REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

INTERPUBLIC GROUP OF COMPANIES, INC.,
Respondent.

CTA EB No. 791
(CTA Case No. 7796)

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

Promulgated:

OCT 2 3 2012 1:25 p.m.

x---x

D E C I S I O N

CASTAÑEDA, JR., *J.* :

Before us is an appeal by petitioner Commissioner of Internal Revenue ("CIR" for brevity; respondent in the division case) of the February 21, 2011 Decision[1] and May 31, 2011 Resolution[2] of the Third Division of the Court of Tax Appeals (CTA Third Division, for brevity) in CTA Case No. 7796[3], entitled "*The Interpublic Group of Companies, Inc. vs. Commissioner of Internal*

[1] Division Docket, pp. 520-539.
[2] *Id.*, pp. 625-627.
[3] Decision and Resolution penned by Associate Justice Lovell R. Bautista and concurred in by Associate Justices Olga Palanca-Enriquez and Amelia R. Cotangco-Manalastas.

Revenue", which granted the claim for refund or issuance of tax credit certificate (TCC) of respondent Interpublic Group of Companies, Inc. ("IGC" for brevity; petitioner in the division case) in the amount of P12,338,921.00, representing overpaid final withholding tax (FWT) on cash dividends for taxable year 2006. CIR prays that the assailed decision and resolution be set aside and another one be rendered denying IGC's claim for refund for lack of merit.

The dispositive portion of the assailed Decision reads:

> **WHEREFORE**, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent[4] is hereby **ORDERED** to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner[5] in the amount of **TWELVE MILLION THREE HUNDRED THIRTY-EIGHT THOUSAND NINE HUNDRED TWENTY-ONE PESOS (P12,338,921.00)**, representing overpaid final withholding tax on cash dividends for taxable year 2006.
>
> **SO ORDERED**.

Likewise, the dispositive portion of the assailed Resolution provides:

> **WHEREFORE**, premises considered, respondent[6]'s "**Motion for Reconsideration**" is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**

THE FACTS

The following are the facts of this case, as found by the CTA Third Division:[7]

> The facts of the case, based on joint stipulations and evidence on record, are as follows:

---

[4] Refers to Commissioner of Internal Revenue in the division case, petitioner in this *en banc* case.
[5] Refers to Interpublic Group of Companies, Inc., in the division case, respondent in this *en banc* case.
[6] *Supra., Note 4.*
[7] Division Docket, pp. 520-523; Citations Omitted; "Petitioner" pertains to IGC, "respondent" refers to CIR.

Petitioner is a non-resident foreign corporation duly organized and existing under and by virtue of the laws of the State of Delaware, United States of America, with principal place of business at 1114 Avenue of the Americas, New York, NY 10036, USA.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), vested by law with authority to decide, approve and grant claims for refund or tax credit of erroneously or excessively paid taxes. She holds office at the 5th Floor, BIR National Office Building, Diliman, Quezon City.

Petitioner owns 2,999,998 shares or thirty percent (30%) of the total outstanding and voting capital stock of McCann Worldgroup Philippines, Inc. (hereinafter referred to as "McCann"), a domestic corporation duly organized and existing under the laws of the Philippines engaged in the general advertising business. Its principal address is at 33F-35F GT Tower, 6813 Ayala Avenue corner H.V. dela Costa St., Salcedo Village, Makati City.

In 2006, McCann's Board of Directors declared cash dividends in the total amount of P205,648,685.02 in favor of its stockholders of record. Petitioner received cash dividends from McCann in the amount of P61,694,605.51, computed as follows:

Shareholder	**Percentage of Shares**	**Amount of Dividend**
Fintec Holdings, Inc.	70%	P143,954,079.51
Interpublic Group of Companies	30%	61,694,605.51
TOTAL		P205,648,685.02

On June 15, 2006, McCann withheld a final withholding tax at the rate of thirty-five percent (35%) on petitioner's cash dividends and remitted the payment of the FWT in the amount of P21,593,111.93 to respondent.

On September 27, 2007, petitioner established a Regional Headquarters (RHQ) in the Philippines. On April 30, 2008, petitioner's RHQ was converted into its Regional Operating Headquarters (ROHQ).

On March 5, 2008, petitioner filed an administrative claim for refund or issuance of tax credit certificate with the BIR, requesting refund or issuance of tax credit certificate in the amount of P12,338,921.00, representing the alleged overpaid FWT on dividends paid by McCann to petitioner. In the said administrative claim, petitioner averred that as a non-resident foreign corporation, it may avail of the preferential FWT rate of fifteen percent (15%) on dividends received from a domestic corporation under Section 28(B)(5)(b) of the National Internal Revenue Code (NIRC).

> Thereafter, on May 29, 2008, petitioner submitted to respondent additional documents in support of its administrative claim for refund or issuance of tax credit certificate.
>
> Respondent failed to act on petitioner's administrative claim for refund or issuance of tax credit certificate, prompting petitioner to file with this Court a Petition for Review on June 16, 2008.

On February 21, 2011, the CTA Third Division granted IGC's petition for review. Accordingly, CIR was ordered to refund or issue a tax credit certificate in favor of IGC in the amount of P12,338,921.00, representing overpaid FWT on cash dividends for taxable year 2006.

On March 14, 2011, CIR filed a Motion for Reconsideration (Re: Decision promulgated 21 February 2011). Said motion was denied for lack of merit on May 31, 2011.

On June 22, 2011, CIR filed a "Motion for Extension of Time to File Petition for Review" which the Court *en banc* granted.

On July 7, 2011, CIR filed the Petition for Review.

On July 21, 2011 Resolution, the Court *en banc* directed IGC to file comment within ten (10) days from receipt of the said resolution. Thereafter, IGC filed a "Motion for Additional Time to File Comment" which the Court *en banc* granted. On August 15, 2011, IGC filed its Comment (to the Petition for Review).

On September 1, 2011, the Court *en banc* granted the parties a period of thirty (30) days from notice, within which to file their memoranda. On October 7, 2011, IGC filed a "Motion for Additional Time to File Memorandum" which the Court *en banc* granted. Within the period given, IGC filed its Memorandum. CIR, however, failed to file her Memorandum

On January 11, 2012, this case was submitted for decision.

ISSUE

WHETHER THE THIRD DIVISION OF THE HONORABLE COURT ERRED WHEN IT HELD THAT RESPONDENT IS ENTITLED TO A REFUND OF P12,338,921.00 REPRESENTING OVERPAID FINAL WITHHOLDING TAX ON CASH DIVIDENDS FOR TAXABLE YEAR 2006.

THIS COURT'S RULING

The petition is denied.

We find that the issue regarding IGC's entitlement to a refund of FWT on cash dividends for taxable year 2006 and the arguments raised by CIR have already been considered and exhaustively discussed by the CTA Third Division in its assailed Decision and Resolution.

Unlicensed Foreign corporation not doing business in the Philippines can sue before Philippine courts

CIR alleges that IGC has no capacity to sue in Philippine courts without the requisite license citing Sec. 133, Title XV of the Corporation Code of the Philippines. On the other hand, IGC submits that it does not need a license to maintain an action before Philippine courts because mere investment in domestic corporation is not considered doing business. IGC pointed out that a foreign corporation not doing business in the Philippines may sue in our courts.

This Court agrees with IGC.

In the case *B. Van Zuiden Bros., Ltd. vs. GTVL Manufacturing Industries, Inc.*[8], the Supreme Court categorically stated that Section 133 of the Corporation Code is clear that an unlicensed foreign corporation doing business in the Philippines cannot sue before Philippine courts. On the other hand, an unlicensed foreign corporation not doing business in the Philippines can sue before Philippine courts. We quote pertinent portions of the said case, as follows:

> "Section 133 of the Corporation Code provides:
>
> 'Doing business without license. — No foreign corporation transacting business in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines; but such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws.'
>
> The law is clear. An unlicensed foreign corporation doing business in the Philippines cannot sue before Philippine courts. On the other hand, **an unlicensed foreign corporation not doing business in the Philippines can sue before Philippine courts.**"

Clearly, a license is necessary only if it is "transacting or doing business" in the country.[9]

As to whether IGC is "doing business" in the country at the time the dividends were declared, We rule in the negative. *gr*

---

[8] G.R. No. 147905, May 28, 2007, 523 SCRA 233.
[9] *Eriks Pte., Ltd. vs. Court of Appeals, et al.,* G.R. No. 118843, February 6, 1997, 267 SCRA 567.

Mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business shall not be deemed "doing business" in the Philippines as provided under Section 3 (d) of Republic Act No. 7042 (as amended by Republic Act No. 8179) as well as in Section 1(f)(1) of Rule I of the Implementing Rules and Regulations of RA 7042 (as amended by RA 8179), as follow:

REPUBLIC ACT NO. 7042[10]

xxx xxx xxx

SEC. 3. *Definitions.* — As used in this Act:

xxx xxx xxx

d) the phrase "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization: *Provided, however*, That the **phrase "doing business" shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business**, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account; *(Emphasis Supplied)*

xxx xxx xxx

IMPLEMENTING RULES AND REGULATIONS OF RA 7042
(AS AMENDED BY REPUBLIC ACT NO. 8179) JC

[10] "Foreign Investments Act of 1991", as amended by RA 8179.

RULE I

Definitions

SECTION 1. *Definition of Terms.* — For the purposes of these Rules and Regulations.

xxx xxx xxx

f. *Doing Business* shall include soliciting orders, service contracts, opening offices, whether liaison offices or branches; appointing representatives or distributors, operating under full control of the foreign corporation, domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that comply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to and in progressive prosecution of commercial gain or of the purpose and object of the business organization. The following acts **shall not be deemed "doing business" in the Philippines:**

(1) **Mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business,** and/or the exercise of rights as such investor; *(Emphasis Supplied)*

xxx xxx xxx

Based on the foregoing, a foreign corporation not doing business in the Philippines may sue even without a license, as correctly ruled by the CTA Third Division in the assailed Decision[11], as follow:

Based on established facts, the final withholding tax imposed against the cash dividends issued in favor of petitioner was a result of a mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor. The phrase "doing business" shall **not** be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor.

In C*olumbia Pictures, Inc., et al. vs. Court of Appeals, et al.,* it was held that:

---

[11] Division Docket, pp. 534-535; Citations Omitted.

> "The obtainment of a license prescribed by Section 125 of the Corporation Code is not a condition precedent to the maintenance of any kind of action in Philippine courts by a foreign corporation. However, under the aforequoted provision, no foreign corporation shall be permitted to transact business in the Philippines, as this phrase is understood under the Corporation Code, unless it shall have the license required by law, and until it complies with the law in transacting business here, it shall not be permitted to maintain any suit in local courts. As thus interpreted, any foreign corporation not doing business in the Philippines may maintain an action in our courts upon any cause of action, provided that the subject matter and the defendant are within the jurisdiction of the court. **It is not the absence of the prescribed license but 'doing business' in the Philippines without such license which debars the foreign corporation from access to our courts.** In other words, although a foreign corporation is without license to transact business in the Philippines, it does not follow that it has no capacity to bring an action. Such license is not necessary if it is not engaged in business in the Philippines." *(Emphasis Supplied)*

CIR also argues that the proper claimant in this case should have been the Regional Operating Headquarters (ROHQ) and not IGC. CIR reasoned out that IGC posits that its Regional Headquarters (RHQ) was converted into ROHQ on April 30, 2008. However, the subject of the claim for refund was filed on March 5, 2008. Thus, ROHQ should be the proper claimant.

IGC commented that investments in McCann were made directly by IGC and not its ROHQ, thus, IGC should be considered as a separate taxable entity from its ROHQ citing *Marubeni Corporation vs. Commissioner of Internal Revenue*[12].

CIR's argument lacks merit.

---

[12] G.R. No. 76573, September 14, 1989, 177 SCRA 501.

In the case. *Marubeni Corporation vs. Commissioner of Internal Revenue*[13], the Supreme Court adopted the argument of the Solicitor General that when the foreign corporation transacts business in the Philippines independently of its branch, the principal-agent relationship is set aside. The transaction becomes one of the foreign corporation, not of the branch. Pertinent portions of the said case provide:

> The Solicitor General has adequately refuted petitioner's arguments in this wise:
>
> "The general rule that a foreign corporation is the same juridical entity as its branch office in the Philippines cannot apply here. This rule is based on the premise that the business of the foreign corporation is conducted through its branch office, following the principal-agent relationship theory. It is understood that the branch becomes its agent here. So that **when the foreign corporation transacts business in the Philippines independently of its branch, the principal-agent relationship is set aside. The transaction becomes one of the foreign corporation, not of the branch. Consequently, the taxpayer is the foreign corporation, not the branch or the resident foreign corporation.**
>
> "Corollarily, if the business transaction is conducted through the branch office, the latter becomes the taxpayer, and not the foreign corporation." *(Emphasis Supplied; Citation Omitted).*

Applying by analogy the above jurisprudence, considering that investments in McCann was made directly by IGC, it is just proper that the claimant is IGC.

The claim for refund is based on Section 28 (B) 5(b) of the 1997 NIRC

CIR argues that IGC failed to follow the requisites for filing an administrative claim for refund. CIR asserts that IGC invokes the RP-US Treaty as basis for the reduced rate of tax for dividends resulting in overpayment of FWT. CIR alleges that IGC failed to adduce evidence to the

---

[13] *Id.*

effect that it filed a tax treaty relief application with the International Tax Affairs Division of the BIR in accordance with Revenue Memorandum Order No. 1-2000[14] ("RMO No. 1-2000", for brevity).

IGC commented that contrary to the allegations of CIR, its claim for refund is not anchored on a tax treaty provision or relief, thus, RMO No. 1-2000 is irrelevant.

IGC is correct.

In this case, as found by the CTA Third Division, IGC, consistently, based its administrative and judicial claims for refund or issuance of tax credit certificate of allegedly overpaid final withholding tax (FWT) on cash dividends under Section 28 (B) (5) (b) of the National Internal Revenue Code of 1997 (1997 NIRC), as amended by Republic Act (R.A.) No. 9337, which provides that:

> SEC. 28. Rates of Income Tax on Foreign Corporations.—
>
> xxx xxx xxx
>
> "(B) Tax on Nonresident Foreign Corporation. —
>
> xxx xxx xxx
>
> "(5) Tax on Certain Incomes Received by a Nonresident Foreign Corporation. —
> xxx xxx xxx
>
> "(b) Intercorporate Dividends. — A **final withholding tax at the rate of fifteen percent (15%) is hereby imposed on the amount of cash and/or property dividends received from a domestic corporation**, which shall be collected and paid as provided in Section 57 (A) of this Code, **subject to the condition that the country in which the non-resident foreign corporation is domiciled, shall allow a credit against the tax due from the non-resident foreign corporation taxes deemed**

---

[14] Procedures for Processing Tax Treaty Relief Application.

> **to have been paid in the Philippines** equivalent to twenty percent (20%), which represents the difference between the regular income tax of thirty-five percent (35%) and the fifteen percent (15%) tax on dividends as provided in this subparagraph: Provided, That effective January 1, 2009, the credit against the tax due shall be equivalent to fifteen percent (15%), which represents the difference between the regular income tax of thirty percent (30%) and the fifteen percent (15%) tax on dividends;" *(Emphasis supplied).*

Based on the foregoing provision, intercorporate dividends received by a nonresident foreign corporation from a domestic corporation shall be subject to 15% final withholding tax, subject to the condition that the country in which the non-resident foreign corporation is domiciled, shall allow a tax credit against the tax due from the non-resident foreign corporation taxes deemed to have been paid in the Philippines equivalent to 20%. However, in 2009, the credit against tax due shall be equivalent to 15%.

Thus, the findings and conclusion of the CTA Third Division[15] is reiterated with approval:

> Consequently, **dividends received from a Philippine corporation by a corporation incorporated outside of the Philippines and domiciled in the U.S. are subject to the preferential tax rate of 15%, considering that the U.S. allows a credit against the tax due from the non-resident foreign corporation taxes deemed to have been paid in the Philippines, as confirmed in *Commissioner of Internal Revenue vs. Procter and Gamble Philippine Manufacturing Corp., et al.*[16], particularly, Sections 901 and 902 of the U.S. Internal Revenue Code**. As correctly pointed out by petitioner, if it will be subjected to the tax rate of 35% instead of the 15% preferential rate based on the said cash dividend, it will be a departure and contrary to the intention of the RP-US Tax Treaty; which clearly provided the contracting parties specific preferential rates other than the 35% tax rate.
>
> In view of the foregoing, this Court finds petitioner, as a foreign corporation incorporated and domiciled in the U.S., entitled to

---

[15] Division Docket, pp. 531-532.
[16] G.R. No. 66838, December 2, 1991, 204 SCRA 377.

> the 15% preferential tax treatment of dividends pursuant to Section 28(B)(5)(b) of the NIRC of 1997, as amended by RA No. 9337. *(Emphasis Supplied).*

We, thus, agree with the decision of the CTA Third Division[17], as follows:

> As correctly pointed out by petitioner, RMO No. 1-2000 is irrelevant considering that the basis of claim for refund is Section 28(B)(5)(b) of the NIRC. xxx xxx xxx

When the claim for refund/TCC with the Commissioner has not yet been acted upon and the two-year period is about to prescribe, judicial claim should be filed

CIR asserts that IGC's claim for refund is subject to administrative investigation/examination because claims for refund partake the nature of exemption, thus, pending the closure of this investigation, no grant of refund may be given to IGC based on the filed claim.

IGC argues that it presented sufficient evidence to support its claim and complied with all the statutory and jurisprudential requirements entitling it to a refund. In addition, since CIR failed to act on the claim for refund, her inaction was appealed to the CTA pursuant to Section 229 of the 1997 Tax Code. IGC concludes that there is no basis to insist that the refund is subject to further investigation by CIR.

CIR's assertion deserves scant consideration.

As correctly ruled by the CTA Third Division, "To be granted a refund, petitioner[18], in addition to being able to point to some positive provisions of

---

[17] Division Docket, p. 534.

law creating such right, must also be able to establish the fact of payment of the tax sought to be refunded as well as the filing of the claim for refund within the reglementary period."

As regards proof of payment of FWT, pertinent portion of the assailed Decision[19] provides:

> "As borne out by the evidence submitted to this Court, in the Resolution[20] dated May 18, 2006, the Board of Directors of McCann Worldgroup Philippines, Inc. declared cash dividends of P205,648,685.02 in favor of all its stockholders, including the petitioner who owns 30% of McCann's outstanding shares at the time the dividends were declared[21], to wit:
>
> > 'RESOLVED, that the Board of Directors of McCann Worldgroup Philippines, Inc. (the 'Corporation'), declare, as it hereby declares, a cash dividend of PhP205,648,685.02 in favor of all stockholders of record of the Corporation as of the close of business on May 18, 2006, which cash dividend shall be payable as soon as the approvals of any concerned government agencies have been obtained.'
>
> The cash dividends accruing to petitioner amounted to P61,694,605.51, computed as follows:
>
> | | |
> |---|---|
> | Cash Dividends declared | P 205,648,685.02 |
> | x percentage of ownership | 30% |
> | Cash Dividends to Petitioner | P 61,694,605.51 |
>
> In order to prove that on June 13, 2006 McCann withheld final withholding tax on such dividends at the rate of 35% or in the amount of P21,593,111.93, and remitted the same on June 15, 2006, petitioner submitted in evidence the Monthly Remittance Return of Final Income Taxes Withheld[22] of McCann, and the accompanying Payment Transaction[23]. Such remittance was also certified by the BIR's Large Taxpayers Document Processing and Quality Assurance Division.[24]"

[18] respondent IGC, in this *en banc* case.
[19] Division Docket, pp. 532-533.
[20] Exhibit "O"
[21] Exhibit "P", page 2; Exhibit "D", page 4
[22] Exhibit "G"
[23] Exhibit "G-1".
[24] Exhibit "H".

Based on the foregoing, it was proven that the fact of payment of FWT on cash dividends was on June 15, 2006.

As to the prescriptive period of administrative and judicial claims, respectively, for refund of erroneously paid tax, these claims must be filed within two (2) years from the date the tax was paid pursuant to Sections 204 (C) and 229 of the 1997 National Internal Revenue Code, as amended, as follow:

> "SEC. 204. Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes. — The Commissioner may —
>
> xxx xxx xxx
>
> (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.
> xxx xxx xxx"

> "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, 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." *(Emphasis Supplied).*

IGC filed its administrative claim for refund/TCC on March 5, 2008 [25] and its judicial claim for refund/TCC on June 16, 2008[26] (June 15, 2008, falls on a Sunday). Clearly, the claim for refund/TCC was filed within the 2-year prescriptive period from June 15, 2006, the date of payment of FWT.

In *Commissioner of Internal Revenue vs. Philippine National Bank,*[27] the CTA *en banc* ruled that when the two-year period is already about to prescribe and the claim for refund with the Commissioner has not yet been acted upon, the taxpayer should file a petition for review with the CTA in order to preserve his right to seek judicial recourse. Pertinent portion is quoted, as follows:

> "It is clear that the aforequoted *Sections 204 and 229* govern all kinds of refund or credit of internal revenue taxes — imposed and collected erroneously or illegally, pursuant to the NIRC *(CIR vs. Central Azucarera Don Pedro, 49 SCRA 474; CIR vs. Insular Lumber Co., 21 SCRA 1237).* Section 204 applies to administrative claims filed with the BIR, while Section 229 refers to judicial actions for the recovery of the tax. However, the **settled rule is that both 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. These two requirements are mandatory and non-compliance therewith would be fatal to the action for refund or tax credit** *(Johnston Lumber Co., Inc. vs. CTA, 101 Phil 151; Guagua Elec. Light Co., Inc. vs. Coll., 1 SCRA 1221).* The two-year period is a limitation of action not only in submitting the written claim for refund to the Commissioner, but likewise in instituting an action with the Court of Tax Appeals *(Tax Law and Jurisprudence, 2nd ed., Justice Jose Vitug and Presiding Justice Ernesto D. Acosta, p. 306).* Hence, the taxpayer must file its administrative claim for refund with the Commissioner, within two (2) years after the payment of the tax; however, if the Commissioner takes time in deciding the claim and the period of two (2) years is about to end, the

[25] Exhibits "I" and "J".
[26] Division Docket, p.1.
[27] CTA EB No. 499 (Case No. 7203), November 26, 2009 with Entry of Judgment on October 11, 2010. In G.R. No. 191530 (*The Commissioner of Internal Revenue vs. Philippine National Bank*) this case was closed and terminated in August 25, 2010 Minute Resolution of SC First Division.

> 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 Commissioner. This is so because of the positive requirement of *Section 204* and the doctrine that delay of the Commissioner in rendering decision does not extend the peremptory period fixed by the statute *(Gibbs & Gibbs vs. CIR and CTA, 15 SCRA 318, citing Gibbs vs. Collector of Internal Revenue, G.R. No. L-13453, February 29, 1960)*. Thus, **when the two-year period is already about to prescribe and the claim for refund with the Commissioner has not yet been acted upon, the taxpayer should file a petition for review with the CTA in order to preserve his right to seek judicial recourse.**" *(Emphasis Supplied).*

Based on the foregoing, there is no reason to set aside the findings and conclusions of the CTA Third Division in the assailed Decision and Resolution.

WHEREFORE, premises considered, the petition for review is **DENIED** for lack of merit. Accordingly, the February 21, 2011 Decision and the May 31, 2011 Resolution of the Third Division of the Court of Tax Appeals are **AFFIRMED.**

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(On Leave)
ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
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