REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

NORTHWIND POWER DEVELOPMENT CORPORATION, Petitioner, - versus - COMMISSIONER OF INTERNAL REVENUE, Respondent.	CTA CASE NO. 7918 Members: ACOSTA, Chairperson UY, and FABON-VICTORINO Promulgated: OCT 03 2012 ; 9:50 a.m.

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DECISION

Fabon-Victorino, J.:

In this Petition for Review filed on April 17, 2009, petitioner Northwind Power Development Corporation prays for the refund or issuance of tax credit certificate (TCC) in the amount of P3,412,414.07, representing unutilized input value-added tax (VAT) allegedly attributable to its zero-rated sales for the four quarters of taxable year 2007.

Petitioner Northwind Power Development Corporation states that it is a corporation duly organized and existing domestic corporation, with principal office at Unit 702 Net One Center, 3rd Avenue corner 26th Street, E-Square, Crescent Park West District, Bonifacio Global City, 1634 Taguig City. It is engaged in the business of building electric generating plants and sale of renewable power.[1]

As a VAT-registered entity, petitioner was issued Registration No. OCN3RC0000242067 on October 13, 2000.[2] It was likewise issued a Certificate of Registration No. 2004-108 by the Board of Investments (BOI) as a "New Operator of Wind Power Generation Plant", on September 20, 2004.[3]

On the other hand, respondent is the Commissioner of the Bureau of Internal Revenue (BIR), with the power, among others, to grant claims for refund of internal revenue taxes. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On July 19, 2002, petitioner executed an Electricity Sales Agreement with the Ilocos Norte Electric Cooperative (INEC) for

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[1] Exhibits "A" and "A-1"; Par. I (2) and (5), Admitted Facts, Joint Stipulation of Facts, docket p. 205.
[2] Exhibit "B"; Par. I (3), Admitted Facts, Joint Stipulation of Facts, docket p. 206.
[3] Exhibit "C"; Par. I (4), Admitted Facts, Joint Stipulation of Facts, docket p. 206.

the sale of renewable energy power generated from its wind turbine in Bangui, Ilocos Norte. [4]

On November 6, 2008, petitioner filed with BIR Revenue District No. 43 an administrative claim for refund or issuance of TCC in the amount of P3,412,414.07, representing its alleged unutilized input VAT covering the four quarters of taxable year 2007.[5]

On April 17, 2009, petitioner filed the instant Petition for Review alleging inaction on the part of respondent on its claim for refund/TCC[6].

On May 8, 2009, or before respondent filed her Answer, petitioner filed an Amended Petition for Review,[7] invoking Section 2, Rule 10 of the Rules of Court, as amended. The same was admitted by the Court in the Order[8] dated May 11, 2009.

On May 25, 2009, respondent filed her Answer[9], interposing the following Special and Affirmative Defenses:

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[4] Exhibit "D".
[5] Exhibits "W" and "X".
[6] Par. I (6), Admitted Facts, Joint Stipulation of Facts, docket p. 206.
[7] Docket p. 86.
[8] Docket p. 165.
[9] Docket, pp. 170-172.

4. Assuming but without admitting that Petitioner filed a claim for refund, the same is still subject to investigation by the Bureau of Internal Revenue;

5. Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;

6. Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not creditable or refundable;

7. It is incumbent upon the Petitioner to show that it has complied with the provision of Sections 112(A) and 204(C) in relation to Sections (sic) 229 of the 1997 Tax Code, as amended;

8. Further, Petitioner has the burden of proving that it complied with the requirements of effectively zero-rated transactions under Revenue Regulations 16-2005 dated 1 September 2005;

9. In an action for tax credit or refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge the said burden is fatal to the claim (*Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 206*);

10. Claims for refund are construed strictly against the claimant, 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 121*).

On June 30, 2009[10] and July 21, 2009[11], the parties filed their respective Pre-trial Briefs, followed by their Joint Stipulation of Facts on August 17, 2009, which the Court approved on August 18, 2009.[12]

In support of its case, petitioner presented its sole witness, Nerissa N. Posadas. She testified that as petitioner's Accounting Manager, she prepares, reviews, and files petitioner's tax returns with the BIR, including VAT Returns. She also reviews records of sales and purchases, financial statements and financial reports for monitoring purposes or compliance with the reportorial requirements of the government.

Petitioner is engaged in the business of general builders of electric generating plants and sale of renewable power. Its BIR Certificate of Registration shows that it is engaged in the generation, collection, and distribution of electricity for which it is liable for income tax, VAT, and withholding tax. Currently, it generates renewable power generated from wind and sells it to Ilocos Norte Electric Cooperative (INEC).

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[10] Petitioner's Pre-trial Brief, docket pp. 183-193.
[11] Pre-trial Brief for the Respondent, docket pp. 198-199.
[12] Docket p. 208.

Petitioner is likewise registered with the BOI as a "New Operator of Wind Power Generation Plant" pursuant to the Omnibus Investments Code of 1987. Since petitioner is engaged in the sale of renewable power through the operation of wind turbines, its sale of electricity generated through this process is classified as zero-rated sales for VAT purposes, pursuant to Section 108 (B)(7) of the National Internal Revenue Code (NIRC), as amended, Section 4.108-5(b)(7) of Revenue Regulations (RR) No. 16-2005, and BIR Ruling No. 020-02.

Under the Electricity Sales Agreement, petitioner, in 2007, sold to INEC as its sole customer, electricity generated from its wind turbines. These sales were reported to the BIR through the corresponding VAT Returns filed for the said period. As of the year 2007, petitioner's input VAT amounted to P3,412,414.07, as shown in its Monthly and Quarterly VAT Returns for 2007 and several Summary List of Purchases.

On November 6, 2008, petitioner filed with the BIR RDO 43 Pasig an Application for Tax Credits/Refund (BIR Form No. 1914). To prove that no other claim involving the same unutilized input VAT for 2007 has been made, petitioner secured from the Department of Finance a Certification to the effect it had no previous similar or outstanding application for tax credit.

According to the same witness, petitioner purchased goods and services during the first quarter of taxable year 2007 which were directly attributable to petitioner's zero-rated sale of electricity to INEC. For these purchases, petitioner paid input VAT amounting to ₱2,108,368.00, which was carried forward to the succeeding taxable period since there was no output tax against which it could be applied given that petitioner's sale of power to INEC was zero-rated for VAT purposes.

For similar purchases of goods and services during the second quarter of 2007, petitioner accumulated input VAT amounting to ₱1,030,860.38. This amount was again carried forward to the succeeding taxable period for the same reason.

During the third quarter of 2007, petitioner also purchased goods and services for which it paid input VAT amounting to ₱343,562.49. Again, this amount was carried forward to the succeeding taxable period also for lack of output VAT against which it could be applied.

This was repeated as regard petitioner's input VAT accumulated during the fourth quarter of 2007 in the amount of P1,556,433.80. For the same reason it was carried forward to the succeeding taxable period. In fine, petitioner's entire input VAT paid on domestic purchases of goods and services and importation of goods, attributable to zero-rated sales of power generated services, was not utilized in the succeeding taxable quarters, [13] thus, the instant claim for refund.

After petitioner rested its case[14], the reception of evidence for respondent was twice set, however, the latter failed to appear on both occasions, despite due notice. For this reason, respondent was deemed to have waived the right to present evidence. Thereafter, the parties were directed to file their respective memoranda.[15]

On June 22, 2011, petitioner filed a Motion To Present Additional Documentary Evidence,[16]which the Court granted by virtue of the Resolution dated July 18, 2011.[17] During the scheduled hearing on August 04, 2011, petitioner recalled its

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[13] Exhibit G[8].
[14] Docket pp. 513-523.
[15] See Minutes of the hearing dated May 19, 2011, docket p. 579; Resolution dated May 26, 2011, docket p. 581.
[16] Docket p. 582-584.
[17] Docket p. 589.

lone witness Nerissa Posadas, who identified additional documents which were admitted after offer in open court.

Despite the opportunity granted, respondent again manifested that she would no longer present evidence and would just submit the case for decision.[18]

On October 26, 2011, the case was submitted for decision, considering petitioner's Memorandum[19] filed on October 17, 2011, *sans* respondent's Memorandum.

