REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

HEDCOR SIBULAN, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 8014

Members:

BAUTISTA, Chairperson,
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, JJ.

Promulgated:
SEP 18 2012
JBFernando 3:36 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

Settled is the rule that jurisdiction over the subject matter in a judicial proceeding is conferred by the sovereign authority, which organizes the court; it is given only by law and in the manner prescribed by law *(Hasegawa, Kazuro vs. Kitamura, Minoru, 538 SCRA 274)*.

THE CASE

This is a Petition for Review filed by Hedcor Sibulan, Inc. (hereafter "petitioner") praying for refund or issuance of a tax credit certificate ("TCC") in the amount of P15,301,194.87, representing its unutilized input value-added

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tax ("VAT") on purchases of goods and services for the fourth quarter of calendar year 2007, attributable to petitioner's zero-rated sales of generated power.

THE PARTIES

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines, the primary purpose of which is to engage in the business of owning, developing, constructing, operating, repairing, and maintaining of hydro-electric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations, with principal office at Brixton Street, Pasig City, with principal office at Sta. Cruz, Davao Del Sur. Petitioner may be served with summons and other court processes thru Salvador & Associates, counsel for petitioner, at Units 815-816, 8/F, Tower One & Exchange Plaza, Ayala Triangle, Ayala Avenue, 1226 Makati, City.

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 credits of erroneously or excessively paid taxes, as provided by law, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City.

THE FACTS

The facts, as culled from the records, are as follows:

On January 18, 2008, petitioner filed with Revenue District Office No. 115 ("RDO 115") its original quarterly VAT Returns for the fourth quarter of calendar year 2007.

On May 20, 2008, petitioner filed an amended quarterly VAT Returns for the fourth quarter of calendar year 2007 with RDO 115, reflecting the following:

	Purchases	Input Tax
Purchases of capital goods not exceeding 1M	P221,830.42	P26,619.65
Domestic purchases of goods other than capital goods	5,865,789.58	703,894.74
Domestic purchases of services	121,422,337.40	14,570,680.48
Total		**P15,301,194.87**

On December 18, 2009, petitioner filed its administrative claim for refund/tax credit with RDO 115 for its unutilized input VAT for the fourth quarter of calendar year 2007 in the amount of P15,301,194.87.

On December 29, 2009, petitioner filed the instant Petition for Review.

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After several extensions, on March 29, 2010, respondent CIR filed a "Motion to Admit Answer" with attached "Answer", which the Court granted in its Resolution dated May 24, 2010.

In her Answer, respondent CIR alleged that petitioner's claim for refund is subject to administrative routinary investigation/examination by the BIR; the amount of P15,301,194.87 being claimed by petitioner as unutilized input VAT on domestic purchases of capital goods and other capital goods and services for the fourth quarter of calendar year 2007 is not properly documented; petitioner must prove that it has complied with the provisions of *Section 112(A) and (C) of the NIRC of 1997, as amended*, on the prescriptive period to claim for VAT refunds/credits; proof of compliance with the prescribed checklist of requirements to be submitted involving claims for VAT refund, pursuant to *Revenue Memorandum Order 53-98*, otherwise there would be no sufficient compliance with the filing of the administrative claim for refund; *Section 112(C) of the NIRC of 1997, as amended*, requires the submission of complete documents in support of the application filed with the BIR before the 120-day period shall apply; petitioner must also prove that it complied with the invoicing requirements mentioned in *Sections 110 and 113 of the NIRC of 1997, as amended*; in an action for refund/tax credit, the *onus probandi* is on the

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taxpayer to establish its right to refund/tax credit and failure to sustain the burden is fatal to its claim for refund/tax credit; claims for refund are construed in *strictissimi juris* against the claimant for the same partake of the nature of exemption from taxation; the CTA has no jurisdiction to entertain the instant petition for review for failure to comply with the provisions of *Section 112(C) of the NIRC of 1997, as amended,* since petitioner filed the administrative claim for refund on December 18, 2009 and barely 11 days thereafter, filed the Petition for Review with this Court on December 29, 2011, hence, the 120-day period for the CIR to decide had not yet lapsed; the petition was prematurely filed; hence, it must be dismissed for lack of jurisdiction and/or lack of cause of action; and petitioner did not comply with the conditions required in the *NIRC of 1997, as amended*, hence, petitioner is estopped from questioning the premature filing of its claim for refund with this Court.

Petitioner presented Elaine Grace E. Maridable and Emmanuel Y. Mendoza, as witnesses, and documentary evidence, marked as *Exhibits "A" to "EEE"*, inclusive of their submarkings, which were all admitted by the Court in a Resolution dated November 4, 2011.

For the repeated failure of counsel for respondent to appear during the initial presentation of the evidence for the respondent despite notice, upon motion of counsel for petitioner, respondent was deemed to have waived her right to present evidence, and both parties were granted 30 days from notice to submit their simultaneous memoranda, afterwhich, the case shall be deemed submitted for decision.

On March 7, 2012, respondent manifested that she is adopting all the relevant facts, issues, and arguments stated in her Answer as her "Memorandum", which the Court noted in its Resolution dated March 21, 2012.

On March 26, 2012, petitioner filed its "Memorandum", hence, the case was deemed submitted for decision on April 3, 2012.

As stipulated by the parties, the main issue for this Court's consideration is:

ISSUE

WHETHER OR NOT PETITIONER IS ENTITLED TO REFUND OF OR ISSUANCE OF A TCC FOR ITS ALLEGED UNUTILIZED INPUT VAT AMOUNTING TO P15,301,194.87.

Said main issue is broken down into the following sub-issues:

1) Whether or not petitioner's unutilized input VAT for the fourth quarter of calendar year 2007 amounting to P15,301,194.87 is duly substantiated by documentary evidence in the form of invoices and official receipts;

2) Whether or not petitioner's unutilized input VAT for the fourth quarter of calendar year 2007 amounting to P15,301,194.87 was applied or credited against any output VAT of petitioner in the same quarter and subsequent taxable quarter or quarters;

3) Whether or not the input VAT on petitioner's domestic purchases of goods and services for the fourth quarter of calendar year 2007 is attributable to its zero-rated sales of generated power; and

4) Whether or not petitioner's administrative and judicial claims for refund or issuance of a TCC for its unutilized input VAT paid and incurred by petitioner on its domestic purchases of goods and services attributable to its zero-rated sales of generated power were filed within the period prescribed under the NIRC of 1997, as amended.

THE COURT'S RULING

The petition is without merit.

Section 112(C) of the NIRC of 1997, as amended, provides, as follows:

"SEC. 112. *Refunds or Tax Credits of Input Tax.* –

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

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(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."

Pursuant to the above-quoted *Section 112 (A),* a taxpayer may apply a claim for refund of unutilized input VAT payments, not otherwise used for any internal revenue tax due, within two years reckoned from the close of the taxable quarter when the relevant sales were made.

While, *Section 112(C)* provides that the CIR has 120 days from the submission of supporting documents to decide the claim for refund. In case of full or partial denial, or inaction of the CIR, the taxpayer may appeal to the CTA, within 30 days from receipt of the decision, or from the lapse of the 120-day period.

Thus, in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., 632 SCRA 422* ("Aichi case"), the Supreme Court ruled, as follows:

> "In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.
>
> 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.

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 the 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) (now C) 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 Subsection (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) (now C) 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) (now C) 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 vs. Victorias Milling, Co., Inc. (22 SCRA 12) 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."

Applying the foregoing to the instant case, records show that petitioner timely filed its administrative claim for refund for the fourth quarter of calendar year 2007 on December 18, 2009, or within the two year prescriptive period from the close of the taxable quarter when the sales were made or from December 31, 2009, pursuant to *Section 112 (A) of the NIRC of 1997, as amended.*

However, notwithstanding the timely filing of its administrative claim, records show that petitioner filed the instant Petition for Review on December 29, 2009, or barely 11 days after petitioner filed its administrative claim for refund, together with the supporting documents in support of its claim. The instant Petition for Review was, therefore, prematurely filed, as petitioner did not wait for the lapse of the 120 days before filing its appeal with the CTA, in violation of *Section 112(C) of the NIRC of 1997, as amended.*

Hence, pursuant to the Aichi case, the premature filing of petitioner's judicial claim for refund/credit of input VAT before this Court warrants a dismissal, inasmuch as no jurisdiction was acquired by this Court.

It must be emphasized that *Section 7 of RA 9282, as amended,* explicitly provides that the CTA shall exercise exclusive appellate jurisdiction to review by appeal **decisions** of the CIR or **inaction** by the CIR on refunds of internal revenue taxes, 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 arising under the National Internal Revenue Code 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 for action, in which case the inaction shall be deemed a denial;
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> xxx xxx." *(Emphasis supplied)*

Hence, contrary to petitioner's contention, the jurisdiction of the CTA in *Section 7 (a) (1) and (2)* is limited not only to "refunds of internal revenue taxes", but also to "Decisions of the Commissioner of Internal Revenue in cases involving xxx refunds of internal revenue taxes xxx" and "Inaction by the Commissioner of Internal Revenue in cases involving xxx refunds of internal revenue taxes xxx". For the CTA, therefore, to acquire jurisdiction over

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refunds of internal revenue taxes, there must be a decision or inaction by the CIR. Otherwise, the CTA will not acquire jurisdiction over the claim for refund or credit. In the instant case, no decision has yet been rendered by the CIR, neither was there inaction on her part, as the 120-day period to decide has not yet lapsed. Thus, the CTA has not acquired jurisdiction over petitioner's claim for refund or credit of unutilized input VAT for the fourth quarter of calendar year 2007 for having been prematurely filed.

In view of the foregoing, we find it unnecessary to discuss petitioner's compliance with the other requisites for refund of input taxes on purchases of goods and services for the fourth quarter of calendar year 2007 attributable to its zero-rated sales, for being moot and academic.

WHEREFORE, premises considered, the present Petition for Review is hereby **DISMISSED** for lack of jurisdiction as the Petition For Review was prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Dissenting Opinion) **LOVELL R. BAUTISTA**

(With Separate Concurring Opinion) **AMELIA R. COTANGCO-MANALASTAS**

A T T E S T A T I O N

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson, Third Division

C E R T I F I C A T I O N

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

HEDCOR SIBULAN, INC., Petitioner,	**CTA CASE NO. 8014**
- *versus* -	Members: **BAUTISTA,** *Chairperson* **PALANCA-ENRIQUEZ,** and **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 18 2012 ABFernando 3:36p.m.

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DISSENTING OPINION

BAUTISTA, J.:

At the outset, let the case of *Magtoto v. Manguera, et al.,*[1] as ruled by the Supreme Court sitting *En Banc*, be emphasized:

> **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 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

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[1] 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.

> 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.*)

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.[2] Nonetheless, this 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*.[3]

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 close of the relevant taxable quarter when the sales were made – should apply; for when petitioner filed its administrative claim for refund/tax credit on December 18, 2009, and the subsequent Petition for Review with this Court on December 29, 2009, the then controlling doctrine in this forum is that of the case of *Commissioner of Internal*

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[2] Jose Kabigting *v.* The Acting Director of Prisons, G.R. No. L-15548, October 30, 1962.
[3] 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.*

Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.].[4] It was merely unfortunate that during the pendency of the case at bench that the Supreme Court issued the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*[5]

Albeit the latter ruling is more in accordance with the letter and spirit of Section 112 of the 1997 National Internal Revenue Code, as amended, it would be the height of injustice to impose a new ruling, on the basis of the so-called "adherence to precedence," for the latter doctrine is clearly promulgated *after* the taxpayer-claimant had faithfully relied and complied with the Court's former ruling.

In addition, a plain reading of Section 112(C) of the 1997 National Internal Revenue Code ("NIRC"),[6] as amended,[7] will show that the provision uses 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

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[4] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[5] G.R. No. 184823, October 6, 2010.
[6] (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.
[7] As amended by Republic Act No. 9337.

nor jurisdictional; subject only to the period provided under Section 112(A)[8] of the same Code.

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 inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[9] The administrative and judicial claims must be *both* filed within the two (2)-year period;[10] otherwise, the Court will be deprived of jurisdiction to entertain the case.[11]

Given the foregoing, I thus find the administrative and judicial claims filed within the prescribed prescriptive period.

Accordingly, I vote that the Petition for Review be **GIVEN DUE COURSE.**

LOVELL R. BAUTISTA
Associate Justice

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[8] 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.

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

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

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

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COURT OF TAX APPEALS
QUEZON CITY

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- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8014

Members:

Bautista, Chairperson
Palanca-Enriquez, and
Cotangco-Manalastas, *JJ.*

Promulgated:

SEP 18 2012
3:36 p.m.

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SEPARATE CONCURRING OPINION

I concur with the dismissal of the instant Petition for Review for having been prematurely filed.

However, at the outset let me clarify that, although I agree with the conclusion dismissing the instant petition, I maintain my view that premature filing of a judicial claim for refund or non-observance of the doctrine of exhaustion of administrative remedies is not jurisdictional; it only renders the action premature and not ripe for judicial determination.

The premature filing of petitioner Hedcor Sibulan, Inc.'s Petition for Review is a violation of the *doctrine of exhaustion of administrative remedies*. This failure to observe the doctrine of exhaustion of administrative remedies is fatal to one's cause of action, thus, absent any waiver or *estoppel*, the case is susceptible of dismissal for *lack of cause of action*[1]. It bears to stress, however, that said failure to exhaust

[1] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.

administrative remedies does not affect the jurisdiction of the court. Non-exhaustion of administrative remedies only renders the action premature, that the claimed cause of action is not ripe for judicial determination[2]. Since the premature filing of a claim for refund and/or tax credit or the failure to exhaust administrative remedy is not jurisdictional and, at the most, only renders the case susceptible of dismissal for *lack of cause of action*, such defense of premature filing of judicial claim for refund is therefore **waivable** or may be considered **waived** pursuant to Section 1, Rule 9 of the Rules of Court[3].

Given that respondent Commissioner Internal Revenue (CIR) alleged as an affirmative defense the premature filing of petitioner's judicial claim for refund or issuance of tax credit, it cannot be said that respondent CIR waived such defense of premature filing, thus, said defense was properly raised for the consideration of this Court as a valid ground for dismissal.

Hence, considering that petitioner's judicial claim for refund or issuance of a tax credit of unutilized input VAT for the 4^{th} quarter of calendar year 2007 was prematurely filed, and the said defense of premature filing was timely raised in respondent CIR's Answer, I vote that the present Petition for Review be DISMISSED not for lack of jurisdiction but on the ground of lack of cause of action.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

[2] Merida Water District, et al. vs. Francisco Bacarro, et al., G.R. No. 165993, September 30, 2008 citing *Rosario v. Court of Appeals*, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; *Carale v. Abarintos*, G.R. No. 120704, March 3, 1997, 269 SCRA 132, 141

[3] Section 1, Rule 9 of the Rules of Court states that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if dismissal is based on the ff. grounds, to wit: lack of jurisdiction, *litis pendentia*, *res judicata*, and prescription.