REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

MINDANAO II GEOTHERMAL PARTNERSHIP, Petitioner,	C.T.A. CASE NO. 8248
	Members:
- versus -	ACOSTA, *Chairperson* UY, *and* FABON-VICTORINO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: AUG 25 2011 ; 2:35 pm

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RESOLUTION

Fabon-Victorino, J.:

Shortly after filing her Answer on May 26, 2011, respondent filed a Motion to Dismiss on June 22, 2011, on the ground that the instant Petition for Review was filed out of time depriving the Court of jurisdiction to entertain the appeal, as mandated in Section 7 of Republic Act (R.A.) No. 9282, and Section 112 of the National Internal Revenue Code (NIRC) of 1997.

Respondent posits that petitioner filed its administrative claim for refund with Revenue District Office No. 108, Kidapawan City on April 12, 2010. Under Section 112 of the National

Internal Revenue Code (NIRC), as amended, respondent had 120 days or until August 10, 2010 to act on the claim. Thereafter, without any action from respondent, petitioner had 30 days or until September 09, 2010 to elevate the case to the Court via a petition for review.

However, petitioner filed the instant Petition for Review only on March 31, 2011, or more than 6 months after the lapse of the 30-day prescriptive period mandated in Section 112 of the NIRC justifying the dismissal of the case for want of jurisdiction. According to respondent lack of jurisdiction as a defense may be raised at any time during the proceedings, precisely the filing of the present motion to dismiss.

In rejecting the motion, petitioner explains that it was effectively dissolved as a corporate entity on March 29, 2010, when the Securities and Exchange Commission (SEC) approved the withdrawal of Marubeni Pacific Energy Holdings Corporation as one of its partners. According to petitioner it had two years counting from March 29, 2010, within which to file a judicial claim for refund pursuant to Section 112 of the NIRC which provides that a person whose registration has been cancelled due to retirement from or cessation of business or due to changes in or cessation of status may within two years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax. This mandate is reiterated in Revenue Regulation (RR) No. 16-05 dated September 01, 2005. Petitioner opines that under the foregoing provisions, the instant Petition for Review was seasonably filed on March 31, 2011.

Petitioner also argues that the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[1] is not applicable to the present case. Allegedly, the principle laid down therein was not yet in existence at the time petitioner was deemed dissolved as a corporate entity on March 29, 2010 and at the time its administrative claim for refund was filed on April 12 2010, as it was promulgated in October 2010.

Petitioner as well invokes substantial justice and relegating to the side technicalities mainly because it is entitled to a refund having been deemed dissolved without the possibility of incurring future tax liability against which its unused input tax can be utilized. This is in keeping with the principle that the government must not keep money that does not belong to it, thereby enriching itself at the expense of its law abiding citizens.

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[1] G.R. No. 184823, October 06, 2010.

Unarguably, respondent filed the instant Motion to Dismiss on June 22, 2011 or shortly after the filing of her Answer on May 26, 2011.

Section 1, Rule 16 of the Revised Rules of Civil Procedure provides that a motion to dismiss shall be filed within the time for but before filing the answer to the complaint or pleading asserting a claim.[2] This rule is however not absolute. Even after the answer has been filed, a defendant or respondent can still file a motion to dismiss on the following grounds: (1) lack of jurisdiction, (2) *litis pendentia* (3) lack of cause of action, and (4) discovery during trial of evidence that constitutes a ground for dismissal.[3]

Obviously, the primary issue presented to the Court falls under the foregoing enumerated exceptions to the general rule, i.e., the jurisdiction or competence of the Court to hear and determine the case. Thus, the filing of the Motion to Dismiss after the Answer has been filed is still in accord with the Rules.

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[2] Co vs. Court of Appeals, G.R. No. 147999. February 27, 2004.
[3] Panganiban vs. Pilipinas Shell, G.R. No. 131471. January 22, 2003.

