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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

KELPHIL, INC.,
Petitioner,

~*versus*~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE No. 7749

Members:

Acosta, *PJ,*
Bautista, *and*
Casanova, *JJ.*

Promulgated:

NOV 22 2010 ; 3:00 pm

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AMENDED DECISION

ACOSTA, *PJ:*

This resolves petitioner's "Motion for Reconsideration/New Trial" filed on August 4, 2010 on the assailed Decision dated July 12, 2010, the dispositive part thereof reads:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** in favor of petitioner the reduced amount of P48,850.34, representing excess or unutilized input VAT on domestic purchases of goods and services, attributable to zero-rated sales of services for taxable years 2006 and 2007.
>
> **SO ORDERED.**"

In this Motion, petitioner faults the Court in holding that it failed to prove that the services it rendered in taxable years 2006 and 2007 were made to non-resident foreign clients doing business outside of the Philippines. Allegedly, it has presented more than adequate documentary and testimonial evidence to prove that the recipients of the services that it rendered were doing business outside of the Philippines.

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Moreover, petitioner attached to its Motion the copies of "Certification of Non-Registration of Company" issued by the Company Registration and Monitoring Department of the Securities and Exchange Commission and "Official Receipt No. 0448534" issued by SEC for certification fee to corroborate the fact that the recipient of its services was not doing business in the Philippines. Petitioner states that its failure to adduce in evidence such certification during the presentation of its evidence was due to its honest belief that on the basis of the documentary and testimonial evidences presented, it had already adduced sufficient evidence to prove that the non-resident foreign recipients of its services were doing business outside of the Philippines. It therefore prays, in the alternative, to order a new trial to afford it the opportunity to present the foregoing documents as evidence.

The foregoing Motion for Reconsideration is bereft of merit. The arguments presented therein had already been lengthily considered and passed upon in the assailed Decision. In fact, petitioner's alternative Motion for New Trial in order to offer additional documents as evidence belie its own assertion that it was able to present enough evidence.

Beside this point the Court, however, would like to modify the ruling in the assailed Decision regarding the discussion on the timeliness of the Petition for Review. This would not however, affect the conclusion that petitioner is entitled to its claim for refund in the reduced amount of P48,850.34 representing the excess or unutilized input tax on purchases of goods and services attributable to zero-rated sales of service for taxable years 2006 and 2007.

The judicial remedy for the refund of input tax attributable to zero-rated sales is laid down in Section 112(D) of the 1997 National Internal Revenue Code (NIRC)[1], which states:

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[1] As amended by Section 10, Republic Act No. 9337.

> "(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 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."

In ***Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.***,[2] the Supreme Court explained Section 112(D) in this wise:

> "Section 112(D) of the NIRC clearly provides that the CIR has "120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit]," within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days."
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> xxx xxx xxx
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> "xxx 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."

Applying the foregoing provisions of law and jurisprudence in this instant case would appear that the Commissioner of Internal Revenue has one hundred twenty (120) days or until July 23, 2008, within which to decide on the claim, reckoned from March 25, 2008, the date of petitioner's application for refund with the Bureau of Internal Revenue and presumably the date of its submission of complete supporting documents of the said application. Thereafter, petitioner may appeal with this Court within thirty (30) days after receipt of the decision of the Commissioner or from inaction after the lapse of the said 120-day period.

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

Here, petitioner however immediately filed its Petition for Review on April 2, 2008, barely seven days from its administrative claim, without waiting for the decision of the Commissioner or the lapse of the 120-day period. Clearly, the Petition for Review was premature in accordance with the foregoing jurisprudence. Such premature filing of the Petition for Review is a violation of the rule on exhaustion of administrative remedies.

The rule on exhaustion of administrative remedies before resorting to the court means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiarly within the competence of the administrative agency, avoidance of interference with functions of the administrative agency by withholding judicial action until the administrative process has run its cause, and prevention of attempts to swamp the courts by a resort to them in the first instance.[3] A party seeking an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to court action.[4]

Settled is the rule that the non-exhaustion of administrative remedies is not jurisdictional and it renders only the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[5] The premature invocation of the court's intervention is fatal to one's cause of action; and absent any finding of waiver or estoppel, the case is susceptible of dismissal for failure to state a cause of action.[6] Conversely, if the defense of failure to state a cause of action due to premature invocation of the court's intervention was not raised in a motion to

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[3] Abe-Abe vs. Manta, L-4827, May 31, 1979; 90 SCRA 524.
[4] Commissioner of Internal Revenue vs. Rosemarie Acosta, G.R. No. 154068, August 3, 2007.
[5] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.
[6] Ilo-ilo City Zoning Board of Adjustment and Appeals vs. Gegato-Abecia Funeral Homes, Inc. G.R. No. 157118, December 8, 2003.

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dismiss or as an special and affirmative defense in the answer, *like the case at bar*; such defense was therefore waived[7] by respondent pursuant to Section 1, Rule 9 of the Rules of Court.[8] Therefore, the Court correctly entertained the case and exercised jurisdiction thereof.

On the other hand, petitioner's alternative Motion for New Trial cannot likewise be granted.

Section 5 of Rule 15 of the Revised Rules of the Court of Tax Appeals (RRCTA) provides:

> "SEC. 5. *Grounds of motion for new trial.* – A motion for new trial may be based on one or more of the following causes materially affecting the substantial rights of the movant:
>
> (a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which the rights of such aggrieved party has probably been impaired in his rights; or
>
> (b) Newly discovered evidence, which the party could not, with reasonable diligence, have discovered and produced at the trial and, which if presented, would probably alter the result."

The instant Motion for New Trial of the petitioner does not specifically state the ground for its motion. However, the arguments presented imply that petitioner is invoking the first ground, which is 'mistake or excusable negligence', as it states that its failure to adduce such certification was due to its honest belief that it had already adduced sufficient evidence to prove that the non-resident foreign recipients of its services were doing business outside of the Philippines. Motion for new trial based on this ground requires that the same shall be supported by affidavits of merits pursuant to the second paragraph of

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[7] Nippon Express (Phils) Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6688, Amended Decision promulgated on March 24, 2009.

[8] Rule 9. Effect of Failure to Plead: Section 1. Defenses and objections not pleaded. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.

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Section 6, Rule 15 of RRCTA. Since petitioner has failed to attach the foregoing affidavit of merits, the Motion shall be deemed *pro forma* pursuant to the third paragraph of Section 6, Rule 15 of RRCTA.

Even if we based petitioner's Motion for New Trial on the second ground, which is newly discovered evidence, since it mentioned and attached the SEC Certification of Non-Registration together with the Official Receipt as part of its Motion, the same would still fail.

A motion for new trial on the ground of newly discovered evidence shall be granted when the concurrence of the following requisites is established: (a) the evidence is discovered after trial; (b) the evidence could not have been discovered and produced during trial even with the exercise of reasonable diligence; and (c) the evidence is material and not merely corroborative, cumulative or impeaching and is of such weight that if admitted, would probably change the judgment.[9]

The foregoing requirements are not present in this case.

The SEC Certification of Non-Registration, which is sought to be offered as additional evidence, is not newly discovered evidence but merely forgotten ones. The said document is not discovered after trial but was already available to petitioner during trial. It is well-settled that forgotten evidence, not presented during the trial nor formally offered, is not newly found evidence that merits a new trial.[10]

Aside from the fact that the SEC Certification of Non-Registration is considered as forgotten evidence, the same is also not material and, if ever admitted, would not change the outcome of the case. The said Certification merely proves that its client is not

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[9] Bernaldez vs. Francia, G.R. No. 143929, February 28, 2003.
[10] Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue, G.R. No. 159490, February 18, 2008.

registered in the Philippines and it does not prove that the same is not doing business in the Philippines.

WHEREFORE, petitioner's Motion for Reconsideration/New Trial is hereby denied. The assailed Decision promulgated on July 12, 2010 is hereby modified insofar as the discussion on the timeliness of the Petition for Review is concerned.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

We concur.

(w/ Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

KELPHIL, INC., Petitioner,	CTA CASE NO. 7749
- versus -	Members: ACOSTA, *Chairperson* BAUTISTA, and CASANOVA, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: NOV 2 2 2010 3:03 pm

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SEPARATE OPINION

BAUTISTA, J.:

I concur with the denial of petitioner's Motion for Reconsideration/New Trial inasmuch as none of the grounds for the allowance of a Motion for Reconsideration has been observed by petitioner; likewise, the alternative Motion for New Trial lacks merit since the document sought to be presented cannot be considered as newly discovered evidence.

However, I must express my separate stand insofar as the Amended Decision modified the reckoning of the two (2)-year prescriptive period within which to file the administrative and judicial claims for refund.

In the Decision[1] dated July 12, 2010, the Court discussed the matter as follows:

[1] *Records*, pp. 129-150.

Lastly, anent the issue of whether or not the claim for refund/tax credit certificate was filed within the two-year prescriptive period, the answer is in the affirmative.

The reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund starts from the date of filing of the corresponding Quarterly VAT Return. The present claim pertains to input VAT incurred for the first to fourth quarters of 2006 and 2007. Reckoned from April 20, 2006, July 19, 2006, October 18, 2006, January 18, 2007, April 20, 2007, July 23, 2007, October 22, 2007 and January 25, 2008, petitioner had until April 20, 2008, July 19, 2008, October 18, 2008, January 18, 2009, April 20, 2009, July 23, 2009, October 22, 2009 and January 25, 2010 within which to file its claim both in the administrative and judicial levels. Apparently, the administrative claim filed on March 25, 2008 and the Petition for Review filed with this Court on April 2, 2008 are well within the two-year prescriptive period.[2]

Being the *ponente* of the assailed Decision and in keeping with my view that there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court,[3] as long as the recourse is made within the 2-year prescriptive period provided under Sections 112 and 229 of the 1997 National Internal Revenue Code ("NIRC").[4]

The Court *En Banc*, in the case of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[5] aptly penned as follows:

> **It is true that Section 112(D) [now Section 112(C)] of the abovementioned provision applies to the present case. However, what the petitioner failed to consider is Section 112(A) of the same provision. The respondent is also covered by the two (2) year prescriptive period. We have repeatedly held that the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period.**

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[2] *Id.*, at p. 146.
[3] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[4] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.
[5] CTA EB No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.

Accordingly, the Supreme Court held in the case of Atlas *Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* that the two-year prescriptive period for filing a claim for input tax is reckoned from the date of the filing of the quarterly VAT return and payment of the tax due. **If the said period is about to expire but the BIR has not yet acted on the application for refund, the taxpayer may interpose a petition for review with this Court within the two year period.**

In the case of *Gibbs vs. Collector*, the Supreme Court held that if, however, the Collector (now Commissioner) takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector.

Furthermore, in the case of *Commissioner of Customs and Commissioner of Internal Revenue vs. The Honorable Court of Tax Appeals and Planters Products, Inc.*, the Supreme Court held that the taxpayer need not wait indefinitely for a decision or ruling which may or may not be forthcoming and which he has no legal right to expect. It is disheartening enough to a taxpayer to keep him waiting for an indefinite period of time for a ruling or decision of the Collector (now Commissioner) of Internal Revenue on his claim for refund. It would make matters more exasperating for the taxpayer if we were to close the doors of the courts of justice for such a relief until after the Collector (now Commissioner) of Internal Revenue, would have, at his personal convenience, given his go signal.

This Court ruled in several cases that once the petition is filed, the Court has already acquired jurisdiction over the claims and the Court is not bound to wait indefinitely for no reason for whatever action respondent (herein petitioner) may take. At stake are claims for refund and unlike disputed assessments, no decision of respondent (herein petitioner) is required before one can go to this Court. *(Boldfacing supplied)*

And in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[6] the same was further bolstered as follows:

Corollary thereto, the Honorable Court of Appeals has ruled that **when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been**

[6] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

acted upon by him, 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 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:

> "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.
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> 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 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*)."

Even the Bureau of Internal Revenue cited the foregoing disquisition of the Court of Appeals as basis when it made the following ruling:

> "In reply, please be informed that a taxpayer-claimant need not wait for the lapse of the 120-day period

> before it could seek judicial relief with the CTA by way of Petition for Review. Neither is it required that the Commissioner should first act on the claim of a particular taxpayer before the CTA may acquire jurisdiction, particularly if the claim is about to prescribe. The Tax Code fixed the period of two (2) years for filing a claim for refund with the Commissioner [Sec. 112(A) in relation to Sec. 204(c)] and for filing a case in court [Section 229]. Hence, a decision of the Commissioner is not a condition or requisite before the taxpayer can resort to the judicial remedy afforded by law." *(Boldfacing supplied)*

In addition, Revenue Memorandum Circular No. 49-03,[7] dated August 15, 2003, provides as follows:

> 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 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

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[7] 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.

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.

Based on the foregoing, it is my considered view that the judicial recourse within thirty (30) days after the lapse of the 120-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period provided under Sections 112 and 229 of the 1997 NIRC.[8]

Accordingly, I vote for the **DENIAL** of petitioner's Motion for Reconsideration/New Trial.

LOVELL R. BAUTISTA
Associate Justice

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[8] *Supra* note 4.