REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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TOTAL (PHILIPPINES) CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 838
(CTA Case No. 7855)

Present:

DEL ROSARIO, *PJ.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS,
RINGPIS-LIBAN, *JJ.*

Promulgated:

AUG 27 2013 Apolinario 9:00 a.m.

x - x

AMENDED DECISION

UY, *J.*:

For resolution is petitioner's **"MOTION FOR RECONSIDERATION"**[1] filed on March 21, 2013, with respondent's **"COMMENT (Re: Motion for Reconsideration dated 20 March 2013)"**[2] thereto filed on May 10, 2013.

The instant motion seeks a reconsideration of this Court's Decision dated February 21, 2013,[3] and for the issuance of a resolution finding petitioner entitled to its claim for refund or issuance of a tax credit certificate in the total amount of Eight Million Eight

[1] Docket, pp. 167 to 179.
[2] Docket, pp. 190 to 204.
[3] Docket, pp. 145 to 157.

Hundred Forty Three Thousand Two Hundred Twenty Eight and Thirty Centavos (P8,843,228.30) on its alleged unutilized input value-added tax (VAT) incurred from its domestic purchases of taxable goods and services attributable to zero-rated sales for taxable year 2006. The dispositive portion of the assailed Decision reads:

> "**WHEREFORE,** premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, (the) June 30, 2011 Decision and September 14, 2011 Resolution of the CTA Second Division are hereby **AFFIRMED.**
>
> **SO ORDERED.**"

In support of its Motion, petitioner raises the following arguments, *viz:*

1. The *Aichi* Doctrine[4] does not apply in the instant case pursuant to the recent decision of the Supreme Court in the consolidated cases of *Commissioner of Internal Revenue vs. San Roque Power Corporation, G.R. No. 187485, Taganito Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 196113 and Philex Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 197156*; and

2. Petitioner complied with all the requirements for the refund of its excess and unutilized input VAT arising from its domestic purchases of taxable goods and services for the 4th Quarter of CY 2006 attributable to its zero-rated sales in the total amount of Eight Million Eight Hundred Forty Three Thousand Two Hundred Twenty Eight and Thirty Centavos (₱8,843,228.30).

In her Comment, respondent counters as follows:

1. Petitioner never claimed the benefit of BIR Ruling No. DA 489-03;

2. Every time an Answer is filed to a Petition demanding a VAT refund and the BIR invokes the periods in Section 112 of the 1997 NIRC, as amended, as strictly applicable, then BIR Ruling No. DA-489-03 is deemed revoked;

3. The issuance of Revenue Regulation No. 16-2005 on

[4] Referring to the doctrine laid down in *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010.

September 1, 2005, which became effective on November 1, 2005, absolutely revoked BIR Ruling No. DA-489-03; and

4. Petitioner failed to prove by sufficient evidence that it is entitled to the claim for refund.

THE COURT *EN BANC'S* RULING

The instant Motion is partly meritorious.

The 120+30-periods under Section 112 of the Tax Code is mandatory and jurisdictional, except when the taxpayer relied upon BIR Ruling No. DA-489-03 from December 10, 2003 until October 6, 2010.

Section 112(C) of the NIRC of 1997, as amended Republic Act No. 9337,[5] provides as follows:

> "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: xxx.
>
> 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**

[5] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

> **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.**
>
> xxx xxx xxx." *(Emphases supplied)*

In *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[6] (hereinafter referred to as the "*Aichi* case"), the Supreme Court said:

> Section 112(D)[7] 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.
>
> 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.
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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

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[6] G.R. No. 184823, October 6, 2010.
[7] Now Section 112(C), as amended by Republic Act No. 9337.

> 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)[8] 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)[9] 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)[10] 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."

Notwithstanding the foregoing pronouncement, the same may not be applied in the instant case in view of the subsequent decision of the Supreme Court *En Banc* in the landmark consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation; Taganito Mining Corporation v. Commissioner of Internal Revenue; Philex Mining Corporation v. Commissioner of Internal Revenue* [11] (hereinafter referred to as the "*San Roque* case"), to wit:

> When Section 112(C) states that 'the taxpayer affected **may**, within thirty (30) days from 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 law does not make the 120+30 day periods optional just because the law uses the word '**may**.' The word 'may' simply means that the taxpayer **may or may not appeal** the decision of the Commissioner within 30 days from receipt of the decision

[8] Id.
[9] Id.
[10] Id.
[11] G.R. Nos. 187485, 196113, and 197156, February 12, 2013.

or within 30 days from the expiration of the 120-day period. Certainly, by no stretch of the imagination can the word 'may' be construed as making the 120+30 day periods optional, allowing the taxpayer to file a judicial claim one day after the filing the administrative claim with the Commissioner.

The old rule that the taxpayer may file the judicial claim, without waiting for the Commissioner's decision if the two-year prescriptive period is about to expire, cannot apply because that rule was adopted before the enactment of the 30-day period. **The 30-day period was adopted precisely to do away with the old rule, so that under the VAT System the taxpayer will always have 30 days to file the judicial claim even if the Commissioner acts only on the 120th day, or does not act at all during the 120-day period.** With the 30-day period always available to the taxpayer, the taxpayer can no longer file a judicial claim for refund or credit of input VAT without waiting for the Commissioner to decide until the expiration of the 120-day period.

To repeat, a claim for tax refund or credit, like a claim for tax exemption, is construed strictly against the taxpayer. One of the conditions for a judicial claim of refund or credit under the VAT System is compliance with the 120+30 day mandatory and jurisdictional periods. Thus, strict compliance with the 120+30 day periods is necessary for such a claim to prosper, whether before, during, or after the effectivity of the *Atlas* doctrine,[12] except for the period from the issuance of BIR Ruling No. DA-489-03 on 10 December 2003 to 6 October 2010 when the *Aichi* doctrine was adopted, which again reinstated the 120+30 day periods as mandatory and jurisdictional.

The foregoing pronouncements were reinforced in the more recent consolidated cases of *Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue, and Mindanao I Geothermal Partnership v. Commissioner of Internal Revenue*[13], wherein the Supreme Court held as follows:

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[12] Referring to *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* (G.R. Nos. 141104 and 148763, June 8, 2007), wherein it was held that claims for refund or credit of input VAT must comply with the two-year prescriptive period under Section 229 of the NIRC of 1997.

[13] G.R. Nos. 193301 and 194637, March 11, 2013.

"We summarize the rules on the determination of **the prescriptive period for filing a tax refund or credit of *unutilized input VAT* as provided in Section 112 of the 1997 Tax Code**, as follows:

(1) An administrative claimed must be filed with the CIR within two years after the close of the taxable quarter when the zero-rated or effectively zero-rated sales were made.

(2) The CIR has 120 days from the date of submission of complete documents in support of the administrative claim within which to decide whether to grant a refund or issue a tax credit certificate. The 120-day period may extend beyond the two-year period from the filing of the administrative claim if the claim is filed in the later part of the two-year period. If the 120-day period expires without any decision from the CIR, then the administrative claim may be considered to be denied by inaction.

(3) A judicial claim must be filed with the CTA within 30 days from the receipt of the CIR's decision denying the administrative claim or from the expiration of the 120-day period within any action from the CIR.

(4) All taxpayers, however, can rely on BIR Ruling No. DA-489-03 from the time of its issuance on 10 December 2003 up to its reversal by this Court in *Aichi* on 6 October 2010, as an exception to the mandatory and jurisdictional 120+30 day periods." *(Underscoring supplied)*

Also in *Nippon Express (Philippines) Corporation vs. Commissioner of Internal Revenue*,[14] the Supreme Court ruled that:

Pursuant to the ruling of the Court in *San Roque*, the 120+30-day period is mandatory and jurisdictional from the time of the effectivity of Republic Act *(R.A.)* No. 8424 or the Tax Reform Act of 1997. The Court, however, took into consideration the issuance by the BIR of Ruling No. DA-489-03, which expressly stated that the taxpayer need not wait for the lapse of the 120-day period before seeking judicial relief. Because taxpayers cannot be faulted for relying on this declaration by the BIR, the Court deemed it reasonable to allow taxpayers to file its judicial claim even before the expiration of the 120-day period. This exception

[14] G.R. No. 196907, March 13, 2013.

> is to be observed from the issuance of the sale ruling on December 10, 2003 up until its reversal by *Aichi* on October 6, 2010. In the landmark case of *Aichi*, this Court made a definitive statement that the failure of a taxpayer to wait for the decision of the CIR or the lapse of the 120-day period will render the filing of the judicial claim with the CTA premature. As a consequence, its promulgation once again made it clear to the taxpayers that the 120+30-day period must be observed.
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> As laid down in *San Roque*, judicial claims filed from January 1, 1998 until the present should strictly adhere to the 120+30-day period referred to in Section 112 of the NIRC. The only exception is the period from December 10, 2003 until October 6, 2010, during which, judicial claims may be filed even before the expiration of the 120-day period granted to the CIR to decide on the claim for refund." *(Underscoring supplied)*

In this case, it was established that petitioner's refund claim pertains to its alleged input tax for the fourth quarter of 2006 (*i.e.*, from October 1 to December 31, 2006), and that the administrative claim (along with all supporting documents) was filed by petitioner with respondent on December 18, 2008. However, it appears that petitioner did not wait for the lapse of the 120-day period under Section 112 of the National Internal Revenue Code (NIRC) of 1997, and it filed its judicial claim on December 22, 2008, or only four (4) days after it filed its administrative claim.

Clearly, while petitioner timely filed its administrative claim, it never complied with the 120+30-day periods under the earlier quoted Section 112(C) of the NIRC of 1997, as amended RA 9337.

Nevertheless, in view of BIR Ruling No. DA-489-03 vis-à-vis the above-quoted jurisprudential pronouncements, petitioner may be excused from complying with the 120+30-day periods as its refund claim was filed within the period from December 10, 2003 until October 6, 2010. Correspondingly, petitioner's Petition for Review in CTA Case No. 7855 is deemed timely filed, pursuant to the *San Roque* case; and therefore, the Court in Division has jurisdiction to entertain the same.

It is not a pre-requisite to invoke BIR Ruling No. DA-489-03 to be entitled to its benefits.

Respondent insists, in her Comment, that petitioner never claimed or invoked the benefits of BIR Ruling No. DA-489-03, as it was never aware thereof. According to respondent, the fact is petitioner is fully aware of the "2 year-120days-30days" period that needed to be satisfied in order for the administrative and judicial claim for refund to prosper. However, petitioner allegedly failed to comply with the same. In other words, respondent is, in effect, of the view that since petitioner did not claim, nor even knew about the benefits of BIR Ruling No. DA-489-03, petitioner cannot be entitled thereto.

We disagree.

Respondent's arguments have no leg to stand on. Whether or not the taxpayer claimed the benefit of, or knew about the said BIR Ruling is of no moment. This is gleaned from the pronouncements of the Supreme Court in the *San Roque* case, in relation to BIR Ruling No. DA-489-03, to wit:

> "... BIR Ruling No. DA-489-03 *expressly* states that the **'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.'** Prior to this ruling, the BIR held, as shown by its position in the Court of Appeals,[15] that the expiration of the 120-day period is mandatory and jurisdictional before a judicial claim can be filed.
>
> xxx xxx xxx
>
> ...the only issue is whether BIR Ruling No. DA-489-03 is a general interpretative rule applicable to all taxpayers or a specific ruling applicable only to a particular taxpayer.
>
> <u>BIR Ruling No. DA-489-03 is a general interpretative rule because it was a response to a query made, not by a particular taxpayer, but by a government agency tasked with processing tax refunds and credits, that is, the **One Stop Shop Inter-Agency Tax Credit and Drawback Center of the Department of Finance**</u>. This government agency is also the addressee, or the entity responded to, in BIR Ruling No. DA-489-03. Thus, while

[15] *Commissioner of Internal Revenue vs. Hitachi Computer Products (Asia) Corporation*, CA-G.R. SP No. 63340, February 7, 2002.

this government agency mentions in its query to the Commissioner the administrative claim of Lazi Bay Resources Development, Inc., the agency was in fact asking the Commissioner what to do in cases like the tax claim of Lazi Bay Resources Development, Inc., where the taxpayer did not wait for the lapse of the 120-day period.

Clearly, BIR Ruling No. DA-489-03 is a general interpretative rule. Thus, all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on 10 December 2003 up to its reversal by this Court in *Aichi* on 6 October 2010, where this Court held that the 120+30 day periods are mandatory and jurisdictional." *(Underscoring supplied)*

Interpretative rules, such as BIR Ruling No. DA-489-03, are designed to provide guidelines to the law which the administrative agency is in charge of enforcing.[16] In *Roxas & Company, Inc. vs. DAMBA-NFSW, et al., etseq*,[17] the Supreme Court said:

"Interpretative rule x x x x is promulgated by the administrative agency to interpret, clarify or explain statutory regulations under which the administrative body operates. The purpose or objective of an interpretative rule is merely to construe the statute being administered. It purports to do no more than interpret the statute. Simply, the rules tries to say what the statute means. *Generally, it refers to no single person or party in particular but concerns all those belonging to the same class which may be covered by the said interpretative rule.* **It need not be published and neither is a hearing required since it is issued by the administrative body as an incident of its power to enforce the law and is intended merely to clarify statutory provisions for proper observance by the people**. x x x x. (Emphasis and underscoring supplied)" *(Italics supplied)*

Correspondingly, if indeed, interpretative rules are *"designed to provide guidelines to the law which the administrative agency is in charge of enforcing"* and are *"issued by the administrative body as an*

[16] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 119761, August 29, 1996, citing *Misamis Oriental Association of Coco Traders, Inc. vs. Department of Finance Secretary, et al.*, G.R. No. 108524, November 10, 1994.

[17] G.R. Nos. 1497548, 167505, 167540, 167543, 167845, 169163, and 179650, December 14, 2010.

incident of its power to enforce the law and is intended merely to clarify statutory provisions for proper observance by the people", the question that should be asked is **not** whether the people or the taxpayers have relied on, or invoked such interpretative rule, but whether the people or the taxpayers followed the said *"guidelines"* or properly observed the clarification of the statutory provisions made by the administrative body.

Furthermore, in *Misamis Oriental Association of Coco Traders, Inc. vs. Department of Finance Secretary, et al.*,[18] the Supreme Court held:

> "xxx. In the case of an interpretative rule, the inquiry is not into the validity but into the correctness or propriety of the rule. **As a matter of power a court, when confronted with an interpretative rule, is free to (i) give the force of law to the rule;** (ii) go to the opposite extreme and substitute its judgment; **or (iii) give some intermediate degree of authoritative weight to the interpretative rule.**" *(Emphases supplied)*

Without doubt, the Supreme Court has given BIR Ruling No. DA-489-03 the force of law, or at least, some intermediate degree of authoritative weight. This is clearly manifested in the *San Roque* case that while the 120+30-day periods under the law are declared as mandatory and jurisdictional, said BIR Ruling became an exception thereto, even admittedly such BIR Ruling is a wrong interpretation of the law. If then, BIR Ruling No. DA-489-03 has the force of law or some intermediate degree of authoritative weight, it would not be necessary for petitioner to claim or invoke the same before it can be entitled to the benefits thereof.

The majority opinion in the* San Roque *case must be followed.

To reinforce the instant Motion in assailing the efficacy of BIR Ruling No. DA-489-03, respondent respectively cites portions of the Separate Opinion of Associate Justice Marvic Mario Victor F. Leonen, and the Dissenting Opinion of Associate Justice Presbiterio J. Velasco, Jr., both entered in the *San Roque* case.

Regrettably, the majority opinion prevails over the dissents of the minority in the Supreme Court.

[18] G.R. No. 108524, November 10, 1994.

This must be so because elementary decision-making teaches that We cite the majority opinion as precedent, not lone dissenting opinions.[19] A dissenting opinion is not binding, as it is a mere expression of the individual view of the dissenting justice from the conclusion held by the majority of the court.[20] Thus, We are mandated to adhere to the majority opinion in the *San Roque* case, instead of the respective diverse opinion of the minority.

Respondent cannot claim that BIR Ruling DA-489-03 has been absolutely revoked. And even when BIR Ruling No. DA-489-03 may be considered revoked by the filing of respondent's Answer in the Court* a quo*, such revocation cannot be given retroactive application.

Respondent further argues that BIR Ruling No. DA-489-03 was deemed revoked when Answers to various Petitions for Review were filed before the Court. She avers that :

> "From the time BIR Ruling No. DA-489-03 was issued on 10 December 2003, there were quite a lot of judicial claims filed before the Honorable Court. And to these respondent filed Answers[21]. Hence, following the jurisprudence in the Burmeister case[22] it can be construed that every time an Answer is filed to a Petition demanding a VAT refund and BIR invokes the periods in Section 112 of the 1997 NIRC, as amended, as strictly applicable, then BIR Ruling No. DA-489-03 is deemed revoked."

However, the foregoing argument is untenable.

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[19] *In the Matter of the Allegations Contained in the Columns of Mr. Amado P. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007,* A.M. No. 07-09-13-SC, August 8, 2008.

[20] *Garcia vs. Perez*, G.R. No. L-28184, September 11, 1980.

[21] Citing as examples the Answers that were filed in the cases of *"Quezon Power Limited Co. vs. Commissioner of Internal Revenue"* (CTA Case No. 7350), and *"San Roque Power Corporation vs. Commissioner of Internal Revenue"* (CTA Case No. 7424).

[22] Referring to the case of *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*, G.R. No. 153205, January 22, 2007, wherein it was held that: *"Petitioner's filing of his Answer before the CTA challenging respondent's claim for refund effectively serves as a revocation of VAT Ruling No. 003-99 and BIR Ruling No. 023-95."*

While We do not dispute the ruling in the said *Burmeister* case and there are indeed Answers filed by respondent in other cases which alleges defenses contrary to BIR Ruling No. DA-489-03, it is equally true that there are also Answers filed by respondent in some cases that adhere to, although do not mention, the ruling in BIR Ruling No. DA-489-03. Thus, whenever such adherence happens, the ruling in BIR Ruling No. DA-489-03 is revived or becomes the prevailing stand again by the BIR.

It is noteworthy that BIR Ruling No. DA-489-03 states:

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

It is clear from the foregoing that the legal bases of the said BIR Ruling regarding the prescriptive period for filing a claim for refund of input taxes are not only Section 112(A) of the NIRC of 1997, but also of Sections 204(C) and 229 thereof.

The following are some of the cases involving claims for refund of input taxes wherein respondent filed Answers to the effect, *inter alia*, that the taxpayer-claimant must show compliance with Sections 204(C) and/or 229 of the NIRC of 1997, *viz*:

- CTA Case No. 7820 – *Procter & Gamble Asia, Pte. Ltd. vs. Commissioner of Internal Revenue*:

Answer filed on September 29, 2008:

> "11. It is incumbent upon the Petitioner **to show that it has complied with the provisions under Section 204 (c) in relation to Section 229 of the 1997**

Tax Code. Otherwise, its failure to prove the same is fatal to its claim for refund."[23] *(Emphasis supplied)*

- <u>CTA Case No. 7889 – *Visayas Geothermal Power Company vs. Commissioner of Internal Revenue*</u>:

Answer filed on April 14, 2009:

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

xxx xxx xxx

e. That petitioner's administrative and **judicial claims** for tax credit or refund of the unutilized input tax (VAT) **was filed within two (2) year after the close of the taxable quarter when the sales were made in accordance with Sections 112(A) and (D) 229 of the NIRC of 1997**;"[24] *(Emphases supplied)*

- <u>CTA Case No. 7975 - *Harte Hanks Philippines, Inc. vs. Commissioner of Internal Revenue*</u>:

Answer filed on November 6, 2009:

"9. It is incumbent upon the Petitioner **to show that it has complied with the provision of Sections 108 and 112 in relation to Section 229 of the 1997 Tax Code, as amended.**"[25] *(Emphasis supplied)*

- <u>CTA Case No. 8124 - *Harte Hanks Philippines, Inc. vs. Commissioner of Internal Revenue*</u>:

Answer filed on August 19, 2010:

"10) It is incumbent upon the Petitioner **to show that it has complied with the provision of Sections 112 and 204(C) in relation to Sections 229 of the 1997 Tax Code, as amended;**"[26] *(Emphasis supplied)*

Thus, respondent cannot claim that BIR Ruling No. DA-489-03

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[23] Division Docket for CTA Case No. 7820, p. 158.
[24] Division Docket for CTA Case No. 7889, pp. 148 and 149.
[25] Division Docket for CTA Case No. 7975, p. 81.
[26] Division Docket for CTA Case No. 8124, p. 52.

has absolutely lost its efficacy, and may no longer be applied in the instant claim for refund.

Furthermore, the filing of respondent's Answer on February 6, 2009 with the Court *a quo* in CTA Case No. 7855 is of no moment, although it was averred therein that:

> "7. Petitioner's judicial claim for tax credit/refund was prematurely filed for failure to comply with the provision of Section 112(C) of the 1997 National Internal Revenue Code (NIRC), as amended, which states:
>
> > **'Section 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.'-(Italics supplied)
>
> As stated in the Petition, petitioner filed its administrative claim for tax credit/refund with respondent on 18 December 2008. After only four (4) days or on 22 December 2008, the instant Petition was filed with this Honorable Court. Obviously, the 120-day period given to respondent to decide on the claim has just started. Such action on the part of petitioner is tantamount to a wanton disregard of the doctrine of exhaustion of administrative remedies."[27]

This must be so because even when the foregoing Answer effectively served as a revocation of BIR Ruling No. DA-489-03 following the ruling in the said *Burmeister* case, insofar as the

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[27] Division Docket (CTA Case No. 7855), pp. 58 to 59.

petitioner herein is concerned, the revocation cannot be given retroactive application, since it is prejudicial to petitioner.

Section 246 of the NIRC of 1997 provides:

> "SEC. 246. *Non-Retroactivity of Rulings.* — **Any revocation, modification or reversal of** any of the rules and regulations promulgated in accordance with the preceding Sections or **any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith."

It is clear from the foregoing provision that any revocation or reversal of any rulings promulgated by the Commissioner shall not be given retroactive application if such revocation or reversal will be prejudicial to the taxpayers.

The ruling in *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*,[28] — the very ruling relied upon by respondent, recognized the above-quoted Section 246 as follows:

> "Petitioner's filing of his Answer before the CTA challenging respondent's claim for refund effectively serves as a revocation of VAT Ruling No. 003-99 and BIR Ruling No. 023-95. **However, such revocation cannot be given retroactive effect since it will prejudice respondent.** Changing respondent's status will deprive respondent of a refund of a substantial amount representing excess output tax. **Section 246 of the Tax Code provides that any revocation of a ruling by the Commissioner of Internal Revenue shall not be given**

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

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> **retroactive application if the revocation will prejudice the taxpayer. Further, there is no showing of the existence of any of the exceptions enumerated in Section 246 of the Tax Code for the retroactive application of such revocation.**" *(Emphases supplied)*

Thus, since respondent fails to show the existence of any of the exceptions enumerated in Section 246 of the NIRC of 1997 against petitioner, and this Court sees none, the revocation of BIR Ruling No. DA-489-03 by virtue of respondent's Answer, cannot be given retroactive application. Correspondingly, BIR Ruling No. DA-489-03 may still be made to apply in the instant claim for refund.

Revenue Regulation No. 16-2005 did not revoke BIR Ruling No. DA-489-03.

Respondent argues that Revenue Regulations No. (RR) 16-2005, which became effective on November 1, 2005, had absolutely revoked BIR Ruling No. DA-489-03. She cites as basis the first paragraph of the repealing clause thereof, to wit:

> "All other laws, acts, decrees, executive orders, issuances and rules and regulations or parts thereof which are contrary to and inconsistent with any provisions of R.A. No. 9337 are deemed repealed, amended or modified. All other issuances and rules and regulations or parts thereof which are contrary to and inconsistent with any provisions of these Regulations are deemed repealed, amended or modified."

This contention is untenable, for it runs counter to the *San Roque* case.

Indeed, under RR 16-2005, the latter took effect on November 1, 2005.[29] However, it must be pointed out that in the *San Roque* case, Taganito Mining Corporation's claim[30] covered the entire calendar year of 2005, thereby including the 4th quarter thereof (October 1, 2005 to December 31, 2005). Thus, the Supreme Court, which is presumed to be aware of RR 16-2005 and its effectivity, have considered the same when it categorically ruled on the applicable prescriptive periods involving claims for the refund or issuance of a tax credit certificate of input VAT under Section 112 of

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[29] "EFFECTIVITY" provision of RR 16-2005.
[30] G.R. No. 196113.

the NIRC of 1997. In fact, of the three taxpayers involved in the *San Roque* case (*i.e.*, San Roque Power Corporation, Taganito Mining Corporation, and Philex Mining Corporation), only Taganito Mining Corporation was allowed to claim the benefit of BIR Ruling No. DA 489-03, thus:

> "San Roque, therefore, cannot benefit from BIR Ruling No. DA-489-03 because it filed its judicial claim prematurely on 10 April 2003, before the issuance of BIR Ruling No. DA-489-03 on 10 December 2003. To repeat, San Roque cannot claim that it was misled by the BIR into filing its judicial claim prematurely because BIR Ruling No. DA-489-03 was issued only after San Roque filed its judicial claim. At the time San Roque filed its judicial claim, the law as applied and administered by the BIR was that the Commissioner had 120 days to act on administrative claims. This was in fact the position of the BIR prior to the issuance of BIR Ruling No. DA-489-03. **Indeed, San Roque never claimed the benefit of BIR Ruling No. DA-489-03 or RMC 49-03, whether in this Court, the CTA, or before the Commissioner.**
>
> <u>Taganito, however, filed its judicial claim with the CTA on 14 February 2007, ***after*** the issuance of BIR Ruling No. DA-489-03 on 10 December 2003. Truly, Taganito can claim that in filing its judicial claim prematurely without waiting for the 120-day period to expire, it was misled by BIR Ruling No. DA-489-03, which shields the filing of its judicial claim from the vice of prematurity.</u>
>
> Philex's situation is not a case of premature filing of its judicial claim but of late filing, indeed very late filing. BIR Ruling No. DA-489-03 allowed premature filing of a judicial claim, which means non-exhaustion of the 120-day period for the Commissioner to act on an administrative claim. Philex cannot claim the benefit of BIR Ruling No. DA-489-03 because Philex did not file its judicial claim prematurely but filed it long after the lapse of the 30-day period **following the expiration of the 120-day period.** In fact, Philex filed its judicial claim 426 days after the lapse of the 30-day period." *(Underscoring supplied)*

Based on the foregoing, it is evident that the Supreme Court did not consider BIR Ruling No. DA-489-03 to have been revoked by RR 16-2005, which took effect on November 1, 2005, because it still applied the same BIR Ruling to a claim for refund covering the period from October 1, 2005 to December 31, 2005?

Moreover, respondent's stance that RR 16-2005 revoked BIR Ruling No. DA-489-03 is not entirely true.

As above-stated in the *San Roque* case, Taganito Mining Corporation's judicial claim[31] was filed with this Court on February 14, 2007, or after RR 16-2005 took effect. In the Answer thereto filed on March 28, 2007, respondent made the following allegation, to wit:

> "6. **Petitioner must prove that it has complied with the provisions of Sections** 112 (A) and (D) and **229 of the National Internal Revenue Code of 1997 (1997 Tax Code) on the prescriptive period for claiming tax refund/credit**;"[32] *(Emphases supplied)*

If respondent truly understood that BIR Ruling No. DA-489-03, which was mainly anchored on Section 229 of the NIRC of 1997, has been indeed revoked by RR 16-2005, then why would she still argue that Taganito Mining Corporation must prove that it has complied with the said provision on the prescriptive period for claiming tax refund/credit?

In fine, there can be no merit in respondent's argument that RR 16-2005 revoked BIR Ruling No. DA-489-03.

Be that as it may, there being as yet no determination of the merits of petitioner's claim for refund or issuance of a tax credit certificate, CTA Case No. 7855 should be remanded to the court of origin for further proceedings.

WHEREFORE, premises considered, the instant Motion for Reconsideration is **PARTIALLY GRANTED**. The Decision dated February 21, 2013 of the Court *En Banc* is hereby **REVERSED** and **SET ASIDE**.

Accordingly, CTA Case No. 7855 is hereby **REMANDED** to the Second Division of this Court, for a complete determination whether petitioner complied with the other legal requirements in claiming for refund or issuance of a tax credit certificate for its alleged unutilized input VAT incurred from its domestic purchases of taxable goods and

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[31] CTA Case No. 7574 (CTA EB No. 624).
[32] Division Docket for CTA Case No. 7574, p. 46.

services attributable to its zero-rated sales for taxable year 2006.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen M. R. L.
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice