REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

MINDANAO I GEOTHERMAL PARTNERSHIP,	**C.T.A. CASE NOS. 8088 & 8107**
Petitioner,	Members:
-versus-	BAUTISTA, Chairperson, PALANCA-ENRIQUEZ, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE,	**Promulgated:**
Respondent.	JUN 17 2011 [signature] 10:42 a.m.

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R E S O L U T I O N

This resolves:

1) a) petitioner's " Motion for Leave of Court to File and Admit Attached Supplemental Petition for Review" filed on December 7, 2010;

b) respondent CIR's "Comment" filed on December 17, 2010; and

c) petitioner's "Reply (To respondent CIR's Comment dated December 16, 2010)" filed on January 10, 2011.

2) a) respondent CIR's "Motion to Dismiss" filed on December 9, 2010; and

b) petitioner's "Comment/Opposition (To Respondent CIR's Motion to Dismiss)" filed on January 10, 2011.

This Court deems it necessary to first resolve respondent CIR's "Motion to Dismiss".

Respondent CIR's "Motion to Dismiss"

The motion is anchored on the ground that this Court has no jurisdiction to entertain these cases for failure of petitioner to comply with the provision of *Section 112(C) of the National Internal Revenue Code of 1997, as amended* (NIRC of 1997, as amended). Respondent CIR argues that C.T.A. Case No. 8088 was prematurely filed, while C.T.A. Case No. 8107 was filed out of time.

In its comment, petitioner counter-argues that the filing of C.T.A. Case No. 8088, though the 120-day period had yet to expire, is warranted under the circumstances of the present case, citing the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), 565 SCRA 154.*

C.T.A. CASE NO. 8088

As regards C.T.A. Case No. 8088, the Court finds merit in respondent CIR's "Motion to Dismiss".

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

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

Pursuant to the above provision, the Commissioner of Internal Revenue has 120 days from the submission of supporting documents to decide the claim for refund. In case of full or partial denial, or inaction of the Commissioner of Internal Revenue, the taxpayer may file an appeal with the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

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

> "xxx 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."

Applying the foregoing to the instant case, records show that petitioner timely filed its administrative claim for refund for the four quarters of 2008 on January 5, 2010 or within the two year prescriptive period, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.* However, petitioner prematurely filed its judicial appeal before this Court on March 30, 2010 or only 74 days after it filed its application for refund with respondent CIR. The 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.

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

C.T.A. CASE NO. 8107

As regards C.T.A. Case No. 8107, a perusal of the records shows that: (1) the Petition for Review lacks the affidavit of service; (2) the registry return card was not attached to the petition; and (3) the stamp registry date appearing on the envelope appears to have been superimposed, the ink appears darker, and the date is not aligned.

Thus, on March 31, 2011, this Court ordered petitioner to submit an affidavit of service and a certification from the postmaster, attesting to the fact of the date of filing of the Petition for Review to enable the Court to determine the timeliness of the filing of the Petition for Review.

On April 11, 2011, upon motion of petitioner, this Court granted an additional period of seven (7) days for petitioner to comply with the Resolution dated March 31, 2011.

On April 13, 2011, petitioner filed its "Manifestation/Compliance."

However, a perusal of the Manifestation/Compliance shows that petitioner did not submit the required affidavit of service and certification from the postmaster. What petitioner submitted are only the original return card and a certified true copy of the front and back portions of the envelope containing the Petition for Review allegedly filed through registered mail.

On May 18, 2011, petitioner filed its "Manifestation," submitting an affidavit executed by Eddie P. Sito, former messenger of counsel for petitioner, in lieu of the lost affidavit of service and certification from the Pasay Central Post Office.

Even assuming that this Court can now determine the timeliness of the filing of the Petition for Review in C.T.A. Case No. 8107; still, the instant Petition must necessarily fail for failure to pay the docket fees on time. A perusal of the records of C.T.A. Case No. 8107 shows that petitioner paid the docket fees on June 11, 2010 only or seven (7) days after the lapse of the prescribed period to appeal. Petitioner filed its administrative claim on January 5, 2010; thus, respondent CIR's 120-day period to decide the claim expired on May 5, 2010. Thereafter, petitioner has thirty (30) days or until June 4, 2010, within which to appeal to this Court respondent CIR's inaction. Thus, even assuming that petitioner timely filed on June 3, 2010, thru registered mail, the subject Petition for Review and complied with the required proof of service, still the petition must necessarily fail on the ground that petitioner paid the required docket fees seven (7) days late.

Pursuant to *Sections 1 and 3 of Rule 42 of the 1997 Rules of Civil Procedure, as amended,* the payment of docket fees must be made before the expiration of the reglementary period for appeal, and failure to do so shall be sufficient ground for dismissal of the appeal. Well-settled is the rule that payment of docket fees within the prescribed period is mandatory for the perfection of an appeal. Without such payment, the appellate court does not acquire jurisdiction over the subject matter of the action and the decision sought to be appealed from becomes final and executory *(Yambao v. Court of Appeals, 346 SCRA 141, 146)*. Equally settled is the rule that the payment of the appellate docket fee is not a mere technicality of law or procedure. It is an essential requirement, without which the decision or final order appealed from would become final and executory as if no appeal was filed at all *(Sps. Manalili vs. Sps. De Leon, 370 SCRA 625).*

For all the foregoing, the Court has no alternative, but to dismiss C.T.A. Case no. 8107 for failure of petitioner to pay the appellate docket fee within the prescribed period.

Petitioner's "Motion for Leave of Court to File and Admit Attached Supplemental Petition for Review"

A perusal of the Supplemental Petition for Review shows that petitioner merely intends to state the fact of its receipt on October 18, 2010 of a letter from the BIR, dated October 1, 2010, with TCC issued in its favor in the amount of P17,243,904.09. In view thereof, petitioner intends to modify its judicial claim from the amount of P30,509,672.26 to P13,265,768.17. However, in view of the dismissal of the petition, we find no need to resolve petitioner's "Motion for Leave of Court to File and Admit Attached Supplemental Petition for Review" and its "Supplemental Petition for Review", for being moot and academic.

WHEREFORE, premises considered, respondent CIR's "Motion to Dismiss" is hereby **GRANTED.** Accordingly:

1) As regards C.T.A. Case No. 8088, the Petition for Review is hereby **DISMISSED** for having been prematurely filed; and

2) As regards C.T.A. Case No. 8107, the Petition for Review is likewise **DISMISSED** for failure to pay the docket fees within the prescribed period.

SO ORDERED.

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

MINDANAO I GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. 8088 & 8107

Members:
BAUTISTA, *Chairperson*
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

JUN 17 2011
ABFumand 10:42 a.m.

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DISSENTING OPINION

BAUTISTA, J.:

The Court in resolving respondent's Motion to Dismiss disposed of the case as follows:

> **WHEREFORE,** premises considered, respondent CIR's "Motion to Dismiss" is hereby **GRANTED**. Accordingly:
>
> 1) As regards C.T.A. Case No. 8088, the Petition for Review, the Petition for Review is hereby **DISMISSED** for having been prematurely filed; and
> 2) As regards C.T.A. Case No. 8107, the Petition for Review is likewise **DISMISSED** for failure to pay the docket fees within the prescribed period.
>
> **SO ORDERED.**

With all due respect to the members of this Court, I must express my dissent in so far as the Petition for Review in C.T.A Case No. 8088 is ordered to be dismissed on the ground of prematurity is concerned.

I maintain that if the two (2)-year prescriptive period is about to expire, 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.[1]

Section 112(C) of the 1997 National Internal Revenue Code (NIRC) provides:

> **SEC. 112.** *Refunds or Tax Credits of Input Tax.- xxx*
>
> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made. – xxx*
>
> 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.** *(Boldfacing supplied)*

The word "may" when used in a statute commonly denotes that it is directory in nature.[2] The same term is generally permissive only and operates to confer discretion.[3]

The Court *En Banc*, in the case of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[4] fittingly affirmed as follows:

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[1] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[2] De Ocampo *v.* Secretary of Justice, G.R. No. 147932, January 25, 2006, 480 SCRA 71.
[3] *Supra, citing Agpalo, Ruben E., Statutory Construction, Second Edition 1990, p. 239 citing Bersabel v. Salvador, G.R No. 35910, July 21, 1978, 84 SCRA 176.*
[4] CTA EB No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.

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.

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)*

Likewise, in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation,*[5] the same was further upheld, to wit:

> 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:
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> > "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*

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

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)*

Therefore, it is my considered view that the judicial recourse within thirty (30) days after the lapse of the one hundred twenty (120)-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is within the two (2)-year prescriptive period provided under Sections 112 and 229 of the same Code.[6] Hence, applying the foregoing discourse to the case at bench, since the judicial claim which was filed before this Court on March 30, 2010 or only 74 days after the petitioner filed its application for refund with the respondent must still be considered timely filed as it was made well-within the two (2) - year prescriptive period.

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

Accordingly, I vote that the respondent's Motion to Dismiss to be **PARTIALLY GRANTED** only as regards the dismissal of the Petition for Review in C.T.A Case No. 8107.

LOVELL R. BAUTISTA
Associate Justice