REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MIRANT (NAVOTAS II) CORPORATION, Petitioner,	C.T.A. EB NO. 783 (C.T.A. Case No. 7619)
	Members:
- versus -	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, *and* COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 18 2012 2:00 p.m.

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DECISION

Fabon-Victorino, J.:

In the instant Petition for Review, petitioner Mirant (Navotas II) Corporation seeks to reverse and set aside the Amended Decision[1] dated February 03, 2011 and the subsequent

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[1] *Id.*, pp. 91-100.

Resolution[2] of May 03, 2011 and reinstate the Decision[3] dated June 04, 2010, all rendered by the Former Second Division of the Court in C.T.A. Case No. 7619, entitled, *Mirant (Navotas II) Corporation (formerly: Southern Energy Navotas II Power, Inc.) vs. Commissioner of Internal Revenue*.

THE PARTIES

Petitioner is a duly organized and existing domestic corporation with principal office at the 5F, CTC Building, 2232 Roxas Boulevard, Pasay City. It is engaged in the business of power generation and registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer, with Taxpayer's Identification Number (TIN) 001-726-862-000.

Respondent, on the other hand, is the Commissioner of Internal Revenue, with the authority, among others, to decide, approve, and grant claims for issuance of tax credit certificate or refund of overpaid internal revenue taxes as provided by law. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

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[2] *Id.*, pp. 64-66.
[3] *Id.*, pp. 72-89.

THE FACTS

The facts, as found by the Court in Division are undisputed, to wit:

On December 17, 2004, petitioner filed with the BIR an Application for VAT Zero-Rate of its supply of electricity to the NPC, which was subsequently approved to cover the period from January 1, 2005 to October 31, 2005.

Petitioner filed its Quarterly VAT Returns for taxable year 2005 on the following dates:

Exhibit	Year 2005	Date Filed
"F" and "I"	1st Qtr	April 25, 2005
"J" and "M"	2nd Qtr	July 26, 2005
"N" and "Q"	3rd Qtr	October 25, 2005
"R" and "T"	4th Qtr (Original VAT Return)	January 26, 2006
"U"	4th Qtr (Amended VAT Return)	February 16, 2006
"W"	4th Qtr (Second Amended VAT Return	February 22, 2006
"Y"	4th Qtr (Third Amended VAT Return	April 25, 2006

On December 20, 2006, petitioner filed with the BIR Revenue District Office No. 51, Pasay City an administrative claim for refund or issuance of tax credit certificate in the amount of P1,471,810.90, representing its unutilized input VAT for the period covering January to October 2005.

On April 18, 2007, petitioner filed a Petition for Review alleging respondent's inaction and to suspend the running of the two-year prescriptive period on its administrative action.

On June 26, 2007, respondent filed her Answer interposing the following defences:

> "6. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;
>
> 7. Petitioner must prove that it paid the alleged VAT input taxes for the periods stated;
>
> 8. Petitioner must prove that its sales of electricity is subject to VAT at zero percent (0%) rate;
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> 9. Petitioner must prove that the alleged input VAT is directly attributable to such alleged zero-rated sales;
>
> 10. Petitioner must prove that its alleged unutilized input VAT has not been applied against any output tax liabilities;
>
> 11. Petitioner must prove that the alleged claim was filed within the periods prescribed in Section 112 of the NIRC of 1997;
>
> 12. 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;
>
> 13. Claims for refund are construed strictly against the claimant for the

> same partake of the nature of exemption from taxation."

During the trial, petitioner presented two witnesses, namely, Independent Public Accountant Atty. Raymund S. Gallardo and Taryn F. Uberita, in support of its claim.

On September 19, 2008, petitioner filed its Formal Offer of Evidence. In the Resolutions dated November 11, 2008 and December 12, 2008, all of petitioner's formally offered exhibits were admitted.

On April 27, 2009 the right of respondent to present evidence was deemed waived for the inability of her counsel to appear during the scheduled hearings for the presentation of her evidence, despite notice.

On June 16, 2009, the case was deemed submitted for decision after the parties filed their respective memoranda.

On June 04, 2010, the Court in Division rendered a Decision[4] granting albeit partially petitioner's claim for refund or issuance of tax credit certificate in the reduced amount of

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[4] See note 4, *Supra*.

Php786,728.01, representing its unutilized input VAT attributable to zero-rated sales to NPC for the period covering January 01, 2005 to October 31, 2005.

Both aggrieved, petitioner and respondent filed their respective *Motions for Partial Reconsideration*.

In its *Motion for Partial Reconsideration*, petitioner interposed the following assigned error:

> The claim for refund for the first quarter of 2005 has not prescribed as the ruling in the 2008 case of Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.) does not apply to the present case, which was filed in 2007.

Respondent, on the other hand, raised the following grounds in her *Motion for Partial Reconsideration*:

> THE HONORABLE COURT ERRED IN MERELY APPLYING SECTION 112 (A) OF THE TAX CODE OF 1997 WHILE DISREGARDING THE APPLICATION OF SECTION 112 (D) THEREOF.
>
> THE HONORABLE COURT ERRED IN FAILING TO CONSIDER THAT PETITIONER DID NOT SUBSTANTIATE ITS ADMINISTRATIVE CLAIM AS REQUIRED BY

LAW, JURISPRUDENCE AND ADMINISTRATIVE ISSUANCES.

In the assailed Amended Decision of February 3, 2011, the Court in Division recalled and set aside the Decision of June 4, 2010 and denied the *Petition for Review* on ground of prematurity. The dispositive portion of the Amended Decision reads:

> **WHEREFORE**, premises considered, petitioner's *Motion for Partial Reconsideration* is hereby **DENIED** for lack of merit and respondent's *Motion for Partial Reconsideration* is hereby **GRANTED**. Accordingly, this Court's *Decision* dated June 4, 2010 is hereby **RECALLED** and **SET ASIDE** and the *Petition for Review* is hereby **DENIED** for having been prematurely filed.
>
> **SO ORDERED.**

In the Resolution dated May 3, 2011, the Court in Division denied petitioner's *Motion for Reconsideration* of the Amended Decision dated February 3, 2011, on the ground that it was a second motion for reconsideration prohibited under Rule 15, Section 7 of the Revised Rules of the Court of Tax appeals ("CTA Rules").

Hence, this *Petition for Review* filed before the Court *En Banc* on June 09, 2011.

THE ISSUES

The instant petition ascribes upon the Court in Division the following errors:

I

> The Honorable Court's Former Second Division erred in ruling that Mirant's *Motion for Reconsideration* was a prohibited second motion for reconsideration under the CTA Rules.

II

> The Honorable Court's Former Second Division erred in ruling that Mirant's *Petition for Review* was prematurely filed.

III

> The Honorable Court's Former Second Division erred in ruling that Mirant's judicial claim for refund for the first quarter of 2005 was barred by prescription.

Petitioner disagrees with the ruling that its Motion for Reconsideration assailing the Amended Decision is a second motion for reconsideration proscribed under the rules. It argues that the Amended Decision is entirely a new decision and under Rule 15, Section 1 of the CTA Rules, the available remedy is a motion for reconsideration. Thus, following the ruling of the Supreme Court in the case of *Lee vs. Trocino, et al*,[5] its *Motion for Reconsideration* is not a prohibited second motion for reconsideration under the CTA Rules.

Petitioner as well argues that the *Aichi* case,[6] which was promulgated after the filing of its Petition for Review should not be retroactively applied lest it will be unduly deprived of its right to claim for tax refund. After all, it merely relied in good faith on the prevailing rule at that time to the effect that the taxpayer need not wait for the lapse of the 120-day period under Section 112(D) [now Section 112(C)] of the National Internal Revenue Code (NIRC) of 1997, as amended, before filing a judicial claim for refund.

Further, pursuant to the doctrine prevailing at the time its Petition for Review was filed which was enunciated in *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue (Atlas case),* [7] its administrative and judicial claims for refund for the first quarter

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[5] 561 SCRA 178 (2008).
[6] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010.
[7] 524 SCRA 73 (2007).

of 2005 were filed within the two-year prescriptive period reckoned from the date it filed its quarterly VAT return.

In her *Comment*[8] filed on July 12, 2011, respondent points out that her motion for reconsideration of the Amended Decision was as well deemed a prohibited pleading. However, she disagrees with petitioner in the latter's claim that the Court in Division erred in applying the *Mirant*[9] and *Aichi* rulings as precedents in the present case.

Citing the case of *CBK Power Company, Limited vs. Commissioner of Internal Revenue,*[10] she contends that the *Aichi* ruling, being the latest on the matter rendered by the Ultimate Arbiter of any justiciable controversy, the Court *En Banc* is left with no option but to uphold and apply the same.

On September 20, 2011, the instant petition was submitted for decision after petitioner filed its *Memorandum* on September 08, 2011 and respondent its manifestation on August 12, 2011, stating that she is adopting her *Comment* dated July 11, 2011, as her *Memorandum*.

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[8] *En Banc* Case Docket, pp. 104-107.
[9] *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*, G.R. No. 172129, September 12, 2008, (the "Mirant case").
[10] CTA EB No. 658, June 27, 2011.

THE RULING OF THE COURT EN BANC

The Court *En Banc* agrees with petitioner that its *Motion for Reconsideration* of the Amended Decision is not the second motion for reconsideration proscribed in Section 7 Rule 15 of the Revised Rules of the Court of Tax Appeals, which reads as follows:

> SEC. 7. *No second motion for reconsideration or for new trial.* No party shall be allowed to file a second motion for reconsideration or for new trial of a decision, final resolution or order. *(Rules of Court, Rule 52, Sec. 2a)*

Under the obtaining circumstances, the pertinent provision is Section 1, Rule 15 of the CTA Rules which provides as follows:

> SEC. 1. Who may and when to file motion. — Any aggrieved party may seek a reconsideration or a new trial of any decision, resolution, or order of the Court by filing a motion for reconsideration or new trial within fifteen days from the date or receipt of notice of the decision, resolution, or order of the Court in question.

As the party aggrieved by the ruling laid down in the Amended Decision of February 03, 2011, petitioner has the right to seek for a reconsideration of the adverse decision which effectively superseded the Original Decision dated June 04, 2010.

When the Court in Division amended its Decision dated June 4, 2010 and denied the *Petition for Review*, such amounted to a material change in the Original Decision which granted the claim for refund albeit in the reduced amount of P786,728.01. The Court in Division turned 180 degrees and rendered a new decision diametrically opposed to the one previously rendered. The alteration in the Amended Decision is so significant and substantial as to give rise to the corresponding right of petitioner to assail it through a motion for reconsideration. To immediately seek relief to the Court *En Banc* is to deprive the Court in Division the opportunity to correct itself, if warranted. The amended and clarified decision is an entirely new decision, which supersedes the original decision.[11] Hence, petitioner's *Motion for Reconsideration* is not a second motion for reconsideration, which is a proscribed under Section 7, Rule 15 of the CTA Rules, in relation to Section 2, Rule 52 of the 1997 Rules of Civil Procedure, as amended.

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[11] *Magdalena Estate, Inc. vs. Caluag*, 11 SCRA 333; *Sta. Romana vs. Lacson*, 104 SCRA 93.

Being interrelated, the Court *En Banc* shall discuss the second and third assigned errors jointly.

Prescriptive period for filing administrative and judicial claims on VAT refund cases

The specific provision governing the period for filing claims for refund or tax credit of input VAT is Section 112 of the NIRC of 1997, as amended by Republic Act No. 9337, viz.,:

> Section 112. Refunds or Tax Credits of Input Tax. —
>
> (A) Zero-rated or Effectively Zero-rated Sales. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated

> proportionately on the basis of the volume of sales.
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> xxx xxx xxx
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> 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.
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> **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**. (*Emphases supplied*)

Thus, a VAT-registered person, such as petitioner, has **two (2) years after the close of the taxable quarter when the pertinent sales were made,** within which to apply with respondent a claim for refund or tax credit of creditable input tax that remains unutilized. Respondent, on the other hand, has **120 days from the date of submission of complete documents in support of the application for refund or tax credit of input tax** to grant or deny the same. Upon notice of denial or expiration of the allowable period of 120 days without any action on the part of respondent, the VAT-registered person has **30 days, within which to appeal the adverse decision or the inaction of respondent with the Court of Tax Appeals.**

The above interpretation is not without authority. In the early case of *Intel Technology Philippines, Inc. v. Commissioner of Internal Revenue,*[12] promulgated on April 27, 2007, the Supreme Court enumerated the requisites for filing an application for refund or issuance of tax credit certificate for unutilized input VAT attributable to zero-rated or effectively zero-rated transactions, thus:

> Under Section 106 (A)(2)(a)(1) in relation to 112 (A) of the Tax Code, a taxpayer engaged in zero-rated or effectively zero-rated transactions may apply for a refund or issuance of a tax credit certificate for input taxes paid attributable to such sales upon complying with the following requisites: **(1) the taxpayer is engaged in sales which are zero-rated (like export sales) or effectively zero-rated; (2) the taxpayer is VAT-registered; (3) <u>the claim must be filed within two years after the close of the taxable quarter when such sale were made</u>; (4) the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax; and (5) in case of zero-rated sales under Section 106(A)(2)(a)(1) and (2), the acceptable foreign currency exchange proceeds**

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[12] G.R. No. 166732.

> **thereof had been duly accounted for in accordance with BSP rules and regulations.** (*Emphases ours*)

The two-year prescriptive period emphasized in the above-quoted ruling was affirmed in the *Mirant* case where the Final Arbiter literally applied the letter of the law and reckoned the two-year prescriptive period from the close of the taxable quarter when the relevant sales were made. The doctrine was fortified in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (Aichi case),*[13] where the Supreme Court laid to rest the issue on the reckoning period for filing a claim for refund of input VAT explaining the underlying legal principle, in this wise:

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

[13] G.R. No. 184823, October 6, 2010.

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. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed.

Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable

To be sure, MPC cannot avail itself of the provisions of either Sec. 204(C) or 229 of the NIRC which, for the purpose of refund, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor. Secs. 204(C) and 229 respectively provide:

> Sec. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. — The Commissioner may —
>
> xxx xxx xxx

(c) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

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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, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

Notably, the above provisions also set a two-year prescriptive period, reckoned from date of payment of the tax or penalty, for the filing of a claim of refund or tax credit. Notably too, both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.

MPC's creditable input VAT not erroneously paid

For perspective, under Sec. 105 of the NIRC, creditable input VAT is an indirect tax which can be shifted or passed on to the buyer, transferee, or lessee of the goods, properties, or services of the taxpayer. The fact that the subsequent sale or transaction involves a wholly-tax exempt client, resulting in a zero-rated or effectively zero-rated transaction, does not, standing alone, deprive the taxpayer of its right to a refund for any unutilized creditable input VAT, albeit the erroneous, illegal, or wrongful payment angle does not enter the equation.

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Considering the foregoing discussion, **it is clear that Sec. 112 (A) of the NIRC, providing a two-year prescriptive period reckoned from the close of the taxable quarter when the relevant sales or transactions were made pertaining to**

> **the creditable input VAT**, applies to the instant case, and not to the other actions which refer to erroneous payment of taxes. (Emphasis supplied.)
>
> In view of the foregoing, we find that the CTA En Banc erroneously applied Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT. **To be clear, Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period should be reckoned from the close of the taxable quarter when the sales were made**. (*Emphases supplied*)

The *Aichi* case likewise interpreted Section 112(A) of the NIRC of 1997, as amended, with regard to the time and manner of filing the administrative claim for refund or credit with the Commissioner of Internal Revenue (CIR), thus:

> There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales." **The phrase "within two (2) years xxx apply for the issuance of a tax credit certificate or refund" refers to application for refund/credit filed with the CIR and not to appeals made to the CTA.** This is apparent in the first paragraph of Subsection (D) of the same provision, which states that the **CIR has "120 days from the submission of complete**

> **documents in support of the application filed in accordance with Subsections (A) and (B)" within which to decide on the claim.**
>
> In fact, applying the two-year period to judicial claims would render nugatory **Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR.** The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. (*Emphases ours*)

More significantly, the *Aichi* Case emphasized the mandatory need to observe the 120-30 day period provided under Section 112 (C) of the 1997 NIRC, as amended, prior to instituting a judicial claim with the CTA. The Supreme Court held, thus:

> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112 (D) of the NIRC, which provides that:
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> xxx xxx xxx
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> Section 112(D) of the NIRC clearly provides that the CIR has '120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit],' within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is

> to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.
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> In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. **Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature**.
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> . . . 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
>
> In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA. (*Emphases supplied*)

It is undisputed that petitioner filed its administrative claim for refund of the unutilized input VAT attributable to its zero-rated sales for the period beginning January 1, 2005 to October 31, 2005 on December 20, 2006. Undoubtedly, the administrative claim was filed well within the two-year prescriptive period provided under Section 112(A) of the NIRC of 1997, as amended.

However, the same is not true insofar as petitioner's judicial claim is concerned. Under Section 112(C)] of the NIRC of 1997, as amended, respondent has 120 days from receipt of the complete documents, within which to act on the application for refund. Only after the lapse of the said 120 days or from receipt of the adverse decision, may petitioner within 30 days therefrom, seek judicial intervention via a petition for review.

In the instant case, petitioner defied the rules and sprinted to the Court without seeing the fruition of its administrative action alleging inaction on the part of respondent, who in fact was not given the full benefit of the period granted unto her to act on the application for refund. The Court *En Banc* cannot agree more with the Court in Division in its Amended Decision dated February 3, 2011, that the filing of the *Petition for Review* was premature, thus:

> In the instant case, petitioner filed on December 20, 2006 its administrative claim for refund or issuance of tax credit certificate together with the supporting documents before the BIR. However, petitioner filed on

> April 18, 2007 the instant Petition for Review, or two (2) days earlier prior to the expiration of the 120-day period on April 20, 2007 for the Commissioner of Internal Revenue to act on its administrative claim for refund as provided under Section 112 (D) of the NIRC of 1997. The filing of the instant Petition for Review without waiting for the expiration of the aforesaid 120-day period is fatal to its refund claim. Thus, following the Aichi case, the factual backdrop of which falls squarely in the instant case, this Court has not acquired jurisdiction over the instant case.
>
> It is settled that the premature invocation of the court's intervention is fatal to one's cause of action. If a remedy within the administrative machinery can still be resorted to by giving the administrative officer every opportunity to decide on a matter that comes within his jurisdiction, then such remedy must first be exhausted before the court's power of judicial review can be sought. The party with an administrative remedy must not only initiate the prescribed administrative procedure to obtain relief but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to the court.

Petitioner however, finds the above-quoted ruling erroneous. In its *Petition for Review* before the Court *En Banc*, it reiterates its position in its *Motion for Reconsideration* dated February 24, 2011, that its *Petition for Review* was seasonably filed relying in good faith on prevailing doctrine at the time of the institution of the petition. In other words, the doctrine in the

Aichi case should not be applied retroactively so as to deprive it of its right to claim a tax refund.

To be sure, this issue is no longer novel. As extensively discussed by the Court *En Banc* in the case of *Marubeni Philippines Corporation vs. Commissioner of Internal Revenue*,[14] the *Mirant* and the *Aichi* Cases are the leading and applicable jurisprudence on the issue. The pertinent portion of the Decision reads:

> A careful analysis of the above-mentioned cases Atlas, Mirant and Aichi clearly shows that **the Atlas Case was an interpretation by the Supreme Court of the 1977 NIRC, prior to its amendment by R.A. 7716; while the Mirant and Aichi cases was an interpretation of the 1997 NIRC or the application and interpretation of the amendatory provisions of Tax Reform Act of 1997**.
>
> Significantly, it is emphasized that the premise of the Supreme Court's ruling in the Atlas Case was anchored on the need to harmonize the provisions on Refund or Tax Credits of Input Tax under Section 106 (now Section 112) with the two-year prescriptive period for instituting a suit or proceeding for the Recovery of Tax Erroneously or Illegally paid under Section 230 (now Section 229) of the Tax Code of 1977, as amended, citing the cases of ACCRA Investments Corporation v. Court of Appeals and Commissioner of Internal Revenue v. TMX Sales, Inc. As previously discussed, prior to the effectivity of R.A. No. 7716 and R.A. No. 8424, there was no specific provision on judicial claim for

[14] CTA EB No. 557 (CTA Case No. 6469), March 23, 2011.

unutilized input Vat/credit under Section 106 of the NIRC of 1977, hence, there is the need to harmonize the provisions of Section 106 with Section 230 of the Tax Code.

It was in the advent of R.A. No. 7716 and R.A. 8424 when the legislature specifically provided for a judicial recourse with the Court of Tax Appeals in claiming unutilized input VAT refund/credit under Section 106(D) of the NIRC of 1977 (now Section 112 of the NIRC of 1997) within which the period of thirty (30) days reckoned from the receipt of the decision of the CIR denying the claim or after the expiration of a given period (now 120 days).

Accordingly, petitioner cannot blindly invoke the doctrine enunciated in Atlas case in the instant case. As discussed above, the need to harmonize the provisions of Section 106 and Section 230 of the Tax Code of 1977 is no longer necessary nor applicable due to the clear legislative intent embodied in the provisions of R.A. No. 7716 and R.A. 8424, which delineated specific amendatory provision for the prescriptive period in claiming and judicial claims for unutilized input VAT refund/credit.

Further, contrary to petitioner's argument that the prevailing doctrine should still be the Atlas Case because the Mirant Case was decided merely by the Second Division of the Supreme Court and not En Banc; therefore, the Mirant Case cannot validly overturn the Atlas Case doctrine without violating Article VIII, Section 4(3) of the Constitution, it is worthy of emphasis that the Mirant Case did not overturn the Atlas Case. As pointed out earlier, Section 106 of the 1977 Tax Code was amended and restructured by R.A. No. 7716 and further amended by R.A. No. 8424. Hence, the Atlas Case doctrine, which is an interpretation of Section 106 of the 1977 Tax Code prior to the aforesaid amendments, is no longer applicable because the legislature clearly delineated both administrative and judicial

> claims for unutilized input VAT refund/credit in one provision of the Tax Code, and that is Section 106 of the 1977 Tax Code, as amended by R.A. No. 7716 (now Section 112 of the NIRC of 1997).
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> xxx xxx xxx
>
> Thus, the Mirant Case should be read in relation to the prospectivity principle of statutes considering that it was an interpretation of the prevailing and applicable law, i.e., R.A. No. 7716 as amended by R.A. No. 8424. This is in consonance with the Supreme Court's pronouncement in Senarillos v. Hermosisima, et al. that "judicial interpretation of a statute constitutes part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect. Such judicial doctrine does not amount to the passage of a new law but consists merely of a construction or interpretation of a pre-existing one, as is the situation in this case."
>
> xxx xxx xxx.
>
> Concomitantly, there is no merit in petitioner's contention that it should not be penalized for relying and observing the existing laws, prevailing rule and jurisprudence (due to the long line of Court of Appeals and Court of Tax Appeals cases allegedly applying the Atlas Case doctrine) considering that petitioner anchored its claim under Section 112 of R.A. 8424 and in which case, the Mirant and Aichi Cases are the leading jurisprudence in interpreting the said provision. (*Emphases supplied*)

Like the *Mirant* Case, the *Aichi* case should be read in relation to the principle of prospective application of statutes as it was the interpretation of the prevailing and applicable law, viz., R.A. No. 7716, as amended by R.A. No. 8424.

It must be stressed that the interpretation of the law by the Highest Tribunal is part of the law as of the date of its original passage since the Court's interpretation merely establishes contemporary legislative intent that the construed law purports to carry into effect.[15] Moreover, by tradition in our system of judicial administration, the Supreme Court, as the Final Arbiter of any justiciable controversy,[16] has the last word on what the law is. Its decision becomes a judicial precedent to be followed in subsequent cases brought before the court for determination. There is only one Supreme Court from whose decisions all other courts should take bearings.[17]

We ruled then, as we rule now, that for refund of input tax, Section 112 of the 1997 NIRC, as amended, is the applicable law and not Section 229 of the same Code. The *Atlas* case which harmonized Sections 112 and 229 is no longer controlling and applicable due to the amendments made by the legislature intentionally providing the manner and period in claiming refunds

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[15] *Philippine Constitution Association vs. Enriquez*, G.R. No. 113105, August 19, 1994.
[16] *Dante Nacuray et, al. v. NLRC*, 270 SCRA 59.
[17] *Commissioner of Internal Revenue vs. Michael J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of *GSIS vs. Court of Appeals*, 334 Phils. 163, 175.

which is entirely different and distinct from recovery of tax erroneously or illegally collected.

WHEREFORE, the *Petition for Review* filed by petitioner Mirant (Navotas II) Corporation (formerly Southern Energy Navotas II Power, Inc.) is hereby **DENIED,** for lack of merit. The impugned Amended Decision of the Court in Division dated February 3, 2011 is hereby **AFFIRMED** *in toto.*

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

MIRANT (NAVOTAS II) CORPORATION,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 783
(CTA Case No. 7619)

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

Promulgated:

JUL 1 8 2012 2:00 p.m.

x---x

SEPARATE OPINION

BAUTISTA, J.:

Setting aside the issue on the timeliness of the administrative and judicial claims, I hereby quote Section 1 of Rule 15 of the Revised Rules of the Court of Tax Appeals, which states as follows:

RULE 15
MOTION FOR RECONSIDERATION OR NEW TRIAL

> SECTION 1. *Who may and when to file motion.* - Any aggrieved party may seek a reconsideration or new trial of any decision, resolution or order of the Court by filing a motion for reconsideration or new trial within fifteen days from the date of receipt of notice of the decision, resolution or order of the Court in question.

Based on the records of the case, the Former Second Division of the Court ("Court in Division") issued a Decision dated June 4, 2010, in which both petitioner and respondent filed their Motions for Partial Reconsideration dated June 22, 2010, and June 23, 2010, respectively.

After consideration, the Court in Division found for the respondent and accordingly issued an Amended Decision dated February 3, 2011. Thereafter, petitioner filed another Motion for Reconsideration on February 24, 2011, assailing the said Amended Decision.

Section 3 of Rule 14 of the Revised Rules of the Court of Tax Appeals, expressly provides, to wit:

RULE 14
JUDGMENT, ITS ENTRY AND EXECUTION

xxx xxx xxx

> SEC. 3. *Amended decision.* - Any action modifying or reversing a decision of the Court *en banc* or in Division shall be denominated as Amended Decision.

The rule is clear. The said Amended Decision is the Court in Division's resolution on the parties' Motions for Partial Reconsideration, reconsidering the original Decision.

Thus, from the Amended Decision, the party adversely affected may file a Petition for Review before the Court *En Banc*, in accordance with Sections 1 and 3(b) of Rule 8 of the Revised Rules of the Court of Tax Appeals, which state:

> SECTION 1. *Review of cases in the Court en banc.* - In cases falling under the exclusive appellate jurisdiction of the Court *en banc*, the petition

> for review of a decision or resolution of the Court in Division must be preceded by the filing of a timely motion for reconsideration or new trial with the Division.
>
> xxx xxx xxx
>
> SEC. 3. *Who may appeal; period to file petition.* -
>
> xxx xxx xxx
>
> (b) **A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution.** Upon proper motion and the payment of the full amount of docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (*Boldfacing supplied.*)

Further, a perusal of the arguments in petitioner's Motion for Partial Reconsideration dated June 22, 2010, assailing the Decision dated June 4, 2010; and the Motion for Reconsideration dated February 24, 2011, assailing the Amended Decision dated February 3, 2011, shows that both are mere reiterations which have already been passed upon by the Court in Division.

A second motion for reconsideration which contains mere iterations and reiterations of the same points and arguments over and over again becomes, in effect, a mere dilatory strategy and consequently nothing more than *pro forma*.[1]

With this, the Motion for Reconsideration filed by petitioner on February 24, 2011 before the Court in Division constitutes a violation of Section 7 of Rule 15 of the Revised Rules of the Court of Tax Appeals, to wit:

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[1] Commissioner of Internal Revenue *v.* Mindanao II Geothermal Partnership, CTA EB Case No. 610 (CTA Case Nos. 7227, 7287, & 7317) dated November 2, 2010.

> SEC. 7. *No second motion for reconsideration or for new trial.* - No party shall be allowed to file a second motion for reconsideration or for new trial of a decision, final resolution or order.

And since Section 3(b) of Rule 8 of the Revised Rules of the Court of Tax Appeals only provides a party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration - which in the case at bench the Amended Decision dated February 3, 2011, denying petitioner's Motion for Partial Reconsideration filed on June 22, 2010 - fifteen days from receipt of the same within which to elevate the case to the Court *En Banc*, therefore, the Motion for Reconsideration filed by petitioner on February 24, 2011, assailing the Amended Decision dated February 3, 2011, did not toll the fifteen-day reglementary period to file its Petition for Review before this Court sitting *En Banc*.

It follows then that the Petition for Review filed by petitioner before the Court *En Banc* on June 6, 2011, was appealed out of time.

In sum, I find the Petition for Review filed by petitioner should be denied on procedural ground, and not for lack of merit.

Accordingly, I vote for the **DISMISSAL** of the Petition for Review filed by Mirant (Navotas II) Corporation.

LOVELL R. BAUTISTA
Associate Justice