REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

THIRD DIVISION

SAN ROQUE POWER CORPORATION,	**C.T.A. CASE NOS. 7882 &7937**
Petitioner,	Members:
	BAUTISTA, Chairperson, PALANCA-ENRIQUEZ, and COTANGCO-MANALASTAS, JJ.
-versus-	
	Promulgated:
COMMISSIONER OF INTERNAL REVENUE,	FEB 08 2012
Respondent.	APFernando 11:17a.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

The 30-day period within which to file an appeal with the CTA is jurisdictional and failure to comply therewith would bar the appeal and deprive the CTA of its jurisdiction. Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same *(Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue, 522 SCRA 144).* This rule applies to cases of refund or issuance of tax credit certificate under Section 112 of the NIRC of 1997, as amended, where the

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taxpayer may, within 30 days from receipt of the decision denying the claim or after the expiration of the 120-day period, appeal the decision or the unacted claim with the CTA. Likewise, the premature filing of the claim/credit of input VAT before the CTA warrants a dismissal, inasmuch as no jurisdiction was acquired by the CTA *(Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., 632 SCRA 422).*

THE CASE

This is a Petition for Review filed by San Roque Power Corporation (hereafter "petitioner") praying for the refund or issuance of a tax credit certificate (TCC) in the aggregate amount of P28,289,562.04, representing unutilized input VAT paid on its domestic purchases of taxable goods and services for the four quarters of calendar year 2007.

THE PARTIES

Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Barangay San Roque, San Manuel, Pangasinan.

Respondent, on the other hand, is the duly appointed CIR empowered to perform the duties of said office including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes, as provided by law. Respondent holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

The antecedent facts of the case, as culled from the records, are, as follows:

Petitioner is principally engaged in the designing, constructing, erecting, assembling, owning, commissioning, and operating power-generating plants and related facilities, pursuant to and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government-owned or controlled corporation, or other entity engaged in the development, supply or distribution of energy.

Petitioner's 345 MW Hydroelectric Power Plant Project, a three unit rated 345 MW hydroelectric power generating facility, has been duly accredited as a Block Power Production Facility by the Department of Energy, as evidenced by its DOE Certification of Accreditation (No. 99-01-50) issued on January 20, 1999.

On April 16, 2007, petitioner filed with the BIR its Original Quarterly VAT Returns for the first quarter of 2007.

On May 12, 2007, petitioner filed with the BIR its Amended Quarterly VAT Returns for the first quarter of 2007.

On July 18, 2007, petitioner filed with the BIR another Amended Quarterly VAT Returns for the first quarter of 2007.

On July 23, 2007, petitioner filed with the BIR its Quarterly VAT Returns for the second quarter of 2007.

For the first and second quarters of 2007, petitioner incurred unutilized input VAT credits from its purchases of capital goods, other domestic goods and services, as well as on its importations of goods, in the total amount of P17,459,164.54:

2007 Taxable Quarter	INPUT VAT						TOTAL (Php)
	Purchases of Capital Goods not exceeding 1M	Allowable Input tax for the period on purchase of capital goods exceeding 1M	Domestic purchases – Goods other than Capital Goods (Php)	Importation of goods other than capital goods	Domestic purchases – Services (Php)	Services rendered by non-residents	
1st	19,018.93	150,811.53	1,127,738.78	54,343.00	2,082,238.91	362,437.40	3,796,588.55
2nd	15,042.86	170,081.12	1,600,779.89	62,391.00	11,390,996.06	546,499.36	13,785,790.29
TOTAL	34,061.79	320,892.65	2,728,518.67	116,734.00	13,473,234.97	908,936.76	17,582,378.84
Less: Output TAX for the 2nd qtr							(123,214.30)
Total Unutilized Input VAT for the 1st and 2nd quarters of 2007							17,459,164.54

The unutilized input VAT for the 1st and 2nd quarters of taxable year 2007, in the aggregate amount of P17,459,164.54, is attributable to its zero-rated sales of generated power to the National Power Corporation ("NPC").

The unutilized input VAT for the 1st and 2nd quarters of taxable year 2007 was allegedly not applied against the output VAT in the succeeding taxable quarters.

On October 23, 2007, petitioner filed with the BIR its Quarterly VAT Returns for the third quarter of 2007.

On January 23, 2008, petitioner filed with the BIR its Original Quarterly VAT Returns for the fourth quarter of 2007.

On February 7, 2008, petitioner filed with the BIR its Amended Quarterly VAT Returns for the fourth quarter of 2007.

On February 26, 2008, petitioner filed with the BIR another Amended Quarterly VAT Returns for the fourth quarter of 2007.

For the third and fourth quarters of 2007, petitioner incurred unutilized input VAT credits from its purchases of capital goods, other domestic goods and services, as well as on its importations of goods, in the total amount of P10,830,397.50:

2007 Taxable Quarter	INPUT VAT						TOTAL (Php)
	Purchases of Capital Goods not exceeding 1M	Allowable Input tax for the period on purchase of capital goods exceeding 1M	Domestic purchases – Goods other than Capital Goods (Php)	Importation of goods other than capital goods	Domestic purchases – Services (Php)	Services rendered by non-residents	
3rd	44,355.77	212,509.42	1,175,914.15	132,289.00	4,278,931.09	150,529.20	5,994,528.63
4th	12,428.57	(296,655.34)	959,160.91	122,048.00	3,980,850.49	61,150.54	4,838,983.17
TOTAL	56,784.34	(84,145.92)	2,135,075.06	254,337.00	8,259,781.58	211,679.74	10,833,511.80
Less: Output TAX for the 2nd qtr							(3,214.20)
Total Unutilized Input VAT for the 1st and 2nd quarters of 2007							10,830,397.50

The unutilized input VAT for the 3rd and 4th quarters of taxable year 2007, in the aggregate amount of P10,830,397.50, is attributable to its zero-rated sales of generated power to the NPC.

The unutilized input VAT for the 3rd and 4th quarters of taxable year 2007 was allegedly not applied against output VAT in the succeeding taxable quarters.

On May 28, 2008, petitioner filed its administrative claim for refund of unutilized input VAT for the first and second quarters of taxable year 2007.

On January 27, 2009, petitioner filed its administrative claim for refund of unutilized input VAT for the third and fourth quarters of taxable year 2007 in the amount of P11,883,843.50.

On March 30, 2009, petitioner filed an amended administrative claim for refund of unutilized input VAT for the third and fourth quarters of taxable year 2007 in the reduced amount of P10,830,397.50.

In view of respondent's inaction and in order to suspend the running of the two-year prescriptive period under the *NIRC of 1997, as amended,* on March 13, 2009, petitioner filed its judicial claim for refund of the unutilized input VAT for the 1st and 2nd quarters of taxable year 2007 with this Court, docketed as C.T.A. Case No. 7882.

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On June 26, 2009 petitioner filed its judicial claim for refund of the unutilized input VAT for the 3rd and 4th quarters of taxable year 2007 with this Court, docketed as C.T.A. Case No. 7937.

On September 10, 2009, petitioner filed a "Motion to Consolidate" C.T.A. Case No. 7937 with C.T.A. Case No. 7882, which the Court granted. Thus, C.T.A Case No. 7937 was ordered consolidated with C.T.A. Case No. 7882, which bears the lower docket number.

In C.T.A. Case No. 7882, respondent CIR, in his answer, alleged by way of special and affirmative defenses:

> "5. Petitioner must prove that it has filed a claim for refund within the reglementary period provided by law. Section 112 of the NIRC of 1997 reads:
>
> > **"SEC. 112. *Refunds or Tax Credits of Input Tax. -***
> >
> > **(A) *Zero-Rated or Effectively Zero-Rated Sales.*** - any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the 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.

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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.
>
> **(C)** ***Cancellation of VAT Registration.*** - A person whose registration has been cancelled due to retirement from or cessation of business, or due to changes in or cessation of status under Section 106(C) of this Code may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax which may be used in payment of his other internal revenue taxes.
>
> **(D)** ***Period Within Which Refund or Tax Credit of Input Taxes Shall be Made.*** - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of compete documents in support of the application filed in accordance with Subsections (A) and (B)hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.-
>
> **(E)** ***Manner of Giving Refund.*** - Refunds shall be made upon warrants drawn by the Commissioner or by his duly authorized representative without the necessity of being countersigned by the Chairman, Commission on audit, the provisions of the Administrative Code of 1987 to the contrary notwithstanding: Provided, That refunds under this paragraph shall be subject to post audit by the Commission on Audit."

6. The Petition for Review was filed outside the period provided by law for judicial review. Petitioner's administrative refund was filed on May 28, 2008 and its Petition for Review was filed before the Honorable Court on March 13, 2009. From the abovequoted provision of law, petitioner had a period of 120 days or until September 25,

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2008. Afterwards, petitioner may opt to file a Petition for Review within 30 days or until October 25, 2008. The instant Petition for Review was filed one hundred forty days later or on March 13, 2009. Clearly, petitioner's right to a judicial review has prescribed.

xxx xxx."

While in C.T.A. Case No. 7937, respondent CIR, in his answer, alleged by way of special and affirmative defenses:

"6. Petitioner's alleged claim for refund is subject to administrative investigation/examination by the Bureau;

7. Petitioner failed to demonstrate that the tax subject in the case at bar was erroneously or illegally collected.

8. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112(A) of the Tax Code of 1997, as amended.

9. Petitioner must prove compliance with the following in order to be entitled to a claim for refund:

a. The registration requirements of a value-added taxpayer under the pertinent provisions of the Tax Code of 1997, as amended and its implementing regulations;

b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT pursuant to the provisions of Sections 113 and 114 of the Tax Code, as amended;

c. Submission of complete documents in support of the administrative claim for refund pursuant to Section 112© of the Tax Code of 1997, as amended, otherwise, there would be no sufficient compliance with regard to the filing of administrative claim for tax credit/refund which

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is a condition sine qua non prior to the filing of judicial claim;

d. That the input taxes in the amount of P10,830,397.50 allegedly representing input VAT from its domestic purchases of non-capital goods and services, as well as importations of goods for the 3rd and 4th quarters of calendar year 2007 were:

1. attributable to its zero-rated sales;
2. incurred or paid by petitioner; and
3. not applied against any output VAT liability;

e. That the claim for refund in the amount of Php10,830,397.50 representing unutilized input tax was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Sections 112(A) of the Tax Code, as amended;

f. Petitioner must likewise prove that it has complied with the governing rules and regulations with regard to recovery of taxes as provided in Section 112(a) of the Tax Code, as amended.

10. Corollary thereto, Section 112 of the NIRC 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, except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx
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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

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> the close of the taxable quarter when the importation or purchase was made.
>
> **(C) xxx**
>
> **(D)** ***Period Within Which Refund or Tax Credit of Input Taxes Shall be Made.*** - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes **within one hundred twenty (120) days from the date of submission of compete documents** in support of the application filed in accordance with Subsections (A) and (B) hereof.
>
> **In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above**, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.- "

Petitioner presented Pia Tose O. Talosig and Ma. Milagros F. Padernal, as witnesses, and documentary evidence, marked as Exhibits "A" to "U", "W", "AA" to "HH", "AAA", "AAA1" to "EEE2", "RRR1" to "HHHH-1", inclusive of their sub-markings, which were all admitted by the Court.

On the other hand, respondent waived his right to present evidence.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.

Both parties having complied thereto, the petition was deemed submitted for decision on September 16, 2011.

Hence, this decision. bbl

ISSUES

As stipulated by the parties, the following are the issues for this Court's consideration:

I

WHETHER PETITIONER'S UNUTILIZED INPUT VAT FOR THE FOUR QUARTERS OF CY2007 AMOUNTING TO PHP17,459,164.54 FOR THE 1ST AND 2ND QUARTERS OF CY2007 AND PHP10,830,397.50 FOR THE 3RD AND 4TH QUARTERS OF CY2007 OR THE AGGREGATE AMOUNT OF PHP28,289,562.04 IS DULY SUBSTANTIATED BY DOCUMENTARY EVIDENCE.

II

WHETHER PETITIONER'S ALLEGED UNUTILIZED INPUT VAT FOR THE FOUR QUARTERS OF CY2007 AMOUNTING TO PHP17,459,164.54 FOR THE 1ST AND 2ND QUARTERS OF CY2007 AND PHP10,830,397.50 FOR THE 3RD AND 4TH QUARTERS OF CY2007 OR THE AGGREGATE AMOUNT OF PHP28,289,562.04 WAS APPLIED OR CREDITED AGAINST ANY OUTPUT VAT OF THE PETITIONER IN THE SUBSEQUENT QUARTER OR QUARTERS.

III

WHETHER PETITIONER IS ENTITLED TO A REFUND OF AND/OR ISSUANCE OF A TAX CREDIT FOR ITS ALLEGED UNUTILIZED INPUT VAT IN THE AGGREGATE AMOUNT OF PHP28,289,562.04, WHICH INPUT VAT: (i) ALLEGEDLY AROSE FROM PETITIONER'S DOMESTIC PURCHASES OF NON-CAPITAL GOODS AND SERVICES, SERVICES RENDERED BY NON-RESIDENTS AND IMPORTATION OF NON-CAPITAL GOODS; AND (ii) ARE ALL

ATTRIBUTABLE TO PETITIONER'S ZERO-RATED SALES OF GENERATED POWER TO NPC.

IV

WHETHER PETITIONER'S CLAIM FOR REFUND OF AND/OR ISSUANCE OF TCC OF THE UNUTILIZED INPUT VAT WAS FILED WITHIN THE PERIOD PRESCRIBED BY THE 1997 TAX CODE.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is entitled to a refund or issuance of a TCC for its excess and unutilized input VAT for the four quarters of calendar year 2007 in the aggregate amount of P28,289,562.04 on its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods.

THE COURT'S RULING

The petition has no merit.

Section 112(C) of the NIRC of 1997, as amended, provides:

> "(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.*–In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.

> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may, within thirty (30) days** from the receipt of the decision denying the claim or **after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals**." *(Emphasis supplied)*

Pursuant to the above provision, the Commissioner of Internal Revenue has 120 days from the submission of complete documents to decide the claim for refund. In case of full or partial denial, or inaction of the Commissioner of Internal Revenue, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

Thus, in the case of *CIR vs. Aichi Forging Company of Asia, Inc.*, *supra*, the Supreme Court ruled:

> "xxx Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two 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." The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the application filed in accordance with

> Subsections (A) and (B)" within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA."

C.T.A. Case No. 7882

Applying the foregoing to this case, records show that petitioner timely filed its administrative claim for refund for the first and second quarters of 2007 on May 28, 2008 or within the two year prescriptive period from the close of the taxable quarter when the sales were made or from March 31, 2009 and June 30, 2009, respectively, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.*

Counting 120 days from May 28, 2008, pursuant to *Section 112(C) of the NIRC of 1997, as amended,* the CIR had until September 25, 2008, to decide petitioner's administrative claim. Since the CIR failed to act on petitioner's claim for refund, pursuant to *Section 112(C) of the NIRC of 1997, as amended,* the taxpayer has 30 days from September 26, 2008, or until October 25, 2008 to appeal the inaction of the CIR to this Court.

Records show, however, that petitioner filed the Petition for Review on March 13, 2009 only, which is 140 days way beyond the prescribed 30-day period to appeal to this Court.

The 30-day period within which to file an appeal with the CTA is jurisdictional and failure to comply therewith would bar the appeal and deprive the CTA of its jurisdiction. Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same *(Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue, supra).* This rule applies to cases of refund or issuance of tax credit under Section 112 of the NIRC of 1997, as amended, where the taxpayer may, within 30 days from receipt of the decision denying the claim or after the expiration of the 120-day period, appeal the decision or the unacted claim with the CTA. Likewise, the premature filing of the claim/credit of input VAT before the CTA warrants a dismissal, inasmuch as no jurisdiction was acquired by the CTA *(Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., supra).*

Settled is the rule that courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying the pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings *(Ace Publications vs. Commissioner of Customs, 11 SCRA 147).*

C.T.A. Case No. 7937

With regard to C.T.A. Case No. 7937, records show that petitioner timely filed its administrative claim for refund in the amount of P11,883,843.50 for the third and fourth quarters of 2007 on January 27, 2009 or within the two year prescriptive period from the close of the taxable quarter when the sales were made or from September 30, 2009 and December 31, 2009, respectively, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.* However, on March 30, 2009, petitioner filed an amended administrative claim for refund in the amount of P10,830,937.50, which is the subject matter of C.T.A. Case No. 7937.

However, notwithstanding the timely filing of its amended administrative claim, petitioner's claim must necessarily fail as it prematurely filed its judicial appeal before this Court on June 26, 2009 or barely 88 days after it filed its amended application for refund with respondent CIR. The instant Petition for Review was, therefore, prematurely filed, as petitioner did not wait for the lapse of the 120 days before filing its appeal with the CTA, in violation of *Section 112(D) of the NIRC of 1997, as amended.*

Pursuant to the aforesaid ruling of the Supreme Court in the Aichi case, the premature filing of petitioner's judicial claim for refund/credit of input VAT with this Court warrants a dismissal inasmuch as no jurisdiction was acquired by this Court.

In view of the foregoing, we find no need to discuss petitioner's compliance with the other requisites for refund of input taxes for the four quarters of 2007 on its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods attributable to its zero-rated sales, for being moot and academic.

WHEREFORE, premises considered:

1) as regards C.T.A. Case No. 7882, the Petition for Review is hereby **DISMISSED** for having been filed late; and
2) as regards C.T.A. Case No. 7937, the Petition for Review is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Separate Concurring Opinion)
LOVELL R. BAUTISTA
Associate Justice

(I concur with ponente in C.T.A. Case No. 7882. In C.T.A. Case No. 7937, I concur with the separate concurring opinion of Justice Bautista.)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

A T T E S T A T I O N

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

LOVELL R. BAUTISTA
Associate Justice
Chairperson, Third Division

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

SAN ROQUE POWER CORPORATION,
Petitioner,

CTA CASE NOS. 7882

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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SAN ROQUE POWER CORPORATION,
Petitioner,

CTA CASE NOS. 7937

-versus-

Members:
Bautista, *Chairperson*
Palanca-Enriquez, *and*
Cotangco-Manalastas, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

FEB 08 2012
ABFumant 11:17 a.m.

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SEPARATE CONCURRING OPINION

BAUTISTA, J.:

While I am in harmony with the Court in dismissing both the Petitions for Review filed petitioner San Roque Power Corporation, I am compelled to vary from the basis of the said opinion of the Court.

Settled is the rule that a claim for refund is in the nature of a claim for exemption; hence, it should be construed in *strictissimi juris* against the taxpayer.[1] Therefore before any claim for refund is allowed, a taxpayer must sufficiently prove that it has complied with all the requirements.

[1] Commissioner of Internal Revenue v. Tokyo Shipping Co., Ltd., *et al.*, G.R. No. L-68252 May 26, 1995, 244 SCRA 332.

Pursuant to Section 112(A) of the 1997 NIRC, San Roque Power Corporation must comply with the following requisites to be entitled to a refund of its input tax, *viz.*:

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

Following the above-enumerated requirements, a determination must be made whether the generation services rendered by San Roque Power Corporation for the four quarters of 2007 qualified for VAT zero-rating.

In order for its sale of electricity as a power generation company, such as San Roque Power Corporation, to qualify for VAT zero-rating, it must fall under Section 6 of Republic Act ("R.A.") No. 9136, also known as the "Electric Power Industry Reform Act of 2001," ("EPIRA"), which states:

> SEC. 6. *Generation Sector.* – Generation of electric power, a business affected with public interest shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation

> and supply of electricity shall not be required to secure a national franchise.
>
> Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.
>
> Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

In the case of *Mindanao I Geothermal Partnership v. Commissioner of Internal Revenue*,[2] this Court, in applying the provisions of R.A. No. 9136, specified the conditions to qualify for VAT zero-rating of power generating companies, *viz*:

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

From the above quoted decision, petitioner must be able to prove the twin requirements of being a generation company and of deriving its sales from power generation, for it to qualify for VAT zero-rating in accordance with R.A. No. 9136.

Notwithstanding the repeal of *RA 9136* under *RA 9337*, which took effect on November 1, 2005, petitioner's sale of generated power continued to be VAT zero-rated under Section 108(B)(7) of the 1997 NIRC, as amended by RA 9337.

Before the Court can conclude that petitioner is a generation company based

[2] CTA Case 6788, October 13, 2005.

upon the above cited case and provision of law, a comprehensive study of the entire law and its implementing rules and regulation must be conducted.

Under Section 4(x) of the EPIRA, the term "generation company" is defined as follows:

> **Section 4.** *Definition of Terms.* -
>
> xxx xxx xxx
>
> (x) "Generation Company" refers to any person or entity authorized by the ERC[3] to operate facilities used in the generation of electricity; xxx

Corollary thereto, Section 4 of Rule 5 of the Implementing Rules and Regulations ("IRR") of the EPIRA provides the following:

> **Section 4.** *Obligations of a Generation Company.*
>
> (a) A COC[4] 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 ERC to operate such existing Generation Facility.

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[3] Energy Regulatory Commission.
[4] Certificate of Compliance.

Under the EPIRA, part of the obligations of a "generation company" includes the submission within the period ninety (90) days from the effectivity of the Rules to ERC, when applicable, a certificate of DOE[5]/NPC[6] accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. Upon completion of these requirements, the said generation company shall be issued a COC by ERC to operate such existing generation facility.

Thus, the authority to operate a generation facility as a generation company referred to in the preceding provisions pertains to the duly issued COC which must be secured by both a new generation company and an existing generation company to operate a new and existing generation facility, respectively.

In the case of *Toledo Power Company v. Commissioner of Internal Revenue*,[7] the Court ruled that failure of the claimant to submit proof of its approved COC will lead to the disqualification for VAT zero-rating of its sales of generated power under the EPIRA.

Again in *GBH Power Resources, Inc. [Formerly: Mirant (Philippines) Island Generation Corporation] v. Commissioner of Internal Revenue*,[8] the Court held that GBH failed to establish that it was a generation company under Section 4(x) in relation to Section 6 of the Electric Power Industry Reform Act of 2001. Petitioner therein failed to submit its ERC registration and Certificate of Compliance, thus it cannot qualify for VAT zero-rating under the EPIRA.

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[5] Department of Energy.
[6] National Power Corporation.
[7] CTA Case No. 6961, November 11, 2009
[8] CTA Case No. 7462, March 26, 2010

According to the records, petitioner's MW Hydroelectric Power Plant Project has been duly accredited as a Block Power Production Facility by the Department of Energy, as evidenced by its DOE Certification of Accreditation (No. 99-01-50) issued on January 20, 1999. Thus while petitioner has submitted its accreditation by the DOE, I however, finds the said certificate to be insufficient.

The DOE Certificate of Accreditation is merely one of the requirements mentioned earlier in order to obtain the necessary COC for the petitioner's sales to qualify for VAT zero-rating.

Petitioner must comply with Section 4(a)(i) of Rule 5 of the IRR of the same law, which particularly provides for the required COC to be considered a generation company, before this Court can deem its sales transactions under the VAT zero-rating. Failure to present, or even secure a COC duly issued by the ERC will necessarily result in the failure of the sales transactions to qualify for VAT zero-rating under the EPIRA Law.[9] The burden of proof to present this particular document lies within the responsibility of the petitioner to successfully support its claim for refund.

Where the taxpayer claims a refund, the Court as a court of record is required to conduct a formal trial (*trial de novo*) to prove every minute aspect of the claim.[10] In addition, the rule is that the best evidence under the circumstance must be adduced to prove the allegations in a complaint, petition, or protest.

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[9] Toledo Power Company *v.* Commissioner of Internal Revenue, CTA Case Nos. 7233 & 7294, December 15, 2009.
[10] Commissioner of Internal Revenue *v.* Manila Mining Corporation, G.R. No. 153204, August 31, 2005, 469 SCRA 571.

Considering that there is no record showing that San Roque Power Corporation has been duly issued with a COC by the ERC, I find it unnecessary to further discuss the other issues raised in both the Petitions for Review.

I have no recourse therefore, but to deny petitioner's claim for refund/tax credit.

Accordingly, I vote to **DENY** both the Petitions for Review filed by the San Roque Power Corporation.

LOVELL R. BAUTISTA
Associate Justice