Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

KEPCO ILIJAN CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 733
(CTA Case No. 6966)

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

Promulgated:

SEP 06 2012 aw Apolinario 11:00 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as

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[1] Sec. 2. *Cases within the jurisdiction of the Court en banc.*- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

amended, of the Amended Decision [2] dated February 18, 2011, rendered by the Former Second Division of this Court in CTA Case No. 6966.

Petitioner assailed the aforesaid Amended Decision, the dispositive portion of which reads as follows:

Amended Decision dated February 18, 2011:

> *"**WHEREFORE**, premises considered, the Motion for Partial Reconsideration is hereby **DENIED** for lack of merit. On the other hand, the assailed Decision promulgated on April 14, 2009 is hereby SET ASIDE and the instant Petition for Review is hereby **DISMISSED**, for lack of jurisdiction.*
>
> *SO ORDERED."*

The antecedent facts are undisputed.

Petitioner Kepco Ilijan Corporation, a duly registered domestic corporation and engaged in the production and sale of electricity as an independent power producer (IPP) solely to the National Power Corporation, is claiming a refund or issuance of tax credit certificate in

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(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

xxx xxx xxx

Sec. 4. *Where to appeal; mode of appeal.-*

(a) xxx.

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.

(c) xxx.

[2] En banc Docket, pp. 44-55.

the amount of ₱74,658,461.68 for the input value added tax (VAT) it incurred for taxable year 2002[3].

Respondent Commissioner of Internal Revenue is vested with authority, among others, the power to decide, approve and grant claim for refunds or tax credit of internal revenue taxes.

Petitioner filed its Quarterly VAT Returns for the four quarters of the taxable year 2002, showing the incurred expenses representing the importation and domestic purchases of goods and services including the input VAT thereon[4].

On April 13, 2004, petitioner filed an administrative claim for refund with respondent, thru its BIR-Revenue District Office (RDO) No. 43, for the alleged excess input VAT incurred for the taxable year 2002 in the amount of ₱74,658,481.68[5].

On April 22, 2004, 9 days after filing an administrative claim before respondent, petitioner filed a Petition for Review and it was raffled to the former Second Division of this Court docketed as CTA Case No. 6966[6].

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[3] Division Docket, pp. 52-55
[4] Ibid.
[5] Ibid.
[6] Ibid.

Respondent filed her answer.[7] Trial ensued during which petitioner presented testimonial and documentary evidence. Thereafter, the case was submitted for decision due to respondent's consistent failure to appear and present evidence despite due notice thereof[8].

On April 14, 2009, the former Second Division of this Court promulgated its decision. The former Second Division denied petitioner's input VAT claim for the 1st quarter for the taxable year 2002 on the ground of prescription and the other input VAT claim for not being supported with the required documentary evidence, the pertinent portion of which states:

> "*In sum, petitioner has sufficiently proven that it is entitled to a refund or issuance of tax credit certificate corresponding to its unutilized input VAT for the second, third, and fourth quarters of taxable year 2002 in the amount of P23,389,050.05, computed as follows:*

Amount of Claim			*P74,658,481.68*
Less:	*Barred by prescription-1st Quarter*	*P1,740,640.93*	
	Disallowances per CPA Report- 2nd to 4th Quarters	*1106701.67*	
	Disallowances per Court's verification- 2nd to 4th Quarters	*48,422089.03*	*51,269,431.63*
Refundable Input VAT			*23,389,050.05*

> *WHEREFORE, with the foregoing disquisitions, the Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED to REFUND or to ISSUE TAX CREDIT CERTIFICATE in favor of petitioner in the reduced amount of P23,389,050.05, representing unutilized excess input VAT attributable*

[7] Ibid. p.30.
[8] Ibid. p.309.

to its zero-rated sales of electricity to NPC for the second, third, and fourth quarters of taxable year 2002.

SO ORDERED."

On April 30, 2009, Petitioner filed a "Motion for Partial Reconsideration[9] with Prayer to Admit Attached Additional Supporting Documents". However, in the February 18, 2011 Amended Decision, this Court's Division set aside the April 14, 2011 Decision and dismissed the petition for lack of jurisdiction, the pertinent portion of which states:

"Taking into consideration the importance of the periods provided under Section 112 (D) [now Section 112 (C)] of the NIRC of 1997, as amended, this Court has no recourse but to strictly apply said provision in this case.

Accordingly, counting from the filing of the administrative claim, which presumably is the date when petitioner had submitted the complete documents supporting its claim, the Commissioner has one hundred twenty (120) days or until August 11, 2004 within which to decide on the said claim. After the lapse of the said period, without any receipt of a decision on its administrative claim, the said inaction shall be deemed a denial of the claim and such denial may be appealed before this Court within thirty (30) days or until September 10, 2004. Nevertheless, petitioner filed its judicial claim on April 22, 2004, merely 9 days from the filing of the administrative claim. Obviously, petitioner prematurely filed the instant Petition without waiting for the lapse of the 120-day period. Thus, petitioner's non-observance of the periods provided under Section 112(D) [now Section 112 (C)] of the NIRC of 1997, as amended, by filing the instant Petition for Review on April 22, 2004 would mean that this Court cannot take cognizance of the instant petition.

In view thereof, a reconsideration of the supplemental evidence submitted by petitioner is rendered moot by the afore-mentioned findings that this Court cannot acquire jurisdiction over the instant petition.

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[9] Ibid. pp.376-411.

WHEREFORE, premises considered, the Motion for Partial Reconsideration is hereby ***DENIED*** *for lack of merit. On the other hand, the assailed Decision promulgated on April 14, 2009 is hereby SET ASIDE and the instant Petition for Review is hereby* ***DISMISSED,*** *for lack of jurisdiction.*

SO ORDERED."

Hence, petitioner filed the instant petition. Petitioner raised the issues, as follows:

1. WHETHER OR NOT PETITIONER'S CLAIM FOR REFUND WAS TIMELY FILED.

2. WHETHER OR NOT PETITIONER IS ENTITLED TO THE REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE IN THE AMOUNT OF PHP72,618,752.22 REPRESENTING UNUTILIZED INPUT TAX FOR 2002."[10]

Petitioner's arguments read as follows:

"A. Petitioner seasonably filed its administrative and judicial claims and the CTA properly acquired jurisdiction over the same.

i. In accordance with CTA and SC Decisions, KEILCO filed its Petition for review before the CTA on 22 April 2004, two years from the filing of the quarterly VAT returns.

ii. Petitioner relied on earlier CTA pronouncements that two-year period is counted from the date of filing of the Quarterly VAT Returns. Subsequent conflicting CTA decisions can only be applied prospectively.

iii. As early as 2005, the Supreme Court affirms rulings that claim for VAT Refund should be filed within two years from the date of the filing of the Quarterly VAT Returns. In 2009, the Supreme Court also affirms that the 120-day rule now espoused in Aichi is neither mandatory nor jurisdictional. Petitioner thus timely filed

[10] En banc. Docket, p.9.

its claim for refund and it cannot be prejudiced by Aichi or any contrary decisions.

iv. The cases of Mirant and Aichi having been promulgated by Supreme Court Divisions cannot overrule the Supreme Court in Amex, Sekisui, Atlas and CE Cebu Geothermal.

v. At best, Mirant and Aichi can only be applied prospectively.

vi. Retroactive application of Mirant and Aichi amounts to a denial of Petitioner's right to due process.

vii. Retroactive application of Mirant and Aichi amounts to unjust enrichment of Respondent CIR.

B. KEILCO adopts and repleads en toto the contents of its Memorandum dated 06 May 2010."

Petitioner asserts that in 2004, at the time petitioner filed an administrative claim and filed a petition for review, the prevailing rule was to file the petition before this Court within two years from the filing of the quarterly VAT returns. In support thereof petitioner relied on the various CTA decisions and argued that where a party relies in good faith on the earlier doctrines pronounced by an appellate court, a contrary doctrine pronounced by the latter can be applied prospectively. Petitioner insists that the Supreme Court affirms that the Aichi Case is neither mandatory nor jurisdictional, citing the cases of Commissioner of Internal Revenue vs. American Express International, Inc. [11], Commissioner of Internal Revenue v Sekisui Jushi Philippines, Inc,[12]

[11] G.R. No. 152609, June 29,2005.
[12] G.R. No. 149671, July 21,2006.

Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue[13], and Commissioner of Internal Revenue vs. CE Cebu Geothermal[14] which was allegedly affirmed in a Minute Resolution[15] dated 23 September 2009. Furthermore, petitioner argued that the Mirant Case [16] and Aichi Case [17] having been promulgated by the Supreme Court in Divisions cannot overrule the Supreme Court decisions in the cases cited by petitioner.

Petitioner claims that reliance in the controlling law as affirmed by Atlas Case[18] ripened into a property right which Mirant Case and Aichi Case cannot simply take away. Furthermore, petitioner claims that retroactive application of Mirant and Aichi would result in the unjust enrichment of respondent CIR.

We resolve to deny the petition.

The arguments raised by petitioner shall be jointly discussed.

[13] G.R. Nos. 141104 & 148763, June 8, 2007.
[14] CTA EB Nos. 426 & 427, May 29, 2009.
[15] G.R. Nos. 188640-41, September 23, 2009.
[16] Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), G.R. No. 172129, September 12, 2008.
[17] Commissioner of internal Revenue vs. Aichi Forging Company of Asia, Inc.,G.R. No. 184823, October 6, 2010.
[18] G.R. Nos. 141104 & 148763, June 8, 2007.

Petitioner based its right to claim refund under Section 112 of the NIRC as amended[19], and we quote:

> "Section 112. Refunds or Tax Credits of Input Tax. —
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> (A) Zero-rated or Effectively Zero-rated Sales. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
>
> (B) Capital Goods. — A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made.
>
> (C) Cancellation of VAT Registration. — xxx.
>
> (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. — In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying

[19] PRIOR TO REPUBLIC ACT NO. 9337-AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals. (Emphasis Supplied)

Apparently, the statutory period in claiming refund or tax credit with respondent CIR and appeal to this Court is provided by law. Consequently, we shall apply the abovementioned applicable law and the interpretations made by the Supreme Court on the law, specifically, the period within which refund or tax credit of input taxes shall be made and the period to appeal thereon. The Mirant Case and Aichi Case would be the applicable jurisprudence in the instant case for they squarely answer the issue pertaining to the statutory period in claiming input VAT refund on zero rated sales and the period to appeal thereon. Likewise, the Supreme Court is clear in both the Mirant Case and Aichi Case that Section 229 [20] of the NIRC, as amended does not apply to

[20] 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 proceedings 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.

refunds/credits of input VAT, such as the instant case. Thus, we find that the Former Second Division of this Court was correct when it ruled as follows:

> *"An examination of the facts surrounding the Mirant Case reveals that it did not create a new doctrine. Instead, it merely established the correct application of Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, as amended, which took effect on January 1, 1998. In adopting the Mirant Case, this Court, in effect, merely applied Section 112(A) of the NIRC of 1997, as amended, to the instant petition. The interpretation made by the Supreme Court in the Mirant Case constitutes part of the law as of the date it was originally passed. It is elementary that the interpretation placed by this Court upon a law constitutes part of the law as of the date it was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect. Clearly, there was actually no new doctrine that was retroactively applied by this Court in the assailed Decision.*
>
> *To reiterate the ruling of the Supreme Court in the case of Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), this Court hereunder quotes the pertinent part of the said Decision to wit:*
>
>> *"The above proviso 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."*
>
> *Verily, the ruling in the case of Mirant which set the reckoning of the two-year prescriptive period for filing claims for refund from the close of the taxable quarter when the sales were made applies in the present case.*

However, while this Court upholds the ruling of the Supreme Court in the case of Mirant, a closer study of the provisions of Section 112(A) of the NIRC, as amended, and of the very recent ruling of the Supreme Court in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., reveals that the ruling in the Mirant case in relation to Section 112(A) of the NIRC of 1997, as amended, apply only to the determination of the timeliness of the administrative claim for refund. Thus, a review of the Court's Decision as to the timeliness of the filing of the administrative and judicial claims for refund is deemed necessary The pertinent portion of the High Court's ruling in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. reads:

> *"xxxx 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.*
>
> ***The administrative claim was timely filed***
>
> *Bearing this in mind, we shall now proceed to determine whether the administrative claim was timely filed.*
>
> *XXX*
>
> *Applying this to the present case, the two-year period to file a claim for tax refund/credit for the period July 1, 2002 to September 30, 2002 expired on September 30, 2004. Hence, respondent's administrative claim was timely filed.*
>
> *XXX*
>
> *x x x Subsection (A) of the said provision (Section 112) 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.**" (Emphasis supplied)*

Petitioner claims for refund or issuance of tax credit certificate for its unutilized input Value-Added Tax (VAT) on its purchase of capital goods and services made in the four quarters of taxable year

2002. Applying the foregoing jurisprudence in relation to Section 112(A) of the NIRC of 1997, as amended, the reckoning date of the two-year prescriptive period for filing the administrative claim for tax refund commences from the close of the first, second, third and fourth taxable quarters of 2002 which are on March 31, 2002, June 30, 2002, September 30, 2002 and December 31, 2002, respectively.

xxx xxx xxx

xxx. On such basis, petitioner may only claim for refund in the administrative level for the first, second , third and fourth quarters of 2002 until March 31 , 2004, June 30, 2004, September 30, 2004 and December 31, 2004, respectively. It must be noted that the administrative claim for refund was filed on April 13, 2004. Evidently, petitioner's administrative claim for refund for the first quarter of the taxable year 2002 was filed out of time while the administrative claim for the second , third and fourth quarters of taxable year 2002 was accordingly filed within the two-year prescriptive period provided by law.

After determination of the timeliness of the filing of administrative claim for tax refund, this Court shall now proceed with the determination of the timeliness of the filing of the judicial appeal before this Court. xxx.

xxx xxx xxx

Significantly, in the same case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., the Supreme Court emphasized the mandatory nature of the periods provided in Section 112(D) [now Section 112 (C)] of the NIRC of 1997, as amended, to wit:

> *"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 CI R to CTA within 30 days.*
>
> *XXX*
>
> *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 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 for a specific period within which a taxpayer should appeal the decision or inaction of the CIR.** The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. **In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.***
>
> *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.)*

Taking into consideration the importance of the periods provided under Section 112(D) [now Section 112 (C)] of the NIRC of 1997, as amended, this Court has no recourse but to strictly apply the said provision in this case.

Accordingly, counting from the filing of the administrative claim, which presumably is the date when petitioner had submitted the complete documents supporting its claim, the Commissioner has one hundred twenty (120) days or until August 11, 2004 within which to decide on the said claim. After the lapse of the said period, without any receipt of a decision on its administrative claim, the said inaction shall be deemed a denial of the claim and such denial may be *appealed before this Court within thirty (30) days or until September 10, 2004. Nevertheless, petitioner filed its judicial claim on April 22, 2004, merely 9 days from the filing of the administrative claim. Obviously, petitioner prematurely filed the instant Petition without waiting for the lapse of the 120-day period. Thus, petitioner's non-observance of the periods provided under Section 112(0) [now Section 112 (C)] of the NIRC of 1997, as amended, by filing the instant Petition for Review on April 22 , 2004 would mean that this Court cannot take cognizance of the instant petition."*

Indeed, Supreme Court Decisions in the Mirant Case and Aichi Case serve as precedents in interpreting the period in claiming administrative refund and appeal therefrom to this Court. Petitioner's reliance in Commissioner of Internal Revenue vs. American Express International, Inc.[21], Commissioner of Internal Revenue v Sekisui Jushi Philippines, Inc, [22] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, [23] and Commissioner of Internal Revenue vs. CE Cebu Geothermal which was affirmed in a Minute Resolution[24] dated 23 September 2009, does not persuade us. Said cases cannot be given full weight. A perusal of the cases of Commissioner of Internal Revenue vs. American Express International, Inc.[25] and Commissioner of Internal Revenue vs. Sekisui

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[21] Supra. Note 13.
[22] Supra. Note 14.
[23] Supra. Note 15.
[24] Supra. Note 16.
[25] Supra. Note 13.

Jushi Philippines, Inc,[26] reveals that the period to claim refund and appeal was never raised as an issue. In the instant case, the very heart of the issue is the interpretation of the 120/30 period in Section 112(D) of the 1997 NIRC as amended (now subsection (C) of Section 112, as amended). Thus, the cases cited by petitioner cannot be considered as legal precedent regarding the interpretation of the period to claim refund and the period to appeal to this Court, specifically, the 120-30 day period in Section 112(D) of the 1997 NIRC (now subsection (C) of Section 112, as amended).

Significantly, the Atlas Case which harmonized Section 106 with the two-year prescriptive period for instituting a suit or proceeding for recovery of tax erroneously or illegally paid under the Tax Code of 1977 is no longer applicable due to the specific provision in Rep. Act No. 8424 which give the taxpayer thirty (30) days to appeal to this Court after receipt of the decision denying the claim or after the lapse of 120-day inaction of the CIR. Furthermore, petitioner cannot successfully invoke in its favor a Minute Resolution[27] of the Supreme Court which is

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[26] Supra. Note 14.
[27] Supra. Note 16.

not a binding a precedent considering that petitioner is not a party in that case[28].

Accordingly, the cases mentioned by petitioner cannot be said to be *stare decisis* in the instant case. Where the issue involved was not raised nor presented to the Court and the same was not passed upon by the Court in the previous case, the decision in the previous case is not *stare decisis* of the question presented[29]. Moreover, it is a well-settled rule that the law in force at the time of the occurrence of the cause of action is the applicable law[30], in this case the 1997 NIRC, as amended.

Thus, we find no merit on petitioner's arguments that the Mirant Case and Aichi Case having been promulgated by the Supreme Court in Divisions cannot overrule the Supreme Court cases cited by the petitioner which have ripened to a property right and they would result to respondent CIR's unjust enrichment.

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[28] Philippine Health Care Providers, Inc. vs. Commissioner of Internal Revenue, G.R. No. 167330. September 18, 2009.

[29] Office of the Ombudsman *vs.* Honorable Court of Appeals and Former Deputy Ombudsman for the Visayas Arturo C. Mojica, G.R. No. 146486, March 4, 2005.

[30] Benolirao v. Court of Appeals, G.R. No. 75968, 7 November 1991, 203 SCRA 338, 341, citing Joint Ministry of Health – MOLE Accreditation Committee for Medical Clinics v. Court of Appeals, G.R. No. 78254, 25 April 1991, 196 SCRA 263, 268; *Buyco* v. Philippine National Bank, 112 Phil. 588, 592 (1961); In re Will of *Riosa*, 39 Phil. 23, 27 (1918).

In fine, only the decisions of the Supreme Court establish jurisprudence or doctrines in this jurisdiction[31] and all courts including this Court must take their bearings from the decisions of the Supreme Court[32]. It is an established rule that actions for tax refund are in the nature of a claim for exemption and the law should be construed in *strictissimi juris* against the taxpayer. Concomitantly, application of the provisions pertaining to claim for refund or tax credit of input VAT as interpreted in the Mirant Case and Aichi Case should likewise be construed *strictissimi juris.*

WHEREFORE premises considered, the Petition for Review docketed as CTA EB No. 733 is **DISMISSED.** The Amended Decision dated February 18, 2011 of the Former Second Division of this Court in CTA Case No. 6966, is hereby **AFFIRMED.** No pronouncement as to costs.

SO ORDERED.

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

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[31] Commissioner of Internal Revenue vs. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals, G.R. No. 104151. March 10, 1995; Atlas Consolidated Mining and Development Corporation vs. Court of Appeals, Commissioner of Internal Revenue and Court of Tax Appeals, G.R. No. 105563. March 10, 1995.

[32] Systra Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 176290, September 21, 2007.

WE CONCUR:

(with Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(concurs with Presiding Justice Acosta's Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

(concurs with PJ Acosta's 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 among the members of the Court En Banc 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

KEPCO ILIJAN CORPORATION,
Petitioner,

CTA EB NO. 733
(CTA CASE NO. 6966)

Members:

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

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 06 2012 Apolinario 11:00 a.m.

x- x

DISSENTING OPINION

With all due respect to the view of the majority, I disagree with the dismissal of the Petition for Review merely on the ground that it was prematurely filed.

The pertinent dates are as follows:

Period Covered	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim	End of the 120-day period under Section 112 (D) [now Section 112(C)], NIRC	End of the 30-day period under Section 112 (D) [now Section 112(C)], NIRC
1ST to 4th Quarter, 2002	April 13, 2004	April 22, 2004	August 11, 2004	September 10, 2004

As correctly applied by the majority, an application for refund or tax credit over input taxes arising from zero-rated sales or effectively zero-rated sales is governed by Section 112(A) and (D) [now Section 112(C)] of the 1997 NIRC.

The foregoing provisions require that a claim for refund over excess input VAT arising from zero-rated or effectively zero-rated sales must be administratively filed within two (2) years from the close of the taxable quarter when the sales were made. There is also an indispensable requirement for the taxpayer to await the action or inaction of the Commissioner within a period of one hundred twenty (120) days before it can appeal to this Court its claim for refund on excess or unutilized input VAT arising from zero-rated or effectively zero-rated sales. The application of Sections 112(A) and (D) [now Section 112(C)] of the 1997 NIRC has already been established in the cases of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[1] and *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[2]

Following the provisions of Sections 112(A) and (D) [now Section 112(C)] of the 1997 NIRC, I agree with the Amended Decision of the Second Division that petitioner may only claim for refund in the administrative level for the first, second, third and fourth quarters of 2002 until March 31, 2004, June 30, 2004, September 30, 2004 and December 31, 2004, respectively. It appears that the claim for refund or issuance of a tax credit certificate of input VAT for the <u>first quarter of taxable year 2002 was administratively filed out of time</u> while the <u>administrative claim for the second, third and fourth quarters of taxable year 2002</u>

[1] G.R. No. 172129, September 12, 2008.
[2] G.R. No. 184823, October 6, 2010.

was filed within the two (2) year period, hence, compliant with Section 112(A) of the 1997 NIRC. The petitioner, however, failed to comply with the one hundred twenty (120) day period required to await the decision of the respondent as prescribed in Section 112(D) [now Section 112(C)] of the 1997 NIRC. Thus, petitioner prematurely filed the judicial claim of excess input VAT for the second, third and fourth quarters of taxable year 2002.

Nevertheless, I beg to differ from the view of the majority that the premature filing of a refund claim involving unutilized input VAT is jurisdictional. With all due respect, the premature filing of said claim is a violation of the doctrine of exhaustion of administrative remedies.

It is well settled that non-exhaustion of administrative remedies is not jurisdictional. It only renders the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[3] The premature invocation of 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.[4]

However, it appears that respondent failed to allege in her answer or in a motion to dismiss the premature filing of the case in Court. Thus, respondent waived said defense. Therefore, the Court must aptly acquire jurisdiction to determine petitioner's claim of unutilized input VAT for the second, third and fourth quarters of taxable year 2002.

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[3] *Carale vs. Abarintos,* G.R. No. 120704, March 3, 1997.
[4] *Paat vs. Court of Appeals,* G.R. No. 111107, January 10, 1997.

In view thereof, I dissent on the majority's dismissal of petitioner's claim for refund or issuance of a tax credit certificate representing its unutilized input VAT for the second, third and fourth quarters of taxable year 2002 since the Court may aptly take cognizance of the case for failure of respondent to allege the defense of lack of cause of action.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

KEPCO ILIJAN CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 733
(CTA Case No. 6966)

Present:

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

Promulgated:

SEP 06 2012 11:00 a.m.

x---x

DISSENTING OPINION

BAUTISTA, J.:

With all due respect to my esteemed colleagues, I must dissent on the decision made by the Court.

The Court dismissed the Petition for Review filed by petitioner on March 9, 2011, and thereby affirming the Amended Decision dated February 18, 2011. The Amended Decision dismissed the claim on the ground of lack of jurisdiction for prematurely of filing the judicial, claim a mere nine (9) days from filing of the administrative claim, based on Section 112(C)[1] of the 1997 National Internal Revenue Code ("NIRC").

At the onset, claims for refund or tax credit of VAT on zero-rated or effectively zero-rated sales transactions filed prior to the promulgation of the *Mirant case* on September 12, 2008 should follow the doctrine set in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* ("*Atlas case*").[2]

It should be recalled that prior to the *Mirant case* and at the time of filing of the claim for refund by Kepco, the controlling doctrine was that enunciated in the *Atlas case*. Judicial decisions become part of the law of the land, however, the Court should keep in mind the principle behind Article 4 of the New Civil Code which states that "laws shall have no retroactive effect unless the contrary is provided," the same provision expressed in the familiar legal maxim *lex prospicit, non respicit*, the law looks forward not backward.[3]

This principle was applied in the case of *Rolando Santos v. Sandiganbayan and the People of the Philippines*,[4] citing *Co v. Court of Appeals*,[5] wherein the Supreme Court ruled that:

> In accordance with Article 8 of the Civil Code providing that "(j)udicial decisions applying or interpreting the laws or the Constitution shall form

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[1] As amended by Republic Act No. 9337.
[2] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[3] Spouses Gauvain and Bernardita Benzonan v. Court of Appeals, G.R. No. 97973, January 27, 1992, 205 SCRA 515, *citing Francisco v. Certeza, No. L-16849, November 29, 1961, 3 SCRA 565.*
[4] G.R. Nos. 71523-25. December 8, 2000, 347 SCRA 386, 420.
[5] G.R. No. 100776. October 28, 1993, 277 SCRA 444, 448-449 [1993].

> a part of the legal system of the Philippines," and Article 4 of the same Code stating that "(l)aws shall have no retroactive effect, unless the contrary is provided," the principle of prospectivity of statutes, original or amendatory, shall apply to judicial decisions, which, although in themselves are not laws, are nevertheless evidences of what the law means.

In *Chicot County Drainage District v. Baxter States Bank*,[6] the High Court also discussed why the "principle of absolute retroactive invalidity"[7] has been negated, to wit:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those who have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[8]

Again in the case of *Columbia Pictures, Inc., et al. v. Court of Appeals, et al.*,[9] the Supreme Court ruled that:

> The reasoning behind *Senarillos vs. Hermosisima* 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, is all too familiar. Such judicial doctrine does not amount to the passage of a new law but consists merely of a construction or

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[6] 308 US 371, 374 [1940].
[7] Felicisimo Rieta v. People, G.R. No. 147817, August 12, 2004, 436 SCRA 273.
[8] Albino S. Co v. Court of Appeals, *et al.*, G.R. No. 100776, October 28, 1993, 277 SCRA 444, *citing Chicot County Drainage District v. Baxter States Bank, supra note 6.*
[9] G.R. No. 110318, August 28, 1996, 261 SCRA 144.

interpretation of a pre-existing one, and that is precisely the situation obtaining in this case.

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

Therefore, applying the doctrines laid down in the aforecited cases, the prescriptive period applicable herein would be the then well-established doctrine adopted by this Court in *Atlas case*, wherein the 2-year prescriptive period is reckoned not from the close of the pertinent quarter, but from the date of filing of the VAT return.

In the case of *JIDECO Manufacturing Philippines, Inc. v. CIR*,[10] the Court *En Banc* affirmed the matter as follows:

As we have already elucidated in our Resolution dated July 20, 1998 in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5296,* the two-year prescriptive period for the filing of claims for VAT refund should be reckoned from the date of filing of the corresponding quarterly VAT returns in order to harmonize the provisions of Section 112(B) of the NIRC of 1997 with Sections 114(A) and 229 of the same Code.

xxx xxx xxx

In the cases of *Commissioner of Internal Revenue vs. TMX Sales, Inc. and the Court of Appeals, G.R. No. 83736, dated January 15, 1992 and ACCRA Investments Corporation vs. Commissioner of Internal Revenue, 204 SCRA 957,* the Supreme Court held that the two (2)-year period should be counted

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[10] CTA Case No. 6552, September 16, 2004.

> from the filing of the final income tax return, because it is only during that date that the exact tax liability or refundability of the tax can be determined. In the same manner, it is only after the filing of the quarterly VAT return that we can determine the VAT liability or refundability of VAT. It should be noted that the basic requirement is that VAT refund can only be granted to the extent that the input taxes have not been applied against output tax. All these matters can only be determined if a return is filed. It is logical therefore, that the two-year period should not immediately be counted from the close of the quarter but from the prescribed date of filing of the VAT return.[11]

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

Period	Filing of Quarterly VAT Return
1st Quarter	April 25, 2002
2nd Quarter	July 25, 2002
3rd Quarter	October 25, 2002
4th Quarter	January 27, 2003

In addition, petitioner filed its administrative claim on April 13, 2004, while the judicial claim was filed on April 22, 2004. Clearly, applying the *Atlas case*, both the administrative and judicial claims were filed within the two-year period from the date of actual filing of the Quarterly VAT Returns.

It is important to point out 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

[11] CTA EB No. 53, June 7, 2005.

> 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."

I maintain that the judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC, wherein 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 Commissioner of Internal Revenue shall decide on the claim, or after the receipt of the decision denying the same, is directory and permissive, and not mandatory nor jurisdictional, as long as it is made within the two (2)-year prescriptive period prescribed under Section 229 of the same Code.[12]

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

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.[13] It gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[14] 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:

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[13] 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.
[14] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

> "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, 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,[15] for claims for refund or

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

tax credit, both in the administrative and judicial fora must be filed within the 2-year period,[16] and beyond that period, the taxpayer can no longer appeal to this Court.[17]

Considering the factual circumstance in this particular case, I find that both the administrative and judicial claims to have been filed within the periods prescribed under the law.

Accordingly, I vote to **GRANT** the Petition for Review dated March 9, 2011, subject to the verification of its input VAT for the taxable year 2002.

LOVELL R. BAUTISTA
Associate Justice

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[16] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[17] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.