REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

PHILEX MINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7798

Members:

BAUTISTA, Chairperson,
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

APR 13 2011
ABFernando 4:05 p.m.

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DECISION

PALANCA-ENRIQUEZ , J.:

The phrase "within two (2) years xxx 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 of 1997*, which already provides for a specific period within which a taxpayer should appeal the

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decision or inaction of the CIR *(Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010)*.

THE CASE

This is a Petition for Review filed by Philex Mining Corporation (hereafter "petitioner") praying for the refund or issuance of a tax credit certificate (TCC) in the total amount of P11,970,602.23, allegedly representing excess and unutilized input value-added tax (VAT) on domestic purchases and importations of goods attributable to zero-rated sales for the 2nd quarter of taxable year 2006.

THE FACTS

The facts, as culled from the records, are as follows:

Petitioner, a corporation organized under Philippine laws, is engaged in the mining business, including the exploration and operation of mine properties and commercial production and marketing of mine products, with principal office at 27 Brixton St., Pasig City.

Petitioner is a value-added tax (VAT)-registered taxpayer, with VAT Registration Certificate No. 35-6-000731 effective October 29, 1987, and under Bureau of Internal Revenue (BIR) Form No. 2303 as of January 31, 1997. Likewise, pursuant to *Sec. 4.100-3 of Revenue Regulations No. 7-95*, it had its Application For Zero rate, approved on April 21, 1988.

On the other hand, respondent Commissioner of Internal Revenue is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected, and other refundable or creditable taxes under the NIRC. She holds office at the BIR National Office, Diliman, Quezon City.

On July 19, 2006, petitioner filed with the BIR its Original VAT Return (BIR Form 2550-Q) for the 2nd quarter of 2006.

On February 28, 2008, petitioner filed an Amended VAT Return (BIR Form 2550-Q) for the 2nd quarter of 2006 showing a total zero-rated sales of P2,175,954,150.68, domestic purchases of goods amounting to P220,089.25 with input tax of P26,410.71, and importation of goods amounting to P99,534,929.34 with input tax of P11,944,191.32.

On January 10, 2007, petitioner filed its claim for refund or tax credit with the One-Stop-Shop Center of the Department of Finance via Application No. 54767, in the amount of P11,970,602.23.

On June 27, 2008, petitioner filed the instant Petition for Review, alleging respondent's inaction on said administrative claim for refund, docketed as C.T.A. Case No. 7798.

In her Answer, respondent alleged by way of special and affirmative defenses, to wit:

> "6. The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund or issuance of tax credit certificate;
>
> 8. The grant of claim for refund tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
>
> 9. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

Petitioner presented Eileen C. Rodriguez and Albert G. Alba, as witnesses, and documentary evidence, marked as *Exhibits "A" to "J"*, inclusive of their submarkings, which were all admitted by the Court in a Resolution dated August 18, 2009.

On the other hand, respondent submitted the case for decision, without presenting any evidence.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.

Considering petitioner's "Memorandum" filed on April 29, 2010, and the Report of the Judicial Records Division dated May 13, 2010 that respondent failed to file her memorandum despite notice, the case was deemed submitted for decision on May 20, 2010.

On June 1, 2010, this case was originally raffled for study and report to Associate Justice Lovell R. Bautista. During the deliberation of this case, Justice Bautista expressed his opinion that the instant claim should be partly granted. However, Associate Justice Olga Palanca-Enriquez dissented and voted to deny the instant petition, to which Associate Justice Amelia R. Cotangco-Manalastas concurred. Thus, the case was re-assigned to Associate Justice Olga Palanca-Enriquez to write the majority Decision.

ISSUES

As stipulated upon by the parties, the following are the issues for this Court's consideration:

I

WHETHER OR NOT PETITIONER'S DOMESTIC AND IMPORTATIONS OF GOODS WHICH ARE ATTRIBUTABLE TO ITS EXPORT SALES FOR THE 2ND QUARTER OF 2006, ARE DULY SUPPORTED BY DOCUMENTARY EVIDENCE.

II

WHETHER PETITIONER MADE DIRECT EXPORTS OF MINERAL PRODUCTS DURING THE SAME PERIOD.

III

WHETHER OR NOT THE ACCUMULATED OR EXCESS INPUT VAT WAS NOT UTILIZED OR APPLIED BY PETITIONER AGAINST OUTPUT VAT IN THE 2ND QUARTER OF 2006 OR IN THE SUCCEEDING QUARTERS OR TAXABLE YEARS.

IV

WHETHER OR NOT THE EXPORT SALES WERE PAID FOR IN ACCEPTABLE FOREIGN CURRENCY AND ACCOUNTED FOR IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THE BANGKO SENTRAL NG PILIPINAS.

V

WHETHER OR NOT PETITIONER IS ENTITLED TO THE REFUND OF THE EXCESS INPUT TAXES IN THE TOTAL AMOUNT OF PHP11,970,602.23 FOR THE 2ND QUARTER OF 2006 PAID FOR THE PURCHASE OF GOODS AND SERVICES DUE TO PETITIONER BEING A PRODUCER AND EXPORTER OF MINERAL PRODUCTS.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is entitled to a refund or issuance of a TCC in the total amount of P11,970,602.23, allegedly representing excess input taxes for the 2nd quarter of 2006.

THE COURT'S RULING

We deny the petition.

At the outset, petitioner's claim is clearly covered by *Section 112 (A) of the NIRC of 1997, as amended by RA 9337*, which provides:

> **"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 a tax credit certificate or refund of 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: *Provided, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108 B(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally*, That for a person making sales that are zero-rated under Section 108 (B) (6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."

Pursuant to the above quoted provision, in order to be entitled to a refund or issuance of a TCC of input VAT paid, petitioner must prove the following:

1) the claimant must be a VAT-registered person;

2) there must be zero-rated or effectively zero-rated sales;

3) input taxes were incurred or paid;

4) such input taxes are attributable to said zero-rated or effectively zero-rated sales;

5) said input taxes were not applied against any output VAT liability; and

6) the claim for refund was filed within the prescriptive period.

It is imperative, therefore, that petitioner should be able to prove the above requirements.

This Court deems it appropriate to first resolve the procedural issue pertaining to the timeliness of the filing of the instant petition.

Pursuant to *Section 112 (A) of the NIRC of 1997, as amended*, petitioner may apply for refund within two (2) years from the close of the taxable quarter when the relevant sales were made. As the prescribed period of two (2) years under *Section 112 (A)* applies to administrative claims, petitioner must be able to show that its administrative claim was filed within the prescriptive period of two (2) years from the close of the taxable quarter when the relevant sales which are attributable to its zero-rated sales were made.

Applying the foregoing, since the subject of the instant claim covers the 2nd quarter of 2006, petitioner had until June 30, 2008, within which to file its administrative claim for refund. A perusal of the records shows that petitioner filed its administrative claim on January 10, 2007 for the refund of its unutilized input VAT for the 2nd quarter of 2006, with the One Stop-Shop Center of the Department of Finance. Evidently, petitioner's administrative claim was filed within the two-year prescriptive period.

However, notwithstanding the timely filing of the administrative claim, we are constrained to deny the present petition for having been filed late, way beyond the period prescribed in *Section 112 (C)* of the *NIRC of 1997, as amended,* which provides:

> "**SEC. 112. Refunds or Tax Credits of Input Tax.** —
>
> xxx xxx
>
> (C) *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 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."

Pursuant to the above provision, the Commissioner has one hundred twenty (120) days from the submission of supporting documents to decide the claim for refund. In case of full or partial denial, or inaction, the taxpayer may appeal to this Court, within thirty (30) days from receipt of the decision or from the lapse of the 120-day period.

Thus, counting from January 10, 2007, which was presumably the date when petitioner submitted supporting documents, together with its application for refund, the CIR had 120 days, or until May 10, 2007, within which to decide the claim. Within 30 days from the lapse of the 120-day period, or from May 11, 2007 until June 9, 2007, petitioner should have elevated its claim for refund to this Court. Therefore, petitioner had until June 9, 2007 within which to elevate its claim to this Court on the ground of respondent's inaction. However, records show that petitioner filed the present Petition for Review on June 27, 2008 only, which is more than one (1) year late or 384 days, to be exact, way beyond the prescribed period.

It bears stressing that petitioner cannot now raise the timeliness of its judicial claim based on its compliance with *Section 229 of the NIRC of 1997, as amended*, as the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation* (*565 SCRA 172-173)* categorically ruled that taxpayers cannot avail of the provisions of either *Sections 204(C)*

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or 229 as regards the refund of any unutilized creditable input VAT. Both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes. A refund of unutilized input VAT is not an erroneously, illegally, or wrongfully collected tax.

More importantly, the Supreme Court had already settled the relevance of the prescribed periods under *Section 112* in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., supra,* to wit:

> ***"The filing of the judicial claim was premature***
>
> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent' claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
>
>> SEC. 112. Refund or Tax Credits of Input Tax. –
>>
>> 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 Subsection (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

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> part of the Commissioner to tax on the application within the period prescribed above, the taxpayer affected may, within (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 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.

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 the 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 xxx 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 Subsection (A) and (B)' within which to decide on the claim.
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> ***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.***
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> With regard to Commissioner of Internal Revenue vs. Victorias Milling, Co., Inc. (22 SCRA 12) relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.
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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.***" *(Emphasis ours)*

Evidently, the period of 30 days under *Section 112 of the NIRC of 1997, as amended*, is mandatory and jurisdictional. Thus, when petitioner filed the instant Petition for Review with this Court on June 27, 2008, clearly the petition was filed way beyond the 30-day prescribed period to appeal.

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Accordingly, petitioner's failure to comply with the 30-day statutory period barred the appeal and warrants the dismissal of the petition, as the Court has not acquired jurisdiction over the same.

In the case of *Ker and Company, Ltd. vs. Court of Tax Appeals (4 SCRA 163; also cited in Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, 491 SCRA 221),* the Supreme Court ruled that while the right to appeal a decision of the Commissioner to the CTA is merely a statutory remedy, nevertheless, the requirement that it must be brought within 30 days is jurisdictional.

For all the foregoing, we have no alternative, but to dismiss the instant Petition for Review for having been filed 384 days late, way beyond the 30-day prescribed period; thus, this Court has not acquired jurisdiction over the same.

In view of the above conclusion, we find no need to discuss petitioner's compliance with the other requisites for refund of input taxes on domestic purchases and importations of goods attributable to its zero-rated sales, for being moot and academic.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for having been filed late.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

AMELIA R. COTANGCO- MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice