REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

AIR LIQUIDE PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8052

Members:

ACOSTA, *Chairperson*
UY, *and*
FABON-VICTORINO, *JJ.*

Promulgated:

SEP 01 2010 ; 9:15 am

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RESOLUTION

FABON-VICTORINO, *J.*:

For resolution is the Motion to Dismiss dated May 13, 2010, filed by respondent moored on the ground of lack of cause of action for failure of petitioner to exhaust all available administrative remedies.

Respondent contends that petitioner admits having filed with all supporting documents its administrative claim for refund of unutilized input VAT paid for the First Quarter of 2008 on December 23, 2009. Pursuant to Section 112(C) of the Tax Code, respondent had 120 days or until April 22, 2010 to process the application. Upon receipt of the adverse ruling or the expiration of the 120-day period allotted to respondent, petitioner had 30 days or until May 22, 2010, within which to appeal to this Court.

However, petitioner, without waiting for the 120-day period to expire, filed the instant Petition for Review some twenty-three (23) days earlier or on March 30, 2010 in clear violation of the doctrine of exhaustion of administrative remedies. For premature filing of the instant Petition for Review due to failure of petitioner to comply with the cited condition precedent, the same must be dismissed on the ground of lack of cause of action.

But petitioner contends otherwise. Allegedly, the instant Petition was filed within the two (2) year prescriptive period from the close of the taxable quarter when the relevant sales were made as mandated in Section 112(A) of the Tax Code. Moreover, Section 112 should be read in conjunction with Sections 204 and 229 of the same Tax Code which provide for the general prescriptive period of two (2) years for refund of all kinds of taxes, which necessarily includes refund of unutilized input tax. Moreover under Sections 112(A), 204, and 229 of the NIRC, both the administrative and the judicial claim for refund must be filed within the said two-year period, lest the claim shall be barred. That being the case, the filing of the instant Petition on March 30, 2010 is clearly not premature, having been filed within the 2-year prescriptive period from the close of the First Quarter of year 2008.

Further, respondent's invocation of non-exhaustion of administrative remedies as ground for the plea for dismissal lacks merit. The doctrine is not inflexible and admits of exceptions as when there is an urgent need for judicial intervention and when irreparable damage will be suffered by the litigant.

Petitioner likewise posits that it is justified in filing the Petition even prior to the expiration of the 120-day period granted unto respondent considering that it will lose its right to seek relief from this Court should the two-year prescriptive period lapse while its claim for refund is still pending evaluation by respondent. In view thereof, there is an urgent need for judicial intervention as petitioner will sustain irreparable damage if it fails to invoke this Court's intervention on its claim for refund.

Finally, respondent cannot invoke violation of the doctrine of non-exhaustion of administrative remedies as he himself issued Revenue Memorandum Circular 42-2003, stating that the administrative claim for refund may proceed simultaneously with court action and should a decision be released ahead of the result of the evaluation of the claim, it is only then that respondent shall cease processing the claim in the administrative level.

The incident was submitted for resolution *sans* Reply from respondent who failed to file any, despite the opportunity granted.

A claim for refund or tax credits of input tax attributable to zero-rated sales or effectively zero-rated sales is specifically governed by Section 112 (A) and (D) (under R.A. No. 8424), now (C) of the 1997 NIRC, as amended. The clear mandate provides the road map for tax credit or refund of creditable and unutilized input tax – from the administrative level before respondent to the appal before this Court. Section 112(A) and (C) of the Tax Code read as follows:

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

From the foregoing provision, 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 not otherwise used for any internal revenue tax due the taxpayer within two years reckoned from the close of the taxable quarter when the relevant sales were made regardless of whether said tax was paid or not.[1]

The record reveals that petitioner's administrative claim for refund for the first quarter of the taxable year 2008 was seasonably filed on December 23, 2009 or within two-year prescriptive period. Upon denial or the expiration of the allowable period of 120 days without any action on the part of respondent, petitioner, within 30 days from notice of such denial or expiration of 120 days, may invoke this Court's competence by filing a corresponding Petition for Review. Any action filed prior to such

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

condition precedent is considered premature justifying an order of dismissal for lack of cause of action.

Undoubtedly, the administrative claim for refund was seasonably filed by petitioner on December 23, 2009. Under the obtaining circumstances, petitioner had 120 days or until April 22, 2010 to process the claim. Thereafter, petitioner had 30 days from notice of adverse ruling or expiration of the allowable period 120 days or until May 22, 2010 to file a Petition for Review with this Court.

However, petitioner hastily filed the instant Petition for Review on March 30, 2010 or before the 120-day period expired on April 22, 2010. Obviously, the instant Petition lacks cause of action as it was prematurely filed, hence dismissible on such ground.

Settled is the rule that where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application. The Court has no choice but to see to it that its mandate is obeyed.[2]

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[2] CIR vs. American Express, G.R. No. 152609, June 29, 2005

Contrary to petitioner's protestation, the two-year limit prescribed in Section 112 refers only to the filing of the administrative claim for refund or credit with respondent and does not include judicial recourse as illustrated in *Intel v. CIR*.[3] To rule otherwise is to render the more expeditious and less expensive administrative proceeding under Section 112 of the NIRC, as amended, nugatory if not inutile.

Further, the two-year period prescribed in Section 229 of the Tax Code, as amended, is not applicable to refund of input tax, the same being a general provision pertaining only to recovery of other tax erroneously or illegally collected which is not the nature of a Value Added Tax.[4] VAT is legally collected and refund is allowed when it remains unutilized.

In a more recent case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.,* the Supreme Court unequivocally stated that **Section 229 of the Tax Code is not applicable to VAT refund of credit**. The relevant portion of the Decision reads as follows:

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[3] G.R. No. 166732, April 27, 2007
[4] Tax Principles and Remedies by Court of Tax Appeals Justice Japar B. Dimaampao, p. 182

"Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable

To be sure, MPC cannot avail itself of the provisions of either Sec. 204(C) or 229 of the NIRC which, for the purpose of refund, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor. Secs. 204(C) and 229 respectively provide:

> Sec. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*— The Commissioner may –
>
> x x x x
>
> (c) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
>
> x x x x
>
> Sec. 229. *Recovery of Tax Erroneously or Illegally Collected.*— No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or

> of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> 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: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

Notably, the above provisions also set a two-year prescriptive period, reckoned from date of payment of the tax or penalty, for the filing of a claim of refund or tax credit. **Notably too, both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes**." (emphasis ours)

The significance of the administrative proceeding before judicial action is resorted to is also indicated in Section 11 of Republic Act No. 9282,[5] and Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals which respectively state as follows:

[5] An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating Its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging Its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, As Amended, Otherwise Known as the law Creating the Court of Tax Appeals, and for Other Purposes

"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. x x x" (emphasis ours)

"SEC. 3. *Who may appeal; period to file petition*. - **A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes**, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction **may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments**. x x x" (emphasis ours)

Clear from both Republic Act No. 9282 and Revised Rules of the Court of Tax Appeals that an aggrieved taxpayer may appeal from an unsuccessful administrative claim for refund within thirty

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(30) days but only from receipt of the adverse decision or ruling, or after the expiration of the period fixed by law for action by respondent.

In the instant case, no decision or ruling was issued by respondent. More importantly, at the time that the Petition for Review was filed, no inaction could be attributed to respondent as the 120-day period allotted to him to process the claim was yet to lapse.

Anent the issuance of Revenue Memorandum Circular 42-2003 stating that the administrative claim for refund may proceed simultaneously with court action, 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 great respect, the same is not conclusive nor binding upon the Court. It can even be ignored if judicially found erroneous.[6]

WHEREFORE, premises considered, the Motion to Dismiss dated May 13, 2010, filed by respondent Commissioner of Internal Revenue, is GRANTED. Consequently, the Petition for Review filed

[6] Philippine Bank of Communications vs. CIR, G.R. No. 112024. January 28, 1999

by Air Liquide Philippines Inc. is hereby DISMISSED, without prejudice.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(with Separate Opinion)
ERLINDA P. UY
Associate Justice