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THIRD DIVISION

[G.R. No. 197525, June 04, 2014]

VISAYAS GEOTHERMAL POWER COMPANY, PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

D E C I S I O N

MENDOZA, J.:

Before the Court is a petition for review on *certiorari* under Rule 45 of the Rules of Court assailing the February 7, 2011 Decision[1] and the June 27, 2011 Resolution[2] of the Court of Tax Appeals En Banc *(CTA En Banc)*, in CTA EB Case Nos. 561 and 562, which *reversed and set aside* the April 17, 2009 Decision of the CTA Second Division in CTA Case No. 7559.

The Facts:

Petitioner Visayas Geothermal Power Company *(VGPC)* is a special limited partnership duly organized and existing under Philippine Laws with its principal office at Milagro, Ormoc City, Province of Leyte. It is principally engaged in the business of power generation through geothermal energy and the sale of generated power to the Philippine National Oil Company *(PNOC)*, pursuant to the Energy Conversion Agreement.

VGPC filed with the Bureau of Internal Revenue *(BIR)* its Original Quarterly VAT Returns for the first to fourth quarters of taxable year 2005 on April 25, 2005, July 25, 2005, October 25, 2006, and January 20, 2006, respectively.

On December 6, 2006, it filed an administrative claim for refund for the amount of P14,160,807.95 with the BIR District Office No. 89 of Ormoc City on the ground that it was entitled to recover excess and unutilized input VAT payments for the four quarters of taxable year 2005, pursuant to Republic Act (R.A.) No. 9136,[3] which treated sales of generated power subject to VAT to a zero percent (0%) rate starting June 26, 2001.

Nearly one month later, on January 3, 2007, while its administrative claim was pending, VGPC filed its judicial claim via a petition for review with the CTA praying for a refund or the issuance of a tax credit certificate in the amount of P14,160,807.95, covering the four quarters of taxable year 2005.

In its April 17, 2009 Decision, the CTA Second Division partially granted the petition as follows:

> WHEREFORE, in view of the foregoing considerations, the Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is

ORDERED TO REFUND or, in the alternative, TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner the reduced amount of SEVEN MILLION SIX HUNDRED NINENTY NINE THOUSAND THREE HUNDRED SIXTY SIX PESOS AND 37/100 (P7,699,366.37) representing unutilized input VAT paid on domestic purchases of non-capital goods and services, services rendered by non-residents, and importations of non-capital goods for the first to fourth quarters of taxable year 2005.

SO ORDERED.[4]

The CTA Second Division found that only the amount of P7,699,366.37 was duly substantiated by the required evidence. As to the timeliness of the filing of the judicial claim, the Court ruled that following the case of *Commissioner of Internal Revenue (CIR) v. Mirant Pagbilao Corporation (Mirant)*,[5] both the administrative and judicial claims were filed within the two-year prescriptive period provided in Section 112(A) of the National Internal Revenue Code of 1997 (NIRC), the reckoning point of the period being the close of the taxable quarter when the sales were made.

In its October 29, 2009 Resolution,[6] the CTA Second Division denied the separate motions for partial reconsideration filed by VGPC and the CIR. Thus, both VGPC and the CIR appealed to the CTA En Banc.

In the assailed February 7, 2011 Decision,[7] the CTA En Banc *reversed* and *set aside* the decision and resolution of the CTA Second Division, and dismissed the original petition for review for having been filed prematurely, to wit:

WHEREFORE, premises considered:

i. As regards CTA EB Case No. 562, the Petition for Review is hereby DISMISSED; and

ii. As regards CTA EB Case No. 561, the Petition for Review is hereby GRANTED.

Accordingly, the Decision, dated April 17, 2009, and the Resolution, dated October 29, 2009, of the CTA Former Second Division are hereby REVERSED and SET ASIDE, and another one is hereby entered DISMISSING the Petition for Review filed in CTA Case No. 7559 for having been filed prematurely.

SO ORDERED.[8]

The CTA En Banc explained that although VGPC seasonably filed its administrative claim within the two-year prescriptive period, its judicial claim filed with the CTA Second Division was prematurely filed under Section 112(D) of the National Internal Revenue Code *(NIRC)*. Citing the case of *CIR v. Aichi Forging Company of Asia, Inc. (Aichi)*,[9] the CTA En Banc held that the judicial claim filed 28 days after the petitioner filed its administrative claim, without waiting for the expiration of the 120-day period, was premature and, thus, the CTA acquired no jurisdiction over the

case.

The VGPC filed a motion for reconsideration, but the CTA En Banc denied it in the assailed June 27, 2011 Resolution for lack of merit. It stated that the case of *Atlas Consolidated Mining v. CIR (Atlas)*[10] relied upon by the petitioner had long been abandoned.

Hence, this petition.

ASSIGNMENT OF ERRORS

I

The CTA En Banc erred in finding that the 120-day and 30-day periods prescribed under Section 112(D) of the 1997 Tax Code are jurisdictional and mandatory in the filing of the judicial claim for refund. The CTA-Division should take cognizance of the judicial appeal as long as it is filed with the two-year prescriptive period under Section 229 of the 1997 Tax Code.

II

The CTA En Banc erred in finding that *Aichi* prevails over and/or overturned the doctrine in *Atlas*, which upheld the primacy of the two-year period under Section 229 of the Tax Code. The law and jurisprudence have long established the doctrine that the taxpayer is duty-bound to observe the two-year period under Section 229 of the Tax Code when filing its claim for refund of excess and unutilized VAT.

III

The CTA En Banc erred in finding that Respondent CIR is not estopped from questioning the jurisdiction of the CTA. Respondent CIR, by her actions and pronouncements, should have been precluded from questioning the jurisdiction of the CTA-Division.

IV

The CTA En Banc erred in applying *Aichi* to Petitioner VGPC's claim for refund. The novel interpretation of the law in *Aichi* should not be made to apply to the present case for being contrary to existing jurisprudence at the time Petitioner VGPC filed its administrative and judicial claims for refund.[11]

Petitioner VGPC argues that (1) the law and jurisprudence have long established the rule regarding compliance with the two-year prescriptive period under Section

112(D) in relation to Section 229 of the 1997 Tax Code; (2) *Aichi* did not overturn the doctrine in *Atlas*, which upheld the primacy of the two-year period under Section 229; (3) respondent CIR is estopped from questioning the jurisdiction of the CTA and *Aichi* cannot be indiscriminately applied to all VAT refund cases; (4) applying *Aichi* invariably to all VAT refund cases would effectively grant respondent CIR unbridled discretion to deprive a taxpayer of the right to effectively seek judicial recourse, which clearly violates the standards of fairness and equity; and (5) the novel interpretation of the law in *Aichi* should not be made to apply to the present case for being contrary to exisiting jurisprudence at the time VGPC filed its administrative and judicial claims for refund. *Aichi* should be applied prospectively.

Ruling of the Court

Judicial claim not premature

The assignment of errors is rooted in the core issue of whether the petitioner's judicial claim for refund was prematurely filed.

Two sections of the NIRC are pertinent to the issue at hand, namely Section 112 (A) and (D) and Section 229, 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: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
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> **(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.
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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.

SEC. 229. Recovery of Tax Erroneously or Illegally Collected. - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, **until a claim for refund or credit has been duly filed with the Commissioner**; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, **no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty** regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[Emphases supplied]

It has been definitively settled in the recent En Banc case of *CIR v. San Roque Power Corporation (San Roque)*,[12] that it is Section 112 of the NIRC which applies to claims for tax credit certificates and tax refunds arising from sales of VAT-registered persons that are zero-rated or effectively zero-rated, which are, simply put, claims for unutilized creditable input VAT.

Thus, under Section 112(A), the taxpayer may, within 2 years after the close of the taxable quarter when the sales were made, via an administrative claim with the CIR, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales. Under Section 112(D), the CIR must then act on the claim within 120 days from the submission of the taxpayer's complete documents. In case of (a) a full or partial denial by the CIR of the claim, or (b) the CIR's failure to act on the claim within 120 days, the taxpayer may file a judicial claim via an appeal with the CTA of the CIR decision or unacted claim, within 30 days (a) from receipt of the decision; or (b) after the expiration of the 120-day period.

The 2-year period under Section 229 does not apply to appeals before the CTA in relation to claims for a refund or tax credit for unutilized creditable input VAT. Section 229 pertains to the recovery of taxes erroneously, illegally, or excessively collected.[13] *San Roque* stressed that "input VAT is not 'excessively' collected as understood under Section 229 because, at the time the input VAT is