REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

LUZON HYDRO CORPORATION,
Petitioner,

~ *versus* ~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 420
(CTA CASE No. 6669)

Present:

Acosta, *PJ,*
Castañeda,
Bautista,
Uy,
Casanova, *and*
Palanca-Enriquez, *JJ.*

Promulgated:

MAY 0 5 2009 Apolinario 4:35 p.m.

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DECISION

ACOSTA, *PJ:*

This is an appeal, by way of a Petition for Review, filed by petitioner pursuant to Section 18 of Republic Act No. 9282, praying that the Decision dated May 2, 2008 rendered by the Court of Tax Appeals Second Division[1] in CTA Case No. 6669 as well as the Resolution of the same Court dated September 5, 2008 be reversed and set aside; and that respondent be ordered to grant the claim cash refund or issuance of tax credit certificate in the amount of P2,920,665.16 representing its unutilized input tax attributable to zero-rated sales of power generation services for 2001.

[1] Herein referred as Court *a quo*.

The pertinent facts which were aptly narrated in the Decision by the Court *a quo* are hereunder reproduced:

> "Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Philippines, with principal office address at Poblacion Alilem, Ilocos Sur. It is registered with the Bureau of Internal Revenue as a VAT taxpayer under Taxpayer Identification Number (TIN) 004-266-526.
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> Respondent is the Commissioner of the Bureau of Internal Revenue, who is duly appointed and empowered to perform the duties for refund or tax credit as provided by law, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City, where he may be served with summons and other court processes.
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> Petitioner was formed by a consortium of four corporations, namely: Northern Mini Hydro Corporation, Aboitiz Equity Ventures, Inc., Ever Electrical Manufacturing, Inc. and Pacific Hydro Limited. Pursuant to a Power Purchase Agreement with NPC, the electricity produced by petitioner in its operation of the Bakun Hydroelectric Power Plant will be sold solely to the NPC.
>
> Relative to its sale of electricity to NPC, petitioner has been granted by the respondent an approved Application/Certificate for Zero Rate for VAT purposes for the following periods:
>
> 3.1 For January 1, 2000 to December 31, 2000 – filed with RDO2 Vigan
> 3.2 For February 1, 2000 to December 31, 2000 with Certificate No. Z-162-2000
> 3.3 For January 2, 2001 to December 31, 2001 with Certificate No. Z-2001-269
>
> For the four quarters of 2001, petitioner allegedly incurred input VAT in the amount of P9,795,427.89 on its domestic purchases of goods and services which were used in its generation and sale of electricity to NPC.
>
> In its amended VAT returns for the four quarters of 2001, petitioner declared the alleged input VAT amount of P9,795,427.89, as follows:

Exhibit	Date Filed	Period Covered	Input VAT
F	May 25, 2001	1st qtr-2001	P1,903,443.96
I	June 23, 2001	2nd qtr-2001	2,166,051.96
L	June 23, 2002	3rd qtr-2001	1,598,482.39
O	July 24, 2002	4th qtr- 2001	4,127,449.58
			P9,795,427.89

> On November 26, 2001, petitioner filed a written claim for refund/application for Tax Credit Certificate of its unutilized input VAT for the period from October 1999 to October 2001 in the amount of P14,557,004.38.
>
> On July 24, 2002, petitioner filed an amended written claim for refund/application for Tax Credit Certificate of its unutilized input VAT to cover the period from October 1999 to May 2002 for a total amount of P20,609,047.56.
>
> The Bureau of Internal Revenue through Revenue Examiner Felicidad Mangabat, Revenue Officer III of RDO No. 2 Vigan City has already concluded an investigation and made a recommendation over the claim for refund of petitioner for

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> the period January 1, 2001 to December 31, 2001 contained in a report dated August 19, 2002.
>
> The Commissioner of Internal Revenue has not yet finally acted on the claim for refund of the petitioner despite the aforementioned recommendation. Hence, on April 14, 2003, petitioner filed a Petition for Review before this Court praying for the refund or issuance of a tax credit certificate corresponding to its alleged unutilized input VAT payment for the four quarters of 2001 in the amount of P9,795,427.88.
>
> While the case was pending trial, respondent, through the Assistant Commissioner for Assessment Services, informed petitioner in a letter dated March 3, 2005, that the subject claim for refund has been granted in the amount of P6,874,762.72, net of disallowances of P2,920,665.16. Enclosed in the said letter is the Tax Credit Certificate (TCC No. 00002618) in the amount of P6,874,762.72.
>
> Due to the partial grant of refund, petitioner filed on May 3, 2005, a Motion for Leave of Court to Amend Petition for Review. The said motion was granted in open court on May 11, 2005 and the Amended Petition for Review praying for the reduced amount of P2,920,665.16, was admitted as part of the records of this case. Furthermore, respondent was directed to file Supplemental Answer within ten (10) days therefrom.
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> As no Supplemental Answer was filed within the given period, the Answer filed on May 16, 2003 was considered as respondent's answer to petitioner's Amended Petition for Review.
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> To support its claim, petitioner presented testimonial and documentary evidence. Respondent, on the other hand, submitted the case for decision based on the pleadings as there was no report of investigation in this case.
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> On May 2, 2007, the case was submitted for decision sans the memorandum of respondent."
>
> *(References omitted)*

In the Decision dated May 2, 2008, the Court *a quo* denied petitioner's claim input tax of P2,920,665.16 due to its failure to prove that it had effectively zero-rated sales. The said Court ruled that the sale of electricity by petitioner to NPC is subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the National Internal Revenue Code (NIRC) of 1997, however, since there is no zero-rated sales for 2001 considering that there are no amount of zero-rated sales declared in petitioner's VAT returns for the four quarters of 2001 and that petitioner did not submit any VAT official receipt proving actual receipt of payments for services rendered to NPC, the claimed input VAT allegedly attributable thereto cannot be refunded. The dispositive portion of the questioned Decision reads:

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"**WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED."

Undaunted, petitioner filed a Motion for Reconsideration on May 21, 2008 arguing that Tax Credit Certificate (TCC No. 00002618) issued by the Assistant Commissioner established that its sale of electricity qualify as effectively zero-rated; the post audit of TCC is a duty reposed on respondent and the Court cannot question *moto proprio* the TCC not unless the findings of the post audit has been raised before the Court; the Court failed to rule on the sole issue of whether or not it is entitled to the unapproved balance of its claim for refund/issuance of tax credit certificate in the amount of P2,920,665.16; and the Court has exceeded an authority to rule on the issue of whether it generated effectively zero-rated sale since the same has already been resolved at the administrative level given the fact that the Assistant Commissioner had already granted a partial refund through the issuance of TCC.

In the September 5, 2008 Resolution, the Court *a quo* denied the said motion for lack of merit. It was ruled that while the BIR had already issued a TCC covering the amount of P6,874,762.72, the Court cannot grant petitioner's claimed input tax of P2,920,665.16. Accordingly, the presumption of regularity in the issuance of a TCC in the amount of P6,874,762.72 cannot prevail considering that petitioner has failed to submit any document showing a breakdown of the input tax claim disallowed by the BIR to delineate the same from the approved claim, and the available documents presented by petitioner do not establish the existence of effectively zero-rated sales for 2001.

It was likewise ruled that the issue of whether or not petitioner was able to establish its alleged effectively zero-rated sales is a question interwoven or interrelated to the issue of its entitlement to the claim amount of P2,920,665.16. Accordingly, an unassigned error closely related to an error properly assigned, or upon which a determination of the question raised by the error properly assigned is dependent, will be considered by the appellate court notwithstanding the failure to assigned it as an error.

Hence, petitioner's present recourse substantially reiterating the arguments raised in its Motion for Reconsideration before the Court *a quo*.

The issue of this case is whether or not petitioner is entitled to its claim for refund or issuance of a tax credit certificate in the amount of P2,920,665.16 representing the disallowed portion of the alleged unutilized input tax it had paid on domestic purchases of goods and services that were used in the generation and sale of electricity to NPC for the four quarters of 2001.

Refunds or tax credits of input tax attributable to zero-rated sales is governed by Section 112 (A) of the National Internal Revenue Code (NIRC) of 1997, *viz*:

> "Section 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 or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributable to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

As ruled by the Court *a quo*, petitioner has no zero-rated sales, which is one of the important requirement for the entitlement of refund or tax credit of input tax under the aforementioned provision of the 1997 NIRC. Petitioner's thesis that the Court should no longer look into the compliance of this requirement considering that there is already a tax credit certificate issued in its favor is erroneous. Such tax credit certificate cannot be used as evidence to prove petitioner's compliance with the requirements under Section 112(A) of the NIRC as regards its claim input tax of P2,920,665.16 which was denied (since only P6,874,762.72 was covered by the tax credit certificate out of the total claim of P9,795,427.88) by respondent. In one case,[2] the Supreme Court had an occasion to rule on the nature of the proceedings in the Court of Tax Appeals, *viz*:

> "Petitioner's contention that non-compliance with Revenue Regulations 3-88 could not have adversely affected its case in the CTA indicates a failure on its part to appreciate the nature of the proceedings in that court. First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an appeal by way of petition for review of a previous, unsuccessful administrative claim. Therefore, as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency a quo did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit. Second, cases filed in the CTA are litigated de novo. Thus, a petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required from the successful prosecution of an administrative claim."

The pronouncement of the High Court is very clear. Petitioner must have convinced the Court that the Bureau of Internal Revenue had no reason to deny its claim input tax of P2,920,665.16 by not only showing that it is entitled under the law to the grant of its claim but should have likewise submitted evidence, including whatever evidence required from the successful prosecution of an administrative claim. Petitioner could not therefore insist that the Court is devoid of any authority to determine the existence of its alleged zero-rated sales notwithstanding the fact that the Assistant Commissioner had already issued a tax credit certificate.

The other argument of petitioner that even if the tax credit certificate will not be used as evidence, it was able to prove that it has zero-rated sale as shown in its financial statements and income tax returns quoting the letter opinion of Regional Director Rene Q. Aguas that the statements and the return are considered sufficient to establish that it generated zero rated sale of electricity is bereft of merit. As found by the Court *a quo*, the letter opinion refers to taxable year 2000, while the instant case covers taxable year 2001; hence, cannot be given credence. Even assuming for the

[2] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, GR No. 145526, March 16, 2007.

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sake of argument that the financial statements, the return and the letter opinion relates to 2001, the same could not be taken plainly as it is because there is still a need to produce the supporting documents proving the existence of such zero-rated sales, which is wanting in this case.

Considering that there are no zero-rated sales to speak of for taxable year 2001, petitioner is, therefore, not entitled to a refund of P2,920,665.16 input tax allegedly attributable thereto since it is basic requirement under Section 112(A) of the NIRC that there should exists a zero-rated sales in order to be entitled to a refund of unutilized input tax.

It is settled that tax refunds, like tax exemptions, are construed strictly against the taxpayer and that the claimant has the burden of proof to establish the factual basis of its claim for tax credit or refund.[3] Failure in this regard, petitioner's claim must, therefore, fail.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

[3] Silicon Philippines, Inc. vs. Commissioner of Internal Revenue, CTA EB Case No. 298, January 18, 2008 *citing Citibank, N.A. vs. Court of Appeals and the Commissioner of Internal Revenue, 280 SCRA 459.*

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 Justice