REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FORMER SECOND DIVISION

KEPCO PHILIPPINES CORPORATION, Petitioner, - versus - COMMISSIONER OF INTERNAL REVENUE, Respondent.	CTA CASE NO. 7628 Members: CASTAÑEDA, JR., *Chairperson* UY, *and* PALANCA-ENRIQUEZ, *JJ*. **Promulgated:** OCT 19 2010 1:58 p.m.

x- -x

DECISION

CASTAÑEDA, JR., *J*.:

This Petition for Review seeks the refund or issuance of a Tax Credit Certificate in the amount of P11,262,584.47, representing petitioner's unutilized input taxes incurred for the period January 1 to October 31 of taxable year 2005, attributable to purchases of goods and services relative to its production and sales of electricity to the National Power Corporation (NPC).

Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at the 18th Floor Citibank Tower, 8741 Paseo de Roxas, Salcedo Village, Makati City. Petitioner is likewise a Value Added Tax (VAT)-registered taxpayer engaged in the production and sale of electricity (as an independent power producer), and sells electricity solely to the NPC as its only customer. [1]

Respondent is the duly appointed Commissioner of Internal Revenue, vested under appropriate laws with authority to carry out all functions, duties and responsibilities of the said Office, including, *inter alia*, the power to decide, approve and grant refunds and/or tax credits of erroneously paid or illegally collected internal revenue taxes and holds office at the 5th Floor, Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.[2]

For the period of January to October of the calendar (taxable) year 2005, petitioner incurred expenses representing purchases of goods and services for which it incurred an input VAT in the total amount of P11,262,584.47. The aforementioned expenses represent the costs incurred by petitioner as it produced and sold electricity to the NPC from January 1, 2005 to October 31, 2005.[3]

On 22 December 2004, petitioner filed with respondent an application for zero-rated sales for its sale of electricity for the taxable year 2005, which application was duly approved. On 28 October 2005, petitioner filed with respondent, through Revenue District Office No. 50, the appropriate claim for refund of the input VAT incurred for the first three (3) quarters of calendar

---

[1] Paragraph 1, Joint Stipulation of Facts and Issues ("JSFI"), Docket, p. 76.
[2] Paragraph 2, JSFI, Docket, p.76.
[3] Paragraph 1, Petition for Review, (Petition), Docket, p. 3.

(taxable) year 2005. On 07 December 2007,[4] petitioner also filed with respondent, through Revenue District Office No. 50, the appropriate claim for refund of the input VAT incurred for the month of October 2005.[5]

Petitioner timely filed with respondent its quarterly VAT returns for the first three (3) quarters of the taxable year 2005 as well as the monthly returns for October of the taxable year 2005.[6]

To date, respondent has not acted on petitioner's claims for refund nor issued a TCC relative to said claims. Hence, this Petition for Review was filed on April 25, 2007.

In the Answer[7] filed on July 16, 2007, respondent alleged the following Special and Affirmative Defenses:

> "6. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.
>
> 7. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.
>
> 8. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit.
>
> 9. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the 1997 Tax Code including Revenue Regulations No. 5-87 as amended by Revenue Regulation Nos. 3-88 and 7-95, as amended.
>
> 10. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation **(Commissioner of Internal Revenue vs.**

[4] This should have been 07 December 2005 as per Exhibits "I" and "J," Petitioner's Formal Offer Of Evidence (FOE).
[5] Paragraph 3. JSFI, Docket, p. 76.
[6] Paragraph 6, JSFI, Docket, p. 77.
[7] Docket, pp. 50-52.

> **Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95)** and as such, they are looked upon with disfavor **(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)**."

On November 6, 2009, the case was submitted for decision upon petitioner's submission of its Memorandum on November 3, 2009, *sans* respondent's Memorandum.

The issues[8], as jointly stipulated by the parties, are the following:

> "1. Whether or not petitioner has an unutilized input VAT in the amount of P11,262,584.47 for the year 2005.
>
> 2. Whether or not petitioner's unutilized input VAT on domestic purchases of goods and services for the year 2005 have been applied against its output taxes for the succeeding taxable quarters/years.
>
> 3. Whether or not the sale of electricity by petitioner solely to the NPC, which respondent admits to be exempt from the payment of all taxes, whether direct or indirect, is subject to a VAT rate of zero percent (0%) or otherwise called a zero-rated transaction.
>
> 4. Whether or not the petitioner's claim for refund/tax credit of unutilized input VAT attributable to its zero-rated sales for the year 2005 is substantiated by documentary evidence.
>
> 5. Whether or not petitioner is entitled to the refund of the amount of P11,262,584.47 representing the input VAT incurred for the period of January to October 2005 from its sale of electricity solely to the NPC."

The issues stipulated by the parties may be summed up into one issue:

"Whether or not, based on the evidence presented, petitioner is entitled to refund or issuance of a tax credit certificate worth P11,262,584.47, representing its unutilized input VAT incurred for the period January 1 to

---

[8] JSFI, Docket, pp. 78-79.

October 31 2005, from its purchases of goods and services attributable to the sale of electricity solely to the NPC."

Pertinent to this case is Section 112 (A) of the NIRC of 1997, as amended, which is quoted hereunder for ready reference, thus:

> **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.

From the foregoing, in order to be entitled to refund or issuance of tax credit certificate of input VAT directly attributable to zero-rated or effectively zero-rated sales, petitioner must comply with the following requisites:

(1) there must be zero-rated or effectively zero-rated sales;
(2) that input taxes were incurred or paid;
(3) that such input taxes are attributable to zero-rated or effectively zero-rated sales;
(4) that the input taxes were not applied against any output VAT liability; and
(5) that the claim for refund was filed within the two-year prescriptive period. Jr

This Court finds it appropriate to determine first the timeliness of the filing of the instant claim.

A. Reckoning of the two-year prescriptive period in claiming a refund/credit of unutilized input VAT.

In the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.),* [9] (*Mirant* case) the Supreme Court ruled that the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under *Section 112(A) of the NIRC of 1997* starts 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.

We find the *Mirant* case applicable to the instant case.

Petitioner's claim pertains to unutilized input VAT incurred for the period January 1, 2005 to October 31, 2005. Reckoned from March 31, 2005, June 30, 2005, September 30, 2005 and December 31, 2005, the close of each taxable quarter covering the year 2005, petitioner had until April 2, 2007[10], July 2, 2007[11], October 1, 2007[12] and December 31, 2007, respectively, within which to file its claim for refund. Below are the dates pertinent to the present case:

---

[9] G.R. No. 172129, September 12, 2008, 565 SCRA 154
[10] March 31, 2007, fell on a Saturday.
[11] June 30, 2007, fell on a Saturday.
[12] September 30, 2007, fell on a Sunday.

Table 1

<table>
<tr><th rowspan="2">Taxable Quarter/Month (Year 2005)</th><th rowspan="2">Close of Taxable Quarter</th><th rowspan="2">End of Two(2) Year Period</th><th colspan="2">Date of Filing</th><th rowspan="2">Amount of Claim</th></tr>
<tr><th>Administrative Claim</th><th>Judicial Claim</th></tr>
<tr><td>1st</td><td>03/31/05</td><td>04/02/07</td><td rowspan="3">10/28/05[13]</td><td rowspan="4">04/25/07</td><td>P 2,922,043.57</td></tr>
<tr><td>2nd</td><td>06/30/05</td><td>07/02/07</td><td>4,177,091.63</td></tr>
<tr><td>3rd</td><td>09/30/05</td><td>10/01/07</td><td>3,231,523.91</td></tr>
<tr><td>October</td><td>12/31/05</td><td>12/31/07</td><td>12/07/05[14]</td><td>931,925.36</td></tr>
<tr><td></td><td></td><td></td><td></td><td>TOTAL</td><td>P 11,262,584.47</td></tr>
</table>

As can be seen from the above table, petitioner's administrative claim for refund of input VAT for the first, second, third quarters was filed on October 28, 2005 which is well within the two-year prescriptive period. As for the month of October 2005, the administrative claim was filed on December 7, 2005 which is also within the two-year prescriptive period. Both administrative claims were timely filed.

B. Compliance with the 120-30 day period under Section 112(D) of NIRC of 1997 is crucial in filing a judicial claim.

Although the administrative claims for refund of input VAT were timely filed, We deny petitioner's judicial claim for having been filed in violation of Section 112 (D) of the NIRC of 1997,[15] which provides:

> **Sec. 112. Refunds or Tax Credits of Input Tax. –**
>
> 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

[13] Exhibits "G" & "H", Petitioner's FOE.
[14] Exhibits "I" & "J", Petitioner's FOE.
[15] Prior to the amendment under Republic Act (RA) No. 9337.

> 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.-
>
> xxx xxx xxx

In applying the above-cited provision, the Supreme Court in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.,*[16] ruled that 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 Court of Tax Appeals (CTA). As pointed out in the said decision, **the 120-day period is crucial in filing an appeal with the CTA.** The pertinent portions of the decision said:

> 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, *gr*

---

[16] G.R. No. 184823, October 6, 2010.

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 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 x x x 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, 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 v. Victorias Milling, Co., Inc.* 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.

xxx xxx xxx xxx

The Supreme Court, being the ultimate arbiter of justifiable controversy and whose decisions all other courts should take bearings,[17] We are bound to apply the 120-30 day rule to the present case as it is on all fours with the above-cited case.

As shown in Table 2 below, the counting of the 120-day period shall be reckoned from October 28, 2005, presumably the same date of submission of complete documents in support thereof absent any evidence contrary thereto. The last day of the 120-day period was on February 25, 2006. Petitioner has 30 days or until March 27, 2006 within which to appeal the inaction of the Commissioner of Internal Revenue (CIR) before the CTA. The judicial claim was filed on April 25, 2007 or more than 30 days from the CIR's inaction.

As for the month of October, administrative claim was filed on December 7, 2005. As shown in Table 2 below, the counting of the 120-day period shall be reckoned from December 7, 2005, presumably the same date of submission of complete documents in support thereof absent any evidence contrary thereto. The last day of the 120-day period was on April 6, 2006. Petitioner has 30 days or until May 8, 2006[18] within which to appeal the inaction of the CIR before the CTA. The judicial claim was filed on April 25, 2007 or more than 30 days from the CIR's inaction.

---

[17] *Commissioner of Internal Revenue vs. Michel J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of *GSIS vs. Court of Appeals*, 334 Phils. 163, 175, 266 SCRA 187 (1997).
[18] May 6, 2006, fell on a Saturday.

<u>Table 2</u>

<table>
<tr><th rowspan="2">Taxable Quarter/Month (Year 2005)</th><th rowspan="2">Close of Taxable Quarter</th><th rowspan="2">End of Two(2) Year Period</th><th colspan="2">Date of Filing</th><th rowspan="2">End of the 120-day period from date of submission of complete documents in support of the administrative claim</th><th rowspan="2">End of the 30-day period from expiration of the 120-day period (in case of inaction which is the prevailing circumstance herein)</th></tr>
<tr><th>Administrative Claim</th><th>Judicial Claim</th></tr>
<tr><td>1st</td><td>03/31/05</td><td>04/02/07</td><td rowspan="3">10/28/05[19]</td><td rowspan="4">04/25/07</td><td rowspan="3">02/25/06</td><td rowspan="3">03/27/06</td></tr>
<tr><td>2nd</td><td>06/30/05</td><td>07/02/07</td></tr>
<tr><td>3rd</td><td>09/30/05</td><td>10/01/07</td></tr>
<tr><td>October</td><td>12/31/05</td><td>12/31/07</td><td>12/07/05[20]</td><td>04/06/06</td><td>05/08/06 [21]</td></tr>
</table>

In view of the foregoing, the judicial claim for the first to third quarters of 2005 and for the month of October 2005 was filed beyond the period provided under Section 112 (D) of the NIRC of 1997. The late filing of petitioner's claim for refund/credit of input VAT before this Court warrants a dismissal inasmuch as no jurisdiction was acquired by the Court. Accordingly, the Court finds it no longer necessary to discuss petitioner's compliance with the other requisites for refund of input taxes attributable to purchases of goods and services relative to its production and sales of electricity to the NPC.

WHEREFORE, premises considered, the Petition for Review is hereby DISMISSED for being filed out of time.

SO ORDERED.

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

---

[19] Exhibits "G" & "H", Petitioner's FOE.
[20] Exhibits "I" & "J", Petitioner's FOE.
[21] *Supra*, note 18.

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

Juanito C. Castañeda, Jr.

JUANITO C. CASTAÑEDA, JR.
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