The issues[20], as jointly stipulated by the parties, are as follows:

I. WHETHER OR NOT PETITIONER HAS UNAPPLIED OR UNUTILIZED CREDITABLE INPUT VAT FOR THE 1ST, 2ND, 3RD AND 4TH QUARTERS OF THE TAXABLE YEAR 2007 ATTRIBUTABLE TO ZERO-RATED SALES WHICH ARE THE PROPER SUBJECT FOR REFUND PURSUANT TO RELEVANT PROVISIONS OF THE NIRC; AND

II. WHETHER THE CREDITABLE INPUT VAT OF PETITIONER FOR SAID PERIOD IS SUBSTANTIATED BY DOCUMENTS.

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[18] Minutes of the hearing dated September 15, 2011
[19] Docket, pp. 599-633
[20] No. II, Joint Stipulation of Facts, docket, p. 206

The Ruling of the Court

Petitioner claims that its sale of renewable power to INEC is subject to zero percent (0%) VAT, as provided under Section 108(B)(7) of the NIRC of 1997, as amended, which states as follows:

> SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
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> 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:
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> xxx xxx xxx
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> (7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.

Petitioner also contends that it is entitled to a refund or issuance of tax credit certificate in the amount of P3,412,414.07, pursuant to Section 112 of the NIRC of 1997, as amended, to wit:

> SEC. 112. *Refunds or Tax Credits of Input Taxes.* –

> (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: xxx
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> xxx xxx xxx
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> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) 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.

In connection thereto, petitioner cites Section 4.112-1 of Revenue Regulations No. 16-2005, the pertinent portion of which provides that:

> (a) *Zero-rated and Effectively Zero-rated Sales of Goods, Properties or Services*

> A VAT-registered person whose sales of goods, properties or services are zero-rated or effectively zero-rated may apply for the issuance of a tax credit certificate/refund of input tax attributable to such sales. The input tax that may be subject of the claim shall exclude the portion of input tax that has been applied against the output tax. The application should be filed within two (2) years after the close of the taxable quarter when such sales were made.

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 following requisites must be satisfied:

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 claim for refund was filed within the two-year prescriptive period.

It is paramount at this point to first determine if the claim for refund or issuance of tax credit certificate was seasonably filed by petitioner.

In the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*[21],

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

the Supreme Court held 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 commences from the close of the taxable quarter when the relevant sales were made.

It must be stressed however, that the said two-year prescriptive period mandated in Section 112 of the 1997 Tax Code pertains to the filing of the application for refund or tax credit with respondent and not recourse to the Court. In her level, respondent has 120 days from the filing of complete documents within which to act on the application. From receipt of the adverse decision or from the lapse of the 120-day period without any action from respondent, the aggrieved taxpayer has 30 days, within which to assail the adverse decision or elevate respondent's inaction to this Court. The Supreme Court instructively ruled in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[22] (*Aichi case*), in this wise:

> 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

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

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 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 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**." *(Emphasis supplied)*

The present claim for refund or tax credit covers input VAT incurred for the four quarters of taxable year 2007. Reckoned from March 31, June 30, September 30, and December 31, 2007, the close of the taxable quarters of the year 2007, petitioner had until March 31, June 30, September 30, and December 31, 2009, respectively, within which to file its administrative claims with respondent. Therefore, petitioner's administrative claim for refund or issuance of tax credit certificate filed on November 6, 2008 with the Bureau of Internal Revenue was filed on time.

This is however not true with the judicial action taken by petitioner via the instant Petition for Review. As earlier stated, respondent had 120 days or until March 6, 2009 to act on petitioner's administrative claim for refund/tax credit. Since respondent failed to act on the claim for refund in her level, petitioner had until **April 6, 2009,**[23] to question such inaction before the Court. But for reason only known to it, petitioner filed

[23] April 5, 2009 fell on a Sunday.

the instant Petition for Review only on **April 17, 2009**, effectively depriving this Court of competence to entertain the judicial action.

Following the doctrine laid down in the *Aichi case* and the mandate of Section 112(C) of the NIRC of 1997, as amended, the Court must deny the instant petition for want of jurisdiction.

It has been ruled that the Court of Tax Appeals is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.[24] Further, tax refunds are in the nature of tax exemptions, and are to be construed *strictissimi juris* against the entity claiming the same.[25]

On account of all the foregoing, elucidation on the other requisites in order for petitioner to be entitled to a refund or tax credit of its alleged input VAT due or paid attributable to zero-rated or effectively zero-rated sales is unnecessary if not superfluous.

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[24] RCBC vs. CIR, G.R. No. 168498, April 24, 2007.
[25] Philippine Geothermal vs. Commissioner of Internal Revenue, G.R. No. 154028. July 29, 2005.

WHEREFORE, the Petition for Review dated April 16, 2009 filed by petitioner Northwind Power Development Corporation is hereby **DENIED,** for lack of jurisdiction.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

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