Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

CBK POWER COMPANY LIMITED,
Petitioner,

CTA EB NO. 658
(CTA Case No. 7621)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 659
(CTA Case No. 7621)

-versus-

CBK POWER COMPANY LIMITED,
Respondent.

Members:
ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *J.J.*

Promulgated:
JUN 27 2011 3:10 pm

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DECISION

CASANOVA, J.:

This is an appeal, by way of Petitions for Review, filed by both parties seeking the reversal of the CTA *Former* Second Division Decision[1] (the Assailed Decision) dated March 3, 2010 and the Resolution[2] (the Assailed Resolution) dated July 6, 2010, denying both parties' Motion for Reconsideration.

The facts of the case, as found by the CTA *Former* Second Division[3], are as follows:

> "Petitioner, CBK Power Company Limited, is a partnership duly organized and existing under and by virtue of the laws of the Philippines, with principal office at the NPC Compound, Kalayaan, Laguna.[4] It was registered as a value-added tax (VAT) entity on April 10, 2000 with TIN/VAT No. 205-760-474-000, and was issued Bureau of Internal Revenue (BIR) Certificate of Registration OCN 1RC0000195405 by the BIR Revenue District Office (RDO) No. 55 (San Pablo City, Laguna) on May 11, 2005.[5]
>
> Petitioner is a special purpose entity, the sole purpose of which is to engage in all aspects of (a) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna; and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna.[6]
>
> Respondent is the duly appointed Commissioner of Internal Revenue vested with authority to act as such, including *inter alia,* the power to

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[1] Petition for Review, Annex "B", CTA En Banc Rollo (CTA EB No. 658), pp. 48-66
[2] Ibid., Annex "A", CTA En Banc Rollo (CTA EB No. 658), pp. 40-47
[3] CTA En Banc Rollo (CTA EB No. 658), pp. 48-53
[4] Par. 1, Facts Admitted, Joint Stipulation of Facts and Issues (JSFI), Division Docket, p. 220
[5] Par. 5, Facts Admitted, JSFI, Ibid., p. 221
[6] Exhibit "B"

decide, approve, and grant refunds or tax credit of erroneously or illegally collected internal revenue taxes as provided by law, with office at the BIR National Office Building, Diliman, Quezon City.[7]

On December 29, 2004, petitioner filed an Application for VAT Zero-Rate with the BIR in accordance with Section 108(B)(3) of the NIRC of 1997, as amended.[8] The said application was duly approved by the BIR, wherein the BIR declared that petitioner's sale of electricity to the National Power Corporation (NPC) for the period from January 1, 2005 to October 31, 2005, is entitled to the benefit of effectively zero-rated VAT.[9]

Petitioner filed with the BIR its Original and Amended Quarterly VAT Returns for the first three quarters of 2005 on the following dates:

Period Covered	Original Return Filed On	Exhibit	Amended Return Filed On	Exhibit
1st Quarter-2005	April 19, 2005	CC[10]	June 29, 2005	DD[11]
2nd Quarter-2005	July 22, 2005	EE	September 14, 2005	FF[12]
3rd Quarter-2005	October 21, 2005	GG	October 27, 2005	HH[13]

Petitioner, through its tax counsel, filed with the BIR RDO No. 55 of Laguna, its administrative claims for the issuance of tax credit certificates for its alleged unutilized input taxes on its purchase of capital goods and alleged unutilized input taxes on its local purchases and/or importation of goods and services, other than capital goods, for the period covering January 1, 2005 to September 30, 2005, pursuant to Sections 112(A) and 112(B) of the NIRC of 1997, as amended, on June 30, 2005, September 15, 2005, and October 28, 2005, respectively, with the following details:[14]

[7] Par. 2, Facts Admitted, JSFI, Ibid., p.220
[8] Par. 6, Facts Admitted, JSFI, Ibid., p.221
[9] Par. 7, Facts Admitted, JSFI, Ibid., p.221. Exhibit "X"
[10] BIR Records, pp. 236 -237
[11] Ibid., pp. 238-240
[12] Ibid., pp. 155-157
[13] Ibid., pp. 20-21
[14] Par. 8, Facts Admitted, JSFI, Division Docket, pp. 221-222

Dates Filed	Input taxes on purchase of capital goods	Input taxes on local purchase of goods and services, other than capital goods, attributable to zero-rated sales	Total
June 30, 2005	P 7, 740,737.65	P 3, 687,781.69	P 11,428,519.34
September 15, 2005	10,157,799.73	5, 217,557.29	15,375,357.02
October 27, 2005 (sic)[15]	7, 920,772.94	5, 016,607.24	12,937,380.18
	P25, 819,310.32	**P13, 921,946.22**	**P39,741,256.54**

Considering that respondent has not issued a final decision on the said administrative claims, petitioner filed the instant Petition for Review on April 18, 2007, to toll the running of the two-year period for judicially claiming a tax refund/credit as provided in the NIRC of 1997, as amended.[16]

In his Answer[17] filed on June 6, 2007, respondent interposed the following Special and Affirmative Defenses:

> '4. Petitioner has no cause of action against respondent. Petitioner failed to submit all documents in support of its claim for refund as attested to by Revenue Officer Emily E. Garcia in a Memorandum dated April 27, 2006. In fact, this failure is admitted by petitioner in a letter dated April 26, 2006 wherein it is stated that the documents are available at its office at NPC Compound, San Juan, Kalayaan, Laguna. Petitioner's failure to submit the documents to respondent violates Section 112(D) of the National Internal Revenue Code of 1997 (NIRC of 1997) which provides as follows:

'Section 112. Refunds or Tax credits of Input Tax.-

[15] Should be October 28, 2005
[16] Par. 4, Facts Admitted, JSFI, Division Docket, pp. 220-221
[17] Ibid., pp. 184-188

xxx xxx xxx

(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 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.'

5. The petition was not filed within the reglementary period. Section 112(D) of the NIRC of 1997 specifically requires that petitioner should appeal to this Honorable Court of Tax Appeals the denial of its claim for refund within thirty days from receipt of the denial of the claim or the expiration of the one-hundred twenty day-period granted to respondent to grant or deny the claim for refund.

On one hand, as of April 27, 2006, petitioner has not yet submitted all documents in support of its claim for refund. Therefore, the period within which this judicial claim for refund may be filed has not yet commenced. Petitioner must submit to respondent all documents in support of its claim as this is the reckoning point in the determination of the timeliness of its appeal to this Honorable Court.

On the other hand, if petitioner had submitted all documents in support of its claim for refund, the date should be specifically alleged in the petition to ascertain the timeliness of the appeal.'

On June 7, 2007, respondent, through counsel, transmitted to this Court the *BIR Records* of the instant case consisting of two hundred sixty one (261) pages in two (2) folders.[18]

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[18] Division Docket, p. 190

The parties filed their Joint Stipulation of Facts and Issues on September 4, 2007, which was subsequently approved by this Court through Resolution dated September 17, 2007.[19]

Trial on the merits then proceeded.

During the trial, petitioner presented testimonial and voluminous documentary evidence primarily aimed at proving its supposed entitlement to the issuance of a tax credit certificate in the amount of P39,741,256.54, representing petitioner's alleged unutilized input taxes for the period covering January 1, 2005 to September 30, 2005.

At the hearing held on December 3, 2008, counsel for respondent manifested that respondent is waiving his right to present evidence and moved for a thirty (30)-day period to file a Memorandum. Both parties were granted thirty (30) days from such date or until January 2, 2009 within which to file their respective Memorandum.[20]

On December 12, 2008, respondent filed a Manifestation and Compliance[21] stating that, upon being requested to submit a status report, the revenue officers who conducted the administrative investigation of this case responded that 'the verification is still in progress considering the volume of receipts to be verified and to establish factual existence of the input tax being claimed for refund.'

On December 15, 2008, petitioner filed its Memorandum. On the other hand, respondent filed his Memorandum on March 3, 2009 after having been granted two extensions, upon motions filed on January 5, 2009 and February 2, 2009.

Thereafter, in the Resolution promulgated on March 10, 2009, this case was considered submitted for decision."

The CTA *Former* Second Division rendered a Decision on March 3, 2010, the dispositive portion of which reads as follows:

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent Commissioner

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[19] Ibid., p. 227
[20] Minutes of Hearing held on December 3, 2008, Division Docket, p. 515
[21] Ibid., pp. 584-586

of Internal Revenue is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWENTY-SEVEN MILLION ONE HUNDRED SEVENTY THOUSAND ONE HUNDRED TWENTY-THREE PESOS AND THIRTY SIX CENTAVOS (P27,170,123.36)**, representing unutilized excess input taxes on local purchases of goods and services attributable to petitioner's effectively zero-rated sales to NPC for the second and third quarters of 2005.

SO ORDERED."

On March 17, 2010, CBK Power Company Limited (CBK) filed a Motion for Partial Reconsideration[22] while Commissioner of Internal Revenue (CIR) filed her Motion for Partial Reconsideration[23] on March 22, 2010. Both Motions were denied in a Resolution[24] dated July 6, 2010 for lack of merit.

Hence, the instant Petitions for Review filed by both parties, viz:

a. CTA EB No. 658- CBK Power Company Limited vs. Commissioner of Internal Revenue

b. CTA EB No. 659- Commissioner of Internal Revenue vs. CBK Power Company, Limited

In support of their respective Petition for Review, CBK and CIR presented their respective issues/discussions:

<u>CTA EB Case No. 658 (CBK, petitioner)</u>

CBK argues that at the time it filed the subject administrative and judicial claims, the prevailing law and jurisprudence[25] allows the filing of the claim for refund/credit of input VAT on zero-rated sales and input tax from the date of filing of the Quarterly VAT

[22] Division Docket, pp. 643-671
[23] Ibid., pp. 674-678
[24] Ibid., 700-707
[25] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. No. 141104 and 148763, June 8, 2007

return and payment of tax due. Hence, CBK posits that the case of Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation[26] (Mirant Case) should not be given retroactive application in the instant case following the principle of prospectivity of statutes. Furthermore, petitioner claims that it has sufficiently complied with all the basic requirements of subsections (A) and (B) of Section 112 and Section 229 of the 1997 National Internal Revenue Code (NIRC), as amended, in order to be entitled to the issuance of tax credit certificate in the amount of P39,741,256.54 for the period January 1, 2005 to September 30, 2005.

CTA EB Case No. 659 (CIR, petitioner)

CIR argues that the Court of Tax Appeals (CTA) erred when it applied Section 229 of the 1997 NIRC, as amended, considering that such provision is applicable only for the recovery of taxes erroneously or illegally collected. According to CIR, what should have been applied is Section 112 (D) of the 1997 NIRC, as amended. Failure to observe the said section will render the Court bereft of jurisdiction to hear the judicial claim.

After a careful and thorough evaluation and consideration of the facts as well as jurisprudence on the matter, the Court *En Banc* finds merit in CIR's Petition for Review (CTA EB Case No. 659).

The Court deems it proper to apply in the instant case the recent ruling in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.,

[26] G.R. No. 172129, September 12, 2008

(Aichi Case)[27] which reiterated the ruling in the Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Mirant Case)[28] regarding the reckoning period for tax refund/credit. The High Tribunal in the Aichi Case ruled in this wise:

> "The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation,* where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204(C) and 229 of the NIRC are inapplicable as 'both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.' We explained that:
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>> The above proviso [Section 112 (A) of the NIRC] 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

[27] G.R. No. 184823, October 6, 2010
[28] G.R. No. 172129, September 12, 2008

> 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.
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> xxx xxx xxx
>
> 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. xxx
>
> xxx xxx xxx
>
> Considering the foregoing discussion, **it is clear that Sec. 112 (A) of the NIRC, providing a two-year prescriptive period reckoned from the close of the taxable quarter when the relevant sales or transactions were made pertaining to the creditable input VAT, applies to the instant case, and not to the other actions which refer to erroneous payment of taxes.** (Emphasis supplied.)
>
> xxx xxx xxx."

In view of the aforequoted decision, it is clear that Section 112 and not Section 229 of the 1997 NIRC, as amended, is the pertinent provision in claiming refund/credit of unutilized input VAT and that the two (2)-year prescriptive period should be reckoned from the close of the taxable quarter when the sales were made. Section 229 of the 1997 NIRC, as amended, is not applicable in claiming refund or credit of unutilized input VAT because the said provision applies only to erroneous payment or illegal collection of taxes.

The Aichi Case further emphasized the mandatory need to observe the 120-30 day period provided under Section 112(D) of the 1997 NIRC, as amended, prior to instituting a judicial claim with the CTA. The Supreme Court thus ruled:

> "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 on Input Tax.-
>
> xxx
>
> (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 (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)
>
> 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 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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> xxx xxx xxx
>
> xxx 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.
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> xxx xxx xxx
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> 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."

In the instant case, the *Former* Second Division is correct in its findings that the administrative claim for refund for the first quarter of 2005 was timely filed within the two (2)-year prescriptive period and that the judicial claim thereon was filed out of time. But, with respect to the partial grant of unutilized excess input taxes on local purchases of goods and services attributable to CBK's effectively zero-rated sales to NPC for the second and third quarter of 2005 in the sum of P27,170,123.36, the Court *En Banc* has no choice but to reverse the said Decision due to late filing of judicial claim in the light of the ruling in the Aichi Case.

Based on the records, CBK filed its administrative application[29] with the Bureau of Internal Revenue (BIR) for the second quarter of 2005 on September 15, 2005. Applying subsections (A) and (D) of Section 112 of the 1997 NIRC, as amended, CIR has one hundred twenty (120)-days or until January 13, 2006 to act on the said application. After the lapse of the one hundred twenty (120)-day period, CBK may appeal the unacted administrative claim within thirty (30) days or until February 12, 2006, a Sunday. Under the Rules[30], should the last day of the period to file a pleading fall on a Saturday, a Sunday or a legal holiday, a litigant is allowed to file his or her pleading on the next working day.[31] Applying Section 1 of Rule 22 of the 1997 Rules of Court, CBK had until the next working day, which is Monday, February 13, 2006 to file an appeal before the CTA.

For the third quarter of 2005, CBK filed its administrative claim[32] on October 28, 2005. CIR has one hundred twenty (120)-days or until February 25, 2006, a Saturday to act on the said claim. Following Section 1 of Rule 22 of the Rules of Court, CIR had until February 27, 2006 to decide on the application. After the lapse of the one hundred twenty (120)-day period, CBK may appeal the unacted administrative claim within thirty (30) days or until March 29, 2006.

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[29] Annex "O"
[30] Rules of Court, Rule 22, Section 1. How to Compute time- In computing any period of time prescribed or allowed by these Rules, or by order of the court, or by any applicable statute, the day of the act or event from which the designated period of time begins to run is to be excluded and the date of performance included. If the last day of the period, as thus computed, falls on a Saturday, a Sunday, or a legal holiday in the place where the court sits, the time shall not run until the next working day.
[31] Nilo Padre vs. Fructosa Badillo, Fedila Badillo, Presentacion Caballes, Edwina Vicario (d) represented by Mary Joy Vicario-Orbeta and Nelson Badillo, G.R. No. 165423, January 19, 2011
[32] Annex "P"

As can be gleaned from the records, notwithstanding the timely filing of administrative claims for the second and third quarter of 2005, the judicial claim was found to have been filed only on April 18, 2007, which is obviously already beyond the reglementary period provided under Section 112(D) of 1997 NIRC, as amended. Thus, due to the late filing of CBK's Petition for Review, the Court of Tax Appeals is therefore, bereft of jurisdiction to act on the said judicial claim.

Being the latest ruling of the High Tribunal on the matter and having reiterated the ruling in the Mirant Case (in so far as the reckoning period for filing administrative claim for refund), *We* have no option but to uphold and apply the ruling of the Supreme Court, it being the ultimate arbiter of justiciable controversy.

> "The Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is. It is the final arbiter of any justifiable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings."[33]

With the above discussion, the Court *En Banc* deems it proper to deny CBK Power Company Limited's Petition for Review (CTA EB No. 658).

WHEREFORE, premises considered:

I. As regards **CTA EB Case No. 658,** the Petition for Review is hereby **DISMISSED**; and

II. As regards **CTA EB Case No. 659,** the Petition for Review is hereby **GRANTED.**

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[33] Commissioner of Internal Revenue vs. Michael J. Lhuiller Pawnshop, Inc., G.R. No. 150947, July 15, 2003, citing the case of GSIS vs. Court of Appeals, 334 Phil. 163, 175; 266 SCRA 187 (1997)

Accordingly, the Decision dated March 3, 2010 and the Resolution dated July 6, 2010 of the CTA *Former* Second Division are hereby **REVERSED** and **SET ASIDE,** and another one is hereby entered **DISMISSING** the Petition for Review filed in CTA Case No. 7621 for having been belatedly filed.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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