REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

MINDANAO I GEOTHERMAL PARTNERSHIP,
Respondent.

C.T.A. EB NO. 673
(C.T.A. CASE NO. 6906)

x---x

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 675
(C.T.A. CASE NO. 6906)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

APR 19 2011 BAApolinario 2:00 p.m.

x -- x

D E C I S I O N

PALANCA-ENRIQUEZ, J.:

A taxpayer is entitled to a refund either by authority of a statute expressly granting such right, privilege, or incentive in his favor, or under the principle of *solutio indebiti* requiring the return of taxes erroneously or illegally collected. In both cases, a taxpayer must prove not only his entitlement to a refund, but also his compliance with the procedural due process as non-observance of the prescriptive periods within which to file the administrative and judicial claims would result in the denial of his claim *(Commissioner of Internal Revenue vs. Aichi Forging Company Asia, Inc., G.R. No. 184823, October 6, 2010).*

THE CASE

Before the Court *En Banc* are consolidated Petitions for Review separately filed by the Commissioner of Internal Revenue (hereafter "CIR") and Mindanao I Geothermal Partnership (hereafter "MGP"), which seek the review of the Decision dated June 8, 2009 partially granting the Petition for Review filed by Mindanao, and the Resolution dated August 6, 2010, denying both CIR's "Motion for Partial Reconsideration" and MGP's "Motion for Partial Reconsideration" rendered by the Special First Division of this Court in C.T.A. Case No. 6906. The respective dispositive portions of the Decision and Resolution read, as follows:

> "**WHEREFORE**, petitioner's claim for issuance of tax credit certificate is hereby **PARTIALLY GRANTED.** Accordingly, respondent is hereby **ORDERED TO ISSUE A TAX CREDIT**

> **CERTIFICATE** in favor of petitioner the reduced amount of P8,586,772.03, representing its excess/unutilized input VAT for the period covering January 1, 2002 to December 31, 2002.
>
> **SO ORDERED.**"
>
> "**WHEREFORE,** the "Motions for Partial Reconsideration" filed by the respondent and the petitioner are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE PARTIES

MGP is a partnership duly registered with the Securities and Exchange Commission (SEC) and existing under the laws of the Philippines, with principal address at the 36th Floor, Tower 1, The Enterprise Center, 6766 Ayala Avenue, Makati City

CIR, on the other hand, is the duly appointed Commissioner of Internal Revenue with exclusive and original jurisdiction to: a) interpret the provisions of *RA* 8424, *as amended,* and other tax laws, subject to review by the Secretary of Finance; and b) decide disputed assessments, refunds of internal revenue taxes, fees and charges, penalties imposed in relation thereto, or other matters arising under the Tax code or other laws or portions thereof administered by the Bureau of Internal Revenue, subject to the appellate jurisdiction of the Court of Tax Appeals; with office address at the 5/F BIR National Office Building, Agham Road Diliman, Quezon City, where she may be served with summons and other court processes.

THE FACTS

The facts, as culled from the records, are as follows:

MGP is a power generation company, involved in the sales of generated power and delivery of electric capacity and energy to National Power Corporation for and in behalf of Philippine National Oil Company-Energy Development Corporation (PNOC-EDC), which sales are subject to VAT-zero rated, pursuant to *RA* 9136, otherwise known as the Electric Power Industry Reform Act of 2001 (EPIRA LAW).

In the course of its operation, MGP made domestic purchases of goods and services from which transactions, it accumulated creditable input taxes, and pursuant to the provisions of the 1997 Tax Code, as amended, MGP can use its accumulated input taxes to offset its output tax liability. However, MGP was unable to utilize its accumulated creditable input taxes, thus, it reported said excess and unutilized creditable input taxes, in its quarterly VAT returns for the 1st, 2nd, 3rd and 4th quarters of taxable year 2002, which were filed on the following dates:

Exhibit	Period	Date of Filing
"D"	1st quarter (Amended)	July 1, 2003
"E"	2nd quarter (Amended)	March 29, 2004
"F"	3rd quarter (Amended)	March 29, 2004
"G"	4th quarter (Amended)	March 30, 2004

On June 3, 2003, MGP filed with the BIR's Large Taxpayer Division an administrative claim for tax credit/refund in the amount of P61,067,122.87, representing its excess and unutilized input taxes for the period of January 1, 2002 to December 31, 2002. However, due to CIR's failure to act on such claim and to toll the running of the prescriptive period, on March 31, 2004, MGP filed a Petition for Review with the Special First Division of this Court, docketed as C.T.A. Case No. 6906.

