REPUBLIC OF THE PHILIPPINES
*Court of Tax Appeals*
QUEZON CITY

*En Banc*

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| **COMMISSIONER OF INTERNAL REVENUE,** *Petitioner,* | **CTA *EB* NO. 2094** *(CTA Case No. 9006)* |
| *-versus-* | Present: **DEL ROSARIO, P.J., CASTAÑEDA, JR., UY, FABON-VICTORINO, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.* |
| **CE CASECNAN WATER AND ENERGY COMPANY, INC.,** *Respondent.* | Promulgated: JUL 21 2020 1:21 p.m. |

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# DECISION

*MODESTO-SAN PEDRO, J.:*

## *The Case*

Before the Court *En Banc* is a **PETITION FOR REVIEW ("Petition")** filed on 18 July 2019[1] with respondent's **COMMENT (Re: Petition for Review dated July 16, 2019) ("Comment")** filed on 18 October 2019.[2]

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[1] See Petition, Records, Vol. 1, pp. 7-25.
[2] See Comment, Records, Vol. 1, pp. 97-114.

## *The Parties*

Petitioner **COMMISSIONER OF INTERNAL REVENUE** is the head of the Bureau of Internal Revenue ("BIR") and empowered to perform the duties of said office, including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously paid taxes, as provided by law. He may be served summons, pleadings, and other processes at his office at the BIR National Office Building, BIR Road, Diliman, Quezon City.[3]

Respondent **CE CASECNAN WATER AND ENERGY COMPANY, INC.** is a domestic corporation duly organized and existing under Philippine laws, with principal office at Pantabangan, Nueva Ecija. Its primary purpose is "to design, develop, construct, erect, assemble, commission, finance, own and operate a combined irrigation and hydro-electric power project and related facilities in Central Luzon, Philippines for the conversion into electricity of water provided by and under contract with the National Irrigation Administration (NIA) and for the supply of water for agricultural purposes to the National Irrigation Administration (the "Project"); provided that, in no event shall the corporation itself engage in the general supply or distribution of electricity, in retail trade or in the business of a public utility, or furnish electricity to end-users or consumers, or provide a public service or engage in industries or activities reserved by the Constitution or by law to corporations wholly or partially owned by Filipino citizens."[4]

## *The Facts*

On 4 November 2014, respondent filed with petitioner an administrative claim for refund of its excess and unutilized input VAT for the 1$^{st}$ quarter to 4$^{th}$ quarter of calendar year ("CY") 2013 in the amount of Php22,944,645.77.[5]

On 11 March 2015, respondent filed its original Petition for Review before the Court in Division.[6]

On 8 May 2015, petitioner issued Tax Credit Certificate ("TCC") No. 200600004679 dated 8 April 2015 in the total amount of Php15,142,641.11 to respondent, partially granting its administrative claim for refund.[7]

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3 See Petition, Records, Vol. 1, p. 8.
4 *Id.*
5 See Decision, Records, Vol. 1, p. 28.
6 *Id.*
7 See Decision Records, Vol. 1, pp. 28-29.

Because of the partial grant by petitioner, respondent filed a Motion for Leave to File and Admit Supplemental Petition for Review (with Motion for Partial Withdrawal) with attached Supplemental Petition for Review on 11 June 2015, which was granted (with the Supplemental Petition for Review admitted) by the Court in Division on 16 September 2015. Accordingly, the original Petition for Review before the Court in Division was partially withdrawn to the extent of Php15,187,176.71.[8]

On 19 October 2018, the Court in Division partially granted respondent's judicial claim for refund in the amount of Php6,402,530.48.[9]

Petitioner and respondent filed their respective Motions for Partial Reconsideration to this Decision. In an Amended Decision promulgated on 22 February 2019, the Court in Division increased the amount subject of refund or TCC to Php6,872,939.30, *viz:*[10]

> "**WHEREFORE,** premises considered, the Motion for Partial Reconsideration filed by the Commissioner of Internal Revenue is hereby **DENIED** for lack of merit.
>
> On the other hand, the Motion for Partial Reconsideration filed by CE Casecnan Water and Energy Company is **PARTIALLY GRANTED.** Accordingly, the assailed Decision dated October 19, 2018 is hereby modified and shall read as follows:
>
>> '**WHEREFORE,** premises considered, the Petition for Review with Supplemental Petition for Review filed by CE Casecnan Water and Energy Company on March 11, 2015 and June 11, 2015, respectively, are hereby **PARTIALLY GRANTED.** Accordingly, the Commissioner of Internal Revenue is **ORDERED TO REFUND or TO ISSUE A TAX CREDIT CERTIFICATE** in favor of CE Casecnan Water and Energy Company in the amount of **P6,872,939.30,** representing its unutilized excess input VAT attributable to its zero-rated sales for the four quarters of calendar year 2013.'
>
> **SO ORDERED.**"

Petitioner and respondent filed their respective Motions for Partial Reconsideration to this Amended Decision, which were denied by the Court in Division in a Resolution dated 17 June 2019, *to wit:*[11]

> "**WHEREFORE**, premises considered, both Motions for Partial Reconsideration are hereby **DENIED** for lack of merit."

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8 See Decision, Records, Vol. 1, p. 29.
9 See Decision, Records, Vol. 1, p. 65.
10 Records, Vol. 1, p. 88.
11 Records, Vol. 1, p. 71.

On 2 July 2019, petitioner filed a Motion for Extension of Time to File Petition for Review,[12] which was granted by this Court *En Banc* in a Resolution dated 3 July 2019.[13]

On 18 July 2019, petitioner filed the instant Petition.[14]

On 20 August 2019, this Court *En Banc* issued a Resolution requiring petitioner to submit a Certified True Copy of the Amended Decision,[15] which he accomplished through a Compliance dated 28 August 2019.[16]

On 16 September 2019, this Court *En Banc* issued a Resolution directing respondent to file a Comment.[17] On 4 October 2019, respondent filed a Motion for Additional Time to File Comment,[18] which was granted by this Court *En Banc* on 8 October 2019.[19]

On 18 October 2019, respondent filed the Comment.[20]

In a Resolution dated 13 November 2019, this Court *En Banc* submitted the Petition for decision.[21]

***The Assigned Errors***

In the Petition, petitioners raised the following issue:[22]

> **"WHETHER OR NOT THE SPECIAL FIRST DIVISION OF THE HONORABLE COURT ERRED IN PARTIALLY GRANTING RESPONDENT'S CLAIM FOR REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE IN THE AMOUNT OF P6,872,939.30 REPRESENTING UNUTILIZED EXCESS INPUT VAT ALLEGEDLY ATTRIBUTABLE TO ZERO-RATED SALES FOR THE FOUR QUARTERS OF CALENDAR YEAR 2013 PURSUANT TO REPUBLIC ACT NO. 9513."**

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12 Records, Vol. 1, pp. 1-5.
13 Records, Vol. 1, p. 6.
14 See Petition, Records, Vol. 1, pp. 7-25.
15 Records, Vol. 1, pp. 73-75.
16 Records, Vol. 1, pp. 76-78.
17 Records, Vol. 1, pp. 90-92.
18 Records, Vol. 1, pp. 93-95.
19 Records, Vol. 1, p. 96.
20 See Comment, Records, Vol. 1, pp. 97-114.
21 Records, Vol. 1, pp. 115-117.
22 See Petition, Records, Vol. 1, p. 9.

## *Arguments of the Parties*

In the Petition, petitioners alleged the following:

1. Respondent is not entitled to refund in the amount of Php6,872,939.30 excess and unutilized input taxes as the right to seek refund belongs to its supplier of goods and/or services following ***Coral Bay Nickel Corporation v. Commissioner of Internal Revenue.***[23] It is petitioner's view that since this is an appeal, the records of the case may be open for review;[24]

2. Under ***Section 15 (g) of Republic Act No. 9513 ("RA 9513"),*** all Renewable Energy Developers ("RE Developers") are entitled to zero-rated valued added tax ("VAT") on its purchases of local supply of goods, properties, and services needed for the development, construction, and installation of its plant facilities, which will also include the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors.[25] As such, no VAT should be passed on to RE Developers such as respondent. Conversely, no VAT shall be paid by RE Developers, including respondent, on its purchase transactions. There being no input VAT to be paid by RE Developers, it necessarily follows that they are not entitled to refund or issuance of TCC from said purchase transactions.[26] Considering that respondent is engaged in the production of power from renewable sources, the input VAT from its local supply of goods, properties, and services needed for the development, construction, and installation of its plant facilities, as well as the whole process of exploring and developing renewable energy sources up to its conversion into power, are also zero-rated in accordance with ***Sections 106 (A) (2) (c) and 108 (B) (3) of the National Internal Revenue Code ("NIRC")*** in relation to ***Section 15 (g) of RA 9513;***[27]

3. The law requires that only "creditable input taxes" that are "directly attributable" may be refunded. Respondent was not able to establish attributability between the input VAT on purchases vis-à-vis the zero-rated sales.[28] To be creditable, the input VAT must come from purchases of goods that form part of the finished product of the taxpayer or it must be directly used in the chain of production.[29] In addition, the

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23 G.R. No. 190506, 13 June 2016.
24 See Petition, Records, Vol. 1, p. 9.
25 See Petition, Records, Vol. 1, p. 10.
26 See Petition, Records, Vol. 1, p. 11.
27 See Petition, Records, Vol. 1, pp. 10-11.
28 See Petition, Records, Vol. 1, p. 12.
29 See Petition, Records, Vol. 1, p. 14.

law requires that a second evaluation to determine which of the creditable input VAT are attributable. To be attributable, the connection between the purchases and the finished product is concrete, not imaginary or remote;[30] and

4. A tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer.[31]

In its Comment, respondent alleged the following:

1. Petitioner belatedly invoked as an argument his novel interpretation of ***Section 15 (g) of RA 9513*** against respondent's entitlement to refund of input VAT;[32]

2. ***Section 15 (g) of RA 9513*** is not applicable to respondent considering that it is not registered thereunder as an RE Developer nor did it undergo the process of registration with the Department of Energy;[33] and

3. Respondent sufficiently established that it is entitled to the refund and/or issuance of TCC application for unutilized input VAT attributable to its zero-rated sales for the four quarters of CY 2013.[34]

### *The Ruling of the Court En Banc*

*Following a studied review of the arguments, we **DENY** the Petition for lack of merit.*

The arguments alleged in the Petition have already been adequately passed upon by the Court in Division. But to finally resolve any doubt existing in the mind of petitioner, we shall tackle once more the same issues he raised.

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30 *Id.*
31 See Petition, Records, Vol. 1, p. 16.
32 See Comment, Records, Vol. 1, pp. 98-102.
33 See Comment, Records, Vol. 1, pp. 102-107.
34 See Comment, Records, Vol. 1, pp. 107-112.

***<u>This Court En Banc cannot take into consideration issues, arguments or points of law which were raised for the first time on appeal.</u>***

***Rule 9, Section 1 of the Rules of Court*** provides that "defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived." This ensures compliance with the rule on fair play, justice and due process.[35]

In ***Chinatrust (Phils.) Commercial Bank v. Philip Turner,***[36] the Supreme Court ruled that "issues that were not alleged or proved before the lower court cannot be decided for the first time on appeal. This rule ensures fairness in proceedings", *viz:*

> "Basic rules of fair play, justice, and due process require that arguments or issues not raised in the trial court may not be raised for the first time on appeal.
>
> In *Philippine Ports Authority v. City of Iloilo:*
>
>> As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court. To permit petitioner in this case to change its theory on appeal would thus be unfair to respondent, and offend the basic rules of fair play, justice and due process. (Citations omitted)"

Further, in the case of ***S.C. Megaworld Construction and Development Corporation v. Engr. Luis U. Parada,***[37] the High Court declared that "[i]t is well-settled that no question will be entertained on appeal unless it has been raised in the proceedings below. Points of law, theories, issues and arguments not brought to the attention of the lower court, administrative agency or quasi-judicial body, need not be considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic considerations of fairness and due process impel this rule. Any issue raised for the first time on appeal is barred by *estoppel.*"

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[35] Sps. Delfino v. St. James Hospital, Inc., G.R. No. 166735, 23 November 2007.
[36] G.R. No. 191458, 3 July 2017.
[37] G.R. No. 183804, 11 September 2013.

It cannot be denied that petitioner's arguments were raised for the first time in his Motion for Partial Reconsideration to the Decision dated 19 October 2018[38] and simply repeated in his Motion for Partial Reconsideration to the Amended Decision dated 22 February 2019.[39] Solely due to this circumstance, the instant Petition should be dismissed outright.

***Section 15 (g) of RA 9513 and Coral Bay Nickel Corporation v. Commissioner of Internal Revenue are inapplicable to the present Petition.***

Moreover, even if petitioner's arguments may be ruled upon by this Court *En Banc,* the same are still without merit.

Petitioner alleges that respondent is not entitled to a refund of excess and unutilized input taxes as the right to seek refund belongs to its supplier of goods and/or services following ***Coral Bay Nickel Corporation v. Commissioner of Internal Revenue.***[40] Petitioner notes that ***Section 15 (g) of RA 9513*** provides that input VAT on the purchases of goods, properties and services by RE Developers necessary for the development, construction and installation of its plant facilities, as well as the whole process of exploring and developing renewable energy sources up to its conversion into power, are zero-rated. From this point, petitioner concludes that respondent, as an RE Developer, cannot claim input VAT refund on its purchases of goods and/or services as this remedy solely belongs to its suppliers of goods and/or services.

*This is misplaced.*

As this Court *En Banc* ruled in ***Commissioner of Internal Revenue v. CE Casecnan Water and Energy Company, Inc.,***[41] which involved the same parties in the present Petition, the case of ***Coral Bay Nickel Corporation v. Commissioner of Internal Revenue***[42] is inapplicable to respondent since the petitioner in the latter case has a principal place of business located inside a special economic zone while herein respondent's place of business is within the customs territory. Therefore, since the goods and/or services purchased by respondent are destined for consumption within the Philippine territory, it is legally feasible that its supplier of goods and/or services passed on VAT to

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38 See Amended Decision, Vol. 1, p. 80.
39 See Resolution dated 17 June 2019, Records, Vol. 1, p. 68.
40 G.R. No. 190506, 13 June 2016.
41 C.T.A. E.B. Case No. 1510, C.T.A. Case No. 8788, 21 June 2018.
42 G.R. No. 190506, 13 June 2016.

respondent. Being the party which ultimately bears the burden of the VAT, respondent is the proper party to claim the same. The cited case provides:[43]

> "But if only to put petitioner's mind to rest, let it be stressed that the Coral Bay case that he cited as authority is not applicable to the present case.
>
> In Coral Bay, petitioner-claimant Coral Bay Nickel Corporation's principal place of business was located inside the special economic zone (ECOZONE) known as Rio Tuba Export Processing Zone. Under the Destination Principle and Cross Border Doctrine, the goods/services destined for consumption inside the ECOZONE are considered as consumption outside the Philippine Territory, therefore zero-rated.
>
> Coral Bay was found to be located inside an ECOZONE, which was deemed a foreign territory by fiction of law, thus, its purchases of goods/services consumed within the ECOZONE should be VAT-free. As such, it was not possible to shift the VAT to Coral Bay and that the tax shall be for the account of its suppliers of good/services. In the event that VAT was erroneously passed to Coral Bay by its suppliers of goods and services, the latter shall be the proper party to institute a refund claim and not Coral Bay Nickel Corporation.
>
> In stark contrast with the factual setting in Coral Bay, respondent's principal office is located at Pantabangan, Nueva Ecija, which is neither foreign soil nor one considered by law as such. Since the purchases of goods/services by respondent were destined for consumption within the Philippine territory, it is legally feasible for its supplier of goods and/or services to pass on the VAT charged thereon to respondent. Ergo, the VAT imposed on respondent's purchases shall be considered as its input taxes, which in turn may be claimed by it for possible input VAT refund. Being the entity that ultimately bears the burden of the tax, respondent is the proper party to claim the same."

Neither is the incentive provided under ***Section 15 (g) of RA 9513*** applicable to respondent. The said provision holds:

> **"CHAPTER VII**
> **GENERAL INCENTIVES**
>
> **Section 15. Incentives for Renewable Energy Projects and Activities.** - RE developers of renewable energy facilities, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, **<u>as duly certified by the DOE, in consultation with the BOI,</u>** shall be entitled to the following incentives:
>
> xxx xxx xxx

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[43] ***Commissioner of Internal Revenue v. CE Casecnan Water and Energy Company, Inc.,*** C.T.A. E.B. Case No. 1510, C.T.A. Case No. 8788, 21 June 2018.

> (g) Zero Percent Value-Added Tax Rate. - The sale of fuel or power generated from renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, shall be subject to zero percent (0%) value-added tax (VAT), pursuant to the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337.
>
> **All RE Developers shall be entitled to zero-rated value added tax on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities.**
>
> **This provision shall also apply to the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors."**
>
> (Emphasis and Underscoring, Ours)

In relation thereto, ***Section 25 of RA 9513*** provides as follows:

> **Section 25.** ***Registration of RE Developers and local manufacturers, fabricators and suppliers of locally-produced renewable energy equipment.*** - **RE Developers** and local manufacturers, fabricators and suppliers of locally-produced renewable energy equipment **shall register with the Department of Energy, through the Renewable Energy Management Bureau. Upon registration, a certification shall be issued to each RE Developer** and local manufacturer, fabricator and supplier of locally-produced renewable energy equipment **to serve as the basis of their entitlement to incentives provided under Chapter VII of this Act.**
>
> (Emphasis and underscoring, Ours)

Implementing the foregoing provisions are Sections 18 (A) (1) and 39 of Department of Energy ("DOE") Circular No. 2009-05-0008[44] and Sections 4 (b) (ii) and 14 of DOE Circular No. 2009-07-0011,[45] *viz:*

> "SEC. 18. ***Conditions for Availment of Incentives and Other Privileges.*** –
>
> ***A. Registration/Accreditation with the DOE***
>
> **For purposes of entitlement to the incentives and privileges under the Act, existing and new RE Developers, and manufacturers, fabricators, and suppliers of locally-produced RE equipment shall register with the DOE, through the Renewable Energy Management Bureau (REMB).** The following certifications shall be issued:

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44 25 May 2009.
45 12 July 2009.

*(1) **DOE Certification of Registration*** – issued to an RE Developer holding a valid RE Service/Operating Contract.

For existing RE projects, the new RE Service/Operating Contract shall pre-terminate and replace the existing Service Contract that the RE Developer has executed with the DOE subject to the Transitory Provisions in Rule 13, Section 39.

**The DOE Certificate of Registration shall be issued immediately upon award of an RE Service/Operating Contract covering an existing or new RE project or upon approval of additional investment.**

Any investment added to existing RE projects shall be subject to prior approval by the DOE."

(Emphasis and Underscoring, Ours)

"SEC. 39. **Transitory Provisions**

Benefits or incentives extended to RE Developers, and manufacturers, fabricators, and suppliers of locally-produced RE equipment under existing laws not amended or withdrawn under this Act shall remain in full force and effect. No provision of the Act shall be taken as to diminish any right vested by virtue of existing laws, contracts, or agreements. However, **in order to qualify for the availment of the incentives provided under Chapter VII of the Act and this IRR, the RE Developer, and manufacturers, fabricators, and suppliers of locally-produced RE equipment shall be required to secure a certificate of registration or accreditation with the DOE.**

The fiscal incentives granted under Section 15 of the Act shall apply to all RE capacities upon the effectivity of the Act.

Pending the issuance of other necessary guidelines, the grant of provisional certificates of registration by the DOE shall be valid and effective."

(Emphasis and Underscoring, Ours)

"**SEC. 4. Nature of RE Contract.** – xxx

xxx xxx xxx

**b. Conversion of RE Contract:**

xxx xxx xxx

ii. **From Existing Service Contract/Agreement on RE Resources to RE Contracts under the Act and this Circular – For an existing RE project, the contract holder may elect to convert its Service Contract/Agreement under applicable laws by applying for an RE Contract under the Act and this Circular. The approval of such**

> **<u>application shall be carried out on the basis of its prior rights over the contract area.</u>**
>
> Any individual or juridical entity with a valid and existing service or development contracts and agreements with the DOE/Government for the exploration, development or utilization of RE resource shall be deemed provisionally registered as an RE Developer under the Act, which registration shall subsist until the issuance of DOE Certificate of Registration provided for under Section 18 of the IRR. For this purpose, the DOE shall issue the corresponding provisional certificate of registration, pursuant to Section 39 of the IRR, upon receipt of the RE Developer's letter of intent for conversion to RE Contract."

(Emphasis and Underscoring, Ours)

"**SEC. 14. Registration as an RE Developer.** – The DOE shall issue the Certificate of Registration to the RE Developer immediately upon the effectivity of the RE Contract whether during Pre-Development or Development/Commercial Stage.

**<u>Holders of valid and existing contracts or agreements on renewable energy resources awarded prior to the effectivity of the Act shall be issued a DOE Certificate of Registration as RE Developers only upon conversion of these contracts or agreements to RE Contracts pursuant to Section 4 (b) hereof.</u>**"

(Emphasis and Underscoring, Ours)

From the above-cited provisions, before an RE Developer such as herein respondent can avail of the incentives provided by ***Section 15 (g) RA 9513,*** it must first register itself as such with the DOE, which in turn shall issue a Certification certifying an RE Developer as entitled to such incentives.

Here, petitioner did not adduce proof that herein respondent is registered as an RE Developer with the DOE entitled to the incentives provided by ***RA 9513.*** In fact, this entitlement to the incentives under ***RA 9513*** was vehemently denied by respondent in its Comment.[46] Due to the foregoing, respondent cannot be classified as an RE Developer under ***RA 9513.*** As such, ***RA 9513*** and its corresponding incentives are inapplicable to respondent. Respondent is therefore not entitled to VAT zero-rating of its purchases of goods and services. Consequently, petitioner's allegation that it is respondent's suppliers of goods and services which have the standing to claim for refund excess and unutilized input VAT has no leg to stand on.

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46 See Comment, Records, Vol. 1, p. 106.

***<u>Section 112 of the NIRC does not absolutely require that input taxes subject of a refund/TCC claim be directly attributable to zero-rated sales.</u>***

With respect to petitioner's allegation that creditable input taxes must be directly attributable to the zero-rated sales, it has already been settled that ***Section 112 of the NIRC*** does not require absolute direct attribution of purchases (the input VAT of which is subject of a refund/TCC claim) to zero-rated sales. In fact, the said provision allows the allocation of input VAT that cannot be directly attributed to any of the taxpayer's sales (*i.e.,* zero-rated sales, taxable sales or exempt 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): **<u>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 of 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.</u>** Provided, finally, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."
>
> (Emphasis and Underscoring, Ours)

This Court *En Banc* agrees with the ruling of the CTA Division in the Amended Decision interpreting this provision, *to wit:*[47]

> "As to the issue that the creditable taxes must be directly attributable to the sales of CE Casecnan, as properly observed by the taxpayer herein, Section 112 provides 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, the CIR's claim is not an absolute

[47] See Amended Decision, Records, Vol. 1, pp. 82-83.

rule. As stated in the case of *Toledo Power Company vs. Commissioner of Internal Revenue:*

> 'Contrary to respondent's argument, Section 112 (A) of the NIRC of 1997, as amended, does not decree that the input tax be directly attributable to petitioner's zero-rated sales. Input taxes that bears a direct or indirect connection with a taxpayer's zero-rated sales satisfies the requirement of the law. *Ubi lex non distinguit nec nos distinguire debemus.* When the law does not distinguish, we must not distinguish.'

Also, in the case of *Taganito Mining Corporation vs. Commissioner of Internal Revenue,* it is settled that:

> 'Section 112 (A) of the National Internal Revenue Code (NIRC) of 1997, as amended, requires that the input tax paid or incurred is attributable to a taxpayer's zero-rated sales. It does not, however, decree that the input tax be directly attributable to petitioner's zero-rated sales. Input taxes that bears a direct or indirect connection with a taxpayer's zero-rated sales satisfies the requirement of the law. Thus, the input VAT on importations of capital goods, which are undeniably necessary for the production of petitioner's exports, is attributable to its zero-rated sales.'"

All told, respondent's entitlement to the TCC, as found by the Court in Division, has been sufficiently established.

**WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision dated 15 November 2018 and Resolution dated 15 August 2019 promulgated by the Court in Division are hereby **AFFIRMED.**

**SO ORDERED.**

**MARIA ROWENA MODESTO-SAN PEDRO**
Associate Justice

***WE CONCUR:***

**ROMAN G. DEL ROSARIO**
Presiding Justice

Juanito C. Castañeda, Jr.

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

Ma. Belen

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

Catherine T. Manahan

**CATHERINE T. MANAHAN**
Associate Justice

**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

## C E R T I F I C A T I O N

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.

**ROMAN G. DEL ROSARIO**
Presiding Justice