REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CE LUZON GEOTHERMAL POWER COMPANY, INC.,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 893
(CTA Case No. 7890)

Present:

Del Rosario, *PJ,*
Castañeda,Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, *JJ.*

Promulgated:

JUN 19 2013 8:15 a.m.

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DECISION

COTANGCO-MANALASTAS, J.:

This is a petition for review from the Decision dated December 29, 2011 and Resolution dated March 30, 2012 of the CTA Second Division, which dismissed petitioner's claim for refund/issuance of tax credit certificate of alleged unutilized input value-added tax (VAT) for taxable year 2007.

Facts[1]

Petitioner CE Luzon Geothermal Power Company, Inc. is a corporation duly organized and existing under Philippine law, with its principal place of business at Ormoc City, Leyte. It is registered with the Bureau of Internal Revenue (BIR), as a VAT taxpayer, with Taxpayer's Identification No. (TIN) 003-924-356-000.

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[1] *Rollo*, C.T.A. EB Case No. 893, pp. 73-75.

Petitioner is engaged in the business of power generation through geothermal energy and the subsequent sale thereof to PNOC-EDC pursuant to an Energy Conversion Agreement (ECA). It is accredited and certified as such by the Department of Energy (DOE) as evidenced by its DOE Certificate of Accreditation (OSAC 94-12) issued on June 15, 1994.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue, empowered to perform the duties of said office including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner filed with the BIR its original quarterly VAT returns for the first to fourth quarters of 2007 on April 23, 2007; July 25, 2007; October 25, 2007; and January 24, 2008, respectively.

On February 12, 2009, petitioner filed an administrative claim for the refund or issuance of a tax credit certificate(TCC) for its unutilized input VAT with the Large Taxpayers Audit and Investigation Division I of the Bureau of Internal Revenue, in the total amount of P10,895,847.59 for the four quarters of the year 2007.

Petitioner filed its judicial claim for the refund/issuance of a tax credit certificate on March 30, 2009, docketed as CTA Case No. 7890.

After trial, the CTA Second Division promulgated its Decision[2] on December 29, 2011, disposing of the case, as follows:

> "WHEREFORE, premises considered, the instant Petition for Review is hereby DISMISSED for lack of jurisdiction."[3]

Petitioner's motion for reconsideration was likewise denied in the Resolution[4] dated March 30, 2012.

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[2] *Rollo*, pp. 72-94.
[3] *Rollo*, p. 94.
[4] *Rollo*, pp. 95-100.

Issues

As grounds for the petition, the following are raised:

"13.1 The Petition for Review was filed within the period prescribed by law. Petitioner has basis to rely on the law as it has been legally and jurisprudentially understood at the time of the filing of its claim for refund.

13.2 The case of Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc. effectively grants respondent unbridled discretion to deprive a taxpayer of the right to seek judicial redress.

13.3 The Aichi case could not have validly overturned the well-settled rule on periods for filing VAT claims set forth in the case of Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue without violating the constitutional mandate that no doctrine or principle laid down by the Supreme Court may be reversed or modified except by the Supreme Court sitting *En Banc.*

13.4 The mandatory observance of the 120-day rule, if at all, should only be applied prospectively.

13.5 The CTA-Division ignored the clear legislative history as well as the judicial pronouncements that the two-year prescriptive period applies to both administrative and judicial claims for refund.

13.6 The impact of the Aichi Decision on the entire power generation industry and other investors is indubitable and thus, needs to be revisited.

13.7 Petitioner has presented sufficient and uncontroverted evidence to prove its entitlement

> to its claim for refund of input for the four quarters of CY 2007."[5] (*citations omitted*)

Ruling of the Court

The CTA Second Division dismissed petitioner's claim for refund/issuance of TCC on the ground of lack of jurisdiction. This lack of jurisdiction arose from petitioner's premature filing of its petition for review.

Under Section 112(C) of the 1997 Tax Code, as amended, the Commissioner is given 120 days from receipt of the complete documents, within which to act on the application for refund. Only after the lapse of the said 120 days or from the receipt of the adverse decision, may an aggrieved taxpayer, within 30 days therefrom, seek judicial intervention on its claim for refund via a petition for review.

As ruled in the *Aichi*[6] case, and clarified in the *San Roque*[7] case, compliance with the 120-day period is mandatory and jurisdictional, *to wit*:

> "Failure to comply with the 120-day period violates a mandatory provision of law. It violates the doctrine of exhaustion of administrative remedies and renders the petition premature and thus without a cause of action, with the effect that the CTA does not acquire jurisdiction over the taxpayer's petition.
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> x x x x x
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> Section 112(C) expressly grants the Commissioner 120 days within which to decide the taxpayer's claim. The law is clear, plain, and unequivocal: 'x x x 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

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[5] *Rollo*, pp. 17-18.

[6] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010.

[7] *Commissioner of Internal Revenue vs. San Roque Power Coporation*; *Taganito Mining Corporation vs. Commissioner of Internal Revenue*; *Philex Mining Corporation vs. Commissioner of Internal Revenue*, G.R. Nos. 187485, 196113 & 197156, February 12, 2013.

> complete documents.' Following the *verba legis* doctrine, this law must be applied exactly as worded since it is clear, plain, and unequivocal. The taxpayer cannot simply file a petition with the CTA without waiting for the Commissioner's decision within the 120-day mandatory and jurisdictional period. The CTA will have no jurisdiction because there will be no 'decision' or 'deemed a denial' decision of the Commissioner for the CTA to review."[8]

In the instant case, it is undisputed that petitioner filed its administrative claim on February 12, 2009. Counting from February 12, 2009, respondent had until June 12, 2009 to act upon the said administrative claim. When petitioner filed its judicial claim on March 30, 2009, the same was clearly filed prematurely.

Thus, based on the foregoing, the CTA Second Division dismissed the petition for lack of jurisdiction.

However, in the same *San Roque* case, the Supreme Court *En Banc,* apart from declaring the mandatory and jurisdictional nature of the 120+30 day periods, also recognized the existence of BIR Ruling No. DA-489-03[9] as a valid exception to the strict compliance with the 120+30 day periods.

BIR Ruling No. DA-489-03 expressly states that the "taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review." It was further explained that "all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on 10 December 2003 up to its reversal by this Court in *Aichi* on 6 October 2010."[10]

Under the foregoing, taxpayers who did not wait for the lapse of the 120-day period are still considered to have filed their petitions on time and not penalized for having filed their judicial claims prematurely. L

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[8] *Ibid.*
[9] Dated December 10, 2003.
[10] *Supra* Note 7, pp. 39-40.

In the instant case, petitioner clearly filed its petition for review before the expiration of the 120-day period. But considering that the judicial claim was filed on March 30, 2009, it is clearly within the period of exception established by the *San Roque* case, which is from December 10, 2003 to October 6, 2010. Thus even though petitioner's judicial claim is premature, the same is not treated as dismissible by virtue of the exception provided by the *San Roque* case.

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. The Resolution dated March 30, 2012, and the Decision dated December 29, 2011 promulgated by the Second Division of this Court, which dismissed the Petition for Review docketed as C.T.A. Case No. 7890, are **REVERSED** and **SET ASIDE**.

Accordingly, C.T.A. Case No. 7890 is hereby **REMANDED** to the court of origin for further proceedings.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(with Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(no part)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

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FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS, *JJ*.

Promulgated:
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DISSENTING OPINION

CASANOVA, *J*.:

With due respect to my esteemed colleagues, I dissent with the majority opinion granting petitioner's Petition for Review filed on May 3, 2012.

I am aware of the recent pronouncement of the Supreme Court in the consolidated cases of *Commissioner of Internal Revenue vs. San Roque Power Corporation; Taganito Mining Corporation vs. Commissioner of Internal Revenue; Philex Mining Corporation vs. Commissioner of Internal Revenue*[1] which clarifies the issue on the application of the 120-30 day prescriptive period for refund under Section 112 of the 1997 NIRC. In the said consolidated cases, particularly in the San Roque case, the Supreme Court ruled that from the issuance of BIR Ruling No. DA-489-03 on December 10, 2003 up to its reversal by the

[1] G.R. Nos. 187485, 196113 & 197156, February 12, 2013.

Supreme Court in the Aichi case on October 6, 2010, the taxpayer-claimant need not wait for the lapse of the 120-day period before it could file its judicial claim before the CTA.

In the present case, petitioner filed its judicial claim on March 30, 2009, forty-six (46) days after it filed its administrative claim on February 12, 2009, thus violating the 120-30 rule. However, as it filed its judicial claim within the period after the issuance of BIR Ruling No. DA-489-03 and before the promulgation of the Aichi case, petitioner is said to have filed its judicial claim on time, hence the decision of the majority to grant petitioner's Petition for Review.

Notwithstanding the foregoing, it is possible that a Motion for Reconsideration of the said decision may have been filed, thus, until the said Supreme Court case has attained finality and the corresponding entry of judgment has been made[2], prudence dictates that this Court's position on the matter be maintained and application of the new doctrine be, in the meantime, deferred.

In view of the foregoing, the undersigned votes that the instant Petition for Review should be denied considering that the premature filing of judicial claim warrants a dismissal inasmuch as no jurisdiction was acquired by this Court.

CAESAR A. CASANOVA
Associate Justice

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2 RULE 36
JUDGMENTS, FINAL ORDERS AND ENTRY THEREOF
Sec. 2. *Entry of judgments and final orders.*
If no appeal or motion for new trial or reconsideration is filed within the time provided in these Rules, the judgment or final order shall forthwith be entered by the clerk in the book of entries of judgments. The date of finality of the judgment or final order shall be deemed to be the date of its entry. The record shall contain the dispositive part of the judgment or final order and shall be signed by the clerk, with a certificate that such judgment or final order has become final and executory.