**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

**MIRANT NAVOTAS CORPORATION**
**(formerly Southern Energy Navotas, Inc.),**
Petitioner,

- versus - C.T.A. CASE NO. 5949

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

Promulgated:
FEB 0 3 2003

x - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

# DECISION

Brought before this court is a Petition for Review seeking for the cancellation and withdrawal of the alleged deficiency income, expanded withholding tax (EWT), value added tax (VAT) and documentary stamp tax (DST) assessments issued by the respondent against herein petitioner in the total amount of P 22,037,114.97 for the fiscal year ended June 30, 1995.

The facts of the case are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines with principal address at Suite 202 CTC Building 2232, Roxas Boulevard, Pasay City, Metro Manila. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation under a Build, Operate and Transfer (BOT) scheme (*pars. 1 and 3, Joint Stipulation of Facts*).

278

Petitioner is registered with the Board of Investments as a pioneer enterprise for the operation of a power generating plant under the provisions of Executive Order No. 226, otherwise known as the "Omnibus Investments Code of 1987." Under the terms of its registration, petitioner is entitled to an income tax holiday for six (6) years or until June 30, 1996 (*par. 4, Joint Stipulation of Facts*).

On December 17, 1998, petitioner received from the Bureau of Internal Revenue (BIR) Pre-Assessment Notices dated December 8, 1998 which were unnumbered and issued by the Assessment Division of Revenue Region No. 8, Makati City. On the same day, petitioner received Formal Assessment Notices Nos. 000584-FY95-B2-98-457, 02-251-FY95B-98-B2-457 and 02-252-FY95B-98-B2-457, all dated December 14, 1998 and issued by the Assessment Division of Revenue Region No. 8, Makati City (*pars. 6 and 7, Joint Stipulation of Facts*), the details of which were jointly stipulated by the parties to be as follows:

I. Formal Assessment Notice No. 000584-FY95-98-B2457 issued by the respondent against petitioner pertains to an alleged deficiency income tax assessment for fiscal year ended June 30, 1995 in the amount of P13,295,996.24, computed as follows:

| | | |
|---|---|---|
| Tax Due | | P 6,502,202.96 |
| Add: | Surcharge | 1,625,550.74 |
| | Interest | 5,143,242.54 |
| | Compromise | 25,000.00 |
| Total Amount Due | | P13,295,996.24 |

The income tax assessment of P13,295,996.24 resulted from the BIR examiner's findings as follows:

a. Petitioner had discrepancies between the other income reported per tax audit investigation (P7,526,448.96) and the other income reported in the tax return (P5,145,850.00);

279

b. Petitioner had discrepancies in the amount of P 12,657,062.80 between the total revenues per books of accounts (P273,088,165.77) and the total fees per income tax return (P262,036,892.00);

c. Petitioner had realized income from the provision for major maintenance cost in the amount of P8,297,728.40;

d. Petitioner had realized income from the provision for uncollectible account expense in the amount of P15,679,478.67;

e. Petitioner had unrealized foreign exchange loss in the amount of P452,241.94;

f. Petitioner had deficiency income tax in the amount of P13,295,996.24, inclusive of P 6,793,793.28 as surcharge, interest and compromise penalty.

II. Formal Assessment Notice No. 000584-FY95-98-B2-457 *(Exhibit E)* issued against petitioner pertains to an alleged deficiency expanded withholding tax (EWT) assessment for fiscal year ended June 30, 1995 in the amount of P240,741.68, computed as follows:

| | | |
|---|---|---|
| Tax Due | | P 112,332.94 |
| Add: | Surcharge | 28,083.24 |
| | Interest | 96,325.50 |
| | Compromise | 1,000.00 |
| Total Amount Due | | P 240,741.68 |

The EWT assessment of P240,741.68 resulted from the BIR examiner's findings as follows:

a. There is a discrepancy of P112,332.94 between the income payments reported per books of accounts in the amount of P302,770.81 and per alpha list in the amount of P190,437.87.

b. Petitioner did not withhold the proper amount of income taxes due in the amount of P112,332.94, inclusive of P128,408.74 as surcharge, interest and compromise penalty.

280

III. Formal Assessment Notice No. 02-251-FY95-98-B2-457 (*Exhibit F*) issued against petitioner pertains to an alleged value-added tax (VAT) deficiency assessment for fiscal year ended June 30, 1995 in the amount of P5,530,377.05, computed as follows:

| | | |
|---|---|---|
| Tax Due | | P 2,622,700.91 |
| Add: | Surcharge | 655,675.23 |
| | Interest | 2,227,000.91 |
| | Compromise | 25,000.00 |
| Total Amount Due | | P 5,530,377.05 |

The VAT assessment of P5,530,377.05 resulted from the BIR Examiner's findings as follows:

a. There is a discrepancy of P26,227,009.13 between the sales reported per VAT returns in the amount of P306,290,058.95 and the total sales per books of accounts in the amount of P332,517,067.98.

b. Petitioner did not pay the VAT due in the amount of P5,530,377.05, inclusive of P2,907,676.14 as surcharge, interest and penalty.

IV. Formal Assessment Notice No. 02-252-FY95-98-B2-457 (*Exhibit G*) issued against petitioner pertains to the alleged deficiency documentary stamp tax (DST) assessment for fiscal year ended June 30, 1995 in the amount of P2,970,000.00, computed as follows:

| | | |
|---|---|---|
| Tax Due | | P 2,376,000.00 |
| Add: | Surcharge | 594,000.00 |
| | Interest | 0 |
| | Compromise | 0 |
| Total Amount Due | | P 2,970,000.00 |

The DST assessment of P2,970,000.00 resulted from the BIR Examiner's findings as follows:

281

a. Petitioner has subscribed to the original issuance of its share of stock in the total amount of P237,600,000.00 which should be subject to DST at the rate of P200 per 200 under Section 175 of the Tax Code.

b. Petitioner did not pay the DST due on the original issuance of its share of stock amounting to P2,970,000.00, inclusive of P594,000.00 as surcharge.

On January 15, 1999, petitioner filed a letter-protest against the various unnumbered pre-assessment notices, all dated December 8, 1998, and the Formal Assessment Notices, all dated December 14, 1998, issued by the Assessment Division of Revenue Region No. 8, Makati City and requested that the said deficiency tax assessments be withdrawn and cancelled for the reasons stated therein and after re-investigation (*Exhibit H*).

On March 16, 1999 or within 60 days from the filing of the protest, petitioner submitted a supplemental protest letter in support of its protest against the subject assessment pursuant to Section 228 of the National Internal Revenue Code of 1997 (*Exhibit I*).

On June 17, 1999, the Securities and Exchange Commission issued the certificate of filing of amended articles of incorporation in favor of petitioner. One of the amendments related to the change of the corporate name of the petitioner from Hopewell Energy (Philippines), Corp. to Southern Energy Navotas, Inc.

On September 12, 1999, or 180 days from March 16, 1999, petitioner did not receive any written or verbal communication from the respondent regarding any action of the latter on the protest of the petitioner.

The inaction of the respondent on petitioner's letter-protest prompted the petitioner to elevate the matter before this court by way of a Petition for Review on October 8, 1999.

On November 29, 1999, respondent filed an Answer to the instant petition for Review *(pages 42-44, CTA docket)* and raised the following Special and Affirmative Defenses, to wit:

1. The petition for review should be dismissed on the ground of lack of jurisdiction.

   The assessments are already final for failure on the part of the petitioner to submit the required documents needed for reinvestigation within sixty (60) days from the filing of its protest dated January 15, 1999, as provided in Section 228 of the 1997 Tax Code, which provides:

   > ***"Section 228. Protesting of Assessments. – xxx***
   >
   > Such assessments may be protested administratively by filing a request for reconsideration or investigation within thirty (30) days from receipt of the assessment in such form and manner as maybe prescribed by implementing rules and regulations. ***Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final."***(underscoring supplied)

   Although the petition alleges that the petitioner, on March 16, 1999, submitted a supplemental protest letter attaching all relevant documents in support of its protest letter dated January 15, 1999, the truth of the matter would reveal however that as per indorsement letter of respondent's revenue officers who were assigned to conduct the investigation regarding the petitioner's tax liabilities for fiscal year ending June 30, 1995, the petitioner was not able to submit the required documents needed for reinvestigation under its protest letter dated January 15, 1999. Copy of the indorsement letter is hereto attached as Annex "1".

2. For failure of the petitioner to submit all relevant documents within sixty (60) days from the filing of protest, the deficiency assessments became final and accordingly, this Honorable Court acquires no jurisdiction over the case pursuant to provision of Republic Act No. 1125. The Tax Court is a Court of special jurisdiction. As such, it can

283

take cognizance only of such matters as are clearly within its jurisdiction ***(Commissioner of Internal Revenue vs Villa, 22 SCRA 3).***

3. Considering that the subject assessments have already become final, the 180-day rule provided for under Section 228 of the tax Code, as amended, finds no application in the case at bar.

4. Assuming that this Honorable Court has jurisdiction over the case, the assessments were all issued within the prescriptive period. Records show that on September 23, 1998, taxpayer signed a waiver of prescription under the Statute of Limitations, accepted by the Commissioner through and in behalf of Revenue District Officer, Revenue District Office No. 51, Pasay City, extending the prescribed period from October 15, 1998 to December 15, 1998.

5. The assessments in question were made and issued in accordance with existing laws, rules and regulations.

6. All presumptions are in favor of the correctness of the tax assessment ***(Interprovincial Autobus, Inc. vs Collector of Internal Revenue, 98 Phil. 290).***

As stipulated by the parties, the issues in this case are as follows:

1. Whether or not the Formal Assessment Notices Nos. 000584-FY95-B2-98-457, 02-251-FY95B-98-B2-457 and 02-252-FY95B-98-B2-457 all dated December 14, 1998 issued against herein petitioner have already prescribed;

2. Whether or not the Formal Assessment Notices Nos. 000584-FY95-B2-98-457, 02-251-FY95B-98-B2-457 and 02-252-FY95B-98-B2-457 all dated December 14, 1998 issued against petitioner are proper and valid.

We shall now resolve the issue on prescription.

According to petitioner, the right of the respondent to assess for deficiency income tax, EWT and VAT had already prescribed as it was done beyond the three-year prescriptive period. However, respondent contends that on September 23, 1998, petitioner has executed a waiver of the defense of prescription under the statute of limitations. Thus, it can no longer raise the issue of prescription to invalidate the assessment notice.

284

The law in point governing prescription of the Government's right to assess taxes is Section 203 of the 1997 Tax Code, which reads as follows:

> ***"SEC. 203. Period of Limitation Upon Assessment and Collection. -*** Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day *(underscoring supplied)*."

Clearly from the foregoing provision, any assessment for deficiency taxes issued after the lapse of three years is no longer valid and effective. For purposes of determining whether or not the tax was assessed within the 3-year period, it is important to consider the date of filing of the tax return. Generally speaking, the 3-year period to assess is counted from the last day prescribed by law for the filing of the return. However, if the taxpayer filed his return *beyond* the period provided by law, the three-year period is reckoned from the actual date the return is filed. On the other hand, if petitioner filed his return *before* the last day prescribed by law, the three-year period would only begin to run on the last day prescribed by law.

In the case at bar, three items of assessment are under question on the ground of prescription - income tax, expanded withholding tax and value added tax.

Records would show that petitioner actually filed its Annual Income Tax Return (Form No. 1702) for the fiscal year ending June 30, 1995 on October 16, 1995, considering that the last day to file (*i.e. October 15, 1995*) fell on a Sunday.

As to petitioner's EWT, which is filed on a monthly basis (Form No. 1743-W), records disclose the following details:

288

| Period Covered | Date Filed | Reference |
|---|---|---|
| July 1994 | 08/10/94 | p. 105, BIR records |
| August 1994 | 09/09/94 | p. 104, BIR records |
| September 1994 | 10/11/94 | p. 103, BIR records |
| October 1994 | 11/10/94 | p. 102, BIR records |
| November 1994 | 12/12/94 | p. 101, BIR records |
| December 1994 | 01/25/95 | p. 101, BIR records |
| January 1995 | 02/10/95 | p. 133, BIR records |
| February 1995 | 03/10/95 | p. 132, BIR records |
| March 1995 | 04/10/95 | p. 131, BIR records |
| April 1995 | 05/10/95 | p. 130, BIR records |
| May 1995 | 06/13/95 | p. 129, BIR records |
| June 1995 | 07/10/95 | p. 128, BIR records |

As to petitioner's VAT, the dates of filing of its value added tax returns (Form No. 2550) are as follows:

| Taxable Quarter Ending | Date Filed | Reference |
|---|---|---|
| September 30, 1994 | October 20, 1994 | p. 161, BIR records |
| December 31, 1994 | January 20, 1995 | p. 151, BIR records |
| March 31, 1995 | April 20, 1995 | p. 191, BIR records |
| June 30, 1995 | July 20, 1995 | p. 176, BIR records |

From the foregoing dates of filing, we now determine whether the assessments issued by the BIR have already prescribed. A perusal of the records would show that the BIR simultaneously issued the subject assessment notices bearing nos. 000584-FY95-98-B2-457 (for income tax and EWT) and 02-251-FY95B-98-B2-457 (for VAT) on December 14, 1998. Thus, counting from the dates when the respective returns were filed, or from October 16, 1995 *for income tax*, July 10, 1995, at the latest, *for EWT* and July 20, 1995, at the latest, *for VAT*, it is quite evident that more than three years had lapsed from the time of the filing of the returns up to the issuance of the assessment notice on December 14, 1998.

280

The question now for the court to determine is whether or not the Waiver of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code executed by petitioner on September 23, 1998 is valid. Petitioner assails the validity of the waiver since it was not signed by the respondent in accordance with Section 222(b) of the 1997 NIRC which provides:

> "**SEC. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, <u>both the Commissioner and the taxpayer have agreed in writing</u> to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon." (*Emphasis ours*)

We agree with the petitioner.

An agreement is different from an attestation. To agree means to give assent; to express approval while to attest means to bear witness; to affirm to be true or genuine. Section 222 (b) requires that the waiver be agreed upon and not attested to only.

An evaluation of the records reveals that petitioner agreed to extend the period to assess until December 15, 1998 through the waiver executed on September 23, 1998. The same, however, while signed by petitioner, was merely attested to by the respondent through Revenue District Officer Anselmo G. Adriano. The law is explicit that the waiver must have been agreed upon and signed by both the Commissioner and the taxpayer. In this case, the waiver was defective and invalid since respondent did not comply with the requirement in Section 222 (b) of the NIRC, which provides that the agreement be made in writing by both the Commissioner and the taxpayer. It was not accepted by the respondent. Consequently, no valid waiver was executed between the

287

parties. Thus, respondent cannot assess petitioner beyond the three-year period prescribed under Section 203 of the NIRC and petitioner may not be held liable for the payment of any deficiency income/business tax for the fiscal year 1995 as the same has prescribed.

But even on the assumption that the waiver is valid, the deficiency income tax assessment issued against the petitioner is still bereft of any legal basis. As records would show, petitioner is registered with the BOI as a pioneer enterprise for the operation of a power generating plant under the provisions of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987. Under the terms of its registration, petitioner is entitled to an incentive of income tax holiday for six (6) years up to June 30, 1996 (*par. 4, Joint Stipulation of Facts*). This is clear from the contents of the certificate of registration *(Exhibit A)* offered by petitioner, thus:

*"<u>Specific Terms and Conditions</u>*

*1. The enterprise shall be entitled to the following incentives:*

*a. Income tax holiday for six (6) years from June 30, 1989 or from date of actual start of commercial operation whichever comes first but in no case earlier than the date of registration;*

*x x x x x x"*

Petitioner's Income Tax Return for the fiscal year ended June 30, 1995 clearly indicates that said income tax holiday was duly availed of.

Moreover, this court observed that the waiver was executed on September 23, 1998, long after the expiration of the period within which to assess the EWT and VAT. As illustrated earlier, the petitioner filed its last EWT monthly return on July 10, 1995 and the last VAT quarterly return on July 20, 1995. Taking these dates as the reckoning

288

period for the computation of the three-year period to assess, respondent only had until July 9, 1998 and July 19, 1998 within which to issue the assessments for EWT and VAT (*the year 1996 being a leap year*). Thus, even assuming that the waiver is valid, the same may not suspend the running of the period to assess the EWT and VAT.

Anent the documentary stamp tax assessment issued by respondent, we find petitioner not to be liable for the payment thereof.

Respondent avers that petitioner is liable for deficiency DST in the amount of P2,970,000.00. It was alleged that petitioner had subscribed to the original issuance of its shares of stock in the total amount of P 237,600,000.00 which should be subject to DST at the rate of P2.00 per P200.00 under Section 175 of the old Tax Code. Petitioner however, maintains that it had already paid the corresponding DST on September 19, 1990. To support its contention, petitioner submitted the following documents:

1. Corporate Stock Documentary Stamp Tax (DST) Declaration for Existing Corporation *(Exhibit VV)*;

2. BIR Payment Order No. C8776790 issued on September 19, 1990 *(Exhibit WW)*;

3. Certification dated May 9, 2000 issued by the BIR attesting to the remittance by petitioner of P2,019,620.00 *(Exhibit KKK)*.

We find for the petitioner for it has sufficiently established that the amount of P2,019,620.00 was duly remitted to the BIR as evidenced by the certification issued by one Carmelita Pascual *(Exhibit KKK)* attesting to the fact of payment, thus:

Q. Now, Ms Witness, what documents do you have to prove that petitioner indeed paid the Documentary Stamp tax in the amount of P2,019,620.00?

A. We request a Certification from the Revenue Accounting Division.

289

Q. I am showing you a one-page document, could you please identify the same?

*A.* This is the Certification issued by the Chief Revenue Accounting Division of the Bureau of Internal Revenue, Carmelita SJ Pascual dated May 9, 2000. This Certification relayed to the Confirmation receipt listed as verified by the BIR Records, BIR records No. 1256 wherein our company, Hopewell Energy Philippines Corporation with Confirmation Receipt No. 20618342, Payment Order No. 8776713 dated September 19, 1990, we have verified that we have paid the amount of P2,019,620 and we also have source to verify our payment with the Central Bank Credit Advice" *(TSN, June 26, 2000, pages 5-6).*

It is to be noted that the tax rate used in the payment of DST for 1990 is P1.70 for every P200.00. We find this to be the correct tax rate as the applicable provision would be the law in effect when the original shares were issued, thus, Section 175 of the old Tax Code provides:

> ***SEC. 175. Stamp tax on original issue of certificates of stocks.***- On every original issue, whether on organization, reorganization, or for any lawful purpose, of certificates of stock by any association, company or corporation, there shall be collected a documentary stamp tax of one peso and seventy centavos on each two hundred pesos, or fractional part thereof, of the par value of such certificates: *Provided*, that in the case of the original issue of stock without par value the amount of the documentary stamp tax herein prescribed shall be based upon the actual consideration received by the association, company or corporation for the issuance of such stock, and in the case of stock dividends on the actual value represented by each share"*(as amended by Pres. Decrees Nos. 1457 and 1959).*

Consequently, respondent's application of Section 3 of RA 7660 providing for a DST rate of P2.00 for each P200 is misplaced. It bears stressing that RA 7660, which amended the provision of the old tax code on documentary stamp tax was approved only on December 23, 1993 and was published in the Official Gazette on January 17, 1994. Clearly, this provision cannot be applied to shares of stock which were issued in 1990.

290

**WHEREFORE**, in view of the foregoing, the instant Petition for Review is hereby **GRANTED.** Accordingly, Formal Assessment Notice No. 000584-FY95-98-B2457 for deficiency income tax assessment in the amount of P13,295,996.24, Formal Assessment Notice No. 000584-FY95-98-B2-457 for deficiency expanded withholding tax (EWT) in the amount of P240,741.68, Formal Assessment Notice No. 02-251-FY95-98-B2-457 for deficiency value-added tax (VAT) in the amount of P5,530,377.05 and Formal Assessment Notice No. 02-252-FY95-98-B2-457 for deficiency documentary stamp tax (DST) in the amount of P2,970,000.00, all issued by the respondent on December 14, 1998 for the fiscal year ended June 30, 1995, are hereby **CANCELLED** and **WITHDRAWN**.

**SO ORDERED.**

**ERNESTO D. ACOSTA**
Presiding Judge

**WE CONCUR:**

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

**LOVELL R. BAUTISTA**
Associate Judge

291

## 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

292