THIRD DIVISION

G.R. No. 256720 – MAIBARARA GEOTHERMAL, INC, Petitioner, **v. COMMISSIONER OF INTERNAL REVENUE,** Respondent.

Promulgated:

August 7, 2024

x----------x

Separate Concurring Opinion

INTING, *J.*:

The *ponencia* affirms the Decision of the Court of Tax Appeals *En Banc* (CTA EB) which denies the application for refund filed by petitioner Maibarara Geothermal, Inc. (MGI). The denial is anchored on two grounds: (1) MGI's failure to establish its zero-rated sales; and (2) prior to the issuance of Department of Energy (DOE) Department Circular No. DC2021-12-1142, the DOE and other regulatory agencies may require other certifications before a Renewable Energy (RE) developer may qualify to the fiscal incentives under Section 15 of Republic Act No. 9513 or the Renewable Energy Act of 2008 (RE Law), but the added certification requirement is inapplicable to VAT zero-rating in Section 15(g) of the RE Law.

I agree with the *ponencia*'s conclusion that MGI is not entitled to a refund for its failure to establish the existence of zero-rated sales upon which the claimed input VAT is attributed, and that the DOE may not require an added certification requirement before an RE developer can avail of the VAT zero-rating incentive under the RE Law.

However, I submit this Separate Concurring Opinion to highlight that the DOE's role in the implementation of the RE Law is limited to the determination of the financial and technical qualifications of RE developers—to "ensure that they have met all the requirements to undertake the project in terms of capacity, technical skills, management capability and financial muscle."[1]

Notably, a DOE Certificate of Endorsement requirement only appears in Section 15(b) of the RE Law on the incentive of duty-free importation of RE machinery, equipment and materials, and their subsequent sale, transfer, or disposition. Thus, the DOE cannot extend this Certificate of Endorsement requirement to other incentives, as doing so would defeat the declared policies of the RE Law; that is, to "accelerate the exploration and development of renewable energy resources," "increase the utilization of renewable energy," and "encourage the development and utilization of renewable energy

---

[1] 23 Journal, Senate, 14th Congress, 23rd Session (September 24, 2008), pp. 502–503

resources."[2]

It can be inferred from the deliberations of the House of Representatives on House Bill No. 4913 that the lawmakers wanted to provide a safeguard against the improper use of incentives, particularly, on duty-free importation, viz.:

> REP. GOLEZ. . . .
> Now, first of all, Madam Speaker, I'd like to tackle the general incentives under Chapter VII of the bill. I note. Madam Speaker. that the incentives are very, similar to the Investment Incentives Act of way back when the distinguished Sponsor was the Minister of Trade and Industry, when we were talking of BOI incentives. For example, duty-free importation of machinery equipment and materials, net operating loss carryover, accelerated depreciation - well, there was no value-added tax during the IPP days.
>
> My concern, Madam Speaker, is what was experienced also in the implementation of the Investment Incentives Act, even today, when we're talking of incentives being improperly used and equipment imported under duty-free importation being diverted for other purposes other than the, intended use of the project. The question now is, how do we avoid this? For example, we may be talking of machinery, equipment, materials and parts directly and actually needed and used for these RE facilities that are also usable in projects and operations not covered by this Renewable Energy Bill if it comes into law.
>
> REP. VILLAFUERTE. Madam Speaker. this bill provides for safeguards where any sale of a duty-free equipment or transfer, or disposition made within, the six-year period from the date of importation, must meet the following conditions. It can be done, so as to prevent abuse, if made to another RE developer enjoying tax and duty-free exemption on imported capital equipment. You know, that transfer to an entity that is also involved in renewable energy is allowed.
>
> Now, the second is that, if made to a non-renewable energy developer but upon payment of any taxes and duties due on the net book value of the capital equipment to be sold.
>
> The third is the exportation of the used capital equipment. machinery spare parts or those required for RE redevelopment.
>
> The last is for reasons of proven technical obsolescence. Unless any of the enumerated conditions are met, there will be sanctions and they will have to pay the taxes that were originally due as if they were not duty-free.
>
> I think all government, particularly BOI, has learned many lessons about

---

[2] Republic Act No. 9513, sec. 2.

> the point raised by the Gentleman from Parañaque and that is a very good point and that is something that all of us in government must guard against. That's why we have limited the opportunity for a resale of duty-free imported equipment under only certain selective situations and no other.[3]

Meanwhile, under Section 27 of Senate Bill No. 2046, a single certification from the DOE would be sufficient to entitle an RE Developer to all the incentives under the proposed law. In response, House Representative Luis R. Villafuerte, Sr. expressed his reservations on the Senate's proposed single DOE certification requirement during the bicameral conference, *viz.*:

> REP. VILLAFUERTE. 27, we object to it, we object to it being impractical.
>
> CHAIRPERSON E. J. ANGARA. Why?
>
> REP. VILLAFUERTE. Why do we require a single certification from all these? It may not happen just like that in actual operation. Can we ask the DOE, can you issue a single certification of authority to import, entitlement to tax credit, special realty rates, entitlement to income tax holiday, net operating loss, entitlement to accelerated depreciation. It cannot be done, it has to go through…
>
> CHAIRPERSON E. J. ANGARA. *Teka muna para maintindihan naman ng* co-panel members *mo ha*, there is no comparable provision in the House version.
>
> REP. VILLAFUERTE. Yes.
>
> CHAIRPERSON E. J. ANGARA. The purpose of this single certification requirement is because of our feedback that even local governments would require certification. So in order to simplify documentation and speed up and facilitate approvals, because we are trying to encourage, we are only requiring single certification. That's why… I think *naman* out of parliamentary courtesy, you should not object *naman* to a provision that we originated and you don't have any, *di ba*?
>
> REP. VILLAFUERTE. Mr. Chairman, the point I'm raising is not an objection per se. What I'm saying that the DOE, and the Secretary is here, can you give us assurances because the delay will happen eh, *hindi pa nag iimport, ayaw mo pa sila bigyan ng income tax holiday, hindi pa sila… gusto mo ng bigyan sila ng accelerated depreciation, hindi pa dumarating iyong equipment, gusto mo na kaagad sila kung ano-ano dito, it will not be* implemented as a single certification, *hindi ba*?
>
> REP. ZUBIRI. Mr. chair, just to add quickly. During the passage of the Bio fuels Law, Manong, that's why we do not have a bio-fuels plant in existence today because *nahihirapan sila sa dami ng pinupuntahan nila from the* DA,

---

[3] JOURNAL, HOUSE 14th Congress 1ST Session (June 10, 2008), pp. 411–412.

> the DENR, the NCIP, the DOE, *ang dami nilang pinupuntahan. At ang request talaga ng developers single certification na lang dahil pag meron sila nito, tuloy-tuloy na po iyong trabato*.
>
> REP. VILLAFUETE. I'm sorry I have to say… why don't we just say that all certifications and all of these will emanate from the Department of energy, *hindi ba*? The point I was raising is that, that it cannot be done as a single certification.
>
> CHAIRPERSON E. J. ANGARA. Louie, *para hind imo naman dino dominate lahat*, Mitos, can you suggest the language?
>
> REP. MAGSYASAY. *Iyong ano lang naman ang ano niya iyong single, per certification nalang*.
>
> CHAIRPERSON E.J. ANGARA. All certifications necessary shall be….
>
> REP. MAGSAYSAY. Course through the Renewable Energy Management Bureau of the DOE.
>
> CHAIRPERSON E. J. ANGARA. *Okay iyon*, Secretary?
> REP. MAGSAYSAY. It's better (b)[.]
>
> REP. *Hindi, hindi*, I'm not objecting, but I'm only saying put the phraseology correct.
>
> CHAIRPERSON E. J. ANGARA. *Iyon nga.*
>
> REP. VILLAFUERTE. *Ang sasabihin lang natin,* all certifications required to qualify RE developer to entitlement of incentives shall be issued by the Department of Energy…
>
> CHAIRPERSON E. J. ANGARA. No, no.
>
> REP. VILLAFUERTE. *Dapat* you have to qualify for incentives.
>
> CHAIRPERSON E.J. ANGARA. Okay, accepted na iyon.[4]

Thus, as a compromise, the lawmakers introduced Section 26 to the RE Law:

> Section 26. Certification from the Department of Energy. – *All certifications required to qualify RE developers to avail of the incentives provided for under this Act shall be issued by the DOE through the Renewable Energy Management Bureau.*
>
> The Department of Energy, through the Renewable Energy Management Bureau shall issue said certification [15] days upon request of

---

[4] *Id.* at 518–519.

the renewable energy developer or manufacturer, fabricator or supplier.

Provided, That the certification issued by the Department of Energy *shall be without prejudice to any further requirements that may be imposed by the concerned agencies of the government charged with the administration of the fiscal incentives abovementioned.*

Notably, Section 26 of the RE Law provides that all certifications required for RE developers to be entitled to avail of the incentives shall be issued by the DOE through its Renewable Energy Management Bureau. As an additional safeguard, the last paragraph of Section 26 was introduced empowering the concerned agencies charged with the administration of fiscal incentives, that is, the Bureau of Internal Revenue and the Bureau of Customs, to impose further requirements in recognition of their institutional knowledge. Contrary to the *ponencia*, the last paragraph of Section 26 of the RE Law does not authorize the DOE to impose certification requirements in addition to the requirements provided under the RE Law. Thus, the DOE cannot extend the DOE Certification of Endorsement requirement to other incentives other than the duty-free importation incentive.

To stress, the purpose of the law is to encourage investment in the RE industry, not to discourage investments by the DOE's imposition of unnecessary certification requirements from RE developers.

Nonetheless, this issue has been rendered *moot* by the DOE's issuance of Department Circular No. DC2021-12-1142 on December 24, 2021. As astutely pointed out by Associate Justice Alfredo Benjamin S. Caguioa, Section 18(c) of the IRR, as amended by Department Circular No. DC 2021-12-1142, now provides that a DOE Certificate of Endorsement is only required from RE developers that import RE equipment, materials, parts, and components on a per importation, in order to avail themselves of duty-free importation. As to other incentives provided under Republic Act No. No. 9513, RE developers are automatically qualified to avail themselves of these incentives after securing a Certificate of Registration.

As a general rule, a statute or an administrative rule shall have no retroactive effect unless the contrary is provided. However, the rule is subject to exceptions, such as when the statute creates new rights, or when the statute is remedial or curative.[5]

Notably, Section 6 of Department Circular No. DC2021-12-1142 does not provide for its retroactive application, viz.:

---

[5] *Superiora Locale Dell' Istituto Delle Suore Di San Giuseppe Del Caburlotto, Inc. v. Republic*, G.R. No. 242781, June 21, 2022, *citing Pasig v, Rizal*, G.R. No. 213207, February 15, 2022.

> Section 6. EFFECTIVITY. This Circular shall take effect fifteen days following its publication in two (2) newspapers of general circulation and submission to the University of the Philippines Law Center – Office of National Administrative Register (UPLC-ONAR).

Prior to the amendment, every sale by RE developers should bear a DOE Certificate of Endorsement in order to qualify for zero-rating. Stated differently, without a DOE Certificate of Endorsement, the sale of power generated from renewable sources of energy by RE developers are subject to 12% VAT. Consequently, RE developers cannot file a claim for tax refund or credit of excessive or unutilized input VAT under Section 112(a) of the NIRC even if the input taxes claimed are attributable to sale of power generated from renewable sources of energy because sales without a DOE Certificate of Endorsement are not qualified for zero-rating under the IRR. This requirement is excessively burdensome not only to the RE developers but also to the Renewable Energy Management Bureau of the DOE in view of the volume of sale transactions of RE developers all over the country that it had to endorse on a per transaction basis. Such overly bureaucratic requirement only serves as a setback for the declared policies of the RE Law to "accelerate the exploration and development of renewable energy resources," "increase the utilization of renewable energy," and "encourage the development and utilization of renewable energy resources."[6]

A reading of the "WHEREAS" clauses of Department Circular No. DC2021-12-1142 would show that the circular was intended to correct the deleterious effects of expanding the DOE Certificate of Endorsement requirement to all incentives under the RE Law on a per transaction basis:

> WHEREAS, in implementing Section 26 of the RE Law, Section 18(C) of the RE Law IRR requires RE Developers and manufacturers, fabricators and suppliers of locally-produced RE equipment to secure a "Certificate of Endorsement from the DOE, through the Renewable Energy Management Bureau ("REMB"), on a per transaction basis" to avail of the incentives provided under the RE Law;
>
> WHEREAS, Republic Act No. 11032 or the Ease of Doing Business Act and Republic Act No. 11234 or the Energy Virtual One Stop Shop or EVOSS Law were passed mandating the streamlining of government processes and eliminating red tape in government transactions to promote the ease of doing business; and
>
> WHEREAS, cognizant of the need to address implementation gaps, promote efficiency in government processes, and ensure that fiscal

---

[6] Republic Act No. 9513, sec. 2.

> incentives are property availed of, the DOE deemed it necessary to amend Section 13(E) and Section 18(C) of the RE Law IRR.

In view of the foregoing, Department Circular No. DC2021-12-1142 should be given retroactive application as it is a c*urative amendment* that remedied the implementation gaps and inefficiencies caused by the IRR. In addition, the retroactive application of Department Circular No. DC2021-12-1142 will not adversely affect any vested right and is more in keeping with the declared policies of the RE Law.

HENRI JEAN PAUL B. INTING
Associate Justice