REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

MINDANAO II GEOTHERMAL, PARTNERSHIP,
Respondent.

CTA EB NO. 690
(CTA Case Nos. 7595, 7638 & 7692)

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MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 718
(CTA Case Nos. 7595, 7638 & 7692)

Present:

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

Promulgated:
APR 04 2012 crApolinario 9:10 a.m.

x---x

DECISION

CASTANEDA, JR., *J.*: Jr

Before Us are consolidated Petitions for Review, docketed as CTA EB No. 690,[1] and CTA EB Case No. 718,[2] respectively filed by the Commissioner of Internal Revenue (CIR) on October 20, 2010, and Mindanao II Geothermal Partnership (MIIGP) by registered mail on February 7, 2011.

The first petition, CTA EB No. 690, seeks to set aside portion of the Amended Decision promulgated by the CTA Former Second Division on September 14, 2010[3]; and accordingly, prays for the dismissal of the entire claim for lack of merit. On the other hand, the second petition, CTA EB No. 718 seeks the reversal and setting aside of the same Amended Decision dated September 14, 2010, and Resolution[4] dated December 30, 2010; and accordingly, prays that the Decision[5] dated April 23, 2010 be affirmed, which ordered for the issuance of tax credit certificate in the amount of ₱8,605,526.64, representing its unutilized input tax for the four quarters of taxable year 2005.

THE FACTS

The facts of the case as found by the CTA Former Second Division are as follows: [6]

> Petitioner Mindanao II is a partnership duly registered with the Securities and Exchange Commission, with principal office at Barangay Ilomavis, Kidapawan City, Cotabato. Petitioner entered into a Build-Operate-

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[1] *Rollo*, CTA EB No. 690, pp. 7-70, with Annexes.
[2] *Rollo*, CTA EB No. 718, pp. 110-178, with Annexes.
[3] *Rollo*, CTA EB No. 690, pp. 20-41. Penned by Associate Justice Olga Palanca Enriquez, with Separate Concurring and Dissenting Opinion of Associate Justice Juanito C. Castañeda, Jr., and Separate Concurring Opinion of Associate Justice Erlinda P. Uy.
[4] *Rollo*, CTA EB No. 718, pp. 28-37.
[5] *Rollo*, CTA EB No. 690, pp. 42-67. Penned by Associate Justice Olga Palanca Enriquez, with Associate Justice Juanito C. Castañeda, Jr., concurring, and Associate Justice Erlinda P. Uy, was on leave.
[6] *Rollo*, CTA EB No. 690, pp. 44-54.

Transfer ("BOT") contract with the PNOC-EDC[7] for the finance, engineering, supply, installation, testing, commissioning, operation, and maintenance of a 48.25 megawatt geothermal power plant, provided that PNOC-EDC shall supply and deliver steam to petitioner at no cost. In turn, petitioner shall convert the steam into electric capacity and energy for PNOC-EDC and shall deliver the same to the NPC[8] for and in behalf of PNOC-EDC. Petitioner's 48.25 megawatt geothermal power plant has been accredited by the Department of Energy ("DOE"), as a Block Power Production Facility, pursuant to the provisions of EO 215[9] (*Exhibit "B."*).

Petitioner is a registered value added tax (VAT) taxpayer with the Bureau of Internal Revenue, as evidenced by its Certificate of Registration with Tax Identification Number 004-766-953 (*Exhibits "K"* and *"L"*). On January 7, 2008, respondent's Revenue District Officer issued an updated Certificate of Registration to petitioner, where petitioner is considered a VAT zero-rated taxpayer (*Exhibit "M"*).

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credit of erroneously or excessively paid taxes. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

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

Periods	Date of Filing	Exhibit
1st Quarter – Original	April 20, 2005	*"C"*
2nd Quarter – Original	July 25, 2005	*"D"*
3rd Quarter – Original	October 25, 2005	*"E-2"*
Amended	January 25, 2006	*"E"*
4th Quarter – Original	January 26, 2006	*"F"*

The aforesaid quarterly returns show the following:

Quarter	Zero-rated Sales	Input Tax
1st	₱179,138,640.15	₱4,275,112.73
2nd	190,016,316.29	2,548,753.01
3rd amended	164,833,783.11	974,794.09
4th	152,701,089.63	813,653.09
Total	₱686,689,829.18	₱8,612,312.92

[7] Philippine National Oil Company – Energy Development Corporation.
[8] National Power Corporation.
[9] Executive Order No. 215, entitled "*Amending Presidential Decree No. 40 and Allowing the Private Sector to Generate Electricity*," dated July 10, 1987.

On January 4, 2007, petitioner filed an administrative claim for refund of unutilized excess input VAT for taxable year 2005 in the amount of ₱8,612,312.92, with BIR Revenue District Office No. 108, Kidapawan City, North Cotabato (*Exhibit "H"*).

On March 1, 2007, petitioner filed a supplemental administrative claim for refund of unutilized input VAT for taxable year 2005 in the same amount of ₱8,612,312.92, to highlight the effect of Section 108(B)(7) of the NIRC of 1997, as amended by R.A. 9337[10] (*Exhibit "I"*).

Since respondent has not acted on petitioner's administrative claim for refund, petitioner elevated its claim before this Court by way of three separate Petitions for Review, docketed as C.T.A. Cases Nos. 7595, 7638, and 7692.

C.T.A. Case No. 7595

In his Answer, respondent by way of special and affirmative defenses, averred:

"8. To support its claim for refund, it is imperative for petitioner to prove the following, *viz.*:

a. The registration requirements of a value-added taxpayer in compliance with the pertinent provision of the Tax Code of 1997, as amended, and its implementing revenue regulations;

b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT in compliance with the provisions of Sections 113 and 114 of the Tax Code of 1997, as amended;

c. Proof of compliance with the submission of complete documents in support of the administrative claim for refund pursuant to Section 112(D) of the Tax Code of 1997, as amended, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim in accordance with the provision of Section 229 of the Tax Code, as amended;

d. That the input taxes of ₱8,612,312.92 allegedly representing unutilized input VAT from its domestic purchases of goods and services were:

d.i paid by the petitioner;

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[10] Republic Act No. 9337, entitled "*An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue code of 1997, as amended, and for other Purposes.*"

d.ii attributable to its zero-rated sales; and
d.iii such have not been applied against any output tax;

e. That petitioner's claim for tax credit or refund of the unutilized input tax (VAT) in the amount of ₱4,275,112.73 was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 112(A) of the Tax Code of 1997, as amended;

f. That petitioner has complied with the governing rules and regulations with reference to recovery of tax erroneously or illegally collected as explicitly found in Sections 112(A) and 229 of the Tax Code, as amended;

g. Petitioner failed to prove compliance with the aforesaid requirements."

CTA Case No. 7638

In his Answer, respondent alleged the following:

"5. The amount of ₱3,523,547.10 being claimed by petitioner as alleged unapplied and unutilized creditable input taxes for the 2nd to 3rd quarters of 2005 was not properly documented.

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

7. To support its claim, it is imperative for petitioner to prove the following, *viz.*:

   a. The registration requirements of a value-added taxpayer in compliance with Section 6(a) and (b) of Revenue Regulations No. 6-97 in relation to Section 4.107-a(a) of Revenue Regulations No. 7-95, and Section 236 of the National Internal Revenue Code of 1997 (NIRC of 1997).

   b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT in compliance with the provisions of Sections 113 and 114 of the NIRC of 1997.

   c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance (*sic*) to Revenue Memorandum Order No. 53-98, otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition *sine qua non* prior to the filing of judicial claim in accordance with the provision of Section 229 of the NIRC of 1997. It is worthy of emphasis that Section 112(D) of the NIRC of 1997 requires the submission of complete documents in support of the application filed with the Bureau of Internal Revenue before the 120-day audit period shall apply, and before the taxpayer could avail of judicial remedies as provided for in the law. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review.

d. That the input taxes of ₱20,546,004.87 allegedly paid by petitioner on its domestic purchases of non-capital goods and services, services rendered by non-residents and importation of non-capital goods for the first to fourth quarters of taxable year 2005 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters.

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Sections 112(A) and (D) and 229 of the NIRC of 1997.

f. That petitioner's domestic purchases of goods and services were made in the course of its trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchases journal, showing that it actually paid VAT in accordance with Sections 110(A)(2) and 113 of the NIRC of 1997, and in pursuance (*sic*) to Section 4.104-5(a) and (b) of Revenue Regulations No. 7-95 (RE: Submission of Claims for Input Tax Credit).

g. The requirements as enumerated under Section 4.104-2 of Revenue Regulations 7-95 (Re: Persons who can avail of the Input Tax Credits).

h. The petition for review is premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112(D) of the NIRC of 1997, the 120-day period starts to run on 4 January 2007, the date when it filed its administrative claim for refund. The said period is yet to expire on 4 May 2007. Hence, the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 3 June 2007. This being so, this Honorable Court has no jurisdiction to act on the instant petition for review.

The instant case involves a claim for refund or tax credit of alleged unapplied and unutilized creditable input taxes hence, Je

Section 112(D) of the NIRC of 1997 should apply as regards the prescriptive period for filing a claim for refund.

First, distinctions should be made in the application of Sections 112(D) and 229 of the NIRC of 1997. Section 112(D) specifically refers to refunds or tax credits of 'creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that said input has not been applied against output tax,' while Section 229 of the same Code refers to 'any national internal revenue taxes alleged to have been erroneously or allegedly assessed or collected.'

Second, Section 112(D) provides for a specific period within which the claim for refund or tax credit of input VAT shall be made. It is clearly provided in said Section that in case of failure on the part of the Commissioner to act on the application, the claimant only has thirty (30) days from the expiry of the 120-day period within which to file the petition for review before the Honorable Court. There is no such specific period provided under Section 229 which merely provides for two (2) years from the date of payment of any national internal revenue tax.

Clearly, from the foregoing, Section 112(D) is specific as to the prescriptive period for claiming refunds of excess or unutilized VAT attributable to zero-rated or effectively zero-rated sales.

In the case at bar, petitioner seeks for a refund of its unapplied and unutilized creditable input tax. Hence, the 120-day period starts to run on 4 January 2007, the date when it filed its administrative claim for refund. The said period is yet to expire on 4 May 2007. Thus, the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 3 June 2007. This being so, this Honorable Court has no jurisdiction to act on the instant petition for review."

CTA Case No. 7692

In his Amended Answer, respondent, by way of special and affirmative defenses, averred:

"9. The Court of Tax Appeals has no jurisdiction to entertain the instant petition for review for failure on the part of the petitioner to comply with the provision of Section 112(D) of the 1997 National Internal Revenue Code which provides, thus:

'Section 112. *Refunds or Tax Credits of Input Tax.* —

xxx xxx xxx

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

In cases of full or partial denial of 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.

10. As stated in the petition, petitioner filed the administrative claim for refund with the Bureau of Internal Revenue on January 4, 2007. Under the afforested (*sic*) provision, respondent ha[s] 120 days or until May 4, 2007 within which to act on the application. Corollarily, petitioner ha[s] 30 days from May 4, 2007 within which to appeal before this Honorable Court. The instant petition was filed on October 24, 2007. Obviously the thirty (30) days given to the petitioner to appeal to this Honorable Court in case of full or partial denial of the tax refund or failure on the part of the Commissioner to act on the application ha[d] already prescribed."

