Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**G.R. No. 189440**
	Present:
- versus -	SERENO, *C.J.*, *Chairperson*, LEONARDO-DE CASTRO, BERSAMIN, VILLARAMA, JR., and REYES, *JJ.*
MINDANAO II GEOTHERMAL PARTNERSHIP, Respondent.	Promulgated: JUN 18 2014

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DECISION

VILLARAMA, JR., *J.*:

Before us is a petition for review on certiorari assailing the May 29, 2009 Decision[1] and September 4, 2009 Resolution[2] of the Court of Tax Appeals *En Banc* (CTA *En Banc*) in CTA EB Case No. 431. The CTA *En Banc* had affirmed the Decision[3] dated June 4, 2008 and Resolution[4] dated October 7, 2008 of the First Division of the Court of Tax Appeals (CTA First Division) in CTA Case No. 6909 which ordered the petitioner to issue a tax credit certificate (TCC) in favor of the respondent in the reduced amount of ₱689,313.37. This amount represented the unutilized input value-added tax (VAT) allegedly incurred by the respondent in connection with its zero-rated sales for the taxable year 2002.

The pertinent facts, as summarized by the CTA *En Banc*, are as follows:

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1 *Rollo*, pp. 38-61. Penned by Associate Justice Olga Palanca-Enriquez, with Presiding Justice Ernesto D. Acosta and Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy, and Caesar A. Casanova, concurring.

2 Id. at 62-68.

3 Id. at 84-96. Penned by Associate Justice Lovell R. Bautista, with Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova, concurring.

4 Id. at 103-105.

Respondent Mindanao II Geothermal Partnership filed with the Bureau of Internal Revenue (BIR) its Quarterly VAT Returns for the four quarters of taxable year 2002. The respondent declared zero-rated sales in the amount of ₱769,384,702.23 and input VAT of ₱7,427,965.37 on domestic purchases of goods and services worth ₱74,279,653.78.[5]

The zero-rated sales, purchases, and input VAT of the respondent are broken down per quarter by the CTA *En Banc* as follows:

Exhibit	Taxable Quarter	Zero-rated Sales	Purchases	Input Vat
D	1st Quarter	P213, 813, 056.47	P17, 516, 718.65	P1, 751, 671.86
E	2nd Quarter	210, 379, 134.36	14, 294, 058.68	1, 429, 405.85
F	3rd Quarter	176, 468, 276.36	24, 719, 490.96	2, 471, 949.09
G	4th Quarter	168, 724, 235.04	17, 749, 385.49	1, 774, 938.57
	Total	P769, 384, 702. 23	P74, 279, 653.78	P7, 427, 965.37 [6]

On May 30, 2003, the respondent filed with the BIR Revenue District No. 108 a claim for refund or issuance of a TCC of its unutilized input VAT attributable to its zero-rated sales for the taxable year 2002 in the amount of ₱7,427,965.37. However, the petitioner failed to act on the claim. Thus, on March 31, 2004, the respondent filed a *Petition for Review* with the CTA First Division. The case was docketed as CTA Case No. 6909.[7]

On July 30, 2004, the respondent filed a *Motion for Leave of Court to Amend its Petition for Review* in order to correct its claim from ₱3,891,414.38 to the proper amount of ₱7,427,965.37. This was granted by the CTA First Division on September 22, 2004.[8]

Meanwhile, pending the resolution of CTA Case No. 6909, the petitioner issued to respondent TCC No. 200600003060 in the amount of ₱6,251,065.74. The issuance of this TCC belatedly and partially granted the claim of the respondent. For this reason, the respondent filed a *Motion for Leave of Court to File Attached Supplemental Petition for Review* which was granted by the CTA First Division on February 13, 2008.[9]

On June 4, 2008, the CTA First Division rendered the assailed decision partially granting respondent's claim in the amount of ₱6,940,379.11. Since the petitioner already issued the aforementioned TCC No. 200600003060 in favor of the respondent, the CTA First Division ordered the fulfillment of only the balance of the respondent's claim in the amount of ₱689,313.37. Specifically, the dispositive portion of the assailed decision provides:

> WHEREFORE, the Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED to ISSUE a TAX CREDIT CERTIFICATE in favor of petitioner in the reduced

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5 Id. at 41.
6 Id.
7 Id. at 41-42.
8 Id. at 42.
9 Id. at 42-43.

