REPUBLIC OF THE PHILIPPINES

Court Of Tax Appeals

QUEZON CITY

THIRD DIVISION

HEDCOR SIBULAN, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 8051

Members:

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

Promulgated:

JAN 5 2012

AEFernando 11:15a.m.

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D E C I S I O N

PALANCA-ENRIQUEZ, J.:

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 *Subsections (A) and (B)*" within which to decide on the claim. *alu*

In fact, applying the two-year period to judicial claims would render nugatory *Section 112(D) of the NIRC of 1997,* which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR *(Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010).*

THE CASE

This is a Petition for Review filed by Hedcor Sibulan, Inc. (hereafter "petitioner") praying for the refund or issuance of a tax credit certificate (TCC) in the aggregate amount of P9,379,866.27, representing unutilized input VAT paid on its domestic purchases of taxable goods and services for the 1st quarter of calendar year 2008.

THE PARTIES

Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Sta. Cruz, Davao Del Sur.

On the other hand, respondent is the duly appointed CIR empowered to perform the duties of said office including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes, as provided by law. Respondent holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

The facts of the case, as culled from the records, are as follows:

Petitioner is principally engaged in the business of power generation through hydropower and subsequent sale of generated power to the Davao Light and Power Company, Inc. (DLPCI).

On April 21, 2008, petitioner filed with the BIR its Original Quarterly VAT Returns for the first quarter of 2008.

On May 20, 2008, petitioner filed with the BIR its Amended Quarterly VAT Returns for the first quarter of 2008.

For the first quarter of 2008, petitioner incurred unutilized input VAT credits from its domestic purchases of goods and services in the total amount of P9,379,866.27:

2008 Taxable Quarter	INPUT VAT		TOTAL (Php)
	Domestic purchases – Goods other than Capital Goods (Php)	Domestic purchases – Services (Php)	
FIRST	505,991.90	8,873,874.37	9,379,866.27

Petitioner allegedly did not have any local sales subject to VAT at 12%. As a consequence thereof, petitioner did not have any output VAT liability against which its unutilized input VAT may be applied or credited.

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The input VAT paid and incurred by petitioner on its domestic purchases of goods and services for the 1st quarter of 2008 amounting to Php9,379,866.27 is attributable to its zero-rated sales of generated power.

On March 29, 2010, petitioner filed its administrative claim for refund of unutilized input VAT for the first quarter of taxable year 2008.

In view of respondent's inaction and pursuant to *Section 229 of the NIRC of 1997, as amended,* on March 30, 2010, petitioner filed its judicial claim for refund with this Court, docketed as C.T.A. Case No. 8051.

In her Answer, respondent alleged by way of special and affirmative defenses:

> "xxx xxx
>
> 4. Petitioner's alleged claim for refund is subject to administrative investigation/examination by the Bureau.
>
> 5. The amount of P9,379,866.27 being claimed by petitioner as unutilized input VAT on purchases of goods and services for the first quarter of calendar year 2008 was not properly documented.
>
> 6. In an action for refund, the burden of proof is on the taxpayer to establish its rights to refund, and failure to sustain the burden is fatal to the claim for refund/credit.

7. To support its claim, it is imperative for the petitioner to prove the following, viz:

a. The registration requirements of a value-added taxpayer in compliance with Section 6(a) and (b) of Revenue Regulations No. 6-97 in relation to Section 4.107-a (a) of Revenue Regulations No. 7-95, and Section 236 of the National Internal Revenue Code of 1997 (NIRC of 1997);

b. The invoicing and accounting requirements for VAT registered persons, as well as the filing and payments of VAT in compliance with the provisions of Sections 113 and 114 of the NIRC of 1997;

c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance with Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition sine qua non prior to the filing of judicial claim. It is worthy of emphasis that Section 112 (D) of the NIRC of 1997, requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review;

d. That the input taxes of P9,379,866.27 allegedly paid by petitioner on its unutilized input VAT on purchases of goods and services for the first quarter of calendar year 2008 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Sections 112 (A) and (D) of the NIRC of 1997;

f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase journal, showing that it actually paid VAT in accordance with Sections 110 (A)(2) and 113 of the NIRC of 1997, and pursuant to Section 4.104-5 (a) and (b) of Revenue Regulations No. 7-95; (RE: Substantiation of Claims for Input Tax Credit); and

g. The requirements as enumerated under Section 4.104-2 of Revenue Regulations No. 7-95 (Re: Persons who can avail of the Input Tax Credits).

8. The petition for review was prematurely filed. There was likewise no proof of compliance with the prescribed checklist of requirements to be submitted involving a claim for VAT refund pursuant to RMO No. 53-98, hence, there was no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim in accordance with the provision of Section 112(D) of the NIRC of 1997. It is worthy of emphasis that Section 112(D) of the NIRC of 1997 requires the submission of complete documents in support of the application filed with the BIR before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law Section 112(D) of the NIRC categorically provides, thus:

'SEC. 112. Refunds or Tax Credits of Input Tax.—

xxx xxx

> (D) Period within which Refund or Tax Credit of Input Taxes shall be Made.--- In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period appeal the decision or the unacted claim with the Court of Tax Appeals.'"

Petitioner presented Arlene Galace and Emmanuel Y. Mendoza, as witnesses, and documentary evidence, marked as Exhibits *"A"* to *"D"*, "F" to "H-1", "BB-1" to "FF-1", "AAA" to "EEE-1", inclusive of their sub-markings, which were admitted by the Court, except for Exhibit "E", which was denied admission for petitioner's failure to submit the original thereof for comparison.

On the other hand, respondent waived her right to present evidence and submitted the case for decision.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice; afterwhich the case shall be deemed submitted for decision.

Both parties having complied therewith, on September 7, 2011, the petition was deemed submitted for decision.

ISSUES

As stipulated by the parties, the following are the issues for this Court's consideration:

I

WHETHER OR NOT THE HONORABLE COURT HAS JURISDICTION TO ACT ON THE INSTANT PETITION FOR REVIEW.

II

WHETHER OR NOT PETITIONER IS ENTITLED TO THE REFUND OF OR THE ISSUANCE OF A TCC FOR ITS ALLEGED UNUTILIZED INPUT VAT AMOUNTING TO P9,379,866.27.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is entitled to a refund or the issuance of a TCC for its excess and unutilized input VAT for the first quarter of calendar year 2008 in the aggregate amount of P9,379,866.27 on its domestic purchases of goods and services.

THE COURT'S RULING

The petition has no merit.

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

> "SEC. 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 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**." *(Emphasis supplied)*

Pursuant to the above provision, the CIR has 120 days from the submission of supporting documents to decide the claim for refund. In case of full or partial denial, or inaction of the CIR, 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.

Thus, in the case of *CIR vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010*, the Supreme Court ruled:

> "There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years x x x apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has '120 days from the submission of complete documents in support of the application filed in accordance with Subsections (A) and (B)' within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA."

Applying the above ruling to the instant case, we find that petitioner timely filed its administrative claim for refund for the first quarter of 2008 on March 29, 2010 or within the two year prescriptive period from the close of the taxable quarter when the sales were made or from March 31, 2008, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.*

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However, notwithstanding the timely filing of its administrative claim, petitioner's claim must necessarily fail as it prematurely filed its judicial appeal before this Court on March 30, 2010, barely 1 day after it filed its application for refund with respondent CIR. The instant Petition for Review was, therefore, prematurely filed, as petitioner did not wait for the lapse of the 120 days before filing its appeal with the CTA, in violation of *Section 112(D) of the NIRC of 1997, as amended.*

Pursuant, therefore, to the aforesaid ruling of the Supreme Court in the Aichi case, the premature filing of petitioner's judicial claim for refund/credit of input VAT before this Court warrants a dismissal inasmuch as no jurisdiction was acquired by this Court.

In view of the foregoing, we find it unnecessary to discuss petitioner's compliance with the other prescribed requisites for refund of input taxes on domestic purchases of goods and services attributable to its zero-rated sales.

WHEREFORE, premises considered, the present Petition for Review is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

(With Separate Concurring Opinion)
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, Third Division

C E R T I F I C A T I O N

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.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
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-versus-

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Respondent.

CTA CASE NO. 8051

Members:

Bautista*, Chairperson*
Palanca-Enriquez*, and*
Cotangco-Manalastas*, JJ.*

Promulgated:

JAN 5 2012
ABFernandez 11:15 a.m.

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DISSENTING OPINION

BAUTISTA, J.:

With all due respect to my esteemed colleagues, I must dissent on the decision made by the Court.

The Court denied the Petition for Review filed by Hedcor Sibulan, Inc. ("petitioner") stating that the Petition for Review was filed prematurely, based on Section 112(C) of the 1997 National Internal Revenue Code ("NIRC"), as amended,[1] wherein the Commissioner of Internal Revenue ("CIR") has one hundred twenty (120) days from the submission of complete supporting documents to decide the claim for refund.

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[1] As amended by Republic Act No. 9337.

Based on the records of the case, petitioner filed its Quarterly Value-Added Tax ("VAT") Returns for the 1st quarter of the taxable year 2008 on April 21, 2008. On March 29, 2010, petitioner then filed its administrative claim for refund of unutilized input VAT for the 1st quarter, while a judicial claim was filed with the Court a day after, or on March 30, 2010.

Contrary to the majority, I find from the foregoing facts on record that petitioner timely filed its judicial claim within the prescribed period set forth in Section 112(C) of the 1997 NIRC.

It is my opinion that the declaration of the two (2)-year prescriptive period under Section 112 of the 1997 NIRC must be in accordance with Section 229 of the same Code. Thus, the judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC is merely directory and permissive, and not mandatory nor jurisdictional, for so long as it is made within the settled two (2)-year prescriptive period.[2]

A taxpayer-claimant *may* file an appeal within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the CIR shall decide on the claim, or after the receipt of the decision denying the same, so long as it is within the two (2)-year prescriptive period.

Section 112 (C) of the 1997 NIRC states that:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* –

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[2] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.

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.

The cited provision will show that it contains the word "may," thus indicating that it is merely permissive and operates to confer discretion.[3] It gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[4] to wit:

> **It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty 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 under Section 229 of the NIRC.** It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.

[3] Bersabal *v.* Salvador, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, *citing Dizon v. Encarnacion, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.*
[4] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

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 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.
>
> 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)."*
> *(Boldfacing supplied.)*

Therefore, there is no need to wait for the denial of the claim by the CIR or even his inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal with this Court,[5] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period.[6] Beyond that period, the taxpayer can no longer appeal to this Court.[7]

Accordingly, I vote that the Petition for Review be **GIVEN DUE COURSE**.

LOVELL R. BAUTISTA
Associate Justice

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[5] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[6] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[7] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

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Members:

Bautista, Chairperson
Palanca-Enriquez, and
Cotangco-Manalastas, *JJ.*

Promulgated:

JAN 5 2012
[signature] 11:45 a.m.

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SEPARATE CONCURRING OPINION

I concur with the dismissal of the instant Petition for Review for having been prematurely filed.

I write this separate concurring opinion, however, to express my view that premature filing of judicial claim for refund or non-observance of the doctrine of exhaustion of administrative remedies is not jurisdictional; it only renders the action premature and not ripe for judicial determination.

Petitioner Hedcor Sibulan, Inc.'s premature filing of its Petition for Review before this Court, for having failed to comply with the 120-30 days required under Section 112(C) of the NIRC of 1997, as amended, is a violation of the doctrine of exhaustion of administrative remedies. This failure to observe the doctrine of exhaustion of administrative remedies is fatal to one's cause of action, and thus, in the absence of any waiver or *estoppel*, the case is susceptible of dismissal for *lack of* *cause of action*[1]. The failure to exhaust administrative remedies, however, does not affect the jurisdiction of the court. Non-exhaustion of administrative remedies only renders the action premature, that the claimed cause of action is not ripe for judicial determination.[2]

Considering that the premature filing of claim for refund and/or tax credit or non-exhaustion of administrative remedies is not jurisdictional and, at the most, only renders the case susceptible of dismissal for lack of cause of action, such defense is waivable or may be considered waived pursuant to Section 1, Rule 9 of the Rules of Court.

Given that respondent Commissioner Internal Revenue (CIR) alleged as an affirmative defense the premature filing of petitioner's judicial claim for refund or issuance of tax credit, it cannot be said that respondent CIR waived such defense of premature filing, thus, said defense was properly raised for the consideration of this Court as a valid ground for dismissal.

Hence, considering that petitioner's judicial claim for refund or issuance of a tax credit of unutilized input VAT for the 1st quarter of calendar year 2008 was prematurely filed, and the said defense of premature filing was timely raised in respondent CIR's Answer, I vote that the present Petition for Review be DISMISSED not for lack of jurisdiction but on the ground of lack of cause of action.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[1] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.
[2] Merida Water District, et al. vs. Francisco Bacarro, et al., G.R. No. 165993, September 30, 2008 citing *Rosario v. Court of Appeals*, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; *Carale v. Abarintos*, G.R. No. 120704, March 3, 1997, 269 SCRA 132, 141.