REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NOS. 7227, 7287 and 7317

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
JUN 26 2009 ; 1:30pm

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AMENDED DECISION

CASANOVA, *J.*:

For resolution are respondent's **"MOTION FOR PARTIAL RECONSIDERATION"** filed on October 14, 2008, and petitioner's **"MOTION FOR PARTIAL RECONSIDERATION"** filed on October 16, 2008, both seeking the partial reconsideraton of this Court's Decision promulgated on September 22, 2008; the dispositive portion of which reads:

> "**WHEREFORE**, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** in the modified amount of **SEVEN MILLION SEVEN HUNDRED THREE THOUSAND NINE HUNDRED FIFTY SEVEN AND 79/100 PESOS (P7,703,957.79)** representing its unutilized input VAT for the four (4) quarters of the taxable year 2003.
>
> **SO ORDERED.**"

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Since the parties' Motions rest on different arguments, the Court shall address them separately.

Respondent seeks to reconsider the said Decision arguing that:

1. the judicial claims for the first and second quarters of 2003 were filed beyond the period allowed by law, which means that this Court has no jurisdiction over the same;
2. the judicial claims for the first and second quarters of 2003 were prematurely filed, which as a consequence deprives this Court of jurisdiction; and
3. the petitioner's claim for refund was not properly documented in the administrative proceedings, which means that petitioner is not entitled over the relief sought.[1]

Respondent argues that the judicial claims for the first and second quarters of 2003 were filed beyond the period allowed by law on the basis of its literal interpretation of Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, which states:

> "**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: xxx" (*Emphasis supplied*)

Respondent further refutes this Court's dependence on Section 229 of the NIRC of 1997 and labeled such provision as "a more general provision" that "can only govern those cases outside the ambit of Section 112(A)"[2].

[1] Respondent's *Motion for Partial Reconsideration*, *Rollo*, pp. 283, 288, and 292.
[2] Respondent *Motion for Partial Reconsideration*, *Rollo*, p. 285.

Moreover, respondent relies on the Supreme Court ruling in the case entitled **Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)**[3], wherein it was held that:

> "The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years **reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Section 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."

Respondent's Motion is partly meritorious.

Applying the afore-quoted ruling in the ***Mirant*** case and Section 112 of the NIRC, petitioner's administrative application for refund of input tax for the first quarter of 2003 filed on April 13, 2005 and the judicial claim for the second quarter of 2003 filed on July 7, 2005, were made out of time; considering that the reckoning dates of the two-year prescriptive period for the first and second quarters of 2003 are April 1, 2003 and July 1, 2003, respectively, *i.e.*, after the close of the said quarters when the sales were made. Therefore, the refund claims for the first and second quarters of 2003 had already prescribed.

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

As regards the issue of premature filing or elevation of the refund claim before this Court, Section 229 of the NIRC of 1997, which is pertinent to its resolution, is hereunder quoted, thus:

> "**SEC. 229. Recovery of Tax Erroneously or Illegally Collected. -** No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or **of any sum alleged to have been excessively** or in any manner wrongfully **collected**, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without the 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." *(Emphasis supplied)*

It is a basic principle in statutory construction that force and effect should not be narrowly given to isolated and disjoined clauses of the law but to its spirit, broadly taking all its provisions together in one rational view. Since a statute is enacted as a whole and not in parts or sections, that is, one part is as important as the others, the statute should be construed and given effect as a whole.[4]

Thus, although Section 112 is specific as to the subject matter of the refund or tax credit certificate, *i.e.*, "the creditable input tax due or paid" attributable to zero-rated or effectively zero-rated sales, such provision should still be harmonized with Section 229. This must be so because the latter provision covers also "any sum alleged to have been excessively... collected", which is exactly the nature of an input VAT attributable to zero-rated or effectively zero-rated sales.

Such being the case, the *mandatory* statute of limitations prescribed under Section 229 in seeking judicial recourse should also be made to apply to claims for refund or tax credit certificate under Section 112. This notwithstanding the fact that the second

[4] *Leynes vs. Commission on Audit*, G.R. No. 143596, December 11, 2003.

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paragraph of Section 112(D) provides a period within which to appeal a decision or an unacted claim to this Court, since the same provision is couched merely in a *permissive* sense with the employment of the word "may".

Accordingly, petitioner's immediate recourse to this Court without awaiting the decision of respondent on its application for refund of input tax for the first and second quarters of 2003, *cannot* be regarded as a premature invocation of this Court's jurisdiction.

As earlier explained, Section 229 of the NIRC of 1997 is applicable.

The provisions of the internal revenue code, such as said Section 229, are not merely directory but mandatory.[5] Apart from being mandatory, said provision is not subject to any qualification; hence, it applies regardless of the conditions under which the payment has been made.[6]

As aptly held in **Commissioner of Internal Revenue vs. Rosemarie Acosta**[7]:

> "xxx. Revenue statutes are substantive laws and in no sense must their application be equated with that of remedial laws. As well said in a prior case, **revenue laws are not intended to be liberally construed**. Considering that taxes are the lifeblood of the government and in Holmes's memorable metaphor, the price we pay for civilization, **tax laws must be faithfully and strictly implemented**." *(Emphasis supplied)*

The Supreme Court has repeatedly held that the claim for refund or credit with the Bureau of Internal Revenue and the subsequent appeal to this Court must be filed within the two-year period. If the Commissioner of Internal Revenue takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in this Court before the end of the two-year period without awaiting the decision of the Commissioner.[8]

Corollarily, nowhere and in no wise does the law imply that the Commissioner of Internal Revenue must act upon the claim, or that the taxpayer shall not go to court before

[5] *Chan Kian vs. Court of Tax Appeals, et al.*, G.R. No. L-12184, May 29, 1959.
[6] *Guagua Electric Light Plant Co., Inc. vs. Collector of Internal Revenue, et al.*, G.R. No. L-14421, April 29, 1961; *Gonzales vs. Court of Tax Appeals, et al.*, G.R. Nos. L-14532-33, May 26, 1965; *Commissioner of Internal Revenue vs. Insular Lumber Co., et al.*, G.R. No. L-24221, December 11, 1967.
[7] G.R. No. 154068, August 3, 2007.
[8] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc., et al.*, G.R. No. L-24108, January 3, 1968.

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he is notified of the Commissioner's action[9] on the claim for refund or credit. This is so because of the positive requirement of Section 229 and the doctrine that delay of the Commissioner in rendering decision does not extend the peremptory period fixed by a statute.[10]

It must also be pointed out that it is beyond the power of the courts to extend the period for appeal.[11] In fact, the taxpayer's failure to comply with the requirement regarding the institution of the action or proceeding in court within two years after the payment of the taxes bars him from the recovery of the same, irrespective of whether a claim for the refund of such taxes filed with the Commissioner of Internal Revenue is still pending action of the latter.[12]

In a nutshell, petitioner's refund claims for the first and second quarters of 2003 were filed out of time. Such being the case, this Court finds petitioner entitled to a refund or issuance of tax credit certificate representing unutilized input VAT merely for the third and fourth quarters of taxable year 2003 in the amount of P2,980,887.77, computed as follows:

Claimed Input VAT				
	CTA Case No.	Period Covered-2003	Amount	
	7227	1st Quarter (filed out of time)	-0-	
	7287	2nd Quarter (filed out of time)	-0-	
	7317	3rd & 4th Quarters	P 3,521,129.50	P 3,521,129.50
Less: Disallowed Input VAT per Exhibit "X"				
	Annex D.1		P 2,090.16	
	Annex D.2		29,861.82	
	Annex D.3		2,752.00	
	Annex D.4		487,355.93	522,059.91
Creditable Input VAT				P 2,999,069.59
Less:	Output VAT due on the sale of fully depreciated Nissan Patrol			18,181.82
Refundable Input VAT				**P 2,980,887.77**

Regarding the third assigned error, respondent contends that petitioner's claim for refund was not properly documented in the administrative proceedings and accordingly

[9] *P.J. Kiener Co. Ltd. vs. David*, G.R. No. L-5163, April 22, 1953.
[10] *Gibbs, et al. vs. Collector of Internal Revenue, et al.*, G.R. No. L-13453, February 29, 1960.
[11] *Chan Kian vs. Court of Tax Appeals, et al., supra.*
[12] *College of Oral & Dental Surgery vs. Court of Tax Appeals, et al.*, G.R. No. L-10446, January 28, 1958.

invokes the ruling of the Supreme Court in **Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue**[13], to wit:

> "Petitioner's contention that non-compliance with Revenue Regulations 3-88 could not have adversely affected its case in the CTA indicates a failure on its part to appreciate the nature of the proceedings in that court. First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an *appeal* by way of petition for review of a previous, unsuccessful administrative claim. Therefore, as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency *a quo* did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit. Second, cases filed in the CTA are litigated *de novo.* Thus, a petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required for the successful prosecution of an administrative claim."

While this Court does not disprove the foregoing pronouncement, nowhere in his Motion did respondent identify which document or documents petitioner failed to submit. In the ***Atlas*** case, the documents which petitioner therein failed to submit were clearly identified, *viz.*, the purchase invoices and receipts.

Upon a careful evaluation of the evidence offered by petitioner, it appears that petitioner was able to submit the necessary documents. Records show that the Bureau of Internal Revenue, through Revenue District Officer Muslimen L. Maca-Agir Al Hadj, sent a letter dated July 18, 2005[14] to petitioner, having the following contents:

> "This refers to your request for issuance of Tax Credit on excess VAT Inputs for the taxable year 2003.
>
> In order to expedite the processing of your request, please submit the following documents within twenty (20) days after receipt thereof, to wit:
>
> 1. Certified photocopies of the Supplier's Value Added Tax Returns showing the remittances of the taxes; and

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[13] G.R. No. 145526, March 16, 2007.
[14] Exhibit "U".

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> 2. Furnished copy of the Revenue Accounting Division (RAD) certification showing the tax credit subject of this claim was remitted to the bureau."

On the basis of the said letter, this Court can deduce that there are no other documents that were required to be submitted for the BIR to process petitioner's claim for refund, except that which were mentioned. There is no showing that the said requested documents were ever submitted. However, petitioner was justified in not submitting the same. As pointed out in its letter to respondent dated July 26, 2005[15], petitioner stated:

> "In connection with your letter dated July 18, 2005 (copy attached for your ready reference), please be informed that we cannot submit the requested documents **because these are not the requirements under the checklist issued by the BIR as per RMO 53-98**. Moreso, we understand that every region is doing the tax mapping program so that BIR would be the first one to know whether these suppliers are filing and remitting their corresponding Value-added-tax." (*Emphasis supplied*)

It must be emphasized that Revenue Memorandum Order No. (RMO) 53-98[16] lists down the documents which taxpayers are required to submit. As a background in issuing the said issuance, the latter states:

> "It has been observed that for the same kind of tax audit case, Revenue Officers differ in their request for requirements from taxpayers as well as in the attachments to the dockets resulting to tremendous complaints from taxpayers and confusion among tax auditors and reviewers.
>
> **For equity and uniformity**, this Bureau comes up with a prescribed list of requirements from taxpayers, per kind of tax, as well as of the internally prepared reporting requirements, **all of which comprise a complete tax docket**." (*Emphasis supplied*)

A cursory reading of the checklist of RMO 53-98 for VAT refunds would reveal that the documents which were requested by the BIR in the above-stated letter dated July 18, 2005 are in fact *not* included in the required documents to be submitted. Hence, it cannot be said that petitioner's claim for refund was not properly documented.

The Court now proceeds to resolve petitioner's Motion.

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[15] Exhibit "V".

[16] SUBJECT: Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket.

Petitioner seeks to partially reconsider the same Decision based on the following allegations:

1. the sale of the fully depreciated Nissan Patrol is a one-time transaction and is not incidental to the VAT zero-rated operation of petitioner; and
2. the disallowed input taxes being claimed for refund or tax credit by petitioner are justifiable and substantially complied with the requisites for refund or tax credit.[17]

In its Motion, petitioner argues that the sale of the fully depreciated Nissan Patrol is a one-time transaction and is not incidental to its VAT zero-rated operation; consequently, it should not be subject to VAT at ten percent (10%). According to petitioner, the said sale does *not* come within the ambit of the primary operation of petitioner as to be considered as having been made "in the course of trade or business" as defined under Section 105 of the NIRC of 1997.

The records of this case, however, are bereft of any indication or evidence which would show that the said sale is not incidental to petitioner's VAT zero-rated operation. All that petitioner can offer are bare assertions to that effect.

As cases filed before this Court are litigated *de novo*, party-litigants must prove *every minute aspect* of their cases.[18]

Moreover, as can be gleaned from the Decision sought to be reconsidered[19], in finding that the said sale is subject to VAT at 10%, the Court relied on the Independent Certified Public Accountant's Report[20], which was formally offered to and duly admitted by this Court without any qualification. Accordingly, this Court maintains that the sale of the fully depreciated Nissan Patrol is subject to VAT at 10%.

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[17] Petitioner's *"Motion for Partial Reconsideration"*, *Rollo*, pp. 300 and 301.
[18] *Dizon vs. Court of Tax Appeals, et al.*, G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation*, G.R. No. 153204, August 31, 2005.
[19] Decision, p. 19, *Rollo*, p. 279.
[20] Exhibit "X".

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Anent the allegation that some of the disallowances were erroneous since petitioner substantially complied with the requisites for refund claims, the Court reiterates that the disallowance was proper. A review of the evidence on record vis-à-vis petitioner's explanation proves that petitioner's assertions are not supported by evidence. Therefore, the disallowance was appropriate.

WHEREFORE, the **"MOTION FOR PARTIAL RECONSIDERATION"** of petitioner is hereby **DENIED** for lack of merit; while the **"MOTION FOR PARTIAL RECONSIDERATION"** of respondent is **PARTIALLY GRANTED**. Accordingly, the dispositive portion of the Decision promulgated on September 22, 2008 is hereby **MODIFIED** as follows:

> "**WHEREFORE**, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** in the modified amount of **TWO MILLION NINE HUNDRED EIGHTY THOUSAND EIGHT HUNDRED EIGHTY SEVEN AND 77/100 PESOS (P2,980,887.77)** representing its unutilized input VAT for the third and fourth quarters of taxable year 2003.
>
> **SO ORDERED**."

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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****

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 7227

x---x

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. Case No. 7287

x---x

MINDANAO II GEOTHERMAL PARTNERSHIP,
Petitioner

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. Case No. 7317

Members:

ACOSTA, *P.J.*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
JUN 26 2009 1:30pm

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CONCURRING AND DISSENTING OPINION

I concur with the *ponencia* of Justice Casanova in granting petitioner's claim for refund or issuance of tax credit certificate in the modified amount of P2,980, 887.77 representing unutilized input VAT for the third and fourth quarters of 2003.

However, with due respect, I beg to disagree with the following conclusions:

a. Petitioner's claim for the second quarter has prescribed;

b. There is no premature invocation of this Court's jurisdiction;

c. Section 229 of the National Internal Revenue Code (NIRC) of 1997 is applicable to the instant case which is a case of refund of input VAT; and

d. The sale of petitioner's fully depreciated vehicle (Nissan Patrol) is subject to VAT.

Petitioner's application for administrative refund of input tax filed on April 13, 2005 for the second quarter of 2003 is within the two-year period reckoned from July 1, 2003 which is after the close of the taxable quarter when the sales were made provided under Section 112 (A) of the NIRC of 1997. However, petitioner's immediate recourse to this Court on July 7, 2005 without awaiting the decision of the Commissioner of Internal Revenue or the lapse of the 120-day period, in utter disregard of the procedure laid down in Section 112 (D) of the same Code, is a premature invocation of this Court's jurisdiction and is a clear violation of the rule on exhaustion of administrative remedies.

In this case, Section 112 of the NIRC of 1997 is the relevant and applicable provision in determining whether petitioner's claim is filed within the prescriptive period or not, contrary to Section 229 of the same Code. Section 112 provides that:

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"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.

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 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." (*Emphasis supplied.*)

Clearly, the afore-quoted section applies to **refunds or tax credits of input taxes**. Sub-sections (A) and (D) thereof categorically applies to the instant case. A perusal of Sub-section (A) in relation to Sub-section (D) would show that a taxpayer

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has **two years after the close of the taxable quarter to apply for refund.** The Commissioner shall grant the refund or issue tax credit certificate within 120 days from the date of submission of complete documents. In case of denial or inaction on the part of the Commissioner within 120 days, the taxpayer may appeal to this Court.

Nowhere in the afore-quoted section can you find the indispensable requirement that a taxpayer may appeal to this Court even without awaiting the expiration of the 120-day period if the two-year prescriptive period under Section 229 is about to expire. It must be remembered that Section 229, hereunder reproduced, applies to recovery of taxes erroneously or illegally assessed or collected:

> "**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, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

Section 229 has no application in the case at bar -- being a claim for refund or issuance of tax credit certificate for excess or unutilized input VAT. Rather, it is

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Section 112 that must be applied. Worth emphasizing is the rule of *generalia specialibus non derogant*. Where there is in the same statute a particular or special provision, and also a general one which in its most comprehensive sense would include what is embraced in the special or particular provision, the latter must be operative, and the general provision can only affect such cases as are not within the particular provision. In other words, Section 112 (D) of the NIRC of 1997, a specific provision on claims for refund of input tax, must be operative and Sections 204 and 229 of the same, both more general provisions, can only govern those cases outside the ambit of Section 112 (D).

Admittedly, in a litany of cases decided by the Supreme Court, it is consistently ruled that a taxpayer need not wait for the action of the Commissioner on his claim for refund before taking it to court. The rule is stated succinctly in the case of *Gibbs, et al. vs. Collector of Internal Revenue, et. al.*,[1] as follows:

> "If, however, the Collector takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector. This is so because of the positive requirement of Section 306 (now Section 229 of the present Code) and the doctrine that the delay of the Collector in rendering a decision does not extend the peremptory period fixed by the statute."

The above ruling is reiterated in the case of *Commissioner of Internal Revenue vs. Victorias Milling Co.*[2], which has been mentioned in the instant case.

Then, in a 2007 case, *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*,[3] the Supreme Court had the occasion to deal with prescriptive periods on refund of input taxes, to quote:

[1] 107 Phil 232.
[2] G.R. No. L-24108, January 3, 1968.
[3] G.R. Nos. 141104 & 148763, June 8, 2007.

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"The prescriptive period for filing an application for tax refund/credit of input VAT on zero-rated sales made in 1990 and 1992 was governed by Section 106(b) and (c) of the Tax Code of 1977, as amended, which provided that: xxx

By a plain reading of the foregoing provision, the two-year prescriptive period for filing the application for refund/credit of input VAT on zero-rated sales shall be determined from the close of the quarter when such sales were made.

xxx xxx xxx

It is already well-settled that the two-year prescriptive period for instituting a suit or proceeding for recovery of corporate income tax erroneously or illegally paid under Section 230 of the Tax Code of 1977, as amended, was to be counted from the filing of the final adjustment return. This Court already set out in ACCRA Investments Corporation v. Court of Appeals, the rationale for such rule, thus – xxx

The very same reasons set forth in the afore-cited cases concerning the two-year prescriptive period for claims for refund of illegally or erroneously collected income tax may also apply to the Petitions at bar involving the same prescriptive period for claims for refund/credit of input VAT on zero-rated sales.

xxx xxx xxx

Lastly, **although the taxpayer's refundable or creditable input VAT may not be considered as illegally or erroneously collected, its refund/credit is a privilege extended to qualified and registered taxpayers by the very VAT system adopted by the Legislature.** Such input VAT, the same as any illegally or erroneously collected national internal revenue tax, consists of monetary amounts which are currently in the hands of the government but must rightfully be returned to the taxpayer. Therefore, whether claiming refund/credit of illegally or erroneously collected national internal revenue tax, or input VAT, the taxpayer must be given equal opportunity for filing and pursuing its claim." (*Emphasis supplied.*)

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The Supreme Court applied Section 230 (now 229) of the 1977 Tax Code to the above cases. However, it bears stressing that the **Gibbs**, **Atlas** and **Victorias Milling** cases were decided under the old Tax Code. Unlike Section 112 of the NIRC of 1997, Section 106 of the 1977 Tax Code does not provide for a period within which to appeal to this Court. Thus, in the **Atlas** case, the Supreme Court applied Section 230 (now 229) of the Tax Code and held that the two-year prescriptive period for claims for refund of illegally or erroneously collected tax may also apply to therein petition, involving claims for refund/credit of input tax.

With the amendments[4] introduced to Section 106 (now 112) of the 1977 Tax Code, the "periods" on when to file a judicial claim for refund of input taxes before this Court is already provided. This only shows the legislative intent of filling up the absence of a "rule" on the matter.

Furthermore, the rationale behind the ruling that *the taxpayer need not wait for the Commissioner to decide before elevating his case before this Court* is that, after the expiration of the two-year period, the taxpayer would already be barred from filing his judicial claim. Thus, if the two-year period is about to expire, the taxpayer has to elevate his claim before this Court *sans* the decision of the Commissioner. But this predicament sought to be avoided is not present in the case of "refunds or tax credits of input taxes" under the NIRC of 1997. Precisely because in accordance to the second paragraph of Section 112 (D), if the Commissioner failed to decide the claim within 120 days, a taxpayer can still elevate his claim before this Court within thirty days albeit the two-year prescriptive period in Section 229 had already prescribed or is about to expire.

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[4] Republic Act No. 7716 otherwise known as "The Expanded Value Added Tax Law" which became effective on May 28, 1994.

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It is worth noting too that if the two-year prescriptive period provided in Section 229 is applicable to refund or tax credit of input taxes in spite of the pronouncement in Section 112 (D) that *a taxpayer may appeal to this Court within 30 days after the expiration of the 120-day period*, the latter mandate will become futile and inoperative. A propounding question then comes to mind; what is the reason of the Legislature in placing the "120-30" day period in Section 112 if such period can just be disregarded in relation to Section 229? Of course, we cannot assume that the "120-30" day period to appeal under Section 112 (D) is a mere perfunctory aftermath of the amendment.

Long standing is the legal fiat that we should avoid, if possible, a construction that renders any part of the statute meaningless or extraneous. A law should be interpreted with a view to upholding rather than destroying it. **One portion of a statute should not be construed to destroy the other.** A construction that would render a provision inoperative or ineffective should be avoided. The provisions should be harmonized and reconciled, if possible; they should be construed together as means to effect the purpose of the law. **The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another so that all may stand together.**[5]

If we limit the application of Section 229 to instances of refunds of erroneous and illegal taxes, and Section 112 (D) to refund of input taxes; both provisions will be harmonized and can be given effect independently without rendering the "120-30" day period in the latter Section meaningless.

It is likewise postulated in the *ponencia* that Section 112 (D) uses the word "may" which indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive. It is neither mandatory nor

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[5]Statutory Construction, Fifth Edition, 2003, Pages 256-257.

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jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the NIRC.

I am in accord that judicial recourse upon this Court under Section 112 (D) of the NIRC of 1997 is merely directory or permissive. The import of the word "may" is to give the taxpayer a choice/option to appeal before this Court. Nonetheless, the use of the word "may" in the provision should not lead to an interpretation that would disregard the "120-30" day period, evidently provided in Section 112 (D). The directory import of the proviso is not an argument against the fact that a taxpayer is provided with a 30-day period to appeal before this Court upon the denial of the claim or expiration of the 120-day period.

Thus, at this juncture, I wish to point out my position that Section 229 of the NIRC of 1997 should no longer be used in determining whether a claim for refund of input taxes has already prescribed or not. The pertinent section on the matter is Section 112 of the NIRC of 1997.

On the vatability of petitioner's sale of its fully depreciated Nissan Patrol, it is ruled that the records of the case is bereft of any indication or evidence which would show that the said sale is not incidental to petitioner's VAT zero-rated operation, all that petitioner can offer are bare assertions to that effect thus, the ruling.

I humbly disagree, pursuant to Section 105 in relation to Section 106, both of the Tax Code of 1997, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties, is collected from any person, who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, which tax shall be paid by the seller or transferor.

The phrase "in the course of trade or business" means the regular conduct or pursuit of a commercial activity, including transactions incidental thereto.

The Supreme Court defined the phrase "to engage" as "to embark on a business or to employ oneself therein. The word 'engaged' **connotes more than a single act or a single transaction; it involves some continuity of action.** 'To engage in business' is uniformly construed as signifying an employment or occupation which occupies one's time, attention, and labor for the purpose of a livelihood or profit. **The expressions 'engage in business', 'carrying on business' or 'doing business' do not have different meanings, but separately or connectedly convey the idea of progression, continuity, or sustained activity.** 'Engaged in business' means occupied or employed in business: 'carrying on business' does not mean the performance of a single disconnected act but means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereto; while 'doing business' conveys the idea of business being done, not from time to time, but all the time."[6]

On the other hand "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to or depending upon another, which is termed the principal[7].

Petitioner is an accredited power generation company by the Department of Energy, which under a Built-Operate-Transfer, is engaged in the sale of generated power and delivery of electric capacity and energy to the National Power Corporation for and in behalf of Philippine National Oil Company-Energy Development Corporation[8]. Apparently, the sale of its vehicle is not "in the course

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[6] *Commissioner of Internal Revenue vs. Court of Appeals, et.al. and Atlas Consolidated Mining and Development Corporation, vs. Court of Appeals, et. al. G.R. Nos. 104151 & 105563, March 10, 1995.*
[7] Black's Law Dictionary, 6th ed., page 762.

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of its business", the sale is not being regularly done by petitioner, neither is it incidental, for the same is not necessary to carry out petitioner's power generating service. The sale of the vehicle is a mere isolated transaction that should not be subject to the 10% VAT.

WHEREFORE, I maintain my stand that petitioner's claim for refund of unutilized input for the second quarter of 2003 has not prescribed but prematurely filed for its failure to wait for the decision of the Commissioner of Internal Revenue or the expiration of the 120-day period, thus, it failed to exhaust the available administrative remedies. When an action is premature, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[9]

Likewise, the sale of the Nissan Patrol is not subject to 10% VAT for the same is not done in accord to or incidental to petitioner's business.

ERNESTO D. ACOSTA
Presiding Justice

[9] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.