REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SOUTHERN ENERGY QUEZON, INC.
[formerly HOPEWELL POWER
(PHILIPPINES) CORPORATION),
Petitioner,

- versus -

C.T.A. CASE NOS. 5933
& 5984

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Promulgated:

JAN 15 2002

x - x

DECISION

This consolidated case seeks the refund of alleged unutilized input value-added tax (VAT, for brevity) on domestic purchases of goods and services in the total amount of P21,830,341.61 broken down as follows:

CTA Case No.	Period Involved	Amount
5933	Third Quarter of 1997	P12,055,652.81
5984	Fourth Quarter of 1997	9,774,688.80
T o t a l		P21,830,341.61

These two (2) cases were resolved to be consolidated pursuant to the order given in open court on March 7, 2000, upon written motion of Petitioner's counsels (see Resolution dated March 10, 2000, CTA records, p. 66).

The facts of this consolidated case are stated as follows:

Petitioner is a corporation duly existing under and by virtue of the laws of the Philippines with principal office address located in Pagbilao Grande Island, Pagbilao, Quezon. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate, Transfer (ROT) Scheme. It is registered with the Bureau of Internal Revenue as a VAT taxpayer with Certificate of Registration bearing RDO Control No. 96-600-002498 (Exhibit A). It was originally registered with the Securities and Exchange Commission under the name "Hopewell Power (Philippines), Corporation" (Exhibit C-2).

On February 27, 1996, Petitioner filed with the BIR Revenue District Office No. 60 an Application for Effective Zero Rating of its sales of services to National Power Corporation for the building and operation of the latter's power station under the Build Operate Transfer (BOT) scheme (Exhibits B, B-1, and B-2). The inaction of the said office on its application compelled Petitioner to seek a confirmatory ruling with the VAT Review Committee of the BIR National Office on January 28, 1999, with respect to the question of whether or not the energy and capacity fees it received from NPC for the supply of electricity under the BOT scheme are effectively zero rated for VAT purposes pursuant to Sections 106(A)(2)(c) and 108(B)(3) of the 1997 Tax Code (Exhibits C, C-1, and C-2)).

On May 13, 1999, Petitioner received VAT Ruling No. 052-99 from the Respondent containing the information that based on the Memorandum issued by the Secretary of Finance dated January 26, 1998, the supply of electricity of Petitioner to NPC shall be subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the National Internal Revenue Code of 1997 (see paragraph 8, Joint Stipulation of Facts, CTA Case No. 5984, CTA records, p. 54).

For the third and fourth quarters of 1997, Petitioner seasonably filed its quarterly Value-Added Tax Returns on October 20, 1997 and January 20, 1998 (Exhibits "E-9", "E-10", and p. 151, CTA records). These VAT returns were respectively amended on October 22, 1999 and November 25, 1999, reflecting total zero rated sales in the amount of P3,490,778,282.58 for the third and fourth quarters of 1997 with the corresponding aggregate input taxes in the amount of P21,830,341.61 for the same period (Exhibits "E", "E-2", "E-3", "E-6", "F", "F-2", "F-3",and "F-5").

On June 30, 1999, Petitioner filed its administrative claim for refund with RDO No. 60 of the Bureau of Internal Revenue believing that its sales of services to the NPC are subject to VAT at 0% hence it is entitled to the refund of unutilized input VAT attributable thereto (Exhibits "D" and "D-1").

The inaction of Respondent on its claim for refund compelled Petitioner to file the instant petitions for review on September 29, 1999 and December 28, 1999 in order to toll the running of the two-year prescriptive period under the law. The petition for review for the third quarter of 1997 was docketed as CTA Case No. 5933 while the petition for review for the fourth quarter of 1997 was docketed as CTA Case No. 5984.

The issues to be resolved by the Court as enumerated in Petitioner's memorandum are as follows:

> 1. Whether or not the power generation services rendered by Petitioner for supply to NPC are subject to zero percent (0%) VAT pursuant to Section 108(B)(3) of the Tax Code of 1997 [formerly Section 102(b)(3) of the Old Tax Code];
>
> 2. Whether or not Petitioner has unapplied or unutilized creditable input VAT for the third and fourth quarters of 1997 arising from its domestic purchases of goods and services amounting to P12,055,652.81 and P9,774,688.80, respectively, that can be a proper object of a claim for refund pursuant to Section 112(A) of the Tax Code of 1997 [formerly Section 106(a) of the Old Tax Code];
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> 3. Whether or not the said creditable input VAT for the third and fourth quarters of 1997 were carried over to the succeeding taxable

quarter(s) and applied against any output VAT liability of the Petitioner for the said period; and

4. Whether or not Petitioner's claim for refund were substantiated by documentary evidence.

Anent the first issue, Petitioner asserts that the services it rendered to the National Power Corporation are subject to 0% VAT pursuant to Section 102(b)(3) of the Tax Code, as amended, quoted, thus:

> **SEC. 102.** *Value-added tax on sale of services and use or lease of properties.* – (a) xxx
>
> (b) *Transactions subject to zero-rate.* – The following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> (1) xxx
>
> (2) xxx
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero rate.

Based on the foregoing provision, Petitioner now seeks the refund of input VAT it paid during the period July 1, 1997 to December 31, 1997 in accordance with Section 106(a) of the same code which provides:

> **SEC. 106**. *Refunds or tax credits of creditable input tax.* - (a) 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; xxx"

On the other hand, Respondent argues that Petitioner is not entitled to the refund because of its failure to present an approved application for zero-rating. He cites as basis this Court's ruling in the case of **ABB Power Generation Ltd. vs. Commissioner of**

Internal Revenue, CTA Case No. 5270, dated March 3, 1999[1]. Pertinent portions of the said decision are quoted as follows:

> Moreover, granting *arguendo*, that petitioner's sale of services to the NPC are considered effectively zero-rated sales under Section 102(a)(3) of the Tax Code, supra, nevertheless, this Court has to deny the instant claim for refund as petitioner failed to comply with Section 8(d) of Revenue Regulations No. 5-87 which requires that any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application with the Commissioner of Internal Revenue justifying the imposition of zero-rate on said transactions. Quoted hereunder is Section 8(d) of Revenue Regulations No. 5-87, thus:
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> > (d) Application for zero rate. – Any person claiming that its sales of goods or services are effectively zero-rated under Sections 100 and 102 shall file an application in a form prescribed therefor with the Commissioner of Internal Revenue justifying the imposition of zero-rate on the said transactions. Upon approval, his status as a zero-rated taxpayer shall remain valid until revoked.
>
> (F)ailure to get an approval from the Commissioner for a zero-rating classification will make the said sale of services by petitioner to NPC an EXEMPT transaction under paragraph (u) of Art. 103 of the Tax Code, thus, petitioner shall not be entitled to the refund of any input tax it paid on its purchase of goods and services during the period in question.

Records affirmatively show that Petitioner failed to secure from the Bureau of Internal Revenue an approved application for zero-rating. In fact, in its Memorandum, Petitioner admitted that such requirement is necessary for its claim for refund to prosper (paragraph 2, CTA records, p. 277). However, Petitioner begged the indulgence of this Court to consider the peculiar circumstances surrounding the present case.

After a careful review of the arguments of both parties, we rule in favor of Petitioner.

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[1] With Entry of Judgment, dated March 24, 1999.

In the case of **Ernesto M. Maceda vs. Hon. Catalino Macaraig, G. R. No. 88291, May 31, 1991,** the total exemption of National Power Corporation (NPC) from all kinds of taxes whether direct or indirect was already settled by the Supreme Court. The NPC's exemption from all kinds of taxes was further elucidated in the High Court's Resolution dated June 8, 1993 resolving the same issue raised in the motion for reconsideration in this manner, thus:

> A chronological review of the NPC laws wil' show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes – direct or indirect.
>
> One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$4 Billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved.

In the light of the aforementioned decision, the Secretary of the Department of Finance issued a Memorandum dated January 28, 1998, addressed to the Commissioner of Internal Revenue, upholding the ruling of the Supreme Court with respect to the total exemption of NPC from all kinds of taxes and further ruled that purchases by NPC of electricity from independent power producers are subject to VAT at 0%. Pertinent portions of said memorandum read as follows:

> As explained by the Supreme Court, the rationale for the NPC's tax exemption is to ensure cheaper power. If the BIR's recent view is to be implemented, the VAT, being an indirect tax, may be passed on the by seller of electricity to NPC. Effectively, this means that electricity will be sold at a higher rated to the consumers. Estimates show that a 10% VAT on electricity which is purchased by NPC from its independent power producers will increase power cost by about P109.4 million a month or about P1.30 billion a year. The effect on the consumer is an additional charge of P0.059 per kilowatt-hour. The recognition of NPC's broad privilege will inure to the ultimate benefit of the Filipino consumer.

> In view of the foregoing and using the power of review granted to the Secretary of Finance under Section 4 of Republic Act No. 8424, the DOF upholds the ruling of the Supreme Court that the NPC is exempt under its charter and subsequent laws from all direct and indirect taxes on its purchases of petroleum products and electricity. Thus, the purchases by NPC of electricity from independent power producers are subject to VAT at zero-rate. (Underlining supplied).

The affirmations of both the Supreme Court and the Secretary of Finance regarding NPC's exemption from all kinds of taxes should be enough bases for the Revenue District Officer of RDO No. 51 to approve the pending application of Petitioner. However, the said office chose to be silent on the matter (probably) because its approval would result to the granting of Petitioner's claim for refund.

We are not unaware of the fact that Petitioner failed to secure an approved application for effective zero-rating with RDO No. 51 of Pasay City. However, we believe that the inaction of the said office regarding the application should not be taken against Petitioner. In fact, in numerous VAT and BIR rulings, the Respondent had already acknowledged that purchases of NPC of electricity from independent power producers are subject to VAT at zero-rate (VAT Ruling Nos. 015-99, 022-99, 052-99, 067-99, 018-00, BIR Ruling Nos. DA-247-04-19-99, DA-632-11-10-99 and DA209-04-04-99). To the Court's mind, the admission of Respondent regarding the issue qualifiedly approved all the pending applications for effective zero-rating filed with any district or regional offices of the Bureau of Internal Revenue considering that Respondent had already expressed its decision over the matter. Moreover, Respondent being the agency head of the Bureau of Internal Revenue has the authority and supervision over all district and regional offices of the bureau hence any actions, rulings or pronouncements made by him can be adopted by the District Officers or Regional Directors with respect to resolving similar issues. Therefore, the payments received by Petitioner for the services rendered in generating and selling of electricity to NPC are subject to VAT at zero percent.

In the Court's resolution in the case entitled **Mirant (Navotas II) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5911 promulgated on December 12, 2001**, we ruled that the absence of an approved application for effective zero-rating under such peculiar circumstances, should not be a deterrent to the claim for refund and we quote:

> "We note that as early as March 1, 1996, Petitioner filed with Respondent's Revenue District Office (RDO) No. 51 Pasay City an Application for Effective Zero Rating. However, up to this time, Respondent has failed to act upon said application. We believe that if Respondent had a valid ground to disapprove the application, he would have done so swiftly instead of "sitting on" the application for an interminable length of time to the detriment of the taxpayer's rights.
>
> With this in mind, this Court has decided to study the factual aspects of the claim for refund instead of dismissing the same based on a technicality." (Underscoring supplied)

The legal issue having been settled, we shall now proceed to the factual aspects of the case which are the remaining issues at bar.

Records show that Petitioner received capacity and energy fees from the National Power Corporation for the period July to December 1997 in the aggregate amount of P3,490,778,282.58 (Exhibits Q-4 and R-3). The fees were all supported by invoices or official receipts and were declared in the respective third and fourth quarterly VAT returns (Exhibits O-1 to O-43, P-1 to P-47, Q-1, and R-1). Since the services of Petitioner are subject to VAT at 0% based on the aforementioned rulings, it is therefore entitled to the refund of input taxes attributable thereto. However, Petitioner must still prove its claimed input taxes in the total amount of P21,830,341.61 by valid VAT invoices and official receipts.

Based on the evidence submitted by Petitioner which were already examined by the commissioned independent CPA, Mr. Ruben R. Rubio and audit partner of SGV & Company, input taxes in the sum of P353,927.92 should be disallowed based on the following reasons: (Exhibit L)

Findings	3rd Quarter	4th Quarter	Total
I. Input Taxes on Local Purchases of Services			
1. Supported by VAT Invoices, not VAT ORs (*Annex A*)	P 296,291.59		P 296,291.59
II. Input Taxes on Local Purchases of Goods			
1. Supported by VAT ORs, not VAT Invoices (*Annex B*)		51,575.00	51,575.00
2. Supported by Debit Note, not VAT Invoice (*Annex C*)		2,594.82	2,594.82
III. Input Taxes on Local Purchase of Goods and Services Without Supporting Documents (*Annex D*)		3,466.51	3,466.51
Total	**P296,291.59**	**P 57,636.33**	**P353,927.92**

After verification of the above report, the Court finds the same to be in order. In addition, input taxes in the amount of P2,100.00 from the supplier Camson Enterprises for the third quarter of 1997 should be disallowed for failure of Petitioner to present the supporting invoice or official receipt. The aforesaid input tax of P2,100.00 was not taken as an exception by the independent CPA in his report.

Below is a table of the recomputation of Petitioner's allowable input tax credits, thus:

	3rd Quarter	4th Quarter	Total
Input Taxes Claimed	P12,055,652.81	P9,774,688.80	P21,830,341.61
Less: Exceptions Noted			
a) by the CPA	P 296,291.59	P 57,636.33	P 353,927.92
b) Per Court's evaluation	2,100.00		2,100.00
Total	P 298,391.59	P 57,636.33	P 356,027.92
Amount Refundable	P11,757,261.22	P9,717,052.47	P21,474,313.69

WHEREFORE, in view of the foregoing, the petitions for review are hereby partially **GRANTED**. Respondent is **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the amount of P21,474,313.69 in favor of Petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

AMANCIO Q. SAGA
Associate Judge

JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge