

**SIGNIFICANT DECISIONS OF THE COURT OF TAX APPEALS
May 2013**

VAT Refund

1. In an application for refund of input taxes related to zero-rated sales, compliance with the 120-day waiting period is mandatory and jurisdictional, with the exception of the period from December 10, 2003 to December 6, 2010.

Applying the Supreme Court En Banc decision in the case 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 promulgated on February 12, 2013, compliance with the mandatory and jurisdictional 120+30 day period is necessary whether before, during, or after the effectivity of the Atlas and Mirant doctrine. However, there is an exception - the period from the issuance of BIR Ruling No. DA-489-03 on December 10, 2003 to December 6, 2010 when the Aichi doctrine was adopted, which again reinstated the 120+30 day periods as mandatory and jurisdictional¹. [***Deutsche Knowledge Services Pte. Ltd. vs. CIR, CTA EB Case No. 816, May 9, 2013***]

2. Observance of the 120-day period under Section 112(C) of the Tax Code for the Commissioner to act on administrative claims for refund/credit of unutilized input VAT is crucial in filing an appeal to the CTA.

As to its judicial claim, Petitioner belatedly filed its Petition for Review before the Court *a quo* only on April 20, 2007 or 187 days beyond the prescribed 30-day period to appeal before the CTA, reckoned from the lapse of the 120-day period fixed by law for the BIR to act on claim for refund. Clearly then, this case is one of late filing which renders the Court without jurisdiction to entertain the instant petition.

Consequently, petitioner's failure to file its judicial claim before the CTA within 30 days from the lapse of the mandatory 120-day period under *Section 112(C) of the NIRC of 1997, as amended*, warrants a dismissal on its petition on the ground of absence of jurisdiction to take cognizance of the case. (***Chevron Holdings, Inc. vs. CIR, CTA EB Case No. 837, May 07, 2013***²)

3. The 120-day period should be reckoned from the filing of the administrative claim for refund should the taxpayer fail or opt not to submit any document.

¹ Justice Caesar Casanova dissented on the basis that a Motion for Reconsideration of the said recent decision of the Supreme Court decision may have been filed, thus, until the said Supreme Court case has attained finality and the corresponding entry of judgment has been made, prudence dictates that the application of the new doctrine be, in the meantime, deferred.

² Same decision was made in the case of Pan Century Surfactants, Inc. vs. CIR, CTA EB Case No. 898, May 14, 2013

Petitioner filed an administrative claim with the BIR for the refund of its alleged unutilized input VAT attributable to its zero-rated sales for the year 2009. Respondent argues that Petitioner must prove that it submitted the complete documents required under RMO No.53-98 before the 120-day audit period shall apply and before judicial remedies as provided for in the law may be availed of. Respondent also alleges that perusal of the petition for review would show that petitioner never made mention that it submitted documents in support of its claim for refund. The allegation of submission of complete documents is a material fact necessary to invoke jurisdiction and to justify relief demanded. Having failed to allege submission of complete documents, respondent claims that she was evidently deprived of her opportunity to validate petitioner's claim for refund in the administrative level.

The court disagreed and ruled that the completeness of documents to support a claim is determined by a taxpayer. Should the taxpayer decide to submit only certain documents, or should the taxpayer fail, or opted not, to submit any document at all, in support of its application for refund under Section 112, the 120-day period should be reckoned from the filing of the said application. Moreover, the alleged non-submission of complete documents at the administrative level is not fatal to a claim for refund in the judicial level. (***CE Casecan Water and Energy Company, Inc. vs. CIR, CTA Case No 8245, May 10, 2013***)

4. Unreported input taxes cannot be the subject of refund on the ground of erroneous payment.

Petitioner claims that due to inadvertence, some of its input taxes for the quarter were not declared in its Quarterly VAT Return, and consequently, not charged to the output tax payable for the same quarter, resulting to the alleged understatement of VAT overpayment. Petitioner filed a claim for refund of the alleged understatement of overpayment of VAT liabilities pursuant to Sections 204(C) and 229 of the amended 1997 Tax Code.

The court denied Petitioner's claim and ruled that the amount being claimed essentially represents undeclared input taxes for the second quarter of 2008, and not the erroneously paid VAT. The Court ruled that for input taxes to be available as tax credits, they must be substantiated and reported in the VAT returns. Moreover, Section 112 of the NIRC of 1997, as amended, enumerates the two instances when excess input taxes may be claimed for refund: a) when they are attributable to zero-rated or effectively zero-rated sales, and b) upon cancellation of VAT registration due to retirement from business. The undeclared input taxes do not fall under any of these instances. Hence, petitioner is not entitled to refund or issuance of tax credit. (***Coca-Cola Bottlers Philippines, Inc. vs. CIR, CTA Case No. 8136, May 15, 2013***)

5. Sale of services to a foreign corporation with a branch office in the Philippines cannot qualify for VAT zero-rating.

In claim for refund under Section 112 of the 1997 Tax Code, the refund/tax credit of unutilized input VAT attributable to zero-rated or effectively zero rated sales is allowed subject to the taxpayer's compliance with the following requisites:

1. that there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes are attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

Petitioner claims that its sales of services to foreign affiliates which are all engaged in business conducted outside the Philippines qualify for VAT zero-rating. But the Court ruled that Petitioner's reported sales of services to The Manufacturers Life Insurance Company cannot qualify for VAT zero-rating, as it is a corporation organized under the laws of the Dominion of Canada but duly licensed and registered with the SEC to do business in the Philippines through its branch, The Manufacturers Life Insurance Co. (Phils.), Inc. (***Manulife Data Services, Inc. vs. CIR, CTA Case Nos. 8054, 8117, and 8139, May 8, 2013***)

Assessments

6. Issuance of Preliminary Assessment Notice (PAN) is part of the due process and non-issuance of which renders the assessment void.

Petitioner was issued a Formal Letter of Demand and Final Assessment Notice for the year 2005, without prior issuance of a PAN. The Court ruled that the issuance of PAN is an integral part of procedural due process. The PAN lays down the factual and legal basis for the assessment. The Court emphasized the indispensable nature of the PAN in the issuance of assessments and gave emphasis to the fact that the 1997 NIRC provided that the issuance of PAN is mandatory in tax assessments except in a few instances, specifically enumerated by law, where it is not required. (***CIR vs. Laurence Lee V. Luang (CTA EB Case No. 878 May 14, 2013)***)

7. Under-declaration of purchases cannot give rise to income tax and VAT assessments.

Petitioner received from the CIR assessment on alleged Petitioner's deficiency income tax and VAT for taxable year 2007. The assessment arose from the Reconciliation of Listing for Enforcement System (RELIEF), Tax Reconciliation System (TRS) and Third Party Matching – Bureau of Customs (TPM-BOC) Data Program. Respondent alleged that Petitioner had under-declaration of purchases as a result of reconciliation of the BOC data as against Petitioner's purchases per returns filed. It is on this alleged under-declaration of purchases that Petitioner was assessed with deficiency income tax and VAT on the premise that the under-declaration of purchases will translate to under-declaration of income.

The court ruled that the assessment has no factual or legal basis because under-declaration of purchases does not mean under-declaration of income. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. The three (3) elements in the imposition of income are 1) there must be gain or profit, 2) the gain or profit is realized or received, actually or constructively, and 3) it is not exempted by law or treaty from income tax. In the imposition of assessment of income tax, it must be clear that there was an income, and such income was received by the taxpayer, not when there is under-declaration of expenses. Likewise, VAT can be imposed only when it is shown that the taxpayer received an amount of money or its equivalent from its sale, barter or exchange of goods or properties, or from sale or exchange of services, and not when there are un-declared sales. (***Agri-nurture, Inc. vs. CIR, CTA Case No. 8345, May 29, 2013***)

8. Taxpayer is liable for excise taxes on distilled spirits on losses incurred in the transportation and delivery of denatured alcohol.

On the imposition of excise tax under Section 141 of the amended 1997 NIRC, "losses due to evaporation" is covered and contemplated by the excise tax impositions because "no claim for excise tax refund or credit shall be allowed on distilled spirits that have been lost or destroyed after removal thereof from the place of production or released from the customs' custody", and that "any allowance for losses or actual losses incurred, whether or not due to negligence, in-transit, handling/storage or during the rectification process shall not be allowed or granted."

Section 14 of RR No. 3-2006 even expressly provides that the "excise tax due on losses shall be paid by the rectifier on or before the eighth (8th) day of the month immediately following the month of operation." (*Avon Products Manufacturing, Inc. vs. CIR, CTA Case No. 8174, May 16, 2013*)

Local Taxes

9. An entity that was not granted secondary franchise by the government cannot be liable for franchise tax.

The term "franchise" for purposes of the imposition of the franchise tax under Section 137 of RA No. 7160 is clearly defined under Section 131(m) as "a right or privilege, affected with public interest which is conferred upon private persons or corporation, under such terms and conditions as the government and its political subdivisions may impose in the interest of public welfare, security, and safety."

It is clear that no secondary franchise was granted by the Government or its agency in favor of petitioner. First, the grant of such franchise is not required under PD No. 1442 and RA No. 9513 for the exploration, development, and operation of geothermal resources. Second, considering the meaning of the terms "service contract" and "franchise", petitioner's operation of the Steamfields located within the Geothermal Plant is by virtue of a service contract or agreement whereby petitioner undertakes to perform all the obligations stated under Section VI of the Geothermal Service Contract. Since petitioner does not have a secondary franchise as it is not required by law to be granted one, there is no basis to hold petitioner liable for franchise tax under Section 137 of the LGC and the Sorsogon City Revenue Code.

Accordingly, the Notice of Assessment dated July 26, 2010 issued by the Office of the City Treasurer of Sorsogon, assessing petitioner for deficiency franchise tax in the amount of P3,711,742 .66, is void for lack of legal and factual basis. Being a void assessment, said Notice of Assessment does not give rise to an obligation on the part of petitioner to pay deficiency franchise tax to respondent Sorsogon City who had no authority to collect the same. (*Energy Development Corporation vs. CIR, CTA AC. NO. 90 May 14, 2013*)

Documentary Stamp Tax

10. To prove that DST payments are covered by the exemption under section 199(e) of the Tax Code, taxpayer must show that the DST was paid on instruments evidencing sale, barter or exchange of shares of stock listed and traded through the local stock exchange.

Petitioner filed a refund on its alleged erroneous payment of documentary stamp tax (DST) on the sale of shares of stock listed and traded through the Philippine Stock Exchange (PSE). It argued that it is not liable to pay DST on the sale, barter or exchange of shares of stock listed and traded through the local stock exchange pursuant to Section 199(e) of the 1997 Tax Code as, amended by Republic Act (RA) 9648.

The court denied Petitioner's claim for insufficiency of evidence. The Summary of Periodic Payments, which was presented by Petitioner to support its claim that it indeed paid DST does not show that the alleged documentary stamp tax was paid on instruments, documents, and papers evidencing sale, barter or exchange of shares of stock listed and traded through the local stock exchange. (*Imperial, De Guzman, Abalos & Co., Inc. vs. CIR, CTA Case No. 8261, May 15, 2013*)