REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MIRANT (NAVOTAS II) CORPORATION
(formerly Southern Energy Navotas II Power, Inc.),
Petitioner,

- versus -

C.T.A. CASE NO. 5950

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JAN 13 2003

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DECISION

This case seeks the cancellation and withdrawal of the Assessment Notices issued by respondent against petitioner for deficiency income tax, expanded withholding tax (EWT), value-added tax (VAT) and documentary stamp tax (DST) in the aggregate amount of P47,408,437.80, inclusive of increments, for the fiscal year ended June 30, 1995.

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines with principal business address at Suite 202 CTC Building 2232, Roxas Boulevard, Pasay City, Metro Manila. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation under a Build, Operate and Transfer (BOT) scheme (*pars. 1 and 3, Joint Stipulation of Facts and Issues*).

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Petitioner is registered with the Board of Investments as a pioneer enterprise for the operation of a power generating plant and was issued Certificate of Registration No. 92-296 pursuant to the provisions of Executive Order No. 226, otherwise known as the "Omnibus Investment Code of 1987." Under the terms of its registration, petitioner is entitled to an income tax holiday for six (6) years until March 17, 1999 (*par. 4, Joint Stipulation of Facts and Issues; Exhibit "B"*).

On March 23, 1999, the Securities and Exchange Commission issued to petitioner a Certificate of Filing of Amended Articles of Incorporation. One of the amendments related to the change of corporate name of petitioner from Hopewell Tileman (Philippines), Corp. to Southern Energy Navotas II Power, Inc. (*Exhibit "GG"*). Again, on July 6, 2001, petitioner filed a "Motion to Change Caption" which was granted by the court in a Resolution dated July 11, 2001 and the name of petitioner was changed from Southern Energy Navotas II Power Inc. to Mirant (Navotas II) Corporation (formerly Southern Energy Navotas II Power Inc.) (*p. 340, CTA Docket*).

On December 17, 1998, petitioner received from respondent various unnumbered pre-assessment notices dated December 8, 1998 and issued by the Assessment Division of Revenue Region No. 8, Makati City (*par. 6, Joint Stipulation Facts and Issues*). On the same date, various Formal Assessment Notices were likewise received by petitioner bearing the Nos. 000586-FY95-98-457, 02-254-FY95B-98-B2-457 and 02-253-FY95B-98-B2-457, all dated December 14, 1998, (*par. 7, Joint Stipulation of Facts and Issues*) for alleged deficiency income tax, expanded withholding tax (EWT), value added tax (VAT) and documentary stamp tax (DST) assessments, respectively, covering the fiscal

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year ended June 30, 1995, in the aggregate amount of P47,408,437.80, inclusive of penalties and interest. The deficiency taxes were computed as follows:

Assessment Notice No. 000586-FY95-98-457
(Deficiency Income Tax)

Tax Due	P15,477,084.35
Add: Surcharge	3,869,271.09
Interest	12,242,373.72
Compromise	25,000.00
(*Exhibit "KK"*) Total Amount Due	P31,613,729.16

Assessment Notice No. 000586-FY95-98-457
(Deficiency Expanded Withholding Tax)

Tax Due	P 61,950.45
Add: Surcharge	15,487.61
Interest	52,866.96
Compromise	3,000.00
(*Exhibit "LL"*) Total Amount Due	P 133,305.02

Assessment Notice No. 02-254-FY95B-B2-457
(Deficiency Value Added Tax)

Tax Due	P7,298,347.88
Add: Surcharge	1,824,586.97
Interest	6,197,209.64
Compromise	25,000.00
(*Exhibit "MM"*) Total Amount Due	P15,345,144.49

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Assessment Notice No. 02-253-FY95B-98-B2-457
(Deficiency Documentary Stamp)

Tax Due	P253,007.30
Add: Surcharge	63,251.83
Interest	
Compromise	
(*Exhibit "NN"*) Total Amount Due	P316,259.13

On January 15, 1999, petitioner filed its protest-letter against both the Pre-Assessment Notices dated December 8, 1998 and Formal Assessment Notices dated December 14, 1998, which were all received by petitioner on December 17, 1998 (*Exhibit "HH"*).

On March 16, 1999 or within sixty (60) days from the filing of the aforementioned protest letter, petitioner, through SGV & Co., filed a supplemental protest letter reiterating its disagreement to the deficiency assessments issued by respondent for the fiscal year ended June 30, 1995. The relevant documents were likewise attached therewith (*Exhibit "II"*).

According to petitioner, under Section 228 of the 1997 Tax Code, respondent is given one hundred eighty (180) days to act on the protest. Respondent, therefore, had until September 12, 1999 within which to act on the protest. And under the same section, if the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period.

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Thus, for failure on the part of respondent to act on petitioner's protest, petitioner filed the instant petition for review on October 8, 1999 or within thirty (30) days after the lapse of the 180-day period prescribed by law for respondent to act on the protest.

In his answer filed on November 29, 1999, respondent raised the following Special and Affirmative Defenses:

> "4. The petition for review should be dismissed on the ground of lack of jurisdiction.
>
> The assessments are already final for failure on the part of the petitioner to submit the required documents needed for reinvestigation within sixty (60) days from the filing of its protest dated January 15, 1999, as provided in Sec. 228 of the 1997 Tax Code, which provides:
>
> > "**SEC. 228. Protesting of Assessments.** – xxx xxx
> >
> > Such assessments may be protested administratively by filing a request for reconsideration or investigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. ***Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.***" (underscoring supplied)
>
> Although the petition alleges that the petitioner, on March 16, 1999, submitted a supplemental protest letter attaching all relevant documents in support of its protest letter dated January 15, 1999, the truth of the matter would reveal however that as per indorsement letter of respondent's revenue officers who were assigned to conduct the investigation regarding the petitioner's tax liabilities for fiscal year ending June 30, 1995, the petitioner was not able to submit the required documents needed for reinvestigation under its protest letter dated January 15, 1999. Copy of the indorsement letter is hereto attached as Annex "1".
>
> 5. For failure of the petitioner to submit all relevant documents within sixty (60) days from filing of protest, the deficiency assessments became final and accordingly, this Honorable Court acquires no jurisdiction over the case pursuant to provision of Republic Act No. 1125. The Tax Court is a Court of special jurisdiction. As such, it can take cognizance only of such

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matters as are clearly within its jurisdiction. **(Commissioner of Internal Revenue vs. Villa, 22 SCRA 3).**

6. Considering that the subject assessments have already become final, the 180-day rule provided for under Section 228 of the Tax Code, as amended, finds no application in the case at bar.

7. Assuming that this Honorable Court has jurisdiction over the case, the assessments were all issued within the prescriptive period. Records show on September 23, 1998, taxpayer signed a waiver of prescription under the Statute of Limitations, accepted by the Commissioner through and in behalf of Revenue District Officer, Revenue District Office No. 51, Pasay City, extending the prescribed period from October 15, 1998 to December 15, 1998.

8. The assessments in question were made and issued in accordance with existing laws, rules and regulations.

9. All presumptions are in favor of the correctness of the tax assessment. **(Interprovincial Autobus, Inc. vs. Collector of Internal Revenue, 98 Phil. 290)**

The issues we are tasked to resolve have been stipulated by the parties to be as follows:

1. Whether or not the Formal Assessment Notices Nos. 000586-FY95-98-457, 02-253-FY95B-98-B2-457, and 02-254-FY95B-98-B2-457 all dated December 14, 1998 and issued against petitioner have already prescribed.

2. Whether or not petitioner's deficiency income tax assessment was based from income not directly derived from petitioner's registered operations.

3. Whether or not petitioner underdeclared its sales subject to value added tax.

4. Whether or not petitioner withheld the proper amount of income taxes due.

5. Whether or not petitioner had actually paid the documentary stamp tax on the original issuance of shares of stock in the total amount of P25,300,730.00.

6. Whether or not petitioner is liable for the amount of P47,408,437.80 as deficiency income, expanded withholding tax, value added tax and documentary stamp tax for the fiscal year ending June 30, 1995.

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Before discussing the issues stipulated by the parties, we shall resolve first the issue on jurisdiction raised by respondent in his Answer.

Respondent averred that petitioner failed to submit to the BIR all the relevant documents within the 60-day period prescribed under Section 228 of the NIRC. Consequently, the deficiency assessment became final and this court acquired no jurisdiction over the case.

In its Reply filed on December 21, 1999, petitioner claimed that on March 15, 1999 or within 60 days from the filing of the protest on January 15, 1999, a supplemental protest was filed together with the necessary documents (*pages 44-46, CTA Docket*).

We find for the petitioner.

Records show that indeed, petitioner filed on March 16, 1999 a supplemental protest reiterating its previous protest on the Pre-Assessment Notices and formal Assessment Notices for the fiscal year ended June 30, 1995. In support of its protest, petitioner submitted supporting documents and schedules for reinvestigation.

Clearly, respondent's allegation that petitioner failed to submit to the BIR all the relevant documents within the 60-day period has no basis. "This Court believes that the "relevant supporting documents" mentioned in the law refers to such documents which the taxpayer feels would be necessary to support his protest and not what the Respondent Commissioner feels should be submitted, otherwise, Petitioner taxpayer would always be at the mercy of the BIR which may require production of such documents which taxpayer could not produce. In this manner the assessment could easily become final. The most appropriate way Respondent Commissioner would do under the circumstances when he feels the documents submitted are insufficient, is to deny the protest stating his reason therefore, so the taxpayer would have the opportunity to go to Court, if warranted" (*Resolution, Standard Chartered Bank-Philippine Branches vs. Commissioner of Internal Revenue, CTA Case No. 5696, May 27, 1999*).

We proceed to the issue on prescription. Petitioner contended that respondent's right to assess petitioner for deficiency income tax, expanded withholding tax and value-added tax for the fiscal year ended June 30, 1995 had already prescribed.

The last day for filing the income tax return for the fiscal year ended June 30, 1995 was October 15, 1995. Thus, respondent had three (3) years from October 15, 1995, or until October 14, 1998, within which to make an assessment pursuant to Section 203 of the NIRC. Respondent avers that assuming that this court has jurisdiction over the case, the assessments were all issued within the prescriptive period in view of a waiver signed by the taxpayer (petitioner) on September 23, 1998, extending the prescribed period from October 15, 1998 to December 15, 1998. Thus, before we proceed to discuss whether respondent still has a right to assess petitioner for deficiency income tax, we shall rule first on the validity of the waiver of statute of limitations executed by petitioner.

The Waiver of the Statute of Limitations was executed on September 23, 1998, signed for the petitioner by a certain Gerardo T. Ebrada and attested to by Revenue District Officer Anselmo G. Adriano (*Exhibit "JJ"*). Petitioner assails the validity of the waiver since it was not agreed upon nor accepted by the respondent in accordance with Section 222(b) of the 1997 NIRC which provides:

"**SEC. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –

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> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon." (Emphasis ours)

We agree with the petitioner.

An agreement is different from an attestation. To agree means to give assent; to express approval while to attest means to bear witness; to affirm to be true or genuine. Section 222 (b) requires that the waiver be agreed upon and not attested to only.

An evaluation of the records reveals that petitioner agreed to extend the period to assess until December 15, 1998 through the waiver executed on September 23, 1998. The same, however, while signed by petitioner, was merely attested to by the respondent through Revenue District Officer Anselmo G. Adriano. The law is explicit that the waiver must have been agreed upon and signed by both the Commissioner and the taxpayer. In this case, the waiver was defective and invalid since respondent did not comply with the requirement in Section 222 (b) of the NIRC, which provides that the agreement be made in writing by both the Commissioner and the taxpayer. It was not accepted by the respondent. Consequently, no valid waiver was executed between the parties. Thus, respondent cannot assess petitioner beyond the three-year period prescribed under Section 203 of the NIRC and petitioner may not be held liable for the payment of any deficiency income tax for the fiscal year 1995 as the same has prescribed.

But, even assuming that the attestation made by the Revenue District Officer in the waiver is valid, petitioner is still not liable for any deficiency income tax. Petitioner was under income tax holiday for six (6) years, or until March 17, 1999 (*admitted, par. 1,* *Answer*). Since the instant case involves the fiscal year June 30, 1995, petitioner was not yet subject to income tax because it was at the time enjoying income tax holiday (*Exhibit "B"*).

On the deficiency assessment for EWT, this Court rules that prescription had likewise set in.

Section 51 of the old NIRC provides, viz:

> "**Sec. 51**. *Returns and payment of taxes withheld at source.* – (a) Quarterly returns and payment of taxes withheld.- Taxes deducted and withheld under Section 53 (now 50) shall be covered by a return and paid to the Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city, or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located. xxx xxx xxx The <u>Commissioner of Internal Revenue may, with the approval of the Secretary of Finance, require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the Government</u>. The return for final withholding tax shall be filed and the payment made within 25 days from the close of each calendar quarter xxx" (Emphasis supplied)

Upon the other hand, Revenue Regulations No. 5-85, in relation to Section 51 of the NIRC, provided for the synchronization of the time and manner of filing and remitting creditable and final income taxes withheld, pertinent portion of which reads:

> "**SECTION 2**. *Monthly return and remittance of taxes withheld.-* Taxes deducted and withheld on :
>
> xxx xxx xxx
>
> (ii) income payments subject to the creditable (expanded) withholding taxes xxx shall be remitted within ten (10) days after the end of each calendar month xxx"

Thus, for the fiscal year ended June 30, 1995, petitioner filed its Monthly Remittance Return of Income Taxes Withheld as follows:

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Exhibit	Period Covered	Date Filed
E	July 1994	August 10, 1994
F	August 1994	September 9, 1994
G	September 1994	October 10, 1994
H	October 1994	November 10, 1994
I	November 1994	December 12, 1994
J	December 1994	January 25, 1995
K	January 1995	February 10, 1995
L	February 1995	March 10, 1995
M	March 1995	April 10, 1995
N	April 1995	May 10, 1995
O	May 1995	June 13, 1995
P	June 1995	July 10, 1995

Petitioner argued that under the NIRC, the last day for filing the monthly remittance return of income taxes withheld was on the tenth day after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year. Hence, according to petitioner, pursuant to Section 203 of the NIRC, respondent had a period of three (3) years from July 10, 1995 or until July 9, 1998, at the latest, within which to assess petitioner for any deficiency EWT. Since the subject deficiency EWT assessment was issued only on December 14, 1998, the period to assess had lapsed.

We agree. An examination of the records would show that respondent's right to assess petitioner for its deficiency expanded withholding tax for the fiscal year 1995 had already prescribed since respondent only had until July 9, 1998 within which to issue an assessment to petitioner for any deficiency EWT. Respondent issued the deficiency assessment for expanded withholding tax on December 14, 1998, which is clearly beyond the three-year period.

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The same holds true with regard to petitioner's deficiency value added tax for the fiscal year 1995. Under Section 110 of the 1995 Tax Code, every person liable to pay the value-added tax shall file a quarterly return of the amount of his gross sales or receipts within twenty (20) days following the close of each taxable quarter prescribed for each taxpayer.

Petitioner's quarterly VAT returns for the fiscal year ended June 30, 1995 were filed on the following dates:

Exhibit	Taxable Quarter	Date Filed
PP	September 30, 1994	October 20, 1994
YY	December 31, 1994	January 20, 1995
HHH	March 31, 1995	April 20, 1995
PPP	June 30, 1995	July 20, 1995

Thus, for the taxable quarters ending September 30, 1994, December 31, 1994, March 31, 1995 and June 30, 1995, respondent had until October 20, 1997, January 20, 1998, April 20, 1998 and July 20, 1998, respectively, within which to assess petitioner for deficiency VAT. Again, respondent failed to issue the assessment notice within the said periods. It was only on December 14, 1998 that respondent issued the subject assessment notice, which is obviously beyond the three-year period allowed by law.

Finally, respondent assessed petitioner for deficiency documentary stamp tax (DST) in the amount of P316,259.13, inclusive of increments. This was based on the increase in capital stock from 22 Million to 25 Million. According to respondent, petitioner did not pay the corresponding DST.

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Petitioner, however, asserts that the DST corresponding to the original issuance of shares of stock have already been paid, as testified by Ms. Taryn Uberita, petitioner's Tax Manager, thus:

> Q: Now, what is the Documentary Stamps (sic) Tax Assessment against the petitioner, Ms. Witness?
>
> A: This DST Deficiency assessed by the BIR pertains to non-payment of the DST for the amount of P25,300,730,000.00 (sic).
>
> Q. Are you familiar why was the petitioner assessed such amount, Ms. Witness?
>
> A: There was an increase of capital stock from 22 million to 25 million and it was alleged that there was a non-payment of DST for this transaction.
>
> Q: Now Ms. Witness, did the petitioner pay the Documentary Stamp Tax for this transaction?
>
> A: Yes.
>
> Q: What document do you have to prove the same?
>
> A: We have the Certification issued by the Revenue Accounting Division on the payments we made.
>
> Q: What other documents do you have, aside from the Certification issued by the Revenue Accounting Division?
>
> A: We have the Order of Payment for the payment of DST.
>
> Q: If shown to you a copy of that Order Payment, would you be able to identify the same?
>
> A: Yes.
>
> Q: I am now showing you a document previously marked as Exhibit FF for the petitioner, could you please identify the same?
>
> A: Exhibit "FF" is the Authority to Accept Payment which is a payment for the DST, amounting to P215,067.70.

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Q: Now, what relation does this document have with the Documentary Stamp Tax Assessment against the petitioner?

A: This is the payment of the DST, wherein as alleged by the BIR, we did not pay for the DST, but in fact, we have paid the DST as supported by this Authority to Accept Payment.

Q: Now, what document do you have to support this Authority to Accept Payment, Ms. Witness?

A: We have the Certification issued by the BIR Accounting Division.

Q: If shown to you copy of that Certification, would you be able to identify the same?

A: Yes.

Q: I am now showing you a document entitled, Certification, which came from the Bureau of Internal Revenue, can you please identify the same?

Q: This is the Certification issued by the BIR wherein this is verified against the VAT returns, ATP, batch control sheet of the division, herein there is an item with Reference No. 93-00369, dated October 1, 1993 with Bank Code 02-000, amounting to P215,067.17, which is our payment for Documentary Stamp Tax.

(*pages 29-32, TSN, August 3, 2000*)

We find for the petitioner.

Section 175 of the 1993 Tax Code provides:

"**SEC. 175**. *Stamp tax on original issue of certificates of stock.* – On every original issue, whether on organization, reorganization or for any lawful purpose, of certificates of stock by any association, company, or corporations, there shall be collected a documentary stamp tax of one peso and seventy centavos on each two hundred pesos, or fractional part thereof, of the par value of such certificates: Provided, That in the case, of the original issue of stock without par value the amount of the documentary stamp tax herein prescribed shall be based upon the actual consideration received by the association, company, or corporation for the issuance of such stock, and in the case of stock dividends on the actual value represented by each share."

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Records show that based on the foregoing provision of law, petitioner paid documentary stamp tax for the original issuance of shares of stocks on October 1, 1993 as evidenced by Authority to Accept Payment (ATAP) No. SN-789526 in the amount of P215,067.17. (*Exhibit "FF"*). Moreover, the BIR Revenue Accounting Division issued a Certification to the effect that the amount of P215,067.17, among others, was verified to have been remitted to the BIR (*Exhibit "BBBB"*).

Since petitioner had already paid the documentary stamp tax in the amount of P215,067.17 on October 1, 1993, respondent's assessment for DST has no leg to stand on.

In fine, petitioner is not liable to pay income tax during the fiscal year ended June 30, 1995 because it was under income tax holiday. Likewise, respondent has no right to assess petitioner for deficiency value-added and expanded withholding taxes for the reason that prescription had already set in. Therefore, there is no need to delve into the merits of the assessments.

Anent the deficiency DST assessment, petitioner is not liable to pay the same since payment has already been made on October 1, 1993.

WHEREFORE, in view of all the foregoing, the court finds the instant petition meritorious and in accordance with law. Accordingly, the following Assessment Notices issued by respondent on December 14, 1998 and received by petitioner on December 17, 1998, are hereby **CANCELLED** and **WITHDRAWN** as follows:

1. Assessment Notice No. 000586-FY'95-98-457 for deficiency income tax in the total amount of P31,613,729.16;

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2. Assessment Notice No. 000586-FY95-98-457 for deficiency expanded withholding tax in the total amount of P133,[illegible]05.02;
3. Assessment Notice No. 02-254-FY95B-98-B2-457 for deficiency value-added tax in the total amount of P15,345,144.49; and
4. Assessment Notice No. 02-253-FY95B-98-B2-457 for deficiency documentary stamp tax in the total amount of P316,259.13.

SO ORDERED

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

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

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

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