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

# *EN BANC*

TOLEDO POWER COMPANY,
*Petitioner,*

-versus-

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

**C.T.A. EB NO. 708**
**(C.T.A. CASE NOS. 7233 and 7294)**

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, JJ.

**Promulgated:**

JUL 07 2011
4:20 pm

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# DECISION

**PALANCA-ENRIQUEZ, J.:**

A taxpayer is entitled to a refund either by authority of a statute expressly granting such right, privilege, or incentive in his favor, or under the principle of *solutio indebiti* requiring the return of taxes erroneously or illegally collected. In both cases, a taxpayer must prove not only his entitlement to a refund but also his compliance with the procedural due process as non-observance of the prescriptive periods within which to file the administrative and the judicial claims would result in the denial of his claim *(CIR vs. Aichi Forging Company Asia, Inc., G.R. No. 184823, October 6, 2010).*

**THE CASE**

This is a Petition for Review filed by Toledo Power Company (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Amended Decision dated December 1, 2010 rendered by the Special First Division of this Court in C.T.A. Case Nos. 7233 and 7294, the dispositive portion of which reads, as follows:

> "**WHEREFORE**, respondent's Motion for Partial Reconsideration is hereby **GRANTED**; while petitioner's Motion for Partial Reconsideration is hereby **DENIED** for lack of merit. This Court's Decision promulgated on December 15, 2009 is hereby **REVERSED and SET ASIDE**. Accordingly, petitioner's claim for refund or issuance of tax credit certificate for its unutilized input VAT for the first quarter of taxable year 2003 filed on April 22, 2005, and docketed as CTA Case No. 7233 is hereby **DISMISSED** for being prematurely filed. Likewise, petitioner's claim for refund or issuance of tax credit certificate for its unutilized input VAT for the second quarter of taxable year 2003 filed on July 22, 2005 and docketed as CTA Case No. 7294 is hereby **DISMISSED** for having been filed beyond the period provided by law.
>
> **SO ORDERED**."

## THE PARTIES

Petitioner is a general partnership duly organized and existing under Philippine laws, with principal office at Sangi, Toledo City, Cebu. It is principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC), Cebu Electric Cooperative III (CEBECO), Atlas Consolidated Mining and Development Corporation, and Atlas Fertilizer Corporation.

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

## THE FACTS

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

On April 25, 2003 and July 25, 2003, petitioner filed its Quarterly VAT returns for the 1st and 2nd quarters of taxable year 2003.

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, on December 23, 2004, petitioner filed an administrative claim for refund of unutilized input VAT for the four (4) quarters of taxable year 2003 in the amount of P15,838,539.48 with BIR RDO No. 83.

Alleging inaction of respondent CIR, on April 22, 2005, petitioner filed a Petition for Review, docketed as C.T.A. Case No. 7233, for the refund or issuance of tax credit certificate in the amount of P3,907,783.80, representing unutilized input VAT from its domestic purchases of goods and services and importation of goods attributable to zero-rated sales for the 1st quarter of 2003.

On July 22, 2005, petitioner filed another Petition for Review, docketed as C.T.A. Case No. 7294, for the refund or issuance of tax credit certificate in the amount of P2,124,847.14, representing unutilized input VAT from its domestic purchases of goods and services and importation of goods attributable to zero-rated sales for the 2nd quarter of 2003.

On September 22, 2005, upon motion of petitioner, both cases were ordered consolidated.

After trial on the merits, on December 15, 2009, the Special First Division rendered a decision partially granting petitioner's claim for refund in the amount of P185,395.11.

On January 6, 2010, petitioner filed a "Motion for Partial Reconsideration (with Motion for Leave to Submit Supplemental Evidence)", to which respondent filed her "Opposition (Re: Motion for Partial Reconsideration)" on January 18, 2010.

Likewise, on January 19, 2010, respondent filed her "Motion for Partial Reconsideration", to which petitioner filed its "Comment (To Respondent's Motion for Partial Reconsideration dated January 18, 2010)" on February 18, 2010.

On December 1, 2010, the Special First Division rendered the assailed "Amended Decision" reversing and setting aside its Original Decision dated December 15, 2009, and accordingly denied petitioner's "Motion for Partial Reconsideration (with Motion for Leave to Submit Supplemental Evidence)", but granted respondent CIR's "Motion for Partial Reconsideration".

Not satisfied, on January 7, 2010, petitioner Toledo Power Company filed the instant Petition for Review raising the following:

**ISSUES**

I

WHETHER OR NOT THE CTA-DIVISION ERRED IN DENYING PETITIONER'S CLAIM FOR REFUND OF

UNUTILIZED INPUT VAT ON THE GROUND THAT PETITIONER FAILED TO COMPLY WITH THE PERIOD PROVIDED UNDER SECTION 112 (D) [NOW 112 (C)], TAX CODE.

II

WHETHER OR NOT PETITIONER IS ENTITLED TO ITS CLAIM FOR REFUND OF UNUTILIZED INPUT VAT AMOUNTING TO P6,023,630.94.

On January 7, 2011, without necessarily giving due course to the petition, respondent was ordered to file her comment, within ten (10) days from notice, to which respondent complied on January 26, 2011.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice. In compliance therewith, petitioner filed its "Memorandum" on March 25, 2011, while respondent manifested on March 8, 2011 that she is adopting her "Comment" to the Petition for Review as her Memorandum.

Thus, on April 20, 2011, this case was deemed submitted for decision.

**THE COURT EN BANC'S RULING**

The petition has no merit.

***First Issue***

Petitioner contends that it timely filed its judicial claim for refund

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in accordance with the provisions of law and existing jurisprudence; that *Section 229 of the Tax Code* applies to claims for refund of excess input VAT; and *Section 229* is imperative and should be taken into consideration in applying the periods stated under *Section 112 (D)*; that the CIR has recognized the permissive nature of the 120-day period under *Section 112 (D)*, and it is a mere working timeline which may be stopped or suspended; the ruling of the First Division of the Supreme Court in the Aichi case did not overturn the Supreme Court's doctrinal ruling in Atlas; any application of the Aichi case should be done prospectively in order to be fair to taxpayers who have relied on the prevailing doctrine that both the administrative and judicial claims for VAT refund must be filed within the prescriptive period; the Amended Decision's impact on the entire power generation industry and other investors is indubitable, and thus, it needs to be revisited; and were it not for the application of the Aichi case in the present claim, petitioner is entitled to a refund or tax credit of P6,032,630.94, representing unutilized input VAT, which are attributable to its zero-rated sales of electricity.

Respondent CIR, on the other hand, counter argues that the issue raised by petitioner had already been settled by the Supreme Court in the Aichi case; the CTA has no jurisdiction to act on the Petition for Review as C.T.A. Case No. 7233 was prematurely filed, while C.T.A. 7294 was belatedly filed; and it is incumbent upon petitioner to prove that it is entitled to the refund sought; and exemptions from taxation are highly disfavored in law.

We rule for respondent CIR.

At the outset, it is worthy to note that the issues raised in the instant petition had already been considered and passed upon in the assailed Amended Decision dated December 1, 2010, however, to reiterate, the issues raised by petitioner had already been settled by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010,* thus:

> ***"The filing of the judicial claim was premature***
>
> 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:
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> SEC. 112. Refund or Tax Credits of Input Tax.
>
> 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 Subsection (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 (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 refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.

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

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

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within the two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years xxx apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) 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 vs. Victorias Milling, Co., Inc. (22 SCRA 12) relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.

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> 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."

Pursuant to the above ruling, the periods provided under *Section 112 (D) of the NIRC of 1997, as amended*, are crucial in filing an appeal with the CTA. Again, petitioner cannot now rely on the provision of *Section 229 of the NIRC of 1997, as amended*, since it is already settled that said provision is not applicable to claims for VAT refund *(CIR vs. Mirant Pagbilao Corporation, supra)*. Thus, the two (2)-year period is applicable to administrative claims for VAT refund only, pursuant to *Section 112 (A)* of the same Code, and not to judicial actions.

Applying the foregoing to the instant case, records show that petitioner filed its administrative claim for refund on December 23, 2004 for its unutilized input VAT for the four quarters of taxable year 2003, which is well within the two (2) year prescriptive period. Thus, pursuant to *Section 112(C)* (previously Section 112 (D)) *of the NIRC of 1997), as amended,* the CIR has 120 days from December 23, 2004 or until April 23, 2004, within which to decide petitioner's claim for refund. Within thirty (30) days from the lapse of the 120-day period, or until May 23, 2005, petitioner should have elevated its claim for refund to this Court.

However, as aptly ruled by the Special First Division, petitioner filed its judicial claims in C.T.A. Case No. 7233 on April 22, 2005 and in C.T.A. Case No. 7294 on July 22, 2005, for the first and second quarters of taxable year 2003, respectively. Clearly, the Petition For Review filed in C.T.A. Case No. 7233 for the first quarter of taxable year 2003 was prematurely filed, as petitioner did not wait for the lapse of the 120-day period of the CIR to decide on its claim. While the Petition For Review filed in C.T.A. Case No. 7294 for the second quarter of taxable year 2003 was filed late.

As regards petitioner's contention that the Aichi case should not be applied to this case following the principle of prospectivity of statutes, we must emphasize that the Aichi case is a mere reiteration of what *Section 112 of the NIRC of 1997, as amended*, clearly provides and does not establish a rule which is not familiar to petitioner; hence, it cannot claim that it is legally impossible to comply with such doctrine as such was still non-existent at the time petitioner filed its Petition for Review. It cannot be mistaken that the law itself is very clear and unambiguous. Hence, we cannot disregard the letter of the law on the pretext of pursuing its spirit *(Tañada and Macapagal vs. Cuenco, et al., 103 Phil. 1051, 1086 [1957]).*

Basic is the rule that judicial interpretation of the law retroacts to the date when the said law became effective. Thus, the ruling in the Aichi case retroacts to the date when *Section 112* took effect.

At any rate, the ruling in the Aichi case, partakes of the nature of a procedural rule. Elementary is the rule that one does not have a vested right in procedural rules.

It must be stressed that the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right, and that recovery of excess input VAT is a refund which is in the nature of an exemption. There is parity between tax refund and tax exemption when the former is based either on a tax exemption statute or a tax refund statute. Clearly, a claim for tax refund may be based on statutes granting tax exemption or tax refund. In such case, the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, a legislative grace, which cannot be allowed unless granted in the most explicit and categorical language. The taxpayer must show that the legislature intended to exempt him from the tax by words too plain to be mistaken *(CIR vs. Fortune Tobacco Corporation, 559 SCRA 160, 178).*

Finally, tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption *(Commissioner of Internal Revenue vs. SC Johnson & Son, Inc., 368 Phil. 388, 411, June 25, 1999; Magsaysay Lines, Inc. vs. Court of Appeals, 329 Phil. 310, 324, August 12, 1996; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 314 Phil. 220, 228, May 26, 1995).*

Finding no reversible error, we affirm the assailed Amended Decision dated December 1, 2010 rendered by the Special First Division in C.T.A. Case Nos. 7233 & 7294. With this conclusion, we find no need to discuss the other issues raised by petitioner, for being moot and academic.

**WHEREFORE**, premises considered, the instant petition is hereby **DENIED,** and accordingly, **DISMISSED** for lack of merit. The assailed Amended Decision dated December 1, 2010 rendered by the Special First Division in C.T.A. Case Nos. 7233 and 7294 is hereby **AFFIRMED.**

**SO ORDERED.**

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**WE CONCUR:**

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

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**(I maintain my Dissenting Opinion in the Decision dated December 1, 2010)**
**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

**(Concurs with PJ Acosta in his Concurring and Dissenting Opinion)**
**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**(On Wellness Leave)**
**CIELITO N. MINDARO-GRULLA**
Associate Justice

**(On Wellness Leave)**
**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

# CERTIFICATION

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

**ERNESTO D. ACOSTA**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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*EN BANC*

**TOLEDO POWER COMPANY,**
Petitioner,

- versus -

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**EB CASE NO. 708**
**(C.T.A. CASE NO. 7233 & 7294)**

Members:

**ACOSTA**, *PJ,*
**CASTAÑEDA, JR.,**
**BAUTISTA,**
**UY**,
**CASANOVA,**
**PALANCA-ENRIQUEZ,**
**FABON-VICTORINO,**
**MINDARO-GRULLA,** *and,*
**COTANGCO-MANALASTAS**, *JJ.*

**Promulgated:**

JUL 07 2011
2:20 pm

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## CONCURRING AND DISSENTING OPINION

I concur in the dismissal of the Petition for Review filed before the Court *En Banc* insofar as petitioner's 2nd quarter claim for refund of unutilized input VAT arising from zero-rated sales for the year 2003 on the basis of petitioner's failure to file the judicial claim within the period provided by law. I, however, disagree with the conclusion to dismiss petitioner's 1st quarter claim for refund of unutilized input VAT for the year 2003 merely on the ground that it was prematurely filed.

The pertinent dates herein are as follows:

| Quarter Claimed | Filing of VAT Returns | Date of Filing of Administrative Claim | End of the 120-day Period Under Section 112(D) of the NIRC | Filing of Judicial Claim | End of the 30-day Period Under Section 112(D) of the NIRC |
|---|---|---|---|---|---|
| 1st Qrt. | April 25, 2003 | December 23, 2004 | April 22, 2005 | April 22, 2005 | May 22, 2005 |
| 2nd Qrt. | July 25, 2003 | December 23, 2004 | April 22, 2005 | July 22, 2005 | May 22, 2005 |

The filing of the Petition for Review for the 1st quarter claim for refund was done by petitioner on the 120th day after the filing of the administrative claim. Considering that Section 112(D) of the 1997 NIRC requires a 120-day period for the Commissioner of the BIR to act on said administrative claim, petitioner's claim for refund for its 1st quarter unutilized input VAT is premature. As to the 2nd quarter claim for refund, the Petition for Review was filed only on July 22, 2005, way beyond the period of until May 22, 2005 within which to file a claim for refund under the same Section 112(D) of the 1997 NIRC.

I agree with the majority's discussion on the prematurity of the 1st quarter claim for refund of unutilized input VAT, however, I believe the majority failed to take into consideration that the premature filing of the 1st quarter judicial claim for refund is a violation of exhaustion of administrative remedies. The failure to raise said defense in the Answer or in a separate Motion to Dismiss will amount to a waiver on the part of the respondent, thus enabling the Court to take cognizance of the claim.

On the outset, as part of my usual dissent in the past, I opined that a claim for refund or issuance of a tax credit certificate must be in compliance with Sections 112(A)[1]and 112(D)[2] and not Section 229[3] of the 1997 NIRC.

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[1] **Section 112.** *Refunds or Tax Credits of Input Tax.* -
(A) *Zero-rated or Effectively Zero-rated Sales.* - any VAT-registered person, whose sales are zero-rated or effectively zero-rated **may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales,** except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales. (Emphasis Ours).
[2] (D) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of compete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

The Supreme Court, in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[4], has already made a pronouncement emphasizing the appropriateness of applying Section 112, instead of Sections 204(C) and 229 of the 1997 NIRC, *viz*:

> The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation*, **where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes."** We explained that:
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> ***Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable***
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> To be sure, MPC cannot avail itself of the provisions of either Sec. 204(C) or 229 of the NIRC which, for the purpose of refund, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor. Secs. 204(C) and 229 respectively provide:
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> Sec. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
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> x x x x
>
> (c) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided,

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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 Ours).

[3] **Section 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.

[4] GR No. 184823, October 6, 2010.

however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.

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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.

Notably, the above provisions also set a two-year prescriptive period, reckoned from date of payment of the tax or penalty, for the filing of a claim of refund or tax credit. Notably too, both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.

***MPC's creditable input VAT not erroneously paid***

For perspective, under Sec. 105 of the NIRC, creditable input VAT is an indirect tax which can be shifted or passed on to the buyer, transferee, or lessee of the goods, properties, or services of the taxpayer. The fact that the subsequent sale or transaction involves a wholly-tax exempt client, resulting in a zero-rated or effectively zero-rated transaction, does not, standing alone, deprive the taxpayer of its right to a refund for any unutilized creditable input VAT, albeit the erroneous, illegal, or wrongful payment angle does not enter the equation.

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Considering the foregoing discussion, **it is clear that Sec. 112 (A) of the NIRC, providing a two-year prescriptive period reckoned from the close of the taxable quarter when the relevant sales or transactions were made pertaining to the creditable input VAT, applies to the instant case, and not to the other actions which refer to erroneous payment of taxes.** (Emphasis supplied.)

In view of the foregoing, we find that the CTA *En Banc* erroneously applied Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT. **To be clear, Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period should be reckoned from the close of the taxable quarter when the sales were made.**

The Court's application of Section 112, particularly Sections 112(A) & (D) in herein case is therefor proper.

In the application of Section 112(D), however, I do not agree with the majority that the premature filing of the 1st quarter claim for refund for the year 2003 would automatically make the judicial claim dismissible. The premature filing of a claim for refund arising from the failure to observe the 120-day period for the Commissioner of the BIR to act on the administrative claim is a violation of the doctrine of exhaustion of administrative remedies.

It is already well settled that non-exhaustion of administrative remedies is not jurisdictional. It only renders the action premature, *i.e.*, 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.[5] The premature invocation of court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel,* the case is susceptible of dismissal for lack of cause of action.[6]

Notably, the respondent has not raised nor objected on the premature filing of the case in this Court as respondent only invoked Section 229 of the 1997 NIRC, hence, the respondent is considered to have waived said defense. The Court, therefore, can take cognizance of the case to determine petitioner's rightful claim of its 1st quarter unutilized input VAT for the year 2003.

In sum, I agree with the dismissal of the Petition for Review insofar as petitioner's 2nd quarter claim for refund of unutilized input VAT for the year 2003 for being filed out of time. As to the Petition for Review insofar as the 1st quarter claim, the same is premature, however, since respondent failed to raise said defense, the 1st quarter claim is cognizable by the Court.

**ERNESTO D. ACOSTA**
Presiding Justice

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[5] *Carale vs. Abarintos*, GR No. 120704, March 3, 1997.
[6] *Paat vs. Court of Appeals*, G.R. No. 111107, January 10, 1997; 266 SCRA 167, pp. 175-177.

I CONCUR:

**ESPERANZA R. FABON-VICTORINO**
Associate Justice