REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

TEAM SUAL CORPORATION (formerly MIRANT SUAL CORPORATION and SOUTHERN ENERGY PANGASINAN, INC.) *Petitioner,*	**CTA Case No. 7620**
	Members:
	CASTAÑEDA, JR., *Chairperson,* and **UY,** *JJ.*
- versus –	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: MAR 02 2020 4:30 p.m.

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DECISION

CASTAÑEDA, JR., *J.:*

THE CASE

This is a remanded case for the proper determination of the refundable amount due to petitioner TeaM Sual Corporation, pursuant to the Supreme Court Resolution dated February 26, 2018 rendered in G.R. No. 211667,[1] and CTA *En Banc* Resolution dated December 4, 2018.[2]

[1] Docket – Vol. III, pp. 1160 to 1164.
[2] Docket – Vol. III, pp. 1181 to 1182.

THE FACTS

On April 23, 2010, this Court, through its Former Second Division, promulgated its Decision,[3] partly granting petitioner's *Petition for Review* in this wise:

> "For all the foregoing, the Court finds that petitioner is entitled to a refund or issuance of a Tax Credit Certificate representing unutilized input VAT attributable to zero-rated sales for the second and third quarters and the month of October of taxable year 2005, but in the reduced amount of P77,519,684.39, computed, as follows:

Amount of Claim		P103,588,530.59
Less: Prescribed Claim (1st Quarter)		18,738,140.02
Unprescribed Claim		84,850,390.57
Less: Disallowances		
Per ICPA	348,163.67	
Per Court's verification	4,098,113.50	4,446,277.17
Valid Input VAT		**P80,404,113.40**
Less: Output VAT		218,935.35
Excess Input VAT		**P80,185,178.05**

Substantiated Zero-rated Sales	P8,218,054,010.45
Total Declared Zero-rated Sales	÷ 8,500,629,604.08
Excess Input VAT	x 80,185,178.05
REFUNDABLE EXCESS INPUT VAT Attributable to Zero-Rated Sales	**P77,519,684.39**

> **WHEREFORE**, premises considered, the present Petition for Review is **PARTLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **SEVENTY SEVEN MILLION FIVE HUNDRED NINETEEN THOUSAND SIX HUNDRED EIGHTY FOUR and 39/100 PESOS (₱77,519,684.39)**, representing unutilized input VAT attributable to zero-rated sales for the second and third quarters and the month of October of taxable year 2005.
>
> **SO ORDERED.**" *gr*

[3] Docket – Vol. II, pp. 559 to 599. Penned by Associate Justice Olga Palanca-Enriquez (now retired), and concurred by Associate Justice Juanito C. Castañeda, Jr. Associate Justice Erlinda P. Uy was on leave.

Respondent then filed a *Motion for Reconsideration* on May 12, 2010 before this Court,[4] praying for the partial reconsideration of the above-stated Decision, and for the rendition of a new Decision dismissing the claim for refund in its entirety. Petitioner filed its *Comment/Opposition (To Respondent's Motion for Partial Reconsideration)* on June 3, 2010.[5]

On May 13, 2010, petitioner likewise filed a *Motion for Partial Reconsideration* with this Court,[6] praying for the reconsideration of the latter's findings that: (a) the judicial claim for the first quarter of 2005 had prescribed and, consequently, grant unto petitioner its (i) input VAT claim for the first quarter of 2005 amounting to ₱18,738,140.02; and (ii) input VAT claim of ₱4,098,113.50 pertaining to claims for input VAT on importation and on domestic purchases of goods and of services for the second quarter, third quarter and month of October 2005 which are supported by official receipts and invoices dated January, February and March 2005; and (b) petitioner's sales of electricity to Mirant Philippines Energy Corporation, Mirant Philippines Industrial Power Corporation, and Mirant Philippines Industrial Power II Corporation for the second quarter (₱162,513,372.18), third quarter (₱108,548,925.84) and month of October 2005 (₱11,513,295.61), totaling to an amount of ₱282,575,593.63, do not qualify as zero-rated sale of electricity under Republic Act (RA) No. 9136 (EPIRA Law), and consequently, grant unto petitioner input VAT claim of ₱2,665,493.66 attributable to said zero-rated sales. Respondent failed to file his comment on petitioner's *Motion for Partial Reconsideration*.[7]

This Court granted respondent's *Motion for Partial Reconsideration* in its Amended Decision dated September 16, 2010,[8] the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, respondent CIR's 'Motion for Partial Reconsideration' is hereby **GRANTED**. Accordingly, our Decision dated April 23, 2010 ge

[4] Docket – Vol. II, pp. 600 to 606.
[5] Docket – Vol. II, pp. 610 to 618.
[6] Docket – Vol. II, pp. 619 to 647.
[7] Records Verification dated June 22, 2010, issued by the Judicial Records Division of this Court, Docket – Vol. II, p. 650.
[8] Docket – Vol. II, pp. 652 to 663. Penned by Associate Justice Olga Palanca-Enriquez (now retired), and concurred by Associate Justice Erlinda P. Uy. Associate Justice Juanito C. Castañeda, Jr. entered his Dissenting Opinion.

> is hereby **RECALLED** and **SET ASIDE**, and a new one is hereby entered dismissing the Petition of Review for failure to comply with a condition precedent.
>
> **SO ORDERED**."

As a consequence, petitioner filed on September 7, 2010 a *Petition for Review* with the Court *En Banc*.[9] On November 3, 2010, respondent filed his *Comment*.[10]

In the Resolution dated November 12, 2010,[11] the Court *En Banc* gave due course to the *Petition for Review*, and required the parties to submit their respective memorandum within thirty (30) days from notice.

On December 14, 2010 respondent filed his *Memorandum*;[12] while the *Memorandum for the Petitioner* was filed on December 20, 2010.[13]

On March 4, 2013, the Court *En Banc* rendered its Decision,[14] the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the Amended Decision dated September 16, 2010, rendered by the Former Second Division of this Court is hereby AFFIRMED. Accordingly, the instant Petition for Review is **DISMISSED.**
>
> **SO ORDERED.**"

Petitioner then filed a *Motion for Reconsideration* with the Court *En Banc* on April 18, 2013.[15] Respondent filed his *Comment (to the Respondent's Motion for Reconsideration)* on May 31, 2013.[16]

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[9] Docket – Vol. II, pp. 670 to 730.
[10] Docket – Vol. II, pp. 818 to 823.
[11] Docket – Vol. II, pp. 826 to 827.
[12] Docket – Vol. II, pp. 831 to 842.
[13] Docket – Vol. II, pp. 844 to 892.
[14] Docket – Vol. II, pp. 958 to 975.
[15] Docket – Vol. II, pp. 987 to 1005.
[16] Docket – Vol. II, pp. 1010 to 1019.

On August 13, 2013, the Court *En Banc* rendered an Amended Decision,[17] the dispositive portion of which states:

> "**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration is hereby **GRANTED**. The Court En Banc's Decision promulgated on March 04, 2013 is hereby **REVERSED AND SET ASIDE.** Accordingly, CTA Case No. 7620 is hereby **REMANDED** to the Court of origin for further proceedings.
>
> **SO ORDERED.**"

Respondent then filed his *Motion for Reconsideration (Re: Amended Decision Promulgated August 13, 2013)* on September 25, 2013.[18]

The Court *En Banc* denied respondent's *Motion for Reconsideration (Re: Amended Decision Promulgated August 13, 2013)* in the Resolution dated March 5, 2014,[19] the dispositive portion thereof states:

> "**WHEREFORE,** premises considered, respondent's Motion for Reconsideration is hereby **DENIED**. The Court En Banc's Amended Decision promulgated on August 13, 2013 is hereby **AFFIRMED**. Accordingly, CTA Case No. 7620 is hereby **REMANDED** to the Court of origin for further proceedings.
>
> **SO ORDERED.**"

Thus, on May 2, 2014, respondent filed with the Supreme Court a *Petition for Review on Certiorari* entitled *"Commissioner of Internal Revenue, Petitioner, versus Team Sual Corporation (formerly Mirant Sual Corporation and Southern Energy Pangasinan, Inc.), Respondent"*. The case was docketed as G.R. No 211667.[20]

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[17] Docket – Vol. II, pp. 1022 to 1027.
[18] Docket – Vol. II, pp. 1029 to 1038.
[19] Docket – Vol. II, pp. 1060 to 1071.
[20] Docket – Vol. III, pp. 1078 to 1094.

On October 10, 2014, petitioner filed with the Supreme Court its *Comment/Opposition (To Petitioner's Petition for Review on Certiorari).*[21] On March 26, 2015, respondent filed with the Supreme Court its *Reply.*[22]

On February 26, 2018, the Supreme Court rendered a Resolution,[23] the dispositive portion of which reads:

> "**WHEREFORE**, the petition is **DENIED**. The August 13, 2013 Amended Decision and the March 5, 2014 Resolution of the Court of Tax Appeals En Banc in CTA EB No. 691 are AFFIRMED *in toto.* Accordingly, the case is **REMANDED** to the CTA Division for the proper determination of the refundable amount due to the respondent.
>
> **SO ORDERED.**"

In the Resolution dated December 4, 2018,[24] the Court *En Banc* remanded the present case pursuant to its Amended Decision dated August 13, 2013, considering the Entry of Judgment issued by the Supreme Court in G.R. No. 211667, certifying that the Resolution dated February 26, 2018 had become final and executory on June 18, 2018.

Subsequently, this Court issued the Resolution dated January 16, 2019,[25] giving the parties a period of fifteen (15) days from notice, to file a written *Manifestation* alleging any supervening event that may have transpired in this case which the parties would want to present before this Court for its consideration.

On February 6, 2019, petitioner filed a *Manifestation with Motion to Partially Reinstate the Decision dated 23 April 2010 and for Proper Determination of the Additional Refundable Amount Due.*[26] Respondent failed to comply with the Resolution dated January 16, 2019 (re: to file written *Manifestation*).[27]

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[21] Docket – Vol. III, pp. 1104 to 1114.
[22] Docket – Vol. III, pp. 1144 to 1151.
[23] Docket – Vol. III, pp. 1160 to 1163.
[24] Docket – Vol. III, pp. 1181 to 1182.
[25] Docket – Vol. III, pp. 1184 to 1187.
[26] Docket – Vol. III, pp. 1188 to 1198.
[27] Records Verification dated February 11, 2019 issued by the Judicial Records Division of this Court, Docket – Vol. III, p. 1200.

In the Resolution dated March 6, 2019,[28] the Court noted petitioner's *Manifestation with Motion to Partially Reinstate the Decision dated 23 April 2010 and for Proper Determination of the Additional Refundable Amount Due*, and deemed the case, including the proper determination of the refundable amount due to petitioner in accordance with the Supreme Court Resolution in G.R. No. 211667, submitted anew for decision.

THE COURT'S RULING

The Court partially grants the *Petition for Review*.

Section 112(A) and (D) of the NIRC of 1997 reads:

> "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 volume of sales.

[28] Docket – Vol. III, pp. 1201 to 1203.

xxx xxx xxx

(D) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals."

Based on the foregoing provision, jurisprudence has laid down certain requisites which the taxpayer-applicant must comply with to successfully obtain a credit/refund of input VAT. Said requisites are classified into certain categories, to wit:

<u>Timeliness of the filing of the administrative and judicial claims</u>:

1. the claim is filed with the BIR within two years after the close of the taxable quarter when the sales were made;[29]

2. that in case of full or partial denial of the refund claim, or the failure on the part of the Commissioner to act on the said claim within a period of 120 days, the judicial claim has been filed with this Court, within 30 days from receipt of the decision or after the expiration of the said

[29] *Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 155732, April 27, 2007; *San Roque Power Corporation vs. Commissioner of Internal Revenue*, G.R. No. 180345, November 25, 2009; and *AT&T Communications Services Philippines, Inc.*, G.R. No. 182364, August 3, 2010.

120-day period;[30]

Taxpayer's registration with the BIR:

3. the taxpayer is a VAT-registered person;[31]

Taxpayer's output VAT:

4. the taxpayer is engaged in zero-rated or effectively zero-rated sales;[32]

5. for zero-rated sales under Sections 106(A)(2)(1) and (2); 106(B); and 108(B)(1) and (2), the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with BSP rules and regulations;[33]

Taxpayer's input VAT being refunded:

6. the input taxes are not transitional input taxes;[34]

7. the input taxes are due or paid;[35]

8. the input taxes have not been applied against output taxes during and in the succeeding quarters;[36] and

9. the input taxes claimed are attributable to zero-rated or effectively zero-rated sales. However, where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales, and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the

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[30] *Steag State Power, Inc. (Formerly State Power Development Corporation) vs. Commissioner of Internal Revenue*, G.R. No. 205282, January 14, 2019; *Rohm Apollo Semiconductor Philippines vs. Commissioner of Internal Revenue*, G.R. No. 168950, January 14, 2015.

[31] *Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue*, supra; *San Roque Power Corporation vs. Commissioner of Internal Revenue*, supra; and *AT&T Communications Services Philippines, Inc.*, supra.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue*, supra; *San Roque Power Corporation vs. Commissioner of Internal Revenue*, supra; and *AT&T Communications Services Philippines, Inc.*, supra.

basis of sales volume.[37]

Petitioner's administrative and judicial claims were timely filed.

The *first* requisite pertains to the filing of the refund claim for tax credit or refund of input VAT before the BIR, which must be within two (2) years from the close of the quarter when the zero-rated or effectively zero-rated sales were made.

The instant claim pertains to the 1st, 2nd and 3rd quarters, and the month of October, of taxable year 2005. Counting two (2) years from the respective close of the taxable quarters covered by the claim, the following table indicates the pertinent last days for the filing of an administrative claim for the said periods, to wit:

Period Covered	**Close of the Taxable Quarter**	**Last Day to File Administrative Claim**
January 1 to March 31, 2005 (1st quarter)	March 31, 2005	March 31, 2007
April 1 to June 30, 2005 (2nd quarter)	June 30, 2005	June 30, 2007
July 1 to September 30, 2005 (3rd quarter)	September 30, 2005	September 30, 2007
October 1 to 31, 2005	December 31, 2005	December 31, 2007

Clearly, petitioner timely filed its administrative claim for the subject periods on December 21, 2006.

As for the *second* requisite, it is to the effect that the judicial claim must have been filed within thirty (30) days from receipt of respondent's decision or after the expiration of the 120-day period enunciated under Section 112.

When the *first* and *second* requisites are taken together, it is clear that after the filing of the administrative claim with the BIR, the taxpayer-applicant need to wait for respondent's decision or the lapse of the said 120-day period.

[37] *Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue*, supra; and *San Roque Power Corporation vs. Commissioner of Internal Revenue*, supra.

However, upon appeal of this case, the Supreme Court (in G.R. No. 211667) clarified the rule regarding the said 120-day period under prevailing jurisprudence, in this wise:

> "[Section 112(C)[38] of the NIRC] was interpreted by BIR Ruling No. DA-489-03 issued on December 10, 2003, which stated that 'a taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review. Neither is it required that the Commissioner should first act on the claim of a particular taxpayer before the CTA may acquire jurisdiction, particularly if the claim is about to prescribe.'
>
> This rule, however, was nullified in *Aichi*[39], promulgated on October 6, 2010. *Aichi* emphasized that the failure to await the decision of the Commissioner or the lapse of the 120-day period prescribed in Sec. 112(C) amounted to a premature filing.
>
> **Nevertheless, *San Roque*[40] clarified, once and for all, that BIR Ruling No. DA-489-03 was a general interpretative rule and it applies to each and every taxpayer.** Even though it was subsequently declared invalid, the same can be invoked by all taxpayer-claimants of VAT refund in good faith before it was nullified by the Court. Thus, **all taxpayers can rely on the said BIR ruling from the time of its issuance on December 10, 2003 up to its reversal in *Aichi* on October 6, 2010, where it was held that the 120+30 day periods were mandatory and jurisdictional.** In other words, the *Aichi* ruling was prospective in application. *San Roque* put to rest any issue regarding the applicability of BIR Ruling No. DA-489-03.
>
> **As long as the judicial claim was filed within the interim period of December 10, 2003 up to October 6, 2010, the taxpayer is not required to**

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[38] Actually referring to Section 112(D) of the NIRC of 1997.
[39] *Commissioner of Internal Revenue vs. Aichi Forging Co.*, 646 Phil. 710 (2010).
[40] *Commissioner of Internal Revenue vs. San Roque Power Corporation, Taganito Mining Corporation vs. Commissioner of Internal Revenue*, and *Philex Mining Corporation vs. Commissioner of Internal Revenue*, 703 Phil. 310 (2013).

> **<u>wait for the 120-day period</u>. This doctrine has been consistently upheld in the recent decisions of the Court.**
>
> **In this case, [petitioner] filed its judicial claim for refund on April 18, 2007, or within the interim period of BIR Ruling No. DA-489-03's validity from December 10, 2003 to October 6, 2010. <u>Thus, there was no need to wait for the lapse of 120 days prescribed in Sec. 112 (C) of the NIRC because it relied on good faith on BIR Ruling No. DA-489-03</u>.**"[41] *(Emphases and underscoring ours)*

Accordingly, it is settled that petitioner fulfilled the above-stated *first* and *second* requisites.

Petitioner is a VAT-registered person.

The parties jointly stipulated that petitioner is registered with the BIR as a VAT taxpayer in accordance with Section 107 of the NIRC of 1977 [now Section 236 of the NIRC of 1997] with Tax Identification No. 003-841-103".[42] Hence, petitioner has likewise complied with the *third* requisite.

Petitioner's zero-rated or effectively zero-rated sales/receipts for the subject period of claim only amounts to ₱11,789,638,188.67.

Anent the *fourth* requisite, petitioner alleges that its sale of power generation services to National Power Corporation (NPC) is VAT zero-rated, pursuant to Section 108(B)(3) of the NIRC of 1997 in relation to Section 13 of Republic Act (RA) No. 6395 (The Revised NPC Charter), as amended by Presidential Decree (PD) Nos. 380 and 938.

[41] Notice from the Third Division of the Supreme Court in G.R. No. 211667, Docket – Vol, III, pp. 1160 to 1163, at p. 1162.
[42] Par. 2, Jointly Stipulated Facts, JSFI, Docket – Vol, I, p. 340.

The said provisions read:

Section 108(B)(3), NIRC of 1997:

"SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* —

(A) *Rate and Base of Tax.* — xxx

(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:**

xxx xxx xxx

(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 percent (0%) rate**." (*Emphases supplied*)

Section 13, RA No. 6395, as amended:

"Sec. 13. *Non-profit Character of the Corporation, Exemption from All Taxes, Duties, Fees, Imposts and Other Charges by the Government and Government Instrumentalities.* — The Corporation shall be non-profit and shall devote all its returns from its capital investments, as well as excess revenues from its operation, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance of effective implementation of the policy enunciated in Section one of this Act, **the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes,** duties, fees, Imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." (*Emphases supplied*).

In *Ernesto M. Maceda vs. Hon. Catalino Macaraig, Jr.,*[43] the total exemption of NPC from all kinds of taxes, whether direct or indirect, was already settled by the Supreme Court. The NPC's exemption from all kinds of taxes was further discussed by the High Court in its Resolution dated June 8, 1993 resolving the same issue in a motion for reconsideration in this manner, thus:

> "A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes — direct or indirect.
>
> One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 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 be and has to be exempt from all forms of taxes if this goal is to be achieved."

From the foregoing, NPC is an entity with a special charter, which categorically makes it exempt from payment of all taxes, whether direct or indirect, including VAT.[44] Furthermore, the BIR itself approved petitioner's Application for Effective Zero-Rate of its supply of electricity to the NPC for the period from January 1, 2005 to October 31, 2005.[45] Hence, services rendered by a VAT-registered entity, like herein petitioner, to NPC are effectively subject to zero percent (0%) VAT.

Petitioner also claims that its sales of electricity, as a generation company, to entities other than the NPC, namely, Mirant Philippines Energy Corporation (MPEC), Mirant Philippines Industrial Power Corporation (MPIPC) and Mirant Philippines Industrial Power II Corporation (MPIPC II) qualify for VAT zero-rating under paragraph 5, Section 6 of RA No. 9136 also known as the "Electric Power Industry Reform Act of 2001" (EPIRA Law), which states:

[43] G.R. No. 88291, May 31, 1991.
[44] Section 24(A) of Republic Act No. 9337, which took effect on November 1, 2005, repealed NPC's exemption from VAT.
[45] Par. 3, Jointly Stipulated Facts, JSFI, Docket – Vol. I, p. 336.

"SEC. *Generation Sector.* — xxx

xxx xxx xxx

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated."

However, it has already been held by this Court in its April 23, 2010 Decision[46] that petitioner failed to establish that it is a generation company in accordance with RA No. 9136, to wit:

"To qualify for VAT zero-rating under the EPIRA law, petitioner must be able to establish that: 1) it is a generation company and 2) it derives sales from power generation.

1) Generation Company

Section 4 of RA 9136 provides:

'SEC. 4. *Definition of Terms.* —

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(w) 'Generation Company' refers to any person or entity ***authorized by the ERC*** to operate facilities used in the generation of electricity;" (*Emphasis supplied*)

As regards the first requisite, petitioner failed to establish that it is a generation company in accordance with RA *9136*. Petitioner failed to present any proof that it was registered with the Energy Regulatory Commission (ERC), pursuant to *Section 4 of RA 9136*, in relation to *Section 6 (b) Rule 5 of the IRR*, nor did it present any document to prove that it was accredited by the Department of Energy."

[46] Docket – Vol. II, pp. 559 to 599.

Moreover, petitioner's claim under the EPIRA Law is being raised for the first time in this Court, it was never raised at the administrative level. Notably, in its administrative claim for refund with the BIR, only petitioner's sales to NPC were raised, as subject to zero-percent VAT, hence, it cannot raise the issue of its zero-rated sales to other companies, pursuant to the EPIRA Law for the first time in this Court. It is well settled that under the principle of prior exhaustion of administrative remedies, questions or issues not raised in the administrative level cannot be raised for the first time in the judicial level. To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court — which is supposed to review administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum (*Commissioner of Internal Revenue vs. Wander Philippines, Inc., 160 SCRA 573*). Thus, petitioner's sales of generated power to Mirant Philippines Energy Corporation, Mirant Philippines Industrial Power Corporation, and Mirant Philippines Industrial Power II Corporation, cannot be claimed as zero percent (0%) VAT under the EPIRA Law."

As such, petitioner's sales to MPEC, MPIPC, and MPIPC II cannot qualify for VAT zero-rating under the EPIRA Law.

In this regard, petitioner declared a total amount of ₱12,276,041,728.09 zero-rated sales/receipts for the first, second and third quarters and for the month of October of TY 2005, computed as follows:

Exhibit	Year 2005	Zero-Rated Sales/Receipts
"C"	1st Quarter	₱ 3,775,412,124.01
"D"	2nd Quarter	3,600,420,391.50
"E"	3rd Quarter	3,700,406,077.70
"HH"	October	1,199,803,134.88
	TOTAL	**₱12,276,041,728.09**

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Considering that petitioner's sales to MPEC, MPIPC, and MPIPC II do not qualify as zero-rated sales, the corresponding sales amount of ₱486,403,539.42, broken down below, shall be deducted from the total declared amount of ₱12,276,041,728.09, to wit:

Period Covered	Client	Declared Zero-Rated Sales/Receipts	
1st quarter of 2005[47]	MPEC	₱83,682,260.92	
	MPIPC	1,446,684.29	
	MPIPC II	23,109,307.34	
	MPEC	83,046,656.07	
	MPIPC	1,156,062.78	
	MPIPC II	11,386,974.39	₱203,827,945.79
2nd quarter of 2005[48]	MPIPC	₱ 3,004,545.95	
	MPIPC II	44,795,375.78	
	MPEC	114,713,450.45	162,513,372.18
3rd quarter of 2005[49]	MPEC	₱ 84,751,495.71	
	MPIPC	1,109,534.31	
	MPIPC II	22,687,895.82	108,548,925.84
October 2005[50]	MPIPC II		11,513,295.61
	TOTAL		**₱486,403,539.42**

Thus, only the remaining declared zero-rated sales/receipts in the amount of ₱11,789,638,188.67 representing petitioner's sales of electricity to NPC qualify for VAT zero-rating under Section 108(B)(3) of the NIRC of 1997, as amended:

Declared zero-rated sales/receipts	₱ 12,276,041,728.09
Less: Sales to/receipts from MPEC, MPIPC & MPIPC II	486,403,539.42
Valid zero-rated sales/receipts	**₱11,789,638,188.67**

However, considering that petitioner's sale of electricity to NPC pertains to sale of services, the same must be substantiated by VAT zero-rated official receipts (ORs) issued in accordance with Section 113(A) of the NIRC of 1997, which is quoted hereunder: Jc

[47] Exhibit "EE".
[48] Exhibit "FF".
[49] Exhibit "GG".
[50] Exhibit "HH".

> "SEC. 113. *Invoicing and Accounting Requirements for VAT-Registered Persons* —
>
> (A) *Invoicing Requirements.* — A VAT-registered person shall, *for every sale, issue* an invoice or *receipt.* In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt:
>
> 1. A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and
>
> 2. The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax."

Relative thereto, Section 4.1081 of Revenue Regulations (RR) No. 7-95, which implements Section 113(A) of the NIRC of 1997 provides as follows, to wit:

> "SECTION 4.108-1. *Invoicing Requirements.* — All VAT-registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:
>
> 1. the name, TIN and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
> 5. the word `zero rated' imprinted on the invoice covering zero-rated sales; and
> 6. the invoice value or consideration.
>
> In the case of sale of real property subject to VAT and where the zonal or market value is higher than the actual consideration, the VAT shall be separately indicated in the invoice or receipt. gr

> Only VAT-registered persons are required to print their TIN followed by the word `VAT' in their invoice or receipts and this shall be considered as a `VAT Invoice'. All purchases covered by invoices other than "VAT" Invoice" shall not give rise to any input tax.
>
> If the taxable person is also engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations. A `VAT Invoice' shall be issued only for sales of goods, properties or services subject to VAT imposed in Sections 100 and 102 of the Code.
>
> The invoice or receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records."

The ORs must also be duly registered with the BIR as prescribed under Section 237 in relation to Section 238 of the NIRC of 1997, as amended, to wit:

> "SEC. 237. *Issuance of Receipts or Sales or Commercial Invoices.* — All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service: xxx"
>
> "SEC. 238. *Printing of Receipts or Sales or Commercial Invoices.* — All persons who are engaged in business shall secure from the Bureau of Internal Revenue an authority to print receipts or sales or commercial invoices before a printer can print the same.
>
> No authority to print receipts or sales or commercial invoices shall be granted unless the receipts or invoices to be printed are serially numbered and shall show, among other things, the name, business style, Taxpayer Identification Number (TIN) and business address of the

> person or entity to use the same, and such other information that may be required by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner."

A scrutiny of petitioner's supporting VAT zero-rated ORs[51] shows that the same comply with the invoicing requirements under the aforequoted law and regulations. Accordingly, petitioner's valid zero-rated sales/receipts for the 1st, 2nd and 3rd quarters, as well as the month of October, of taxable year 2005 that are duly covered by VAT zero-rated ORs amounted to ₱11,789,638,188.67.

Having found that petitioner had VAT zero-rated sales/receipts *only* in the total amount of ₱11,789,638,188.67 for the subject period of claim, there is only a partial compliance with the *fourth* requisite for the grant of refund or tax credit of input VAT in the instant case.

Notably, petitioner need not comply with *fifth* requisite, since it zero rating is not based on Sections 106(A)(2)(1) and (2); 106(B); and 108(B)(1) and (2) of the NIRC of 1997.

The Court shall then proceed to determine whether petitioner complied with the remaining requisites pertaining to the input VAT being claimed for refund or issuance of a tax credit certificate.

The claimed input VAT are not transitional input taxes.

The claimed input taxes do *not* appear to be transitional input taxes, as understood under Section 111(A) of the NIRC of 1997, to wit:

> "SEC. 111. *Transitional/Presumptive Input Tax Credits.* –
>
> (A) *Transitional Input Tax Credits.* – A person who becomes liable to value-added tax or any person who elects to be a VAT-registered person shall, subject to the filing of an inventory according to the rules and regulations

[51] Exhibits "II-1" to "II-19", "LL-1" to "LL-2", "KK-1" to "KK-16" and "JJ-1" to "JJ-22".

prescribed by the Secretary of Finance, upon recommendation of the Commissioner, be allowed input tax on his beginning inventory of goods, materials and supplies equivalent to eight percent (8%) of the value of such inventory or the actual value-added tax paid on such goods, materials and supplies, whichever is higher, which shall be creditable against the output tax."

Transitional input tax credit operates to benefit newly VAT-registered persons, whether or not they previously paid taxes in the acquisitions of their beginning inventory of goods, materials and supplies. During the period of transition from non-VAT to VAT status, the transitional input tax credit serves to alleviate the impact of the VAT on the taxpayer.[52]

Considering that there is no showing that the claimed input VAT are transitional input VAT, petitioner has complied with the *sixth* requisite for the grant of an input VAT refund.

The input VAT being claimed were due or paid.

In its *Quarterly VAT Returns* for the 1st, 2nd and 3rd quarters of 2005, and *Monthly Value-Added Tax Declaration* for the month of October 2005, petitioner reflected the following input taxes due or paid totaling ₱103,588,530.59:

	INPUT VAT				
	1st Qtr 2005 ***(Exhibit "C")***	**2nd Qtr 2005** ***(Exhibit "D")***	**3rd Qtr 2005** ***(Exhibit "E")***	**October 2005** ***("Exhibit I-1")***	**Total**
Domestic Purchases-Capital Goods	₱ 1,330,658.64	₱ 1,758,804.92	₱ 640,550.64		
Domestic Purchases-Goods other than Capital Goods	4,370,261.17	10,829,191.24	7,911,729.59		
Domestic Purchases-Services	6,396,471.38	18,850,924.93	8,731,434.05		
Services Rendered by Non-residents	658,193.83	19,838.43	501,678.06		

Je

[52] *Fort Bonifacio Development Corporation vs. Commissioner of Internal Revenue*, G.R. Nos. 158885 and 170680, April 2, 2008.

Importations - Capital Goods	545,822.00	13,731.00	736,036.98		
Importations - Goods other than Capital Goods	5,436,733.00	2,560,587.00	19,026,634.02		
On Taxable Goods/Services				₱13,269,249.71	
	₱18,738,140.02	**₱34,033,077.52**	**₱37,548,063.34**	**₱13,269,249.71**	**₱103,588,530.59**

In support of the above input VAT, petitioner submitted suppliers' invoices/ORs, Bureau of Customs (BOC) Import Entries and Internal Revenue Declarations (IEIRDS) and BOC/bank official receipts[53] which were examined by the Court-commissioned ICPA, Mendoza Querido & Co, through its Partner, Mr. Emmanuel Y. Mendoza.

The results of the ICPA's verification of petitioner's reported input VAT of ₱103,588,530.59 are summarized as follows: [54]

Findings	**INPUT VAT**				
	1st Qtr 2005	**2nd Qtr 2005**	**3rd Qtr 2005**	**October 2005**	**Total**
1. Properly substantiated input VAT	₱18,391,904.40	₱33,820,832.60	₱37,433,265.75	₱13,248,128.55	₱102,894,131.30
2.1 Input VAT on domestic purchases of services supported by documents other than ORs	855.23	340.91	3,232.84	67.73	4,496.71
2.2 Input VAT on domestic purchases of goods supported by documents other than invoices	754.89	24,590.73	26.64	10,966.55	36,338.81
2.3 Input VAT on domestic purchases of goods supported by invoices with no BIR authority to print	145,000.31	45,634.95	10,773.38		201,408.64
2.4 Input VAT on domestic purchases of services supported by ORs with preprinted "Non VAT/NV"	33.02	649.87	2,871.36	2,742.44	6,296.69
2.5 Input VAT on domestic purchases of goods supported by invoices with preprinted "Non VAT/NV"				1,697.82	1,697.82
2.6 Input VAT on domestic purchases of services supported by ORs with preprinted "TIN" only		9,090.91			9,090.91

Jc

[53] Exhibits "S" to "V", including sub-markings, as summarized in Exhibits "O" to "R".
[54] Exhibit "J", pages 4 to 8.

2.7 Input VAT on domestic purchases of goods supported by invoices with preprinted "TIN" only			139.82		139.82
2.8 Input VAT on domestic purchases of goods supported by VAT invoices with no "TIN"		2,625.00			2,625.00
2.9 Input VAT on domestic purchases of services supported by ORs dated before the taxable year of claim	43.57				43.57
2.10 Input VAT on domestic purchases of goods supported by invoices dated before the taxable year of claim	34,562.65				34,562.65
2.11 Input VAT on domestic purchases of services supported by ORs with zero-rated "TIN"	29,265.86	445.15	26.11	246.71	29,983.83
2.12 Input VAT on domestic purchases of services where the amount in the schedule is in excess as compared to the amount in the supporting documents	8,147.28	186.40		1,229.82	9,563.50
2.13 Input VAT on domestic purchases of goods where the amount in the schedule is in excess as compared to the amount in the supporting documents			2,603.31		2,603.31
2.14 Input VAT on domestic purchases of services and goods with no available supporting documents presented	31,017.81	58,823.00	94,796.13	1,909.09	186,546.03
2.15 Input VAT on importation of goods with no available supporting documents presented	96,555.00	69,858.00	328.00	2,261.00	169,002.00
TOTAL	₱ 346,235.62	₱34,033,077.52	₱37,548,063.34	₱13,269,249.71	₱103,588,530.59

Input taxes under number 2.1 to 2.15 amounting to ₱694,399.29 shall be disallowed for failure to meet the substantiation requirements under Sections 110(A) and 113(A) of the NIRC of 1997 as implemented by Sections 4.104-1, 4.104-5 and 4.108-1 of Revenue Regulations (RR) No. 7-95.

Further, the Court found that input VAT in the amount of ₱759,664.57 should be likewise be disallowed for failure to meet the substantiation requirements under the aforementioned VAT law and regulations, *viz*: *Jr*

Exhibit	OR/Inv. No.	OR/Inv. Date	Supplier's Name	Amount
2nd quarter 2005				
Input VAT due on domestic purchases of goods without supporting invoices				
(none)[55]	912671303A	March 30, 2005	Pilipinas Shell Petroleum Corp.	₱ 4,838.58
Input VAT due on domestic purchases of goods supported by invoices without BIR Authority to Print				
"T-1443"	912732800	May 30, 2005	Pilipinas Shell Petroleum Corp.	98,741.15
"T-1444"	912732801	May 30, 2005	Pilipinas Shell Petroleum Corp.	53,860.94
"T-1445"	912671307	March 30, 2005	Pilipinas Shell Petroleum Corp.	10,298.46
"T-1447"	912641095	February 28, 2005	Pilipinas Shell Petroleum Corp.	1,163.08
"T-1448"	912641097	February 28, 2005	Pilipinas Shell Petroleum Corp.	1,163.08
"T-1449"	912641100	February 28, 2005	Pilipinas Shell Petroleum Corp.	71,201.73
"T-1450"	912698520	April 25, 2005	Pilipinas Shell Petroleum Corp.	26,481.76
"T-1451"	912662334	March 21, 2005	Pilipinas Shell Petroleum Corp.	6,931.79
"T-1452"	912671301	March 30, 2005	Pilipinas Shell Petroleum Corp.	27,952.97
"T-1453"	912671303	March 30, 2005	Pilipinas Shell Petroleum Corp.	4,413.63
"T-1454"	912671373	March 30, 2005	Pilipinas Shell Petroleum Corp.	84,669.11
"T-1455"	912671375	March 30, 2005	Pilipinas Shell Petroleum Corp.	11,205.28
"T-1456"	912671376	March 30, 2005	Pilipinas Shell Petroleum Corp.	7,356.05
6. Input VAT due on domestic purchases of goods supported by an invoice dated outside the period of claim				
"T-1274"	216177	Nov. 30, 2004	Mabuhay Vinyl Corp.	13,883.37
			Subtotal	**424,160.98**
3rd quarter 2005				
Input VAT due on domestic purchases of goods supported by invoices without BIR Authority to Print				
"U-1264"	912763728	June 28, 2005	Pilipinas Shell Petroleum Corp.	83,500.75
"U-1265"	912763731	June 28, 2005	Pilipinas Shell Petroleum Corp.	59,682.79
"U-1266"	912764315	June 29, 2005	Pilipinas Shell Petroleum Corp.	2,228.40
"U-1267"	912792960	July 27, 2005	Pilipinas Shell Petroleum Corp.	87,676.53
"U-1268"	912792968	July 27, 2005	Pilipinas Shell Petroleum Corp.	86,054.37
"U-1269"	912827156	August 31, 2005	Pilipinas Shell Petroleum Corp.	7,512.96
"U-1270"	912827159	August 31, 2005	Pilipinas Shell Petroleum Corp.	7,499.95
6. Domestic purchases of services by ORs dated outside the period of claim				
U-664	84972	June 02, 2004	Carworld Inc.	219.64
U-665	87107	Dec. 06, 2004	Carworld Inc.	1,128.20
			Subtotal	**335,503.59**
			Total	**₱ 759,664.57**

Based on the foregoing, petitioner complied with the *seventh* requisite, *i.e.*, the input VAT was due or paid, but only to the extent of ₱102,134,466.73, as computed below: *Je*

[55] No exhibit was presented for this transaction, but was included in the schedule provided by petitioner.

Input VAT per VAT returns	₱ 103,588,530.59
Less: Disallowances	
Per ICPA report	₱ 694,399.29
Per this Court's further verification	759,664.57
Total Disallowances	₱ 1,454,063.86
Valid Input VAT Due or Paid	**₱102,134,466.73**

The amount of input VAT not applied against any output tax during and in the succeeding quarters is only ₱101,902,544.06

Deducting petitioner's output tax liability for the subject period in the amount of ₱231,922.69 from these available input VAT yields an excess input VAT due or paid amounting to ₱101,902,544.04, as shown below:

Valid input VAT due or paid		₱ 102,134,466.73
Less: Output VAT Due		
1st quarter 2005 *(Exhibit "C")*	₱ 12,987.34	
2nd quarter 2005 *(Exhibit "D")*	42,325.57	
3rd quarter 2005 *(Exhibit "E")*	162,501.23	
October 2005 *(Exhibit "I-1")*	14,108.55	231,922.69
Excess valid input VAT due or paid		**₱101,902,544.04**

The said amount of ₱101,902,544.04 formed part of the ₱206,891,158.45[56] [₱103,302,627.88 for *TeaM Sual Corporation (Formerly Mirant Sual Corporation) vs. Commissioner of Internal Revenue,* docketed as CTA Case No. 7470,[57] and ₱103,588,530.59 for the instant case) input VAT deducted as *"Any VAT Refund/TCC Claimed"* in the *Quarterly VAT Return* for the fourth quarter of 2005.[58] Consequently, the claimed input VAT of ₱103,588,530.59 (including the substantiated amount of ₱101,902,544.04) no longer formed part of the excess input VAT of ₱8,376,093.24[59] as of the end of the fourth quarter of 2005. Hence, petitioner is deemed to have fulfilled the *eighth* requisite for the refund/tax credit of input VAT. *gr*

56 Exhibit "G".
57 April 5, 2011.
58 CTA Case No. 7620, April 23, 2010.
59 Exhibit "G", line 29.

The determined excess input taxes due or paid must still be allocated to the valid zero-rated or effectively zero-rated sales/ receipts of petitioner to ascertain the refundable amount.

To reiterate, the *ninth* requisite is to the effect that the input taxes claimed are attributable to zero-rated or effectively zero-rated sales. However, where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales, and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume.

Records show that for the subject period of claim, petitioner's reported total sales/receipts consisted of both zero-rated sales/receipts and VATables sales/receipts, to wit:

	VATable Sales/Receipts	**Zero-Rated Sales/Receipts**	**Total Sales/Receipts**
1st quarter 2005 *(Exhibit "C")*	₱ 129,873.36	₱ 3,775,412,124.01	₱ 3,775,541,997.37
2nd quarter 2005 *(Exhibit "D")*	423,255.68	3,600,420,391.50	3,600,843,647.18
3rd quarter 2005 *(Exhibit "E")*	1,625,012.27	3,700,406,077.70	3,702,031,089.97
October 2005 *(Exhibit "HH")*	141,085.46	1,199,803,134.88	1,199,944,220.34
Total	**₱2,319,226.77**	**₱12,276,041,728.09**	**₱12,278,360,954.86**

However, considering that petitioner's input VAT cannot be directly identified or attributed with specific sales, We shall allocate the excess valid input VAT of ₱101,902,544.04 proportionately on the basis of the volume of its sales, as follows:

Valid zero-rated sales/receipts per this Court's verification	₱11,789,638,188.67
Divided by total declared sales/receipts	÷ ₱12,278,360,954.86
Multiplied by valid excess input VAT due or paid	× ₱ 101,902,544.04
Excess valid input VAT due or paid allocated to zero-rated sales/receipts	**₱ 97,846,457.61**

Such being the case, petitioner has refundable excess input VAT in the amount of ₱97,846,457.61.

WHEREFORE, in light of the foregoing discussions, the instant *Petition for Review* is **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED** to refund or issue a tax credit certificate in favor of petitioner in the amount of **₱97,846,457.61**, representing the latter's unutilized excess input VAT attributable to its zero-rated sales/receipts for the 1st, 2nd and 3rd quarters, and the month of October, of taxable year 2005.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

I CONCUR:

ERLINDA P. UY
Associate Justice

ATTESTATION

I attest 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice