REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6909

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

JUN 04 2008 9:40 am

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DECISION

BAUTISTA, *J.*:

The Petition for Review seeks the issuance of a tax credit certificate in the amount of P7,427,965.37, allegedly representing unutilized excess input VAT incurred by petitioner in connection with its zero-rated sales of electricity as a power generation company for taxable year 2002.

Mindanao II Geothermal Partnership (petitioner) is a partnership duly registered with the Securities and Exchange Commission, with principal address at Barangay Ilomavis, Kidapawan City, North Cotabato.[1] It is a value-added tax (VAT)-registered taxpayer[2], engaged in the production and sale of electricity as a generation company and sells electricity solely to the National Power Corporation, for and in behalf of the Philippine

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[1] Annex "J", Petition for Review
[2] Exhibit "A"

National Oil Corporation-Energy Development Corporation (PNOC-EDC) under a Build-Operate-Transfer (BOT) contract.[3]

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of the office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law. He holds office at the 4th Floor, BIR National Building, Agham Road, Diliman, Quezon City[4].

Petitioner filed with the BIR its Quarterly VAT Returns[5] for the four quarters of taxable year 2002, declaring zero-rated sales in the amount of P769,384,702.23 and input VAT of P7,427,965.37 on domestic purchases of goods and services of P74,279,653.78, detailed as follows:

Exhibit	Taxable Quarter	Zero-rated Sales	Purchases	Input VAT
D	1st Quarter	P 213,813,056.47	P 17,516,718.65	P 1,751,671.86
E	2nd Quarter	210,379,134.36	14,294,058.68	1,429,405.85
F	3rd Quarter	176,468,276.36	24,719,490.96	2,471,949.09
G	4th Quarter	168,724,235.04	17,749,385.49	1,774,938.57
	Total	**P 769,384,702.23**	**P 74,279,653.78**	**P 7,427,965.37**

On May 30, 2003, petitioner filed with the BIR Revenue District Office No. 108 a claim for the issuance of a tax credit certificate corresponding to its unutilized input taxes for the four quarters of taxable year 2002 in the amount of P7,427,965.37.[6]

Due to respondent's inaction on its claim, petitioner filed a Petition for Review with this Court on March 31, 2004. Respondent, on the other hand, filed his Answer on June 11, 2004.[7]

However, on July 30, 2004, petitioner filed a Motion for Leave of Court to Amend its Petition for Review in order to correct the amount prayed, which is from P3,891,414.38 to

[3] Exhibit "B"
[4] Par.1, Joint Stipulation of Facts and Issues, Docket, p. 116
[5] Pars. 3, 4, 5, and 6, Joint Stipulation of Facts and Issues, Docket, p. 116
[6] Exhibit "I"
[7] Docket, pp. 38-42

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P7,427,965.37, representing excess and/or unutilized input VAT for the period covering January 1, 2002 to December 31, 2002.[8] The Court granted the said Motion in open court on September 10, 2004[9], followed by a confirming Resolution dated September 22, 2004.[10]

Respondent, on October 22, 2004, filed his Amended Answer[11] and made the following Special and Affirmative Defenses:

> "3. He reiterates and pleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
>
> 4. Petitioner's claim for refund is subject to administrative investigation/examination by the respondent;
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> 5. To support its claim, it is imperative for petitioner to prove the following, viz:
>
> > a. The registration requirements of a value-added taxpayer in compliance with Section 6 (a) and (b) of the Revenue Regulations No. 6-97 in relation to Section 4. 107-1 (a) of Revenue Regulations No. 7-95 and Section 236 of the Tax Code, as amended;
> >
> > b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT in compliance with the provisions of Section 113 and 114 of the Tax Code, as amended;
> >
> > c. Proof of compliance with the prescribed checklist requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, **otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim** in accordance with the provision of Section 229 of the Tax Code, as amended. It is worthy of emphasis that Section 112 (D) of the Tax Code, as amended, requires the **submission of complete documents in support of the application filed** with the Bureau of Internal Revenue before the 120-day audit period shall apply, and **before the taxpayer could avail of judicial remedies as provided for in the law**. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review;

[8] Docket, p. 48
[9] Docket, p. 75
[10] Docket, p. 76
[11] Docket, pp. 83-86

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d. That the input taxes of P7,427,965.37 allegedly paid by the petitioner on its purchase of goods and services for the period covering January 1 to December 31, 2002 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 112 (A) and (D) and 229 of the Tax Code, as amended;

f. That petitioner's domestic purchases of goods and services were made in the course of its trade and business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase journal, showing that it actually paid VAT in accordance with Sections 110 (A) (2) and 113 of the Tax Code, as amended, and in pursuance to Section 4. 104-5 (a) and (b) of Revenue Regulations No. 7-95 (Re: Substantiation of Claims for Input Tax Credit);

g. The requirements as enumerated under Section 4. 104-2 of Revenue Regulations 7-95. (Re: Persons who can avail of the Input Tax Credits);

6. Furthermore, in action for refund the burden of proof is on the taxpayer to establish its right to refund. 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 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);

7. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

The parties submitted their Joint Stipulation of Facts and Issues[12], on March 7, 2005, which was approved by this Court via Resolution dated March 11, 2005.[13]

During trial, petitioner presented its evidence, while respondent submitted the case for decision without presenting any evidence;[14] thus, this Court in a Resolution dated July 3,

[12] Docket, pp. 116 to 118
[13] Docket, p. 119
[14] Minutes of June 22, 2007 Hearing, Docket, p. 297

2007 ordered the parties to submit their respective Memorandum.[15] On September 5, 2007, the case was submitted for decision after both parties failed to submit their Memoranda within the time given.

On November 13, 2007, respondent issued to petitioner Tax Credit Certificate No. 200600003060[16] in the amount of P6,251,065.74, which belatedly and partially granted petitioner's administrative claim for issuance of tax credit certificate in the amount of P7,427,965.37 arising from its excess creditable input taxes for taxable year 2002, subject matter of this present case.

Due to the partial grant of petitioner's claim, petitioner filed a Motion for Leave of Court to File Attached Supplemental Petition for Review on December 17, 2007. The said Motion was granted in the Resolution dated February 13, 2008, where the Supplemental Petition for Review was admitted and respondent was ordered to submit his Supplemental Answer. The Resolution dated September 5, 2007 submitting the instant case for decision was likewise set aside.

The issues[17] as stipulated by the parties are as follows:

"1. Whether or not petitioner's sale of generated power qualifies as zero-rated sales under the Tax Reform Act of 1997, as amended, and the Electric Power Industry Reform Act of 2001 (R.A. No. 9136);

2. Whether or not the amount P7,427,965.37 represents the aggregate input tax paid by petitioner on its domestic purchases of goods and services for taxable Year 2002 only;

3. Whether or not the aggregate input tax paid by petitioner on its domestic purchases of goods and services for taxable Year 2002 in the amount of P7,427,965.37 remained unutilized and/or unapplied;

4. Whether or not petitioner's unutilized and/or unapplied input tax for taxable Year 2002 in the amount of P7,427,965.37 was carried over to the succeeding years;

[15] Docket, p. 299
[16] Annexes "A" and "B", Motion for Leave of Court to File Attached Supplemental Petition for Review
[17] Issues, Joint Stipulation of Facts and Issues, Docket, p. 117

5. Whether or not the unutilized and/or unapplied input tax arising from petitioner's domestic purchases of goods and services for taxable Year 2002 are duly supported by pertinent documents, such as VAT invoices and official receipts;

6. Whether or not petitioner is entitled to the claim for refund or tax credit in the amount of P7,427,965.37 representing unutilized and/or unapplied input VAT of petitioner for taxable Year 2002."

The issues can be trimmed down into two, namely:

1. Whether or not petitioner's sale of generated power qualifies as zero-rated sales under the NIRC of 1997, as amended, and the Electric Power Industry Reform Act of 2001; and

2. Whether or not petitioner is entitled to the claim for refund or tax credit in the amount of P7,427,965.37, representing unutilized and/or unapplied input VAT of petitioner for taxable year 2002.

At this juncture, the Court wishes to point out that while the Bureau of Internal Revenue already found petitioner partially entitled to its claim for issuance of tax credit certificate for its excess creditable input taxes for taxable year 2002 by issuing Tax Credit Certificate No. 200600003060[18] in the amount of P6,251,065.74, such finding is not binding upon this Court. And the Court will decide the present case based on the evidence presented and applicable laws and jurisprudence.

Petitioner anchors its claim on Sections 110(B) and 112(A) of the National Internal Revenue Code (NIRC) of 1997, which provide as follows:

"**SECTION 110. Tax Credits. —**

(A) Creditable Input Tax. —

1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax:

xxx xxx xxx

(B) Excess Output or Input Tax. — If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the

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[18] Annexes "A" and "B", Motion for Leave of Court to File Attached Supplemental Petition for Review

excess shall be carried over to the succeeding quarter or quarters. Any input tax attributable to the purchase of capital goods or to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112."

"**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 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."

Based on the foregoing, in order to be entitled to refund or issuance of tax credit certificate of input VAT payments directly attributable to zero-rated or effectively zero-rated sales, the following requisites must be satisfied:

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

As correctly argued by petitioner, its sales of electricity as a power generation company qualify for VAT zero-rating in accordance with Section 6 of Republic Act No. 9136, also known as the "Electric Power Industry Reform Act of 2001", which states:

"**SECTION. 6.** *Generation Sector* — Generation of electric power, a business affected with public interest shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.

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." (*Emphasis supplied*)

In the case of **Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue**[19], this Court, applying the provisions of R.A. No. 9136, specified the conditions to qualify for VAT zero-rating of power generating companies, to wit:

> "...it is undisputed that Republic Act No. 9136 otherwise known as the 'Electric Power Industry Reform Act of 2001' provided for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001. Thus, the pertinent provisions of the National Internal Revenue Code of 1997 are deemed amended by the provisions of RA No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.
>
> To qualify for VAT zero-rating under R.A. No. 9136, petitioner must prove that: 1) it is a generation company and 2) it derived sales from power generation."

Here, petitioner entered into a Build-Operate-Transfer contract with the PNOC-EDC for the finance, construction, design, testing, operation, maintenance and repair of a 48.25-megawatt geothermal power plant, provided that PNOC-EDC supplies and delivers steam to petitioner at no cost. In turn, petitioner converts the steam into electric capacity and energy

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[19] CTA Case No. 6788, October 13, 2005

and delivers it to the National Power Corporation for and in behalf of PNOC-EDC.[20] Further, its 48.25-megawatt geothermal power plant project has been accredited by the Department of Energy as a Block Power Production Facility under the Implementing Rules and Regulations of Executive Order No. 215, as amended.[21] And petitioner actually generated sales from power generation services rendered to PNOC-EDC in the amount of P769,384,702.23 for the four quarters of taxable year 2002, which was properly declared in its Quarterly VAT Returns[22] for the same period and duly covered by VAT official receipts and invoices.[23]

As to the requisite that input taxes must be incurred or paid, petitioner submitted invoices and official receipts to support its purchases of goods and services for taxable year 2002 in the total amount of P74,279,653.78 with the corresponding input VAT of P7,427,965.37. Upon verification of the said documents, the Court Commissioned Independent CPA noted the following exceptions:[24]

Invoice date	Supplier	Invoice amount	Input VAT	Remarks
7/20/2002	Copylandia Office Systems	P 5,145.00	P 514.50	Invoice in the name "Mindanao Geothermal"
7/23/2001	Philam Insurance Company	490.00	49.00	Dated other than 2002
8/31/2001	Philam Insurance Company	690.00	69.00	Dated other than 2002
12/18/2001	Philam Insurance Company	490.00	49.00	Dated other than 2002
	TOTAL	**P 6,815.00**	**P 681.50**	

A further evaluation of the documents revealed that the foregoing were all purchases of services. Therefore, the basis for the determination of the input VAT should be the official receipt as provided in Section 108(C) of the NIRC of 1997:

[20] Exhibit "M"
[21] Exhibit "B"
[22] Exhibits "D", "E", "F", and "G"
[23] Exhibits "P" to "P-13-b"
[24] Annex "B", Exhibit "N"

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> "**SECTION 108. Value-added Tax on Sale of Services and Use or Lease of Properties.**—
>
> xxx xxx xxx
>
> **(C) Determination of the Tax.**—The tax shall be computed by multiplying the total amount indicated in the **official receipt** by one-eleventh (1/11)." (*Emphasis supplied*)

The Court found that the following input taxes in the amount of P563.50 represents petitioner's valid claim because the corresponding official receipts are in order:

Exhibit	OR Date	Supplier	Amount	Input VAT
O-36	7/27/2002	Copylandia Office Systems	P 5,145.00	P 514.50
O-78	5/22/2002	Philam Insurance Company	490.00	49.00
		TOTAL	**P 5,635.00**	**P 563.50**

Hence, of the total input VAT of P681.50 excepted by the commissioned Independent CPA, only the amount of P118.00 shall be denied.

Nevertheless, additional input taxes in the amount of P487,468.26 shall be disallowed for the following reasons:

Exh.	OR Date	Supplier	Amount	Input VAT
OR in the name "Mindanao Phils. Inc."				
O-27	6/7/2002	Maunsell Philippines, Inc.	P 3,750.00	P 375.00
No Official Receipt				
O-43	2/6/2002	Philam Insurance Company	490.00	49.00
O-50	-	Philam Insurance Company	490.00	49.00
OR date not within the period of claim				
O-65	1/5/2003	Cebu Power Exponents Services	115,754.10	11,575.41
O-75-a	1/14/2003	Marubeni Energy Services Corp.	4,700,426.30	470,042.63
O-77-b	1/30/2003	Mindanao 1 Geothermal Partnership	53,772.16	5,377.22
	TOTAL		**P 4,874,682.56**	**P 487,468.26**

The Court notes that part of the claimed input VAT of P7,427,965.37 pertains to the premium payments made by petitioner on its fire insurance policies with the Government Service Insurance System (GSIS). In a letter dated July 2, 2002[25], the GSIS billed petitioner for a total of US$49,475.28 inclusive of 10% VAT of US$20,193.99 on the total premium. On August 21, 2002, petitioner informed GSIS that it had deposited its payment,[26] and GSIS

[25] Exhibit "O-37-d"
[26] Exhibit "O-37-e"

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acknowledged receipt of the same on August 23, 2002.[27] GSIS did not issue a receipt because it was the agency's policy not to issue official receipts for payments made through bank deposits.[28] However, GSIS issued BIR Form No. 2307 Certificate of Creditable Tax Withheld at Source to petitioner for the amount of VAT paid.[29] A copy of the remittance of VAT and other percentage taxes withheld and supporting schedule and bank deposit slips[30] were submitted. The amount of VAT remitted by GSIS is P1,028,984.76, but petitioner claims only P1,018,302.14. The discrepancy is due to the difference in foreign currency exchange rates used at the time when petitioner recognized the input VAT in its books and when GSIS remitted the VAT collected.

Thus, petitioner has sufficiently substantiated this transaction with the GSIS and that the VAT paid by petitioner was duly remitted. The input VAT of P1,018,302.14 represents petitioner's valid claim.

However, petitioner's claim should be reduced by P487,586.26, broken down as follows:

Exh.	OR Date	Supplier	Amount	Input VAT
Invoice dated other than 2002				
Annex B, Exh. N	7/23/2001	Philam Insurance Company, Inc.	P 490.00	P 49.00
Annex B, Exh. N	8/31/2001	Philam Insurance Company, Inc.	690.00	69.00
Subtotal-Per CPA Report			*P 1,180.00*	*P 118.00*
OR in the name "Mindanao Phils. Inc."				
O-27	6/7/2002	Maunsell Philippines, Inc.	P 3,750.00	P 375.00
No Official Receipt				
O-43	2/6/2002	Philam Insurance Company	490.00	49.00
O-50	-	Philam Insurance Company	490.00	49.00
OR date not within the period of claim				
O-65	1/5/2003	Cebu Power Exponents Services	115,754.10	11,575.41
O-75-a	1/14/2003	Marubeni Energy Services Corp.	4,700,426.30	470,042.63
O-77-b	1/30/2003	Mindanao 1 Geothermal Partnership	53,772.16	5,377.22
Subtotal-Per Court's Verification			*P 4,874,682.56*	*P 487,468.26*
	TOTAL		**P 4,875,862.56**	**P 487,586.26**

[27] Exhibit "O-37-f"
[28] TSN dated February 14, 2006, pp. 8-9
[29] Exhibit "O-37"
[30] Exhibits "O-37-a", "O-37-b", "O-37-c", and "O-37-c-1"

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Anent the third and fourth requisites, the Court finds that petitioner's input taxes are directly attributable to its zero-rated sales. They were not applied against any output VAT liability since all of petitioner's sales were zero-rated and there was no output VAT thereon. The said unutilized input VAT was not carried over to the succeeding taxable quarters, as evidenced by petitioner's Quarterly VAT Return[31] for the First Quarter of taxable year 2003.

Petitioner also complied with the fifth requirement. It filed its administrative claim for refund with the Bureau of Internal Revenue on May 30, 2003 and the Petition for Review on March 31, 2004. Both dates of filing are well within the two-year period from the respective dates when petitioner filed its First, Second, Third, and Fourth Quarterly VAT Returns on April 24, 2002, July 25, 2002, October 22, 2002, and January 25, 2003, respectively.[32]

With the foregoing disquisitions, petitioner has sufficiently proven its entitlement to the issuance of a tax credit certificate representing unutilized input VAT attributable to zero-rated sales for taxable year 2002 in the reduced amount of P6,940,379.11, computed as follows:

Amount of Input VAT Claim	P 7,427,965.37
Less: Disallowances	487,586.26
Validly supported Input VAT	P 6,940,379.11

However, inasmuch as petitioner already received a Tax Credit Certificate of the amount of P6,251,065.74, representing petitioner's excess creditable input taxes for taxable year 2002, which is the same subject matter of this present case; the amount of P6,251,065.74 will be deducted from the above-stated amount of P6,940,379.11. Hence, petitioner will only be entitled to the amount of P689,313.37.

[31] Exhibit "H"
[32] Exhibits "D", "E", "F", and "G"

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WHEREFORE, the Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, respondent is hereby **ORDERED** to **ISSUE** a **TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of P689,313.37, representing unutilized input VAT incurred by petitioner in connection with its zero-rated sales for taxable year 2002.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
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

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