REPUBLIC OF THE PHILIPPINES
*Court of Tax Appeals*
QUEZON CITY

# ***FORMER SECOND DIVISION***

MINDANAO II GEOTHERMAL PARTNERSHIP,
***Petitioner,***

-versus-

COMMISSIONER OF INTERNAL REVENUE,
***Respondent.***

**C.T.A. CASE NO. 7595**

x -------------------------------------------- x

MINDANAO II GEOTHERMAL PARTNERSHIP,
***Petitioner,***

-versus-

COMMISSIONER OF INTERNAL REVENUE,
***Respondent.***

**C.T.A. CASE NO. 7638**

x -------------------------------------------- x

MINDANAO II GEOTHERMAL PARTNERSHIP,
***Petitioner,***

-versus-

COMMISSIONER OF INTERNAL REVENUE,
***Respondent.***

**C.T.A. CASE NO. 7692**

Members:

CASTAÑEDA, JR., Chairperson,
UY, and
PALANCA-ENRIQUEZ, JJ.

**Promulgated:**
SEP 14 2010
3:05 p.m.

x ---------------------------------------------------------------------------------------- x

# AMENDED DECISION

**PALANCA-ENRIQUEZ, J.:**

This resolves:

1) respondent Commissioner of Internal Revenue's ("CIR") "Motion for Partial Reconsideration (Re: Decision promulgated 23 April 2010)" filed on May 14, 2010; and

2) petitioner Mindanao II Geothermal Partnership's ("Mindanao II") "Comment/Opposition (To Respondent's Motion for Partial Reconsideration") filed on May 31, 2010.

Respondent CIR's "Motion for Partial Reconsideration" (Re: Decision promulgated 23 April 2010)" is anchored on the following grounds:

1) this Court has no jurisdiction over the amount claimed in C.T.A. Case No. 7692, for being filed beyond the prescriptive period provided by law;

(2) the claim for refund in C.T.A. Case No. 7595 suffers from procedural infirmity due to the premature filing of the Petition for Review with this Court, in violation of the doctrine of exhaustion of administrative remedies;

(3) invoice numbers 4278, 564, 566, 567 and 656 with total input VAT of P599.27 should be disallowed for being not attributable to power generation of petitioner;

(4) the amount of P60,490,341.00 zero-rated sale of petitioner should be disallowed since it does not fall within the period of claim, as the invoice date is 29 December 2004; and

(5) petitioner failed to substantiate its claim for refund in the administrative proceedings.

In its "Comment/Opposition (To Respondent's Motion for Partial Reconsideration)", petitioner counters that: (1) the judicial recourse within thirty days after the lapse of the 120-day period is only directory and permissive, and not mandatory, nor jurisdictional, as long as the thirty (30)-day period is within the two (2)-year prescriptive period; (2) contrary to respondent CIR's contention, petitioner has properly and timely filed C.T.A. Case No. 7595, despite the fact that petitioner did not wait for the 120-day period under *Section 112(D) of the NIRC of 1997, as amended*; (3) the EPIRA Law was enacted by Congress to ensure the reliability, security and affordability of supply of electric power to end users. In order to achieve this purpose, it mandated that sales of generation companies be zero-rated, paving the way for such generation company to claim for refund the creditable input taxes it incurred and/or paid in the course of its operation. Hence, it includes expenses incurred in the course of petitioner's business activities; (4) the amount of P60,490,341.81, which pertains to VAT zero-rated sales of petitioner to PNOC-EDC, was paid within the period of claim, as evidenced by Official Receipt Nos. 222 and 223; and (5) respondent's allegation that petitioner failed to submit the required documents in the administrative level is without any proof, as respondent did not even mention what are those required documents.

We find merit in respondent CIR's "Motion For Partial Reconsideration".

**First Ground**
***C.T.A. Case No. 7692***

As regards the first ground, respondent CIR contends that this Court has no jurisdiction to entertain the claim for refund in C.T.A. Case No. 7692, as the Petition for Review was filed only on October 24, 2007, way beyond the prescriptive period provided by law.

After a careful re-study and re-examination of *Sections 112 and 229 of the NIRC of 1997, as amended,*we find that C.T.A. Case No. 7692 was filed way beyond the prescribed period.

As regards claims for refund or issuance of a tax credit certificate of excess input VAT, the applicable provision is *Section 112 of the NIRC of 1997, as amended.* In the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, 565 SCRA 154,* the Supreme Court categorically ruled that taxpayers cannot avail of the provisions of either *Section 204(c) or Section 229 of the NIRC of 1997, as amended*, as regards the refund of any unutilized creditable input VAT. Both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.

While *Section 112(A) of the NIRC of 1997, as amended*, provides that 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, this provision specifically applies only to administrative claims for refund, as clearly indicated by the word "apply". Hence, the taxpayer must apply for refund or issuance of a tax credit certificate with the BIR, within two years after the close of the taxable quarter when the sales were made. On the other hand, *Section 112(D) of the NIRC of 1997, as amended,* is the procedure applicable to claims for refund of input tax filed with this Court, which provides:

> "(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 cases 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 aforequoted *Section 112(D)*, the CIR shall decide whether to grant a refund/issue a tax credit certificate, or to deny the claim, within 120 days from the date of submission of complete documents. If the Commissioner grants or denies the claim, or in case he fails to act within the 120-day period, the taxpayer may within 30 days from receipt of the decision, or after the expiration of the 120-day period, appeal the decision or unacted claim to this Court.

The 30-day period to appeal the decision of the Commissioner or his inaction is provided under *Section 11 of RA 9282,* to wit:

> "SEC. 11. Who May Appeal; Mode of Appeal; Effect of Appeal. – Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein."

Corollary, thereto, *Section 3(a), Rule 8 of the 2005 Revised Rules of the CTA, as amended*, provides:

> "(a) 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 the 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. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for

review within the two-year period prescribed by law from payment or collection of the taxes"

Clearly, pursuant to *Section 11 of RA 9282* and *Section 3(a) of the* the *2005 Revised Rules of the CTA, as amended,* a party adversely affected by a decision or inaction of the CIR on claims for refund of input VAT, may appeal to this Court within 30 days from receipt of the decision of the CIR, or from the lapse of the 120-day period. Said 30-day period is not directory or permissive, but mandatory, as basic is the rule that the period to appeal is jurisdictional.

In C.T.A. Case No. 7692, records show that petitioner applied the administrative claim for refund/issuance of a TCC of unutilized input VAT on January 4, 2007, which is well within the two-year prescriptive period from the close of the taxable quarter when the sales were made, pursuant to *Section 112(A) of the NIRC of 1997, as amended.* Counting 120 days from January 4, 2007, pursuant to *Section 112(D) of the NIRC of 1997, as amended*, the CIR had until May 4, 2007 to decide petitioner's administrative claim. Since the CIR failed to act on petitioner's claim for refund, pursuant to Section *112(D) of the NIRC of 1997, as amended*, the taxpayer has 30 days from May 5, 2007, or until

June 3, 2007 to appeal the inaction of the CIR to this Court. However, records show that petitioner filed the Petition for Review in C.T.A. Case No. 7692 only on October 24, 2007, which is 133 days way beyond the prescribed 30-day period to appeal to this Court.

Clearly, the Petition for Review in C.T.A. Case No. 7692 was filed out of time.

**Second Ground**
***C.T.A. Case No. 7595***

As regards the second ground, respondent CIR contends that C.T.A. Case No. 7595 was filed prematurely with this Court, since the Petition for Review was filed before the 30-day period from the lapse of the 120-day period to decide.

Again, after a careful examination of the applicable laws and jurisprudence, we agree with respondent CIR that C.T.A. Case No. 7595 was prematurely filed on March 30, 2007. As already discussed, petitioner applied the administrative claim for refund/issuance of a TCC of unutilized input VAT on January 4, 2007, which is well within the two-year prescriptive period from the close of the taxable quarter when the sales were made, pursuant to *Section 112(A) of the NIRC of 1997, as* *amended.* Counting 120 days from January 4, 2007, the CIR had until May 4, 2007 to decide petitioner's administrative claim. Since the CIR failed to act on petitioner's claim for refund, pursuant to Section *112(D) of the NIRC of 1997, as amended*, the taxpayer has 30 days from May 5, 2007, or until June 3, 2007 to appeal the inaction of the CIR to this Court.

Records show, however, that petitioner filed the Petition for Review in C.T.A. Case No. 7595 on March 30, 2007, 35 days before the lapse of the 120-day period for the CIR to decide and before the commencement of the 30-day period to appeal to this Court. Clearly, C.T.A. Case No. 7595 was prematurely filed with this Court.

Settled is the rule that exhaustion of available administrative remedies is a condition precedent before taking judicial action.

In the case of *Lopez vs. City of Manila, 303 SCRA 458*, the Supreme Court ruled that where a remedy is available within the administrative machinery, this should be resorted to before resort can be made to courts, not only to give the administrative agency the opportunity to decide the matter by itself correctly, but also to prevent unnecessary and premature resort to courts.

Further, in the case of *Paat vs. Court of Appeals, 266 SCRA 175*, the Supreme Court ruled that before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction then such remedy should be exhausted first before court's judicial power can be sought. Failure to exhaust administrative remedies provided by law, by weight of established jurisprudence, is fatal to one's petition *(Montanez vs. Provincial Agrarian Reform Adjudicator (PARAD), Negros Occidental, 600 SCRA 237)*.

<u>C.T.A. Case No. 7638</u>

In view of the foregoing, petitioner is thereof, entitled only to the claim for refund or issuance of TCC of unutilized input VAT pertaining to the claim for refund filed in C.T.A. Case No. 7638, which was filed within the 30-day period after the lapse of the 120-day period for the CIR to decide. Records show that the Petition for Review in C.T.A. Case No. 7638 was filed on June 1, 2007, which is well within the 30-day period, the last day of which was on June 3, 2007.

Accordingly, petitioner is entitled to claim for refund or issuance of a TCC of unutilized input VAT for the second quarter of 2005 in the amount of P2,548,753.00 *(Annex C.2 of Exhibit "Q");* and for the third quarter of 2005 in the amount of P974,794.09 *(Annex C.3 of Exhibit "Q")* less the exception found by the Court-Commissioned Independent CPA as to OR No. 025379 in the amount of P491.64 *(Annex D.3 of Exhibit "Q").*

In sum, as regards C.T.A. Case No. 7638, petitioner is entitled to a claim for refund or issuance of a TCC in the total amount of P3,523,055.45 only.

**Third and Fourth Grounds**

As regards the third ground that invoice numbers 4278, 564, 566, 567 and 656, with total input VAT of P599.27 should be disallowed not being attributable to power generation of petitioner, and zero-rated sale in the amount of P60,490,341.00 should be disallowed since it does not fall within the period of claim as the invoice date is 29 December 2004, resolution of said issues has been rendered moot and academic due to the fact that the input VATs therein were incurred during the first quarter for 2005, subject matter of the Petition for Review in C.T.A. Case No. 7595, which as heretofore discussed, was prematurely filed.

**Fifth Ground**

As regards the last ground raised by respondent CIR that petitioner failed to submit the required documents in the administrative level, records show that petitioner submitted the following documentary evidence in its Request for Issuance of Tax Credit for Excess VAT Input filed with the BIR on January 4, 2007 *(Exhibit "H")*: BIR Form 2550Q (quarterly) VAT for the year 2005, with complete copies of invoices and official receipts; Letter dated August 30, 2001 by Secretary Vincent Perez, Jr. of the DOE confirming that Mindanao II is a duly accredited generating company; Certificate of Accreditation No. 95-03-07 issued by DOE on the 47-MW Geothermal Power Plant of Mindanao II; and Letter dated September 3, 2001 of Benjamin P. Lim, Manager of Planning & Control Division of PNOC-EDC advising petitioner of the passage and effectivity of RA 9136.

On the other hand, there is no evidence on record in the administrative level that the CIR informed Mindanao II of certain lacking documentary evidence. It is only after Mindanao II filed this judicial claim for refund that the CIR raises the issue of failure to substantiate the claim for refund.

Finding merit in respondent CIR's "Motion for Partial Reconsideration", the same is hereby granted.

**WHEREFORE**, premises considered, respondent CIR's "Motion For Partial Reconsideration" is hereby **GRANTED.** Accordingly, the dispositive portion of our Decision dated April 23, 2010 is hereby amended to read, as follows:

> "**WHEREFORE**, premises considered:
>
> 1) as regards C.T.A. Case No. 7595, the Petition For Review is hereby **DISMISSED** for failure to comply with a condition precedent;
>
> 2) as regards C.T.A. Case No. 7692, the Petition For Review is hereby **DISMISSED** for being filed way beyond the prescribed period; and
>
> 3) as regards C.T.A. Case No. 7638, the Petition For Review is hereby **PARTLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby ORDERED TO REFUND or TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner Mindanao II Geothermal Partnership in the reduced amount of P3,523,055.45, representing input VAT paid on domestic purchases of goods and services for the second and third quarters of 2005.

**SO ORDERED.**

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**WE CONCUR:**

Juanito C. Castañeda, Jr.
**(With Separate Concurring and Dissenting Opinion)**
**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**(With Separate Concurring Opinion)**
**ERLINDA P. UY**
Associate Justice

# ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

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

# CERTIFICATION

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

**ERNESTO D. ACOSTA**
Presiding Justice