REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FORMER SECOND DIVISION

MIRANT (NAVOTAS II) CORPORATION (formerly: Southern Energy Navotas II Power, Inc.), Petitioner,	**CTA CASE NO. 7619**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **UY,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** FEB 0 3 2011 3:10 p.m.

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AMENDED DECISION

CASTAÑEDA, JR., J.:

For resolution are: (1) petitioner's *Motion for Partial Reconsideration* filed on June 22, 2010; and (2) respondent's *Motion for Partial Reconsideration* filed on June 25, 2010, with petitioner's *Comment (on Respondent's Motion for Partial Reconsideration dated June 23, 2010)* filed on July 16, 2010.

Both *Motions* seek partial reconsideration of this Court's *Decision* promulgated on June 4, 2010, the dispositive portion of which reads as follows: ge

> "**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** to petitioner in the reduced amount of **SEVEN HUNDRED EIGHTY SIX THOUSAND SEVEN HUNDRED TWENTY EIGHT PESOS AND 01/100 (P786,728.01)**, representing unutilized input VAT attributable to its zero-rated sales to the NPC for the period covering January 1, 2005 to October 31, 2005.
>
> **SO ORDERED**."

In its *Motion for Partial Reconsideration*, petitioner interposed the following assigned error:

> "The claim for refund for the first quarter of 2005 has not prescribed as the ruling in the 2008 case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)* does not apply to the present case, which was filed in 2007."

On the other hand, in her *Motion for Partial Reconsideration*, respondent raised the following grounds:

> "THE HONORABLE COURT ERRED IN MERELY APPLYING SECTION 112 (A) OF THE TAX CODE OF 1997 WHILE DISREGARDING THE APPLICATION OF SECTION 112 (D) THEREOF.
>
> THE HONORABLE COURT ERRED IN FAILING TO CONSIDER THAT PETITIONER DID NOT SUBSTANTIATE ITS ADMINISTRATIVE CLAIM AS REQUIRED BY LAW, JURISPRUDENCE AND ADMINISTRATIVE ISSUANCES."

The Court will resolve petitioner's *Motion for Partial Reconsideration* and respondent's *Motion for Partial Reconsideration* jointly.

Petitioner claims that this Court relied on *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)*[1] (*Mirant case*) in ruling that the two-year prescriptive period for the filing Jr

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

of a claim for refund of input VAT on zero-rated sales under Section 112(A) of the National Internal Revenue Code (NIRC) of 1997 is reckoned from the close of the taxable quarter when the pertinent sale or transaction was made, and not from the date of filing of the corresponding Quarterly VAT Return and payment of the tax.

Petitioner alleges that at the time of filing of its administrative and judicial claims for refund, it relied on the prevailing rule that the two-year prescriptive period in claiming for a refund of input VAT is reckoned from the date of filing of the Quarterly VAT Return set by the Supreme Court in *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*[2] *(Atlas case)* and by this Court's decisions in a long line of cases. It concludes that pursuant to this Court's ruling in *TeaM Energy Corporation (Formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.) vs. Commissioner of Internal Revenue*[3], the new rule laid down in the 2008 decision of the Supreme Court in the *Mirant case* should not be applied as it will impair its vested right.

On the other hand, respondent submits that the Court erred by merely considering Section 112(A) of the NIRC of 1997 without considering the adjunct provision of Section 112(D). Respondent points out that the administrative claim of petitioner was filed on December 20, 2006 and was not acted upon with finality by respondent until the lapse of one hundred twenty (120) days from such date or until April 19, 2007. The law provides that petitioner has thirty (30) days from the decision or expiration of the 120-day

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[2] G.R. Nos. 141104 and 148763, June 8, 2007.
[3] CTA Case Nos. 7229 and 7298, October 5, 2009.

period given to the Revenue Commissioner to decide on the administrative claim to elevate its refund claim before this Court, or from April 20, 2007 to May 19, 2007, citing Section 112(D) of the NIRC of 1997. Thus, respondent asserts that the present action was prematurely filed on April 18, 2007, before the lapse of the period prescribed by law. Hence, this Court had no jurisdiction to act on the instant case.

Respondent further avers that there is no record of petitioner submitting complete documents to substantiate its administrative claim for refund. Respondent claims that the law requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided by law, again citing Section 112(D). Respondent argues that petitioner's failure to comply with the foregoing legal requirements warranted the denial by inaction of the said administrative claim.

In its *Comment*, petitioner counters that respondent's *Motion for Partial Reconsideration* is *pro forma* and does not cite new arguments or compelling reasons to warrant consideration and reversal of the *Decision*. The *Petition for Review* was filed within the prescriptive period under the Tax Code and respondent's reliance on Section 112(D) of the NIRC is misplaced and that petitioner's administrative claim for refund was properly substantiated.

After a careful re-evaluation of the foregoing arguments presented, this Court finds for respondent and hereby reconsiders the assailed *Decision*.

Section 112(D) of the NIRC of 1997 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 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.
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> 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**." (*Emphasis supplied*)

Based from the foregoing, the taxpayer has 30 days from its receipt of the decision denying the claim for refund or issuance of tax credit certificate for creditable input taxes or after the expiration of the 120-day period the Commissioner of Internal Revenue to act upon the same, to appeal the decision or the unacted claim with this Court.

Moreover, Sections 7(a)(2) and 11 of Republic Act (R.A.) No. 1125, as amended provide:

> "SEC. 7. *Jurisdiction.* – The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal as herein provided:
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> xxx xxx xxx
>
> 2. **Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments**, refunds or internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by

> the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial.**" (*Emphasis supplied*)
>
> "SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* – Any party adversely affected by a decision, ruling or **inaction of the Commissioner of Internal Revenue,** the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.**
>
> **Appeal shall be made by filing a petition for review** under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure **with the CTA within thirty (30) days** from the receipt of the decision or ruling or **in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. xxx" *(Emphasis supplied)*

Pursuant to the above provisions, this Court has appellate jurisdiction over a Petition for Review filed by any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, within thirty (30) days from the receipt of the said decision or ruling, or in the case of inaction of the Commissioner of Internal Revenue, from the expiration of the period fixed by law to act thereon.

In applying Section 112(D) of the NIRC of 1997, the Supreme Court in *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia Inc.*[4] *(Aichi case)* held 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

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

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, 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.**

xxx xxx xxx

In fine, **the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a** *gc*

dismissal inasmuch as no jurisdiction was acquired by the CTA." (*Emphasis supplied*)

In the instant case, petitioner filed on December 20, 2006 its administrative claim for refund or issuance of tax credit certificate together with the supporting documents before the BIR. However, petitioner filed on April 18, 2007 the instant *Petition for Review*, or two (2) days earlier prior to the expiration of the 120-day period on April 20, 2007 for the Commissioner of Internal Revenue to act on its administrative claim for refund as provided under Section 112(D) of the NIRC of 1997. The filing of the instant *Petition for Review* without waiting for the expiration of the aforesaid 120-day period is fatal to its refund claim. Thus, following the *Aichi case,* the factual backdrop of which falls squarely in the instant case, this Court has not acquired jurisdiction over the instant case.

It is settled that the premature invocation of the court's intervention is fatal to one's cause of action. If a remedy within the administrative machinery can still be resorted to by giving the administrative officer every opportunity to decide on a matter that comes within his jurisdiction, then such remedy must first be exhausted before the court's power of judicial review can be sought. The party with an administrative remedy must not only initiate the prescribed administrative procedure to obtain relief but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to the court.[5]

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[5] Asia International Auctioneers, Inc. and Subic Bay Motors Corporation vs. Hon. Guillermo L. Parayno, Jr., et al. G.R. No. 163445, December 18, 2007

Based on the foregoing, this Court deems it no longer necessary to resolve the other issues in this case.

WHEREFORE, premises considered, petitioner's *Motion for Partial Reconsideration* is hereby **DENIED** for lack of merit and respondent's *Motion for Partial Reconsideration* is hereby **GRANTED**. Accordingly, this Court's *Decision* dated June 4, 2010 is hereby **RECALLED** and **SET ASIDE** and the *Petition for Review* is hereby **DENIED** for having been prematurely filed.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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