REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

MIRANT SUAL CORPORATION (Formerly: Southern Energy Pangasinan, Inc.) Petitioner,	**C.T.A. CASE NO. 6958**
	Members:
- versus -	**ACOSTA,** Chairperson **BAUTISTA, and** **CASANOVA, *JJ.***
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** AUG 2 9 2007 ; 9:10 Am

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DECISION

CASANOVA, J.:

THE CASE

Before Us is a Petition for Review filed by Mirant Sual Corporation (formerly known as Southern Energy Pangasinan, Inc.) seeking that judgment be issued ordering respondent to refund or issue a tax credit certificate in favor of petitioner for the total amount of P132,834,793.47. The amount claimed allegedly represents unutilized input VAT paid on its domestic purchases of goods and services and importation of goods attributable to petitioner's zero-rated sales to National Power Corporation for the four quarters of the year 2002.

THE FACTS

Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at Bo. Pangascasan, Sual, Pangasinan. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate, Transfer ("BOT") Scheme. It is registered with the Bureau of Internal Revenue (BIR) as a value-added tax (VAT) taxpayer in accordance with Section 107 of the Old Tax Code [now Section 236 of the National Internal Revenue Code of 1997] with Tax Identification No. 003-841-103 as shown on its BIR Certificate of Registration bearing RDO Control No. 05-0181. It was originally registered with the Securities and Exchange Commission (SEC) under the name "Pangasinan Electric Corporation", and later on changed to "Southern Energy Pangasinan, Inc." on August 17, 1999. Subsequently, on June 28, 2001, it made another change of name from "Southern Energy Pangasinan, Inc.," to "Mirant Sual Corporation" as shown by its SEC Certificate of Filing of Amended Articles of Incorporation.[1]

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue who is duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as

[1] *Paragraphs 1, 2, 3 and 4 of Joint Stipulation of Facts (JSOF), Rollo pp. 291-292.*

provided by law, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On December 7, 2001, petitioner filed with the BIR Revenue District Office No. 5, at Alaminos City, Pangasinan, an application for Effective Zero-Rate of its supply of electricity to the NPC, which was subsequently approved.[2]

Afterwards, as a duly registered VAT taxpayer, petitioner filed its quarterly VAT Returns for the four quarters of the taxable year 2002 as follows:[3]

Quarter	**Dated filed**
1st	April 25, 2002
2nd	July 25, 2002
3rd	October 25, 2002
4th	January 27, 2003

However, on July 25, 2003, petitioner filed amended VAT returns for the said quarters declaring zero-rated sales in the amount of 13,385,579,184.65, and domestic purchases of goods and services as well as importation of goods (including capital goods) and services in the amount of P1,328,347,934.70 with the related input VAT of P132,834,793.47, detailed as follows:[4]

2002 SALES

EXH	PERIOD	TAXABLE	ZERO-RATED	TOTAL
C	1st Qtr	P 30,817,316.85	P 3,325,573,078.57	P 3,356,390,395.42
D	2nd Qtr	39,484,860.23	3,215,203,895.43	3,254,688,755.66
E	3rd Qtr	107,622,829.58	3,372,259,263.68	3,479,882,093.26
F	4th Qtr	9,177.66	3,472,542,946.97	3,472,552,124.63
	TOTAL	P 177,934,184.32	***P13,385,579,184.65***	P13,563,513,368.97

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[2] *Paragraph 5 of JSOF, Rollo p. 292.*
[3] *Paragraphs 6, 7, 8 and 9 of JSOF, Rollo p. 292.*
[4] *Ibid.; Exhibits C, D, E and F.*

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2002 PURCHASES

EXH	PERIOD	DOMESTIC	IMPORTATION	TOTAL	INPUT VAT
C	1st	P 222,700,334.90	P 246,827,857.60	P 469,528,192.50	P 46,952,819.25
D	2nd	106,856,781.60	118,957,810.00	225,814,591.60	22,581,459.16
E	3rd	134,382,449.10	124,639,400.40	259,021,849.50	25,902,184.95
F	4th	156,520,880.40	217,462,420.70	373,983,301.10	37,398,330.11
	TOTAL	P 620,460,446.00	P 707,887,488.70	***P1,328,347,934.70***	***P132,834,793.47***

On December 23, 2003, pursuant to the prescribed procedure in Revenue Regulations No. 7-95, as amended, petitioner filed its administrative claim for refund of the alleged unutilized input VAT attributable to effectively zero-rated sales for the said quarters of taxable period 2002 with the aforesaid District Officer of the Bureau of Internal Revenue at Alaminos City, West Pangasinan. It invoked Section 112(A), as amended, in relation to Section 112 (D) of the 1997 National Internal Revenue Code as basis for its claim.[5]

Due to respondent's inaction and in order to suspend the running of the two-year (2) prescriptive period under Section 229 of the 1997 National Internal Revenue Code, as amended, petitioner filed on April 22, 2004 a Petition for Review praying for refund of its alleged unutilized input VAT for the four quarters of calendar year 2002.[6]

Respondent, in his Answer filed on June 25, 2004, interposed the following Special and Affirmative Defenses, and We quote:

> "10. To support its claim, it is imperative for petitioner to prove the following, viz:

[5] *Paragraph 10 of JSOF, Rollo p. 292-293.*

[6] *Paragraph 11 of JSOF, Rollo p. 293; Paragraph 19, Petition for Review, Rollo p. 5.*

a. The registration requirements of a value-added taxpayer in compliance with Section 6 (a) and (b) of the Revenue Regulations No. 6-97 in relation to Section 4.107-1 (a) of Revenue Regulations No. 7-95, and Section 236 of the Tax Code, as amended;

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

c. Proof of compliance with the checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition sine qua non prior to the filing of judicial claim in accordance with the provision of Section 229 of the Tax Code, as amended. It is worthy of emphasis that Section 112 (D) of the Tax Code, as amended, requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review;

d. That the input taxes of P132,834,793.47 allegedly paid by petitioner on its purchases of goods and services for four quarters of the year 2002 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) and 229 of the Tax Code, as amended;

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f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase journal, showing that it actually paid VAT in accordance with Sections 110 (A) (2) and 113 of the Tax Code as amended, and in pursuance to Section 4.104-5 (a) & (b) of Revenue Regulations No. 7-95 (Re: Substantiation of Claims for Input Tax Credit);

g. The requirements enumerated under Section 4.104-2 of the Revenue Regulations 7-95. (Re: Persons who can avail of the Input Tax Credit);

11. Furthermore, in an action for refund the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit. This is so because 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 the common burden cannot be permitted to exist upon vague implications (*Asiatic Petroleum Co. {P.I} v. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue v. Manila Jockey Club, Inc., 98 Phil. 670*);

12. Finally, claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

To support its claim, petitioner presented documentary and testimonial evidence. On the other hand, respondent did not present any. After which, the parties were required to submit their respective memoranda.

On March 29, 2007, respondent filed his memorandum. On the other hand, petitioner filed its memorandum on April 27, 2007. Hence, on May 9, 2007 the case was submitted for decision.

ISSUES

The parties jointly stipulated the following issues for resolution of this court:[7]

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;

2. Whether or not petitioner has unutilized creditable input VAT for the four quarters of CY 2002 arising from its domestic purchases of goods and services and importation of goods amounting to P132,834,793.25 that can be a proper object of claim of refund pursuant to Sections 108 (B)(3) and Section 112 (A) of the Tax Code;

3. Whether or not the unutilized creditable input taxes for the four quarters of CY 2002 are substantiated by proper invoices and official receipts;

4. Whether or not the unutilized creditable input VAT for the four quarters of CY 2002 were carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of petitioner; and

5. Whether or not petitioner is entitled to a refund and/or issuance of tax credit certificate for the unutilized input VAT payments in the amount of P132,834,793.25.

THE COURT'S RULING

The petition is partly meritorious.

Anent the *first issue* of whether or not the power generation services rendered by petitioner to NPC are subject to zero percent (0%) VAT, petitioner relied on the provision of Section 108 (B)(3) of the 1997 Tax Code, to wit:

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[7] *Joint Stipulation of Issues, Rollo p. 291.*

> "***Section 108. Value-Added Tax on Sale of Services and Use or Lease of Properties.—*** ...
>
> (B) Transactions Subject to Zero Percent (0%) Rate. – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (1.) ......
>
> (2.) ......
>
> (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.*" (Emphasis supplied).

Since Section 108(B)(3) of the 1997 Tax Code refers to the services rendered to persons or entities who are exempt under special laws or international agreement to which the Philippines is a signatory, We need to determine whether NPC is an exempt entity and subjects the supply of services to it to zero-percent (0%) rate, by relating this Section of the Tax Code to Section 13 of Republic Act No. 6395, as amended, otherwise known as the National Power Corporation Charter, which provides:

> "**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."* (Emphasis supplied).

From the foregoing, NPC is an entity with a special charter, which categorically makes it exempt from payment of all taxes, whether direct or indirect, 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, this legal issue had already been resolved by the Supreme Court in the case of ***Ernesto M. Maceda vs. Hon. Catalino Macaraig, Jr., supra, G.R. No. 88291, May 31, 1991; 197 SCRA 771***, where the High Court ruled in this wise:

> "Under R.A. No. 358 the exemption was worded in general terms, as to cover " all taxes, duties, fees, imposts, charges, etc. . ." However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemption. Subsequently, P.D. No. 380, made even more specific the details of the exemption of NPC to cover, among others, both direct and indirect taxes on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from "*all forms of taxes, duties, fees, imposts, as well as costs and services fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." The use of the " all forms" of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before.* (Emphasis Supplied).
>
> xxx xxx xxx
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> The rationale for this exemption is that being non-profit the NPC "shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion. To enable the Corporation to pay the indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, ..."

And for the second time, in a Motion for Reconsideration, the High Court affirmed their aforesaid ruling, through a Resolution dated June 8, 1993 in the same case, ***"Ernesto M. Maceda vs. Hon. Catalino Macaraig, Jr., in his***

capacity as Executive Secretary, Office of the President, Hon. Vicente Jayme, Etc., Et al., G.R. No. 88291, June 8, 1993; 223 SCRA 217, to wit:

> *"A chronological review of the NPC laws will show that it has been the lawmaker's intention the NPC was to be completely tax exempt from all forms of taxes—direct and indirect.*
>
> xxx xxx xxx
>
> One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$5 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." (Emphasis Supplied)

Having settled the legal issue, We will now discuss the remaining issues jointly, considering that they relate to the factual aspect of petitioner's claim for refund.

In petitioner's amended quarterly VAT returns for the said taxable period, it showed that petitioner generated revenues from its sale of power generation services to NPC for the four quarters of 2002 in the aggregate sum of P13,385,579,184.65.[8] Since the said revenues are effectively zero-rated for VAT purposes under Section 108 (B)(3) of the 1997 National Internal Revenue Code, as amended, petitioner is therefore entitled to the refund of input taxes directly attributable thereto under Section 112 (A) and (D) of the 1997 National Internal Revenue Code, as amended.

[8] *Exhibits C, D, E and F.*

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

1. 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 of the 1997 National Internal Revenue Code, as amended;

2. the claimed input VAT payments are directly attributable to zero-rated sales;

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

4. 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 1997 National Internal Revenue Code, as amended.

To support its claim, petitioner submitted various suppliers' invoices and official receipts.[9] However, based on the report of the commissioned Certified Public Accountant (CPA), Mr. Ruben R. Rubio, dated September 5, 2005, part of the claimed input VAT of P132,834,793.47 did not meet the substantiation requirements under Section 4.104-5 of Revenue Regulations No. 7-95 in relation to Sections 113 and 237 of the 1997 National Internal Revenue Code, as amended. An input VAT of P18,333,332.17 was disallowed because some purchases of goods and services did not meet the aforementioned substantiation

[9] *Exhibits V-6 to V-8, V-8 to V-11.*

requirements.[10] Only the reduced amount of P114,501,461.30 was supported by valid VAT invoices and/or official receipts.[11] Petitioner's creditable input VAT of P114,501,461.30 is computed as follows:

Claimed Input VAT	P132,834,793.47
Less: Disallowed Input Vat (P2,971,547.71 + 15,361,784.46)	18,333,332.17
Creditable Input VAT	**P114,501,461.30**

Nevertheless, an output VAT of P17,793,418.43 subsisted for the aforesaid taxable period.[12] From the substantiated input VAT of P114,501,461.30, the output VAT of P17,793,418.43 shall be deducted. Thus, petitioner's valid creditable input tax amounts to P96,708,042.87, computed as follows:

Claimed Input VAT	P132,834,793.47
Less: Disallowed Input Vat	18,333,332.17
Creditable Input VAT	P114,501,461.30
Less: Output VAT	17,793,418.43
Valid input VAT	**P 96,708,042.87**

Now from the foregoing valid input VAT, We need to determine the amount attributable to zero-rated sales that is substantiated to be considered for refund.

Petitioner declared a total zero-rated sales of P13,385,579,184.65 in its amended VAT returns for the four quarters.[13] But, the commissioned CPA found that the zero-rated sales reported in the "Summary List of Zero-Rated Sales"

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[10] *Commissioned Certified Public Accountant (CPA)Report, Rollo pp. 356-421; Exhibits V-6 to V-8, V-8 to V-9.*
[11] *Ibid.*
[12] *Exhibits C, D, E and F.*
[13] *Ibid.*

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prepared by petitioner for the calendar quarters of 2002 consisted of sales of electricity to the National Power Corporation (NPC) and Mirant (Philippines) Energy Corporation (MPEC).[14] The sales of electricity to MPEC amounting to P204,982,480.92 are not effectively zero-rated sales, thus should be disallowed from the reported zero-rated sales. Below is the breakdown of petitioner's sales to MPEC of P204,982,480.92:

Exhibit No.	OR Number	Date		Amount
Z-4	773	1-Jul-02	P	25,815,224.12
Z-4	774	1-Jul-02		38,989,678.33
Z-4	780	1-Aug-02		42,795,395.19
Z-4	787	12-Sep-02		31,794,467.25
Z-4	788	20-Sep-02		32,626,597.24
Z-5	797	3-Dec-02		31,055,454.40
Z-5	797	3-Dec-02		1,905,664.39
TOTAL			**P**	**204,982,480.92**

Therefore, petitioner's substantiated zero-rated sales amounted only to P13,180,596,703.73, representing the difference between the declared zero-rated sales of P13,385,579,184.65 and the sales to MPEC of P204,982,480.92

Since, only the portion of the input VAT claim that is attributable to the substantiated zero-rated sales will be considered for refund, We need to get the rate by basing it on the volume of sales, computed as follows:

Supported zero-rated sales	P13,180,596,703.73
Divided by total declared zero-rated sales	P13,385,579,184.65
Rate of supported zero-rated sales	**98.47%**

[14] *Exhibit V-2; Commissioner CPA Report, Rollo p. 352.*

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Hence, petitioner's valid input VAT that was substantiated and attributable to zero-rated sales amounted only to P95,228,409.81, computed as follows:

Validly supported input VAT	P96,708,042.87
Multiply by rate of supported zero-rated sales	98.47%
Valid input VAT attributable to substantiated zero-rated sales	**P95,228,409.81**

Moreover, anent the third requisite, petitioner could not have possibly utilized the input VAT of P95,228,409.81 in the succeeding quarters. For in its original quarterly VAT return for the second quarter of the taxable year 2004, petitioner deducted the amount of P132,834,793.47, which included the valid input VAT of P95,228,409.81, as "Any VAT Refund/TCC Claimed" from the available input tax as of P352,881,305.15 the end of the first quarter of 2004.[15]

Finally, petitioner filed its claim for refund with the Bureau of Internal Revenue on December 23, 2003 and the Petition for Review on April 22, 2004.[16] These periods are well within the two-year prescriptive period from the respective dates when petitioner filed its first, second, third and fourth Quarterly VAT Returns.

In sum, petitioner is found to have sufficiently proven its entitlement to the VAT refund sought for but in the reduced amount of P95,228,409.81 computed as follows:

[15] *Exhibit U-2.*
[16] *Paragraphs 10 and 11 JSOF, Rollo pp. 292-293.*

Claimed Input VAT	P132,834,793.47
Less: Disallowed Input Vat	18,333,332.17
Creditable Input VAT	P114,501,461.30
Less: Output VAT	17,793,418.43
Valid input VAT	P 96,708,042.87
Multiply by rate of supported zero-rated sales (supported zero-rated sales divided by total declared zero-rated sales)	98.47%
Total Creditable input VAT	**P 95,228,409.81**

WHEREFORE, in the light of the foregoing, the instant petition is **PARTIALLY GRANTED**. Respondent is **ORDERED** to **REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P95,228,409.81 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 2002.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division