REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT (NAVOTAS II) CORPORATION
[formerly SOUTHERN ENERGY NAVOTAS II
POWER, INC.],
Petitioner,

- versus -

C.T.A. CASE NO. 6258

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

FEB 05 2003

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DECISION

This case involves a claim for refund or issuance of a tax credit certificate in the amount of P4,341,957.88 allegedly representing unutilized input VAT paid on its domestic purchases of goods and services which are attributable to effectively zero-rated sale of services for the four quarters of 1999.

Petitioner is a domestic corporation existing under and by virtue of Philippine laws, with principal office at 5F, CTC Building, 2232 Roxas Boulevard, Pasay City. It was originally registered with the Securities and Exchange Commission ("SEC") under the name "Hopewell Tileman (Philippines), Corporation". However, on March 23, 1999, petitioner's name was officially changed to "Southern Energy Navotas II Power, Inc.". Finally, on April 26, 2001, the SEC approved the application of the petitioner to further change its corporate name to "MIRANT (NAVOTAS II) CORPORATION" (*pars. 1 & 3, Stipulated Facts*).

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Petitioner is engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate and Transfer (BOT) Scheme. As such, it is registered as a Value-Added Tax (VAT) taxpayer in accordance with Section 107 of the Tax Code [now Section 236 of the National Internal Revenue Code of 1997], with BIR Certificate of Registration bearing RDO Control No. 96-051-005717 (*pars. 4 & 5, Stipulated Facts*).

On December 1, 1997, petitioner filed with the BIR Revenue District Office No. 51 at Pasay City an Application for Effective Zero Rating for the construction and operation of a gas turbine power station under the BOT scheme with the NPC (*par. 6, Stipulated Facts*).

Subsequently, petitioner filed an Application for zero-rate with the BIR National Office which was approved by said office in 1999 (*par. 7, Stipulated Facts*).

For the four quarters of 1999, petitioner filed its quarterly VAT returns reflecting zero-rated sales of P61,554,241.29 and P61,274,503.70 for the third and fourth quarters, respectively, or the sum of P122,828,744.99 and input taxes for each quarter in the aggregate amount of P4,341,957.88, broken down as follows:

Exhibit	1999	Date of Filing of Return	Zero-rated Sales	Input VAT
D	1st qtr	4/19/99		P 3,508,753.85
F	2nd qtr	7/21/99		368,556.33
H	3rd qtr	10/11/99	P 61,554,241.29	130,590.12
I	4th qtr	1/25/00	61,274,503.70	334,057.58
			P 122,828,744.99	P 4,341,957.88

On September 27, 1999, petitioner filed amended quarterly VAT returns for the first and second quarters of 1999 in order to reflect its zero-rated sales of P58,480,799.32

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and P56,460,924.91, respectively. Hence, petitioner's declared zero-rated sales for the four quarters of 1999 amounted to P237,770,469.22, as shown below:

Exhibit	1999	Date of Filing of Return	Zero-rated Sales	Input VAT
E (amended)	1st qtr	9/27/99	P 58,480,799.32	P 3,508,753.85
G (amended)	2nd qtr	9/27/99	56,460,924.91	368,556.33
H	3rd qtr	10/11/99	61,554,241.29	130,590.12
I	4th qtr	1/25/00	61,274,503.70	334,057.58
			P 237,770,469.22	P 4,341,957.88

On February 15, 2001, petitioner filed an administrative claim for refund in the amount of P4,341,957.88 representing alleged unutilized input VAT attributable to effectively zero-rated sales for the four quarters of 1999, citing Section 108(B)(3) in relation to Section 112(A) of the Tax Code of 1997 as legal bases (*pages 64 & 65, CTA records; par. 9, Stipulated Facts*).

In order to preserve its right to judicially claim the aforesaid amount, petitioner, on March 29, 2001, filed with this court the instant Petition for Review.

Respondent, in his Answer filed through registered mail on May 3, 2001, interposed the following Special and Affirmative Defenses:

> "4. Assuming without admitting that petitioner filed a claim for refund, the same is subject to investigation by the Bureau of Internal Revenue;
>
> 5. Petitioner miserably failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;
>
> 6. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable;
>
> 7. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit;

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8. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the Tax Code, as amended, as well as the requirements provided for in Revenue Regulations No. 5-87 as amended by Revenue Regulations No. 3-88;

9. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation **(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).**"

Petitioner, to support its claim, presented testimonial and documentary evidence. Respondent, on the other hand, merely submitted the case for decision, as there were no BIR records (*page 167, CTA records*).

On August 13, 2002, this case was submitted for decision sans the memorandum of the respondent.

As jointly stipulated by the parties, the issues to be resolved by this court are:

1. Whether or not the power generation services rendered by petitioner to NPC are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997 (formerly Section 102[b][3] of the old Tax Code);

2. Whether or not petitioner has unapplied or unutilized creditable input VAT for the four (4) quarters of 1999 arising from its domestic purchases of goods and services in the total amount of PhP4,341,957.88 that can be proper object of a claim for refund pursuant to Section 108(B)(3) [formerly Sec. 102(3)(b) of the old Tax Code] and Section 112(A) [formerly 106(b) of the old Tax Code] of the National Internal Revenue Code, as amended;

3. Whether or not the unutilized creditable input taxes for the four (4) quarters of 1999 are substantiated by proper invoices and official receipts; and

4. Whether or not the said unutilized creditable input VAT for the four (4) quarters of 1999 were carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of the petitioner for the said period.

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The issue of whether or not the power generation services rendered by petitioner to NPC are subject to zero percent (0%) VAT is not a novel one as this court had already ruled in the affirmative in previous similar cases, more recent of which is ***Mirant Navotas Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6044, dated October 16, 2002.*** As in those previous cases, the governing law is Section 108(B)(3) of the 1997 Tax Code in relation to Section 13 of Republic Act No. 6395 (NPC Charter), as amended, to wit:

> "**Section 108.** ***Value-Added Tax on Sale of Services and Use or Lease of Properties.*** x x x
>
> (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:
>
> (1) x x x
> (2) x x x
> (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."(Underscoring supplied).
>
> "**Section 13.** ***Non-profit Character of the Corporation: Exemption from All Taxes, Duties, Imposts and Other Charges by the Government and Government Instrumentalities***. — The Corporation shall be non-profit and shall devote all its returns from its capital investment as well as excess revenues from its operations, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance of effective implementation of the policy enunciated in Section one of this Act, the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes, duties, fees, imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." (Underscoring supplied).

It is clear from the foregoing that NPC is an entity with a special charter, which categorically makes it exempt from payment of all taxes, whether direct or indirect,

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including VAT. Hence, by virtue of the said charter, the services rendered by petitioner to NPC are effectively subject to zero percent (0%) VAT.

Moreover, as correctly cited by petitioner, NPC's exemption from all kinds of taxes, whether direct or indirect, has long been settled by the Supreme Court in the case of ***Maceda vs. Macaraig, Jr., 197 SCRA 771***. In resolving the same issue in a Motion for Reconsideration filed by former Senator Ernesto M. Maceda, the Supreme Court reaffirmed the exemption of NPC from all direct and indirect taxes. Quoted below is the pertinent portion of the Supreme Court's Resolution dated June 8, 1993:

> "A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes – direct or indirect.
>
> xxx xxx xxx
>
> One common theme in all these laws is that the NPC must be enabled to pay its indebtedness which, as of P.D. No. 938, was P12 Billion in total domestic indebtedness, at any one time, and US$4 Billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved."

