REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

MINDANAO I GEOTHERMAL PARTNERSHIP,
Respondent.

C.T.A. EB NO. 630
(C.T.A. CASE NO. 7506)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

JAN 1 2 2011 4:20 pm

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DECISION

PALANCA-ENRIQUEZ, J.:

A taxpayer is entitled to a refund either by authority of a statute expressly granting such right, privilege, or incentive in his favor, or under the principle of *solutio indebiti* requiring the return of taxes erroneously or illegally collected. In both cases, a taxpayer must prove not only his entitlement to a refund, but also his compliance with the procedural due process as non-observance of the prescriptive periods within which to file the administrative and the judicial claims would result in the denial of his claim. *(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 the Commissioner of Internal Revenue (hereafter "petitioner CIR") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals), as amended, in relation to Rule 43 of the 1997 Rules of Civil Procedure, as amended*, praying for the reversal of the Decision dated May 12, 2009 and for partial reversal of the Amended Decision dated April 30, 2010 rendered by the Former First Division of this Court in C.T.A. Case No. 7506, the respective dispositive portions of which read, as follows:

> "WHEREFORE, petitioner's claim for issuance of tax credit certificate is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner in the reduced amount of P2,279,821.99, representing its

excess and unutilized input VAT for the period covering the third and fourth quarters of taxable year 2004.

SO ORDERED."

"WHEREFORE, premises considered, respondent's Motion for Partial Reconsideration is hereby DENIED for lack of merit; while petitioner's Motion for partial Reconsideration is hereby PARTIALLY GRANTED. This court's Decision dated May 12, 2009 is hereby MODIFIED. Accordingly, respondent is hereby ORDERED TO ISSUE A TAX CREDIT CERTIFICATE in the amount of P5,278,036.06 in favor of petitioner, representing its unutilized input VAT for the second, third, and fourth quarters of taxable year 2004.

SO ORDERED.'

THE PARTIES

Petitioner is the duly appointed Commissioner of Internal Revenue, with exclusive and original jurisdiction to interpret the provisions of *RA 8424, as amended,* and other tax laws, subject to review by the Secretary of Finance, and to decide disputed assessments, refunds of internal revenue taxes, fees and charges, penalties imposed in relation thereto, or other matters arising under the Tax Code or other laws or portions thereof administered by the Bureau of Internal Revenue, subject to the appellate

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jurisdiction of the Court of Tax appeals; with office address at the 5/F, BIR National Office Building, Agham Road, Diliman, Quezon City, where she may be served with summons and other court processes.

On the other hand, respondent Mindanao I Geothermal Partnership (hereafter "respondent Mindanao I") is a partnership duly registered with the Securities and Exchange Commission, with principal address at 36^{th} Floor, Tower I, Enterprise Center, 6766 Ayala Avenue, Makati City.

THE FACTS

The antecedent facts, as found by the Former First Division, are as follows:

> "Petitioner entered into a Build-Operate-Transfer contract with the Philippine National Oil Company-energy Development Corporation (PNOC-EDC) for the finance, design, construction, testing, commissioning, operation, maintenance, and repair of a 47-megawatt geothermal power plant, provided that PNOC-EDC shall supply and deliver steam to petitioner at no cost. In turn, petitioner shall convert the steam into electric capacity and energy for PNOC-EDC and shall deliver the same to the National Power Corporation (NPC) for and in behalf of PNOC-EDC. Its 47-megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Private Sector Generation Facility, pursuant to the provision of the Executive Order No. 215 and evidenced by Certificate of Accreditation No. 95-03-07. In order to facilitate the operations and management of the said geothermal

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plant, it entered into an Operations and Maintenance Agreement with Marubeni Energy Services Corporation (MSEC).

For the second to fourth quarters of taxable year 2004, petitioner filed its Quarterly VAT Returns on the following dates:

Quarter	Date Filed	Date Amended
Second	July 22, 2004	June 22, 2005
Third	October 22, 2004	June 22, 2005
Fourth	January 25, 2005	June 22, 2005

On August 16, 2005, petitioner filed a letter –request for the issuance of a tax credit certificate with the BIR Large Taxpayers Service arising from its excess and unutilized creditable input taxes in the amount of P9,470,500.39, accumulated from the first to fourth quarters of taxable year 2004. However, said application for issuance of tax credit certificate remains unacted upon by respondent despite the lapse of the one hundred twenty (120)-day period provided under Section 112 (D) of the National Internal Revenue Code (NIRC) of 1997, as amended.

On July 21, 2006, petitioner filed the instant Petition for Review, praying for the issuance of tax credit certificate in the amount of P6,199,278.90 instead of the amount of P9,470,50.39, which covers merely the second to fourth quarters of the taxable year 2004.

On September 18, 2006, respondent (now petitioner) filed his Answer interposing the following counter-arguments:

> '4. Petitioner's claim for refund is subject to administrative investigation by the Bureau;

> 5. Petitioner must prove that it paid the alleged VAT input Taxes for the period in question;
>
> 6. Petitioner must prove that the same alleged input VAT was not utilized against any output VAT liability;
>
> 7. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112 (A) of the Tax Code of 1997;
>
> 8. Petitioner must prove that the alleged VAT input taxes for the period in question are attributable to its alleged VAT zero-rated sales;
>
> 9. Petitioner must prove that the claim was filed within the period prescribed by law;
>
> 10. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;
>
> 11. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption of taxation."

After due proceedings, on May 12, 2009, the Former First Division rendered its decision in the terms earlier set forth.

On June 4, 2009, respondent Mindanao I filed a "Motion for Partial Reconsideration" of the Decision dated May 12, 2009, while on June 5, 2009, the CIR filed her "Motion for Partial Reconsideration".

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On June 26, 2009, the Former First Division ordered respondent Mindanao I to comment on CIR'S Motion for Partial Reconsideration; afterwich, both motions shall be deemed submitted for resolution.

On July 6, 2009, respondent Mindanao I filed its "Comment/Opposition (To Respondent's Motion for Partial Reconsideration)".

On April 30, 2010, the Former First Division rendered an Amended Decision denying CIR's "Motion for Partial Reconsideration" and partially granting respondent Mindanao I's "Motion for Partial Reconsideration". Accordingly, the CIR was ordered to issue a tax credit certificate in favor of respondent Mindanao I in the amount of P5,278,036.06, representing its unutilized input VAT for the second, third, and fourth quarters of taxable year 2004.

On June 7, 2010, petitioner CIR filed the instant Petition for Review before this Court *En Banc*, raising the sole issue of:

ISSUE

WHETHER OR NOT THE HONORABLE COURT ERRED IN RULING THAT RESPONDENT IS ENTITLED TO REFUND OR ISSUANCE OF A TAX CREDIT

> CERTIFICATE IN THE AMOUNT OF TWO MILLION TWO HUNDRED SEVENTY NINE THOUSAND EIGHT HUNDRED TWENTY ONE AND 99/100 PESOS (P2,279,821.99) BECAUSE THE CLAIM WAS NOT FILED IN ACCORDANCE WITH THE PROCEDURE PRESCRIBED BY LAW.

Without necessarily giving due course to the Petition for Review, on June 23, 2010, We ordered respondent Mindanao I to file its comment, not a motion to dismiss, within ten (10) days from notice.

On July 8, 2010, respondent filed its "Comment [To Petitioner's Petition for Review dated June 3, 2010]".

On July 29, 2010, the Court *En Banc* ordered both parties to file their simultaneous memoranda, within thirty (30) days from notice; afterwhich the petition shall be deemed submitted for decision.

On September 6, 2010, respondent Mindanao I filed its Memorandum, while on September 7, 2010, petitioner CIR filed a "Manifestation" stating that she is adopting her Petition for Review dated June 3, 2010 as her Memorandum. On October 14, 2010, the petition was deemed submitted for decision.

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Petitioner CIR's Arguments

Petitioner CIR alleges that on August 16, 2005, respondent Mindanao I filed its administrative claim for refund in the amount of P6,199,278.90, representing alleged accumulated excess input taxes attributable to its alleged VAT zero-rated revenue for the second to fourth quarters of 2004. Said claim was not acted upon with finality by petitioner CIR, until the lapse of the 120 days from August 16, 2005 or until December 14, 2005. Thus, on July 21, 2006, respondent Mindanao I filed with this Court its judicial claim for refund by way of a Petition for Review. However, pursuant *to Section 112 (D) of the NIRC of 1997, as amended*, respondent Mindanao I has 30 days from the expiration of the 120- day period to appeal to the CTA the unacted claim for refund; and respondent had until January 13, 2006 to appeal. Hence, the Petition for Review was filed on July 21, 2006, way beyond the period prescribed by law; thus, this Court cannot acquire jurisdiction over the instant case.

Petitioner CIR further alleges that respondent Mindanao I failed to submit complete documents to substantiate its administrative claim for refund, and the submission of complete documents in support of its

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application for refund is a requirement established by law and jurisprudence. Hence, respondent's failure to comply with the duly mandated legal requirements in such claim for refund/tax credit warranted the denial by inaction of respondent's administrative claim.

Respondent Mindanao I's Counter-Arguments

Respondent Mindanao I counters that the judicial recourse within thirty days after the lapse of the 120-day period is only directory and permissive, and not mandatory nor jurisdictional, as long as said 30-day period is within the two year prescriptive period; that its judicial claim for refund filed on July 21, 2006 is within the two-year prescriptive period prescribed by *Section 229;* thus, said judicial claim was filed on time.

Respondent Mindanao I further argues that it was able to submit documents to substantiate its administrative claim for refund; that the BIR had all the opportunity to examine respondent's books of accounts and other accounting records; and it was able to satisfy the requirements necessary to prove its claim for tax refund/credit.

THE COURT *EN BANC'S* RULING

The petition is meritorious.

Section 112 of the NIRC of 1997, as amended, 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.
>
> 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

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> 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 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-quoted *Section 112 (A)*, a taxpayer may apply a claim for refund of unutilized input VAT payments not otherwise used for any internal revenue tax due with the BIR, within two years reckoned from the close of the taxable quarter when the relevant sales were made.

While the afore-quoted *Section 112 (C)* provides that the CIR 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 of the CIR, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

In the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., supra*, the Supreme Court categorically ruled:

> ***"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. –
> >
> > xxxx
> >
> > (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 part of the Commissioner to act 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

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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.

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.

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.

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."

Pursuant to the above ruling, respondent Mindanao I's administrative claim for refund for the second to fourth quarters of taxable year 2004 filed on August 16, 2005, is well within the two year prescriptive period.

Furthermore, pursuant to *Section 112 (C)* of the same Code, the CIR has 120 days from August 16, 2005 or until December 14, 2005 to decide respondent Mindanao I's administrative claim for refund. In this case,

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respondent Mindanao I's claim was not acted upon by petitioner CIR; thus, respondent Mindanao I has 30 days from December 14, 2005 or until January 13, 2006 to appeal to the CTA the CIR's inaction on its claim for refund.

Records show, however, that respondent Mindanao I filed its judicial claim for refund by way of a petition for review before this Court in Division on July 21, 2006 only, which is one hundred eighty nine (189) days way beyond the 30-day prescribed period to appeal.

Evidently, the Petition for Review in C.T.A. Case No. 7506 was filed 189 days late, thus, no jurisdiction was acquired by the CTA in Division. We have therefore, no alternative, but to dismiss the Petition for Review filed in C.T.A. Case No. 7506.

WHEREFORE, premises considered, the instant petition is hereby **GRANTED**. Accordingly, the Amended Decision dated April 30, 2010 rendered by the Former First Division of this Court in C.T.A. Case No. 7506 is hereby **REVERSED** and **SET ASIDE**, and another one is hereby entered dismissing the Petition for Review filed in C.T.A. Case No. 7506 for having been filed late.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with separate opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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