REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

NIPPON EXPRESS (PHILIPPINES) CORPORATION, Petitioner,	**CTA CASE NO. 6967**
	Members:
- versus -	**BAUTISTA,** *Chairperson* **PALANCA-ENRIQUEZ,** and **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** AUG 10 2011 ABFernando 2:39 p.m.

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DECISION

BAUTISTA, *J.:*

This is a Petition for Review filed by Nippon Express (Philippines) Corporation (petitioner) on April 23, 2004 pursuant to Sections 7(a)(2) and 11 of Republic Act No. (RA) 1125, as amended, to review by appeal the inaction of the Commissioner of Internal Revenue over petitioner's administrative claim for the issuance of tax credit certificate in the amount of P24,644,506.86, representing alleged excess input tax attributable to its zero-rated sales for taxable year 2002.

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines. It is registered with the Securities and

Exchange Commission (SEC) under Certificate of Registration No. AS095-005669, with principal office at U-2701 Yuchengco Tower, RCBC Plaza, 6819 Ayala Avenue, Salcedo Village, Makati City.[1]

It is primarily engaged in the business of a forwarder for the combined transportation by air, sea or land from one point of receipt to a point of destination; in the operation of container depot, warehousing, storage, hauling and packing facilities; and in the business of international and domestic air and sea freight and cargo forwarding, hauling, carrying, handling, distributing, loading and unloading of general cargoes and all classes of goods, wares and merchandise.[2] It is registered as a value-added tax (VAT) taxpayer with the Large Taxpayer District Office of the Bureau of Internal Revenue (BIR), Revenue Region No. 8.[3]

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue, vested by law with the power to decide, approve and grant refunds or tax credit of overpaid internal revenue taxes as provided by law. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On April 25, 2002[4], July 25, 2002[5], October 25, 2002[6], and January 27, 2003[7], petitioner filed its Quarterly VAT Returns for the four quarters of 2002 with the BIR, through the Electronic Filing and Payment System (EFPS).

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[1] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 50
[2] Par. 3, Petition for Review, docket, p. 2
[3] Supplemental Joint Stipulation of Facts, docket, p. 52
[4] Exhibits "A" and "B", inclusive of sub-markings, docket, pp. 166-169
[5] Exhibit "C-2", docket, p. 170
[6] Exhibit "D-2", docket, p. 174
[7] Exhibit "E-2", docket, p. 178

On April 22, 2004, petitioner filed an administrative claim for the issuance of tax credit certificate (TCC) with the Large Taxpayers District Office, Revenue Region No. 8 in the amount of P24,644,506.86, representing the excess/unused input taxes attributable to its zero-rated sales.[8]

Due to respondent's inaction on the said administrative claim for issuance of TCC, petitioner filed with this Court a Petition for Review on April 23, 2004, praying that judgment be rendered granting its claim for the issuance of TCC in the amount of P24,644,506.86, representing its alleged excess input tax attributable to its zero-rated sales for taxable year 2002. The same was later docketed as CTA Case No. 6967.

In her Answer[9] filed on June 17, 2004, respondent interposed the following Special and Affirmative Defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

4. Assuming without admitting that petitioner filed a claim for refund, the same is subject to investigation by the Bureau of Internal Revenue.

5. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.

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

7. Sale of goods, properties or services to a PEZA registered enterprises do not qualify as zero-rated sale.

8. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure

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[8] Exhibit "J"; Par. 3, Stipulation of Facts, JSFI, docket, p. 50
[9] Answer, docket, pp. 35-36

to adduce sufficient proof is fatal to the action for tax refund/credit.

9. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the Tax Code, as amended.

10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (**Commissioner of Internal Revenue vs. Ledesma, G.R. no. L-13509, January 30, 1970, 31 SCRA 95**) and as such, they are looked upon with disfavor (**Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121**)."

On February 10, 2005, upon motion of petitioner, this Court commissioned Mr. Jose S. Tayag, Jr. as an Independent Certified Public Accountant (ICPA) pursuant to CTA Circular No. 1-95, as amended.[10]

During trial, petitioner presented as witness Mr. Jose S. Tayag, Jr., the Court's duly commissioned ICPA.[11] On January 7, 2008, it filed its Formal Offer of Evidence[12] submitting Exhibits "A" to "H", "J", "K", "M" to "O", "R", and "S", inclusive of sub-markings; which this Court admitted in the Resolutions[13] dated June 4, 2008 and September 3, 2008.

On the other hand, upon oral motion of petitioner's counsel during the October 30, 2008 hearing and in view of the absence of respondent's counsel for the two consecutive hearings on October 2 and 30, 2008, this Court considered respondent to have waived her right to present evidence.[14] Thus, the Court directed petitioner to file its Memorandum within

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[10] Docket, pp. 57-58 and 66
[11] Minutes, docket, pp. 66, 74, 76, 78, 132, and 291
[12] Docket, pp. 162-165
[13] Docket, pp. 216-245 and 269-271
[14] Docket, p. 276

thirty (30) days from October 30, 2008; while respondent was given a period of fifteen (15) days from receipt of the Resolution dated November 4, 2008 to file her Memorandum.

However, on March 3, 2009, petitioner filed a Motion for Leave of Court to Allow Presentation of Additional Evidence[15], which this Court granted in the Resolution[16] dated May 6, 2009.

During the February 10, 2010 hearing, petitioner recalled Mr. Jose S. Tayag, Jr. as witness, who testified on further examination.[17] Thereafter, on March 1, 2010, petitioner filed its Supplemental Formal Offer of Evidence[18] submitting Exhibits "L", "P", "T" to "SSS", "TTT", "UUU", and "VVV-1" to "VVV-6527", inclusive of sub-markings; which this Court admitted in the Resolutions dated April 30, 2010 and August 9, 2010.[19]

On November 11, 2010, this case was submitted for decision, considering the "Memorandum for the Petitioner" filed on October 11, 2010, and "Memorandum for the Respondent" dated November 25, 2010.[20]

The following are parties' jointly stipulated issues[21] submitted for this Court's consideration:

"1. Whether or not Petitioner's sale of services to PEZA-registered enterprises qualify as zero rated sales;

2. Whether or not Petitioner has unutilized input value-added tax in the amount of P24,644,506.86 for the period January

[15] Docket, pp. 293-301
[16] Docket, pp. 332-333
[17] Docket, p. 387
[18] Docket, pp. 395-398
[19] Docket, pp. 401-403 and 418-419
[20] Docket, p. 456
[21] Docket, p. 51

1, 2002 to December 31, 2002 from domestic purchases of goods and services;

3. Whether or not said unutilized input VAT is attributable to Petitioner's zero-rated sales;

4. Whether or not said unutilized input VAT is substantiated by documentary evidence; and

5. Whether or not Petitioner is entitled to a refund of the said unutilized input VAT."

The foregoing issues boil down to one major issue: whether or not petitioner is entitled to the issuance of tax credit certificate in the amount of P24,644,506.86, representing excess/unutilized input tax attributable to its zero-rated sales for taxable year 2002.

Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, the provision enumerating the requisites for the issuance of tax credit certificate or refund of input tax due or paid attributable to zero-rated or effectively zero-rated sales, reads:

> "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." (*Emphasis supplied*)

Based on the foregoing, in order to be entitled to a refund or issuance of tax credit certificate, petitioner must comply with the following requisites:

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

This Court finds it appropriate to determine first the timeliness of the filing of petitioner's administrative and judicial claims for refund of input VAT before addressing the other requisites.

It bears stressing that the prevailing ruling of the Supreme Court at the time of the filing of the instant Petition for Review is *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*[22], where it was held that the reckoning of the two-year prescriptive period is from the date of filing of the Quarterly VAT Return. In this case, the earliest quarter covered by the instant claim is the first quarter of 2002 for which petitioner filed its original Quarterly VAT Return on April 25, 2002[23]. Counting from this date, both the administrative and the judicial claims filed on April 22, 2004 and April 23, 2004, respectively, were filed within the two-year

[22] G.R. Nos. 141104 and 148763, June 8, 2007
[23] Exhibits "A" and "B", inclusive of submarkings

prescriptive period. Therefore, petitioner's claim was timely filed both in the administrative and judicial levels.

Proceeding on to the first requisite, petitioner's VAT Returns for the four quarters of 2002 showed that it had the following taxable, exempt, and zero-rated sales/receipts:

Exh.	Qtr.	Taxable Sales	Exempt Sales	Zero-rated Sales	Total
A & B	1st	P 13,488,849.50	P 8,405,667.61	P 234,336,380.82	P 256,230,897.93
C	2nd	13,949,751.70	7,537,301.00	222,977,516.06	244,464,568.76
D	3rd	13,270,389.52	8,192,602.62	639,350,644.18	660,813,636.32
E	4th	13,485,746.10	13,920,335.36	1,016,606,795.44	1,044,012,876.90
TOTAL		**P 54,194,736.82**	**P 38,055,906.59**	**P 2,113,271,336.50**	**P 2,205,521,979.91**

However, in its claim for tax credit and Petition for Review, petitioner declared a total sales of P992,033,656.83, broken down as follows:[24]

	Amount
Zero-rated	P 933,312,013.16
Taxable	54,503,816.91
Exempt	4,217,826.76
Total Sales	**P 992,033,656.83**

It should be noted that there is a discrepancy between petitioner's sales as claimed and as reported in its Quarterly VAT Returns, as shown below:

	Per Petition	Per VAT Returns	Difference
Taxable sales	P 54,503,816.91	P 54,194,736.82	P (309,080.09)
Exempt sales	4,217,826.76	38,055,906.59	33,838,079.83
Zero-rated sales	933,312,013.16	2,113,271,336.50	1,179,959,323.34
Total	**P 992,033,656.83**	**P 2,205,521,979.91**	**P 1,213,488,323.08**

Petitioner submits that its sale of freight forwarding services to its Philippine Economic Zone Authority (PEZA)-registered clients is effectively zero-rated pursuant to Section 108(B)(3) of the NIRC of 1997 in relation to

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[24] Pars. 5 and 8, Petition for Review; Exhibit "K"

Section 24 of Republic Act No. 7916, otherwise known as The Special Economic Zone Act of 1995, to wit:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* —
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> xxx xxx xxx
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate;"

In support of its claim, petitioner submitted a Certification from the Philippine Economic Zone Authority confirming that the companies listed therein, which are mostly petitioner's clients, are PEZA-registered enterprises for the period covering January 1 to December 31, 2002.[25]

Moreover, petitioner submitted the official receipts issued to its clients for the subject taxable period,[26] which were examined by the Court-commissioned ICPA[27].

In his Supplemental Report dated November 17, 2009, Mr. Jose S. Tayag, Jr. stated:[28]

> "Based on the Independent CPA Report dated May 30, 2005 and submitted to the Honorable Court last July 18, 2005, the total zero-rated sales of the Company amounts to P933,312,013.16.

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[25] Exhibit "O"
[26] Exhibits "VVV-1" to "VVV-6527"
[27] Jose S. Tayag, Jr. of Joaquin Cunanan and Co.
[28] Page 1, Exhibit "UUU"

> Based on the Supplemental CPA Report dated June 29, 2007, only P349,480,318.38 of the P933,312,013.16 are sales made by the Company to PEZA registered entities. The remaining P583,831,694.78 were sales made to foreign affiliates and overseas agents which are supported by the schedule of offsetting of receivables against payables and have been traced through corresponding billing statements, sales invoices, global netting agreements, banks' inward remittances and credit advices."

Considering the foregoing, Section 108(B)(2) of the NIRC of 1997 also applies, which provides:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* —
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> xxx xxx xxx
>
> (2) Services other than those mentioned in the preceding paragraph, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);"

In the case of *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*[29], the Supreme Court held that in order for the supply of services to be VAT zero-rated under Section 108(B)(2) of the NIRC of 1997, as amended [then Section 102(b)(2) of the NIRC of 1977, as amended], the following requisites must be met:

1. the services must be other than processing, manufacturing or repacking of goods;

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[29] G.R. No. 153205, January 22, 2007

2. payment for such services must be in acceptable foreign currency accounted for in accordance with the BSP rules and regulations, and
3. the recipient of such services is doing business outside the Philippines.

This Court finds that petitioner complied with the first requisite as the freight forwarding services it renders are not in the same category as "processing, manufacturing or repacking of goods". Likewise, the second requisite was met. For freight forwarding services rendered in the year 2002, petitioner received foreign currency payments, which were accounted for in accordance with the BSP rules and regulations, as evidenced by billing statements, sales invoices, inward remittances, and bank credit advices.[30]

However, petitioner failed to comply with the equally significant third requisite. While the SEC Certificates of Non-Registration[31] submitted by petitioner show that the alleged non-resident foreign clients of petitioner are not registered corporations in the Philippines, the same do not prove that such corporations are non-residents "doing business outside the Philippines." Thus, for failure to prove that the freight forwarding services it rendered for the year 2002 were made to non-resident foreign clients doing business outside the Philippines, petitioner's purported sales therefrom in the amount of P583,831,694.78 cannot qualify for VAT zero-rating under Section 108(B)(2) of the NIRC of 1997, as amended. Consequently, the input VAT allegedly attributable to said sales cannot be refunded. It is clear under Section 112(A) of the NIRC of 1997, as amended, that the refund/tax credit of

[30] Exhibits "R-1" to "R-28"
[31] Exhibits "T" to "SSS"

unutilized input VAT is premised on the existence of zero-rated or effectively zero-rated sales.

Claim for refund is in the nature of a claim for exemption and should be construed in *strictissimi juris* against the taxpayer. Likewise, petitioner, as taxpayer claimant, has the burden of proof to establish the factual basis of its claim for refund.[32]

As to the remaining zero-rated sales to PEZA-registered entities, the Court-commissioned ICPA reported the following findings:[33]

	Valid Zero-rated Sales	**Zero-rated sales without Customer's TIN**	**Total**
Parañaque Branch	P 147,276,106.39	P 8,458,344.16	P 155,734,450.55
Pasong Tamo Branch	126,197,658.09	4,100,559.79	130,298,217.88
Cebu	62,737,721.37	709,928.25	63,447,649.62
Head Office	-	-	-
Total	**P 336,211,485.85**	**P 13,268,832.20**	**P 349,480,318.05**

Inasmuch as only a portion of petitioner's zero-rated sales is properly substantiated, only the portion of the input VAT claimed attributable to the substantiated zero-rated sales will be considered for refund. The rate to be applied is based on the volume of sales and is computed as follows:

Substantiated zero-rated sales	P 336,211,485.85
Divided by total declared zero-rated sales	P 2,113,271,336.50
Rate of supported zero-rated sales	**15.91%**

Anent, the second requisite for the entitlement to a refund of input taxes, petitioner reported output and input taxes in its VAT returns for the four quarters of 2002, detailed as follows:

Exh.	**Qtr.**	**Input VAT**	**Output VAT**
A & B	1st	P 7,440,001.54	P 1,348,884.95
C	2nd	7,126,169.27	1,394,975.17

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[32] *Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd.,* 244 SCRA 336
[33] Exhibit "L"

D	3rd	7,196,558.26	1,327,038.96
E	4th	8,416,895.70	1,348,574.61
TOTAL		**P 30,179,624.77**	**P 5,419,473.69**

However, its claim showed total input VAT for the same year in the amount of P30,192,349.28 and output VAT amounting to P5,419,473.69, broken down below:[34]

