REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CBK POWER COMPANY LIMITED,

Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CTA EB No. 760
(CTA Case No. 7887)

Present:

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

Promulgated:

FEB 01 2012

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DECISION

CASTAÑEDA, JR., *J.*:

This is a Petition for Review filed by CBK Power Company Limited before the Court of Tax Appeals (CTA) *en banc* assailing the Resolution[1] dated January 28, 2011 and the Resolution[2] dated April 5, 2011 promulgated by the CTA Third

[1] *Rollo*, pp. 62-72, with Associate Justice Lovell R. Bautista, dissenting.
[2] *Rollo*, pp. 74-83. Penned by Associate Justice Olga Palanca-Enriquez, with Associate Justice Amelia R. Cotangco-Manalastas, concurring and Associate Justice Lovell R. Bautista, dissenting.

Division in the case entitled "*CBK Power Company Limited vs. Commissioner of Internal Revenue,*" docketed as CTA Case No. 7887.

The assailed resolutions GRANTED respondent's "Motion to Dismiss" which consequently DISMISSED the Petition for Review seeking the issuance of a tax credit certificate in favor of petitioner in the amount of P58,802,851.18 allegedly representing unutilized input value-added tax (VAT) paid on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents attributable to zero-rated sales for all the four quarters of taxable year 2007.

THE FACTS

The facts of the case as stipulated by the parties in the Joint Stipulation of Facts and Issues[3] and as borne by the records of this case, the following are the undisputed facts:

Petitioner is a partnership duly organized and existing under and by virtue of the laws of the Philippines with principal office at the NPC Compound, Kalayaan, Laguna.

Respondent is the duly appointed Commissioner of Internal Revenue vested with authority to act as such, including *inter alia*, the power to decide, approve and grant refunds or tax credit of erroneously or illegally collected internal revenue taxes as provided by law, with office at the BIR National Office

[3] Division Docket, pp. 209-211.

Building, Diliman, Quezon City, where he may be served with summons and other court processes.

The National Power Corporation (NPC) exists by virtue of Republic Act (RA) No. 6395 entitled "An Act Revising the Charter of the National Power Corporation."

Petitioner is a special purpose entity, the sole purpose of which is to engage in all aspects of (a) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna, and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna, as shown by petitioner's SEC Registration and Amended Articles of Partnership.

Petitioner is registered as a value-added tax (VAT) entity with TIN/VAT No. 205-760-474-000 in accordance with the Tax Code, as amended. It was issued BIR Certificate of Registration OCN 1RC0000050243 dated April 10, 2000 by the BIR Revenue District Office No. 55 (San Pablo City, Laguna), which was updated on May 11, 2005, as a consequence, petitioner was issued BIR Certificate of Registration OCN 1RC0000195405.

Petitioner thru its tax counsel, filed on March 26, 2009 with the BIR Revenue District Office (RDO) No. 55 of Laguna, its administrative claim for the issuance of a tax credit certificate for the total amount of P58,802,851.18 for its unutilized input taxes on its local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112 (A) of the Tax Code of 1997, as amended.

Since respondent has not yet issued its final decision on petitioner's administrative claim for the issuance of a tax credit certificate for unutilized input taxes on local purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, all attributable to zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112 (A) of the Tax Code of 1997, as amended, a Petition for Review was filed on March 27, 2009 before the CTA.

On May 4, 2009, respondent filed his Answer[4] raising prematurity of judicial claim as one of his defenses. According to respondent, the petition was filed prematurely, as both the administrative claim and judicial claim was filed on the same day. Hence, the petition for review should be dismissed for lack of jurisdiction.

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[4] Division Docket, pp. 165-172.

On June 4, 2009, the case was set for pre-trial conference.[5] During pre-trial and upon motion of the respondent's counsel, the Court granted the respondent fifteen (15) days within which to file his Motion to Dismiss while giving petitioner 15 days to file its comment thereto.[6] Respondent failed to file his Motion to Dismiss.

Thereafter, the parties submitted their Joint Stipulation of Facts and Issues[7] on July 27, 2009 and the same was approved in the Resolution dated July 30, 2009.[8] During trial, petitioner presented documentary and testimonial evidence to support its claim.[9] On the other hand, respondent filed a Motion to Dismiss[10] on December 6, 2010. Subsequently, petitioner filed its Comment on/Opposition to Respondent's Motion to Dismiss[11] on December 17, 2010.

On January 28, 2011, the CTA Third Division rendered the assailed Resolution granting respondent's motion which resulted to the dismissal of the Petition for Review. The dispositive portion of the assailed Resolution reads as follows:

> **WHEREFORE**, premises considered, respondent's "**Motion to Dismiss**" is hereby **GRANTED**. Accordingly, the ***Petition for Review*** filed in the above-captioned case is hereby **DISMISSED** for having been prematurely filed.
>
> **SO ORDERED.**[12]

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[5] Division Docket, p. 174.
[6] Division Docket, p. 201.
[7] Division Docket, pp. 209-213.
[8] Division Docket, p. 215.
[9] Petitioner's Formal Offer of Evidence, Division Docket, pp. 414-457.
[10] Division Docket, pp. 514-518.
[11] Division Docket, pp. 522-539.
[12] *Rollo,* p. 66.

Aggrieved, petitioner filed a Motion for Reconsideration on February 14, 2011 while respondent filed his Comment on February 23, 2011. In the Resolution dated April 5, 2011, the CTA Third Division denied the motion for lack of merit. The dispositive portion of the assailed Resolution reads as follows:

> **WHEREFORE**, premises considered, petitioner's "Motion for Reconsideration" is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**[13]

Hence, this Petition for Review *en banc.*

THE ISSUE

The issue in this case is whether or not petitioner timely and duly filed its administrative and judicial claims for the issuance of a tax credit certificate amounting to P58,802,851.18 representing its unutilized input VAT on its local purchases and/or importation of goods and services attributable to its zero-rated sales for the period January 1, 2007 to December 31, 2007.

In support of the present Petition for Review, petitioner proffers the following grounds:

a. Respondent's Motion To Dismiss should be denied for having been filed in violation of Rule 16, Section 1 of the Revised Rules of Court which provides that a Motion to Dismiss may be filed "within the time for but **before filing the answer to the complaint** or a pleading asserting a claim xxx;"

b. Petitioner **had timely and duly filed its administrative and judicial claims** for the issuance of a tax credit certificate for P58,802,851.18 for its unutilized input taxes on its local

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[13] *Rollo,* p. 77.

purchases and/or importation of goods and services, capital goods and payments for services rendered by non-residents, which were all attributable to petitioner's zero-rated sales for the period January 1, 2007 to December 31, 2007, pursuant to Section 112(A) of the Tax Code of 1997, as amended; and

c. Under Section 5 (5), Article VIII of the 1987 Philippine Constitution, it is provided that Rules of Procedure shall not diminish, increase or modify substantive rights (*Land Bank of the Philippines vs. Arlene De Leon and Bernardo De Leon, G.R. No. 143275, En Banc, March 20, 2003*) Further, following the principle of prospectivity of statutes, which had been applied to judicial decisions and considering that petitioner had followed in good faith the prevailing jurisprudence when it filed its administrative and judicial claims for its unutilized input taxes for the period January 1, 2007 to December 31, 2007, the Supreme Court ruling in the case of **Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.** with G.R. No. 184823 and promulgated on October 6, 2010, which ruled that the filing of the judicial claim therein with the CTA was premature since the administrative and judicial claims therein were simultaneously filed, **should not be applied in the instant case.** (*Albino S. Co, v. Court of Appeals and People of the Philippines, G.R. No. 100776 dated October 28, 1993*)

THIS COURT'S RULING

The petition is without merit.

We affirm the ruling of the CTA Third Division DENYING the judicial claim for being premature as no jurisdiction was acquired by the Court of Tax Appeals (CTA). This is based on the following grounds:

1. The jurisdiction of a court may be questioned at any stage of the proceedings.

2. When the law provides a period within which to commence an action, such requirement is jurisdictional and failure to comply therewith may be raised in a motion to dismiss.[14]

[14] *Ker & Company, Ltd. vs. Court of Tax Appeals,* No. L-12396, January 31, 1962, 4 SCRA 160.

3. The CTA is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.[15]

4. The principles laid down in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* [16] (*Aichi*) are applicable to the present case.

The jurisdiction of a court may be questioned at any stage of the proceedings.

Petitioner argued that the CTA Third Division erred in granting respondent's "Motion to Dismiss" which resulted to the denial of the judicial claim. It contended that the motion was filed in violation of Rule 16, Section 1 of the Rules of Court which provides that a Motion to Dismiss may be filed "within the time for but before filing the answer to the complaint xxx."

The argument must fail.

The rule that a motion to dismiss should be filed within the time for filing the answer is not absolute. Even after an answer has been filed, a defendant can still file a motion to dismiss on the following grounds: (1) lack of jurisdiction, (2) *litis pendentia* (3) lack of cause of action, and (4) discovery during trial of evidence that would constitute a ground for dismissal. Lack of jurisdiction is one of the grounds that authorize a court to dismiss a case *motu proprio.* [17]

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[15] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*, G.R. No. 168498, Resolution dated April 24, 2007, 522 SCRA 144.
[16] G.R. No. 184823, October 6, 2010, 632 SCRA 422. The *Aichi* case became final as per Supreme Court's Resolution dated December 6, 2010.
[17] *Carmelita T. Panganiban vs. Pilipinas Shell Petroleum Corporation*, G.R. No. 131471, January 22, 2003, 395 SCRA 624.

The rule is that the jurisdiction of a court may be questioned at any stage of the proceedings.[18] Lack of jurisdiction is one of those excepted grounds where the court may dismiss a claim or a case at any time when it appears from the pleadings or the evidence on record that any of those grounds exists, even if they were not raised in the answer or in a motion to dismiss.[19] The reason is that jurisdiction is conferred by law, and lack of it affects the very authority of the court to take cognizance of and to render judgment on the action. [20] Therefore, the Court is empowered, on its own initiative, to raise the question of jurisdiction even it was not raised by the proper party.

When the law provides a period within which to commence an action, such requirement is jurisdictional and failure to comply therewith may be raised in a motion to dismiss.

The period for filing administrative and judicial claims for refund or issuance of tax credit certificate of unutilized input VAT attributable to zero-rated sales is governed by Section 112 (A) and (C) of the 1997 NIRC, as amended, to wit:

Section 112. *Refunds or Tax Credits of Input Tax.* —

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[18] *Honorio Bernardo vs. Heirs of Eusebio Villegas*, G.R. No. G.R. No. 183357, March 15, 2010, 615 SCRA 466 citing the case of *Vargas vs. Caminas*, G.R. No. 137869 and G.R. No. 137940, 12 June 2008, 554 SCRA 305, 316.

[19] *Ibid.*, citing the cases of *Geonzon Vda. de Barrera vs. Heirs of Vicente Legaspi*, G.R. No. 174346, 12 September 2008, 565 SCRA 192, 198, citing *Francel Realty Corporation vs. Sycip*, G.R. No. 154684, 8 September 2005, 469 SCRA 424, 432.

[20] *Ibid.*, citing the cases of *Sales vs. Barro*, G.R. No. 171678, 10 December 2008, 573 SCRA 456, 464, citing *Venancio Figueroa y Cervantes vs. People*, G.R. No. 147406, 14 July 2008, 558 SCRA 63, 69, and *Atwel vs. Concepcion Progressive Association, Inc.*, G.R. No. 169370, 14 April 2008, 551 SCRA 272, 283.

> (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: *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 nonzero-rated sales.
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> xxx xxx xxx xxx
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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.
>
> 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.-
>
> xxx xxx xxx xxx

Based on the foregoing, the application for refund of unutilized input VAT attributable to zero-rated sales may be made only within two (2) years after the close of the taxable quarter when the sales were made. This period, however, *gc* refers solely to administrative claims filed with the Commissioner of Internal Revenue (CIR) and not to appeals made to the CTA.

Meanwhile, judicial claim for refund should be filed within thirty (30) days from receipt of the decision of the CIR or upon the expiration of the one hundred twenty (120) days in case of inaction of the CIR. The observance of these periods is mandatory and non-compliance therewith would result in the denial of the claim.

Applying the same to the present case, petitioner timely filed its administrative claim for refund on March 26, 2009.[21] However, judicial claim was prematurely filed on March 27, 2009[22] or a day after filing the administrative claim. Hence, We deny petitioner's refund for failure to observe the 120-30 day period under Section 112 (C) of the NIRC of 1997, as amended, because it resulted to prematurity of claim which warrants a dismissal as no jurisdiction was acquired by the CTA.

The CTA is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.

Taking into consideration the CTA's special and limited jurisdiction, the decisions, rulings or inaction of the Commissioner are necessary in order to vest the CTA with jurisdiction to entertain the appeal.[23] The jurisdiction of the CTA is

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[21] Paragraph 6, Joint Stipulation of Facts and Issues, Division Docket, p. 211.
[22] Petition for Review, Division Docket, pp. 4-17.
[23] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, supra,* note 15.

provided under Section 7 of Republic Act (RA) No. 1125, as amended by RA 9282, to wit:

> Sec. 7. Jurisdiction. — The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
>
> (2) **Inaction by the Commissioner of Internal Revenue in cases involving** disputed assessments, **refunds of internal revenue taxes**, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial**; (emphasis ours)

The CTA shall exercise exclusive appellate jurisdiction to review by appeal the decisions as well as the inaction by the CIR in cases involving refunds of internal revenue taxes. In case where the NIRC provides a specific period for action, the CIR's inaction shall be deemed a denial.

In this case, Section 112 (C) of the NIRC provides specific period of action, that is, the 120-day period within which the CIR shall render a decision. When no decision is made after the 120-day period, the taxpayer has 30 days within which to file an appeal with the CTA. At this point, there was neither a showing that a decision was rendered by the CIR nor that the 120-day period has already lapsed. In fact, there was no dispute that the judicial claim was filed a day after the administrative claim was filed. Evidently, there is nothing yet to be reviewed by the CTA. Thus, the 120-day period is crucial in filing an appeal with the CTA.[24]

In the case of *Ker & Company, Ltd. vs. Court of Tax Appeals*,[25] the Supreme Court held that when the law provides a period within which to commence an action, such requirement is jurisdictional, pertinent portion of the decision states:

> While the right to appeal a decision of the Collector to the Tax Court is merely a statutory remedy, nevertheless the requirement that it must be brought within thirty days after receipt of the Collector's decision, or ruling is jurisdiction. "**If a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional and failure to comply therewith may be raised in a motion to dismiss**" (Callahan vs. Chespeake & Ohio, 407 Supp. 323, mentioned on p. 175, Moran's Rules of Court, Vol. 1, 1952 Ed.). xxx **The right to appeal from the decision of the Collector being a statutory right, the same can be invoked only in accordance with the requisites provided by law** (Wee Poco v. Posadas, 64 Phil. 648). xxx (emphasis ours)

Also, the case of *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue* [26] should be applied by analogy to the present case. The pertinent portion of the ruling states:

> The decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal, provided it is filed within 30 days after the receipt of such decision or ruling, or within 30 days after the

[24] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., supra,* note 16.
[25] *Supra,* note 14.
[26] *Supra,* note 15.

> expiration of the 180-day period fixed by law for the Commissioner to act on the disputed assessments. **This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction** to entertain and determine the correctness of the assessments. **Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same.**[27] (emphasis ours)

The Supreme Court ruled that the **30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction**. This applies to cases of refund under Section 112 where the taxpayer may, within 30 days from receipt of the decision denying the claim or after the expiration of the 120-day period, appeal the decision or the unacted claim with the CTA.

Similarly in the case of *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation,*[28] the Supreme Court reiterated that **perfection of an appeal in the manner and within the period laid down by law is not only mandatory but also jurisdictional**. The failure to perfect an appeal as required by the rules has the effect of defeating the right to appeal of a party and precluding the appellate court from acquiring jurisdiction over the case. At the risk of being repetitious, We declare that the right to appeal is not 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.[29]

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[27] *Ibid.*
[28] G.R. No. 167606, August 11, 2010, 628 SCRA 96.
[29] *Ibid.*

The principles laid down in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. are applicable to the present case.

The *Aichi* case is **controlling and should be applied outright** in all cases where the facts are substantially the same as the mentioned case. The *Aichi* case is an actual application of Section 112(A) and (C) of the NIRC of 1997 where the Supreme Court disallowed the refund of unutilized input VAT due to prematurity of judicial claim as no jurisdiction was acquired by the CTA, pertinent portion of the decision states:

> ***Unutilized input VAT must be claimed within two years after the close of the taxable quarter when the sales were made***
>
> In computing the two-year prescriptive period for claiming a refund/credit of unutilized input VAT, the Second Division of the CTA applied Section 112(A) of the NIRC, which states:
>
> > 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. (Emphasis supplied.)

The CTA *En Banc,* on the other hand, took into consideration Sections 114 and 229 of the NIRC, which read:

> SEC. 114. Return and Payment of Value-Added Tax. –
>
> (A) In General. – Every person liable to pay the value-added tax imposed under this Title shall **file a quarterly return of the amount of his gross sales or receipts within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer**: Provided, however, That VAT-registered persons shall pay the value-added tax on a monthly basis.
>
> Any person, whose registration has been cancelled in accordance with Section 236, shall file a return and pay the tax due thereon within twenty-five (25) days from the date of cancellation of registration: Provided, That only one consolidated return shall be filed by the taxpayer for his principal place of business or head office and all branches.
>
> x x x x
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> SEC. 229. Recovery of tax erroneously or illegally collected. –
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> 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 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. (Emphasis supplied.)

Hence, the CTA *En Banc* ruled that the reckoning of the two-year period for filing a claim for refund/credit of unutilized input VAT should start from the date of payment of tax and not from the close of the taxable quarter when the sales were made.

The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation*, where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes." xxx (emphasis ours)

xxx xxx xxx

In view of the foregoing, we find that the CTA *En Banc* erroneously applied Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT. **To be clear, Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period should be reckoned from the close of the taxable quarter when the sales were made.** (emphasis ours)

xxx xxx xxx

The filing of the judicial claim was premature

However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112 (D) of the NIRC, which provides that:

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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.

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 xxx 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.

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.

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In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA.[30] (emphasis ours)

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[30] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., supra*, note 16.

It should be noted that the judicial claim in *Aichi* was filed on September 30, 2004, a date earlier than the judicial claim of herein petitioner (March 27, 2009). Yet, the Supreme Court applied outright the ruling in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Corporation, Inc.)* [31] which reckoned the two-year prescriptive period for filing an administrative claim for refund from the close of the taxable quarter when the relevant sales were made. Hence, We see no reason why We should depart from the recent *Aichi* and *Mirant* rulings.

We note the ruling of the Supreme Court in the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue* [32] penned by then Associate Justice Renato C. Corona (now Chief Justice) that all rulings of the Supreme Court on questions of law are conclusive and binding on all courts. All courts must take their bearings from the decisions of the Supreme Court. Thus, We do not presume to reverse the current decision of the Supreme Court on the ground that a new ruling or doctrine violates any constitutional provision absent any pronouncement from it as such. It should be noted that the Supreme Court, by tradition and in our system of judicial administration has the last word on what the law is; it is the final arbiter of any justifiable controversy. Indeed, there is only one Supreme Court from whose decisions all other courts should take bearings.[33]

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[31] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[32] G.R. No. 176290, Resolution dated September 21, 2007, 533 SCRA 776, 781.
[33] *Commissioner of Internal Revenue vs. Michel J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of *GSIS vs. Court of Appeals*, 334 Phil. 163, 175; 266 SCRA 187 (1997).

The Court has time and again stated that the rule on *stare decisis* promotes stability in the law and should, therefore, be accorded respect. However, blind adherence to precedents, simply as precedent, no longer rules. More important than anything else is that the court is right, thus its duty to abandon any doctrine found to be in violation of the law in force. [34]

In conclusion, petitioner's judicial claim was prematurely filed which warrants a dismissal as no jurisdiction was acquired by the CTA. "A taxpayer must prove not only his entitlement to a refund but also his compliance with the procedural due process as non-observance of the prescriptive periods within which to file the administrative and the judicial claims would result in the denial of his claim."[35]

WHEREFORE, on the basis of the foregoing considerations, the Petition for Review *En Banc* is **DISMISSED.** Accordingly, the Resolutions of CTA Third Division dated January 28, 2011 and April 5, 2011 are hereby **AFFIRMED**.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

(with Separate Concurring Opinion)
ERNESTO D. ACOSTA
Presiding Justice

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[34] *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company,* G.R. No. 140230, December 15, 2005, 478 SCRA 61.
[35] *Supra,* note 16.

I maintain my Dissenting Opinions as promulgated by the Third Division of the Court in the assailed Resolutions dated January 28, 2011 and April 5, 2011.

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Concurs with Separate Concurring Opinion of Presiding Justice Acosta)
ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(Concurs with Separate Concurring Opinion of Presiding Justice Acosta)
AMELIA R. COTANGCO-MANALASTAS
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

CBK POWER COMPANY LIMITED,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 760
(CTA CASE NO. 7887)

Members:

ACOSTA, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, *and,*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

FEB 01 2012

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SEPARATE CONCURRING OPINION

The present claim pertains to input VAT on zero-rated sales incurred for the period of 1st to 4th quarters of 2007. The pertinent dates are as follows:

Period Covered	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim	End of the 120-day period under Section 112 (D), NIRC	End of the 30-day period under Section 112 (D), NIRC
1ST to 4th Quarter, 2007	March 26, 2009	March 27, 2009	July 24, 2009	August 23, 2009

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As correctly applied by the majority, an application for refund or tax credit over input taxes arising from zero-rated sales or effectively zero-rated sales is governed by Section 112(A) and (D) of the 1997 NIRC which provides:

> **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 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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> xxx xxx xxx
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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.**
>
> 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 Ours)

The foregoing provisions require that a claim for refund over excess input VAT arising from zero-rated or effectively zero-rated sales must be administratively filed within two (2) years from the close of the taxable quarter

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when the sales were made. There is also an indispensable requirement for the taxpayer to await the action or inaction of the Commissioner within a period of one hundred twenty (120) days before it can appeal to this Court its claim for refund on excess or unutilized input VAT arising from zero-rated or effectively zero-rated sales. The application of Sections 112(A) and (D) of the 1997 NIRC has already been established in the cases of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[1] and *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[2]

Following the provisions of Sections 112(A) and (D) of the 1997 NIRC, it appears that the claim for refund or issuance of a tax credit certificate of input VAT was administratively filed within the two (2) year period, hence, compliant with Section 112(A) of the 1997 NIRC. The petitioner, however, failed to comply with the one hundred twenty (120) day period required to await the decision of the respondent as prescribed in Section 112(D) of the 1997 NIRC. Thus, petitioner prematurely filed the judicial claim of excess input VAT for all the four quarters of taxable year 2007.

Nevertheless, I beg to differ from the view of the majority that the premature filing of a refund claim involving unutilized input VAT is jurisdictional. With all due respect, the premature filing of said claim is a violation of the doctrine of exhaustion of administrative remedies.

It is well settled that non-exhaustion of administrative remedies is not jurisdictional. It only renders the action premature, *i.e.*, the claimed cause of

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[1] G.R. No. 172129, September 12, 2008.
[2] G.R. No. 184823, October 6, 2010.

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action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[3] The premature invocation of court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel,* the case is susceptible of dismissal for lack of cause of action.[4]

It appears that respondent raised in his answer as a special and affirmative defense the premature filing of the case in Court. Thus, respondent did not waive said defense. Therefore, the Court must dismiss petitioner's claim for the issuance of a tax credit certificate representing its unutilized input taxes for the period January 1, 2007 to December 31, 2007 for lack of cause of action.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[3] *Carale vs. Abarintos,* G.R. No. 120704, March 3, 1997.
[4] *Paat vs. Court of Appeals,* G.R. No. 111107, January 10, 1997.