REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CE CEBU GEOTHERMAL POWER COMPANY INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 741
(C.T.A. CASE NO. 7395)

Present:

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

Promulgated:

JAN 1 2 2012 ArApolinario 2:00 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

The phrase "within two (2) years xxx 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 *(Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010).*

THE CASE

This is a Petition for Review filed by CE Cebu Geothermal Power Company, Inc. (hereafter "petitioner"), under *Section 11 of RA 9282,* in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks to reverse and set aside the Amended Decision dated November 25, 2010 and Resolution dated March 4, 2011 rendered by the Special First Division of this Court in C.T.A. Case No. 7395, entitled "CE Cebu Geothermal Power Company, Inc. vs. Commissioner of Internal Revenue," the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, the "**Motion for Reconsideration"** filed by respondent is hereby **GRANTED.** Accordingly, the Decision dated January 5, 2010 is hereby **REVERSED** and **SET ASIDE**. The

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Petition for Review is **DENIED** for insufficiency of evidence.

The **"Motion for Partial Reconsideration"** filed by petitioner is hereby **DENIED** for lack of merit.

SO ORDERED."

"**WHEREFORE**, petitioner's **"Motion for Reconsideration"** filed on December 17, 2010 is hereby **DENIED** for lack of merit.

SO ORDERED."

THE PARTIES

Petitioner CE Cebu Geothermal Power Company, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office at 24/F 6750 Bldg., Ayala Avenue, Makati City.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue ("CIR"), with the authority, among others, to decide, approve and grant tax credit and/or refund, and holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

The facts, as culled from the records, are as follows:

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On December 14, 2005, petitioner filed with the Bureau of Internal Revenue (BIR) a written application for the refund or issuance of a tax credit certificate of its excess and unutilized input value-added tax (VAT) in the amount of P8,623,007.12 for the four quarters of taxable year 2004.

In view of respondent's inaction, and pursuant to *Section 229 of the NIRC of 1997, as amended,* on December 29, 2005, petitioner filed its judicial claim for refund with this Court, docketed as C.T.A. Case No. 7395.

On January 5, 2010, the Special First Division rendered a decision partially granting the Petition for Review.

On January 25, 2010, petitioner filed a "Motion for Reconsideration" of the Decision dated January 5, 2010, while respondent filed a "Motion for Reconsideration" of the Decision dated January 5, 2010, on January 26, 2010.

On November 25, 2010, the Special First Division rendered an Amended Decision denying petitioner's "Motion for Reconsideration" for lack of merit and granting respondent's "Motion for Reconsideration".

On December 17, 2010, petitioner filed a "Motion for Reconsideration" of the Amended Decision dated November 25, 2010.

On March 4, 2011, the Special First Division denied petitioner's "Motion for Reconsideration" for lack of merit.

On April 6, 2011, petitioner filed the instant Petition for Review before this *Court En Banc*, raising this sole issue, to wit:

ISSUE

WHETHER OR NOT THE SPECIAL FIRST DIVISION ERRED IN DENYING PETITIONER'S JUDICIAL CLAIM FOR PETITIONER WAS ABLE TO PROVE, BY PREPONDERANCE OF EVIDENCE, THAT ITS SALES ARE ZERO-RATED AND THEREFORE, IT IS ENTITLED TO CLAIM FOR REFUND IN THE TOTAL AMOUNT OF P18,623,007.12.

In support thereof, petitioner argues that:

1) Petitioner was able to present sufficient and uncontroverted evidence, apart from the Certificate of Compliance (COC), that it is a generation company engaged in zero-rated sales of power to PNOC-EDC;

2) The EPIRA does not require petitioner to show its COC to be considered a generation company for purposes of treating its sales as VAT zero-rated;

3) Petitioner's COC, even if issued only on October 5, 2005, nonetheless confirms that petitioner is a generation company and

its sale of generated power to PNOC-EDC is zero-rated for VAT purposes;

4) The CTA-Division should have taken judicial notice of the fact that petitioner is a generation company; and

5) Petitioner duly filed its Motion for Reconsideration.

Without necessarily giving due course to the Petition for Review, on April 19, 2011, We ordered respondent CIR to file her comment, not a motion to dismiss, within ten (10) days from notice. Despite notice, respondent failed to file her comment.

On June 23, 2011, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice; after which the case shall be deemed submitted for decision.

On July 15, 2011, respondent filed her Memorandum, while petitioner filed its Memorandum on August 19, 2011.

On September 20, 2011, the case was deemed submitted or decision.

THE COURT *EN BANC'S* RULING

The petition has no merit.

In determining petitioner's entitlement to a refund of unutilized input VAT, the Court deems it necessary to first determine whether or not petitioner's administrative and judicial claims for refund of unutilized input VAT were filed within the prescribed period under the *NIRC of 1997, as amended.*

Section 112(A) and (C) of the NIRC of 1997, as amended, provides:

> "SEC. 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: Provided, however, that in case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof has been duly accounted for in accordance with the rules and regulations of the BSP: Provided, further, that where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
>
> (B) xxx
>
> (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**." *(Emphasis supplied)*

Pursuant to the above provisions, the application for refund of the unutilized input VAT attributable to zero-rated sales may be made within two (2) years after the close of the taxable quarter when the sales were made. From the submission of the supporting documents, the CIR has 120 days to decide the claim for refund. In case of full or partial denial, or inaction of the CIR, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

Thus, in the case of *CIR vs. Aichi Forging Company of Asia, Inc., supra*, the Supreme Court ruled:

> "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

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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."

Applying the above ruling to the instant case, we find that petitioner timely filed its administrative claim for refund for the four quarters of 2004 on December 14, 2005, which is well within the two year prescriptive period from the close of the taxable quarter when the sales were made or from December 31, 2006, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.*

However, notwithstanding the timely filing of its administrative claim, petitioner's claim must necessarily fail as it prematurely filed its judicial

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appeal before this Court on December 29, 2005, barely 15 days after it filed its application for refund with respondent CIR. The Petition for Review, docketed as C.T.A. Case No. 7395, was, therefore, filed prematurely, as petitioner did not wait for the lapse of the 120 days before filing its appeal with the CTA, in violation of *Section 112(D) of the NIRC of 1997, as amended.*

Pursuant, therefore, to the aforesaid ruling of the Supreme Court in the Aichi case, the premature filing of petitioner's judicial claim for refund/credit of input VAT with this Court warrants a dismissal inasmuch as no jurisdiction was acquired by this Court.

In view of the foregoing, we find it unnecessary to discuss petitioner's compliance with the other requisites for refund of input taxes on domestic purchases of goods and services and importation of goods attributable to its zero-rated sales, for being moot and academic.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit. The assailed Amended Decision dated November 25, 2010 and Resolution dated March 04, 2011 are **REVERSED** and **SET ASIDE**.

Accordingly, the Petition for Review in CTA Case No. 7395 is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my vote in the assailed Amended Decision dated November 25, 2010)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(Concurs with PJ Acosta)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(Concurs with PJ Acosta)
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 CEBU GEOTHERMAL POWER COMPANY, INC., Petitioner,	**CTA EB CASE NO. 741** **(C.T.A. CASE NO. 7395)**
	Members:
- versus -	**ACOSTA**, *PJ,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA,** *and,* **COTANGCO-MANALASTAS**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JAN 1 2 2012

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CONCURRING AND DISSENTING OPINION

I am in concurrence with the majority that in the application of the reglementary period to file the judicial claim for refund of petitioner's excess input VAT for the four quarters of taxable year 2004 before the Court under Section (D)[1] of the 1997 NIRC, the petitioner has prematurely filed its judicial claim. I, however, do not agree that because of said prematurity, this Court has no jurisdiction. On the contrary, I believe that the prematurity of petitioner's filing of its judicial claim is a violation of the principle of exhaustion of administrative remedies.

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[1] Now Section C of the 1997 NIRC, as amended.

The doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence. The rationale for this doctrine is obvious. It entails lesser expenses and provides for the speedier resolution of controversies. Comity and convenience also impel courts of justice to shy away from a dispute until the system of administrative redress has been completed.[2]

Under the doctrine of exhaustion of administrative remedies, before a party is allowed to seek the intervention of the court, he or she should have availed himself or herself of all the means of administrative processes afforded him or her. Hence, if resort to a remedy within the administrative machinery can still be made by giving the administrative officer concerned every opportunity to decide on a matter that comes within his or her jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. The premature invocation of the intervention of the court is fatal to one's cause of action.[3]

Likewise, the failure to exhaust administrative remedies does not affect the jurisdiction of the Court. It is already well settled that non-exhaustion of administrative remedies is not jurisdictional. It only renders the action premature, i.e., the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[4]

Pertinent to quote the pronouncement of the Supreme Court in the case of *Soto v. Janero*[5], thus:

> "Failure to observe the doctrine of exhaustion of administrative remedies does not affect the jurisdiction of the Court. We have repeatedly stressed this in a long line of decisions. The only effect of non-compliance with this rule is that it will deprive the complainant of a cause of action, which is a ground for a motion to

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[2] *Universal Robina Corp. (Corn Division) vs. Laguna Lake Development Authority*, GR No. 191427, May 30, 2011 citing *Caballes vs. Perez-Sison*, G.R. No. 131759, March 23, 2004 and *Estrada vs. Court of Appeals*, G.R. No. 137862, November 11, 2004.
[3] *Public Hearing Committee of the LLDA and Cataquiz vs. SM Prime Holdings, Inc.,* GR No. 170599, September 22, 2010 citing *Ongsuco vs. Malones*, G.R. No. 182065, October 27, 2009.
[4] *Carale vs. Abarintos*, GR No. 120704, March 3, 1997.
[5] GR No. L-38962, September 15, 1986.

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dismiss. If not invoked at the proper time, this ground is deemed waived and the court can take cognizance of the case and try it."

Accordingly, Section 1 Rule 9 of the Rules of Court provides that defenses and objections not pleaded in a motion to dismiss or in the answer are deemed waived except when it appears from the pleadings or evidence presented that the Court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations. Since the defense of a violation of the doctrine of exhaustion of administrative remedies is not one of the exceptions, said defense must be invoked either in a motion to dismiss or in the answer, otherwise, it is waived.

Notably, the respondent has not raised nor objected on the premature filing of the case in this Court, hence, the respondent is considered to have waived said defense. The ultimate effect of respondent's waiver is for the Court to take cognizance of this case and rule on the merits.

Consequently, after consideration of the Petition for Review filed before the CTA *En Banc*, I find petitioner's allegation bereft of merit. I stand by my concurrence in the assailed Amended Decision penned by Honorable Justice Bautista of the Special First Division. Unfortunately, in this case, petitioner failed to present evidence that it is a generation company at the time of the claim, as it failed to secure a COC duly issued by ERC. Petitioner's sale of generated power cannot, therefore, qualify for VAT zero-rating under the EPIRA.[6]

In sum, I concur with the dismissal of the Petition for Review, however, not on the ground that the Court has no jurisdiction but because the Petition is bereft of merit.

ERNESTO D. ACOSTA
Presiding Justice

[6] Amended Decision, November 25, 2010, page 5 of 6, par.5.

WE CONCUR

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice