REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**EB CASE NO. 624** **(C.T.A. CASE NO. 7574)**
	Members:
- versus -	**ACOSTA**, *PJ*, **CASTAÑEDA, JR.**, **BAUTISTA**, **UY**, **CASANOVA**, **PALANCA-ENRIQUEZ**, **FABON-VICTORINO**, **MINDARO-GRULLA**, *and*, **COTANGCO-MANALASTAS**, *JJ.*
TAGANITO MINING CORPORATION, Respondent.	**Promulgated:** DEC 0 8 2010

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DECISION

ACOSTA, *PJ:*

Before this Court of Tax Appeals *En Banc*[1] is a Petition for Review filed on April 29, 2010 assailing the Decision of the Court of Tax Appeals Special Second Division[2] dated January 8, 2010 and the subsequent Resolution dated April 7,

[1] Court *En Banc.*
[2] Court Second Division.

2010, affirming the assailed Decision. The dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** to petitioner the amount of **EIGHT MILLION TWO HUNDRED FORTY NINE THOUSAND EIGHT HUNDRED EIGHTY THREE PESOS AND THIRTY THREE CENTAVOS (P8,249,883.33)** representing its unutilized input taxes attributable to zero-rated sales from January 1, 2005 to December 31, 2005.
>
> **SO ORDERED.**

THE FACTS

The Court Second Division found the pertinent facts[3] to be as follows:

> Petitioner, Taganito Mining Corporation (herein respondent), is a corporation duly organized and existing under and by virtue of the laws of the Philippines, with principal office at 4th Floor, Solid Mills Building, De La Rosa St., Legazpi Village, Makati City. It is duly registered with the Securities and Exchange Commission with Certificate of Registration No. 138682 issued on March 4, 1987 with the following primary purpose:
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> > "To carry on the business, for itself and for others, of mining lode and/or placer mining, developing, exploiting, extracting, milling, concentrating, converting, smelting, treating, refining, preparing for market, manufacturing, buying, selling, exchanging, shipping, transporting, and otherwise producing and dealing in nickel, chromite, cobalt, gold, silver, copper, lead, zinc, brass, iron, steel, limestone, and all kinds of ores, metals and their by-products and which by-products thereof of every kind and description and by whatsoever process the same can be or may hereafter be produced, and generally and without limit as to amount, to buy, sell, locate, exchange, lease, acquire and deal in lands, mines, and mineral rights and claims and to conduct all business appertaining thereto, to purchase, locate, lease or otherwise acquire, mining claims and rights, timber rights, water rights, concessions and mines, buildings, dwellings, plants machinery, spare parts, tools and other properties whatsoever which this corporation may from time to time find to be to its advantage, to mine lands, and to explore, work, exercise, develop or turn to account the same, and to acquire, develop and utilize water rights in such manner as may be authorized or permitted by law; to purchase, hire, make, construct or otherwise, acquire, provide, maintain, equip, alter, erect, improve, repair, manage, work and operate private roads, barges, vessels, aircraft and vehicles, private telegraph and telephone lines, and other communication media, as may be needed by the corporation for its own purpose, and to purchase, import, construct, machine, fabricate, or otherwise acquire, and maintain and operate bridges, piers,

[3] Decision promulgated on January 8, 2010, pp.1-7.

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> wharves, wells, reservoirs, plumes, watercourses, waterworks, aqueducts, shafts, tunnels, furnaces, cook ovens, crushing works, gasworks, electric lights and power plants and compressed air plants, chemical works of all kinds, concentrators, smelters, smelting plants, and refineries, matting plants, warehouses, workshops, factories, dwelling houses, stores, hotels or other buildings, engines, machinery, spare parts, tools, implements and other works, conveniences and properties of any description in connection with or which may be directly or indirectly conducive to any of the objects of the corporation, and to contribute to, subsidize or other wise aid or take part in any operations";

and is a VAT-registered entity, with Certificate of Registration (BIR Form No. 2303) No. OCN 8RC0000017494. Likewise, petitioner is registered with the Board of Investments (BOI) as an exporter of beneficiated nickel silicate and chromite ores, with BOI Certificate of Registration No. EP-88-306.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue (herein petitioner) vested with authority to exercise the functions of the said office, including *inter alia*, the power to decide refunds of internal revenue taxes, fees and other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) or other laws administered by the Bureau of Internal Revenue (BIR) under Section 4 of the NIRC. He holds office at the BIR National Office Building, Diliman, Quezon City.

Petitioner filed all its Monthly VAT Declarations and Quarterly VAT Returns for the period January 1, 2005 to December 31, 2005. For easy reference, a summary of the filing dates of the original and amended Quarterly VAT Returns for taxable year 2005 of petitioner is as follows:

Exhibit(s)	**Quarter**	**Nature of the Return**	**Mode of filing**	**FILING DATE**
L to L-4	1st	Original	Electronic	April 15, 2005
M to M-3		Amended	Electronic	July 20, 2005
N to N-4		Amended	Electronic	October 18, 2006
Q to Q-3	2nd	Original	Electronic	July 20, 2005
R to R-4		Amended	Electronic	October 18, 2006
U to U-4	3rd	Original	Electronic	October 19, 2005
V to V-4		Amended	Electronic	October 18, 2006
Y to Y-4	4th	Original	Electronic	January 20, 2006
Z to Z-4		Amended	Electronic	October 18, 2006

As can be gleaned from its amended Quarterly VAT Returns, petitioner reported zero-rated sales amounting to P1,446,854,034.68; input VAT on its domestic purchases and importations of goods (other than capital goods) and services amounting to P2,314,730.43; and input VAT on its domestic purchases and importations of capital goods amounting to P6,050,933.95, the details of which are summarized as follows:

Period Covered	Zero-Rated Sales	Input VAT on Domestic Purchases and Importations of Goods and Services	Input VAT on Domestic Purchases and Importations of Capital Goods	Total Input VAT
01/01/05-03/31/05	P551,179,871.58	P1,491,880.56	P239,803.22	P1,731,683.78
04/01/05-06/30/05	64,677,530.78	204,364.17	5,811,130.73	6,015,494.90
07/01/05-09/30/05	480,784,287.30	144,887.67	-	144,887.67
10/01/05-12/31/05	350,212,345.02	473,598.03	-	473,598.03
TOTAL	**P1,446,854,034.68**	**P2,314,730.43**	**P6,050,933.95**	**P8,365,664.38**

On November 14, 2006, petitioner filed with respondent, through BIR's Large Taxpayers Audit and Investigation Division II (LTAID II), a letter dated November 13, 2006 claiming a tax credit/refund of its supposed input VAT amounting to P8,365,664.38 for the period covering January 1, 2004 to December 31, 2004. On the same date, petitioner likewise filed an Application for Tax Credits/Refunds for the period covering January 1, 2005 to December 31, 2005 for the same amount.

On November 29, 2006, petitioner sent again another letter dated November 29, 2004 to respondent, to correct the period of the above claim for tax credit/refund in the said amount of P8,365,664.38 as actually referring to the period covering January 1, 2005 to December 31, 2005.

As the statutory period within which to file a claim for refund for said input VAT is about to lapse without action on the part of the respondent, petitioner filed the instant Petition for Review on February 14, 2007.

In his Answer filed on March 28, 2007, respondent interposes the following defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative investigation/examination by the Bureau of Internal Revenue (BIR);
>
> 5. The amount of P8,365,664.38 being claimed by petitioner as alleged unutilized input VAT on domestic purchases of goods and services and on importation of capital goods for the period January 1, 2005 to December 31, 2005 is not properly documented;
>
> 6. Petitioner must prove that it has complied with the provisions of Sections 112 (A) and (D) and 229 of the National Internal Revenue Code of 1997 (1997 Tax Code) on the prescriptive period for claiming tax refund/credit;
>
> 7. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund pursuant to Revenue Memorandum Order No. 53-98, **otherwise there would be no sufficient compliance with the filing of administrative claim for refund, the administrative claim thereof being mere pro-forma, which is a condition sine qua non prior to the filing of judicial claim** in accordance

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with the provision of Section 229 of the 1997 Tax Code. Further, Section 112 (D) of the Tax Code, as amended, requires the **submission of complete documents in support of the application filed** with the BIR before the 120-day audit period shall apply, and **before the taxpayer could avail of judicial remedies as provided for in the law.** Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review.

8. Petitioner must prove that it has complied with the invoicing requirements mentioned in Sections 110 and 113 of the 1997 Tax Code, as amended, in relation to the provisions of Revenue Regulations No. 7-95.

9. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit **(Asiatic Petroleum Co. vs. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue v. Manila Jockey Club, Inc., 98 Phil. 670)**;

10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)** and as such, they are looked upon with disfavor **(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211).**

SPECIAL AND AFFIRMATIVE DEFENSES

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

> *'Section 112. Refunds or Tax credits of Input Tax. —*
> 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 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.)

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> 12. As stated in the petition, petitioner filed the administrative claim for refund with the Bureau of Internal Revenue on November 14, 2006. Subsequently on February 14, 2007, the instant petition was filed. Obviously the 120 days given to the Commissioner to decide on the claim has not yet lapsed when the petition was filed. The petition was prematurely filed, hence it must be dismissed for lack of jurisdiction."
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> During trial, petitioner presented testimonial and documentary evidence primarily aimed at proving its supposed entitlement to the refund in the amount of P8,365,664.38, representing input taxes for the period covering January 1, 2005 to December 31, 2005 Respondent, on the other hand, opted not to present evidence. Thus, in the Resolution promulgated on January 22, 2009, 15 this case was submitted for decision as of such date, considering petitioner's "Memorandum" filed on January 19, 2009 and respondent's "Memorandum" filed on December 19, 2008.

On January 8, 2010, the Court Second Division rendered the assailed Decision, which partially granted the Petition for Review and ordered herein petitioner Commissioner of Internal Revenue (CIR) to refund to herein respondent Taganito Mining Corporation (Taganito) the amount of 8,249,883.33 representing its unutilized input taxes attributable to zero-rated sales from January 1, 2005 to December 31, 2005.

Petitioner CIR filed his Motion for Reconsideration of the said Decision on January 29, 2010 with respondent Taganito's Comment/Opposition on the Motion for Partial Consideration filed on February 15, 2010. The Court Special Second Division, however, denied petitioner CIR's Motion in a Resolution dated April 7, 2010.

Hence, petitioner CIR filed this instant Petition for Review before the Court *En Banc* seeking the reconsideration of the Court Second Division's Decision and Resolution, and praying that said Decision and Resolution be reversed and set aside and another one be rendered denying respondent Taganito's entire claim for refund.

On July 1, 2010, the Court *En Banc* issued a Resolution directing respondent Taganito to file a Comment on the instant Petitioner for Review.

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A Motion for Extension of Time to File Comment was filed by respondent Taganito on July 20, 2010; to which the Court *En Banc* granted in a Resolution dated July 21, 2010.

Respondent Taganito filed its Comment on July 27, 2010. A Resolution promulgated on July 29, 2010 was issued by the Court *En Banc* requiring the parties to submit their respective Memoranda within a non-extendible period of thirty (30) days from receipt thereof.

On August 13, 2010, petitioner CIR filed a Manifestation that it shall adopt its Petition for Review as her Memorandum. The Court *En Banc* noted said manifestation in a Resolution dated August 16, 2010.

Respondent Taganito filed a Motion to Admit the Attached Memorandum on October 4, 2010. The Court *En Banc* granted herein respondent's Motion in a Resolution dated October 14, 2010. Accordingly in the same resolution, the instant case was deemed submitted for decision.

THE ISSUE

Petitioner CIR assigns a single issue:

> Whether or not the Special Second Division erred in partially granting respondent's claim for refund in the amount of P8,249,883.33 allegedly representing unutilized input taxes attributable to zero-rated sales from 1 January 2005 to 31 December 2005 because respondent has not sufficiently proved its entitlement to refund and that the claim was not filed in accordance with the procedure prescribed by law.

THE ARGUMENTS OF THE PARTIES

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Petitioner's Arguments

Petitioner CIR posits that respondent Taganito failed to prove that its purchases of goods and services were made in the course of business; and that they were properly supported by VAT invoices and/or official receipts and other documents pursuant to Sections 110 (A)(2) and 113 of the 1997 NIRC.

Petitioner CIR also avers that the Honorable Court has no jurisdiction to act on the instant petition considering that respondent Taganito failed to await the expiration of the 120 day requirement to await the decision of the CIR over its administrative claim for refund, as prescribed in Section 112 (D) of the 1997 NIRC, hence, the Petition for Review filed before the Court Second Division was prematurely filed.

Respondent's Arguments

On the other hand, respondent Taganito alleged in its Comment that its claim was properly supported by documents as emphasized in paragraphs 4, 17 and 33 of its Memorandum filed before the Court Second Division and as presented during trial. Considering that herein petitioner CIR did not present evidence during trial, respondent Taganito asserts the general rule that factual findings of lower courts must be accorded respect on review of decision.

THE COURT *EN BANC'S* RULING

The Court *En Banc* finds the petition for review meritorious.

Before resolving any issue of substantiation, it is pivotal to determine, first and foremost, whether the Court of Tax Appeals has jurisdiction to rule on herein

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case. Pertinent to discuss the basis in law of every application for tax refund of unutilized input VAT.

Reckoning of the Period to File A Claim for Refund of Input Taxes

An application for refund or tax credits over input taxes is governed by Section 112 of the 1997 National Internal Revenue Code (NIRC).

An application for refund or tax credit over input taxes arising from zero-rated sales is governed by Section 112(A) of the 1997 NIRC, to wit:

> **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).

An application for refund or tax credit over input taxes paid on capital goods imported or locally purchased is governed by Section 112(B) of the 1997 NIRC, to wit:

> (B) *Capital Goods.* - A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. **The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made.** (Emphasis Ours).

In both aforementioned provisions, it is worthy to note that the 1997 NIRC specifically set forth the reckoning of the two-year period for filing a claim for

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refund/tax credit over input taxes to be the close of the taxable quarter when the sales were made.

In the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[4], the Supreme Court has cited the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[5] wherein it was ruled that the two-year period to file a refund for input tax arising from zero-rated sales should be reckoned from the close of the taxable quarter when the sales were made, *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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>> The above proviso [Section 112 (A) of the NIRC] 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 Sec. 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.
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> ***Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable***

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[4] GR No. 184823, October 6, 2010.
[5] GR No. 172129, September 12, 2008.

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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:

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

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> 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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> x x x xxx xxx
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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.)
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> 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.**

Thus, it is clear that the reckoning of the two year period on claims for refunds/credit for input tax on zero-rated sales should be from the close of the taxable quarter when the sales were made.

Considering the same reckoning is clearly stated in Section 112(B) of the 1997 NIRC, the reckoning of the two year period on claims for refunds/credits for input tax paid on capital goods imported or locally purchased is also from the close of the taxable quarter when the sales were made.

The Period to File the Administrative Claim and Judicial Claim for Refund of Input Taxes

In the same *Aichi Forging Case*, the Supreme Court has applied Section 112(A) in ascertaining whether the taxpayer timely filed its administrative claim for refund, thus:

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Applying this to the present case, the two-year period to file a claim for tax refund/credit for the period July 1, 2002 to September 30, 2002 expired on September 30, 2004. Hence, respondent's administrative claim was timely filed.

As to the filing of the judicial claim for refunds on both Sections 112(A) and (B) of the 1997 NIRC, the provision of Section 112(D) thereto is pertinent, *viz*:

> 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 Ours)

The disquision in the *Aichi Forging Case* significantly explained that the phrase *"within two (2) years xxx apply for the issuance of a tax credit certificate or refund"* pertains to application for refunds/credits filed with the CIR. Moreover, in the same case, it was emphasized that the failure to await the decision of the CIR or the lapse of the 120-day period prescribed in Section 112(D) amounts to a premature filing which is crucial in filing an appeal with the Court of Tax Appeals, *viz*:

> 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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> xxx xxx xxx
>
> 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.
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> 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

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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 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. (Emphasis provided)

Applying Sections 112(A), (B) & (D) of the 1997 NIRC.

Applying the foregoing in this case, the two-year period prescribed for the administrative filing is summarized as follows:

Period Covered (2005)	End of the Two-Year Period
1st Quarter – (01/01/05-03/31/05)	March 31, 2007
2nd Quarter – (04/01/05-06/30/05)	June 30, 2007
3rd Quarter – (07/01/05-09/30/05)	September 30, 2007

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4th Quarter – (10/01/05-12/31/05)	December 31,2007

Respondent Taganito filed its administrative claim on November 14, 2006[6]. Respondent Taganito's administrative filing is well within the period prescribed under Sections 112(A) & (B) of the 1997 NIRC.

As to its judicial filing[7], it appears that respondent Taganito filed its Petition for Review before the Court Second Division on February 14, 2007. Respondent Taganito judicially filed its claim after only ninety two (92) days from its filing of its administrative claim with petitioner CIR, thus, in violation of the 120 days required to await the action by the CIR as prescribed in Section 112(D) of the 1997 NIRC. Respondent Taganito's judicial filing is premature.

The premature filing of respondent Taganito's judicial 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.[8] 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.[9]

Considering petitioner CIR, as early as in her Answer, has raised the failure of petitioner Taganito to comply with the requirement to await the decision of the CIR within the 120 day period, as set forth in Section 112(D) of the 1997 NIRC, there was no waiver on the part of petitioner CIR, thus, the judicial claim of respondent Taganito for its 2005 input taxes on zero rated sales and capital goods imported or locally purchased must be dismissed for lack of cause of action.

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[6] Exhibits "AA", "AA-1", "AA-2" and "BB", *Rollo*, pp. 286-288.
[7] Rollo, p. 1.
[8] *Carale vs. Abarintos*, GR No. 120704, March 3, 2009.
[9] *Paat vs. Court of Appeals*, GR No. 111107, January 10, 1997; 266 SCRA 167, pp. 175-177.

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WHEREFORE, the instant Petition for Review is hereby **GRANTED.** The assailed Decision dated January 8, 2010 and Resolution dated April 7, 2010 of the Special Second Division of this Court are hereby **REVERSED and SET ASIDE.** Another one is hereby entered **DISMISSING** the Petition for Review filed in CTA Case No. 7574 for having been prematurely filed.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

JUANITO C. CASTANEDA, JR.
Associate Justice

(Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

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

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice