REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

DEUTSCHE KNOWLEDGE SERVICES PTE LTD.,
Petitioner,

\- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7940

Members:
ACOSTA, *Chairman*
UY, *and*
FABON-VICTORINO, *JJ.*

Promulgated:

APR 2 6 2011, 2:17 p.m.

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RESOLUTION

Fabon-Victorino, J.:

For resolution is the Motion to Dismiss dated February 21, 2011, filed by respondent Commissioner of Internal Revenue seeking the dismissal of the instant case for refund or issuance of a Tax Credit Certificate (TCC) in the amount of P8,767,719.30 allegedly representing petitioner's excess and unutilized input value-added tax attributable to the latter's zero-rated sales for the 2nd quarter of year 2007.

Respondent contends that under Section 112 of the National Internal Revenue Code (NIRC), as amended, respondent has 120 days from the submission of complete documents to act on any claim for refund or issuance of TCC. It is only upon receipt of the adverse decision or the lapse of the said 120-day period without any action on the part of respondent that an aggrieved taxpayer may, within 30 days, seek this Court's intervention.

In the present case, petitioner filed its administrative claim on June 18, 2009. Barely 12 days thereafter or on June 30, 2009, petitioner without waiting for the mandated 120-day period to lapse, filed the instant Petition for Review. Respondent claims that under the circumstances, she had until October 26, 2009 to act on petitioner's administrative claim for refund and only thereafter or until November 25, 2009 that the remedy of review by this Court could be sought. Having been prematurely filed, the instant Petition for Review should be dismissed.

Respondent added that the phrase "may appeal" in Section 112(C) simply means that the litigant has the option to exercise its right of appeal before this Court. The law is clear and warrants no interpretation. It should be taken in its simple and literal meaning.

In rejecting the Motion, petitioner contends that respondent is already estopped from raising the issue of jurisdiction in view of the fact that it already concluded presentation of evidence wherein she actively participated in the proceedings. Further, respondent is deemed to have waived her right to invoke the defense of prematurity in the filing of the Petition for Review with the issuance of Revenue Regulations (R.R.) No. 7-95 specifically Section 4.104-2 thereof, Revenue Memorandum Circular (RMC) No. 42-99, RMC No. 42-2003, and RMC No. 29-2009, which state, among others, that the administrative and judicial claims for refund may be simultaneously instituted as long as both are filed within the 2 year period provided under Section 229 of the NIRC. In fact, the BIR, under the same regulations, may even suspend the running of the 120-day period in certain instances.

Petitioner points out that respondent cannot complain in this petition its non-observance of the 120-day period in the administrative level considering the numerous unresolved cases of petitioner of the same nature brought about by inaction in her level.

Besides, at the time of the administrative claim was filed by petitioner, the prevailing jurisprudence was that the 30-day period to appeal, following the expiration of the 120-day period under Section 112 of the NIRC is not mandatory, as long as both the administrative and the judicial claims are filed within the two-year prescriptive period in accordance with Section 229 of the Tax Code. With this in mind, petitioner filed its appeal on June 30, 2009, as the subject of the claim was its excess and unutilized input VAT for the 2nd quarter of year 2007. Pursuant to Section 229 of the NIRC, the two year prescriptive period was to lapse in June 2009.

The mandatory two year prescriptive period provided in Section 229 must prevail over the permissive nature of the periods in Section 112.

Petitioner as well posits that the ruling in *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[1] (*Aichi*) promulgated in 2010, stating that Section 229 of the Tax Code does not apply to claims for refund of input VAT should be prospectively applied and not in this case filed on June 18, 2009. At the time petitioner filed the administrative claim, the

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[1] G.R. No. 184823, October 06, 2010.

prevailing jurisprudence was that laid down in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*[2] (*Atlas*). Moreover, the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation* (G.R. No. 172129, September 12, 2008) cannot validly overturn the *Atlas* case without violating the Constitutional mandate that no doctrine or principle laid down by the Supreme Court may be modified except by the Supreme Court sitting *en banc.* At most, the ruling in Mirant that Section 229 of the NIRC does not apply to claims for refund of input VAT may be considered an *obiter.*

Petitioner further argues that strict observance of the 120-day period before appeal can lead to confusion on the part of the litigants and abuse by respondent who can arbitrarily require submission of various documents effectively extending the allowable 120 day period in the administrative level which Section 229 of the Tax Code seeks to curtail.

The only bone of contention – was there failure on the part of petitioner to exhaust administrative remedies before seeking

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[2] G.R. Nos. 141104 & 148763, June 08, 2007.

this Court's intervention justifying the dismissal of the instant Petition for Review?

Section 112 of the National Internal Revenue Code (NIRC), as amended, is instructive. It reads as follows:

> "Section 112. Refunds or Tax Credits of Input Tax.
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> (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 x x
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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. x x x"

Thus, any VAT-registered person, whose sales are zero-rated or effectively zero-rated, may apply for the issuance of a tax credit certificate or refund of creditable input tax within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT. Undoubtedly, petitioner has seasonably filed its administrative claim for refund for the 2nd quarter of year 2007 on June 18, 2009.

Pursuant to the foregoing provision, respondent had 120 days thereafter or until October 16, 2009, within which to act on the administrative claim, i.e. grant or deny the same. From receipt of the adverse decision or from the expiration of the 120-day period, petitioner had within 30 days or until November 15, 2009 the option to turn to this Court for relief.

Clearly, the filing of the instant Petition for Review on June 30, 2009, or barely twelve (12) days after the administrative claim for refund was filed on June 18, 2009, was premature in violation of the clear mandate of Section 112 of the NIRC, as amended, justifying its dismissal.

Settled is the rule that non-observance of the doctrine of exhaustion of administrative remedies results in lack of cause of action, which is one of the grounds in the Rules of Court justifying the dismissal of the complaint.[3] The doctrine of primary jurisdiction does not warrant a court to arrogate unto itself the authority to resolve a controversy the jurisdiction over which is initially lodged with an administrative body of special competence.[4] Thus, should the Court render a decision on the merits without authority, such would be a void judgment which is in legal effect no judgment, by which no rights are divested, from which no rights can be obtained, which neither binds nor bonds anyone, and under which all acts performed and all claims flowing therefrom are void.[5]

As to the mandatory requirement of awaiting the lapse of the 120-day period granted unto respondent to act on claim for refunds before judicial action, the same has been put to rest with finality in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*,[6] *(Aichi)* the pertinent portion of which is quoted, as follows:

[3] Teotico vs. Baer, G.R. NO. 147464, June 08, 2006.
[4] Paat vs. Court of Appeals, G.R. No. 111107, January 10, 1997.
[5] Tanenglian v. Silvestre, et al., G.R. No. 173415, March 28, 2008.
[6] G.R. No. 184823, October 06, 2010.

> "Section 112(D) of the NIRC clearly provides that the CIR has "120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit]," within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.
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> In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.
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> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis."

Anent petitioner's claim that the foregoing principle should be applied prospectively, such simply lacks merit. It has been ruled that judicial interpretation of a statute constitutes part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[7] As the Supreme Court is merely interpreting a provision of the NIRC, as

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[7] Eagle Realty vs. Republic of the Philippines, G.R. No. 151424, July 31, 2009.

amended, which is already in effect, and not modifying or reversing any existing jurisprudence, the ruling in the *Aichi* case must be applied immediately.

The same ratiocination applies to petitioner's claim that the *Aichi* case is not applicable herein since it was promulgated on October 06, 2010 or after the instant Petition was filed. It must be pointed out that in the *Aichi* case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Both the administrative and the judicial claims in the *Aichi* case were filed almost five (5) years ahead of the instant case, and yet, for prematurely filing its claim before the CTA, the petition for review in the *Aichi* case was dismissed immediately upon the promulgation of the decision of the Supreme Court. This Court can do no less.

The *Mirant*[8] case, *on the other hand,* clarified the non-applicability of the two-year prescriptive period provided under Section 229 of the NIRC in claims for refund of unutilized input VAT attributable to zero-rated or effectively zero rated sales. The Supreme Court added that Sections 204(C) and 229 of the NIRC are inapplicable in cases of the same nature. Subsequently,

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

in *Aichi* case, the Supreme Court declared that it is erroneous to apply Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT.

As to the applicability of the *Atlas*[9] case, let it be stated that the factual milieu of the instant case is different from that of *Atlas* case hence, not applicable. Note that the Supreme Court resolved that case using the Tax Code of 1977, the law enforced at that time. The Supreme Court construed and applied with specificity Sections 106, 110, and 230 (now Section 229), of the 1977 Tax Code as the said case involved claim for refund/tax credit of input VAT on therein petitioner's purchases of capital goods and on its zero-rated sales for the taxable quarters of the years 1990 and 1992.

As to petitioner's contention that estoppel had set in by virtue of petitioner's previous issuances, to wit: R.R. No. 7-95, RMC No. 42-99, RMC No. 42-2003, and RMC No. 29-2009, suffice it to say that while the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to

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[9] G.R. Nos. 141104 & 148763, June 08, 2007.

great respect by the courts, such is not conclusive nor binding upon the Court and will be ignored if judicially found to be erroneous.[10]

Finally, the record shows that respondent filed the instant Motion to Dismiss on February 21, 2011, after the filing of the Answer on July 27, 2009 and more importantly, after petitioner has concluded the presentation of its evidence.

However the rule[11] that a motion to dismiss shall be filed within the time for but before filing the answer to the complaint or pleading asserting a claim[12] is not absolute.

Even after the answer has been filed, a defendant or respondent can still file a motion to dismiss on the following grounds: (1) lack of jurisdiction, (2) *litis pendentia* (3) lack of cause of action, and (4) discovery during trial of evidence that constitutes a ground for dismissal.[13]

Indubitably, respondent's plea to dismiss the instant Petition for Review on the ground of lack of cause of action for

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[10] Philippine Bank of Communications vs. CIR, G.R. No. 112024. January 28, 1999.
[11] Section 1, Rule 16 of the Revised Rules of Civil Procedure.
[12] Co vs. Court of Appeals, G.R. No. 147999. February 27, 2004.
[13] Panganiban vs. Pilipinas Shell, G.R. No. 131471. January 22, 2003.

failure to exhaust administrative remedies, falls within the exceptions.

WHEREFORE, premises considered, the Motion to Dismiss dated February 21, 2011, filed by respondent, is hereby GRANTED. Consequently, the Petition for Review dated June 30, 2009, filed by petitioner Deutsche Knowledge Services Pte. Ltd. is hereby DISMISSED.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ON LEAVE
ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice