importation of goods other than capital goods, payment to services rendered by non-residents, and domestic purchases and importation (both exceeding P1 Million and not exceeding P1 Million), all of which are attributable to the sale of electricity to NPC. The quarterly VAT returns for CY 2017 evidenced said expenses and taxes.

On 31 May 2019, petitioner [herein respondent] filed an administrative claim before the BIR for the VAT refund or TCC of its unutilized or excess creditable input taxes of P37,731,282.57 for the 2nd to the 4th quarter of CY 2017. It based its claim on Section 108 (B) (7) of the NIRC of 1997, as amended, and BIR Ruling [DA-146-06]. A revenue officer from the ELTAD 1 received petitioner's [herein respondent's] request letter for refund, Application for Tax Credits/Refunds (BIR Form

No. 1914), and Revised Checklist of Mandatory Requirements for Claim for VAT refund.

On 11 July 2019, petitioner [herein respondent] received a Tax Verification Notice with No. TVN201800064479 (dated 09 July 2019) for the verification of the supporting documents it submitted in support of the refund claim. On 31 July 2019, petitioner [herein respondent] received respondent's [herein petitioner's] letter dated 12 July 2019 which partially approved its claim for VAT refund or TCC in the amount of P2,137,713.00.

PROCEEDINGS BEFORE THE COURT IN DIVISION[6]

Respondent filed the instant *Petition* before this Court on August 30, 2019. Petitioner filed his Answer on October 31, 2019.

The Pre-Trial Conference was conducted on February 13, 2020 and on March 10, 2021, respondent presented its witnesses, namely: (1) Fernando J. De La Paz, the company's Chief Financial Officer (CFO); and, (2) Ms. Myra Celeste O. Dabalos, the court-commissioned Independent Certified Public Accountant (ICPA).

In Ms. Dabalos' *Judicial Affidavit*, she testified that: (1) she conducted a special audit and examination of petitioner's documents in relation to the claim for VAT refund or tax credit certificate (TCC) (the subject matter of the instant *Petition*); (2) the result of the special audit was contained in a *Final Report* and in a USB that she filed before this Court on December 11, 2020; (3) there were errors in the *Final Report* that required rectification and in some exhibits that were inadvertently excluded; and, (4) correspondingly, she filed an *Amended Final Report* and another USB containing all the corrections on January 18, 2021. No cross and re-direct examinations were conducted.

By way of Mr. Dela Paz's Judicial Affidavit, he testified that: (1) respondent is a limited partnership that generates electricity through the four (4) hydroelectric power plants; (2) pursuant to the Accession Undertaking, respondent assumed the obligations of the contractor to rehabilitate and operate the CBK Power, and supply electricity to National Power Corporation (NPC); (3) in turn, NPC pays petitioner for the capital recovery fees and operation and maintenance (O&M) fees; (4) according to Sections 108 (B) (7) and 112 of the NIRC of 1997, as amended, and BIR Ruling [DA-146-06], respondent's sale of electricity to NPC are considered as zero-rated sales; (5) attributable to the said zero-rated sales, respondent incurred unutilized and excess input taxes in the amount of P37,731,282.57 for the period of April 1, 2017 to December 31, 2017; (6) respondent filed an administrative claim for VAT refund or TCC on May 31, 2019; (7) on July 31, 2019, petitioner

[6] Proceedings Before the Second Division, Decision dated June 29, 2023, Docket – Vol. IV, pp.1493 to 1496.

partially granted the VAT refund claim in the amount of P2,137,713.00 only; (8) petitioner denied the remaining balance of P35,593,569.57 due to its reliance on the allegedly erroneous decision of the First Division in CTA Case No. 8784 [42] wherein it was ruled that under Republic Act 9513 (RA 9513), respondent (as an Revenue Energy (RE) Developer entitled to zero-rated VAT on purchases of local supply of goods, properties and services) is not entitled to any claim for VAT refund or TCC; (9) in a later ruling of the En Banc in CTA EB Case No. 1861, the Court already clarified that respondent is not availing the incentives under RA 9513, hence, its refund claim was then granted; (10) in consonance with the said *En Banc* decision, respondent secured Negative Certifications from the Department of Energy (DOE) to prove that it was not registered with the latter agency under RA 9513 and has no pending application for registration under it; and, (11) using the said negative certifications, respondent then filed the instant petition on August 30, 2019 to appeal the denied claim.

On cross-examination, Ms. Dabalos clarified that from 2001 up to the present, respondent used the regular corporate income tax (CIT) rate. She also confirmed that in the DOE Negative Certifications, it was specified that respondent did not avail any incentives under RA 9513.

Subsequently, on March 17, 2021, respondent filed its *Formal Offer of Evidence*. In the Resolution dated July 7, 2021, the Court admitted all of respondent's exhibits except Exhibits "P-122-2-342," "P-122-2-358," "P-122-7-153," "P-122-9-79," "P-122-9-122," and "P-125-216," for its failure to submit the duly marked documents. Moreover, the Court noted discrepancies and observations in some of the exhibits.

During the hearing conducted on April 18, 2022, petitioner manifested that he will no longer present any evidence. The Court, thus, ordered the parties to submit their *Memoranda* within 30 days therefrom. Respondent filed its *Memorandum* on April 21, 2022; while, petitioner filed his *Memorandum* on May 18, 2022. Thereafter, the case was submitted for decision.

On June 29, 2023, the Special Second Division promulgated a Decision denying respondent's *Petition* for lack of merit. Respondent then filed its *Motion for Reconsideration* on July 13, 2023, assailing the Decision dated June 29, 2023. In response thereto, petitioner filed his *Comment/Opposition (to Petition's Motion for Reconsideration)* on August 4, 2023.

The Special Second Division promulgated the assailed Amended Decision on December 12, 2023.

On December 27, 2023, petitioner filed a *Motion for Partial Reconsideration [re: Decision dated 12 December 2023]*. Respondent then filed its *Comment on/Opposition to Respondent's Motion for Partial Reconsideration (Re: Decision dated December 12, 2023)* on January 29, 2024 through accredited courier and received by the Court on January 30, 2024.

The Court promulgated the assailed Resolution on April 16, 2024.

PROCEEDINGS BEFORE THE COURT *EN BANC*

On May 8, 2024, petitioner filed a *Motion for Extension to File Petition for Review*.[7]

The instant *Petition for Review* was filed on May 23, 2024.[8]

Respondent filed its *Comment on Petition for Review (Dated May 23, 2024)* on July 15, 2024.[9] On July 31, 2024, the instant case was submitted for decision.[10]

ISSUES[11]

The sole issue raised by petitioner in the instant *Petition for Review* is whether or not the Special Second Division of the Honorable Court erred in ruling that respondent is entitled to refund in the aggregate amount of ₱30,791,652.85, representing its excess and unutilized input VAT attributable to its zero-rated sales from the second to the fourth quarters of calendar year 2017.

ARGUMENTS

Petitioner submits that the Special Second Division, in the Decision dated June 29, 2023, correctly ruled that respondent failed to establish that it is engaged in zero-rated or effectively zero-rated sales. He emphasizes that respondent proferred as evidence three (3) Certificates of Compliance (COC) issued by the Energy Regulatory Commission (ERC) which were issued on July 4, 2019 with a validity period of July 19, 2019 to July 20, 2024; hence, outside petitioner's subject period of claim i.e. April 1 to December 31, 2017.

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7 *Rollo*, pp. 1 to 5.
8 *Id.* at 7 to 24.
9 *Id.* at 74 to 81.
10 *Id.* at 86.
11 *Id.* at 10.

Petitioner argues that the Special Second Division erred in reversing the said Decision and granting respondent's *Motion for Reconsideration* giving probative value to the COCs which were attached thereto and not offered as evidence. For petitioner, respondent did not offer any valid or justifiable reason to merit the admission of the documents despite not being formally offered.

Petitioner likewise claims that the Special Second Division erred in ruling that respondent complied with the sixth requisite, i.e. the input taxes claimed are attributable to zero-rated or zero-rated sales. According to petitioner, while respondent may have established that its sales are zero-rated, it failed to prove that its input taxes are directly attributable to its alleged zero-rated sales. Petitioner contends that that law does not state that all input taxes of a VAT-registered person whose sales are zero-rated are refundable. He asserts that there was no attributability established between the input tax on purchases vis-à-vis the zero-rated sales of respondent as such must be established by quantum of evidence and not by assumption.

Respondent, on the other hand, maintains that the Special Second Division correctly found that it has sufficiently proven and established its entitlement to refund.

RULING OF THE COURT IN DIVISION

On June 29, 2023, the Special Second Division denied respondent's Petition for Review on the ground that it failed to show that it sold electricity generated through hydropower to NPC during the second to fourth quarters of 2017, armed with the requisite COC from the ERC. Clearly, respondent failed to meet the requirements under the RA 9136 of the Electric Power Industry Reform Act of 2001 (EPIRA) and the NIRC of 1997, as amended.

The Special Second Division, however, reconsidered the Decision and promulgated the assailed Amended Decision, giving probative value to the COCs attached to respondent's *Motion for Reconsideration*. The Court in Division explained that although not offered, any evidence, may be admitted provided that the following requirements are present: (1) the same must have been duly identified by testimony duly recorded; and, (2) the same must have been incorporated in the records of the case. Being an exception, the same may only be applied when there is strict compliance with the requisites mentioned above; otherwise, the general rule in Section 34 of Rule 132 of the Revised Rules on Evidence, as amended, should prevail. Since the COCs, which covers the period of the subject claim for refund are found in the BIR Records, are public documents, being issued by a public officer in the performance of official duties, they are deemed public documents and are considered *prima facie* evidence of the facts stated therein. The COCs are, thus, given probative value and considered in the resolution of the cases.

Petitioner filed a *Motion for Reconsideration* on the assailed Amended Decision, but was denied by the Special Second Division for lack of merit.

RULING OF THE COURT *EN BANC*

The Court denies the instant *Petition for Review*.

Timeliness of the Petition for Review

Records show that petitioner received the assailed Resolution on April 23, 2024.[12] Counting 15 days therefrom, petitioner had until May 8, 2024 within which to file his Petition for Review before the Court *En Banc*. On May 8, 2024, petitioner filed a *Motion for Extension to File Petition for Review*[13] requesting for an additional period of 15 days within which to file his Petition for Review, which was granted by this Court in a Minute Resolution dated May 13, 2024.[14] On May 23, 2024, petitioner timely filed his *Petition for Review*.[15]

Exception to the rule that evidence that are not formally offered may not be considered by the Court in the resolution of the case.

In the Decision dated June 29, 2023, the Special Second Division found that the COCs submitted by respondent were issued by the ERC on July 4, 2019 with a validity period of July 19, 2019 to July 20, 2024, hence, outside its subject period of claim, i.e. April 1 to December 31, 2017. While these are renewal COCs, the Court found that respondent failed to proffer as evidence the original COCs that would cover the subject period of claim. Thus, there is no evidence on record that would show that when petitioner sold electricity generated through hydropower to NPC during the second to fourth quarters of 2017, it was armed with the requisite COC issued by the ERC in compliance with the EPIRA Law[16] and the NIRC of 1997, as amended.

[12] *Rollo*, p. 65.
[13] *Id.* at 1 to 4.
[14] *Id.* at 6.
[15] Supra note 1.
[16] Republic Act No. 9136.

The Special Second Division held that no evidentiary value can be given to any piece of evidence unless it is formally offered in Court pursuant to Section 34 of Rule 132 of the Rules of Court, which provides:

xxx xxx xxx

> SEC. 34. *Offer of evidence.* — The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.

xxx xxx xxx

The Supreme Court, in various cases, has relaxed the application of said rule by allowing the admission of evidence not formally offered. To be admissible, however, two essential conditions must concur: first, the same must have been duly identified by testimony duly recorded and, second, the same must have been incorporated in the records of the case.[17]

In the instant case, the documents, which were not offered but were considered by the Special Second Division in the assailed Amended Decision, are the COCs issued by the ERC in favor of herein respondent.

In considering the COCs in the resolution of the case, the Special Second Division held that, pursuant to Sections 19, 23 and 24 of Rule 132,[18] these documents are public documents, which do not require identification or authentication, for being made in the performance of official duty by a public officer and is part of the BIR Records of the case, to wit:

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[17] *Herman Medina vs. People of the Philippines*, G.R. No. 182648, June 17, 2015.

[18] **Section 19.** *Classes of Documents.* — For the purpose of their presentation evidence, documents are either public or private.

Public documents are:

(a) **The written official acts, or records of the official acts** of the sovereign authority, official bodies and tribunals, and **public officers**, whether of the Philippines, or of a foreign country;
(b) Documents acknowledge before a notary public except last wills and testaments; and
(c) Public records, kept in the Philippines, of private documents required by law to the entered therein.

Section 23. *Public documents as evidence.* — **Documents consisting of entries in public records made in the performance of a duty by a public officer are prima facie evidence of the facts therein stated.** All other public documents are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter.

Section 24. *Proof of official record.* — The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, **may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record,** or by his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody. If the office in which the record is kept is in foreign country, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office.

> Indubitably, the subject COCs were **issued by a public officer in the performance of official duties**, hence, they come within the purview of what are **deemed to be public documents, and are prima facie evidence of the facts stated therein pursuant to Section 23, Rule 132 of the Revised Rules on Evidence, as amended**. Thus, even if none of petitioner's witnesses testified on the said COCs, they remain to be unassailed prima facie evidence. It helps to note that they are **found to be included in respondent's own BIR records**. Thus, in the absence of strong, complete and conclusive proof of its falsity or nullity, the evidentiary nature of the COCs must be sustained and considered.[19] (Emphasis ours)

The Court *En Banc* affirms the findings and rulings of the Special Second Division. Considering that the COCs are public documents, which need not be identified, and are found in the BIR Records duly submitted to the Court, the subject COCs, which are valid from 2014 to 2019 and covers the subject claim for refund, may be considered by the Court in resolving the case.

The input taxes need not be directly attributable to the zero-rated sale.

In the instant *Petition for Review*, petitioner maintains that the law requires that only "creditable input taxes" that are "directly attributable" may be refunded. Thus, the fact that no attributability was established, the input tax on purchases vis-à-vis zero-rated sales of respondent must be a sufficient reason to deny the claim for refund.

The Special Second Division has sufficiently addressed said issue in the assailed Resolution. Quoting the case of *Commissioner of Internal Revenue vs. Cargill Philippines, Inc.*,[20] the Court a quo held that the law does not require direct attributability of the input VAT from the purchase of goods to the finished product whose sale is zero-rated.

Further, contrary to petitioner's argument that the law requires direct attributability of the input taxes to the zero-rated sales, Section 112 (A) of the NIRC of 1997, as amended, clearly provides:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* —
>
> (A) *Zero-rated or Effectively Zero-rated Sales.* — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, . . . Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the

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[19] Citations omitted.
[20] G.R. No. 255470-71, January 30, 2023.

> amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, **it shall be allocated proportionately on the basis of the volume of sales**. . . (Emphasis ours)

Undoubtedly, the law permits the proportionate allocation of input taxes to the zero-rated sales, exempt sales, and taxable sales.

Consequently, this Court finds no reason to grant the instant *Petition for Review*.

WHEREFORE, in view of the foregoing, the **Petition for Review** filed on May 23, 2024 is **DENIED** for lack of merit. Accordingly, the assailed Amended Decision dated December 12, 2023 and the assailed Resolution dated April 16, 2024 in CTA Case No. 10157 are **AFFIRMED**.

SO ORDERED.

CORAZON G. FERRER-FLORES
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

On Leave
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes-Fajardo
MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

HENRY S. ANGELES
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.

ROMAN G. DEL ROSARIO
Presiding Justice