REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

C.T.A. EB NO. 408
(C.T.A. Case No. 6647)

Present:

-versus-

Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

SAN ROQUE POWER CORPORATION,
Respondent.

Promulgated:
MAR 2 5 2009 Gr Apolinario 1:35 p.m.

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D E C I S I O N

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review[1] filed pursuant to paragraph 2, Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282 and Rule 8, Section 3(b) of the Revised Rules of the Court of Tax

[1] *Rollo*, C.T.A. EB No. 408 (C.T.A. Case No. 6647), pp. 7 – 42, with Annexes.

Appeals, praying for the denial of respondent's entire claim for refund or tax credit and the setting aside of:

1. the Amended Decision dated November 29, 2007 rendered by the Second Division of the Court ("Court in Division") in CTA Case No. 6647, which ordered herein petitioner to refund or issue a tax credit certificate in favor of herein respondent the reduced amount of ₱483,797,599.65, representing the latter's unutilized input value-added tax ("VAT") on its purchases of capital goods and services for the taxable year 2001; and
2. the Resolution of the Court in Division promulgated on July 11, 2008, which denied herein petitioner's Motion for Partial Reconsideration.

Antecedent Facts

The undisputed facts of the case as taken from the records and the Amended Decision of the Court in Division are as follows:

Petitioner is the duly appointed Commissioner of Internal Revenue, empowered, among others, to act upon and approve claims for refund or tax credit, with office at the Bureau of Internal Revenue ("BIR") National Office Building, Diliman, Quezon City.[2]

Respondent is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines with principal office at Barangay San Roque, San Manuel, Pangasinan. It was incorporated in October

[2] *Records*, p. 156, Joint Stipulation of Facts and Issues, Facts Admitted, par. 2.

1997 to design, construct, erect, assemble, own, commission and operate power-generating plants and related facilities pursuant to and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government-owned or controlled corporation, or other entity engaged in the development, supply, or distribution of energy.[3]

As a seller of services, respondent is duly registered with the BIR with TIN/VAT No. 005-017-501. It is likewise registered with the Board of Investments ("BOI") on a preferred pioneer status, to engage in the design, construction, erection, assembly, as well as to own, commission, and operate electric power-generating plants and related activities, for which it was issued Certificate of Registration No. 97-356 on February 11, 1998.[4]

On October 11, 1997, respondent entered into a Power Purchase Agreement ("PPA") with the National Power Corporation ("NPC") to develop the hydro-potential of the Lower Agno River and generate additional power and energy for the Luzon Power Grid, by building the San Roque Multi-Purpose Project located in San Manuel, Pangasinan. The PPA provides, among others, that respondent shall be responsible for the design, construction, installation, completion, testing and commissioning of the Power Station and shall operate and maintain the same, subject to NPC

[3] *Records*, p. 157, Joint Stipulation of Facts and Issues, Facts Admitted, par. 3.
[4] *Id.*, pars. 4 & 5.

instructions. During the cooperation period of twenty-five (25) years commencing from the completion date of the Power Station, NPC will take and pay for all electricity available from the Power Station.[5]

On the construction and development of the San Roque Multi-Purpose Project which comprises of the dam, spillway and power plant, respondent allegedly incurred excess input VAT in the amount of ₱559,709,337.54 for taxable year 2001 which it declared in its Quarterly VAT Returns filed for the same year.[6] Respondent duly filed with the BIR separate claims for refund, in the total amount of ₱559,709,337.54, representing unutilized input taxes as declared in its VAT returns for taxable year 2001.[7]

However, on March 28, 2003, respondent filed amended Quarterly VAT Returns for the year 2001 since it increased its unutilized input VAT to the amount of ₱560,200,283.14. Consequently, respondent filed with the BIR on even date, separate amended claims for refund in the aggregate amount of ₱560,200,283.14.[8]

Petitioner's inaction on the subject claims led to the filing by respondent of the Petition for Review with the Court in Division on April 10, 2003.

Trial of the case ensued and on July 20, 2005, the case was submitted for decision.[9]

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[5] *Records,* p. 157, Joint Stipulation of Facts and Issues, Facts Admitted, par. 6.
[6] *Id.*, pp. 157-158, par. 7.
[7] *Id.*, p. 159, par. 10.
[8] *Id.*, pp. 158-159, pars. 8 & 11.
[9] *Id.*, p. 367, Resolution.

On March 8, 2006, the Court in Division rendered a Decision denying herein respondent's subject claim. Respondent's lack of recorded zero-rated or effectively zero-rated sales, its failure to submit documents specifically identifying the purchased goods/services related to the claimed input VAT which were included in its Property, Plant and Equipment account, and its failure to prove that the related construction costs were capitalized in its books of accounts and subjected to depreciation were the bases for the denial of its claim.[10]

> "Subsequently, on April 7, 2006, petitioner[11] filed a 'Motion for New Trial and/or Reconsideration' of the assailed Decision on the ground of honest mistake or oversight; and that the Court's findings and conclusions do not agree with the evidence presented and with applicable law and jurisprudence, specifically:
>
> > '(1) Petitioner's 2001 audited financial statements are attached to all of Petitioner's letters to Respondent,[12] representing its administrative claims for refund of excess input taxes which were presented by Petitioner as **Exhibits "EE" to "LL"** but Petitioner inadvertently failed to include the attachments to the said Exhibits. As indicated in the attached affidavit of merit and in the aforementioned Exhibits, the attachments provide further proof that Petitioner's construction costs and other capital goods are duly recorded as Property, Plant and Equipment in Petitioner's books of accounts;
> >
> > (2) The Honorable Court should consider several other evidence submitted by Petitioner in support of its purchases showing that such purchases consist of capital goods;
> >
> > (3) The Honorable Court should find that in the absence of any other line of business engaged in by Petitioner, it logically follows that all its expenses which are made in the ordinary course of business are attributable to its effectively zero-rated business. The law does not require that zero-rated sales be made within the same period as the time when the expenses were incurred in order to consider such purchases as attributable to its zero-rated sales.'
>
> Respondent was directed to file his Comment to the instant Motion in the Resolution dated May 3, 2006, within ten (10) days from receipt thereof. On May 18, 2006, respondent filed an 'Opposition (Re: Motion for New Trial and/or Reconsideration', arguing, among others, that it is

[10] *Records*, pp. 380 – 381.
[11] Herein respondent.
[12] Herein petitioner.

incorrect for petitioner to file a Motion for New Trial and/or Reconsideration; rather it should choose between the two remedies; that petitioner's reliance on the ground of honest mistake is misplaced; and that Annexes 'A' to 'A-24' attached to the Motion are inadmissible as these are not original documents and were neither presented during trial nor formally offered.

Pursuant to Section 1, Rule 1 of the 1997 Rules of Civil Procedure, this Court resolved in the Resolution dated July 28, 2006 to construe the Rules of Court liberally to promote the objective of securing a just, speedy, and inexpensive disposition of every action, and allowed petitioner to present additional evidence in support of its subject motion. Thereafter, upon petitioner's motion, the Court commissioned Ma. Victoria C. Españo as an Independent CPA on November 9, 2006, to examine the voluminous documents evidencing petitioner's capital goods purchases, and corresponding VAT input tax thereon, and was directed to submit her CPA Report within thirty (30) days from said date, and to testify on her findings on January 10, 2007. On said date, Independent CPA, Ma. Victoria C. Españo, completed her testimony and petitioner was directed to file Supplemental Offer of Evidence within thirty (30) days therefrom, while respondent was given fifteen (15) days to file Comment thereto.

On February 9, 2007, petitioner filed its Supplemental Offer of Evidence consisting of Exhibits 'SS' to 'WW', with submarkings, for the purpose of proving the following: purchases of its capital goods; the nature and/or details of petitioner's purchases for the calendar year 2001 which gave rise to its excess VAT input taxes for the said year; the amount of its claim for refund of excess input VAT that are attributable to purchases of capital goods which are duly substantiated in accordance with law; due recording of capital goods purchases in petitioner's books of accounts under property plant and equipment; and petitioner's entitlement to the refund or credit of the excess VAT input taxes thereon.

In respondent's 'Comment (Re: Petitioner's Formal Offer of Evidence)' filed on February 15, 2007, it was stated that respondent has no objection to the admission of Exhibits 'SS' to 'WW-1' inclusive of sub-markings, without necessarily admitting their relevancy, materiality or probative value and the validity of the purposes for which the said exhibits are offered in evidence.

In the Resolution dated March 14, 2007, all the exhibits mentioned in petitioner's Supplemental Formal Offer of Evidence were admitted and the parties were directed to simultaneously file their memoranda within thirty (30) days from receipt thereof. Petitioner filed its Supplemental Memorandum on April 27, 2007 while respondent filed her Memorandum on May 28, 2007. On June 6, 2007, petitioner's 'Motion for New Trial and/or Reconsideration' dated April 7, 2006 was submitted for resolution."[13]

The Ruling of the Court in Division

In an Amended Decision promulgated on November 29, 2007, the Court in Division ordered herein petitioner to refund or issue a tax credit certificate in favor of herein respondent the reduced amount of ₱483,797,599.65, representing the latter's unutilized input VAT on its purchases of capital goods and services for the taxable year 2001.

Upon review and verification of the additional evidence submitted by respondent as well as the Report of the commissioned Independent CPA,[14] the Court in Division ascertained that the proper subject of the refund or issuance of a tax credit certificate was only the amount of ₱483,797,599.65. It deducted certain amounts from respondent's claim for reasons stated hereunder:

1. Input VAT in the amount of ₱1,294,907.89 was disallowed for either being erroneously computed, or the related purchases could not be ascertained to be in the nature of capital goods or some pertain to non-capital goods;
2. The amount of ₱9,862,986.26 represents the difference between respondent's claim and that appearing on its books;
3. The amount of ₱36,897.96 on purchase of local services is not within the period of the claim; and

[13] *Rollo*, pp. 24 -27, Amended Decision dated November 29, 2007, C.T.A. Case No. 6647, pp.1 – 4.
[14] *Records*, Exhibit "VV-A.5".

4. The amounts of ₱52,454,331.00 and ₱533,730.93 should be disallowed since the amount of VAT cannot be determined from the submitted official receipts and invoices.

The Court in Division further ruled that respondent's claim for refund or tax credit of its unutilized input VAT attributable to its zero-rated or effectively zero-rated sales must be denied since it had no record of such type of sales for the four quarters of 2001.

The decretal portion of the Amended Decision reads as follows:

> "**WHEREFORE**, petitioner's "Motion for New Trial and/or Reconsideration" is hereby **PARTIALLY GRANTED** and this Court's Decision promulgated on March 8, 2006 in the instant case is hereby **MODIFIED**.
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> Accordingly, respondent is hereby **ORDERED** to **REFUND** or in the alternative, to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **Four Hundred Eighty Three Million Seven Hundred Ninety Seven Thousand Five Hundred Ninety Nine Pesos and Sixty Five Centavos (P483,797,599.65)** representing unutilized input VAT on purchases of capital goods and services for the taxable year 2001.
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> **SO ORDERED.**"

Dissatisfied, petitioner filed a Motion for Partial Reconsideration[15] on December 20, 2007, which was denied for lack of merit by the Court in Division in its Resolution dated July 11, 2008.

The Issues

Hence, this recourse to the Court *En Banc*, with petitioner ascribing to the Court in Division the following errors:

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[15] *Records*, pp. 761-767.

> "THE SECOND DIVISION OF THE HONORABLE CTA HAD NO JURISDICTION OVER RESPONDENT'S JUDICIAL CLAIM FOR REFUND
>
> THE SECOND DIVISION OF THE HONORABLE CTA ERRED IN GRANTING RESPONDENT'S CLAIM FOR REFUND"

Petitioner's Arguments

Petitioner maintains that when respondent filed its Petition for Review with the Court in Division on April 10, 2003, the one hundred twenty (120) days given to petitioner to decide on the claim under Section 112 (D) of the 1997 National Internal Revenue Code ("NIRC") had not yet lapsed. Thus, the Petition for Review should have been dismissed by the Court in Division for lack of jurisdiction.

Petitioner also posits that by applying the rule of *generalia specialibus non derogant*, the said Section 112 (D) must be applied since it is a specific provision on claims for refund of input tax whereas Sections 204 and 229 of the NIRC are more general provisions which can govern those cases outside the ambit of Section 112 (D).

Lastly, petitioner strongly believes that respondent is not entitled to the refund as it failed to meet the requisites to claim a refund/tax credit for input VAT paid on capital goods purchased. Petitioner insists that respondent's input VAT payments on capital goods were not supported by VAT invoices and/or official receipts and some of the invoices presented by respondent did not pertain to capital goods and other taxable goods and services which are attributable to its alleged zero-rated sales.

Respondent's Counter-arguments

Respondent, in its Comment/Opposition, avers that Section 112 (D) of the NIRC does not give rise to jurisdictional issues in refund cases. Rather, it refers to the period within which petitioner is required to complete the processing of claims for refund.

Respondent also cites Revenue Memorandum Circular No. 49-03 which was issued by petitioner where the latter recognizes that refund cases filed with the CTA can proceed simultaneously with the period within which it is expected to conclude the claim for refund, most especially where the taxpayer is constrained to file a case with the CTA due to the impending lapse of the prescriptive period under Section 229 of the NIRC.

