REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MIRANT NAVOTAS CORPORATION
(formerly SOUTHERN ENERGY NAVOTAS CORPORATION, INC.),
Petitioner,

C.T.A. CASE NO. 6459

Members:

- versus -

ACOSTA, *Chairman*
BAUTISTA, and
CASANOVA, ***JJ.***

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

APR 2 1 2005

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DECISION

CASANOVA, J.:

Before Us is a Petition for Review seeking a refund or issuance of a tax credit certificate in the amount of Three Million Three Hundred Ninety Nine Thousand Eight Hundred Fifteen Pesos and 99/100 (P3,399,815.99), allegedly representing unutilized input taxes paid on domestic purchases and importation of goods and services attributable to zero-rated sales covering the four quarters of taxable year 2000.[1]

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[1] Rollo, p. 5

THE FACTS

Mirant Navotas Corporation ("petitioner") formerly known as Hopewell Energy (Philippines) Corporation and Southern Energy Navotas Inc.,[2] is a domestic corporation organized and existing under and by virtue of the laws of the Republic of the Philippines. Petitioner is engaged in the business of generation and sale of electricity to the National Power Corporation ("NPC") under a Build, Operate and Transfer ("BOT") Scheme. It is registered with the Bureau of Internal Revenue ("BIR") as a value- added tax ("VAT") enterprise with Tax Identification No. 000-361-230-000. [3]

Pursuant to the BOT Scheme, on November 26, 1999, petitioner filed an application for effectively zero rate for taxable year 2000 for the supply of electricity which was approved by Revenue District No. 51, Pasay City.[4]

On April 24, July 25, October 25, 2000 and January 25, 2001, petitioner submitted with the BIR its quarterly VAT returns for the first, second, third and fourth quarters of taxable year 2000, respectively.[5]

Said quarterly VAT returns reflected excess input taxes in the amount of Three Million Three Hundred Ninety Nine Thousand Eight Hundred Fifteen Pesos and 99/100 (P3,399,815.99) on its domestic purchases of goods and services during the four quarters of taxable year 2000 and importation of goods and services for the fourth quarter of the same year, both attributed to zero-rated sales, computed as follows:

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[2] Rollo. p. 86
[3] Rollo, pp. 1-2 & 86 -Joint Stipulation of Facts and Issues
[4] Rollo, pp. 2 & 86-Joint Stipulation of Facts and Issues
[5] Petitioner's Memorandum

First Quarter (January to March)	P 770,006.02
Second Quarter (April to June)	545,612.70
Third Quarter (July to September)	1,539,784.78
Fourth Quarter (October to December)	544,412.49[6]
	P3,399,815.99

On April 11, 2002, petitioner filed before the Commissioner of Internal Revenue ("respondent") an administrative claim for refund of its alleged unutilized input VAT in the amount of P3,399,815.99.[7]

On April 18, 2002, petitioner filed a Petition for Review before this Court without waiting for the verdict of the respondent as the two (2)-year prescriptive period was about to lapse.[8]

In his Answer filed on May 15, 2002, respondent maintains as Special & Affirmative Defenses that petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the BIR. Moreover, it failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected. Taxes paid and collected are presumed to have been paid in accordance with the law and regulations, hence, not refundable. The burden of proof rests on the petitioner to establish its right of refund and failure to adduce sufficient proof is fatal to the action for tax refund or credit. Lastly, petitioner must prove that its alleged purchases are covered by the provision of Section 112(A) of the Tax Code, as amended and show compliance with the provisions of Section 204(C) and 229 of the Tax Code, as amended.[9]

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[6] Exhibits E, F, G, H and I; Rollo, pp. 2, 3 & 105
[7] Exhibit D; Rollo, p. 87 – Joint Stipulation of Facts & Issues
[8] Rollo, p. 1
[9] Rollo, pp. 60-61

After the pre-trial conference, trial on the merits ensued where parties presented evidence not covered by their Joint Stipulation of Facts and Issues.[10] Thereafter, the case was submitted for decision sans the memorandum of the respondent.[11]

THE ISSUES

The parties interposed the following issues for the consideration of the Court:

> ***1. Whether or not the power generation services rendered by Petitioner for the supply to NPC of power generation services are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997.***
>
> ***2. Whether or not petitioner has unapplied or unutilized creditable input VAT for the four (4) quarters of 2000 arising from its domestic purchases of goods and services as well importation of goods which can be a proper object of a claim for refund pursuant to Section 108 (B)(3) and Section 112(A) of the Tax Code of 1997.***
>
> ***3. Whether or not the unapplied or unutilized creditable input VAT of petitioner for the four quarters of 2000 are substantiated by documentary evidence in the form of invoices and official receipts.***
>
> ***4. Whether or not the unutilized and unapplied creditable input VAT for the four quarters of 2000 were carried over to the succeeding taxable quarter and applied against any of the output VAT liability of the Petitioner for the said period.***[12]

THIS COURT'S RULING

Anent the first issue, petitioner asserts that under Section 108 (B)(3) of the 1997 National Internal Revenue Code (NIRC), the generation and sale of electricity to NPC are subject to zero percent VAT. To quote:

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[10] Resolution dated July 31, 2002
[11] Decision dated January 6, 2005
[12] Rollo, p. 87 – Joint Stipulation of Facts and Issues

SEC. 108. – Value-Added Tax on Sale of Service and Use or Lease of Properties. -

x x x ***xxx*** ***xxx***

(B) Transactions Subject to Zero Percent (0%) Rate. –

x x x ***xxx*** ***xxx***

(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 (0%) rate.

We agree with petitioner.

The services rendered by petitioner in supplying electricity to NPC are subject to zero percent (0%) VAT since the NPC is exempt from all kinds of taxes whether direct or indirect.[13] The Supreme Court in the case of Maceda vs. Macaraig, Jr., made this pronouncement in its resolution dated June 8, 1993, ***viz***:

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.

x x x ***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 $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.[14]

In a memorandum dated January 28, 1998 issued by the Secretary of the Department of Finance addressed to respondent, the former upheld the Supreme

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[13] Maceda vs. Macaraig, Jr., 197 SCRA 771
[14] 223 SCRA 217

Court's ruling on NPC's total exemption from direct or indirect taxes to ensure reduction of the cost of electricity, 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 in a month or about P1.30 billion a year. The effect on the consumer is an additional 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 the 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." (Also cited in Magellan Cogeneration Inc. vs. Commissioner of Internal Revenue, February 26, 2002, CTA Case No. 5765).***

Clearly, purchases by NPC of electricity from independent power producers such as petitioner are subject to VAT at zero rate.[15]

Being interrelated, the second, third and fourth issues will be jointly discussed.

Petitioner asserts that it is entitled to a refund or tax credit for excess taxes paid on domestic purchases of goods and services and importation of goods for taxable year 2000. It cites as legal anchor Section 112(A) of the 1997 NIRC which reads:

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[15] Mirant Pagbilao vs. Commissioner of Internal Revenue, CTA Case No. 6183, February 18, 2004

"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 or 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."

A cursory examination of the records shows that petitioner's declared zero-rated sales or receipts, in the amount of Three Hundred Twenty One Million Three Hundred Ninety Five Thousand One Hundred Thirty One Pesos and 95/100 (P321,395,131.95) in its quarterly Value Added Tax (VAT) returns for the four quarters of 2000[16] represent energy and capacity fees paid by the NPC. Said fees are supported by invoices and/or official receipts.[17] Considering that the services of petitioner are subject to 0% VAT, it can, therefore claim for a refund of input taxes attributable thereto. However, petitioner must prove its claimed unapplied input taxes in the amount of P3,399,815.99 by complying with the following requirements:

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

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[16] Exhibits E to I, inclusive of submarkings
[17] Exhibits X to X41

2. The claimed input VAT payments are directly attributable to zero-rated sales or effectively 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 the two year prescriptive period.[18]

Anent the first requirement, records disclose that out of the P3,399,815.99 claim for refund or tax credit, petitioner was able to duly substantiate by valid VAT invoices and/or official receipts the amount of Three Million Two Hundred Forty Six Thousand Two Hundred Twenty Three Pesos and 07/100 (P3,246,223.07). The input taxes in the sums of P40,892.70[19] and P112,700.22 should be disallowed for the following reasons:

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
I. Input Taxes on Purchases of Services					
1. Supported by VAT ORs Issued Not in the Company's Name	P 358.75	-	-	P 948.80	P 1,307.55
II. Input Taxes on Purchases of Goods					
1. Supported by Invoices with Stamped "NV"	6,116.36	-	-	3,163.64	9,280
III. Input Taxes Claimed on Importations					
1. Supported by Documents Other than Import Entry Declarations (i.e., Customs Brokers' Statement of	-	55.00	55.00	-	110.00

[18] Epson Precision Philippines Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6184, November 17, 2003; Mirant Navotas Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6044, October 16, 2002; Mirant Navotas II Corp. (formerly known as Southern Energy Navotas II Power Inc.) vs. Commissioner of Internal Revenue, CTA Case No. 6043, July 5, 2002 and Lazi Bay Resources Devpt. Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6031, June 27, 2002

[19] Exhibits R2 to R13

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Account/ Charges, Customs Form 38-A, Custom Broker's ORs)					
IV. Input Taxes Claimed on Purchases of Goods and Services Without Supporting Documents	2,545.07	3,284.60	15,239.38	9,126.10	30,195.15
TOTAL	**P 9,020.18**	**P 3,339.60**	**P 15,294.38**	**P 13,238.54**	**P 40,892.70**

Finding	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Importations supported by IEIRDs w/o payment validation or valid OR[20]	-	P 61,923.00[21]	P 28,947.00[22]	-	P 90,870.00
Importations [23]supported merely by broker's OR	-	220.05[24]	7,687.48[25]	-	7,907.53
Purchases supported by ORs/invoices with no date/no year	P 113.64[26]	2,378.18[27]	1,261.84[28]	P 2,000.00[29]	5,753.66
Purchases with no supporting OR/invoice	80.36[30]	1,282.55[31]	1,309.73[32]	4,227.13[33]	6,899.77
Purchases supported by ORs/invoices with no BIR permit	-	-	454.72[34]	-	454.72
Purchases supported by ORs/invoices with preprinted "NV#TAN"	814.54[35]	-	-	-	814.54
TOTAL	**P 1,008.54**	**P 65,803.78**	**P 39,660.77**	**P 6,227.13**	**P 112,700.22**

[20] Note that the amounts under this classification are within the Independent CPA's observations (CTA Records, p. 143-144). However, after verification, the input taxes pertaining to these importations were supported by IEIRD with no valid OR or payment validation.

[21] Exhibits LL, W68, JJ, & W364.

[22] Exhibit W675

[23] Note that the amounts under this classification are within the Independent CPA's observations (CTA Records, p. 143-144). However, after verification, the input taxes pertaining to these importations were supported only by broker's OR.

[24] Exhibit W512 of W516

[25] Exhibit W863 & W862-A

[26] Exhibit W162.

[27] Exhibit W343.

[28] Exhibits W810 to W814, W818 & W904.

[29] Exhibits W1002, W1004 & W1246.

[30] Exhibit S3, Payee: Vaccare Enterprises

[31] Exhibits S7 to S8, Payees: Telecommunications & Computer Technologies and Wyler Enterprises.

[32] Exhibit S9 to S10, Payees: Canon Mktg. and Macro Hardware

[33] Exhibits S13 to S16, Payees: Antonio Viernes Construction, RTG Sheet, Syntrade Ent., &Telecom Distributor.

[34] Exhibit W835.

[35] Exhibit W134.

With regard to the second requirement, We have already discussed that the services of petitioner in the generation and supply of electricity to NPC are subject to zero percent (0%) VAT. Hence, it can claim for a refund or tax credit on input taxes attributable thereto. However, its claim for refund or tax credit is to the extent of the amount of P3,246,223.07 only which represents unapplied input taxes for the subject period and substantiated by official receipts and invoices.

The third requirement has likewise been complied with by the petitioner. The first quarterly VAT return of taxable year 2002 reveals that the input taxes claimed in the gross amount of P3,399,815.99 were deducted by petitioner from the total available input VAT as of April 25, 2002.[36] Thus, the input taxes sought to be refunded were not applied by petitioner against its output VAT liability as of April 25, 2002 and can no longer be used as credit against its future output VAT liability.

Finally, as regards the fourth requirement, a perusal of the records shows that the filing of the administrative and judicial actions on April 11 and 18, 2002, respectively, falls within the two (2)-year prescriptive period reckoned from April 24, 2000, the date of filing of the 1st quarterly VAT for the year 2000, the earlier taxable quarter covered by the subject claim.[37]

WHEREFORE, premises considered, the petition is **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or in the alternative, **TO ISSUE A TAX CREDIT CERTIFICATE** in the reduced amount of ***Three Million Two***

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[36] Exhibits O & O-5

[37] Exhibit E, Magellan Cogeneration Incorporated vs. CIR, CTA Case No. 6033, May 19, 2003; Telecommunications Technologies Philippines, Inc. vs. CIR, CTA Case No. 6018, November 24, 2003 and Atlas Consolidated Mining and Development Corporation vs. CIR, C.T.A Case No. 5296 (Resolution), July 20, 1998.

Hundred Forty Six Thousand Two Hundred Twenty Three Pesos and 07/100 (P3,246,223.07), detailed as follows:

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Input taxes claimed	P 770,006.02	P 545,612.70	P 1,539,784.78	P 544,412.49	P 3,399,815.99
Less: Disallowance a) per Independent CPA	9,020.18	3,339.60	15,294.38	13,238.54	40,892.70
b) per Court's Verification	1,008.54	65,803.78	39,660.77	6,227.13	112,700.22
TOTAL	**P 759,977.30**	**P 476,469.32**	**P 1,484,829.63**	**P 524,946.82**	**P 3,246,223.07**

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Chairman, First Division
Presiding Justice