REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

CTA EB No. 750
(CTA Case Nos. 8082 & 8106)

- versus-

Present:

Acosta, *PJ,*
Castañeda,Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated: JUL 05 2012 anApolinario 11:00 a.m.

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DECISION

COTANGCO-MANALASTAS, J.:

On appeal before the Court *En Banc* is the *Resolution* of the Second Division, dated January 20, 2011, granting respondent's Motion to Dismiss, as well as the *Resolution*, dated March 15, 2011, denying petitioner's Motion for Reconsideration. Said Resolutions dismissed petitioner's claim for refund of excess input VAT for the 1st quarter of 2008 amounting to P1,624,603.33.

The Assailed Resolutions disposed of the case, as follows:

> "WHEREFORE, premises considered, respondent's Motion to Dismiss is hereby GRANTED on the ground that the instant Petition for Review was filed prematurely."[1]

* * * * *

[1] *Rollo*, C.T.A. EB Case No. 750, p.147.

> "WHEREFORE, premises considered, petitioner's "Motion for Reconsideration" is hereby DENIED for lack of merit."[2]

The Facts[3]

Petitioner was a partnership duly registered with the Securities and Exchange Commission, with registered principal address at Barangay Ilomavis, Kidapawan City, North Cotabato.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including, among others, the duty to act upon and approve claims for refund or tax credit as provided by law, with office address at Bureau of Internal Revenue, Agham Road, Diliman, Quezon City.

On March 11, 1997, petitioner entered into a Build-Operate-Transfer Contract with the Philippine National Oil Company-Energy Development Corporation (PNOC-EDC) for the finance, engineering, supply, installation, testing, commissioning, operation and maintenance of a 48.25 megawatt geothermal power plant provided that PNOC-EDC shall supply and deliver steam to petitioner at no cost. In turn, petitioner shall convert the steam into electric capacity and energy for PNOC-EDC and shall deliver the same to the National Power Corporation (NPC) for and in behalf of PNOC-EDC.

Petitioner's 48.25 megawatt geothermal power plant project has been accredited by the Department of Energy (DOE) as a Block Power Production Facility, pursuant to the provisions of Executive Order No. 215.

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[2] *Rollo*, p. 149.
[3] As culled from the records, *Rollo*, pp. 107-117.

Petitioner has been issued by the Energy Regulatory Commission (ERC) a Certificate of Compliance No. 03-10-GXT25-0025 on October 2003 and Certificate of Compliance No. 08-12-GXT25-0025 on December 2008.

Petitioner is registered with the Revenue District Office No. 108, Kidapawan City with Tax Identification No. (TIN) 004-766-953 as a Value-Added Tax (VAT) entity, among others, with generation, collection and distribution of electricity as its registered line of business.

The sale of generated power and delivery of electric capacity and energy of petitioner to the NPC for and in behalf of PNOC-EDC pursuant to the BOT contract is petitioner's primary revenue generating activity.

Petitioner also generates minimal and incidental revenue for which it reports output taxes.

In the course of its operation, petitioner makes domestic purchases of goods other than capital goods and services from which transactions it accumulates creditable input taxes which remained unutilized.

Petitioner filed its Quarterly VAT Returns for four quarters of 2008 on April 24, 2008; July 25, 2008; October 24, 2008; and January 2, 2009 resulting to the unapplied creditable input taxes amounting to P6,149,256.25.

On December 28, 2009, petitioner filed its administrative claim with the RDO No. 108, Kidapawan City of the BIR for refund or tax credit of its unapplied and unutilized input taxes for the year 2008 in the total amount of P6,149,256.25.

Petitioner then filed Petitions for Review with this Court on March 30, 2010, docketed as CTA Case No. 8082; and on May 27, 2010, docketed as CTA Case No. 8106. These were later consolidated pursuant to a Resolution of the 3rd Division dated August 9, 2010.

On December 7, 2010, respondent filed its Motion to Dismiss CTA Case No 8082 for being prematurely filed. The Motion to Dismiss was granted in the Assailed Resolution dated January 20, 2011. Petitioner's Motion for Reconsideration was likewise denied.

Hence, this petition.

The Issues[4]

Petitioner raises the following grounds for the reversal of the assailed resolutions:

> I. At the time petitioner filed its petition for review in CTA Case No. 8082, it relied in good faith on the then settled rulings of this Honorable Court that a taxpayer is not bound by the 120-day period but by the two-year prescriptive period.
>
> II. At the time petitioner filed its petition for review, it also relied in good faith on the interpretation of this Honorable Court (and of the Supreme Court) of the word "may".
>
> III. The Aichi Ruling cannot be applied retroactively in the present case as it would impair vested rights and produce substantial inequitable results and grave injustice to petitioner.

Ruling of the Court

Petitioner's arguments deal mainly with the application of Section 112(A) in relation to Section 112(C) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Section 112(A) and (C) of the NIRC of 1997, as amended, are very clear and categorical in stating periods for the administrative and judicial claims for refund. Thus, there is no need for a judicial interpretation of the law considering that a clear

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[4] *Rollo*, p. 117.

and "to the letter" application of the law is possible. In other words, where a provision of law speaks categorically, the need for interpretation is obviated, no plausible pretense being entertained to justify non-compliance. All that has to be done is to apply it in every case that falls within its terms.[5]

It should be emphasized that the *Aichi Ruling*[6] deals specifically with the application of Section 112 of the NIRC of 1997, as amended, and the importance of the 120-day period.

Before the *Aichi Ruling*, the Court only determined the proper period to start the reckoning point of the prescriptive period. This was found to be the close of the taxable quarter when the sale or transaction was made as held in the *Mirant Ruling*[7]. Clearly, even without the *Aichi* and *Mirant Rulings*, a straightforward application of Section 112(A) and (C) will produce the same result. Administrative claims for refund of unutilized input VAT must be filed within two years from the close of the taxable quarter when the sales were made. Judicial claims must be filed within thirty (30) days from receipt of the CIR's decision denying the claim or after the expiration of the 120-day period.

Petitioner also argues that the word "may" has always been interpreted as being merely permissive and not mandatory.

In the instant case, while petitioner is correct that the word "may" is permissive, we do not agree that it relates to the period within which an appeal may be taken to this Court. For clarity, we quote the provision below:

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[5] *Luzon Stevedoring Corporation vs. Court of Tax Appeals*, G.R. No. 30232, July 29, 1988 citing *Allied Brokerage Corporation vs. Commissioner of Customs*, G.R. No. L-27641, August 31, 1971.

[6] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010.

[7] *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)*, G.R. No. 172129, September 12, 2008.

> "Section 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 <u>may, within 30 days from</u> the receipt of the decision <u>denying the claim or after the expiration</u> of the one hundred <u>twenty-day period</u>, appeal the decision or the unacted claim with the Court of Tax Appeals."

As the provision is phrased, the word "may" relates to the taxpayer's option to appeal or not to appeal, upon the denial of its claim for refund or after the expiration of the 120-day period. However, if the taxpayer opts to appeal, such claim must be filed within the 30-day period given from receipt of the denial or the expiration of the 120-day period. Thus, it is the option to appeal which is permissive, however, the period to appeal must be mandatorily complied with.

Finally, as to petitioner's argument that the Court's ruling has impaired its vested rights, basic is the rule that no vested rights are acquired on procedural rules.[8] Furthermore, the right to appeal is neither a natural right nor a part of due process. It is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law.[9]

Thus, when petitioner's administrative claim for refund was filed on December 28, 2009, respondent had 120 days within which to act on the same, or until April 27, 2010. However, even prior to the expiration of the 120-day period, on March 30, 2010, petitioner already filed its judicial claim for the 1st quarter of year

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[8] *Teotimo Billones, Celso Vallecer, et al. vs. The Court of Industrial Relations, et al.*, G.R. No. L-17566, July 30, 1965 and *Salvador Villardo, Eulogio V. Mata, et al. vs. The Court of Industrial Relations, et al.*, G.R. No. L-17567, July 30, 1965.

[9] *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation*, G.R. No. 167606, August 11, 2010.

2008. Based on the foregoing, there is no reason to reverse the CTA Second Division's resolution that CTA Case No. 8082 was prematurely filed on March 30, 2010.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

MINDANAO II GEOTHERMAL PARTNERSHIP, Petitioner,	**CTA EB CASE NO. 750** (CTA Case Nos. 8082 and 8106)
-*versus*-	Present: ***Acosta, P.J. Castañeda, Jr., Bautista, Uy, Casanova, Palanca-Enriquez, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, JJ.***
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JUL 05 2012 *ArApolinario 11:00 a.m.*

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DISSENTING OPINION

BAUTISTA, J.:

While the Court sitting *En Banc* dismissed the Petition for Review for lack of merit; still it is my considered view that the factual circumstances present in the case at bench supports the application of *the then prevailing jurisprudence at the time the claim was made*, thus, I find the Petitions for Review, docketed as CTA Case Nos. 8082 and 8106, respectively, filed in accordance with the 1997 National Internal Revenue Code, as amended.

In the case of *Magtoto v. Manguera, et al.*,[1] the Supreme Court sitting *En Banc* made the following pronouncement:

> **The final authority of this Court rests upon public respect for its decisions. That public respect is based upon an image which represents this Court as declaring legal principles with an authority and certainty that the people may place upon it their *bona fide* reliance and reasonable expectations.** To hold now that public officers, who have acted in justifiable reliance on Our aforecited doctrines, have transgressed the Constitution, would certainly not strengthen public respect on the authority of Our judgments.
>
> **Where there has been justifiable reliance on Our decisions, and those who have so relied may be substantially harmed if retroactive effect is given, where the purpose of the new rule can be adequately effectuated without giving it retroactive operation, or where retroactive operation might greatly burden the administration of justice, then it is Our duty to apply the new rule prospectively.**
>
> **The factual and textual bases for a contrary rule, are at best, less than compelling. Relevant is the Court's duty to assess the consequences of its action.** More than the human dignity of the accused in these cases is involved. There is the compelling realization that substantial interests of society may be prejudiced by a retrospective application of the new exclusionary rule. Thus, the values reflected transcend the individual interests of the herein accused, and involve the general security of society. The unusual force of the countervailing considerations strengthens my conclusion in favor of prospective application. xxx (*Boldfacing supplied.*)

It need not be stated that the Supreme Court, being the court of last resort, is the final arbiter of all legal questions properly brought before it, and that its decision in any given case constitutes the law of that particular case. Once its judgment become final it is binding on all inferior courts, and hence beyond their power and authority to alter or modify.[2]

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[1] G.R. Nos. L-37201-02, L-37424, and L-38929, March 3, 1975, 63 SCRA 4, Concurring Opinion penned by Justice Felix Q. Antonio, with Justices Antonio P. Barredo and Cecilia Muñoz-Palma, concurring.
[2] Jose Kabigting *v.* The Acting Director of Prisons, G.R. No. L-15548, October 30, 1962.

However, the Court's decisions should not be, as to a given period of time, upon the same or similar facts and under the same or similar circumstances, as fluctuating as to engender the phenomenon described by Mr. Justice Thompson of the Supreme Court of Virginia as *ignis fatuus*.[3]

Thus, with the foregoing doctrines in mind, as well as, the factual milieu present in the case at bench, the reckoning of the prescriptive period - from the close of the taxable quarter when the sales were made - should apply.

In addition, a plain reading of Section 112(C) of the 1997 National Internal Revenue Code ("NIRC"),[4] as amended,[5] will show that the provision use the word "*may*," which as settled in statutory construction connotes permissiveness, rather than of a restrictive or mandatory in nature.

Consistent with the aforementioned provision's permissive nature, the judicial recourse to this Court within thirty (30) days after the lapse of the one hundred twenty (120)-day period, therefore, is merely directory, and not mandatory nor jurisdictional; subject only to the period provided under Sections 112(A)[6] and 229[7] of the same Code.

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[3] Ramon Torres *v.* Tan Chim, G.R. No. L-46593, February 3, 1940, 69 Phil. 518, *citing Perkins v. Clemente et al., 1 Pat and (Va.) 153.*

[4] (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.

[5] As amended by Republic Act No. 9337.

[6] 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

Therefore, 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.[8]

The administrative and judicial claims must be *both* filed within the two (2)-year period,[9] otherwise, the Court will be deprived of jurisdiction to entertain the case.[10]

Counting two (2) years from the close of the respective taxable quarters of the year 2008, the administrative claim filed on December 28, 2009, and the judicial claims filed on March 30, 2010, and May 27, 2010, were, thus, made within their respective prescribed periods.

Applying the above disquisitions, I find the administrative and judicial claims filed within the prescribed period.

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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.

[7] 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, 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.

[8] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.

[9] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.

[10] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

Accordingly, I vote that the Petition for Review be **GIVEN DUE COURSE**.

LOVELL R. BAUTISTA
Associate Justice