REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

SECOND DIVISION

KEPCO ILIJAN CORPORATION, *Petitioner,*	**C.T.A. CASE NO. 6550**
	Members:
- versus -	CASTAÑEDA, JR., *Chairperson* UY, *and* PALANCA-ENRIQUEZ, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** MAY 1 5 2009 9:21 a.m.

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DECISION

PALANCA-ENRIQUEZ, *J.*:

Section 112 (B) of the NIRC of 1997, as amended, expressly provides that unutilized input VAT payments, not otherwise used for internal revenue tax due the taxpayer, must be claimed within two (2) years reckoned from the close of the taxable quarter when the relevant capital goods were imported or locally purchased pertaining to the input VAT regardless of whether said tax was paid or not. The reckoning frame would always be the end of the quarter when the capital goods were imported or locally purchased, regardless when the input VAT was paid. Further, both the administrative claim and judicial claim for refund must be filed within the two (2) year period.

THE CASE

This is a Petition for Review filed by Kepco Ilijan Corporation (hereafter "petitioner") praying for a refund in the amount of P660,940,560.12, representing input value-added tax (VAT) allegedly incurred by petitioner for the third quarter of calendar year 2000 from its importations and domestic purchases of capital goods/equipment and services preparatory to its production and sale of electricity to the National Power Corporation.

THE PARTIES

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal place of business at Suite 2501-A, 25th Floor, Tektite Tower I, Exchange Road, Ortigas Centre, City of Pasig. It is a VAT-registered taxpayer engaged in the production and sales of electricity, as an independent power producer *(Exhibit "A")*.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) 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. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

On October 25, 2000, petitioner filed its Quarterly VAT Return *(Exhibit "B")* for the third quarter of calendar year 2000 with the BIR, reflecting the following:

Input Tax Carried over from Previous Quarter	485,471,552.24
Domestic Purchases for the Quarter	46,600,517.58
Importation of Goods for the Quarter	614,340,042.54
Total Available Input Tax	1,146,358,112.36

On June 23, 2002, petitioner filed with the BIR a letter claiming refund of the input tax in the amount of P660,940,560.12, representing the input VAT incurred for the third quarter of 2000 *(Exhibit "D")*.

On October 23, 2002, petitioner filed the instant Petition for Review in view of the inaction of respondent.

On December 2, 2002, respondent filed his *Answer,* alleging the following special and affirmative defenses:

> "7. The claim for refund is subject to reinvestigation by the Bureau of Internal Revenue;
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> 8. Taxes paid and collected are presumed to have been made in accordance with laws and regulations, hence, not refundable. Claims for tax refund are construed in *strictissimi*

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juris strictly against the claimant as they partake of the nature of an exemption from tax (Commissioner of Internal revenue vs. Ledesma, G.R. No. L-13509, January 30, 1979, 31 SCRA 95) and it is incumbent upon the petitioner to prove that it is entitled thereto under the law (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121) and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. It is not sufficient for the Petitioner to make allegations of the applicability of the cited provisions of law, cited cases and memorandum issued. It is incumbent upon the Petitioner to prove that it is entitled to a refund and it should not merely make an assumption that it is similarly situated to that of National Power Corporation, an entity separate and distinct from that of the herein Petitioner.

9. Petitioner's allegation that it erroneously and excessively paid the tax during the year under review does not ipso facto warrant the refund/credit;

10. Moreover, petitioner must prove that it has complied with the governing rules with regard to tax recovery or refund, which are found in Sections 204 (C) and 229 of the Tax Code, as amended, which are quoted as follows:

> Section 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. – The Commissioner may –
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use or refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer agrees in writing with the Commissioner a claim for credit or refund within two (2) years after payment of the tax or

> penalty; Provided, however, That a return filed showing an overpayment shall be considered a written claim for credit or refund..
>
> Section 229. Recovery of Tax Erroneously or Illegally Collected – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner collected, until a claim for refund or credit or has been duly filed with the Commissioner; whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of the payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, that the Commissioner may, even without a written claim thereof, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

On September 12, 2003, petitioner filed a "Motion for Leave of Court to Admit Attached Petition for Review" and its "Amended Petition for Review", which the Court granted and admitted in its Resolution dated December 4, 2003.

Petitioner presented Ruben R. Rubio, Jane Tranquilino-Pagkalinawan, and Engr. Pritz Pagkalinawan, as witnesses, and documentary evidence, marked as *Exhibits "A" to "HHH",* inclusive of their submarkings, which were all admitted by the Court.

On the other hand, in a Resolution dated November 3, 2008 and upon motion of petitioner's counsel, respondent was considered to have waived his right to present evidence for the repeated failures of counsel for respondent to appear despite due notice for the presentation of evidence for the respondent.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice. On December 23, 2008, petitioner filed its Memorandum, while respondent failed to file his memorandum, despite notice.

Hence, this decision.

ISSUES

As stipulated upon by the parties, the following are the issues for this Court's consideration:

I

WHETHER OR NOT THE PETITIONER IS ENTITLED TO THE REFUND OF THE AMOUNT OF PHP 660,940,560.12 AS ALLEGED UNUTILIZED ACCUMULATED INPUT VAT FOR THE THIRD QUARTER OF THE YEAR 2000.

II

WHETHER OR NOT THE PETITIONER INCURRED ACCUMULATED INPUT VAT FROM THE PURCHASE OF GOODS AND SERVICES FOR THE THIRD QUARTER OF THE CALENDAR YEAR 2000, WHICH PURCHASES ARE ATTRIBUTABLE TO THE SALE BY PETITIONER OF ELECTRICITY TO NPC.

III

WHETHER OR NOT THE SALE BY PETITIONER OF ELECTRICITY TO NPC FOR THE THIRD QUARTER OF THE CALENDAR YEAR 2000 IS SUBJECT TO VAT AT ZERO RATE.

IV

WHETHER OR NOT THE ALLEGED ACCUMULATED INPUT VAT ARE DULY SUPPORTED BY VAT INVOICES AND/OR OFFICIAL RECEIPTS.

V

WHETHER OR NOT THE ACCUMULATED INPUT VAT FOR THE THIRD QUARTER OF THE CALENDAR YEAR 2000 WERE UTILIZED OR APPLIED BY THE PETITIONER TO THE SUCCEEDING TAXABLE YEAR.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is entitled to a refund or the issuance of a tax credit certificate in the amount P660,940,560.12, representing unutilized input VAT incurred from its domestic purchases and importation of capital goods/equipment for the third quarter of calendar year 2000.

THE COURT'S RULING

We deny the petition.

Petitioner entered into an Energy Conversion Agreement with the National Power Corporation (NPC) which provides, among others, that petitioner shall construct, operate and maintain the power station in Ilijan, Batangas and sell electricity only to NPC on a turn-key basis *(Exhibit "G")*. In its preparation for the production and sale of electricity to NPC, petitioner allegedly incurred input VAT in the amount of P660,940,560.12 from its domestic purchases and importations of capital goods/equipment for the third quarter of calendar year 2000, which was reflected in its VAT Return *(Exhibit "B")* for the said quarter, as follows:

Domestic purchases	P 46,600,517.58
Importation of goods	614,340,042.54
TOTAL	**P 660,940,560.12**

Petitioner is seeking a refund of the P660,940,560.12 input VAT, citing as legal basis *Section 112 (A) and (B) of the National Internal Revenue Code (NIRC) of 1997, as amended*, which provides:

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"**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.

(B) Capital Goods. — A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made."

The aforequoted provisions allow the refund/tax credit of excess input VAT in two instances, namely: (1) when the excess input VAT is attributable to zero-rated or effectively zero-rated sales; and (2) when the excess input VAT is attributable to capital goods purchased by a VAT-registered person.

Since no amount of zero-rated sales/receipts was reported in petitioner's VAT Return for the third quarter of calendar year 2000, as its commercial operations started only on June 5, 2002 *(Exhibit "PP", Notes to Financial Statements)*, the input VAT of P660,940,560.12 cannot be the subject of a claim for refund under *Section 112 (A) of the NIRC of 1997, as amended.*

However, petitioner may still claim refund of its input VAT paid on capital goods, pursuant to *Section 112 (B) of the NIRC of 1997, as amended.*

Pursuant to the above quoted provision, in order to be entitled to a refund or issuance of a tax credit certificate of input VAT paid on capital goods purchased, petitioner must prove the following:

1) petitioner is a VAT-registered entity;

2) that its input taxes claimed were paid on capital goods duly supported by VAT invoices and/or official receipts;

3) petitioner did not offset or apply the claimed input VAT payments on capital goods against any output VAT liability; and

4) the claim for refund was filed within the two-year prescriptive period both in the administrative and judicial levels.

