REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PHILEX MINING CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 787
(CTA CASE NOS. 7933 & 7968)

Present:

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

Promulgated:

SEP 24 2012 CAApolinario 1:45 p.m.

x- -x

DECISION

UY, J.:

This Petition for Review filed before the Court of Tax Appeals *En Banc* on June 7, 2011 seeks a review of the Decision and Resolution by the Second Division of this Court (Court in Division)[1] in CTA Case Nos. 7933 and 7968, entitled "Philex Mining Corporation, petitioner, vs. Commissioner of Internal Revenue, respondent"[2], to wit:

---

[1] Chaired by Associate Justice Juanito C. Castañeda, Jr., with Associate Justice Caesar A. Casanova and Associate Justice Cielito N. Mindaro-Grulla as members.

[2] Ponencia of Associate Justice Juanito C. Castañeda, Jr., concurred by Associate Justice Caesar A. Casanova and Associate Justice Cielito N. Mindaro-Grulla.

1) Decision promulgated on March 17, 2011[3] denying the consolidated Petitions in CTA Case Nos. 7933 and 7968 for having been prematurely filed; and

2) Resolution promulgated on May 11, 2011[4] denying herein petitioner's Motion for Reconsideration for lack of merit.

THE FACTS

The factual antecedents of the case are undisputed.

Petitioner is a domestic corporation engaged in the business of mining which includes exploration, development, and operation of mining properties for commercial production, and the marketing of mine products. Its principal office address is located at Brixton corner Fairlane Streets, Pasig City. It is a VAT-registered entity with VAT Registration Certificate No. 35-6-000731 effective October 29, 1997, and under BIR Form No. 2303 as of January 31, 1997. Petitioner had its Application for Zero-Rate, pursuant to Sec. 4.100-3 of Revenue Regulations (RR) No. 7-95, approved effective April 12, 1998.

On the other hand, respondent is the government official charged with the administration and enforcement of the national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected and other refundable or creditable taxes under the National Internal Revenue Code (NIRC) of 1997, as amended, with address at the BIR National Office, Diliman, Quezon City.

On July 24, 2007, petitioner filed its original VAT return for the 2nd quarter of taxable year 2007. Subsequently, it filed an amended return on June 23, 2008 which reflected a total zero-rated sales of P3,336,877,804.52,

---

[3] Docket, pp. 27-40.
[4] Ibid, at pp. 42-45.

importation of goods of P149,885,075.00 with input tax of P17,986,209.00, and purchases of services of P3,550,949.42 with input tax of P426,112.93.

On October 23, 2007, petitioner then filed its original VAT return for the 3rd quarter of taxable year 2007. Thereafter, it filed an amended return on June 23, 2008 which reflected a total zero-rated sales of P3,322,807,460.21, importation of goods of P169,237,058.34 with input tax of P20,312,767.00, and purchases of services of P3,745,108.00 with input tax of P449,412.96, and domestic purchases of goods of P9,037,481.00 with input tax of P1,084,497.72.

Pursuant to Section 4.112-1, Revenue Regulations (RR) No. 16-2005, petitioner filed its claim for refund/tax credit with the One Stop Shop Center of the Department of Finance (OSS) on June 15, 2009, per Application No. 52743 in the amount of P18,412,322.93 for the 2nd quarter of taxable year 2007, and per Application No. 52742 in the amount of P21,846,677.68 for the 3rd quarter of taxable year 2007, both of which are well within the two (2)-year period prescribed in Section 112 (A) of the NIRC of 1997, as amended.

Since respondent has not issued a final decision on petitioner's administrative claim for refund or issuance of tax credit certificate, petitioner filed a Petition for Review before the Court of Tax Appeals (First Division) on June 19, 2009 docketed as CTA Case No. 7933 (covering the claim for the 2nd quarter of taxable year 2007) and another Petition for Review before the same Division on September 8, 2009 docketed as CTA Case No. 7968 (covering the claim for the 3rd quarter of taxable year 2007).

On October 16, 2009, the parties filed their "Stipulation of Facts and Issues", which was approved by the First Division in a Resolution dated October 23, 2009 for CTA Case No. 7933; while on October 23, 2009, the parties likewise filed their "Stipulation of Facts and Issues", which was approved by the same in a Resolution dated October 29, 2009 for CTA Case No. 7968. Pre-Trials for both cases were terminated and thus, both parties were ordered to proceed with the trial on the merits.

On January 7, 2010, the First Division issued the corresponding Orders transferring CTA Case Nos. 7933 and 7968 to the Second Division (Court in Division), pursuant to CTA Administrative Circular No. 01-2010 dated January 5, 2010, "Implementing the Fully Expanded Membership in the Court of Tax Appeals".[5]

On January 25, 2010, petitioner filed a motion for the consolidation of CTA Case No. 7933 with CTA Case No. 7968, considering that both cases involve the same cause of action, the same issue, the same witnesses and the same documentary evidences. The only difference between CTA Case No. 7933 from CTA Case No. 7968 is that the former covers the claim for VAT refund for the 2nd quarter of taxable year 2007 while the latter covers the claim for VAT refund for the 3rd quarter of taxable year 2007. Thereafter, the Court in Division granted the said motion for consolidation in a Resolution dated January 27, 2010.[6]

Petitioner filed its Formal Offer of Evidence on April 16, 2010, offering exhibits "A" to "P", inclusive of their sub-markings. In a Resolution dated June

---

[5] CTA Case No. 7933, Records, p. 83; CTA Case No. 7968, Records, p. 64.
[6] Ibid., p. 90.

3, 2010, the Court in Division admitted Exhibits “A” to “C-3”, “D” to “H-26”, “J” to “J-178”, “L” to “L-10”, “N-1” to “N-16” and “P”. Exhibit "C-4", however, was denied admission for failure of the petitioner to mark and identify the same during the proceedings. On the other hand, respondent manifested that she has no documentary evidence to be marked and no witnesses to be presented.

Both parties were granted a period of thirty (30) days from July 26, 2010 or until August 25, 2010 to file their respective memorandum.

On September 3, 2010, the consolidated cases were submitted for decision before the Court in Division, considering petitioner’s Memorandum filed on August 10, 2010, and the Report dated September 1, 2012 of the Court’s Records Division that respondent failed to file a memorandum.

On March 17, 2011, the Court in Division rendered its assailed Decision, denying petitioner’s claim for refund of its alleged unutilized input VAT paid on purchases on goods and services attributable to zero-rated sales for the 2nd and 3rd quarters of taxable year 2007 on the sole ground that both Petitions for Review in CTA Case Nos. 7933 and 7968 were prematurely filed. The Court *a quo* ruled that the since the administrative claim for refund was filed on June 15, 2009, respondent had a period of 120 days therefrom or until October 13, 2009 to decide petitioner’s claim. However, without waiting for the expiration of the said period within which respondent could act on such claim, petitioner filed its petitions before the Court of Tax Appeals on June 19, 2009 and September 8, 2009, covering the 2nd and 3rd quarters of taxable year 2007, respectively. Thus, the consolidated petitions were denied for having been prematurely filed, consistent with the pronouncements made in Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010.

Petitioner filed a Motion for Reconsideration of the assailed Decision before the Court *a quo* on April 4, 2011. Finding that the issues raised thereto are without merit, the Court in Division denied said Motion for Reconsideration in the Resolution dated May 11, 2011.

Thus, petitioner came before the Court *En Banc* praying that the assailed Decision dated March 17, 2011, and Resolution dated May 11, 2011 of the Court in Division, be reversed and set aside, and that a new decision be rendered ordering respondent to refund petitioner its alleged excess and unutilized input VAT for the 2nd and 3rd quarters of taxable year 2007.

In compliance with the Resolution dated July 4, 2011[7], respondent filed a Comment on July 21, 2011. On August 17, 2011, both parties were directed to file their respective memorandum.[8] Thereafter, this case was considered submitted for decision on October 25, 2011, after petitioner filed its Memorandum on September 21, 2011[9], sans respondent's memorandum.

Hence, this Decision.

THE ISSUE

The principal issue centers on whether or not this Court properly acquired jurisdiction over the instant claim taking into consideration the timeliness of the filing of the judicial claims with the Court of Tax Appeals as

---

[7] Docket, pp. 47-48.
[8] Resolution dated August 17, 2011, Docket, pp. 56-57.
[9] Memorandum for Petitioner, Docket, pp. 58-69.

provided under Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended.

In support thereof, petitioner asserts the following assignments of error:

> 1. The Court in Division erred in not ruling that respondent is deemed to have waived the defense of premature filing of the judicial claims before the Court of Tax Appeals, pursuant to Rule 9, Section 1 of the Rules of Court; thus, the Court in Division should have entertained and exercised jurisdiction over the consolidated cases and rendered a decision thereon based on the merits;
>
> 2. The Court in Division erred in denying the petitions due to alleged premature filing. The fact is that both petitions were filed before the Court of Tax Appeals within the period set by the prevailing Court rulings at the time they were filed; hence, they were not premature; and
>
> 3. The Court in Division erred in retroactively applying the Aichi ruling in denying the petitions in the consolidated cases.

THE COURT EN BANC'S RULING

Section 7 of Republic Act (RA) No. 1125[10], as amended by RA No. 9282[11], defines the appellate jurisdiction of the Court of Tax Appeals. The said provision, in part, reads:

> "SEC. 7. *Jurisdiction*. - The CTA shall exercise:
>
> a) **Exclusive appellate jurisdiction to review by appeal**, as herein provided:

[10] AN ACT CREATING THE COURT OF TAX APPEALS.

[11] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO.1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

(2) **Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial**; xxx" *(Emphasis Ours)*

Furthermore, Section 11 of the same law prescribes how the said appeal should be taken, to wit:

"SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* – **Any party adversely affected by** a decision, ruling or **inaction of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days** after the receipt of such decision or ruling or **after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein**.

Appeal should be made by filing a petition for review under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure **with the CTA within thirty (30) days** from the receipt of the decision or ruling or **in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. xxx" *(Emphases Ours)*.

One of the "inactions" contemplated in the above-quoted provisions, pertinent to the instant case, is found in Section 112 of the NIRC of 1997, as amended, the pertinent provisions of which state:

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

(A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales**, except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx

xxx xxx xxx

(C)[12] *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) 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.**

xxx xxx xxx." *(Emphasis Ours)*

Based on the foregoing provisions, prior to seeking judicial recourse before the Court of Tax Appeals, a VAT-registered person may apply for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated or effectively zero-rated sales **within two (2) years after the close of taxable quarter when the sales or purchases were made**.

Thus, as correctly found by the Court in Division in its assailed Decision dated March 17, 2011, the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under said section **starts from the close of the taxable quarter when the relevant sales or**

[12] Previously Section 112(D) before Republic Act No. 9337 took effect on November 1, 2005.

purchases were made pertaining to the input VAT regardless of whether said tax was paid or not, as held in the case of ***Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc)***,[13] which is the applicable ruling in the instant case. In said case, the Supreme Court held that:

> "The above proviso (Sec. 112 [A]) 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**. xxx" (*Emphasis Ours)*

Additionally, a further reading of the provisions of Section 112 shows that under paragraph (C) thereof, the Commissioner of Internal Revenue is given a **120-day period**, from submission of complete documents in support of the administrative claim within which to act on claims for refund/applications for issuance of the tax credit certificate. Upon denial of the claim or application, or upon expiration of the **120-day period**, the taxpayer only has a **30-day period** within which to appeal said adverse decision or unacted claim before the Court of Tax Appeals.

---

[13] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

The aforesaid provision was applied in ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.***,[14] wherein the Supreme Court expounded on the significance of the **120-day** and **30-day** periods as follows:

> "Section 112(D)[15] 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**.
>
> xxx xxx xxx
>
> xxx. 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 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**

---

[14] G.R. No. 184823, October 6, 2010.
[15] Changed to Section 112(C) upon effectivity of Republic Act No. 9337 in November 1, 2005.

> **CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.**
>
> xxx xxx xxx." *(Emphasis and underscoring Ours)*

Clearly therefore Section 112(C) of the NIRC of 1997, as amended, directs the Commissioner of Internal Revenue to act on administrative claims for refund/applications for issuance of the tax credit certificate within a period of one hundred twenty (120) days from submission of complete supporting documents. Upon partial or full denial of such claim, or the expiration thereof without any action by the Commissioner on said claim, the taxpayer only has a period of thirty (30) days within which to seek judicial recourse from the adverse decision or inaction of the Commissioner before the Court of Tax Appeals.

Thus, it becomes incumbent upon the taxpayer-claimant to comply, not only with the two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue, but must also give the Commissioner of Internal Revenue a period of one hundred twenty (120) days to either partially or fully deny the claim.

Subsequently, upon denial of the claim, or after the expiration of the 120-day period without any action by the Commissioner thereon, only then may the taxpayer-claimant seek judicial recourse to appeal the Commissioner's action or inaction on a refund/tax credit claim, within a period of 30 days therefrom.

It is worthy of emphasis that judicial interpretation of a statute constitutes a part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[16] As the Supreme Court is merely interpreting a law (Section 112 of the NIRC of 1997) which had long been effective, and not modifying or reversing any existing jurisprudence, the pronouncements made in the ***Mirant case*** and ***Aichi case*** (although promulgated only on September 12, 2008 and October 6, 2010, respectively) must be applied herein. Consequently, neither the doctrine of *stare decisis* nor any vested right was violated in applying the said rulings in the present case.

Applying the foregoing discussion in the case at bench, although petitioner has indeed complied with the required two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue by filing its administrative claim on June 15, 2009 (within the period from the close of the subject taxable quarters when the relevant sales or purchases were made), it appears however, that petitioner's corresponding judicial claims before the Court in Division through Petitions for Review filed on June 19, 2009 and September 8, 2009 were prematurely filed as the same were done before the lapse of the 120-day period, detailed hereunder as follows:

Taxable year 2007	***Filing date of the administrative claim***	***Last day of the 120-day period under Section 112(C) from the filing of the administrative claim in case of inaction***	***Filing date of the Petition for Review***
2nd Quarter	June 15, 2009	**October 23, 2009**	**June 19, 2009**
3rd Quarter			**September 8, 2009**

[16] *Eagle Realty vs. Republic of the Philippines,* G.R. No. 151424, July 31, 2009.

Based on the above undisputed factual findings, the reckoning date of the 120-day period under Section 112(C) of the NIRC of 1997, as amended, commenced simultaneously with the filing of petitioner's administrative claim since no subsequent supporting documents was submitted by petitioner, absent any evidence contrary thereto.

Indubitably, petitioner miserably failed to observe the 120-day period under Section 112(C) of the NIRC of 1997, as amended, to give the Commissioner of Internal Revenue the opportunity to act on its refund claim. Correspondingly, the premature filing of the Petitions for Review before the Court in Division in CTA Case Nos. 7933 and 7968 warrants a dismissal inasmuch as no jurisdiction was acquired thereto. This jurisdictional nature of such premature filing is consistent with the pronouncements made in the ***Aichi case***[17], the prevailing jurisprudence on the matter.

In the ***Aichi*** case, the Supreme Court categorically ruled that the premature filing of claim for refund/credit of input VAT before this Court warrants its dismissal as no jurisdiction was acquired therein. The High Court said thus:

> **"In this case, the administrative and the judicial claims were <u>simultaneously filed</u> on September 30, 2004. <u>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</u>.**
>
> 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.
>
> xxx xxx xxx

---

[17] Supra, see note 14.

Based on the above undisputed factual findings, the reckoning date of the 120-day period under Section 112(C) of the NIRC of 1997, as amended, commenced simultaneously with the filing of petitioner's administrative claim since no subsequent supporting documents was submitted by petitioner, absent any evidence contrary thereto.

Indubitably, petitioner miserably failed to observe the 120-day period under Section 112(C) of the NIRC of 1997, as amended, to give the Commissioner of Internal Revenue the opportunity to act on its refund claim. Correspondingly, the premature filing of the Petitions for Review before the Court in Division in CTA Case Nos. 7933 and 7968 warrants a dismissal inasmuch as no jurisdiction was acquired thereto. This jurisdictional nature of such premature filing is consistent with the pronouncements made in the ***Aichi case***[17], the prevailing jurisprudence on the matter.

In the ***Aichi*** case, the Supreme Court categorically ruled that the premature filing of claim for refund/credit of input VAT before this Court warrants its dismissal as no jurisdiction was acquired therein. The High Court said thus:

> "**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.
>
> xxx xxx xxx

MO

[17] Supra, see note 14.

> 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**." *(Emphasis and underscoring supplied).*

Clearly therefore, the premature filing of the judicial claim before the Court of Tax Appeals makes both the Petitions in CTA Case Nos. 7933 and 7968 dismissible as no jurisdiction was acquired by the Court to entertain the said consolidated cases. And being jurisdictional in nature, this defense is not waivable. Otherwise, We run the risk of favoring a non-complying taxpayer-claimant, at the mere expedient of failing to invoke the defense of prematurity before this Court at the first instance.

It must also be noted that the right to appeal is a mere statutory privilege and not an inherent constitutional right as aptly held in the case of ***Yao vs. Court of Appeals, et al.***[18], to wit:

> "The right to appeal is **not** a constitutional, natural or inherent right. It is a statutory privilege of statutory origin and, therefore, available only if granted or provided by statute. Since the right to appeal is not a natural right nor a part of due process, **it may be exercised only in the manner and in accordance with the provisions of law**. Corollary, **its requirements must be strictly complied with**.
>
> **That an appeal must be perfected in the manner and within the period fixed by law is not only mandatory but jurisdictional**. Non-compliance with such legal requirements is fatal, for it renders the decision sought to be appealed final and executory, with the end result that no court can exercise appellate jurisdiction to review the decision." *(Emphases Ours)*

Parenthetically, it must be emphasized that jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy,[19] and is conferred only by law and not by the consent or waiver

m

---

[18] G.R. No. 132428, October 24, 2000.

[19] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.

upon a court which, otherwise, would have no jurisdiction over the subject matter or nature of an action. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties.[20] If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[21]

Furthermore, the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right. It bears emphasis 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. Evidently, 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.[22]

In this case, input VAT is taxes legally due to the government from the taxpayer and is not a kind of an erroneously or illegally collected tax. However, under certain exceptional circumstances (such as for sales or

---

[20] *Laresma vs. Abellana*, G.R. No. 140973, November 11, 2004.
[21] Please refer to *De Guzman, et al. vs. Escalona, et al.*, G.R. No. L-51773, May 16, 1980.
[22] *CIR vs. Fortune Tobacco Corporation*, G.R. Nos. 167274-75, July 21, 2008; *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.

purchases that are zero-rated), the legislature provided a tax refund statute under Section 112 from which the taxpayer is given the benefit to refund such input VAT as a mere privilege granted by the government for having such kind of sales or transactions. Hence, it being a mere liberality granted to the taxpayer, it is with more reason that the Court must be cautious in interpreting the law governing the claim for such privilege.

Applying the foregoing discussion in the case at bench, We adhere to the Court in Division's pronouncement on this matter, quoted hereunder for ready reference:

> "By tradition and in our system of judicial administration, the Supreme Court has the last word on what the law is; it is the final arbiter of any justifiable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings. It is the duty of the lower courts to obey the decisions of the Supreme Court and render obeisance to its status as the apex of hierarchy of courts.
>
> The Supreme Court ruled, in the Aichi case, that 'the premature filing of a claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA.' Such pronouncement demonstrates that in cases of input tax refund, the premature invocation of this Court's jurisdiction would warrant the dismissal of the case on the ground of lack of jurisdiction. Being a question of jurisdiction, the same can be taken up motu proprio by the Court.
>
> As regards the argument on the prospective application of the Aichi case, suffice to say that a cursory reading of the said case would reveal that the period to appeal before the CTA was determined pursuant to Section 112 (D) [now 112 (C)] of the NIRC. It was ruled in that case that the phrase 'within two years' under Section 112 (A) of the NIRC refers to application for refund/credit with the Commissioner of Internal Revenue and not to appeals made to the CTA. The construction/interpretation placed upon Section 112 (A) and (D) of the NIRC in that Aichi case retroacts to the date of the enactment of the said law on January 1, 1998. As held in Philippine Constitution Association vs. Enriquez, 'the Court's

nvb

> interpretation of the law is part of the law as of the date of its enactment since the court's interpretation merely establishes the contemporary legislative intent that the construed law purports to carry into effect.'"[23]

To reiterate, the premature filing of the judicial claim before the Court of Tax Appeals makes the petition dismissible as no jurisdiction was acquired by the Court to entertain the case. Consequently, this Court has no alternative but to deny the instant Petition and dismiss the case for lack of jurisdiction.

WHEREFORE, in light of the foregoing considerations, the Petition for Review is hereby **DENIED** for lack of merit. Consequently, the filing of the Petitions for Review in CTA Case No. 7933 and CTA Case No. 7968 are both deemed premature; and therefore, this Court has no jurisdiction to entertain the instant case.

Accordingly, the Decision dated March 17, 2011 and the Resolution dated May 11, 2011 of the Court in Division in CTA Case Nos. 7933 and 7968 are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

[23] Assailed Resolution dated May 11, 2011, pp. 3-4, Docket, pp. 44-45.

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Concurs with Presiding Justice Acosta's Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(Concurs with Presiding Justice Acosta's Dissenting Opinion)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILEX MINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 787
(CTA Case Nos. 7933 and 7968)

Present:

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

Promulgated:

SEP 24 2012 1:45 p.m.

x- x

DISSENTING OPINION

Acosta, PJ:

With all due respect to my esteemed colleagues, I disagree with the affirmation of the Court Division's dismissal of the Petition for Review on the ground that this Court has no jurisdiction over a *prematurely filed judicial case* for refund of unutilized input Value Added Tax (VAT) attributable to zero-rated or effectively zero-rated sales under Section 112 of the National Internal Revenue Code (NIRC). It is my humble opinion that this Court has jurisdiction to entertain such a case albeit prematurely elevated from the administrative level.

The majority subscribes to the view that the absence of a decision from the Commissioner of Internal Revenue (CIR) prior to the lapse of the one hundred twenty (120) days to decide the claim in the administrative level, provided for by Section 112 (C), as amended, of the NIRC, does not constitute *inaction on the part the CIR* that will allow the claim to be elevated to this Court in accordance with Republic Act No. 1125[1], as amended by Republic Act No. 9282. This view of the majority thus leads to the conclusion that the Court does not have jurisdiction over a prematurely filed judicial refund claim under Section 112 of the NIRC, which is accordingly in line with the pronouncement of the Honorable Supreme Court in the case of ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*** (GR No. 184823, 06 October 2010).

I beg to disagree.

The petitioner filed two separate judicial petitions for the refund of its unutilized input VAT covering the second and third quarters of 2007. One on 19 June 2009 (second quarter) and another on 08 September 2009 (third quarter), which were both filed within less than one hundred twenty (120) days from the filing of the administrative claim covering the two periods on 15 June 2009. From the bare facts, it is evident that the judicial claims were filed before the issuance of an adverse decision by the BIR, or the lapse of the one hundred twenty (120) day period mandated by Section 112 (C), as amended, of the NIRC, which covers refund claims of this nature, *viz*:

> SEC. 112. *Refunds or Tax Credits of Input Tax.* –
>
> ...(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.

gm

[1] An Act Creating the Court of Tax Appeals, 16 June 1954.

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.

xxx

(Underscoring supplied.)

In not joining the majority in its disposition of the case, I advance the view that the failure of petitioner to comply with the above subsection does not rob this Court of jurisdiction over the claim for refund as such merely constitutes a violation of the doctrine of exhaustion of administrative remedies.

The rule on exhaustion of administrative remedies before resorting to the courts means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiar within the competence of the administrative agency, avoidance of interference with functions of such administrative agency by withholding judicial action until the administrative process has run its course, and prevention of attempts to swamp the courts by a resort to them in the first instance.[2] A party seeking an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to court action.[3]

---

[2] *Abe-Abe vs. Manta*, L-4827, 31 May 1979.
[3] *Commissioner of Internal Revenue vs. Rosemarie Acosta*, GR No. 154068, 03 August 2007.

Unlike a lack of jurisdiction, the non-exhaustion of administrative remedies is *not at all times fatal* to the claimant.

In the case of *Castro vs. Gloria*, GR No. 132174, 20 August 2001, the Supreme Court, citing the case of *Vidad vs. RTC of Negros Oriental*, Branch 42[4], declared that—

> Non-exhaustion of administrative remedies implies absence of cause of action. Where a remedy is available within the administrative machinery, this should be resorted to before recourse can be made to the courts. The doctrine of primary jurisdiction does not warrant a court to arrogate unto itself the authority to resolve a controversy the jurisdiction over which is initially lodged with an administrative body of special competence. (Underscoring supplied.)

Therefore the failure to exhaust available administrative remedies will not rob the courts of its jurisdiction over a case as the same is tantamount only to a judicial petition lacking or failing to state a cause of action. In our jurisdiction, the defense of failing to state a cause of action is not jurisdictional in nature and may be deemed waived if not timely raised in a Motion to Dismiss or in the Answer.[5]

In the case of *Iloilo City Zoning Board of Adjustment and Appeals vs. Gegato Abecia Funeral Homes, Inc.*, GR No. 157118, 08 December 2003, the Supreme Court established that the premature invocation of the court's intervention is only fatal to *one's cause of action*. The case though is susceptible of dismissal for such failure to state a cause of action absent any finding of waiver or estoppel, *viz*:

> The settled rule is that before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. The premature invocation of the court's intervention is fatal to one's cause of action.

[4] 227 SCRA 221.
[5] Sec. 1, Rule 9 of the Rules of Court.

> Accordingly, absent any finding of waiver or estoppel the case is susceptible of dismissal for failure to state a cause of action. This doctrine of exhaustion of administrative remedies is not without practical and legal reasons, for one thing, availment of administrative remedy entails lesser expenses and provides for a speedier disposition of controversies. It is no less true to state that courts of justice for reasons of comity and convenience will shy away from a dispute until the system of administrative redress has been completed and complied with so as to give the administrative agency concerned every opportunity to correct its error and to dispose of the case.[6]

In disregarding ***Aichi***s, *supra*, pronouncement on the Court's lack of jurisdiction based on the ground of a premature filing of a judicial claim, I submit and choose to echo past jurisprudence and authority which laid to rest the issue of non-exhaustion of administrative remedies, which, are established doctrines not only in taxation but also in other fields of law. It is my humble opinion that the statement by the Supreme Court in ***Aichi*** that the 'Court has no jurisdiction' is stated in its broadest and generic sense. The Court cannot very well do away with these established doctrines by cutting corners and declaring succinctly that it has no jurisdiction over a case without strict legal basis. In the absence of any waiver or estoppel, a premature recourse to the courts is dismissible. Otherwise, the Court acquires jurisdiction and may properly act on the petition.

In the case at bar, it appears that respondent failed to allege in her answer or in a motion to dismiss the premature filing of the cases in Court. Thus, respondent is considered to have waived said defense.

In view thereof, I dissent to the dismissal of petitioner's claims for refund or issuance of a tax credit certificate representing its unutilized input VAT for the second and third quarters of taxable year 2007 since the Court may aptly take

---

[6] Citing *Paat v. Court of Appeals*, 334 Phil. 146, 152–153 (1997)

Eh

cognizance of the case for failure of respondent to allege the defense of failure to state a cause of action. It is my considered position therefore that this Court should have exercised jurisdiction and determined the merits of petitioner's claim of unutilized input VAT for the second and third quarters of taxable year 2007.

ERNESTO D. ACOSTA
Presiding Justice

We concur:

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA COTANGCO- MANALASTAS
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

PHILEX MINING CORPORATION
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE
Respondent.

CTA EB CASE NO. 787
(CTA Case Nos. 7933 & 7968)

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

Promulgated:
SEP 2 4 2012

x - x

DISSENTING OPINION

BAUTISTA, J.:

With all due respect to my esteemed colleagues, I must dissent on the decision made by the Court denying the Petitions for Review in CTA Case No. 7933 and CTA Case No. 7968, finding them to be premature, and consequently, out of the jurisdiction of the Court *En Banc*.

I, however, find the petitions partly meritorious.

Pertinent to this discussion is Section 112 (C) of the 1997 NIRC, as amended, which states:

> **SEC. 112.** *Refunds or Tax Credits of Input Tax.* –
>
> xxx xxx xxx

> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals. (Underlining Ours.)

The word "may," indicates that it is merely permissive and operates to confer discretion.[1] Thus, this provision gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

Section 112 of the 1997 NIRC, as amended, must be read in accordance with Section 229 of the same Code. The judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC, as amended, is therefore, merely directory and permissive, and not mandatory nor jurisdictional, for so long as it is made within the settled two (2)-year prescriptive period.[2]

In the case of *Commissioner of Internal Revenue v. San Roque Power Corporation,*[3] the Court *En Banc* states:

> "It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the NIRC. It is a well-

[1] *Bersabal vs. Salvador*, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, citing *Dizon vs. Encarnacion*, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.
[2] *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*, CTA EB Case No. 416, February 4, 2009.
[3] CTA EB Case No. 408 (CTA Case No. 6647), March 25, 2009.

settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.

Corollary thereto, the Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:

> "It appears therefore, that it is not necessary for the Commissioner of Internal Revenue to first act unfavorably on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case. This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
>
> Incidentally, the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal. The law fixed the same period — two years — for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court. Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. In fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)." (Underlining Ours.)"

Thus, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even his inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal with this Court,[4] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period,[5] and beyond that period, the taxpayer can no longer appeal to this Court.[6]

With regard to the filing of the instant Petition for Review, the prevailing ruling of the Supreme Court at the time petitioner lodged its appeal to this Court is the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)* ("*Mirant case*"),[7] which states that excess unutilized input VAT 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 whether said tax was paid or not.

In the case at hand, petitioner's administrative claim for refund was filed on June 15, 2009, while the judicial claims for the 2nd and 3rd Quarters were filed on June 19, 2009 and September 8, 2009 respectively. While, respondent does have until October 13, 2009 to resolve the administrative claims, given the above discussion of Section 112 (C) of the 1997 NIRC, petitioner need not wait for a denial by the respondent in order for a judicial claim to be proper. Petitioner needs to file a Petition for Review with the Court of Tax Appeals within the said 2-year period

---

[4] *Commissioner of Internal Revenue vs. CE Cebu Geothermal Power Company, Inc.*, CTA EB Case No. 426, May 29, 2009.
[5] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc.*, No. L-24108, January 3, 1968, 22 SCRA 12.
[6] *Commissioner of Internal Revenue vs. Accenture, Inc.*, CTA EB Case No. 410 (CTA Case No. 7387), March 18, 2009.
[7] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

from the close of the taxable quarter; in the event that petitioner waits for the respondent, allowing the period to run out and respondent resolves the administrative case against the petitioner, petitioner effectively loses the opportunity to bring his claim to this Court.

Furthermore, I do not agree with the retroactive application of the *Aichi* case. The basic legal maxim *lex prospicit, non respicit*, states that law looks forward not backward. The principle of prospectivity applies not only to original or amendatory statutes, administrative rulings, and circulars, but also, to judicial decisions.[8] Thus, petitioner's reliance on the prevailing jurisprudence at the time of filing its judicial claims is valid.

Accordingly, I vote that the Petition for Review be **GRANTED.** Therefore, the Decision of the Court in Division dated March 17, 2011 and Resolution dated May 11, 2011 should be **REVERSED** and **SET ASIDE.**

LOVELL R. BAUTISTA
Associate Justice

---

[8] *Columbia Pictures, Inc., Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, United Artists Corporation, Universal City Studios, Inc., The Walk Disney Company, and Warner Brothers, Inc. vs. Court of Appeals, Sunshine Home Video, Inc. and Danilo Pekindario,* G.R.No. 110318, August 28, 1996, 252 SCRA 259, citing *Co vs. Court of Appeals, et al.*, G.R. No. 100716, October 28, 1993, 227 SCRA 444.