Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
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MINDANAO II GEOTHERMAL, PARTNERSHIP,
Petitioner,

C.T.A. CASE NO. 6787

Members:

- versus -

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

FEB 20 2008, 10:30 AM

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DECISION

CASANOVA, J.:

This case involves a claim for refund or issuance of a tax credit certificate in the amount P3,536,550.99 filed by herein petitioner – **Mindanao II Geothermal, Partnership**. The amount being claimed allegedly represents excess and/or unutilized input VAT for the period covering July 1, 2001 to December 31, 2001 attributable to petitioner's zero-rated sales of services.

THE FACTS

Petitioner, **Mindanao II Geothermal, Partnership** (Mindanao II), is allegedly a partnership duly registered with the Securities and Exchange Commission (SEC) with principal address at Barangay Ilomavis, Kidapawan City, Cotabato. It is registered with the Bureau of Internal Revenue (BIR) as a Value Added Tax (VAT) enterprise with Tax Identification No. (TIN) 004-766-953.[1]

Respondent is the duly appointed Commissioner of Internal Revenue, with authority, among others, to decide, approve and grant claims for refund or tax credit of internal revenue taxes, with office address at the Bureau of Internal Revenue National Office Building, Agham Road, Diliman, Quezon City.[2]

On March 11, 1997, Mindanao II entered into a Build-Operate-Transfer (BOT) contract with the Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC) for the finance, design, construction, testing, commissioning, operation, maintenance, and repair of a 48.25-megawatt geothermal power plant, which was built on a site provided by PNOC-EDC that supplies and delivers steam to Mindanao II at no cost. In turn, Mindanao II converts the steam into electric capacity and energy for PNOC-EDC and subsequently delivers it to National Power Corporation (NPC) for and in behalf of PNOC-EDC.[3]

Mindanao II's 48.25-megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Block Power Production Facility (BPPF) under the Implementing Rules and Regulations of Executive Order No. 215, as amended.[4]

On June 26, 2001, Republic Act No. 6136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA Law) took effect. The EPIRA Law is a legislative act which ordained reforms in the electric power industry, amending for the purpose certain laws and for other purposes. Paragraph 5, Section 6 thereof explicitly and unequivocally provides that:

"SEC. 6. Generation Sector. . . .

xxx xxx xxx

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[1] *Exhibit "A", Rollo. p. 223.*

[2] *1st Par. of Joint Stipulation of Facts ("JSF"), Rollo, pp. 60-63, duly approved by this Court in a Resolution dated February 20, 2004, Rollo, p. 64.*

[3] *Exhibit "G-5", Rollo. p. 232; Exhibit "G", Rollo. p. 229.*

[4] *Exhibit "G-5", ibid.*

> 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."

As a consequence of the effectivity of the EPIRA Law, Mindanao II, as one of the generating companies recognized by the DOE, treated the delivery and supply of electric energy to NPC for and in behalf of PNOC-EDC as VAT zero-rated. Prior to the effectivity of the EPIRA Law, such transactions were subject to 10% VAT and petitioner paid the corresponding output tax.

For the third and fourth quarters of 2001, Mindanao II filed its VAT returns on October 24, 2001[5] and January 25, 2002[6], respectively, declaring accumulated unutilized excess input VAT in the amount of P3,536,550.99 as of the fourth quarter of 2001 allegedly attributable to its zero-rated sales to PNOC-EDC for the same period.

On June 25, 2002, Mindanao II filed an administrative claim[7] for the issuance of a tax credit certificate in the amount of P3,536,550.99 corresponding to its alleged unutilized excess input taxes as of the fourth quarter of 2001.

Alleging inaction on the part of the respondent, petitioner filed its claim before this Court by means of Petition for Review[8] on September 30, 2003.

Respondent, in his Answer[9] filed on November 17, 2003, interposed the following Special and Affirmative Defenses:

> "4. Petitioner's claim for refund is subject to administrative investigation/examination by the respondent;
>
> 5. 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 the Revenue Regulations No. 6-97 in relation to Section 4. 107-1 (a) of

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[5] *Exhibit "B", Rollo, pp. 224.*
[6] *Exhibit "D", Rollo, pp. 226.*
[7] *Exhibit "G", inclusive, Rollo. pp. 229-230.*
[8] *Rollo, pp. 1-7.*
[9] *Rollo, pp. 34-38.*

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 Sections 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, 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 Tax Code, as amended. It is worthy of emphasis that Section 112 (D) 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 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 P3,536,550.99 allegedly paid by the petitioner on its purchases of goods and services for the third quarter of taxable year 2001 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) years after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) and 229 of the Tax Code, as amended;

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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 Tax Code as amended, and in pursuance to Section 4. 104-5 (a) & (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 the Revenue Regulations 7-95. (Re: Persons who can avail of the Input Tax Credits);

6. Furthermore, 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 (Asiatic Petroleum Co. {P.I.} v. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue v. Manila Jockey Club, Inc. 98 Phil. 670);

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

The parties jointly stipulated the following issues[10] for this Court's resolution:

"1. Whether of not Petitioner's sale of generated power qualifies as a zero-rated sale under the Tax Reform Act of 1997, as amended and the Electric Power Industry Reform Act of 2001;

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[10] *JSF, Stipulated Issues to be Tried or Resolved, Rollo, pp. 61-62.*

2. Whether or not the amount of P3,536,550.99 represents excess input VAT paid on domestic purchases of taxable goods and services directly attributable to its zero-rated sales of Petitioner for the 3rd and 4th quarter of 2001;

3. Whether or not Petitioner's excess input VAT for the taxable year 2001 was applied or utilized against its output VAT in the 1st quarter of 2002;

4. Whether or not the excess input VAT arising from Petitioner's purchases of goods and services for the taxable year 2001 are duly supported by pertinent documents, such as VAT invoices and receipts;

5. Whether or not Petitioner is entitled to the claim for refund in the amount of P3,536,550.99 representing unutilized and/or unapplied input VAT of Petitioner for the taxable year 2001."

Anent the first issue, it is undisputed that Republic Act No. 6136 otherwise known as the "Electric Power Industry Reform Act of 2001" provided for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001.[11] Thus, the pertinent provisions of the National Internal Revenue Code of 1997 are deemed amended by the provisions of RA No. 6136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.

Because of the foregoing, Mindanao II's sale of power generation services (electricity) by converting steam into electric capacity and energy for PNOC-EDC is zero-rated under Section 108 (B) (3) of the 1997 NIRC, quoted hereunder for easy reference:

"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:

[11] *JSF, par. 3. Ibid.*

(1) xxx

(2) xxx

(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; xxx" *(Emphasis ours)*

Therefore, petitioner may claim a refund or tax credit pursuant to Section 112 (a) of the 1997 NIRC which provides:

"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) xxx" *(Emphasis ours)*

But in order for petitioner to be entitled to a refund or tax credit of input VAT payments directly attributable to zero-rated or effectively zero-rated sales, the following requisites must be complied with:

1) there must be zero-rated or effectively zero-rated sales;

2) that input taxes were incurred or paid;

3) that such input VAT payments are directly attributable to zero-rated sales or effectively zero-rated sales;

4) that the input VAT payments were not applied against any output VAT liability; and

5) that the claim for refund was filed within the two-year prescriptive period.[12]

It was established that for the third and fourth quarters of 2001, petitioner's reported gross receipts in the respective amounts of P218,660,267.50 and P215,928,984.05 were derived from its sales of generated power to PNOC-EDC for the period June 26, 2001 to November 27, 2001. These sales where summarized by the Court commissioned Certified Public Accountant (CPA), Mr. Eliseo A. Aurellado, in his report[13] dated October 25, 2004 and evidenced by invoices numbering "34, 37, 38, 42, 43 and 44".[14]

Pursuant to Sections 113 and 237 of the 1997 NIRC, the corresponding duly registered official receipts must be presented to establish zero-rated sales of services.[15] Sections 113 and 237 of the 1997 NIRC read:

> **"SEC. 113. Invoicing and Accounting Requirements for VAT-Registered Persons. —**
>
> (A) Invoicing Requirements. — A VAT-registered person shall, for every sale, issue an 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 obligated to pay to the seller with the indication that such amount includes the value-added tax.
>
> (B) Accounting Requirements. — Notwithstanding the provisions of Section 233, all persons subject to the value-added tax under Sections 106 and 108 shall, in addition to the regular accounting records required, maintain a subsidiary sales journal and subsidiary purchase journal on which the daily sales and purchases are recorded. The subsidiary journals shall contain such information as may be required by the Secretary of Finance."

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[12] *Section 112 (a) of the 1997 NIRC.*
[13] *Exhibit "K-4", Rollo, p 248 and Schedules C-1 and C-2, Rollo pp. 249-250.*
[14] *Exhibits "M" to "M-5", Rollo, pp. 317-322.*
[15] *American Express International, Inc. – Philippine Branch v. Commissioner of the Internal Revenue, C.T.A. E.B. No. 197 (C.T.A. Case No. 6468), May 23, 2007. Southern Philippines Power Corporation vs. Commissioner of the Internal Revenue, C.T.A. E.B. No. 214 (C.T.A. Case No. 6336), July 31, 2007.*

"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 in 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, receipt or quantity, unit cost and description of merchandise or nature of service: Provided, however, That in 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, receipt 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 of the purchaser.

The original of each receipt or 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 or 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 an internal revenue tax from compliance with the provisions of this Section."

The Court *En Banc* has in fact ruled that non-presentation of VAT official receipts to establish zero-rated sales is fatal to a taxpayer's claim for refund of its unapplied input VAT payment which are directly attributable to such zero-rated sales.[16]

In view of the foregoing, this Court reiterate that mere invoices imprinted or stamped with the word "zero-rated" are not sufficient in the sale of services. Petitioner must present official receipts.

The Court *En Banc* explained that:

> "xxx Applicable is Section 110 (A) (1) of the National Internal Revenue on tax credits. This provision appears to make no distinction as to the evidentiary value of an invoice and an official receipt, however, a closer examination of its entirety would reveal otherwise. Pertinent portions thereof is (sic) hereunder quoted for excellent reference:
>
> > ***'SEC. 110. Tax Credits. —***
> > (A) Creditable Input Tax. —
> > (1) xxx
> > ***(2) The input tax on domestic purchase of goods or properties shall be creditable.***
> > (a) ***To the purchaser upon consummation of sale*** and on importation of goods or properties; and
> > (b) xxx
> > 'However, ***in the case of purchase of services,*** lease or use of properties, ***the input tax shall be creditable to the purchaser,*** lessee or licensee ***upon payment of the compensation***, rental, royalty or ***fee.*** *(Emphasis in the original)*
>
> Based on the foregoing, the ***input VAT on domestic purchases of goods and properties*** shall be allowed as tax credit to the purchaser upon consummation of sale, which means upon issuance by the seller of the VAT sales invoice evidencing the sale of goods and properties. *(Emphasis in the original)*

[16] *American Express International, Inc. - Philippine Branch v. Commissioner of Internal Revenue, C.T.A. E.B. No. 103 (C.T.A. Case No. 6294), March 3, 2006. Southern Philippines Power Corporation vs. Commissioner of the Internal Revenue, C.T.A. E.B. No. 214 (C.T.A. Case No. 6336), July 31, 2007.*

On the other hand, the ***input VAT on purchases of services*** shall be available as tax credit to the purchaser ***only upon payment of the compensation*** or fee for the services rendered, ***meaning, upon the issuance by the seller of the VAT Official Receipts*** evidencing receipt of the payment for such services performed or services yet to be performed. *(Emphasis in the original)*

Petitioner failed to differentiate an invoice from an official receipt when dealing with sale of services and sale of goods. Since petitioner renders service, likewise applicable to it is Section 108 of the National Internal Revenue Code:

> ***'SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. —***
>
> (A) Rate and Base of Tax. — There shall be levied, assessed and collected, a value-added tax equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties. xxx
>
> The term ***'gross receipts'*** means the total amount of money or its equivalent representing the contract price, compensation, service fee, rental or royalty, including the amount charged for materials supplied with the services and deposits and advanced payments ***actually or constructively received*** during the taxable quarter for the services performed or to be performed for another person, excluding value-added tax.
>
> (B) xxx
>
> (C) Determination of the Tax. — The tax shall be computed by multiplying the total amount indicated in the ***official receipt*** by one-eleventh (1/11).' *(Emphasis in the original)*

Stated differently, the ***VAT on sale of services*** accrues upon actual or constructive receipt of the consideration therefore irrespective of whether or not the service has been rendered. For this reason, Section 108 (c) clearly provides that the tax on the sale of services shall be computed by multiplying by 1/11 the total amount indicated in the ***official receipt***. Thus, in case of sale of services, the VAT is computed based on gross receipts indicated in the official receipts. *(Emphasis in the original.)*

> Considering that for the same transaction, the output VAT by the seller becomes the input VAT of the purchaser, the law requires that the input VAT be substantiated by the very same document on which the output VAT was based. Thus, the input VAT on the purchase of services must also be supported by VAT Official Receipts."[17]

Thus, the requirement of issuing a duly registered VAT official receipt with the imprinted word "zero-rated" is mandatory under the law and cannot be substituted especially for input VAT refund purposes.[18]

Such is the situation in the instant case. Petitioner failed to submit proper VAT Official Receipts imprinted or stamped with the word "zero-rated." What it submitted were mere invoices which, as the Court have explained, are not sufficient.

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.[19]

WHEREFORE, for failure of petitioner to properly substantiate its claimed zero-rated sales of services, the Petition for Review is **DISMISSED**. Accordingly, petitioner's refund claim in the amount of P3,536,550.99 is hereby **DENIED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

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[17] *Ibid.*
[18] *Kepco Philippines Corporation v. Commissioner of Internal Revenue, C.T.A. Case No. E.B. 107 (C.T.A. Case No. 6413), June 29, 2007.*
[19] *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*

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
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