REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

****

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7596

x--x

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7648

x--x

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7666

Members:

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

Promulgated:

OCT 04 2010; 9:45am

x- -x

DECISION

BAUTISTA, *J.*:

This case is a consolidation of three Petitions for Review separately filed by petitioner to seek the refund or issuance of tax credit certificate in the aggregate amount of P8,584,567.89, allegedly representing unutilized excess input value-added tax (VAT) incurred by petitioner for taxable year 2005, broken down as follows:

CTA Case No.	Period Covered (Year 2005)	Amount of Input VAT Claim
7596	1st Quarter	P 2,808,123.13
7648	2nd Quarter	2,504,836.19
7666	3rd and 4th Quarters	3,271,608.57
	Total	**P 8,584,567.89**

Mindanao I Geothermal Partnership (Petitioner) is a partnership duly registered with the Securities and Exchange Commission, with principal address at 36^{th} Floor, Tower 1, Enterprise Center, 6766 Ayala Avenue, Makati City. It is a VAT-registered entity, with Tax Identification No. 004-712-984-000, as evidenced by its Certificate of Registration No. 8RC0000017055.[1]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of his office, including, among others, the duty to act upon and approve claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner claims that with the passage of Republic Act (R.A.) No. 9136 or the "Electric Power Industry Reform Act of 2001 (EPIRA)", its sale of generated power is now VAT zero-rated. According to petitioner, it always has a resultant excess creditable input tax, considering that its principal revenue-generating activity is its sale of generated power or electricity to the National Power Corporation (NPC) for and in behalf of the Philippine National

[1] Exhibit "A"; pars. 1 and 2, Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 126

Oil Company-Energy Development Corporation (PNOC-EDC), which are all duly reported in its Quarterly VAT Returns filed with the BIR.[2]

Petitioner's Quarterly VAT Returns for taxable year 2005 were filed on the following dates:[3]

CTA CASE NO.	PERIOD COVERED 2005	DATE OF FILING	
		ORIGINAL RETURN	AMENDED RETURN
7596	1st Quarter	April 22, 2005	January 23, 2006
7648	2nd Quarter	July 22, 2005	January 23, 2006
7666	3rd Quarter	October 11, 2005	January 23, 2006
7666	4th Quarter	January 23, 2006	February 15, 2006

On December 29, 2006, petitioner filed with respondent its application for refund or issuance of tax credit certificate for its excess input tax.[4] Thereafter, or on March 30, 2007, petitioner filed with respondent an amended application for refund or issuance of tax credit certificate arising from its alleged excess and unutilized creditable input tax in the total amount of P8,584,567.89 for the four quarters of taxable year 2005.[5]

Due to respondent's inaction on petitioner's administrative claim, petitioner filed three separate Petitions for Review on March 30, 2007, covering the first quarter of 2005; June 29, 2007, covering the second quarter of 2005; and August 6, 2007, covering the third and fourth quarters of 2005. The said Petitions were consolidated via Resolution[6] dated August 31, 2007 inasmuch as they involved the same parties and the same subject matter.

[2] Par. 6, Stipulated Facts, JSFI, docket, p. 126
[3] Exhibits "D" to "M"
[4] Exhibit "P"
[5] Exhibit "R"
[6] Docket, p. 88

In his Answers to the three Petitions for Review, respondent interposed the following Special and Affirmative Defenses:

CTA Case No. 7596

"4. Petitioner's claim for refund is still subject to administrative investigation/examination by respondent;

5. To support its claim, it is imperative for petitioner to prove the following, *viz:*

a. The registration requirements of a VAT Taxpayer in compliance with Section 6(a) and (b) of the Revenue Regulations No. 6-97 in relation to Section 4.701-1(a) of Revenue Regulations No. 7-95, and Section 236 of the Tax Code, as amended;
b. The invoicing and accounting requirements for VAT-registered persons as well as the filing and payment of VAT in compliance with the provisions of Section 113 and 114 of the Tax Code, as amended;
c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No 53-98,

6. Failure to comply with the aforesaid mandatory requirements, there would be no sufficient compliance with the filing of administrative claim for refund, as if there was no administrative claim for refund filed.

7. An administrative claim for refund is a condition *sine qua non* to the filing of judicial claim in accordance with the provisions of Section 229 of the Tax Code, as amended. It is worthy of emphasis that Section 229 of the Tax Code, as amended, requires the submission of *complete* documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law.

8. It is also incumbent upon petitioner to show that it has complied with the mandatory invoicing requirements as provided under Section 4.108-1 of Revenue Regulations No. 7-

95 and Sections 113(A) and 237 of the National Internal Revenue Code of 1997:

> **Sec. 4.108-1 Invoicing Requirements.** – All VAT registered persons shall for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:
>
> 1. the name, TIN and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of service;
> 5. the word 'zero-rated' imprinted on the invoice covering zero-rated sales; and
> 6. the invoice value or consideration.
>
> In case the sale of real property subject to VAT and where the zonal or market value is higher than the actual consideration, the VAT shall be separately indicated in the invoice or receipt.
>
> Only VAT-registered persons are required to print their TIN followed by the word 'VAT' in their invoices or receipts and this shall be considered as a 'VAT Invoice.' All purchases covered by invoices other than 'VAT Invoice' shall be issued only for sales of goods, properties or services subject to VAT imposed in Sections 100 and 102 of this Code.
>
> The invoice or receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records.
>
> **Sec. 113. Invoicing and Accounting Requirements of VAT-registered Persons.** -
>
> (A) Invoicing Requirements. A VAT-registered person shall, for every sale, issue an (sic) invoice or receipt. In addition to the information required under Section 237, the following information shall be indicated in the invoice or receipt;

(1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN); and

(2) The total amount which the purchaser pays or is obliged to pay to the seller with the indication that such amount includes the value-added tax.

Sec. 237. Issuance of Receipts or Sales or Commercial Invoices. - All persons subject to an internal revenue tax shall, for each sale or transfer of merchandise or for services rendered valued at Twenty-five Pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service: Provided, however, That i[n] the case of sales, receipts or transfers in the amount of One Hundred Pesos (P100) or more, regardless of amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations, or fees, receipts or invoices shall be issued which shall show the name, business style, if any, and address of the purchaser, customer or client: Provided, further, That where the purchaser is a VAT-registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer Identification Number (TIN) of the purchaser.

The original of each receipt of invoice shall be issued to the purchaser, customer or client at the time the transaction is effected, who, if engaged in business or in the exercise of profession, shall keep and preserve the same in his place of business for a period of three (3) years from the close of the taxable year in which such invoice or receipt was issued, while the duplicate shall be kept and preserved by the issuer, also in his place of business, for a like period.

The Commissioner may, in meritorious cases, exempt any person subject to internal revenue tax from compliance with the provisions of this Section.

9. Under Revenue Memorandum Circular No. 42-2003, failure to comply with the invoicing requirements on the

documents supporting the sale of goods and services shall result in the *disallowance* of the claim for input tax of the taxpayer claimant. If the claim for refund/issuance of tax credit certificate is based on the existence of zero-rated sales by the taxpayer, but fails to comply with the invoicing requirements in the issuance of sales invoices, such as the failure of the claimant taxpayer to imprint the word 'zero-rated' on the sales invoice or receipt, the claim for tax credit/refund of V[AT] on its sales shall be denied;

10. 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/credit. This is so because exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from common burden cannot be permitted to exist upon vague implications;

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

12. Petitioner has the burden of proving compliance with the requirements of NIRC and its implementing rules and regulations. This shall be complied with in all actions involving taxation, more particularly, those involving the claims for refund or issuance of a tax credit certificate, considering that tax refunds are in the nature of tax exemption and as such, must be strictly construed against the claimant. It cannot be allowed that the true intentions of the lawmakers in enacting the VAT law as an additional revenue generating system be brushed aside by doing away with all the requirements of law, for to do so would result in the continued dwindling of the financial resources of this government; and

13. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the Petition for Review."[7]

CTA Case Nos. 7648 and 7666

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

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[7] Docket, pp. 55-58

5. The amounts of P2,504,836.19 and P3,271,608.57 being claimed by petitioner as alleged unutilized or unapplied creditable input taxes for the second quarter of 2005 and the third and fourth quarters of 2005 was not properly documented.

6. 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/credit;

7. To support its claim, it is imperative for petitioner to prove the following, viz:

a. The registration requirements of a value-added taxpayer in compliance with Section 6(a) and (b) of Revenue Regulations No. 6-97 in relation to Section 4.107-a (a) of Revenue Regulations No. 7-95, and Section 236 of the National Internal Revenue Code of 1997 (NIRC of 1997);

b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT in compliance with the provisions of Sections 113 and 114 of the NIRC of 1997;

c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim in accordance with the provision of Section 229 of the NIRC of 1997. It is worthy of emphasis that Section 112 (D) of the NIRC of 1997 requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review.

d. That the input taxes of P20,546,004.87 allegedly paid by petitioner on its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods for the first to fourth quarters of taxable year 2005 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) year (sic) after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) and 229 of the NIRC of 1997;

f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase journal, showing that it actually paid VAT in accordance with Sections 110 (A) (2) and 113 of the NIRC of 1997, and in pursuance to Section 4.104-5 (a) and (b) of Revenue Regulations No. 7-95 (RE: substantiation of Claims for Input Tax Credit);

g. The requirements as enumerated under Section 4.104-2 of Revenue Regulations 7-95 (Re: Persons who can avail of the Input Tax Credits).

8. Both petitions for review are premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112 (D) of the NIRC of 1997, the 120-day period started to run on 30 March 2007, the date when it filed its administrative claims for refund. The said period expired on 28 July 2007. Hence, the 30-day period within which to file the petition for review before this Honorable Court should have expired on 27 August 2007. This being so, this Honorable Court has no jurisdiction to act on the instant petitions for review.

Under Section 112 (D) of the NIRC of 1997, respondent has 120 days within which to process claims for refund of unutilized input tax, to wit:

> 'SEC. 112. Refunds or Tax Credits of Input Tax.
>
> xxx
>
> (D) 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 Subsections (A) and (B) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the 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.'

It is clear from the foregoing provision of law that petitioner should give respondent 120 days to process its claim for refund. It can appeal to this Honorable Court only after the expiration of the 120-day period granted by law or within thirty days from the decision of respondent denying its claim for refund.

In the case at bar, petitioner filed its administrative claims for refund on 30 March 2007 for the second quarter of 2005 and for the third and fourth quarters of 2005 and appealed before this Court on 29 June 2007 and 6 August 2007. Clearly, respondent (sic) violated the mandatory provisions of the NIRC of 1997. Thus, the filing of the instant petition[s] for review was premature. This being so, this Honorable Court has no jurisdiction to act on the instant petition[s] for review which were filed on 29 June 2007 and 6 August 2007.

The instant case involves a claim for refund or tax credit of alleged unutilized and/or unapplied input VAT hence, Section

112 (D) of the NIRC of 1997 should apply as regards the prescriptive period for filing a claim for refund.

First, distinctions should be made in the application of Sections 112 (D) and 229 of the NIRC of 1997. Section 112 (D) specifically refers to refunds or tax credits of 'creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that said input tax has not been applied against output tax', while Section 229 of the same Code refers to 'any national internal revenue taxes alleged to have been erroneously or illegally assessed or collected.'

Second, Section 112 (D) provides for specific periods within which refund or tax credit of input VAT shall be made. It is clearly provided in said Section that in case of failure on the part of the Commissioner to act on the application, the claimant only has thirty (30) days from the expiry of the 120-day period within which to file the petition for review before the Honorable Court. There is no such specific period provided under Section 229 which merely provides for two (2) years from the date of payment of any national internal revenue tax.

Clearly, from the foregoing, Section 112 (D) is specific as to the prescriptive period from claiming refunds of excess or unutilized VAT attributable to zero-rated or effectively zero-rated sales.

In the case at bar, petitioner seeks for a refund of its unutilized excess input tax. Hence, petitioner should have filed the instant petition[s] within thirty days from the expiration of the 120 days or until 24 February 2004 and 17 May 2004. However, as stated earlier, petitioner filed the petition[s] only on 30 September 2003 and 19 December 2003, or barely 4 days and 1 day from the day it filed its administrative claims for refund.

