REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PANAY POWER CORPORATION (formerly: Avon River Power Holdings, Corp.), Petitioner,	**CTA EB No. 709 (CTA Case No. 7402)**
	Present:
- versus -	**ACOSTA,** *P.J.* **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **PALANCA-ENRIQUEZ,** **FABON-VICTORINO,** **MINDARO-GRULLA,** *and* **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondents.	
	Promulgated: MAY 17 2012 9:00 a.m.

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DECISION

UY, *J.*:

This is a Petition for Review filed by petitioner Panay Power Corporation against respondent Commissioner of Internal Revenue, praying for the reversal of the Amended Decision dated December 6, 2010[1] rendered by the Special First Division of this Court (hereinafter referred to as the "Court in Division") in CTA Case No. 7402, entitled *"Panay Power Corporation (Formerly: Avon River Power*

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[1] Penned by Associate Justice Caesar A. Casanova and concurred by Presiding Justice Ernesto D. Acosta, with Dissenting Opinion by Associate Justice Lovell R. Bautista, Docket, pp. 56 to 71.

Holdings Corporation), Petitioner, vs. Commissioner of Internal Revenue, Respondent", the dispositive portion of which read:

> "**WHEREFORE,** premises considered, the instant *Motion for Reconsideration* is hereby **DENIED**; while the *Petition for Review* is hereby **DISMISSED** for being prematurely filed.
>
> **SO ORDERED.**"

THE FACTS

Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at 7th Floor CTC Building, 2232 Roxas Boulevard, Pasay City, Metro Manila. It is principally engaged in the business of acquiring, holding, owning, and operating power generation assets for lighting and power purposes and whole selling the electric power to the National Power Corporation, private electric utilities and electric cooperatives, and for the carrying on of all business incident thereto. As such, it is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer in accordance with Section 236 of the National Internal Revenue Code (NIRC) of 1997 with Tax Identification No. 223-606-641-000, as shown on its BIR Certificate of Registration bearing OCN 9RC0000123988.

Petitioner was originally registered with the Securities and Exchange Commission under the name "Avon River Holdings Corporation" which was subsequently changed to "Avon River Power Holdings Corporation" on February 19, 2004.

Respondent is the Commissioner of the BIR who is duly appointed and empowered to perform the duties of her office, including, among others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law, including input value-added tax (VAT) paid on purchases of capital goods. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner filed its quarterly VAT return for the fourth quarter of CY 2003 with the BIR on January 26, 2004. Subsequently, on January 28, 2005, petitioner filed its amended quarterly VAT return for the fourth quarter of CY 2003. Thereafter, on January 19, 2006, petitioner filed its amended quarterly VAT return for the fourth quarter of CY 2003 which reflects a total unutilized input VAT amounting to ₱ 14,122,347.21.

According to petitioner, the amount of ₱ 14,122,347.21 pertains to the input VAT that petitioner paid on its purchases of capital goods and services consisting of power generation assets located in Iloilo City which input VAT have not been utilized against any output VAT liability in the fourth quarter of CY 2003 or even in subsequent quarters.

On December 29, 2005, petitioner filed with the Revenue District Office No. 51 at Pasay City an administrative claim for refund or issuance of a tax credit certificate of the unutilized input VAT in the total amount of ₱ 14,122,347.21 for the fourth quarter of CY 2003.

Without waiting for an answer from the respondent as to its claim for refund or issuance of a tax credit, petitioner filed, on January 20, 2006, a Petition for Review before the Court in Division, docketed as CTA Case No. 7402.

In her Answer, respondent interposed the following defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau;
>
> 5. The amount of P14,122,347.21 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of goods and services for the 4th quarter of calendar year 2003 was not properly documented;

6. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

7. Petitioner must show that it has complied with the provisions of Sections 204(C) and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit;

8. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (*Commissioner of Internal Revenue vs. Ledesma*, 31 SCRA 95) and such, they are looked upon with disfavor (*Western Minolco Corp. vs. Commissioner of Internal Revenue*, 124 SCRA 1211)."

Respondent and petitioner filed their pre-trial briefs on March 20, 2006 and April 3, 2006, respectively.

On May 2, 2006, the parties submitted their Joint Stipulation of Facts and Issues which was subsequently approved by the Court in Division in its Resolution dated May 4, 2006. In the same Resolution, the Court in Division considered the pre-trial terminated and thereby ordered the parties to proceed with the trial of the case.

On May 30, 2007, petitioner filed a Motion for the Commissioning of an Independent Certified Public Accountant (CPA) due to the voluminous nature of its evidence to be presented in Court. The same was granted by this Court, appointing Mendoza Querido & Co., represented by Mr. Emmanuel Y. Mendoza, as Independent CPA.

Petitioner presented testimonial and documentary evidence to support its claims. On October 29, 2008 and November 17, 2008, petitioner filed with the Court in Division its "Formal Offer of Evidence" and "Supplemental Formal Offer of Evidence", respectively, and formally offered Exhibits "A" to "KK". In the Resolution dated February 4, 2009, said exhibits were admitted by the Court in

Division and thereafter set the initial presentation of the evidence of the respondent.

On March 9, 2009, petitioner filed a Motion to Amend Caption of Petition for Review praying for the amendment of the caption of the present case from "Avon River Power Holdings Corp. vs. Commissioner of Internal Revenue" to "Panay Power Corporation (formerly Avon River Power Holdings Corp.) vs. Commissioner of Internal Revenue". By virtue of the Resolution dated March 30, 2009, the Court in Division granted the said Motion.

During the hearing set by the Court in Division for the presentation of respondent's evidence, respondent's counsel manifested that she is submitting the case for decision.

The case was submitted for decision on June 18, 2009, taking into consideration respondent's Memorandum filed on May 18, 2009 and petitioner's Memorandum filed on June 15, 2009.

On February 18, 2010, the Court in Division promulgated its Decision[2] in CTA Case No. 7402, denying the Petition for Review for lack of merit. In the said Decision, the Court in Division identified the requisites that should be complied with by petitioner to be entitled to claim for refund or tax credit of input VAT on its capital goods, to wit:

1. that it is a VAT registered entity;
2. that input taxes were paid on capital goods duly supported by VAT invoices and official receipts;
3. that such input taxes were not applied against any output VAT liability; and

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[2] Penned by Associate Justice Caesar A. Casanova and concurred by Associate Justice Lovell R. Bautista, with Concurring and Dissenting Opinion by Presiding Justice Ernesto D. Acosta, Docket, pp. 72 to 84.

4. that the claim for refund was filed within the two-year prescriptive period.

The Court in Division ruled that petitioner complied with the first, third and fourth requisites. However, it decreed that petitioner failed to establish its compliance with the third.

Petitioner then filed its *Motion for Reconsideration (Re: Decision dated February 18, 2010) with Motion for Leave to Submit Supplemental Evidence with Reservation to Present Additional Evidence"* on March 10, 2010. In the said Motion, petitioner prayed for the following:

1. on the basis of law and evidence, reverse and set aside the Decision and issue an amended decision in favor of petitioner granting the refund of input VAT on capital goods amounting to ₱ 14,122,347.21;
2. grant petitioner leave to submit and offer supplemental evidence and allow the admission of its audited financial statements and/or to recall Ms. Reymonda Aida Obrero to identify the documents;
3. grant petitioner's prayer for reservation of the right to present additional evidence in support of its claim; and
4. on the basis of the supplemental evidence submitted or to be submitted, consider the same as sufficient and competent to prove that petitioner's claim for refund of input VAT on capital goods is duly substantiated.

The Court in Division issued its Resolution dated April 30, 2010, granting petitioner's *Motion for Leave to Submit Supplemental Evidence with Reservation to Present Additional Evidence*, praying for the reversal of the assailed Decision; to allow petitioner to submit and offer supplemental evidence and to allow the admission of its audited financial statements and/or recall witness Reymonda Aida Obrero to identify documents, as well as to present additional evidence in support of its claim.

After the presentation and formal offer of petitioner's supplemental evidence, specifically, Exhibits "R" to "U", the same were admitted in evidence per Resolution dated August 31, 2010. In the same Resolution, the *Motion for Reconsideration* was submitted for resolution.

On December 6, 2010, the Court in Division promulgated the assailed Amended Decision, denying the *Motion for Reconsideration* of petitioner. It ruled that petitioner seasonably filed its administrative claim for refund on December 29, 2005. However, the Court in Division, relying on the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[3] (hereinafter referred to as the "*Aichi* case"), found that petitioner, without waiting for the lapse of the 120-day period under Section 112(D) of the NIRC of 1997, prematurely filed its Petition for Review.

From the foregoing Amended Decision, petitioner came to the Court *En Banc* by way of the instant Petition for Review on January 10, 2011. In the Resolution dated January 25, 2011,[4] the Court *En Banc* ordered respondent to file her Comment thereto, within ten (10) days from receipt thereof.

On February 2, 2011, respondent filed the required Comment.[5]

In the Resolution dated February 16, 2011,[6] the Court *En Banc* ordered the parties to submit their respective Memorandum within a period of thirty (30) days from receipt of the said Resolution.

On March 8, 2011, respondent filed a Manifestation,[7] wherein she manifested that she is adopting her Comment to the instant Petition for Review

[3] G.R. No. 184823, October 6, 2010.
[4] Docket, pp. 86 to 87.
[5] Docket, pp. 88 to 94.
[6] Docket, pp. 97 to 98.

as her Memorandum. Said Manifestation was noted by the Court *En Banc* in the Resolution dated March 9, 2011.[8]

Subsequently, petitioner filed, on March 25, 2011, a Motion for Additional Time to File Memorandum,[9] which the Court *En Banc* granted in its Resolution dated March 28, 2011 and gave petitioner a non-extendible period of twenty (20) days from March 26, 2011 or until April 15, 2011.[10]

Petitioner filed its Memorandum[11] on April 15, 2011.

On May 18, 2011, the Court *En Banc* deemed the instant case submitted for decision.[12]

Hence, this Decision.

THE ISSUES

The issues raised by petitioner are as follows:

> "A. WHETHER OR NOT THE CTA-DIVISION ERRED IN DENYING PETITIONER'S CLAIM FOR REFUND OF UNUTILIZED INPUT VAT ON THE GROUND THAT PETITIONER FAILED TO COMPLY WITH THE PERIOD PROVIDED UNDER SECTION 112(D) [NOW 112(C)], TAX CODE.
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> B. WHETHER OR NOT PETITIONER IS ENTITLED TO ITS CLAIM FOR REFUND OF UNUTILIZED VAT AMOUNTING TO ₱ 14,122,347.21"[13]

Petitioner's arguments

Petitioner presents the following arguments, to wit:

> "The Petition for Review was filed within the period prescribed by law. Petitioner has basis to rely on the law as it has been legally and jurisprudentially understood at the time of the filing of its claim for refund.

[7] Docket, pp. 99 to 100.
[8] Docket, p. 102.
[9] Docket, pp. 103 to 105.
[10] Docket, p. 106.
[11] Docket, pp. 110 to 141.
[12] Resolution dated February 23, 2011, Docket, pp. 107 to 108.
[13] Docket, p. 118.

Petitioner cannot be faulted if it complied with such prevailing legal interpretation."[14]

> "The CIR has recognized the permissive nature of the 120-day period under Section 112(D), Tax Code, and that it is a mere working timeline which may be stopped or suspended. As such, the same cannot be reasonably implemented without compromising petitioner's rights to appeal and due process".[15]
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> "The ruling of the First Division of the Supreme Court in the Aichi case did not overturn the Supreme Court's doctrinal ruling in Atlas[16]."[17]
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> "Any application of the Aichi case should be done prospectively in order to be fair to taxpayers who have relied on the prevailing doctrine that both the administrative and judicial claim for VAT refund must be filed within the prescriptive period."[18]
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> "The Amended Decision's impact on the entire power generation industry and other investors is indubitable and thus, it needs to be revisited. In any event, the novel interpretation of the law in Aichi should not be made to apply to petitioner."[19]
>
> "Petitioner has presented sufficient and uncontroverted evidence to prove its entitlement to its claim for refund of input VAT on capital goods for the fourth quarter of CY 2003 pursuant to Section 112(B) of the Tax Code, pertinent revenue regulations and jurisprudence which warrants the grant of the present claim for refund."[20]

Respondent's counter-arguments

In her Comment, respondent contends that the issues raised by petitioner had already been settled by the Supreme Court in the *Aichi* case.

According to respondent, since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112(D) of the NIRC of 1997, the 120-day period started to run on December 29, 2005, the date when it filed said claim. The said period expired

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[14] Id.
[15] Docket, p. 128.
[16] Referring to *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. Nos. 141104 and 148763, June 8, 2007.
[17] Docket, p. 132.
[18] Docket, p. 134.
[19] Docket, p. 136.
[20] Docket, p. 138.

only on April 27, 2006. Hence, the 30-day period within which to file the petition for review before the Court in Division expired only on May 27, 2006. This being so, the Court in Division has no jurisdiction to act on the petition for review for being prematurely filed on January 20, 2006.

Furthermore, respondent emphasizes that petitioner failed to discharge its burden of establishing its claim for a tax refund or credit.

THE COURT EN BANC'S RULING

The premature filing of the Petitions for Review before the court **a quo** ***is jurisdictional, not only on the basis of the*** **Aichi** ***case, but also of the law creating this Court.***

Section 112 of the NIRC of 1997 provides as follows:

> "SEC. 112. *Refund or Tax Credits of Input Tax.—*
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> xxx xxx xxx
>
> (B) *Capital Goods.—* Any VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase were made.
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> xxx xxx xxx
>
> (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**.

xxx xxx xxx." *(Emphases supplied)*

In the *Aichi* case, the Supreme Court held:

"A taxpayer is entitled to a refund either by authority of a statute expressly granting such right, privilege, or incentive in his favor, or under the principle of *solutio indebiti* requiring the return of taxes erroneously or illegally collected. In both cases, **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**.

xxx xxx xxx

Section 112(D)[21] 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 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 (petitioner in these cases) **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 <u>has no legal basis</u>.**

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

[21] Now Section 112(C), as renumbered by RA 9337.

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 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 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)[22] of the NIRC, which already provides a specific period within which a taxpayer should appeal the decision or inaction of the CIR. **The second paragraph of Section 112(D)[23] 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 v. 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 no jurisdiction was acquired by the CTA.

xxx xxx xxx." *(Emphases and underscoring supplied)*

The foregoing jurisprudence is clear on the importance of the faithful compliance of the concerned taxpayer with the procedural due process as the non-observance of the prescriptive period within which to file the judicial claim would result in the denial of the same. It must be emphasized that the High Court used the phrase *"no jurisdiction was acquired by the CTA"*, thereby indicating that

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[22] Id.
[23] Id.

the timely filing with this Court within the 30-day period contemplated under said Section 112 is jurisdictional. In other words, the said Court could not have used such phrase so loosely, if the timely filing with this Court is not jurisdictional. Hence, the concerned taxpayer must file his judicial claim within the said 30-day period, which comes only upon the expiration of the 120-day period under the above-quoted Section 112. Otherwise, the Court in Division will not acquire jurisdiction over the subject matter or nature of the action.

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 justiciable controversy.[24] Such being the case, in *Commission on Higher Education vs. Dasig*,[25] the High Court said:

> "...it is the duty of lower courts to obey the decisions of the Supreme Court and render obeisance to its status as the apex of the hierarchy of courts. 'A becoming modesty of inferior courts demands conscious realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation.' 'There is only one Supreme Court from whose decision all other courts should take their bearings,' so declared Justice J. B. L. Reyes."

Thus, Our adherence to the doctrine laid down in the *Aichi* case is imperative. For this Court to rule otherwise would be to transgress the Constitution and arrogate upon itself a power that it does not by law possess.[26]

But even if We have the temerity to disregard the instructive ruling in the *Aichi* case, a closer examination of the pertinent law on the jurisdiction of this Court would reveal that the premature filing of the refund claim under Section 112 indeed affects its jurisdiction. Apropos, the rule is that in order to ascertain

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[24] *Nacuray, et al. vs. National Labor Relations Commission, et al.,* G.R. Nos. 114924-27, March 18, 1997.
[25] G.R. No. 172776, December 17, 2008.
[26] See *Republic of the Philippines vs. Maj. Gen. Garcia*, G.R. No. 167741, July 17, 2007.

whether a court has jurisdiction or not, the provisions of the law should be inquired into.[27]

Section 7 of Republic Act No. (RA) 1125[28], as amended by RA 9282[29], enumerates over which cases this Court has exclusive appellate jurisdiction. In part, it provides:

> "SEC. 7. *Jurisdiction.*— The CTA shall exercise:
>
> (a) **Exclusive appellate jurisdiction to review by appeal**, as herein provided:
> xxx xxx xxx
>
> (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 for action, <u>in which case the inaction shall be deemed a denial</u>**; *(Emphases and underscoring supplied)*
>
> xxx xxx xxx."

Furthermore, Section 11 of the same law prescribes how the said appeal should be taken, *viz*:

> "SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.*— **Any party adversely affected by** a decision, ruling or **inaction of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days** after the receipt of such decision or ruling or **after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein**.

[27] *Soller, et al. vs. Sandiganbayan, et al.*, G.R. Nos. 144261-62, May 9, 2001.
[28] AN ACT CREATING THE COURT OF TAX APPEALS.
[29] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

> **Appeal should be made by filing a petition for review** under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure **with the CTA within thirty (30) days** from the receipt of the decision or ruling or **in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. xxx *(Emphases supplied)*
> xxx xxx xxx."

One of the *"inaction*(s) *by the Commissioner of Internal Revenue"* being contemplated in these provisions is that found in Section 112 of the NIRC of 1997[30]—the provision to which petitioner anchors the instant claim for refund or issuance of a TCC—wherein it *"provides a specific period of action"*, *i.e.*, a period of 120 days from the date of submission of complete documents for the Commissioner of Internal Revenue, to grant, in proper cases, a refund or to issue a tax credit certificate for creditable input taxes due or paid attributable to zero-rated or effectively zero-rated sales. The lapse of such 120-day period is so crucial since it is only at such time that *"the inaction shall be deemed a denial"*.

Applying Sections 7(a)(2) and 11 of RA 1125, as amended by RA 9282, in relation to Section 112(D) of the NIRC of 1997, when petitioner filed its appeal via its Petition for Review on January 20, 2006 before the Court in Division, the specified period of 120 days' inaction on the part of the Commissioner of Internal Revenue over the administrative claims of petitioner have not fully lapsed, as to clothe this Court with jurisdiction to entertain said Petition within the bounds of law.

As held in *Yao vs. Court of Appeals, et al.*[31]

> "The right to appeal is **not** a constitutional, natural or inherent right. It is a statutory privilege of statutory origin and, therefore,

[30] The other *"inaction"* is found in Section 228 of the NIRC of 1997.
[31] G.R. No. 132428, October 24, 2000.

> available only if granted or provided by statute. Since the right to appeal is not a natural right **nor a part of due process, it may be exercised only in the manner and in accordance with the provisions of law**. Corollarily, **its requirements must be strictly complied with**.
>
> "**That an appeal must be perfected in the manner and within the period fixed by law is not only mandatory but jurisdictional**." *(Emphases supplied)*

Moreover, it should be recalled that this Court is a court of special jurisdiction. As such, it can only take cognizance of such matters as are clearly within its jurisdiction.[32] Relative thereto, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, the court shall dismiss the claim.[33]

Section 229 of the NIRC of 1997 is not applicable over claims for refund under Section 112 of the same law.

It must be noted that Section 229 of the NIRC of 1997 is a general provision in our revenue code that pertains to *"Recovery of Tax Erroneously or Illegally Collected"* in general. Said Section reads as follows:

> "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

[32] *Ker & Company, Ltd. vs. Court of Tax Appeals, et al.*, G.R. No. L-12396, January 31, 1962.
[33] Section 1, Rule 9, Rules of Court.

> 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." *(Emphasis supplied)*

On the other hand, We must not lose sight of the provisions of Section 112 of the same Code which refers to *"Refund or Tax Credits of Input Tax"*, as this section provides a specified period and manner in pursuing a refund claim or issuance of tax credit on input tax arising from zero-rated or effectively zero-rated sales, and on input taxes paid on capital goods.

As related to this case therefore, Section 229 of the NIRC of 1997, being a general provision, is inapplicable insofar as claims for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased as provided under Section 112(B) of the same NIRC are concerned.

Moreover, as earlier mentioned, Section 7(a)(2) of RA 1125, as amended by RA 9282, now declares that *"where the National Internal Revenue Code provides a specific period for action"*, as in the case of said Section 112(D) of the NIRC of 1997, and that where there was an *"inaction"* on the part of the Commissioner of Internal Revenue within such period, *"the inaction shall* (already) *be deemed a denial"*. In such case, pursuant to Section 11 of the same RA 1125, as amended by RA 9282, "(a)*ppeal should be made by filing a petition for review…within thirty (30) days…from the expiration of the period fixed by law to act thereon"*.

In view of these provisions, it becomes apparent that the application of Section 229 of the NIRC of 1997 over said claims cannot be made. One of the rules of statutory construction is that all parts of a statute are to be harmonized and reconciled so that effect may be given to each and every part thereof, and that conflicting intentions in the same statute are never to be supposed or so regarded, unless forced upon the court by an unambiguous language.[34]

In this connection, the following irreconcilable differences between Section 229 and Section 112 are hereby noted, to wit:

1. The above-quoted Section 229, for the purpose of refund or credit, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor.[35] Under said provision, the two-year prescriptive limit starts *"from the date of payment of the tax"*; while under Section 112(B), it starts *"after the close of the taxable quarter when the importation or purchase were made"*.
2. The two-year prescriptive period under Section 229 refers to the filing of both the administrative and judicial claims, while the two-year prescriptive period under Section 112(B) refers only to administrative claims.
3. A cursory reading of Section 229 would reveal that, unlike the said Section 112, it does not provide for a procedure of appeal in case of denial, whether full or partial, or in case of an implied denial or inaction by the Commissioner of Internal Revenue of the administrative claim. Section 229 merely prohibits the filing of a suit or proceeding in any court for the recovery of taxes, penalties and certain sums, beyond the two-year period *"from the date of payment of the tax"*.

The pronouncement made by the Supreme Court in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal*

[34] *People of the Philippines vs. Garcia*, G.R. No. L-2873, February 28, 1950.
[35] *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.*, G.R. No.172129, September 12, 2008.

Revenue[36] (hereinafter referred to as the "*Atlas* case"), to the effect that the filing of the administrative and judicial claims for refund of input VAT on zero-rated sales should be made within the two-year prescriptive period, cannot be made as the controlling doctrine in disposing the instant case. It must be emphasized that the *Atlas* case involved the refund/credit of the input VAT on purchases of capital goods and on its zero-rated sales in the taxable quarters of the years 1990 and 1992. Thus, the said case was decided interpreting the pertinent provisions of the NIRC of 1977 [Presidential Decree No. (PD) 1158], as amended by Executive Order No. (EO) 273[37] (the law then in force), which took effect on January 1, 1988.[38] Upon the other hand, the *Aichi* case entailed the refund/credit of input VAT for the period July 1, 2002 to September 30, 2002. Hence, it was decided applying and interpreting Section 112 of the NIRC of 1997, which took effect on January 1, 1998.[39]

To bolster this point, a comparison of the provisions in question is in order, to wit:

NIRC of 1977, as amended by EO 273	*NIRC of 1997 (renumbered by RA 9337)*
SEC. 106. *Refunds or tax credits of input tax.* – x x x. (b) *Zero-rated or effectively zero-rated sales.* – Any person, except those covered by paragraph (a) above, whose sales are zero-rated may, within two years after the close of the quarter when such sales were made, apply for the issuance of a tax credit certificate or refund of the input taxes attributable to such sales	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

[36] G.R. Nos. 141104 and 148763, June 8, 2007.
[37] ADOPTING A VALUE-ADDED TAX, AMENDING FOR THIS PURPOSE CERTAIN PROVISIONS OF THE NATIONAL INTERNAL REVENUE CODE, AND FOR OTHER PURPOSES.
[38] Section 30, Executive Order No. 273, series of 1987.
[39] Section 8, Republic Act No. 8424.

to the extent that such input tax has not been applied against output tax. x x x x (e) *Period within which refund of input taxes may be made by the Commissioner.* – The Commissioner shall refund input taxes within 60 days from the date the application for refund was filed with him or his duly authorized representative. No refund of input taxes shall be allowed unless the VAT-registered person files an application for refund within the period prescribed in paragraphs (a), (b) and (c) as the case may be.	attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: x x x (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 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 supplied)*

It can be easily discerned from the foregoing comparison that in the refund of input VAT attributable to zero-rated sales, unlike Section 106 of the NIRC of 1977, as amended by EO 273, Section 112 of the NIRC of 1997 spelled out the judicial remedy, by specifying the court where appeal should be taken, and the period within which the same appeal should be made, in case of full or partial denial of the claim, or in case of inaction on the part of the Commissioner of Internal Revenue.

The deliberate selection in a statute of language differing from that of earlier acts on the subject indicates that a change of law was intended.[40] In other words, the change in phraseology by amendment of a provision of law indicates a legislative intent to change the meaning of the provision from that it originally had.[41] Logically, a different meaning of the law entails a different interpretation. An amended act is ordinarily to be construed as if the original statute had been repealed, and a new and independent act in the amended form had been adopted in its stead.[42]

Thus, considering that the two cases were decided under different sets of law, the pronouncement in the *Atlas* case should not be made to apply to cases involving the application of Section 112 of the NIRC of 1997.

Furthermore, We are not unaware of the factual milieu in *Silicon Philippines, Inc. (Formerly Intel Philippines Manufacturing, Inc.) vs. Commissioner of Internal Revenue*[43] and *Kepco Philippines Corporation vs. Commissioner of Internal Revenue*[44], which were decided by the Supreme Court without taking into consideration the non-observance of the 120-day period under Section 112 of the NIRC of 1997 of the concerned taxpayers, despite the fact that the respective period covered of the refund was during the effectivity of the same law. In fact, there are similar cases where said 120-day period was not taken into account, to wit: *Intel Technology, Inc. vs. Commissioner of Internal Revenue*;[45]

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[40] *Portillo vs. Salvani*, G.R. No. L-32181, March 10, 1930, citing *Brewster vs. Gage* [1930], U.S. Sup. Ct. Advance Opinions, p. 183.
[41] *Commissioner of Customs vs. Court of Tax Appeals, et al.*, G.R. Nos. L-48886-88, July 21, 1993.
[42] *Estrada vs. Caseda*, No. L-1560, October 25, 1949, 84 Phil. 791.
[43] G.R. No. 172378, January 17, 2011.
[44] G.R. No. 179961, January 31, 2011.
[45] G.R. No. 166732, April 27, 2007.

San Roque Power Corporation vs. Commissioner of Internal Revenue;[46] and *AT&T Communications Services Philippines, Inc. vs. Commissioner of Internal Revenue*.[47] However, it must be emphasized that, **in all of the said cases**, the issue of whether the judicial and administrative claims for tax refund/credit were filed within the prescriptive period **was never raised**. In the *Aichi* case, the following was squarely raised as the core issue, viz:

> *"...whether respondent's judicial and administrative claims for tax refund/credit were filed within the two-year prescriptive period provided in Sections 112(A) and 229 of the NIRC."*

This is not so in the said cases. Without doubt, in deciding the same, the High Court was guided by the following postulates:

> In rendering decisions, courts ought to limit themselves to the issues presented by the parties in their pleadings.[48]
>
> A judgment going outside the issues and purporting to adjudicate something upon which the justices were not heard is not merely irregular, but extrajudicial and invalid.[49]
>
> Courts of justice have no jurisdiction or power to decide a question not in issue.[50]

Hence, We cannot apply the said cases in the instant case.

The interpretation of Section 112 of the NIRC of 1997 by the Supreme Court in the* Aichi *case constitutes as part of the law of the land as of the date it was originally passed.

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[46] G.R. No. 180345, November 25, 2009.
[47] G.R. No. 182364, August 3, 2010.
[48] *Liga vs. Allegro Resources Corporation,* G.R. No. 175554, December 23, 2008.
[49] *Salvante vs. Cruz,* 88 Phil. 236*; Lazo vs. Rep. Surety,* 31 SCRA 329*; Cebu Portland vs. Dumon,* G.R. No. 26738, 2 November 1974*; Viajar vs. Court of Appeals,* 168 SCRA 405*; Sarmiento vs. Court of Appeals,* G.R. No. 83138, 17 October 1989*; Pe vs. Intermediate Appellate Court,* G.R. No. 74781, 13 March 1991; *Bernas vs. Court of Appeals,* G.R. No. 85041, 5 August 1993.
[50] *Lim Toco vs. Go Fay,* 80 Phil. 166; *Ramon vs. Ortuzar,* 89 Phil. 730; *Belandres vs. Lopez Sugar,* 97 Phil. 100.

Petitioner's contention that the *Aichi* case should be applied prospectively is without merit.

The Supreme Court's interpretation of a statute constitutes part of the law as of the date it was originally passed since it merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[51] In *Columbia Pictures, Inc., et al. vs. Court of Appeals, et al.*,[52] the Supreme Court qualified this principle, to wit:

> "It is consequently clear that a judicial interpretation becomes a part of the law as of the date that law was originally passed, **<u>subject only</u> to the qualification that when a doctrine of this Court is overruled and a different view is adopted, and more so when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith**. To hold otherwise would be to deprive the law of its quality of fairness and justice then, if there is no recognition of what had transpired prior to such adjudication."

Based on the foregoing, the general rule is that judicial interpretation becomes part of the law as of the date it was originally passed, and the exception thereto is that when a doctrine laid down by the High Court is subsequently overruled or reversed, in which case, the new doctrine will only be applied prospectively.

For sure, the *Aichi* case did not overrule or reverse any existing doctrine laid down by the Supreme Court. This must be so because the doctrinal pronouncement in the said case was not done by the Supreme Court *En Banc*, but by a Division thereof (*i.e.*, by its First Division). Relative thereto, it must be recalled that Section 4(3), Article VIII of the 1987 Constitution provides that *"no doctrine or principle of law laid down by the court in a decision rendered en banc*

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[51] *Victorias Milling Co., Inc. vs. Intermediate Appellate Court, et al.*, G.R. No. 66880, August 2, 1991.
[52] G.R. No. 110318, August 28, 1996.

or in division may be modified or reversed except by the court sitting en banc"[53]. If the said First Division of the High Court indeed intended to modify or reverse any existing doctrine or principle of law, it could have easily referred the case to the Court *En Banc* in accordance with Circular No. 2-89[54] dated February 7, 1989, but it did not.

Such being the case, the interpretation of Section 112 of the NIRC of 1997 as embodied in the *Aichi* case constitutes part of the law of the land as of the date it was originally passed, *i.e.*, on January 1, 1998.[55]

Section 112(D) of the NIRC of 1997 is NOT permissive. It is mandatory.

Admittedly, the taking of appeals before this Court under Section 112(D) of the NIRC of 1997 is couched in the permissive term "may" instead of the mandatory word "shall". And while the ordinary acceptations of these terms may indeed be resorted to as guides in the ascertainment of the mandatory or directory character of statutory provisions, they are in no wise absolute and inflexible criteria in the vast areas of law and equity. Depending upon a consideration of the entire provision, its nature, its object and the consequences that would follow from construing it one way or the other, the convertibility of said terms either as mandatory or permissive is a standard recourse in statutory construction.[56]

The matter here involved not only concerns public interest but also goes into the jurisdiction of the Court in Division and is of the essence of the

[53] Underscoring supplied.
[54] SUBJECT: GUIDELINES AND RULES IN THE REFERRAL TO THE COURT EN BANC OF CASES ASSIGNED TO A DIVISION.
[55] Section 8, Republic Act No. 8424.
[56] *Vda. De Mesa, et al. vs. Mencias, et al*, G.R. No. 24583, October 29, 1966.

proceedings taken thereon. On this point, there is authority to the fact that in statutes relating to procedures, as is the one now under consideration, **every act which is jurisdictional**, or of the essence of the proceedings, or is prescribed for the protection or benefit of the party affected, **is mandatory**.[57] It is apparent that the present case is well within the purview of this doctrine.

Furthermore, respondent's supposed recognition, in some administrative issuances [*i.e.*, Section 4.106-2 of Revenue Regulations No. 7-95[58]; Revenue Memorandum Circular No. (RMC) 42-03[59], as amended by RMC 49-03[60]; and RMC 29-09[61]], of the permissive nature of the 120-day period under Section 112(D) of the NIRC of 1997 does not denigrate the mandatory nature of the said provision, as We have already discussed. An administrative agency may not enlarge, alter or restrict the provisions of the statute being administered.[62] In fact, a regulation that "operates to create a rule out of harmony with the statute is a mere nullity."[63]

In the case of *Philippine Bank of Communications vs. Commissioner of Internal Revenue, et al*,[64] the Supreme Court declared:

> "xxx. It is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts. **Nevertheless, such interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, courts will not countenance administrative issuances that**

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[57] Id.; and *Vda. De la Cruz, et al. vs. Court of Appeals, et al.*, G.R. No. L-41107, February 28, 1979.
[58] Consolidated Value-Added Tax Regulations.
[59] SUBJECT: Clarifies certain issues raised relative to the processing of claims for VAT credit/refund, including those filed by direct exporters with the DOF's One-Stop Shop Inter-Agency Tax Credit and Duty Drawback.
[60] SUBJECT: Prescribes amendments to RMC No. 42-2003 relative to the processing of claims for VAT credit/refund.
[61] SUBJECT: Clarifies certain issues relative to the processing of claims for tax credit/refund.
[62] *Pilipinas Kao, Inc. vs. Court of Appeals, et al.*, G.R. No. 105014, December 18, 2001.
[63] *Commissioner of Internal Revenue vs. Central Luzon Drug Corporation*, G.R. No. 148512, June 26, 2006.
[64] G.R. No. 112024, January 28, 1999.

override, instead of remaining consistent and in harmony with, the law they seek to apply and implement.

xxx xxx xxx

Article 8 of the Civil Code recognizes judicial decisions, applying or interpreting statutes as part of the legal system of the country. But administrative decisions do not enjoy that level of recognition. A memorandum-circular of a bureau head could not operate to vest a taxpayer with a shield against a judicial action. For **there are no vested rights to speak of respecting a wrong construction of the law by the administrative officials and such wrong interpretation could not place the Government in estoppel to correct or overrule the same**. xxx." *(Emphases supplied)*

Nevertheless, there are equally persuasive reasons why RMC 42-03, as amended by RMC 49-03, and RMC 29-09, may not be applied in the interpretation of Section 112 of the NIRC of 1997 vis-à-vis the instant case.

Upon a cursory reading of the pertinent provisions of RMC 42-03, as amended by RMC 49-03, We see nothing therein that recognizes the fact that the 120-day period under Section 112(D) of the NIRC of 1997 is not mandatory. In fact, the 120-day period was not even mentioned. For easy reference, the pertinent portion of the said issuance reads:

"In cases where the taxpayer has filed a 'Petition for Review' with the Court of Tax Appeals involving a claim for refund/TCC that is pending at the administrative agency (Bureau of Internal Revenue or OSS-DOF), the administrative agency and the tax court may act on the case separately. While the case is pending in the tax court and at the same time is still under process by the administrative agency, the litigation lawyer of the BIR, upon receipt of the summons from the tax court, shall request from the head of the investigating/processing office for the docket containing certified true copies of all the documents pertinent to the claim. The docket shall be presented to the court as evidence for the BIR in its defense on the tax credit/refund case filed by the taxpayer. In the meantime, the investigating/processing office of the administrative agency shall continue processing the refund/TCC case until such time that a final decision has been reached by either the CTA or the administrative agency.

If the CTA is able to release its decision ahead of the evaluation of the administrative agency, the latter shall cease from processing the claim.

> On the other hand, if the administrative agency is able to process the claim of the taxpayer ahead of the CTA and the taxpayer is amenable to the findings thereof, the concerned taxpayer must file a motion to withdraw the claim with the CTA. A copy of the positive resolution or approval of the motion must be furnished the administrative agency as a prerequisite to the release of the tax credit certificate/tax refund processed administratively. However, if the taxpayer is not agreeable to the findings of the administrative agency or does not respond accordingly to the action of the agency, the agency shall not release the refund/TCC unless the taxpayer shows proof of withdrawal of the case filed with the tax court. If, despite the termination of the processing of the refund/TCC at the administrative level, the taxpayer decides to continue with the case filed at the tax court, the litigation lawyer of the BIR, upon the initiative of either the Legal Office or the Processing Office of the Administrative Agency, shall present as evidence against the claim of the taxpayer the result of investigation of the investigating/processing office."

The foregoing issuance merely addresses the scenario when a taxpayer has already filed an appeal regarding its refund claim, which was earlier filed at the administrative level. To the mind of the Court, this issuance is even to the advantage on the part of the taxpayer concerned, because even when it has filed the pertinent Petition for Review and the case is still pending before this Court or when the Court has no jurisdiction to entertain the same, the BIR or the Department of Finance still continues or may continue to process the refund claim.

Lastly, on the assumption that RMC 29-09 is valid, it is clear that this issuance was only issued in the year 2009, while the refund claim herein involved is for the fourth quarter of the year 2003. The principle is well entrenched that statutes, including administrative rules and regulations, operate prospectively only, unless the legislative intent to the contrary is manifest by express terms or by necessary implication.[65] There being no clear legislative intent to retroactively apply RMC 29-09, the same should only be applied prospectively.

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[65] *BPI Leasing Corporation vs. Court of Appeals, et al.*, G.R. No. 127624, November 18, 2003.

WHEREFORE, all the foregoing considered, the instant Petition for Review is hereby **DENIED**. The assailed Amended Decision dated December 6, 2010 rendered by the Court in Division in CTA Case No. 7402 is hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(concurs with the dissenting opinion of Justice Manalastas)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my dissenting opinion in the assailed Amended Decision dated December 6, 2010)
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(concurs with PJ Acosta and Justice Manalastas)
ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Wellness Leave)
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 conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PANAY POWER CORPORATION (formerly: AVON RIVER POWER HOLDINGS, CORP.) ,
Petitioner,

- versus-

COMMISSIONER of INTERNAL REVENUE,
Respondent.

CTA EB No. 709
(CTA Case No. 7402)

Present:

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

Promulgated:
MAY 1 7 2012 ... 9:08 a.m.

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DISSENTING OPINION

With all due respect, I dissent from the position of the ponente and believe that the defense of prematurity of the judicial claim is waivable and has been waived by respondent.

Thus, when petitioner filed its judicial claim on January 20, 2006 or merely twenty-two (22) days from the filing of the administrative claim, the judicial claim was clearly prematurely filed.[1]

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[1] *Rollo*, p. 62.

However, the premature filing of the judicial claim for refund, as happened in this case, or the non-observance of the doctrine of exhaustion of administrative remedies does not oust the Court of jurisdiction, but merely renders the action premature and not ripe for judicial determination.[2] Such 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 *lack of cause of action.*[3]

It is important to note that since the premature filing of claim for refund and/or tax credit or failure to exhaust administrative remedies is <u>not</u> jurisdictional, such defense is therefore <u>**waivable**</u> or may be considered <u>**waived**</u> pursuant to Section 1, Rule 9 of the Rules of Court, which provides 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 following grounds, to wit: lack of jurisdiction, *litis pendentia*, *res judicata*, and prescription.

A careful review of the records reveal that respondent did not raise in its Answer the issue of prematurity of the judicial claim pursuant to Section 112 of the 1997 NIRC. Instead, respondent specifically alleged the following:

> "7. Petitioner must show that it has complied with the provisions of Sections 204(C) and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit;"[4]

Based on the foregoing, I find that respondent has waived the defense of prematurity, the same not having been raised in the Answer or in a motion to dismiss. Thus, it has been previously ruled:

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[2] *Merida Water District, et al. vs. Francisco Bacarro, et al.*, G.R. No. 165993, September 30, 2008 citing *Rosario vs. Court of Appeals*, G.R. No. 89554, July 10, 1992; *Carale vs. Abarintos*, G.R. No. 120704, March 3, 1997.

[3] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.

[4] *Rollo*, p. 53.

> "Conversely, if the defense of failure to state a cause of action due to premature invocation of the court's intervention was not raised in a motion to dismiss or as a special and affirmative defense in the answer, xxx, such defense was therefore waived by respondent pursuant to Section 1, Rule 9 of the ROC." [5]

Even if respondent's Memorandum raised the issue of prematurity under Section 112 of the 1997 NIRC, the same should not be considered, since it is settled that no new issues may be raised by a party in the memorandum.[6] Allowing a party to change horses in midstream, as it were, is to run roughshod over the basic principles of fair play, justice and due process.[7]

Finding that respondent failed to raise the defense of prematurity in due time, respondent has waived such defense. Therefore, it is only fitting that the instant Petition for Review be given due course.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[5] *Kelphil, Inc. vs. Commissioner of Internal Revenue*, C.T.A. Case No. 7749, November 22, 2010.
[6] Supreme Court A.M. No. 99-2-04-SC (*In Re:* Dispensing with Rejoinder), March 15, 1999.
[7] *Precision Electronics Realty Corp. vs. Commissioner of Internal Revenue*, C.T.A. Case No. 6013, November 26, 2002. See also: *Atlas Consolidated Mining & Development Corp. vs. Commissioner of Internal Revenue*, G.R. No. L-26911 and L-26924, January 27, 1981, where the Court declined to consider issues asserted for the first time at the Memorandum stage.