REPUBLIC OF THE PHILIPPINES
*Court of Tax Appeals*
QUEZON CITY

# *EN BANC*

CE LUZON GEOTHERMAL POWER COMPANY, INC.,
***Petitioner,***

-versus-

COMMISSIONER OF INTERNAL REVENUE,
***Respondent.***

**C.T.A. EB NO. 553**
**(C.T.A. CASE NOS.7180 & 7279)**

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COMMISSIONER OF INTERNAL REVENUE,
***Petitioner,***

-versus-

CE LUZON GEOTHERMAL POWER COMPANY, INC.,
***Respondent.***

**C.T.A. EB NO. 554**
**(C.T.A. CASE NOS.7180 & 7279)**

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

**Promulgated:**

NOV 2 2 2010 Ars Apolinario 3:07 p.m.

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# AMENDED DECISION

**PALANCA-ENRIQUEZ, J.:**

This resolves:

1) a) CE Luzon's "Motion for Partial Reconsideration (Re: Decision dated July 20, 2010)" filed on August 10, 2010; and

b) CIR's "Comment (Re: Motion for Partial Reconsideration)" filed on September 30, 2010;

2) a) CIR's "Motion for Reconsideration" filed on August 3, 2010; and

b) CE Luzon's "Comment (Re: Commissioner of Internal Revenue's Motion for Reconsideration dated 2 August 2010)" filed on September 7, 2010.

***<u>CIR's "Motion for Reconsideration"</u>***

In her motion, CIR contends that the Petitions for Review originally filed with the former Second Division failed to comply with the prescribed period under *Section 112 (D) of the NIRC of 1997, as amended;* that CE Luzon failed to observe the rule on exhaustion of administrative remedies as it did not wait for the lapse of the 120-day period before appealing to this Court; and that the CIR was not given an opportunity to act on the matter within the period prescribed; thus, it renders the present action premature.

On the other hand, CE Luzon contends that its petition was timely filed since it is settled that the taxpayer need not wait for the lapse of the 120-day period before filing the judicial claim for refund; that it has two

(2) years within which to file both its administrative and judicial claims; and that CIR herself has made contemporaneous pronouncements on the non-mandatory nature of the periods stated under *Section 112 (D) of the Tax Code*.

After taking a second hard look on the factual circumstances of this case and the applicable laws and jurisprudence, we rule for the CIR.

To emphasize, *Section 112 of the NIRC of 1997, as amended*, is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period to file the administrative claim should be reckoned from the close of the taxable quarter when the sales were made. As previously ruled in Our original decision, dated July 20, 2010, CE Luzon's administrative claims were filed within the prescriptive period of two (2) years, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.*

The pivotal issue now is the timeliness of CE Luzon's judicial claims.

In view of the recent decision of the Supreme Court in the case of *CIR vs. Aichi Forging Company of Asia, Inc., (G.R. No. 184823, October 6, 2010)*, we are constrained to deny CE Luzon's claims for tax refund/credit for having been filed way beyond the period prescribed in *Section 112 (D)* of the *NIRC of 1997, as amended*, which provides:

> **"SEC. 112. Refunds or Tax Credits of Input Tax. —**
>
> 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."

Pursuant to the above-quoted provision, the Commissioner has one hundred twenty (120) days from the submission of supporting documents to decide on the claim for refund. In case of full or partial denial, or inaction, the taxpayer may appeal to this Court, within thirty (30) days from receipt of the decision or from the lapse of the 120-day period.

CE Luzon's contention 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. The Supreme Court finally settled this issue in the case of *CIR vs. Aichi Forging Company of Asia, Inc., supra.,* thus:

> "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."

Pursuant to the above decision of the Supreme Court, the following dates should be considered in determining whether or not CE Luzon's judicial claims were timely filed within the prescribed period under *Section 112 (D)*, thus:

| Period of Claim Taxable year 2003 | Date Administrative Claim Filed | Expiration of 120 days | Petition for Review Filed |
|---|---|---|---|
| 1st quarter | January 20, 2005 | May 20, 2005 | March 30, 2005 (CTA Case No. 7180) |
| 2nd quarter | March 31, 2005 | July 29, 2005 | June 30, 2005 (CTA Case No. 7279) |
| 3rd quarter | June 7, 2005 | October 5, 2005 | |
| 4th quarter | June 7, 2005 | | |

It is clear that CE Luzon filed its Petitions for Review with the former Second Division of this Court when the Commissioner's 120-day period to decide the claim has not yet lapsed. CE Luzon did not wait for the lapse of the 120-day period prior to the filing of its appeal to the Court. As a consequence thereof, CE Luzon's judicial claims were filed prematurely, since the 120-day period for the Commissioner to decide the claim has not yet lapsed.

It bears emphasis that the filing of an administrative claim with the Commissioner is a condition precedent to the filing of a judicial claim for refund with the CTA. Thus, failure of CE Luzon to comply with *Section 112 (D)*, particularly the 120-day period, is tantamount to non-exhaustion of administrative remedies. Consequently, the said Petitions for Review should have been dismissed for having been filed prematurely.

In the case of *Castro vs. Gloria (363 SCRA 417),* the Supreme Court held that the doctrine of exhaustion of administrative remedies calls for

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resort first to the appropriate administrative authorities in the resolution of a controversy falling under their jurisdiction before the same may be elevated to the courts for review. The rationale behind this principle is for reasons of practical considerations, comity and convenience.

Well-settled is the rule that if a remedy is very much available within the administrative machinery of the administrative agency, then this alternative should first be utilized before resort can be made to the courts, not only to give the administrative agency the opportunity to decide the matter by itself correctly, but also to avoid the very pernicious evil the doctrine itself seeks to prevent – the unnecessary and premature resort to courts and the clogging of its dockets (*National Electrification Administration vs. Val L. Villanueva, G.R. No. 168203, March 9, 2010*).

Since the doctrine of exhaustion of administrative remedies is a condition precedent to the filing of a case with this Court, non-observance thereof is a ground for the dismissal of action under *Section 1(j) of Rule 16 of the 1997 Rules of Civil Procedure, as amended.* Hence, CE Luzon's failure to comply with *Section 112 (D)* is fatal to its claim.

In fine, the premature filing of CE Luzon's judicial claims for refund/credit of input VAT before this Court warrants a dismissal, inasmuch as no jurisdiction was acquired by the Court in Division. Thus, CE Luzon's

Petitions for Review filed with the former Second Division, docketed as C.T.A. Case Nos. 7180 and 7279, must necessarily fail for failure to comply with a condition precedent under *Section 112 (D) of the NIRC of 1997, as amended*, and accordingly dismissed, pursuant to *Section 1 (j) of Rule 16 of the 1997 Rules of Civil Procedure, as amended.* Accordingly, the Petition for Review filed by CE Luzon in C.T.A. EB No. 553 before this Court *En Banc*, must likewise be dismissed.

***CE Luzon's "Motion for Partial Reconsideration"***

In view of the foregoing, we find no need to resolve CE Luzon's "Motion for Partial Reconsideration" for being moot and academic.

**WHEREFORE,** premises considered:

1) the Commissioner of Internal Revenue's "Motion for Reconsideration" is hereby **GRANTED.** Accordingly, our Decision dated July 20, 2010 in the above captioned case is hereby **RECALLED** and **SET ASIDE,** and a new one is hereby entered **DISMISSING** CE Luzon's Petition for Review in C.T.A. EB No. 553 and **GRANTING** CIR's Petition for Review in C.T.A. EB No. 554. Accordingly, the Decision dated April 21, 2009 and Resolution dated October 19, 2009 rendered by the Former Second Division in C.T.A. CASE Nos. 7180 and 7279 are hereby **REVERSED and SET ASIDE**.

2) For being moot and academic, CE Luzon's "Motion for Partial Reconsideration" is hereby **DENIED**.

**SO ORDERED.**

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**WE CONCUR:**

**ERNESTO D. ACOSTA**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

(w/ Dissenting Opinion)
**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**CIELITO N. MINDARO-GRULLA**
Associate Justice

**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

# CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

**ERNESTO D. ACOSTA**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

*EN BANC*

**CE LUZON GEOTHERMAL POWER COMPANY, INC.,**
Petitioner,

- versus -

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**CTA EB NO. 553**
(CTA Case Nos. 7189 & 7279)

x-------------------------------------------------x

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

- versus -

**CE LUZON GEOTHERMAL POWER COMPANY, INC.,**
Respondent.

**CTA EB NO. 554**
(CTA Case Nos. 7189 & 7279)

Present:
***Acosta, P.J.***
***Castañeda, Jr.,***
***Bautista,***
***Uy,***
***Casanova,***
***Palanca-Enriquez,***
***Fabon-Victorino,***
***Mindaro-Grulla, and***
***Cotangco-Manalastas, JJ.***

Promulgated :
NOV 2 2 2010 Apolinario 2:00 p.m.

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*DISSENTING OPINION*

*BAUTISTA, J.*

In resolving respondent's Motion for Partial Reconsideration, the Court *En Banc* disposed of the case as follows:

**WHEREFORE,** premises considered:

1) The Commissioner of Internal Revenue's "Motion for Reconsideration" is hereby **GRANTED**. Accordingly, our Decision dated July 20, 2010 in the above captioned case is hereby **RECALLED** and **SET ASIDE**, and a new one is hereby entered **DISMISSING** CE Luzon's Petition for Review in C.T.A. EB No. 553 and **GRANTING** CIR's Petition for Review in C.T.A. EB No. 554. Accordingly, the Decision dated April 21, 2009 and Resolution dated October 19, 2009 rendered by the Former Second Division in C.T.A. CASE Nos. 718[9] and 7279 are hereby **REVERSED** and **SET ASIDE.**

2) For being moot and academic, CE Luzon's "Motion for Partial Reconsideration" is hereby **DENIED**.

**SO ORDERED.**

It is by virtue of the foregoing, that I am compelled to register my dissent.

With all due respect to the Court *En Banc*, I maintain that there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even the inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court,[1] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the two (2)-year period,[2] and beyond that period, the taxpayer can no longer appeal to this Court.[3]

This issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[4] to wit:

> [T]he Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a

[1] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[2] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[3] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.
[4] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:

> "It appears therefore, **that it is not necessary for the Commissioner of Internal Revenue to first act unfavorably on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case.** This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
>
> Incidentally, **the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal.** The law fixed the same period – two years – for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court. Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. In fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)."

Even the Bureau of Internal Revenue cited the foregoing disquisition of the Court of Appeals as basis when it made the following ruling:

> "In reply, please be informed that a taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of

> Petition for Review. Neither is it required that the Commissioner should first act on the claim of a particular taxpayer before the CTA may acquire jurisdiction, particularly if the claim is about to prescribe. The Tax Code fixed the period of two (2) years for filing a claim for refund with the Commissioner [Sec. 112(A) in relation to Sec. 204(c)] and for filing a case in court [Section 229]. Hence, a decision of the Commissioner is not a condition or requisite before the taxpayer can resort to the judicial remedy afforded by law."

More importantly, the Court *En Banc* has squarely and exhaustively ruled on this issue in this wise:

> **"It is true that Section 112(D) of the abovementioned provision applies to the present case. However, what the petitioner failed to consider is Section 112(A) of the same provision. The respondent is also covered by the two (2) year prescriptive period. We have repeatedly held that the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period.**
>
> Accordingly, the Supreme Court held in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* that the two-year prescriptive period for filing a claim for input tax is reckoned from the date of the filing of the quarterly VAT return and payment of the tax due. **If the said period is about to expire but the BIR has not yet acted on the application for refund, the taxpayer may interpose a petition for review with this Court within the two year period.**
>
> In the case of *Gibbs vs. Collector*, the Supreme Court held that if, however, the Collector (now Commissioner) takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector.
>
> Furthermore, in the case of *Commissioner of Customs and Commissioner of Internal Revenue vs. The Honorable Court of Tax Appeals and Planters Products, Inc.*, the Supreme Court

held that the taxpayer need not wait indefinitely for a decision or ruling which may or may not be forthcoming and which he has no legal right to expect. It is disheartening enough to a taxpayer to keep him waiting for an indefinite period of time for a ruling or decision of the Collector (now Commissioner) of Internal Revenue on his claim for refund. It would make matters more exasperating for the taxpayer if we were to close the doors of the courts of justice for such a relief until after the Collector (now Commissioner) of Internal Revenue, would have, at his personal convenience, given his go signal.

**This Court ruled in several cases that once the petition is filed, the Court has already acquired jurisdiction over the claims and the Court is not bound to wait indefinitely for no reason for whatever action respondent (herein petitioner) may take. At stake are claims for refund and unlike disputed assessments, no decision of respondent (herein petitioner) is required before one can go to this Court.**"

Lastly, it is apparent from the following provisions of Revenue Memorandum Circular No. 49-03 dated August 18, 2003, that petitioner knows that claims for VAT refund or tax credit filed with the Court can proceed simultaneously with the ones filed with the BIR and that taxpayers need not wait for the lapse of the subject 120-day period, to wit:

"In response to request of selected taxpayers for adoption of procedures in handling refund cases that are aligned to the statutory requirements that refund cases should be elevated to the Court of Tax Appeals before the lapse of the period prescribed by law, certain provisions of RMC No. 42-2003 are hereby amended and new provisions are added thereto.

In consonance therewith, the following amendments are being introduced to RMC No. 42-2003, to wit:

I.) A-17 of Revenue Memorandum Circular No. 42-2003 is hereby revised to read as follows:

**In cases where the taxpayer has filed a "Petition for Review" with the Court of Tax Appeals involving a claim for refund/TCC that is pending at the administrative agency (Bureau of Internal Revenue or OSS-DOF), the**

> **administrative agency and the tax court may act on the case separately**. While the case is pending in the tax court and at the same time is still under process by the administrative agency, the litigation lawyer of the BIR, upon receipt of the summons from the tax court, shall request from the head of the investigating/processing office for the docket containing certified true copies of all the documents pertinent to the claim. The docket shall be presented to the court as evidence for the BIR in its defense on the tax credit/refund case filed by the taxpayer. In the meantime, the investigating/processing office of the administrative agency shall continue processing the refund/TCC case until such time that a final decision has been reached by either the CTA or the administrative agency.
>
> If the CTA is able to release its decision ahead of the evaluation of the administrative agency, the latter shall cease from processing the claim. On the other hand, if the administrative agency is able to process the claim of the taxpayer ahead of the CTA and the taxpayer is amenable to the findings thereof, the concerned taxpayer must file a motion to withdraw the claim with the CTA. xxx." *(Citations omitted)*

Section 229 of the 1997 National Internal Revenue Code further bolstered the 2-year limitation period; otherwise, the claim for refund or tax credit of input tax will be time-barred, to wit:

> **SEC. 229.** *Recovery of Tax Erroneously or Illegally Collected.* – xxx
>
> In any case, **no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment**: xxx *(Boldfacing supplied)*

Notably in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*,[5] the Supreme Court elucidated as follows:

> Although the taxpayer's refundable or creditable input VAT may not be considered as illegally or erroneously collected, its refund/credit is

[5] G.R. No. 141104 & 148763, June 8, 2007, 524 SCRA 73.

> a privilege extended to qualified and registered taxpayers by the very VAT system adopted by the Legislature. Such input VAT, the same as any illegally or erroneously collected national internal revenue tax, consists of monetary amounts which are currently in the hands of the government but must rightfully be returned to the taxpayer. Therefore, whether claiming refund/credit of illegally or erroneously collected national internal revenue tax, or input VAT, the taxpayer must be given equal opportunity for filing and pursuing its claim.

Therefore, it is my considered view that the taxpayer-claimant has the option of seeking judicial redress for refund or tax credit of excess or unutilized input tax with this Court either within 30 days from receipt of the denial of its claim, or after the lapse of the 120-day period in the event of inaction by the Commissioner; provided that both administrative and judicial remedies must be undertaken within the 2-year period.

Accordingly, I vote for the dismissal of respondent's Motion for Reconsideration.

LOVELL R. BAUTISTA
Associate Justice