C

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE GEOTHERMAL, INC.
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 15
(C.T.A. Case No. 5541)

Present:
Acosta, *P.J.*
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ*.

Promulgated:
FEB 2 2 2005

x---x

BAUTISTA, L., J.

DECISION

In a Petition for Review filed pursuant to R.A. No. 9282, an Act Expanding the Jurisdiction of the Court of Tax Appeals, in relation to Rule 43 of the 1997 Rules of Civil Procedure, petitioner seeks for the reversal and setting aside of the Resolutions dated January 19, 2004 and June 18, 2004 denying petitioner's "Motion for Partial Execution" of this Court's Decision rendered in CTA Case No. 5541 promulgated on April 21, 1999.

The antecedent facts are as follows:

Petitioner is a resident foreign corporation licensed by the Securities and Exchange Commission (SEC) to engage in the exploration, development, and exploitation of geothermal energy and resources in the Philippines. In September, 1971, it entered into a service contract with the National Power Corporation (NPC) for the supply of steam which the latter will use in the production of electricity.

For the period September 1995 to February 1996, Petitioner billed NPC the 10% VAT on its supply of steam which was not paid by NPC but was allegedly remitted by petitioner to the BIR amounting to P39,328,775.41.

An administrative claim for refund was filed by petitioner with the Bureau of Internal Revenue on July 10, 1996 on the basis of the exemption provided under Section 103, in relation to Section 99 of the National Internal Revenue Code, to wit:

> "Section 103. Exempt transactions. – The following shall be exempt from the value-added tax:
>
> xxx xxx xxx
>
> (q) Transactions which are exempt under special laws, except those granted under Presidential Decree Nos. 66, 529, 972, 1491 and 1590, and non-electric cooperatives under Republic Act No. 6938, x x x, "

According to Petitioner, the NPC, by virtue of Fiscal Incentives Review Board (FIRB) Resolution 17-87 which was approved by President Aquino pursuant to Executive Order No. 93, is one of those entities expressly exempted from VAT.

Due to respondent's failure to act on the claim and in order to toll the running of the two-year prescriptive period, petitioner filed a Petition for Review with this Court on July 2, 1997. In his Answer, respondent advanced the following Special and Affirmative Defenses:

<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>

4. The claim of petitioner Philippine Geothermal Incorporated (PGI for short) for Value-Added Tax refund has no legal basis.

5. Petitioner PGI contends that its supply of steam to the National Power Corporation (NPC) is exempt from Value-Added Tax. Allegedly, it is entitled to a refund on its purported erroneous payments of Value-Added Tax for the period from September 1995 to February 1996 in the total amount of P39,328,775.41.

6. Fiscal Incentives Review Board (FIRB) Resolution 17-87 specifically restored the tax and duty exemption privileges of the NPC, including those pertaining to its domestic purchases of petroleum and petroleum products granted under the terms and conditions of Commonwealth Act 120 as amended, effective March 10, 1987.

   However, the restoration of the tax and duty exemption privileges does not apply to importations of fuel oil (crude equivalents) and coal, commercially-funded importations (i.e. importations which include but are not limited to those foreign-based private financial institutions, etc.) and interest income derived from any source. Such exemption also does not include purchases of goods and services. Hence, any contracting services of NPC is not qualified for zero-rated VAT (VAT Ruling 250-89, October, 1989).

7. It is clear from the aforecited FIRB resolution that the tax exemption privilege granted to NPC does not include purchases of goods and services, such as the supply of steam to NPC.

8. Further, as held by the Honorable Supreme Court in the case of Philippine Acetylene Co. vs. CIR, 20 SCRA 1056 (1967), the sales tax must be paid by the manufacturer or producer even if the sale is made to tax-exempt entities like the NPC, an agency

of the Philippine Government and to the Voice of America an agency of the US Government.

9. The decision of the Honorable Supreme Court in the case of Maceda v. Macaraig, 223 SCRA 217, [1993] which states that the NPC is exempt from all taxes, duties, fees, imposts, charges and restrictions of the Republic of the Philippines and its provinces, cities and municipalities, is not applicable to this instant petition. What is being exempted in said decision is NPC <u>per se</u> and such exemption is not extended to the supplier or contractor such as the petitioner in the case at bar.

10. The subject taxes have been paid and collected in accordance with law and regulation.

11. In a claim for refund, it is incumbent upon petitioner to show that it is indubitably entitled thereto. Petitioner's failure to establish the same is fatal to its claim for refund.

12. The present case is no exception to the basic rule that claims for refund are construed strictly against claimant for the same partake of the nature of exemption from taxation. (CIR vs. Ledesma, G.R. No. L-17509, 31 SCRA 95, January 30, 1970).

The sole issue brought for the consideration of the Division of this Court was whether or not petitioner's supply of steam to NPC is a VAT-exempt transaction.

In a Decision promulgated on April 21, 1999, the Division of this Court held that Petitioner's supply of steam to NPC is a VAT-exempt transaction such that neither Petitioner nor NPC is liable to pay the VAT. However, only the amount of P9,012,310.26 out of the total claim of P39,328,775.41 was granted. The balance of the claim was denied because the official receipts issued by petitioner to NPC included the VAT payable shown in the Summary of Payments

Received from NPC for each production period. Therefore, it was held that petitioner was not the one who shouldered the VAT but NPC.

A Motion for Reconsideration was filed by petitioner assailing the Decision in relation to the denied portion of the claim. In a Resolution dated August 23, 1999, the motion was denied on the ground that there were discrepancies in the data appearing in the documents pertaining to all of the production periods involved.

Petitioner, thus, filed a Petition for Review with the Court of Appeals assailing the Decision promulgated on April 21, 1999 and Resolution dated August 23, 1999 by the court *a quo*. The Court of Appeals denied the petition in a Decision promulgated September 14, 2001, dispositive portion of which reads as follows:

> *"WHEREFORE, the petition is hereby DENIED and the assailed Decision of the Court of Tax Appeals is AFFIRMED.*
>
> *SO ORDERED."*

On June 14, 2002, petitioner filed a Motion for Reconsideration which was subsequently denied in a Resolution dated June 14, 2002.

Thereafter, petitioner filed a Petition for Review on Certiorari with the Supreme Court on August 12, 2002 assailing the Court of Appeals' Decision and subsequent Resolution denying petitioner's claim in the amount of P30,316,465.15.

On June 24, 2003, petitioner filed a Motion for Partial Execution of the amount of P9,012,310.26 with the Division of this Court. The same was denied in a Resolution dated January 19, 2004. Petitioner filed a Motion for Reconsideration but was likewise denied in a Resolution dated June 18, 2004 reiterating that the Decision promulgated on April 21, 1999 is not yet final and executory, as the same is pending with the Supreme Court.

On July 8, 2004, petitioner filed with this Court *en banc* the instant Petition for Review raising the following errors:

A.

> THE HONORABLE DIVISION COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE 21 APRIL 1999 DECISION, INSOFAR AS IT AWARDED A TAX REFUND OF P9,012,310.26 TO PETITIONER, IS NOT YET FINAL AND EXECUTORY.

B.

> THE HONORABLE DIVISION COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE AWARD OF P9,012,310.26 TAX REFUND IS INDIVISIBLE FROM THE APPEAL FILED BY PETITIONER WITH RESPECT TO THE PORTION DENYING THE TAX REFUND.

The petition has no merit.

On the first assigned error, petitioner asserts that the granted portion of the claim amounting to P9,012,310.26 has become final and executory. The Decision of the court *a quo* which was promulgated on April 21, 1999 was never appealed by the respondent. Petitioner pointed out that the pending appeal before the Supreme Court only covers the denied portion of the claim amounting to P30,316,465.15. Hence, the decision has become final and the amount of

P9,012,310.26 has ripened into a demandable right which Petitioner can allegedly lawfully execute.

Petitioner further insists that the appellate court has no power to resolve unassigned errors, except those that affect the court's jurisdiction over the subject matter and those that are plain or clerical errors: Thus, since the granted portion of the claim was not an assigned error in the Petition for Review filed with the Supreme Court, there could be no occasion to reverse the said award.