On the timeliness of the filing of the present Petition, the relevant provision is Section 112 of the NIRC, as amended, which reads as follows:

> "Section 112. Refunds or Tax Credits of Input Tax.
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> (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 x x x
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> (B) Cancellation of VAT Registration. – A person whose registration has been cancelled due to retirement from or cessation of business, or due to changes in or cessation of status under Section 106(C) of this Code may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax which may be used in payment of his other internal revenue taxes.
>
> (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.
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> 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. x x x"

The 30-day period to appeal to the Court mandated in Section 112 of the NIRC is reiterated in Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals, thus:

> "SEC. 3. *Who may appeal; period to file petition.* - **A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue** on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction **may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act** on the disputed assessments. x x x" *(emphasis ours)*

The foregoing provisions are clear. Respondent has 120 days from the time the application for refund is filed, within which to approve or deny it. In case of her inaction, as in the present case, the aggrieved taxpayer has 30 days from the expiration of the allowable 120-day period, within which to assail such inaction before the Court.

Thus, petitioner should have filed the instant Petition for Review on September 9, 2010 or after the 120 days of inaction on the part of respondent and not on March 31, 2011 or more than six (6) months beyond the 30-day prescriptive period to seek judicial intervention. At the time of filing of the Petition, the Court had been divested of its authority to entertain the appeal.

The Supreme Court has invariably ruled that perfection of an appeal within the statutory or reglementary period is not only mandatory but also jurisdictional.[4] The failure to perfect an appeal is not a mere technicality as it raises a jurisdictional problem which deprives the appellate court of jurisdiction over the appeal.[5]

Moreover, jurisdiction over the subject matter is the primary concern of a court, for thereon would depend the validity of its entire proceedings.[6] The jurisdiction of the tribunal over the subject matter or nature of an action is conferred only by law.

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[4] Sehwani, Incorporated vs. In-N-Out Burger, Inc., G.R. No. 171053, October 2007.
[5] Bello vs. NLRC, G.R. No. 146212, September 5, 2007.
[6] Commissioner of Internal Revenue vs. Villa, L-23988, January 02, 1928.

It cannot be waived or subject of stipulation or agreement by the parties. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties. If the court has no jurisdiction over the nature of an action, it may dismiss the same *ex mero motu* or *motu proprio.*[7]

Additionally, the present Petition for Review involves a claim for refund which is in the nature of a claim for exemption which should be construed in *strictissimi juris* against the taxpayer.[8]

To be sure, petitioner's computation of the two-year period within which to file judicial claim for refund commencing from the time its corporate entity was allegedly dissolved on March 29, 2010, is flawed. The two-year prescriptive period in Section 112 of the NIRC, as amended, which states that "those whose registration has been cancelled due to retirement from or cessation of business, or due to changes in or cessation of status may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax" refers to the period for filing administrative and not judicial claim for refund.

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[7] Danao, et al. vs. Tappa, et al., G.R. NO. 181303, September 17, 2009.
[8] Philippine Bank Of Communications vs. CIR, G.R. No. 112024. January 28, 1999.

The issue is no longer novel though admittedly not ancient. It has been put to rest with the finality in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[9] (Aichi), the relevant portion of which reads as follows:

> "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."

[9] G.R. No. 184823, October 6, 2010.

Thus, the two-year period applies only to the filing of the administrative claim for refund with respondent and does not pertain to the judicial claim to this Court, which must be instituted within 30 days either from the issuance of respondent of an adverse decision, or from the expiration of the 120 day period without action.

Also lacking in merit is petitioner's submission that the Aichi case is inapplicable since at the time its corporate existence was deemed dissolved on March 29, 2010 and at the time its administrative claim was filed on April 12, 2010, the Aichi case was yet for promulgation.

The chronology of the cases shall quell the contention. Note that Section 112 of the NIRC, as amended, requiring the 120/30-day period before judicial relief is sought in claims for refund was applied by the Supreme Court in the Aichi case whose administrative and judicial claims for refund were simultaneously filed on September 20, 2004, or six years prior to the relevant dates cited in this case. This Court can do no less.

WHEREFORE, the Motion to Dismiss dated June 21, 2011, filed by respondent Commissioner of Internal Revenue, is hereby GRANTED. Consequently, the instant Petition for Review filed by petitioner Mindanao II Geothermal Partnership on March 31, 2011, is hereby **DISMISSED.**

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(on leave)
ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice