REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SOUTHERN ENERGY QUEZON, INC., (formerly Hopewell Power (Philippines) Corp.),
Petitioner,

- versus -

C.T.A. CASE NO. 5912

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 24 2001

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DECISION

Submitted before Us for decision is a Petition for Review filed by the Petitioner on July 20, 1999, seeking for the refund of the amount of P1,095,772.39 allegedly representing unutilized input value-added tax (VAT for brevity) on domestic purchases of goods and services attributable to zero-rated sales for the second quarter of 1997.

The antecedent facts of this case giving rise to the controversy at bar are contained in the parties' Joint Stipulation of Facts and Issues, viz:

> Petitioner is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation under a Build, Operate, and Transfer (BOT) scheme.
>
> Petitioner is a value-added tax (VAT) taxpayer in accordance with Section 107 of the Tax Code [now Section 236 of the National Internal Revenue Code of 1997] with BIR Certificate of Registration bearing RDO Control No. 96-600-002498.
>
> On February 27, 1996, Petitioner filed with the BIR Revenue District Office No. 60 at Lucena City an Application for Effective Zero Rating for the operation and maintenance of the power barges of the

National Power Corporation (NPC) under a Build, Operate and Transfer (BOT) scheme.

On May 13, 1999, the Respondent issued VAT Ruling No. 052-99 to Petitioner where it ruled that "the supply of electricity by HOPEWELL PHIL., (Petitioner in this case) to the NPC, shall be subject to the zero percent (0%) VAT, pursuant to Section 108(B)(3) of the National Internal Revenue Code of 1997," (Annex "A")

Petitioner filed its quarterly VAT return for the second quarter of 1997 on July 21, 1997 reflecting a total domestic purchases of goods and services in the amount of P10,957,723.69 and the corresponding input VAT of P1,095,772.39.

On June 30, 1999, Petitioner filed an administrative claim for refund of unutilized input VAT with the Bureau of Internal Revenue for the second quarter of 1997.

Petitioner asseverates that pursuant to the Supreme Court's pronouncement in the case of *Maceda vs. Macaraig, G.R. No. 88291, promulgated on May 31, 1999*, exempting the NPC from payment of taxes, both direct and indirect, it follows that Petitioner's sale of power generation services to NPC is zero-rated for VAT purposes.

In support of its stance, Petitioner cites as its basis the provisions of Section 102 of the Old Tax Code [now Section 108 of the National Internal Revenue Code of 1997) which provides, thus:

"**Sec. 102**. *Value-added tax on sale of services and use or lease of properties.* –

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

(1) x x x

(2) x x x

(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the

> Philippines is a signatory effectively subjects the supply of such services to zero rate."

From the foregoing legal anchor, Petitioner in its Memorandum concludes that it is entitled to the refund of the amount of P1,095,772.39 the same having remained unutilized considering that Petitioner has yet to engage in a business activity for which it may be liable for output VAT, other than its zero-rated sale of power generation services to NPC which did not produce any output VAT liability. (TSN, October 13, 1999, p. 7)

Unable to obtain an affirmative relief from the Respondent Bureau of Internal Revenue, Petitioner elevated its grievance to this Court via Petition for Review.

This case was considered submitted for decision on December 20, 2000 sans the memorandum of the Respondent.

The issues posed for Our consideration are as follows:

1. Whether or not the operation and maintenance of power barges for the supply of electricity to the National Power Corporation is subject to zero percent (0%) VAT pursuant to Section 102(b)(3) of the old Tax Code [now Section 108(B)(3) of the National Internal Revenue Code of 1997];
2. Whether or not Petitioner has unapplied or unutilized creditable input value-added tax for the second quarter of 1997 arising from its domestic purchases of goods and services which is a proper object of a claim for refund pursuant to Section 108(B)(3) (formerly Sec. 102(b)(3) of the Old Tax Code) and Section 112(A) [formerly Section 106(b) of the Old Tax Code] of the National Internal Revenue Code of 1997;

3. Whether or not the said creditable input value added tax of Petitioner for the second quarter of 1997 are substantiated by documentary evidence in the form of invoices and official receipts;

4. Whether or not said unapplied or unutilized creditable input value added tax for the second quarter of 1997 was applied against any of the output value added tax of the Petitioner in the subsequent quarters.

We deny the claim.

There is no dispute that Petitioner is a VAT registered entity which is rendering power generation services to an exempt entity. However, as admitted by the Petitioner, while it applied for zero-rating with the Bureau of Internal Revenue, it has yet to secure the latter's approval, hence, the denial.

In the earlier case of *Southern Energy Navotas II Power, Inc. [formerly Hopewell Tileman (Philippines) Corporation] vs. Commissioner of Internal Revenue, CTA Case No. 5815, promulgated on March 1, 2001*, this Court had the occasion to rule on the issue of approval in this wise, thus:

> "The records show that Petitioner failed to secure from the BIR an approved application for zero-rating. In fact, in its Memorandum, Petitioner admitted that such requirement is necessary for its claim for refund to prosper. However, Petitioner begged the indulgence of this Court to consider the peculiar circumstances surrounding its present appeal and lamentably the Court cannot rule in favor of the Petitioner.
>
> It is true that Petitioner waited for a long time for the Respondent to act on its application for effective zero-rating considering that the application was filed on March 1, 1996, and until now there was no action from the Respondent. However, this scenario could have been prevented had Petitioner exercised its right to compel Respondent to act on its application. A petition for mandamus should have been resorted to by Petitioner to secure the much needed approval. This Court is of the impression that Petitioner did not exert an effort to follow-up its application

with the BIR and waited this long for the Court to rule on it. Sad to say, such authority to rule on the application for zero-rating is only vested upon the Respondent.

As correctly pointed out by the Respondent, without an approved application for effective zero rating, the transaction otherwise entitled to zero rating shall be considered exempt (VAT Ruling Nos. 033-96, 012-97, 013-97, 037-97, 038-97, 023-98, 006-99, 015-99, 022-99, 052-99, and 063-99).

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This Court maintains that a VAT entity which failed to present an approved application for zero-rating as required by Section 8(d) of Revenue Regulations No. 5-87 will not be considered a zero-rated entity, hence, not entitled to the refund of input taxes paid (**ABB Power Generation Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 5270, March 3, 1999 and Kumagai-gumi Co. Ltd., vs. Commissioner of Internal Revenue, CTA Case No. 4670, July 29, 1997).**"

A similar ruling was laid down by this Court in the recently promulgated case entitled *Southern Energy Navotas II Power Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5910 dated April 10, 2001*, involving the same facts and issues.

At this point, this Court sees no cogent reason to depart from the aforesaid ruling, accordingly, the claim for refund must fail.

Having been mooted by the above pronouncements, this Court deems it unnecessary to delve on the other issues raised.

WHEREFORE, in view of all the foregoing, Petitioner's claim for refund is hereby **DENIED** for lack of merit.

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