In the case of **Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 168498, 24 April 2007**, the Supreme Court ruled thus:

> 'From the foregoing, it is clear that the jurisdiction of the Court of Tax Appeals has been expanded to include not only decisions or rulings **but inaction as well of the Commissioner of Internal Revenue.** The decisions, ruling or inaction of the Commissioner are necessary in

order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal, provided it is filed within 30 days after the receipt of such decision or ruling, **or within 30 days after the expiration of the 180-day period (sic) within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its assessments**. Such period is not merely directory but **mandatory** and it is beyond the power of the courts to extend the same. (Emphasis supplied)

xxx'

Although the above-decision is based on the provision of Section 228 of the NIRC of 1997, it may be applied to Section 112 (D) of the same Code on the basis of substantive justice and uniformity in the rules of taxation.

It bears stressing that the mandate under the said Section in filing an appeal before this Honorable Court, if not strictly complied with, would render the same inutile and impotent. It would again open the floodgates of confusion and chaos in the interpretation and implementation of filing judicial claims for refund, much like what happened to Section 228 of the NIRC of 1997.

9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation. *(Commissioner of Internal Revenue vs. Ledesma 31 SCRA 95)* and such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)."*[8]

Respondent's Pre-Trial Brief[9] was filed on January 8, 2008; while petitioner's Pre-Trial Brief[10] was filed on January 17, 2008.

Thereafter, the parties stipulated on the facts and issues of the case and subsequently filed their Joint Stipulation of Facts and Issues[11] on

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[8] CTA Case No. 7648, pp. 81-88 and CTA Case No. 7666, pp. 80-87
[9] Docket, pp. 105-108
[10] Docket, pp. 110-115

February 8, 2008. The same was approved by the Court in a Resolution[12] dated February 12, 2008.

During trial, petitioner presented and eventually offered its documentary and testimonial evidence; while respondent manifested that he is submitting the case for decision.[13]

In a Resolution[14] dated October 20, 2009, the case was submitted for decision, taking into consideration respondent's Memorandum filed on September 28, 2009 and petitioner's Memorandum posted on October 7, 2009.

The parties submitted the following issues[15] for this Court's disposition:

"1. Whether or not petitioner's judicial claim was timely filed.

2. Whether or not petitioner's sale of generated power by geothermal energy qualifies as zero-rated sales under R.A. No. 9136, then and effective November 1, 2005, under the Tax Code of 1997, as amended by R.A. No. 9337.

3. Whether or not the amount of P8,584,567.89 represents the accumulated excess and unutilized creditable input taxes paid by petitioner within the year 2005 directly attributable to its primary source of revenue which is VAT-zero rated.

4. Whether or not petitioner's excess and unutilized creditable input taxes for the year 2005 is duly supported by pertinent documents, such as VAT invoices and official receipts.

5. Whether or not the accumulated unutilized and/or excess input taxes paid by petitioner within the year 2005 in the total amount of P8,584,567.89 remains unutilized.

6. And in sum, whether or not petitioner is entitled to the claim for refund or tax credit in the accumulated amount of

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[11] Docket, pp. 126-128
[12] Docket, pp. 130-131
[13] Docket, p. 315
[14] Docket, pp. 438-439
[15] Docket, p. 127

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P8,584,567.89 representing its excess and unutilized creditable input taxes for the year 2005 directly attributable to its primary source of revenue which is VAT-zero rated."

The foregoing issues may be summarized as follows:

"Whether or not petitioner is entitled to a refund or issuance of tax credit certificate in the total amount of P8,584,567.89, representing unutilized excess input VAT incurred by petitioner for taxable year 2005, attributable to its zero-rated sales of generated power."

In its amended Quarterly VAT Returns for the four quarters of 2005, petitioner reflected VAT zero-rated sales in the amount of P847,450,520.63, taxable sales in the amount of P18,234,176.00, output VAT of P1,823,417.60, and excess input VAT of P8,584,567.89, broken down as follows:

Exh.	Year 2005	Zero-rated Sales/Receipts	Taxable Sales/Receipts	Output VAT	Input VAT	Excess Input VAT
F	1st Qtr	P209,762,945.52	P 4,690,271.80	P 469,027.18	P 3,277,150.31	P 2,808,123.13
I	2nd Qtr	230,864,069.22	5,427,072.80	542,707.28	3,047,543.47	2,504,836.19
K	3rd Qtr	205,909,066.36	5,125,166.60	512,516.66	1,625,020.59	1,112,503.93
M	4th Qtr	200,914,439.53	2,991,664.80	299,166.48	2,458,271.12	2,159,104.64
		P847,450,520.63	**P18,234,176.00**	**P 1,823,417.60**	**P10,407,985.49**	**P 8,584,567.89**

Thus, the reported excess input VAT for the four quarters of 2005 in the total amount of P8,584,567.89 is the subject of the present claims for refund or issuance of tax credit certificate.

Pertinent to petitioner's claims is Section 112(A) of the National Internal Revenue Code (NIRC) of 1997:

"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): *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."

Based on the afore-quoted provision, petitioner's entitlement to refund or tax credit of unutilized input VAT attributable to zero-rated or effectively zero-rated sales is subject to its compliance with the following requisites:

1. that there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

This Court shall first ascertain petitioner's satisfaction of the fifth requisite which primarily deals with the timeliness of the filing of the petitioner's administrative and judicial claim for refund.

Records show that petitioner's original[16] and amended[17] administrative claims for refund filed on December 29, 2006 and on March 30, 2007, as well as the Petitions for Review filed on March 30, 2007[18], June 29, 2007[19], and

[16] Exhibit "P"
[17] Exhibit "R"
[18] CTA Case No. 7596

August 6, 2007[20] were undertaken within the two-year prescriptive period reckoned from the filing of the original Quarterly VAT Returns[21]. The counting of the prescriptive period is in accordance with the Supreme Court's ruling in the case of **Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue**[22], wherein the two-year prescriptive period was reckoned from the filing of the return. This is in view of the fact that the instant Petitions for Review were all filed before the promulgation of the case of **Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)**[23], the subsequent jurisprudence which set a different reckoning date for the counting of the two-year prescriptive period. The dates of filing of petitioner's returns as well as the dates when both the administrative claim and the judicial claims were filed are detailed as follows:

CTA Case No.	Period Covered (2005)	Filing of Original Return	End of Two-Year Period	Admin. Claim (Original)	Judicial Claim	Amount of Input VAT Claim
7596	1st Qtr	04/22/05	04/22/07		03/30/07	P 2,808,123.13
7648	2nd Qtr	07/22/05	07/22/07		06/29/07	2,504,836.19
7666	3rd Qtr	10/11/05	10/11/07	12/29/06	08/06/07	1,112,503.93
7666	4th Qtr	01/23/06	01/23/08			2,159,104.64
					TOTAL	**P 8,584,567.89**

Even assuming that the applicable jurisprudence in this case is the **Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)**[24], which counted the two-year prescriptive period from the close of the taxable quarter, the present claims

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[19] CTA Case No. 7648
[20] CTA Case No. 7666
[21] Exhibits "D", "G", "J", and "L"
[22] G.R. Nos. 141104 and 148763, June 8, 2007
[23] G.R. No. 172129, September 12, 2008
[24] *Ibid.*

will still be considered as filed within the two-year prescriptive period. The same is illustrated as follows:

<table>
<tr><th>CTA Case No.</th><th>Period Covered (2005)</th><th>Close of Taxable Quarter</th><th>End of Two-Year Period</th><th>Admin Claim (Original)</th><th>Judicial Claim</th><th>Amount of Input VAT Claim</th></tr>
<tr><td>7596</td><td>1st Qtr</td><td>03/31/05</td><td>04/02/07[25]</td><td rowspan="5">12/29/06</td><td>03/30/07</td><td>P 2,808,123.13</td></tr>
<tr><td>7648</td><td>2nd Qtr</td><td>06/30/05</td><td>07/02/07[26]</td><td>06/29/07</td><td>2,504,836.19</td></tr>
<tr><td>7666</td><td>3rd Qtr</td><td>09/30/05</td><td>10/01/07[27]</td><td rowspan="2">08/06/07</td><td>1,112,503.93</td></tr>
<tr><td>7666</td><td>4th Qtr</td><td>12/31/05</td><td>12/31/07</td><td>2,159,104.64</td></tr>
<tr><td></td><td></td><td></td><td></td><td>TOTAL</td><td>P 8,584,567.89</td></tr>
</table>

Thus, both of petitioner's administrative and judicial claims for refund of its alleged excess input VAT for the four quarters of 2005 were filed within the two year prescriptive period provided by law.

Now, moving on to the first requisite, petitioner invokes Section 6 of Republic Act No. 9136, which provides for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001. The significant parts of Section 6 of R.A. No. 9136 read as follows:

> "SECTION 6. *Generation Sector.* - Generation of electric power, a business affected with public interest shall be competitive and open.
>
> xxx xxx xxx
>
> Pursuant to the objective of lowering electricity rates to end-users, **sales of generated power by generation companies shall be value added tax zero-rated.**" *(Emphasis supplied)*

By virtue of the said law, the pertinent provisions of the NIRC of 1997 were deemed amended by R.A. No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten

[25] March 31, 2007 was a Saturday
[26] June 30, 2007 was a Saturday
[27] September 30, 2007 was a Sunday

percent (10%) to zero percent (0%). This was affirmed by the Court in the case of ***Visayas Geothermal Power Company vs. Commissioner of Internal Revenue***[28] which case also mentioned the twin requirement for an entities' sale of electricity to be qualified for zero-rating under the EPIRA Law. The pertinent portion of the said case reads:

> "...Section 6 of the EPIRA Law provides that "sales of generated power by generation companies shall be value-added tax zero-rated". Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated companies from ten (10%) percent to zero (0%) percent.
>
> As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: 1) it is a generation company, and 2) it derived sales from power generation."

Subsequently, R.A. No. 9337 was enacted. Upon the effectivity of R.A. No. 9337 on November 1, 2005, it introduced certain amendments to the provisions of the NIRC of 1997, particularly on its Expanded VAT provisions. One of the relevant changes made by this law is the express repeal of the zero percent VAT rate imposed on the sales of generated power by generation companies under R.A. No. 9136. The significant portions of the repealing clause of R.A. No. 9337 provide:

> "SECTION 24. *Repealing Clause.* - The following laws or provisions of laws are hereby repealed and the persons and/or transactions affected herein are made subject to the value-added tax subject to the provisions of Title IV of the National Internal Revenue Code of 1997, as amended:
>
> xxx xxx xxx

[28] CTA Case No. 6790 and 6838, dated January 18, 2007

(B) Section 6, fifth paragraph of R.A. No. 9136 on the zero VAT rate imposed on the sales of generated power by generation companies; and"

Notwithstanding the said repeal, the sale of generated power continued to be VAT zero-rated under Section 108(B)(7) of the NIRC of 1997, as amended by R.A. No. 9337; thus, on the basis of the said provision, petitioner's sales from November 1, 2005 to December 2005 may still be subject to zero percent VAT rate provided, petitioner must be able to prove its compliance with the requirements therein. Section 108(B)(7) of the NIRC of 1997, as amended, is hereunder quoted, to wit:

"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:

xxx xxx xxx

(7) **Sale of power or fuel generated through 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." (*Emphasis supplied*)

In relation thereto, Section 4.108-3 (f) of Revenue Regulation No. 16-2005 provides:

SECTION 4.108-3. *Definitions and Specific Rules on Selected Services.* —

xxx xxx xxx

(f) Sale of electricity by generation, transmission, and distribution companies shall be subject to 10%

> VAT on their gross receipts; Provided, That **sale of power or fuel generated through 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 0% VAT.**
>
> **"Generation companies" refers to persons or entities authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity**. For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility pursuant to the provisions of the RA No. 9136 (EPIRA). They shall include all Independent Power Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities.

Hence, to be qualified for zero-rating under Section 108 (B) (7) of RA 9337, petitioner must still be able to prove that it is a generation company and that it is engaged in sale of power or fuel generated through renewable energy.

Based on the above discussion and in view of the enactment of R.A. 9316 and R.A. 9337, the first, second and third quarters of the taxable year 2005, as well as the month of October of the same taxable year, or the taxable period before the effectivity of RA 9337, which was on November 1, 2005, shall be governed by the EPIRA law. On the other hand, starting November 1, 2005, or for the months of November and December of 2005, petitioner shall be governed by RA 9337 on its claim for refund or issuance of a TCC.

Nonetheless, considering that both R.A. No. 9136 and R.A. 9337 require petitioner to establish that it is a generation company and that it derive sales from power generation, this Court shall determine petitioner's compliance with the said requirements pertaining to its claim for refund of its excess input vat for the four quarters of the taxable year 2005 simultaneously based on the evidence on record.

The Court-commissioned Independent CPA (ICPA)[29] found that the zero-rated sales reported in the "Summary of Zero-Rated Sales[30]" for taxable year 2005 consisted of sales of electricity to Philippine National Oil Company – Energy Development Corporation (PNOC-EDC). Petitioner submitted Certificate of Accreditation issued by Department of Energy[31], Certificate of Registration issued by the Bureau of Internal Revenue[32], Letter issued by Philippine National Oil Company – Energy Development Corporation (PNOC-EDC) to petitioner[33], Letter of Department of Energy (DOE) to PNOC-EDC[34], and the related invoices[35] and official receipts[36] issued by petitioner to PNOC-EDC for the year 2005 for the aforementioned zero-rated sales. While these documents proved that petitioner actually derived sales from power generation, however, it failed to establish that it is a generation company as defined under Section 4(x) in relation to Section 6 of the EPIRA and under the pertinent provision of Revenue Regulation No. 16-05 which states:

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[29] Mr. Michael L. Aguirre, Managing Partner of M.L Aguirre & Co., CPAs
[30] Exhibit "GG", Annex B
[31] Exhibit "B".
[32] Exhibit "A"
[33] Exhibit "C"
[34] Exhibit "C-1"
[35] Exhibits "AA-1.1", "AA-2.1", "AA-6.1", "BB-4.1", "BB-5.1", "BB-6.1", "CC-4.1", "CC-5.1", "CC-6.1", "DD-3.1", "DD-4.1" and "DD-5.1"
[36] Exhibits "AA-1.2", "AA-2.2", "AA-6.2", "BB-4.2", "BB-5.2", "BB-6.2", "CC-4.2", "CC-5.2", "CC-6.2", "DD-3.2", "DD-4.2" and "DD-5.2"

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xxx

SEC. 4. *Definition of Terms.* –

xxx xxx xxx

(x) "Generation Company" refers to any person or entity authorized by the ERC (Energy Regulatory Commission) to operate facilities used in the generation of electricity;"

"REVENUE REGULATIONS NO. 16-2005

xxx

"SECTION 4.108-3. *Definitions and Specific Rules on Selected Services.* —

xxx

f) xxx

xxx

"Generation companies" refers to persons or entities authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility pursuant to the provisions of the RA No. 9136 (EPIRA). They shall include all Independent Power Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities." *(emphasis supplied)*

Moreover, Section 4, Rule 5 of the "Rules and Regulations to Implement Republic Act No. 9136, Entitled "Electric Power Industry Reform Act of 2001", provides:

Section. 4. *Obligations of a Generation Company.*

(a) A COC[37] shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

(i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility.

From the foregoing provisions, it is clear that the entity should be authorized by the ERC to operate the generation facility for it to be considered as a generation company. Specifically, on the basis of the above-cited provision of the Implementing Rules of RA 9316, both the new and existing Generation Facility is required to secure a Certificate of Compliance from the ERC before it can operate the facilities used for generation of electricity. Thus, in this case, petitioner may clearly establish that it is authorized to operate as a Generation Company as defined under RA 9136 and RA 9337 by presenting its Certificate of Compliance from the ERC.

However, perusal of the evidence presented by petitioner reveals that it failed to submit its ERC registration and Certificate of Compliance. Nowhere in the records of the case is it shown that petitioner is duly authorized by the

[37] Certificate of Compliance

ERC to operate facilities used in the generation of electricity. Thus, in the absence of evidence that petitioner is a generation company, **all** of the reported zero-rated sales of P847,450,520.63 cannot qualify for VAT zero-rating under the EPIRA Law and under R.A. No. 9337. Consequently, this Court is left with no recourse but to deny petitioner's claim for refund in the amount of P8,584,567.89 alleged to be representing its input VAT attributable to zero-rated receipts from power generation services rendered by petitioner for taxable year 2005.

WHEREFORE, the instant Petitions for Review are hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division