On April 29, 2004, CIR filed his "Motion to Admit Attached Answer", which was granted by the Special First Division and CIR's Answer was admitted in a Resolution dated June 8, 2004.

After due proceedings, on June 8, 2009, the Special First Division rendered its decision in the terms earlier set forth.

On June 30, 2009, CIR filed a "Motion for Partial Reconsideration" of the Decision dated June 8, 2009, while on July 1, 2009, MGP filed a "Motion for Partial Reconsideration".

In a Resolution dated July 13, 2009, both parties were ordered to file their respective comment, within ten days from notice; afterwhich both motions shall be deemed submitted for resolution.

On July 27, 2009, MGP filed its Comment/Opposition (to Respondent's Motion for Reconsideration). CIR, on the other hand, failed to file his comment, despite notice.

In a Resolution dated August 6, 2010, the Special First Division denied both CIR's "Motion for Partial Reconsideration" and MGP's "Motion for Partial Reconsideration" for lack of merit.

Not satisfied, both CIR and MGP filed separate Petitions for Review before the Court *En Banc*, docketed as C.T.A. EB No. 673 and C.T.A. EB No. 675, respectively.

In a Resolution dated September 29, 2010, the Court *En Banc* ordered the consolidation of C.T.A. EB No. 675 with C.T.A. EB No. 673, the case bearing the lower docket number, pursuant to *Section 3, Rule IV of the 2005 Revised Internal Rules of the CTA, as amended.*

On October 22, 2010, we gave due course to both Petitions for Review, and ordered the parties to file their simultaneous memoranda, within thirty (30) days from notice. Only MGP filed its "Memorandum" on December 22, 2010.

On February 23, 2011, the consolidated petitions were deemed submitted for decision.

CIR's Assigned Errors

I

THE SPECIAL FIRST DIVISION OF THE HONORABLE CTA ERRED IN RULING THAT IT HAS JURISDICTION OVER THE ORIGINAL PETITION FILED BY RESPONDENT.

II

THE SPECIAL FIRST DIVISION OF THE HONORABLE CTA ERRED IN PARTIALLY GRANTING THE CLAIM FOR REFUND BECAUSE THE ADMINISTRATIVE CLAIM WAS NOT SUBSTANTIATED. HENCE, PETITIONER'S DENIAL BY INACTION SUFFERS NO INFIRMITY.

MGP's Assigned Errors

THE SPECIAL FIRST DIVISION OF THIS HONORABLE COURT ERRED IN AFFIRMING THE EXCLUSION BY THE FIRST DIVISION OF THIS HONORABLE COURT OF THE AMOUNT OF PHP72,271,445.75 FROM PETITIONER'S

ZERO-RATED RECEIPTS OR SALES AS THE OFFICIAL RECEIPTS SUPPORTING THEM DO NOT BEAR THE WORD "ZERO-RATED" ALLEGEDLY IN VIOLATION OF SECTION 4.108-1 OF REVENUE REGULATION NO. 7-95, IN RELATION TO SECTION 113 OF THE TAX CODE IN THAT-

A. SECTION 4.108-1 OF REVENUE REGULATION NO. 7-95 CONTRAVENES SECTION 113 OF THE TAX CODE.

B. THE ABSENCE OF THE WORD "ZERO-RATED" ON THE SAID OFFICIAL RECEIPTS DOES NOT INVALIDATE PETITIONER'S CLAIM AS THE AFOREMENTIONED BIR REQUIREMENT IS IN EXCESS OF THE INVOICING AND ACCOUNTING REQUIREMENTS OF THE TAX CODE.

THE SPECIAL FIRST DIVISION OF THIS HONORABLE COURT LIKEWISE ERRED IN AFFIRMING THE DENIAL BY THE FIRST DIVISION OF THIS HONORABLE COURT OF A SUBSTANTIAL PORTION OF PETITIONER'S CLAIM FOR REFUND OR TAX CREDIT ALLEGEDLY ON THE GROUND OF PRESCRIPTION IN THAT-

A. PETITIONER'S CLAIM FOR REFUND OR TAX CREDIT WAS FILED IN ACCORDANCE WITH THE THEN SETTLED RULINGS OF THIS HONORABLE COURT ON THE RECKONING DATE OF THE TWO-YEAR PRESCRIPTIVE PERIOD.

B. THE RULING IN MIRANT PAGBILAO V. COMMISSIONER OF INTERNAL REVENUE, PROMULGATED ON SEPTEMBER 12, 2008, WHICH NOW USES THE END OR CLOSE OF THE TAXABLE QUARTER WHEN THE PERTINENT SALES WERE MADE AS RECKONING DATE IN COUNTING THE TWO-YEAR PRESCRIPTIVE PERIOD CANNOT BE APPLIED RETROACTIVELY TO THE PRESENT CASE WHICH WAS FILED ON 31 MARCH 2004.

C. FURTHERMORE, THE RULING IN THE MIRANT CASE DID NOT AND CANNOT REVERSE THE SETTLED DOCTRINE IN THE CASE OF ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION VS. COMMISSIONER OF INTERNAL REVENUE, G.R. NOS. 141104 & 148763, JUNE 8, 2007 IN LIGHT OF THE EXPLICIT PROVISION OF SECTION 4(3), ARTICLE VIII OF THE 1987 CONSTITUTION.

D. MOREOVER, THE SPECIAL FIRST DIVISION OF THIS HONORABLE COURT ERRED IN AFFIRMING THE FINDING OF THE FIRST DIVISION OF THIS HONORABLE COURT THAT THE RULING IN THE MIRANT CASE IS APPLICABLE IN THE CASE AT BAR CONSIDERING THAT THEY INVOLVE DIFFERENT SETS OF FACTS.

THE COURT EN BANC'S RULING

Before we resolve the issues raised in both Petitions For Review, we deem it necessary to first resolve the procedural issue of whether the

Petition For Review in C.T.A. Case No. 6906 was filed within the prescribed period.

Section 112 of the NIRC of 1997, as amended, provides, as follows:

> "**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 or 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.
> 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.
>
> 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 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-quoted *Section 112 (A)*, 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.

Section 112 (C), on the other hand, provides that the CIR has one hundred twenty (120) days from the submission of supporting documents to decide a claim for refund. In case of full or partial denial, or inaction of the CIR, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

In the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. supra*, the Supreme Court categorically ruled:

"The filing of the judicial claim was premature

However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent' claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:

SEC. 112. Refund or Tax Credits of Input Tax. –

xxxx

(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 Subsection (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 tax on the application within the period prescribed above, the taxpayer affected may, within (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 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 the 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 xxx 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 Subsection (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.
>
> With regard to Commissioner of Internal Revenue vs. Victorias Milling, Co., Inc. (22 SCRA 12) 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.
>
> 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 above ruling, the two-year prescriptive period should be applied to the administrative claim for refund, while Section *112 (C) of the NIRC of 1997, as amended,* applies to taxpayer's judicial remedy.

Applying said law and jurisprudence in this case, petitioner's administrative claim for refund for the first to fourth quarters of taxable year 2002 filed on June 3, 2003 is well within the two-year prescriptive period. However, as to its judicial claim for refund/credit, records show that on June 3, 2003, MGP applied an administrative claim for refund of unutilized input VAT in the amount of P61,067,122.87 with the BIR's Large Taxpayer Division. From June 3, 2003, which is presumably the date MGP submitted supporting documents, together with the aforesaid application for refund, the CIR has 120 days, or until October 1, 2003, within which to decide the claim. Within 30 days from the lapse of 120-day period, or from October 2, 2003 until October 31, 2003, MGP should have elevated its claim for refund to the CTA. However, MGP filed its Petition for Review only on March 31, 2004, which is 151 days way beyond the 30-day period prescribed by law.

Evidently, the Petition for Review in C.T.A Case No. 6906 was filed 151 days late, thus, no jurisdiction was acquired by the Special First Division. Pursuant to the Aichi ruling, we have, therefore, no alternative, but to dismiss the Petition for Review filed in C.T.A Case No. 6906 for having been filed 151 days late.

In view of the above conclusion, we find no need to discuss the other issues raised by both parties for being moot and academic.

WHEREFORE, premises considered:

1) as regards CIR's Petition for Review, docketed as C.T.A. EB No. 673, the Petition For Review is hereby **GRANTED.**

Accordingly, the assailed Decision dated June 8, 2009 of the Special First Division is hereby **REVERSED** and **SET ASIDE**, and another one is hereby entered dismissing the Petition for Review filed in C.T.A. Case No. 6906 for having been filed late;

2) as regards MGP's Petition for Review, docketed as C.T.A. EB No. 675, the petition is hereby **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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.

ERNESTO D. ACOSTA
Presiding Justice