REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

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MONTALBAN METHANE POWER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8133

Members:

BAUTISTA, *Chairperson*
PALANCA-ENRIQUEZ, *and*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

JAN 13 2011
[illegible] 10:30 a.m.

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RESOLUTION

Submitted for resolution are respondent CIR's affirmative defense of lack of cause of action stated in her Answer filed on September 18, 2010 and petitioner's **"Opposition (Re: Special Affirmative Defense in Respondent's *Answer* dated 9 September 2010)"** filed on November 8, 2010.

Records show that on July 22, 2008, petitioner filed its original *Quarterly Value-Added Tax Return* (BIR Form No. 2550Q)[1] for the 2nd quarter of 2008. Thereafter, it filed an amended *Quarterly Value-Added Tax Return* (BIR Form No. 2550Q) for the 2nd quarter of 2008 on November 27, 2009.[2]

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[1] Annex "H", Petition for Review, *Rollo*, p. 278.
[2] Annex "H-1", Petition for Review, *rollo*, p. 279.

Petitioner allegedly incurred unutilized input Value-Added Tax (VAT) from purchases of goods and services attributable to its zero-rated sales which was allegedly not applied to any output VAT. Thus, on June 29, 2010, petitioner filed with respondent its claim for refund or issuance of tax credit certificate of its unutilized input VAT attributable to zero-rated sales for the 2nd quarter of 2008 amounting to ₱10,027,677.11.[3]

On July 21, 2010 petitioner filed its Petition for Review with this Court when its application for refund/credit remained unresolved by the Bureau of Internal Revenue (BIR) and before the expiration of the two-year prescriptive period.

In her Answer, by way of special and affirmative defenses, respondent sought the dismissal of petitioner's Petition for Review arguing, among others, that the said petition was prematurely filed since it was filed before the lapse of the 120-day period within which respondent can act on the administrative claim for refund pursuant to Section 112 of the NIRC of 1997, as amended.

In its Opposition, petitioner averred that the two-year prescriptive period is mandatory; and that if the two-year period is about to expire, the taxpayer can file directly the judicial claim with this Court without having to wait for the denial of the administrative claim filed with respondent or the expiration of the reglementary 120-day period.

We rule for respondent CIR.

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[3] Annexes "K" and "L", Petition for Review, *rollo*, pp. 387-392.

Section 112 of the NIRC of 1197, as amended,[4] provides:

"SEC. 112. *Refunds or Tax Credits of Input Tax.* –

"(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: *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally,* That for a person making sales that are zero-rated under Section 108 (B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."

"(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."

"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."

Pursuant to the above provision, a taxpayer may apply a claim for refund of unutilized input VAT payments not otherwise used for any internal revenue tax due with the BIR, within two years reckoned from the close of the taxable quarter when the relevant sales were made. Furthermore, Section 112 (C) provides that the CIR has 120 days from the date of submission of

[4] As amended by Republic Act No. 9337 entitled "An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 of the National Internal Revenue Code of 1997, as amended, and for other Purposes.

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 refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to the CTA within 30 days.

In this case, petitioner had until July 22, 2010 within which to file its administrative claim with respondent. It is undisputed that petitioner timely filed its administrative claim for refund on June 29, 2010. However, the crucial issue to resolve is whether or not petitioner prematurely filed its judicial claim with this Court.

In the recent case of ***Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.***[5] the Supreme Court held:

> "Section 112(D)* of the NIRC clearly provides that the CIR has '120 days, from the date of 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.
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> 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.
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> 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.

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

* Now Section 112(C), as amended by Republic Act No. 9337.

> 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.
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> 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, the 120-day period is crucial in filing an appeal with the CTA.
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> With regard to *Commissioner of Internal Revenue v. Victorias Milling Co., Inc.* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.
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> 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."

Pursuant to the aforecited decision of the Supreme Court, it is clear that the taxpayer must either- (1) wait for the denial of its claim for refund or credit, or (2) wait for the expiration of the 120-day period – before it may file its Petition for Review with this Court within 30 days.

In the case at bench, petitioner filed its administrative claim on June 29, 2010, and twenty-two (22) days thereafter or on July 21, 2010, petitioner filed its Petition for Review. Clearly, petitioner failed to wait for the expiration of the 120-day period before lodging its appeal before this Court. Petitioner did not give respondent an opportunity to decide on its claim before filing a

Petition for Review. Consequently, respondent is right in arguing that the instant petition was prematurely filed.

Withal, we cannot subscribe to petitioner's claim that the administrative and judicial claims should be filed within the two-year prescriptive period. As held in the aforecited case of ***Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.***,[6] the two-year period refers only to applications for refund/credit filed before respondent and not to appeals made to this Court. The Supreme Court said that the application of the two-year period to judicial claims would render nugatory the rules laid down in Section 112(C) which explicitly provides that a taxpayer may file an appeal with the CTA only within 30 days after the expiration of the 120-day period.

For all the foregoing, We have no recourse but to dismiss the instant petition for being prematurely filed, as no jurisdiction was acquired by this Court.

WHEREFORE, premises considered, the *Petition for Review* is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

(With Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[6] *Supra*, note 5.