

### THIRD DIVISION

**G.R. No. 181276 – THE COMMISSIONER OF INTERNAL REVENUE, Petitioner, v. VISAYAS GEOTHERMAL POWER COMPANY, INC., Respondent.**

**Promulgated:**

**November 11, 2013** *HA (copiam)*

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### DISSENTING OPINION

**LEONEN, J.:**

I dissent with respect to the claim pertaining to CTA Case No. 6838.<sup>1</sup> Consistent with my dissent in *Commissioner of Internal Revenue v. San Roque Power Corporation*<sup>2</sup> and its consolidated cases, I am of the view that the Court of Tax Appeals (CTA) cannot acquire jurisdiction without waiting for the lapse of the 120-day period or the denial by the Commissioner of Internal Revenue within that period. The 120+30-day periods are mandatory and jurisdictional.<sup>3</sup> Section 112(D) of the National Internal Revenue Code (NIRC)<sup>4</sup> was always clear.

Similar to the main opinion in *San Roque*, the *ponencia* allows for an exception for judicial claims filed between December 10, 2003 and October

<sup>1</sup> Claim for refund or issuance of tax credit certificate in the amount of ₱19,070,378.18 covering the period of October 2001 to December 2002.

<sup>2</sup> G.R. No. 187485, February 12, 2013, 690 SCRA 336. The Motions for Reconsideration filed by San Roque Power Corporation in G.R. No. 187485 and the Commissioner of Internal Revenue in G.R. No. 196113 were denied with finality on October 8, 2013.

<sup>3</sup> *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010, 632 SCRA 422 as cited in *Commissioner of Internal Revenue v. San Roque*, G.R. No. 187485, February 12, 2013, 690 SCRA 336.

<sup>4</sup> **(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.

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.

6, 2010, relying on Section 246 of the National Internal Revenue Code.<sup>5</sup> The period provided corresponds with the issuance of BIR Ruling No. DA 489-03, which allows the filing of a judicial claim without waiting for the lapse of the 120-day period and the promulgation of the case of *Aichi*,<sup>6</sup> which categorically ruled on the mandatory and jurisdictional nature of the waiting period. In *San Roque*, this Court said that:

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.<sup>7</sup>

This continues to allow private parties to rely on an erroneous interpretation of the text despite the clear language of the law.

As I have discussed in my dissent in *San Roque*, there can be no reliance in good faith by taxpayers on administrative interpretations of the law, which clearly contravene its text. No rights are vested by a wrong construction of the law by administrative officials, and such does not put the government in estoppel to correct the mistake.<sup>8</sup> To reiterate:

BIR Ruling DA-489-03 x x x constitutes a clear disregard of the express and categorical provision of Section 112(D) of the NIRC. Thus, the Commissioner's erroneous application of the law is not binding and conclusive upon this Court in any way.<sup>9</sup>

Lastly, I underscore that the allowances we have given to the clearly erroneous reliance by lawyers of taxpayers on opinions of the Commissioner of Internal Revenue that contravene the text of the law cause damage to the government and its ability to do social justice. The costs of error are better internalized by private parties rather than the public in general. After all, as observed in my dissent in *CIR v. San Roque*, government had no agency in the choice of premature filing by the private parties.

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<sup>5</sup> **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.

<sup>6</sup> *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*, supra.

<sup>7</sup> *Commissioner of Internal Revenue v. San Roque Power Corporation*, supra at 404.

<sup>8</sup> *Philippine Bank of Communications v. CIR, CTA and CA*, 361 Phil. 916 (1999).

<sup>9</sup> *Commissioner of Internal Revenue v. San Roque Power Corporation*, supra at 465, Leonen, J., Separate Opinion.

In view of the discussion above, I vote to grant the Petition and to nullify the order of the Court of Tax Appeals to refund or to issue a tax credit to respondent in CTA Case No. 6838.



MARVIC MARIO VICTOR F. LEONEN  
Associate Justice