Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

PANAY POWER CORPORATION,
Petitioner,

E.B. CASE NO. 286
(CTA Case No. 6807)

- versus -

Present:

ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, *and*
PALANCA-ENRIQUEZ, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

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DECISION

CASANOVA, J.:

This is an appeal[1] before the CTA Court *En Banc* filed on June 19, 2007 by herein petitioner, Panay Power Corporation (PPC), which seeks a review and rectification of the Resolution[2] of the *Second Division* of this Court promulgated on May 22, 2007 in CTA Case No. 6807 entitled ***"Panay Power Corporation vs. Commissioner of Internal Revenue"***. The assailed Resolution denied the Motion for Reconsideration filed by PPC and reiterated the *Second Division's*

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[1] *Petition for Review, EB Rollo. pp. 3-31.*
[2] *Division Rollo. pp. 242-246.*

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Decision[3] in the case at bar promulgated on October 30, 2006. The *Second Division's* Decision partially granted PPC's claim for refund or issuance of a Tax Credit Certificate in the reduced amount of P793,505.64 and not the total amount being claimed for refund of P4,639,169.00.

THE FACTS

The facts of the case, as culled from the records, are as follows:

Petitioner is a corporation duly organized and existing under Philippine laws with principal office at 2nd Floor Benpress Building, Meralco Avenue, Pasig City. It is principally engaged in the business of generating power for lighting and power purposes and whole selling the electric power to the National Power Corporation (NAPOCOR), private electric utilities and electric cooperatives, and for the carrying on of all business incident thereto, including but not limited to the sale of the by-products of power generation. It is registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity.

Furthermore, it is registered with the Bureau of Internal Revenue (BIR) as a Value-Added Tax (VAT) taxpayer in accordance with Section 107 of the National Internal Revenue Code of 1977, as amended [now Section 236 of the National Internal Revenue Code of 1997 (1997 NIRC)], with Tax Identification No 004-964-861-VAT.[4]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (CIR) empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes, with office address at BIR National Office Building, BIR Road, Diliman, Quezon City.

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[3] *Division Rollo. pp. 213-225.*
[4] *Paragraphs 1, 3, 4 and 5, Joint Stipulation of Facts and Issues, Stipulation of Facts, Division Rollo, pp. 66-67*

It appears that sometime in September 2001, PPC paid input VAT in the amount of P1,613,219.56 arising from its domestic purchases for said period, which were allegedly entirely attributable to its zero-rated sales of power generation services to Panay Electric Company (PECO).

For the fourth quarter of 2001, PPC allegedly accumulated input VAT in the amount of P3,025,949.44 arising from its domestic purchases attributable to its zero-rated sales of power generation to PECO. In its Quarterly VAT Returns for the *third* and *fourth* quarters of 2001 filed on October 25, 2001[5] and January 23, 2002[6], respectively, PPC declared, among others, the following:

2001	Exhibit	Output VAT	Input VAT Carried Over	Input VAT For the Quarter	VAT Payable (Excess Input VAT)	Payment from Previous Mos.	Tax Payable (Overpayment)
3rd Qtr	D	**10,594,535.03**	-	1,965,846.06	8,628,688.97	10,241,908.53	**(1,613,219.56)**
4th Qtr	G	-	1,613,219.56	**3,025,949.44**	(4,639,169.00)	No payment	**(4,639,169.00)**

PPC alleges that the said input VAT of P4,639,169.00 on its domestic purchases of goods and services for the third and fourth quarters of taxable year 2001 was not utilized against any output VAT liability in said quarters or even in subsequent quarters. Consequently, on January 30, 2002, pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, PPC filed with the BIR RDO No. 043 separate administrative claims for refund of unutilized input VAT in the amount of P1,613,219.56 for September 2001 and in the amount of P3,025,949.44 for the fourth quarter of taxable year 2001 or for a total amount of P4,639,169.00.[7]

Due to inaction on the part of the CIR on its claims and in order to suspend the running of the two-year prescriptive period under Section 112(D) of the 1997 NIRC and Section 4.106-2(c) of Revenue Regulations No. 7-95, as

[5] *Quarterly Vat Return for 3rd Quarter of 2001, Exhibit "D".*
[6] *Quarterly Vat Return for 4th Quarter of 2001, Exhibit "G".*
[7] *Application for Tax Credit/Refund of VAT Paid, Exhibits "H" and "I".*

amended, PPC filed a Petition for Review[8] on October 24, 2003 with the Court of Tax Appeals. The case was raffled and assigned to the *Second Division* of this Court.

After trial on the merits, the CTA *Second Division* promulgated a Decision on October 30, 2006 wherein PPC's claim for refund or issuance of tax credit certificate was partially granted in the reduced amount of P793,505.64.

For the *third* quarter of 2001, PPC's original claim, as mentioned above, was P1,613,219.56. The *Second Division*, in its Decision, found that only the amount of P1,472,181.15 was duly substantiated by PPC pursuant to the report of the Commissioned Independent CPA. Said amount was apportioned pursuant to the last proviso of Section 112 of the 1997 Tax Code. The amount granted of P793,505.64 was computed by the *Second Division* as follows:

Substantiated Claim		P	1,472,181.15
Multiply by the ratio of:			
Declared Gross Receipts per Return	105,945,350.30		
Total Gross Receipts per Official Receipts	196,555,092.31		0.539
Refundable Amount		P	793,505.64

For the *fourth* quarter of 2001, PPC's entire claim for refund in the amount of P3,025,949.44 was denied because according to the *Second Division* and We quote:

> "With respect however to petitioner's alleged zero-rated sales for the *fourth quarter* of 2001, petitioner's evidence would show that it did not report any amount of gross receipts in its VAT return for the said quarter. And as mentioned earlier, to qualify for zero-rating under R.A. 9136, aside from being a generation company, petitioner must prove that it derived sales from power generation. Since petitioner did not declare any amount of gross

[8] *Division Rollo. pp. 1-8.*

receipts for the fourth quarter of 2001, there are no zero-rated sales to speak of. Consequently, petitioner's alleged related input VAT for the fourth quarter of 2001 in the amount of P3,025,949.44 cannot be refunded."

Accordingly, the dispositive portion of the Decision reads as follows:

"**WHEREFORE**, in view of the foregoing considerations, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** or, in the alternative, **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of P793,505.64 representing unutilized input VAT for the third quarter of 2001.

SO ORDERED."

On November 23, 2006, petitioner-PPC filed a Motion for Reconsideration.[9] PPC stated therein, among others, that there was no factual basis to apply the last proviso of Section 112 (A) of the 1997 Tax Code for the amount being claimed for refund for the *third* quarter of the year 2001 and it also argued that it derived sales from power generation in the *fourth* quarter of 2001 and hence, the non-indication in its 4th Quarter Return of this fact should not result to the denial of its claim.

On May 22, 2007, the *Second Division*, in a Resolution[10], denied petitioner's Motion for Reconsideration for lack of merit. Hence, this appeal by way of a Petition for Review filed with the CTA *En Banc* on June 19, 2007.

THE ASSIGNED ERRORS

Petitioner raised the following issues in the instant petition, to quote:

"[First]. For the 3rd Quarter Claim

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[9] *Division Rollo. pp. 226-234.*
[10] *Ibid.*

Whether or not the Honorable Court's Second Division erred in applying the last proviso of Section 112(a) of the Tax Code in its decision considering that the said application is not in accordance with the evidence adduced in Court proving that Petitioner's gross receipts for the third quarter (up to the fourth quarter) of 2001 were all receipts from its sale of power generation services.

[Second]. For the 4th Quarter Claim

Whether or not the non-indication in Petitioner's VAT return of zero-rated gross receipts should result to the denial of its claim, notwithstanding the fact of the existence of zero-rated sales from power generation services for the fourth quarter of 2001 which was clearly established by sufficient evidence adduced before this Honorable Court."

THE COURT *EN BANC'S* RULING

The petition is bereft of merit.

After a careful and thorough perusal, evaluation and study of the instant Petition for Review, the Court *En Banc* finds no cogent reason to disturb the Decision of the *Second Division* promulgated on October 30, 2006 as well as the Resolution dated May 22, 2007. What the instant petition ask is for the Court *En Banc* to view and appreciate the evidence in their own perspective of things, which unfortunately had been resolved and extensively discussed in the aforesaid Decision and Resolution.

Anent the first issue, the Court *En Banc* agrees with the findings and conclusion of the *Second Division*.

PPC's claim for refund corresponding to the *third* quarter of 2001 amounted to P1,613,219.56. Of this amount, the *Second Division* correctly found that only P1,472,181.15 have been duly substantiated in accordance with Section 110 of the 1997 Tax Code, in relation to Section 4.104-5 of Revenue Regulations No. 7-95.

Furthermore, a scrutiny of PPC's VAT return for the third quarter of 2001[11] showed that it reported an output VAT liability of P10,594,535.03, hence indirectly declaring the related gross receipts in the amount of P105,945,350.30 (P10,594,535.03 / 10%). However, the court commissioned independent CPA found that PPC should have reported gross receipts for the third quarter of 2001 amounting to P196,555,092.31. Therefore, there was an under-declaration amounting to P90,609,742.01. This finding of the independent CPA was not questioned by petitioner, hence it became conclusive.

The correctness of the *Second Division's* "pro-rating" of the amount P1,472,181.15 is now being questioned by PPC.

The Court *En Banc* agrees with petitioner that the last proviso of Section 112 (A) of the 1997 Tax Code applies when a VAT-registered 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.

We quote hereunder Section 112(A) for easy reference:

> "**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 <u>attributable to such sales</u>**, 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)

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[11] *Ibid.*

> 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." (Emphasis and underscoring supplied)

The abovementioned provision provides that a taxpayer may apply for the issuance of a tax credit certificate or refund of creditable **input tax due or paid** that are **directly attributable** to the taxpayer's zero-rated or effectively zero-rated sales.

In the case at bar, PPC should take note that, for the third quarter of 2001, it has P1,472,181.15 duly substantiated excess input VAT, and this amount is directly attributable to PPC's gross receipts for the same period amounting to P196,555,092.31. Since PPC failed to present fully in its VAT return the full amount of P196,555,092.31 when it declared a smaller amount of P105,945,350.30, it is but logical that only a proportionate amount relating to the duly substantiated excess input VAT of P1,472,181.15 be allowed to be refunded. Hence, the computation made by the *Second Division* in arriving at the refundable amount of P793,505.04 is correct, and *We* reiterate the same, to wit:

Substantiated Claim		P	1,472,181.15
Multiply by the ratio of:			
Declared Gross Receipts per Return	105,945,350.30		
Total Gross Receipts per Official Receipts	196,555,092.31		0.539
Refundable Amount		P	793,505.64

As for the second issue, PPC contends that the non-indication of zero-rated gross receipts in its VAT return should not result in the denial of its claim. It stated that Section 114 of the 1997 Tax Code is not the law in point in determining whether a taxpayer's claim for refund should be denied or not. It further argued that under Revenue Memorandum Circular No. 42-03, dated July 15, 2003, the non-indication of gross receipts attributable to zero-rated sales in a claimant's VAT return is not fatal to its claim. Furthermore, if ever petitioner failed to state the amount of zero-rated gross receipts from the sale of generated power should, at the most, warrant only the imposition of fine pursuant to Section 250 of the Tax Code.

We do not agree.

For the fourth quarter of 2001, PPC is praying to refund the amount of P3,025,949.44. A study of PPC's VAT return for the said quarter[12] reveals that no amount of gross receipts was reported or indicated therein. As the *Second Division* correctly stated, under R. A. No. 9136[13], to qualify for zero-rating, aside from being a generation company, petitioner must prove that it derived sales from power generation. Since petitioner did not declare any amount of gross receipts for the fourth quarter of 2001, clearly, PPC's alleged related input VAT for the fourth quarter of 2001 cannot be refunded.

Thus, *We* are constrained to reiterate that, this Court has ruled time and again that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the entity claiming the same. Hence, the burden of proof rests upon the taxpayer to establish by sufficient and competent evidence, its entitlement to a claim for refund.[14] Here, PPC bears the burden of

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[12] *Exhibit "G".*
[13] *Electric Industry Reform Act of 2001.*
[14] *Philippine Geothermal, Inc. vs. The Commissioner of Internal Revenue, 465 SCRA 308.*

proving its compliance with all the mandatory provisions of the 1997 Tax Code, as amended and its implementing rules and regulations.

Applicable here is Section 114 of the 1997 Tax Code and it provides the requirement that VAT taxpayers, in this case PPC, file a quarterly return and to declare therein the amount of its gross sales or receipts. *We* quote hereunder the said section for clarity:

> "SECTION 114. Return and Payment of Value-added Tax. —
>
> (A) In General. — Every person liable to pay the value-added tax imposed under this Title shall file a quarterly return of the **amount of his gross sales or receipts** within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer: Provided, however, That VAT-registered persons shall pay the value-added tax on a monthly basis. xxx" (Emphasis supplied)

In PPC's case, as found by this Court as well as by the court commissioned independent CPA, there was a discrepancy between the 3rd and 4th Quarterly VAT Returns and Schedule of Gross Receipts from Zero-rated sales in the amount of P408,437,732.80 broken down as follows[15]:

Period Covered	Exh. No.		Amount
3rd Quarter of 2001	CC	P	196,555,092.31
4th Quarter of 2001	CC		**211,882,640.49**
Total		P	408,437,732.80

It should be noted that, even though PPC has issued receipts to its customer, Panay Electric Company, for the fourth quarter of the year 2001 itemized as follows:

[15] *Page 7, Exhibit "S".*

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Month	Exh. No.		Amount
October 2001	DD-4	P	70,488,695.18
November 2001	DD-5		70,687,807.74
December 2001	DD-6		70,706,137.57
		P	**211,882,640.49**

it did not declare the total amount of P211,882,640.49[16] as sales in its fourth quarter VAT return for the year 2001. PPC instead declared nil sales for the said period.

Hence, the *Second Division* is correct when it ruled that the abovementioned provision, requiring persons liable to pay VAT declare the amount of his gross sales or receipts, is necessary to determine not only the amount of taxes that may be due to the government but also for possible refunds that may be due in favor of the taxpayer. A declaration or indication of amount of gross sales or receipts in the VAT return is needed. This requirement cannot be supplanted or modified by any administrative issuance or order similar to that relied upon by PPC. It is an elementary rule that administrative issuances must not override but must remain consistent and in harmony with the law they seek to apply and implement.[17]

In sum, since PPC did not declare any amount of gross receipts for the fourth quarter of 2001, its alleged related input VAT for the fourth quarter of 2001 amounting to P3,025,949.44 cannot be refunded.

WHEREFORE, the instant Petition for Review is hereby **DENIED DUE COURSE** and **DISMISSED** for lack of merit. Accordingly, the assailed Decision and Resolution of the *Second Division* are hereby **AFFIRMED *in toto.***

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[16] *The independent CPA's total is P211,882,638.57 because it inadvertently recorded Exhibit DD-6 as P70,706,135.57 instead of P70,706,137.57 - the figures appearing in the said exhibit.*
[17] *Commissioner of Internal Revenue vs. Court of Appeals, 240 SCRA 368.*

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTANEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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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.

ERNESTO D. ACOSTA
Presiding Justice