REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MARUBENI PHILIPPINES CORPORATION, Petitioner,	**C.T.A. CASE NO. 7223**
	Members:
- versus -	**ACOSTA,** *Chairperson* **BAUTISTA,** and **CASANOVA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** MAR 14 2011 / 9:44am

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AMENDED DECISION

CASANOVA, *J.*:

For resolution is petitioner's **"Motion for Reconsideration (Re: Decision dated 15 December 2009)"** filed on January 19, 2010, and the **"Supplemental Motion for Reconsideration (With Motion for Leave of Court to Submit Supplemental Evidence)"** filed on February 22, 2010, with respondent's "**Opposition/Comment (To Motion for Reconsideration and Supplemental Motion for Reconsideration)"** filed on March 22, 2010.

The dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, the instant **PETITION FOR REVIEW** is **PARTIALLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** or in the alternative, **ISSUE a TAX CREDIT CERTIFICATE** in the amount

> of **ONE HUDRED THIRTY FOUR THOUSAND SIX HUNDRED SIXTY TWO AND 95/100 PESOS (P134,662.95)** in favor of petitioner, representing unutilized excess input taxes attributable to zero-rated sales for the four taxable quarters of 2003.
>
> **SO ORDERED.**"

In its Motion for Reconsideration, petitioner prays for this Court to reconsider its Decision dated December 15, 2009 and issue an Amended Decision granting in full its claim for refund or issuance of a tax credit certificate in the amount of P11,139,650.20. In support thereof, petitioner raises the following arguments: (1) that the presentation of the sales invoices, export declarations, bank credit advices, bank statements and mutual account ledgers is sufficient to prove that petitioner's export sales are qualified for VAT zero-rating; (2) that it has shown sufficient evidence to establish the existence of its foreign currency payables to Marubeni-Tokyo; and (3) that it has established that the recipients of the services rendered were entities doing business outside the Philippines.

In its Supplemental Motion for Reconsideration (With Motion for Leave of Court to Submit Supplemental Evidence), petitioner prays for the following:

> 1. Grant petitioner leave to submit or offer supplemental evidence and allow the admission of the attached documents;
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> 2. On the basis of the supplemental evidence submitted, consider the same as sufficient and competent to prove that petitioner's claim for refund in the amount of P11,139,650.19, representing petitioner's unutilized excess input VAT for the taxable year 2003; and
>
> 3. On the basis of jurisprudence, reverse and set aside the Decision and issue an amended decision in favor of petitioner, granting the refund of

P11,139,650.19, representing petitioner's unutilized excess input VAT.

Respondent, in her Opposition/Comment (To Motion for Reconsideration and Supplemental Motion for Reconsideration), manifests her vehement objection to the above motions, contending that no new matters or issues were raised and that the presentation of any evidence at this point may no longer be allowed; otherwise, there will be no end in litigation.

The Court finds no merit in petitioner's Motion for Reconsideration.

In the case of *Commissioner of Internal Revenue vs. AICHI FORGING COMPANY OF ASIA, INC., G.R. No. 184823, October 6, 2010*, the Supreme Court ruled:

> "**The filing of the judicial claim was premature**
>
> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
>
> > SEC. 112. Refunds or Tax Credits of Input Tax.-
> >
> > x x x
> >
> > (D) 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 Subsections (A) and (B) 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 supplied)

Section 112(D) of the NIRC clearly provides that the CIR has '120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit]', within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.

In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.

Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within **two 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.' The phrase 'within two (2) years x x x apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is

> apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has '120 days from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)' within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.
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> x x x x x x x x x
>
> In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA."

In the present case, petitioner filed its judicial claim for refund or issuance of tax credit certificate with this Court on April 21, 2005, notwithstanding that its administrative claim was filed only on April 20, 2005.

Under Section 112(C) of the National Internal Revenue Code (NIRC) of 1997, as amended, the Commissioner of Internal Revenue (CIR) has one hundred twenty (120) days from the date of submission of complete documents in support of the application filed to grant or deny the claim.

Therefore, the filing of the instant Petition for Review was premature since the 120-day period for the CIR to decide the claim for refund has not yet lapsed. Petitioner failed to exhaust the administrative remedies available to it which is a condition precedent before taking judicial action.

WHEREFORE, premises considered, petitioner's **Motion for Reconsideration of the Court's Decision dated 15 December 2009** and **Supplemental Motion for Reconsideration (With Motion for Leave of Court to Submit Supplemental Evidence)** are hereby **DENIED** for lack of merit. Consequently, the Court's Decision dated December 15, 2009, granting the tax refund or the issuance of a tax credit certificate in the amount of P134,662.95, is **REVERSED** and **SET ASIDE**, and the Petition for Review filed on April 21, 2005 is **DISMISSED** for having been prematurely filed.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairman, First Division

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

MARUBENI PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7223

Members:

Acosta, *Chairperson*
Bautista, *and*
Casanova, *JJ.*

Promulgated:

MAR 14 2011 ; 9:49am

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DISSENTING OPINION

BAUTISTA, J.:

The Court denied petitioner's Motion for Reconsideration dated January 19, 2010 and Supplemental Motion for Reconsideration (With Motion for Leave of Court to Submit Supplemental Evidence) dated February 22, 2010, on the basis that the filing of the judicial claim was prematurely made, since the one hundred (120)-day period allotted to the Commissioner of Internal Revenue ("CIR") to decide on the administrative claim has yet to expire.

Based on the records, petitioner filed its administrative claim on April 20, 2005, while the Petition for Review constituting its judicial claim was filed on April 21, 2005. The Court cited Section 112(C) of the National Internal Revenue Code ("NIRC") which allows the CIR one hundred twenty (120) days from the date of submission of complete documents to grant or deny the claim. Following this, the Court concluded that the judicial claim can only be filed upon the end of said period, in line with the principle of exhaustion of administrative remedies.

With all due respect to my esteemed colleagues, I must dissent on the Amended Decision of the Court.

It is my opinion that the declaration of the two (2)-year prescriptive period under Section 112 of the 1997 NIRC must be in accordance with Section 229 of the same Code. The judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC is merely directory and permissive, and not mandatory nor jurisdictional, for so long as it is made within the settled two (2)-year prescriptive period.[1]

A taxpayer-claimant *may* file an appeal within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the CIR shall decide on the claim, or after the receipt of the decision denying the same, so long as it is within the two (2)-year prescriptive period.

Section 112 (C) of the 1997 NIRC states that:

> **SEC. 112.** *Refunds or Tax Credits of Input Tax.* –
>
> xxx xxx xxx
>
> (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.

[1] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.

> 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.

The cited provision will show that it contains the word "may," thus indicating that it is merely permissive and operates to confer discretion.[2] It gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[3] to wit:

> **It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the NIRC**. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.
>
> Corollary thereto, the Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:
>
> > "It appears therefore, **that it is not necessary for the Commissioner of Internal Revenue to first act unfavorably**

[2] Bersabal *v.* Salvador, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, citing Dizon v. Encarnacion, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.
[3] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

> **on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case.** This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
>
> Incidentally, **the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal.** The law fixed the same period — two years — for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court. Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. In fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)." (*Boldfacing supplied*)

Thus, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even his inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal with this Court,[4] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period,[5] and beyond that period, the taxpayer can no longer appeal to this Court.[6]

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[4] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[5] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[6] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

Accordingly, I vote for the GRANT of the Motion for Reconsideration and Supplemental Motion for Reconsideration (With Motion for Leave of Court to Submit Supplemental Evidence) filed by Marubeni Philippines Inc., subject to the verification of its input VAT for the taxable year 2003.

LOVELL R. BAUTISTA
Associate Justice