REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FORMER SECOND DIVISION

CE LUZON GEOTHERMAL POWER COMPANY, INC., *Petitioner*,	**C.T.A. CASE NO. 7738**
	Members:
-versus-	CASTAÑEDA, JR., Chairperson, UY, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: NOV 02 2010 1:35 p.m.

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AMENDED DECISION

PALANCA-ENRIQUEZ, J.:

This resolves:

1) respondent Commissioner of Internal Revenue's ("CIR") "Motion for Reconsideration" of the Decision promulgated on July 1, 2010, filed on July 22, 2010; and

2) petitioner CE Luzon Geothermal Power Company, Inc.'s ("CE Luzon") "Comment (Re: Commissioner of Internal Revenue's Motion for Reconsideration dated 21 July 2010") filed on August 17, 2010.

Respondent's "Motion for Reconsideration" is anchored on the ground that this Court erred in granting petitioner's claim for refund in the amount of P24,010,613.61, representing unutilized input VAT for taxable year 2006 since (1) petitioner failed to submit complete documents for its administrative claim for refund; and (2) the judicial claim was filed beyond the period prescribed by law; hence, this Court has no jurisdiction.

In its "Comment (Re: Commissioner of Internal Revenue's Motion for Reconsideration dated 21 July 2010)", petitioner counters that (1) non-submission of complete documents does not bar petitioner from resorting to judicial review; and (2) its judicial claim for refund was timely filed, as *Section 112 (D) of the NIRC of 1997, as amended*, must be correlated with *Section 229 of the same Code.*

The principal issue in the instant motion is whether or not petitioner's judicial claim for refund was timely filed.

After a careful re-study of the facts and pertinent law of the case, and pursuant to the recent ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia,* *Inc., G.R. No. 184823, October 6, 2010*, we find merit in respondent's "Motion for Reconsideration".

While *Section 112 of the NIRC of 1997, as amended*, is the provision applicable to claims for refund/issuance of a TCC of unutilized input tax, *subsection (A) thereof* pertains solely to the administrative remedy. On the other hand, *subsection (C) thereof* pertains to the judicial remedy. This is clear when *Section 112(C)* made reference to *Subsection (A)* thereof, as to the application of claim for refund with the BIR, and categorically prescribed a period of 30 days within which to appeal the decision or the unacted claim with the Court of Tax Appeals ("CTA"), to wit:

> "**SEC. 112. Refunds 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) 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-quoted provision, the CIR has one hundred twenty (120) days from the submission of supporting documents to decide the claim for refund. In case the claim was denied in full or part, or in case the CIR failed to act within the 120-day period, 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.

Hence, petitioner's contention that the two-year period prescribed in *Section 229 of the NIRC of 1997, as amended*, cannot simply be ignored, notwithstanding the 120-day period prescribed in *Section 112 (C) of the same code* is without legal basis. In the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, 565 SCRA 172-173*, the Supreme Court ruled that taxpayers cannot avail of the provisions of either *Sections 204(C) or 229 of the NIRC of 1997, as amended*, 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.

Finally, in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, supra, the Supreme Court finally settled the issue, as follows:

> "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 the 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.
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> 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 this case, records show that on September 11, 2007, petitioner applied for administrative claim for refund/issuance of a TCC of unutilized input VAT in the amount of P24,673,243.53 with the BIR

Large Taxpayers Audit and Investigation Division I. From September 11, 2007, which is also the date petitioner submitted supporting documents, together with the aforesaid application for refund, the CIR has 120 days, or until January 9, 2008, within which to decide the claim. Within 30 days from the lapse of the 120-day period, or from January 10, 2008 until February 8, 2008, petitioner should have elevated its claim for refund to the CTA. However, petitioner filed its Petition for Review with this Court only on March 14, 2008, which is 35 days way beyond the 30-day prescribed period to appeal.

In the case of *Ker and Company, Ltd. vs. Court of Tax Appeals, 4 SCRA 163*, 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. Settled is the rule that if a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requisite is jurisdictional and failure to comply therewith may be raised in a motion to dismiss *(Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, 491 SCRA 221)*.

Equally settled is the rule that courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings *(Ace Publications, Inc., vs. Commissioner of Customs and the Collector of Customs, 11 SCRA 153)*.

In fine, the filing of petitioner's Petition for Review in the instant case, 35 days way beyond the 30-day prescribed period to appeal warrants the dismissal of the Petition, inasmuch as no jurisdiction was acquired by the CTA.

WHEREFORE, premises considered, respondent CIR's "Motion For Reconsideration" is hereby **GRANTED.** The Decision dated July 1, 2010 is hereby **RECALLED** and **SET ASIDE**, and a new one is hereby entered **DISMISSING** petitioner C.E. Luzon's Petition for Review in the instant case for being filed late.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

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

ERLINDA P. UY
Associate Justice

ATTESTATION

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

ERNESTO D. ACOSTA
Presiding Justice