

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

**COMMISSIONER OF INTERNAL
REVENUE**

Petitioner,

EB Case No. 476
(CTA Cases Nos. 7228, 7286 & 7318)

- versus -

**MINDANAO I GEOTHERMAL
PARTNERSHIP,**

Respondent.

X ----- X

**MINDANAO I GEOTHERMAL
PARTNERSHIP,**

Petitioner,

EB Case No. 483
(CTA Cases Nos. 7228, 7286 & 7318)

Members:

ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

Promulgated:

MAY 31 2010

X ----- X

DECISION

CASANOVA, J.:

This is an appeal, by way of Petitions for Review, filed by both parties seeking the reversal of the *CTA Former Second Division Decision*¹ (the "Assailed

¹ Petition for Review, Annex "B", En Banc Rollo (CTA EB No. 483), pp. 36-51

Decision”) dated October 24, 2008 and the Resolution² (the “Assailed Resolution”) dated March 10, 2009, denying both parties’ Motions for Reconsideration.

The facts of the case, as found by the *CTA Former Second Division*, are as follows:

Mindanao I Geothermal Partnership (MIGP for brevity) is a partnership duly registered with the Securities and Exchange Commission (SEC), with principal address at 36th Floor, Tower I, The Enterprise Center, 6766 Ayala Avenue, Makati City. MIGP is duly registered with the Bureau of Internal Revenue (BIR) as a VAT Taxpayer, with Tax Identification No. (TIN) 004-712-484-000³.

Respondent is the duly appointed Commissioner of Internal Revenue 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.

In December 1994, MIGP entered into a contract of Build-Operate-Transfer (BOT) with the Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC) for the finance, design, construction, testing, commissioning, operation, maintenance, and repair of a 47-megawatt geothermal power plant. Under the said BOT contract, PNOC-EDC shall supply and deliver steam to MIGP at no cost. In turn, MIGP will convert the steam into electric capacity and energy for PNOC-EDC and shall subsequently supply and deliver the same to the National Power Corporation (NPC), for and in behalf of PNOC-EDC⁴.

Petitioner’s 47-megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Private Sector Generation 

² Petition for Review, Annex “A”, En Banc Rollo (CTA EB No. 483), pp. 28-35

³ Joint Stipulation of Facts and Issues to be Resolved, pars. 1 & 4, Division Docket (CTA Case No. 7228), p. 112

⁴ Petition for Review, Annex “C”, Division Docket (CTA Case No. 7228), p. 10

Facility, pursuant to the provision of Executive Order No. 215, wherein Certificate of Accreditation No. 95-03-07⁵ was issued.

On June 26, 2001, Republic Act No. 9136, also known as the "Electric Power Industry Reform Act of 2001" (EPIRA), took effect and the relevant provisions of National Internal Revenue Code (NIRC) of 1997 were deemed modified. More specifically, under the said law and its implementing rules and regulations, the delivery and supply of electric energy by generation companies became VAT-zero-rated, which previously were subject to ten percent (10%) VAT. Thus, on the belief that its sales qualify for VAT-zero-rating, petitioner adopted the VAT-zero-rating of the EPIRA in computing its VAT payable when it filed its VAT returns.

Petitioner reported its unutilized or excess creditable input taxes in its Quarterly VAT Returns for the first, second, third, and fourth quarters⁶ of taxable year 2003, which were subsequently amended and electronically filed with the BIR.⁷

On April 4, 2005, petitioner filed with the BIR separate administrative claims for the issuance of tax credit certificate on its alleged unutilized and/or excess input taxes for taxable year 2003, in the accumulated amount of P14,185,294.80.⁸

Alleging inaction on the part of respondent, petitioner elevated its claims before this Court on April 22, 2005, July 7, 2005, and September 9, 2005 docketed as CTA Case Nos. 7228, 7286, and 7318, respectively.

On October 10, 2005, however, petitioner received a copy of the letter of the BIR dated September 30, 2003⁹, denying its application for tax credit/refund.¹⁰ 

⁵ Petition for Review, Annex "B", Division Docket (CTA Case No. 7228), p. 9

⁶ Exhibits "A", "C", "E" and "G"

⁷ Exhibits "B", "D", "F" and "H"

⁸ Joint Stipulation of Facts and Issues to be Resolved, par. 7, Division Docket (CTA Case No. 7228), p. 113

⁹ Should be 2005

¹⁰ Joint Stipulation of Facts and Issues to be Resolved, par. 8, Division Docket (CTA Case No. 7228), p. 113

Respondent, in his Answer¹¹ dated June 9, 2005, filed in CTA Case No. 7228, averred, by way of Special and Affirmative Defenses, the following:

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

5. The amount of P3,893,566.14 being claimed by petitioner allegedly representing excess or unutilized input tax for the 1st quarter of the year 2003 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. Petitioner must show that it has complied with the provisions of Sections 204(c) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;

8. 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*)."

In CTA Case No. 7286, respondent interposed, in his Answer¹² filed on September 1, 2005, the following Special and Affirmative Defenses, to wit:

"4. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;

5. Petitioner's Claim for refund is subject to administrative investigation/examination by the respondent;

6. 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

¹¹ Division Docket (CTA Case No. 7228), pp. 27-28

¹² Division Docket (CTA Case No. 7286), pp. 37-40

Section 4.107-1(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 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 input taxes of P2,351,000.83 allegedly paid by the petitioner on its purchases of goods and services for the second quarter of the taxable year 2003 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;
- 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) 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 the Revenue Regulations 7-95 (Re: Persons who can avail of the Input Tax Credits);

7. 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);

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

Petitioner pleaded the same Special and Affirmative Defenses in his Answer in CTA Case No. 7318, except for the claimed amount of P7,940,727.83¹³ covering the third and fourth quarters of taxable year 2003.

In a Resolution dated April 4, 2006, this Court consolidated CTA Case Nos. 7286 and 7318 with CTA Case No. 7228, the case bearing the lower docket number.

The parties, in their Joint Stipulation of Facts and Issues To Be Resolved, filed on June 8, 2006¹⁴, submitted the following issues for this Court's resolution, to wit:

"1. Whether or not petitioner's sale of generated power qualifies as zero-rated sale under the NIRC, as amended, and the EPIRA Law; 

¹³ Division Docket (CTA Case No. 7318), p. 51

¹⁴ Joint Stipulation of Facts and Issues To Be Resolved, Division Docket (CTA Case No. 7228), pp. 112-114

2. Whether or not the amount of P14,185,294.80 represents the accumulated unutilized and/or excess input taxes paid by petitioner within the year 2003 directly attributable to its primary source of revenue which is VAT-zero-rated;

3. Whether or not the accumulated unutilized and/or excess input taxes paid by petitioner within the year 2003 in the total amount of P14,185,294.80 remains unutilized and/or unapplied;

4. Whether or not petitioner's unutilized and/or unapplied input taxes for the year 2003 is duly supported by pertinent documents, such as VAT invoices and official receipts;

5. And in sum, whether or not petitioner is entitled to the claim for refund or tax credit in the accumulated amount of P14,185,294.80 representing its unutilized and/or unapplied input taxes for the year 2003 directly attributable to its primary source of revenue which is VAT-zero-rated."

After trial on the merits, the case was submitted for decision on March 24, 2008¹⁵, considering respondent's Memorandum *sans* petitioner's Memorandum.

On October 24, 2008, the *CTA Former Second Division* promulgated the Assailed Decision. Not satisfied with the said Decision, petitioner filed its Motion for Partial Reconsideration with Motion for Clarification on November 11, 2008 while respondent filed its Motion for Partial Reconsideration on November 11, 2008.

In a Resolution¹⁶ promulgated on March 10, 2009, the *CTA Former Second Division* denied both parties' respective Motion.

Hence, the instant Petitions for Review filed by both parties, viz:

- a. CTA EB No. 476 - Commissioner of Internal Revenue vs. Mindanao I Geothermal Partnership 

¹⁵ Division Docket (CTA Case No. 7228), p. 391

¹⁶ Division Docket (CTA Case No. 7228), pp. 468-475

b. CTA EB No. 483 - Mindanao I Geothermal
Partnership vs. Commissioner
of Internal Revenue

On May 22, 2009, the Court issued a Resolution¹⁷ consolidating CTA EB No. 483 with CTA EB No. 476, the case bearing the lower docket number; and, ordering both parties to submit their respective memorandum within thirty (30) days from receipt of the resolution after which the case shall be deemed submitted for decision.

In support of their respective Petition for Review, petitioner and respondent presented the following grounds/arguments, to wit:

CTA EB Case No. 483 (MIGP, petitioner)¹⁸

"1. In partially denying petitioner's claim for refund or tax credit, the Second Division of this Honorable Court failed to distinctly and expressly state in its questioned decision and resolution the legal and factual bases for the disallowance in the amounts of P1,097,860.09 and P1,429,987.57.

2. The proportionate allocation made by the Second Division of this Honorable Court of the substantiated claim (as computed by it) on account of the unreported collections amounting to P80,263,851.89 as found by the independent certified public accountant (ICPA) has no basis and is contrary to Section 112(A) of the 1997 Tax Code, as amended.

3. Petitioner was able to clarify and explain some of the disallowed claim by the ICPA, thus, the disallowance by this Second Division of this Honorable Court in the amount of P1,097,860.09 arising from the findings of the independent certified public accountant is, aside from having no legal and factual bases, unwarranted and contrary to the evidence on record.



¹⁷ En Banc Rollo (CTA EB No. 476), pp. 62-63

¹⁸ Petition for Review, En Banc Rollo (CTA EB No. 483), pp. 15-16

4. It is the intent of the EPIRA Law that petitioner's input taxes be refunded or credited in order to achieve the rationale for the law: to lower the cost of electricity."

CTA EB Case No. 476 (CIR, petitioner)¹⁹

"1. that petitioner²⁰ failed to substantiate its claim for refund pursuant to Section 6(a) and (b) of Revenue Regulations No. 6-97, in relation to Section 4.107-1(a) of Revenue Regulations No. 7-95 and Section 236 of the National Internal Revenue Code (NIRC) of 1997;

2. that petitioner failed to exhaust administrative remedies by appealing its case even before the lapse of one hundred twenty (120) days from the submission of documents in support of its claim or within thirty (30) days from receipt of the decision denying its claim, pursuant to Section 112(D) of the NIRC of 1997, as amended; and

3. that Sections 112(A) and (D) of the NIRC of 1997, as amended are specific provisions, while Section 229 of the same Code is a general provision, which means that the latter law can only govern those cases which are outside the ambit of the former law."

After a careful and thorough evaluation and consideration of the records of the cases, the *CTA En Banc* finds no merit in the Petitions.

The arguments raised by both parties in their respective Petition for Review in CTA EB No. 476 and CTA EB No. 483 are mere reiterations of the arguments in their respective Motion for Partial Reconsideration (for Commissioner of Internal Revenue) and Motion for Partial Reconsideration with Motion for Clarification (for MIGP) both filed on November 11, 2008. The *CTA En Banc* finds no new matters which have not yet been considered and passed upon by the *CTA Former Second Division* in its Assailed Decision and Assailed Resolution.

¹⁹ Resolution, par. 2, En Banc Rollo (CTA EB No. 476), p. 40

²⁰ Respondent in CTA EB No. 476

In resolving the CIR's Motion for Partial Reconsideration, We quote, with approval, the following excerpts from the Assailed Resolution, to wit:

"Even though Section 112 is specific as to the subject matter of refund or tax credit of 'creditable input tax due or paid' attributable to zero-rated or effectively zero-rated sales, such provision should still be harmonized with Section 229. This must be so because the latter provision covers also 'any sum alleged to have been excessively . . . collected', which is exactly the nature of an input VAT attributable to zero-rated or effectively zero-rated sales.

Accordingly, the mandatory statute of limitations prescribed under Section 229 in seeking judicial recourse should also be made to apply to claims for refund or issuance of tax credit certificate under Section 112. This is notwithstanding the fact that the second paragraph of Section 112(D) provides a period within which to file an appeal of a decision or an unacted claim with this Court. After all, the same provision is couched merely in a permissive manner with the employment of the word 'may'.

The fact that under Section 112(D), the two-year prescriptive period for an administrative claim is reckoned from the close of the taxable quarter when the sales are made; while under Section 229, the two-year prescriptive period is counted from the payment of the tax or penalty, is of no consequence. This must be so because in *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*²¹, the High Court opined that 'it is more practical and reasonable to count the two-year prescriptive period for filing a claim for refund/credit of input VAT on zero-rated sales from the date of filing of the return and payment of the tax due'. Such pronouncement was made considering that Sections 106 and 230 of the Tax Code of 1977, are respectively, the present Sections 112 and 229 of the NIRC of 1997.

Inasmuch as Section 112(D) is in harmony with Section 229 of the NIRC of 1997, the allegation of respondent that petitioner failed to exhaust administrative remedies before it filed its Petition for Review must likewise fail.

Anent MIGP's arguments/grounds in its Motion for Partial Reconsideration with Motion for Clarification, the same were resolved in the Assailed Resolution in this wise: 

²¹ G.R. Nos. 141104 and 148763, June 8, 2007

"In petitioner's Motion for Partial Reconsideration with Motion for Clarification, it claims that the proportionate allocation of the amount of creditable taxes in Section 112(A) of the NIRC of 1997 applies only when the creditable input taxes due cannot be directly and entirely attributed to any of the zero-rated or effectively zero-rated sales. Since petitioner's unreported collection of P80,263,851.89 is directly attributable to petitioner's VAT zero-rated sales, the Court should not have allocated proportionately petitioner's unutilized creditable input taxes for the taxable year 2004.

The Court is not persuaded.

While it is true that the amount of P80,263,851.89 is directly attributable to petitioner's VAT zero-rated sales; nevertheless, it is also true that the substantiated excess input VAT in the amount of P11,657,447.14 represents the amount of undeclared and declared portions of the zero-rated sales or the gross receipts. And based on the evidence presented, petitioner merely declared the amount of P744,471,339.59 out of the total amount of P824,735,191.48 as substantiated by official receipts²². Since the latter amount is attributable to the total substantiated excess input VAT in the amount of P11,657,447.14, which means it represents the declared and undeclared portions of the gross receipts, there is a need to get the portion that is undeclared in order to know what percentage from the P11,657,447.14 represents the undeclared portion. And, in order to get the percentage there is the need to pro-rate the amount of the declared gross receipts and the total gross receipts per official receipt.

This is based on Section 114 of the NIRC of 1997, as amended, which states:

"SEC. 114. Return and Payment of Value-Added Tax. –

X X X

X X X

X X X

From the foregoing, it is clear that there is a need for petitioner to declare its gross receipts. Since, there was a portion of the gross receipts that was not divulged, the Court needed to determine that undeclared portion of the gross receipts.

Based on the record, the declared portion is in the amount of P744,471,339.59 and the total gross receipts is in the amount of P824,735,191.48. 

²² Declared Gross Receipts per Returns Total Gross Receipts per Official Receipts Ration (%)

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From these amounts, the Court divides P744,471,339.59 to P824,735,191.48 to get the quotient of 90.27%. Logically, only a proportionate amount relating to the duly substantiated excess input VAT can be refunded."

In view of the foregoing, the Court finds no cogent reason to reverse the Assailed Decision and Resolution dated October 24, 2008, and March 10, 2009, respectively, of the CTA Second Division.

WHEREFORE, premises considered, the Petitions for Review are hereby **DISMISSED** for lack of merit. Accordingly, the October 24, 2008 Decision and March 10, 2009 Resolution of the *CTA Former Second Division* in CTA Case Nos. 7228, 7286 and 7318, entitled "Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue" are hereby **AFFIRMED** *in toto*.

SO ORDERED.



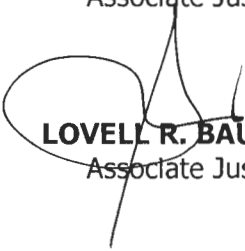
CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(ON LEAVE)

ERNESTO D. ACOSTA
Presiding Justice


(Agrees with the Concurring and
Dissenting Opinion of Justice Enriquez)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

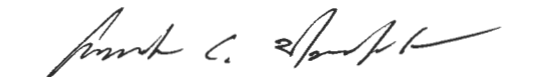

LOVELL R. BAUTISTA
Associate Justice


(Agrees with the Concurring and
Dissenting Opinion of Justice Enriquez)
ERLINDA P. UY
Associate Justice


(With Concurring and Dissenting Opinion)
OLGA PALANCA-ENRIQUEZ
Associate Justice


With Dissenting Opinion
by 
ESPERANZA R. FABON-VICTORINO
Associate Justice


CIELITO N. MINDARO GRULLA
Associate Justice


AMELIA C. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *en banc* before the case was assigned to the writer of the opinion of the Court.


JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

C.T.A. EB NO. 476
(C.T.A. CASE NOS. 7228, 7286 & 7318)

-versus-

MINDANAO I GEOTHERMAL PARTNERSHIP,
Respondent.

X ----- X

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

C.T.A. EB NO. 483
(C.T.A. CASE NOS. 7228, 7286 & 7318)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

Promulgated:
MAY 31 2010

X ----- X

DISSENTING AND CONCURRING OPINION

PALANCA-ENRIQUEZ, J.:

Dissenting

With all due respect, after taking a second hard look at the pertinent facts of the case, in relation to the recent ruling of the Supreme



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Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*, 565 SCRA 154 (hereafter “Mirant case”), promulgated on September 12, 2008, I vote to deny petitioner’s claim for refund for the first and second quarters of 2003.

In the Mirant case, the Supreme Court held that the two (2) year period for filing a claim for input VAT refund is reckoned from the close of the taxable quarter when the relevant sales pertaining to input VAT were made. The Supreme Court applied *Section 112 (A) of the NIRC of 1997, as amended*, which took effect on January 1, 1998. *Section 112 (A)* expressly provides:

“SEC. 112. Refunds or Tax Credit 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.” (*emphasis supplied*)

Considering that the rule regarding the period to file claims for refund or tax credit certificate of input VAT attributable to zero rated sales, which is “two (2) years after the close of the taxable quarter” has been effective and existing since January 1, 1998, the date of the effectivity of the *NIRC of 1997, as amended*, and even as early as in the *1977 Tax Code*, as contained in *Section 106 (b)* thereof; the *Mirant Case*, therefore, did not overturn any existing law. Clearly, the *Mirant case* merely applied *Section 112 (A) of the NIRC of 1997, as amended*, and *Section 106 (b) of the 1977 Tax Code*. The ruling in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, 524 SCRA 73 (“Atlas case”), counting the two (2)-year prescriptive period not from the close of the quarter when the zero-rated sales were made, but from the date of the filing of the quarterly VAT return and payment of the tax due 20 days thereafter, is not even an application of the *1977 Tax Code*, the law applicable at that time, which also prescribes a two-year prescriptive period from the close of the



taxable quarter when the sales were made for claims of refund of input VAT attributable to zero rated sales, but a mere interpretation of the Supreme Court of said *1977 Tax Code*.

Further, in the most recent ruling of the Supreme Court in the case of *San Roque Power Corporation vs. Commissioner of Internal Revenue*, G.R. No. 180345, November 25, 2009 (“San Roque case”), which also involves a claim for refund of unutilized input VAT attributable to zero-rated sales for taxable year 2002, the Supreme Court in determining the reckoning of the two-year prescriptive period ruled that the claim should be filed within two years after the close of the taxable quarter when such sales were made. It must be emphasized that when the *Mirant* case was promulgated, the *San Roque* case was already pending with the Supreme Court. Yet, the Supreme Court in deciding the *San Roque* case, applied the *Mirant* ruling, and not the *Atlas* case. Thus, it confirmed the Supreme Court’s current ruling in the reckoning of the two-year prescriptive period in claims for refund, which is from the close of the taxable quarter when the sales were made, which we are bound to follow.



Applying the ruling in the Mirant case and *Section 112(A) of the NIRC of 1997, as amended*, the following are the pertinent dates to petitioner's claim for refund:

Period (2003)	Close of Taxable Quarter	Last Day for Filing the Claim
1st Quarter	March 31, 2003	March 31, 2005
2 nd Quarter	June 30, 2003	June 30, 2005
3 rd Quarter	September 30, 2003	September 30, 2005
4 th Quarter	December 31, 2003	January 2, 2006 (December 31, 2005 being a Saturday)

Records show that petitioner filed its administrative claim for refund or issuance of a TCC for the first quarter of 2003 on April 4, 2005 (*Exhibits ""W" to "W-d", Consolidated C.T.A. Cases Nos. 7228, 7286 & 7318*), which is beyond the prescriptive period. While for the second, third and fourth quarters of 2003, records likewise show that petitioner filed its administrative claims for refund or issuance of a TCC on April 4, 2005 (*Exhibits "W-1" to "W-1-d", "W-2" to "W-2-d", and "W-3" to "W-3-d", Consolidated C.T.A Cases Nos. 7228, 7286 and 7318*), which are well within the prescriptive period.

As to its judicial claim, records show that for the first quarter of 2003, petitioner filed the Petition for Review on April 22, 2005 (*C.T.A. Case No. 7228*), while for the second quarter of 2003, petitioner filed the Petition for Review on July 7, 2005 (*C.T.A. Case No. 7286*), and for the third



and fourth quarters of 2003, petitioner filed the Petition for Review on September 9, 2005 (*C.T.A. Case No. 7318*). Evidently, petitioner's judicial claim for refund/issuance of a TCC for its unutilized input VAT for the first and second quarters of 2003 was filed beyond the prescriptive periods, while its claim for refund/issuance of a TCC for its unutilized input VAT for the third and fourth quarters of 2003 was filed well within the prescriptive period.

Therefore, petitioner's claim for refund for the first and second quarters of 2003 must be denied for being filed out of time.

Concurring

However, as to petitioner's claim for refund/issuance of a TCC of unutilized input VAT pertaining to the third and fourth quarters of 2003, I fully concur with the *ponencia* to partially grant the claim.

For all the foregoing, I vote to partially grant the present Petition For Review and order the refund or issuance of a TCC in favor of petitioner corresponding to the substantiated input VAT attributable to petitioner's zero-rated sales of electricity to NPC for the third and fourth quarters of 2003 only.


OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

Juanito C. Castaneda, Jr.
JUANITO C. CASTANEDA, JR.
Associate Justice

ErLinda P. Uy
ERLINDA P. UY
Associate Justice

EN BANC

- versus -

Respondent.

X-----X

MINDANAO I GEOTHERMAL C.T.A. EB No. 483
PARTNERSHIP, (C.T.A. CASE NOS. 7228,
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MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

- versus -

COMMISSIONER OF INTERNAL REVENUE, Promulgated: MAY 24 2023

Respondent.

MAY 31 2010

X-----X

DISSENTING OPINION

FABON-VICTORINO, J.:

With due respect to the ponente, I agree with the opinion of Justice Olga Palanca-Enriquez that the administrative claim for

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refund of petitioner's excess and unutilized creditable input tax attributable to zero-rated sales for the first quarter of 2003 was filed beyond the two-year prescriptive period provided under Section 112 (A) of the 1997 National Internal Revenue Code (NIRC) taking into consideration the ruling in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)*¹, which held that the two (2) year period for filing a claim for input VAT refund is reckoned from the close of the taxable quarter when the relevant sales pertaining to input VAT were made.

I respectfully disagree, however with the opinion of the majority regarding petitioner's claim for the second, third and fourth quarters of 2003.

Refund or tax credits of input tax attributable to zero-rated sales is specifically governed by Section 112 (A) and (D) (under R.A. No. 8424), now (C) of the NIRC, as amended, to wit:

Section 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

¹ CIR vs. Mirant Pagbilao Corporation, G.R. No. 172129, September 12, 2008

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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: *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

(C) Period within which Refund or Tax Credit of Input Taxes shall be Made. – **In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application** filed in accordance with Subsection (A) hereof.

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. (emphasis ours)

The foregoing provision provides that a VAT-registered person may **apply** for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated sales **within two years after the close of the taxable quarter** and that an **appeal to the CTA may be taken within thirty (30) days from receipt of the adverse decision** of the Commissioner **or after the**

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expiration of the one hundred twenty (120) day-period without action on the part of the Commissioner.

In accordance with Section 112 and in the light of *Mirant* decision, the second quarter of 2003 subject of the claim was April – June 2003 and two years from the close of the taxable quarter within which the claim for refund must be made was until June 2005. The record shows that petitioner filed its administrative claim for the 2nd quarter of 2003 on April 04, 2005. Under the relevant provision, respondent Commissioner had 120 days, within which to act on the claim or until August 02, 2005 and upon the lapse of such period without any action on the part of respondent Commissioner, petitioner had 30 days to file a judicial claim with this Court. In the present case, petitioner filed its judicial claim for the 2nd quarter on July 07, 2005, without waiting for the 120 days to lapse on August 02, 2005 for respondent Commissioner to act on its administrative claim for refund. The judicial claim was therefore prematurely filed depriving the Court of authority to act on the petition.

On the other hand, the judicial claim for the 3rd and 4th quarters were filed beyond the 30-day period to appeal with this Court as provided under Section 112(C) of the NIRC.

The administrative claims for refund for the 3rd and 4th quarters of 2003 were also filed on April 04, 2005, which were undeniably within 2 years from the close of the taxable quarter as provided in Section 112. From April 04, 2005, respondent Commissioner had 120 days or until August 02, 2005, within which to act on the matter and in case of inaction, the petitioner had 30 days from the lapse of the 120-day period, or until September 01,

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2005, within which to file a judicial claim with this Court. But as the judicial claim covering the 3rd and 4th quarters were admittedly filed on September 09, 2005, they must already be deemed time-barred.

In view of the foregoing, I respectfully vote to deny petitioner's claim for refund in its entirety.



ESPERANZA R. FABON-VICTORINO
Associate Justice