REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PROCTER & GAMBLE ASIA, PTE. LTD., Petitioner,	C.T.A. CASE NO. 7747
	Members:
- versus -	ACOSTA, *Chairperson* UY, *and* FABON-VICTORINO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 13 2011 3:13pm

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DECISION

***Fabon-Victorino, J.*:**

This case involves a claim for refund or issuance of a tax credit certificate (TCC) in the amount of Php50,041,975.77, allegedly representing input VAT attributable to zero-rated sale for the periods covering January 1 to March 31, 2006 and April 1 to June 30, 2006, filed by petitioner Procter & Gamble Asia, Pte. on March 31, 2008.

Petitioner alleges that it is an existing foreign corporation duly organized in Singapore and with a Regional Operating Headquarter (ROHQ) in the Philippines located at the 18/F Petron

Megaplaza, 358 Sen. Gil Puyat Ave., Makati City. It provides management, marketing, technical and financial advisory, and other qualified services to related companies as indicated in its Certificate of Registration and License issued by the Securities and Exchange Commission (SEC). [1] It is a VAT-registered taxpayer with Certificate of Registration No. 9RC0000071787.[2]

Respondent, on the other hand, is a duly appointed Commissioner of the Bureau of Internal Revenue(BIR), empowered to act on administrative claims for refund/tax credit and holds office at BIR National Office Building, Diliman, Quezon City.

Petitioner renders services to its affiliates in and outside the Philippines under Service Agreements executed for that purpose.[3] It bills its local clients through the issuance of BIR registered debit/credit memos while those served abroad, through BIR-registered VAT zero-rated debit/credit memos.[4]

As a service provider and a VAT-registered entity, petitioner files its Quarterly Value-Added Tax (VAT) Returns.

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[1] Exhibit "A"; Paragraph 1, Admitted Facts by Petitioner and Respondent, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 202.
[2] Exhibit "B".
[3] Par. 8, Petition for Review, Docket, p. 4.
[4] Par. 5, Petition for Review, Docket, p. 3.

On April 25, 2006 and July 25, 2006, petitioner filed its Quarterly VAT Returns for the quarters ended March 31, 2006 and June 30, 2006, respectively.[5] They reflected refundable input VAT of Php17,818,682.69 for the quarter ended March 31, 2006 and Php32,223,293.08 for the quarter ended June 30, 2006, or a sum of Php50,041,975.77.

On December 21, 2007, petitioner filed an Application for Tax Credits/Refunds and a letter request with the BIR Revenue District Office (RDO) No. 49 for its alleged unutilized input VAT attributable to its zero-rated sales covering the periods January 1 to March 31, 2006 and April 1 to June 30, 2006.[6]

On March 31, 2008, petitioner filed the instant Petition for Review hinged on respondent's alleged inaction on its administrative claim for refund or tax credit.

In her Answer posted on April 25, 2008, respondent moves to dismiss with the following Special and Affirmative Defenses as grounds therefor:

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[5] Exhibits "G" and "J".
[6] Exhibits "D" and "D-1".

"3. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;

4. Petitioner's alleged claim for issuance of tax credit certificate is still subject to administrative routinary investigation/examination by the respondent's Bureau;

5. Taxes paid and collected are presumed to have been made in accordance with law, hence, not refundable.

6. Petitioner's claim for refund or issuance of tax credit certificate in the aggregate amount of **P50,041,975.77**, as alleged unutilized input VAT paid attributable to its zero-rated sales of goods and services for the period covering January 1 to March 31, 2006 and April 1 to June 30, 2006 were not fully substantiated by proper documents, such sales invoices, official receipts and others.

7. In an action for refund/credit, the burden of proof is on the petitioner to establish its right to the claimed refund and failure to adduce sufficient proof is fatal to its claim.

8. Petitioner's sales of goods and services to various alleged clients/affiliates do not qualify as zero-rate VAT.

9. The amount subject of the claim for refund of petitioner do not pertain in full to its input VAT attributable to its zero-rated sales of goods and services for the period covering January 1 to March 31, 2006 and April 1 to June 30, 2006.

10. Petitioner failed to comply with the substantiation requirements under BIR Revenue Regulations No. 7-95 in relation to Section 113 and 237 of the Tax Code.

11. It is incumbent upon the petitioner to show that it has complied with the provisions under Section 204 (c) in

relation to Section 229 of the Tax Code. Otherwise, its failure to prove the same is fatal to its claim for refund.

12. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation ***(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)*** and as such, they are looked upon with disfavor ***(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)***."

On June 19, 2008, the parties filed their Joint Stipulation of Facts and Issues,[7] after filing their respective Pre- Trial Briefs.[8] The same was approved on June 24, 2008[9].

During the trial, petitioner presented four (4) witnesses, namely: 1) Maria Nora Manalo, its affiliate's Tax Manager; 2) Sandeep Devgon, its Associate Director for Financial Services and Solutions Department; 3) Teresita O. Sugay, Director, CitiService and Client Delivery Head, Global Transaction Services Group of Citibank N.A., Philippine Branch; and 4) Katherine Constantino, the Court Commissioned Independent Certified Public Accountant (ICPA).

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[7] Docket, pp. 184-186; 202-206.
[8] Docket, pp. 172-183.
[9] Docket, p. 200.

Ms. Maria Nora Manalo testified that she is a Tax Manager in one of petitioner's affiliate authorized to file petitioner's tax returns and pay the tax due thereon, if any, through the Electronic Filing and Payment System (EFPS) of the BIR. She was in charge of the preparation and filing of petitioner's monthly and quarterly VAT declarations for the period January 2006 to June 2006 and subsequent quarters with the BIR. The figures in the monthly and quarterly VAT declarations for the period January 2006 to June 2006 were from the records of petitioner's Accounting Group.

She further testified that the amount of the subject input tax was arrived at based on the proportion of zero-rated sales to total sales for the quarter since input taxes paid for the said quarter cannot be directly and entirely attributed to either zero-rated sales or taxable sales. The creditable input tax for the period January 2006 to March 2006 was not applied against any output tax liability of petitioner during the same period or in the succeeding months or quarters. The same is true for the creditable input tax for the period April 2006 to June 2006.

Petitioner's Associate Director For Financial Services and Solutions Department Sandeep Devgon testified that he is the custodian of Service Agreements that petitioner executed with its affiliates. For the period January 2006 to June 2006, petitioner executed about thirty (30) Service Agreements with its affiliates[10] to provide the following: 1) Accounting and Financial Reporting Services; 2) Employee Services; 3) Purchases; 4) Business Intelligence Services; 5) Information Technology Business Solution; 6) Workplace Services; and 7) Other Services. In consideration thereof, petitioner was paid a service fee equal to all net costs and expenses incurred, either directly or indirectly, plus percentage of mark up. Foreign affiliates pay in acceptable foreign currency while the local affiliates in Philippine pesos. The Service Agreements entered into governed the transactions which gave rise to petitioner's claim for refund or issuance of tax credit certificate.

The third witness Teresita O. Sugay testified that her employer Citibank, N.A., Philippine Branch is the depository bank of petitioner in which it maintains both peso and dollar accounts. The Bank issued two (2) Certifications both dated August 20, 2008 - one confirming inward remittances in favor of petitioner under United States Dollar (USD) Account No. 0/602585/026 and the other confirming outward remittances under the same USD

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[10] Exhibits "S-1" to S-30".

current account. The inward remittances in foreign currency transmitted by Procter & Gamble Companies abroad through Citibank branches or offices outside the Philippines or through correspondent foreign banks were verified/confirmed and credited to petitioner's USD current account with Citibank N.A., Philippine Branch. Outward remittances, on the other hand, were foreign currency amounts remitted by petitioner to other Procter & Gamble entities outside the Philippines.

ICPA Katherine O. Constantino declared that she was commissioned by the Court to perform audit functions in relation to the present claim for refund or issuance of tax credit certificate. Based on her examination and validation of petitioner's pertinent documents, the latter's claim should be adjusted from Php50,041,975.77 to Php44,730,622.46.

On July 29, 2009, the Court, acting on petitioner's Formal Offer of Exhibits[11] *sans* any comment/opposition thereto from respondent, admitted the exhibits offered except Exhibits "Y", "Z", "EE", "FF", "GG", "KK", "LL", "MM", "NN", "OO", "PP", and "ZZ" for failure of the ICPA to examine and certify that they were the original or certified true copies of the purported documents.

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[11] Docket, pp. 400-434.

Exhibits "AA-1" to "AA-28", "DD", "QQ-173", "QQ-174", "XX-1" to "XX-4", "YY", and "AAA" were denied admission as well for being mere photocopies.[12]

On August 20, 2009, petitioner moved 1) for the reconsideration of the June 29, 2009 Resolution; 2) to recall the Court commissioned ICPA; and 3) for leave to admit attached Supplemental Offer of Evidence.

On October 9, 2009, the Court partly granted petitioner's Omnibus Motion filed on August 20, 2009[13], allowing the ICPA to testify further and certify Exhibits "Y", "Z", "EE", "FF", "GG", "KK", "LL", "MM", "NN", "OO", "PP", "ZZ", "AA-1" to "AA-28", "DD", "XX-1" to "XX-4", "YY", and "AAA". In the same Resolution the Court admitted Exhibits "QQ-175" and "TT-126" to "TT-225" but still denied Exhibits "QQ-173" and "QQ-174".[14]

On February 1, 2010, the Court admitted Exhibits "Y", "Z", "EE", "FF", "GG", "KK", "LL", "MM", "NN", "OO", "PP", "ZZ", "AA-1" to "AA-28", and "XX-1" to "XX-4". However, Exhibits "DD",

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[12] Docket, pp. 436-438.
[13] Docket, pp. 444-450.
[14] Docket, pp. 458-460.

"YY", and "AAA" were denied admission being mere photocopies of the purported documents.[15]

On March 11, 2010, respondent submitted the case for decision without presentation of evidence alleging that petitioner's application for refund was still pending investigation.[16]

On July 26, 2010, the instant Petition for Review was submitted for decision after the parties submitted their respective memorandum.[17]

THE ISSUES

In their Joint Stipulation of Facts and Issues[18], the parties listed the following the issues for resolution, to wit:

> "1.) Whether or not petitioner's sales of services to affiliates abroad who are not doing business in the Philippines in the amounts of **Php490,326,997.57** and **Php650,419,092.62** for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006, respectively, are zero-rated for VAT

[15] Docket, pp. 468-469.
[16] Docket, p. 470.
[17] Docket, p.512.
[18] Docket, pp. 202-206

purposes under Section 108(B)(2) of the 1997 Tax Code.

2.) Whether or not petitioner has carried-over to the succeeding taxable quarter or quarters the alleged unutilized input VAT paid on goods and services attributable to its zero-rated sales, for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006 and applied the same amount in full to its output VAT liability for the said period, if any.

3.) Whether or not the amounts of **Php17,818,682.69** and **Php32,223,293.08** being claimed by petitioner as unutilized input VAT for the period covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006, respectively, or a total of **Php50,041,975.77** pertains in full to its zero-rated sales of services.

4.) Whether or not petitioner complied with the substantiation requirements prescribed under Revenue Regulation No. 7-95 in relation to Section 113 and 237 of the 1997 Tax Code.

5.) Whether or not petitioner is entitled to its claimed refund or issuance of tax credit certificate in the amounts of **Php17,818,682.69** and **Php32,223,293.08**, as alleged unutilized input VAT paid on goods and services attributable to its zero-rated sales, for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006, respectively, or a total of Php50,041,975.77."

From the foregoing stipulated issues, the parties are basically asking the Court to determine whether or not, based on the evidence adduced, petitioner is entitled to refund or issuance of TCC in the amount of PHP50,041,975.77, representing petitioner's alleged unutilized input VAT for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006.

THE COURT'S RULING

The petition is partly meritorious.

Petitioner's claim for refund or issuance of tax credit certificate or TCC is anchored on Sections 110 (B) and 112 (A) of the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337, which for ready reference are hereby quoted:

> "**SEC. 110. Tax Credits.** —
>
> (A) *Creditable Input Tax.* - xxx
>
> (B) *Excess Output or Input Tax.* — If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters: Provided, That the input tax inclusive of input VAT carried over from the previous quarter that may be credited in every quarter shall not exceed seventy percent (70%) of the output

VAT: Provided, however, That any input tax attributable to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112.

xxx xxx xxx

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 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: 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."

Thus, to be entitled to a refund or tax credit of input VAT due or paid attributable to zero-rated or effectively zero-rated sales, the taxpayer must comply with the following requisites, to wit:

> 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 tax liability; and
>
> 5) that the administrative claim for refund was filed within the two-year prescriptive period.

The Court will first determine the timeliness of the filing of the instant Petition for Review.

Under Section 112(A) of the NIRC of 1997, as amended, a taxpayer must file an application for refund or tax credit of unutilized or excess creditable input VAT attributable to its zero-rated or effectively zero-rated sales within **two (2) years after the close of the taxable quarter when the sales were made**.

This much was clarified by the Supreme Court in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.).*[19] The Final Arbiter ruled that the reckoning of the two-year prescriptive period for the filing of a claim for refund of input VAT under Section 112 (A) of the NIRC of 1997 commences 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.

In the instant petition, the subject of the claim for refund or issuance of a tax credit certificate is petitioner's unutilized or excess creditable input VAT, attributable to zero-rated or effectively zero-rated sales for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006 or the third and fourth quarters of the fiscal year ended June 30, 2006. Hence, counting from March 31, 2006 and June 30, 2006, the close of the third and fourth quarters, respectively, petitioner had until March 31, 2008 and June 30, 2008, respectively, within which to file its administrative claim with respondent. Evidently, petitioner seasonably filed its administrative claim for the periods

[19] G.R. No. 172129, September 12, 2008.

covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006 on December 21, 2007.

As to petitioner's judicial claim, the pertinent provision is Section 112(D) [now Section 112(C)], which reads as follows:

> "**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 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." (*Underscoring supplied*)

Thus, respondent had 120 days from the submission of complete documents by petitioner within which to grant or deny the latter's claim. After the said allowable period of 120 days without any action on the part of respondent, petitioner had 30 days within which to seek relief from the Court via a Petition for Review.

Since petitioner's administrative claim for refund was filed on December 21, 2007, the 120-day period enunciated under Section 112(D) ended on **April 19, 2008**. In the instant case however, petitioner worked against time and prematurely filed its Petition for Review on **March 31, 2008** without waiting for the 120-day period to lapse. Evidently, petitioner failed to exhaust the administrative remedies available under the law.

Jurisprudence has it that a party with an administrative remedy must not only initiate the prescribed administrative procedure to obtain relief, but also pursue to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court.[20] If a litigant goes to court without first pursuing his administrative remedies, his action is premature as he has no

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[20] Carale vs. Abarintos, 269 SCRA 142.

cause of action to ventilate in Court. His case is not ripe for judicial determination.[21]

But as ruled time and again, the failure to exhaust available administrative remedies will not deny the Court of its jurisdiction over the case as the same will amount only to a judicial petition wanting a cause of action.

Let it be stressed that failure to exhaust administrative remedies is not jurisdictional. The non-exhaustion of administrative remedies merely renders the action premature which means that the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[22]

In the recent case of *Merida Water District, et al. vs. Francisco Bacarro, et al.*,[23] the Highest Tribunal emphasized that:

> "xxx. Their **failure to exhaust administrative remedies, however, does not affect the jurisdiction of the RTC. Non-exhaustion of administrative remedies only renders the action premature, that the "claimed cause of**

[21] Aboitiz vs. Collector of Customs, 83 SCRA 271; Abe-Abe vs. Manila, 90 SCRA 531.
[22] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.
[23] G.R. No. 165993, September 30, 2008 citing Rosario v. CA, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; Carale v. Abarintos, G.R. No. 120704, March 03, 1997, 269 SCRA 132, 141.

> **<u>action is not ripe for judicial determination</u>**." (*Boldfacing and underscoring supplied*)

Since the failure to exhaust administrative remedies is not jurisdictional, the defense of failure to exhaust administrative remedies is waivable or may be considered waived if not raised in a motion to dismiss or in the Answer pursuant to Section 1, Rule 9 of the Rules of Court.[24] Under the said provision, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if dismissal is based on the following: (1) lack of jurisdiction; (2) *litis pendencia*; (3) *res judicata*; and (4) prescription. And none of the foregoing exceptions is present in the instant case. Under the circumstances, the Court may proceed having acquired jurisdiction over the case.

Going back to the heart of the case, petitioner submits that its sale of services to its affiliates abroad is effectively zero-rated pursuant to Section 108(B)(2) of the NIRC of 1997, to wit:

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[24] Rule 9, Sec. 1. Defenses and objections pleaded. — Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties*.-
>
> xxx xxx xxx
>
> "(B) *Transactions Subject to Zero Percent (0%) Rate*.-The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> "(1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas;
>
> "(2) **Services other than those mentioned in the preceding paragraph, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);**

In *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*,[25] the Supreme Court enumerated the requisites before supply of services may be considered VAT zero-rated under Section 108(B)(2) of the NIRC of 1997, as amended [*then Section 102(b)(2) of the NIRC of 1977, as amended*], namely 1) the services must be other than processing, manufacturing or repacking of goods; 2) payment for such services must be in acceptable foreign

[25] G.R. No. 153205, January 22, 2007.

currency accounted for in accordance with the BSP rules and regulations; and 3) the recipient of such services is doing business outside the Philippines. The Supreme Court declared:

> "**<u>The Tax Code not only requires that the services be other than "processing, manufacturing or repacking of goods" and that payment for such services be in acceptable foreign currency accounted for in accordance with BSP rules. Another essential condition for qualification to zero-rating under Section 102 (b) (2) is that the recipient of such services is doing business outside the Philippines.</u>** While this requirement is not expressly stated in the second paragraph of Section 102 (b), this is clearly provided in the first paragraph of Section 102 (b) where the listed services must be "for other persons doing business outside the Philippines". The phrase "for other persons doing business outside the Philippines" not only refers to the services enumerated in the first paragraph of Section 102 (b), but also pertains to the general term "services" appearing in the second paragraph of Section 102 (b). In short, services other than processing, manufacturing, or repacking of goods must likewise be performed for persons doing business outside the Philippines." (*Emphasis and underscoring supplied*)

Evidently, petitioner met the requirements for zero-rated sales of services to its affiliates abroad who are not doing business in the Philippines for the periods covering January 1, to Marach 31, 2006 and April 1, to June 30, 2006. Firstly, the services it rendered were not in the same category as "processing, manufacturing or repacking of goods". Secondly, the payments received for the said services were all in acceptable foreign currencies duly accounted for in accordance with the *Bangko Sentral ng Pilipinas* (BSP) rules and regulations as evidenced by the Bank Certification of Inward Remittance[26] as testified to by petitioner's witness Teresita O. Sugay. Finally, petitioner established to the satisfaction of the Court that its non-resident foreign clients/affiliates were not registered corporations in the Philippines and were not doing business in the Country through the following documents:

1. SEC Certificates of Non-Registration[27];
2. service agreements with its non-resident affiliate-clients[28];
3. duly authenticated affidavits executed by the respective officers of its affiliates abroad[29]; and
4. Exhibit "21" of the Procter & Gamble and Subsidiaries Report, which can be accessed at the U.S. SEC website[30].

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[26] Exhibits "V" to "V-4".
[27] Exhibits "AA-1" to "AA-28".
[28] Exhibits "S-1" to "S-30".
[29] Exhibits "FFF" to "EEEE".
[30] Exhibit "EEE" .

As regards to the existence of petitioner's zero-rated or effectively zero-rated sales, the Court-commissioned ICPA, Katherine O. Constantino, reported the following findings on her examination of petitioner's zero-rated sales: [31]

	Reference (Annexed to Exh. "BBB")	3rd Qtr FY June 2006 (Jan-Mar 2006)	4th Qtr FY June 2006 (Apr-Jun 2006)	Total
1. Zero-rated sales/receipts properly supported by zero-rated official receipts.	Annex 5 and 6	P 520,604,045.64	P 650,522,240.74	P 1,171,126,286.38
2. Zero-rated sales/receipts properly supported by zero-rated official receipts but the amount reflected is net of withholding tax. This is supported by appropriate withholding tax certificate.	Annex 7	10,950,007.03		10,950,007.03
3. Adjustments to zero-rated sales/receipts supported by debit and credit notes	Annex 8 and 9	(43,159,409.54)	(103,148.12)	(43,262,557.66)
Total		**P488,394,643.13**	**P650,419,092.62**	**P1,138,813,735.75**
Difference:				
Understatement of zero-rated sales/receipts no. 1989. This is the withholding tax deducted and should form part of gross sales.	Annex 7 and Exh. DD	1,932,354.44		1,932,354.44
Total per Schedule of Zero-rated Sales	**Exhibit "Y" and "Z"**	**P490,326,997.57**	**P650,419,092.62**	**P1,140,746,090.19**

The difference of P1,932,354.44, representing the withholding tax deducted, should be disallowed for lack of basis as the certificate of withholding tax offered as Exhibit "DD" was not admitted being mere photocopies of the purported document.[32]

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[31] Page 6, Exhibit "BBB".
[32] Docket, pp. 468 to 469.

Considering that a portion of petitioner's declared zero-rated sales is not properly substantiated, only the portion of the input VAT claimed attributable to the substantiated zero-rated sales will be considered for refund. The rate to be applied is based on the volume of sales and is computed as follows:

Supported zero-rated sales	P 1,138,813,735.75
Divided by total declared zero-rated sales	P 1,140,746,090.19
Rate of supported zero-rated sales	**99.83%**

Anent the second requisite, petitioner reported output and input taxes in its Quarterly VAT Returns for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006 or the third and fourth quarters of the fiscal year ended June 30, 2006, respectively, as follows:

Exh.	Qtr.	Input VAT	Output VAT
"G"	3rd	P 23,489,958.58	P 3,139,553.22
"J"	4th	34,197,697.81	768,462.96
TOTAL		**P 57,687,656.39**	**P 3,908,016.18**

Upon examination and verification by the ICPA on petitioner's documentary evidence supporting the reported input taxes, i.e., official receipts and invoices[33], it appears that out of

[33] Exhibits "QQ-1" to "QQ-175", "RR-1" to "RR-154", "SS-1" to "SS-223", "TT-1" to "TT-125", "VV-1" to "VV-13", and "WW-1" to "WW-9".

the reported amount of Php57,687,656.39, only the amount of Php51,283,188.04 was properly substantiated for VAT purposes, computed as follows:[34]

	Allowable input taxes properly substantiated for VAT purposes		
	3rd Qtr	4th Qtr	Total
Purchase of goods	P 150,901.07	P 293,278.17	P 444,179.24
Purchase of services	18,841,864.77	29,145,171.87	47,987,036.64
Purchase of capital goods	1,445,424.07	1,406,548.09	2,851,972.16
Total	**P 20,438,189.91**	**P 30,844,998.13**	**P 51,283,188.04**

The ICPA disallowed certain claimed input taxes for lack of substantiation required under Sections 110(A) and 113(A) of the NIRC of 1997, as amended, and as implemented by Sections 4.110-1, 4.110-8, and 4.113-1 of Revenue Regulations No. 16-2005. For the same reason, the input taxes on purchase of services supported by TIN-V official receipts[35] and input taxes on importation of goods other than capital goods supported by a billing statement from the broker[36] are likewise disallowed. Hence, the total disallowances per the ICPA Report amounts to P6,404,468.35.[37]

Further evaluation of official receipts and invoices however revealed that the following additional input taxes in the amount

[34] Annexes 16 and 30 and pages 22, 24, and 25 of Exhibit "BBB".
[35] Item 1c, Annex 30 of Exhibit "BBB"
[36] Page 22, Exhibit "BBB"
[37] Annex A of this Decision

of P7,998,468.17 should be disallowed for reasons stated below:

Exh.	Supplier	Invoice/ OR No.	Date	Input tax	Remarks
"QQ-8"	MBM Gift Shoppe	355	3/16/2006	P 5,263.39	non-VAT invoice
"RR-11"	MBM Gift Shoppe	0368	4/17/2006	3,321.43	non-VAT invoice
"RR-2"	Citimex Inc.	24303	3/14/2006	4,461.43	invoice not in the name of Petitioner
"TT-22"	Hewlett Packard Phils Corp	65829		7,973,570.61	undated OR
"TT-87"	BPO International Inc	15442	7/6/2006	11,851.31	OR dated outside the period of claim
	TOTAL			**P 7,998,468.17**	

Thus, petitioner's substantiated input taxes for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006 amount to only Php43,284,719.87 (P51,283,188.04 – P7,998,468.17).

Significantly, the said input VAT was not applied against any output VAT liability and/or carried over to the succeeding taxable quarter(s) during the period of claim and in the succeeding quarters as all of petitioner's output VAT due on its taxable sales are properly deducted. Moreover, petitioner's claim in the amounts of P17,818,682.69 and P32,223,293.08, for the periods covering January 1, to March 31, 2006 and April 1, to June 30, 2006, respectively, are reflected in petitioner's Quarterly VAT Returns as "VAT Refund/TCC Claimed".[38]

[38] Line 23D, Exhibits "G" and "J".

All told, petitioner has sufficiently established that it is entitled to a refund or issuance of TCC corresponding to its unutilized input VAT for the periods covering January 1, to March 31, 2006 and April 1, to June 30, 2006, but in the reduced amount of P35,578,668.89, computed as follows:

Input taxes per VAT returns:			
3rd Qtr		P23,489,958.58	
4th Qtr		34,197,697.81	P 57,687,656.39
Disallowances per ICPA Report:			
Purchases of goods	P 945,116.51		
Purchases of services	4,250,553.04		
Importation of goods other than capital goods	39,901.00		
Purchases of capital goods	1,168,897.80	P 6,404,468.35	
Disallowance per Court's verification		7,998,468.17	
Total disallowances			14,402,936.52
Substantiated input tax			P43,284,719.87
Less: Deferred input tax on capital goods for succeeding period			(3,737,664.44)
Output tax for the quarter:			
3rd Qtr		P 3,139,553.22	
4th Qtr		768,462.96	(3,908,016.18)
Valid input tax			**P35,639,039.25**
Multiply by rate of substantiated zero-rated sales			99.83%
Valid input tax attributable to substantiated zero-rated sales			**P35,578,668.89**

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **DIRECTED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **THIRTY FIVE MILLION FIVE HUNDRED SEVENTY EIGHT THOUSAND SIX HUNDRED SIXTY EIGHT AND 89/100 PESOS (PHP35,578,668.89)**, representing unutilized input

VAT incurred by petitioner in relation to its zero-rated sales for the periods covering January 1, 2006 to March 31, 2006 and April 1, 2006 to June 30, 2006.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

(with Concurring & Dissenting Opinion)
ERLINDA P. UY
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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's Division.

ERNESTO D. ACOSTA
Presiding Justice

Annex A

DETAILS OF DISALLOWED INPUT TAXES PER ICPA REPORT

(all amounts are in Philippine Peso)

		Ref.	3rd Qtr	4th Qtr	Total
PURCHASES OF GOODS (Annex 16)					
OTHER FINDINGS:					
1	Input taxes claimed on purchases of goods which are supported by photocopied invoices:				
	a. Properly supported by VAT REG	Annex 21	864.86	-	864.86
	b. Properly supported by TIN VAT	Annex 22	1,272.73	-	1,272.73
			2,137.59	-	2,137.59
2	Input taxes claimed on purchases of goods which are not dated within the period of claim.				
	a. Properly supported by VAT REG	Annex 19	35,794.50	-	35,794.50
	b. Properly supported by TIN VAT invoice	Annex 20 and 26	895,126.87	9,296.73	904,423.60
			930,921.37	9,296.73	940,218.10
3	Input taxes claimed on domestic purchase of goods reported both as purchase of goods and services in February VAT return	Annex 23	2,332.25	-	2,332.25
4	Input taxes claimed on purchases of goods which are not covered by sales invoices		-	428.57	428.57
Total disallowed input VAT from purchases of			**935,391.21**	**9,725.30**	**945,116.51**
PURCHASES OF SERVICES (Annex 30)					
c. Properly supported by TIN V official receipts		Annex 33 and 47	11,700.00	21,060.00	32,760.00
OTHER FINDINGS:					
1	Input taxes claimed on purchases or services supported by VAT official receipts but:				
	a. Not in the Petitioner's name and with different TIN	Annex 49	-	182,061.80	182,061.80
	b. Correction on the date of receipts	Annex 36	9,027.70	-	9,027.70
	c. Correction in Petitioner's name and date of official receipts	Annex 37	33,105.21	-	33,105.21
	d. Correction in Petitioner's name	Annex 38	18,930.44	2,700.00	21,630.44
	e. Not in the Petitioner's name and with erasure on the TIN	Annex 39	27.73	-	27.73
	f. There is an erasure on the heading of TIN VAT	Annex 40	157,879.93	-	157,879.93
	g. The TIN is different	Annex 54	-	38,400.00	38,400.00
			218,971.01	223,161.80	442,132.81
2	Input taxes claimed on purchases of services supported by VAT official receipts not dated within the fiscal year 2006:				
	a. Supported by VAT REG TIN official receipts	Annex 50	-	383,922.00	383,922.00
	b. Supported by TIN VAT official receipts	Annex 51	-	1,094,930.32	1,094,930.32
			-	1,478,852.32	1,478,852.32
3	Input taxes claimed on purchases of services supported by VAT official receipts but a NON VAT word was typed on the face of the receipt	Annex 41	144,741.39		144,741.39
4	Input taxes claimed on purchases of services supported by TIN NON VAT official receipts	Annex 42	1,036.36		1,036.36
5	Input taxes claimed on services supported by a provisional receipt	Annex 52		885,764.90	885,764.90
6	Input taxes on purchases of services with negative balances	Annex 43	(10,052.44)		(10,052.44)
7	Input tax claim on purchase of services which are not covered by official receipts	Annex 44 and 55	571,141.84	693,948.60	1,265,090.44
	Subtotal		**937,538.16**	**3,302,787.62**	**4,240,325.78**
	Difference:				
	Unlocated difference		(6,600.50)	(0.03)	(6,600.53)

		Ref.	3rd Qtr	4th Qtr	Total
	Overstatement of input tax due to the VAT rate used. It is computed at 12% instead of 10%. The input tax reported in the schedule is different from what is reflected in the official receipts.	Exh. SS-158 and SS-161	16,542.00		16,542.00
	The input tax reported in schedule is different from what is reflected in the official receipts.	Exh. TT-6		285.79	285.79
Total disallowed input VAT from purchases of services		Exh. G and J	**947,479.66**	**3,303,073.38**	**4,250,553.04**
IMPORTATION OF GOODS OTHER THAN CAPITAL GOODS					
Input taxes claimed on importation of goods other than capital goods supported by a billing statement of Brokers		Exh. UU	-	39,901.00	39,901.00
Total disallowed input VAT on importation of goods other than capital goods		Exh. J	-	**39,901.00**	**39,901.00**
PURCHASES OF CAPITAL GOODS					
2	Input taxes claimed on purchases of capital goods which are supported by TIN VAT invoices not dated within the quarter and outside the claim period but within fiscal year	Annex 58	234,125.38	-	234,125.38
3	Input taxes claimed on purchases of capital goods which are supported byt VAT REG TIN invoices but not dated within the quarter and outside the claim period but within fiscal year	Annex 59	536,757.19	-	536,757.19
4	Difference between VAT return and Schedule of capital goods due to VAT rate used		398,015.23	-	398,015.23
Total disallowed input VAT on purchases of capital goods		Exh. J	**1,168,897.80**	-	**1,168,897.80**
GRAND TOTAL			**3,051,768.67**	**3,352,699.68**	**6,404,468.35**

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

PROCTER & GAMBLE ASIA, PTE., LTD.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7747

Members:

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

Promulgated:

JUL 13 2011; 3:13 pm

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CONCURRING AND DISSENTING OPINION

UY, J.:

With all due respect to my esteemed colleagues, although I agree with the majority's position that the instant judicial claim filed on March 31, 2008 was prematurely filed as the same was done before the lapse of the 120-day period mentioned in Section 112 (D)[1] of the National Internal Revenue Code (NIRC) of 1997, I find difficulty in concurring with the majority's view that this Court may take cognizance of the present case since such premature filing was merely a violation of the doctrine of exhaustion of administrative remedies, and therefore, not jurisdictional, which can be waived if not raised as a defense.

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[1] Should be Section 112 (C) of the NIRC of 1997, as amended by Republic Act No. 9337 which took effect on November 1, 2005, considering that the subject claims for refund in the present case involve alleged unutilized input VAT for the period covering the Third and Fourth Quarters of the fiscal year ending June 30, 2006.

Hence, I am constrained to register my dissent.

At the outset, the exercised option of petitioner to claim for the refund/issuance of tax credit for its alleged input taxes paid on its purchases of capital goods and services attributable to zero-rated sales for the Third and Fourth Quarters of the fiscal year ending June 30, 2006 is subject to the provisions of Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Section 112 of the NIRC of 1997 provides that any VAT-registered person may apply for the refund/tax credit of excess input VAT in two instances, namely: when the excess input VAT is attributable to zero-rated or effectively zero-rated sales[2]; or when the excess input VAT refer to payment for capital goods imported or locally purchased, to the extent that both input taxes have not been applied against output taxes.[3] In both instances, the claim must be filed within two (2) years after the close of taxable quarter when the sales were made. This is consistent with the pronouncements made in ***Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)***[4] which interpreted Section 112 (A) of the NIRC of 1997, as amended, and expressed that the reckoning of the two-year prescriptive period shall commence 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.

Relevant thereto, in the landmark case of ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.***[5], the Supreme Court had the

[2] Section 112 (A) of the NIRC of 1997.
[3] Section 112 (B) of the NIRC of 1997.
[4] G.R. No. 172129, September 12, 2008.
[5] G.R. No. 184823, October 6, 2010.

opportunity to further expound on the subject matter and stressed that the Tax Code provides a period of two (2) years after the close of the taxable quarter when the sales were made, within which a VAT-registered person, whose sales are zero-rated or effectively zero-rated, may file an administrative claim for the issuance of tax credit certificate or refund of its unutilized input tax. Should the Revenue Commissioner deny the claim or fail to act on the claim within one hundred twenty (120) days from the filing of the administrative claim and submission of supporting documents, the affected taxpayer is granted a period of thirty (30) days from the denial or inaction within which to appeal the administrative refund claim before this Court.

Clearly therefore, as correctly ruled by the majority, the two-year prescriptive period applies to administrative claims filed before the Commissioner of Internal Revenue for the issuance of a tax credit certificate or refund of input VAT reckoned from the close of the taxable quarter when the relevant zero-rated sales were made.

Thus, counting the two-year prescriptive period from the close of the taxable quarters when the relevant sales or purchases were made in the instant case, specifically on: March 31, 2006 (for the Third Quarter) and June 30, 2006 (for the Fourth Quarter), petitioner had until March 31, 2008 and June 30, 2008, respectively, within which to file its administrative claims for refund.

Consequently, I concur with the finding that petitioner seasonably filed its administrative claim for the Third and Fourth Quarters of the fiscal year ending June 30, 2006 on December 21, 2007, well within the two-year prescriptive period provided by law. However, a perusal of the records reveal that the subsequent judicial appeal filed with this Court was prematurely filed on March 31, 2008, as petitioner miserably failed to observe the 120-day period under Section 112 (C) of the NIRC of 1997, as amended, to give the Commissioner of Internal Revenue the opportunity to act on its refund claim. Correspondingly, and diverse from the majority's opinion, it is my humble submission that the premature filing of the instant case warrants its dismissal inasmuch as no jurisdiction was acquired by this Court. The jurisdictional nature of such premature filing is consistent with the pronouncements made in the aforementioned ***Aichi*** case which is the prevailing jurisprudence on the matter.

In said case, the Supreme Court interpreted the provisions of Section 112 (C)[6] and pronounced that premature filing of claim for refund/credit of input VAT before this Court warrants its dismissal as no jurisdiction was acquired therein. The High Court said thus:

> **"In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. <u>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</u>.**
>
> 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 xxx apply

[6] Previously Section 112(D) before Republic Act No. 9337 took effect on November 1, 2005.

> 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.**
>
> xxx xxx xxx
>
> In fine, **<u>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</u>**." *(Emphasis and underscoring supplied).*

In light of the foregoing jurisprudential pronouncements, Section 112 (C) of the NIRC of 1997, as amended, directs the Commissioner of Internal Revenue to act on administrative claims for refund/applications for issuance of the tax credit certificate within a period of one hundred twenty **(120) days** from submission of complete supporting documents. Upon partial or full denial of such claim, or the expiration thereof without any action by the Commissioner on said claim, the taxpayer only has a period of thirty **(30) days** within which to seek judicial recourse from the adverse decision or inaction of the Commissioner before the Court of Tax Appeals.

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Thus, it becomes incumbent upon the taxpayer-claimant to comply, not only with the two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue, but must also give the Commissioner of Internal Revenue a period of one hundred twenty (120) days to either partially or fully deny the claim.

Subsequently, upon denial of the claim, or after the expiration of the 120-day period without any action by the Commissioner thereon, only then may the taxpayer-claimant seek judicial recourse to appeal the Commissioner's action or inaction on a refund/tax credit claim, within a period of 30 days therefrom.

Clearly therefore, the premature filing of the judicial claim before this Court makes the Petition for Review dismissible as no jurisdiction was acquired by the Court to entertain the instant case. And being jurisdictional in nature, this defense is not waivable. Otherwise, we run the risk of favoring a non-complying taxpayer-claimant, at the mere expedient of failing to invoke the defense of prematurity before this Court at the first instance.

It must be emphasized that jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy,[7] and is conferred only by law and not by the consent or waiver upon a court which, otherwise, would have no jurisdiction over the subject matter or nature of an action. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties.[8] If the court has

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[7] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.
[8] *Laresma vs. Abellana*, G.R. No. 140973, November 11, 2004.

no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[9]

To reiterate, it is my humble submission that the premature filing of the instant case warrants a dismissal of the instant petition inasmuch as no jurisdiction was acquired by this Court. Consequently, the resolution of the other issues raised herein becomes unnecessary.

All told, I vote to DISMISS the Petition for Review filed on March 31, 2008 for having been prematurely filed.

ERLINDA P. UY
Associate Justice

[9] Please refer to *De Guzman, et al. vs. Escalona, et al.*, G.R. No. L-51773, May 16, 1980.