REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

*EN BANC*

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| **PHILIPPINE GEOTHERMAL PRODUCTION COMPANY, INC.,** Petitioner, | **CTA EB NO. 1894** (CTA Case No. 9048) |
| - versus - | Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.* |
| **COMMISSIONER OF INTERNAL REVENUE,** Respondent. | Promulgated: NOV 21 2019 3:26 p.m. |

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# DECISION

**RINGPIS-LIBAN, *J.*:**

## The Case

Before the Court is a Petition for Review seeking the nullification of the Decision[1] ("Assailed Decision") dated March 21, 2018 and Resolution[2] ("Assailed Resolution") dated July 10, 2018 of the Court of Tax Appeals Second Division ("Second Division"), denying Petitioner's claim for refund or issuance of a Tax Credit Certificate ("TCC") amounting to Php14,145,000.00, representing its alleged excess and unutilized input value-added tax ("VAT") attributable to its zero-rated sales for the fourth quarter of taxable year 2012.

[1] Penned by Associate Justice Juanito C. Castañeda, Jr., with Associate Justices Caesar A. Casanova and Catherine T. Manahan concurring. Docket, pp. 1275-1290.

[2] *Id.*, pp. 1320-1323.

The dispositive portion of the Assailed Decision reads:

> "**WHEREFORE**, the instant Petition for Review is **DENIED**, for lack of merit.
>
> **SO ORDERED.**"[3]

Meanwhile, the Assailed Resolution provides:

> "**WHEREFORE**, premises considered, petitioner's **Motion for Reconsideration** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"[4]

## The Parties

Petitioner Philippine Geothermal Production Company, Inc. is a domestic corporation engaged in the development and utilization of minerals, mineral oils, geothermal and other similar products, among others. It is duly registered with the Securities and Exchange Commission and with the Bureau of Internal Revenue ("BIR") with Tax Identification No. 214-127-981-000. Petitioner holds office at the 14th Floor, 6750 Ayala Avenue, Makati City.[5]

Respondent is the duly appointed Commissioner of the BIR empowered to perform the duties of his 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 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.[6]

## The Facts

The facts as found by the Second Division are as follows:

> "During the fourth quarter of taxable year 2012, [P]etitioner had zero-rated sales in the amount of [Php]355,077,241.24. It likewise made royalty payments to its non-resident suppliers in December 2012 amounting to [Php]117,875,000.00, which was subjected to twelve percent (12%) VAT amounting to [Php]14,145,000.00.

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3 *Id.*, p. 1289.
4 *Id.*, p. 1323.
5 *Id.*, Decision, The Facts, p. 1276.
6 *Id.*

> On December 22, 2014, [P]etitioner filed its claim for refund or tax credit in the total amount of [Php]14,145,000.00, along with supporting documents with the BIR Large Taxpayers Excise Audit Division I (LTEAD I), pursuant to Sections 112(A) and 108(B)(7) of the National Internal Revenue Code (NIRC) of 1997, as amended, and as implemented by Section 4.108-5(b)(7) of Revenue Regulations (RR) No. 16-2005.
>
> On April 15, 2015, [P]etitioner received a letter from the BIR denying its claim for refund or tax credit.
>
> As a result, [P]etitioner filed the instant case before this Court on May 15, 2015."[7]

***The Ruling of the Second Division***

On March 21, 2018, the Second Division promulgated the Assailed Decision denying the Petition for Review. The Court *a quo* found that Petitioner's registration with the Department of Energy ("DOE") as "RE Developer of Geothermal Energy Resources" only took effect on April 25, 2013. As of the fourth quarter of 2012, Petitioner was not yet certified as a Renewable Energy ("RE") developer. Hence, Petitioner's sales of power generated through geothermal energy for the said period do not qualify yet for VAT zero-rating under Republic Act ("RA") No. 9513.

The Second Division also found that Petitioner failed to establish that it is duly authorized by the Energy Regulatory Commission ("ERC") to operate a generation facility. Thus, its sales cannot qualify for VAT zero-rating under Section 108(B)(7) of the National Internal Revenue Code ("NIRC") of 1997 either.

Aggrieved, Petitioner filed a "Motion for Reconsideration"[8] on April 06, 2018, which the Second Division denied in the Assailed Resolution on July 10, 2018. Although the Court *a quo* agreed that Petitioner is not required to secure a Certificate of Compliance (COC) with the ERC for it is not a generation company, its motion for reconsideration should still be denied for failure to submit a provisional certificate of registration with the DOE to support its alleged VAT zero-rating for the fourth quarter of taxable year 2012.

***The Proceedings in the Court of Tax Appeals En Banc***

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[7] *Id.*, pp. 1276-1277.
[8] *Id.*, pp. 1291-1307.

On July 27, 2018, Petitioner filed the present "Petition for Review"[9].

On August 30, 2018, the Court issued a Resolution[10] which ordered Respondent to comment on the Petition for Review within ten (10) days from receipt.

On December 07, 2018, a Records Verification Report[11] was issued stating that Respondent has failed to file its comment. Thus, on January 17, 2019, a Resolution[12] was issued giving due course to the Petition for Review, and submitting the instant case for decision.

## Assignment of Errors

Petitioner raises the following grounds in support of its petition:

1. The Second Division erred in denying Petitioner's claim for refund on the ground that it failed to present a provisional certificate of registration with the DOE;

2. Petitioner should not be faulted in the delay in the issuance of its Certificate of Registration with the DOE since the delay is beyond the control of Petitioner and is solely attributable to DOE itself; and

3. The Second Division erred in denying Petitioner's claim for refund of its unutilized input VAT attributable to zero-rated sales for the fourth quarter of taxable year 2012.[13]

## Petitioner's Arguments

Petitioner mainly argues that the Certificate of Registration with the DOE is not a condition *sine qua non* for entitlement for refund of unutilized input VAT under RA No. 9513[14] or the Renewable Energy Act of 2008. The fiscal incentive of a RE Developer under the law subsisted provisionally, by operation of law, until the release of Petitioner's Certificate of Registration on April 25, 2013.

Moreover, the delay in the issuance of the Certificate of Registration as well as the non-issuance of the Provisional Certificate of Registration is beyond

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9 Rollo, pp. 1-14. Record shows that Petitioner received the Assailed Resolution on July 13, 2018; Docket, p. 1319.
10 *Id.*, pp. 40-41.
11 *Id.*, pp. 44-45.
12 *Id.*, pp. 149-150.
13 Rollo, pp. 4-5.
14 Approved December 16, 2008.

Petitioner's control and is solely attributable to DOE. Petitioner should not be prejudiced by the delay in action of the government agency tasked to issue the certification.

Lastly, Petitioner was able to comply with all the requisites for entitlement to a refund of unutilized input VAT under Section 112(A) of the NIRC of 1997, in relation to RA 9513 and Section 108(B)(7) of the NIRC of 1997.

## The Ruling of the Court

### *Timeliness of Petition*

The Court in Division issued the Assailed Resolution, denying Petitioner's "Motion for Reconsideration", on July 10, 2018. Petitioner received said Resolution on July 13, 2018. Pursuant to Rule 4, Section 2(a)(1)[15] in relation to Rule 8, Section 3(b)[16] of the Revised Rules of the Court of Tax Appeals[17] (RRCTA), Petitioner had fifteen (15) days from date of receipt of the resolution or until July 28, 2018 within which to file its petition for review.

On July 27, 2018, Petitioner timely filed the present "Petition for Review". Hence, the Court *En Banc* validly acquired jurisdiction.

We now proceed to the merits of the case.

### *The Court in Division correctly denied Petitioner's claim for refund*

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15 **Sec. 2.** *Cases within the jurisdiction of the Court en banc.* — The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

xxx xxx xxx

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture; x x x

16 **Sec. 3.** *Who may appeal; period to file petition.* — x x x

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (Rules of Court, Rule 42, sec. 1a)

17 A.M. No. 05-11-07-CTA, November 22, 2005.

The claim for refund of excess and unutilized input VAT is governed by Section 112[18] of NIRC of 1997, as amended, and this Court has time and again followed the criteria contained therein as its basis for its conclusion on whether to grant or deny claims for refund of the same nature. We reiterate the requisites as follows:

1) That the claim for refund was filed within the prescriptive period;
2) The taxpayer is VAT registered;
3) That there must be zero-rated or effectively zero-rated sales;
4) That input taxes were incurred or paid;
5) That such input taxes are attributable to zero-rated or effectively zero-rated sales; and
6) That the input taxes have not been applied against the output tax.

The Second Division found that Petitioner complied with the first and second requisites (*i.e.*, claim was filed within the prescriptive period and the taxpayer is VAT registered). Nonetheless, the court *a quo* ruled that Petitioner was not able to satisfy the third requirement.

Conversely, Petitioner posits that its sales for the fourth quarter of 2012 qualify for VAT zero-rating under RA No. 9513.

We analyze.

Section 15(g) of RA No. 9513 or the Renewable Energy Act of 2008, provides that the sale of fuel or power generated from renewable sources of energy by RE Developers shall be subject to zero percent (0%) VAT:

"CHAPTER VII

[18] SEC. 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 of 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: Provided, finally, That for a person making sales that are zero-rated under Section 108 (B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

GENERAL INCENTIVES

SECTION 15. *Incentives for Renewable Energy Projects and Activities.* – **RE Developers of renewable energy facilities**, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, **as <u>duly certified by the DOE</u>**, in consultation with the BOI, **shall be entitled to the following incentives**:

xxx xxx xxx

(g) Zero Percent Value-Added Tax Rate. – **The sale of fuel or power generated from renewable sources of energy** such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, **shall be subject to zero percent (0%) value-added tax (VAT)**, pursuant to the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337.

All RE Developers shall be entitled to zero-rated value added tax on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities.

This provision shall also apply to the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors."[19]

This is echoed in Part III, Rule 5, Section 13(G) of DOE Circular No. DC2009-05-0008[20] which implements Section 15(g) of RA No. 9513, *viz*:

**"PART III. INCENTIVES FOR RENEWABLE ENERGY PROJECTS AND ACTIVITIES**

**RULE 5. GENERAL INCENTIVES AND PRIVILEGES FOR RENEWABLE ENERGY DEVELOPMENT**

**SEC 13. Fiscal Incentives for Renewable Energy Projects and Activities**

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[19] *Emphasis and underscoring supplied.*
[20] Rules and Regulations Implementing Republic Act No. 9513, May 25, 2009.

<u>**DOE-certified**</u> **existing and new RE Developers of RE facilities**, including Hybrid Systems, in proportion to and to the extent of the RE component, for both Power and Non-Power Applications, **shall be entitled to the following incentives**:

xxx xxx xxx

**G. *Zero Percent Value-Added Tax Rate***

The following transactions/activities shall be subject to zero percent (0%) value-added tax (VAT), pursuant to the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337:

(a) Sale of fuel from RE sources or power generated from renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels;

(b) Purchase of local goods, properties and services needed for the development, construction, and installation of the plant facilities of RE Developers; and

(c) Whole process of exploration and development of RE sources up to its conversion into power, including, but not limited to, the services performed by subcontractors and/or contractors."[21]

However, as stated in the provisions above, the fiscal incentives granted under RA No. 9513, in particular the sale subject to zero percent (0%) VAT, is only available to an entity "duly certified" by the DOE as an RE Developer.

The question now is what "duly certified by the DOE" means. Section 26 of RA No. 9513 and Rule 5, Section 18(A) of DOE Circular No. DC2009-05-0008 sheds light on this:

"SECTION 26. *Certification from the Department of Energy.* – All **certifications required to qualify RE developers to avail of the**

[21] *Emphasis and underscoring supplied.*

**incentives provided for under this Act shall be issued by the DOE** through the Renewable Energy Management Bureau..."[22]

"**SEC 18. Conditions for Availment of Incentives and Other Privileges**

**A. Registration/Accreditation with the DOE**

**For purposes of entitlement to the incentives and privileges under the Act, existing** and new **RE Developers**, and manufacturers, fabricators, and suppliers of locally-produced RE equipment **shall register with the DOE**, through the Renewable Energy Management Bureau (REMB). The following certifications shall be issued:

*(1)* ***DOE Certificate of Registration*** – issued to an RE Developer holding a valid RE Service/Operating Contract.

For existing RE projects, the new RE Service/Operating Contract shall pre-terminate and replace the existing Service Contract that the RE Developer has executed with the DOE subject to the Transitory Provision in Rule 13, Section 39.

The DOE Certificate of Registration shall be issued immediately upon award of an RE Service/Operating Contract covering an existing or new RE project or upon approval of additional investment.

Any investment added to existing RE projects shall be subject to prior approval by the DOE."[23]

From the foregoing, in order to be "duly certified" as an RE Developer, an entity must secure a Certificate of Registration with the DOE as such. This is true even in the case of entities who are holders of valid and existing contracts on renewable energy resources awarded prior to the effectivity of RA No. 9513.[24]

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22 *Emphasis supplied.*
23 *Emphasis supplied.*
24 **RULE 13**

*Transitory and Other Provisions*

SECTION 39. *Transitory Provisions.* — **Benefits or incentives extended to RE Developers**, and manufacturers, fabricators, and suppliers of locally-produced RE equipment **under existing laws** not amended or withdrawn under this Act **shall remain in full force and**

In other words, an entity cannot avail the fiscal incentives under RA No. 9513 unless and until it is issued a Certificate of Registration as an RE Developer by the DOE.

In the case at bar, Petitioner presented two (2) Certificates of Registration issued by the DOE: (1) Registration No. GSC 2013-04-044 and (2) Registration No. GSC 2013-04-045, which serve as proof that it is an RE-Developer of geothermal energy resources located in Tiwi, Albay, and Makiling-Banahaw, Batangas and Laguna, respectively.

Yet, it must be emphasized that both registrations took effect only on April 25, 2013.[25] We agree therefore with the Second Division's conclusion that as of the fourth quarter of 2012, Petitioner "is not entitled yet...to any of the incentives under RA No. 9513, particularly the VAT zero-rating treatment of sale of power generated through geothermal energy"[26].

Even so, Petitioner avers that since it has an existing service contract with the government, it is deemed provisionally registered as an RE Developer, which shall subsist until the issuance of the two (2) DOE Certificates of Registration on April 25, 2013. In support thereof, Petitioner cites DOE Department Circular No. DC-2007-07-0011[27].

The Court is not persuaded.

We agree with Petitioner that DOE Department Circular No. DC-2007-07-0011 recognized that there are entities with existing development contracts with the government (for the exploration, development or utilization of RE resource). Additionally, the registration of said entities who are provisionally registered as an RE Developer shall subsist until the issuance of their DOE Certificate of Registration. To our mind however, Petitioner purposely left out in its citation the last sentence of the paragraph which stated the condition in order to be provisionally registered under said Department Circular.

Section 4(b)(ii), paragraph 2 of DOE Department Circular No. DC-2007-07-0011, in its entirety, reads:

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**effect**. No provision of the Act shall be taken as to diminish any right vested by virtue of existing laws, contracts, or agreements. **However, in order to qualify for the availment of the incentives provided under Chapter VII of the Act and this IRR, the RE Developer**, and manufacturers, fabricators, and suppliers of locally-produced RE equipment **shall be required to secure a certificate of registration** or accreditation **with the DOE**. (*Emphasis and underscoring supplied*).

25 Docket, Exhibits "P-6" to "P-7", pp. 859 and 897.

26 *Id.*, p. 1287.

27 Guidelines Governing a Transparent and Competitive System of Awarding Renewable Energy Service/Operating Contracts and Providing for the Registration Process of Renewable Energy Developers, July 12, 2009.

> "Any individual or juridical entity with a valid and existing service or development contracts and agreements with the DOE/Government for the exploration, development or utilization of RE resource shall be deemed provisionally registered as an RE Developer under the Act, which registration shall subsist until the issuance of DOE Certificate of Registration provided for under Section 18 of the IRR. **For this purpose, the DOE shall issue the corresponding <u>provisional</u> <u>certificate</u> <u>of</u> <u>registration</u>, pursuant to Section 39 of the IRR, upon receipt of the RE Developer's letter of intent for conversion to RE Contract**."[28]

Without a Certificate of Registration for the fourth quarter of 2012, the only way for Petitioner to be entitled to the fiscal incentives under RA No. 9513 is to present to this Court a provisional certificate of registration issued by the DOE. This, Petitioner failed to do. Hence, its argument that its sales for the fourth quarter of 2012 are subject to zero-rated VAT notwithstanding the absence of a Certificate of Registration, deserves scant consideration.

The entitlement or enjoyment of the fiscal incentives under RA No. 9513 is not automatic. The law and its implementing rules require *inter alia* that entities should be registered with the DOE as an RE Developer. The purpose of such requirement is for the said entities to prove their entitlement to the incentives they would avail. On the other hand, the failure of said entities to secure a Certificate of Registration from the DOE shall amount to forfeiture of said incentives for a particular taxable period.

Thus, the failure of Petitioner to secure the required Certificate of Registration or provisional certificate of registration from DOE for the fourth quarter of 2012 shall result in its non-enjoyment of the incentives under the law and will, instead, render its sales subject to 12% VAT under the NIRC of 1997, as amended.

Petitioner should be aware that actions for tax refund or credit, as in the instant case, are in the nature of a claim for tax exemption which is construed in *strictissimi juris* against the taxpayer. The burden is on the taxpayer to show that he has strictly complied with the conditions for the grant of the tax refund or credit. In the absence of a clear and convincing evidence in support of said claim, the right of the state to tax the petitioner prevails.[29]

Considering all these pronouncements, We find no cogent reason to reverse or modify the Assailed Decision and Assailed Resolution of the Court *a*

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[28] *Emphasis and underscoring supplied.*
[29] Coca-Cola Bottlers Philippines, Inc. v. Commissioner of Internal Revenue, G.R. No. 222428, February 19, 2018.

*quo.* Respondent's claim for refund or issuance of a TCC amounting to Php14,145,000.00 is groundless and without foundation.

**WHEREFORE**, premises considered, the instant Petition for Review is **DENIED**. The Decision dated March 21, 2018 and the Resolution dated July 10, 2018 of the Second Division in CTA Case No. 9048 are **AFFIRMED**.

**SO ORDERED.**

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

**WE CONCUR:**

**ROMAN G. DEL ROSARIO**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**CIELITO N. MINDARO-GRULLA**
Associate Justice

**CATHERINE T. MANAHAN**
Associate Justice

**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

**MARIA ROWENA MODESTO-SAN PEDRO**
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.

**ROMAN G. DEL ROSARIO**
Presiding Justice