REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

W. RED CONST. & DEV'T CORP.,
Petitioner,

- versus -

C.T.A. CASE NO. 6488

COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 16 2002

x - x

RESOLUTION

Before us is a **Motion to Dismiss** filed by respondent on July 2, 2002, seeking the dismissal of petitioner's claim for refund on the ground of lack of jurisdiction.

As borne out by the records, the antecedent facts of the case are as follows:

Petitioner is a domestic corporation organized and existing in accordance with Philippine laws and engaged in the business as general constructor with principal office at No. 23 Judge Juan Luna St., San Francisco Del Monte, Quezon City *(Paragraph 1, Petition for Review).*

On July 30, 1991 the Department Works and Highways (DPWH) entered into a contract with petitioner denominated as **"Agreement for the Execution of Mabini Circumferential Road Project, Batangas** " *(Annex A, Petition for Review).*

On September 14, 1994, petitioner wrote a demand letter to the Department of Public Works and Highways (DPWH) addressed to Acting Secretary Edmundo V. Mir and claimed for the payment of P141,741,350.78 allegedly representing financial losses it sufferred due to various delays in the course of the construction which resulted to underutilization of the heavy equipment and maintenance and overhead cost for manpower *(Annex B, Petition for Review).*

On April 18, 1995 then Secretary Gregorio Vigilar communicated the intention of DPWH to terminate the contract immediately but not later than April 28, 1998, under Clause 96(2) C- Occurrence of Special Risks enumerated in Clause 82(2) of the 1988 Standard Specification, Volume 1, which form part of their contracts subject to several conditions. These include the condition that the gover.ment (DPWH) will review all claims and disputes submitted and registered with the said office as of April 18, 1995 and that the claims and disputes not satisfactorily resolved within one (1) month from the date of the Notice of Termination may be elevated to and settled under the rules of the Construction Industry Arbitration Commission (CIAC) as created by Executive Order No. 1008.

With the claims remain unresolved, petitioner filed a case before the office of CIAC, which docketed the case as CIAC Case No. 26-98. Eventually, a decision was rendered in favor of petitioner.

Unsatisfied with the decision, DPWH appealed the case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties entered into a Compromise Agreement wherein the parties agreed that petitioner waived 30 % of the CIAC award or the amount of P28,590.565.13, thus it will receive 70% of the said amount or P66,711,318.65 *(Annex E, Petition for Review).* The Court of Appeals approved the Compromise Agreement on December 28, 1999 and on the basis of said

Compromise Agreement, the Court of Appeals dismissed the Petition for Review having become moot and academic *(Annex F, Petition for Review).*

In a letter dated January 7, 2000, petitioner informed the Chief Accountant of DPWH that the award to the corporation by the Arbitration Board is not covered by nor subject to the Value-Added Tax Law since the award was purely cumulative losses. Besides, the award given was only minimal *(Annex G, Petition for Review).*

On January 12, 2000, petitioner requested for a ruling from the Bureau of Internal Revenue as to whether or not the subject award/claim of the corporation is subject to the coverage of the Expanded Value-Added Tax and/or the withholding tax law since the award was limited to the recovery of losses and not receipt of income contemplated by the National Internal Revenue Code on withholding tax *(Annex H, Petition for Review).*

Meanwhile, DPWH paid petitioner the subject award and deducted the sum of P5,154,965.53 thereof as a value- added tax, broken down as follows: P826,098.79 and P4,328,866.74 remitted to the Bureau of Internal Revenue on February 23, 2000 and August 4, 2000 *(Annexes I-c and I-1),* respectively.

Unable to obtain any response to the aforementioned request from the BIR, petitioner, on December 5, 2000, reiterated its request for a ruling in a letter addressed to the then Commissioner of Internal Revenue, Dakila Fonacier *(Annex J, Petition for Review).*

Bearing in mind that the two (2)-year period allowed by law for administrative and judicial claim for refund was about to prescribe, petitioner filed a Petition for Review on June 21, 2002 before this court.

Summons was issued to the respondent on June 26, 2002. Instead of filing his Answer, respondent filed this Motion to Dismiss on July 2, 2002, alleging that the court has no jurisdiction to act on the petition.

Respondent claimed that the Petition for Review filed by petitioner failed to show on its face that it complied with the mandatory requirement in a claim for refund as provided in Section 229 of the National Internal Revenue Code of 1997. For easy reference, Section 229 is hereunder quoted:

> **Section 229**. *Recovery of Tax Erroneously or Illegally Collected-*
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> No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress.
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> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefore, refund or credit any tax, where on the face of the return upon which payment appears clearly to have been erroneously paid (underscoring supplied).

Petitioner, according to respondent, failed to file a written claim with the Commissioner of Internal Revenue. As a result, its claim for refund must fail.

On July 8, 2002, petitioner wrote Commissioner Rene Banez of the Bureau of Internal Revenue requesting for the immediate refund and/or reimbursement by the BIR of the sum of P5,154,966.50 plus interest, representing value-added tax erroneously/illegally collected by the BIR on the award given in its favor in CIAC Case No.26-98 *(CTA Records, p.159)*.

On July 23, 2002, petitioner filed an Amended Petition for Review and alleged therein that in its letter dated July 8, 2002 and received on July 11, 2002 by the respondent, it demanded for the refund/reimbursement in the amount of P5,154,966.50 *(pp.86-92, CTA Records)*.

The sole issue that needs ventilation in this case is whether or not the Motion to Dismiss filed by the respondent on the ground of lack of jurisdiction may properly prosper. Central to the resolution of this issue is a determination of whether or not petitioner filed a written claim for refund as required under Section 229 of the Tax Code.

As previously quoted, Section 229 of the Tax Code is clear and explicit that it is a condition *sine qua non* in a claim for recovery of tax erroneously or illegally paid that a written claim for refund be duly filed with the Commissioner, unless on the face of the return upon which payment was made, the payment is apparently erroneous. In relation thereto Section 7 (1) of Republic Act No. 1125 (the Act creating the Court of Tax Appeals) provides, to wit:

> **Sec. 7.** *Jurisdiction.* - The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided-
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> **(1)** Decisions of the Commissioner of Internal Revenue in cases involving disputed assessment, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Interr al Revenue.

This court has repeatedly ruled that before the CTA can acquire jurisdiction, a written claim for refund must be filed before the BIR, otherwise, the case shall be dismissed for non-exhaustion of administrative remedies. In the case of *Geodetic and Construction Survey, Ltd. (Philippine Branch) vs. Commissioner of Internal Revenue, CTA Case No. 4526, promulgated on June 2, 1993,* this court held thus:

> xxx The taxpayer is given two years prescriptive period before appealing to the Court of Tax Appeals to precisely give the respondent opportunity to decide on the claim in order for him to correct the action of subordinate officers; and to notify the government that such taxes have been questioned, and the notice should then be borne in estimating the revenue available for expenditure. *(Bermejo vs. Collector L-3028, July 29, 1950).* This is the very essence, the very substance of the doctrine of exhaustion of administrative remedies. The doctrine rest upon the presumption that the administrative body, board or officer, if given the chance to correct its mistake or error, may amend its decision on the given matter and decide it properly. (*Sec. 42 Am. Jur.579).* It is elementary therefore that before resort to the courts can be obtained, all the administrative remedies available should first be exhausted. *(Sampaguita Shoe Factory vs. Court of Tax Appeals, G. R. No. L-10285, Jan. 1958).* And non-compliance thereof is proper ground for dismissal of court action *(Cruz v. Del Rosario, L-17444, December 26, 1963, 9 SCRA 755)* for lack of cause of action (ibid) and is a flaw which is fatal to the court review *(Walstrom v. Mapa, Jr. 181 SCRA 431).*
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> Jurisdictionally, this Court can entertain only decisions of the Commissioner of Internal Revenue in cases involving among others, refunds of internal revenue taxes, fees or other charges. In this particular case, there was no such decision of the Commissioner of Internal Revenue because he was not even given the opportunity to do so. Herein petitioner cannot seek refuge under the cloak of having filed the action (although pro-forma) within the two-year prescriptive period since to date, respondent has not yet acted upon the said claim for refund or tax credit to the prejudice of the petitioner (emphasis supplied).

After a deliberative review of the facts in this case, arguments of the parties evidence submitted and apropos laws and jurisprudence, we rule in favor of the respondent.

A careful scrutiny of the documents submitted by petitioner reveals that both letters it sent to the Bureau of Internal Revenue dated January 7, 2000 and December 5, 2000, merely requested for a ruling as to whether or not the award given by the CIAC and modified in the Compromise Agreement entered into by petitioner and DPWH is subject to value-added tax. The pertinent portions of the letters mentioned are hereunder reproduced, thus:

> "All the foregoing premises, facts, and/or circumstances considered and for the enlightenment of the parties concerned, we have the honor to hereby respectfully request for a ruling or opinion of the Bureau of Internal Revenue, thru the Law Division, on whether or not the subject award/claim of this corporation is subject to the coverage of the Expanded Value Added Tax Law and/or the withholding tax law (since the award was limited to the recovery of losses and not receipt of the income contemplated by Internal Revenue Code on withholding tax) *(January 12, 2000; pp.62-63, CTA Records).*"
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> "We trust that this request for VAT exemption ruling will merit your understanding consideration and favorable approval and so that the corporation can fully benefit from its discounted net losses recovery as aforestated. *(December 5, 2000; pp 72-73, CTA Records).*"

In the case of *Cagayan Electric Power and Light Company, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 3761, promulgated October 30, 1985,* the meaning of a claim for refund is elaborated in this manner, thus:

> "Settled is the rule that a claim for refund as contemplated in the above-quoted provision of law, has been defined as a <u>document filed within the statutory period in which the taxpayer has indicated with reasonable</u>

> clarity that it is demanding of overpaid taxes and the grounds upon which he is making his demand."

We cannot consider the letters requesting for a ruling as a written claims for refund, which is contemplated in Section 229 of the Tax Code and the above court ruling. It is not stated clearly in these documents that petitioner is demanding for the refund of the value-added tax it alleged to have been erroneously paid.

Indeed, petitioner wrote another letter to the Commissioner of Internal Revenue dated July 8, 2002 *(CTA Records, p 159).* In this letter petitioner categorically stated its intention to claim for refund in the amount of P5,154,966.50. Subsequently, petitioner filed an Amended Petition adding an allegation that it had already sent a letter to the Commissioner as opposed to the respondent's claim in its Motion to Dismiss. Such allegation is bereft of honesty and candor because the written claim was filed with the Commissioner only after respondent's Motion to Dismiss was filed.

While this court is aware that a party is allowed by law to amend its pleading once as matter of right before a responsive pleading is filed, we cannot consider the amendment made by the petitioner within the contemplation of the law. Rule 10 Section 1 of the Rules of Court sets forth the limitations in amending a pleading, thus:

Rule 10

> **Section 1.** *Amendments in general.*- Pleadings may be amended by adding or striking out an allegation or the name of any party, or by correcting a mistake in the name of the any party, or by correcting a mistake or inadequate allegation or description in any other respect, so that the actual merits of the controversy may speedily be determined, without regard to technicalities, and in the most expeditious and inexpensive manner. (Emphasis ours).

The above provision is explained and elaborated, thus;

> "Generally, an "amendment" is the correction of some error or mistake in the pleading which is before the court. A pleading is amended when the correction of its faults has been made or when its defects have been cured, whether that change has been brought about by the action of the court or through the initiative of the parties in striking out or lopping off improper, irrelevant and unnecessary matter contained therein, or whether a new frame of words has been filed embodying the material allegations of the original, with the improper, irrelevant and unnecessary matters left out *(Martin, Rules of Court in the Philippines with Notes and Comments, p. 365).*

To emphasize, petitioner's filing of a claim for refund with the Commissioner after the Motion to Dismiss and the subsequent filing of an Amended Petition is apparently not within the meaning of the law and the above stated principle. Moreover, although amendments to pleadings are generally favored and liberally in the furtherance of justice, they cannot be allowed so as to confer jurisdiction upon the court. *(Martin, Rules of Court in the Philippines with Notes and Comments, p. 369).* Therefore, the CTA having acquired no jurisdiction over the case, the amendment of the petition after the petitioner filed an administrative claim with the BIR, does not confer CTA any jurisdiction over the same. Jurisdiction over the subject matter or nature of the action is conferred by the Constitution, substantive law or other statutes *(Office of the Court Administrator vs. Matas 247 SCRA 9; Zamora vs. CA, 183 SCRA 279)* and not by a mere amendment to the pleadings.

Accordingly, and based strongly on the aforesaid laws and jurisprudence, we hold that this court lacks jurisdiction to act on the Petition for Review. Petitioner failed to comply with the mandatory requirement of the law, that is filing a written claim for refund with the Commissioner of Internal Revenue before filing the Petition for Review with this court.

WHEREFORE, finding merit on the Motion to Dismiss, the same is hereby **GRANTED.** Accordingly, the instant Petition for Review is hereby **DISMISSED** for lack of jurisdiction.

SO ORDERED.

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

ERNESTO D. ACOSTA
Presiding Judge