REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SOUTHERN ENERGY NAVOTAS II POWER, INC., [Formerly Hopewell Tileman (Philippines) Corporation],
Petitioner,

- versus -

C.T.A. CASE NO. 5911

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 25 2001

x - x

DECISION

This is a Petition for Review initiated by SOUTHERN ENERGY NAVOTAS II POWER, INC., against the Commissioner of Internal Revenue for the refund of the amount of P108,771.17 representing the former's alleged unapplied or unutilized creditable input value added tax (VAT) for the second quarter of 1997.

As represented, 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 in accordance with Section 107 of the Tax Code, and was issued VAT Registration Certificate No. 96-051-005717, effective January 30, 1996.

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 a gas turbine power station under the build-operate-transfer

(BOT) scheme with the National Power Corporation (NPC). This application was not acted upon by the BIR.

For the taxable quarter ending June 30, 1997, Petitioner filed with the BIR within the legally prescribed period, its VAT return reflecting therein an input tax amounting to P108,771.17 (Par. 4, Joint Stipulation of Facts and Issues, p. 45-47, docket) and domestic purchases of goods and services amounting to P1,087,771.17 (Exh. A).

On June 30, 1999, Petitioner filed with Respondent a claim for refund in the amount of P108,771.17 anchored on its theory that its sale of power generation services to NPC is zero-rated for VAT purposes, and all the VAT input taxes referred to above were all directly attributable to its zero-rated sales and that the input VAT amounting to P108,771.17 were undiminished by any output tax liability during the period covered.

The claim for refund was not acted upon by the Respondent, hence, on July 20, 1999, Petitioner filed with this Court the instant Petition for Review.

Petitioner asseverates in the instant petition that (1) its sale of power generation services to NPC is subject to zero percent (0%) VAT, pursuant to Section 102(b)(3) [now Section 108(B)(3)] of the Tax Code, and Republic Act 6395 declaring NPC exempt from the payment of all forms of taxes, duties and fees, (2) its creditable input VAT for the quarter ended June 30, 1997 are duly substantiated by documentary evidence in the form of invoices and official receipts, (3) its unapplied or unutilized creditable input VAT as of June 30, 1997 in the amount of P108,771.17 arising from its domestic purchases of goods and services is a proper object of a claim for refund under Section 112(A) [formerly Section 106] of the Tax Code. Petitioner then argues that it is entitled to the refund of the input VAT it incurred during the second quarter of 1997 since it is not subject to any output VAT as its sales of services to NPC are zero-rated. Sections 102 and 112 of the 1997 Tax Code are hereinbelow quoted thus:

Section 102. ***Value-added tax on sale of services and use or lease of properties.*** - (a) *Rate and base of tax.* x x x

(b) *Transactions subject to zero-rate.* - The following services performed in the Philippines by VAT-registered persons shall be subject to 0%:

(1) x x x

(2) x x x

(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 rate.

x x x x x x x x x

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, 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 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.

Respondent in his answer raised the herein Special and Affirmative Defenses, thus:

(1) the alleged claim for refund is subject to investigation by the Bureau of Internal Revenue,

(2) taxes paid and collected are presumed to have been made in accordance with laws and regulations, hence, not refundable. Claims for tax refund are construed strictly against the claimant as they partake the nature of an exemption from tax (**Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1979, 31 SCRA 95**) and it is incumbent upon the Petitioner to prove that it is entitled thereto under the law (**Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121**) and he who claims exemption must be able to justify his claim by the clearest grant of organic or statute law. An exemption from the common burden cannot be permitted to exist upon vague implications (**Asiatic Petroleum Co. vs. Llamas, 49 Phil. 466 cited in Collector vs. Manila Jockey Club Inc. L-8755, March 23, 1956**),

(3) Petitioner must prove that it has complied with the governing rules with reference to tax recovery or refund, which are found in Sections 204 (C) and 229 of the Tax Code.

The issues presented by the parties in their Joint Stipulation of Facts and Issues may be summarized into whether or not Petitioner's sale of power generation services to NPC are subject to zero-rate under Section 102(b)(3) of the Tax Code, therefore not subject to any output tax, thus, enabling the Petitioner to claim the refund of the input VAT it paid during the period April 1 to June 30, 1997 in the total amount of P108,771.17.

A tax refund partakes of the nature of a tax exemption and therefore cannot be allowed unless granted in the most explicit and categorical manner **(Commissioner of Internal Revenue vs. Rio Tuba Nickel Mining, 207 SCRA 550).** As the power of taxation is a high prerogative of sovereignty, its relinquishment is never presumed and any reduction or diminution thereof with respect to its mode or its rate must be strictly construed, and the same must be couched in clear and unmistakable terms in order that it may be applied. Needless to say, the law frowns against exemption from taxation and it looks upon it with a jaundiced eye **(American Express International Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5031 promulgated on August 16, 1996**).

In the case at bar, it is an uncontroverted fact that Petitioner failed to adduce in evidence its approved application for zero-rating for the period in question thus, the Court cannot consider the Petitioner's sale of services to NPC as effectively zero-rated absent the approved application.

In the case entitled **ABB Power Generation, Ltd. vs. The Commissioner of Internal Revenue, CTA Case No. 5270, March 3, 1999,** this Court ruled that a VAT entity who failed to present an approved application for zero-rating as required by Section 8(d) of Revenue Regulations No. 5-87 will not be considered a zero-rated enterprise.

Pertinent portions of said decision are quoted below:

> "Moreover, granting *arguendo*, that petitioner's sale of services to the NPC are considered effectively zero-rated sales under Section 102 (a)(3) of

the Tax Code, *supra*, nevertheless, this Court has to deny the instant claim for refund as petitioner failed to comply with Section 8(d) of Revenue Regulations No. 5-87 which requires that any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application with the Commissioner of Internal Revenue justifying the imposition of zero-rate on said transactions. Quoted hereunder is Section 8 (d) of Revenue Regulations No. 5-87, thus :

> (d) Application for 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.

Petitioner in the instant case did not adduce in evidence its approved application for zero-rating in the face of the allegation made by respondent that petitioner failed to obtain the approval of the Commissioner of Internal Revenue pursuant to the aforecited section 8 (d) of Revenue Regulations No. 5-87 (see respondent's Answer, page 7, CTA records) Failure to get an approval from the Commissioner for a zero-rating classification will make the said sale of services by petitioner to NPC an EXEMPT transaction under paragraph (u) of Art. 103 of the Tax Code, thus, petitioner shall not be entitled to the refund of any input tax it paid on its purchase of goods and services during the period in question. Sec. 9 of Rev. Reg. No. 5-87 provides as follows :

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

A VAT entity who failed to present an approved application for zero-rating as required by Sec. 8(d) of Revenue Regulations No. 5-87 will not be considered a zero-rated enterprise, hence, not entitled to the refund of its input taxes (see **Kumagai-Gumi Co., Ltd. (Phil. Branch) vs. The Commissioner of Internal Revenue, CTA Case No. 4670, July 29, 1997**)."

We do not think any different conclusion ought to be reached in the case at bar, as the circumstances of this case are on all fours with the above-cited case decided by this Court.

It is true that Petitioner waited for a long time for the Respondent to act on its application for effective zero-rating considering that the application was filed on March 1, 1996, and until now there was no action from the Respondent. However, this scenario could have been prevented had Petitioner exercised its right to compel Respondent to act on its application. A petition for mandamus should have been resorted to by Petitioner to secure the much needed approval. This Court is of the impression that Petitioner did not exert any effort to follow-up its application with the BIR and waited this long for the Court to rule on it. Sad to say, such authority to rule on the application for zero-rating is only vested upon the Respondent **(Southern Energy Navotas II Power, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5815, March 1, 2001; Southern Energy Navotas II Power, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5910 promulgated on April 10, 2001)**.

IN THE LIGHT OF ALL THE FOREGOING, judgment is hereby rendered denying the instant Petition for Review for lack of merit. No costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

AMANCIO Q. SAGA
Associate Judge

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