Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
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MIRANT (PHILIPPINES) OPERATIONS CORPORATION [Formerly: SOUTHERN ENERGY ASIA-PACIFIC OPERATIONS (PHILS.), INC.],
Petitioner,

CTA Case No. 6970

-versus-

Members:

ACOSTA, Chairperson
BAUTISTA, and
CASANOVA, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 29 2007 9:05 Am

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DECISION

CASANOVA, J.:

This case involves a claim for refund or issuance of a tax credit certificate ("TCC") in the amount of P23,108,689.00 allegedly representing overpaid income tax or excess creditable withholding taxes for the calendar year ended December 31, 2002.

THE FACTS

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province.[1]

[1] *1st Par. of Joint Stipulation of Facts and Issues ("JSF"), Rollo, pp. 85-88, duly approved by this Court in a Resolution dated February 10, 2005, Rollo, p. 91.*

177

Petitioner is duly licensed to do business in the Philippines and is primarily engaged in the business of designing, construction, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plants and related facilities for the conversion into electricity of coal, distillate and other fuel provided by and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government owned or controlled corporations or other entity engaged in the development, supply or distribution of energy.[2]

Respondent is the duly appointed Commissioner of Internal Revenue vested with the authority to act as such, including *inter alia*, the power to decide, approve, and grant refunds or tax credits of overpaid internal revenue taxes as provided by law with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner secured with the Securities and Exchange Commission (SEC) its Certificate of Filing of Amended Articles of Incorporation, reflecting its change of name from Southern Energy Asia-Pacific Operations (Phils.), Inc. to Mirant (Philippines) Operations Corporation on April 30, 2001. Prior to its use of the name Southern Energy Asia-Pacific Operations (Phils.), Inc., petitioner operated under the corporate names CEPA Operations (Philippines) Corporation, CEPA Tileman Project Management Corporation and Hopewell Tileman Project Management Corporation. The change of petitioner's corporate name from CEPA Operations (Philippines) Corp. to Southern Energy Asia-Pacific Operations (Phils.) Inc., from CEPA Tileman Project Management Corporation to CEPA Operations (Philippines) Corp. and from Hopewell Tileman Project Management Corp. to CEPA Tileman Project Management Corp. were approved by the SEC on November 24, 2000, November 21, 1997 and July 29, 1994 respectively.[3]

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[2] *Par. 2 of JSF.*
[3] *Pars. 3 to 5 of JSF.*

178

Petitioner then entered into Operating and Management Agreements with Mirant Pagbilao Corporation [formerly Southern Energy Quezon, Inc.] or ("MPagC") and Mirant Sual Corporation [formerly Southern Energy Pangasinan, Inc.] or ("MSC") to provide these corporations with maintenance and management services in connection with the operation, construction and commissioning of the coal-fired power stations situated in Pagbilao, Province of Quezon and Sual, Province of Pangasinan, respectively. Payments received by petitioner for the operating and management services rendered to MPagC and MSC were allegedly subjected to creditable withholding tax.

On April 15, 2003, petitioner filed with the Bureau of Internal Revenue ("BIR") its original Annual Income Tax Return ("ITR") for the calendar year ended December 31, 2002 declaring zero taxable income and unutilized tax credits of P23,108,689.00, detailed as follows[4]:

Gross Income	P	82,732,818.00
Add: Non-Operating & Other Income		172,834.00
Total Gross Income	P	82,905,652.00
Less: Deductions	P	82,905,652.00
Taxable Income		NIL
Tax Rate		32%
Minimum Corporate Income Tax (MCIT)	P	1,658,113.00
Income Tax Due	P	1,658,113.00
Less: Prior Years' Excess Credits		NIL
Tax Payments for 1st 3 Quarters		NIL
Creditable Tax Withheld for 1st 3 Quarters		24,766,802.00
Total Tax Credits/Payments		24,766,802.00
Tax Overpayment	**P**	**(23,108,689.00)**

In its ITR for the year 2002, petitioner indicated its option to refund its alleged excess creditable withholding tax when it marked[5] "X" the box corresponding to the option "To be refunded" under line 30 of said ITR.

On March 17, 2004, petitioner filed an administrative claim for refund or issuance of tax credit certificate with the BIR in the total amount of

[4] *Par. 7 of JSF and Exhibit D.*
[5] *Exhibit D-9.*

179

P23,108,689.00, allegedly representing overpaid income tax or excess creditable withholding tax of petitioner for calendar year ended December 31, 2002.

As the two-year prescriptive period for the filing of a judicial claim under Section 229 of the National Internal Revenue Code ("NIRC") of 1997 was about to lapse without action on the part of respondent, petitioner elevated its case before this Court by way of Petition for Review on April 27, 2004.

Respondent, in his Answer[6] filed on June 28, 2004, interposed the following Special and Affirmative Defenses:

1. Petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the respondent's Bureau;

2. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;

3. Petitioner, which has the burden of proving its entitlement to the tax refund, has failed to establish any clear right over the alleged unutilized creditable withholding income tax for CY 2002;

4. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable;

5. Petitioner must show that it has complied with the provisions of Section 204 (C) in relation to Section 229, both of the 1997 Tax Code;

6. 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);

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[6] *Rollo. pp. 59-61.*

180

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

During the trial on the merits, petitioner presented documentary and testimonial evidence. Respondent, on the other hand, submitted his case for decision based on the pleadings[7]. Petitioner filed its Memorandum on April 4, 2007. Respondent did not file his memorandum. Hence, on April 25, 2007 the case was submitted for decision.

THE ISSUE

The parties jointly stipulated the following issue for this Court's resolution:

"Whether or not petitioner is entitled to the refund of P23,108,689.00 representing excess and unutilized creditable withholding taxes for calendar year ended December 31, 2002 by showing that –

a. The creditable withholding taxes amounting to P23,108,689.00 are duly supported by Certificates of Creditable Tax Withheld at Source;

b. The income from which these creditable taxes were withheld were duly declared as part of petitioner's income in its annual income tax return for calendar year ended December 31, 2002;

c. Petitioner had shown that it did not carry over its unutilized creditable withholding taxes for calendar year ended December 31, 2002 to the succeeding taxable period;

d. Petitioner had duly filed both the administrative and judicial claim for refund within the two-year prescriptive period provided under Sections 204 and 229 of the National Internal Revenue Code, as amended."

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[7] *Rollo p. 158.*

181

THE COURT'S RULING

Petitioner anchors its claim on Section 76 of the NIRC of 1997 in relation to Sections 204(C) and 229 quoted hereunder for easy reference:

> "**SEC. 76. Final Adjustment Return.** — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
>
> (A) Pay the balance of tax still due; or
> (B) Carry-over the excess credit; or
> (C) <u>Be credited or refunded with the excess amount paid, as the case may be.</u>
>
> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor." *(Underscoring Supplied)*
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> "**SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.** — The Commissioner may —
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> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner

182

> a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Underscoring Supplied)*

> "**SEC. 229. Recovery of Tax Erroneously or Illegally Collected.** — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner, may even without a written claim therefore, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Underscoring .Supplied)*

In relation to Section 76 of the 1997 NIRC, a thorough study of the records of the case disclosed that petitioner selected the option "To be refunded" of its total excess creditable tax withheld in 2002.[8] Petitioner did not carry-over the excess tax credits from 2002 to the succeeding year 2003.[9]

There are three (3) substantiation requirements[10] that the petitioner should comply with in order for it to be entitled to claim a refund, to quote:

1) That the claim for refund was filed within the two (2)-year period under Section 229 (in relation to Section 204) of the 1997 NIRC,

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[8] *Exhibit D-9.*
[9] *Exhibit E-3.*
[10] *Citibank N. A. vs. Court of Appeals & Commissioner of Internal Revenue, 280 SCRA 459, Section 2.58.3(B) of Revenue Regulation No. 2-98*

183

2) That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee showing the amount paid and the amount of tax withheld therefrom,

3) That the income upon which the taxes were withheld were included in the return of the recipient.

As to the *first requirement*, it is clear from the records that petitioner has complied with the same.

The excess unutilized withholding taxes being claimed for refund or the issuance of TCC in this case were for the calendar year ending December 31, 2002. Petitioner filed its original annual ITR for the said year on April 15, 2003[11]. Counting the two (2)-year period from April 15, 2003, the last day to file the administrative and judicial actions is on April 15, 2005.

The administrative claim for refund or issuance of the TCC was filed by the petitioner with the respondent on March 17, 2004[12]. The Petition for Review was filed on April 27, 2004.

Therefore, considering the above premises, both the administrative and judicial claims were filed within the two (2)-year period required by law, particularly Section 229 in relation to Section 204 of the Tax Code.

Petitioner also satisfied the *second requirement*. To prove the fact of withholding, petitioner presented the Certificates of Creditable Tax Withheld at Source issued to it by MPagC and MSC for the year 2002. As stated by the Court commissioned auditing firm, SGV & Co., in its report[13] dated May 9, 2006, these certificates were found to be faithful reproductions of the original copies. Since the certificates were duly signed and prepared under the penalties of perjury, the figures appearing therein are presumed to be true and correct.

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[11] *Exhibit D-8, Rollo and Paragraph 7, JSF. Ibid.*
[12] *Annex D of Petition for Review, Rollo. 41-44 and Paragraph 8, JSF.Ibid.*
[13] *Exhibits S-1 to S-6.*

184

The creditable withholding taxes reflected in the certificates amounted to P24,766,801.58, broken down as follows:

Exh.	Period Covered	Withholding Agent	Income Amount	Tax Rate	Tax Withheld
H	Jan. 2002 to Mar. 2002	Mirant Sual Corporation	81,694,812.20	10%	8,169,481.22
J	Apr. 2002 to June 2002	Mirant Sual Corporation	32,835,093.20	10%	3,283,509.32
G	Jan. 2002 to Mar. 2002	Mirant Pagbilao Corporation	132,590,415.80	10%	13,259,041.58
I	Apr. 2002 to June 2002	Mirant Pagbilao Corporation	547,694.60	10%	54,769.46
			247,668,015.80		24,766,801.58

In petitioner's ITR for the year 2002, it reflected as "Creditable Tax Withheld for the First Three Quarters" and "Total Tax Credit/Payments" the amount of P24,766,802.00 which is almost exactly the same amount, except for the immaterial difference per rounding off of P0.42, as the total of the taxes withheld on all the certificates presented. Petitioner deducted the "Income Tax Due" for the year 2002, in the amount of P1,658,113.00 from the amount of P24,766,802.00, to get the difference amounting to P23,108,689.00, described as tax overpayment. The amount of P23,108,689.00 is the same amount being claimed for refund or issuance of TCC.

As for the *third requirement*, the gross revenues reported in petitioner's 2002 ITR was P247,120,318.00 while the total income payments from the certificates, as stated in the above table, is P247,668,015.80 leaving a difference of P547,697.80.

According to the report of the court commissioned independent CPA, Mr. Henry Tan, the difference "refers to the realized foreign exchange gain on the collection of fixed Operation Fee from Mirant Pagbilao Corporation per Invoice No. 58. [They] have traced these amounts to the General Journal."[14]

The Court finds the abovementioned reason insufficient. Petitioner should have included the amount as part of its income in its 2002 ITR.

To quote again the third requirement:

[14] *p. 5, Report. Ibid.*

187

"3. That the income upon which the taxes were withheld was included in the return of the recipient."

Applying the above requirement here, the income upon which the taxes were withheld amounted to P247,668,015.80 but only P247,120,318.00 was included in the return of the recipient-petitioner. The tax that corresponds to the difference of P547,697.80 is P54,769.78 (10%), therefore, the amount of P54,769.78 should be disallowed because the income upon which it was withheld did not form part of the income declared in petitioner's 2002 ITR.

Hence, the amount available for refund will only be P23,053,919.22, computed as follows:

Total Income on Certificates	P	247,668,015.80
Income in 2002 ITR		247,120,318.00
Difference	P	547,697.80
Tax Rate		10%
Tax disallowed for refund	**P**	**54,769.78**
Cr Creditable Tax Withheld	P	24,766,802.00
Less: Amount disallowed		54,769.78
Net	P	24,712,032.22
Less: MCIT		1,658,113.00
Refundable Tax	**P**	**23,053,919.22**

Therefore, petitioner complied with the substantiation requirements with respect to its claim of excess/unutilized tax credits for the taxable year 2002 in the reduced amount of P23,053,919.22 as shown above.

WHEREFORE, premises considered, the Petition is hereby **PARTIALLY GRANTED**. Respondent is **ORDERED** to **REFUND** or, in the alternative, issue a Tax Credit Certificate in favor of the petitioner the reduced amount of **Twenty Three Million Fifty Three Thousand Nine Hundred Nineteen and 22/100 pesos** (P23,053,919.22) representing excess/unutilized creditable withholding taxes for taxable year 2002.

186

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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

187