On June 14, 2007, in C.T.A. Case No. 7368, petitioner filed the "Amended Petition for Review with Motion to Consolidate with CTA Case No. 7595."

On October 24, 2007, in C.T.A. Case No. 7692, petitioner filed the "Petition for Review with Motion to Consolidate with CTA Case Nos. 7595 and 7638," which the Court granted in a Resolution dated January 29, 2008.

In view of the consolidation, on March 25, 2008, the parties filed their "Joint Stipulation of Facts and Issues" and stipulated the following facts:

"1. Republic Act No. 9337 took effect on November 1, 2005.

2. On January 4, 2007, petitioner filed its administrative claim with the Bureau of Internal Revenue, Revenue District Office No. 6, Kidapawan City ('BIR') arising from its unapplied and unutilized creditable input taxes for the year 2005 in the total amount of ₱8,612,312.92.

3. On March 1, 2007, petitioner submitted with the BIR a letter dated February 10, 2007."

> Petitioner presented Daisy Abenes, its General Office and Accounting Manager, Michael Aguirre, the Court-Commissioned Independent CPA, Eric Castro, the Accountant of PNOC-EDC, and Rommel Dela Vega, Payable Assistant of PNOC-EDC, as witnesses, and documentary evidence, marked as *Exhibits "A"* to *"EEE,"* inclusive of their submarkings, which were all admitted in a Resolution dated June 23, 2009.
>
> On the other hand, upon manifestation of respondent's counsel, respondent waived his right to present evidence and submitted the case for decision.
>
> Thereafter, the parties were granted thirty (30) days from August 26, 2009, within which to file their simultaneous memoranda; afterwhich the case shall be deemed submitted for decision.
>
> Both petitioner and respondent having filed their respective "Memorandum," the case was deemed submitted for decision on October 22, 2009.[11]

On April 23, 2010, the CTA Former Second Division rendered a Decision which partly granted MIIGP's Petition for Review, the dispositive portion reads:

> **WHEREFORE**, premises considered, the above-captioned Petitions for Review are hereby **PARTLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner Mindanao II Geothermal Partnership in the reduced amount of ₱8,605,526.64, representing input VAT paid on domestic purchases of goods and services for the four quarters of 2005.
>
> **SO ORDERED**.[12]

Aggrieved, CIR filed a Motion for Partial Reconsideration (Re: Decision promulgated on 23 April 2010) on May 14, 2010 while MIIGP filed its Comment/Opposition (To Respondent's Motion for Partial Reconsideration) on May 31, 2010. The CTA Former Second Division issued an Amended Decision on September 14, 2010, the dispositive portion as follows:

[11] *Rollo*, CTA EB Case No. 690, pp. 44-54.
[12] *Ibid.*, p. 66.

> **WHEREFORE,** premises considered, respondent CIR's "Motion for Partial Reconsideration" is hereby **GRANTED**. Accordingly, the dispositive portion of our Decision dated April 23, 2010 is hereby amended to read, as follows:
>
> "**WHEREFORE**, premises considered:
>
> 1) as regards C.T.A. Case No. 7595, the Petition for Review is hereby **DISMISSED** for failure to comply with a condition precedent;
>
> 2) as regards C.T.A. Case No. 7692, the Petition for Review is hereby **DISMISSED** for being filed way beyond the prescribed period; and
>
> 3) as regards C.T.A. Case No. 7638, the Petition for Review is hereby **PARTLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby ORDERED TO REFUND or TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner Mindanao II Geothermal Partnership in the reduced amount of ₱3,523,055.45, representing input VAT paid on domestic purchases of goods and services for the second and third quarters of 2005.
>
> **SO ORDERED.**[13]

On October 1, 2010, MIIGP filed a Motion for Partial Reconsideration which was denied in a Resolution dated December 30, 2010, to wit:

> **WHEREFORE,** premises considered, petitioner's "Motion For Partial Reconsideration" is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**[14]

Hence, this Petition for Review *en banc.* Je

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[13] *Ibid.*, p. 33.
[14] *Rollo*, CTA EB No. 718, p. 32.

Initially, CTA EB No. 690 was raffled for study and report to Associate Justice Lovell R. Bautista while CTA EB No. 718 was raffled for study and report to Associate Justice Caesar A. Casanova. In a minute resolution[15] dated December 14, 2011, the Court *en banc* resolved to consolidate CTA EB No. 718 with CTA EB No. 690, the latter case bearing the lower docket number, after considering that the said cases were filed by both parties from the same Amended Decision promulgated on September 14, 2011 by the CTA Former Second Division in CTA Case Nos. 7595, 7638 & 7692.

After due deliberation on the consolidated petitions, Associate Justice Olga Palanca-Enriquez expressed her opinion to AFFIRM the Amended Decision dated September 14, 2010 of the CTA Former Second Division. This became the majority opinion and the case was re-raffled to Associate Justice Juanito C. Castañeda, Jr. who was tasked to write the prevailing opinion since Associate Justice Olga Palanca-Enriquez was the *ponente* of the assailed decision.

THE ISSUES

The following are the assigned errors/grounds proffered by the parties in their respective Petitions for Review:

CTA EB No. 690

THE SECOND DIVISION OF THE HONORABLE COURT ERRED WHEN IT GRANTED THE CLAIM FOR REFUND OF RESPONDENT IN THE AMOUNT OF ₱3,523,055.45 REPRESENTING INPUT VAT PAID ON

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[15] *Rollo*, CTA EB No. 690, pp.148-149.

DOMESTIC PURCHASES OF GOODS AND SERVICES FOR THE SECOND AND THIRD QUARTERS OF 2005.[16]

CTA EB No. 718

I.

AT THE TIME PETITIONER FILED ITS JUDICIAL CLAIM FOR REFUND/TAX CREDIT FOR THE 1ST QUARTER OF YEAR 2005 (CTA CASE NO. 7595), PETITIONER RELIED IN GOOD FAITH ON THE THEN CONSISTENT RULINGS OF THE HONORABLE COURT THAT A TAXPAYER IS NOT BOUND BY THE 120-DAY PERIOD BUT BY THE TWO-YEAR PRESCRIPTIVE PERIOD;

II.

AT THE TIME PETITIONER FILED ITS PETITION FOR REVIEW, IT ALSO RELIED IN GOOD FAITH ON THE INTERPRETATION OF THIS HONORABLE COURT (AND OF THE SUPREME COURT) OF THE WORD "MAY"; and

III.

THE RETROACTIVE APPLICATION IN THE PRESENT CASE OF THE RULING IN THE CASE OF COMMISSIONER OF INTERNAL REVENUE VS. AICHI FORGING COMPANY OF ASIA, INC., G.R. NO. G.R. No. *(sic)* 184823, OCTOBER 6, 2010, WOULD CERTAINLY RESULT IN THE GROSS DENIAL OF DUE PROCESS TO PETITIONER, IMPAIR ITS VESTED RIGHTS AND PRODUCE SUBSTANTIAL INEQUITABLE RESULTS AND INJUSTICE TO PETITIONER WHO MERELY RELIED IN GOOD FAITH ON THE THEN CONSISTENT RULINGS OF THIS HONORABLE COURT AT THE TIME IT FILED ITS PETITION FOR REVIEW.[17]

THIS COURT'S RULING

Both petitions are DISMISSED for lack of merit. We find no cogent reason to reverse the findings and conclusion of the CTA Former Second Division in the assailed rulings, to wit: *Je*

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[16] *Rollo*, CTA EB No. 690, p. 10.
[17] *Rollo*, CTA EB No. 718, p. 122.

1. First Quarter of 2005 (CTA Case No. 7595) – while the administrative claim was timely filed on January 4, 2007, the judicial claim was prematurely filed on March 30, 2007;

2. Second and Third Quarters of 2005 (CTA Case No. 7638) – both administrative and judicial claims were timely filed. However, the claim is partly granted in the reduced amount of P 3,523,055.45; and

3. Fourth Quarter of 2005 (CTA Case No. 7692) - while the administrative claim was timely filed on January 4, 2007, the judicial claim was belatedly filed on October 24, 2007.

CTA EB No. 690

The input taxes on the portion partly granted were attributable to zero-rated sales.

The CIR assailed the portion of unutilized input VAT partly granted, particularly the inclusion of the following receipts for these were NOT directly connected with MIIGP's business of power generation, to wit:

Exhibits	Particulars	Nature of Transaction	Amount
"BB-25.1"	Services rendered by SGV & Co.	Audit Services	₱70,400.00
"BB-25.2"	Services rendered by SGV & Co.	Audit Services	₱63,800.00

Upon re-examination of the records of the case, it was found that the sales of MIIGP were all zero-rated sales, hence, the transactions below were entirely attributable to its zero-rated sales. *jl*

Non-submission of supporting documents in the administrative level is not fatal to a claim for refund. [18]

The alleged non-submission of complete documents at the administrative level will not bar this Court from receiving, evaluating and appreciating evidence. Once the claim for refund has been elevated to the Court, the admissibility, materiality, relevancy, probative value and weight of evidence presented therein become subject to the Rules of Court.[19] The question of whether or not the evidence submitted by a party is sufficient to warrant the granting of a claim for refund lies within the sound discretion and judgment of the Court.[20] Moreover, CTA being a court of record, the cases filed before it are litigated *de novo* and party litigants should prove every minute aspect of their cases. No evidentiary value can be given the purchase invoices or receipts submitted to the BIR as the rules on documentary evidence require that these documents must be formally offered before the CTA.[21] Otherwise stated, judicial claims are being decided based on what has been presented and formally offered by party litigants during the trial of the case before the Court and not on the mere allegation of non-submission of complete documents before the BIR. Jc

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[18] *Commissioner of Internal Revenue vs. CE Luzon Geothermal Power Company, Inc.*, CTA EB No. 474, September 1, 2009.
[19] *Commissioner of Internal Revenue vs. Toledo Power Company*, CTA EB No. 589 (CTA Case No. 7471), September 15, 2010.
[20] Consolidated cases of *CE Luzon Geothermal Power Company, Inc. vs. Commissioner of Internal Revenue*, CTA EB No. 553 and *Commissioner of Internal Revenue vs. CE Luzon Geothermal Power Company, Inc.*, CTA EB No. 554, July 20, 2010, *Commissioner of Internal Revenue vs. San Roque Power Corporation*, CTA EB No. 523, April 15, 2010.
[21] *Commissioner of Internal Revenue vs. Manila Mining Corporation*, G.R. No. 153204, August 31, 2005, 468 SCRA 571.

CTA EB No. 718

The arguments of MIIGP essentially questioned the application to the present case of both the 120-30 day period for filing judicial claims under Section 112 of the 1997 National Internal Revenue Code (NIRC) and the Supreme Court case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* [22] *(Aichi* case).

The pertinent portion of Section 112 of the 1997 NIRC reads:

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

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[22] G.R. No. 184823, October 6, 2010, 632 SCRA 422. The *Aichi* case became final as per Supreme Court's Resolution dated December 6, 2010.

within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying 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. [23]

xxx xxx xxx xxx

The above-mentioned provision was applied in *Aichi* case where the Supreme Court ruled:

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales." **The phrase "within two (2) years xxx apply for the issuance of a tax credit certificate or refund" refers to 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 Jc

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[23] Now Section 112 (C) under Republic Act (RA) No. 9337. This law was signed on May 24, 2005. It was supposed to take effect on July 1, 2005 but its enforcement was stopped because of a temporary restraining order. The constitutionality of the law was upheld in *ABAKADA Guro Partylist officer Samson S. Alcantara et. Al. v. The Hon. Executive Secretary Eduardo Ermita*, G.R. No. 168056, October 18, 2005. The law was finally enforced on November 1, 2005. (RBSI Editorial Staff, "The National Internal Revenue Code of the Philippines," Second Edition 2006, p. 215)

> **scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.**
>
> xxx xxx xxx
>
> **In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA.**[24] (emphasis ours)

Based on law and jurisprudence, administrative claim for unutilized input VAT attributable to zero-rated sales may be made only within two (2) years after the close of the taxable quarter when the sales were made. On the other hand, judicial claim should be filed within thirty (30) days from receipt of the decision of the CIR or upon the expiration of the one hundred twenty (120) days in case of inaction of the CIR. The observance of these periods is mandatory and non-compliance therewith would result in the denial of the claim.

The Supreme Court is the ultimate arbiter whose decisions all other courts should take bearings.

We note the ruling of the Supreme Court in the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue* [25] that all rulings of the Supreme Court on questions of law are conclusive and binding on all courts. All courts must take their bearings from the decisions of the Supreme Court. The Supreme Court, by

[24] *Supra* note 22.
[25] G.R. No. 176290, Resolution dated September 21, 2007, 533 SCRA 776, 781.

tradition and in our system of judicial administration has the last word on what the law is; it is the final arbiter of any justifiable controversy. Indeed, there is only one Supreme Court from whose decisions all other courts should take bearings.[26]

The Court has time and again stated that the rule on *stare decisis* promotes stability in the law and should, therefore, be accorded respect. However, blind adherence to precedents, simply as precedent, no longer rules. More important than anything else is that the court is right, thus its duty to abandon any doctrine found to be in violation of the law in force. [27]

Judicial doctrine does not amount to the passage of a new law, but consists merely of a construction or interpretation of a pre-existing one.

Judicial interpretation of a statute constitutes part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect. Such judicial doctrine does not amount to the passage of a new law, but consists merely of a construction or interpretation of a pre-existing one. [28]

The law takes effect from the time of its effectivity and not from the time of the promulgation of a decision applying the law. Considering that the claims for refund in the instant case involved taxable year 2005 filed in 2007, the applicable

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[26] *Commissioner of Internal Revenue vs. Michel J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of *GSIS vs. Court of Appeals*, 334 Phils. 163, 175, 266 SCRA 187 (1997).
[27] *Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company,* G.R. No. 140230, December 15, 2005, 478 SCRA 61.
[28] *Eagle Realty Corporation vs. Republic*, G.R. No. 151424, Resolution dated July 31, 2009, 594 SCRA 555.

law was Section 112 of 1997 NIRC which took effect on January 1, 1998,[29] the same law applied to *Aichi* case. MIIGP was very well within its coverage. It is only upon the effectivity of the statute that legal rights and obligations become available to those entitled by the language of the statute. [30] The validity and obligatory force of a law proceed from the fact that it has first been promulgated. [31]

The judicial claim in *Aichi* was filed on September 30, 2004. This was prior to the promulgation of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Corporation, Inc.)* [32] (*Mirant* case), and earlier than the claims of herein respondent (First Quarter- March 30, 2007, Second & Third Quarters- June 14, 2007 and Fourth Quarter- October 27, 2007 for respondent). Yet, the Supreme Court applied outright the ruling in *Mirant* when it decided the *Aichi* case. Hence, We see no reason why We should depart from the recent *Aichi* rulings.

The words of the law are clear, plain, and free from ambiguity, hence, it must be given its literal meaning and applied without any interpretation.

Section 112 of NIRC of 1997 is clear and unambiguous. Under the *verba legis* rule, if the words of the law are clear, plain, and free from ambiguity, it must be

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[29] *Commissioner of Internal Revenue vs. McGeorge Food Industries, Inc.,* G.R. No. 174157, October 20, 2010, 634 SCRA 193, 200.
[30] *Abakada Guro Party List, et.al. vs. Cesar V. Purisima,* et.al. , G.R. No. 166715, August 14, 2008, 562 SCRA 251.
[31] *Mighty Corporation vs. E. & J. Gallo Winery,* G.R. No. 154342, July 14, 2004, 434 SCRA 473.
[32] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

given its literal meaning and applied without any interpretation, [33] the need for interpretation is obviated, no plausible pretense being entertained to justify non-compliance. [34] All that has to be done is to apply it in every case that falls within its terms. [35] More so, it is not within the province of the Court to inquire into the wisdom of the law, for indeed, we are bound by the words of the statute. [36]

The CTA is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.

Since the CTA is a specialized court of limited jurisdiction, [37] we can only take cognizance of such matters as are clearly within our jurisdiction *i.e.*, exclusive appellate jurisdiction on decisions/rulings or inaction of the CIR.[38] The law conferring jurisdiction on the CTA is Section 7 of Republic Act No. 1125, as amended by RA 9282, to wit:

> Sec. 7. Jurisdiction. — The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters

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[33] *Commissioner of Internal Revenue vs. Central Luzon Drug Corporation*, G.R. No. 159610, June 12, 2008, 554 SCRA 398.
[34] *Carmelino F. Pansacola vs. Commissioner of Internal Revenue*, G.R. No. 159991, November 16, 2006, 507 SCRA 81 citing the case of *Allied Brokerage Corporation vs. Commissioner of Customs,* No. L- 27641, August 31, 1971, 40 SCRA 555, 559, 560.
[35] *Ibid.*
[36] *Commissioner of Customs vs. Manila Star Ferry, Inc.*, G.R. Nos. L-31776-78, October 21, 1993, 227 SCRA 317.
[37] *Southern Cross Cement Corporation vs. Philippine Cement Manufacturers Corporation,* G.R. No. 158540, July 8, 2004, 434 SCRA 65.
[38] *Visayas Geothermal Power Company vs. Commissioner Internal Revenue,* CTA EB Case Nos. 520 & 521 (CTA Case No. 7394), Resolution dated May 9, 2011.

> arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
>
> (2) **Inaction by the Commissioner of Internal Revenue in cases involving** disputed assessments, **refunds of internal revenue taxes**, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial**; (emphasis ours)

The CTA shall exercise exclusive appellate jurisdiction to review by appeal the decisions as well as the inaction by the CIR in cases involving refunds of internal revenue taxes. In case where the NIRC provides a specific period for action, the CIR's inaction shall be deemed a denial.

Section 112 (D) of the NIRC provides specific period of action *i.e.*, the 120-day period within which the CIR shall render a decision. When no decision is made after the 120-day period, the taxpayer has 30 days within which to file an appeal with the CTA. If the taxpayer failed to do so, the taxpayer loses his right of judicial recourse. On the other hand, when a judicial claim is filed without awaiting the lapse of the 120-day period and there is no decision yet, the CTA acquires no jurisdiction as there is no decision or inaction to speak of.

In the case of *Ker & Company, Ltd. vs. Court of Tax Appeals*,[39] the Supreme Court held that "if a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional." Also, the case of *Rizal Commercial Banking Corporation vs.*

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[39] No. L-12396, January 31, 1962, 4 SCRA 160.

Commissioner of Internal Revenue [40] should be applied by analogy to the present case. The pertinent portion of the ruling states:

> **The decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal,** provided it is filed within 30 days after the receipt of such decision or ruling, or within 30 days after the expiration of the 180-day period fixed by law for the Commissioner to act on the disputed assessments. **This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction** to entertain and determine the correctness of the assessments. **Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same.** [41] (emphasis ours)

Similarly in the case of *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation,* [42] the Supreme Court reiterated that "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." [43]

Thus, "a taxpayer must prove not only his entitlement to a refund but also his compliance with the procedural due process as non-observance of the prescriptive periods

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[40] G.R. No. 168498, Resolution dated April 24, 2007, 522 SCRA 144.
[41] *Ibid.*
[42] G.R. No. 167606, August 11, 2010, 628 SCRA 96.
[43] *Ibid.*

within which to file the administrative and the judicial claims would result in the denial of his claim."[44]

WHEREFORE, in light of the foregoing laws and jurisprudence, Petitions for Review under CTA EB No. 690 and CTA EB No. 718 are hereby **DISMISSED**. Accordingly, the Amended Decision dated September 14, 2010, and Resolution dated December 30, 2010 promulgated by CTA Former Second Division are **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

(On Wellness Leave)

ERNESTO D. ACOSTA
Presiding Justice

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

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

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[44] *Supra* note 22.

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.

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB CASE NO. 690
(CTA Case Nos. 7595, 7638 & 7692)

-versus-

MINDANAO II GEOTHERMAL, PARTNERSHIP,
Respondent.

x---x

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

CTA EB CASE NO. 718
(CTA Case Nos. 7595, 7638 & 7692)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

Promulgated:
APR 04 2012 Apolinario 9:10 a.m.

x---x

CONCURRING AND DISSENTING OPINION

BAUTISTA, J.:

Based on the records of the case, the Former Second Division of the Court ("Court in Division") in its Decision dated April 23, 2010, discussed as follows:

> As regards the first requisite, petitioner contends that its sales of electricity as a power generation company qualify for VAT zero-rating,

under *paragraph 5, Section 6 of RA 9136*, also known as the *Electric Power Industry Reform Act of 2001* ("EPIRA"), which states:

xxx xxx xxx

Under the EPIRA law, to qualify for VAT zero-rating, petitioner must be able to establish that: (1) it is a generation company; and (2) it derives sales from power generation.

On July 1, 2005, however, *RA 9337* was enacted, amending certain provisions of *RA 8424* and *RA 9136*. *Section 6 of RA 9337* provides as follows:

xxx xxx xxx

Under *RA 9337*, to qualify for VAT zero-rating, petitioner must be able to prove that it is engaged in sale of power or fuel generated through renewable energy.

Accordingly, for the first and second quarters of 2005, petitioner is, therefore, governed by the EPIRA law. However, starting July 1, 2005, or for the third and fourth quarters of 2005, petitioner is governed by *RA 9337* on its claim for refund or issuance of a TCC.

Petitioner witness, Daisy Abenes, on direct examination testified that petitioner is a power generation company pursuant to the Build-Operate Transfer ("BOT") contract with the Philippine National Oil Company-Energy Development Corporation ("PNOC-EDC") for the finance, engineering, supply, installation, testing, commissioning, operation, and maintenance of a 48.25-megawatt geothermal power plant which has been duly accredited by Department of Energy ("DOE") as a Block Power Production Facility. Under the BOT contract, the PNOC-EDC supplies or delivers steam to petitioner at no cost. In turn, petitioner converts the steam into electric capacity or energy for the PNOC-EDC and delivers it to the National Power Corporation ("NPC") for and in behalf of the PNOC-EDC (*Exhibit "J"*).

Records show that petitioner indeed owns and operates a dual flash direct geothermal steam power plant with a capacity of 48.25 MW, located at the Mindanao Geothermal Reservation, Mount Apo, North Cotabato, and accredited by the Department of Energy as a Block Power Production Facility (*Exhibit "B"*).[1]

[1] *Rollo*, (CTA EB Case No. 690), pp. 59-61.

From the foregoing, the Court in Division ruled that Mindanao II Geothermal Partnership ("MIIGP") is a generation company using geothermal energy as its power source. It then found that MIIGP complied with the requisites under the EPIRA[2] that the taxpayer must be a generation company, and under RA No. 9337 that to be zero-rated, its source of energy must be renewable source, such as geothermal power. In addition, in its Amended Decision dated September 14, 2010, the Court in Division mentioned the following, *viz*: "Letter dated August 30, 2001 by Secretary Vincent Perez, Jr., of the [Department of Energy] DOE confirming that [MIIGP] is a duly accredited generating company; Certificate of Accreditation No. 95-03-07 issued by DOE on the 47-MW Geothermal Power Plant of [MIIGP]; and the Letter dated September 31, 2001 of Benjamin P. Lim, Manager of Planning & Control Division of PNOC-EDC advising [MIIGP] of the passage and effectivity of RA 9136."[3]

While I agree with the ruling of the Court in Division that for the first (1st) and second (2nd) quarters of 2005, MIIGP is governed by the provisions of the EPIRA, the same, however, holds true until November 1, 2005, or until the effectivity of RA No. 9337.

Republic Act ("RA") No. 9337, entitled "*An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, as amended, and for Other Purposes,*" expressly repeals Section 6 of the EPIRA, to quote:

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[2] An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes.
[3] *Rollo*, (CTA EB Case No. 690), p. 32.

SEC. 24. *Repealing Clause.* - The following laws or provisions of laws are hereby repealed and the persons and/or transactions affected herein are made subject to the value-added tax subject to the provisions of Title IV of the National Internal Revenue Code of 1997, as amended:

xxx xxx xxx

(B) Section 6, fifth paragraph of R.A. No. 9136 on the zero VAT rate imposed on the sales of generated power by generation companies; xxx

Nevertheless, as duly pointed out by the Court in Division, Section 6 of RA No. 9337 expressly provides as follows:

SEC. 6. Section 108 of the same Code, as amended, is hereby further amended to read as follows:

"SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –

xxx xxx xxx

(B) *Transactions Subject to Zero Percent (0%) Rate.* – The following services performed in the Philippines by VAT registered persons shall be subject to zero percent (0%) rate:

xxx xxx xxx

(7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels."

From the foregoing, albeit RA No. 9337 explicitly repeals the provision which provides for the sales of generated power by generation companies to be value added tax zero-rated, it specifically included in the enumeration, as an amendment under Section 108(B)(7) of the 1997 National Internal Revenue Code ("NIRC") that sale of power or fuel generated through renewable sources of energy, such as geothermal in the case at bench, is subject to zero percent (0%) rate.

However, I must underline the importance of the date of enforceability of RA No. 9337.

RA No. 9337 was signed on May 24, 2005, with the effectivity clause which states that "[t]his Act shall take effect on July 1, 2005." Nonetheless, the enforceability and implementation of the law was ceased by a temporary restraining order issued by the Supreme Court on July 1, 2005.

On September 1, 2005, the Supreme Court sitting *En Banc* upheld the constitutionality of RA No. 9337, and accordingly ruled that "[t]here being no constitutional impediment to the full enforcement and implementation of R.A. No. 9337, the temporary restraining order issued by the Court on July 1, 2005 is lifted upon finality of herein decision."[4] And on October 18, 2005, the Supreme Court denied with finality the Motions for Reconsideration, and the temporary restraining order issued was lifted.[5] RA No. 9337 was, thus, finally enforced on November 1, 2005.[6]

Applying therefore the foregoing discussions, MIIGP's claim covering the third (3^{rd}) quarter of 2005, until October 30, 2005, were likewise governed by the EPIRA, while from November 1, 2005 to December 31, 2005, the same shall be

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[4] ABAKADA Guro Party List (Formerly AASJAS), *et al., v.* The Honorable Executive Secretary Eduardo Ermita, *et al.*, G.R. Nos. 168056, 168207, 168461, 168463, and 168730, dated September 1, 2005.
[5] *Ibid.*
[6] J.R.A. Philippines, Inc., *v.* Commissioner of Internal Revenue, G.R. No. 177127, October 11, 2010; Panasonic Communications Imaging Corporation of the Philippines (formerly Matsushita Business Machine Corporation of the Philippines) *v.* Commissioner of Internal Revenue, G.R. No. 178090, February 8, 2010.

governed by RA No. 9337. Still, I must emphasize that the presentation of the COC duly issued by the ERC will best prove that MIIGP is engaged in the sale of generated power for the whole period of the subject claim, for as early as the effectivity of the EPIRA on June 26, 2001,[7] MIIGP has the opportunity to secure the required COC to bolster its claim for refund/credit of VAT-zero-rated transactions.

In not a few instances did this Court rule that in order to qualify for VAT zero-rating in accordance with EPIRA, the claimant must prove the twin requirements of being a generation company and of deriving its sales from power generation.[8] And for emphasis, in invoking Section 6 of the EPIRA in claiming zero-rated sale of power generation services, the claimant must comply with Section 4(a)(i) of Rule 5 of the IRR of the same law, which particularly provides for the required COC to be considered as a generation company.

With this, it is clearly established that the records of the case are bereft of evidence to prove that MIIGP is a generation company and that it derived its sales from power generation. I, nevertheless, take judicial notice of BIR Ruling No. 003-06, dated February 14, 2006, which states as follows:

BIR RULING NO. 003-06

> *Mindanao I & II Geothermal Partnership*
> Level 36, Tower I, the Enterprise Center
> 6766 Ayala Ave., corner Paseo de Roxas
> 1200 Makati City

xxx xxx xxx

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[7] Mindanao I Geothermal Partnership *v.* Commissioner of Internal Revenue, CTA Case No. 6788, October 13, 2005; Toledo Power Company *v.* Commissioner of Internal Revenue, CTA Case Nos. 7233 & 7294, December 15, 2009.
[8] *Ibid.*

This refers to your letter dated November 30, 2005, seeking confirmation of the following:

1. That the sale of electricity by Mindanao I Geothermal Partnership (M1GP) and Mindanao II Geothermal Partnership (M2GP) to Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC) is subject to zero percent (0%) value added tax (VAT) rate pursuant to Section 108(B)(7) of the Tax Code of 1997, as amended by Republic Act (R.A.) No. 9337; and

2. That any input on their purchases of goods, properties or services related to such zero-rated sales shall be available as tax credit or refund as provided for under Section 112 of the same Tax Code, as amended by R.A. No. 9337.

FACTUAL BACKGROUND

xxx xxx xxx

M1GP and M2GP are duly registered with the Board of Investments (BOI) in accordance with the Omnibus Investments Code of 1987, under Certificate of Registration No. 94-240, dated September 16, 1994. **Both M1GP and M2GP have been certified by the Energy Regulatory Commission (ERC) as power generation facilities under Certificate of Compliance Nos. 03-10-GXT26-0026 and 03-10-GXT25-0025, respectively, dated October 15, 2003.** Both are VAT-registered with Registration Nos. 004-712-984 and 004-776-953, respectively.

xxx xxx xxx

In support of their request, M1GP and M2GP, submitted the following documents:

1. Copy of **ERC Certificates of Compliance, both dated October 15, 2003, issued to M1GP and M2GP, respectively;**

xxx xxx xxx

BIR REPLY

xxx xxx xxx

Accordingly, we hereby confirm your opinion, to wit:

1. The sale of electricity by M1GP and M2GP to PNOC-EDC, which is generated through a renewable source of energy, particularly geothermal energy, continues to be subject to automatic zero percent (0%) VAT rate pursuant to Section 108(B)(7) of the Tax Code, as amended by R.A. 9337.

2. Any input tax on their purchases of goods or services, except capital goods related to such zero-rated sales, shall be available as tax credit or refund pursuant to Section 112 of the same Tax Code, as amended by R.A. 9337.

xxx xxx xxx

(SGD.) JOSE MARIO C. BUÑAG
Commissioner of Internal Revenue
(Boldfacing supplied.)

From the foregoing, I vote to affirm the ruling of the Court in Division that MIIGP complied with the requisites under the EPIRA Law and RA No. 9337.

Nonetheless, it is still my view that the Court sitting *En Banc* must reverse and set aside the Amended Decision dated September 14, 2010, insofar as the Court in Division's ruling on the reckoning of the prescriptive period.

Records show that MIIGP filed its administrative claim for refund or issuance of a tax credit certificate for the four (4) quarters of 2005 on January 4, 2007. And as to its judicial claims, records show that: (a) for the first (1st) quarter of 2005, MIIGP filed a Petition for Review on March 30, 2007, docketed as CTA Case No. 7595; (b) for the second (2nd) and third (3rd) quarters of 2005, it filed an Amended Petition for Review on June 14, 2007, docketed as CTA Case No. 7638; and (c) for the fourth (4th) quarter of 2005, it filed a Petition for Review on October 24, 2007, docketed as CTA Case No. 7692.

When MIIGP filed the above claims the then controlling doctrine in this forum is that the reckoning of the prescriptive period is from the filing of the pertinent return,[9] not from the close of the quarter,[10] and neither within thirty (30) days after the one hundred twenty (120)-day period given to the CIR to resolve the administrative claim;[11] the latter doctrines were promulgated only *after* the taxpayer-claimant had faithfully relied and complied with the Court's former ruling.

With this, while the Court in Division ruled in its Decision dated April 23, 2010 that MIIGP's administrative and judicial claims were all filed within the prescriptive period, and on the other hand, in the Amended Decision dated September 14, 2010 that CTA Case No. 7595 was prematurely filed, and CTA Case No. 7692 was filed out of time, I must point out that from the filing of the returns for the year 2005, *viz*: First (1st) Quarter on April 20, 2005;[12] Second (2nd) Quarter on July 26, 2005;[13] Third (3rd) Quarter on October 25, 2005;[14] and Fourth (4th) Quarter on January 25, 2006,[15] MIIGP has two (2) years from said respective dates within which to file both its administrative and judicial claims.

Therefore, after a thorough review of the records of the case, I deem the findings made by the Court in Division in its Decision dated April 23, 2010 more in accordance with the above disquisitions.

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[9] Atlas Consolidated Mining and Development Corporation *v.* Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[10] Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[11] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010.
[12] *Exhibit "C."*
[13] *Exhibit "D."*
[14] *Exhibit "E-2."*
[15] *Exhibit "F."*

In sum, it is my opinion that MIIGP is entitled to a refund or issuance of a tax credit certificate in the amount of ₱8,605,526.64, representing input tax paid on domestic purchases of goods and services for the four quarters of 2005.

Accordingly, I vote that the Petition for Review, docketed as CTA EB Case No. 690, filed by the Commissioner of Internal Revenue, be **DENIED**, and therefore, the Petition for Review, docketed as CTA EB Case No. 718, filed by Mindanao II Geothermal Partnership, be **GRANTED**.

The Amended Decision promulgated on September 14, 2010, and the Resolution dated December 30, 2010, issued by the Former Second Division of the Court should be **REVERSED** and **SET ASIDE**. The Decision dated April 23, 2010 should be **REINSTATED**.

LOVELL R. BAUTISTA
Associate Justice