REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

VISAYAS GEOTHERMAL POWER COMPANY,
Respondent.

CTA EB Case No. 429
(CTA CASE NOS. 7179 & 7277)

Members:
ACOSTA, *PJ.*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
JUN 1 1 2009 11:00 a.m.

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DECISION

CASANOVA, *J.*:

This is an appeal, by way of a *Petition for Review*, filed by the Commissioner of Internal Revenue (*Commissioner*), from the Decision (*Assailed Decision)* of the Court of Tax Appeals (CTA) Second Division promulgated on July 14, 2008 in the consolidated cases of CTA Case Nos. 7179 and 7277, both entitled *Visayas Geothermal Power Company vs. Commissioner of Internal Revenue,* wherein the Court partially granted Visayas Geothermal Power Company's (*Visayas*) claim for refund of excess input Value Added Taxes (VAT); and from the Resolution (*Assailed Resolution)* dated October 6, 2008 denying both parties' respective *Motion for Partial Reconsideration*.

The facts of the case, as found in the records, are as follows:

"Visayas Geothermal Power Company (petitioner) is a special purpose limited partnership organized and existing under Philippine laws, with principal office at Milagro, Ormoc City, Province of Leyte. It is registered with the Securities and Exchange Commission as a partnership the main purpose of which is to invest in, acquire, finance, complete, construct, develop, improve, operate, maintain and hold a geothermal electrical generating facility in Malitbog, Leyte Province, Philippines for the production and sale of electricity from geothermal resources.[1]

On June 15, 1994, petitioner was issued Certificate of Accreditation No. OSAC 94-13 by the Department of Energy (DOE) to own and operate a power plant facility comprising of three (3) steam turbine-generating units and related equipments, with a total capacity of 216 megawatts situated in Malitbog, Leyte Province.[2] Likewise, petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer with VAT TIN No. 003-832-538-VAT, as shown by its Certificate of Registration RDO Control No. 96-890-000139.[3]

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue 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.[4]

As a result of its operations, petitioner generated sales by virtue of its Power Purchase Agreement with its sole client Philippine National Oil Company-Energy Development Corporation (PNOC-EDC).[5] Pursuant to Republic Act (R.A.) 9136 or the 'Electric Power Industry Reform Act of 2001' (EPIRA), petitioner argued that sales of generated power by generation companies shall be VAT zero-rated counted from the effectivity of the Act on July 26, 2001. Section 6 of R.A. No. 9136 states that: [6]

'Republic Act No. 9136

Electric Power Industry Reform Act of 2001 (EPIRA)

xxx xxx xxx

SECTION. 6. *Generation Sector* — Generation of electric power, a business affected with public interest shall be competitive and open.

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[1] Exhibit "A-2", *Rollo,* CTA Second Division, p. 280.
[2] Exhibit "B", *Rollo,* CTA Second Division, p. 285; Par. 3, Consolidated Joint Stipulation of Facts and Issues, *Rollo,* CTA Second Division, p. 109.
[3] Exhibit "C", *Rollo,* CTA Second Division, p. 286.
[4] Par. 2, Consolidated Joint Stipulation of Facts and Issues, *Rollo,* CTA Second Division, p. 109.
[5] Exhibit "EE," *Rollo,* CTA Second Division, pp. 317-318.
[6] Par. 5, Consolidated Joint Stipulation of Facts and Issues, *Rollo,* CTA Second Division, pp. 109-110.

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 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.

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements' (*Emphasis supplied*)

In compliance with VAT laws, petitioner filed its original returns for all quarters of taxable year 2003, indicating the following details:

Exhibit	Quarter	Date of Filing Of Return	Zero-rated Sales	Input VAT
"D"[7]	first	April 15, 2003	P 625,296,588.45	P3,014,273.09
"Q"[8]	second	July 25, 2003	889,380,015.38	2,494,739.12
"R"[9]	third	October 27, 2003	911,041,553.41	2,601,774.03
"S"[10]	fourth	January 26, 2004	1,753,522,381.16	12,527,767.29
		Total	**P4,179,240,538.40**	**P20,638,553.53**

Petitioner, however, amended the above returns in order to reflect corrected entries. Such amended returns read as:

Exhibit	Quarter of 2003	Date of Filing Of Return	Zero-rated Sales	Domestic Purchases/Importation	Unutilized VAT
"E"[11]	first	November 26, 2004	P 625,296,588.45	P 25,603,608.60	P 2,560,360.86
"F"[12]	second	November 26, 2004	889,380,015.38	26,255,096.70	2,625,509.67

[7] *Rollo*, CTA Second Division, p. 287.
[8] *Rollo*, CTA Second Division, p. 303.
[9] *Rollo*, CTA Second Division, p. 304.
[10] *Rollo*, CTA Second Division, p. 305.
[11] *Rollo*, CTA Second Division, p. 288.
[12] *Rollo*, CTA Second Division, p. 289.

“G”[13]	third	November 26, 2004	911,041,553.41	30,510,234.00	3,051,023.40
“H”[14]	fourth	November 26, 2004	1,753,522,381.16	112,122,532.40	11,212,253.24
		Total	**P 4,179,240,538.40**	**P 194,491,471.70**	**P 19,449,147.17**

The input taxes being claimed by petitioner as refund were all carried-over to the succeeding quarters up to the fourth quarter of taxable year 2004. However, in the first[15] and second[16] quarters of taxable year 2005, petitioner deducted from its available input tax its refund claims.[17]

To assert its belief that its sales are zero-rated, petitioner, through its auditor *Sycip Gorres Velayo & Co.*, filed administrative claims for refund with the BIR Revenue District Office No. 89 on the following dates:

Exhibit	**Year**	**Quarter**	**Date of Filing of Claim for Refund**	**Input VAT**
“N”[18]	2003	first	February 9, 2005	P 2,560,360.86
“O”[19]	2003	second	April 25, 2005	2,625,509.67
“P”[20]	2003	third	June 14, 2005	3,051,023.40
“P”	2003	fourth	June 14, 2005	11,212,253.24
			Total	**P 19,449,147.17**

Receiving no favorable response from the BIR, in order to comply with the prescriptive periods provided by law and to preserve its rights, petitioner filed before this Court its Petitions for Review docketed as CTA Case No. 7179, filed on March 30, 2005 and CTA Case No. 7277, filed on June 30, 2005, claiming P2,560,630.86 and P16,888,786.31, respectively. Upon motion, these cases were consolidated on September 15, 2005.[21]

In CTA Case No. 7179, respondent presented the following Special and Affirmative Defenses:[22]

> ‘5. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
>
> 6. Petitioner's alleged claim for refund is subject to administrative investigation / examination by the Bureau of Internal Revenue;

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[13] *Rollo,* CTA Second Division, p. 290.
[14] *Rollo,* CTA Second Division, p. 291.
[15] Exhibit “DD”, *Rollo,* CTA Second Division, p. 316.
[16] Exhibit “BB”, *Rollo,* CTA Second Division, p. 314.
[17] Exhibit “EE”, *Rollo,* CTA Second Division, pp. 321-323.
[18] *Rollo,* CTA Second Division, pp. 297-298.
[19] *Rollo,* CTA Second Division, pp. 299-300.
[20] *Rollo,* CTA Second Division, pp. 301-302.
[21] Motion to Consolidate, *Rollo,* CTA Second Division, pp. 65-69; Confirming Resolution, *Rollo,* CTA Second Division, pp. 76-77.
[22] Answer, Pars. 6-8, *Rollo,* CTA Second Division, pp. 24-26.

7. To support its claim, it is imperative for petitioner to prove the following, to wit:

(a.)The registration requirements of a Value Added Taxpayer pursuant to Section 6(a) & (b) of Revenue Regulations No. 6-97 in relation to Section 4.107-1 (a) of Revenue Regulations No. 7-95.

(b.)That the accumulated input VAT taxes of Php 2,560,360.86 allegedly paid by petitioner from its importation and purchases of capital goods and other taxable goods and services were attributable to its zero-rated sales and such taxes has not been applied against any output tax.

(c.) That petitioner's claim for tax credit or refund of the excess input Value Added Tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 4.106-1 (Re: Refunds or Tax Credits of Input Tax) and Section 4.106-2 (Re: Procedures for Claiming Refunds or Tax Credits of Input Tax) of Revenue Regulations No. 7-95.

(d.)That petitioner's domestic purchases of services were made in the course of its trade or business, properly supported by invoices or receipts and import entry or other equivalent documents showing that it actually paid VAT in pursuance to Section 4.104-5 (a) & (b) of Revenue Reg. No. 7-95. (Re: Substantiation of Claims for Input Tax Credit).

(e.)The requirements as enumerated under Section 4.104-2 of the Rev. Reg. 7-95 (Re: Persons who can avail of the Input Tax Credits)

(f.) That Petitioner has complied with the governing rules and regulations with reference to recovery of tax erroneously or illegally collected as explicitly found in Sections 112 (A) and 229 of the Tax Code as amended.

(8.) Furthermore and consistent with the well settled principle in taxation, claims for refund are construed strictly against the claimant as they partake the nature of an exemption from tax and it is incumbent upon petitioner to prove that it is entitled thereto under the law. Failure to prove the same is fatal to its claim for tax refund. 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 statutory law. An exemption from common burden cannot be permitted to exist upon the vague implications. (*Asia Petroleum Co. vs. Llamas 49 Phil. 466).'*

Petitioner pleaded the same Special and Affirmative Defenses in CTA Case No. 7277, except for the claimed amount of tax refund which is P16,888,786.31 instead.[23]

During the hearing of this case, petitioner presented the testimony of the commissioned Independent Certified Public Accountant (ICPA) and that of its senior accountant. Aside from the original and amended VAT Returns, petitioner also presented various pieces of documentary evidence such as sales invoices[24], official receipts[25], ledgers[26], and summary of purchases[27] in support of its claim of zero-rated sales.

On September 5, 2007, respondent, through counsel, manifested that she is waiving her right to present evidence. Upon the submission of petitioner and respondent of their Memoranda, on November 12, 2007 and November 5, 2007, respectively; the case was submitted for decision on December 13, 2007."

After trial on the merits, the *CTA Second Division* promulgated the *Assailed Decision* on July 14, 2008, the dispositive portion of which reads as follows:

"**WHEREFORE**, the consolidated Petitions for Review are hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **SEVENTEEN MILLION ONE HUNDRED THIRTY SEVEN THOUSAND SEVEN HUNDRED ELEVEN PESOS AND 31/100**, representing petitioner's unutilized excess input VAT for the period covering all quarters of taxable year 2003, computed as follows:

Claimed input VAT			P 19,449,147.17
Less: Disallowances	P	2,301,220.31	
		10,215.55	(2,311,435.86)
Valid input VAT			**P 17,137,711.31**

SO ORDERED."

Not satisfied with the above decision, both the *Commissioner* and *Visayas* filed their respective *Motions for Partial Reconsideration* on July 30, 2008[28]. The

[23] CTA Case No. 7277, *Rollo*, CTA Second Division, pp. 45-47.
[24] Exhibits "JJ" and "KK".
[25] Exhibits "LL" and "MM".
[26] Exhibit "QQ".
[27] Exhibit "NN".
[28] *Rollo*, CTA Second Division, pp. 513-519 and pp. 521-537.

Court, in a *Resolution*[29] dated August 5, 2008, ordered the parties to file their respective *Comment. Visayas* filed his "*Comment/Opposition (Re: Respondent's Motion for Partial Reconsideration Dated July 30, 2008)*"[30] on August 21, 2008. The *Commissioner,* on the other hand, filed a "*Motion for Extension of Time to File Comment (On Petitioner's Motion for Partial Reconsideration)*"[31] on August 21, 2008 which the *CTA Second Division* granted on August 26, 2008[32]. The *Commissioner* filed its "*Comment (On Petitioner's Motion for Partial Reconsideration)*"[33] on September 8, 2008.

In the *Assailed Resolution*[34] dated October 6, 2008, the *CTA Second Division* denied both *Motions* for lack of merit. .

On October 24, 2008, the *Commissioner* filed a *Motion for Extension of Time (To File Petition for Review)*[35] before the Court *En Banc* which was granted on October 27, 2008. Come November 10, 2008, herein petitioner filed the instant *Petition for Review*[36] presenting the sole issue of whether or not respondent is entitled to P17,137,711.31 as claim for refund or issuance of a tax credit certificate representing its unutilized input VAT for the 1st to 4th quarters of 2003. The issue was supported by the following arguments:

1. The Petitions for Review were filed prematurely in violation of the doctrine of exhaustion of administrative remedies;

2. The Second Division of the Honorable CTA had no jurisdiction over respondent's judicial claim for refund;

3. Respondent made the fatal error of disregarding the prescriptive period for filing a claim for refund.

[29] Ibid., p. 539.
[30] Ibid., pp. 540-550.
[31] Ibid., pp. 551-555.
[32] Ibid., p. 557.
[33] Ibid., pp. 558-565.
[34] Ibid., pp. 578-593.
[35] Ibid., pp. 594-598.
[36] *Rollo,* CTA En Banc, pp. 8-19.

On November 18, 2008, the Court *En Banc* ordered[37] herein respondent to file his *Comment*. On December 11, 2008, *Visayas* filed its *Comment (Re: Petitioner's Petition for Review)*[38]. On January 20, 2009[39], the parties were required to file their respective *Memorandum*. *Visayas* filed its *Memorandum*[40] on March 19, 2009 while the *Commissioner*[41] filed his on March 24, 2009. On April 3, 2009, through a *Resolution*[42] promulgated by this Court, the instant *Petition* was submitted for decision.

The issues being interrelated, shall be discussed together.

The *Commissioner* argues that Section 112(D) of the 1997 NIRC, states that

> "SECTION 112. Refunds or Tax Credits of Input Tax. —
>
> xxx xxx 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 complete 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."

Hence, based on the cited section, respondent should have filed its judicial claim within thirty (30) days from receipt of the decision denying the claim or after the expiration of the one hundred twenty (120)-day period from the filing of its refund claim.

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[37] Ibid., pp. 65-66.
[38] Ibid., pp. 73-89.
[39] Ibid., pp. 93-94.
[40] Ibid., pp. 105-138.
[41] Ibid., pp. 139-158.
[42] Ibid., p. 161.

With the said provision, the *Commissioner* argues that *Visayas* filed the two *Petitions for Review* before the *CTA Second Division* prematurely; the first was filed forty-nine (49) days after *Visayas* filed a claim for refund before *Commissioner,* while the second was filed sixty-five (65) days after the claim for the 2nd quarter, and sixteen (16) days after the claim for the 3rd and 4th quarters.

The *Commissioner* cited the recent Supreme Court ruling in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[43] which said that in counting the two-year period for the filing of claims for VAT refund, the applicable provision should be Section 112(A), which provides the reckoning point to be the end of the taxable quarter, and not Section 204 (C) of the 1997 NIRC, that states the reckoning period to be from the payment of tax or penalty. The *Commissioner* further argued that Section 204(C) should only be used when the refund claim is not one that concerns VAT.

By analogy, the *Commissioner* insists that in resolving VAT refund claims, the thirty and 120-day periods in Section 112(D) should likewise be observed and not Section 229 which provides that both the administrative and judicial claims be filed within two years; to do otherwise would prevent him from correcting, modifying or affirming the findings of his subordinates, which would be, in effect, contrary to the doctrine of exhaustion of administrative remedies.

Lastly, the *Commissioner* said that in not observing Section 112(D), *Visayas* disregarded the prescriptive periods in appealing to the Commissioner.

Despite the foregoing, We find petitioner's reliance on the doctrine of administrative remedies, through the application of the recent *Mirant Case,* to be misplaced. The cited case primarily discusses the reckoning point of the two-year period within which to file a claim for refund. It is virtually silent as to the strict application of Section 112(D) with respect to the thirty-day or 120-day period to file a claim before the Court of Tax Appeals, hence, this Court *En Banc* is exceeding its authority if it expands the application of the cited case.

[43] SC-GR No. 172129, September 12, 2008.

Considering the absence of interpretation by the High Court with respect to Section 112(D), We stand by the *CTA Second Division's* previous *Assailed Resolution*[44] quoted as follows:

> "It is without doubt that, as a rule, the *doctrine of exhaustion of administrative remedies* ought not to be disregarded. However, there are a number of instances when the doctrine may be dispensed with and judicial action may be validly resorted to immediately.[45] Two of these exceptional cases are (1) when there is urgent need for judicial intervention[46], and (2) when irreparable damage will be suffered[47].
>
> It cannot be overemphasized that Sections 229 and 112 are clear on the period within which to file a claim for refund or tax credit certificate. Such period expires *'regardless of any supervening cause that may arise after payment'* of the tax. In *College of Oral and Dental Surgery vs. Court of Tax Appeals, et al.*[48], the High Court ruled that:
>
> > 'This Court, construing the aforequoted provision of law[49] in an identical case, made the pronouncement that although the filing of the claim with the Collector of Internal Revenue is intended as a notice to said official that unless the tax or penalty alleged to have been erroneously or illegally collected is refunded court action will follow, this does not imply that the taxpayer must await for the action of the Collector before bringing the matter to court (P.J. Kiener Co., Ltd. vs. David, 92 Phil. 945, penned by Mr. Justice Pedro Tuason). Indeed, it must be observed that under said provisions, **the taxpayer's failure to comply with the requirement regarding the institution of the action or proceeding in court within 2 years after the payment of the taxes bars him from the recovery of the same**, irrespective of whether a claim for the refund of such taxes filed with the Collector of Internal Revenue is still pending action of the latter.' (*Emphasis supplied*)
>
> Thus, upon the expiration of the said period, petitioner loses its right to seek judicial redress on the claim. Accordingly, before such expiration, judicial intervention is needed. Furthermore, should petitioner await the final action of respondent on petitioner's claim for refund or issuance of tax credit certificate before taking court action, a

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[44] Supra, note 34.
[45] *Sunville Timber Products, Inc. vs. Abad, et al.*, G.R. No. 85502, February 24, 1992.
[46] *Aquino, et al. vs. Luntok, et al.*, G.R. No. 84324, April 5, 1990.
[47] *De Lara, et al. vs. Cloribel, et al.*, G.R. No. L-21653, May 31, 1965.
[48] G.R. No. L-10446, January 28, 1958.
[49] Referring to then Section 306 of the National Internal Revenue Code, now Section 229 of the National Internal Revenue Code of 1997.

knowing fully well that the prescriptive period is about to end, petitioner will then lose its judicial remedy.

Hence, respondent cannot validly invoke the doctrine of exhaustion of administrative remedies in this instance."

From the *Assailed Resolution,* the *CTA Second* Division found it proper to forego the doctrine of exhaustion of administrative remedies as a taxpayer's right to claim refund will be prejudiced. To strictly follow Section 112(D) as petitioner is suggesting may give rise to a situation where a taxpayer who has filed an administrative claim within two years will file a judicial claim within 30 days after denial or 120 days from submission of complete documents but beyond the two year period. In such instance, the taxpayer already loses its right of recourse under Section 229.

Furthermore, this Court *En Banc* observed that even if We apply the principle in the *Mirant Case,* that the reckoning period be deemed at the end of the taxable quarter, *Visayas* sufficiently complied with the same as shown in the table below:

Qtr.	End of Taxable Quarter	End of Two-Year Period	Exh.	Administrative Claim Filed	Petition for Review
First	March 31, 2003	March 30, 2005	"N"	February 9, 2005	March 30, 2005
Second	June 30, 2003	June 29, 2005	"O"	April 25, 2005	June 30, 2005
Third	September 30, 2003	September 29, 2005	"P"	June 14, 2005	June 30, 2005
Fourth	December 31, 2003	December 30, 2005	"P"	June 14, 2005	June 30, 2005

Having sufficiently complied with the rules of prescription, *Visayas* has more than established its right to tax refund.

WHEREFORE, in view of the foregoing, the instant *Petition for Review* filed by the Commissioner of Internal Revenue is hereby **DENIED** for **LACK OF MERIT**. The *Assailed Decision* dated July 14, 2008 and the *Assailed Resolution* dated October 6, 2008 are hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice