Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

MIRANT PAGBILAO CORPORATION (Formerly: Southern Energy Quezon, Inc.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

E.B. CASE NO. 216
(C.T.A. Case No. 6417)

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COMMISSIONER OF INTERNAL REVENUE
Petitioner,

- versus –

MIRANT PAGBILAO CORPORATION (Formerly: Southern Energy Quezon, Inc.),
Respondent.

E.B. CASE NO. 225
(C.T.A. Case No. 6417)

Members:

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

Promulgated:

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DECISION

CASANOVA, J.:

THE CASE

This is a case where both parties filed their respective Petitions for Review.

On August 31, 2005, the *Second Division* of the Court of Tax Appeals promulgated a Decision (Original Decision) entitled *"Mirant Pagbilao Corporation (Formerly: Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue"* with CTA Case No. 6417 that ordered the Commissioner of Internal Revenue ("CIR") to refund in favor of Mirant Pagbilao Corporation ("MPC") the reduced amount of P118,749,001.55 from the original amount being claimed for refund of P127,140,331.85.

On September 30, 2005, MPC filed a Motion for Partial Reconsideration with Motion for Partial New Trial.

On August 30, 2006, the *Second Division* promulgated an Amended Decision (assailed Decision) increasing the amount to be refunded by MPC to P118,756,640.97 or an additional amount of P7,639.42. It denied MPC's Motion for Partial New Trial.

On September 15, 2006, the CIR filed a Motion for Reconsideration of the Amended Decision.

MPC filed on October 5, 2006 a Petition for Review of the Amended Decision and the same was docketed as ***En Banc*** **Case No. 216** entitled *"Mirant Pagbilao Corporation (Formerly: Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue".*

On November 13, 2006, in a Resolution, the CIR's Motion for Recondsideration was denied by the *Second Division.*

The CIR filed on December 11, 2006 a Petition for Review of the said Amended Decision and of the Resolution of the *Second Division* promulgated on November 13, 2006 that denied CIR's Motion for Reconsideration. The said petition was docketed as ***En Banc* Case No. 225**, entitled *"Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly: Southern Energy Quezon, Inc.)"*.

THE FACTS

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

Mirant Pagbilao Corporation or MPC, previously known as Hopewell Power (Philippines) Corporation and Southern Energy Quezon, Inc., is a corporation organized and existing under the laws of the Republic of the Philippines. It is primarily engaged in the generation and distribution of electricity to the National Power Corporation ("NPC") under a Build, Operate, Transfer ("BOT") scheme, and registered under RDO Control No. 96-600-002498 and Taxpayer Identification No. 0001-726-870 with address at Pagbilao Grande Island, Pagbilao, Quezon.

On the other hand, the Commissioner of Internal Revenue or CIR, is duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or tax credit as provided by law, with office address at the BIR National Office Building, Diliman, Quezon City.

The Bureau of Internal Revenue ("BIR") approved the application of MPC for Effective Zero-Rating dated November 26, 1999 for the construction and operation of the power plant.

On April 25, 2000, July 25, 2000, October 24, 2000 and August 27, 2001, MPC filed its quarterly Value Added Tax ("VAT") returns for the four (4) quarters of taxable year 2000 showing excess input VAT paid on domestic purchases of goods, services, and importation of goods for taxable year 2000 in the amount of

One Hundred Twenty Seven Million One Hundred Forty Thousand Three Hundred Thirty One Pesos and 85/100 (P127,140,331.85), detailed as follows:

EXHIBIT	TAXABLE YEAR 2000	ZERO-RATED SALES	INPUT VAT ON DOMESTIC PURCHASES	INPUT VAT ON IMPORTATION	TOTAL
G	1st Quarter	2,415,714,387.94	24,531,376.33		24,531,376.33
H	2nd Quarter	2,440,549,290.06	34,122,619.83		34,122,619.83
I	3rd Quarter	2,568,092,829.35	29,084,228.67		29,084,228.67
J	4th Quarter	2,887,571,454.65	24,365,887.02	15,036,220.00	39,402,107.02
		Aggregate Zero **Rated Sales** **10,311,927,962.00**			**127,140,331.85**

Thus, on March 11, 2002, MPC instituted an administrative claim for refund before the BIR in the amount of P127,140,331.85 for the four (4) quarters of calendar year 2000.

The inaction of the BIR on its claim for refund prompted MPC to seek relief before this Court by filing a Petition for Review dated March 26, 2002. The case was raffled to the *Second Division* of this Court. The Petition for Review was later amended to conform to evidence pursuant to a Motion For Leave of Court to Amend Petition for Review to Conform to Evidence filed by MPC on June 10, 2003.

MPC availed of the provisions of C.T.A. Circular No. 1-95, as amended, and the Court commissioned Mr. Ruben R. Rubio, an independent certified public accountant (CPA) to verify MPC's voluminous documents. Mr. Rubio's report was made part of the records of this case.

After trial on the merits, on August 31, 2005 the *Second Division* promulgated a Decision that partially granted MPC's claim for refund, the dispositive portion of which is hereunder quoted, to wit:

> "**WHEREFORE**, premises considered, the Petition is hereby PARTIALLY GRANTED. Respondent [CIR] is ORDERED to REFUND or in the alternative, ISSUE A TAX CREDIT CERTIFICATE in favor of the petitioner [MPC] in the reduced amount of One Hundred Eighteen Million Seven Hundred Forty Nine Thousand One Peso and 55/100 (P118,749,001.55) computed as follows: a

		1st Quarter		2nd Quarter		3rd Quarter		4th Quarter		Total
Input taxes claimed	P	24,531,376.33	P	34,122,619.83	P	29,084,228.67	P	39,402,107.20	P	127,140,331.85
Less: Disallowance										
a) per Independent CPA		379,542.44		270,704.75		399,356.84		1,067,247.76		2,116,851.79
b) per Court's Verification		1,847,148.91		2,331,520.52		1,145,248.30		950,560.78		6,274,478.51
TOTAL	P	22,304,684.98	P	31,520,394.56	P	27,539,623.53	P	37,384,298.66	P	118,749,001.55

SO ORDERED."

On September 30, 2005, MPC filed a "Motion for Partial Reconsideration with Motion for Partial New Trial"[1]. On May 22, 2006, the *Second Division* promulgated a Resolution[2] requiring MPC to submit copies of certain exhibits. On June 15, 2006, MPC filed its Compliance[3] therewith.

Thus, on August 30, 2006, the *Second Division* promulgated the assailed Amended Decision which modified the original Decision by granting MPC's refund amounting to P7,639.42 (in addition to the original amount of P118,749,001.55 awarded to it by virtue of the August 31, 2005 Decision) or for a total of P118,756,640.97, but denied MPC's Motion for Partial New Trial.

On September 15, 2006, the CIR filed a Motion for Reconsideration of the Amended Decision.

On October 5, 2006, MPC filed a Petition for Review docketed as EB Case No. 216 wherein it raised the following issues:

I. WHETHER OR NOT THE CTA ERRED IN DISALLOWING THE UNUTILIZED INPUT TAXES IN THE AMOUNT OF P810,047.31 DUE TO NON-SUBMISSION OF SUPPORTING DOCUMENTS.

II. WHETHER OR NOT THE CTA ERRED IN DISALLOWING THE UNUTILIZED INPUT TAXES ON IMPORTATIONS IN THE AMOUNT OF P836,768.00 FOR LACK OF PROOF OF PAYMENT.

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[1] *Division Rollo, pp. 388-406.*
[2] *Division Rollo. pp. 529-531.*
[3] *Division Rollo. pp. 533-534.*

III. WHETHER OR NOT THE CTA ERRED IN DENYING PETITIONER'S MOTION FOR NEW TRIAL TO ALLOW PETITIONER TO PRESENT ADDITIONAL EVIDENCE TO PROVE INPUT TAXES IN THE AMOUNT OF P3,310,109.20.

On November 13, 2006, in a Resolution[4], CIR's Motion for Recondsideration was denied by the *Second Division*.

On December 11, 2006, the CIR filed a Petition for Review docketed as EB No. 225 wherein he raised the sole issue of:

> WHETHER OR NOT RESPONDENT IS ENTITLED TO A TAX REFUND/CREDIT IN THE AMOUNT OF P118,756,640.97 REPRESENTING UNUTILIZED INPUT TAXES PAID ON ITS DOMESTIC PURCHASES OF GOODS AND SERVICES AS WELL AS IMPORTATION OF GOODS ATTRIBUTABLE TO ZERO-RATED SALES FOR THE TAXABLE YEAR 2000.

The Court *En Banc* gave due course to both petitions. The parties were required by the Court *En Banc* to file their respective Comments and both complied with the same.

In a Resolution dated May 2, 2007, the Court *En Banc* consolidated EB No. 225 with EB No. 216, the case bearing the lower docket number, considering that both cases emanated from the same Decision promulgated by the CTA *Second Division* on August 31, 2005 in CTA Case No. 6417 entitled *"Mirant Pagbilao Corporation (formerly: Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue"*.

THE COURT *EN BANC'S* RULING

After a careful and thorough perusal, evaluation and study of the instant Petitions for Review, the Court *En Banc* finds no cogent reason to disturb the Amended Decision of the *Second Division* promulgated on August 30, 2006 as well as the Resolution dated November 13, 2006. What the instant petitions ask

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[4] *Divison Rollo. pp. 816-818.*

are 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 original Decision, assailed Amended Decision and Resolution.

With regard to the *first issue* raised in **EB Case No. 216**, MPC claims that the *Second Division* erred in disallowing the refund of its alleged input taxes in the amount of P810,047.31 considering that it was able to adduce evidence to substantiate the amount claimed. MPC maintains that it was able to adduce evidence before the Court by way of official receipts and invoices marked as Exhibits "V-9853" to "V-9877" in support of the amount of P810,047.31 and through the testimony of its tax manager, Taryn F. Uberita, during the September 1, 2003 hearing, wherein she identified allegedly pertinent documents marked as Exhibits "V-9853" to "V-9877" in support of the input taxes which were not submitted in time for the commissioned independent CPA's evaluation, including an alleged summary list marked as Exhibit "Z" to prove unutilized input tax in the amount of P810,047.31.

We are not persuaded.

It should be noted that, in a Resolution dated May 22, 2006, MPC was given an opportunity by the *Second Division*, to present copies of Exhibits "V-9853" to "V-9877" that relates to the amount of P810,047.31 being claimed for refund. Based on the records, MPC did not comply with the same. Up to now, MPC still failed to present the said exhibits. We considered Exhibit "Z" as immaterial considering that the source documents (Exhibits "V-9853" to "V-9877") upon which it was allegedly based were not presented.

Well-settled is the rule that tax refunds are in the nature of tax exemptions and as such they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming it.[5] In the present case, petitioner failed to discharge its burden of establishing its claim for a tax refund or credit.

Thus, *We* are constrained to uphold the ruling of the *Second Division* to disallow the amount of P810,047.31 for lack of supporting documents.

As for the *second issue*, MPC pointed out that the *Second Division* erred in disallowing the amount of P836,768.00 by disregarding Exhibits "V-2622" to "V-2624", "V-2633" to "V-2635", "V-2741" to V-2742", "V-4856" to "V-4858" and "V-5259" to "V-5297". MPC further claimed that the input taxes paid were clearly reflected in the Import Entry and Internal Revenue Declarations ("IEIRDs") as covered by the abovementioned exhibits. MPC also emphasized that input taxes on importations shall be supported with import entry or other equivalent document showing actual VAT payment pursuant to Section 4.104-5(b) of Revenue Regulations ("RR") No. 7-95. It concluded that the submission of bank debit advice or other documents, in addition to the IEIRDs, is required only in case the original or certified true copies of the IEIRDs are not available. It added that since MPC offered in evidence the IEIRDs, certified by the Independent CPA as faithful reproduction of the original IEIRDs, said IEIRDs should be admitted and considered by the Court *En Banc* as sufficient evidence of the input taxes on importations in the total amount of P836,768.00. It further asserts that, considering that the subject bank debit advices are mere corroborative evidence to the IEIRDs, which primarily reflect the duties and input taxes paid on importations, reference to them is deemed necessary only if IEIRDs have not clearly reflected payments of these input taxes.

We sustain the *Second Division's* disallowance of input taxes in the amount of P836,768.00.

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[5] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332; and Commissioner of Customs vs. Court of Tax Appeals, 328 SCRA 822*

To reiterate, as a general rule, input tax on importations should be supported with IEIRDs duly validated for actual payment of the input tax. Nevertheless, resort to other documents may be done to determine payment of input tax. In the present case, the IEIRDs presented by MPC did not show payment of the input taxes. Likewise, the bank debit advices attached to the IEIRDs to supposedly prove payment, failed to attain this purpose. Considering that the amounts in the bank debit advices do not match the amounts in the IEIRDs, the Court *En Banc*, was unable to determine whether or not the amounts in the IEIRDs were paid through the bank debit advice.

Furthermore, as correctly found by the *Second Division*, there were no proper descriptions of the kind of payment in the bank debit advice which made it difficult for *Us* to determine to which payee, and to what kind of payment, did the bank debit advices pertain to.

Hence, MPC's claim for refund of input taxes in the amount of P836,768.00 should also be denied for lack of proof of payment.

As for the *third issue*, MPC submits that the *Second Division* erred in denying its Motion for New Trial to allow it to present additional evidence to prove the input taxes in the amount of P3,310,109.20. In support of this, MPC claimed that it will be unfair for it to be faulted when the relevant documents, such as official receipts and invoices, which should form part of the independent CPA's submission to the Court were, for some reason, omitted. It further emphasized that this is not a case of forgotten evidence because all evidence forming part of the voluminous records were examined and evaluated by the independent CPA although some were not submitted to the Court, without fault on the part of MPC. It also asserted that the Court should have applied the provisions of Rule 32 of the Rules of Court as referred to in CTA Circular No. 1-95, as amended by CTA Circular 10-97, specifically, pursuant to Section 11 of Rule 32 of the Rules of Court, to wit:

Section 11. Hearing upon report.— Upon expiration of the period of ten (10) days referred to in the preceding section, the report shall be set for hearing, after which the court shall issue an order adopting, modifying, or rejecting the report in whole or in part, or recommitting it with instructions, or requiring the parties to present further evidence before the commissioner or the court. (*Underscoring supplied*)

Again, *We* are not persuaded.

The *Second Division* is correct in ruling that it is pointless to require MPC to submit additional documents in support of the unutilized input tax of P3,310,109.20 in view of its admission that the VAT official receipts and invoices were not even pre-marked and proffered before this Court. The VAT official receipts or invoices and the CPA Report are essential in ascertaining the validity of the taxpayer's claim for a refund or credit as *We* have ruled in ***Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue***[6], to wit:

"The importance of the presentation of the sales invoices in spite of the submission of the CPA Report was aptly explained in the assailed Resolution, portion of which reads as follows:

'xxx It is worth stressing that under CTA Circular 1-95, as amended, the "voluminous" documents supporting the claim for refund, should have been pre-marked and submitted to the court after the independent auditor shall have examined and compared them with the originals. Without these pre-marked documents, the court cannot verify the correctness of the independent auditor's conclusion. xxx The method of individual presentation of each and every receipt, invoice or account for marking, identification and comparison with the originals thereof need not be done before the Court or Clerk of Court anymore after the introduction of the summary and CPA certification. It is enough that the receipts, invoices, vouchers or other documents covering the said accounts or payments to be introduced in evidence must be premarked by the party concerned and submitted to the Court in order to be

[6] *As cited in CTA EB No. 49, May 17,2005.*

made accessible to the adverse party who desires to check and verify the correctness of the summary and CPA certification'."

More importantly, the *Second Division* is correct by pointing out that during the interim of the proceedings of the case, specifically from the time of the presentation of the CPA Report during the May 7, 2003 hearing and before issuance of the Court's Decision on August 31, 2005 or a period of more than two (2) years, MPC, through its counsel, failed to inform this Court of the absence of the pre-marking and non-submission of VAT official receipts and invoices in support of the amount of P3,310,109.20 input tax. To reiterate, a party who fails to file opportunely its objections to the report of the commissioner or referee, such that the record does not disclose the objections thereto, questions relating to the report cannot be reviewed and cannot escape the legal consequences thereon[7]. MPC cannot shift the blame to this Court for non-compliance with Section 10 and 11 of Rule 32 of the Rules of Court.

Therefore, the Court *En Banc* rules that a partial new trial for the presentation of additional evidence cannot be granted to MPC.

In **EB Case No. 225**, the sole issue raised before *Us* by the CIR is whether or not MPC is entitled to a tax refund/credit in the amount of P118,756,640.97 representing unutilized input taxes paid on its domestic purchases of goods, services, and importation of goods attributable to zero-rated sales for the taxable year 2000. The CIR raised this issue on the ground that the *Second Division* erred in holding that the claimed input VAT payments are directly attributable to MPC's zero-rated sales.

This issue has been thoroughly discussed and correctly ruled upon by the *Second Division* in the original Decision promulgated on August 31, 2005 and *We* quote a portion of the discussion:

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[7] *De La Rama Steamship Co. vs. National Development Co. 35 SCRA 567.*

> "[MPC's] Quarterly VAT Returns for the four quarters of taxable year 2000 reflect the amount of declared zero-rated sales/receipts, in the amount of P10,311,927,962.00 [Exhibits G to J, inclusive of submarkings] representing energy and capacity fees paid by the NPC. [MPC's] VAT invoices and/or official receipts [Exhibits W-1 to W-192] supported said fees."

The CIR presented no evidence to the contrary.

Furthermore, Section 108 of the 1997 Tax Code provides:

> "**SEC. 108. Value-Added Tax on Sale of Services and Use or Lease of Properties. —**
>
> xxx xxx xxx
>
> (B) Transactions subject to Zero Percent (0%) Rate. — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (1) x x x
> (2) x x x
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate."

Complementary thereto is Section 112 (A) of the 1997 NIRC which provides for 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 such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax. . . ."

The Court *En Banc* agrees with the *Second Division* that VAT at zero (0%) percent rate maybe imposed on the sale of services of MPC to the National

Power Corporation or NPC on the basis that NPC's Revised Charter, Republic Act 6395, as amended, categorically exempted it from all kinds of taxes. To wit:

> "**Section 13. Non-profit Character of the Corporation; Exemption from all Taxes, Duties, Imposts and Other Charges by the Government and Government Instrumentalities.** — The Corporation shall be non-profit and shall devote all its returns from its capital investment as well as excess revenues from its operations, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance of effective implementation of the policy enunciated in Section one of this Act, the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes, duties, fees, imposts as well as costs and service fees including fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings." (Underscoring supplied)

In the case of ***Ernesto M. Maceda vs. Hon. Catalino Macaraig***[8] the Supreme Court confirmed NPC's tax-exempt status, viz:

> "A chronological review of the NPC laws will show that it has been the lawmaker's intention that the NPC was to be completely tax-exempt from all forms of taxes-direct or indirect.
>
> One common theme in all these laws is that the NPC must be enable to pay its indebtedness which, as P.D. No. 938 was P12 Billion in total domestic indebtedness, at any one time, and US$5 billion in total foreign loans at any one time. The NPC must be and has to be exempt from all forms of taxes if this goal is to be achieved."

Hence, by virtue of NPC's exemption from direct and indirect taxes, MPC's sale of services to NPC is subject to VAT at zero percent (0%) rate.

In sum, based on the foregoing discussions on **EB Case No. 216** and **EB Case No. 225**, *We* find no cogent reason to disturb, modify, reverse or set aside the assailed amended Decision promulgated August 30, 2006 and Resolution dated November 13, 2006. In rendering this *En Banc* Decision, *We* took into

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[8] *223 SCRA 217*

consideration the parties' documentary and testimonial evidence and found MPC's evidence sufficient to establish its claim for refund or issuance of tax credit certificate in the total amount of P118,756,640.97.

WHEREFORE, the assailed amended Decision and Resolution of the *Second Division* are hereby **AFFIRMED *in toto*.** The instant Petitions for Review are hereby DISMISSED for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice