REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

MIRANT SUAL CORPORATION, [Formerly Southern Energy Pangasinan, Inc.],
Petitioner,

~ *versus* ~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE No. 7230

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MIRANT SUAL CORPORATION, [Formerly Southern Energy Pangasinan, Inc.],
Petitioner,

~ *versus* ~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE No. 7299

Members:

Acosta, *PJ,*
Bautista, *and*
Casanova, *JJ.*

Promulgated:

FEB 06 2009 3:15 pm

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DECISION

ACOSTA, *PJ:*

The Case

Before Us is a consolidated Petition for Review seeking the refund or issuance of a tax credit certificate in the aggregate amount of P166,158,823.50 allegedly representing unutilized input value-added tax (VAT) paid on domestic purchases of goods and services, and importation of goods attributable to zero-rated sales for the four quarters of taxable year 2003.

The Facts

Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at Barangay Pangascasan, Sual, Pangasinan. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build Operate Transfer (BOT) Scheme. It is registered as a VAT taxpayer in accordance with Section 107 of the Tax Code [now Section 236 of the National Internal Revenue Code], with BIR Certificate of Registration bearing RDO Control No. 05-0181 and Taxpayer Identification No. 003-841-103. It was originally registered with the Securities and Exchange Commission ("SEC") under the name "Pangasinan Electric Corporation" which was subsequently changed to "Southern Energy Pangasinan, Inc." on August 17, 1999. On June 28, 2001, its name was again changed from "Southern Energy Pangasinan Inc." to "Mirant Sual Corporation.[1]

Respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law, with office address at the BIR National Office Building, Agham Road, Quezon City, where he may be served with summons and other court processes.[2]

On November 13, 2002, petitioner filed with the BIR Revenue District Office No. 5 at Alaminos, Pangasinan, an Application for Effective Zero-Rate of its supply of electricity to NPC, which was subsequently approved.[3]

Petitioner filed its quarterly VAT returns for first, second, third and fourth quarters of taxable year 2003 on April 24, 2003, July 25, 2003, October 27, 2003 and January 26, 2004, respectively, declaring among others the following:[4]

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[1] Par. 1, 3, 4 and 5, Stipulation of Facts, Joint Stipulation of Facts and Issues.
[2] Par. 2, Stipulation of Facts, Joint Stipulation of Facts and Issues.
[3] Par. 6, Stipulation of Facts, Joint Stipulation of Facts and Issues; and Exhibit A.
[4] Exhibits "C", "E", "G", and "H".

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
Taxable sales	6,488.86	31,551,939.57	324,678.18	19,332.30
Zero Rated Sales	3,596,438,393.77	3,465,050,084.39	3,601,959,563.07	3,614,577,820.66
Total Sales	3,596,444,882.63	3,496,602,023.96	3,602,284,241.25	3,614,597,152.96
Output Tax	648.89	3,155,193.96	32,467.82	1,933.23
Less: Input Tax				
Input Tax Carried Over	296,371,388.03	379,051,038.85	237,399,953.93	258,658,515.95
Input Tax on:				
Domestic Purchases-Capital Goods	991,877.66	230,881.17	155,740.92	186,660.22
Goods other than Capital Goods	5,575,693.02	6,106,804.23	5,743,795.37	5,426,308.15
Domestic Purchases-Services	47,424,330.03	6,826,881.11	6,192,825.27	27,508,664.15
Services rendered by Non-Resident	2,240,609.43	2,155,495.32	2,749,133.28	735,256.51
Importations-Capital Goods	94,818.00	174,170.00	1,148,164.00	
Importations-other than Capital Goods	11,199,697.61	12,730,245.00	5,301,371.00	8,628,585.00
Total Available Input Tax	363,898,413.78	407,275,515.68	258,690,983.77	301,143,989.98
Deduction: VAT Refund		176,602,366.25		
Net Creditable Input Tax	363,898,413.78	230,673,149.43	258,690,983.77	301,143,989.98
Tax Overpayment	363,897,764.89	227,517,955.47	258,658,515.95	301,142,056.75

(Underlines supplied)

Petitioner filed its amended quarterly VAT returns for the first, second and fourth quarters of the year 2003 on July 25, 2003, August 19, 2003 and July 26, 2004, respectively, declaring among others the following:[5]

	1st Quarter	2nd Quarter	4th Quarter
Taxable sales	6,488.86	31,551,939.57	19,332.30
Zero Rated Sales	3,596,438,393.77	3,465,050,084.39	3,614,577,820.66
Total Sales	3,596,444,882.63	3,496,602,023.96	3,614,597,152.96
Output Tax	648.89	3,155,193.96	1,933.23
Less: Input Tax			
Input Tax Carried Over	311,524,661.99	379,051,038.85	258,658,515.95
Input Tax on:			
Domestic Purchases-Capital Goods	991,877.66	230,881.17	186,660.22
Goods other than Capital Goods	5,575,693.02	6,106,804.23	9,994,299.22
Domestic Purchases-Services	47,424,330.03	6,826,881.11	29,049,761.13
Services rendered by Non-Resident	2,240,609.43	2,155,495.32	735,256.51
Importations-Capital Goods	94,818.00	174,170.00	
Importations-other than Capital Goods	11,199,697.61	12,730,245.00	9,150,314.00
Total Available Input Tax	379,051,687.74	407,275,515.68	307,774,807.03
Deduction: VAT Refund		166,720,367.79	
Net Creditable Input Tax	379,051,687.74	240,555,147.89	307,774,807.03
Tax Overpayment	379,051,038.85	237,399,953.93	307,772,873.80

(Underlines supplied)

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[5] Exhibits "D", "F", and "I".

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed an administrative claim for refund of its unutilized input VAT with the Bureau of Internal Revenue on December 20, 2004 in the total amount of P166,158,823.50 for the four quarters of CY 2003.[6]

Petitioner filed a Petition for Review (docketed as CTA Case No. 7230) with this Court on April 22, 2005 claiming for refund or issuance of tax credit certificate in the amount of P67,527,025.75 representing its alleged unutilized input VAT paid on domestic purchases of goods and services and importation of goods attributable to zero-rated sales for the first quarter of 2003. In response thereto, respondent filed an Answer on June 21, 2005 praying for the dismissal of the petition for lack of merit.

On July 22, 2005, petitioner filed another Petition for Review (docketed as CTA Case No. 7299) before this Court, praying for a refund or issuance of tax credit certificate in the total amount of P98,631,797.75, representing the alleged unutilized input VAT paid on domestic purchases of goods and services and importation of goods attributable to zero-rated sales for the second, third, and fourth quarters of 2003. On September 6, 2005, respondent filed her Answer to the said Petition praying that the same be dismissed for lack of merit.

On August 24, 2005, relying on Rule 31, Section 1 of the Revised Rules of Court, petitioner filed a Motion for Consolidation of CTA Case Nos. 7230 and 7299, due to the fact that both cases involve the same parties and issues. This Court granted petitioner's Motion and ordered the consolidation of the said cases in a Resolution dated October 12, 2005.

After trial, this consolidated case was submitted for decision on November 13, 2008 taking into consideration petitioner's Memorandum filed on November 10, 2008 and respondent's Memorandum filed on November 5, 2008.

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[6] Par. 9, Stipulation of Facts, Joint Stipulation of Facts and Issues; and Exhibit "B".

The Issues

The parties jointly stipulated the following issues[7] to be resolved by this Court, to wit:

> 1. Whether or not the power generation services rendered by Petitioner to NPC are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the National Internal Revenue Code of 1997 ("Tax Code");
>
> 2. Whether or not Petitioner had unutilized creditable input VAT for the four quarters of CY 2003 arising from its domestic purchases of goods and services and importation of goods amounting to P166,158,823.50 that can be a proper object of a claim for refund pursuant to Section 108(B)(3) and Section 112(A) of the Tax Code;
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> 3. Whether or not the unutilized creditable input taxes for the first, second, third, and fourth quarters of CY 2003 are substantiated by proper invoices and official receipts;
>
> 4. Whether or not the unutilized creditable input VAT for the four quarters of CY 2003 was carried over to the succeeding taxable quarter(s) and applied against any of the output VAT liability of the Petitioner; and,
>
> 5. Whether or not Petitioner is entitled to a refund and/or issuance of tax credit certificate for the unutilized input VAT payments for the four quarters of CY 2003 in the amount of P166,158,823.50.
>
> 6. Whether or not the unutilized input taxes are all attributable to zero-rated sales.

The above issues boil down into a single point of whether or not petitioner is entitled to a refund or tax credit certificate in the amount of P166,158,823.50 allegedly representing excess input taxes attributable to zero-rated sales for the four quarters of taxable year 2003.

The Court's Ruling

Refunds or tax credits of input tax attributable to zero-rated sales is governed by Section 112 (A) of the National Internal Revenue Code (NIRC) which provides:

> "Section 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

[7] Stipulation of Issues, Joint Stipulation of Facts and Issues.

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> 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)(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 attributable to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

Pursuant to the above provision, in order to be entitled to the issuance of tax credit certificate/refund of unutilized input VAT, petitioner must prove compliance with the following requisites:[8]

1. There must be zero-rated or effectively zero-rated sales;
2. That input taxes were incurred or paid;
3. That such input taxes are directly attributable to zero-rated sales or effectively zero-rated sales;
4. That the input taxes were not applied against any output VAT liability during and in the succeeding quarters; and
5. That the claim for refund was filed within the two-year prescriptive period.

We will now determine petitioner's compliance with the above requirements.

It is petitioner's stand that its sale of power generation services to NPC, Mirant Philippines Energy Corporation, Mirant Philippines Industrial Power Corporation, and Mirant Philippines Industrial Power II Corporation are subject to zero percent (0%) VAT.

The said stance of the petitioner is meritorious.

Section 6 of Republic Act No. 6136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA) provides that sale of generated power by generation companies shall be subject to value added tax at zero percent rate. Rule 5, Section 6 of the Rules and Regulations to Implement EPIRA, which was promulgated

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[8] Nippon Express (Philippines) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6464, June 15, 2007.

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by the Department of Energy, provides that sale of generated power by generation company shall be zero-rated for the purpose of imposition of value-added tax, and that the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a generation company through all stages of sale until it reaches the end-user. In an earlier case,[9] this Court stressed that "the provisions of EPIRA, the regulations implementing the same, the interpretative rulings issued by the BIR and the CTA Decision on the case of Mindanao I Geothermal Partnership are unanimous in declaring that the sales of generated power by generation companies are VAT zero-rated."

From the foregoing quoted provisions of law and its implementing rules and regulations, and decision of this Court, the benefits of zero-rating are clearly granted. In fact, even the BIR itself had earlier approved petitioner's application for VAT zero rate covering the taxable year 2003.[10]

However, to qualify for VAT zero-rating under RA 6136, petitioner must prove that: 1) it is a generation company, and 2) it derived sales from power generation.[11]

It is undisputed that petitioner is principally engaged in the business of power generation.[12] However, petitioner has failed to prove compliance with the second requirement in order to qualify for VAT zero-rating under RA 6136. While petitioner declared the total amount of P14,278,025,861.89[13] as zero-rated sales in its 2001 quarterly VAT returns, the same could not be taken plainly as it is because there is still a need to produce the supporting documents proving the existence of such zero-rated sales. Noteworthy, that the photocopies of supporting documents of such zero-rated sales offered by petitioner[14] were not admitted as evidence for failure of

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[9] Toledo Power Co., vs. Commissioner of Internal Revenue, CTA Case Nos. 6805 & 6851, May 17, 2007.
[10] Par. 6, Stipulation of Facts, Joint Stipulation of Facts and Issues; and Exhibit "A".
[11] Note 9 *citing Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue, CTA Case No. 6788, October 13, 2005.*
[12] Par. 3, Stipulation of Facts, Joint Stipulation of Facts and Issues.
[13] Exhibits "C", "D", "E", "F", "G", "H", and "I".
[14] Marked as Exhibits Z to Z-302.

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petitioner's counsel/witness to identify the same during trial.[15] Moreover, the report of the Commissioned Independent CPA that the zero-rated sales are supported by zero rated VAT invoices and official receipts, has no probative value and is therefore, not binding to this Court in the absence of the supporting documents which became the basis of such a report.

Considering that there are no zero-rated sales to speak of during the four quarters of taxable year 2003, petitioner is, therefore, not entitled to a refund of input taxes allegedly attributable thereto since it is a basic requirement under Section 112(A) of the NIRC that there should exists a zero-rated sales in order to be entitled to refund of unutilized input taxes.

It is settled that tax refunds, like tax exemptions, are construed strictly against the taxpayer and that the claimant has the burden of proof to establish the factual basis of its claim for tax credit or refund.[16] Failure in this regard, petitioner's claim must fail.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for insufficiency of evidence.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[15] Resolutions dated April 3, 2008 and June 3, 2008.
[16] Silicon Philippines, Inc. vs. Commissioner of Internal Revenue, CTA EB Case No. 298, January 18, 2008 *citing Citibank, N.A. vs. Court of Appeals and the Commissioner of Internal Revenue, 280 SCRA 459.*

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice