REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8587

Members:

DEL ROSARIO, *Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

MAR 08 2017 ; 1:40 p.m.

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RESOLUTION

UY, *J.*:

Submitted for this Court's resolution, pursuant to the Resolution dated December 9, 2016, are the following:

1. Respondent's **Motion for Reconsideration (Re: Decision promulgated 19 September 2016)**, filed on October 6, 2016, with petitioner's **Comment *(on CIR's Motion for Reconsideration dated 6 October 2016)***, posted on November 14, 2016; and

2. Petitioner's **Partial Motion for Reconsideration (on the Honorable Court's 19 September 2016 Decision)**, posted on October 7, 2016, with respondent's **Comment/Opposition (Re: Motion for Reconsideration)**, filed on October 28, 2016.

The parties move for the reconsideration of the Decision promulgated on September 19, 2016 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the deficiency value-added tax assessment in the amount of ₱7,642,925,210.78 for taxable year 2009 is hereby **CANCELLED** and **WITHDRAWN**.
>
> **SO ORDERED**."

Respondent's Motion for Reconsideration

Respondent seeks reconsideration of the assailed Decision insofar as it ruled that petitioner is not subject to the deficiency value-added tax (VAT) assessment considering that it has sufficient input tax credits to cover its output tax liability.

In his Motion for Reconsideration, respondent prays for the Court to reconsider and set aside the assailed Decision and that another one be rendered ordering petitioner to pay the amount of ₱4,227,839,623.78 representing the 20% deficiency and delinquency interest for late payment until fully paid pursuant to Sections 248 and 249 of the 1997 National Internal Revenue Code (NIRC).

Respondent alleges that the amount of ₱14,009,651,700.16 reflected in petitioner's Quarterly VAT Returns for taxable year 2009, which was carried over to the First Quarter of 2010, was applied against petitioner's 2010 output tax liability as shown in respondent's Formal Letter of Demand against all of petitioner's internal revenue tax liabilities for 2010. Thus, respondent claims that the total input tax that should be applied against petitioner's output tax is ₱4,850,906.690.77, deducting the input tax carried over to the succeeding period of January to March 2010. Accordingly, based on respondent's computation, petitioner is still liable for deficiency VAT in the amount of ₱8,122,005,225.36.

Nevertheless, respondent avers that the amount of ₱8,127,574,215.40 was already paid by petitioner as evidenced by

Special Allotment Release Order (SARO) No. BMB-F-12-0012539 and SARO No. BMB-F-12-0035639, and that what is left to be settled are the penalties and interests as of November 30, 2012 in the amount of ₱4,227,839,623.78.

Respondent alleges that after receipt of the Preliminary Assessment Notice (PAN), petitioner requested for a tax subsidy from the Fiscal Incentives Review Board (FIRB) amounting to ₱4,712,488,628.40 representing the 12% VAT on the proceeds from the sale of generation assets amounting to ₱39,270,738,570.00 on a letter dated June 28, 2012. SARO No. BMB-F-12-0012539 dated June 29, 2012 was allegedly issued by the Department of Budget and Management (DBM) in favor of petitioner.

Respondent maintains that after evaluation and consideration of petitioner's protest to the PAN and the partial payment made to the VAT assessment, the deficiency VAT due was lessened from ₱9,663,536,901.05 to ₱7,642,925,210.78. Respondent alleges that since petitioner was not able to refute/rebut the audit findings on the other issues stated in the PAN, a Formal Letter of Demand (FLD) with Final Assessment Notice (FAN) dated July 20, 2012 was issued and served to petitioner.

Respondent also claims that petitioner requested again, in a letter dated December 28, 2012, for a tax subsidy from FIRB amounting ₱3,415,085,587.00, representing the basic VAT due; and that SARO No. BMB-F-12-0035639 dated December 28, 2012 was issued by the DBM in favor of petitioner.

Petitioner's act in paying the assessed VAT for the year 2009 is allegedly conclusive that the assessment was valid and that petitioner admits that it is liable to pay VAT. Hence, respondent concludes that petitioner cannot deny the validity of the VAT assessment.

On the contrary, petitioner, in its comment on respondent's motion for reconsideration, claims that petitioner's privatization of National Power Corporation's (NPC) assets is not subject to VAT.

The Court disagrees with respondent.

With regard to respondent's claim that the total allowable input tax that should be applied against petitioner's output tax is ₱4,850,906.690.77, deducting the input tax carried over to the succeeding period of January to March 2010, the Court finds the same bereft of merit.

As correctly ruled in the assailed Decision, it is improper for respondent to disallow the VAT overpayment reflected in the Fourth Quarter VAT Return because the tax benefit derived by petitioner from the carry-over of the said amount to taxable year 2010 redounds to the said succeeding year 2010. The pertinent portion of the assailed Decision is hereunder reiterated:

> "As for the input tax carried over to succeeding quarter amounting to ₱14,009,651,700.16 per Line 29 of the Fourth Quarter VAT Return, the Court could only surmise that the VAT overpayment carried over to the succeeding year was disallowed in order to recapture the tax benefit realized by petitioner in carrying the said amount to the succeeding year.
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> However, it was improper for respondent to disallow the said VAT overpayment because any tax benefit derived by petitioner from the carry-over of the said amount redounds to the succeeding year 2010. Since the tax benefit will be in the succeeding year, at most, petitioner may only be assessed in the said succeeding year.
>
> In sum, the Court finds petitioner not subject to the deficiency VAT assessed considering that it has sufficient input tax credits to cover its output tax liability, xxx"

If it is true that the excess input VAT was carried-over to the succeeding taxable year 2010, the tax benefit will be in the succeeding year, and petitioner, at most, may only be assessed in the said succeeding year, and not in 2009. Thus, the fact that petitioner carried-over the amount of ₱14,009,651,700.16 excess input VAT to 2010 should not affect the Court's determination of petitioner's VAT liability for 2009.

As to respondent's allegation that petitioner's act in paying the assessed VAT for the taxable year 2009 is conclusive that the assessment was valid and that petitioner admits that it is liable to pay VAT, the Court notes that the documents supporting the said allegations were previously denied admission by the Court as per Resolution dated December 18, 2014[1]. Also, respondent failed to interpose any provision of law from which such conclusion can be based.

Furthermore, even if the Court considers the above allegation and testimony of respondent's witness, it must be emphasized that the fact alone that petitioner paid the VAT is not automatically equivalent to an admission of the validity of the assessment. In fact, a perusal of the protest[2] to the FAN clearly shows that petitioner assailed the validity of the assessment in detail.

Besides, it must be noted that an appeal from the decision of respondent does not suspend the payment, levy, distraint, and/or sale of any property of the taxpayer for the satisfaction of the tax liability as provided under Section 11 of RA No. 1125, as amended[3].

Hence, petitioner cannot be faulted for paying the assessed amount while at the same time contesting the validity of the assessment by way of filing the protest before respondent and the instant appeal before this Court.

At this juncture, it must be pointed out that it is true that tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of the taxpayer is made. **If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is**

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[1] Docket, vol. II, pp. 890-891.

[2] Exhibit "P-2", Docket, Vol. II, pp. 476-486.

[3] SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal. - xxx*

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No appeal taken to the CTA from the decision of the Commissioner of Internal Revenue or the Commissioner of Customs or the Regional Trial Court, provincial, city or municipal treasurer or the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture, as the case may be, shall suspend the payment levy, distraint, and/or sale of any property of the taxpayer for the satisfaction of his tax liability as provided by existing law: xxx.

correct, and that in preparing the same, the BIR personnel regularly performed their duties.[4]

However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a "naked assessment," i.e., without any foundation character, the determination of the tax due is without rational basis. In such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. **Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.**[5]

In this case, the Court already found that VAT should be imposed on the transactions subject of the petition. However, petitioner presented sufficient evidence to prove that the excess input VAT for the taxable year 2009 is more than enough to offset its output VAT liability for the said period. Thus, petitioner was able to overturn the presumption of correctness of respondent's VAT assessment.

Petitioner's Partial Motion for Reconsideration

Petitioner moves for the reconsideration of the assailed Decision only as to the findings that its privatization activities and transaction incidental thereto are subject to VAT. Petitioner alleges that its privatization of NPC assets and all transactions incidental thereto do not constitute sale in the ordinary course of trade or business and therefore not subject to VAT.

According to petitioner, respondent issued BIR Ruling No. 020-2002 on May 13, 2002 to address the various tax issues pertinent to the privatization of NPC as well as the tax incidence relative to transactions of its successors-in-interest.

Petitioner claims that respondent itself explicitly stated in the BIR Ruling that petitioner's privatization activities are exempt from

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[4] *Commissioner of Internal Revenue vs. Hantex Trading, Inc.,* G.R. No. 136975, March 31, 2005.
[5] *Ibid.*

VAT precisely because its sale of NPC's properties were not undertaken in the course of trade or business, but rather is a consequence of its mandate under the Electric Power Industry Reform Act of 2001 (EPIRA).

In addition, petitioner argues that its reliance in good faith on BIR Ruling No. 020-2002 was not applied in the assailed Decision as it stated the pertinent applicable provision is Sections 106 and 108 of the NIRC of 1997, as amended by Republic Act (RA) No. 9337 or the E-VAT Law. However, petitioner points out that there was no express mention in the E-VAT law of the privatization of NPC's assets.

Petitioner explains that the E-VAT law, which imposed VAT on the sale of electricity, and BIR Ruling No. 020-2002 which involves the privatization activities of petitioner, clearly deal with different subject matters with distinct features. Petitioner avers that the law considers sales of electricity by generation companies as transactions made in the ordinary course of business, while the law does not consider sale of generation assets as transactions made in the ordinary course of business. Thus, petitioner concludes that as to petitioner's privatization, BIR Ruling No. 020-2002 is applicable, and not the E-VAT Law.

Even assuming that the privatization of assets became subject to VAT due to the enactment of the E-VAT law, petitioner mentions that respondent could not retract its disquisition in BIR Ruling No. 020-2002 affirming that the privatization is considered an isolated transaction and is not conducted in pursuit of any commercial or profitable activity, including transactions incidental thereto.

Petitioner adds that in the case of *Commissioner of Internal Revenue vs. PSALM*[6], the Third Division of the Supreme Court affirmed in a Resolution issued on August 31, 2016 that PSALM should not be subject to VAT.

Respondent opposes the foregoing allegations, and avers that the NPC's tax exemption was amended by Section 24 of RA No. 9337, or the EVAT Law, which expressly repealed Section 13 of RA No. 6395, or the NPC charter, insofar as NPC's exemption from VAT is concerned. Thus, respondent claims that the exemption privilege

[6] G.R. Nos. 221215 & 221221, Resolution dated August 31, 2016.

accorded to petitioner under BIR Ruling No. 20-2002 is also deemed abandoned.

Respondent further mentions that the provision of Section 105 of the NIRC of 1997, as amended, in relation to Section 24 of RA No. 9337, expressly repealed Section 13 of RA No. 6395, or the NPC Charter, insofar as NPC's exemption from VAT is concerned.

Respondent explains that Section 105 of the NIRC of 1997, as amended, clearly provides that incidental transactions, such as the subject matter of the petition, are well within the definition of the phrase "in the course of trade or business". Thus, the said transactions are subject to VAT.

After a careful scrutiny of the foregoing, the Court finds that the same are mere rehash of the averments contained in both parties' memoranda[7] which were already addressed and sufficiently passed upon in the assailed Decision.

To reiterate the Court's ruling that petitioner is subject to VAT, the relevant portions of the assailed Decision is hereunder quoted:

> "From the foregoing, it is clear that the primary purpose for the creation of petitioner is for the **orderly sale, disposition and privatization of NPC generation assets, real estate and other disposable assets**, and IPP contracts with the **objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner**.
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> In this regard, it must be highlighted that petitioner's primary purpose of pursuing the orderly sale, disposition and privatization of NPC generation assets, real estate and other disposable assets and IPP contracts is to liquidate all NPC financial obligations and stranded contract costs in an **OPTIMAL MANNER**, meaning, that it not be for a loss but optimally for a gain.

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[7] Petitioner's Memorandum, docket, vol. II, pp. 935-958; Respondent's Memorandum, docket, vol. III, pp. 1043-1061.

Accordingly, the proceeds from petitioner's sale of generation assets, transfer of coal, diesel and other supplies to IPPs and the Miscellaneous Income derived from activities related to or incidental to the privatization activities of petitioner, being part of its regular conduct or economic activity, which is the primary purpose for which it was created, were properly subjected to VAT.

As to the allegation that the BIR Ruling No. 020-2002 correctly held that petitioner's sale of assets is not being conducted in pursuit of any commercial or profitable activity as to fall within the ambit of a VATable transaction under Sections 105 and 106 of the NIRC, the said ruling cannot be applied in this case.

The pertinently applicable provisions in this case, Sections 106 and 108 of the NIRC of 1997, as amended by RA No. 9337, state:

xxx xxx xxx

The foregoing show that with the enactment of RA No. 9337 on July 1, 2005, the Electric Power Industry was placed under the VAT system, and the sale of electricity by generation companies, transmission and distributions companies became subject to VAT on the basis of Sections 106 and 108 of the Tax Code, as amended.

Clearly, the enactment of R.A. No. 9337 subjected the electric power industry's main business activities Value Added Tax or VAT. Therefore, by classifying petitioner's income from its main business activity as subject to VAT, it follows that its incidental income shall likewise be subject to VAT.

In other words, RA No. 9337 now subjects petitioner's income from its main and incidental activities to VAT. Accordingly, BIR Ruling No. 20-2002, which was issued prior to the enactment of RA No. 9337, cannot be applied in this case.

Considering that Section 106 imposes VAT on 'all kinds of goods and properties' sold in the Philippines, the proceeds and income derived by petitioner from its sale of generation assets and from transfer of coal, diesel and other supplies to IPP should be properly subjected to VAT." (*Citations omitted*)

As to the Resolution of the Supreme Court in the case of *Commissioner of Internal Revenue vs. PSALM*[8] cited by petitioner, the Court finds that the same cannot be applied in this case. Significantly, in the case of *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*[9], the Supreme Court explicitly held that a minute resolution is not a binding precedent. The pertinent portion of the Supreme Court's ruling reads:

"***A minute resolution is not a binding precedent***

At the outset, this Court's minute resolution on *Mirant* is not a binding precedent. The Court has clarified this matter in *Philippine Health Care Providers, Inc. v. Commissioner of Internal Revenue* as follows:

It is true that, although contained in a minute resolution, our dismissal of the petition was a disposition of the merits of the case. When we dismissed the petition, we effectively affirmed the CA ruling being questioned. As a result, our ruling in that case has already become final. When a minute resolution denies or dismisses a petition for failure to comply with formal and substantive requirements, the challenged decision, together with its findings of fact and legal conclusions, are deemed sustained. But what is its effect on other cases?

With respect to the same subject matter and the same issues concerning the same parties, it constitutes *res*

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[8] G.R. Nos. 221215 & 221221, Resolution dated August 31, 2016.
[9] G.R. No. 188550, August 19, 2013.

> ***judicata*. However, if other parties or another subject matter (even with the same parties and issues) is involved, the minute resolution is not binding precedent.** Thus, in *CIR v. Baier-Nickel*, the Court noted that a previous case, *CIR v. Baier-Nickel* involving the same parties and the same issues, was previously disposed of by the Court thru a minute resolution dated February 17, 2003 sustaining the ruling of the CA. Nonetheless, the Court ruled that the previous case 'ha(d) no bearing' on the latter case because the two cases involved different subject matters as they were concerned with the taxable income of different taxable years."

In *Commissioner of Internal Revenue vs. PSALM*[10] cited by petitioner, having the same parties and the same issues as the instant case, was previously disposed of by the Supreme Court by way of a minute resolution dated August 31, 2016 affirming the ruling of the CTA. However, the said case and the instant petition involve different subject matters as they pertain to different taxable years.

Thus, following the above-mentioned jurisprudence, the ruling in *Commissioner of Internal Revenue vs. PSALM*[11] has no bearing on the instant case as these cases involve different subject matters.

WHEREFORE, finding no cogent reason to disturb the ruling in the assailed Decision, respondent's **Motion for Reconsideration (Re: Decision promulgated 19 September 2016)** and petitioner's **Partial Motion for Reconsideration (on the Honorable Court's 19 September 2016 Decision)** are **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[10] G.R. Nos. 221215 & 221221, Resolution dated August 31, 2016.
[11] *Ibid.*

WE CONCUR:

(*Inhibited*)
ROMAN G. DEL ROSARIO
Presiding Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice