REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**C.T.A. EB NO. 693** (C.T.A. CASE NO. 7457)
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ.
PENN PHILIPPINES, INC., *Respondent.*	**Promulgated:** JUN 2 7 2012 Apolinario 1:30 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by the Commissioner of Internal Revenue (hereafter "petitioner CIR") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Decision dated April 6, 2010 and Resolution dated September 15, 2010 rendered by the Special First Division of this Court in C.T.A. Case No. 7457, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in the amount of **ONE MILLION NINE HUNDRED TWENTY FOUR THOUSAND THREE HUNDRED FOURTEEN PESOS AND 91/100 (P1,924,314.91)** in favor of petitioner Penn Philippines, Inc., representing its unutilized input VAT for the second, third and fourth quarters of taxable year 2004.
>
> **SO ORDERED.**"
>
> "**WHEREFORE**, petitioner's *Motion for Partial Reconsideration (of the Decision dated 6 April 2010)* and respondent's *Motion for Partial Reconsideration* are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE PARTIES

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

Respondent Penn Philippines, Inc., on the other hand, is a corporation duly organized and existing under the laws of the Republic of the Philippines,

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with business address at FTI Avenue, FTI Complex, Taguig, Metro Manila. Formerly, its corporate name was Penn Gold-Zack Philippines, Inc., and prior to that, its original corporate name was Goldzack Philippines, Inc.

Respondent is registered as a VAT taxpayer with the BIR Large Taxpayer District Office, under Certificate of Registration No. 0000015817 dated January 1, 1996. It is primarily engaged in the manufacture of textile products (elastic fabric) and other products allied thereto.

THE FACTS

The facts, as culled from the records, are as follows:

Respondent claims that it had paid input tax in the amount of P4,868,496.87 on its domestic purchases of goods and services and importation of capital goods. Thus, on March 27, 2006, respondent filed with the BIR its application for tax credit/refund of its unapplied/unutilized input VAT for the four (4) quarters of 2004.

On April 19, 2006, respondent filed a Petition for Review with the Court in Division, docketed as C.T.A. Case No. 7457.

In her answer, petitioner CIR alleged by way of special and affirmative defenses:

> "4. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.

Ob

> 5. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.
>
> 6. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit.
>
> 7. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the 1997 Tax Code including Revenue Regulations No. 5-87 as amended by Revenue Regulations Nos. 3-88 and 7-95, as amended.
>
> 8. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma G.R. No. L-13509, January 30, 1970, 31 SCRA 95)* and as such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)*."

After trial on the merits, on April 6, 2010, the Special First Division rendered a Decision partially granting respondent's claim for refund representing its unutilized input VAT for the 2nd, 3rd and 4th quarters of taxable year 2004.

Both parties filed their respective Motions for Partial Reconsideration, which were denied by the Special First Division in a Resolution dated September 15, 2010.

Not satisfied, on October 20, 2010, petitioner CIR filed the instant Petition for Review raising the following:

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ISSUES

I

WHETHER OR NOT THE FORMER FIRST DIVISION OF THE HONORABLE COURT OF TAX APPEALS HAS JURISDICTION OVER THE CASE INASMUCH AS RESPONDENT PENN PHILIPPINES, INC. FILED THE PETITION FOR REVIEW BEFORE THE EXPIRATION OF THE 120-DAY PERIOD AS SPECIFICALLY PROVIDED FOR UNDER SECTION 112 (C) OF THE NIRC FOR THE COMMISSIONER TO ACT ON TAXPAYER'S CLAIM FOR REFUND.

II

WHETHER OR NOT RESPONDENT'S SALES TO PENN PHILIPPINES EXPORT, INC. ARE SUBJECT TO 10% VALUE ADDED TAX.

Without necessarily giving due course to the petition, on November 9, 2010, respondent was ordered to file its comment, within ten (10) days from notice. On December 2, 2010, respondent filed its Comment

On January 10, 2011, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.

On February 17, 2011, respondent filed its Memorandum. On the other hand, as per Report of the Judicial Records Division dated March 7, 2011, petitioner CIR failed to file her memorandum despite notice.

Thus, on March 16, 2011, this case was deemed submitted for decision.[1]

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[1] This case was originally raffled for study and report to Associate Justice Amelia R. Cotangco-Manalastas.

Petitioner CIR's arguments

Petitioner CIR contends that the Petition for Review filed before the lapse of the 120-day period accorded to the CIR to decide the claim for refund is not within the ambit of the jurisdiction of the CTA; the defense of lack of jurisdiction may be raised at any stage of the proceedings, even on appeal; the Petition for Review filed by Penn Philippines Inc. with the Court in Division is clearly anchored on Section 106 (A) (2) (c) of the NIRC, which provides that zero-rated sales shall apply to sales made by a VAT registered person to a person/entity who is exempt from indirect tax; respondent's sales to Penn Philippine Export, Inc. do not qualify for zero percent VAT, but to 10% VAT, pursuant to Section 106 of the NIRC of 1997; and the total output VAT of respondent for the four (4) quarters of 2004 amounted to P110,043.87, which should be applied against respondent's substantiated input VAT.

During the deliberation, Associate Justice Amelia R. Cotangco-Manalastas voted to dismiss the petition, to which Presiding Justice Ernesto D. Acosta and Associate Justice Esperanza R. Fabon-Victorino concurred, while Associate Justice Lovell R. Bautista registered a Separate Concurring Opinion. On the other hand, Associate Justice Juanito C. Castañeda registered his dissent, which was joined by Associate Justices Erlinda P. Uy, Caesar A. Casanova, Olga Palanca Enriquez, and Cielito N. Mindaro-Grulla.

Pursuant to *Section 3, Rule 2 of the 2005 Revised Rules of the CTA, as amended*, the affirmative votes of five (5) members of the Court *En Banc* shall be necessary to reverse a decision of the Court in Division. Considering that five (5) Justices voted to reverse the assailed Decision dated April 6, 2010, on February 10, 2012, the case was re-raffled among Associate Justices Juanito C. Castañeda, Erlinda P. Uy, Caesar A. Casanova, Olga Palanca Enriquez, and Cielito N. Mindaro-Grulla to write the majority opinion, and the case was re-raffled to Associate Justice Olga Palanca Enriquez.

Respondent's counter-arguments

On the other hand, respondent counter-argues that the CTA has jurisdiction to entertain and decide its claim for refund; the two (2) year period covers both the administrative and judicial claims as recognized in petitioner CIR's own issuances; the CTA has consistently applied that the two (2) year period covering both administrative and judicial claims is mandatory and not the 120 or 30 days; the Supreme Court has also ruled in a number of cases that the two (2) year period applies to both administrative and judicial claims; the Aichi case cannot be applied to respondent as the doctrine prevailing at the time it filed its Petition for Review with the Special First Division was that both the administrative and judicial claims for refund must be filed within the two (2) year period; petitioner is estopped from raising lack of jurisdiction on appeal; the Special First Division clearly explained that the basis for the zero-rating of respondent's sales is not Section 106 (A) (2) (c) of the Tax Code; respondent is entitled to a refund or issuance of tax credit certificate for the total amount of P1,924,314.91 after offsetting the total amount of output VAT for 2004 amounting to P110,043.87 against the total amount of input VAT for 2004, as found by the Special First Division.

THE COURT *EN BANC'S* RULING

We grant the petition.

Qbe

In the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. ("Aichi case"), 632 SCRA 442-444*, the Supreme Court ruled, as follows:

> "***The filing of the judicial claim was premature***
>
> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent' claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
>
> > SEC. 112. Refunds or Tax Credits of Input Tax.–
> >
> > x x x x
> >
> > (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 tax on the application within the period prescribed above, the taxpayer affected may, within (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.)*
>
> Section 112(D) 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,'

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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.

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.

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 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 the 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

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> 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.
>
> With regard to Commissioner of Internal Revenue vs. Victorias Milling, Co., Inc. relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.
>
> 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."

Pursuant to the above ruling, the periods provided under *Section 112 (D) of the NIRC of 1997, as amended*, are crucial in filing an appeal with the CTA. The Aichi case clarified the provisions of *Section 112 (A) of the NIRC of 1997, as amended*, that 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. On the other hand, *Section 112 (D)[now Section 112 (C)]* provides for the period within which to file the judicial claim with the CTA, which is, within thirty (30) days from receipt of the decision of the CIR denying the claim, or after the expiration of the 120-day period.

Applying the foregoing ruling in the Aichi case, records show that on March 27, 2006, respondent filed its administrative claim for refund of its unutilized input VAT for the four (4) quarters of 2004, which is well within the prescribed two (2) year period after the close of the taxable quarter when the sales were made. Pursuant to *Section 112 (C)*, petitioner CIR had 120-days or until July 25, 2006, within which to decide respondent's claim for refund. Within thirty (30) days from the lapse of the 120-day period, or until August 24, 2006, respondent may appeal its claim for refund to the CTA. However, records show that respondent filed the Petition for Review in C.T.A. Case No. 7457 on April 19, 2006, barely twenty-three (23) days after it filed its administrative claim. Evidently, respondent did not wait for the lapse of the 120-day period for the CIR to decide its administrative claim. It is clear, therefore, that the Petition for Review in C.T.A. Case No. 7457 was prematurely filed, since the CIR was not given the full opportunity to decide respondent's claim. Therefore, C.T.A. Case No. 7457 should be dismissed for having been prematurely filed.

As regards the cases relied upon by respondent, we find the same inapplicable as said cases were promulgated prior to the Aichi case.

Application of the Aichi case

As to respondent's contention that the Aichi case is not applicable in this case, it must be stressed that the Aichi case involves the application and interpretation of *Section 112 of the NIRC of 1997, as amended*, and does not establish a rule which is not familiar with respondent. It cannot be mistaken that the law itself is very clear and unambiguous. Hence, we cannot disregard the letter of the law on the pretext of pursuing its spirit *(Tañada and Macapagal vs. Cuenco, et al., 103 Phil. 1086).*

Basic is the rule that judicial interpretation of the law retroacts to the date when the said law became effective. Thus, the ruling in the Aichi case retroacts to the date when *Section 112* took effect.

Considering, further, that the Aichi case, which interpreted *Section 112 of the NIRC of 1997, as amended,* in prescribing the period to apply for a claim for refund with the BIR and to file the judicial claim with the CTA, dealt on a procedural law; then, it can be applied retroactively to cases pending at the time of its promulgation, such as the instant case. Elementary is the rule that one does not have a vested right in procedural rules.

In the case of *Zulueta vs. Asia Brewery, Inc., 354 SCRA 106-107*, the Supreme Court ruled that though as a general rule, laws have no retroactive effect, there are certain recognized exceptions, such as when they are remedial or procedural in nature. Thus, procedural laws may operate retroactively as to pending proceedings even without express provision to that effect. Accordingly, rules of procedure can apply to cases pending at the time of their enactment *(Del Rosario vs. Court of Appeals, 241 SCRA 526)*.

Thus, in the recent case of *Go vs. Sunbanun, 642 SCRA 383*, the Supreme Court reiterated the ruling that "Procedural laws may be given retroactive effect to actions pending and undetermined at the time of their passage, there being no vested rights in the rules of procedure."

The issue of jurisdiction may be raised at any stage of the proceedings

As regards respondent's contention that petitioner CIR is already estopped from raising the issue of jurisdiction, well settled is the rule that the Court may dismiss a case *motu proprio* on the ground of lack of jurisdiction at any stage of the proceedings. Courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings *(Ace Publications, Inc., vs. Commissioner of Customs and the Collector of Customs, 11 SCRA 153)*.

For all the foregoing, we have no alternative but to reverse and set aside the assailed Decision dated April 6, 2010 and Resolution dated September 15, 2010, and to dismiss the Petition for Review filed in C.T.A. Case No. 7457 for having been prematurely filed.

WHEREFORE, premises considered, the instant petition is hereby **GRANTED**. Accordingly, the assailed Decision dated April 6, 2010 and Resolution dated September 15, 2010 rendered by the Special First Division in C.T.A. Case No. 7457 are hereby **REVERSED** and **SET ASIDE**. The Petition for Review filed in C.T.A. Case No. 7457 is hereby **DISMISSED** for having been prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(I agree with Justice Manalastas)
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

(I agree with Justice Manalastas)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(With Dissenting Opinion)
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

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB CASE NO. 693** (CTA Case No. 7457)
	Present: *Acosta, P.J. Castañeda, Jr., Bautista, Uy, Casanova, Palanca-Enriquez, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, JJ.*
-versus-	
PENN PHILIPPINES, INC., (Formerly, PENN GOLD-ZACK PHILIPPINES, INC., and Formerly GOLDZACK PHILIPPINES, INC.), Respondent.	**Promulgated:** JUN 2 7 2012

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DISSENTING OPINION

BAUTISTA, J.:

As one of the members of the Special First Division of the Court and as the *ponente* of the assailed Decision dated April 6, 2010, and Resolution dated September 15, 2010, now before this Court sitting *En Banc*, I maintain that the factual circumstances present in the case at bench should make this Court consider the principle which states that "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."[1]

In not a few instances did this Court rule that the date of filing of the relevant return is the determinative factor. However, during the pendency of the case at bench, the Supreme Court issued a ruling, which substantially reversed and modified the reckoning of the prescribed period within which a claim for refund or tax credit for zero-rated or effectively zero-rated sales is to be made.

Albeit I agree that the latter-issued ruling is in accordance with the letter and spirit of Section 112 of the 1997 National Internal Revenue Code, as amended, it would be the height of injustice to impose a new ruling wherein after a taxpayer-claimant had faithfully relied and complied therein, this Court will only nullify the same on the basis of the so-called "adherence to precedence." Even the taxpayer-claimant itself could not have foreseen that after it had filed its claims before the administrative and judicial *fora*, a subsequent ruling, either modifying or overruling a previous one, would be issued that would put to naught its claims.

It is true that this Court has the duty to obey the decisions of the Supreme Court and render obeisance to its status as the apex of the hierarchy of courts.[2] Nonetheless, this Court should not decide a case by merely adhering to precedence;

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[1] Magtoto *v.* Manguera, *et al.*, 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] Commission on Higher Education *v.* Atty. Felina S. Dasig, G.R. No. 172776, December 17, 2008, 574 SCRA 227, *citing Albert v. Court of First Instance of Manila, No. L-26364, May 29, 1968, 23 SCRA 948, 961.*

idolatrous reverence for precedent, simply as precedent, no longer holds true.[3] Therefore, this Court cannot merely impose a ruling that was yet to be enunciated at the time a claim was lodged in Our forum.

As the Supreme Court aptly ruled, "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."[4]

With this, prior determinations deemed to have finality and acted upon accordingly, demands examination. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects. It may have consequences which cannot just be ignored.[5]

When respondent filed its claim before petitioner on March 27, 2006, and the Petition for Review before the Special First Division of this Court on April 19, 2006, claiming for refund of unutilized input value-added tax covering the four quarters of the taxable year 2004, the then prevailing doctrine, is that the reckoning of the two (2)-year prescriptive period is from the filing of the pertinent return,[6] and not from the close of the quarter;[7] not even within thirty (30) days from receipt of the decision

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[3] Philippine Trust Company and Smith, Bell and Co. *v.* Mitchell, 59 Phil. 30, 36.
[4] *Supra*, note 1.
[5] Albino S. Co *v.* Court of Appeals, *et al.*, G.R. No. 100776, October 28, 1993, 277 SCRA 444, *citing Chicot County Drainage District v. Baxter States Bank, 308 US 371, 374 [1940].*
[6] Atlas Consolidated Mining and Development Corporation *v.* Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[7] Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.

denying the claim, or after the one hundred twenty (120)-day period given to the Commissioner to act thereon.[8]

In sum, I maintain my vote to apply the ruling in force at the time the action was made.

Accordingly, I vote that the Petition for Review be **DENIED** for lack of merit.

LOVELL R. BAUTISTA
Associate Justice

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

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 693
(CTA Case No. 7457)

- versus-

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

PENN PHILIPPINES, INC.,
Respondent.

Promulgated:
JUN 2 7 2012

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DISSENTING OPINION

COTANGCO-MANALASTAS, *J.*:

Brought before the Court *En Banc* is the *Petition for Review*[1] filed by the Commissioner of Internal Revenue (CIR), seeking the reconsideration and setting aside of the *Decision*[2] and *Resolution*[3] promulgated by the Special First Division of this Court on April 6, 2010 and September 15, 2010, respectively, which partially granted respondent's claim for refund or the issuance of a tax credit certificate in the

[1] *Rollo*, pp. 5 16.
[2] *Rollo*, pp. 17 33, Decision dated April 6, 2010 penned by Associate Justice Lovell R. Bautista in the case entitled *Penn Philippines, Inc. (Formerly: PENN GOLD ZACK PHILIPPINES, INC. and Formerly: GOLDZACK PHILIPPINES, INC.), vs. Commissioner of Internal Revenue*, CTA Case No. 7457.
[3] *Rollo*, pp. 34-41, Resolution dated September 15, 2010 penned by Associate Justice Lovell R. Bautista in the case entitled *Penn Philippines, Inc. (Formerly: PENN GOLD-ZACK PHILIPPINES, INC. and Formerly: GOLDZACK PHILIPPINES, INC.), vs. Commissioner of Internal Revenue*, CTA Case No. 7457.

reduced amount of Php1,924,314.91 representing respondent's excess or unutilized input VAT for the taxable year 2004 arising from its zero rated sales.

The majority, acting on the petition, resolves to grant the same. With due respect, I dissent from the majority decision.

At the outset let me clarify that, although I dissent from the conclusion of the majority granting the instant petition, I subscribe to the portions of the decision articulating that:

I. the 2-year prescriptive period under Section 112(A) of the National Internal Revenue Code (NIRC) of 1997 refers to applications for refund/credit filed with the CIR and not to appeals made to this Court; and

II. the Petition for Review in CTA Case No. 7457 was prematurely filed considering that respondent did not wait for the lapse of the 120-day period for the CIR to decide its administrative claim as mandated under Section 112(C) NIRC of 1997, as amended, and as was settled in the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.* ("*Aichi* case")[4].

However, while I agree with the above disquisitions, I maintain my view that the premature filing of respondent's Petition for Review in CTA Case No. 7457 is a violation of the *doctrine of exhaustion of administrative remedies*. This failure to observe the doctrine of exhaustion of administrative remedies is fatal to one's cause of action, thus, absent any waiver or *estoppel*, the case is susceptible of dismissal for

[4] G.R. No. 184823 on October 6, 2010.

lack of cause of action[5]. It bears to stress, however, that said failure to exhaust administrative remedies does not affect the jurisdiction of the court. Non-exhaustion of administrative remedies only renders the action premature, that the claimed cause of action is not ripe for judicial determination[6]. Since the premature filing of a claim for refund and/or tax credit or the failure to exhaust administrative remedy is not jurisdictional and, at the most, only renders the case susceptible of dismissal for *lack of cause of action*, such defense of premature filing of judicial claim for refund is therefore **waivable** or may be considered **waived** pursuant to Section 1, Rule 9 of the Rules of Court[7].

Records of this case show that petitioner CIR, indeed, failed to allege in her Answer the premature filing of Penn Philippine's judicial claim for refund as one of her special and affirmative defenses, thus, applying the foregoing precepts, CIR is **deemed to have waived** the premature filing of respondent Penn Philippine's petition as a ground for dismissal.

In view of the foregoing, I vote that the instant petition, docketed as CTA EB No. 693, be **DISMISSED**.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[5] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.
[6] Merida Water District, et al. vs. Francisco Bacarro, et al., G.R. No. 165993, September 30, 2008 citing *Rosario v. Court of Appeals*, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; *Carale v. Abarintos*, G.R. No. 120704, March 3, 1997, 269 SCRA 132, 141.
[7] Section 1, Rule 9 of the Rules of Court states that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if dismissal is based on the ff. grounds, to wit: lack of jurisdiction, *litis pendentia*, *res judicata*, and prescription.