REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PANAY POWER CORPORATION,
Petitioner,

C.T.A. EB CASE No. 666
(C.T.A. Case Nos. 7231 & 7296)

- versus-

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 24 2011 ArApolinario 2:50 p.m.

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DECISION

COTANGCO-MANALASTAS, *J.*:

This is an appeal by way of *Petition for Review*[1] of the *Decision*[2] and *Resolution*[3] promulgated by the Former Second Division on April 28, 2010 and July 22, 2010, respectively, filed by Panay Power Corporation on August 25, 2010 pursuant to *Section 18 of Republic Act (R.A.) No. 1125, as amended by Section 11 of R.A. No. 9282, and Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA).* Quoted hereunder are the pertinent portions of the challenged *Decision* and *Resolution*:

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[1] *Rollo*, pp. 1-43.
[2] *Rollo*, pp. 45-60, *Panay Power Corporation vs. Commissioner of Internal Revenue*, CTA Case Nos. 7231 and 7296, April 28, 2010.
[3] *Rollo*, pp. 62-68, *Panay Power Corporation vs. Commissioner of Internal Revenue*, CTA Case Nos. 7231 and 7296, July 22, 2010.

Decision dated April 28, 2010:

> "As to its judicial claim, records show that in C.T.A. Case No. 7231 for the first quarter of 2003, petitioner filed the Petition for Review on April 22, 2005, and in C.T.A. Case No. 7296 for the second quarter of 2003, petitioner filed the Petition for Review on July 22, 2005. Evidently, petitioner's judicial claim for refund/issuance of a TCC for its unutilized input VAT for the first and second quarters of calendar year 2003 was filed beyond the prescriptive period. Petitioner, therefore, is barred from claiming refund or issuance of a TCC of its input VAT for the first and second quarters of 2003 in the aggregate amount of P8,764,550.30 due to prescription.
>
> In view of the foregoing discussion, the Court finds it no longer necessary to discuss petitioner's compliance with the other requisites for refund of input taxes on its domestic purchases of taxable goods and services attributable to its zero-rated sales.
>
> **WHEREFORE**, premises considered, the above-captioned Petitions for Review are hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED**.
>
> **SO ORDERED**."

Resolution dated July 22, 2010:

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

Petitioner, respectfully prays that this Court reverse and set aside the assailed *Decision* and *Resolution*, and thereafter issue a resolution finding that the claim of petitioner has not yet prescribed and granting petitioner's claim for refund or issuance of a tax credit certificate (TCC) in the total amount of P8,764,550.30 representing its unutilized input Value Added Tax (VAT) incurred from domestic purchases of taxable goods and services attributable to its zero-rated sales of electricity for the first (1st) and second (2nd) quarters of taxable year 2003.

ANTECEDENT FACTS

The factual milieu of the case, as succinctly recited by the CTA Former Second Division, is hereunder reproduced:

> "On April 23, 2003, petitioner filed its quarterly VAT return for the first quarter of taxable year 2003, which reflected an (sic) excess or unutilized input VAT credits of P5,025,430.46.
>
> On July 25, 2003, petitioner filed its quarterly VAT return for the second quarter of taxable year 2003, which reflected an (sic) excess or unutilized input VAT credits of P3,739,119.84.
>
> The amounts of P5,025,430.46 and P3,739,119.84 for the first and second quarters of 2003, respectively, represent accumulated input VAT on petitioner's domestic purchases of taxable goods and services and importation of goods, which purchases and importation are all attributable to its zero-rated sale of power generation services. These input taxes remain unutilized.
>
> On December 22, 2004, petitioner filed an administrative claim for refund of unutilized excess input VAT in the total amount of P18,002,410.37 for the four (4) quarters of CY 2003 with the BIR Revenue District Office No. 043.
>
> Since respondent has not acted on petitioner's administrative claim for refund, petitioner elevated its claim before this Court by way of two separate Petitions for Review, docketed as C.T.A. Case Nos. 7231 and 7296.
>
> C.T.A. Case No. 7231
>
> In his Answer, respondent alleged by way of special and affirmative defenses:
>
> "6. The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;

8. The grant of a claim for refund [is] tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;

9. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

C.T.A. Case No. 7296

In his Answer, respondent alleged the following:

"2. He SPECIFICALLY DENIES the allegations in paragraphs 1, 3, 4, 5, 10, 11 and 12 of the petition for lack of knowledge or information sufficient to form a belief as to the truth thereof;

3. He SPECIFICALLY DENIES the allegations in paragraphs 6, 7, 8, 9, 13 and 14 of the petition for being, as a whole, mere opinions, gratuitous assertions and erroneous conclusions or interpretations of fact and/or the law, the truth of the matter being those stated hereunder;

4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;

5. The amount of P3,739,119.84 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of goods and services for the second quarter of 2003 is not properly documented;

6. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

7. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the 1997 Tax Code on the prescriptive period for claiming tax refund/credit;

8. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and as such, they are looked upon with disfavor (Western Minolco Corporation vs. Commissioner of Internal Revenue, 124 SCRA 1211)."

On October 5, 2005, petitioner filed a Motion for Consolidation, praying for the consolidation of C.T.A. Case No. 7296 with C.T.A. Case No.

7231, the case bearing the lower docket number, which the Court granted in a Resolution dated December 7, 2005.

Petitioner presented Cherry Liez Rafal, Emmanuel Mendoza, Reymonda Aida Obrero and Ceara Cecilio, as witnesses, and documentary evidence, marked as Exhibits "A" to "LLL", inclusive of their submarkings, which were all admitted by the Court.

On December 8, 2008, counsel for respondent manifested that he has no witness to present, and he is submitting the case for decision based on the pleadings.

Both parties were ordered to file their simultaneous memoranda, within thirty (30) days from December 8, 2008, afterwhich, the case shall be deemed submitted for decision.

Petitioner having filed its Memorandum on January 7, 2009, without respondent's Memorandum, the case was deemed submitted for decision on June 22, 2009."

The Ruling of the Court in Division

The Court in Division denied the petition, applying the ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*[4] ("*Mirant* case"), where it was held that the two-year prescriptive period provided in Section 112(A) of the NIRC of 1997, *as amended*, should be reckoned from the close of the taxable quarter when the sales were made and not from the payment of the tax, the Court *a quo*

Listed below are the dates pertinent to petitioner's claim for refund, as follows:

Period (2003)	***Close of Taxable Quarter***	***Last Day for Filing the Claim***		***Administrative Claim filed***	***Judicial Claim filed***
1st Quarter	March 31, 2003	March 31, 2005		December 22, 2004	April 22, 2005
2nd Quarter	June 30, 2003	June 30, 2005			July 22, 2005

Based on the table above, the Court *a quo* held that petitioner's administrative claim for refund or issuance of a TCC for its unutilized input VAT for the four (4)

[4] G.R. No. 172129, September 12, 2008.

quarters of 2003 filed on December 22, 2004 was well within the prescriptive period. However, it was ruled that petitioner's judicial claims for the 1st and 2nd quarters of 2003 were filed beyond the prescriptive period, seeing that the date of filing of the judicial claims were beyond the "*Last Day for Filing the Claim*" referred to above or beyond two years from the close of the taxable quarter when the sales were made as provided in Section 112(A) of the NIRC of 1997, *as amended*.

Relevant portion of the assailed *Decision* is quoted for ready reference:

> "From the foregoing, it is clear that the two-year prescriptive period provided in Section 112 (A) of the NIRC of 1997, as amended, should be reckoned not from the payment of the tax, but from the close of the taxable quarter when the sales were made. Applying the aforesaid ruling of the Supreme Court and the provision of Section 112 (A) of the NIRC of 1997, as amended, the following are the pertinent dates to petitioner's claim for refund:

Period (2003)	Close of Taxable Quarter	Last Day for Filing the Claim
1st Quarter	March 31, 2003	March 31, 2005
2nd Quarter	June 30, 2003	June 30, 2005

> Records show that petitioner filed its administrative claim for refund or issuance of a TCC for the four (4) quarters of 2003 on December 22, 2004, which is well within the prescriptive period.
>
> As to its judicial claim, records show that in C.T.A. Case No. 7231 for the first quarter of 2003, petitioner filed the Petition for Review on April 22, 2005, and in C.T.A. Case No. 7296 for the second quarter of 2003, petitioner filed the Petition for Review on July 22, 2005. Evidently, petitioner's judicial claim for refund/issuance of a TCC for its unutilized input VAT for the first and second quarters of calendar year 2003 was filed beyond the prescriptive period. Petitioner, therefore, is barred from claiming refund or issuance of a TCC of its input VAT for the first and second quarters of 2003 in the aggregate amount of P8,764,550.30 due to prescription."

Petitioner filed a Motion for Reconsideration on May 14, 2010. However, the Court *a quo* found no merit in the motion, thus, denied the same for lack of merit in a *Resolution*[5] dated July 22, 2010.

Aggrieved, petitioner filed the instant *Petition for Review*[6].

On September 14, 2010, the Court *En Banc* ordered respondent Commissioner of Internal Revenue (CIR) to file her comment within ten (10) days from receipt of the Resolution.[7]

In a Resolution dated October 26, 2010, the parties were ordered to submit their respective Memorandum within a non-extendible period of thirty (30) days from receipt thereof, considering that respondent failed to file her Comment within the prescribed period.[8]

For failure of respondent CIR to file her Memorandum, and it appearing that petitioner already filed its Memorandum on December 2, 2010, the case was submitted for decision on January 19, 2011.[9]

In response to respondent's Comment, petitioner filed its Reply (To Respondent's Comment)[10] on November 4 2010.

ISSUES

The foregoing account as revealed by the records of this case leads this Court to resolve the following controversies:

I. Whether this Court through its Former Second Division erred in denying petitioner's claim for refund or issuance of a TCC on the ground of prescription.

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[5] *Supra* Note 3.
[6] *Supra* Note 1.
[7] *Rollo*, pp. 103-104.
[8] *Rollo*, pp. 107-108.
[9] *Rollo*, pp. 181-182.
[10] *Rollo*, pp. 89-98.

II. Whether petitioner is entitled to refund or issuance of a TCC in the amount of P8,764,550.30 representing its unutilized input VAT incurred from its domestic purchases of taxable goods and services attributable to zero-rated sales of electricity for the 1st and 2nd quarters of calendar year (CY) 2003.

Arguments of Petitioner

In this present Petition for Review, petitioner maintains that its claim for refund or issuance of a TCC on unutilized input VAT has not yet prescribed. In support of the said claim, petitioner argues that: the ruling of the Supreme Court in the *Mirant* case does not apply in the instant case; it is the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*[11] ("*Atlas* case"), where it was held that the two-year prescriptive period for filing the application for refund/credit of input VAT on zero-rated sales should be counted from the date of filing of the quarterly VAT return and not from the close of the quarter when the zero-rated sales were made, which should be applied; it should not be a sufficient argument that the *Atlas* case and the *Mirant* case have different doctrines on the mere basis that they were decided under different Tax Codes, especially so when the wordings of the provisions themselves are essentially similar; that to start the counting of the two-year period from April 1, 2003 (for the 1st quarter) and from July 1, 2003 (for the 2nd quarter) would in effect be denying petitioner the full benefit of the two-year period, because petitioner could not have filed its claim from April 1, 2003 to April 22, 2003 (for the 1st quarter) and from July 1, 2003 to July 24, 2003 (for

[11] G.R. No. 141104 & 148763, June 8, 2007.

the 2nd quarter) since the necessary information for the filing of the claims were not yet available during those periods.

In addition to the contention that its claim has not yet prescribed, petitioner asserts that the *Mirant* case did not overturn the doctrine enunciated by the Supreme Court in the *Atlas* case pursuant to Section 4(3) of Article VIII of the 1987 Constitution where it is provided that doctrines laid down by the High Court in a decision rendered en banc or in division may be modified or reversed only by a decision of the High Court sitting en banc; that granting for the sake of argument that the *Mirant* case overruled the *Atlas* case and is now the prevailing doctrine, the same should be applied prospectively.

Alternatively, petitioner interposed the principle enunciated in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[12] ("*Aichi* case") which states that the two-year prescriptive period applies to the administrative claim and not the judicial claim. According to petitioner, it has complied with the 120-30 day period mandated in the *Aichi* case for having filed its administrative claim for refund for the 1st quarter of 2003 on December 22, 2004 and the judicial claim on April 21, 2005, thus, based on the *Aichi* case its claim for refund for the 1st quarter of 2003 has not yet prescribed.

After having raised the foregoing arguments to support its position that its claim for refund has not yet prescribed, petitioner laid down the following justifications to establish its entitlement to claim refund or issuance of a TCC: [1] that its power generation services for the 1st and 2nd quarters of CY 2003 are subject to zero percent (0%) VAT pursuant to the *Electric Power Industry Reform Act of 2001* (EPIRA), starting June 26, 2001, and its implementing rules and regulations; [2] that

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[12] G.R. No. 184823, October 6, 2010. *a*

petitioner has unutilized input VAT for the 1st and 2nd quarters of CY 2003 in the total amount of P8,764,550.30 arising from its domestic purchases of taxable goods and services and importation of goods; [3] that petitioner's unutilized input VAT for the 1st and 2nd quarters of CY 2003 in the amount of P8,764,550.30 are attributable to its zero-rated sales to Panay Electric Cooperative (PECO); [4] that the unutilized creditable input taxes of the Petitioner for the 1st and 2nd quarters of CY 2003 are properly substantiated by invoices and official receipts; and [5] that petitioner did not apply the excess unutilized input VAT subject of this refund case against any of the output VAT liability considering that petitioner deducted the amount being claimed as refund from its total available input VAT, as shown in petitioner's Exhibit "AAA".

THE RULING OF THE COURT *EN BANC*

In claiming a refund or issuance of a tax credit certificate for unutilized input VAT attributable to zero rated or effectively zero-rated sales, one must be guided and abide by the provision of the NIRC of 1997, specifically Section 112 (A) and (D) [*now paragraph (C)*], *viz*:

> '"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 of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
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> "(B) *xxx*
>
> "(C) *xxx*
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> "(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 compete 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 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.-"'

As can be gleaned from the foregoing, a taxpayer engaged in zero-rated or effectively zero-rated transactions may apply for tax refund or issuance of TCC for unutilized input VAT provided, the following requisites are satisfied:

(1) the taxpayer is VAT registered;

(2) the taxpayer is engaged in zero-rated or effectively zero-rated sales;

(3) the input taxes were incurred or paid;

(4) the input taxes have not been applied against output taxes during and in the succeeding quarters;

(5) the input taxes claimed are attributable to zero-rated or effectively zero-rated sales;

(6) the claim was applied/filed within the period prescribed in Section 112(A) and (D) of the NIRC of 1997.

I. Whether the Court in Division erred in denying petitioner's claim for refund or the issuance of a TCC on the ground of prescription.

Records of this case reveal that petitioner filed its Quarterly VAT Returns, its administrative and judicial claims for refund or issuance of TCC on the following dates:

Quarter (CY 2003)	Quarterly VAT Return Filed	Administrative Claim filed	Judicial Claim filed
1^{st}	April 23, 2003	December 22, 2004	April 22, 2005
2^{nd}	July 25, 2003		July 22, 2005

Petitioner insists that the administrative and judicial claims were filed within the reglementary period, *i.e.*, within the 2 year prescriptive period from the filing of the quarterly VAT returns.

In the challenged *Decision*, the Court *a quo* held that petitioner's administrative claim for refund or issuance of a TCC for its unutilized input VAT for CY 2003, filed on December 22, 2004, was well within the prescriptive period. However, it ruled that petitioner's judicial claims for the 1^{st} and 2^{nd} quarters of 2003 were filed beyond the prescriptive period, seeing that the date of filing of the judicial claims were beyond two years from the close of the taxable quarter when the sales were made as provided in Section 112(A) of the NIRC of 1997.

Administrative Claim

In determining whether petitioner Panay Power Corporation complied with the prescriptive period in filing its administrative claim for refund or issuance of tax credit certificate of unutilized input tax, reference must be made to the provision of Section 112(A) of the NIRC of 1997 which prescribes the 2-year period within which to make a claim for refund or tax credit, *i.e., from the close of the taxable quarter when the sales were made*.

We cannot agree more with the Court in Division when it stated that "*the two –year prescriptive period provided in Section 112(A) of the NIRC of 1997, as amended, should be reckoned not from the payment of the tax, but from the close of the taxable quarter when the sales were made.*"[13] The Court *En Banc* refuses to countenance petitioner's assertion that the two-year prescriptive period for filing a claim for refund/tax credit of input VAT on zero-rated sales should be counted from the date of filing of the return and payment of the tax due.

Emphasis must be given to the fact that Section 112 (A) of the NIRC of 1997 is so clear and unequivocal that there is no room for interpretation, all that is left for this Court is to enforce strict compliance with the said statutory provision which plainly states that the two-year prescriptive period within which to make a claim for refund or tax credit should be reckoned *from the close of the taxable quarter when the sales were made*. Verily, the High Court in the cases of *Mirant* and *Aichi* simply applied the express provision of Section 112(A) of the NIRC of 1997 pertaining to the

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[13] *Rollo*, pp. 57-58. *Decision* in CTA Case Nos. 7231 & 7296, promulgated on April 28, 2010, marked as Annex "A" of the Petition for Review. *a*

reckoning of the 2-year period within which to make a claim for refund or tax credit, *i.e., from the close of the taxable quarter when the sales were made.* Ostensibly, rulings in the said cases give an impression that a new doctrine [as to the "reckoning of the 2-year period"] was given a retroactive application considering that the Supreme Court applied the same to cases which were filed during the time the *Atlas* doctrine or rule was widely recognized and relied upon. However, a thorough examination of the cases of *Atlas*, *Mirant*, and *Aichi* tells us that: the *Atlas* case was an interpretation of the 1977 NIRC; while the *Mirant* and *Aichi* cases were interpretations of the 1997 NIRC. Therefore, the principles laid down in the *Mirant* and *Aichi* were in fact not new rules/principles which were given retroactive application, but were mere applications of the unambiguous provision of law, *i.e.,* Section 112 (A) of the 1997 NIRC, prevailing at the time of the filing of the petitions for refund/tax credit.

The Supreme Court, in the *Aichi* case, fortified the ruling laid down in the *Mirant* case, that the 2-year prescriptive period is reckoned from the close of the taxable quarter when the relevant sales or transactions were made. In the *Aichi* case[14], the Supreme Court explained thus:

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

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[14] *Supra*, Note 12. *a*

> The above proviso [Section 112 (A) of the NIRC] clearly provides in no uncertain terms that **unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not.** As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112 (A), "[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued." Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed.

For all the foregoing, suffice it to say that petitioner Panay Power Corporation timely filed its administrative claim [December 22, 2004] for refund or issuance of TCC of unutilized input VAT for the 1st and 2nd quarters of 2003, having filed the same within 2 years reckoned from the close of the taxable quarters when the sales were made.

Judicial claim

In resolving the question as to whether petitioner timely filed its judicial claims for refund or issuance of TCC of unutilized input VAT, the aforementioned

Section 112(D) *[now paragraph C]* of the NIRC of 1997 should be considered. Under Section 112(D), the CIR has "120 days from the date of the submission of the complete documents in support of the application [for tax refund/credit]," within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to the CTA within 30 days.[15]

Likewise, in determining the timeliness of petitioner's judicial claims, it is significant to note the ruling explicitly pronounced by the Supreme Court in the *Aichi* case[16] *,i.e., the 2-year prescriptive period under Section 112(A) of the NIRC of 1997 refers to applications for refund/credit filed with the CIR and not to appeals made to this Court*. In this regard, while *We* agree with the Court *a quo's* pronouncement as to the reckoning of the 2-year prescriptive period under Section 112(A) of the NIRC of 1997, the Court *En Banc* begs to differ with respect to the Court *a quo's* stance in considering the two-year prescriptive period as applicable to both administrative and judicial claims for refund/credit.

In the *Aichi* case[17], the Supreme Court ratiocinated in this wise:

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> "Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.
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> 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,

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[15] *Supra*, Note 12.
[16] *Supra*
[17] *Supra*

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.

With regard to *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc.* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.

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."

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In the case at bar, records show that:

Quarter (2003)	Administrative Claim Filed	End of 120 Days for the BIR Commissioner to Decide the Claim	End of 30 Days from the expiration of the 120 days	Date Judicial Claim Filed
1st	December 22, 2004	April 21, 2005	May 21, 2005	April 22, 2005
2nd				July 22, 2005

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Petitioner filed its administrative claim for refund for all the quarters of 2003 on December 22, 2004. As earlier discussed, 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. Considering that petitioner failed to sufficiently substantiate or prove the period when it submitted the necessary documents with the BIR, it may be fairly inferred that December 22, 2004 is the reckoning point in counting the 120-day period. Hence, counting 120 days from December 22, 2004, CIR had until **April 21, 2005** within which to decide the claim for refund/tax credit, consequently, petitioner is given a period of **30 days** from April 21, 2005 or until **May 21, 2005** within which to appeal to this Court.

With regard to petitioner's judicial claim for the 1st quarter of 2003, *We* find the same to have been filed within the period allowed under Section 112(D) of the NIRC of 1997 as it was filed on **April 22, 2005**, thus, has not yet prescribed.

However, as regards petitioner's judicial claim for the 2nd quarter of 2003, *We* find the same to have been filed out of time, considering that the said claim was filed on **July 22, 2005**, 62 days late or beyond the 30-day period provided under Section 112(D) of the NIRC of 1997.

Hence, insofar as the claim for refund for the 2nd quarter of 2003 is concerned, we are convinced that for petitioner's failure to appeal the case within 30 days or until May 21, 2005, its statutory right to appeal has already prescribed, and thus, this Court has not acquired jurisdiction over the instant claim for the 2nd quarter of 2003. Perfection of an appeal in the **manner and within the period** laid down by law is not only mandatory but also jurisdictional[18].

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[18] *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation*, G.R. No. 167606, August 11, 2010.

Worthy of emphasis is the ruling of the Supreme Court in the case of *Yao vs. Court of Appeals*[19], *viz*:

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> "The right to appeal is not a constitutional, natural or inherent right. It is a statutory privilege of statutory origin and, therefore, available only if granted or provided by statute. Since the right to appeal is not a natural right nor a part of due process, it may be exercised only in the manner and in accordance with the provisions of law. Corollarily, its requirements must be strictly complied with.
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> That an appeal must be perfected in the manner and within the period fixed by law is not only mandatory but jurisdictional. Non-compliance with such legal requirements is fatal, for it renders the decision sought to be appealed final and executory, with the end result that no court can exercise appellate jurisdiction to review the decision."

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It is likewise significant to note that in the recent case of *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation*,[20] the Supreme Court reaffirmed the principle that the right to appeal is not a natural right, but merely a statutory privilege exercised only in the manner and in accordance with the provisions of law, and thus, held as follows:

xxx

> "The right to appeal is not a natural right. It is also not part of due process. It is merely a statutory privilege and may be exercised only in the manner and in accordance with the provisions of law. Thus, one who seeks to avail of the right to appeal must comply with the

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[19] G.R. No. 132428, October 24, 2000 citing *Aris, Phil. Inc. v. NLRC*, 200 SCRA 246, 253 [1991]; *Pedrosa v. Hill*, 257 SCRA 373, 378 19961, citing *Bello v. Fernandez*, 4 SCRA 138; *Ortiz v. Court of Appeals*, 299 SCRA 708 [1998]; *Almeda v. Court of Appeals*, 292 SCRA 587 [1998]; also *Asuncion v. NLRC* 273 SCRA 498 [1997]; *Mabuhay Development Industries v. NLRC*, 288 SCRA 1 [1998]; *Rosewood Processing, Inc. v. NLRC*, 290 SCRA 408 [1998]; *Laza v. Court of Appeals*, 269 SCRA 654 [1997]; *Uy v. Court of Appeals*, 286 SCRA 343 [1998]; *Pascual v. Court of Appeals*, 300 SCRA 214 [1998].

[20] G.R. No. 167606, August 11, 2010 citing *Neypes v. Court of Appeals*, 506 Phil. 613, 621 (2005); *Nuñez v. GSIS Family Bank*, G.R. No. 163988, November 17, 2005, 475 SCRA 305, 320; *Republic v. Court of Appeals*, 379 Phil. 92, 100-101 (2000); *In the matter of the Heirship (Intestate Estates) of the late Hermogenes Rodriquez v. Robles*, G.R. No. 182645, December 4, 2009, 607 SCRA 770.

requirements of the Rules. Failure to do so often leads to the loss of the right to appeal.

The failure to timely perfect an appeal cannot simply be dismissed as a mere technicality, for it is jurisdictional. Thus:

Nor can petitioner invoke the doctrine that rules of technicality must yield to the broader interest of substantial justice. While every litigant must be given the amplest opportunity for the proper and just determination of his cause, free from the constraints of technicalities, the failure to perfect an appeal within the reglementary period is not a mere technicality. It raises a **jurisdictional** problem as it deprives the appellate court of jurisdiction over the appeal. **The failure to file the notice of appeal within the reglementary period is akin to the failure to pay the appeal fee within the prescribed period. In both cases, the appeal is not perfected in due time**. [Emphases supplied]

As to the claim that the government would suffer loss of substantial amount if not allowed to recover the tax refund in the amount of more than ₱15M, the Court is of the view that said problem has been caused by petitioner's own doing or undoing. While We understand its counsel's predicament of being burdened with a heavy case load, We cannot always rule in favor of the Government. In this case, petitioner even failed to sufficiently explain its failure to observe the Rules.

Petitioner merely pointed out that due to plain oversight, the motions for extension of time and the petition for review that it filed were erroneously titled as *"Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue"* when it should have been *"Commissioner of Internal Revenue v. Fort Bonifacio Development Corporation;"* that "on the assumption that it was respondent which filed the motion, the Court of Appeals, in its Resolution dated January 29, 2002, denied the motion for extension of time to file petition for review on the ground of failure to pay docket and other legal fees;" that respondent filed a manifestation stating that the case was incorrectly titled as it was not the one who appealed the CTA decision to the CA; and that in order to rectify the error, petitioner filed an Amended Petition for Review. To recognize the foregoing statements would render the mandatory rule on appeals meaningless and nugatory.

The point of reference of Our discussion is not the CA's Resolution dated January 29, 2002 but its **January 27, 2003** Resolution. Records bear out that the assailed January 27, 2003 Resolution reiterated the dismissal of the petition for review and thus denied the admission of the amended petition but NOT on the basis of the earlier (January 29, 2002) resolution dismissing the petition for non-payment of docket and other legal fees as there was clearly an error in the designation of FBDC as petitioner in the first motion for extension of time filed by the CIR. Indeed, the CIR is exempted from payment of docket and other legal fees, as a government official representing the BIR.

It bears emphasizing that the dismissal of the petition for review and the denial of the amended petition were premised rather on: ***(1)*** the late filing of the original petition for review by the CIR; ***(2)*** the absence of a motion for reconsideration of the January 29, 2002 Resolution; and ***(3)*** lack of authority of Atty. Alberto R. Bomediano, Jr., legal officer of the BIR Region 8, Makati City, to pursue the case on behalf of petitioner CIR.

It has been ruled that **perfection of an appeal** in the manner and within the period laid down by law is **not only mandatory but also jurisdictional**. The failure to perfect an appeal as required by the rules has the effect of defeating the right to appeal of a party and precluding the appellate court from acquiring jurisdiction over the case. At the risk of being repetitious, We declare that the right to appeal is not a natural right nor a part of due process. It is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law.

Public policy and sound practice demand that judgments of courts should become final and irrevocable at some definite time fixed by law. Such rules are necessary incidents to the proper, efficient and orderly discharge of judicial functions. Just as a losing party has the privilege to file an appeal within the prescribed period, so does the winner also have the correlative right to enjoy the fruits of his victory. Failure to meet the requirements of an appeal deprives the appellate court of jurisdiction to entertain any appeal. Undeniably, there are exceptions to this rule. Petitioner, however, did not present any circumstances that would justify the relaxation of said rule.

It need not be overemphasized that it is the responsibility of the counsel to check and keep track of the period of time left to file an appeal. He cannot escape from the inflexible observance of this rule which is jurisdictional. The rules, particularly on **the statutory requirement for perfecting an appeal within the reglementary period** provided, must be **strictly followed. If an appeal is not taken within the period prescribed therefor, the judgment becomes final and the court loses all jurisdiction over the case.** [Emphasis supplied]

xxx

The denial of petitioner's claim for refund for the 2nd quarter of 2003 is anchored on the ground of prescription of petitioner's right to appeal by reason of its failure to file its judicial claim within 30 days or until May 21, 2005. Prescription, under Rule 9 Section 1 of the Rules of Court, is one of the defenses or objections not deemed waived even if not pleaded in the motion to dismiss or in the answer, thus it may be raised at any stage of the proceedings.

II. Whether petitioner is entitled to refund or the issuance of a TCC for its unutilized input VAT incurred from its domestic purchases of taxable goods and services attributable to its zero-rated sales of electricity for the 1st quarter of calendar year (CY) 2003.

Having established that petitioner's claim for refund or issuance of TCC for the 2nd quarter of 2003 has already prescribed, it is now appropriate for this Court to proceed in giving due course to the instant Petition for Review for the purpose of determining whether petitioner is entitled to refund or the issuance of TCC in the amount of **P5,025,430.46** representing its unutilized input VAT incurred from its domestic purchases of taxable goods and services attributable to zero-rated sales of electricity for the **1st quarter** of CY 2003.

Petitioner anchors its claim for refund or issuance of TCC on the argument that since it is a power generation company duly registered with and authorized by the Energy Regulatory Commission (ERC), its sales of electricity qualify for VAT zero-rating pursuant to Section 4(x) in relation to Section (6) of Republic Act No. 9136, otherwise known as the *Electric Power Industry Reform Act of 2001* (EPIRA), starting June 26, 2001, and Rule 5, Sec. 6 of the Rules and Regulations to Implement R.A. 9136 ("EPIRA IRR"), which substantially states:

> "R.A. 9136 (EPIRA)
>
> Section 4. Definition of Terms. —
>
> xxx xxx xxx
>
> (x) 'Generation Company' refers to any person or entity authorized by the ERC [Energy Regulatory Commission] to operate facilities used in the generation of electricity;
>
> xxx xxx xxx
>
> Sec. 6. Generation Sector. — Generation of electric power, a business affected with public interest, shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.
>
> Upon implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by ERC except as otherwise provided in this Act.
>
> Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value-added tax zero-rated.
>
> The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the

> submission of their individual pricing formulas as well as their financial statements."

Rules and Regulations to Implement R.A. 9136 (EPIRA "IRR")

> "RULE 5.
>
> Generation Sector
>
> xxx xxx xxx
>
> SECTION 6. Generation Charges and VAT. —
>
> (a) . . .
>
> Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these Rules." [Emphasis Supplied]

In support of its contention, petitioner made reference to BIR Ruling No. 20-02 dated May 13, 2002, addressed to the Power Sector Assets and Liabilities Management Corporation (PSALM) wherein the respondent confirmed that the sale of electricity by the PSALM, an ERC-registered generation company, is subject to zero percent (0%) VAT by virtue of the EPIRA, to wit:

> "Section 102 of the Tax Code of 1997 imposes VAT equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services in the course of trade or business in the Philippines, provided the annual gross receipts exceed P550,000.00.
>
> Section 6(b), Rule 5 of the IRR in relation to Section 4(x) of the EPIRA, however, expressly provides that the sale of generated power by generation companies shall, upon the effectivity of the Act, be subject to zero percent (0%) VAT. Since PSALM, once registered with the ERC will fall within the

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> definition of a Generation Company, under Rule 5 of the aforesaid IRR with respect to its sale of generated power, we confirm your opinion that its sale of generated power will be subject to VAT at the rate of zero percent (0%)."

Further, petitioner alleged that the foregoing ruling was reiterated in VAT Ruling No. 050-03 dated December 1, 2003, wherein it was stated that the 'sale of generated power by generation companies is entitled to the benefit of zero percent (0%) VAT pursuant to Section 6, R.A. No. 9136, without any qualification that it is merely entitled to effectively zero rated VAT."

To sum up, petitioner cites the case of *Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue*[21], where this Court ruled that:

> "it is undisputed that Republic Act No. 9136 otherwise known as the "Electric Power Industry Reform Act of 2001" provided for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001. Thus, the pertinent provisions of the National Internal Revenue Code of 1997 are deemed amended by the provisions of R.A. No. 9136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.
> To qualify for VAT zero-rating under R.A. No. 9136, petitioner must prove that: 1) it is a generation company and 2) it derived sales from power generation."

We have carefully re-evaluated the records of this case and mused upon the arguments interposed by the petitioner, and are convinced that petitioner's claim for refund or issuance of TCC for the 1st quarter of 2003 is outrightly dismissible.

It is undisputed that, effective June 26, 2001, sales of generated power by generation companies achieved VAT zero-rated status by virtue of Section 4 (x) in

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[21] CTA Case No. 6788, October 13, 2005. Ci

relation to Section 6 of RA No. 9136 or the EPIRA, and Rule 5, Section 6 of the Rules and Regulations to Implement Republic Act No. 9136 ("EPIRA IRR"), promulgated by the Department of Energy. This was affirmed in the case of *Visayas Geothermal Power Company vs. Commissioner of Internal Revenue*[22], thus:

> ". . . Section 6 of the EPIRA Law provides that "sales of generated power **by generation companies** shall be value-added tax zero-rated". Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated companies from ten (10%) percent to zero (0%) percent.
> As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: 1) it is a generation company, and 2) it derived sales from power generation." *(Empasis supplied)*

Based on the foregoing, in order to qualify for VAT zero-rating under R.A. No. 9136, petitioner must be able to establish that **(1) it is a power generation company**, and **(2) it derived sales from power generation services**.

To prove its claim, petitioner offered in evidence its Articles of Incorporation and By-Laws, quarterly VAT returns, schedule of input VAT; and attached a photocopy of its Certificate of Compliance (COC) No. 03-06-GXT8-0008 issued by the ERC on June 4, 2003, however, though the said COC was attached to the Petition for Review filed with the Court *a quo,* the same was never formally offered in evidence.

Two main considerations strengthened this Court's resolve to deny petitioner's claim for refund or issuance of a TCC for the 1st quarter of 2003 for unutilized input VAT attributable to its zero rated sales.

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[22] CTA Case No. 6790 and 6838, January 18, 2007.

First, after a careful examination of the records, *We* find that, while the above-mentioned documents may prove that petitioner actually derived sales from power generation, it, however, failed to establish that petitioner is a *generation company*.

As defined under Section 4(x) of R.A. No. 9136, the term *generation company* refers to:

> "SEC. 4. Definition of Terms. —
>
> xxx xxx xxx
>
> (x) 'Generation Company' refers to **any person or entity authorized by the ERC** (Energy Regulatory Commission) to operate facilities used in the generation of electricity;" [Emphasis supplied]

In relation thereto, Sections 1 and 4 (a), Rule 5 of the Implementing Rules and Regulations ("IRR") of R.A. No. 9136, provide:

> "SECTION 1. Guiding Principle. —
>
> xxx xxx xxx
>
> No Person may engage in the Generation of Electricity as a new Generation Company unless such Person has received a COC from the ERC to operate facilities used in the Generation of Electricity. A Person that demonstrates compliance with the standards and requirements of this Rule 5, and such other terms and conditions as determined by the ERC to be appropriate to ensure that Persons comply with all applicable legal and regulatory requirements, shall be issued a COC." *(Emphasis supplied)*
>
> "SECTION 4. Obligations of a Generation Company. —
>
> (a) A COC shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.
>
> (i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC

accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility." (Emphasis supplied)

As can be deduced from the above-quoted provisions of R.A. No. 9136 and its implementing rules and regulations, a *generation company* is defined as '*any person or entity authorized by the ERC*'; and to be considered *authorized* by the ERC, one desiring to operate or operating a generation facility must have a *Certificate of Compliance (COC)* issued by the ERC. Simply put, without the COC, a person cannot be said to be a Generation Company.[23]

In this case, the Court *En Banc* is aware of COC No. 03-06-GXT8-0008 which was attached by petitioner in the records of this case, however, a scrutiny of the said COC reveals that it was issued only on **June 4, 2003;** while petitioner's claim, currently subject of this Court's resolution, covers the period from ***January to March of 2003 or the 1st quarter of 2003***. It is significant to note that, the first paragraph of the *Terms and Conditions of the Certificate of Compliance* clearly states that '*this Certificate of Compliance (COC) shall be **valid for a period of five (5) years from date of issuance***'[24].

In view of the foregoing, it cannot be any clearer that, inasmuch as petitioner's COC became valid only on June 4, 2003, COC's date of issuance, petitioner cannot be considered as a *generation company* contemplated under R.A. No. 9136 during the period covering the 1st quarter of 2003. *Ergo*, petitioner not being a *generation company* during the 1st quarter of 2003, its sales of generated power for the said quarter is NOT entitled to the benefit of zero percent (0%) VAT or have not achieved

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[23] *Mindanao II Geothermal Partnership vs. Commissioner of Internal Revenue*, CTA Case No. 7800, January 19, 2011.
[24] *Rollo*, p. 79.

VAT zero-rated status by virtue of R.A. No. 9136, because only those "*sales of generated power* ***by generation companies***"[25] shall be zero-rated for the purpose of imposition of value-added tax.

Conclusively, if petitioner's sales of generated power have not achieved VAT zero-rated status, there is no claim for refund or issuance of TCC of unutilized input VAT attributable to **zero rated** sales to speak about in this case.

Second, attached Certificate of Compliance, with COC No. 03-06-GXT8-0008 could not be considered by this Court for petitioner's failure to formally offer the same in the proceedings before the Court in Division.

'Under Section 8 of RA 1125, the CTA is categorically described as a court of record. As cases filed before it are litigated *de novo*, party-litigants shall prove every minute aspect of their cases. [26] Indubitably, no evidentiary value can be given to pieces of evidence merely attached or submitted by the BIR, as the rules on documentary evidence require that these documents must be formally offered before the CTA. Pertinent is Section 34, Rule 132 of the Rules of Court which reads:

> "Section 34 of Rule 132 of the Rules of Court provides that '*the court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.*"

In the case of *People vs. Villanueva*,[27] the Supreme Court had the occasion to reiterate its ruling in *Heirs of Pedro Pasag v. Parocha*[28], thus:

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[25] Rule 5, Section 6 of the Rules and Regulations to Implement Republic Act No. 9136.
[26] *Dizon vs. Court of Tax Appeals*, G.R. No. 140944, April 30, 2008 citing *Commissioner of Internal Revenue v. Manila Mining Corporation*, G.R. No. 153204, August 31, 2005, 468 SCRA 571, 588-589.
[27] G.R. No. 181829, September 1, 2010.
[28] G.R. No. 155483, April 27, 2007, 522 SCRA 410.

The rule on formal offer of evidence is not a trivial matter. Failure to make a formal offer within a considerable period of time shall be deemed a waiver to submit it. Consequently, as in this case, any evidence that has not been offered shall be excluded and rejected.

x x x x

The Rules of Court [provide] that 'the court shall consider no evidence which has not been formally offered' A formal offer is necessary because judges are mandated to rest their findings of facts and their judgment only and strictly upon the evidence offered by the parties at the trial. Its function is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence. On the other hand, this allows opposing parties to examine the evidence and object to its admissibility. Moreover, it facilitates review as the appellate court will not be required to review documents not previously scrutinized by the trial court.

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Thus, the trial court is bound to consider only the testimonial evidence presented and exclude the documents not offered. **Documents which may have been identified and marked as exhibits during pre-trial or trial but which were not formally offered in evidence cannot in any manner be treated as evidence. Neither can such unrecognized proof be assigned any evidentiary weight and value**. It must be stressed that there is a significant distinction between identification of documentary evidence and its formal offer. The former is done in the course of the pre-trial, and trial is accompanied by the marking of the evidence as an exhibit; while the latter is done only when the party rests its case. The mere fact that a particular document is identified and marked as an exhibit does not mean that it has already been offered as part of the evidence. It must be emphasized that any evidence which a party desires to submit for the consideration of the court must formally be offered by the party; otherwise, it is excluded and rejected."

Also, in the said case of *People vs. Villanueva*, the High Court reiterated the case of *Dizon v. Court of Tax Appeals*[29], *viz*:

"Under Section 8 of RA 1125, the CTA is categorically described as a court of record. As cases filed before it are litigated *de novo*, party-litigants shall prove every minute aspect of their cases. Indubitably, no evidentiary value can be given the pieces of evidence submitted by the BIR, as the rules on

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[29] G.R. No. 140944, April 30, 2008, 553 SCRA 111.

> documentary evidence require that these documents must be formally offered before the CTA.
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> x x x
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> x x x x
>
> x x x [T]he presentation of the BIR's evidence is not a mere procedural technicality which may be disregarded considering that it is the only means by which the CTA may ascertain and verify the truth of BIR's claims against the Estate. The BIR's failure to formally offer these pieces of evidence, despite CTA's directives, is fatal to its cause. Such failure is aggravated by the fact that not even a single reason was advanced by the BIR to justify such fatal omission. This, we take against the BIR."

'Elementary is the rule that a taxpayer claimant has the burden of proof to show that it is entitled to the refund of the amount claimed as refundable because taxes are presumed to have been collected in accordance with laws and regulations on the matter. The burden of proof rests upon the taxpayer to establish by sufficient and competent evidence its entitlement to a claim for refund. And for failure of petitioner to establish the factual basis of its claim for refund, the Court has no option but to deny the present claim.'[30]

WHEREFORE, premises considered:

1. Petitioner's claim for refund or issuance of tax credit certificate of unutilized input VAT attributable to zero rated sales of electricity for the **1st quarter of 2003** is hereby **DENIED** due to insufficiency of evidence.

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[30] C.T.A Case No. 7800, January 19, 2011. q/

2. Petitioner's claim for refund or issuance of tax credit certificate of unutilized input VAT attributable to zero rated sales of electricity for the 2nd **quarter of 2003** is hereby **DENIED** due to prescription.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were 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

PANAY POWER CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 666
(CTA Case Nos. 7231 & 7296)

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

Promulgated:
OCT 24 2011 ApApolinario 2:50 p.m.

x---x

Concurring and Dissenting Opinion

BAUTISTA, J.:

The Court *En Banc* pronounced that petitioner cannot be considered as a generation company pursuant to Republic Act No. 9136,[1] covering its claim for the first (1st) quarter of the taxable year 2003, docketed as CTA Case No. 7231, since the required Certificate of Compliance duly issued by the Energy Regulatory Commission was issued only on June 4, 2003, and that it failed to formally offer the same pursuant to Section 34 of Rule 132 of the Revised Rules of Court, however, the

[1] Electric Power Industry Reform Act of 2001.

same ruling should likewise apply to its claim for refund/credit covering the second (2nd) quarter of the same taxable year, docketed as CTA Case No. 7296.

Therefore, while I concur that petitioner's claim for the first (1st) quarter of the taxable year 2003 must be denied for insufficiency of evidence, its claim for the second (2nd) quarter of the same year should also be denied for insufficiency of evidence, and not due to prescription.

When petitioner filed its administrative claim with the respondent on December 22, 2004, covering the four (4) quarters of the taxable year 2003, and when it elevated its claim with this Court on April 22, 2005, covering the first (1st) quarter of the taxable year 2003, and on July 22, 2005, covering the second (2nd) quarter of the same year, respectively docketed as CTA Case No. 7231 and CTA Case No. 7296, the then prevailing doctrine on the reckoning of the prescriptive period within which to file administrative and judicial claims for refund or tax credit of input tax is counted not from the close of the taxable quarter,[2] but from the filing of the relevant return.[3]

In the case of *Magtoto v. Manguera, et al.*,[4] the Supreme Court sitting *En Banc* made the following pronouncement:

> The final authority of this Court rests upon public respect for its decisions. That public respect is based upon an image which represents this Court as declaring legal principles with an authority and certainty that the people may place upon it their *bona fide* reliance and reasonable expectations. To hold now that public officers, who have acted in

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[2] Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.

[3] Atlas Consolidated Mining and Development Corporation *v.* Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.

[4] G.R. Nos. L-37201-02, L-37424, and L-38929, March 3, 1975, 63 SCRA 4, Concurring Opinion penned by Justice Felix Q. Antonio, with Justices Antonio P. Barredo and Cecilia Muñoz-Palma, concurring.

> justifiable reliance on Our aforecited doctrines, have transgressed the Constitution, would certainly not strengthen public respect on the authority of Our judgments.
>
> **Where there has been justifiable reliance on Our decisions, and those who have so relied may be substantially harmed if retroactive effect is given, where the purpose of the new rule can be adequately effectuated without giving it retroactive operation, or where retroactive operation might greatly burden the administration of justice, then it is Our duty to apply the new rule prospectively.**
>
> The factual and textual bases for a contrary rule, are at best, less than compelling. Relevant is the Court's duty to assess the consequences of its action. More than the human dignity of the accused in these cases is involved. There is the compelling realization that substantial interests of society may be prejudiced by a retrospective application of the new exclusionary rule. Thus, the values reflected transcend the individual interests of the herein accused, and involve the general security of society. The unusual force of the countervailing considerations strengthens my conclusion in favor of prospective application. xxx (*Boldfacing supplied.*)

It need not be stated that the Supreme Court, being the court of last resort, is the final arbiter of all legal questions properly brought before it, and that its decision in any given case constitutes the law of that particular case. Once its judgment become final it is binding on all inferior courts, and hence beyond their power and authority to alter or modify.[5]

However, the Court's decisions should not be, as to a given period of time, upon the same or similar facts and under the same or similar circumstances, as fluctuating as to engender the phenomenon described by Mr. Justice Thompson of the Supreme Court of Virginia as *ignis fatuus*.[6]

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[5] Jose Kabigting *v.* The Acting Director of Prisons, G.R. No. L-15548, October 30, 1962.
[6] Ramon Torres *v.* Tan Chim, G.R. No. L-46593, February 3, 1940, 69 Phil. 518, *citing Perkins v. Clemente et al., 1 Pat and (Va.) 153.*

Thus, with the foregoing doctrines in mind, as well as, the factual milieu present in the case at bench, the reckoning of the prescriptive period – from the filing of the relevant return – should apply.

In addition, a plain reading of Section 112(C) of the 1997 National Internal Revenue Code ("NIRC"),[7] as amended,[8] will show that the provision use the word "*may*," which as settled in statutory construction connotes permissiveness, rather than of a restrictive or mandatory in nature.

Consistent with the aforementioned provision's permissive nature, the judicial recourse to this Court within thirty (30) days after the lapse of the one hundred twenty (120)-day period, therefore, is merely directory, and not mandatory nor jurisdictional; subject only to the period provided under Sections 112(A)[9] and 229[10] of the same Code.

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[7] (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected *may*, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.

[8] As amended by Republic Act No. 9337.

[9] 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.

[10] 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

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.[11] The administrative and judicial claims must be *both* filed within the two (2)-year period,[12] otherwise, the Court will be deprived of jurisdiction to entertain the case.[13]

Based on the records of the case, petitioner filed its Quarterly Value-Added Tax Returns for the first (1st) and second (2nd) quarters of the taxable year 2003 on April 23, 2003 and July 25, 2003, respectively. Counting two (2) years from the aforementioned dates, the administrative claim filed on December 22, 2004 and the judicial claims filed on April 22, 2005 and July 22, 2005 were, thus, made within their respective prescribed periods.

Nonetheless, while I find the Petitions for Review, docketed as CTA Case Nos. 7231 and 7296 made within the two (2)- year period, petitioner's entire claim for the subject periods must be denied for failure to formally offer the required Certificate of Compliance pursuant to Section 34 of Rule 132 of the Revised Rules of

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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.

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

[12] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.

[13] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

Court in order to prove that it is a generation company pursuant to Republic Act No. 9136.

Accordingly, I vote for the **DENIAL** of the Petition for Review for insufficiency of evidence.

LOVELL R. BAUTISTA
Associate Justice