Lastly, respondent points out that petitioner only made a general allegation that respondent failed to comply with the requirement for invoices or official receipts without specifying the particular expenses with corresponding input taxes. Such general allegation prevents respondent from ascertaining whether the items being objected to by petitioner are the ones already disallowed by the Court in Division.

The Ruling of the Court En Banc

The Petition for Review has no merit.

The judicial claim for refund was seasonably filed

At the outset, the Court *En Banc* shall discuss petitioner's argument on the Court's jurisdiction and the applicable prescriptive period.

The Court *En Banc* finds no merit in petitioner's contention that respondent's judicial claim was prematurely filed since the 120 days given to the Commissioner of Internal Revenue to decide on the claim under Section 112 (D) of the 1997 NIRC had yet to lapse when the Petition for Review was filed with the Court on April 10, 2003. Section 112(D)[16] provides:

> "SEC. 112. **Refunds or Tax Credits of Input Tax.** —
>
> 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.**" (*Emphasis supplied*)

It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive

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[16] now Section 112 (C) of the 1997 NIRC, as amended by R.A. No. 9337.

period under Section 229 of the NIRC. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.[17]

Corollary thereto, the Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:[18]

> "It appears therefore, that **it is not necessary for the Commissioner of Internal Revenue to first act unfavorably on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case.** This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
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> Incidentally, the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal. **The law fixed the same period — two years — for filing a claim for refund with the**

[17] Republic Planters Bank v. Hon. Enrique A. Agana, Sr. et.al., G.R. No. 51765, March 3, 1997, 269 SCRA 1.
[18] Commissioner of Internal Revenue v. Hitachi Computer Products (Asia) Corporation, CA-G.R. SP No. 63340, February 7, 2002 *citing Gibbs v. Collector of Internal Revenue and Court of Tax Appeals, 107 Phil 232, Johnson Lumber Co. vs. CTA, 101 Phil 151.*

> **Commissioner (Sec. 204, par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court.** Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. **In fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former** (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)." (*Emphasis supplied*)

Even the Bureau of Internal Revenue cited the foregoing disquisition of the Court of Appeals as basis when it made the following ruling:

> "In reply, please be informed 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.** The Tax Code fixed the period of two (2) years for filing a claim for refund with the Commissioner [Sec. 112(A) in relation to Sec. 204(c)] and for filing a case in court [Section 229]. **Hence, a decision of the Commissioner is not a condition or requisite before the taxpayer can resort to the judicial remedy afforded by law.**"[19] (*Emphasis supplied*)

More importantly, the Court *En Banc* has squarely and exhaustively ruled on this issue in this wise:

> "**It is true that Section 112 (D) of the abovementioned provision applies to the present case. However, what the petitioner failed to consider is Section 112 (A) of the same provision.** The respondent is also covered by the two (2) year prescriptive period. We have repeatedly held that the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period.
>
> Accordingly, the Supreme Court held in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* that the two-year prescriptive period for filing a claim for input tax is reckoned from the date of the filing of the quarterly VAT return and payment of the tax due. **If the said period is about to expire**

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[19] BIR Ruling [DA-489-03] dated December 10, 2003, signed by Deputy Commissioner (Legal and Enforcement Group) Jose Mario C. Buñag.

but the BIR has not yet acted on the application for refund, the taxpayer may interpose a petition for review with this Court within the two year period.

In the case of *Gibbs vs. Collector,* the Supreme Court held that if, however, the Collector (now Commissioner) takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector.

Furthermore, in the case of *Commissioner of Customs and Commissioner of Internal Revenue vs. The Honorable Court of Tax Appeals and Planters Products, Inc.,* **the Supreme Court held that the taxpayer need not wait indefinitely for a decision or ruling which may or may not be forthcoming and which he has no legal right to expect.** It is disheartening enough to a taxpayer to keep him waiting for an indefinite period of time for a ruling or decision of the Collector (now Commissioner) of Internal Revenue on his claim for refund. It would make matters more exasperating for the taxpayer if we were to close the doors of the courts of justice for such a relief until after the Collector (now Commissioner) of Internal Revenue, would have, at his personal convenience, given his go signal.

This Court ruled in several cases that once the petition is filed, the Court has already acquired jurisdiction over the claims and the Court is not bound to wait indefinitely for no reason for whatever action respondent (herein petitioner) may take. **At stake are claims for refund and unlike disputed assessments, no decision of respondent (herein petitioner) is required before one can go to this Court.**" [20] *(Emphasis supplied and citations omitted)*

Lastly, it is apparent from the following provisions of Revenue Memorandum Circular No. 49-03 dated August 18, 2003[21], that petitioner knows that claims for VAT refund or tax credit filed with the Court can proceed simultaneously with the ones filed with the BIR and that taxpayers need not wait for the lapse of the subject 120-day period, to wit:

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[20] Commissioner of Internal Revenue v. Toledo Power, Inc., C.T.A. EB Case No. 321 (C.T.A. Case Nos. 6805 & 6851), May 7, 2008.

[21] Entitled *"Amending Answer to Question Number 17 of Revenue Memorandum Circular No. 42-2003 and Providing Additional Guidelines on Issues Relative to the Processing of Claims for Value-Added Tax (VAT) Credit/Refund, Including Those Filed with the Tax and Revenue Group, One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, Department of Finance (OSS-DOF) by Direct Exporters"*

"In response to request of selected taxpayers for adoption of procedures in handling refund cases that are aligned to the statutory requirements that refund cases should be elevated to the Court of Tax Appeals before the lapse of the period prescribed by law, certain provisions of RMC No. 42-2003 are hereby amended and new provisions are added thereto.

In consonance therewith, the following amendments are being introduced to RMC No. 42-2003, to wit:

I.) A-17 of Revenue Memorandum Circular No. 42-2003 is hereby revised to read as follows:

In cases where the taxpayer has filed a "Petition for Review" with the Court of Tax Appeals involving a claim for refund/TCC that is pending at the administrative agency (Bureau of Internal Revenue or OSS-DOF), the administrative agency and the tax court may act on the case separately. While the case is pending in the tax court and at the same time is still under process by the administrative agency, the litigation lawyer of the BIR, upon receipt of the summons from the tax court, shall request from the head of the investigating/processing office for the docket containing certified true copies of all the documents pertinent to the claim. The docket shall be presented to the court as evidence for the BIR in its defense on the tax credit/refund case filed by the taxpayer. In the meantime, the investigating/processing office of the administrative agency shall continue processing the refund/TCC case until such time that a final decision has been reached by either the CTA or the administrative agency.

If the CTA is able to release its decision ahead of the evaluation of the administrative agency, the latter shall cease from processing the claim. On the other hand, if the administrative agency is able to process the claim of the taxpayer ahead of the CTA and the taxpayer is amenable to the findings thereof, the concerned taxpayer must file a motion to withdraw the claim with the CTA. xxx." *(Emphasis supplied)*

Respondent has sufficiently proven that it is entitled to a refund or tax credit in the amount of ₱483,797,599.65

To validly claim a refund of unutilized input VAT on capital goods purchased, a taxpayer must comply with Section 112(B) of the NIRC of 1997 which provides:

> "SEC. 112. Refunds or Tax Credits of Input Tax. –
>
> xxx xxx xxx
>
> (B) Capital Goods. – A VAT registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made."

Thus, respondent must show that:

1) it is a VAT-registered entity;

2) its input taxes claimed were paid on capital goods duly supported by VAT invoices and/or official receipts;

3) it did not offset or apply the claimed input VAT payments on capital goods against any output VAT liability; and

4) its claim for refund was filed within the two-year prescriptive period both in the administrative and judicial levels.

An evaluation of the facts of the case leads the Court *En Banc* to affirm the findings of the Court in Division in its original Decision[22] that respondent complied with the first, third and fourth requisites, *viz*:

> "The fact that petitioner[23] is a VAT registered entity is admitted (*par. 4, Facts Admitted, Joint Stipulation of Facts, Records, p.157)*. It was also established that the instant claim of P560,200,823.14 is already net of the

[22] *Records*, p.378, Decision dated March 8, 2006.
[23] Herein respondent.

P11,509.09 output tax declared by petitioner in its amended VAT return for the first quarter of 2001. Moreover, the entire amount of P560,200,823.14 was deducted by petitioner from the total available input tax reflected in its amended VAT returns for the last two quarters of 2001 and first two quarters of 2002 (*Exhibits M-6, O-6, OO-1 & QQ-1*). This means that the claimed input taxes of P560,200,823.14 did not form part of the excess input taxes of P83,692,257.83 as of the second quarter of 2002 that was to be carried-over to the succeeding quarters. Further, petitioner's claim for refund/tax credit certificate of excess input VAT was filed within the two-year prescriptive period reckoned from the dates of filing of the corresponding quarterly VAT returns.

For the first, second, third and fourth quarters of 2001, petitioner filed its VAT returns on April 25, 2001, July 25, 2001, October 23, 2001 and January 24, 2002, respectively (*Exhibits "H,J,L and N"*). These returns were all subsequently amended on March 28, 2003 (*Exhibits "I, K, M and O"*). On the other hand, petitioner originally filed its separate claims for refund on July 10, 2001, October 10, 2001, February 21, 2002 and May 9, 2002 for the first, second, third and fourth quarters of 2001, respectively, (*Exhibits "EE, FF, GG and HH"*) and subsequently filed amended claims for all quarters on March 28, 2003 (*Exhibits "II, JJ, KK and LL"*). Moreover, the Petition for Review was filed on April 10, 2003. Counting from the respective dates when petitioner originally filed its VAT returns for the first, second, third and fourth quarters of 2001, the administrative claims for refund (original and amended) and the Petition for Review fall within the two-year prescriptive period."

Consequently, the only issue left for resolution is whether respondent was able to comply with the second requisite which requires the substantiation of its claim for refund or tax credit.

It is essential first to determine the nature of the capital goods or properties, as basis for the refund or issuance of tax credit certificate. Section 4.106-1 (b) of Revenue Regulations No. 7-95 provides that "capital goods or properties" refer to goods or properties with estimated useful life greater than one year and which are treated as depreciable assets under Section 29 (F) of the NIRC of 1997 [now Section 34 (F)], and used directly or indirectly in the production or sale of taxable goods or services.

Pursuant to the above provision, the purchased goods and properties must have the following qualities to qualify as capital goods:

1) useful life greater than one year;

2) treated as depreciable assets under Section 34 (F); and

3) used directly or indirectly in the production or sale of taxable goods or services.

It is undisputed that respondent's power plant and related facilities such as the dam and spillway have economic useful lives of more than one year and used directly or indirectly by respondent in its power generation and sale of electricity to NPC. As such, they can be classified as capital assets under Property, Plant and Equipment account. Hence, all costs directly related to the building and construction thereof such as engineering and design services can be capitalized.

However, in its original Decision, the Court in Division denied respondent's claim for refund or tax credit since respondent failed to submit documents such as schedule of capital goods purchased, detailed general ledger and audited financial statements that would show which of the subject purchases actually formed part of its Property, Plant and Equipment account and would prove that the related construction costs were capitalized in its books of accounts and subjected to depreciation.[24]

Realizing its mistake, respondent filed a "Motion for New Trial and/or Reconsideration"[25] on April 7, 2006. The Court in Division then allowed respondent to present additional evidence to support its Motion[26] and likewise commissioned Ma. Victoria C. Españo as an Independent CPA to examine the voluminous documents evidencing respondent's capital goods purchases and corresponding VAT input tax thereon.[27]

Respondent's Supplemental Formal Offer of Evidence,[28] which was admitted by the Court in Division in its Resolution dated March 14, 2007, consisted, among others, of the following documents:

1. Respondent's 2001 Income Tax Return filed with the BIR on April 10, 2002 (*Exhibits "SS-1 to SS-9"*);

2. Report of Independent Public Accountant, SGV & Co. with respondent's 2001 Audited Financial Statements as attached to its 2001 Income Tax Return (*Exhibits "TT-1 to TT-16"*);

3. The January 8, 2007 Report of Maria Victoria C. Españo (*Exhibit "VV"*).

[24] *Records*, pp. 380 – 381.
[25] *Id.*, pp. 385-401.
[26] *Id.*, pp. 573-574.
[27] *Id.*, p. 608.
[28] *Id.*, pp. 713 – 717.

4. The 12-page schedule of accounts used in recording the local purchases of goods and services in respondent's books of accounts (*Exhibit "VV-A"*);

5. The copy of the respondent's documents, such as respondent's General Ledger Batch Listing, Posting Journals and vouchers in support of *Exhibit "VV"* (*Exhibits "VV-A-1 to VV-A-44-b"*);

6. The details of tracing of local suppliers' invoice to Construction in Progress (CIP) Account (*Exhibit "VV-A.2"*);

7. The 10-page schedule showing the description of imported goods (*Exhibit "VV-F"*);

8. The 3-page details of tracing of United Engineers International, Inc. invoice to CIP Account (*Exhibit "VV-D"*);

9. The 2-page Schedule of accounts used in recording purchases of services from non-resident suppliers in respondent's books of accounts (*Exhibit "VV-G-1"*);

10. The copy of respondent's documents such as Journal Vouchers, General Ledger postings and supplier's invoices in support of the aforementioned 2-page Schedule of accounts (*Exhibits "VV-G-1-A1" to "VV-G-1-G7"*); and

11. The details of the tracing of invoice of non-resident suppliers of services to CIP account (*Exhibit "VV-G-2"*).

The foregoing pieces of evidence sufficiently establish that respondent's subject purchases and related construction costs are depreciable assets and actually formed part of its Property, Plant and Equipment account. Thus, the Court *En Banc* quotes with approval the findings of the Court in Division:

> "The Report[29] of the commissioned Independent CPA reflects the following summarized findings regarding petitioner's[30] claim for refund or issuance of tax credit certificate pertaining to unutilized input VAT arising from purchases of capital goods:

1.)	Input VAT on local purchases of goods & services ascertained to be in the nature of capital goods and recorded under PPE account	P 359,440,010.47	Exh. VV-A & VV-A.2
2.)	Input VAT on importation of goods ascertained to be in the nature of capital goods & can reasonably be concluded to be part of the progress billings of the contractor that had been recorded under PPE account	182,522,086.77	Exh. VV-F & VV-D
3.)	Input VAT on payment to services of nonresident foreign contractors ascertained to be in the nature of capital goods and recorded under PPE account	4,723,448.56	Exh. VV-G-1 to VV-G-2
4.)	Footing error	39,300.27	Exh. VV-B & VV-B-2
5.)	Input VAT relating to purchases of non-capital goods	143,265.82	Exh. VV-A.3
6.)	Input VAT from local purchases of services which cannot be traced in the books under PPE account	134,898.36	Exh. VV-A.4
7.)	Input VAT on importation of goods that cannot be ascertained to be in the nature of capital goods used in the construction of the Power Plant	1,673.00	Exh. VV-F-1
8.)	Input VAT on importation of services that cannot be ascertained to be in the nature of capital goods; supporting invoices were not available	508,534.88	Exh. VV-G-3
9.)	Input VAT from importation of services where the onshore fees in the invoices cannot be reconciled with the Company's schedules	467,235.56	Exh. VV-G-4
	TOTAL	**P 547,980,453.69**	

[29] *Records,* Exhibit "VV-A.5".
[30] Herein respondent.

Based on the foregoing findings, only the input VAT mentioned in item nos. 1, 2, and 3, in the aggregate amount of P546,685,545.80 represents petitioner's valid claim since the related purchases were ascertained to be in the nature of capital goods and recorded under petitioner's Property, Plant and Equipment (PPE) account.

On the other hand, input VAT in the combined amount of P1,294,907.89 under nos. 4, 5, 6, 7, 8, and 9, cannot be allowed for any of the following reasons: for being erroneously computed; their related purchases cannot be ascertained to be in the nature of capital goods; or they pertain to non-capital goods.

The input VAT of P359,440,010.47 under item no. 1 of the commissioned Independent CPA's summarized findings should further be reduced by **P9,862,986.26**. The amount of reduction represents the difference between petitioner's claim and that appearing on its books; the details are provided below:[31]

SUPPLIER	CLAIMED	RECORDED PER BOOKS UNDER CIP	DIFFERENCE
January			
REOL	P 18,596,495.64	P 18,118,772.73	P 477,722.91
March			
REOL	31,628,456.25	30,583,712.42	1,044,743.83
Sithe	483,670.00	478,120.00	5,550.00
April			
REOL	36,053,626.63	34,872,993.23	1,180,633.40
Sithe	498,800.00	497,430.00	1,370.00
May			
REOL	30,231,248.56	25,344,686.78	4,886,561.78
Sithe	563,960.91	504,870.00	59,090.91
July			
REOL	35,915,314.62	34,311,242.62	1,604,072.00
August			
REOL	27,261,188.82	26,872,762.99	388,425.83
September			
AB Garcia	590,512.28	590,512.00	0.28
REOL	19,738,153.10	19,730,072.99	8,080.11
October			
URS Phils.	8,516.55	7,750.00	766.55
November			
REOL	38,559,147.56	38,439,390.82	119,756.74
December			

[31] *Records*, Exhibit "VV-A.5".

REOL	20,861,261.50	20,775,049.58	86,211.92
TOTAL	**P 260,990,352.42**	**P 251,127,366.16**	**P 9,862,986.26**

Moreover, the official receipts[32] covering the claimed input VAT of **P36,897.96** on purchase of local services included in item no. 1 are not within the period of claim. Thus, the same must likewise be disallowed from the total input VAT of **P359,440,010.47.**

The amounts of **P52,454,331.00** and **P533,730.93** should likewise be disallowed and be deducted from the total claim of P182,522,086.77 under item no. 2 in the Independent CPA's summarized findings, inasmuch as the amount of VAT cannot be determined from the submitted official receipts and invoices. The particulars are as follows:

Amount of VAT cannot be ascertained from the ORs and invoices presented		
SUPPLIER	PER PETITIONER'S SCHEDULE (ANNEX C.2)	EXHIBIT NO.
August		
Toshiba Int'l Corp.	P 32,826,222.00	MM-2-V283/MM-2-V288
Toshiba Int'l Corp.	14,177,949.00	MM-2-V284/MM-2-V285/MM-2-V289
September		
Ishikawajima-Harima Heavy Industries	4,827.00	MM-2-W232/MM-2-W233
UEII	2,104.00	MM-2-W236/MM-2-W237
November		
Toshiba Int'l Corp.	5,443,229.00	MM-2-Y208/MM-2-Y209
TOTAL	**P 52,454,331.00**	

Variance of input VAT claimed vs. amount appearing in supporting documents				
SUPPLIER	PER PETITIONER'S SCHEDULE ("ANNEX C.2)	PER EVALUATION OF IEIRDs & OTHER DOCUMENTS	DIFFERENCE	EXHIBIT NO.
February				
UEII	P 622,382.00	P 109,727.00	P 512,655.00	MM-2-P180/MM-2-P181
April				
UEII	412,956.00	391,880.93	21,075.07	MM-2-R169/MM-2-R168
June				
Ishikawajima-Harima Heavy Industries	30,776.43	30,776.00	0.43	MM-2-T232/MM-2-T233/MM-2-T234
August				
Chevalier	825,509.00	825,508.89	0.11	MM-2-V236/MM-2-V237/MM-2-V238
September				
TATE Access	75,175.00	75,174.68	0.32	MM-2-W229/MM-2-W230/MM-2-W231
TOTAL	**P 1,966,798.43**	**P 1,433,067.50**	**P 533,730.93**	

[32] *Records*, Exhibits "MM-2-P16" and "MM-2-P17".

Therefore, the proper subject of refund or issuance of tax credit certificate is **P483,797,599.65,** computed as follows:

1.)	Input VAT on local purchases of goods & services ascertained to be in the nature of capital goods and recorded under PPE account	P 359,440,010.47	
	Less: Disallowances: a) Variance between the claimed input VAT and input VAT recorded per books under CIP	(9,862,986.26)	
	b) Official receipt for purchase of local services not within the period of claim	(36,897.96)	P 349,540,126.25
2.)	Input VAT on importation of goods ascertained to be in the nature of capital goods & can reasonably be concluded to be part of the progress billings of the contractor that had been recorded under PPE account	P 182,522,086.77	
	Less: Disallowances: a) Amount of VAT cannot be ascertained from the Ors and invoices presented	(52,454,331.00)	
	b) Variance of input VAT claimed vs. amount appearing in the supporting Documents	(533,730.93)	129,534,024.84
3.)	Input VAT on payment to services of nonresident foreign contractors ascertained to be in the nature of capital goods and recorded under PPE account		4,723,448.56
	TOTAL		P **483,797,599.65"**

It bears stressing that petitioner failed to specify in its Petition for Review the pieces of evidence which may show the alleged error committed by the Court in Division *i.e.* invoices that do not pertain to respondent's capital goods. Other than the general arguments presented, no other evidence was identified in the Petition. As a rule, bare allegations, unsubstantiated by evidence, are not equivalent to proof under our Rules of Court.[33]

Therefore, the Court *En Banc* concurs with the ruling of the Court in Division that respondent presented substantial evidence to support its claim

[33] Emilia Manzano v. Miguel Perez Sr. et.al., G.R. No. 112485, 362 SCRA 430, August 9, 2001.

for refund of its input VAT on capital goods and services for the taxable year 2001 in the reduced amount of ₱483,797,599.65.

While the settled rule is that tax refunds are in the nature of tax exemptions and regarded as derogation of the sovereign authority, thus should be construed *strictissimi juris* against the person or entity claiming the exemption, the Court *En Banc* finds that respondent in this case was able to discharge the burden of proof to establish its right to a tax credit or refund.

All told, there is no error in the disquisition of judgment rendered by the Court in Division, the same being in accord with the evidence on record and with the applicable law and jurisprudence.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED.** Accordingly, the assailed Amended Decision promulgated on November 29, 2007 and the Resolution dated July 11, 2008 are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice