Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

VESTAS SERVICES PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8888

Members:
CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
MAY 26 2017
9:15 a.m.

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DECISION

CASANOVA, J.:

Before this Court is a Petition for Review[1] filed by Vestas Services Philippines, Inc. on September 5, 2014, praying that judgment be rendered ordering the Commissioner of Internal Revenue to refund or issue a tax credit certificate (TCC) in favor of petitioner in the amount of FORTY-ONE MILLION SIX HUNDRED FIFTY-NINE THOUSAND TWO HUINDRED TWENTY-ONE AND 63/100 (₱41,659,221.63), representing unutilized/excess input Value Added Tax (VAT) credits for the fourth (4th) quarter of taxable year 2013.

Petitioner Vestas Services Philippines, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office address at 31st Floor, Tower II, RCBC Plaza, Ayala Avenue cor. Gil Puyat Ave., Makati City.[2] It was registered with the Securities and Exchange Commission (SEC) on December 14, 2009, for the purpose of acting "as a business development and information technology center that will provide services to its affiliates in the Asia Pacific Region", and setting up and operating "shared services

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[1] Docket (Vol. I), pp. 14-21.
[2] Exhibit "P-1".

operations in Manila, providing back office operations, including IT software development and maintenance, help desk/customer care, finance and accounting and human resources operations."[3]

Respondent Commissioner of Internal Revenue is vested by the National Internal Revenue Code (NIRC) of 1997, as amended, with authority to decide, approve and grant tax refunds. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Diliman, Quezon City.

On January 18, 2010, petitioner registered with the Philippine Economic Zone Authority (PEZA) as an ecozone IT enterprise.[4]

On September 6, 2013, petitioner, through its Board of Directors, resolved to amend its primary purpose to be able "to engage in the business of installation and construction services (except contracts for the construction of locally funded public works and contracts for the construction of defense related structures), including entering into subcontracting arrangements, and service of wind power systems i.e. Wind Turbine Generators, Spare Parts and activities related thereto."[5] A Certificate of Filing of Amended Articles of Incorporation was issued by the SEC on September 20, 2013.[6]

Pursuant to petitioner's new business purpose, it entered into an Onshore Engineering, Procurement and Construction Contract (EPC Contract) with EDC Burgos Wind Power Corporation (EDC), an export-oriented enterprise, which is duly registered with the Board of Investments (BOI) and is engaged in sale of power through renewable sources of energy.[7]

On March 20, 2014, petitioner filed its Quarterly VAT Return for the 4th quarter of 2013.[8] On even date, a letter-request for the refund and/or issuance of a TCC was filed by petitioner with the BIR Revenue District Office No. 50.[9]

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[3] Exhibit "P-1".
[4] Exhibit "P-11".
[5] Exhibit "P-1".
[6] *Id.*
[7] Exhibit "P-12" and "P-13".
[8] Exhibit "P-14".
[9] Exhibit "P-5" and "P-5-1".

Petitioner filed the instant Petition for Review[10] before this Court on September 5, 2014.

In his Answer[11], filed on October 27, 2014, respondent interposed the following defenses:

"<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>

6. Respondent reproduces and repleads all the foregoing allegations insofar as they are relevant to her defenses which are discussed hereunder and incorporates them herein by way of reference and, in addition thereto, most respectfully avers THAT:

7. Petitioner's alleged claim for issuance of tax credit certificate is still subject to administrative routinary investigation/examination by the respondent's Bureau.

8. Taxes paid and collected are presumed to have been made in accordance with law, hence, not refundable.

9. Petitioner failed to offer proof that an application for refund was indeed filed with Revenue District Office 50 in South Makati.

10. Petitioner's claim for refund or issuance of tax credit certificate, if any, in the amount of Php 41,659,221.63, representing alleged unutilized/excess input VAT credits for the fourth quarter of the taxable 2013, were not fully substantiated by proper documents, such as sales invoices, official receipts and others pursuant to Revenue Regulations No. 7-95 in relation to Section 113 and 237 of the 1997 Tax Code.

11. In fact, a verification of petitioner's Quarterly Value Added Tax Return for the quarter ending March 31, 2014 disclosed that petitioner have excess Input Tax Carried over from Previous Quarter in the amount of P107,309,259.02, which is the same amount of its Excess Input Tax for the Quarter Ending December 31, 2013. Consequently, the petitioner is disqualified from claiming

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[10] Docket (Vol. I), p. 14-22.
[11] Docket (Vol. I), p. 62-65.

VAT refund pursuant to Section 110 (B) of the Tax Code, as amended.

12. In an action for refund/credit, the burden of proof is on the petitioner to establish its right to claimed refund and failure to adduce sufficient proof is fatal to the claim for tax refund/credit.

13. It is incumbent upon the latter to show that it has complied with the provisions under Section 204(c) in relation to Section 229 of the Tax Code. Otherwise, its failure to prove the same is fatal to its claim for refund.

14. Claims for refund are construed strictly against herein petitioner since the same partakes 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 of Internal Revenue, 124 SCRA 1211)**"

The case was set for pre-trial conference on December 4, 2014.[12] Thus, respondent and petitioner filed their pre-trial briefs on November 25, 2014[13] and December 1, 2014[14], respectively.

On December 18, 2014, the parties filed their Joint Stipulation of Facts and Issues (Between Petitioner Vestas Services Philippines, Inc. and Respondent Commissioner of Internal Revenue)[15], which was adopted by the Court in the Pre-Trial Order[16] dated February 4, 2015.

During trial[17], petitioner presented the following witnesses: (1) Atty. Jackielyn N. Arceño – Independent Certified Public Accountant (ICPA); and (2) Ms. Edna Rose V. Gonzales – petitioner's Finance Controller. It, likewise, formally offered its documentary evidence[18] on July 20, 2015.

[12] Notice of Pre-Trial Conference, Docket (Vol. I), p. 67.
[13] Pre-Trial Brief (for the Respondent), Docket (Vol. I), p. 130-132.
[14] Pre-Trial Brief (of Petitioner Vestas Services Philippines, Inc.), Docket (Vol. I), p. 68-73.
[15] Docket (Vol. I), pp. 143-145.
[16] Docket (Vol. I), pp. 152-155.
[17] Minutes of the Hearing dated February 9, 2015, Docket (Vol. I), p. 157.
[18] Formal Offer of Evidence with Motion for Leave to Admit Certified True Copies (by Vestas Services Philippines, Inc.), Docket (Vol. I), p. 284-301.

The Court issued a Resolution[19] on February 1, 2016, admitting, as petitioner's evidence, Exhibits "P-1", "P-2", "P-3", "P-3-1", "P-4", "P-4-1", "P-5", "P-5-1", "P-5-2", "P-6", "P-8", "P-8-1", "P-9", "P-9-1", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15" to "P-25", with submarkings, "P-26", "P-27", "P-28 to "P-51"", "P-63", "P-63-a", "P-64", "P-65", "P-66", "P-67", "P-68", "P-68-a", "P-69", "P-69-a", "P-70", "P-71", "P-72", "P-74", "P-75", "P-76", "P-77", "P-78", "P-78-1", and "P-79". Upon petitioner's Motion for Reconsideration, the Court also admitted as petitioner's evidence, Exhibits "P-6-2" as "P-6-1", "P-52 to "P-61"", "P-62", and "P-73".

Meanwhile, respondent manifested that he will no longer be presenting any evidence, considering that no final report has been prepared by the revenue examiner on petitioner's application for refund.[20]

As directed by the Court, petitioner filed its memorandum[21] on July 21, 2016, while respondent failed to file the same, as per Records Verification[22] dated July 22, 2016.

Consequently, the case was submitted for decision on July 29, 2016.[23]

The parties submitted this sole issue[24] for this Court's disposition:

Whether petitioner is entitled to its claim for refund in the amount of Pesos: Forty-One Million Six Hundred Fifty-Nine Thousand Two Hundred Twenty One & 63/100 (P41,659,221.63), representing unutilized/excess input VAT credits for the 4th quarter of the CY 2013.

Petitioner claims that the administrative and judicial claim for refund were filed within the prescriptive period provided under the Tax Code and its pertinent regulations; that it is a VAT-registered entity, as required under Section 112 (B) of the NIRC of 1997, as amended; and that its claim for refund or issuance of a TCC for its excess and

[19] Docket (Vol. II), pp. 428-430.
[20] Very Urgent Manifestation, Docket (Vol. I), p. 389-390.
[21] Memorandum (for Petitioner Vestas Services Philippines, Inc.), Docket (Vol. II), pp. 480-505.
[22] Docket (Vol. II), p. 474.
[23] Resolution, Docket (Vol. II), p. 506.
[24] II. Stipulation of Issues, Joint Stipulation of Facts and Issues (Between Petitioner Vestas Services Philippines, Inc. and Respondent Commissioner of Internal Revenue), Docket (Vol. I), p. 143-144.

unutilized input VAT finds legal support in Chapter VII, Section 15 (g) of the Renewable Energy Act of 2008, in relation to Sections 106 (A)(2)(c), 110 and 112 (A) of the NIRC of 1997, as amended.

Petitioner further argues that the services performed by a VAT-registered entity in favor of a non-resident foreign corporation not engaged in business in the Philippines and paid for in acceptable foreign currency, are subject to VAT zero rating. Petitioner also claims that its transaction with EDC, Bayview Technologies, Inc. (Bayview) and Vestas Wind System AIS (Vestas Wind) either involve the sale of service or lease of property and have been classified and duly proved as zero-rated transactions. Furthermore, as a Cagayan Economic Zone Authority (CEZA)-registered enterprise, Bayview is exempt from all local and national taxes, including VAT as a tax incentive granted under the Cagayan Special Economic Zone and Freeport Enterprise (CSEZFP).

Moreover, petitioner claims that the input taxes due from the purchases of goods and services directly attributable to zero-rated sales of petitioner were duly supported by VAT invoices or official receipts in accordance with Sections 113 and 237 of the NIRC of 1997, as amended. Also, the claimed input VAT payments were not applied against any output tax in the succeeding periods. Considering the foregoing, petitioner claims that it has sufficiently established all the requisites provided by law for it to be entitled to its claim for VAT refund or issuance of TCC.

On the other hand, respondent insists that petitioner's alleged claim for refund or issuance of a TCC is still subject to administrative routinary investigation/examination. Further, he avers that taxes paid and collected are presumed to have been made in accordance with law, thus, not refundable. Moreover, he argues that a verification of petitioner's Quarterly VAT Return for the quarter ending March 31, 2014 disclosed that petitioner has excess Input Tax Carried over from Previous Quarter in the amount of P107,309,259.02, which is the same amount of its Excess Input Tax for the Quarter Ending December 31, 2013. Consequently, petitioner is disqualified from claiming VAT refund pursuant to Section 110 (B) of the NIRC of 1997, as amended.

Finally, respondent asserts that in an action for refund/credit, the burden of proof is on the petitioner to establish its right to claim refund and failure to adduce sufficient proof is fatal to the claim for tax refund/credit.

Pertinent to the resolution of the present case are the provisions of Sections 112(A) and (C) of the NIRC of 1997, as amended, which state:

> "**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: *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 nonzero-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."

Based on the foregoing, a taxpayer engaged in zero-rated or effectively zero-rated sales may be entitled to a refund or tax credit of unutilized input VAT attributable to such sales upon compliance with the following requisites:

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

As stated under Section 112(A) of the NIRC of 1997, as amended, the application for TCC or refund must be filed within two (2) years after the close of the taxable quarter when the zero-rated or effectively zero-rated sales were made.

The present claim covers the 4th quarter of taxable year 2013 which closed on December 31, 2013. Counting therefrom, petitioner had until December 31, 2015 within which to file its administrative claim. Thus, petitioner's administrative claim filed with the BIR on March 20, 2014[25] is well within the 2-year period prescribed under Section 112(A) of the NIRC of 1997, as amended.

As to the timeliness of its judicial claim, Section 112(C) of the NIRC of 1997, as amended, provides that the Commissioner of Internal Revenue (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 Court

[25] Exhibits "P-5" and "P-6".

of Tax Appeals (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 the CTA within 30 days.

The Supreme Court, in the case of ***Commissioner of Internal Revenue vs. Mindanao II Geothermal Partnership***[26], elucidated the time requirements for filing a judicial claim for refund or tax credit of input VAT under Section 112(C) *[then Section 112(D)]* of the NIRC of 1997, as amended, to wit:

> "Section 112(D) speaks of two periods: the period of 120 days, which serves as a waiting period to give time for the CIR to act on the administrative claim for refund or credit, and the period of 30 days, which refers to the period for interposing an appeal with the CTA. It is with the 30-day period that there is an issue in this case.
>
> The CTA *En Banc*'s holding is that, since the word 'or' – a disjunctive term that signifies dissociation and independence of one thing from another – is used in Section 112(D), the taxpayer is given two options: 1) file an appeal within 30 days from the CIR's denial of the administrative claim; or 2) file an appeal with the CTA after expiration of the 120-day period, in which case the 30-day appeal period does not apply. The judicial claim is seasonably filed so long as it is filed after the lapse of the 120-day waiting period but before the lapse of the two-year prescriptive period under Section 112(A).
>
> We do not agree.
>
> The 30-day period applies not only to instances of actual denial by the CIR of the claim for refund or tax credit, but to cases of inaction by the CIR as well. This is the correct interpretation of the law, as held in *San Roque*:
>
>> Section 112(C)[27] also expressly grants the taxpayer a 30-day period to appeal to the

[26] G.R. No. 191498, January 15, 2014.

[27] Original footnote: The section is numbered 112(D) under RA 8424. However, RA 9337 renumbered the section to 112(C). In *San Roque*, the Court refers to Section 112(D) under RA 8424 as Section 112(C) as it is currently numbered. Elsewhere in this Decision, we refer to the provision as Section 112(D) to make it consistent with references to it made by the Court in other cases.

> CTA the decision or inaction of the Commissioner, thus:
>
> > x x x 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.
>
> This law is clear, plain, and unequivocal. Following the well-settled *verba legis* doctrine, this law should be applied exactly as worded since it is clear, plain, and unequivocal. As this law states, the taxpayer may, if he wishes, **appeal the decision of the Commissioner to the CTA within 30 days from receipt of the Commissioner's decision, or if the Commissioner does not act on the taxpayer's claim within the 120-day period, the taxpayer may appeal to the CTA within 30 days from the expiration of the 120-day period**. (Emphasis supplied)

The *San Roque* pronouncement is clear. The taxpayer can file the appeal in one of two ways: (1) file the judicial claim within thirty days after the Commissioner denies the claim within the 120-day period, or (2) file the judicial claim within thirty days from the expiration of the 120-day period if the Commissioner does not act within the 120-day period.

B. The Judicial Claim Was Belatedly Filed

In this case, the facts are not up for debate. Mindanao II filed its administrative claim for refund or credit for the second, third, and fourth quarters of 2004 on 6 October 2005. The CIR, therefore, had a period of 120 days, or until 3 February 2006, to act on the claim. The CIR, however, failed to do so. **<u>Mindanao II then could treat the inaction as a denial and appeal it to the</u>**

CTA within 30 days[28] from 3 February 2006, or until 5 March 2006.

Mindanao II, however, filed a Petition for Review only on 21 July 2006, 138 days after the lapse of the 30-day period on 5 March 2006. The judicial claim was therefore filed late. (See timeline below.)[29]

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C. The 30-Day Period to Appeal is Mandatory and Jurisdictional

However, what is up for debate is the nature of the 30-day time requirement. The CIR posits that it is mandatory. Mindanao II contends that the requirement of judicial recourse within 30 days is only directory and permissive, as indicated by the use of the word "may" in Section 112(D).

The answer is found in *San Roque*. There, we declared that the 30-day period to appeal is both mandatory and jurisdictional:

> Section 112(C) also expressly grants the taxpayer a 30-day period to appeal to the CTA the decision or inaction of the Commissioner, thus:
>
> > x x x 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)
>
> This law is clear, plain, and unequivocal. Following the well-settled *verba legis* doctrine, this law should be applied exactly as worded,

[28] Emphasis ours.
[29] Illustration omitted.

since it is clear, plain, and unequivocal. As this law states, the taxpayer may, if he wishes, appeal the decision of the Commissioner to the CTA within 30 days from receipt of the Commissioner's decision, or if the Commissioner does not act on the taxpayer's claim within the 120-day period, the taxpayer may appeal to the CTA within 30 days from the expiration of the 120-day period.

xxx xxx xxx

Sections 112(A) and (C) must be interpreted according to its clear, plain, and unequivocal language. The taxpayer can file his administrative claim for refund or credit at **anytime** within the two-year prescriptive period. If he files his claim on the last day of the two-year prescriptive period, his claim is still filed on time. The Commissioner will have 120 days from such filing to decide the claim. **If the Commissioner decides the claim on the 120th day, or does not decide it on that day, the taxpayer still has 30 days to file his judicial claim with the CTA.**[30] This is not only the plain meaning but also the only logical interpretation of Section 112(A) and (C).

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When Section 112(C) states that '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,' the law does not make the 120+30 day periods optional just because the law uses the word **'may'. The word 'may' simply means that the taxpayer may or may not appeal the decision of the Commissioner within 30 days from receipt of the decision, or**

[30] Emphasis ours.

within 30 days from the expiration of the 120-day period. x x x "

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SUMMARY OF RULES ON PRESCRIPTIVE PERIODS FOR CLAIMING REFUND OR CREDIT OF INPUT VAT

XXX XXX XXX

B. 120+30 Day Period

1. The taxpayer can file an appeal in one of two ways: (1) file the judicial claim within thirty days after the Commissioner denies the claim within the 120-day period, or (2) **file the judicial claim within thirty days from the expiration of the 120-day period if the Commissioner does not act within the 120-day period**.

2. **The 30-day period always applies, whether there is a denial or inaction on the part of the CIR**.[31]

3. As a general rule, the 30-day period to appeal is both mandatory and jurisdictional. (*Aichi* and *San Roque*)

4. As an exception to the general rule, premature filing is allowed only if filed between 10 December 2003 and 5 October 2010, when BIR Ruling No. DA-489-03 was still in force. (*San Roque*)

5. Late filing is absolutely prohibited, even during the time when BIR Ruling No. DA-489-03 was in force. (*San Roque*)." *(Emphasis supplied)*

From the foregoing, it is clear that in order for the judicial claim to be considered as timely filed, the taxpayer should strictly follow the "120+30" rule under Section 112(C) of the NIRC of 1997, as amended.

[31] Emphasis ours.

ATTESTATION

I attest 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's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice

Applying the same to the instant case, from March 20, 2014, the date when petitioner filed its administrative claim and presumably submitted its complete documents in support of its application for refund, respondent had 120 days, or until July 18, 2014, to decide on the petitioner's claim. Considering that respondent did not act on the petitioner's claim on or before July 18, 2014, the latter had until August 18, 2014[32], the last day of the 30-day period, within which to file its judicial claim.

However, petitioner filed its Petition for Review before this Court only on September 5, 2014, or 18 days after the lapse of the 30-day period on August 18, 2014. Clearly, petitioner belatedly brought its judicial claim for refund or issuance of TCC, and thus, the CTA has lost jurisdiction over the petitioner's appeal.

WHEREFORE, in view of the foregoing, petitioner's claim for refund or issuance of TCC amounting to ₱41,659,221.63, representing its alleged excess and unutilized input VAT credits for the 4th quarter of taxable year 2013, is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

Catherine T. Manahan
(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

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[32] August 17, 2014 being a Sunday.

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Second Division

VESTAS SERVICES PHILIPPINES, INC., *Petitioner,*	**CTA Case No. 8888**
	Members :
-versus-	**CASTAÑEDA, JR.,** *Chairperson* **CASANOVA,** and **MANAHAN,** *JJ.*
	Promulgated: MAY 2 6 2017 9:15 a.m.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

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DISSENTING OPINION

MANAHAN, J.:

With due respect, I express my dissent to the decision of my esteemed colleagues dismissing the petition for review filed by Vestas Services Philippines, Inc. (hereinafter referred to as "petitioner") for lack of jurisdiction.

The majority adopts the posture that petitioner filed its appeal with this Court beyond the thirty (30) day period from the lapse of the 120 day period, and I quote:

> "Applying the same to the instant case, from March 20, 2014, the date when petitioner filed its administrative claim and presumably submitted its complete documents in support of its application for refund, respondent had 120 days or until July 18, 2014, to decide on the petitioner's claim. Considering that respondent did not act on the petitioner's claim on or before July 18, 2014, the latter had until August 18, 2014, the last of the 30-day period, within which to file its judicial claim."

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> "However, petitioner filed its Petition for Review before this Court only on September 5, 2014 or 18 days after the lapse of the 30-day period on August 18, 2014. Clearly petitioner belatedly brought its judicial claim for refund or issuance of TCC, and thus, the CTA has lost jurisdiction over petitioner's appeal."

While I find the counting of the 120 + 30 days correct as aforestated, I believe that the Court did not lose its jurisdiction to entertain the appeal because the petitioner opted to wait for the decision of the Commissioner of Internal Revenue (CIR) and subsequently file an appeal with this Court within the thirty -day period from receipt of the said decision denying its claim for refund. In view of the option taken by petitioner, there is no doubt in my mind that this Court should have adjudicated the controversy on its merits instead of dismissing it for lack of jurisdiction.

The astute examination conducted by the majority on the dates of filing of the administrative claim and the appeal with this Court by the petitioner as these relate to the lapse of the 120 day period is commendable if only for the fact that it stressed the inviolability of the 120 + 30 day rule enunciated in the cases of *Commissioner of Internal Revenue vs. San Roque*[1] and *Commissioner of Internal vs. Mindanao II Geothermal Partnership.*[2]

In interpreting the provisions of Section 112 (c) of the Tax Code, the Supreme Court in these two landmark cases categorically ruled that compliance with the 120-day waiting period is mandatory and jurisdictional. In cases of inaction of the CIR on administrative claims for refund, taxpayers are required to wait for the lapse of the 120-day period before filing an appeal with the CTA. The *ratio decidendi* is that the failure to comply with the 120-day waiting period violates the doctrine of exhaustion of administrative remedies which renders the petition premature.

That is all well and good if this is the only option allowed by law to the taxpayers in cases involving refund of alleged excess or unutilized input taxes. Section 112 (c) of the Tax Code provides as follows:

> **Section 112. Refunds or Tax Credits of Input Tax.** -
>
> (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

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1 G.R. No. 187485, February 12, 2013.
2 G.R. No. 191498, January 15, 2014.

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> 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) 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***. (italics and emphasis ours)

It is clear from the aforequoted provision of the Tax Code that a taxpayer is given two options after it files its administrative claim for refund, namely: 1) to wait for the lapse of the 120-day period without any action on the part of the CIR and within thirty days from the lapse, file an appeal with the CTA **or** (2) in case of full or partial denial of the claim for refund, file an appeal with the CTA within thirty days from receipt of the decision denying the claim.

The mandatory character of the 120 + 30 day period is pertinent when the petitioner chooses to appeal the "inaction" of the Commissioner after the lapse of the 120-day period. The operative word "may" in Section 112 (C) suggests that these two options are given to the taxpayer for its benefit who in turn may freely choose one over the other or none at all.

The records of this case show that **the instant claim for refund was denied by the CIR in a letter dated August 4, 2014 and received by the petitioner on August 6, 2014.** Thereafter, **petitioner elevated an appeal with this Court on September 5, 2014 well within the 30-day period from receipt of the letter of denial issued by the CIR**. This was testified to by petitioner's witness, Edna Rose Gonzales in her Judicial Affidavit dated November 27, 2014 and formally offered (and admitted by this Court) as Exhibit "P-8'.[3] Respondent CIR did not dispute this testimony and in fact did not raise this in his Answer nor did he offer any evidence to support his objections to the claim for refund filed by petitioner.

My distinguished colleagues focused their decision only on the lapse of the 120-day period from the filing of petitioner's administrative claim and in my humble opinion missed the fact that the CIR issued the denial of the claim for refund by petitioner after

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[3] Pages 78-85, Court Docket.

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the lapse of the 120-day period but within the 30-day period to appeal the supposed inaction to the CTA. To illustrate:

- If the option is to appeal the CIR inaction, then the last day to file an appeal with the CTA is August 18, 2014; but

- If the option is to appeal the CIR denial of the administrative claim, then the last day to file an appeal with the CTA is September 5, 2014.

It must be noted that the letter of denial from the CIR came within and before the expiry of the 30-day period after the lapse of the 120-day period, hence, the right of the petitioner to exercise the options of either appealing the "inaction" or the denial by the CIR is well within the prescriptive period defined under Section 112 (c) of the Tax Code as aforestated.

Faced with these two options, the petitioner opted to appeal the direct denial of the CIR instead of the supposed inaction as the former would be more substantial in nature because it would be in actuality a real dispute against a firm and definitive position of the respondent being the duly authorized representative of the government agency that processes all claims for tax refund.

To reiterate, I do assent and agree that the counting of the 120-day period is mandatory and jurisdictional but I also hold the view that the counting of the 30-day period from receipt of the CIR's denial of the claim for refund to appeal to this Court is just as significant in ascertaining our jurisdiction to take cognizance of the petition.

WHEREFORE, the petition having been filed on September 5, 2014 which is within the statutory period for filing an appeal from the CIR decision denying petitioner's claim for refund, I vote to GIVE DUE COURSE to the petition for review and decide the same on the merits.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice