REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

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TeaM ENERGY CORPORATION (Formerly: MIRANT PAGBILAO CORPORATION),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A CASE NO. 7617

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
NOV 26 2010; 2:15 pm

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AMENDED DECISION

CASANOVA, *J.*:

For resolution is respondent's Motion for Reconsideration (Re: Decision promulgated 13 July 2010)[1] filed on August 5, 2010, seeking reconsideration of this Court's Decision[2] promulgated on July 13, 2010, the dispositive portion of which reads as follows:

> "**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in the amount of **SEVENTY-NINE MILLION ONE HUNDRED EIGHTY-FIVE THOUSAND SIX**

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[1] Docket, pp. 659-670
[2] Ibid, pp. 639-653

> **HUNDRED SEVENTEEN AND 33/100 PESOS (P79,185,617.33)** in favor of petitioner, representing petitioner's unutilized input VAT, attributable to its effectively zero-rated sales of power generation services to NPC for the period covering January 1, 2005 to October 31, 2005.
>
> **SO ORDERED.**"

Respondent seeks to reconsider the Decision on the following grounds:[3]

> I. The Petition for Review should have been denied for failure of petitioner to observe the doctrine of exhaustion of administrative remedies.
>
> II. Petitioner is not entitled to a refund in the reduced amount of P79,185,617.33 representing unutilized input VAT attributable to effectively zero-rated sales of power corporation services to the National Power Corporation (NPC) for the period covering 01 January 2005 to 31 October 2005.

Respondent argues that petitioner's claim for refund suffers from procedural infirmity as it had prematurely filed its Petition for Review in violation of the doctrine of exhaustion of administrative remedies; and, that a claim for refund partakes the nature of a claim for tax exemption and should be construed *strictissimi juris* against the taxpayer.

We find merit in respondent's Motion.

In the most recent ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company, Inc.*[4] the High Tribunal ruled in this wise:

[3] Motion for Reconsideration (Re: Decision promulgated 13 July 2010), p. 2, Docket, p. 660
[4] G.R. No. 184823, October 2, 2010

> "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. (Underscoring supplied)
>
> 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." (Underscoring supplied)

The aforequoted Supreme Court decision categorically stated that Section 112 of the NIRC is the pertinent provision for claims for tax refund/credit of input VAT attributable to zero-rated sales.

Sections 112(A) and (D) of the NIRC provide thus:

"**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 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 trasactions, it shall be allocated proportionately on the basis of the volume of sales.

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(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.

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In the case at Bench, petitioner's administrative claim was filed on December 20, 2006 which is well within the two-year period prescribed under Section 112(A) of the NIRC. Observing the 120-day period for the Commissioner to render a decision on the administrative claim, as required under Sec. 112(D) of the NIRC, petitioner's judicial claim should have been filed not earlier than April 19, 2007. Petitioner, however, filed its judicial claim on April 18, 2007 or only 119 days from December 20, 2006, thus, prematurely filed.

Accordingly, petitioner's claim for refund/credit of excess input VAT covering the period January 1 to October 31, 2005, warrants a dismissal for having been prematurely filed.

WHEREFORE, the Motion for Reconsideration (Re: Decision promulgated 13 July 2010) of the respondent is hereby **GRANTED**. The assailed July 13, 2010 Decision is hereby **REVERSED** and **SET ASIDE** and CTA Case No. 7617 is hereby considered **DISMISSED** for having been prematurely filed.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice
Chairman, First Division

REPUBLIC OF THE PHILIPPINES
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SPECIAL FIRST DIVISION

TEAM ENERGY CORPORATION (Formerly: Mirant Pagbilao Corporation), Petitioner,	**CTA CASE NO. 7617**
- versus -	Members: **ACOSTA,** *Chairperson* **BAUTISTA,** and **CASANOVA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** NOV 26 2010; 2:15 pm

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DISSENTING OPINION

BAUTISTA, J.:

With all due respect to the members of the Court, I must register my nonconcurrence on the granting of respondent's Motion for Reconsideration, which resulted to the dismissal of the Petition for Review for having been prematurely filed.

Sections 112 and 229 of the 1997 National Internal Revenue Code ("NIRC"), as amended, provide as follows:

> 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 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.

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(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.

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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.

A cursory reading of the foregoing provisions will reveal that the legislature did not intend that Section 112 of the 1997 NIRC should be read in isolation or apart from Section 229 of the same Code, or vice versa. It is a basic principle in statutory construction that force and effect should not be narrowly given isolated and disjoined clauses of the law but to its spirit, broadly taking all its provisions together in one rational view.[1] Because a statute is enacted as a whole and not in parts or sections, that is, one part is as important as the others, the statute should be construed and given effect as a whole. A provision or section which is unclear by itself may be clarified by reading and construing it in relation to the whole statute.[2]

Thus, although Section 112 is specific as to the subject matter of refund or tax credit, such provision should still be harmonized with Section 229, for the latter provision is not merely confined to "any national internal revenue tax alleged to have been erroneously or illegally assessed or collected," but also encompasses "any sum alleged to have been excessively collected," which necessarily covers the characteristics of the input value-added tax ("VAT") attributable to zero-rated or effectively zero-rated sales under the former provision. With this, the mandatory statute of limitations prescribed under Section 229 in seeking judicial recourse should also be made to apply to claims for refund or tax credit under Section 112; this notwithstanding that the second paragraph of Section 112(D) provides for a

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[1] Judge Tomas C. Leynes *v.* Commission on Audit, G.R. No. 143596, December 11, 2003, 418 SCRA 180, *citing Araneta v. Concepcion, 99 Phil. 709 (1956).*
[2] *Ibid., citing Maddumba v. Ozaeta, 82 Phil. 345 (1948).*

period within which to file an appeal of a decision or unacted claim with this Court, since the same provision is merely couched in a permissive term with the employment of the word "may."

The word "may" is permissive and operates to confer a discretion;[3] hence, it cannot be construed as having a mandatory effect. Consequently, petitioner no longer needs to wait for the ruling of the Commissioner of Internal Revenue on its claim for refund before it could seek judicial recourse to this Court.

Corollary thereto, the Court of Appeals has also ruled that when the two (2)-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon, for the protection of the interest of the taxpayer, the latter should file a 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 said period, he can no longer appeal the same to this Court, to quote:

> 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

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[3] Yazaki Torres Manufacturing, Inc., *v.* The Court of Appeals, *et al.*, G.R. No. 130584, June 27, 2006, 493 SCRA 86, *citing Virgilio Capati v. Dr. Jesus P. Ocampo, No. L-28742, 113 SCRA 794.*

> 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).*

Finally, it is apparent from Revenue Memorandum Circular No. 49-03[4] dated August 15, 2003 that respondent acknowledges that claims for VAT refund/tax credit filed with this 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.
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> In consonance therewith, the following amendments are being introduced to RMC No. 42-2003, to wit:
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> I.) A-17 of Revenue Memorandum Circular No. 42-2003 is hereby revised to read as follows:
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> 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

[4] Amending Answer to Question Number 17 of Revenue Memorandum Circular No. 42-2003 and Providing Additional Guidelines on Issues Relative to the Processing of Claims for Value-Added Tax (VAT) Credit/Refund, Including Those Filed with the Tax and Revenue Group, One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, Department of Finance (OSS-DOF) by Direct Exporters.

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. A copy of the positive resolution or approval of the motion must be furnished the administrative agency as a prerequisite to the release of the tax credit certificate/tax refund processed administratively. However, if the taxpayer is not agreeable to the findings of the administrative agency or does not respond accordingly to the action of the agency, the agency shall not release the refund/TCC unless the taxpayer shows proof of withdrawal of the case filed with the tax court. If, despite the termination of the processing of the refund/TCC at the administrative level, the taxpayer decides to continue with the case filed at the tax court, the litigation lawyer of the BIR, upon the initiative of either the Legal Office or the Processing Office of the Administrative Agency, shall present as evidence against the claim of the taxpayer the result of investigation of the investigating/processing office.

From the foregoing, it is my considered view that the Court has jurisdiction to entertain the present case.

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

LOVELL R. BAUTISTA
Associate Justice