REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PHILEX MINING CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 8044

Members:

ACOSTA, *Chairperson*
UY, *and*
FABON-VICTORINO, *JJ.*

Promulgated:
AUG 3 1 2012 ; 2:30 p.m.

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RESOLUTION

Fabon-Victorino, J.:

Obviously not convinced with the ruling of the Court, both petitioner Philex Mining Corporation and respondent Commissioner of Internal Revenue (CIR) move for a reconsideration of the Decision promulgated on April 17, 2012, the decretal portion of which reads as follows:

> **WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** in favor of petitioner the amount of **SEVEN HUNDRED TWENTY-NINE THOUSAND SIX HUNDRED**

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> **NINETY-SEVEN PESOS AND THIRTY CENTAVOS (Php729,697.30),** representing the latter's excess/unutilized input tax attributable to substantiated zero-rated sales for the first quarter of 2008.
>
> **SO ORDERED.**

In her *Motion for Reconsideration* filed on May 8, 2012, to which petitioner poses an objection through her *Opposition (To Respondent's Motion for Reconsideration)* dated May 30, 2012, respondent seeks to reverse the adverse decision and to dismiss the *Petition for Review* for lack of jurisdiction on the part of the Court. Allegedly, the instant petition was prematurely filed before the lapse of the required 120-day period under Section 112(c) of the NIRC. Contrary to the Court's finding, she raised the premature filing of the petition in paragraph 4 of her *Answer,* hence, she could not be deemed to have waived her right to invoke such defense.

Moreover, lack of jurisdiction may be raised at any time even on appeal or even after a final judgment as provided in Section 1, Rule 9 of the Revised Rules of Civil Procedure and as laid down in the cases of *Machado vs. Gatdula*[1] and *La Naval Drug Corporation vs. Court of Appeals.*[2]

In rejecting the respondent's motion, petitioner counters that respondent failed to invoke prematurity in the filing of the petition either in her Answer or in a motion to dismiss. The cited paragraph 4 in respondent's Answer focused on the fact that the subject claim for refund was still undergoing routinary investigation and on the prematurity of the judicial action. Moreover, in the paragraph 10 and 12 of the same Answer, respondent admitted the timely filing of the petition. Petitioner finally argues that the Petition for Review was filed within the period set by the prevailing ruling at the time of filing.

Respondent's *motion* must fail.

The issue is not at all novel. The inability to await the expiration of the 120-day period for respondent to act on a claim for refund before filing a judicial action only amounts to failure to exhaust administrative remedies and does not affect the Court's competence to entertain the action. It merely deprives the complainant or petitioner of a cause of action, which is a ground

[1] G.R. No. 156287, February 16, 2010.
[2] G.R. No. 103200, August 31, 1994, 236 SCRA 78.

for a motion to dismiss. Thus, if not seasonably invoked, this ground is deemed waived and the Court can take cognizance of the case and try it to its conclusion.[3] This has been sufficiently discussed in the assailed Decision of April 17, 2012, and further discourse on the issue is superfluous, if not unnecessary.

As regards respondent's claim that she raised the premature filing of the instant petition in her *Answer*, the Court is not convinced. As aptly stated by petitioner, paragraph 4 of respondent's Answer dwelt on the pendency of the routinary investigation on petitioner's claim for refund. More significant is the fact that in the same Answer, specifically in paragraphs 10 and 12, respondent categorically admitted the timely filing of the petition. On top of this, respondent stipulated in the Joint Stipulation of Facts and Issues that the subject Petition for Review was seasonably filed. In other words, respondent did not only fail to raise the defense of prematurity but also agreed to the stipulation that the instant *Petition for Review* was timely instituted in court.

On petitioner's *Motion for Partial Reconsideration*, to which respondent failed to file any comment/opposition despite the

[3] *Soto vs. Jareno*, 144 SCRA 116; *Eastern Shipping Lines vs. POEA*, 166 SCRA 533.

opportunity granted, petitioner evidently wants more than the amount of Seven Hundred Twenty-Nine Thousand Six Hundred Ninety-Seven and Thirty Centavos (Php729,697.30) granted by the Court for refund or issuance of tax credit certificate.

Petitioner does not agree with the Court's ruling that its export sales to Louis Dreyfus Commodities Metals Suisse SA (LD Metals) do not qualify for VAT zero-rating as the sales invoices issued thereto were not duly registered with the Bureau of Internal Revenue (BIR). As in its previous pleadings, petitioner reiterates that it issues two invoices for each shipment of copper concentrates to LD Metals. The first is provisional and issued upon shipment covering 90% of the estimated value of the shipment. The second is the final invoice issued only after the parties agreed on the final settlement weights, assays and quotations or final value of the shipment, which are determined after arrival of the shipment at the port of loading. While the final invoices issued to LD Metals to cover the balance were not duly registered with the BIR; the provisional invoices issued to cover the 90% of the estimated price were duly registered with the BIR, thus, could qualify for VAT zero-rating.

According to petitioner, the Court likewise erred when it disallowed input taxes amounting to Php1,306,274.00 from its claim on the ground that the supporting Bureau of Customs Official Receipts/Bank Debit Advices and Import Entry And Internal Revenue Declarations (IEIRDs) were dated beyond the period covered by the claim. Admittedly the amount of Php1,306,274.00 was dated not within the covered period but in the immediately preceding quarter, viz, the 4th quarter of 2007, it had yet to claim the said amount as tax credit or refund. Hence, it may still be subject of the instant claimed for refund for the first quarter of 2008.

Petitioner also believes that it was erroneous for the Court to disallow the amount of Php8,455,138.00 in input taxes from petitioner's claim simply because the supporting IEIRDs were not machine validated. It argues that neither Sections 110(A) and 113(A) of the National Internal Revenue Code (NIRC) of 1997 nor Sections 4.110-8 and 4.113-1 of Revenue Regulations No. 16-2005 requires it. All that is required in the cited provision is that input taxes for the importation of goods must be substantiated and supported by import entry or other equivalent documents showing actual payment of VAT on the imported goods.

Petitioner's *Motion for Partial Reconsideration* must also be denied.

Petitioner admitted that it issues two (2) invoices for every shipment to LD Metals, namely, a **provisional invoice** and a **final invoice**. As the term suggest, the provisional invoice is just a temporary or tentative invoice.[4] Petitioner itself recognized this fact as after the parties reached an agreement regarding the final settlement weights, assays and quotations or final value of the shipment, it issues the final invoice. But it is only the final invoice that reflects the real intent or agreement of the parties regarding the cost of the shipment. Amazingly, only the provisional invoice was registered with the BIR. Its final invoice admittedly remains to be unregistered.

On the last issue raised by petitioner regarding inclusion of the alleged input taxes for the 4th quarter of 2007 in the amount of Php1,306,274.00, since it had not yet been claimed for refund, the same is untenable.

[4] Black's Law Dictionary, Sixth Edition.

The Court in the case of *Lepanto Consolidated Mining Co. vs. Commissioner of Internal Revenue*[5] has ruled, thus:

> In a resolution of the case entitled *Telecommunications Technologies Philippines, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 6168, promulgated on July 28, 2004, this Court elucidated that the input VAT on domestic purchases of goods or properties shall be allowed as tax credit to the purchaser upon consummation of sale, which means upon issuance by the seller of the VAT sales invoice evidencing the sale of goods/properties. On the other hand, the input VAT on purchases of services shall be available as tax credit to the purchaser only upon payment of the compensation or fee i.e., upon issuance by the seller of the VAT official receipt evidencing receipt of the payment for services performed or yet to be performed.
>
> Thus, it is indubitable on the part of the petitioner to declare the input value added taxes on domestic purchases of goods and services at the end of the corresponding taxable quarter where purchases of goods were consummated, as evidenced by VAT invoice and for payment of services, as evidenced by VAT official receipt.

Clear from the foregoing pronouncement that petitioner's proposition that the input VAT incurred for a particular month or quarter may be credited to another month or quarter cannot be sustained.

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[5] CTA Case Nos. 6368 and 6480, December 15, 2004; also cited in *Marubeni Philippines Corporation vs. Commissioner of Internal Revenue*, CTA EB Case No. 236, October 1, 2007 (CTA Case No.6581).

Finally, under paragraphs 2.3 and 2.3.1 Customs Administrative Order No. 2-95, dated September 8, 1995, the amount of duty and tax collected including other required information must be machine validated directly on the following import documents and signed by the duly authorized bank official, thus:

> September 8, 1995
>
> CUSTOMS ADMINISTRATIVE ORDER NO. 2-95
>
> xxx xxx xxx
>
> 2.3 The Bureau of Customs Official Receipt (BCOR) will no longer be issued by the AABs (Authorized Agent Banks) for the duties and taxes collected. In lieu thereof, the amount of duty and tax collected including other required information must be machine validated directly on the following import documents and signed by the duly authorized bank official:
>
> 2.3.1. Import Entry and Internal Revenue Declaration (IEIRD) for final payment of duties and taxes.
>
> xxx xxx xxx

Contrary to petitioner's assertion, the BOC (Port of Manila or Manila International Container Port) stamp on the face of the import entry does not indicate that the total duties and taxes reflected therein have been actually paid. Pursuant to the above provision, without the machine validation for the total amount of customs duties and taxes paid, the import entry cannot be accepted as valid proof of payment of the claimed input VAT on imported capital goods.

It cannot be overemphasized that taxpayers have the burden of proving compliance with the mandatory provisions of the NIRC of 1997 as well as the corresponding rules and regulations issued for their implementation. This principle must be applied in all actions involving taxation, more particularly, in claims for refund or tax credit.

It also bears stressing that tax refunds are in the nature of tax exemption and as such, it is regarded as derogation of sovereign authority and should be construed *strictissimi juris* against the person or entity claiming the exemption.[6]

In claims for refund, the law mandates the court to observe a higher standard of caution in appreciating and evaluating evidence. If indeed a claim for refund is wanting in

[6] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc. and Court of Appeals*, G.R. No. 127105, June 25, 1999; *Commissioner of Internal Revenue vs. Procter and Gamble Philippines Manufacturing Corporation and the Court of Tax Appeals*, G.R. No. 66838, December 2, 1991.

pertinent and supporting evidence, then the granting thereof could prove to be improper, if not difficult.[7]

WHEREFORE, there being no compelling reason to disturb the ruling of the Court in the assailed Decision of April 17, 2012, the *Motion for Reconsideration* and the *Motion for Partial Reconsideration* filed by the Commissioner of Internal Revenue and Philex Mining Corporation, respectively, are hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

(NO PART)
ERLINDA P. UY
Associate Justice

[7] *ECW Joint Venture, Inc., vs. Commissioner of Internal Revenue*, CTA EB No. 14 (CTA Case No. 6509), March 22, 2006.