REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MIRANT (PHILIPPINES) OPERATIONS CORPORATION (formerly: Southern Energy Asia-Pacific Operations (Phils.), Inc.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6623

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
AUG 04 2006

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DECISION

ACOSTA, E., PJ.:

This is a Petition for Review filed on March 27, 2003 seeking a claim for refund/tax credit in the amount of P69,562,412.00 allegedly representing overpaid income tax or excess creditable withholding tax for taxable year ended December 31, 2001.

Petitioner is a corporation duly organized and existing under and virtue of the laws of the Republic of the Philippines, with its principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province. It is primarily engaged in the business of designing, constructing, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plans and related facilities for the conversion into electricity of coal, distillate and other fuel provided by and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government owned or controlled corporations or other entity engaged in the development, supply or distribution of energy.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue, charged with the duty of enforcing the provisions of the National Internal Revenue Code, including the power to decide and approve administrative claims for refund. He holds office at the BIR National Building, Agham Road, Diliman, Quezon City.

On April 30, 2001, petitioner secured with the Securities and Exchange Commission ("SEC") its Certificate of Filing of Amended Articles of Incorporation, reflecting its change of name from Southern Energy Asia-Pacific Operations (Phils.), Inc. to Mirant (Philippines) Operations Corporation. Prior to its use of the name Southern Energy Asia-Pacific Operations (Phils.), Inc., petitioner operated under the corporate names CEPA Operations (Philippines) Corporation, CEPA Tileman Project Management Corporation and Hopewell Tileman Project Management Corporation. The changes in petitioner's corporate name from CEPA Operations (Philippines) Corp. to Southern Energy Asia-Pacific Operations (Phils.) Inc., from CEPA Tileman Project Management Corporation to CEPA Operations (Philippines) Corp. and from Hopewell Tileman Project Management Corporation to CEPA Tileman Project Management Corp. were approved by the SEC on November 24, 2000, November 21, 1997 and July 29, 1994, respectively.[1]

Under its original corporate name, Hopewell Tileman Project Management Corp., petitioner was registered with the Bureau of Internal Revenue ("BIR") with Tax Identification

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[1] Pars, 4, 5 & 6, Stipulation of Facts, Records, page 56

No. 003-057-796 as shown by its original BIR Certificate of Registration issued on March 29, 1994.

In line with its primary purpose, petitioner entered into Operating and Management Agreements with Mirant Pagbilao Corporation [MPC] (formerly Southern Energy Quezon, Inc.) and Mirant Sual Corporation [MSC] (formerly Southern Energy Pangasinan, Inc.) to provide MPC and MSC with operation and maintenance services in connection with the operation, construction and commissioning of the coal-fired thermal power stations situated in Pagbilao, Quezon and Sual, Pangasinan, respectively.[2] Payments received by petitioner from MPC and MSC relative to the said agreements were allegedly subjected to creditable withholding taxes.

On April 15, 2002, petitioner filed its 2001 income tax return with the BIR,[3] reporting an income tax overpayment in the amount of P69,562,412.00 arising from unutilized creditable taxes withheld during the year, as follows:

Sales/Revenues	P922,569,303.00
Less: Cost of Sales/Services	938,543,252.00
Gross Income from Operation	(P15,973,949.00)
Add: Non-Operating & Other Income	74,995,982.00
Total Gross Income	P 59,022,033.00
Less: Deductions	59,022,033.00
Taxable Income	-
Tax Rate	32%
Income Tax	NIL
Less: Tax Credits/Payments	
Creditable Tax Withheld for the First Three Quarters	P 27,784,217.00
Creditable Tax Withheld for the Fourth Quarter	41,778,195.00
Total Tax Credits/Payments	P 69,562,412.00
Tax Payable/(Overpayment)	**(P69,562,412.00)**

Petitioner marked the appropriate box manifesting its intent to have the above overpayment refunded.

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[2] *Exhibits L, M & N; pages 8-13, TSN, July 29, 2003*
[3] *Exhibit O*

On March 19, 2003, pursuant to Section 76 in relation to Section 204 of the National Internal Revenue Code (NIRC) of 1997, as amended, petitioner filed with the BIR, a letter requesting for the refund or issuance of a tax credit certificate corresponding to its reported unutilized creditable withholding taxes for taxable year 2001 in the amount of P69,562,412.00.[4]

On March 27, 2003, just a few days later, petitioner filed this Petition for Review in order to toll the running of the two-year prescriptive period provided under Section 229 of the National Internal Revenue Code of 1997, as amended.

On April 30, 2003, respondent filed his Answer interposing the following Special and affirmative defenses:

5.) Petitioner's alleged claim for refund is subject to administrative routine investigation/examination by respondent's Bureau;

6.) In the case of Citibank N.A. vs. Court of Appeals and Commissioner of Internal Revenue, G.R. No. 1074334, October 10, 1997 the Honorable Tax Court, affirmed by the Honorable Supreme Court, ruled that before a claim for refund of creditable withholding taxes is sustained, the following requirements must be complied with:

   a. The claim for refund was filed within the two (2) year period prescribed under Section 230 of the National Internal Revenue Code;

   b. The income upon which the taxes were withheld was included in the return of the recipient;

   c. The fact of withholding is established by a copy of the statement (BIR Form 1743.1) duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom.

7.) It is a well-settled principle in taxation that claims for refund are construed strictly against the claimant as they partake the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the law. Failure to prove the same is fatal to its claim for tax refund. Exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from the

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[4] *Exhibit Y*

> common burden cannot be permitted to exist upon vague implications (Asia Petroleum Co., vs. Llamas, 49 Phil. 466).

On March 28, 2006, with the admission of petitioner's Memorandum filed on March 23, 2006 and the previous filing of respondent's Memorandum on March 20, 2006, the case was submitted for decision.

The parties jointly submitted a lone issue to be resolved in this case of whether or not the petitioner is entitled to the refund of P69,562,412.00 representing unutilized creditable withholding taxes for calendar year ended December 31, 2001 by showing that –

a. the creditable withholding taxes amounting to P69,562,412.00 are duly supported by Certificates of Creditable Tax Withheld at Source;

b. the income from which these creditable taxes were withheld were duly declared as part of Petitioner's gross income in its annual income tax return for calendar year ended December 31, 2001;

c. Petitioner did not carry over its unutilized creditable withholding taxes for calendar ended December 31, 2001 to the succeeding taxable period;

d. Petitioner duly filed both the administrative and judicial claims for refund within the two-year prescriptive period provided under Sections 204 and 229 of the National Internal Revenue Code ("NIRC"), as amended.

Petitioner anchored its claim on the provision of Section 76 of the National Internal Revenue Code of 1997 in relation to Sections 204(C) and 229 of the same Code. To quote:

> "**SEC. 76. *Final Adjustment Return.*** – Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
>
> (A) Pay the balance of tax still due; or
> (B) Carry-over the excess credit; or
> (C) Be credited or refunded with the excess amount paid, as the case may be.
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> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown in its final adjustment return may be carried over and credited against the

estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor."

"SEC. 204. ***Authority of the Commissioner to compromise, abate and refund/credit taxes.*** **-** The Commissioner may-

xxx xxx xxx

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for tax credit or refund within (2) years after the payment of the tax or penalty: *Provided, however*, That a return filed showing an overpayment shall be considered as a written claim for refund."

SEC. 229. ***Recovery of Tax Erroneously or Illegally Collected.*** – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, that the Commissioner, may even without a written claim, therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

Based on Section 76 above quoted, the corporate taxpayer's excess tax credits or overpaid income tax in a given taxable year may either be refunded (either in the form of cash or tax credit certificate) or carried-over/applied to the succeeding taxable years. However, once the option to carry-over has been made, the same becomes irrevocable for that taxable period.

As discussed earlier, petitioner's 2001 income tax return reflected an unutilized tax credit of P69,562,412.00. Petitioner opted to be refund for this unutilized tax credit as shown by the "x" mark in the appropriate box of the return.[5] Considering that petitioner did not carry-over the said unutilized tax credit of P69,562,412.00 in its 2002 income tax return,[6] the same may be a proper subject of a claim for refund/tax credit certificate under Section 76 of the NIRC of 1997.

The present claim for refund/tax credit of excess creditable withholding taxes is dependent on petitioner's compliance with the following basic requirements:

1. That the claim for refund (or issuance of a tax credit certificate) was filed within the two-year prescriptive period prescribed under Section 204(C), in relation to Section 229 of the NIRC of 1997;

2. That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and

3. That the income upon which the taxes were withheld was included in the return of the recipient (*Citibank, NA vs. Court of Appeals and CIR, 280 SCRA 459; ACCRA Investments Corporation vs. Court of Appeals, 204 SCRA 957*).

In this case, this Court finds petitioner entitled to the refund/issuance of tax credit sought for, having complied with all these requirements.

The reckoning of the two-year prescriptive period for the filing of a claim for refund/tax credit certificate of excess creditable withholding tax/quarterly income tax payment starts from the date of filing of the annual income tax return ***(ACCRA Investments Corporation vs. Court Appeals, supra; Commissioner of Internal Revenue vs. TMX Sales, Inc., 205 SCRA 184 [1992])*** because it is only from this time that the refund is ascertained ***(Commissioner of Internal Revenue vs. The American Life Insurance Co., 244 SCRA 446)***.

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[5] *Exhibit O*
[6] *Exhibit P-1*

Here, petitioner filed its income tax return for taxable year 2001 on April 15, 2002.[7] Counting from this date, petitioner had until April 14, 2004 (2004 being a leap year) within which to file its claim for refund/tax credit certificate both administratively and judicially. Therefore, petitioner's administrative claim filed on March 19, 2003[8] and the Petition for Review filed on March 27, 2003, fall within the two-year period prescribed under Section 204(C) in relation to Section 229 of the NIRC of 1997 and as interpreted by the Supreme Court in the above cases.

In compliance with the second requisite, petitioner submitted various Certificates of Creditable Tax Withheld at Source duly issued to it by MPC and MSC for taxable year 2001, showing creditable withholding taxes in the sum of P70,805,771.42:

Exh.	Period Covered	Withholding Agent	Tax Withheld
R	1/31/01-3/31/01	Southern Energy Pangasinan, Inc.	P 7,541,393.62
S	4/1/01-6/30/01	Mirant Pagbilao Corporation	5,231,749.64
T	4/1/01-6/30/01	Mirant Sual Corporation	4,737,701.92
U	7/1/01-9/30/01	Mirant Pagbilao Corporation	5,454,022.47
V	7/1/01-9/30/01	Mirant Sual Corporation	4,819,349.82
W	10/1/01-12/31/01	Mirant Pagbilao Corporation	26,821,192.20
X	10/1/01-12/31/01	Mirant Sual Corporation	16,200,361.75
		Total	**P70,805,771.42**

The Court notes that there is a difference of P1,243,359.42 between the creditable withholding taxes of P70,805,771.42 as reflected in the certificates and the claimed creditable withholding taxes of P69,562,412.00. However, such discrepancy does not have a bearing on petitioner's claim because what is being claimed for refund/tax credit is the lower amount of P69,562,412.00.

Anent the third requisite, the certificates show that the claimed creditable taxes of P69,562,412.00 were withheld on service fees received by petitioner from MPC and MSC for taxable year 2001 in the total amount of P985,899,888.90, broken down as follows:

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[7] *Exhibit O*
[8] *Exhibit Y*

Exhibit	Period Covered	Withholding Agent	Income Payment
R	1/31/01-3/31/01	Southern Energy Pangasinan, Inc.	P150,827,872.40
S	4/1/01-6/30/01	Mirant Pagbilao Corporation	104,634,992.80
T	4/1/01-6/30/01	Mirant Sual Corporation	94,754,038.40
U	7/1/01-9/30/01	Mirant Pagbilao Corporation	109,080,449.40
V	7/1/01-9/30/01	Mirant Sual Corporation	96,386,996.40
W	10/1/01-12/31/01	Mirant Pagbilao Corporation	268,211,922.00
X	10/1/01-12/31/01	Mirant Sual Corporation	162,003,617.50
		Total	**P985,899,888.90**

A comparison of the gross income of P985,899,888.90 per the certificates as against the gross income of P922,569,303.00 declared per petitioner's 2001 income tax return reveals a discrepancy of P63,330,585.90. The commissioned auditing firm, SGV & Co. explained in its report that part of the discrepancy was due to the incentive fee of P58,192,117.00 declared by petitioner in its 2000 income tax return but the related creditable tax in the amount of P2,909,605.00 withheld and the corresponding certificate issued only in the first quarter of 2001. The remaining difference in gross income amounting to P5,138,468.90 (P63,330,585.90 less P58,192,117.00) pertains to the difference between the foreign exchange rates (forex) used by petitioner's clients (withholding agents) at the time income payments were made to petitioner and the forex rates used at the time when petitioner recorded its income and the related tax credits (which occurred prior to actual income payments made by petitioner's clients). The difference of P5,138,468.90 formed part of petitioner's reported Realized Foreign Exchange Gain in taxable year 2001.[9] In other words, petitioner complied with the third requisite as it declared the income related to the claimed creditable withholding taxes of P69,562,412.00.

WHEREFORE, the instant petition is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the amount of P69,562,412.00, representing unutilized tax credits for taxable year ended December 31, 2001.

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[9] *Items b & c, Findings & Observations, Exhibit HH*

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division