> amount of P689,313.37, representing unutilized input VAT incurred by petitioner in connection with its zero-rated sales for taxable year 2002.
>
> SO ORDERED.[10]

On June 23, 2008, the petitioner filed a *Motion for Partial Reconsideration*[11] which was denied by the CTA First Division in its Resolution dated October 7, 2008.

On November 12, 2008, the petitioner filed a *Petition for Review* with the CTA *En Banc* which however dismissed the petition for lack of merit on May 29, 2009, as follows:

> WHEREFORE, premises considered, the instant petition is hereby DENIED DUE COURSE, and accordingly, DISMISSED for lack of merit.
>
> SO ORDERED.[12]

Aggrieved, the petitioner filed a *Motion for Reconsideration*[13] with the CTA *En Banc* raising the issue of prescription of the respondent's judicial claim under Section 112 (D)[14] of the National Internal Revenue Code of 1997 (NIRC) for the first time.

On September 4, 2009, the CTA *En Banc* denied the *Motion for Reconsideration* on the ground that issues raised for the first time at the appellate level cannot be entertained by the reviewing court. The CTA *En Banc* held,

> Record shows that petitioner CIR's argument that respondent Mindanao II failed to file its judicial claim, within 30 days after the lapse of the 120-day period provided under *Section 112 (D) of the NIRC of 1997, as amended,* was raised for the first time by petitioner CIR in its present Motion for Reconsideration before this Court *En Banc*. Said issue was never raised in petitioner CIR's Answer and Amended Answer filed before the Court in Division. Neither was it raised by petitioner CIR in his present Petition for Review before this Court *En Banc*.
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> As a rule, no question will be entertained on appeal unless it has been raised in the court below. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic consideration of due process impels this rule (*Del Rosario vs. Bonga, 350 SCRA 108)*.[15]

Hence, the present petition which raises the sole issue

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10 Id. at 96.
11 Id. at 97-102.
12 Id. at 60.
13 Id. at 118-131.
14 Now Section 112(C).
15 *Rollo*, p. 64.

> [WHETHER] THE COURT OF TAX APPEALS EN BANC DECIDED A QUESTION OF SUBSTANCE WHICH IS NOT IN ACCORD WITH THE LAW AND PREVAILING JURISPRUDENCE.[16]

In fine, the petitioner argues that the issue of prescription of the respondent's judicial claim can still be raised for the first time before the CTA *En Banc*. While the general rule requires that all factual and legal questions, arguments, and issues not raised in the proceedings below cannot be raised belatedly on appeal, the petitioner points out that one of the recognized exceptions to this rule is prescription as when the records of the case clearly reveal that the action has prescribed. Moreover, the petitioner argues that the CTA *En Banc* erred in declaring that the judicial claim for refund must be filed within two years from the close of the taxable quarter when the relevant sales were made as this prescriptive period only refers to taxes erroneously or illegally assessed or collected.

On the other hand, the respondent argues that the petitioner is estopped from raising the issue of prescription before the CTA *En Banc* because a change of theory in the appellate court is offensive to the basic rules of due process, fair play, and justice. The respondent further contends that its claim was, in any event, properly filed within the two-year prescriptive period which should be reckoned from the close of the taxable quarter when the relevant sales were made.

We grant the petition.

Notwithstanding the timely filing of the respondent's administrative claim, we are constrained to order the dismissal of the respondent's judicial claim for tax refund or tax credit for having been filed beyond the mandatory and jurisdictional periods provided in Section 112(C) of the NIRC. Section 112(C) expressly grants the taxpayer a 30-day period to appeal to the CTA the decision or inaction of the Commissioner of Internal Revenue (CIR), thus:

> SEC. 112. *Refunds or Tax Credits of Input Tax. –*
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> x x x x
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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. (Emphasis supplied.)

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[16] Id. at 18.

This law is clear, plain, and unequivocal. Following the well-settled *verba legis* doctrine, this law should be applied exactly as worded since it is clear, plain, and unequivocal. As this law states, the taxpayer may, if he wishes, appeal the decision of the CIR to the CTA within 30 days from receipt of the CIR's decision, or if the CIR does not act on the taxpayer's claim within the 120-day period, the taxpayer may appeal to the CTA within 30 days from the expiration of the 120-day period.[17]

In *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*,[18] this Court clarified the mandatory and jurisdictional nature of the 120+30 day period provided under Section 112(C) of the NIRC. We clarified that the two-year prescriptive period under Section 112(A)[19] of the NIRC refers only to the filing of an administrative claim with the BIR. Meanwhile, the judicial claim under Section 112(C) of the NIRC must be filed within a mandatory and jurisdictional period of 30 days from the date of receipt of the decision denying the claim, or within 30 days from the expiration of the 120-day period for deciding the claim. Thus, we mandated strict compliance with this "120+30" day period:

> Section 112(D) [now Section 112(C)] 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.
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> 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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17 *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. Nos. 187485, 196113 & 197156, February 12, 2013, 690 SCRA 336, 387-388.

18 G.R. No. 184823, October 6, 2010, 632 SCRA 422.

19 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: *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 or 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. *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

> 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.[20]

Thus, as long as the administrative claim is filed within the two-year prescriptive period under Section 112(A) of the NIRC, the 30-day prescriptive period under Section 112(C) can extend beyond two years after the close of the taxable quarter where the sales were made.

In *Commissioner of Internal Revenue v. San Roque Power Corporation*,[21] we reiterated that the 30-day period for filing the judicial claim is mandatory and jurisdictional:

> 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, 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 filing the administrative claim with the Commissioner.

In the present case, the respondent filed its administrative claim on May 30, 2003. The petitioner CIR therefore had only until September 27, 2003 to decide the claim, and following the petitioner's inaction, the respondent had until October 27, 2003, the last day of the 30-day period to file its judicial claim. However, the respondent filed its judicial claim with

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[20] Supra note 18, at 443-444.
[21] Supra note 17, at 398.

the CTA only on March 31, 2004 or 155 days late. Clearly, the respondent's judicial claim has prescribed and the CTA did not acquire jurisdiction over the claim. Well to remember, the right to appeal to the CTA from a decision or "deemed a denial" decision of the CIR is merely a statutory privilege, not a constitutional right. The exercise of such statutory privilege requires strict compliance with the conditions attached by the statute for its exercise.[22] The respondent failed to comply with the statutory conditions and must thus bear the consequences. Further, well settled is the rule that tax refunds or credits, just like tax exemptions, are strictly construed against the taxpayer.[23] The burden is on the taxpayer to show that he has strictly complied with the conditions for the grant of the tax refund or credit.

WHEREFORE, the petition for review on certiorari is **GRANTED**. The Decision dated May 29, 2009 and Resolution dated September 4, 2009 of the CTA *En Banc* in CTA EB Case No. 431 are **SET ASIDE**. CTA Case No. 6909 is dismissed for being filed out of time.

Consequently, TCC No. 200600003060 in the amount of ₱6,251,065.74 previously issued to Mindanao II Geothermal Partnership in CTA Case No. 6909 is hereby **REVOKED/CANCELLED**.

No pronouncement as to costs.

SO ORDERED.

MARTIN S. VILLARAMA, JR.
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

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22 Id. at 390.

23 *Commissioner of Internal Revenue v. Bank of the Philippine Islands*, G.R. No. 178490, July 7, 2009, 592 SCRA 219, 235.

BIENVENIDO L. REYES
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the 1987 Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice