REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

DEUTSCHE KNOWLEDGE SERVICES, PTE LTD.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 8123

Present:

BAUTISTA, Chairperson,
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

MAR 30 2011
AFernando 3:45 p.m.

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RESOLUTION

PALANCA-ENRIQUEZ, J.:

This resolves:

1) respondent CIR's affirmative defense of prematurity raised in her "Answer" filed on August 4, 2010; and
2) petitioner's "Comment (Re: Affirmative Defense of Premature Filing of the Petition for Review)" filed on December 20, 2010.

Respondent CIR prays for the dismissal of the instant Petition for Review on the ground that this Court has no jurisdiction over this case for failure of petitioner to comply with the provision of *Section 112(C) of the*

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National Internal Revenue Code of 1997, as amended (NIRC of 1997, as amended).

On the other hand, in its Comment, petitioner counter-argues that at the time the instant case was filed with this Court, the prevailing rule is that both the administrative and judicial claims for refund must be filed within the two-year prescriptive period as prescribed under *Section 229 of the NIRC of 1997, as amended,* as held in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, 524 SCRA 73;* and that the use of the word "may" in *Section 112(C) of the NIRC of 1997, as amended,* clearly indicates that the judicial recourse within 30 days after the lapse of the 120-day period is merely directory as opposed to the mandatory character of the two-year prescriptive period set under *Section 229 of the NIRC of 1997, as amended.*

With respect to the recent ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (GR No. 184823, dated October 6, 2010),* petitioner contends that said ruling should not be applied retroactively as it would be grossly iniquitous considering the costs of litigation, including the amount spent on court docket fees and lawyer's fees.

We find merit in respondent CIR's *affirmative defense of premature filing* raised in her answer.

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

> "(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.
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> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may, within thirty (30) days** from the receipt of the decision denying the claim or **after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals.**" *(Emphasis supplied)*

Pursuant to the above provision, the Commissioner of Internal Revenue has 120 days from the submission of supporting documents to decide on the claim for refund. In case of full or partial denial, or the inaction of the Commissioner of Internal Revenue, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period. It must be noted that the phrase "may appeal" under *Section 112 (c) of the NIRC of 1997, as amended*, does not mean that the judicial recourse within thirty (30) days from the

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lapse of the one hundred twenty (120) day period is directory and permissive, and not mandatory. Such phrase means that an appeal to the CTA would be totally dependent upon the discretion of the claimant since it is a procedural right extended to the taxpayer which he may or may not exercise based on his judgment.

Thus, in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., supra,* the Supreme Court categorically ruled:

> ***"The filing of the judicial claim was premature***
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> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent' 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. –
>
> xxxx
>
> (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 Subsection (A) and (B) hereof.
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> 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 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.
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> 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."

Pursuant to the above ruling, petitioner's administrative claim for refund for the second quarter of 2008 filed on June 24, 2010, was filed within the two-year prescriptive period.

Pursuant further to *Section 112 (C)* of the same Code, the CIR has 120 days from June 24, 2010 or until October 22, 2010 to decide petitioner's administrative claim for refund. In this case, petitioner's claim was not acted upon by respondent CIR; thus, petitioner has 30 days from October 23, 2010 or until November 22, 2010 to appeal to the CTA the CIR's inaction on its claim for refund.

Records, show, however, that petitioner filed the present Petition For Review before this Court on June 29, 2010. It is clear that the Petition for Review was prematurely filed, since the 120-day period for the CIR to decide the claim for refund had yet to lapse on October 22, 2010.

Pursuant to the aforequoted ruling of the Supreme Court in the Aichi case, the present Petition For Review, having been prematurely filed, this Court has not acquired jurisdiction over the case.

The Court, therefore, is left with no recourse, but to dismiss the petition.

WHEREFORE, premises considered, respondent CIR's affirmative defense of premature filing raised in her Answer is hereby **GRANTED**. Accordingly, the petition for review is hereby **DISMISSED**, for having been prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Dissenting Opinion)	**(With Concurring Opinion)**
LOVELL R. BAUTISTA	**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice	Associate Justice