REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CBK POWER COMPANY LIMITED,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE No. 759
(CTA Case Nos. 8043 and 8116)

Members:
ACOSTA, *P.J.,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

DEC 2 0 2012 4:30pm

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DECISION

Casanova, J.:

This is an appeal, by way of a verified Petition for Review[1], under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals, seeking the reversal of the Resolutions dated March 3, 2011[2] and April 11, 2011[3] (Assailed Resolutions) rendered by the CTA Second Division in CTA Case No.

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[1] En Banc Rollo, pp. 29-57.
[2] Annex "A" of Petition for Review, *Ibid.*, pp. 60-67.
[3] Annex "B" of Petition for Review, *Id.*, pp. 68-71.

8116 entitled ***"CBK Power Company Limited vs. Commissioner of Internal Revenue,"*** granting respondent's Motion to Dismiss and denying petitioner's Motion for Reconsideration of the said resolution.

Petitioner prays for this Honorable Court to proceed with the trial of its claim for refund or issuance of tax credit certificate in the amount of Forty Seven Million Four Hundred Twenty Five Thousand Three Hundred Six and 79/100 Pesos (P47,425,306.79), representing its alleged unutilized input value added tax (VAT) for the second to fourth (2^{nd}-4^{th}) quarters of the calendar year (CY) 2008.

The facts of the case, as culled from the records, are briefly narrated as follows:

Petitioner is a partnership duly organized and existing under and by virtue of the laws of the Philippines with principal office at the NPC Compound, Kalayaan, Laguna.[4]

Respondent is the duly appointed Commissioner of Internal Revenue vested with authority to act as such, including *inter alia,* the power to decide, approve and grant refunds or tax credit of erroneously or illegally collected internal revenue taxes as provided by law, with office at the BIR National Office Building, BIR Road, Diliman, Quezon City.[5]

Petitioner is registered as a VAT entity with TIN/VAT No. 205-760-474-000 in accordance with the Tax Code, as amended.[6]

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[4] Par. 1, Petition for Review, Division Docket (CTA Case No. 8116), p. 1.
[5] Par. 2, *Ibid*, p. 1-2.
[6] Par. 4, *Id.*, p. 2.

For the period April 1, 2008 to December 31, 2008, petitioner filed with the BIR its Monthly VAT Declarations and Quarterly VAT Returns. Petitioner filed its original Quarterly VAT Returns for the Second, Third and Fourth Quarters of CY 2008 on July 23, 2008; October 24, 2008; and January 26, 2009, respectively.[7]

Subsequently, petitioner amended its Monthly VAT Declarations and Quarterly VAT Returns for the period April 1, 2008 to December 31, 2008 on March 25, 2009; and again on June 24, 2010.[8]

On June 25, 2010, petitioner filed its administrative claim for the issuance of tax credit certificate for the total amount of P47,425,306.79 for its unutilized input taxes all attributable to its zero-rated sales for the period April 1, 2008 to December 31, 2008.[9]

On June 28, 2010, petitioner filed its Petition for Review before the Second Division of the Court of Tax Appeals.

On December 20, 2010, respondent filed her Motion to Dismiss[10] on the ground of lack of jurisdiction. In a Resolution[11] dated March 3, 2011, the CTA Second Division granted respondent's Motion, the dispositive portion of the same states:

> "**WHEREFORE**, premises considered, respondent's **"Motion to Dismiss"** is hereby **GRANTED.** Accordingly, the Petition for Review

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[7] Par. 8, *Id.*, p. 3.
[8] Par. 9, *Id.*, p. 4.
[9] Par. 16, *Id.*, p. 8.
[10] Vol. II, Division Docket, (CTA Case Nos. 8043 & 8116), pp. 758-763.
[11] See Note 2.

> docketed as CTA Case No. 8116 is hereby **DISMISSED** for lack of jurisdiction.
>
> On the other hand, set the hearing on petitioner's **"Motion for the Adoption of Procedures on the Presentation of Voluminous Documents Pursuant to Rules 12 and 13 of The Revised Rules of the Court of Tax Appeals"** and the initial presentation of evidence for the petitioner for CTA Case No. 8043 on April 11, 2011 at 9:00 a.m.
>
> **SO ORDERED."**

Petitioner filed its Motion for Reconsideration[12] on March 16, 2011. Respondent filed her Comment on March 21, 2011. In a Resolution[13] dated April 11, 2011, the CTA Second Division denied petitioner's Motion, to wit:

> **"WHEREFORE,** premises considered, petitioner's **"Motion for Reconsideration"** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED."**

Hence, petitioner filed the instant Petition for Review alleging that the CTA Second Division erred in the following respects:

a. Respondent's Motion To Dismiss should be denied for having been filed in violation of Rule 16, Section 1 of the Revised Rules of Court which provides that a Motion to Dismiss may be filed "within the time for but before filing the answer to the complaint or a pleading asserting a claim x x x x x x;"

b. Petitioner **had timely and duly filed its administrative and judicial claims** for the issuance of a tax credit certificate amounting to P47,425,306.79, representing unutilized input taxes on its local purchases and importations of goods other than capital goods, local purchases of services, payments for services rendered by non-residents, local purchases of capital goods not exceeding P1 Million including unutilized amortized input

[12] Vol. II, Division Docket, (CTA Case Nos. 8043 & 8116), pp. 794-814.
[13] See Note 3.

taxes on capital goods exceeding P1 Million, for the period April 1, 2008 to December 31, 2008, all attributable to zero-rated sales for the period April 1, 2008 to December 31, 2008, pursuant to Section 112(A) of the Tax Code of 1997, as amended; and

c. Under Section 5(5), Article VIII of the 1987 Philippine Constitution, it is provided that Rules of Procedure shall not diminish, increase or modify substantive rights (*Land Bank of the Philippines vs. Arlene De Leon and Bernardo De Leon, G.R. No. 143275, En Banc, March 20, 2003*). Further, following the principle of prospectivity of statutes, which had been applied to judicial decisions and considering that Petitioner had followed in good faith the prevailing jurisprudence when it filed its administrative and judicial claims for its unutilized input taxes for the period April 1, 2008 to December 31, 2008, the Supreme Court ruling in the case of **Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.** with G.R. No. 184823 and promulgated on October 6, 2010, which ruled that the filing of the judicial claim therein with the CTA was premature since the administrative and judicial claims therein were simultaneously filed, **should not be applied in the instant case**. (*Albino S. Co v. Court of Appeals and People of the Philippines, G.R. No. 100776 dated October 28, 1993*)

On September 12, 2011, this Court issued a Resolution[14] ordering respondent to file her Comment within ten (10) days from the receipt thereof. On October 5, 2011, respondent filed her Comment[15].

In a Resolution[16] dated October 24, 2011, this Court ordered the parties to submit their respective memorandum within thirty (30) days from receipt thereof. On November 11, 2011, respondent filed a Manifestation[17] stating that she is adopting the arguments in her Comment as her Memorandum in this case while petitioner filed its Memorandum on December

[14] CTA En Banc Rollo, pp. 73-74.
[15] *Ibid.*, pp. 78-86.
[16] *Id.*, pp. 88-89.
[17] *Id.*, pp. 90-92.

1, 2011.[18] On January 11, 2012, the instant case was submitted for Decision.[19]

After a careful and thorough evaluation and consideration of the records of the case, including both parties' arguments in their respective pleading, the CTA *En Banc* finds no new matters which have not yet been considered and passed upon by the CTA Second Division in the Assailed Resolutions.

We affirm the CTA Second Division's ruling granting respondent's Motion to Dismiss. The requirement that a motion to dismiss should be filed within the time for filing the answer is not absolute. A defendant can still file a motion to dismiss even after an answer has been filed if founded on lack of jurisdiction, *litis pendencia*, lack of cause of action and discovery during trial of evidence that would constitute a ground for dismissal.[20]

Anent the issue on premature filing and lack of jurisdiction, this Court finds that the premature filing of the instant Petition for Review is tantamount to a violation of the doctrine of exhaustion of administrative remedies. Petitioner filed its judicial claim before the CTA in division without giving the respondent ample opportunity to decide on its claim for refund at the administrative level, in violation of the procedure and periods clearly prescribed in the 1997 NIRC.

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[18] *Id.*, pp. 94-142.
[19] *Id.*, pp. 144-145.
[20] Felizardo S. Obando and the Estates of Jose Figueras and Doña Alegria Strebel Vda. De Figueras, vs. Eduardo F. Figueras and Amigo Realty Corporation as represented by Antonio A. Kaw, G.R. No. 134854, January 18, 2000.

Petitioner filed its Petition for Review barely three days after it filed its administrative claim. Hence, it is crystal clear that it failed to exhaust its administrative remedies. It is apparent that petitioner filed its judicial appeal without waiting for the lapse of the 120-day period provided for under Section 112(D) [now Section 112(C)] of the NIRC of 1997, as amended. Consequently, petitioner's premature filing of the Petition for Review on June 28, 2010, failed to confer on this Court with jurisdiction to take cognizance of the instant case. As its petition is prematurely filed, there is no case over which the Court may acquire jurisdiction.

Finally, as regards the contention of petitioner on the retroactive application of the doctrine in the Aichi case, it is likewise settled that the law takes effect from the time of its effectivity. It is only upon effectivity of the statute that legal rights and obligations become available to those entitled by the language of the statute. The provisions of Section 112 have been effective as of January 1, 1998 when the said law took place. The fact that the cases interpreting the same were promulgated years after its effectivity does not mean that the Court implements a retroactive application of law.

In sum, the *CTA En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the Assailed Resolutions. What the instant petition seeks is for the Court *En Banc* to view and appreciate the arguments/discussions raised by the petitioner in its own perspective of things, which unfortunately had already been considered and passed upon by the Court.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the Assailed Resolutions dated March 3, 2011 and April 11, 2011 in CTA Case No. 8116 entitled *"CBK Power Company Limited vs. Commissioner of Internal Revenue"*, are hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Separate ***Dissenting Opinion***)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Joins the ***Concurring and Dissenting Opinion*** of Justice Manalastas)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(With ***Concurring and Dissenting Opinion***)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

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Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, JJ.

Promulgated:
DEC 2 0 2012 4:35 pm

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DISSENTING OPINION

BAUTISTA, J.:

The majority of the Court sitting *En Banc* dismissed the Petition for Review for lack of merit, and accordingly, affirmed the assailed Resolutions dated March 3, 2011 and April 11, 2011, granting the Motion to Dismiss filed by respondent; however, this *ponencia* is of the view that the factual circumstances present in the case at bench supports the application of the then prevailing jurisprudence at the time the claims were made.

Based on the records of the case, petitioner filed its judicial claim for issuance of tax credit certificate for unutilized input taxes covering the period from April 1, 2008 to December 31, 2008 before this Court, docketed as CTA Case No. 8116, raffled to the Second Division of the Court on June 28, 2010, notwithstanding that its administrative claim was filed only on June 25, 2010.

It may not be amiss to note that all during the aforementioned dates, the then controlling doctrine is the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.]*.[1]

I submit that the ruling in the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*,[2] is more in accordance with the letter and spirit of Section 112 of the 1997 National Internal Revenue Code, as amended, nonetheless, it would be the height of injustice to impose a new ruling, on the basis of the so-called "adherence to precedence," for the same is clearly promulgated after the taxpayer-claimant had faithfully relied and complied with the Court's former ruling.

The same way that the two (2)-year prescriptive period provided under Section 229[3] of the same Code must also be considered.[4]

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

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

[3] SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

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

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

Therefore, it must be borne in mind that no claim can be had, whether in the administrative or judicial *fora*, beyond the two (2)-year period provided under Section 112 of the 1997 National Internal Revenue Code, as amended, in relation to Section 229 of the same Code.

Stated differently, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal to this Court.[5] Otherwise, this Court will be deprived of jurisdiction to entertain the case.[6]

In the landmark case of *Albino S. Co, v. Court of Appeals, et al.*,[7] the Supreme Court aptly penned the following disquisitions, to wit:

> The principle of prospectivity of statutes, original or amendatory, has been applied in many cases. These include: *Buyco v. PNB, 961 2 SCRA 682 (June 30, 1961)*, holding that Republic Act No. 1576 which divested the Philippine National Bank of authority to accept back pay certificates in payment of loans, does not apply to an offer of payment made before effectivity of the act; *Largado v. Masaganda, et al., 5 SCRA 522 (June 30, 1962)*, ruling that RA 2613, as amended by RA 3090 on June, 1961, granting to inferior courts jurisdiction over guardianship cases, could not be given retroactive effect, in the absence of a saving clause; *Larga v. Ranada, Jr., 64 SCRA 18*, to the effect that Sections 9 and 10 of Executive Order No. 90, amending Section 4 of PD 1752, could have no retroactive application; *People v. Que Po Lay, 94 Phil. 640*, holding that a person cannot be convicted of violating Circular No. 20 of the Central, when the alleged violation occurred before publication of the Circular in the Official Gazette; *Baltazar v. C.A., 104 SCRA 619*, denying retroactive application to P.D. No. 27 decreeing the emancipation of tenants from the bondage of the soil, and P.D. No. 316 prohibiting ejectment of tenants

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[5] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB Case No. 426, May 29, 2009.
[6] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB Case No. 410 (CTA Case No. 7387), March 18, 2009.
[7] G.R. No. 100776, October 28, 1993, 277 SCRA 444.

from rice and corn farmholdings, pending the promulgation of rules and regulations implementing P.D. No. 27; *Nilo v. Court of Appeals, 128 SCRA 519,* adjudging that RA 6389 which removed "personal cultivation" as a ground for the ejectment of a tenant cannot be given retroactive effect in the absence of a statutory statement for retroactivity; *Tac-An v. CA, 129 SCRA 319,* ruling that the repeal of the old Administrative Code by RA 4252 could not be accorded retroactive effect; *Ballardo v. Borromeo, 161 SCRA 500,* holding that RA 6389 should have only prospective application; (*see also Bonifacio v. Dizon, 177 SCRA 294 and Balatbat v. CA, 205 SCRA 419*).

The prospectivity principle has also been made to apply to administrative rulings and circulars, to wit: *ABS-CBN Broadcasting Corporation v. CTA, Oct. 12, 1981, 108 SCRA 142,* holding that a circular or ruling of the Commissioner of Internal Revenue may not be given retroactive effect adversely to a taxpayer; *Sanchez v. COMELEC, 193 SCRA 317,* ruling that Resolution No. 90-0590 of the Commission on Elections, which directed the holding of recall proceedings, had no retroactive application; *Romualdez v. CSC, 197 SCRA 168,* where it was ruled that CSC Memorandum Circular No. 29, s. 1989 cannot be given retrospective effect so as to entitle to permanent appointment an employee whose temporary appointment had expired before the Circular was issued.

The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . .'" *(Boldfacing supplied.)*

Applying the above disquisitions, I find the administrative and judicial claims filed within the then prevailing jurisprudence at the time the claims were made.

Accordingly, I vote that the Petition for Review be **GRANTED**. The Petition for Review, docketed as CTA Case No. 8116 should be **REINSTATED** and be **GIVEN DUE COURSE.**

LOVELL R. BAUTISTA
Associate Justice

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Promulgated:

DEC 20 2012 4:30pm

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CONCURRING AND DISSENTING OPINION

With due respect, I dissent from the majority opinion and hold that prematurity is not jurisdicitional.

The assailed Resolution grants the Motion to Dismiss on the ground of lack of jurisdiction based on prematurity since the judicial claim was prematurely filed, having been filed a mere three days (with only one working day) after the administrative claim.

While I concur with the dismissal, I hold that the premature filing of the judicial claim for refund is not jurisdictional but still subjects the petition to possible dismissal. Premature invocation of the Court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel*, the case is susceptible of dismissal for lack of cause of action.[1] Thus, the premature filing of the subject Petition for Review is only tantamount to lack of cause of action. The premature filing of the judicial claim for refund or failure to exhaust administrative remedies does not affect the jurisdiction of a Court.[2] Since the premature filing of the claim for refund or failure to exhaust administrative remedies is not jurisdictional, such defense is thus waivable pursuant to Section 1, Rule 9 of the Rules of Court.

Given that respondent alleged in her Answer in C.T.A. Case No. 8116, the special and affirmative defense of prematurity of petitioner's judicial claim for refund[3], and again in its Motion to Dismiss, it cannot be said that respondent waived such defense of premature filing.

In sum, I concur with the majority in affirming the dismissal of petitioner's judicial claim but on the ground of prematurity resulting to lack of cause of cause of action and not due to lack of jurisdiction.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CONCURS:

(On Leave)
ERNESTO D. ACOSTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[1] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.
[2] *Merida Water District, et al. vs. Francisco Bacarro, et al.*, G.R. No. 165993, September 30, 2008.
[3] Answer, dated August 3, 2010, p. 5.