We do not subscribe to Petitioner's contentions.

As general rule, the execution of a judgment should not be had until and unless the judgment has become final and executory, i.e.,the period of appeal has lapsed without an appeal having been taken, or appeal having been taken, the appeal has been resolved and the records of the case have been returned to the court of origin, in which event, execution "shall issue as a matter of right". ***(Fortune Guarantee and Insurance Corporation vs. Court of Appeals, G.R. No. 110701, March 12, 2002)***

There being an appeal filed by the petitioner to the Supreme Court with respect to the denied portion of the claim, it can no longer invoke the execution of the granted portion of the claim as a matter of right. The appeal has the effect of opening the whole case for review, i.e., both the denied and granted portions of the claim. Failure on the part of the Respondent to file an appeal assailing the decision of the court *a quo* does not render it final and executory.

In the assailed Resolution dated January 19, 2004, the court *a quo* held:

> " *xxx* *xxx* *xxx*
>
> *In fine, where the decision of the Court of Tax Appeals with respect to the denied portion of the claim which was affirmed by the Court of Appeals has been appealed to the Supreme Court, the whole claim including the granted portion will be subject to review by the High Tribunal. The judgment, therefore, may not be executed as it has not become final and executory. Besides, as earlier stated, there is only one decision here involving one cause of action, which decision for good reason should only be executed as one, accepting both the adverse and favorable position of the decision. If the prevailing party opted to appeal by questioning the decision of this court, it would then be unreasonable to allow it to immediately benefit from the same decision it is assailing.*
>
> *WHEREFORE, the court RESOLVES to DENY petitioner's "Motion for Partial Execution" for lack of merit.*
>
> *SO ORDERED."*
> (Underlining supplied)

Hence, Petitioner's contention that the decision has become final as to the granted portion of the claim which has ripened into a demandable right, is not tenable.

Moreover, while it is true that the amount of P9,012,310.26 was not an assigned error in the appeal pending before the Supreme Court, it is nevertheless, subject to review by the High Tribunal as the whole case is necessarily opened for its deliberation.

On the second assigned error, petitioner argues that the award of P9,012,310.26 may be executed independent of the remaining claim for refund amounting to P30,316465.15. The claim for refund consists of five (5) separate VAT remittances made between September 1995 and February 1996 and each erroneous remittance allegedly gave rise to one cause of action for tax refund.

Respondent, on the other hand, asserts that the allowed and the disallowed portions of petitioner's claim for refund are anchored on the same set of evidence, both documentary and testimonial, the resolution of the appealed Decision and Resolution logically involves the evaluation of the entire documents, whether or not considered by the lower court. Upon filing an appeal with respect to the denied portion of the claim, petitioner "took the risk of making the approved claim for refund in the amount of P9,012,310.26 again the subject of further judicial scrutiny and review, thus making the said amount still the subject of controversy, hence, not rendered final and executory."

Petitioner's arguments cannot be sustained.

Petitioner's claim for refund involves only one cause of action and the judgment rendered in the decision granting a portion of the claim cannot be executed independent of the denied portion which has been controverted and appealed to the Supreme Court.

As aptly explained by the *court a quo* in its Resolution dated January 19, 2004, CTA Case No. 5541, and quoted as follows:

> "The instant case involves one cause of action, one claim pertaining to the refund of erroneous payment of value added taxes covering the period September 1995 to February 1996. Thus, this case does not pertain to several causes of action that would justify the court to render several judgments.
>
> We subscribe to respondent's contentions that since the instant case is still pending with the Supreme Court, there is a possibility that the decision of the court *a quo* will be reversed.
>
> xxx xxx xxx"

For all the foregoing, the Court *en banc* finds no reason to set aside the assailed Resolutions dated January 19, 2004 and June 18, 2004 of the Division of this Court.

WHEREFORE, the instant Petition for Review is hereby **DENIED DUE COURSE,** and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *en banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice