Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

CBK POWER COMPANY LIMITED,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8043

For: Claim for the issuance of a tax credit certificate for unutilized input taxes on local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, all attributable to zero-rated sales for the period January 1, 2008 to March 31, 2008

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CBK POWER COMPANY LIMITED,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8116

For: Claim for the issuance of a tax credit certificate for unutilized input taxes for the period April 1, 2008 to December 31, 2008, all attributable to zero-rated sales for the period April 1, 2008 to December 31, 2008

Members:
CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

MAR 0 3 2011 ail 4:30p.m

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RESOLUTION

This resolves respondent's **"Motion to Dismiss"** filed on December 20, 2010, with petitioner's **"Comment On/Opposition to Respondent's Motion to Dismiss"** filed on January 24, 2011.

Respondent prays that the instant Petition for Review in CTA Case No. 8116 be dismissed for lack of jurisdiction based on the following grounds[1]:

> "3. Based on the Petition for Reviews and the records of the Honorable Court, 3 days had lapsed in relation to CTA Case No. 8116 from the filing of the administrative claim for refund and the filing of the petition for review, this is in violation of Section 112 (D) of the Tax Code of 1997, as amended xxx
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> xxx xxx xxx
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> 4. In the case of CIR vs. Aichi Forging Company of Asia, Inc. (GR No. 184823, October 6, 2010), the Supreme Court had decided that the non-observance of the taxpayer on the 120 day period of the Commissioner in deciding the claim for refund, is fatal.
>
> xxx xxx xxx
>
> 5. This Honorable Court En Banc in its recent Amended Decision on CE Luzon Geothermal Power Co. vs. CIR (CTA EB No. 553 & 554), states that the filing of an administrative claim with Commissioner is a condition precedent to the filing of a judicial claim for refund. Failure to comply with Section 112 (D), particularly the 120-day period is tantamount to non-exhaustion of administrative remedies and is fatal to the claim.
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> 6. 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. (Aichi, ibid)"

Petitioner opposes respondent's Motion to Dismiss on the following grounds, to quote:

a. Respondent's Motion to Dismiss 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;"

b. Petitioner **had timely and duly filed its administrative and judicial claims** for the issuance of a tax credit certificate amounting to

[1] Motion to Dismiss, Docket, pp. 759-760.

P47,425,306.79, representing unutilized input taxes on its local purchases and importations of goods other than capital goods, local purchases of services, payments for services rendered by non-residents, local purchases of capital goods not exceeding P1 Million including unutilized amortized input taxes on capital goods exceeding P1 Million, for the period April 1, 2008 to December 31, 2008, all attributable to zero-rated sales for the period April 1, 2008 to December 31, 2008, pursuant to Section 112(A) of the Tax Code of 1997, as amended; and

c. Following the principle of prospectivity of statutes, which had been applied to judicial decisions and considering that [p]etitioner had followed in good faith the prevailing jurisprudence when it filed its administrative and judicial claims for its unutilized input taxes for the period of April 1, 2008 to December 31, 2008, the Supreme Court ruling in the case of **Commissioner of Internal Revenue v. 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 the CTA was premature since the administrative and the judicial claims therein were simultaneously filed, **should not be applied in the instant case.** *(Albino S. Co, v. Court of Appeals and People of the Philippines, G.R. No. 100776 dated October 28, 1993)*

The Court finds merit in the Motion to Dismiss.

With regard to petitioner's first counter argument, the requirement that a motion to dismiss should be filed within the time for filing the answer is not absolute. Even after an answer has been filed, a defendant can still file a motion to dismiss on the following grounds: (1) lack of jurisdiction, (2) *litis pendentia* (3) lack of cause of action, and (4) discovery during trial of evidence that would constitute a ground for dismissal.[2]

Also, in the case of Quiaoit vs. Consolacion[3], the Supreme Court held that -

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[2] Obando vs. Figueras, G.R. No. 134854, January 18, 2000.

[3] G.R. No. L-41824, September 30, 1976.

> "A motion to dismiss may also be allowed for *some special reason* even after the trial of the case has already begun. Thus, this Court has allowed the filing of a motion to dismiss, *even after defendant's answer and after hearing has been commenced*, upon grounds other than plaintiff's failure to state a cause of action or court's failure to acquire jurisdiction over the subject matter of the action, i.e., where evidence that would constitute a ground for the dismissal of the complaint was discovered during trial."

With respect to petitioner's argument that the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[4], should not be applied in the present case; it is noteworthy that in the case of *Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue*[5], the Court sitting *En Banc*, citing the Supreme Court, ruled:

> "Further, petitioner's contention of non-retroactivity of Mirant ruling runs counter to a more recent decision of the Supreme Court in the case of *San Roque Power Corporation vs. Commissioner of Internal Revenue (San Roque case)*.[6] In *San Roque* case, petitioner San Roque filed a claim for refund of its unutilized input VAT for the period covering January to December 2002. It filed its judicial claim on April 5, 2004. In determining the reckoning of the two-year prescriptive period, the Supreme Court held:
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>> **The last requirement determines that the claim should be filed within two years after the close of the taxable quarter when such sales were made**. The sale of electricity to NPC was reported at the fourth quarter of 2002, which closed on 31 December 2002. Petitioner had until 30 December 2004 to file its claim for refund or credit. For the period January to March 2002, petitioner filed an amended request for refund or tax credit on 30 May 2003; for the period July 2002 to September 2002, on 27 February 2003; and for the period

[4] G.R. No. 184823, October 6, 2010.
[5] CTA EB Case No. 513. March 10, 2010
[6] G.R. No. 180345, November 25, 2009.

> October 2002 to December 2002, on 31 July 2003. In these three quarters, petitioners seasonably filed its requests for refund and tax credit. However, for the period April 2002 to May 2002, the claim was filed prematurely on 25 October 2002, before the last quarter had closed on 31 December 2002.
>
> It should be emphasized that when *Mirant* case was promulgated, *San Roque* case was already and still pending before the Supreme Court. Yet, the Supreme Court in deciding *San Roque* case, it retroactively adopted *Mirant* ruling. Noticeably, the judicial claim of San Roque was filed even earlier than the judicial claims of herein petitioner (April 5, 2004 for San Roque and April 22, July 7, and September 9, all in the year 2005 for herein petitioner). Hence, We see no reason why We should not adopt the same ruling to the instant case."

Likewise, this Court sees no reason why the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[7] cannot be applied in the instant case.

Finally, petitioner argues that it filed its administrative and judicial claims on time. We cannot agree.

In the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc*[8], the Supreme Court ruled:

> ***"The filing of the judicial claim was premature***
>
> 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:
>
> SEC. 112. Refunds or Tax Credits of Input Tax. –
>
> x x x x
>
> (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the

[7] Supra, note 4.
[8] Id.

> 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.)

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.

xxx xxx xxx

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."

Based on the foregoing, the Commissioner of Internal Revenue (CIR) has one hundred twenty (120) days from the date of submission of complete documents in support of the taxpayer's application for refund or issuance of a tax credit certificate, within which to decide the said application pursuant to Section 112 (D) [now, Section 112 (C)] of the NIRC of 1997, as amended. This 120 day period as characterized by the Supreme Court in the above-mentioned case is crucial in filing an appeal to this Court, to wit:

> "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."

Wherefore, non –observance of the above mentioned period will lead to the loss of the right to appeal. Well-settled is the rule that the right to appeal is not a natural right or a part of due process, as the same is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law. The party who seeks to avail of the same must comply with the requirements of the law. Failing to do so, leads to the loss of the right to appeal.[9]

Petitioner filed the Petition for Review, docketed as CTA Case No. 8116 with this Court on June 28, 2010, notwithstanding that its administrative claim was filed only on June 25, 2010. Therefore, its filing thereof was premature since the 120-day period for the CIR to decide the claim for refund has not yet ended. Hence, there was no decision ruling or inaction of the Respondent for this Court "to review".

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[9] Producers Bank of the Phil. vs. Court of Appeals, G.R. No. 126620, April 17, 2002, 381 SCRA 185.

Concomitantly, decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal [10]. Hence CTA Case No. 8116 being prematurely filed is dismissible on such ground for this Court failed to acquire jurisdiction to entertain the case pursuant to the ruling of the Supreme Court in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.

WHEREFORE, premises considered, respondent's **"Motion to Dismiss"** is hereby **GRANTED.** Accordingly, the Petition for Review docketed as CTA Case No. 8116 is hereby **DISMISSED** for lack of jurisdiction.

On the other hand, set the hearing on petitioner's **"Motion for the Adoption of Procedures on the Presentation of Voluminous Documents Pursuant to Rules 12 and 13 of The Revised Rules of the Court of Tax Appeals"** and the initial presentation of evidence for the petitioner for CTA Case No. 8043 on April 11, 2011 at 9:00 a.m.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

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[10] Rizal Commercial Banking Corp. vs. Commissioner of Internal Revenue, G.R. No. 168498, April 24, 2007, 522 SCRA 144.