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. 802
(CTA Case No. 8110)

Members:
ACOSTA, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *J.J.*

Promulgated:
DEC 13 2012 3:30pm

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DECISION

CASANOVA, J.:

This is an appeal, by way of Petition for Review,[1] filed on July 18, 2011 by petitioner-Philex Mining Corporation, seeking the reversal of the March 28, 2011[2] and

[1] CTA En Banc Rollo, pp. 1-18.
[2] Annex "A" of the Petition for Review, Ibid, pp. 20-23.

June 30, 2011[3] Resolutions (Assailed Resolutions) of the Court of Tax Appeals (CTA) Second Division in CTA Case No. 8110, entitled *"Philex Mining Corporation vs. Commissioner of Internal Revenue,* the respective dispositive portion of which reads, as follows:

> March 28, 2011 Resolution
>
> "**WHEREFORE**, the Motion to Dismiss is hereby **GRANTED** and the instant petition for review is **DISMISSED** for lack of jurisdiction.
>
> **SO ORDERED.**"
>
> June 30, 2011 Resolution
>
> "**WHEREFORE**, premises considered, petitioner's **Motion for Reconsideration** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

The factual antecedents of the case are as follows:

Petitioner is a domestic corporation organized under Philippine Laws, engaged in the mining business, which includes the exploration and operation of mining properties and, the commercial production and marketing of mine products, with principal office at 27 Brixton St. Pasig City.[4]

On the other hand, respondent is the duly appointed government official charged with the administration and enforcement of national internal revenue laws, including the granting of refund or tax credit of taxes erroneously or illegally collected, and other

[3] Annex "B" of the Petition for Review, Id, pp. 25-26.
[4] Pars. 1 and 3, Summary of Facts Admitted, Joint Stipulation of Facts and Issues (JSFI), Division Docket, pp. 49-50.

refundable or creditable taxes under the Tax Code, with address at BIR National Office, Diliman, Quezon City.[5]

Petitioner is a value-added tax (VAT) registered entity with VAT Registration Certificate No. 35-6-000731 effective October 29, 1997, and under Bureau of Internal Revenue (BIR) Form No. 2303 as of January 31, 1997. Petitioner likewise had its Application for Zero-Rate, pursuant to Sec. 4.100-3 of Revenue Regulations (RR) No. 7-95, approved effective April 12, 1998.[6]

On July 24, 2008, petitioner filed its original VAT return for the 2nd quarter of 2008. It subsequently filed an amended return on April 28, 2010 which reflected total zero-rated sales of P4,000,750,596.06, importation of goods of P175,372,566.67 with input tax of P21,044,708.00, and purchase of services of P7,135,168.84 with input tax of P856,220.26.[7]

On June 16, 2010, petitioner filed its administrative claim for refund or tax credit with the One Stop Shop Center of the Department of Finance for the excess input taxes for the 2nd quarter of 2008 in the amount of P21,900,928.26.[8]

In view of respondent's inaction, petitioner filed its judicial claim with this Court on June 24, 2010, docketed as CTA Case No. 8110.

In her Answer[9], respondent alleged by way of special and affirmative defenses the following:

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[5] Par. 2, Summary of Facts Admitted, JSFI, Ibid, p. 49.
[6] Par. 4, Summary of Facts Admitted, JSFI, Id, p. 50.
[7] Par. 5, Summary of Facts Admitted, JSFI, Id, p. 50.
[8] Par. 7, Statement of Material Facts, CTA En Banc Rollo, p. 3.
[9] Division Docket, pp., 24-28.

> "6.The claim for refund is still under examination by the respondent's Bureau;
>
> 7. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund or issuance of tax credit certificate;
>
> 8. The grant of claim for refund (sic) tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;
>
> 9. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

On September 29, 2010, a Notice of Pre-Trial Conference[10] was issued by the Second Division of the CTA requiring both parties to be present at the pre-trial on October 28, 2010 and, to file with this Court and serve on the adverse party their respective pre-trial brief. In compliance with the said order, Respondent's Pre-Trial Brief[11] was filed on October 13, 2010 while the Pre-Trial Brief For Petitioner[12] was filed on October 15, 2010.

Thereafter, the parties filed their Joint Stipulation of Facts and Issues[13] on October 28, 2010, which was approved by this Court in a Resolution[14] dated November 2, 2010.

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[10] Ibid, p. 34.
[11] Id, pp. 35-40.
[12] Id, pp. 41-44.
[13] Id, pp. 49-51.
[14] Id, p. 52.

Trial proceeded, during which petitioner presented witnesses, namely: (1) Eileen C. Rodriguez, Manager in the Accounting Department of petitioner[15]; and (2) Albert G. Alba, the Court-commissioned Independent Certified Public Accountant (ICPA)[16].

Respondent filed a Motion to Dismiss[17] on March 8, 2011, claiming that this Court has no jurisdiction to act upon the instant petition since the same was prematurely filed by petitioner.

On March 11, 2011, a Comment (On Respondent's Motion to Dismiss)[18] was filed by petitioner praying for the denial of the Motion to Dismiss on the following grounds: a) that the Motion to Dismiss was filed late; b) respondent is deemed to have waived her defense of premature filing of the petition; and c) based on the prevailing jurisprudence which petitioner relied upon in good faith when it filed its judicial claim, the instant Petition was not prematurely filed.

In a Resolution[19] dated March 28, 2011, the Court in Division granted respondent's Motion to Dismiss as the petition was prematurely filed following the ruling enunciated in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (Aichi Case),* [20] where the Supreme Court emphasized the mandatory requirement to observe the 120-30 day period provided under Section 112(C) of the 1997 NIRC, as amended, prior to instituting a judicial claim.

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[15] Minutes of the Hearing dated November 22, 2010, Id, p. 60.
[16] Minutes of the Hearings dated January 31, 2011 and February 28, 2011,respectively, Id, pp. 78 and 80.
[17] Id, pp. 83-88.
[18] Id. pp.100-109.
[19] Id, pp. 113-116.
[20] G.R. No. 184823, October 6, 2010.

On March 30, 2011, the Court issued a Resolution[21] stating that petitioner's Formal Offer of Evidence[22] filed on March 25, 2011, was noted without action in view of the Court's order granting respondent's Motion to Dismiss.

Undaunted, petitioner filed its Motion for Reconsideration[23] on April 19, 2011, but the same was denied for lack of merit in a Resolution[24] dated June 30, 2011. Thus, this Petition for Review filed before the Court *En Banc* on July 18, 2011.

On August 17, 2011, the Court *En Banc* issued a Resolution[25] ordering respondent to file her comment within ten (10) days from receipt thereof. However, per records verification[26] by the Judicial Records Division of the Court, respondent failed to file the same. Thus, in a Resolution[27] dated October 19, 2011, the Court *En Banc* resolved to give due course to petitioner's Petition for Review, and ordered both parties to submit their respective memorandum.

Pursuant to the Court's Resolution[28] dated January 11, 2012, the case was submitted for decision taking into consideration Memorandum For Petitioner[29] filed on November 16, 2011, sans respondent's Memorandum.

Hence, this Decision.

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[21] Division Docket, p. 118.
[22] Ibid, pp. 110-111.
[23] Id, pp. 119-129.
[24] Id, pp. 133-134.
[25] CTA En Banc Rollo, pp. 28-29.
[26] Records Verification Form dated October 4, 2011, Ibid, p. 30.
[27] Id, pp. 32-33.
[28] Id, pp. 47-48.
[29] Id, pp. 34-44.

In this Petition, petitioner raised the following issues/grounds for the resolution of this Court:

1. The 2nd Division erred in not ruling that respondent is deemed to have waived the defense of premature filing of the judicial claim with the CTA, pursuant to Rule 9, Section 1, of the Rules of Court; thus, the 2nd Division could entertain and exercise jurisdiction over the case and rightfully render a decision thereon based on the evidence formally offered and admitted.

2. The 2nd Division erred in denying the petition due to alleged premature filing. The fact is that the petition was filed with the CTA within the period set by prevailing Court rulings at the time it was filed;

3. The 2nd Division erred in retroactively applying the Aichi ruling in denying the petition in this instant case.

After a careful and thorough evaluation and consideration of the records and arguments as well as the jurisprudence on the matter, the CTA *En* Banc finds no merit in the instant Petition.

We observed that the arguments that petitioner relied upon for review in the instant petition have been thoroughly and sufficiently passed upon and resolved in the Assailed Resolution dated March 28, 2011 of the CTA Second Division, pertinent portion of which is hereby quoted as follows:

> "This Court cannot agree with petitioner. In the aforesaid *Aichi case*, the Supreme Court stated:
>
> > **'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.

xxx xxx xxx

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.
>
> xxx xxx xxx
>
> 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.'** (Emphases supplied)

Pursuant to section 112 of the NIRC of 1997, as amended, and the afore quoted ruling, a party adversely affected by the inaction of the Commissioner of Internal Revenue with respect to tax refund for excess or unutilized input VAT, may appeal his case with this Court within 30 days after the expiration of the 120-day period. On the other hand, judicial recourse on the part of the taxpayer without waiting for the lapse of the 120-day period would warrant the dismissal of the action for lack of jurisdiction.

In this case, petitioner filed its administrative claim for refund on June 16, 2010 and its judicial claim before this Court on June 24, 2010. The judicial claim was filed only upon the lapse of 8 days from the filing of the administrative claim. As such, the premature filing of this case warrants its dismissal for lack of jurisdiction.

With respect to petitioner's allegation that respondent had already waived her right to raise the defense of prematurity; courts are bound to take notice of the limits of their authority and they may, by their motion, even though the question is not raised by the pleadings or not even suggested by counsel, recognized the want of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings.

Furthermore, a cursory reading of the *Aichi case* would show that it merely made an outright application of Section 112(A) and (D) of the NIRC of 1997, as amended; hence, it should be applied immediately. A court's 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."

In sum, there is no cogent reason or justification to disturb the findings and conclusion spelled out in the Assailed March 28, 2011 and June 30, 2011 Resolutions of the CTA Second Division in CTA Case No. 8110, entitled *"Philex Mining Corporation vs. Commissioner of Internal Revenue."*

WHEREFORE, premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the March 28, 2011 and June 30, 2011 Resolutions of the CTA Second Division are hereby **AFFIRMED.**

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Separate Concurring Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Joins Justice Acosta's
Separate Concurring Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(Joins Justice Acosta's Separate Concurring Opinion)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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

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MINDARO-GRULLA, *and,*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

DEC 13 2012 3:30 pm

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SEPARATE CONCURRING OPINION

The present claim pertains to petitioner's alleged excess and unutilized input VAT incurred for the 2nd quarter of 2008. The pertinent dates are as follows:

Period Covered	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim	End of the 120-day period under Section 112 (D) [now Section 112(C)], NIRC	End of the 30-day period under Section 112 (D) [now Section 112(C)], NIRC
2nd Quarter, 2008	June 16, 2010	June 24, 2010	October 14, 2010	November 13, 2010

As correctly applied by the majority, an application for refund or tax credit over input taxes arising from zero-rated sales or effectively zero-rated sales is governed by Section 112(A) and (D) [now Section 112(C)] of the 1997 NIRC which provides:

> **SEC. 112.** ***Refunds or Tax Credits of Input Tax. -***
>
> **(A)** ***Zero-Rated or Effectively Zero-Rated Sales.*** - any VAT-registered person, whose sales are zero-rated or effectively zero-rated **may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales,** except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
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> xxx xxx xxx
>
> **(D)** ***Period within which Refund or Tax Credit of Input Taxes shall be Made.*** - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes **within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.**
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals. (Emphasis Ours)

The foregoing provisions require that a claim for refund over excess input VAT arising from zero-rated or effectively zero-rated sales must be administratively filed within two (2) years from the close of the taxable quarter when the sales were made. There is also an indispensable requirement for the taxpayer to await the action or inaction of the Commissioner within a period of one hundred twenty (120) days before it can appeal to this Court its claim for refund on excess or unutilized input VAT arising from zero-rated or effectively zero-rated sales. The application of Sections 112(A) and (D) [now Section 112(C)] of the 1997 NIRC has already been established in the cases of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[1] and *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[2]

Following the provisions of Sections 112(A) and (D) [now Section 112(C)] of the 1997 NIRC, it appears that the claim for refund or issuance of a tax credit certificate of input VAT was administratively filed within the two (2) year period, hence, compliant with Section 112(A) of the 1997 NIRC. The petitioner, however, failed to comply with the one hundred twenty (120) day period required to await the decision of the respondent as prescribed in Section 112(D) [now Section 112(C)] of the 1997 NIRC. Thus, petitioner prematurely filed the judicial claim of excess input VAT for the second quarter of taxable year 2008.

Nevertheless, I beg to differ from the view of the majority that the premature filing of a refund claim involving unutilized input VAT is jurisdictional. With all due respect, the premature filing of said claim is a violation of the doctrine of exhaustion of administrative remedies.

Ecn

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[1] G.R. No. 172129, September 12, 2008.
[2] G.R. No. 184823, October 6, 2010.

It is 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.[3] 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.[4]

It appears that respondent raised in its Motion to Dismiss the premature filing of the case in Court. Thus, respondent did not waive said defense.

In the case of ***Fidel Dabuco, et. al. vs. Court of Appeals***[5]***,*** the Supreme Court ruled:

> "As a preliminary matter, we wish to stress the distinction between the two grounds for dismissal of an action: failure to state a cause of action, on the one hand, and lack of cause of action, on the other hand. The former refers to the insufficiency of allegation in the pleading, the latter to the insufficiency of factual basis for the action. Failure to state a cause may be raised in a Motion to Dismiss under Rule 16**, while lack of cause may be raised any time.** Dismissal for failure to state a cause can be made at the earliest stages of an action. Dismissal for lack of cause is usually made after questions of fact have been resolved on the basis of stipulations, admissions or evidence presented." (Emphasis supplied)

Accordingly, the Court must dismiss petitioner's claim for refund or tax credit representing its excess input taxes for the 2nd quarter of taxable year 2008 for lack of cause of action.

ERNESTO D. ACOSTA
Presiding Justice

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[3] *Carale vs. Abarintos,* G.R. No. 120704, March 3, 1997.
[4] *Paat vs. Court of Appeals,* G.R. No. 111107, January 10, 1997.
[5] G.R. No. 133775, January 20, 2000.

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
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Mindaro-Grulla, and
Cotangco-Manalastas, JJ.

-versus-

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Promulgated:

DEC 13 2012 3:30pm

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DISSENTING OPINION

BAUTISTA, J.:

Before the Court *En Banc* is a "Petition for Review," filed by Philex Mining Corporation, appealing the denial of its claim for VAT refund for having been prematurely filed, as stated in the Resolutions dated March 28, 2011[1] and June 30, 2011[2] of the Second Division of this Court ("Court in Division").

Based on the records, petitioner filed its Quarterly VAT Return covering the 2nd Quarter of taxable year 2008 on July 24, 2008. On June 16, 2010, petitioner filed an administrative claim with the Bureau of Internal Revenue, and then filed the Petition for Review constituting its judicial claim on June 24, 2010.

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[1] *Records*, (CTA Case No. 8110), pp. 113-116.
[2] *Id.*, pp. 133-134.

The Court *En Banc* dismissed the Petition for Review[3] on July 18, 2011 for lack of merit, affirming the Resolutions dated March 28, 2011[4] and June 30, 2011.[5]

With all due respect to my esteemed colleagues, I must dissent on the Decision of the Court *En Banc*.

It is my opinion that the declaration of the two (2)-year prescriptive period under Section 112 of the 1997 NIRC must be in accordance with Section 229 of the same Code. The judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC is merely directory and permissive, and not mandatory nor jurisdictional, for so long as it is made within the settled two (2)-year prescriptive period.[6]

A taxpayer-claimant *may* file an appeal within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the CIR shall decide on the claim, or after the receipt of the decision denying the same, so long as it is within the two (2)-year prescriptive period.

Section 112 (C) of the 1997 NIRC states that:

> **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

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[3] *Rollo*, pp. 1-26.
[4] *Id.*, pp. 113-116.
[5] *Id.*, pp. 133-134.
[6] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.

> 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.

The cited provision will show that it contains the word "may," thus indicating that it is merely permissive and operates to confer discretion.[7] It gives the taxpayer-claimant an option to pursue the claim with this Court, provided that the claim is filed within the prescriptive period.

The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[8] to wit:

> **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-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:
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>> "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.

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[7] Bersabal v. Salvador, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, citing Dizon v. Encarnacion, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.
[8] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

> 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*)." (*Boldfacing supplied*)

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,[9] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period,[10] and beyond that period, the taxpayer can no longer appeal to this Court.[11]

Accordingly, I vote for the **GRANT** the Petition for Review filed by **Philex Mining Corporation** and the Resolutions dated March 28, 2011 and June 30, 2011 of the Second Division of this Court be **REVERSED** and **SET ASIDE.**

LOVELL R. BAUTISTA
Associate Justice

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[9] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[10] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[11] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.