Qtr.	Input VAT	Output VAT
1st	P 7,440,001.54	P 1,348,883.95
2nd	7,126,169.27	1,394,975.17
3rd	7,196,558.30	1,327,038.96
4th	8,429,620.17	1,348,575.61
TOTAL	**P 30,192,349.28**	**P 5,419,473.69**

Again, it is noteworthy that there is a discrepancy between petitioner's input VAT as claimed and as reported in its Quarterly VAT Returns, as shown below:

Quarter	Per Petition	Per VAT Returns	Difference
1st	P 7,440,001.54	P 7,440,001.54	P -
2nd	7,126,169.27	7,126,169.27	-
3rd	7,196,558.30	7,196,558.26	0.04
4th	8,429,620.17	8,416,895.70	12,724.47
Total	**P 30,192,349.28**	**P 30,179,624.77**	**P 12,724.51**

The Court-commissioned Independent CPA examined the voluminous documents supporting petitioner's input taxes, which consisted of official receipts and invoices[35], and reported the following findings:[36]

SUMMARY OF UNALLOWABLE INPUT TAXES		
Nature of Exception	**Annex**	**Input Taxes**
Suppliers' invoices and/or official receipts are not available	E	P 4,458,943.33
Supported by invoices and/or official receipts not within the period covered in the claim	F	1,385,678.41
Supported by photocopy of invoices and/or official receipts	G	707,247.35
Supported by documents that cannot be identified with the detailed schedules	H	241,514.22
Amounts per invoices and/or official receipts are not equal with the detailed schedules	I	233,911.92

[34] Par. 9, Petition for Review; Exhibit "K"
[35] Exhibits "M" to "M-6325"
[36] Page 1, Annex D, Exhibit "L"

Supported by invoices and/or official receipts with handwritten, rubberstamped or typewritten VAT registration	J	205,159.82
Suppliers' invoices and/or official receipts are not dated	K	165,796.06
Transactions not subject to VAT (airfare, gasoline purchases, concession privilege fee, garbage collection fee)	L	133,124.68
Covered by non-VAT invoices and/or official receipts	M	98,452.89
Supported by acknowledgement receipt without TIN and VAT registration	N	84,183.00
Purchase of services without corresponding proof of payment	O	63,996.01
Supported by invoices and/or official receipts without VAT registration (with TIN)	P	49,040.84
Transactions subject to overseas communication tax (OCT)	Q	29,936.91
Suppliers' reimbursable expenses erroneously included as part of purchases	R	29,890.92
Supported by invoices and/or official receipts which are unreadable	S	22,946.20
Supported by invoices and/or official receipts without TIN and VAT registration	T	19,094.15
Supported by statements of account without any TIN and VAT registration	U	15,000.00
Supported by invoices and/or official receipts that were recorded twice	V	294.55
GRAND TOTAL		**P 7,944,211.26**

The foregoing should be disallowed for the reasons stated. Further, the afore-mentioned difference of P12,724.51 should also be disallowed. Thus, valid input taxes amount to P22,235,413.95, computed as follows:

Input tax per Petition		P 30,192,349.72
Less: Disallowances		
Per ICPA	P 7,944,211.26	
Additional disallowance by the Court	12,724.51	7,956,935.77
Valid input taxes		**P 22,235,413.95**

Since petitioner declared taxable, zero-rated, and exempt sales in its Quarterly VAT Returns for the year 2002, petitioner's purchases for the same period and valid input taxes arising therefrom should be allocated proportionately on the basis of the volume of sales in accordance with Section 112(A) of the NIRC of 1997, to wit:

	Sales per Quarterly VAT Returns	Ratio	Input Tax Allocation
Taxable	P 54,194,736.82	2.46%	P 546,375.15
Zero-rated	2,113,271,336.50	95.82%	21,305,370.51
Exempt	38,055,906.59	1.73%	383,668.29
Total	**P 2,205,521,979.91**	**100.00%**	**P 22,235,413.95**

It was established that petitioner's claimed input taxes were not applied against any output VAT liability during the period of claim and in the succeeding quarters since all of petitioner's output VAT due on its taxable sales is properly deducted. Even though the claimed input tax was carried over to the succeeding quarters, it is represented that the same was deducted as "Any VAT Refund/TCC Claimed" from the Total Available Input Tax as of the second quarter of 2003.[37] Thus, petitioner could not have possibly utilized the subject claim in the succeeding quarters.

In sum, petitioner has sufficiently proven that it is entitled to the issuance of tax credit certificate corresponding to its unutilized input VAT for taxable year 2002 in the reduced amount of P2,614,296.84, computed as follows:

Input tax attributable to zero-rated sales		P 21,305,370.51
Less: Excess output tax		
Output tax on sales subject to VAT	P 5,419,473.69	
Less: Input tax attributable to sales subject to VAT	546,375.15	4,873,098.54
Excess unutilized input taxes attributable to zero-rated sales		**P 16,432,271.97**
Multiplied by ratio of substantiated zero-rated sales over declared zero-rated sales		15.91%
Refundable excess unutilized input taxes attributable to zero-rated sales		**P 2,614,296.84**

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED** to **ISSUE A TAX CREDIT CERTIFICATE** to petitioner in the reduced amount of **TWO MILLION SIX HUNDRED FOURTEEN THOUSAND TWO HUNDRED NINETY-SIX PESOS AND 84/100**

[37] Exhibit "G" ; Pars. 41-44, Memorandum for the Petitioner

(P2,614,296.84), representing excess/unutilized input VAT attributable to its zero-rated sales for taxable year 2002.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

See attached Dissenting Opinion

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

A T T E S T A T I O N

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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

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's Division.

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

REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

THIRD DIVISION

NIPPON EXPRESS (PHILIPPINES) CORPORATION, *Petitioner,*	**C.T.A. CASE NO. 6967** Members:
-versus -	BAUTISTA, Chairperson, PALANCA-ENRIQUEZ, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** AUG 10 2011 APFernand 2:39 p.m.

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DISSENTING OPINION

PALANCA-ENRIQUEZ, J.:

With all due respect to my esteemed colleagues, after a careful study of the applicable law and jurisprudence, I am constrained to register my dissent and accordingly, vote to dismiss the instant Petition for Review for the following reasons:

1) As regards the first quarter of taxable year 2002, it is my humble view that petitioner's administrative claim was filed beyond the period prescribed by law. *Section 112 (A) of the NIRC of 1997, as amended,* expressly provides that unutilized input VAT payments not otherwise

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used for internal revenue tax due the taxpayer must be claimed, within two (2) years reckoned from the close of the taxable quarter when the relevant sales were made or capital goods were imported or locally purchased pertaining to the input VAT, regardless of whether said tax was paid or not [*Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), 565 SCRA 154]*. The reckoning frame would always be the end of the quarter when the sales were made or capital goods were imported or locally purchased, regardless when the input VAT was paid.

In this case, petitioner claims for the unutilized input VAT covering the first quarter of taxable year 2002; thus, the counting of the prescriptive period commences on March 31, 2002. Counting from March 31, 2002, petitioner has two (2) years within which to apply for a refund with respondent CIR, or until March 31, 2004. Records show, however, that petitioner filed its administrative claim for refund on April 22, 2004 only or 22 days late.

The Supreme Court had already settled that taxpayers claiming for a refund of its unutilized input VAT cannot avail itself of the provisions of either *Section 204(C) or Section 229 of the NIRC* which, for the purpose of refund, prescribe a different starting point for the two-year prescriptive limit for the filing of a claim therefore, since both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes (*Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, supra.).*

It is clear, therefore, that petitioner's administrative claim for the first quarter of taxable year 2002 was filed late.

2) As regards the judicial claim for the second, third and fourth quarters of taxable year 2002, it is my humble opinion that the same was prematurely filed.

This issue had already been settled by the Supreme Court in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010*, as follows:

> ***"The filing of the judicial claim was premature***
>
> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
>
> > SEC. 112. Refund or Tax Credits of Input Tax. –
> >
> > xxx xxx
> >
> > (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper

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> 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) 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 (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.)*

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 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.

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

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filed within the two-year prescriptive period has no legal basis.

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 the 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 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 Subsection (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 vs. Victorias Milling, Co., Inc. (22 SCRA 12) 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.

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> 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."

Pursuant to the above ruling, the periods provided under *Section 112 (D) of the NIRC of 1997, as amended*, are crucial in filing an appeal with the CTA. It is already settled that *Section 229 of the NIRC of 1997, as amended*, is not applicable to claims for VAT refund *(CIR vs. Mirant Pagbilao Corporation, supra)*. Thus, the two (2)-year period is applicable to administrative claims for VAT refund only, pursuant to *Section 112 (A)* of the same Code, and not to judicial claims.

Applying the foregoing to the instant case, a perusal of the records shows that on April 22, 2004, petitioner filed its administrative claim for refund of its unutilized input VAT for taxable year 2002 with the Large Taxpayer's District Office, Revenue Region No. 8, which is well-within the prescribed two-year period. On the other hand, applying *Section 112(C)* (previously Section 112 (D) *of the NIRC of 1997), as amended,* the CIR has 120 days from April 22, 2004, or until August 20, 2004, within which to decide petitioner's claim for refund. Within 30 days from the lapse of the 120-day period, or from August 21, 2004 until September 19, 2004, petitioner may elevate its claim for refund with this

Court. However, records show that petitioner filed its Petition for Review on April 23, 2004, or only one (1) day after it filed its administrative claim. Clearly, petitioner did not wait for the lapse of the 120-day period for the CIR to decide its claim. It is clear, therefore, that the Petition for Review was prematurely filed, since the respondent CIR was not given the full opportunity to decide on petitioner's claim. Therefore, the instant petition should be dismissed for having been prematurely filed.

It bears stressing that the Aichi case is a mere reiteration of what *Section 112 of the NIRC of 1997, as amended*, clearly provides, and does not establish a rule which is not familiar to petitioner; hence, it cannot claim that it is legally impossible to comply with such doctrine as such was still non-existent at the time petitioner filed its Petition for Review. It cannot be mistaken that the law itself is very clear and unambiguous. Hence, we cannot disregard the letter of the law on the pretext of pursuing its spirit *(Tañada and Macapagal vs. Cuenco, et al., 103 Phil. 1051, 1086 [1957]).*

Basic is the rule that judicial interpretation of the law retroacts to the date when the said law became effective. Thus, the ruling in the Aichi case retroacts to the date when *Section 112* took effect.

Furthermore, the ruling in the Aichi case partakes of the nature of a procedural rule. Elementary is the rule that one does not have a vested right in procedural rules.

Finally, the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right. Well-settled is the rule that recovery of excess input VAT is a refund which is in the nature of an exemption. There is parity between tax refund and tax exemption when the former is based either on a tax exemption statute or a tax refund statute. Clearly, a claim for tax refund may be based on statutes granting tax exemption or tax refund. In such case, the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, a legislative grace, which cannot be allowed unless granted in the most explicit and categorical language. The taxpayer must show that the legislature intended to exempt him from the tax by words too plain to be mistaken *(CIR vs. Fortune Tobacco Corporation, 559 SCRA 160, 178).*

To reiterate, tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption *(Commissioner of Internal Revenue vs. SC Johnson & Son, Inc., 368*

Phil. 388, 411, June 25, 1999; Magsaysay Lines, Inc. vs. Court of Appeals, 329 Phil. 310, 324, August 12, 1996; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 314 Phil. 220, 228, May 26, 1995).

For all the foregoing, I vote to dismiss the instant Petition for Review on the following grounds:

1) As regards the 1st quarter of 2002, petitioner's administrative claim was filed out of time; and

2) As regards the 2nd, 3rd and 4th quarters of 2002, petitioner's judicial claim was prematurely filed.

OLGA PALANCA-ENRIQUEZ
Associate Justice