REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

HEDCOR, INC., Petitioner,	CTA EB NO. 785 (CTA CASE NO. 8129)
	Present:
- versus -	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 01 2012 Apolinario 1:50 p.m.

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DECISION

***UY, J.*:**

This Petition for Review filed before the Court of Tax Appeals *En Banc* on June 16, 2011, seeks a review of the Resolutions promulgated on January 19, 2011[1] and May 12, 2011 by the Second Division of this Court (Court in Division)[2] in CTA Case No. 8129, entitled "Hedcor, Inc., petitioner, vs. Commissioner of Internal Revenue, respondent", to wit:

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[1] Incorrectly stated in petitioner's prayer as Resolution dated January 21, 2011.
[2] Chaired by Associate Justice Juanito C. Castañeda, Jr., with Associate Justice Caesar A. Casanova and Associate Justice Cielito N. Mindaro-Grulla as members.

1) Resolution promulgated on January 19, 2011[3] granting respondent's Motion to Dismiss, and correspondingly dismissing CTA Case No. 8129 for being filed out of time; and

2) Resolution promulgated on May 12, 2011[4] denying herein petitioner's Motion for Reconsideration (Re: Resolution dated January 19, 2011) for lack of merit.

THE FACTS

Based on the records, the factual antecedents of the case are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines, primarily engaged in the operation of hydro-electric power and generation of hydro-electric power. It is registered with the Bureau of Internal Revenue (BIR) as VAT taxpayer with TIN No. 001-946-873. Respondent, on the other hand, is the Commissioner of Internal Revenue (CIR), who is duly appointed and empowered, to perform the duties of her office, including, among others, the duty to act and approve claims for VAT refund or tax credit as provided by law.

On December 28, 2009, petitioner filed with the BIR an administrative claim for refund of the excess and unused input VAT in the amount of P4,217,955.84 or for issuance of tax credit certificate in its favor.[5]

Petitioner alleges that in the course of operating its business, it had purchased capital goods and had made domestic purchase of goods and services as well. On these purchases, petitioner claims that it had paid the corresponding input VAT as part of the purchase price. In the second quarter

[3] Docket, pp. 29-33.
[4] Ibid, at pp. 34-36.
[5] Petition for Review, Statement of the Case, par. 4, Docket, pp. 8-9.

of taxable year 2008, petitioner asserts that it had paid P35,467,773.00 for said purchase. The alleged input VAT was P4,217,955.84, to wit:[6]

Current Transactions	Purchases	Input VAT Paid
Purchase of Capital Goods	885,982.86	106,307.13
Domestic Purchase of Goods	15,287,984.19	1,834,558.40
Domestic Purchase of Services	19,293,895.09	2,315,267.27
Total Current Purchases	**P35,467,773**	
Total Available Input Tax		**P4,256,132.80**
Excess/Unused Input Tax		**P4,217,955.84**

Petitioner further alleges that since it is in the business of generation of renewable source of energy through hydro power and sale of electricity to National Power Corporation, it is entitled to zero-percent (0%) VAT and qualifies its sales of electric power as automatically zero-rated sales.[7]

On July 6, 2010, petitioner, relying on the Atlas[8] doctrine, and without submitting the complete supporting documents to the BIR, filed an alleged premature appeal or Petition for Review before the Court in Division, docketed as CTA Case No. 8129.[9]

Respondent filed her Answer[10] to the said Petition for Review on July 30, 2010, alleging, as one of her special and affirmative defenses, the argument that petitioner must prove compliance with the provisions of Section 112 (A) and (C) of the National Internal Revenue Code (NIRC) of 1997, as amended, on the prescriptive period for claims for VAT refund or tax credit. Respondent focused on the contention that petitioner's appeal before this

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[6] CTA Case No. 8129, Petition for Review, Statement of the Facts and Case, par. 5, Records, pp. 7-8.
[7] CTA Case No. 8129, Petition for Review, Statement of the Facts and Case, par. 6, Records, p. 8.
[8] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. Nos. 141104 and 148763, June 8, 2007.
[9] Petition for Review, Statement of the Case, par. 5, Docket, p. 9.
[10] CTA Case No. 8129, Answer, Records, pp. 50-57.

