REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PROCTER & GAMBLE ASIA, PTE. LTD.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 746
(C.T.A. CASE NOS. 7523 and 7556)

Present:

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

Promulgated:

DEC 2 0 2011 aistpolinario 9:00 a.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Procter & Gamble Asia, Pte. Ltd. (hereafter "petitioner") under *Section 11 of RA 9282,* in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks to reverse and set aside the Decision dated January 17, 2011 and Resolution

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dated March 15, 2011 rendered by the First Division of this Court in C.T.A. Case Nos. 7523 and 7556, entitled "Procter & Gamble Asia, Pte. Ltd. vs. Commissioner of Internal Revenue," the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, the instant Petitions for Review are hereby **DISMISSED** for being prematurely filed.
>
> **SO ORDERED**."
>
> "**WHEREFORE**, premises considered, petitioner's "Motion for Reconsideration" is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

THE PARTIES

Petitioner, Procter & Gamble Asia, Pte. Ltd. ("P&G") is a foreign corporation duly organized and existing under the laws of Singapore and is maintaining a Regional Operating Headquarters in the Philippines at 18th Floor, Petron Megaplaza, 358 Sen. Gil Puyat Avenue, Makati City, in accordance with the Certificate of Registration and License No. A199913443 issued by the Securities and Exchange Commission. It provides management, marketing, technical and financial advisory and other qualified services to related companies. Petitioner is registered with

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the Bureau of Internal Revenue (BIR) as a Value Added Tax (VAT) entity on October 08, 1999, under Certificate of Registration No. OCN 9RC0000071787.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue ("CIR"), with the authority, among others, to decide, approve and grant tax credit and/or refund, and holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

The antecedent facts, as summarized by the First Division of this Court, are hereunder adopted, to wit:

> "For the periods covering the quarters from July to September 2004, and from October to December 2004, petitioner allegedly rendered services to its affiliates in the Philippines and abroad pursuant to its Service Agreements. For its services abroad, petitioner was paid in the form of foreign currency, which was allegedly accounted for in accordance with the rules of the *Bangko Sentral ng Pilipinas* (BSP).
>
> During the same period, petitioner purchased goods and services from VAT-registered suppliers and service providers, supported by invoices and official receipts, with input VAT in the following amounts:

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Period	Goods	Input VAT	Services	Input VAT
July to September	P8,836,426.36	P883,642.64	P291,883,815.09	P29,188,381.51
October to December	P3,676,074.12	P367,607.41	P273,651,709.60	P27,365,170.96

On the belief that it is entitled to a refund of its alleged unutilized input VAT, petitioner filed applications and letter-requests with the BIR Revenue District Office (RDO) No. 49 for the tax refund or tax credits of its input tax attributable to its zero-rated sales, covering the periods of July to September 2004 and October to December 2004, on the following dates:

Period of claim	Filing date of Administrative Claim	Input TAX
July to September	September 26, 2006	P17,117,309.41
October to December	December 13, 2006	P15,589,137.30

As respondent has not yet issued any decision regarding its refund claim, petitioner filed the instant Petitions for Review for the periods covering July to September 2004 and October to December 2004 on the following dates:

CTA case No.	Period of claim	Filing date of Petition for Review	Amount of Claim
7523	July to September	October 2, 2006	P17,117,309.41
7556	October to December	December 29, 2006	P15,589,137.30

On January 17, 2011, the First Division rendered a decision dismissing the Petition for Review for having been prematurely filed.

On January 27, 2011, petitioner filed a "Motion for Reconsideration" of the Decision dated January 17, 2011.

On March 15, 2011, the First Division denied petitioner's "Motion for Reconsideration" for lack of merit.

On March 30, 2011, petitioner filed the instant Petition for Review before this *Court En Banc*, raising the following:

ISSUES

I

WHETHER OR NOT THE FIRST DIVISION FAILED TO APPRECIATE ARTICLE VIII, SECTION 4(3) OF THE CONSTITUTION.

II

WHETHER OR NOT THE DOCTRINE LAID DOWN IN THE AICHI CASE THAT THE 120-30 DAY RULE IS MANDATORY HAS BEEN EFFECTIVELY ABANDONED IN THE CASES OF HITACHI GLOBAL STORAGE TECHNOLOGIES PHILS. CORP VS COMMISSIONER OF INTERNAL REVENUE, G.R. NO. 174212, DATED OCTOBER 20, 2010, SILICON PHILIPPINES, INC. VS COMMISSIONER OF INTERNAL REVENUE, G.R. NO. 172378, DATED JANUARY 17, 2011, AND KEPCO PHILIPPINES CORPORATION VS COMMISSIONER OF INTERNAL REVENUE, G.R. NO. 179961, DATED JANUARY 31, 2011.

III

WHETHER OR NOT THE FIRST DIVISION ERRED IN APPLYING THE DOCTRINE LAID DOWN IN THE AICHI CASE TO THE INSTANT CASE CONSIDERING THAT THE FACTUAL ANTECEDENTS INVOLVED ARE NOT IDENTICAL.

IV

WHETHER OR NOT THE FIRST DIVISION ERRED IN GIVING RETROACTIVE APPLICATION OF THE DOCTRINE LAID DOWN IN THE AICHI CASE.

V

WHETHER OR NOT THE DECISION OF THE FIRST DIVISION CONTRADICTS THE DOCTRINE THAT SUBSTANTIAL JUSTICE, EQUITY AND FAIR PLAY PREVAIL OVER TECHNICALITIES AND LEGALISM.

VI

WHETHER OR NOT THE FIRST DIVISION FAILED TO CONSIDER THAT WHILE JURISDICTION IS CONFERRED BY LAW, ESTOPPEL SETS IN WHEN A PARTY PARTICIPATES IN ALL STAGES OF THE CASE BEFORE CHALLENGING THE JURISDICTION OF THE COURT.

VII

WHETHER OR NOT THE 120-30 DAY RULE MENTIONED IN SECTION 112(D), NOW SECTION 112(C) OF THE NIRC OF 1997, AS AMENDED, IS DIRECTORY OR PERMISSIVE, NOT MANDATORY.

Without necessarily giving due course to the Petition for Review, on April 8, 2011, We ordered respondent CIR to file her comment, not a motion to dismiss, within ten (10) days from notice.

On May 13, 2011, respondent CIR filed her "Comment/Opposition (to petitioner's Petition for Review)".

On May 23, 2011, petitioner filed its Reply to respondent CIR's Comment/Opposition.

On June 30, 2011, the case was deemed submitted for decision.

THE COURT *EN BANC'S* RULING

The petition has no merit.

As regards the first issue, petitioner invokes *Article VIII, Section 4(3) of the 1987 Constitution,* which provides that no doctrine or principle of law laid down by the Supreme Court in a decision rendered en banc or in division may be modified or reversed except by the court sitting en banc. Petitioner contends that the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010,* upon which the First Division of this Court mainly anchored its decision dismissing the instant case, was decided by a

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Supreme Court Division; the case of Aichi is not authoritative enough to overturn the long standing ruling of the Supreme Court in numerous cases that the two-year prescriptive period under *Section 229 of the NIRC of 1997, as amended,* is controlling; therefore, the Aichi case cannot be regarded as a judicial precedent on the matter for want of constitutional compliance.

We do not agree.

It bears stressing that for *Article VIII, Section 4(3) of the 1987 Constitution* to apply, there must be an existing doctrine or principle of law laid down by the Supreme Court in a decision rendered en banc or in division which the Supreme Court sitting *En Banc*, modifies or reverses. Prior to the promulgation of the Aichi case, there was no Supreme Court decision construing or interpreting the pertinent provisions of *Section 112 of the NIRC of 1997, as amended.* The ruling in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, 524 SCRA 73,* which held that the taxpayer may appeal to the CTA before the lapse of the two (2) year prescriptive period pursuant to *Section 229 of the NIRC of 1997, as amended,* which the petitioner invokes, is an interpretation of the 1977 Tax Code, and not of the *NIRC of 1997, as amended.* Considering further that *Section 112(C) of the NIRC of 1997, as amended,* regarding the period to appeal judicial claims for refund or tax credit certificate of input tax, which is "within thirty (30) days from the expiration of the 120 day period for the CIR to decide or thirty (30) days from the receipt of the decision denying the claim," has been effective and existing as early as January 1, 1998. The Aichi Case, therefore, did not overturn any existing law. Thus, there being no existing doctrine or principle of law laid down by the Supreme Court in a decision rendered en banc or in division that was reversed or modified, *Article VIII, Section 4(3) of the 1987 Constitution* will not apply.

Furthermore, petitioner cannot rely on *Section 229 of the NIRC of 1997, as amended*, as it is already settled that *Section 229* is not applicable to claims for VAT refund [*CIR v. Mirant Pagbilao Corporation (Formely Southern Energy Quezon, Inc.), 565 SCRA 154]*. Thus, the period of two (2) years is applicable only to administrative claims for VAT refund, pursuant to *Section 112(A)* of the same Code, and not to appeals made to

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the CTA.

As regards the second issue, petitioner's contention that the doctrine laid down in the Aichi case stating that the 120-30 day period is mandatory has been abandoned by the Supreme Court in the cases of Hitachi Global Storage Technologies Phils. Corp. vs. CIR, G.R. No. 174212, October 20, 2010; Silicon Philippines, Inc. vs. CIR, G.R. No. 172378, January 17, 2011, and Kepco Philippines, Corp. vs. CIR, G.R. No. 179961, January 31, 2011, is likewise devoid of merit. A careful reading of the decisions in said cases shows that the Supreme Court did not categorically abandon the doctrine laid down in the Aichi case. The said three cases were decided by the Supreme Court sitting in Division. Pursuant to *Article VIII, Section 4(3) of the 1987 Constitution,* no doctrine or principle of law laid down by the Supreme Court in a decision rendered En Banc or in Division may be modified or reversed except by the Court sitting En Banc.

As regards petitioner's contention that the Aichi case should not be applied to this case following the principle of prospectivity of statutes, it must be emphasized that in the Aichi case, the Supreme Court merely interpreted the provisions of *Section 112 of the NIRC of 1997, as amended.* Considering that *Section 112 of the NIRC of 1997, as amended,* is the law in force and applicable to petitioner's claim for refund for the period covering the third and fourth quarters of 2004, it cannot claim that it is legally impossible to comply with the same, and that the Aichi case was still non-existent at the time it filed its Petition for Review. It cannot be mistaken that the law itself is very clear and unambiguous. Hence, we cannot disregard the letter of the law on the pretext of pursuing its spirit *(Tanada and Macapagal v. Cuenco, 103 Phil. 1051).*

As to petitioner's contention that the retroactive application of the Aichi case would impair its vested rights and produce substantial inequitable results and grave injustice to it, basic is the rule that one does not have a vested right in procedural rules.

Moreover, the right of petitioner to refund of unutilized input VAT is a mere statutory privilege and not a vested right. It must be stressed that recovery of excess input VAT is a refund which is in the nature of an exemption. There is a parity between tax refund and tax exemption when the former is based either on a tax exemption statute or tax refund statute.

Clearly, a claim for tax refund may be based on statute granting tax exemption or tax refund. In such case, the rule of strict interpretation against the taxpayer is applicable, as the claim for refund partakes of the nature of an exemption, a legislative grace, which cannot be allowed unless granted in the most explicit and categorical language. The taxpayer must show that the legislature intended to exempt him from the tax by words too plain to be mistaken *(CIR vs. Fortune Tobacco Corporation, 559 SCRA 160).*

Settled is the rule that the right to appeal is not a natural right or a part of due process, as the same is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law. The party who seeks to avail of the same must comply with the requirements of the law. Failing to do so, leads to the loss of the right to appeal *(Producers Bank of The Phil. v. Court of Appeals, 381 SCRA 185).*

Finally, petitioner's contention that the 120-30 day rule provided in *Section 112(c) of the NIRC of 1997, as amended,* is directory and permissive in nature and operates to confer discretion is likewise devoid of merit.

In the Aichi case, the Supreme Court ruled that the 30-day period after the expiration of the 120-day period fixed by law for the Commissioner to act on the claim for refund is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction to entertain the appeal. Thusly:

> "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". (Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., *supra*).

Pursuant to the above ruling of the Supreme Court, the 120-30 day period is not merely directory, but mandatory and it is beyond the power of the courts to extend or shorten the same. As such, the phrase "may appeal" does not mean that the judicial recourse within 30 days after the lapse of the 120-day period is directory and permissive, and not mandatory or jurisdictional.

Finding no reversible error, we affirm the assailed Decision dated January 17, 2011 and Resolution dated March 15, 2011 rendered by the First Division of this Court.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

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

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
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

PROCTER & GAMBLE ASIA, PTE. LTD.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 746
(CTA Case Nos. 7523 & 7556)

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

Promulgated:
DEC 2 0 2011 9:00 a.m.

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DISSENTING OPINION

BAUTISTA, J.:

This Court should bear in mind that there is only one Supreme Court from whose decision all other courts should take their bearings,[1] thus, this Court has the duty to obey the decisions of the Supreme Court and render obeisance to its status as the apex of the hierarchy of courts.[2]

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[1] Commission on Higher Education *v.* Atty. Felina S. Dasig, G.R. No. 172776, December 17, 2008, 574 SCRA 227, *citing Conducto v. Judge Monzon, 353 Phil. 796, 813 (1998); Tahanan Development Corporation v. Court of Appeals, 203 Phil. 652, 690 (1982).*

[2] *Ibid., citing Albert v. Court of First Instance of Manila, No. L-26364, May 29, 1968, 23 SCRA 948, 961.*

Nonetheless, this Court should not decide a case by merely adhering to precedence; idolatrous reverence for precedent, simply as precedent, no longer holds true, for more important than anything else is that the Court should be right.[3]

Therefore, the Court cannot merely impose a ruling that was yet to be enunciated at the time a claim was lodged in Our forum.

Before the Supreme Court even reckoned the two (2)-year prescriptive period from the close of the pertinent quarter,[4] this Court, in not a few instances, ruled that the date of filing of the relevant return[5] is the determinative factor.

Taking into consideration that a taxpayer-claimant cannot observe a prescriptive period that has yet to be enunciated by the Supreme Court at the time it filed its claim, I, therefore, bring forth no reason to rule that the Petitions for Review filed with the First Division of this Court ("Court in Division") were prematurely filed.

When petitioner filed its claims in the administrative level on September 26, 2006 and December 13, 2006, and the Petitions for Review with the Court in Division on October 2, 2006, docketed as CTA Case No. 7523, and on December 29, 2006, docketed as CTA Case No. 7556, the then prevailing doctrine, is that, the reckoning of the two (2)-year prescriptive period is from the filing of the pertinent return.

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[3] Philippine Trust Company and Smith, Bell and Co. *v.* Mitchell, 59 Phil. 30, 36.
[4] Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[5] Atlas Consolidated Mining and Development Corporation *v.* Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.

However, during the pendency of the case at bench, the Supreme Court issued a ruling wherein the two (2)-year period is reckoned, not from the filing of the return, but from the close of the taxable quarter when the sales were made.

Albeit I agree that the said ruling is in accordance with the letter and spirit of Section 112 of the 1997 National Internal Revenue Code ("NIRC"), as amended, it would be the height of injustice to impose a new ruling wherein after a taxpayer-claimant had faithfully relied and complied therein, this Court will only nullify the same on the basis of the so-called "adherence to precedence."

Even the taxpayer-claimant itself could not have foreseen that after it had filed its claims before the administrative and judicial *fora*, a subsequent ruling, either modifying or overruling a previous one, would be issued that would put to naught its claims.

Prior determinations deemed to have finality and acted upon accordingly, demands examination. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects. It may have consequences which cannot just be ignored. Thus, an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[6]

For emphasis, the administrative claims filed on September 26, 2006 and December 13, 2006, and the Petitions for Review with the Court in Division on October 2, 2006, docketed as CTA Case No. 7523, and on December 29, 2006, docketed as CTA Case No. 7556, were made *before* the Supreme Court enunciated the

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[6] 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, 308 US 371, 374 [1940].*

reckoning of the two (2)-year prescriptive period from the close of the taxable quarter when the pertinent sales were made.

Further, the use of the word *"may"* in Section 112(C) of the 1997 NIRC, as amended, indicates that the judicial recourse within thirty (30) days after the lapse of the one hundred twenty (120)-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is within the two (2)-year prescriptive period under Sections 112[7] and 229[8] of the 1997 NIRC.[9] Therefore, 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 with this Court.[10]

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[7] SEC. 112. *Refunds or Tax Credits of Input Tax.* –

(A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *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.

[8] 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.

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

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

Consistent with the foregoing, I find the administrative and judicial claims correspondingly filed.

Accordingly, I vote that the Petition for Review, claiming for refund or issuance of tax credit certificate attributable to zero-rated sales covering the periods from July to September 2004 and October to December 2004, be **GIVEN DUE COURSE**.

LOVELL R. BAUTISTA
Associate Justice