535 Phil. 481

FIRST DIVISION

[G.R. NO. 159593, October 16, 2006]

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. MIRANT[1] PAGBILAO CORPORATION (FORMERLY SOUTHERN ENERGY QUEZON, INC.), RESPONDENT.

D E C I S I O N

CHICO-NAZARIO, J.:

Before this Court is a Petition for Review[2] under Rule 45 of the 1997 Rules of Civil Procedure assailing the Decision,[3] dated 30 July 2003, of the Court of Appeals in CA-G.R. SP No. 60783, which affirmed *in toto* the Decision,[4] dated 11 July 2000, of the Court of Tax Appeals (CTA) in CTA Case No. 5658. The CTA partially granted the claim of herein respondent Mirant Pagbilao Corporation (MPC) for the refund of the input Value Added Tax (VAT) on its purchase of capital goods and services for the period 1 April 1996 to 31 December 1996, and ordered herein petitioner Commissioner of the Bureau of Internal Revenue (BIR) to issue a tax credit certificate in the amount of P28,744,626.95.

There is no dispute as to the following facts that gave rise to the claim for refund of MPC, as found by the CTA[5] -

> [MPC] is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines with principal office address in Pagbilao Grande Island, Pagbilao, Quezon. It is licensed by the Securities and Exchange Commission to principally engage in the business of power generation and subsequent sale thereof (Exh. A). It is registered with the Bureau of Internal Revenue as a VAT registered entity with Certificate of Registration bearing RDO Control No. 96-600-002498, dated January 26, 1996.
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> For the period April 1, 1996 to December 31, 1996, [MPC] seasonably filed its Quarterly VAT Returns reflecting an (sic) accumulated input taxes in the amount of P39,330,500.85 (Exhs. B, C, and D). These input taxes were allegedly paid by [MPC] to the suppliers of capital goods and services for the construction and development of the power generating plant and other related facilities in Pagbilao, Quezon (TSN, November 16, 1998, p. 11).

> Pursuant to the procedures prescribed under Revenue Regulations No. 7-95, as amended, [MPC] filed on June 30, 1998, an application for tax credit or refund of the aforementioned unutilized VAT paid on capital goods (Exhibit "E").
>
> Without waiting for an answer from the [BIR Commissioner], [MPC] filed the instant petition for review on July 10, 1998, in order to toll the running of the two-year prescriptive period for claiming a refund under the law.
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> In answer to the Petition, [the BIR Commissioner] advanced as special and affirmative defenses that "[MPC]'s claim for refund is still pending investigation and consideration before the office of [the BIR Commissioner] accordingly, the filing of the present petition is premature; well-settled is the doctrine that provisions in tax refund and credit are construed strictly against the taxpayer as they are in the nature of a tax exemption; in an action for refund or tax credit, the taxpayer has the burden to show that the taxes paid were erroneously or illegally paid and failure to sustain the said burden is fatal to the action for refund; it is incumbent upon [MPC] to show that the claim for tax credit has been filed within the prescriptive period under the Tax Code; and the taxes allegedly paid by [MPC] are presumed to have been collected and received in accordance with law and revenue regulations.["]
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> On July 14, 1998, while the case was pending trial, Revenue Officer, Rosemarie M. Vitto, was assigned by Revenue District Officer, Ma. Nimfa Penalosa-Asensi, of Revenue District No. 60 to investigate [MPC]'s application for tax credit or refund of input taxes (Exhs. 1 and 1-a). As a result, a memorandum report, dated August 27, 1998, was submitted recommending a favorable action but in a reduced amount of P49,616.40 representing unapplied input taxes on capital goods. (Exhs. 2, 2-a, 3, and 3-a).
>
> [MPC], due to the voluminous nature of evidence to be presented, availed of the services of an independent Certified Public Accountant pursuant to CTA Circular No. 1-95, as amended. As a consequence, Mr. Ruben R. Rubio, Partner of SGV & Company, was commissioned to verify the accuracy of [MPC]'s summary of input taxes (TSN, October 15, 1998, pp. 3-5). A report, dated March 8, 1999, was presented stating the audit procedures performed and the finding that out of the total claimed input taxes of P39,330,500.85, only the sum of P28,745,502.40 was properly supported by valid invoices and/or official receipts (Exh. G; see also TSN, March 3, 1999, p. 12).

The CTA ruled in favor of MPC, and declared that MPC had overwhelmingly proved, through the VAT invoices and official receipts it had presented, that its purchases of goods and services were necessary in the construction of power plant facilities which it used in its business of power generation and sale. The tax court, however, reduced the amount of refund to which MPC was entitled, in accordance with the following computation -

Total amount of the	P39,330,500.85

claim for refund		
Less: Disallowances		
a. Per independent auditor	P10,584,998.45	
b. Per CTA's examination	875.45	10,585,873.90
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		P28,744,626.95[6]
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Thus, the dispositive portion of the CTA Decision,[7] dated 11 July 2000, reads -

> **WHEREFORE**, in view of the foregoing, [MPC]'s claim for refund is hereby partially **GRANTED**. [The BIR Commissioner] is **ORDERED** to **ISSUE** A TAX CREDIT CERTIFICATE in the amount of P28,744,626.95 representing input taxes paid on capital goods for the period April 1, 1996 to December 31, 1996.

The CTA subsequently denied the BIR Commissioner's Motion for Reconsideration in a Resolution,[8] dated 31 August 2001.

Aggrieved, the BIR Commissioner filed with the Court of Appeals a Petition for Review[9] of the foregoing Decision, dated 11 July 2000, and Resolution, dated 31 August 2001, of the CTA. Notably, the BIR Commissioner identified and discussed as grounds[10] for its Petition arguments that were totally new and were never raised before the CTA, to wit -

1. RESPONDENT BEING AN ELECTRIC UTILITY, IT IS SUBJECT TO FRANCHISE TAX UNDER THEN SECTION 117 (NOW SECTION 119) OF THE TAX CODE AND NOT TO VALUE ADDED TAX (VAT).

2. SINCE RESPONDENT IS EXEMPT FROM VAT, IT IS NOT ENTITLED TO THE REFUND OF INPUT VAT PURSUANT TO SECTION 4.103-1 OF REVENUE REGULATIONS NO. 7-95.

The Court of Appeals found no merit in the BIR Commissioner's Petition, and in its Decision, dated 30 July 2003, it pronounced that: (1) The BIR Commissioner cannot validly change his theory of the case on appeal; (2) The MPC is not a public utility within the contemplation of law; (3) The sale by MPC of its generated power to the National Power Corporation (NAPOCOR) is subject to VAT at zero percent rate; and (4) The MPC, as a VAT-registered taxpayer, may apply for tax credit. Accordingly, the decretal portion of the said Decision[11] reads as follows -

> **WHEREFORE**, premises considered, the *Petition* is **DISMISSED** for lack of merit and the assailed 11 July 2000 *Decision* of respondent Court in CTA Case

No. 5658 is hereby **AFFIRMED** *in toto*. No costs.

Refusing to give up his cause, the BIR Commissioner filed the present Petition before this Court on the ground that the Court of Appeals committed reversible error in affirming the Decision of the CTA holding respondent entitled to the refund of the amount of P28,744,626.95, allegedly representing input VAT on capital goods and services for the period 1 April 1996 to 31 December 1996. He argues that (1) The observance of procedural rules may be relaxed considering that technicalities are not ends in themselves but exist to protect and promote the substantive rights of the parties; and (2) A tax refund is in the nature of a tax exemption which must be construed strictly against the taxpayer. He reiterates his position before the Court of Appeals that MPC, as a public utility, is exempt from VAT, subject instead to franchise tax and, thus, not entitled to a refund of input VAT on its purchase of capital goods and services.

This Court finds no merit in the Petition at bar.

I

The general rule is that a party cannot change his theory of the case on appeal.

To recall, the BIR Commissioner raised in its Answer[12] before the CTA the following special and affirmative defenses -

> 3. [MPC]'s claim for refund is still pending investigation and consideration before the office of [the BIR Commissioner]. Accordingly, the present petition is premature;
>
> 4. Well-settled is the doctrine that provisions in tax refund and credit are construed strictly against the taxpayer as they are in the nature of a tax exemption;
>
> 5. In an action for refund or tax credit, the taxpayer has the burden to show that the taxes paid were erroneously or illegally paid and failure to sustain the said burden is fatal to the action for refund;
>
> 6. It is incumbent upon [MPC] to show that the claim for tax credit has been filed within the prescriptive period under the tax code;
>
> 7. The taxes allegedly paid by [MPC] are presumed to have been collected and received in accordance with law and revenue regulations.

These appear to be general and standard arguments used by the BIR to oppose any claim by a taxpayer for refund. The Answer did not posit any allegation or contention that would

defeat the particular claim for refund of MPC. Trial proper ensued before the CTA, during which the MPC presented evidence of its entitlement to the refund and in negation of the afore-cited defenses of the BIR Commissioner. It was only after the CTA promulgated its Decision on 11 July 2000, which was favorable to MPC and adverse to the BIR Commissioner, that the latter filed his Petition for Review before the Court of Appeals on 4 October 2000, averring, ***for the very first time***, that MPC was a public utility, subject to franchise tax and not VAT; and since it was not paying VAT, it could not claim the refund of input VAT on its purchase of capital goods and services.

There is a palpable shift in the BIR Commissioner's defense against the claim for refund of MPC and an evident change of theory. Before the CTA, the BIR Commissioner admitted that the MPC is a VAT-registered taxpayer, but charged it with the burden of proving its entitlement to refund. However, before the Court of Appeals, the BIR Commissioner, in effect denied that the MPC is subject to VAT, making an affirmative allegation that it is a public utility liable, instead, for franchise tax. Irrefragably, the BIR Commissioner raised for the first time on appeal questions of both fact and law not taken up before the tax court, an actuality which the BIR Commissioner himself does not deny, but he argues that he should be allowed to do so as an exception to the technical rules of procedure and in the interest of substantial justice.

It is already well-settled in this jurisdiction that a party may not change his theory of the case on appeal.[13] Such a rule has been expressly adopted in Rule 44, Section 15 of the 1997 Rules of Civil Procedure, which provides -

> SEC. 15. *Questions that may be raised on appeal.* - Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties.

Thus, in *Carantes v. Court of Appeals*,[14] this Court emphasized that -

> The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal. A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party.

In the more recent case of *Mon v. Court of Appeals*,[15] this Court again pronounced that, in this jurisdiction, the settled rule is that a party cannot change his theory of the case or his cause of action on appeal. It affirms that "courts of justice have no jurisdiction or power to decide a question not in issue." Thus, a judgment that goes beyond the issues and purports to adjudicate something on which the court did not hear the parties, is not only irregular but also extrajudicial and invalid. The rule rests on the fundamental tenets of fair play.

The BIR Commissioner pleads with this Court not to apply the foregoing rule to the instant case, for a rule on technicality should not defeat substantive justice. The BIR Commissioner apparently forgets that there are specific reasons why technical or procedural rules are imposed upon the courts, and that compliance with these rules, should still be the general course of action. Hence, this Court has expounded that -

> Procedural rules, we must stress, should be treated with utmost respect and due regard since they are designed to facilitate the adjudication of cases to remedy the worsening problem of delay in the resolution of rival claims and in the administration of justice. The requirement is in pursuance to the bill of rights inscribed in the Constitution which guarantees that "all persons shall have a right to the speedy disposition of their cases before all judicial, quasi-judicial and *administrative bodies*." The adjudicatory bodies and the parties to a case are thus enjoined to abide strictly by the rules. While it is true that a litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to ensure an orderly and speedy administration of justice. There have been some instances wherein this Court allowed a relaxation in the application of the rules, but this flexibility was "never intended to forge a bastion for erring litigants to violate the rules with impunity." A liberal interpretation and application of the rules of procedure can be resorted to only in proper cases and under justifiable causes and circumstances.[16]

The courts have the power to relax or suspend technical or procedural rules or to except a case from their operation when compelling reasons so warrant or when the purpose of justice requires it. What constitutes good and sufficient cause that would merit suspension of the rules is discretionary upon the courts.[17]

In his Petition and Memorandum before this Court, the BIR Commissioner made no attempt to provide reasonable explanation for his failure to raise before the CTA the issue of MPC being a public utility subject to franchise tax rather than VAT. The BIR Commissioner argues, in a singular paragraph in his Petition,[18] subsequently reproduced in his Memorandum,[19] that the Court of Appeals should have taken cognizance of the said issue, although it was raised for the first time on appeal, entirely on the basis of this Court's ruling in *Sy v. Court of Appeals*.[20] He contends that -

> The submission fails to take into account that although this Honorable Court has repeatedly ruled that litigants cannot raise an issue for the first time on appeal, as this would contravene the basic rules of justice and fair play, the observance of procedural rules may be relaxed, noting that technicalities are not ends in themselves but exist to protect and promote the substantive rights of the litigants (**Sy v. Court of Appeals**, 330 SCRA 570 [2000]).

This Court is unconvinced. There is no sufficient cause to warrant the relaxation of

technical or procedural rules in the instant case. The general rules of procedure still apply and the BIR Commissioner cannot be allowed to raise an issue for the first time on appeal.

It should be emphasized that the BIR Commissioner is invoking a suspension of the general rules of procedure or an exception thereto, thus, it is incumbent upon him to present sufficient cause or justifiable circumstance that would qualify his case for such a suspension or exception. That this Court had previously allowed in another case such suspension of or exception to technical or procedural rules does not necessarily mean that the same shall also be allowed in the present case. The BIR Commissioner has the burden of persuading this Court that the same causes or circumstances that justified the suspension of or exception to the technical or procedural rules in the other case are also present in the case at bar.

The *Sy* case, on which the BIR Commissioner fully anchored his claim for suspension of or exception to the technical or procedural rules, is not even on all fours with his case. It involves a petition for declaration of nullity of marriage instituted by the therein petitioner Filipina Sy before the Regional Trial Court (RTC) on the basis of the alleged psychological incapacity of her husband, Fernando Sy. Her petition was denied by the RTC because it found that Fernando's acts did not constitute psychological incapacity, a finding later affirmed by the Court of Appeals. In an appeal by *certiorari* before this Court, Filipina raised the issue that her marriage to Fernando was void from the very beginning for lack of a marriage license at the time of the ceremony. This Court took cognizance of the said issue, reversed the RTC and the Court of Appeals, and ruled in favor of Filipina. Its ratiocination on the matter is reproduced in full below -

> Petitioner, for the first time, raises the issue of the marriage being void for lack of a valid marriage license at the time of its celebration. It appears that, according to her, the date of the actual celebration of their marriage and the date of issuance of their marriage certificate and marriage license are different and incongruous.
>
> Although we have repeatedly ruled that litigants cannot raise an issue for the first time on appeal, as this would contravene the basic rules of fair play and justice, in a number of instances, we have relaxed observance of procedural rules, noting that technicalities are not ends in themselves but exist to protect and promote substantive rights of litigants. We said that certain rules ought not to be applied with severity and rigidity if by so doing, the very reason for their existence would be defeated. Hence, when substantial justice plainly requires, exempting a particular case from the operation of technicalities should not be subject to cavil. In our view, the case at bar requires that we address the issue of the validity of the marriage between Filipina and Fernando which petitioner claims is void from the beginning for lack of a marriage license, ***in order to arrive at a just resolution of a deeply seated and violent conflict between the parties. Note, however, that here the pertinent facts are not disputed; and what is required now is a declaration of their effects according to existing law.***

[21] [Emphasis supplied.]

In the instant case, the conflict between the MPC and the BIR Commissioner could be hardly described as "deeply seated and violent," it remaining on a professional level.

Moreover, this Court pointed out in the *Sy* case that the pertinent facts, *i.e.*, the dates of actual celebration of the marriage, issuance of the marriage certificate, and issuance of the marriage license, were ***undisputed***. The same cannot be said in the case at bar. That MPC is a public utility is not an undisputed fact; on the contrary, the determination thereof gives rise to a multitude of other questions of fact and law. It is a mere deduction on the part of the BIR Commissioner that since the MPC is engaged in the generation of power, it is a public utility. The MPC contests this arguing that it is not a public utility because it sells its generated power to NAPOCOR exclusively, and not to the general public. It asserts that it is subject to VAT and that its sale of generated electricity to NAPOCOR is subject to zero-rated VAT.

Substantial justice, in such a case, requires not the allowance of issues raised for the first time on appeal, but that the issue of whether MPC is a public utility, and the correlated issue of whether MPC is subject to VAT or franchise tax, be raised and threshed out in the first opportunity before the CTA so that either party would have fully presented its evidence and legal arguments in support of its position and to contravene or rebut those of the opposing party.

In *Atlas Consolidated Mining & Development Corp. v. Commissioner of Internal Revenue*, [22] this Court held that it was too late for the BIR Commissioner to raise an issue of fact of payment for the first time in his memorandum in the CTA and in his appeal to this Court. If raised earlier, the matter ought to have been seriously delved into by the CTA. On this ground, this Court was of the opinion that under all the attendant circumstances of the case, substantial justice would be served if the BIR Commissioner be held as precluded from attempting to raise the issue at this stage. Failure to assert a question within a reasonable time warrants a presumption that the party entitled to assert it either has abandoned or declined to assert it.

Therefore, the Court of Appeals correctly refused to consider the issues raised by the BIR Commissioner for the first time on appeal. Its discussion on whether the MPC is a public utility and whether it is subject to VAT or franchise tax is nothing more than *obiter dictum*. It is best not at all to discuss these issues for they do not simply involve questions of law, but also closely-related questions of fact[23] which neither the Court of Appeals nor this Court could presume or garner from the evidence on record.

II

Input VAT on capital goods and services may be the subject of a claim for refund.

The MPC bases its claim for refund of its input VAT on Section 106(b) of the Tax Code of 1986, as amended by Republic Act No. 7716,[24] which provides -

> Sec. 106. *Refunds or tax credits of creditable input tax*. -
>
> x x x x
>
> (b) *Capital goods*. - A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years, after the close of the taxable quarter when the importation or purchase was made.

Capital goods or properties, as defined in Revenue Regulations No. 7-95, the implementing rules on VAT, are "goods and properties with estimated useful life greater than one year and which are treated as depreciable assets under Section 29(f), used directly or indirectly in the production or sale of taxable goods or services."[25]

Contrary to the argument of the BIR Commissioner, input VAT on capital goods is among those expressly recognized as creditable input tax by Section 104(a) of the Tax Code of 1986, as amended by Rep. Act No. 7716,[26] to wit -

> Sec. 104. *Tax Credits*. - (a) *Creditable input tax*. - Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 108 hereof on the following transactions shall be creditable against the output tax:
>
> (1) Purchase or importation of goods:
>
> (A) For sale; or
>
> (B) For conversion into or intended to form part of a finished product for sale including packing materials; or
>
> (C) For use as supplies in the course of business; or
>
> (D) For use as materials supplied in the sale of service; or
>
> (E) ***For use in trade or business for which deduction for depreciation or amortization is allowed under this Code, except automobiles, aircraft and yachts.*** [Emphasis supplied.]

Thus, goods and properties used by the taxpayer in its VAT-taxable business, subject to depreciation or amortization in accordance with the Tax Code, are considered capital

goods. Input VAT on the purchase of such capital goods is creditable against the taxpayer's output VAT. The taxpayer is further given the option, under Section 106(b) of the Tax Code of 1986, as amended by Republic Act No. 7716, to claim refund of the input VAT on its capital goods, but only to the extent that the said input VAT has not been applied to its output VAT.

This Court, likewise, will not give credence to the BIR Commissioner's contention that the claim for refund of input VAT on capital goods by the MPC should be denied for the latter's failure to comply with the requirements for the refund of input VAT credits on zero-rated sales provided in Section 16 of Revenue Regulations No. 5-87, as amended by Revenue Regulations No. 3-88. The BIR Commissioner is apparently confused. MPC is claiming refund of the input VAT it has paid on the purchase of ***capital goods***, it is not claiming refund of its input VAT credits attributable to its ***zero-rated sales***. These are two different input VAT credits, arising from distinct transactions, although both may be the subject of claims for refund by the taxpayer.[27] Indeed, the very same regulation invoked by the BIR Commissioner, Revenue Regulations No. 5-87, as amended, distinguishes between these two refundable input VAT credits and discusses them in two separate paragraphs: Section 16(a) on zero-rated sales of goods and services, and Section 16(b) on capital goods. It is also worth noting that Revenue Regulations No. 7-95, issued on 9 December 1995, which consolidated all VAT regulations, already superseded Revenue Regulations No. 5-87. Still, Revenue Regulations No. 7-95 maintains the distinction between these two input VAT credits, discussing the zero-rated sales of goods or properties or services in Section 4.106-1(a), and capital goods in Section 4.106-1(b).

Hence, the present claim for refund of input VAT on capital goods filed by MPC need not comply with the requirements for refund of input VAT attributable to zero-rated sales.

III

There is no reason for this Court to disturb the findings of fact of the CTA, as affirmed by the Court of Appeals.

While it is true, as the BIR Commissioner alleges, that the MPC has the burden of proving that it is entitled to the refund it is claiming for, both the CTA and Court of Appeals had ruled that the MPC presented substantial evidence to support its claim for refund of its input VAT on capital goods and services in the amount of P28,744,626.95.

The CTA found that MPC is registered as a VAT-taxpayer, as evidenced by its Certificate of Registration, issued by the BIR Revenue District Office (RDO) No. 60, on 26 January 1996. The BIR Commissioner does not contest this fact, and does not offer any explanation as to why the BIR RDO had approved the registration of MPC as a VAT-taxpayer when, as the BIR Commissioner is now asserting, the MPC is not subject to VAT but to franchise tax. The MPC had been filing its VAT Quarterly Returns, including those

for the period covered by its claim for refund, 1 April 1996 to 31 December 1996, reporting and reflecting therein the input VAT it had paid on its purchase of capital goods and services. These capital goods and services were necessary in the construction of the power plant facilities used by MPC in electric power generation.

The VAT invoices and receipts submitted by MPC, in support of its claim for refund, had been examined and evaluated by an independent auditor, as well as by the CTA itself. Thus, from the original amount of P39,330,500.85 claimed by MPC for refund, the independent auditor, SGV & Co., found only the sum of P28,745,502.40 sufficiently supported by valid invoices and/or official receipts. Following its own examination and evaluation of the evidence submitted, the CTA further reduced the amount refundable to P28,744,626.95 after disallowing the input VAT on the purchase of "xerox and office supplies which cannot be capitalized and not necessary in the construction of power plant facilities."[28]

It is worth noting that the foregoing findings by the CTA were affirmed in totality by the Court of Appeals. Likewise, this Court finds no reason to disturb the foregoing findings of the tax court.

Another well-settled principle in this jurisdiction is that this Court is bound by the findings of fact of the CTA. Only errors of law, and not rulings on the weight of evidence, are reviewable by this Court. Findings of fact of the CTA are not to be disturbed unless clearly shown to be unsupported by substantial evidence.[29] Quite the reverse, the claim of MPC for refund of input VAT on its purchase of capital goods and services in the present case is found to be supported by substantial evidence, not just by the CTA, but also by the Court of Appeals. The BIR Commissioner failed to convince this Court otherwise.

IV

The BIR should seriously study and consider each and every application for claim for refund pending before it.

As a final point, this Court would like to call the attention of the BIR Commissioner, as well as the responsible BIR officers, to seriously study and consider each and every application for claim for refund filed before their office. It is very obvious to this Court that the Answer filed by the BIR Commissioner before the Court of Appeals, which it essentially reproduced as its Memorandum before the same court, presented general and *pro forma* arguments. The BIR Commissioner only raised belatedly before the Court of Appeals the issues of whether MPC is a public utility and whether it is subject to franchise tax and not VAT. Even then, his Petition for Review before the appellate court, numbering only six pages, with only one page devoted to a discussion of the merits of his Petition, left much to be desired and would hardly persuade any court. Since he represents the interest of the government in tax cases, the BIR Commissioner should exert more effort and

exercise more diligence in preparing his pleadings before any court; he should not wait to do so only upon appeal of his case to the higher court. This Court may not always be inclined to allow him to remedy his past laxity.

IN VIEW OF THE FOREGOING, the instant Petition is hereby **DENIED**. The Decision, dated 30 July 2003, of the Court of Appeals in CA-G.R. SP No. 60783, which affirmed *in toto* the Decision, dated 11 July 2000, of the CTA in CTA Case No. 5658, is hereby **AFFIRMED**. The BIR Commissioner is hereby **ORDERED** to issue in favor of MPC a tax credit certificate in the amount of P28,744,626.95 representing input VAT paid on capital goods and services for the period of 1 April 1996 to 31 December 1996. No pronouncement as to costs.

SO ORDERED.

Panganiban, C.J., (Chairperson), Ynares-Santiago, Austria-Martinez, and *Callejo, Sr., JJ.*, concur.

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[1] Although the instant Petition for Review referred to respondent as Migrant Pagbilao Corporation, records would reveal that the correct corporate name of respondent is Mirant Pagbilao Corporation. (See the respondent's Amended Articles of Incorporation, *Rollo*, pp. 219-231.)

[2] *Rollo*, pp. 24-47.

[3] Penned by Associate Justice Andres B. Reyes with Associate Justices Eugenio S. Labitoria and Regalado E. Maambong, concurring; *rollo*, pp. 50-61.

[4] Penned by Associate Judge Amancio Q. Saga with Associate Judges Ernesto D. Acosta and Ramon O. De Veyra, concurring; *rollo*, pp. 62-68.

[5] Id. at 62-64.

[6] Id. at 67.

[7] Id.

[8] Penned by Associate Judge Amancio Q. Saga with Associate Judges Ernesto D. Acosta and Ramon O. De Veyra, concurring; *rollo*, p. 184.

[9] CA *rollo*, pp. 6-14.

[10] Id. at 9.

[11] *Rollo*, p. 61.

[12] CTA records, pp. 19-20.

[13] *Ramos v. Poblete*, 73 Phil. 241, 246 (1941); *Cervantes v. Court of Appeals*, G.R. No. L-33360, 25 April 1977, 76 SCRA 514, 521-522; *Mon v. Court of Appeals*, G.R. No. 118292, 14 April 2004, 427 SCRA 165, 171-172.

[14] G.R. No. L-33360, 25 April 1977, 76 SCRA 514, 521.

[15] G.R. No. 118292, 14 April 2004, 427 SCRA 165, 171-172.

[16] *Hon. Fortich v. Hon. Corona*, 359 Phil. 210, 220 (1998).

[17] *Republic of the Philippines v. Imperial, Jr.*, 362 Phil. 466, 477 (1999).

[18] *Rollo*, p. 33.

[19] Id. at 142.

[20] G.R. No. 127263, 12 April 2000, 330 SCRA 550.

[21] Id. at 556-557.

[22] G.R. No. L-26911, 27 January 1981, 102 SCRA 246, 259.

[23] Among these questions are: (1) Whether MPC is actually a holder of a franchise from the government; (2) Whether MPC is actually paying franchise tax; (3) Whether MPC is selling generated power to the general public, or, as contended by the MPC, it is only selling to NAPOCOR; (4) Whether the permit or authority granted for the operation of the MPC is subject to certain conditions and limitations, including one which precludes it from selling generated power to the general public; and (5) Whether the sale by MPC to NAPOCOR is indeed subject to zero-rated VAT. This list of questions, however, is not exhaustive. The court, before which the issue of whether the MPC is a public utility is again raised, may find additional questions of fact which need to be answered for a full determination thereof.

[24] Reproduced in the Tax Code of 1997 as Section 112(B), prior to the amendments introduced by Rep. Act No. 9937.

[25] Section 4.106-1(b).

[26] Reproduced in the Tax Code of 1997 as Section 110(A).

[27] While the refund of input VAT on capital goods was recognized in Section 106(b) of the Tax Code of 1986, as amended by Rep. Act No. 7716 [Section 112(B) of the Tax Code of 1997, prior to the amendments introduced by Rep. Act No. 9937], the refund of input VAT attributable to zero-rated sales was allowed under Section 106(a) of the Tax Code of 1986, as amended by Rep. Act No. 7716 [Section 112(A) of the Tax Code of 1997], which reads -

> Sec. 106. *Refunds or tax credits of creditable input tax*. - (a) 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 100(a)(2)(A)(i), (ii) and (b) and Section 102(b)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the 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

[28] *Rollo*, p. 67.

[29] *Commissioner of Internal Revenue v. Embroidery and Garments Industries (Phil.), Inc.*, 364 Phil. 541, 545-546 (1999); *Commissioner of Internal Revenue v. Union Shipping Corp.*, G.R. No. 66160, 21 May 1990, 185 SCRA 547, 553; *Industrial Textiles Manufacturing Co. of the Phils., Inc. (ITEMCOP) v. Commissioner of Internal Revenue*, G.R. No. L-27718, 27 May 1985, 136 SCRA 549, 551; *Commissioner of Internal Revenue v. Manila Machinery & Supply Company*, G.R. No. L-25653, 28 February 1985, 135 SCRA 8, 14; *Aznar v. Court of Appeals*, 157 Phil. 510, 524 (1974); *Consolidated Mines, Inc. v. Court of Tax Appeals*, 157 Phil. 608, 631 (1974); *Balbas, v. Domingo*, 128 Phil. 467, 472 (1967).