REPUBLIC OF THE PHILIPPINES
Court OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

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HARTE-HANKS PHILIPPINES, INC.,	**CTA CASE NO. 8050**
Petitioner,	Members:
	BAUTISTA, *Chairperson* **PALANCA-ENRIQUEZ,** and **COTANGCO-MANALASTAS,** *JJ.*
-versus-	
COMMISSIONER OF INTERNAL REVENUE,	**Promulgated:**
Respondent.	NOV 30 2010 11:15 a.m.

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RESOLUTION

For resolution are the following:

1. respondent CIR's "***Motion to Dismiss***" filed on May 25, 2010; and

2. petitioner's "***Comment (To Respondent's Motion to Dismiss dated 24 May 2010***" filed on July 14, 2010.

Respondent seeks the dismissal of the instant petition on the ground of lack of cause of action considering that the filing of the petition was premature for being filed before the lapse of the 120-day period provided under Section 112(C) of the 1997 Tax Code, as amended.

Petitioner counter-argues that the motion to dismiss should be denied based on the following grounds:

1) Respondent's Motion is procedurally infirm;

2) There is no basis to hold that petitioner failed to exhaust administrative remedies;

3) Respondent's Motion failed to establish that the 2-year prescriptive period under Section 229 of the 1997 Tax Code does not apply;

4) Section 112(C) of the 1997 Tax Code imposes a duty upon respondent, not the taxpayer;

5) Respondent's Motion violates petitioner's right to a 2-year period to seek refund; and

6) Respondent has not taken any action on petitioner's administrative claim.

With respect to the first ground, enumerated above, petitioner focuses on the supposed defectiveness of the instant Motion, *that is*, the notice of hearing was addressed to the Clerk of Court, instead to the opposing party as required under Section 5, Rule 15 of the Rules of Court. Petitioner posits that failure of the Motion to comply with the said requirement rendered it useless and a mere scrap of paper.

We are not convinced. Section 5 of the Rules of Court provides that:

> "Sec. 5. *Notice of hearing.* – The notice of hearing shall be addressed to all parties concerned, and shall specify the time and date of hearing which must not be later than ten (10) days after the filing of the motion."

Undeniably, the notice was addressed to the Clerk of Court and not to the opposing party as required in Section 5 of the Rules; however, requiring the notice to be addressed to the opposing party is merely directory[1]. What is mandatory is the service of the motion indicating the time and place of

[1] Remedial Law Compendium Volume I, ninth revised edition, Florenz Regalado, p. 263.

hearing.[2] In other words, what is decisive is for petitioner to have sufficient notice of the time and place of the hearing of the motion to dismiss. The reason for this requirement is to give the opposing party an opportunity to be heard.

A perusal of the record of the case shows that petitioner was not deprived of such right. As admitted by petitioner, it received a copy of the Motion on May 28, 2010, which is six (6) days before June 4, 2010, the date of hearing set in the notice. It had sufficient notice of the place, time and date when the motion to dismiss is to be heard. Indeed, petitioner was able to study and prepare for respondent's motion, as shown by the filing of an extensive comment thereto.

In *Case and Nantz vs. Jugo*[3], the Supreme Court made it clear that lapses in the literal observance of a rule of procedure may be overlooked when they have not prejudiced the adverse party and have not deprived the court of its authority.

Going now to respondent's argument that the petition is dismissible for being prematurely filed; we find it meritorious.

Section 112(C) of the 1997 Tax Code, as amended, provides for the relevant periods for the refund/issuance of tax credit of unutilized input taxes. Thus, the Commissioner of Internal Revenue has 120 days from date of the submission of the complete documents in support of the application for tax refund/credit to decide whether to grant or deny the claim. Upon denial of

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[2] Tamargo vs. Court of Appeals, G.R. No. 85044 June 3, 1992.
[3] 77 Phil. vs. 517.

the claim or the expiration of the 120-day period, in case of the Commissioner's inaction; the claimant has 30 days to file a judicial claim with this Court. Failure to wait for the expiration of the 120-day period prior to the filing of the judicial claim will render it premature.

The Supreme Court's ruling In the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[4] is relevant hereto, to wit:

> "However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
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> > SEC. 112. Refunds or Tax Credits of Input Tax. –
> >
> > x x x x
> >
> > (D)[5] 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 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. (Emphasis supplied.)
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> **Section 112(D) of the NIRC clearly provides that the CIR has '120 days, from the date of the submission**

[4] G.R. No. 184823, October 6, 2010.
[5] Now, Section 112(C).

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.

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.**" (*Emphasis supplied.*)

Petitioner asserts that the filing of the instant petition was due to the impending expiration of the two-year period within which to file a claim for refund. The same finds no legal basis.

A perusal of Section 112 of the 1997 Tax Code will show the absence of a requirement to file the judicial claim within a two-year period. While Section 112(A) mentions a two-year period within which a claimant/taxpayer may file its claim; however, the said period refers to the period of filing the claim before the Commissioner of Internal Revenue. It was never intended to include the period for filing the judicial claim. The Supreme Court in the afore-cited case of *Aichi* provides that:

"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.

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."

In the case at bar, petitioner filed its administrative claim on March 23, 2010 and seven (7) days after, or on March 30, 2010, it filed its judicial claim before this Court. Clearly, the filing of the instant petition was premature.

WHEREFORE, premises considered, respondent CIR's "**Motion to Dismiss**" is hereby **GRANTED.** The above-captioned case is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

(w/ Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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