10-410

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

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DIAGEO PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8063

Members:

BAUTISTA, *Chairperson*
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

JAN 12 2011
JBFernando 3:50 p.m.

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RESOLUTION

During the pre-trial on November 5, 2010, counsel for respondent manifested in open court that respondent invoked the affirmative defense of premature filing of the instant Petition for Review in her **"Answer"**, and moves that the same be resolved.

On the other hand, petitioner's counsel manifested that petitioner had already presented its arguments on respondent's affirmative defense of premature filing in its **"Reply"** filed on September 17, 2010; thus, it will no longer file a comment thereon.

In respondent's *Answer*, she avers that this Court has no jurisdiction to entertain the instant Petition for failure of petitioner to await the expiration of the 120-day period before lodging its appeal before this Court, as provided in Section 112 (C) of the 1997 Tax Code, as amended, which states that:

> "SEC. 112. **Refunds or Tax Credit of Input Tax . –**
>
> **(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 Subsections (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**" (*Emphases supplied.*)

For its part, petitioner, contends that this Court sitting *en banc* had already held in the case of *Commissioner of Internal Revenue vs. Cebu Geothermal Power Company, Inc.*[1], that the use of the word "may" in Section 112 (D) (now Section 112[C]) of the 1997 Tax Code, indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the same Code.

Petitioner further argues that Section 112 (A) of the 1997 Tax Code is the controlling provision in determining the time for the filing of a Petition for

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[1] CTA E.B. Nos. 426 & 427 (CTA Case Nos. 6791 & 6836), May 29, 2009

Review before this Court, *that is*, the application for tax refund should be made within two (2) years after the close of the taxable quarter.

This Court agrees with respondent's argument that the instant Petition for Review was prematurely filed.

As may be gleaned from the records of the case, petitioner is claiming refund of its input Value-Added Tax (VAT) attributable to its export sales for the period covering January 1 to March 31, 2008. Petitioner filed its administrative claim for refund with respondent on March 30, 2010, while it filed the instant Petition for Review on March 31, 2010 or one day after the filing of its administrative claim.

The Supreme Court, in the recently promulgated case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[2], enunciated that Section 112 (D) (now Section 112[C]) of the 1997 Tax Code, as amended, clearly provides that the Commissioner of Internal Revenue (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 this Court 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 this Court within 30 days.

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

Applying the aforesaid ruling in this case, it is evident that this Court has no jurisdiction over the instant case since the 120-day period has not yet lapsed when the instant Petition was filed. Accordingly, the premature filing of this case warrants its dismissal.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice