**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

**SECOND DIVISION**

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**HEDCOR SIBULAN, INC.,**
Petitioner,

- versus -

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**C.T.A. CASE NO. 7974**

Members:

**CASTAÑEDA, JR.,** *Chairperson,*
**CASANOVA,** and
**MINDARO-GRULLA,** *JJ.*

**Promulgated:**

DEC 2 1 2011

4:20 p.m.

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# DECISION

**CASANOVA, *J.*:**

The instant Petition for Review seeks the issuance of a tax credit certificate (TCC) or refund in the total amount of Php20,945,796.37, allegedly representing unutilized input VAT on purchases of goods and services for the third quarter of calendar year (CY) 2007 attributable to its zero-rated sales of generated power.

Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Sta. Cruz, Davao Del Sur[1].

Respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the

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[1]Par. 2, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 239.

power to decide, approve and grant tax refunds/credits of erroneously or excessively paid taxes.[2]

Petitioner was incorporated on December 2, 2005, the primary purpose of which is to "engage in the business of owning, developing, constructing, operating, repairing, and maintaining of hydro-electric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations."[3]

Petitioner is registered with the BIR as a VAT taxpayer[4] in accordance with Section 236, National Internal Revenue Code of 1997, as amended with Taxpayer Identification No. (TIN) 005-633-984-VAT[5].

As shown in the Power Supply Agreement (PSA)[6] between petitioner and Davao Light and Power Company, Inc. (DLPCI) dated March 7, 2007, petitioner is principally engaged in the business of power generation through hydropower and the subsequent sale of generated power to the DLPCI[7].

Petitioner's 42 MW Sibulan Hydro Electric Power Plant consisting of two (2) independent hydroelectric projects namely, upstream plant A with installed capacity of about 16.5 MW and downstream plant B with installed

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[2] Par. 3, Admitted Facts, JSFI, Ibid, p. 239.
[3] Par. 6, Admitted Facts , JSFI, Id., p. 240.
[4] Exhibit "B".
[5] Par. 8, Admitted Facts, JSFI, Id., p. 241.
[6] Exhibit "D".
[7] Par. 10, Admitted Facts, JSFI, Id, p. 241.

capacity of about 26 MW has been duly certified by the Department of Energy (DOE) as consistent with the Power Development Plant of the government[8].

On October 19, 2007, petitioner filed with the Revenue District Office (RDO) No. 115 of the Bureau of Internal Revenue (BIR) its Original Quarterly VAT Return for the third quarter of CY 2007[9].

Petitioner, thereafter, filed Amended Quarterly VAT Returns for the third quarter of CY 2007 with the RDO No. 115 on February 11, 2008[10] and September 16, 2009[11].

For the third quarter of CY 2007, petitioner paid and incurred input VAT on its purchases of goods and services in the amount of Php20,945,796.37 for the third quarter CY 2007, broken down as follows:

| **Input VAT** | | | **Total (Php)** |
|---|---|---|---|
| **Domestic Purchases – Goods Other Than Capital Goods (Php)** | **Domestic Purchases – Services (Php)** | **Domestic Purchases – Capital Goods Not Exceeding Php1,000,000 (Php)** | |
| 506,332.26 | 20,409,329.76 | 30,134.28 | 20,945,796.37 |

On September 28 2009, petitioner filed with the RDO No. 115 of the BIR a written application for the refund or issuance of a TCC and an Application for Tax Credits/Refunds (BIR Form No. 1914)[12] for its unutilized

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[8] Par. 12, Admitted Facts, JSFI, Id., p. 241.
[9] Exhibit "E".
[10] Exhibit "F"
[11] Exhibit "G".
[12] Exhibit "H".

input VAT for the third quarter of CY 2007 in the amount of Php20,945,796.37[13].

To date, respondent has not granted or denied petitioner's administrative claim for refund. Thus, petitioner filed this instant Petition for Review on September 29, 2009.

In her Answer[14] filed on December 14, 2009, respondent averred the following Special and Affirmative Defenses:

> "7. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue.
>
> 8. The amount of P 20,945,796.37 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of capital goods and services for the 3rd quarter of the year 2007 is not properly documented.
>
> 9. Petitioner must prove that it has complied with the provisions of Section 112 (A) and (C) of the National Internal Revenue Code of 1997 (1997 Tax Code), as amended, on the prescriptive period for claims for VAT refund/credit.
>
> 10. Petitioner must prove compliance with the prescribed checklist of requirements to be submitted involving claims for VAT refund pursuant to Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund, the administrative claim thereof being mere pro-forma. Further, Section 112(C) of the 1997 Tax Code, as amended, requires the submission of complete documents in support of the application filed with the BIR before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements

[13] Par 4, Admitted Facts, JSFI, Docket, p. 239.
[14] Ibid, pp. 189-197.

warrants immediate dismissal of the Petition for Review.

11. Petitioner must likewise prove that it has complied with the invoicing requirements mentioned in Sections 110 and 113 of the 1997 Tax Code, as amended, in relation to the provisions of Revenue Regulations No. 7-95.

12. In an action for refund/tax credit, the ***onus probandi*** is on the taxpayer to establish its right to refund/tax credit, and failure to sustain the burden is fatal to its claim for refund/credit. **(ASIATIC PETROLEUM CO. VS. LLANES, 49 PHIL 466 cited in COLLECTOR OF INTERNAL REVENUE VS. MANILA JOCKEY CLUB, INC., 98 PHIL. 670)**.

13. Claims for refund are construed in ***strictissimi juris*** against the claimant for the same partake the nature of exemption from taxation **(COMMISSIONER OF INTERNAL REVENUE VS. LEDESMA, 31 SCRA 95)** and as such, they are looked upon with disfavor **(WESTERN MINOLCO CORP. VS. COMMISSIONER OR INTERNAL REVENUE, 124 SCRA 1211)**.

14. The Honorable court *(sic)* of Tax Appeals has no jurisdiction to entertain the instant petition for review for failure on the part of petitioner to comply with the provision of Section 112 (C) of the 1997 Tax Code, as amended, which provides, thus:

> 'Section 112. Refunds or Tax Credits of Input Tax -
>
> xxx xxx xxx xxx
>
> (C) ***Period within which refund or tax Credit of Input Taxes shall be made***. – In proper cases, the Commissioner shall grant refund or issue 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) and (B) hereof.**

In case of full or partial denial 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 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).

15. As stated in the petition, petitioner filed the administrative claim for refund with respondent on September 28, 2009. Subsequently on September 29, 2009, or only one (1) day thereafter, the instant petition was filed. Obviously, the 120 days given to respondent to decide on the claim had not yet lapsed when the petition was filed. The petition was prematurely filed; hence, it must be dismissed for lack of jurisdiction.

16. Petitioner did not observe or comply with the conditions required by said provision of the 1997 Tax Code, as amended. Hence petitioner is estopped from questioning the premature filing of its claim for refund with the Honorable Court."

During trial, petitioner presented testimonial and documentary evidence to prove its case. Respondent's counsel, on the other hand, manifested during the hearing held on July 27, 2011[15] that he will not be presenting a witness. Hence, this Court ordered the parties to file their respective Memorandum within thirty days thereof. In a Resolution dated October 5, 2011, the case was submitted for decision, taking into

[15] Minutes of the hearing, July 27, 2011, Ibid, p. 414.

consideration petitioner's Memorandum filed on September 15, 2011[16] and respondent's Manifestation filed on October 3, 2011 stating that she is adopting all the relevant facts, issues and arguments stated on her Answer as her Memorandum.

The issues[17], as jointly stipulated by the parties, are the following:

1. Whether or not petitioner's unutilized input VAT for the third quarter of CY 2007 amounting to Php20,945,796.37 is duly substantiated by documentary evidence in the form of invoices and official receipts;

2. Whether or not petitioner's unutilized input VAT for the third quarter of CY 2007 amounting to Php20,945,796.37 was applied or credited against any output VAT of the petitioner in the same quarter and subsequent taxable quarter or quarters;

3. Whether or not the input VAT on petitioner's domestic purchases of goods and services for the third quarter of CY 2007 is attributable to its zero-rated sales of generated power; and

4. Whether or not petitioner's administrative and judicial claims for refund or issuance of a TCC for its unutilized input VAT paid and incurred by petitioner on its domestic purchases of goods and services attributable to its zero-rated sales of generated power were filed within the period prescribed under the National Internal Revenue Code of 1997, as amended.

The foregoing issues can be summarized as follows:

"Whether or not petitioner is entitled to the refund or the issuance of a TCC for its alleged unutilized input VAT amounting to Php20,945,796.37".

[16] Memorandum, Id., pp. 427-466.
[17] JSFI, Id., p.242-243.

Pertinent to the resolution of this case is Section 112(A) in relation to Section 112(C) of the NIRC of 1997, as amended, which 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 the 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 had been duly accounted for in accordance with *the rules* and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sales 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: *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.
>
> xxx xxx 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."

Pursuant to the afore-quoted provisions of Section 112(A), for a VAT taxpayer to be entitled to a refund/tax credit of unutilized input VAT, the following requisites must be complied with:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the administrative claim for refund was filed within the two-year prescriptive period.

This Court shall determine first the timeliness of the filing of the instant claim.

The Supreme Court, in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.),*[18] held that the reckoning of the two-year prescriptive period for the filing of a claim for refund of unutilized input VAT under Section 112(A) of the NIRC of 1997 starts from the close of the taxable quarter when the relevant sales were made.

The present claim pertains to the input VAT incurred for the third quarter of CY 2007. Reckoned from September 30, 2007, the close of the

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[18] G.R. No. 172129, September 12, 2008, 565 SCRA 154

taxable quarter covering the third quarter of CY 2007, petitioner had until September 30, 2009, within which to file its administrative claim. Thus, petitioner's administrative claim for refund/tax credit certificate filed with the BIR on September 28, 2009 was timely filed.

Notwithstanding the timely filing of petitioner's administrative claim, this Court still cannot entertain petitioner's judicial claim filed on September 29, 2009, for having been prematurely filed.

In applying the provision of Section 112 (C) of the NIRC of 1997, which was formerly 112 (D) prior to its amendment by Republic Act (R.A.) No. 9337, the Supreme Court in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* (*Aichi case*) [19], held thus:

> "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.
>
> 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.**

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[19] G.R. No. 184823, October 6, 2010

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 . . . 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**.

With regard to *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc.* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.

**In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA**." (Emphases supplied).

Pursuant to the above-quoted ruling in the *Aichi case*, the 120-30-day period under in Section 112 (C) of the NIRC of 1997, as amended, is crucial in filing a judicial claim for the refund/credit of unutilized input VAT.

As mentioned earlier, petitioner timely filed its administrative claim on September 28, 2009. However, petitioner filed the instant Petition for Review on September 29, 2009, which is only one (1) day from the time it filed its administrative claim. Hence, the filing of the instant Petition for Review without waiting for the expiration of the said 120-day period is fatal. Thus, following the ruling in the *Aichi case*, the premature filing of petitioner's judicial claim warrants the dismissal of the same.

In view of the foregoing, this Court deems it no longer necessary to resolve the other issues raised in this case.

**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DISMISSED** on the ground that it was prematurely filed.

**SO ORDERED.**

**CAESAR A. CASANOVA**
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

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

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Acting Presiding Justice