REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

CTA EB CASE No. 683
(CTA Case No. 7468)

- versus-

Present:
Acosta, *PJ*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ*.

PANAY POWER COMPANY,

Respondent.

Promulgated:
NOV 29 2011 ArApolinario 2:00 p.m.

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DECISION

COTANGCO-MANALASTAS, *J*.:

Before this Court is a *Petition for Review*[1] filed by the Commissioner of Internal Revenue on September 17, 2010, pursuant to *Section 18 of Republic Act (R.A.) No. 1125, as amended by Section 11 of R.A. No. 9282, and Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)*, with a prayer that the portion of the *Decision*[2] enunciated by the Special First Division of this Court on March 16, 2010 granting the refund or issuance of a tax credit certificate (TCC) in favor of Panay Power Company in the amount of P14,526,563.31 be set aside and a new one be entered denying the claim in its entirety.

[1] *Rollo*, pp. 1-33.
[2] *Division Docket*, pp. 431-451.

The dispositive portion of the assailed decision reads:

WHEREFORE, premises considered, the Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED to REFUND or to ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner in the reduced amount of P14,526,563.31, representing unutilized input VAT attributable to its zero-rated sales as power generation company for taxable year 2004.

SO ORDERED.

ANTECEDENT FACTS

The facts, as found by the Special First Division, are as follows:

"'Panay Power Corporation (petitioner) is a corporation duly organized and existing under Philippine laws, with principal office at 2nd Floor Benpres Building, Meralco Avenue, Pasig City. Petitioner is registered with the Bureau of Internal Revenue (BIR) as a value-added tax (VAT) taxpayer as of October 11, 1996, with Tax Identification No. (TIN) 004-964-861-000, as evidenced by its Certificate of Registration No. OCN 3RC0000271281.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue 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. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner is principally engaged in the business of generating power for lighting and power purposes and the wholesale of electric power to the National Power Corporation, private electric utilities, and electric cooperatives, and for the carrying on of all businesses incident thereto, including but not limited to the sale of the by-products of power generation. As such, it is likewise registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. It was issued a Certificate of Compliance No. 03-06-GXT8-0008 by the ERC on June 4, 2003.

Petitioner filed with the BIR its Original and Amended Quarterly VAT Returns for the four quarters of 2004 on the following dates:

Period Covered	Original Return Filed On	Exhibit	Amended Return Filed On	Exhibit
First Quarter	April 26, 2004	E	July 28, 2004	F

Second Quarter	July 26, 2004	G to G-2		
Third Quarter	October 25, 2004	H to H-2		
Fourth Quarter	January 24, 2005	I to I-2	April 25, 2005	J to J-2

On December 21, 2005, petitioner filed with the BIR a written claim for refund corresponding to its alleged unutilized excess input VAT in the total amount of P28,121,495.21.

Due to respondent's inaction on the said administrative claim for refund, petitioner filed this instant Petition for Review on April 24, 2006, praying for the refund or issuance of tax credit certificate in the amount of P28,121,495.21, for its alleged unutilized input VAT for taxable year 2004.

In his Answer filed on June 1, 2006, respondent raised the following Special and Affirmative Defenses:

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

5. Petitioner must prove that it paid for the input VAT so alleged;

6. Petitioner must prove that the same input VAT was not utilized against any output VAT liability;

7. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112 (A) of the Tax Code of 1997;

8. Petitioner must prove that the claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;

9. 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;

10. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation."

During trial, petitioner presented documentary and testimonial evidence. Respondent, on the other hand, waived his right to present evidence and submitted the case for decision.

On March 23, 2009, the case was submitted for decision, considering petitioner's Memorandum filed on February 12, 2009 and respondent's Memorandum filed on March 16, 2009.

The Ruling of the Court in Division

The case was decided in favor of respondent Panay Power Company.

The Court in Division affirmed that respondent is registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity, under ERC Certificate of Compliance No. 03-06-GXT8-0008; that respondent generated sales from power generation services for the four quarters of taxable year 2004 in the amount of P957,512,701.53, which was reported in its quarterly Value-Added Tax (VAT) returns for the same period. After careful scrutiny, the Court *a quo* learned that respondent's official receipts showed however a total of P900,262,414.58 only. Thus, respondent's declared zero-rated sales are only 94.02% substantiated, computed as follows:

Substantiated zero-rated sales	P 900,262,414.58
Divided by declared zero-rated sales	P 957,512,701.53
Percentage of substantiated zero-rated sales	94.02%

The Court *a quo* found the Independent Certified Public Accountant's (ICPA) report to be in order, where the ICPA declared that only P17,233,508.29 is properly substantiated out of the total claim of P28,280,542.87. However, after verification, the Court *a quo* further decreased the claimed input VAT by P1,624,111.16. Thus, according to the Court *a quo* respondent's valid creditable input tax is P14,526,563.31, computed as follows:

Total available input VAT per VAT Returns		P 28,280,542.87
Less: Disallowances		
Per ICPA	P 11,047,034.58	
Per Court's verification	1,624,111.16	(12,671,145.74)
Less: Output VAT		(159,047.70)
Valid input VAT		P 15,450,349.43
Multiply by percentage of substantiated zero-rated sales		94.02%
Valid creditable input tax		**P 14,526,563.31**

Also, the Court in Division ruled out the possibility of the input VAT having been utilized in the succeeding taxable quarters; this is in view of the fact that respondent, in its original and amended quarterly VAT returns for taxable year 2005, deducted the amount P59,533,378.83, of which the valid input VAT of P14,526,563.31 forms part, as "Any VAT Refund/TCC Claimed" from the total available input tax of P68,350,275.57.

Finally, the Court *a quo* affirmed that both the administrative claim for refund filed on December 21, 2005 and the Petition for Review filed on April 24, 2006 fell within the two-year prescriptive period.

Both parties sought the partial reconsideration of the Court *a quo's Decision* promulgated on March 16, 2010. In a Resolution[3] dated August 27, 2010, the Court a quo pronounced that it found no cogent reason to disturb, reverse or modify aforesaid *Decision*, thus, Panay Power Company's Motion for Partial Reconsideration (of Decision dated 16 March 2010) and the Commissioner of Internal Revenue's Motion for Partial Reconsideration were both denied for lack of merit.

Hence, this *Petition for Review*[4].

In a Resolution[5] dated October 1, 2010, the Court En Banc ordered respondent Panay Power Company to file its comment within ten (10) days from receipt of resolution. Respondent's Comment On Petitioners Petition for Review was received by this Court on October 26, 2010.

On November 17, 2010, the parties were ordered to submit their respective Memoranda within a non-extendible period of thirty (30) days from receipt thereof.

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[3] *Rollo*, pp. 27-30.
[4] *Rollo*, pp. 1-33.
[5] *Rollo*, pp. 35-36.

Respondent submitted its Memorandum[6] on December 22, 2010, whereas petitioner's Memorandum[7] was received by this Court on February 2, 2011. The case was submitted for decision on March 1, 2011.

ISSUES

Whether the Court *a quo* erred in partially granting respondent's claim for refund or issuance of a tax credit certificate of its unutilized input VAT for taxable year 2004 on the following grounds, *to wit*: [i] respondent's failure to submit with the petitioner all the necessary documents relevant to its claim during the administrative stage of its claim for refund or tax credit; and [ii] respondent's failure to prove compliance with the invoicing requirements mentioned in Sections 110 and 113 of the National Internal Revenue Code (NIRC) of 1997, as amended, in relation to the provisions of Revenue Regulations 7-95.

Arguments of Petitioner

Petitioner submits that respondent is not entitled to refund or tax credit even in the reduced amount of P14,526,563.31 allegedly representing respondent's unutilized input tax because it failed to submit with petitioner all the necessary and relevant documents to support its administrative claim for refund or tax credit.

According to petitioner, respondent failed to prove before this Court during trial that it complied with or submitted all necessary and evidentiary documents to support its administrative application for refund or tax credit of excess input VAT before resorting to judicial review of its claim for refund or tax credit. While it is true that respondent filed an administrative claim for refund, the same is considered merely pro forma as it failed to submit documentary evidence to prove its entitlement thereto. Also,

[6] *Rollo*, pp. 57-90.
[7] *Rollo*, pp. 100-109.

respondent failed to prove compliance with the prescribed checklist of requirements to be submitted in claims for VAT refund pursuant to Revenue Memorandum Order No. 53-98.

Further, petitioner avers that respondent failed to prove that it has complied with the invoicing requirements mentioned in Sections 110 and 113 of the NIRC of 1997, as amended, in relation to the provisions of Revenue Regulations 7-95.

Arguments of Respondent

Two major points were invoked by respondent to controvert petitioner's allegations, *viz*: [1] a new issue cannot be raised for the first time on appeal; and [2] respondent was constrained to file the Petition for Review due to petitioner's inaction to its administrative claim.

First, respondent points out that the Joint Stipulation of Facts and Issues approved on October 25, 2006, does not contain the issue being raised by petitioner in this petition; and that petitioner has not even mentioned the issue on *respondent's failure to submit with the BIR documents to support its administrative claim* in her Answer filed on June 1, 2006. Citing *Rizal Commercial Banking Corporation vs. CIR, G.R. No. 168498, April 24, 2007,* respondent reasoned that said issue cannot anymore be raised as "points of law, theories, issues and arguments not adequately brought to the attention of the lower court will not be ordinarily considered by a reviewing court as they cannot be raised for the first time on appeal, much more in a motion for reconsideration as in this case, because this would be offensive to the basic rules of fair play, justice and due process." Also, respondent argues that petitioner has given only general allegations that respondent has submitted insufficient evidence and did not comply with invoicing requirements; such allegations, having been raised for the first time and without specification on the insufficiency of the documents of respondent, are baseless claims which lack satisfactory explanation as to merit the attention of this Court.[8]

Second, respondent asseverates that: it was constrained to file the instant petition on April 24, 2006, in accordance with Section 112 of the Tax Code and RMC 61-2005, due to petitioner's inaction on its administrative claim; if respondent indeed failed to submit complete documentary evidence, petitioner could have easily rendered a decision in view of the alleged failure.

To buttress its defense, respondent made reference to *CIR vs. Cebu Geothermal Power Company, Inc.*[9] where this Court ruled that 'while the submission of complete supporting documents is necessary for the granting of a refund or tax credit certificate, the afore-quoted provision does not state that the non-submission of the supposed complete documents makes the administrative claim for refund or tax credit certificate invalid or pro forma, the effect of which makes the judicial appeal dismissible for lack of jurisdiction'. Respondent likewise cited the ruling of this Court in the case of *CIR vs. San Roque Power Corporation*[10] where *We* held that 'the alleged non-submission of complete documents at the administrative level will not bar this Court from receiving evidence, evaluating and appreciating its materiality, relevancy, probative value and sufficiency concerning the San Roque Power Corporation's claim for refund considering that the CIR failed to state and identify what documents did San Roque Power Corporation fail to submit in order to warrant their denial. The CIR ought to know that mere allegation is not evidence. Thus, mere allegation in the total absence of evidence is just that — an allegation — underserving of credence'.

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[8] *Rollo*, pp. 42-43, *COMMENT on Petitioner's Petition for Review.*
[9] CTA EB No. 426, May 29, 2009.
[10] CTA EB No. 523, April 15, 2010.

Further, respondent avers that petitioner herself recognizes that administrative and judicial claims for VAT refund or tax credit can proceed simultaneously under Revenue Memorandum Circular No. 49-03. Thus, petitioner may still evaluate and act on respondent's administrative claim for refund or tax credit even if a Petition for Review has already been filed in Court.

THE RULING OF THE COURT *EN BANC*

We find no merit in the instant petition.

The groundwork of the instant petition is principally lodged on the allegation that respondent failed to prove before this Court that it complied with or submitted all necessary and evidentiary documents to support its administrative application for refund or tax credit of excess input VAT in the amount of P14,526,563.31 with petitioner before resorting to judicial review pursuant to Section 112 (C) of the NIRC of 1997, as amended. We quote:

> 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 Subsection (A) hereof.
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> In case of full or partial denial of the claim for tax refund or credit, or the failure on the part of the Commissioner to act on the application within 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. (Italics Supplied)

Pursuant to the aforequoted Section 112 (C) of the NIRC of 1997, as amended, the Commissioner of Internal Revenue (CIR) has 120 days from the submission of the complete supporting documents to decide the claim for refund. Thus, a taxpayer must first submit the complete supporting documents before the 120-day period should commence.

A careful scrutiny of the records reveal that respondent indeed submitted necessary and evidentiary documents to support its administrative application for refund or tax credit of excess input VAT. In the instant case, respondent filed on December 21, 2005 its administrative claim for refund or issuance of tax credit certificate, it is apparent that respondent, upon the filing of its judicial claim, simultaneously submitted the complete documents in support thereof. This is evident in respondent's administrative claim, wherein the following statements were indicated, *viz*:

> "**In support of this application, we enclose copies of the following documents**:
> 1. Articles of Incorporation
> 2. ERC Registration and Compliance Certificate
> 3. VAT Registration Certificate
> 4. Quarterly VAT Returns for the first, second, third and fourth quarters of 2004;
> 5. Summary of Input Tax Payments for the first, second, third and fourth quarters of 2004 showing the details of PPC's purchases of goods and services as well as the corresponding input taxes paid, together with the pertinent supporting VAT invoices and official receipts.
> 6. Application for Zero Rate for the year 2004"

After going over the records of this case, *We* find that there's nothing on record which shows that petitioner notified/required respondent to submit any additional documents other than those already submitted for consideration in the administrative level. Thus, the running of the 120-day period commenced and continued to run from the date respondent filed its administrative application together with the supporting documents, i.e., December 21, 2005 up to April 20, 2006, as the running of the said period was not stopped by any notification from the BIR.

To reiterate, the records of this case belie petitioner's allegations as herein respondent was able to attach together with its administrative application for refund or tax credit the relevant supporting documents, i.e., Articles of Incorporation, ERC Registration and Compliance Certificate, VAT Registration Certificate, Quarterly VAT Returns for 2004, Summary Input Tax Payments for 2004, supporting VAT invoices and official receipts, Application for Zero Rate for the year 2004. Further, the instant petition is in fact dearth of evidence which could prove/show that respondent failed to submit complete documents to support its administrative claim for refund/tax credit. Considering that CIR failed to identify or point out and prove to this Court the specific documents which were not submitted, petitioner's arguments clearly stand on **mere allegations** of non-submission of complete documents. On the basis of those sheer allegations, which run counter to the evidence on record, petitioner prays for this Court to reverse and set aside the *Decision* and *Resolution* which were tediously evaluated and prudently decided by the Special First Division. Such is a dangerous proposition, and one which *We* refuse to countenance.

Settled is the rule in this jurisdiction that the alleged non-submission of complete documents at the administrative level will not bar this Court from receiving evidence, evaluating and appreciating its materiality, relevancy, probative value and sufficiency concerning the respondent's claim for refund considering that the CIR failed to state and identify what documents respondent failed to submit in order to warrant their denial. The CIR ought to know that mere allegation is not evidence. Thus, mere allegation in the total absence of evidence is just that — an allegation — underserving of credence.[11] Mere allegations without adducing documentary evidence are not sufficient. Allegation is not synonymous with proof.[12]

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[11] *Commissioner of Internal Revenue vs. San Roque Power Corporation*, CTA EB Case No. 523, April 15, 2010 citing *Industrial Textile Manufacturing Co. of the Phils. Inc. vs. LPJ Ent. Inc.*, G.R. No. 66140; January 31, 1993, 217 SCRA 322.
[12] *Ernesto Martin vs. Hon. Court of Appeals and Manila Electric Company*, G.R. No. 82248, January 30, 1992.

In view of the foregoing, it would not be amiss to conclude that the reckoning of the 120-day period under Section 112 (C) of the NIRC, as amended, commenced simultaneously with the filing of petitioner's administrative claim on December 21, 2005. Thus, respondent timely filed its appeal by way of a Petition for Review in CTA Case No. 7468 on April 24, 2006, as the same was filed well within the 30-day period after the lapse of the 120-day period under Section 112 (C) of the NIRC, as amended.

'In a VAT refund case such as the present case, the alleged non-submission of complete documents at the administrative level is not fatal to a claim for refund in the judicial level as held in several CTA En Banc cases, one of which is *Commissioner of Internal Revenue vs. CE Luzon Geothermal Power Company, Inc.* It will not bar the CTA from receiving, evaluating and appreciating evidence submitted before it. Once the claim for refund has been elevated to the CTA, the admissibility, materiality, relevancy, probative value and weight of evidence presented therein become subject to the Rules of Court. The question of whether or not the evidence submitted by a party is sufficient to warrant the granting of a claim for refund lies within the sound discretion and judgment of the Court.'[13]

With regard to petitioner's allegation attributing failure on the part of respondent to prove compliance with the invoicing requirements mentioned in Sections 110 and 113 of the NIRC of 1997, as amended, in relation to the provisions of Revenue Regulations 7-95, *We* find the same to be unfounded.

In the challenged *Decision* and *Resolution*, the Court *a quo* ruled that respondent was able to present official receipts and invoices which were reviewed and found to have

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[13] *Commissioner of Internal Revenue vs. Toledo Power Company*, CTA EB Case No. 589, January 12, 2011 citing Consolidated Cases of *CE Luzon Geothermal Power Company, Inc. vs. Commissioner of Internal Revenue*, CTA EB No. 553 and *Commissioner of Internal Revenue vs. CE Luzon Geothermal Power Company, Inc.*, CTA EB No. 554, July 20, 2010, *Commissioner of Internal Revenue vs. San Roque Power Corporation*, CTA EB No. 523, April 15, 2010; CTA EB No. 474, September 1, 2009; *Commissioner of Internal Revenue vs. Visayas Geothermal Power Company, Inc.*, CTA EB Case No. 282 (CTA Case Nos. 6790 & 6838), November 20, 2007, citing *Jideco Manufacturing Corporation vs. Commissioner of Internal Revenue*, CTA Case No. 6552, September 16, 2004.

properly substantiated the amount of claim granted in the subject *Decision*. Further, the allegations in this Petition for Review concerning non-compliance with the invoicing requirements are mere rehash of the allegations in the Motion for Reconsideration which were passed upon, discussed and considered in the assailed *Decision* and *Resolution*. It is significant to note that conclusions and findings of fact by the trial court are entitled to great weight on appeal and should not be disturbed unless for strong and cogent reasons because the trial court is in a better position to examine real evidence, as well as to observe the demeanor of the witnesses while testifying in the case.[14]

In fine, the Court En Banc finds no cogent reason to disturb the findings and conclusion in the assailed *Decision* and *Resolution* of the Court's Special First Division, promulgated on March 16, 2010 and August 27, 2010, respectively.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the assailed *Decision* dated March 16, 2010 and *Resolution* dated August 27, 2010 in CTA Case No. 7468 are hereby **AFFIRMED**.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

[14] *Spouses Patricio and Myrna Bernales v. Heirs of Julian Sambaan, et al., G.R. No. 163271, January 15, 2010.*

(On Wellness Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice