REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SANKYU LOGISTICS PHILIPPINES, INC.,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 707
(CTA Case No. 8098)

Present:

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

Promulgated:
APR 17 2012

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DECISION

COTANGCO-MANALASTAS, J.:

On appeal before the Court *En Banc* is the *Resolution*, dated August 13, 2010, granting respondent's Motion to Dismiss, as well as the *Resolution*, dated December 2, 2010, denying petitioner's Motion for Reconsideration.

The Assailed Resolutions disposed of the case, as follows:

> "Settled is the rule that the non-exhaustion of administrative remedies is not jurisdictional and it renders only the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court. The premature invocation of the court's intervention, *like in the instant Petition for Review*, is fatal to one's cause of action; and the case is susceptible of dismissal for failure to state a cause of action.

> WHEREFORE, respondent's Motion to Dismiss is hereby GRANTED. The instant Petition for Review is hereby DISMISSED for failure to state a cause of action.[1]
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> "After deliberation of the foregoing Motion for Reconsideration, this Court is not persuaded to disturb the assailed Resolution. The arguments presented therein had already been lengthily considered and properly addressed in the Resolution. As a matter of fact, the issue in this case regarding the correct provision that governs the refund of input tax, including the reckoning point of the two-year prescriptive period was finally put to rest in the recent decision of the Supreme Court in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (*G.R. No. 184823, October 6, 2010*).
>
> WHEREFORE, petitioner's Motion for Reconsideration is hereby DENIED for lack of merit."[2]

The Facts

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission, and existing under and by virtue of Philippine law. Respondent is the duly appointed Commissioner of Internal Revenue vested by law with the power to decide, approve and grant claims for refund or tax credit of internal revenue taxes.[3]

Petitioner is duly registered with the Bureau of Internal Revenue as a value-added tax (VAT) taxpayer.

For the period covering the 1st quarter of 2008 up to the 4th quarter of 2008, petitioner filed Monthly VAT Declarations (BIR Form No. 2550M) and Quarterly VAT Returns (BIR Form No. 2550Q) within the period provided under the Tax Code.[4]

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[1] *Rollo*, C.T.A. EB Case No. 707, pp. 72-73.
[2] *Rollo*, p. 104.
[3] *Rollo*, p. 1.
[4] *Rollo*, p. 2.

Petitioner's output VAT for the period 1st quarter 2008 up to 4th quarter 2008 pertains to petitioner's local/domestic sales subject to VAT at 12% rate. The rest and bulk of petitioner's sales consist of services rendered to entities registered with the Philippine Economic Zone Authority (PEZA), which are among the persons or entities whose exemption under special laws effectively subjects the supply of such services to VAT at zero percent (0%) rate.[5]

Petitioner's input VAT for the year 2008 amounts to P20,480,321.87 of which P20,101,949.00 is attributable to effectively zero-rated sales. These input VAT on purchases have not been applied or credited against any output VAT and remains unutilized.[6]

On April 22, 2010, petitioner filed an administrative claim for issuance of a Tax Credit Certificate (TCC) for unutilized input VAT on purchases attributable to effectively VAT zero-rated sales for the 1st quarter 2008 up to the 4th quarter 2008 in the total amount of P20,101,949.00.[7]

Petitioner filed a Petition for Review with the CTA Division on April 23, 2010, or merely a day after its administrative claim. Petitioner reasoned that the filing of the judicial claim was in order to toll the running of the two (2)-year prescriptive period prescribed by Section 229.[8]

Respondent filed a Motion to Dismiss arguing that the petition for review was prematurely filed in violation of Section 112(C) of the 1997 NIRC, as amended.

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[5] *Rollo*, pp. 2-3.
[6] *Rollo*, p. 3.
[7] *Ibid.*
[8] *Ibid.*

Respondent further argues that Section 229 of the 1997 NIRC does not apply to claims for refund of unutilized input VAT.[9]

In a Resolution dated August 13, 2010, the CTA First Division granted respondent's Motion to Dismiss. This was subsequently affirmed when petitioner's Motion for Reconsideration was denied in a Resolution dated December 2, 2010.

Hence, this petition for review.

The Issues

Petitioner argues that its judicial claim for refund is not premature in accordance with jurisprudence and Section 229 of the 1997 NIRC, as amended.

Discussion/Ruling of the Court

We rule against petitioner.

This Court notes that petitioner raises the same arguments it has previously raised in its Comment (On Motion to Dismiss)[10] and Motion for Reconsideration[11], filed on June 29, 2010 and September 1, 2010, respectively. These have been thoroughly discussed in the Division's *Resolution* dated August 13, 2010, *to wit:*

> "While it is already settled that in claims for refund pursuant to Section 229 of the National Internal Revenue Code (NIRC), the petition for review must also be made within the two (2) year prescriptive period; nevertheless, this rule is not applicable to refund of input tax, which is already specifically governed by Section 112 of the NIRC, as amended. To sustain the view of the petitioner would limit the application of the one hundred (120) day waiting period and the thirty (30) day appeal period provided in Section 112(C) of the NIRC within the bounds of the two (2) year prescriptive period under Section 112(A) in relation to Section 229 of the NIRC, and render the provisions of Section 112(C) useless.
>
> Reliance by the petitioner on the ruling of the Supreme Court that (a) within two years the claimant may proceed with his suit without waiting for the Collector's decision; (b) the time for bringing an action for a refund of income tax, fixed by statute, is not extended

[9] *Rollo*, pp. 44-48.
[10] *Rollo*, pp. 51-65.
[11] *Rollo*, pp. 81-100.

by the delay of the Collector of Internal Revenue in giving notice of the rejection of such claim; and (c) if the Collector takes time in deciding the claim and the period of two (2) years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector is misplaced because those cases involved a claim for refund of tax (*other than value-added tax*) pursuant to Section 306 (*now Section 229*) of the NIRC.

It should be emphasized that Section 229 of the 1997 NIRC, which deals only with the recovery of tax erroneously or illegally collected, has been present even prior to the introduction of the value-added tax (VAT) system in our country. Said provisions of the NIRC does not apply to refund of input tax considering that the erroneous, illegal, or wrongful payment does not enter the equation as regards the refund for any unutilized creditable input VAT.

The first VAT law took effect on January 1, 1988 by virtue of Executive Order No. 273 (*E.O. 273*), which amended several provisions of then 1986 NIRC (*Old NIRC*). The provisions providing for the refund of input tax then was found in Section 106 of the old NIRC, as amended by EO 273. Unlike Section 112 of the present NIRC [*Republic Act (RA) No. 8424, as amended by RA 9337*] which governs the case at hand, Section 106 of the old NIRC, as amended by EO 273 does not provide for a period within which to appeal the adverse decision or inaction of the Commissioner of Internal Revenue with the Court of Tax Appeals (*CTA*). It merely provides the two (2) year prescriptive period to apply for an administrative claim and the sixty (60) day period [*became one hundred twenty (120) day period under RA 8424*] within which refund may be made by the Commissioner from the date of such application. The period then to elevate the unsuccessful or unacted administrative claim for refund or tax credit of input tax with the CTA is confined to the two-year prescriptive period provided in Section 229 of the NIRC, which served as the general provision governing claim for refund in the absence of a more specific provision of law. Thus, in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* which involves a claim for refund of input tax attributable to zero-rated sales for years 1990 and 1992, the Supreme Court applied Section 230 (*now 229*) of the NIRC and held that the two-year prescriptive period for claims for refund of illegally or erroneously collected tax may also apply to the Petition involving claims for refund/credit of input tax. However, there is no reason to continuously apply Section 229 to cases involving the "issuance of tax credit/refund of excess/unutilized input tax" with the amendment in our VAT law, particularly introduced in Section 106(d) of RA 7716 (*later became Section 112(D) under RA 8424 and presently as Section 112(C) of RA 9337*), which already provides for the thirty (30) day appeal period with the CTA. Section 112(A) and (C) is comprehensive and specific enough to cover refund/tax credit

> of input tax both in the administrative and judicial levels.[12] (*citations omitted*)

On the basis of the foregoing, the Court Division ruled that the judicial claim, which was filed the day after its application for refund with the BIR was filed, did not comply with the 120-day waiting period and the 30-day appeal period provided for in Section 112(C) of the NIRC, as amended. Thus, the same was found to be premature.

The Court *En Banc* finds no compelling reason to reverse the assailed *Resolution*. In fact, as aptly noted by the Division in its *Resolution* dated December 2, 2010, the foregoing issues have been settled by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[13], the pertinent portions of which are quoted below:

> "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]," 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 the CTA within 30 days.
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> In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.
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> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.
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> 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

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[12] *Rollo*, pp. 67-70.
[13] G.R. No. 184823, October 6, 2010.

> attributable to such sales." The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the application filed in accordance with Subsection (A) and (B)" within which to decide on the claim.
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> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA."[14]

In the instant case, petitioner's filing of its judicial claim with the CTA on April 23, 2008, or merely a day after its application for refund with the BIR, is clearly premature, and therefore, properly dismissed by the Division.

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

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[14] *Ibid.*

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
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

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Mindaro-Grulla, and
Cotangco-Manalastas, JJ.

Promulgated:

APR 17 2012 2:10 p.m.

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DISSENTING OPINION

BAUTISTA, J.:

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] therefore, it is my

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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.

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.*

When petitioner filed its administrative claim for issuance of tax credit certificate for unutilized input value added tax arising from purchases attributable to effectively zero-rated sales for the first (1st) quarter to the forth (4th) quarter of the taxable year 2008 on April 22, 2010, and in order to toll the running of the two (2)-year prescriptive period prescribed under Section 229 of the 1997 National Internal Revenue Code ("NIRC"), as amended, it accordingly filed a Petition for Review before this Court on April 23, 2010, the then controlling doctrine is that of the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.].*[2]

The case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.,*[3] has yet to be promulgated on October 6, 2010.

Albeit the latter ruling is more in accordance with the letter and spirit of Section 112 of the 1997 NIRC, as amended, it would be the height of injustice to impose a new ruling, on the basis of the so-called "adherence to precedence," for the latter doctrine is clearly promulgated *after* the taxpayer-claimant had faithfully relied and complied with the Court's former ruling.

Further, the same would run counter with the use of the word *"may"* in Section 112(C) of the same Code, which indicates that the judicial recourse within thirty (30) days after the lapse of the one hundred twenty (120)-day period is

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[2] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[3] G.R. No. 184823, October 6, 2010.

directory and permissive, and not mandatory nor jurisdictional as long as the claim is made within the two (2)-year prescriptive period under Sections 112[4] and 229[5] of the 1997 NIRC, as amended.[6]

With the pronouncements made in the cases of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[7] and *Commissioner of Internal Revenue v. San Roque Power Corporation*,[8] it must be borne in mind that no claim can be had, whether in the administrative or judicial *fora*, beyond the two (2)-year period provided under Section 112 of the 1997 NIRC, as amended. 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

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[4] 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.

[5] 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.

[6] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB Case No. 416, February 4, 2009.

[7] CTA EB Case No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.

[8] CTA EB Case No. 408 (CTA Case No. 6647), March 25, 2009.

hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[9]

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

Accordingly, I vote that the Petition for Review filed by Sankyu Logistics Philippines, Inc., claiming for issuance of tax credit certificate for unutilized input value added tax arising from purchases attributable to effectively zero-rated sales for the first (1^{st}) quarter to the fourth (4^{th}) quarter of the taxable year 2008 be **GIVEN DUE COURSE.**

LOVELL R. BAUTISTA
Associate Justice

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