Further, the Secretary of the Department of Finance issued a memorandum dated January 28, 1998, addressed to the Commissioner of Internal Revenue, acknowledging the total exemption of NPC from all kinds of taxes and ruled that purchases by NPC of electricity from independent power producers are subject to VAT at 0%. We quote, thus:

> "As explained by the Supreme Court, the rationale for the NPC's tax exemption is to ensure cheaper power. If the BIR's recent view is to be implemented, the VAT, being an indirect tax, may be passed on by the seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rate to the consumers. Estimates show that a 10% VAT on electricity which is purchased by NPC from its independent power producers will increase power cost by about P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional

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> charge of P0.059 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the ultimate benefit of the Filipino consumer.
>
> In view of the foregoing and using the power of review granted to the Secretary of Finance under Section 4 of Republic Act No. 8424, the DOF upholds the ruling of the Supreme Court that the NPC is exempt under its charter and subsequent laws from all direct and indirect taxes on its purchases of petroleum products and electricity. Thus, the purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate."

Likewise, the respondent issued a number of VAT and BIR Rulings declaring that the purchases by NPC of electricity from independent power producers are subject to VAT at 0% [VAT Ruling Nos. 015-99, 022-99, 052-99, 067-99, 018-00; BIR Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA-209-04-04-99] {***Mirant (Navotas II) Corporation (Formerly Southern Energy Navotas II Power Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 6043, July 5, 2002***}.

In addition, the Court of Appeals affirmed our ruling in the case of ***Commissioner of Internal Revenue vs. Mirant Navotas Corporation (formerly Southern Energy Navotas, Inc.), CA-G.R. SP. No. 69114, promulgated on June 27, 2002***.

Having settled the legal issue, we now go to the factual aspect of petitioner's claim for refund.

Petitioner's various invoices, official receipts, account statements/bank credit advices from Citibank (*Exhibits T-1 to T-32; Q1 to Q-4*) show that petitioner derived revenues from its sale of power generation services to NPC for the four quarters of 1999 in the aggregate sum of P237,770,469.22. Since the said revenues are effectively zero-rated for VAT purposes under Section 108(B)(3) of the Tax Code, petitioner is therefore

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entitled to the refund of input taxes directly attributable thereto under Section 112(A) and (D) of the Tax Code.

However, in order to be entitled to a refund of input taxes directly attributable to effectively zero-rated sales, petitioner must prove that:

1.) both the administrative and judicial claims for refund were filed within two years upon filing of the quarterly VAT return(s) covered by the claim as provided under Section 4-106.2(c) of Revenue Regulations No. 7-95 in relation to Section 112(D) of the Tax Code;

2.) the claimed input VAT payments are duly supported by VAT invoices or official receipts in accordance with Section 4.104-5 of Revenue Regulations No. 7-95 in relation to Sections 113 and 237 of the Tax Code;

3.) the claimed input VAT payments are directly attributable to zero-rated sales; and

4.) the claimed input VAT payments were not applied against any output tax nor carried over to the succeeding month(s)/quarter(s).

Petitioner complied with the first requisite. Counting from the respective dates when petitioner filed its original 1999 quarterly VAT returns (*Exhibits D, F, H & I*), both the administrative and judicial claims for refund filed on February 15, 2001 and March 29, 2001, respectively, fall within the two-year prescriptive period as provided under Section 4-106.2(c) of Revenue Regulations No. 7-95 in relation to Section 112(D) of the Tax Code.

To prove compliance with the second requisite, petitioner submitted various suppliers' invoices and official receipts (*Exhibits S-1 to S-670*) which were summarized in *Exhibits R-1 to R-12*. However, as correctly noted by the commissioned auditing firm, SGV & Co., in its report dated December 10, 2001 (*pages 3 to 6, Exhibit W*), the following input VAT payments totalling P129,354.08 failed to meet the substantiation requirements under Section 4.104-5 of Revenue Regulations No. 7-95 in relation to Sections 113 and 237 of the Tax Code and should, therefore, be disallowed from petitioner's claim:

		1st Quarter	*2nd Quarter*	*3rd Quarter*	*4th Quarter*	*Total*
I.	*Input Taxes on Purchases of Services:*					
1.	Supported by Non-VAT ORs	P 17,313.69	P 20,816.45	P 13,084.29	P 19,803.69	P 71,018.12
2.	Payments to Transportation Contractors Supported by ORs with Stamped TIN only	-	3,960.00	7,362.73	3,610.00	14,932.73
3.	Advances Made By Brokers Without Third Party Documents	-	222.57	-	95.18	317.75
4.	Supported by Documents Other Than VAT ORs	-	-	-	13.71	13.71
5.	Supported by ORs Issued Not in the Name of the Company	-	-	2,482.00	-	2,482.00
II.	*Input Taxes on Purchases of Goods:*					
1.	Supported by Non-VAT Invoices	5,272.73	436.37	-	-	5,709.10
2.	Supported by Invoices with TIN only	4,373.18	-	-	-	4,373.18
3.	Supported by Invoices with TAN only	2,954.55	-	-	-	2,954.55

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4.	Supported by Documents Other Than VAT Invoices	-	-	4,926.37	4,332.28	9,258.65
5.	Supported by VAT Invoices Without BIR Permit	1,136.37	-	-	-	1,136.37
6.	Supported by VAT Invoices Issued Not in the Name of the Company	4,036.37	-	-	-	4,036.37
III.	*Input Taxes on Purchases of Goods and Services*					
1.	Without Supporting Documents	5,780.76	-	7,340.79	-	13,121.55
	Total	*P 40,867.65*	*P 25,435.39*	*P 35,196.18*	*P 27,854.86*	*P129,354.08*

Also, petitioner's claimed input taxes of P17,136.37 (*Observation No. 4, page 5 of Exhibit W*) on its purchases of goods from M.P. Seumal Trading and Tri-Ohms Engineering which were found by SGV & Co. to be supported by invoices that are merely photocopies of the certified true copies shall also be disallowed. Thus, petitioner was able to properly substantiate only the claimed input taxes of P4,195,467.43, arrived at by deducting the disallowances of P129,354.08 and P17,136.37 from the total claim of P4,341,957.88.

As regards the third requisite, petitioner's 1999 quarterly VAT returns *(Exhibits E, G, H & I)* show that it had no other sales other than its effectively zero-rated sales of power generation services to NPC. This being so, all of the substantiated input taxes of P4,195,467.43 cannot but be entirely attributable to its 1999 effectively zero-rated sales of P237,770,469.22. In the case of ***Babcock-Hitachi (Phils.), Inc. vs. Commissioner of***

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Internal Revenue and the Court of Tax Appeals, CA-G.R. SP No. 40703, dated November 21, 1996, it was ruled that where petitioner exports 100% of its products, thus, engaged in purely zero-rated sales, all input taxes incurred on its purchases of goods/services and on capital goods imported or locally purchased are considered directly attributable to its zero-rated sales.

Finally, petitioner proved that despite the carry-over of the claimed input VAT in the succeeding quarters until the second quarter of 2001 (*Exhibits J, K, L, M, N, & O*) the same were not utilized since petitioner had no output VAT liability for the said period. Moreover, petitioner deducted the claimed input taxes of P4,341,957.88 as "Any VAT Refund/TCC Claimed" (*Exhibit O-3*) from the "Total Available Input Tax" of P6,082,034.20 (*Exhibit O-2*). Thus, the resulting "Excess Input Tax" of P1,740,076.32 (*Exhibit O-4*) to be carried over to the succeeding third quarter of 2001 no longer included the claimed 1999 input taxes of P4,341,957.88.

WHEREFORE, in view of all the foregoing, the instant petition is hereby *PARTIALLY GRANTED*. Accordingly, respondent is hereby **ORDERED** to **REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the reduced amount of P4,195,467.43 representing unutilized input VAT paid on its domestic purchases of goods and services which are attributable to effectively zero-rated sale of services for the four quarters of 1999.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

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WE CONCUR:

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

LOVELL R. BAUTISTA
Associate Judge

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