REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

TAKASAGO PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 8096

Members:

ACOSTA, *PJ,*
UY, *and,*
FABON-VICTORINO, *JJ.*

Promulgated:
APR 15 2011 ; 11:38 am

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RESOLUTION

For consideration is respondent's **"Motion to Dismiss"** filed on March 4, 2011, *sans* any Comment from petitioner despite notice thereof.

Respondent prays for the dismissal of petitioner's Petition for Review for lack of cause of action and the Court's lack of jurisdiction to entertain the instant case.

Respondent anchors its motion on the allegation that the petition was filed before the lapse of the one hundred twenty (120)-day period accorded to respondent to decide on petitioner's claim for input VAT refund as required in Section 112 of the 1997 National Internal Revenue Code (NIRC), thus, the case is not within the ambit of the jurisdiction of the Court as enumerated in

Section 7(a)(2) of Republic Act (RA)No. 9282. Further, petitioner asserts that since the defense of lack of jurisdiction may be raised at any stage of the proceeding, the Court may rule to dismiss the petition at any time during trial.

The Court finds respondent's Motion meritorious.

On the outset, a claim for refund or issuance of a tax credit certificate over unutilized or excess input VAT arising from zero-rated or effectively zero-rated sales must comply with Section 112 of the 1997 NIRC, as amended by RA No. 9337, to wit:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* –
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> "(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: ...
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> xxx
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> "(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.
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> xxx xxx xxx

From the foregoing, it is worthy to note that the law set the reckoning of the two-year period for filing a claim for refund/tax credit over input taxes to be the close of the taxable quarter when the sales were made. Furthermore, Section 112(C) of the 1997 NIRC, as amended, prescribes a 120-day period for the taxpayer to await the decision of the Commissioner before filing a claim for refund/tax credit with the Court of Tax Appeals.

Pertinent to discuss the application of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[1] (Mirant Case) and *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[2] (Aichi Case) in herein Petition for Review.

The Mirant Case explicitly ruled that the two-year period to file a refund/tax credit for input tax arising from zero-rated sales should be reckoned from the close of the taxable quarter when the sales were made, *to wit*:

> The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation,* **where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT,** and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes." We explained that:
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>> The above proviso [Section 112 (A) of the NIRC] clearly provides in no uncertain terms that **unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not.** xxx (Emphasis supplied)

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[1] GR No. 172129, September 12, 2008.
[2] GR No. 184823, October 6, 2010.

The Aichi Case, on the other hand, held that the two-year period to claim a refund/tax credit applies only to the administrative level and not to the appeals with the Court of Tax Appeals. Moreover, in the same case, it was ruled that the failure to await the decision of the CIR or the lapse of the 120-day period prescribed in Section 112(D) [now Section 112(C)] of the 1997 NIRC, as amended, amounts to a premature filing which is crucial in filing an appeal with the CTA.

> 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.**
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> 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.
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> 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.
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> 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.** (Emphasis Supplied)

It is worthy to note the dates pertinent in this case:

Period Covered (2008)	End of the Two-Year Period	Date of Filing of Administrative Claim with BIR	End of the 120-day Period for the BIR to Decide	Date of Filing of Judicial Claim with CTA
1st Quarter	March 31, 2010	April 22, 2010	August 20, 2010	April 23, 2010
2nd Quarter	June 30, 2010	April 22, 2010	August 20, 2010	April 23, 2010
3rd Quarter	September 30, 2010	April 22, 2010	August 20, 2010	April 23, 2010
4th Quarter	December 31,2010	April 22, 2010	August 20, 2010	April 23, 2010

Applying the provisions of Section 112(A) & (C) of the 1997 NIRC, as amended, and the Mirant and Aichi Cases in the instant petition, it appears that petitioner's administrative claim for input VAT refund for the 1st quarter of taxable year 2008 was filed out of time. The end of the two-year period under Section 112(A) of the 1997 NIRC, as amended, is on March 31, 2010. It is only on April 22, 2010 when petitioner filed its administrative claim, hence, belatedly filed. Therefore, the claim for input VAT refund for the 1st quarter of taxable year 2008 is **DISMISSED** for having been filed beyond the time prescribed by law.

As to the claim for input VAT refund for the 2nd to 4th quarters of taxable year 2008, the Court found the administrative claims were filed within the period allowed by Section 112 of the 1997 NIRC, as amended. In all three (3) periods, the petitioner filed its administrative claims within the two year period provided under Section 112(A) of the 1997 NIRC, as amended.

The problem now lies with petitioner's filing of its judicial claim for the 2nd to 4th quarters of taxable year 2008 wherein it appears that in all the 3 periods, petitioner failed to conform with the 120-day requirement under

Section 112(C) of the 1997 NIRC, as amended. The petitioner hastily filed its judicial claim with the Court on April 23, 2010 , only one (1) day after it filed its administrative claim, hence, the judicial claim was premature.

The premature filing of the judicial claim is a violation of the doctrine of exhaustion of administrative remedies.

The rule on exhaustion of administrative remedies before resorting to the courts means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiar within the competence of the administrative agency, avoidance of interference with functions of such administrative agency by withholding judicial action until the administrative process has run its course, 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].

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[3] *Abe-Abe vs. Manta*, L-4827, 31 May 1979.
[4] *Commissioner of Internal Revenue vs. Rosemarie Acosta*, GR No. 154068, 03 August 2007.

The premature elevation to this Court of petitioner's claim for refund is not a fatal error that amounts to a dismissal of an action on the ground of the Court's *lack of jurisdiction*. The failure to exhaust available administrative remedies is tantamount to a judicial petition *lacking a cause of action*.

It is already well settled that non-exhaustion of administrative remedies is not jurisdictional. It only renders 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 court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel,* the case is susceptible of dismissal for lack of cause of action.[6]

Corollary, 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 dismiss under Section 1, Rule 16[7] of the Rules of Court or as a special affirmative defense in the Answer, such defense may be considered waived pursuant to Section 1, Rule 9[8] of the Rules of Court. The Motion to Dismiss

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[5] *Carale vs. Abarintos*, GR No. 120704, March 3, 1997.
[6] *Paat vs. Court of Appeals*, GR No. 111107, January 10, 1997; 266 SCRA 167, pp. 175-177.
[7] Section 1. Grounds. Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds:
(a) That the court has no jurisdiction over the person of the defending party;
(b) That the court has no jurisdiction over the subject matter of the claim;
(c) That venue is improperly laid;
(d) That the plaintiff has no legal capacity to sue;
(e) That there is another action pending between the same parties for the same cause;
(f) That the cause of action is barred by a prior judgment or by the statute of limitations;
(g) That the pleading asserting the claim states no cause of action;
(h) That the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished;
(i) That the claim on which the action is founded is unenforceable under the provisions of the statute of frauds; and
(j) That a condition precedent for filing the claim has not been complied with.
[8] Section 1. Defenses and objections not pleaded.

under Rule 16 should have been filed before respondent filed an Answer to the Petition for Review. In any case, if no motion to dismiss has been filed by respondent, any of the grounds for dismissal provided under the said Rule 16 may be pleaded as an affirmative defense in the Answer.[9]

It is significant to note that respondent, as early as her Answer, alleged the premature filing or the *lack of cause of action by the petitioner* in its special and affirmative defenses.[10] Consequently, there was no waiver or estoppel on the part of respondent. Thus, the Petition for Review should be dismissed for lack of cause of action.

WHEREFORE, premises considered, the **Motion to Dismiss** filed by respondent is hereby **GRANTED**. The Petition for Review insofar as the claim for refund/tax credit of input VAT for the 1st Quarter of calendar year 2008 is hereby **DISMISSED** for being filed out of time. As to the Petition for Review insofar as the 2nd to 4th quarters of calendar year 2008, it is also hereby **DISMISSED** for lack of cause of action.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

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.

[9] Section 6, Rule 16, Rules of Court.

[10] *Rollo*, p. 20.

On leave

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice