Republic of the Philippines
**COURT OF TAX APPEALS**
Quezon City

***EN BANC***

**TeaM SUAL CORPORATION, (Formerly, Mirant Sual Corporation and Southern Energy Pangasinan, Inc.,),**
*Petitioner,*

-versus-

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**CTA EB No. 691**
**(CTA Case No. 7620)**

**Present:**
**CASTAÑEDA, JR.**
**BAUTISTA**
**UY**
**CASANOVA**
**FABON-VICTORINO**
**MINDARO-GRULLA**
**COTANGCO-MANALASTAS, JJ.**

**Promulgated:**

MAR 04 2013 1:30 p.m.

x-----------------------------------------------------------------------x

# DECISION

***MINDARO-GRULLA, J.:***

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 2(a)(1), Rule 4,* in relation to *Section 4(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA),*[1] *as amended,* of the

[1] Rule 4, SEC. 2. *Cases within the jurisdiction of the Court en banc.* – The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

Amended Decision dated September 16, 2010[2] rendered by the Former Second Division of this Court, the dispositive portion of which reads as follows:

> "WHEREFORE, premises considered, respondent CIR's "Motion for Partial Reconsideration" is hereby **GRANTED**. Accordingly, our Decision dated April 23, 2010 is hereby **RECALLED** and **SET ASIDE**, and a new one is hereby entered dismissing the Petition for Review for failure to comply with a condition precedent.
>
> **SO ORDERED.**"

The facts of the case as recited by the Former Second Division in its Decision dated April 23, 2010,[3] are as follows:

<u>THE PARTIES</u>

> Petitioner (TeaM Sual) is a domestic corporation duly organized and existing under and by virtue of Philippine laws with principal office at Bo. Pangascasan, Sual, Pangasinan. Petitioner was originally registered with the SEC under the name of Pangasinan Electric Corporation, which was changed to Southern Energy Pangasinan, Inc., then to Mirant Sual Corporation. During the pendency of this case, it again changed its corporate name to TeaM Sual Corporation on July 23, 2007.
>
> Respondent (CIR), on the other hand, is the duly appointed Commissioner of Internal Revenue, vested with

---

x x x x x x x x x

Rule 8, SEC. 4. *Where to appeal; mode of appeal.* – x x x

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

x x x x x x x x x

[2] Penned by Associate Justice Olga Palanca-Enriquez, concurred in by Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Erlinda P. Uy, *En Banc* Docket, pp. 63-74.

[3] Penned by Associate Justice Olga Palanca-Enriquez, concurred in by Associate Justice Juanito C. Castañeda, Jr., while Associate Justice Erlinda P. Uy was on leave, *En Banc* Docket, pp. 76-116.

authority to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

## THE FACTS

The antecedent facts of the case are as follows:

Petitioner is principally engaged in the business of power generation and subsequent sale thereof to National Power Corporation (NPC) under a Build, Operate, Transfer (BOT) scheme. As such, it is principally registered with the BIR as VAT taxpayer, in accordance with Section 107 of the NIRC of 1997, as amended, with Tax Identification No. 003-841-103.

On December 17, 2004, petitioner filed with the BIR Audit Information Tax Exemption and incentives Division an Application for Effective Zero-Rate of its supply of electricity to the NPC for the period January 1, 2005 to October 31, 2005, which was subsequently approved.

On December 21, 2006, petitioner filed an administrative claim for refund of unutilized input VAT with the Revenue District Office No. 5, at Alaminos City in the total amount of P 103,588,530.59 for the period January 1, 2005 to October 31, 2005.

In order to preserve its right and to toll the running of the prescriptive period for its judicial claim, petitioner filed the instant Petition for Review on April 18, 2007.

In his answer filed on May 28, 2007, respondent, by way of special and affirmative defenses, averred that the CTA has no jurisdiction to entertain the instant petition for review for failure of petitioner to comply with *Section 112(D) of the NIRC of 1997, as amended;* that the administrative claim for refund with the BIR was filed on December 21, 2006, subsequently, the instant petition was filed on April 15, 2007, obviously, the 120 days given to Commissioner to decide on the claim has not yet lapsed when the petition was filed; hence, the petition was prematurely filed and must be dismissed for lack of jurisdiction.

Petitioner presented Taryn Uberita and Emmanuel Mendoza, as witnesses, and documentary evidence marked as Exhibits "*A*" to "*XX,*" inclusive of their submarkings, which were admitted by the Court, except for Exhibits "*W*" to "*Z,*" "*EE*" to "*HH,*" and their submarkings, for failure of the petitioner to identify the same during trial.

Upon motion of counsel for the petitioner, respondent's right to present evidence was considered waived for his repeated failure to appear at the trial for the presentation of his evidence.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice. Considering petitioner's "Memorandum" filed on March 20, 2009 and respondent's "Memorandum" filed on May 4, 2009, the case was deemed submitted for decision on May 12, 2009.

On April 23, 2010, the Former Second Division of this Court rendered a Decision,[4] ruling that:

"WHEREFORE, premises considered, the present Petition for Review is **PARTLY GRANTED.** Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **SEVENTY SEVEN MILLION FIVE HUNDRED NINETEEN THOUSAND SIX HUNDRED EIGHTY FOUR and 39/100 PESOS (₱77,519,684.39),** representing unutilized input VAT attributable to zero-rated sales for the second and third quarters and the month of October of taxable year 2005.

**SO ORDERED.**"

On May 12, 2010, respondent CIR filed a Motion for Partial Reconsideration, praying for the dismissal of the claim in its entirety. On May 13, 2010, the following day, petitioner TeaM Sual likewise filed a Motion for Partial Reconsideration praying for the reconsideration of the disallowed portion of its claim. On June 3, 2010, TeaM Sual filed its Comment/Opposition (To Respondent's Motion For Partial Reconsideration).

[4] *Ibid.*, pp. 76-116.

On September 16, 2010, this Court then promulgated the assailed Amended Decision[5] and granted CIR's Motion for Partial Reconsideration, recalling and setting aside its April 23, 2010 Decision. The Former Second Division ruled that since TeaM Sual failed to observe the mandatory 120-30 day provision of Section 112(D) [Now Section 112(C)][6] of the National Internal Revenue Code (NIRC) of 1997, such is fatal to its claim for refund as it failed to comply with a condition precedent, hence, the filing by TeaM Sual of this Petition for Review.[7]

In a Resolution[8] dated November 12, 2010, this Court gave due course to the instant Petition for Review. Memoranda were filed on December 14, 2010[9] and December 20, 2010[10] by CIR and TeaM Sual, respectively. Then, in a Resolution[11] dated January 19, 2011, this Court *En Banc* submitted this instant case for decision.

However, petitioner amended its Memorandum by way of an Urgent Motion for Leave of Court to Amend Pleading with Motion to Admit Attached Amended Petitioner's Memorandum[12] filed on May 13, 2011.

---

[5] *Supra* note 2.

[6] SEC. 112. Refunds or Tax Credits of Input Tax. -

> (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.

[7] *En Banc* Docket, pp. 1-62.

[8] *En Banc* Docket, pp. 156-158.

[9] *En Banc* Docket, pp. 159-171.

[10] *En Banc* Docket, pp. 172-222.

[11] *En Banc* Docket, pp. 223-225.

[12] *En Banc* Docket, pp. 226-281.

Considering the said Motion, this Court, in a Resolution[13] dated January 10, 2012, ordered CIR to comment, cancelling and setting aside the previous Resolution[14] submitting the instant Petition for decision. Finally, the Urgent Motion of TeaM Sual was granted, the attached Amended Petitioner's Memorandum was admitted, and the instant Petition for Review was submitted for decision, *sans* CIR's comment, *via* Resolution[15] dated March 21, 2012.

We resolve.

In essence, the issue is whether petitioner is entitled to a tax refund or credit of its alleged unutilized input VAT attributable to zero-rated sales for the periods covering January 1, 2005 to October 31, 2005 in the amount of ₱103,588,530.59.

Petitioner argues –

1. that it complied with the requirements of Sections 112[16] and 229[17] of the NIRC of 1997, as amended, in the filing of its administrative and judicial claims for refund within the period provided under the law;

2. that the 120-30 day period prescribed by Section 112 is merely permissive and not mandatory. Petitioner cites several Supreme Court Decisions[18] allowing tax refund cases

---

[13] *En Banc* Docket, pp. 282-284.
[14] *Supra* note 11.
[15] *En Banc* Docket, pp. 286-288.
[16] *Supra* note 6.
[17] SEC. 229. Recovery of Tax Erroneously or Illegally Collected. – xxx 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: xxx
[18] *Intel Technology Philippines, Inc., vs. Commissioner of Internal Revenue*, G.R. No. 166732, April 27, 2007, 522 SCRA 657; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 141104 & 148763, June 8, 2007; *San Roque Power Corporation vs. Commissioner of Internal Revenue*, G.R. No. 180345, November 25, 2009; and *AT&T Communications Services Philippines, Inc., vs. Commissioner of Internal Revenue,* G.R. No. 182364, August 3, 2010.

even if the Petitions for Review were filed before the lapse of the 120-day period;

3. that in the case of *Oranbo Realty Corporation vs. Commissioner of Internal Revenue*[19] *(the "Oranbo Case"),* this Court held that the pending investigation by the CIR is of no moment, and that the taxpayer claiming refund has to elevate its case before this Court within the peremptory two-year period, otherwise the claim will be barred forever;

4. that *Revenue Memorandum Circular No. 49-03* dated August 18, 2003, provides that administrative and judicial claims for VAT refund or tax credit can proceed simultaneously and that taxpayers need not wait for the lapse of the 120-day period when the two (2)-year prescriptive period is about to expire;

5. that the Former Second Division erred when it ruled[20] that its Motion for Partial Reconsideration need no longer be resolved for being moot and academic;

6. that respondent should be precluded from raising the issue of lack of jurisdiction of this Court, applying the case of *Tijam vs. Sibonghanoy*[21] *(The "Tijam Case"),* wherein the Supreme Court held that allowing the party to raise the question of lack of jurisdiction after it effectively sought affirmative relief from the court, would in effect be declaring as useless all the proceedings that were had in the case since it was commenced; and

7. that assuming, but without conceding, that the 120-day period in Section 112 of the NIRC of 1997 is jurisdictional, as may be gleaned from the *Aichi* Case, this new doctrine should only be applied to cases filed after October 6, 2010, the date of its promulgation.

[19] CTA Case No. 5222, April 7, 1997.
[20] *Supra* note 2, *En Banc* Docket, p. 68.
[21] G.R. No. L-21450, April 15, 1968.

Respondent CIR claims –

1. that the compliance with the 120-day period[22] given to petitioner is a condition precedent to the filing of a judicial claim for refund before this Court;

2. that petitioner's Motion for Partial Reconsideration may no longer be resolved for being moot and academic in view of the Supreme Court ruling in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* [23] *(the "Aichi Case")*;

3. that this Court has no jurisdiction to entertain petitioner's claim for tax credit or refund of the alleged unutilized input VAT because of petitioner's failure to wait for the lapse of the 120-day period before filing a Petition for Review with the Former Second Division.

We find merit in respondent's claim, hence, the issue is answered negatively.

Petitioner erred in applying Section 229 in its claim for refund of its unutilized input VAT, which is clearly covered, instead, by Section 112 of the NIRC of 1997. As held earlier in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*[24] *(the "Mirant Case"),* Section 112 of the NIRC is the applicable provision for a refund/credit of unutilized input VAT. Section 229 of the NIRC specifically applies only to instances of *erroneous payment or illegal collection of internal revenues taxes.*[25] TeaM Sual's unutilized input VAT is not erroneously paid.

Petitioner cannot avail of the provisions of Section 229 of the NIRC, which, for purposes of refund, prescribes a different prescriptive limit for the filing of a judicial claim of

---

[22] *Supra* note 6.
[23] G.R. No. 184823, October 06, 2010
[24] G.R. No. 172129, September 17, 2008.
[25] *Supra* note 24.

an *erroneous or illegally paid tax.* Since petitioner asks for a refund/credit of its *unutilized input VAT,* Section 112 will govern its case, and not Section 229.

Thus, We reiterate the proper application of *Mirant* rulings even to cases filed before its promulgation, to wit:

> "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.)* (*Mirant* case), and earlier than the claims of herein respondent xxx. 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."[26]

As to Revenue Memorandum Circular No. 49-03 dated August 18, 2003 cited by petitioner, the Supreme Court had previously declared that the rule-making power must be confined to details for regulating the mode or proceedings in order to carry into effect the law as it has been enacted, and it cannot be extended to amend or expand the statutory requirements or to embrace matters not covered by the statute. Administrative regulations must always be in harmony with the provisions of the law because any resulting discrepancy between the two will always be resolved in favor of the basic law.[27] In cases of conflict between the law and the rules and regulations implementing the law, the law shall always prevail.[28] Judicial decisions forming part of the law of the land,[29] the *Aichi* interpretation of Section 112 of the 1997 NIRC should prevail over the said Revenue Memorandum Circular.

---

[26] *Commissioner of Internal Revenue vs. Mindanao II Geothermal Partnership,* CTA EB Case Nos. 690 and 718, April 04, 2012.

[27] *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation,* G.R. No. 167274-75, July 21, 2008, citing *Land Bank of the Philippines vs. Court of Appeals,* 327 Phil. 1047, 1052 (1996).

[28] *Commissioner of Internal Revenue vs. Bicolandia Drug Corporation,* G.R. No. 148083, July 21, 2006.

[29] Article 8, Civil Code of the Philippines.

Petitioner's reliance on several Supreme Court cases[30] to show that the two (2)-year prescriptive period under Section 112(A)[31] applies both to administrative and judicial claims for refund or credit of unutilized input VAT is misplaced. In these cases, the interpretation of Section 112 of the NIRC was not in issue. The mandatory provision of Section 112 of the 1997 Tax Code was not raised as a question in these cases for the Supreme Court to clarify the matter.

With respect to the *Oranbo* Case, the same is not applicable in the instant case. It is noted that what was applicable therein was the 1977 NIRC. Also, in the *Oranbo Case,* the claim was for the refund of excess and unutilized creditable expanded withholding tax, and not the refund of unutilized input VAT.

Most importantly, the *Aichi* ruling was applied in the instant case. In *Aichi,* the Supreme Court held that the 120-30 day provision of Section 112 should be mandatory, and non-compliance therewith is fatal to the taxpayer's claim, consequently, to be dismissed by this Court for lack of jurisdiction. The *Aichi* Case explicitly states that this Court does not acquire jurisdiction in cases of non-compliance with the 120-30 day provision of Section 112(D) [now Section 112(C)], to wit:

> "However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:

---

[30] *Supra* note 19.

[31] 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 x x x

SEC. 112. Refunds or Tax Credits of Input Tax.

x x x x

> (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.)

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

In the instant 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[52] 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 two years** after the close of the taxable quarter when the sales were made, **apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales." The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)" within which to decide on the claim.

In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.

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

**In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA.** "[Underlining supplied.]

Nonetheless, regardless of the pronouncement in *Aichi,* petitioner concludes that it should not be applied in its case since it was promulgated only after petitioner's judicial claim was already filed before this Court's Former Second Division.

We do not agree. This is not a retroactive application of a Supreme Court ruling. To support the application of the *Aichi* ruling as it should be in the instant case, the Supreme Court has fittingly stated in many cases that, "Judicial interpretation becomes part of the law *as of the date that law was originally passed."*[32] Although petitioner's judicial claim was filed before *Aichi,* the pronouncements made in that case should be applied to the instant case without violating the rule against retroactive application.[33] When the Supreme Court decides a case, it does not pass a new law, but merely interprets an existing one.[34] Thus, when the Supreme Court interpreted Section 112(D) [Now Section 112 (C)] of the NIRC of 1997, this interpretation became part of the 1997 Tax Code from the moment such law became affective.

The same rule applies in the *Mirant Case.* When the Supreme Court construed the provisions of Sections 112 and 229 of the 1997 NIRC, this interpretation became part of the law from the moment it became effective. It is elementary that the interpretation of a law by the Supreme Court constitutes part of that law from the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[35]

Considering that the claim for refund in this case involves the taxable year 2005, the applicable law is Section 112 of 1997 Tax Code, which took effect on January 1, 1998, the very same law applied in the *Mirant* and *Aichi* Cases. Hence, whatever judicial elucidation laid down in *Mirant* and *Aichi*, interpreting the provision of Section 112, should be applicable to cases covered by the said Section, whether the case was filed before or after the promulgation of the said decisions.

---

[32] *Senarillos vs. Hermosisima,* 100 Phil. 501 (1956); *People vs. Jabinal,* 154 Phil. 565 (1974).
[33] *Accenture Inc., vs. Commissioner of Internal Revenue,* G.R. No. 190102, July 11, 2012.
[34] *Ibid.,* citing *Columbia Pictures Inc., vs. Court of Appeals,* 329 Phil. 875, 907-908 (1996).
[35] *Ibid.,* citing *Senarillos, Supra* note 37.

Moreover, a careful perusal of the *Aichi* Case would show that the judicial claim therein was filed on September 30, 2004. This was even prior to the claim of herein petitioner. Yet, the Supreme Court applied outright the 120-30 day mandatory periods in Section 112 and dismissed outright the judicial claim of the taxpayer in *Aichi* based on lack of jurisdiction. Hence, this Court finds no reason why it should deviate from the *Aichi* ruling as to its application in the instant case.

Lastly on the *Aichi* application, it has been decided by no less than the Supreme Court from whose decisions all other courts should take their bearings.[36] As it is the final arbiter of all justiciable controversies, its decisions deserve utmost respect and adherence. Hence, this Court has no other recourse but to uphold the ruling of the Supreme Court in the *Aichi* Case as it is applicable in the case at bench.[37]

Indisputably, petitioner filed with the BIR its claim for refund and/or tax credit of its unutilized input VAT for the period of January 1 to October 31, 2005 on December 21, 2006. This is very well within the 2-year period prescribed under Section 112 of the 1997 NIRC.

However, on the next question as to whether petitioner has timely filed its judicial claim for refund before this Court, We rule in the negative. Since petitioner filed its administrative claim on December 21, 2006, the 120-day period given to CIR to rule on it would end on April 20, 2007. However, petitioner filed its Petition for Review on April 18, 2007, before the lapse of the mandatory 120-day period.

---

[36] *Kepco Philippines Corporation vs. Commissioner of Internal Revenue,* CTA EB Case No. 736, January 10, 2012, citing *Commissioner of Internal Revenue vs. Michel J. Lhuillier Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003.
[37] *Ibid.*

The 120-30 day period under Section 112 is jurisdictional and failure to comply therewith would bar the appeal and deny this Court of its jurisdiction to accommodate the appeal or the Petition for Review. As stated by this Court:

> "It must be borne in mind that the Court of Tax Appeals is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction.[38] A perusal of ***Section 7 of R.A.* No. 9282,** *amending* R.A. *No. 1125, otherwise known* as *the Law Creating the Court of Tax Appeals*[39] *and Section* 3, *Rule 4* and *Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals*[40] reveals

---

[38] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue,* G.R. No. 168498, April 27, 2007, 522 SCRA 144.
[39] 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 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 the inaction shall be deemed a denial;

[40] RULE 4.Jurisdiction of the Court

XXX

SECTION 3. Cases Within the Jurisdiction of the Court in Divisions.- The Court in Division shall exercise:

(a) Exclusive original or appellate jurisdiction to review by appeal the following:

(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

that the jurisdiction of the Court of Tax Appeals includes not only decisions or rulings but inaction as well of the Commissioner of Internal Revenue. ***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, specifically on claim for refund, provided it is filed within 30 days after the receipt of such decision or ruling, or within 30 days after the expiration of the 120-day period fixed by law for the Commissioner to act on claim for refund.***[41] ℓ

---

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 or other applicable law provides a specific period for action: Provided, that in case of disputed assessments, the inaction of the Commissioner of Internal Revenue within the one hundred eighty day-period under Section 228 of the National Internal Revenue Code shall be deemed a denial for purposes of allowing the taxpayer to appeal his case to the Court and does not necessarily constitute a formal decision of the Commissioner of Internal Revenue on the tax case; Provided, further, that should the taxpayer opt to await the final decision of the Commissioner of Internal Revenue on the disputed assessments beyond the one hundred eighty day-period abovementioned, the taxpayer may appeal such final decision to the Court under Section 3(a), Rule 8 of these Rules; and Provided, still further, that in the case of claims for refund of taxes erroneously or illegally collected, the taxpayer must file a petition for review with the Court prior to the expiration of the two-year period under Section 229 of the National Internal Revenue Code;

[41] *Marubeni Philippines Corporation vs. Commissioner of Internal Revenue,* CTA EB Case No. 557 (CTA Case No. 6469), March 23, 2011.

Since petitioner did not comply with the mandatory period of 120 and 30 days, which is crucial in filing an appeal with this Court, as held in the *Aichi* Case, the filing of petitioner's claim for unutilized input VAT refund/credit before the Court *a quo* was premature as there was no CIR decision for this Court to review nor was there inaction on the part of the CIR after the lapse of the 120-day period provided under Section 112 of the NIRC of 1997. Therefore, the Petition for Review filed before this Court warrants a dismissal on the ground of lack of jurisdiction on the part of the Court *a quo* to take cognizance of the case.[42]

Accordingly, We find no reason to resolve any substantive issue raised by petitioner in its Petition, for as if no Petition for Review was ever filed before this Court.

It is noted that jurisdiction over the subject matter may be raised at any stage of the proceedings, even for the first time on appeal.[43] Courts are bound to take notice of the limits of their authority and they may act accordingly by dismissing the action even though the issue of jurisdiction is not raised or not even suggested by counsel.[44] Even if the parties do not challenge the jurisdiction of a court or tribunal, this does not prevent the court from addressing the issue.[45]

**WHEREFORE,** premises considered, the Amended Decision dated September 16, 2010, rendered by the Former Second Division of this Court is hereby AFFIRMED. Accordingly, the instant Petition for Review is **DISMISSED**.

**SO ORDERED.**

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

---

[42] *Ibid.*
[43] *Calimlim vs. Ramirez,* 118 SCRA 399; *Pangilinan vs. Court of Appeals,* 321 SCRA 51; *Francel Realty Corporation vs. Sycip,* 469 SCRA 424.
[44] *Ace Publications vs. Commissioner of Customs,* 11 SCRA 147.
[45] *Heirs of De La Cruz vs. Heirs of Cruz,* 475 SCRA 743.

**WE CONCUR:**

**JUANITO C. CASTAÑEDA, JR.**
Acting Presiding Justice

"I maintain my
Dissenting Opinion"
**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

(Concurs only as to the result.)
**ESPERANZA R. FABON-VICTORINO**
Associate Justice

(Concurs with the result only.)
**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

**CERTIFICATION**

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court *En Banc* before the case was assigned to the writer for the opinion of the Court *En Banc.*

**JUANITO C. CASTAÑEDA, JR.**
Acting Presiding Justice

REPUBLIC OF THE PHILIPPINES
# *Court of Tax Appeals*
QUEZON CITY

## *En Banc*

**TeaM SUAL CORPORATION, (Formerly, Mirant Sual Corporation and Southern Energy Pangasinan, Inc.),**
Petitioner,

-*versus*-

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**CTA EB CASE NO. 691**
(CTA Case No. 7620)

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

**Promulgated:**

MAR 04 2013 custpalivario 1:30 p.m.

x-----------------------------------------------------------------------------------x

# *DISSENTING OPINION*

*BAUTISTA, J.:*

After a careful perusal of the factual milieu present in the case at bench, I find the Petition for Review meritorious.

In the Decision dated April 23, 2010, the Former Second Division of the Court ("Court in Division") unanimously ruled as follows:

> This Court finds it appropriate to determine first the timeliness of the filing of the instant claim.
>
> Clearly, *Section 112(A)* provides that the taxpayer may apply for a refund or issuance of a tax credit certificate, within

two (2) years from the close of the taxable quarter when the importation or purchase was made.

In the recent case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.), 565 SCRA 154,* the Supreme Court settled the issue on the reckoning of the prescriptive period and the applicable provisions of claims for refund for input VAT, as follows:

xxx xxx xxx

Evidently, *Section 112(A) of the NIRC of 1997,* as amended, clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for internal revenue tax due the taxpayer must be claimed within two (2) years reckoned from the close of the taxable quarter when the relevant sales were made or capital goods were imported or locally purchased pertaining to the input VAT, regardless of whether said tax was paid or not. The reckoning frame would always be the end of the quarter when the sales were made or capital goods were imported or locally purchased, regardless when the input VAT was paid.

In this case, petitioner is claiming for the input VAT accumulated from January 1, 2005 to October 31, 2005, hence, the counting of the two (2) year prescriptive period is, as follows:

| Period covered | Reckoning date | Last day to file a claim (both administrative & judicial) |
|---|---|---|
| January 1 to March 31, 2005 (First Quarter) | March 31, 2005 | March 31, 2007 |
| April 1 to June 30, 2005 (Second Quarter) | June 30, 2005 | June 30, 2007 |
| July 1 to September 30, 2005 (Third Quarter) | September 30, 2005 | September 30, 2007 |
| October 1-31, 2005 | December 31, 2005 | December 31, 2007 |

Records show that petitioner filed its administrative claim on December 21, 2006 (*Exhibit "B"*) and the present *Petition for Review* on April 18, 2007. Clearly, petitioner's administrative claim for the first three (3) quarters of 2005 and for the month of October 2005 was filed within the prescriptive period of two (2) years. However, petitioner's judicial claim for the first quarter of 2005 was filed out of time. Therefore, petitioner is barred from claiming refund of its input taxes for the first quarter of 2005 in the amount of ₱18,738,140.02 due to prescription.[1]

On the other hand, in its Amended Decision dated September 16, 2010, the majority of the Court in Division disposed of as follows:

> As previously ruled in Our original decision, petitioner's administrative claim filed on December 21, 2006 (*Exhibit "B"*) was filed within the prescriptive period of two (2) years, pursuant to *Section 112(A) of the NIRC of 1997, as amended.* However, the issue now is the timeliness of petitioner's judicial claim.
>
> In this regard, even if the instant claim was filed prior to the effectivity of *R.A. 9337*, the same is still covered by *Section 112(D) of the NIRC of 1997*, as amended, which provides:
>
> xxx xxx xxx
>
> Pursuant to the above-quoted provision, the Commissioner has 120 days from the submission of supporting documents to decide the claim for refund. In case of full or partial denial, or inaction, the taxpayer may appeal to this Court, within 30 days from receipt of the decision or from the lapse of the 120-day period.
>
> Considering that petitioner filed its administrative claim on December 21, 2006, the Commissioner had until April 20, 2007, within which to decide petitioner's claim for refund. However, records show that petitioner filed the instant Petition for Review on April 18, 2007, when the Commissioner's 120-day period had yet to expire on April 20, 2007. Clearly, petitioner did not wait for the lapse of the 120-day period prior to the filing of its appeal with this Court. As a consequence thereof, petitioner's judicial claim was prematurely filed, since respondent was not given the full opportunity to decide petitioner's claim.
>
> It bears emphasis that the filing of an administrative claim with the Commissioner is a condition precedent to the filing of a judicial claim for refund with the CTA. Thus, failure of petitioner to comply with Section 112 (D), particularly with the

---

[1] *Rollo*, pp. 84-88.

120-day period, is tantamount to non-exhaustion of administrative remedies. Consequently, this Court should not have entertained the Petition for Review.[2]

Nonetheless, it is my considered view that petitioner filed its administrative and judicial claims well within the prescribed period.

Based on the records of the case, petitioner filed its value-added tax ("VAT") returns on the following dates:

| Period Covered | Date Filed |
|---|---|
| 1st Quarter of 2005 | April 25, 2005 |
| 2nd Quarter of 2005 | July 26, 2005 |
| 3rd Quarter of 2005 | October 25, 2005 |
| October 1 to 31, 2005 | November 21, 2005 |

Petitioner then filed its administrative claim with respondent for refund of unutilized input VAT on December 21, 2006. Subsequently, it filed a Petition for Review with the Court on April 18, 2007.

Concurrently, this Court in not a few instances ruled that the two (2)-year prescriptive period for filing a claim for VAT refund or tax credit should not be counted from the close of the relevant quarter, but from the date of filing of the pertinent return, for it is only during that time that the VAT liability or refundability can be determined.[3]

Further, in the computation of the two (2)-year period, a year is equivalent to three hundred sixty five (365) days, regardless of whether it is a regular year or a leap year.[4]

Therefore, petitioner had until the following dates within which to file its claims, *viz.*: for the period covering the first (1st) quarter of the taxable year 2005, until April 25, 2007; for the period

---

[2] *Ibid.*, pp. 65-66.

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

[4] National Marketing Corporation *v.* Tecson, 139 Phil. 584 (1960), *citing People v. Del Rosario, 97 Phil 70, 71 (1955).*

covering the second (2nd) quarter of the taxable year 2005, until July 26, 2007; for the period covering the third (3rd) quarter of the taxable year 2005, until October 25, 2007; and for the period covering October 1 to 31, 2005, petitioner had until November 21, 2007.

In light of the foregoing, I find petitioner's administrative and judicial claims filed within the two (2)-year period.

Be that as it may, in the Decision dated April 23, 2010, the Court in Division ruled that petitioner's sales of generated power to Mirant Philippines Energy Corporation ("MPEC"), Mirant Philippines Industrial Power Corporation ("MPIPC"), and Mirant Philippines Industrial Power II Corporation ("MPIPC II"), cannot be claimed as zero percent (0%) VAT under Section 6 of RA No. 9136, otherwise known as the *"Electric Power Industry Reform Act of 2001"*; petitioner declared a total of ₱12,276,041,728.09 as zero-rated sales for the first, second and third quarters and for the month of October 2005, broken down as follows:

| Exhibit | 2005 | Zero-rated Sales |
|---|---|---|
| *"C"* | 1st Quarter | ₱3,775,412,124.01 |
| *"D"* | 2nd Quarter | 3,600,420,391.50 |
| *"E"* | 3rd Quarter | 3,700,406,077.70 |
| *"I"* | October | 1,199,803,134.88 |
| | **TOTAL** | **₱12,276,041,728.09** |

The Court-commissioned Independent Certified Public Accountant ("CPA") found that the zero-rated sales per books do not tally with the declared zero-rated sales; the difference was reconciled as follows, to wit:[5]

| | | |
|---|---|---|
| Zero-rated sales per VAT Returns | | **₱12,276,041,728.09** |
| Add: Receivables, October 31, 2005 | ₱1,295,912,485.40 | |
| Accrual of current year's revenue | 45,311,352.37 | 1,341,223,837.77 |
| Less: Receivables, Beg. | ₱1,330,191,291.35 | |
| Reversal of previous year's accrual of revenue | 1,273,229,991.31 | |
| Foreign exchange difference | 6,356,293.79 | (2,609,777,576.45) |
| Zero-rated sales per books | | **₱ 11,007,487,989.41** |

[5] *Exhibit "J,"* p. 12.

And of the foregoing declared zero-rated sales, the following should be deducted for not qualifying as such:

| Period Covered | Sales to | Amount | |
|---|---|---|---|
| 1st Quarter | MPEC | ₱83,682,260.92 | |
| | MPIPC | 1,446,684.29 | |
| | MPIPC II | 23,109,307.34 | |
| | MPEC | 83,046,656.07 | |
| | MPIPC | 1,156,062.78 | |
| | MPIPC II | 11,386,974.39 | ₱ 203,827,945.79 |
| 2nd Quarter | MPIPC | ₱ 3,004,545.95 | |
| | MPIPC II | 44,795,375.78 | |
| | MPEC | 114,713,450.45 | 162,513,372.18 |
| 3rd Quarter | MPEC | ₱84,751,495.71 | |
| | MPIPC | 1,109,534.31 | |
| | MPIPC II | 22,687,895.82 | 108,548,925.84 |
| October | MPIPC II | | 11,513,295.61 |
| | TOTAL | | **₱486,403,539.42** |

Thus, only the amount of ₱11,789,638,188.67 qualified as zero-rated sales, computed as follows:

| | |
|---|---|
| Declared zero-rated sales | ₱12,276,041,728.09 |
| Less: Sales to MPEC, MPIPC & MPIPC II | 486,403,539.42 |
| **Qualified zero-rated sales** | **₱11,789,638,188.67** |

An examination of the official receipts issued by petitioner to National Power Corporation ("NPC") disclosed that of the foregoing zero-rated sales, only the amount of ₱3,571,584,178.21 is substantiated, to wit:

| Exhibit | OR Date | OR No. | Zero-rated Sales |
|---|---|---|---|
| *"II-1"* | 1/4/2005 | 02 | ₱7,731,506.63 |
| *"II-2"* | 1/4/2005 | 03 | 8,126,613.99 |
| *"II-9"* | 1/7/2005 | 07 | 1,216,551,524.21 |
| *"II-10"* | 2/4/2005 | 11 | 6,639,402.63 |
| *"II-11"* | 2/4/2005 | 12 | 7,301,452.97 |
| *"II-12"* | 2/7/2005 | 13 | 1,137,108,919.09 |
| *"II-13"* | 3/7/2005 | 14 | 6,665,321.98 |
| *"II-14"* | 3/7/2005 | 15 | 7,060,558.39 |
| *"II-19"* | 3/7/2005 | 17 | 1,174,398,878.33 |
| | | | **₱3,571,584,178.21** |

With the above-computed properly substantiated zero-rated sales, only the portion of the input VAT claimed attributable to the said substantiated zero-rated sales should be considered for refund; the rate to be applied is based on the volume of sales, and is computed as follows:

| | |
|---|---|
| Substantiated zero-rated sales | ₱3,571,584,178.21 |
| Divided by total declared zero-rated sales | ÷₱12,276,041,728.09 |
| **Rate of supported zero-rated sales** | **29.09%** |

Petitioner submitted suppliers' invoices/official receipts, Bureau of Customs ("BOC") Import Entries and Internal Revenue Declarations ("IEIRDS"), and BOC/bank official receipts,[6] to support its input taxes reported in its Quarterly VAT Returns for the first, second, and third quarters, and for the month of October 2005 in the amount of ₱103,588,530.59. These documents were examined and verified by the Court-commissioned Independent CPA,[7] who reported the following: [8]

| Findings | Input Tax |
|---|---|
| 1. Properly substantiated input VAT | ₱102,894,131.30 |
| 2.1 Input VAT on domestic purchases of services supported by documents other than ORs | 4,496.71 |
| 2.2 Input VAT on domestic purchases of goods supported by documents other than invoices | 36,338.81 |
| 2.3 Input VAT on domestic purchases of goods supported by invoices with no BIR authority to print | 201,408.64 |
| 2.4 Input VAT on domestic purchases of services supported by ORs with preprinted "Non VAT/NV" | 6,296.69 |
| 2.5 Input VAT on domestic purchases of goods supported by invoices with preprinted "Non VAT/NV" | 1,697.82 |
| 2.6 Input VAT on domestic purchases of services supported by ORs with preprinted "TIN" only | 9,090.91 |
| 2.7 Input VAT on domestic purchases of goods supported by invoices with preprinted "TIN" only | 139.82 |
| 2.8 Input VAT on domestic purchases of goods supported by VAT invoices with no "TIN" | 2,625.00 |
| 2.9 Input VAT on domestic purchases of services supported by ORs dated before the taxable year of claim | 43.57 |
| 2.10 Input VAT on domestic purchases of goods supported by invoices dated before the taxable year of claim | 34,562.65 |
| 2.11 Input VAT on domestic purchases of services supported by ORs with zero-rated "TIN" | 29,983.83 |
| 2.12 Input VAT on domestic purchases of services where the amount in the schedule is in excess as compared to the amount in the supporting documents | 9,563.50 |
| 2.13 Input VAT on domestic purchases of goods where the amount in the schedule is in excess as compared to the amount in the | 2,603.31 |

[6] *Exhibits "S"* to *"V,"* including sub-markings, as summarized in *Exhibits "O"* to *"R."*
[7] Emmanuel Y. Mendoza of Mendoza Querido & Co.
[8] *Exhibit "J,"* pp. 4-8.

| | |
|---|---|
| supporting documents | |
| 2.14 Input VAT on domestic purchases of services and goods with no available supporting documents presented | 186,546.03 |
| 2.15 Input VAT on importation of goods with no available supporting documents presented | 169,002.00 |
| **TOTAL** | **₱103,588,530.59** |

Input taxes classified under *Item "1,"* in the amount of ₱102,894,131.30, represents petitioner's valid claims, considering that the same complied with the required documents pursuant to Sections 110(A) and 113(A) of the 1997 NIRC, as amended, and as implemented by Sections 4.104-1, 4.104-5 and 4.108-1 of Revenue Regulations No. ("RR") No. 7-95.

On the other hand, input taxes under *Items "2.1"* to *"2.15,"* in the amount of ₱694,399.29, should be disallowed for the above reasons indicated.

In addition, I find the amount of ₱2,671,656.43 should likewise be disallowed for failure to meet the substantiation requirements as set forth in the aforementioned provisions of the 1997 NIRC, as amended, and RR No. 7-95, thus:[9]

| Findings | Input Tax |
|---|---|
| 1. Domestic purchases of services supported by ORs with no "VAT" | ₱159,090.91 |
| 2. Domestic purchases of services supported by ORs with "TIN-V" | 208,771.10 |
| 3. Domestic purchases of services supported by ORs issued not in the name of Petitioner | 5,454.55 |
| 4. Input taxes without supporting documents | 77,158.67 |
| 5. Domestic purchases of goods supported by invoices without BIR Permit Number | 1,639,978.99 |
| 6. Input taxes supported by ORs/invoices dated outside the period of claim | 15,231.21 |
| 7. Input taxes on importation supported by IEIRDs that are not validated | 565,971.00 |
| **TOTAL** | **₱2,671,656.43** |

Hence, petitioner's valid input VAT only amounts to ₱29,091,190.96, computed as follows:

[9] See Case Report, *Annex "A."*

| | | |
|---|---|---|
| Total Input VAT claim | | ₱103,588,530.59 |
| Less: Disallowances | | |
| a. Per ICPA's findings | ₱694,399.29 | |
| b. Per this Court's findings | 2,671,656.43 | (3,366,055.72) |
| Valid Input VAT | | ₱100,222,474.87 |
| Less: Output VAT | | 231,922.69 |
| Excess Input VAT | | ₱99,990,552.18 |
| Multiplied by substantiated zero-rated sales | | x 29.09% |
| **Refundable Input VAT** | | **₱29,091,190.96** |

Further, records show that petitioner carried-over its valid input VAT of ₱100,222,474.87 to the succeeding quarter, however, the same was not applied against any output tax liability as it was fully deducted as "*Any VAT Refund/TCC Claimed*" in the fourth quarter of 2005.[10]

In conclusion, I find petitioner to be entitled to the reduced amount of ₱29,091,190.96, representing unutilized excess input VAT incurred in relation to its zero-rated sales for the first, second and third quarters, and the month of October 2005.

**Accordingly,** I vote for the **PARTIAL GRANT** of the Petition for Review. The assailed Amended Decision dated September 16, 2010 should be **REVERSED** and **SET ASIDE**.

**LOVELL R. BAUTISTA**
Associate Justice

[10] *Exhibit "G."*