Thus, it is imperative that petitioner should be able to prove compliance with the above requisites.

We deal first with the timeliness of the filing of the instant claim.

Section 112 (B) expressly provides that the taxpayer may apply for a refund or the issuance of a tax credit certificate, within two (2) years from the close of the taxable quarter when the importation or purchase was made.

In the recent case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), G.R. No. 172129, September 12, 2008*, the Supreme Court settled the issue on the reckoning of the prescriptive period and the applicable provisions on claims for refund for input VAT, as follows:

> **"Claim for refund or tax credit filed out of time**
>
> The claim for refund or tax credit for the creditable input VAT payment made by MPC embodied in OR No. 0189 was filed beyond the period provided by law for such claim. Sec. 112(A) of the NIRC pertinently reads:
>
>> (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 <u>when the sales were made</u>, apply for the issuance of a tax credit certificate or refund of creditable input tax**

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> <u>**due or paid**</u> **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. (Emphasis ours.)

The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years **reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed.

Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable

To be sure, MPC cannot avail itself of the provisions of either Sec. 204(C) or 229 of the NIRC which, for the purpose of refund, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor. Secs. 204(C) and 229 respectively provide:

Sec. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*— The Commissioner may –

x x x x

(c) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund <u>within two (2) years after the payment of the tax</u> or penalty**: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

x x x x

Sec. 229. *Recovery of Tax Erroneously or Illegally Collected.*— No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, **no such suit or proceeding shall be filed after the <u>expiration of two (2) years from the date of payment of the tax</u> or penalty** regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid. (Emphasis ours.)

> Notably, the above provisions also set a two-year prescriptive period, reckoned from date of payment of the tax or penalty, for the filing of a claim of refund or tax credit. Notably too, both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes."

Section 112 (B) of the NIRC of 1997, as amended, clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for internal revenue tax due the taxpayer must be claimed within two (2) years reckoned from the close of the taxable quarter when the relevant capital goods were imported or locally purchased pertaining to the input VAT, regardless of whether said tax was paid or not. The reckoning frame would always be the end of the quarter when the capital goods were imported or locally purchased, regardless when the input VAT was paid. Further, if the said period is about to expire and the application for refund/credit is unacted upon by the BIR, the taxpayer-applicant may already file a Petition for Review before the CTA within the prescribed two (2) year period. It bears stressing that both the administrative claim and the judicial claim for refund must be filed, within the two (2) year period.

In this case, petitioner is claiming for the refund of the input VAT accumulated for the third quarter of calendar year 2000, hence, the two

(2) year prescriptive period should be reckoned from September 30, 2000, which is the close of the taxable quarter when the importations and purchases were made. Counting from September 30, 2000, petitioner had until September 30, 2002 within which to file its claim both in the administrative and judicial levels.

As regards the administrative claim, records show that petitioner filed its administrative claim on June 23, 2002 *(Exhibit "D-1")*. Evidently, the administrative claim was filed within the prescriptive period of two (2) years reckoned from the close of the taxable quarter when the capital goods were imported or locally purchased.

As regards the judicial claim, records show that the instant *Petition for Review* was filed only on October 23, 2002, hence, it was filed out of time. Hence, We have no authority to entertain the present appeal. Petitioner should have elevated its claim to this Court prior to the expiration of the two (2) year period on September 30, 2002. The Supreme Court has consistently adhered to the rule that the claim for refund should first be filed with the Commissioner of Internal Revenue, and the subsequent appeal to the Court of Tax Appeals must be instituted, within the said two (2) year period. If, however, the Commissioner takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two year period without awaiting the decision of the Commissioner *(Insular Lumber Co. vs. CTA, 104 SCRA 721; CIR vs. Victorias Milling Company, Inc., 22 SCRA 12; Collector vs. CTA, 1 SCRA 87; Gibbs vs. Collector, 107 Phil 232; College of Oral & Dental Surgery vs. CTA, 102 Phil 912; PJ Kenner & Co. vs. CTA, 92 Phil 945).* Hence, for belatedly filing its judicial claim, petitioner is barred from claiming refund of its input VAT for the third quarter of calendar year 2000 in the amount of P660,940,560.12, due to prescription.

In view of the foregoing discussion, the Court finds it no longer necessary to discuss petitioner's compliance with the other requisites for refund of input taxes on domestic purchases and importation of capital goods/equipment.

WHEREFORE, premises considered, the petition is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED.**

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ATTESTATION

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice