REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION
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CBK POWER COMPANY LIMITED, Petitioner,	**CTA CASE NO. 7887**
	Members:
-versus -	**BAUTISTA,** Chairperson **PALANCA-ENRIQUEZ,** and **MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JAN 28 2011

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RESOLUTION

This resolves respondent's "**Motion to Dismiss**" filed on December 6, 2010, and petitioner's "**Comment on/Opposition to Respondent's Motion to Dismiss**" filed on December 17, 2010.

Respondent moves for the dismissal of the petition on the ground of lack of jurisdiction. Respondent avers that petitioner prematurely filed the instant Petition for Review on March 27, 2010, or a day after it filed its administrative claim, which is in violation of Section 112 (C) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Conversely, petitioner opposes the instant motion on the following grounds:

1. respondent's *Motion* should be denied for having been filed in violation of Rule 16, Section 1 of the Revised Rules of

Court which provides that a Motion to Dismiss may be filed "within the time for but before filing the answer to the complaint or a pleading asserting a claim xxx"

2. petitioner had timely and duly file its administrative and judicial claims for the issuance of a tax credit certificate for P58,802,851.18 for its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the Tax Code of 1997, as amended; and

3. following the principle of prospectivity of statutes, which had been applied to judicial decisions and considering that petitioner had followed in good faith the prevailing jurisprudence when it filed its administrative and judicial claims for its unutilized input taxes for the period January 1, 2007 to December 31, 2007, the Supreme Court ruling in the case of Commissioner of Revenue vs. Aichi Forging Company of Asia, Inc. with G.R. No. 184823 and promulgated on October 6, 2010, which ruled that the filing of the judicial claim therein with this Court was premature since the administrative and the judicial claims therein were simultaneously filed, should not be applied in the instant case. (*Albino S. Co vs. Court of Appeals and People of the Philippines, G.R. No. 10076 dated October 28, 1993*).

We find merit in the motion.

Section 112 (A), in relation to Section 112 (C) of the NIRC of 1997,[1] 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 tax credit certificate or refund 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:

x x x x

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1 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.*"

(C) *Period within which to 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 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**. [*Emphases supplied.*]"

From the foregoing, it is clear that a taxpayer may apply for an administrative claim for refund of its unutilized input Value-added Tax (VAT) payments "within two (2) years reckoned from the close of the taxable quarter when the relevant sales were made." The Commissioner of Internal Revenue (CIR) has 120 days to act on the claim and the taxpayer has 30 days to file a judicial claim before this Court, from the denial of its claim or expiration of the 120-day period, in case of the CIR's inaction.

Thus, in the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*,[2] the Supreme Court ruled:

"**Section 112(D)[3] 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 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.**

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2 G.R. No. 184823, October 6, 2010.

3 Now, Section 112 (C).

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 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. x x x x." [*Emphases supplied.*]

In this case, it is clear that petitioner prematurely filed its Petition for Review when the Petition for Review was filed a day after petitioner filed its administrative claim. Clearly, petitioner filed the instant Petition without waiting for the lapse of the 120-day period prescribed under Section 112(C) of the NIRC of 1997. Likewise, the thirty-day period to appeal to this Court has not even commenced to run.

Petitioner's allegation that the instant motion to dismiss was filed out of time is devoid of merit. Petitioner's allegation is rooted on its conclusion that the ground of respondent's motion to dismiss is that the instant petition failed to state a cause of action. It bears stressing, however, that in the afore-cited case of *Commissioner of Internal Revenue v. Aichi Forging*

Company of Asia, Inc.[4], the Supreme Court ruled that the premature filing of the therein petition failed to clothe this Court with jurisdiction.

Furthermore, well settled is the rule that a question of jurisdiction may be raised at anytime and cannot be waived.

Therefore, pursuant to the aforesaid ruling of the Supreme Court in the Aichi case, the premature filing of the petition warrants the dismissal of the petition, as no jurisdiction was acquired by this Court

WHEREFORE, premises considered, respondent's **"Motion to Dismiss"** is hereby **GRANTED.** Accordingly, the ***Petition for Review*** filed in the above-captioned case is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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4 Supra, note 2.