REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ORMAT, INCORPORATED – PHILIPPINE BRANCH,
Petitioner,

- versus -

C.T.A. CASE NO. 5566

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

MAR 14 2001

x - x

DECISION

This Petition for Review is seeking for the refund of the amount of P32,349,128.58[1], representing unutilized input value-added tax (VAT, for brevity) attributable to Petitioner's zero-rated sales of construction services for the period December 1, 1995 to December 31, 1996.

Petitioner is the Philippine branch of Ormat, Incorporated, a corporation duly organized and existing under and by virtue of the laws of Delaware, U.S.A.. Its principal office is located at 8th Floor, Solidbank Building, 777 Paseo de Roxas Street, Makati City. It is registered with the Bureau of Internal Revenue as a VAT entity bearing a BIR Certificate of Registration RDO Control No. 94-500-001018, dated June 29, 1994 (Exhs. A and A-1).

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[1]Originally in the amount of P45,708,171.70 as prayed for in the Petition for Review.

On April 1, 1994, Petitioner entered into a Construction Contract with CE Cebu Geothermal Power Company, Inc., (CE, for brevity) for the development and construction of the latter's 118.5 megawatt net geothermal power plant located in Upper Mahiao, Leyte, whereby Petitioner will provide the engineering, procurement, and construction services with respect to the construction of the CE's geothermal power plant (Exhs. B and B-1; TSN, April 2, 1998, p. 16). It was also agreed upon that the payment for Petitioner's services shall be in US dollars (Exhs. B-2, B-3, and B-4).

In July 1994, Petitioner subcontracted the services of Upper Mahiao 128 Geothermal J.V. (Upper Mahiao, for brevity) for the Philippine procurement and construction services with respect to CE's geothermal power plant (Exhs. C, C-1, C-2, C-5, and C-6). It was agreed upon, among other things, that during the performance of the work for the Petitioner, Upper Mahiao will maintain its status as a VAT registered person (Exh. C). It was further stipulated that the services of Upper Mahiao are to be paid in US dollars (Exhs. C-3, and C-4).

On January 18, 1995, the Bureau of Internal Revenue issued BIR Ruling No. 002-95 confirming Petitioner's opinion that its sales of services to CE which are paid for in US dollars were subject to VAT at 0% (Exhs. JJ and JJ-1).

For the period December 1, 1995 to December 31, 1996, Petitioner filed its Quarterly Value-Added Tax Returns declaring among others, its zero-rated sales of services to CE and the input VAT from various sources but excluding the input taxes generated from Upper Mahiao (Exhs. EE to II, inclusive of submarkings). The exclusions were due to Petitioner's belief that it is entitled to the refund of input taxes it paid to Upper Mahiao which are attributable to its zero-rated sales of services to CE.

As a consequence, Petitioner filed with the Bureau of Internal Revenue four separate Applications for Tax Credit/Refund of Value-Added Tax Paid for the period December 1, 1995 to December 31, 1996, to wit:

Period Covered	Exh.	Date Filed	Amout
12-29-95 to 02-20-96	KK to KK-3	04-29-96	P14,361,830.52
02-28-96 to 07-11-96	LL to LL-3	08-27-96	16,150,266.58
09-30-96 to 10-30-96	MM to MM-3	01-29-97	19,913,166.11
08-01-96 to 12-31-96	NN to NN-3	03-12-97	2,209,795.82
T O T A L			P52,635,059.03

On December 8, 1997, after the lapse of more than sixty (60) days for the Respondent to act on the aforesaid applications[2], Petitioner was compelled to file the instant Petition for Review in order to toll the running of the two-year prescriptive period under the law.

Respondent, on his part, advanced as Special and Affirmative Defenses that: (T)he petition states no cause of action as it does not allege the date/s when the taxes sought to be refunded were actually paid; Petitioner's claim for refund is under administrative investigation; Petitioner did not bother to show compliance with the provisions of Section 16(c)(3) of Revenue Regulations No. 5-87, as amended by Revenue Regulations No. 3-88; the input taxes allegedly paid on local purchases are not supported by invoices pursuant to Section 108 of the Tax Code; claims for refund are construed

[2]The period within which refund of input taxes may be made by the Commissioner pursuant to Section 106(e) of the Tax Code.

strictly against the claimant, the same being in the nature of exemption from taxes; and anyone who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute which is not so in this case.

To bolster its claim for refund, Petitioner presented various documentary exhibits which were all admitted by the Court in two (2) Resolutions dated September 3, 1999 and May 31, 2000, respectively (CTA records, pp. 142 and 270 to 271).

This case was submitted for decision on November 17, 2000, sans the evidence and memorandum of the Respondent.

The sole issue to be resolved in this case is whether or not Petitioner is entitled to the refund of the amount of P32,349,128.58, representing input VAT on purchases of taxable services attributable to its zero-rated sales of services pursuant to Section 106(a) of the Tax Code, as amended.

For easy reference, Section 106(a) of the Tax Code is hereby quoted as follows:

> **SEC. 106.** ***Refunds or tax credits of creditable input tax.*** — (a) 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 Section100(a)2(A)(i), (ii) and (b) Section 102(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.

Based on the above proviso, Petitioner should prove that (1) it is a VAT registered person; (2) its sales are zero-rated; (3) the administrative claim for refund is seasonably filed; (4) the input taxes claimed were attributable to zero-rated sales and were not applied against output tax liability; and (5) foreign currency exchange proceeds had been duly accounted for in accordance with the regulations of Bangko Sentral ng Pilipinas.

A circumspect study of the records of the case together with the pleadings and evidence at hand, reveals that Petitioner complied with all of the above requisites.

It was established that Petitioner is a VAT registered person as evidenced by the Certificate of Registration RDO Control No. 97-560-0000158 issued by RDO No. 56 of the Bureau of Internal Revenue (Exhs. A, A-1 , and A-2). Petitioner's sales of services derived from the Construction Contract with CE were subject to VAT at zero percent pursuant to Section 102(b)(2) of the Tax Code, as amended, and were supported by sales invoices issued by Petitioner to CE (Exhs. PP to III, inclusive of submarkings). The zero-rating of Petitioner's sales of services was even confirmed by the Assistant Commissioner for Legal Service, Ms. Alicia P. Clemeno (Exhs.JJ and JJ-1). It is also clear that the four administrative claims for refund, which were filed on different dates (as narrated earlier) were all seasonably filed within two years from the close of each VAT taxable quarters for the years 1995 and 1996 (Exhs. E and F). The input taxes derived from Upper Mahiao were undeniably attributable to Petitioner's sales of services to CE and were not applied against any output tax liability. It is to be stressed, at this point, that the input taxes sought to be refunded were not among the input taxes listed in the quarterly VAT returns for the period December 1, 1995 to December 31, 1996, that were offset against output tax liability (Exhs. EE to II, inclusive of sub-markings). Lastly, Petitioner was able to prove that foreign currency exchange proceeds in US dollars, representing payments for services rendered to CE, were credited in Petitioner's foreign currency account under FCDUSSA #60072-535 as certified by Bank of America (Exhs. NNN to PPP, inclusive of sub-markings).

However, as manifested by Petitioner, the portion which was applied against the output tax liabilities of Petitioner for the first and fourth quarters of 1998 in the sum of P2,200,000.00 should be deducted from the total input taxes claimed (Exhs. ZZZ and AAAA, inclusive of sub-markings). Below is a table showing the correct computation of allowable refund to Petitioner:

Date	OR No.	Exh.	Dollar Amount	Dollar Rate[3]	Peso Equivalent
12-29-95	001	E,E-1,E-2	$ 280,764.90	26.2060	P 7,357,724.97
02-10-96	052	F,F-1,F-2	63,239.40	26.1588	1,654,266.82
02-10-96	053	G,G-1,G-2	96,318.00	26.1588	2,519,563.30
02-10-96	055	H,H-1,H-2	5,212.70	26.1588	136,357.98
02-10-96	054	I, I-1, I-2	12,890.52	26.1588	337,200.53
02-20-96	056	J, J-1, J-2	90,092.70	26.1588	2,356,716.92
02-28-96	059	K,K-1,K-2	9,405.00	26.1588	246,023.51
02-28-96	060	L,L-1,L-2	8,280.32	26.1588	216,603.23
02-28-96	061	M.M-1,M-2	53,347.50	26.1588	1,395,506.58
03-13-96	062	N,N-1,N-2	2,761.50	26.1957	72,339.42
03-22-96	063	O,O-1,O-2	97,122.60	26.1957	2,544,194.49
03-22-96	064	P,P-1,P-2	6,520.68	26.1957	170,813.78
04-02-96	065	Q,Q-1,Q-2	2,035.07	26.1897	53,297.87
04-13-96	066	R,R-1,R-2	15,244.56	26.1897	399,250.45
05-10-96	067	S,S-1,S-2	82,793.70	26.1759	2,167,199.61
05-30-96	068	T,T,-1,T-2	13,908.44	26.1759	364,065.93
06-14-96	069	U,U-1,U-2	184,761.90	26.1944	4,839,727.11
07-02-96	070	V,V-1,V-2	84,259.36	26.1995	2,207,553.10
07-02-96	071	W,W-1,W-2	53,199.30	26.1995	1,393,795.06

[3]Monthly average exchange rate of the Philippine peso per unit of US dollar as furnished by the Public Information, Relations and Special Events Office, Bangko Sentral ng Pilipinas (Exhs. QQQ to QQQ-2).

07-11-96	072	X,X-1,X-2	3,080.51	26.1995	80,707.82
08-26-96	080	Y,Y-1,Y-2	73,057.04	26.1994	1,914,050.61
09-30-96	074	Z,Z-1,Z-2	36,813.70	26.2356	965,829.51
09-30-96	076	AA,AA-1,AA-2	26,151.30	26.2356	686,095.05
10-30-96	077	BB,BB-1,BB-2	538.13	26.2693	14,136.30
10-30-96	078	CC,CC-1,CC-2	6,125.00	26.2693	160,899.46
12-27-96	079	DD,DD-1,DD-2	11,025.00	26.2925	289,874.81
Total			$1,318,948.83		P34,543,794.22
Less: Input taxes applied against output taxes (Exhs. ZZZ to ZZZ-2 and AAAA to AAAA-2)					2,200,000.00
Amount sought to be refunded					P32,343,794.22

WHEREFORE, in view of the foregoing, the Petition for Review is hereby partially **GRANTED**. Respondent is **ORDERED** to **REFUND** the amount of P32,343,794.22 in favor of Petitioner, representing unapplied input taxes for the period December 1, 1995 to December 31, 1996.

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