

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

SPECIAL FIRST DIVISION

**AVON RIVER POWER HOLDINGS
CORPORATION (Formerly Avon
River Holdings Corporation),**
Petitioner,

C.T.A. CASE NO. 7467

- versus -

Members:

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

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

Promulgated:

MAR 02 2010, 9:05 A.M.

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DECISION

BAUTISTA, J.:

The Petition for Review seeks the refund or issuance of tax credit certificate in the amount of P57,790,589.73, representing petitioner's alleged unutilized input value-added tax (VAT) paid on domestic purchases of goods and services, and importation of capital goods attributable to zero-rated sales of power generation services under Republic Act No. 9136 for the four quarters of taxable year 2004.

Avon River Power Holdings Corporation (Petitioner) is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at 7th Floor, CTC Building, 2232 Roxas Boulevard, Pasay City, Metro Manila. It was originally registered with the Securities and Exchange Commission under the name "Avon River Holdings Corporation", which was subsequently changed to its present

name "Avon River Power Holdings Corporation" on February 19, 2004.¹ It is principally engaged in the business of acquiring, holding, owning, and operating power generation assets for lighting and power purposes and whole selling the electric power to the National Power Corporation (NPC), private electric utilities and electric cooperatives, and for the carrying on of all businesses incident thereto.² Petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer in accordance with Section 236 of the National Internal Revenue Code (NIRC) of 1997, as amended, with Tax Identification Number 223-606-641-000, as evidenced by its BIR Certificate of Registration bearing OCN 9RC0000123988.³

Respondent is the Commissioner of the Bureau of Internal Revenue who is duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

For the four quarters of taxable year 2004, petitioner filed with the BIR its Quarterly VAT Returns, including the amendments thereto on the following dates:

Period Covered (2004)	Original Return Filed On	Exhibit	Amended Return Filed On	Exhibit
1st Quarter	April 26, 2004	E	July 26, 2004	F
			January 28, 2005	G
			January 23, 2006	H
2nd Quarter	July 26, 2004	I	January 28, 2005	J
			January 23, 2006	K
3rd Quarter	October 25, 2004	L	January 28, 2005	M
			January 23, 2006	N
4th Quarter	January 25, 2005	O	April 25, 2005	P
			January 31, 2006	Q

¹ Exhibit "A"
² Exhibit "A-1"
³ Exhibit "B"

The said Quarterly VAT Returns of petitioner likewise reflected the following:⁴

Quarters	Input VAT		Total Input VAT
1 st Quarter	Domestic Purchases – Capital Goods	P 4,372,001.59	P 4,372,001.59
2 nd Quarter	Domestic Purchases – Capital Goods	13,651,732.74	P 14,437,827.38
	Domestic Purchases – Goods Other than Capital Goods	499,143.10	
	Domestic Purchases – Services	286,951.54	
3 rd Quarter	Domestic Purchases – Capital Goods	18,095,527.54	P 19,423,355.67
	Domestic Purchases – Goods Other than Capital Goods	285,577.88	
	Domestic Purchases – Services	166,115.25	
	Importations – Capital Goods	876,135.00	
4 th Quarter	Domestic Purchases – Capital Goods	18,429,265.31	P 19,557,405.09
	Domestic Purchases – Goods Other than Capital Goods	120,713.68	
	Domestic Purchases – Services	114,725.10	
	Importations – Capital Goods	P 892,701.00	
Total			P57,790,589.73

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed an administrative claim for refund or issuance of tax credit certificate of unutilized input VAT with Revenue District Office No. 51-Pasay City on December 29, 2005 in the total amount of P57,790,589.73 for taxable year 2004.⁵

Due to respondent's inaction and in order to suspend the running of the two-year prescriptive period within which to file a judicial claim for refund/issuance of tax credit certificate, petitioner filed with this Court a Petition for Review on April 24, 2006.

Respondent interposed the following counter-arguments in his Answer⁶ to the Petition for Review:

"4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;

⁴ Par. 10, Joint Stipulation of Facts and Issues, docket, pp. 188-189

⁵ Exhibit "C"

⁶ Docket, pp. 136-139



5. The amount of P57,790,589.73 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of capital goods and services consisting of power generation assets and domestic purchases and importation of goods and services attributable to zero-rated sales for the four quarters of 2004 is not properly documented;

6. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

7. Petitioner must show that it has complied with the provisions of Sections 112 and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit.

8. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)** and as such, they are looked upon with disfavor **(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211).**"

Pre-Trial was held on September 15, 2006.⁷ In a Resolution⁸ dated October 25, 2006, the Court approved the parties' Joint Stipulation of Facts and Issues⁹ filed on October 20, 2006; hence, Pre-Trial was terminated and the parties were ordered to proceed with the trial.

On March 12, 2007, petitioner filed a Motion for Commissioning of Independent Certified Public Accountant¹⁰, which prayed for the commissioning of Mr. Emmanuel Y. Mendoza as the Independent Certified Public Accountant (CPA). Pursuant to Rules 12 and 13 of the Revised Rules of the Court of Tax Appeals, the Court granted the same on March 15, 2007.¹¹



⁷ Docket, p. 174

⁸ Docket, p. 193

⁹ Docket, pp. 186-191

¹⁰ Docket, pp. 313-316

¹¹ Docket, p. 319

The Independent CPA submitted his Report¹² on April 16, 2007; the Updated Independent CPA Report¹³ on August 13, 2007; and the Final Independent CPA Report¹⁴ on June 12, 2008.

Petitioner presented Ms. Reymonda Aida B. Obrero, the Senior Accounting Manager of Global Business Power Corporation and Mr. Emmanuel Y. Mendoza, the Court-commissioned Independent CPA as witnesses. On August 5, 2008, petitioner rested its case and moved for a period of thirty (30) days to file its Formal Offer of Evidence.¹⁵

On October 2, 2008, petitioner filed its Formal Offer of Evidence¹⁶, offering Exhibits "A" to "AAA", inclusive of submarkings; while respondent filed his Comment (Re: Petitioner's Formal Offer of Evidence)¹⁷ on October 14, 2008. The Court resolved the same in Resolution¹⁸ dated October 31, 2008, and the subsequent Motion for Partial Reconsideration¹⁹ posted on November 26, 2008 in Resolution²⁰ dated December 24, 2008.

On February 24, 2009, respondent's counsel manifested that he will no longer present evidence and will be submitting the case for decision. The parties were granted a period of thirty (30) days therefrom within which to file their respective Memorandum.²¹



¹² Exhibit "T"

¹³ Exhibit "PP"

¹⁴ Exhibit "QQ"

¹⁵ Docket, p. 465

¹⁶ Docket, pp. 477-512

¹⁷ Docket, pp. 644-646

¹⁸ Docket, pp. 648-649

¹⁹ Docket, pp. 728-733

²⁰ Docket, p. 805

²¹ Docket, p. 809

In a Resolution²² dated April 17, 2009, the case was submitted for decision, taking into consideration the Memorandum²³ filed by respondent on March 26, 2009 and the Memorandum²⁴ filed by petitioner on April 15, 2009.

Hence, this decision.

The following are the parties' jointly stipulated issues²⁵, submitted for this Court's resolution:

"I. Whether or not Petitioner generated zero-rated sales for the period beginning the 1st quarter to the 4th quarter of 2004 pursuant to Petitioner's zero-rated sales of power generation services under the EPIRA.

II. Whether or not the Petitioner has excess/unutilized input VAT in the amount of PhP57,790,589.73 for the period covering the 1st quarter to the 4th quarter of 2004 (i.e. January 1 to December 31, 2004).

III. Whether or not Petitioner's excess/unutilized input VAT from its domestic purchases and importation of goods are directly attributable to its zero-rated sales.

IV. Whether or not Petitioner's excess/unutilized input VAT were not applied/utilized in the subsequent quarters of 2005.

V. Depending on the Court's resolution of the foregoing issues, whether or not Petitioner is consequently entitled to the refund or issuance of a tax credit certificate in the amount of PhP57,790,589.73 representing unutilized/excess input VAT paid by Petitioner for the period covering the 1st quarter to the 4th quarter of 2004 (i.e. January 1 to December 31, 2004)."

Petitioner anchors its claim on Section 112(A) of the NIRC of 1997, as amended, which reads as follows:

"SEC. 112. Refunds or Tax Credits of Input Tax. –

²² Docket, p. 860

²³ Docket, pp. 816-832

²⁴ Docket, pp. 835-859

²⁵ Docket, p. 190



(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 the volume of sales.”

Based on the foregoing, in order to be entitled to a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales, the following requisites must be satisfied:

1. that there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes 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 pointed out by petitioner, the law explicitly states that sales of generated power by generation companies are VAT zero-rated beginning June 26, 2001; the date of effectivity of Republic Act (R.A.) No. 9136. Section 6 of R.A. No. 9136 provides that:

“SEC. 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.

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements." (*Emphasis supplied*)

Section 6 of Rule 5 of the Implementing Rules and Regulations of R.A. No. 9136 provides a similar pronouncement, to wit:

**"RULE 5
Generation Sector**

xxx xxx xxx

SECTION 6. *Generation Charges and VAT.* —

xxx xxx xxx

(b) Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these rules." (*Emphasis supplied*)



This was affirmed by this Court in the case of **Visayas Geothermal Power Company, Inc. vs. Commissioner of Internal Revenue**²⁶, wherein it was held that:

"...Section 6 of the EPIRA Law provides that 'sales of generated power by generation companies shall be value-added tax zero-rated'. Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.

As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: 1) it is a generation company, and 2) it derived sales from power generation."

In its final amended Quarterly VAT Returns for taxable year 2004, petitioner reported a total of P38,278,231.01 zero-rated sales, broken down as follows:

Exhibit	Quarter	Zero-rated Sales
H	1st	P -
K	2nd	2,993,403.66
N	3rd	13,192,110.64
Q	4th	22,092,716.71
Total		P 38,278,231.01

The Court-commissioned Independent CPA found that the zero-rated sales reported in the "Schedule of Gross Receipts from Zero-rated Sales"²⁷ for taxable year 2004 consisted of sales of electricity to Panay Electric Company and ILECO-1 Electric Cooperative, Incorporated. Petitioner submitted official receipts and invoices²⁸ for the afore-mentioned zero-rated sales. While these documents proved that petitioner actually derived sales from power generation, however, it failed to establish that it is a generation company as defined under Section 4(x), in relation to Section 6 of R.A. No. 9136, which states:

²⁶ CTA Case Nos. 6790 and 6838, dated January 18, 2007

²⁷ Exhibit "AAA", Final Report of Independent CPA, Annexes "B-1", "B-2", "B-3", "B-4", and "B-5"

²⁸ Exhibits "CC-1" to "CC-13"



"SEC. 4. Definition of Terms. –

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xxx

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(x) 'Generation Company' refers to any person or entity authorized by the ERC²⁹ to operate facilities used in the generation of electricity;"

Moreover, Section 4, Rule 5 of the Implementing Rules and Regulations of R.A. No. 9136, provides:

"Section 4. Obligations of a Generation Company.

- (a) A COC³⁰ shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.
- (i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility."

Furthermore, Section 1 of Rule 5 of the same implementing rules reiterates the above-mentioned requirement as follows:

"Section 1. Guiding Principle.

xxx

xxx

xxx

No Person may engage in the Generation of Electricity as a new Generation Company unless such Person has received a COC from the ERC to operate facilities used in the Generation of Electricity. A Person that demonstrates compliance with the standards and requirements of this Rule 5, and such other terms and conditions as determined by the ERC to be appropriate to ensure that Persons comply with all applicable legal and regulatory requirements, shall be issued a COC."

²⁹ Energy Regulatory Commission

³⁰ Certificate of Compliance



Nowhere in the records of the case is it shown that petitioner is duly authorized by the ERC to operate facilities used in the generation of electricity. Petitioner did not submit its ERC registration and Certificate of Compliance. Thus, in the absence of evidence that petitioner is a generation company, **all** of the reported sales of P38,278,231.01 cannot qualify for VAT zero-rating under R.A. No. 9136. Consequently, the alleged input VAT attributable thereto in the amount of P57,790,589.73 cannot be refunded.

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

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