REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

VISAYAS GEOTHERMAL POWER COMPANY, Petitioner,	C.T.A. CASE NO. 7889
	Members:
- versus -	ACOSTA, *Chairperson* UY, *and* FABON-VICTORINO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: OCT 19 2011 ; 3:00pm

x---x

DECISION

***Fabon-Victorino, J.*:**

In this Petition for Review, [1] petitioner VISAYAS GEOTHERMAL POWER COMPANY, seeks for refund or issuance of tax credit certificate in the amount of Php11,902,576.07, representing unutilized input value-added tax (VAT) from its domestic purchases of non-capital goods and services, services rendered by non-residents, and importation of non-capital goods for the first to fourth quarters of taxable year 2007.

[1] Docket, pp. 1-17.

THE FACTS

Visayas Geothermal Power Company (Petitioner) is a special purpose limited partnership duly organized and existing under Philippine laws, with principal office at 24th Floor, 6750 Building, Ayala Avenue, Makati City. It was established on November 4, 1994, to "invest in, acquire, finance, complete, construct, develop, improve, operate, maintain and hold that certain partially constructed power production geothermal electrical generating facility in Malitbog, Leyte Province, Philippines (the 'Project'), and other property incidental thereto, for the production and sale of electricity from geothermal resources, to sell or otherwise dispose of the Project and such other property," and to engage in any other related or incidental activities.[2]

Petitioner is a registered VAT taxpayer with the Bureau of Internal Revenue (BIR) with Taxpayer Identification No. 003-832-538-000.[3]

---

[2] Exhibit "A".
[3] Exhibit "C"; Par. 2 Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 184.

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR) empowered, among others, to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On February 13, 2009, petitioner filed with the BIR Revenue District Office (RDO") No. 47 an administrative claim for refund of its unutilized input VAT for the period covering the first (1st) quarter to the fourth (4th) quarter of taxable year 2007 amounting to P11,902,576.07.[4]

On March 30, 2009, petitioner filed the present action claiming inaction on the part of respondent on its claim for refund.

In her Answer[5], respondent states by way of defense the following:

> "4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau;

---

[4] Exhibit "M"; Par. 3, Admitted Facts, JSFI, docket, p. 184.
[5] Docket, pp. 147-152.

5. The amount of P11,902,576.07 being claimed by petitioner as alleged unutilized input VAT from its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods and domestic purchases of capital goods for the first to fourth quarters of calendar year 2007 was not properly documented;

6. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

7. To support its claim, it is imperative for petitioner to prove the following, viz:

a. The registration requirements of a value-added taxpayer in compliance with Section 6(a) and (b) of Revenue Regulations No. 6-97 in relation to Section 4.107-a (a) of Revenue Regulations No. 7-95, and Section 236 of the National Internal Revenue Code of 1997 (NIRC of 1997);

b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT in compliance with the provisions of Sections 113 and 114 of the NIRC of 1997;

c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim in accordance with the provision of Section 229 of the NIRC of 1997. It is worthy of emphasis that Section 112 (D) of the NIRC of 1997 requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review.

d. That the input taxes of P20,546,004.87 allegedly paid by petitioner on its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods for the first to fourth quarters of taxable year 2005 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) year after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) and 229 of the NIRC of 1997;

f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase journal, showing that it actually paid VAT in accordance with Sections 110 (A) (2) and 113 of the NIRC of 1997, and in pursuance to Section 4.104-5 (a) and (b) of Revenue Regulations No. 7-95 (RE: Substantiation of Claims for Input Tax Credit);

g. The requirements as enumerated under Section 4.104-2 of Revenue Regulations 7-95 (Re: Persons who can avail of the Input Tax Credits).

8. The petition for review is premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112 (D) of the NIRC of 1997, the 120-day period starts to run on 13 February 2009, the date when it filed its administrative claim for refund. The said period is yet to expire on 12 June 2009. Hence, the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 12 June 2009. This being so, this Honorable Court has no jurisdiction to act on the instant petition for review.

> 9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)."*

During the pre-trial conference, the parties agreed and pursuant thereto filed their Joint Stipulation of Facts and Issues (JSFI) on June 04, 2009. It was approved by the Court on June 08, 2009.

Trial ensued during which petitioner presented two (2) witnesses, namely: (1) Ms. Leilah Yasmin E. Alpad, its head of Tax Services Division; and (2) Ms. Katherine O. Constantino, the Court-commissioned Independent Certified Public Accountant (ICPA).

Leilah Yasmin E. Alpad, by way of Judicial Affidavit, testified that as petitioner's head of Tax Services Division, she is responsible for all the financial and statutory reporting and regulatory compliance of petitioner. The latter is engaged in the business of power generation and the powers generated are sold to the Energy Development Corporation (EDC) pursuant to the

Energy Conversion Agreement[6] it executed with EDC. Its 216 Megawatt geothermal power plant has been accredited by the Department of Energy (DOE) as a Block Power Production Facility under Part IV of the Implementing Rules and Regulations of Executive Order No. 215, as evidenced by its DOE Certificate of Accreditation No. OSAC 94-13 issued on June 15, 1994.

The witness further testified that the instant case involves petitioner's claim for refund of its unutilized input VAT for the four (4) quarters of taxable year 2007 in the sum of Php11,902,576.07. The unutilized input VAT were paid and incurred by petitioner on its domestic purchases of goods and services, purchases of services rendered by non-residents, and importations of goods during the taxable year 2007. Allegedly, all these purchases and importations were attributable to petitioner's zero-rated sales of power generation services to EDC.

On February 13, 2009, petitioner filed with the BIR its administrative claim for refund of its unutilized input VAT for the four (4) quarters of taxable year 2007.[7] To prove its unutilized input VAT for the quarters covered, petitioner presented the originally filed as well as the amended Quarterly VAT Returns for

---

[6] Exhibit "D".
[7] Exhibit "M".

the four (4) quarters of taxable year 2007.[8] Petitioner filed amended returns to make the necessary adjustments reflecting the properly claimable unutilized input VAT based on their review of existing documents. Petitioner paid and incurred input VAT in the sum of Php11,902,576.07 on its domestic purchases of taxable goods and services, purchases of services rendered by non-residents, and importation of goods other than capital goods during the taxable year 2007, which amounted to Php99,188,133.91. During the same period, petitioner generated and recorded zero-rated sales to EDC in the total amount of Php1,983,995,474.94. This amount represents all the sales of petitioner for the year 2007.

The witness explained that based on Section 6 of Republic Act (RA) No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001", and the NIRC of 1997, as amended, sales of generated power by generation companies are VAT zero-rated. Moreover, under RA No. 9337, which took effect on November 01, 2005, sales of electricity by power-generating companies generated through renewable sources of energy, such as hydropower, will continue to be zero-rated under Section 108(B)(7) of the NIRC of 1997, as amended.

---

[8] Exhibits "E", "E-1", E-2", "F", "F-1", "G', "G-1", "H" and "H-1".

To prove its claim, petitioner presented its Amended Articles of Partnership[9] as approved by the Securities and Exchange Commission on November 14, 1994, Certificate of Accreditation[10] issued by the DOE on June 15, 1994, Certificate of Registration[11] with the BIR, and Certificate of Compliance[12] issued by the Energy Regulatory Commission on October 05, 2005.

Petitioner's other witness Katherine O. Constantino testified that she was commissioned by the Court to perform the duties and responsibilities of an Independent Certified Public Accountant pursuant to Rule 13 of the Revised Rules of the Court of Tax Appeals.

As required by her commission, she examined petitioner's VAT returns, suppliers' official receipts and invoices, and other voluminous records and documents supporting petitioner's claim for refund or issuance of tax credit certificate for its unutilized input VAT for the taxable year 2007 in the total amount of Php11,902,576.07. In relation thereto, she submitted to the

---

[9] Exhibit "A".
[10] Exhibit "B".
[11] Exhibit "C".
[12] Exhibit "Z".

Court her written report of examination on September 09, 2009.[13]

With the termination of its presentation of evidence, petitioner rested and formally offered its documentary evidence marked as Exhibits "A" to "AA-1", inclusive of sub-markings, to which respondent registered no objection to their admission.

In its Resolution of September 09, 2010, the Court admitted into evidence the formally offered documents except Exhibits "T-6-V-2Q-00206-00208", "T-6-V-2Q-00210", "T-6-V-2Q-00213 - 00214", "T-6-V-2Q-00598 – 00599", "T-6-V-3Q-000067", "T-6-V-3Q-000071", and "T-6-V-3Q-000074 – 000078" for petitioner's failure to authenticate them.

During the scheduled presentation of evidence by respondent on October 12, 2010, her counsel submitted the case for decision *sans* presentation of evidence alleging that no report of investigation was forwarded to her.

---

[13] Exhibit "T".

In compliance with the Court's directive of October 12, 2011, respondent filed her Memorandum on November 11, 2010 while petitioner, on November 26, 2010. [14]

THE ISSUES

The issues, as stipulated by the parties in their Joint Stipulation of Facts and Issues, are as follows: [15]

> "7. Whether or not Petitioner's unutilized input VAT for the period from the 1st quarter to the 4th quarter of CY 2007 amounting to P11,902,576.07 is substantiated by documentary evidence in the form of invoices and official receipts.
>
> 8. Whether or not Petitioner's unutilized input VAT for the period from the 1st quarter to the 4th quarter of CY 2007 amounting to P11,902,576.07 was applied or credited against any output VAT of the Petitioner in the subsequent quarter or quarters.
>
> 9. Whether or not Petitioner is entitled to a refund of and/or issuance of a tax credit certificate ('TCC') for its unutilized input VAT amounting to P11,902,576.07, which input VAT: (i) arose from Petitioner's domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods; and (ii) are all

[14] Docket, p. 590.
[15] Docket, pp. 185-186.

attributable to Petitioner's zero-rated sales of generated power to Energy Development Corporation ('EDC') [formerly Philippine National Oil Company-Energy Development Corporation].

10. Whether or not this Honorable Court has jurisdiction to act on the instant Petition for Review."

The foregoing issues may be reduced into one, to wit:

"WHETHER OR NOT PETITIONER IS ENTITLED TO A REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE FOR ITS UNUTILIZED INPUT VAT AMOUNTING TO P11,902,576.07 FOR THE FOUR TAXABLE QUARTERS OF 2007."

THE RULING OF THE COURT

The instant Petition for Review must fail.

Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act (RA) No. 9337, lays down the requisites for refunds or tax credits of input tax due or paid attributable to zero-rated or effectively zero-rated sales, viz:

"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 or 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."

Thus, to be entitled to a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales, the following requisites must concur:

1. that there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;

3. that such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

First to be considered is the timeliness of petitioner's filing of its claim for refund or tax credit for it will dictate the need to proceed and scrutinize petitioner's alleged compliance with the other requisites for VAT refund.

Under Section 112(A) of the NIRC of 1997, as amended, a VAT registered taxpayer whose sale is 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 refund or issuance of a tax credit certificate (TCC) of its creditable input tax due or paid attributable to such sales.

This much had been clarified by the Supreme Court in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation.* [16] The Final Arbiter ruled that the two-year prescriptive limit on claims for refund of input VAT attributable to zero-rated or effectively zero-rated sales should be reckoned from the close of the taxable quarter when the relevant sales were made, regardless of whether the said tax was paid or not.

In the instant petition, petitioner seeks for a refund or issuance of a TCC of its unutilized input VAT paid on domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods. Allegedly, the purchases are all attributable to its zero rated sales of generated power to Energy Development Corporation (formerly, Philippine National Oil Company – Energy Development Corporation) for the four quarters of taxable year 2007. Hence, counting from March 31, 2007, June 30, 2007, September 30, 2007 and December 31, 2007, the close of the first, second, third and fourth quarters of 2007, respectively, petitioner had until March 31, 2009, June 30, 2009, September 30, 2009 and December 31, 2009, respectively, within which to file its administrative claim with respondent. Evidently,

[16] G.R. No. 172129, September 12, 2008.

petitioner seasonably filed its administrative claim for the first, second, third and fourth quarters of 2007 on February 13, 2009.

Anent petitioner's judicial claim through the instant Petition for Review, Section 112(C) of the 1997 NIRC, as amended, is instructive, to wit:

> "SEC. 112. **Refunds or Tax Credits of Input Tax.** —
>
> xxx xxx xxx
>
> (C) 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**." (*Boldfacing and underscoring supplied*)

Since petitioner's administrative claim for refund was filed on February 13, 2009, respondent henceforth had 120 days or until June 13, 2009, within which to act on the claim as enunciated under Section 112(C). Any adverse decision or inaction on the part of respondent should be appealed within 30 days thereafter. Obviously, the instant Petition for Review was prematurely instituted on March 30, 2009 or barely forty-five (45) days after the application for refund was filed with respondent. Petitioner effectively deprived respondent of the opportunity to determine the merit of its claim within the 120-day period granted unto her by law to grant or deny the claim.

The need to wait for the 120-day period for petitioner to act on the claim for refunds before judicial action is taken is now beyond any inquiry. In *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*,[17] the Supreme Court capsulized its ruling in this wise:

> "Section 112(D)[18] of the NIRC clearly provides that the CIR has "120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit]," within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal

[17] G.R. No. 184823, October 6, 2010.
[18] Now Section 112(C) of the 1997 Tax Code, as amended.

> before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.
>
> In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. **Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.**
>
> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis." (*Emphasis supplied*)

In fine, the Petition for Review at bench was prematurely filed justifying its denial for lack of cause of action, which ground was seasonably invoked by repondent in her Answer.

Indeed, there are procedural requirements that must be complied with before resort to court can be had. A precept that a party with an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court,[19] cannot simply be disregarded. If a litigant goes to court without first pursuing his administrative remedies, his action is premature as he has no cause of action to ventilate in Court. His case is not ripe for judicial determination.[20] That being the case, Court is plainly not competent to entertain the appeal at the time it was filed by petitioner on March 30, 2009.

With the foregoing, discussions to address the remaining requisites are superfluous.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for being prematurely filed.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice

[19] Carale vs. Abarintos, 269 SCRA 142.
[20] Aboitiz vs. Collector of Customs, 83 SCRA 271; Abe-Abe vs. Manila, 90 SCRA 531.

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's Division.

ERNESTO D. ACOSTA
Presiding Justice