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. 5814

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUL 26 2004

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D E C I S I O N

This is a remanded case involving a claim for refund or issuance of a tax credit certificate in the amount of P194,906.48 representing unutilized input value-added tax (VAT) payments for the first quarter of 1997.

The antecedent facts are as follows:

Petitioner is a domestic corporation engaged in the business of power generation and the subsequent sale thereof, with principal office at Suite 202, CTC Building, 2232 Roxas Boulevard, Pasay City. It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer with Certificate of Registration bearing RDO No. 96-051-005718 (*Stipulation of Facts, par. 3*).

On March 1, 1996, petitioner filed with the BIR Revenue District Office (RDO) No. 51 at Pasay City an Application for Effective Zero Rating for its services of construction and operation of gas turbine power station under a "build, operate and transfer" (BOT) scheme with the National Power Corporation (NPC), which was not acted upon by the BIR (*Stipulation of Facts, par. 4; TSN, March 7, 2000*).

On March 30, 1999, petitioner filed with respondent a claim for the refund of its unutilized input VAT of P194,906.48 (*Exhibit D*). In support thereof, petitioner alleged that its sales of power generation services to NPC are zero-rated for VAT purposes; that the said input VAT were directly attributable to its effectively zero-rated sales to NPC; and that the said input VAT were undiminished by any output VAT during the period covered. Respondent, however, did not act upon the said claim for refund, prompting petitioner to file a Petition for Review with this court on April 16, 1999.

On May 4, 2001, this court rendered a decision denying petitioner's claim on the sole ground that it failed to present an approved application for zero-rating as required under Section 8(d) of Revenue Regulations No. 5-87 which provides:

> (d) *Application for the imposition of zero rate.* — Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero rate on the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked.

This court held that without the approved application for zero-rating, petitioner's sales of services to NPC shall be considered as exempt transactions under paragraph (u) of Article 103 of the National Internal Revenue Code (NIRC), and exemption under Section 9 of Revenue Regulations No. 5-87 means -

> SEC. 9. **Exemptions**. — (a) *In general.* — An exemption means that the sale of goods or service is not subject to value-added tax (output tax). **The seller is not allowed any tax credit on VAT (input tax) previously paid**. (Emphasis supplied).

Moreover, this court stated that petitioner should have filed a petition for mandamus to secure respondent's much needed approval of its application for effective zero rating. This court was of the impression that petitioner did not exert an effort to follow-up its application with the BIR.

Petitioner opposed the decision of this court by filing a Motion for Reconsideration on May 23, 2001. Finding that the grounds relied upon by the petitioner were already thoroughly discussed and passed upon in the questioned decision, this court denied the Motion for Reconsideration on August 9, 2001.

Unable to accept the judgment, the petitioner filed a Petition for Review with the Court of Appeals on September 19, 2001.

In its decision promulgated on January 30, 2004, the Court of Appeals set aside the decision of this court and held that while the requirement of an approved application for effective zero-rating under Revenue Regulations No. 5-87 is not an improper exercise of the rule-making power of the Secretary of Finance, respondent's undue delay or inaction on petitioner's pending application should not be a bar to its entitlement to a refund of the input VAT attributable to its effectively zero-rated sales, to wit:

> Petitioner filed its application for effective zero-rating as early as March 1, 1996. However, the same was not acted upon by the BIR. Clearly, therefore, petitioner's failure to obtain and present in evidence before the Tax Court an approved application for effective zero-rating was on account of BIR's inaction or undue delay. Justice requires that petitioner should not suffer the consequences of respondent's neglect and omission.
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> xxx xxx xxx
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> In fact, the Tax Court has already reversed itself on this issue. Thus, in the parallel cases of Mirant (Navotas II) Corporation vs. CIR [2001], Mirant (Phil.) Mobile Corporation vs. CIR (2002], and Mirant Pagbilao Corporation vs. CIR [2003], the Court of Tax Appeals held that the failure of respondent to act on a pending application for effective zero-rating should not be the sole basis for denying the claim for refund. According to the Tax Court, if respondent had a valid ground to

disapprove the application, he would have done so swiftly instead of "sitting on" the application for an indeterminable length of time to the detriment of the taxpayer's right.

It bears stressing, however, that the requirement of an approved application for effective zero-rating under Revenue Regulations No. 5-87 is not an improper exercise of the rule-making power of the Secretary of Finance. In the aforesaid Mirant (Navotas II) Corp. vs. CIR case, this Court had the occasion to rule:

> "x x Requiring VAT-registered entities to first apply for zero-rating is needed ***to ensure that only those which are qualified should be entitled to refund their input VAT***. Given their complexity and their ability to confuse even the experts, this Court cannot leave the interpretation of Our tax laws, i.e., on who is entitled to zero-rating and who is not, entirely to the taxpayer. Thus, in this case the taxpayer, ***petitioner Mirant, cannot alone determine for itself if it is a zero-rated entity, no matter how accurate that determination might be. It must still secure the approval or recognition of the government that it is in fact, a zero-rated entity.***" (Emphasis supplied.)

Nonetheless, because of respondent's unreasonable delay in resolving petitioner's application for zero-rating, petitioner's claim for input tax refund attributable to its effectively zero-rated sales to NPC should still be given due course.

In disposing the legal issue of whether or not petitioner's sale of power generation services to NPC are effectively subject to zero percent (0%) VAT, the Court of Appeals held that under Section 13 of Republic Act No. 6395, NPC is exempt from the payment of all forms of taxes, to wit:

> Sec. 13. **Non-profit Character of the Corporation; Exemption from all Taxes, Duties, Fees, Imposts and other Charges by Government and Governmental Instrumentalities**. — The Corporation shall be non-profit and 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 its indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, the Corporation is hereby declared **exempt**:

(a) From the payment of all taxes, duties, fees, imposts, charges, costs and service fees in any court or administrative proceedings in which it may be a party, restrictions and duties to the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities;

(b) From all income taxes, franchise taxes and realty taxes to be paid to the National Government, its provinces, cities, municipalities and other government agencies and instrumentalities;

(c) From all import duties, compensating taxes and advanced sales tax, and wharfage fees on import of foreign goods required for its operations and projects; and

(d) From all taxes, duties, fees, imposts, and all other charges imposed by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the Corporation in the generation, transmission, utilization, and sale of electric power.

The Court of Appeals cited the Supreme Court's ruling in the case of ***Maceda vs. Macaraig, 197 SCRA 771,*** that NPC is exempt from all taxes, thus:

"The use of the phrase 'all forms' of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before. 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.' xx

It is evident from the provisions of PD No. 938 that its purpose is to maintain the tax exemption of NPC from all forms of taxes including indirect taxes as provided for under R.A. No. 6395 and P.D. 380 if it is to attain its goals." (Emphasis supplied.)

In a Resolution subsequently promulgated in the same case, ***Maceda vs. Macaraig, 223 SCRA 217,*** the Supreme Court maintained NPC's exemption from all taxes, *viz*:

"One common theme in all these laws is that the NPC must be enabled to pay its indebtedness which, as of P.D. 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 and has to be exempt**

> **from all forms of taxes if this goal is to be achieved**." (Emphasis supplied.)

The Court of Appeals ruled that by virtue of Section 13 of Republic Act No. 6395 coupled with the Supreme Court's pronouncement upholding NPC's exemption from the payment of direct and indirect taxes, it is evident that petitioner's sale of power generation services to NPC are effectively subject to zero percent (0%) VAT pursuant to Section 108(B)(3) [then 102(b)(3)] of the NIRC of 1997, to wit:

> "**SEC. 108.** ***Valued-added Tax on Sale of Services and Use or Lease of Properties***. —
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> xxx xxx
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> **(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:
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> xxx xxx
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> (3) **Services rendered to persons or entities whose exemption under <u>special laws</u>** or international agreements to which the Philippines is a signatory **effectively subjects the supply of such services to zero percent (0%) rate**. (Emphasis supplied.)

Accordingly, the Court of Appeals held that petitioner may apply for a tax credit certificate or refund of creditable input taxes attributable to its effectively zero-rated sales as provided for under Section 112(A) [then 106(a)] of the NIRC of 1997:

> "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."

Having settled that petitioner is legally entitled to claim a refund/tax credit certificate of the input VAT attributable to its effectively zero-rated sales to NPC, the Court of Appeals remanded this case for us to determine whether or not petitioner's claim for tax refund is supported by evidence.

To be entitled to a refund of input taxes directly attributable to effectively zero-rated sales, petitioner must prove that:

1.) the claim was filed within the two-year prescriptive period both in the administrative and judicial levels;

2.) 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 and 237 of the Tax Code;

3.) the claimed input VAT payments are directly attributable to effectively zero-rated sales; and

4.) the claimed input VAT payments were not applied against any output tax nor carried over to the succeeding month(s)/quarter(s). [***Mirant Navotas II Corp. vs. Commissioner of Internal Revenue, CTA Case No. 6258, February 5, 2003***]

This court finds that petitioner complied with the first requisite. In a ***Resolution dated July 20, 1998*** in the case of ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5296***, this court ruled that the reckoning of the two-year period for input VAT refunds shall be from the filing of the corresponding quarterly VAT return. It is an admitted fact that petitioner filed its VAT return for the first quarter of 1997 within the legally prescribed period (*par.*

5, Stipulation of Facts). Counting from April 20, 1997, the last day prescribed by law for the filing of the 1997 first quarterly VAT return (*Section 4.110-1 of Revenue Regulations No. 7-95*), both the administrative claim filed by petitioner on March 30, 1999 and the Petition for Review filed on April 16, 1999 fall within the two-year prescriptive period.

To prove compliance with the second requisite, petitioner submitted various suppliers' invoices and official receipts (*Exhibits O to BBBB*) which were summarized in the "Schedule of Value-Add Tax – Input" attached to Exhibit C. However, this court noted that the following input VAT payments totalling P63,899.35 failed to meet the substantiation requirements under Section 4.104-5 of Revenue Regulations No. 7-95 in relation to Sections 113 and 237 of the Tax Code and should, therefore, be disallowed from petitioner's claim:

Exh.	Supplier	Invoice/DM #	OR #	Net Amount	VAT
1.) ***Official Receipts w/o V/VAT after TIN***					
BB-2	San Antonio Condominium Builders	DM#01-010-97	1340	P 131,333.59	P 13,133.36
BB-2	San Antonio Condominium Builders	DM#01-012-97	1340	41,041.32	4,104.13
ZZ-2	San Antonio Condominium Builders	DM#02-053-97	1358	41,041.32	4,104.13
ZZ-2	San Antonio Condominium Builders	DM#02-051-97	1358	131,333.59	13,133.36
ZZZ-1	Polo Carpet Cleaning, Inc.		0449	6,018.16	601.82
2.) ***VAT Invoices/OR not within the period of claim***					
U-1	Floro Blue Printing	1096	92	3,727.27	372.73
II	Compu Medics	4968	2477	4,909.09	490.91
JJ	Oriental Const. & Elect. Supp	167815	31582	6,818.18	681.82
3.) ***Without VAT official receipts***					
CCC	Activewheels Transport Services, Inc.	2644		24,545.45	2,454.55
NNN	Three J Transport	567		12,947.45	1,294.74
RRR	Ravago Equipment & Rentals, Inc.	36973		10,909.09	1,090.91
4.) ***Without any supporting VAT invoice or official receipt***					
	Distributed Processing Sys	32280		7,244.55	724.45
	Afante Furniture	0216		4,431.82	443.18
	Eagle Process Controls	PO148-327		9,000.00	900.00
	Digital Network Communications	6887		31,624.55	3,162.45

ROGF Industrial Sales	96	43,636.36	4,363.64
Wyler Enterprises	9309	5,454.55	545.45
Activewheels Transport Services, Inc.	2854	24,545.45	2,454.55
Ravago Equipment & Rentals, Inc.	37017	10,909.09	1,090.91
Distributed Processing Sys	23688	5,816.36	581.64
Triple K Printing Services	542	4,359.09	435.91
San Antonio Condominium Builders	DM#03-098-97	41,041.30	4,104.13
E-Plus Stationery, Inc.	69467	4,061.81	406.19
Ly Enterprises	50350	4,909.09	490.91
Toyota Balintawak, Inc.	143452	18,880.30	1,888.03
Shaw Accessories Center	13784	8,454.55	845.45
		P 638,993.38	P 63,899.35

As regards the third requisite, petitioner's original and amended 1997 first quarterly VAT returns (*Exhibits C & DDDD*) show that it had no other sales other than its effectively zero-rated sales of power generation services to NPC amounting to P51,970,505.08. This being so, all of the substantiated input taxes of P131,007.13 (P194,906.48 less P63,899.35) cannot but be entirely attributable to its effectively zero-rated sales for the first quarter of 1997 ***[Babcock-Hitachi (Phils), Inc. vs. Commissioner of Internal Revenue and the Court of Tax Appeals, CA-G.R. SP No. 40703, dated November 21, 1996***].

Finally, petitioner proved that despite the carry-over of the claimed input VAT in the succeeding quarters until the third quarter of 1999 (*Exhibits CCCC, EEEE, FFFF & GGGG*) the same were not utilized since petitioner had no output VAT liability for the said period. Moreover, in its 1999 third quarterly VAT return, petitioner deducted the amount of P970,459.01 (which included the claimed input taxes of P194,906.48) as "Any VAT Refund/TCC Claimed" from the "Total Available Input Tax" of P4,941,336.30 (*Exhibits CCCC-1 & CCCC-2*). Thus, the resulting "Excess Input Tax" of P3,970,877.29 to be carried over to the succeeding fourth quarter of 1999 no longer included the claimed input taxes of P194,906.48.

IN VIEW OF ALL THE FOREGOING, petitioner's claim for refund or issuance of a tax credit certificate is hereby **GRANTED** but in a **REDUCED** amount of P131,007.13. Accordingly, respondent is **ORDERED to REFUND** or in the alternative, **ISSUE a TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P131,007.13 representing unutilized input VAT payments for the first quarter of 1997.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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 Justice