Court was filed beyond the prescriptive period of thirty (30) days provided under the said Code.

On October 29, 2010, petitioner filed a Motion for Leave to File Supplemental Petition for Review[11] for the purpose of showing that on September 20, 2010, it allegedly submitted its last set of supporting documents to the BIR.

On the other hand, respondent filed on November 8, 2010 a Motion to Dismiss[12] on the ground of lack of jurisdiction, with petitioner's Opposition[13] thereto later filed on December 3, 2010.

In a Resolution dated December 1, 2010, the Court in Division granted petitioner's Motion for Leave to File Supplemental Petition for Review, without objection from respondent subject to the right to file a Supplemental Answer thereto[14]; and consequently, directed petitioner to file its Supplemental Petition for Review within a non-extendible period of ten (10) days from receipt thereof; while thereafter considering respondent's Motion to Dismiss submitted for resolution.[15]

On January 19, 2011, the Court in Division rendered its assailed Resolution[16], granting respondent's Motion to Dismiss; and accordingly dismissed the Petition for Review in CTA Case No. 8129 for being filed out of time, in violation of Section 112 (C) of the NIRC of 1997, as amended. The Court *a quo* ruled that it cannot give credence on the allegation of petitioner

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[11] CTA Case No. 8129, Records, pp. 86-89.
[12] CTA Case No. 8129, Records, pp. 92-97.
[13] CTA Case No. 8129, Records, pp. 109-118.
[14] CTA Case No. 8129, Respondent's Manifestation filed on November 18, 2012, Records, pp. 100-102.
[15] CTA Case No. 8129, Resolution promulgated on December 1, 2010, Records, p. 108.
[16] Supra, see note 3.

that it submitted its last documents on September 20, 2010 and said date should be the basis in counting the 120-day period for its failure to show proof thereon. It further stated that even if the counting of the 120-day period begins on September 20, 2010, the Court in Division is still constrained to dismiss the case on the ground of prematurity pursuant to the clear terms of Section 112 (C), and the pronouncements made in Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc..

Petitioner filed a Motion for Reconsideration of the assailed Resolution before the Court *a quo* on February 3, 2011, with respondent's Comment thereto filed on February 25, 2011; and finally, petitioner's Reply to said Comment filed on March 11, 2011. Finding that the issues raised thereto are without merit, the Court in Division denied said Motion for Reconsideration in the Resolution dated May 12, 2011.[17]

Thus, petitioner came before the Court *En Banc* praying that the assailed Resolutions dated January 19, 2011 and May 12, 2011 of the Court in Division be set aside, and that a new decision be rendered dismissing without prejudice the Petition for Review in CTA Case No. 8129 on the ground of prematurity.

In compliance with the Resolutions dated July 7, 2011 and July 28, 2011[18], respondent filed a Comment on August 8, 2011. Thereafter, this case was considered submitted for decision on August 18, 2011.

Hence, this Decision.

[17] Supra, see note 4.
[18] Docket, pp. 47-48.

THE ISSUE

The pivotal issue raised in the instant petition for review is: Whether or not the Petition for Review filed on July 6, 2010 was within the prescriptive period provided under Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Petitioner's arguments:

In support of its petition, petitioner asserts the following assignments of error:

> 1. That in resolving a motion to dismiss, scrutiny must only be made on the sufficiency of petitioner's factual allegations constituting its cause of action. There is nothing in the Petition for Review or Supplemental Petition for Review, nor in the documents appended thereto which would support the finding of the Court in Division that CTA Case No. 8129 should be dismissed due to prescription;
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> 2. That it has sufficiently alleged in its Supplemental Petition for Review the fact that it submitted its supporting documents with the BIR only on September 20, 2010, and thus, has in effect shown that its judicial claim for refund of input VAT was in fact prematurely filed in court on July 6, 2010 and not prescribed as held in the challenged Resolutions;
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> 3. That assuming there was a need to rule on prescription based on evidence, petitioner should have been given its day in court by ordering a presentation of evidence, e.g. original or certified true copy of documents;
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> 4. That that the Court *a quo* and the respondent tried to justify the counting of the 120-day period from the date of the filing of the judicial claim for refund/credit application but failed to cite legal provision to support their interpretation; and
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> 5. That assuming it failed to sufficiently allege or show compliance with RMO No. 53-98, the Court *a quo* can only dismiss the case on the ground of failure to state cause of action and not prescription, because the date of the submission of complete supporting documents is a jurisdictional fact which must be alleged in the petition for the tax court to acquire

> jurisdiction over a case of tax refund/credit. Without such allegation of the exact day of the submission of complete documents in relation to Section 112 (C) of the NIRC of 1997, as amended, the tax court has no way of determining if it has jurisdiction to hear and try the case; with the same reason that the tax court will not be able to determine the issue of prescription as the fact of prescription is anchored on such jurisdictional fact.

Respondent's counter-arguments:

In her Comment, respondent counters that the case is dismissible on the ground of prescription and not on the ground of prematurity considering that petitioner's judicial claim for input VAT refund was filed out of time, and such fact clearly appears on the face of the complaint contrary to the allegation of petitioner, citing the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010.

Respondent contends that this Court should not give credence to the allegation that the 120-day period should be reckoned from September 20, 2010 simply because petitioner failed to adduce evidence to prove such allegation; that to rely on the transmittal letter attached to the pleading denominated as "Supplemental Petition for Review" would set a dangerous precedent to the strict interpretation of tax refunds; that to allow petitioner to sustain its allegation would practically put the reckoning of the 120-day period at the mercy of taxpayers who may submit supporting documents at any time most convenient to them which would thereby render nugatory the foremost purpose of prescribing the 120 and 30-day periods.

Likewise, respondent submits that it is dubious for petitioner to actually submit the alleged supporting documents on September 20, 2010 to respondent only after it has already filed its judicial claim on July 6, 2010 wherein it primarily asserts this Court's jurisdiction claiming inaction of respondent; that the supposed filing of documents is a mere afterthought aimed to resort to legal maneuvers to remedy the belated filing of its judicial claim.

And lastly, respondent points out that petitioner failed to show proof that it submitted complete documents on September 20, 2010, as it merely submitted checks, vouchers, official receipts and invoices on purchases; that the courts have consistently reckoned the 120-day period from the filing of the administrative claim in cases the date of submission of complete documents was not sufficiently alleged and proven.

THE COURT *EN BANC'S* RULING

At the outset, the principal issue centers on whether or not this Court properly acquired jurisdiction over the instant claim taking into consideration the timeliness of the filing of the judicial claim with the Court of Tax Appeals as provided under Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Worthy to note that paragraph 2, Section 1 of Rule 14 of the Revised Rules of the Court of Tax Appeals, states that "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case".

Needless to state, to obviate the possibility that its decision may be rendered void, the Court can, by its own initiative, raise the question of jurisdiction, although not raised by the parties.[19] As a corollary thereto, to inquire into the existence of jurisdiction over the subject matter is the primary concern of a court, for thereon would depend the validity of its entire proceedings.[20] 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.[21]

In view thereof, although respondent has not raised the issue of jurisdiction, nevertheless, this Court may *motu proprio* determine whether or not it has jurisdiction over the instant case taking into consideration, the factual and legal allegations contained in the pleadings filed by both parties and admitted by this Court. More so, in the present case, respondent's Motion to Dismiss filed before the Court in Division in CTA Case No. 8129 precisely raised said jurisdictional issue, and petitioner was given the opportunity to counter the same by directing it to file its comment/opposition thereto, which it actually did on December 3, 2010[22].

Therefore, petitioner was given its day in court as it was able to file its opposition to respondent's Motion to Dismiss, a clear substantial compliance with procedural due process.

Now in resolving the primary issue of jurisdiction, it bears stressing that Section 7 of Republic Act (RA) No. 1125[23], as amended by RA No. 9282[24],

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[19] *Ker & Company, Ltd. vs. Court of Tax Appeals, et al.*, G.R. No. L-12396, January 31, 1962.
[20] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.
[21] Supra, see note 19.
[22] Annex "F", Petition for Review, Docket, pp. 81-90.
[23] AN ACT CREATING THE COURT OF TAX APPEALS.
[24] 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.

defines the appellate jurisdiction of the Court of Tax Appeals. The said provision, in part, reads:

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

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

> "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**.
>
> **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 Ours)*.

One of the "inactions" contemplated in the above-quoted provisions, pertinent to the instant case, is found in Section 112 of the NIRC of 1997, as amended, the pertinent provisions of which state:

> "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: xxx
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> xxx xxx xxx
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> (C)[25] *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) 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.**
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> xxx xxx xxx." *(Emphasis Ours)*

Based on the foregoing provisions, prior to seeking judicial recourse before the Court of Tax Appeals, a VAT-registered person may apply for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated or effectively zero-rated sales within two (2) years after the close

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[25] Previously Section 112(D) before Republic Act No. 9337 took effect on November 1, 2005.

of taxable quarter when the sales or purchases were made. This was enunciated in the case of ***Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)***[26].

In said case, the Supreme Court held that:

> "The above proviso (Sec. 112 [A]) clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer **must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. **The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid**. xxx" (*Emphasis Ours)*

Additionally, a further reading of the provisions of Section 112 shows that under paragraph (C) thereof, the Commissioner of Internal Revenue is given a **120-day period, from submission of complete documents in support of the administrative claim** within which to act on claims for refund/applications for issuance of the tax credit certificate. Upon denial of the claim or application, or **upon expiration of the 120-day period, the taxpayer only has a 30-day period within which to appeal said adverse decision or unacted claim before the Court of Tax Appeals**.

The aforesaid provision was applied in ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.***,[27] wherein the Supreme

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[26] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

Court expounded on the significance of the **120-day** and **30-day** periods as follows:

> "Section 112(D)[28] 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**.
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> xxx xxx xxx
>
> xxx. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years 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) 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) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.**
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> xxx xxx xxx." *(Emphasis and underscoring Ours)*

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[27] G.R. No. 184823, October 6, 2010.
[28] Changed to Section 112(C) upon effectivity of Republic Act No. 9337 in November 1, 2005.

Clearly therefore Section 112(C) of the NIRC of 1997, as amended, directs the Commissioner of Internal Revenue to act on administrative claims for refund/applications for issuance of the tax credit certificate within a period of one hundred twenty (120) days from submission of complete supporting documents. Upon partial or full denial of such claim, or the expiration thereof without any action by the Commissioner on said claim, the taxpayer only has a period of thirty (30) days within which to seek judicial recourse from the adverse decision or inaction of the Commissioner before the Court of Tax Appeals.

Thus, it becomes incumbent upon the taxpayer-claimant to comply, not only with the two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue, but must also give the Commissioner of Internal Revenue a period of one hundred twenty (120) days to either partially or fully deny the claim.

Subsequently, upon denial of the claim, or after the expiration of the 120-day period without any action by the Commissioner thereon, only then may the taxpayer-claimant seek judicial recourse to appeal the Commissioner's action or inaction on a refund/tax credit claim, **within a period of 30 days therefrom**.

Applying the foregoing discussion in the case at bench, We are in agreement with the findings of the Court in Division that although petitioner has indeed complied with the required two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue by filing its administrative claim on December 28, 2009 (within the period from the close of the subject second quarter of taxable year 2008 when the relevant sales or purchases were made), it appears however, that petitioner's corresponding judicial claim filed with the Court in Division on July 6, 2010 was filed beyond the 30-day period, detailed hereunder as follows:

Taxable year 2008	***Filing date of the administrative claim***	***Last day of the 120-day period under Section 112(C) from the date of filing of the administrative claim in case of inaction***	***Last day of the 30-day period to judicially appeal said inaction***	***Filing date of the Petition for Review***
2nd Quarter	December 28, 2009	April 27, 2010[29]	**May 27, 2010**	**July 6, 2010**

Based on the foregoing findings of the Court in Division, the reckoning date of the 120-day period under Section 112(C) of the NIRC of 1997, as amended, commenced *simultaneously* with the filing of petitioner's administrative claim, as no sufficient proof was presented by petitioner to show its alleged subsequent filing of any supporting documents. We quote the Court in Division:

> "The documentary evidence of petitioner to prove that it last submitted its supporting documents is the transmittal Letter attached to its Motion for Leave to File Supplemental Petition for Review on October 29, 2010.
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> However, this Court finds the said Transmittal Letter insufficient to really prove that petitioner submitted all its documents on September 20, 2010. A perusal of the said Letter would show that it does not even bear markings, such as stamp markings, to show that it was received by the BIR.

[29] As there was no sufficient proof that petitioner submitted any supporting documents to the BIR, the 120-day period commenced to run from December 28, 2009, the date of filing of petitioner's administrative claim.

> Hence, this Court is constrained to reiterate the assailed Resolution and counts the 120-day period from the date of filing of petitioner's administrative claim on December 28, 2009. Counting 120 days therefrom, respondent had until April 27, 2010 within which to decide petitioner's administrative claim for refund. Due to respondent's inaction, petitioner had thirty (30) days from April 27, 2010, or until May 27, 2010, within which to file a judicial claim for refund before this Court.
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> The instant Petition for Review was filed on July 6, 2010, which is clearly beyond the 30-day prescriptive period. Therefore, the instant case was belatedly filed."[30]

Moreover, as correctly pointed out by respondent in her Comment, petitioner's alleged submission of the complete documents on September 20, 2010 was made only after the filing of its Petition for Review in CTA Case No. 8129 before the Court in Division on July 6, 2010, which is quite an uncommon practice, readily appearing to be a mere afterthought or a legal maneuver to remedy the belated filing of its judicial claim.

In the absence of acceptable proof of submission of complete documents, We are constrained to affirm the findings of the Court in Division that the 120-day period should be counted from the date of the filing of its administrative claim on December 28, 2009, or until April 27, 2010. Indubitably, petitioner failed to observe the 30-day period under Section 112(C) of the NIRC of 1997, as amended, to judicially appeal the instant administrative claim. Correspondingly, the belated filing of the Petition for Review before the Court in Division in CTA Case No. 8129 warrants a dismissal with prejudice, inasmuch as no jurisdiction was acquired thereon to entertain the said case.

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[30] Resolution dated May 12, 2011, p. 3, Annex "B", Petition for Review, Docket, p. 36.

Parenthetically, it must be emphasized that jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy,[31] and is conferred only by law and not by the consent or waiver upon a court which, otherwise, would have no jurisdiction over the subject matter or nature of an action. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties.[32] If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[33]

Hence, petitioner's prayer to dismiss without prejudice the instant Petition for Review, on the ground that it is allegedly withdrawing its appeal in CTA Case No. 8129 on the ground of prematurity, must be denied because a decision had already been rendered in said case, thereby making the withdrawal thereof no longer legally plausible.

Furthermore, the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right. It bears emphasis that recovery of excess input VAT is a refund which is in the nature of an exemption. There is parity between tax refund and tax exemption when the former is based either on a tax exemption statute or a tax refund statute. Evidently, a claim for tax refund may be based on statutes granting tax exemption or tax refund. In such case, the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, a legislative grace, which cannot be allowed unless granted in the

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[31] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.
[32] *Laresma vs. Abellana*, G.R. No. 140973, November 11, 2004.
[33] Please refer to *De Guzman, et al. vs. Escalona, et al.*, G.R. No. L-51773, May 16, 1980.

most explicit and categorical language. The taxpayer must show that the legislature intended to exempt him from the tax by words too plain to be mistaken.[34]

In this case, input VAT is taxes legally due to the government from the taxpayer and is not a kind of an erroneously or illegally collected tax. However, under certain exceptional circumstances (such as for sales or purchases that are zero-rated), the legislature provided a tax refund statute under Section 112 from which the taxpayer is given the benefit to refund such input VAT as a mere privilege granted by the government for having such kind of sales or transactions. Hence, it being a mere liberality granted to the taxpayer, it is with more reason that the Court must be cautious in interpreting the law governing the claim for such privilege.

WHEREFORE, in light of the foregoing considerations, the Petition for Review is hereby **DENIED** for lack of merit. Consequently, the filing of the Petition for Review in CTA Case No. 8129 is filed out of time.

Accordingly, the Resolutions dated January 19, 2011 and May 12, 2011 of the Court in Division in CTA Case No. 8129 are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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[34] *CIR vs. Fortune Tobacco Corporation*, G.R. Nos. 167274-75, July 21, 2008; *Commissioner of Internal Revenue vs. SC Johnson & Son, Inc.*, 368 Phil. 388, 411, June 25, 1999; *Magsaysay Lines, Inc., vs. Court of Appeals*, 329 Phil. 310, 324, August 12, 1996; *Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd.*, 314 Phil. 220, 228, May 26, 1995.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Separate Concurring Opinion)
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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

HEDCOR INC.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 785
(CTA Case No. 8129)

Present:

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

Promulgated:

OCT 01 2012 1:50 p.m.

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SEPARATE CONCURRING OPINION

BAUTISTA, J.:

While I am in harmony with the Court in dismissing the Petition for Review filed Hedcor, Inc. ("petitioner"), I am compelled to vary from the basis of the said opinion of the Court.

The Court denied the Petition for Review filed by petitioner due to prematurity, based on Section 112(C) of the 1997 National Internal Revenue Code

("NIRC"), as amended,[1] wherein the Commissioner of Internal Revenue ("CIR") has one hundred twenty (120) days from the submission of complete supporting documents to decide the claim for refund.

The records of the case reveal the following factual circumstances that are pertinent to the case at hand:

Period covered by Claim	April to June 2008
Administrative Claim	December 28, 2008
Judicial Claim	July 6, 2010
Final Submission of Documents (Administrative Claim)	September 20, 2010

In the Resolution[2] dated January 19, 2011, the Second Division of the Court dismissed the Petition for Review filed by Hedcor for being filed out of time. The Court found that:

> "On December 28, 2009, petitioner filed its administrative claim for refund through a letter dated December 22, 2009. Counting 120 days therefrom, respondent had until April 27, 2010 within which to decide on petitioner's claim. In case of incaction of respondent, such as the instant case, petitioner had 30 days to file its judicial claim from April 27, 2010 or until May 27, 2010. Clearly, the filling of the instant Petition for Review on July 6, 2010 was filed beyond the 30-day period.
>
> This Court cannot give credence on the allegation of petitioner that it last submitted its documents on September 20, 2010 and said date should be the basis in counting the 120-day period for its failure to show proof thereon. However, even if the counting of the 120-day period begins on September 20, 2010, this Court is still constrained to dismiss the case on the ground of prematurity pursuant to the clear terms of Section 112(C) of the NIRC of 1997, as amended, and the ruling of the Supreme Court in the above-cited case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc."[3]

[1] As amended by Republic Act No. 9337.
[2] *Id.*, pp. 30-33.
[3] *Id.*, p. 33.

In the Resolution dated May 12, 2011, the Second Division of the Court rejected the Motion for Reconsideration filed by Hedcor, finding no merit in the arguments set forth. The Court also delved into the documentary evidence that was submitted by petitioner to prove its last submission of supporting documents, stating that it remained unconvinced.

After careful evaluation of the facts, it is my opinion that it is but proper to affirm the dismissal of the Petition for Review by the Court in Division due to prescription, not on the ground as stated in the assailed Resolutions, but on the then prevailing jurisprudence at the time petitioner filed its claims.

It is my humble opinion that the judicial claim filed by petitioner was made beyond the two (2)-year period.

It is important to point out the that the law provides a prescriptive period of two (2) years under Section 112 of the 1997 NIRC, which states that:

> **SEC. 112.** *Refunds or Tax Credits of Input Tax.* –
>
> xxx xxx xxx
>
> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals.

The above cited provision must be in accordance with Section 229 of the same Code, which provides that:

> **SEC. 229**. *Recovery of Tax Erroneously or Illegally Collected*. –
> x x x
>
> 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 therefore, 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.

The judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC is merely directory and permissive, and not mandatory nor jurisdictional, for so long as it is made within the settled two (2)-year prescriptive period.[4]

A taxpayer-claimant *may* file an appeal within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the CIR shall decide on the claim, or after the receipt of the decision denying the same, so long as it is within the two (2)-year prescriptive period.

The cited provision will show that it contains the word "may," thus indicating that it is merely permissive and operates to confer discretion.[5] It gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

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[4] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.
[5] Bersabal *v.* Salvador, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, citing Dizon v. Encarnacion, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.

The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[6] to wit:

> **It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the NIRC**. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.
>
> Corollary thereto, the Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:
>
>> "It appears therefore, **that it is not necessary for the Commissioner of Internal Revenue to first act unfavorably on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case**. This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
>>
>> Incidentally, **the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal.** The law fixed the same period — two years — for filing a claim for refund with the Commissioner (Sec. 204,

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

> par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court. Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. In fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)." (*Boldfacing supplied*)

Thus, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even his inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal with this Court,[7] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period,[8] and beyond that period, the taxpayer can no longer appeal to this Court.[9]

In the present case, at the time of filing of the instant Petition for Review, the prevailing ruling of the Supreme Court was the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)* ("*Mirant case*"),[10] where it was held that the reckoning of the two-year prescriptive period is from the end of the taxable quarter. Thus, both the administrative and the judicial claim should have been filed by June 30, 2010. However, petitioner filed his judicial claim only on July 6, 2010, which is already beyond the said period.

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[7] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[8] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[9] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.
[10] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

In the case of *Ker & Company, Ltd. v. Court of Tax Appeals,*[11] the Supreme Court stated that:

> "If a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional."

This has also been reiterated in cases such as *Commissioner of Internal Revenue v. Fort Bonifacio Development Corporation,*[12] wherein the Supreme Court said that the perfection of an appeal in the manner and within the period laid down by law is not only mandatory but also jurisdictional.

In the present case, the taxpayer failed to observe the procedural rules in filing its judicial claim, and as such, it must be denied its due course.

WHEREFORE, in light of the foregoing laws and jurisprudence, the Petition for Review filed by petitioner Hedcor, Inc. is hereby **DISMISSED**. Accordingly, the Resolutions dated January 21, 2011 and May 12, 2011 promulgated by the Second Division of the Court are hereby **AFFIRMED**.

LOVELL R. BAUTISTA
Associate Justice

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[11] G.R. No. L-12396, January 31, 1962, 4 SCRA 160.
[12] G.R. No. 167606, August 11, 2010, 628 SCRA 96.