REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

KEIHIN-EVERETT FORWARDING CO., INC.,
Respondent.

C.T.A. EB NO. 692
(C.T.A. Case Nos. 7351 & 7472)

Members:

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

Promulgated:

FEB 07 2012 ArApolinario 2:00 p.m.

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DECISION

Fabon-Victorino, J.:

On October 29, 2010 or within the extension granted, petitioner Commissioner of Internal Revenue (CIR) filed the instant Petition for Review,[1] challenging the Decision[2] dated April 21, 2010 and the Resolution[3] dated September 28, 2010, both rendered by the Special First Division of this Court in CTA Cases

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[1] *En Banc* docket, pp. 5-14.
[2] *Id.*, pp. 28-50.
[3] *Id.*, pp. 16-27.

Nos. 7351 & 7472, which partially granted respondent Keihin-Everett Forwarding Co., Inc.'s petition for issuance of tax credit certificate in the amount of P437,193.46, representing its unutilized input VAT for the third quarter of 2003 to the fourth quarter of 2004.

The decretal portion of the assailed Decision reads as follows:

> WHEREFORE, premises considered, the instant Petitions for Review are hereby PARTIALLY GRANTED. Accordingly, respondent Commissioner of Internal Revenue is hereby ORDERED TO ISSUE A TAX CREDIT CERTIFICATE in the amount of FOUR HUNDRED THIRTY-SEVEN THOUSAND ONE HUNDRED NINETY-THREE PESOS AND 46/100 (P437,193.46) in favor of petitioner Keihin-Everett Forwarding Co., Inc., representing its unutilized input VAT on purchases of capital goods and on domestic purchases of goods and services attributable to zero-rated sales covering the third quarter of 2003 to the fourth quarter of 2004.
>
> SO ORDERED.

The foregoing decision was effectively maintained when petitioner's Motion for Reconsideration was denied for lack of merit as indicated in the impugned Resolution of September 28, 2010.

<u>**The Facts**</u>

The facts, as culled from the record of the case are as follows:

Petitioner is the Commissioner of the Bureau of Internal Revenue empowered to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent, on the other hand, is a duly organized and existing domestic corporation, with principal office at Room 501 B.F. Condominium Bldg., A. Soriano Avenue cor. Solana Street, Intramuros, Manila. It is principally engaged in the freight forwarding business, which includes the following: Freight Forwarding, Cargo Consolidator, Non-Vessel Operating Common Carrier (NVOCC), General Transport Services, and Customs Brokerage. Petitioner is a registered VAT taxpayer with Tax Identification No. 002-035-881-000.

Respondent filed its Quarterly VAT Returns for the period covering the third quarter of taxable year 2003 up to the fourth quarter of taxable year 2004 on the following dates:

Period	Date Filed	Exhibit
3rd Quarter - 2003	27-Oct-03	Exhibit "D"
4th Quarter - 2003	27-Jan-04	Exhibit "E"
1st Quarter - 2004	26-Apr-04	Exhibit "H"
2nd Quarter - 2004	26-Jul-04	Exhibit "I"
3rd Quarter - 2004	25-Oct-04	Exhibit "K"
4th Quarter - 2004	25-Jan-05	Exhibit "L"

On December 21, 2004 and May 10, 2005, respondent filed with the BIR Revenue District Office (RDO) No. 33 an administrative claim for issuance of Tax Credit Certificate (TCC) for its alleged unutilized input VAT for the four quarters of taxable year 2003 in the amount of P3,105,321.58 and four quarters of taxable year 2004, in the amount of P3,765,684.34.

Alleging petitioner's inaction on its application for issuance of TCC, respondent sought judicial intervention via a Petition for Review filed on October 25, 2005, but covering only the claim for the 3rd and 4th quarters of 2003 in the amount of Php1,616,942.11.

On April 24, 2006, petitioner filed with the Court another Petition for Review on the same ground, this time covering its claim for the four (4) quarters of 2004 in the total amount of Php3,765,684.34.

Petitioner filed her Answers to the first and second Petitions for Review on December 13, 2005 and June 13, 2006, respectively.

The two Petitions for Review were subsequently consolidated then tried.

After respondent rested, petitioner manifested in open court on August 7, 2008, that she had no witness to present and was submitting the consolidated cases for decision based on the pleadings filed.

On April 21, 2010, the Court in Division partially granted the Petitions for Review directing petitioner to issue in favor of respondent a TCC but only in the amount of Php437,193.46, representing the latter's unutilized input VAT on purchases of capital goods and on domestic purchases of goods and services attributable to zero-rated sales for the covered period commencing from the third quarter of 2003 to the fourth quarter of 2004.

Not convinced, petitioner sought a reconsideration of the adverse decision in a motion filed on May 11, 2010, which the Court in Division denied for lack of merit in its Resolution dated September 28, 2010.

Hence, the Petition for Review[4] at bar filed on October 29, 2010, praying that the adverse Decision of April 21, 2010, be reversed and set aside and another be issued denying respondent's judicial claim for issuance of TCC.

On December 15, 2010, respondent filed its Comment on the petition in compliance with the Court's directive dated November 17, 2010,

After respondent filed its Memorandum on February 7, 2011, and petitioner, on February 10, 2011, as directed by the Court in its Resolution[5] dated January 4, 2011, the instant petition was deemed submitted for decision on February 23, 2011.

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[4] See Note 1.
[5] *En Banc* docket, pp. 88-89.

The Issues

The petition is anchored on the lone argument, to wit:

> THE HONORABLE COURT ERRED IN RENDERING THE DECISION PROMULGATED ON APRIL 21, 2010 ORDERING THE ISSUANCE OF A TAX CREDIT CERTIFICATE IN FAVOR OF HEREIN RESPONDENT IN THE AMOUNT OF FOUR HUNDRED THIRTY-SEVEN THOUSAND ONE HUNDRED NINETY-THREE AND 46/100 (PHP437,193.46) REPRESENTING ITS UNUTILIZED INPUT VAT ONPURCHASES OF CAPITAL GOODS AND ON DOMESTICE PURCHASES OF GOODS AND SERVICES TO ZERO-RATED SALES COVERING THE THIRD QUARTER OF 2003 TO THE FOURTH QUARTER OF 2004.

Petitioner's Arguments:

Petitioner posits that the Court in Division erred when it ruled that the two Petitions for Review were filed within the two-year prescriptive period reckoned from the date of filing of the corresponding quarterly VAT Returns for being contrary to the clear and unequivocal provision of Section 112(A) of the NIRC of 1997.

Further, respondent had only 30 days from the expiration of the 120-day period granted unto her, within which to appeal her alleged inaction on its applications for issuance of TCC filed on December 21, 2005 and May 10, 2005. Hence, the first as well as the second Petition for Review were filed beyond the 30-day period to appeal on October 25, 2005 and April 24, 2006 in violation of Section 112(D) [now subsection (c) of Section 112] of the NIRC of 1997.

Respondent's Arguments:

Contrary to petitioner's claim, respondent's administrative and judicial claims for refund of excess and unutilized input VAT for the 3rd quarter of 2003 to 4th quarter of 2004 were filed within the two-year prescriptive period provided under Sections 112(A) and 229 of the NIRC of 1997. Respondent takes the view that Section 112(A) of the NIRC of 1997, as amended, should be harmonized with Sections 204(C) and 229 of the same Code, in conformity with the Supreme Court's ruling in *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue ("Atlas case").*[6]

Further, the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon,*

[6] G.R. Nos. 141104 and 148763, June 8, 2007.

Inc.) (the "Mirant case")[7] decided by the Second Division of the Supreme Court, cannot validly overturn the Atlas case without violating Article VIII, Section 4(3) of the Constitution, which explicitly provides that "no doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court sitting *en banc*." Even assuming that the doctrine in the Mirant case has validly overturned the one laid down in the Atlas case, that in the Mirant case should be applied prospectively.

Likewise, respondent argues that the 30-day period from the lapse of the 120-day period provided under Section 112(D) of the NIRC of 1997 is neither mandatory nor compulsory, thus, may be dispensed with provided that the judicial claim for refund is filed within the two-year prescriptive period mandated under Section 229 of the same Code.

The Ruling of the Court En Banc

The Court *En Banc* rules in favor of petitioner.

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[7] G.R. No. 172129, September 12, 2008.

The primordial issue in any claim for refund or tax credit of creditable and unutilized input VAT attributable to zero-rated sales or effectively zero-rated sales is the timeliness of the filing of such claim, both in the administrative and judicial levels. The governing provision is Section 112 of the NIRC, as amended. The provision is explicit on the period within which an administrative as well as judicial claim for refund should be filed to merit consideration, thus:

> "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 sales and also in taxable or exempt sale of goods or 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
>
> (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 Subsections (A) and (B) hereof.
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> "In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals." (*Emphasis supplied*)
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> xxx xxx xxx

From the foregoing, it is clear that a VAT-registered person, such as respondent, has two **(2) years after the close of the taxable quarter when the pertinent sales were made,** within which to apply with the CIR a claim for refund or tax credit of creditable input tax that remains unutilized. The CIR, on the other hand, has **120 days from the date of submission of complete documents in support of the application for refund or tax credit of input tax** to grant or deny the same, pursuant to Section 112(C) of the NIRC, as amended. Upon notice of denial or expiration of the allowable period of 120 days without any action on the part of the CIR, the VAT-registered person has **30 days, within which to appeal the adverse decision or the inaction of the CIR with the Court of Tax Appeals.**

Thus, respondent's administrative claim for issuance of TCC for the third and fourth quarters of taxable year 2003, which ended on September 30, 2003 and December 31, 2003, respectively, was seasonably filed with petitioner on December 21, 2004, or within two years from the close of the taxable quarter when the pertinent sales were made. The same is true with the second application pertaining to the four (4) quarters of taxable year 2004, which was filed with petitioner on May 10, 2005.

Petitioner however, failed to act on respondent's administrative claim within the allowable period of 120 days which lapsed on April 21, 2005 for the first application, and on September 10, 2005 for the second.

This incident gave birth to respondent's right to challenge such inaction within the reglementary period of 30 days from the expiration of the period granted by law by filing a petition for review with the CTA under Rule 42 of the Rules of Court. But for unexplained reason, respondent filed its Petition for Review covering the third and the fourth quarters of taxable year 2003 only on October 25, 2005 and for the four (4) quarters of taxable year 2004 only on April 24, 2006. Plainly, the two Petitions for Review were filed out of time depriving the Court of the authority to entertain the same.

The 30-day period to appeal the adverse decision or inaction of petitioner is also explicitly mandated in Section 11 of Republic Act No. 9282,[8] which amended Republic Act No. 1125 (The Law Creating the Court of Tax Appeals), 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.

[8] 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 mended, otherwise known as the Law Creating the Court of Tax Appeals, and for other purposes.

> **"Appeal shall 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 xxx xxx

Note that an appeal is neither a natural nor constitutional right but a mere statutory privilege. Hence, parties who seek to avail of the privilege must comply with the statutes or rules allowing it.[9] The perfection of an appeal in the manner and within the period set by law is not only mandatory, but jurisdictional as well. And failure to perfect an appeal within the reglementary period deprived the court - otherwise competent - of jurisdiction to hear and determine it.

In the 1996 case of Videogram Regulatory Board v. Court of Appeals[10], the Supreme Court, no less, chronicled the inviolability of the period of perfecting an appeal, in this fashion:

> x x x There are certain procedural rules that must remain inviolable, like those setting the periods for perfecting an appeal or filing a petition for review, for it is doctrinally entrenched that the right to appeal is a statutory right and one who

[9] Air France Philippines v. Leachon, 472 SCRA 439, 442-443 [2005].
[10] G.R. No. 106564, November 28, 1996.

> seeks to avail of that right must comply with the statute or rules. **The rules, particularly the requirements for perfecting an appeal within the reglementary period specified in the law, must be strictly followed as they are considered indispensable interdictions against needless delays and for orderly discharge of judicial business. Furthermore, the perfection of an appeal in the manner and within the period permitted by law is not only mandatory but also jurisdictional** and the failure to perfect the appeal renders the judgment of the court final and executory. Just as a losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to enjoy the finality of the resolution of his/her case. These periods are carefully guarded and lawyers are well-advised to keep track of their applications. After all, a denial of a petition for being time-barred is a decision on the merits.

Indeed, the timeliness of an appeal is a jurisdictional caveat that not even the Supreme Court can trifle with.[11] Precisely this Court, in a number of cases, echoed the ruling in *Aichi Case* that a taxpayer claimant must prove not only his entitlement to a refund, but also his compliance with the procedural due process as non-observance of the prescriptive periods, within which to file the administrative and judicial claims will result in the denial of the relief sought.

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[11] BA vs. Gerochi, Jr. 230 SCRA 9 [1994].

As early as the case of *Intel Technology Philippines, Inc. v. Commissioner of Internal Revenue,*[12] promulgated on April 27, 2007, the Supreme Court already enumerated the requisites for filing an application for refund or issuance of tax credit certificate for unutilized input VAT attributable to zero-rated or effectively zero-rated transactions. One of such requisites is the period within which the claim must be filed, thus:

> "Under Section 106 (A)(2)(a)(1) in relation to 112 (A) of the Tax Code, a taxpayer engaged in zero-rated or effectively zero-rated transactions may apply for a refund or issuance of a tax credit certificate for input taxes paid attributable to such sales upon complying with the following requisites: (1) the taxpayer is engaged in sales which are zero-rated (like export sales) or effectively zero-rated; (2) the taxpayer is VAT-registered; (3) **the claim must be filed within two years after the close of the taxable quarter when such sale were made;** (4) the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax; and (5) in case of zero-rated sales under Section 106(A)(2)(a)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with BSP rules and regulations." (*Emphases ours*)

This ruling was affirmed in the Mirant case where the Final Arbiter literally applied the letter of the law and reckoned the

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[12] G.R. No. 166732.

two-year prescriptive period from the close of the taxable quarter when the relevant sales were made. The same doctrine was fortified in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (Aichi case),*[13] where the Supreme Court laid to rest the issue on the reckoning period for filing a claim for refund of input VAT explaining the underlying legal principle in this wise:

> 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

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[13] G.R. No. 184823, October 6, 2010.

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.

Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable

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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> xxx xxx xxx
>
> (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.

xxx xxx xxx

Sec. 229. Recovery of Tax Erroneously or Illegally Collected. — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

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

MPC's creditable input VAT not erroneously paid

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

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

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

The Aichi case likewise squarely dealt with the interpretation of Section 112(A) of the NIRC of 1997, as amended, with regard the time and manner of filing of the administrative claim for refund or credit with petitioner, thus:

> "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 xxx apply for the issuance of a tax credit certificate or refund" refers to application 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.**
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> 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. (*Emphases ours*)

We ruled then, as we rule now, that for refund of input tax, Section 112 of the 1997 NIRC, as amended, is the applicable law and not Section 229 of the same Code. The Atlas case which harmonized Sections 112 and 229 is no longer controlling and applicable due to the amendments made by the legislature intentionally providing the manner and period in claiming refunds which is entirely different and distinct from recovery of tax erroneously or illegally collected.

Contrary to respondent's protestation, the Mirant case did not overturn the Atlas case. The latter is an interpretation by the Supreme Court of the provisions of the 1977 Tax Code, while the former and the subsequent Aichi case are interpretations of the provisions of the NIRC of 1997, as amended. Note that the applicable law insofar as the instant case is concerned is Section 112 of 1997 NIRC which took effect on January 1, 1998.[14] Mirant and Aichi cases being the interpretation of prevailing and

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[14] Commissioner of Internal Revenue vs. Michel J. Lhuiller Pawnshop, Inc., G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of GSIS vs. Court of Appeals, 334 Phils. 163, 175, 266 SCRA 187 (1997).

applicable law, i.e., R.A. 7716 and R.A. 8424, must be read in conjunction with the prospective principle of statutes.[15]

It bears stressing that the interpretation of the law by the Highest Tribunal is part of the law as of the date of its original passage since the Court's interpretation merely establishes contemporary legislative intent that the construed law purports to carry into effect.[16] Moreover, by tradition in our system of judicial administration, the Supreme Court, as the Final Arbiter of any justiciable controversy,[17] has the last word on what the law is. Its decision becomes a judicial precedent to be followed in subsequent cases brought before the court for determination. There is only one Supreme Court from whose decisions all other courts should take bearings.[18]

WHEREFORE, the Petition for Review filed by petitioner, the Commissioner of Internal Revenue, is hereby **GRANTED**. The assailed Decision dated April 21, 2010 and the Resolution dated September 28, 2010 are hereby **REVERSED** and **SET ASIDE**. Accordingly, the Petition for Review for issuance of Tax

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[15] Visayas Geothermal Power Corporation v. CIR, CTA EB No. 520 and 521, May 9, 2011.
[16] Philippine Constitution Association vs. Enriquez, G.R. No. 113105, August 19, 1994.
[17] Dante Nacuray et, al. v. NLRC, 270 SCRA 59.
[18] Commissioner of Internal Revenue vs. Michael J. Lhuiller Pawnshop, Inc., G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of GSIS vs. Court of Appeals, 334 Phils. 163, 175.

Credit Certificate filed by Keihin-Everett Forwarding Co., Inc. is **DENIED,** on jurisdictional ground.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

w/Dissenting Opinion
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 692** (CTA Case Nos. 7351 & 7472)
-versus-	Present: ***Acosta, P.J. Castañeda, Jr., Bautista, Uy, Casanova, Palanca-Enriquez, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, JJ.***
KEIHIN-EVERETT FORWARDING CO., INC., Respondent.	Promulgated: FEB 07 2012 Apolinario 2:07 p.m.

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DISSENTING OPINION

BAUTISTA, J.:

With all due respect to my esteemed colleagues, I must dissent on the decision made by the Court.

The Court *En Banc*, in reversing the Decision dated April 21, 2010 and the Resolution dated September 28, 2010, denied the Petition for Review filed by Keihin-Everett Forwarding Co., Inc. In its denial, the Court *En Banc* stated that the judicial claim for the issuance of the Tax Credit Certificate was filed after the lapse of the one hundred twenty (120)-day period, in violation of Section 112(C) of the 1997 NIRC.

I maintain however, that the judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC, wherein 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 Commissioner of Internal Revenue shall decide on the claim, or after the receipt of the decision denying the same, is directory and permissive, and not mandatory nor jurisdictional, as long as it is made within the two (2)-year prescriptive period prescribed under Sections 112 and 229 of the same Code.[1]

A perusal of Section 112(C) will show that it contains the word "may", thus, denoting that it is merely permissive and operates to confer discretion.[2] Hence, a taxpayer has an option to pursue the claim with the Court, provided that the judicial claim is filed pursuant to the settled 2-year prescriptive period. The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[3] 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"

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[1] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.
[2] 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.*
[3] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

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*)." (*Boldfacing supplied*)

From the foregoing, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even the 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] Beyond the prescribed period, the taxpayer can no longer appeal to this Court.[6]

Further, it has been my stand that claims for refund or tax credit of value-added tax ("VAT") on zero-rated sales transactions filed prior to the promulgation of the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)* ("*Mirant case*"),[7] on September 12, 2008 should follow the doctrine set in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* ("*Atlas case*");[8] while taking into consideration that judicial decisions form part of the law of the land, the Court should also respect the principle behind Article 4 of the New Civil Code which states that "laws shall have no retroactive effect unless the

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[4] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[5] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[6] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.
[7] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[8] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.

contrary is provided;" the same provision expressed in the familiar legal maxim *lex prospicit, non respicit*, the law looks forward not backward.[9]

In the case of *Columbia Pictures, Inc., et al. v. Court of Appeals, et al.*,[10] the Supreme Court made the following disquisition:

> The reasoning behind *Senarillos vs. Hermosisima* that judicial interpretation of a statute constitutes 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, is all too familiar. Such judicial doctrine does not amount to the passage of a new law but consists merely of a construction or interpretation of a pre-existing one, and that is precisely the situation obtaining in this case.
>
> It is consequently clear that a judicial interpretation becomes a part of the law as of the date that law was originally passed, **subject only to the qualification that when a doctrine of this Court is overruled and a different view is adopted, and more so when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith. To hold otherwise would be to deprive the law of its quality of fairness and justice then, if there is no recognition of what had transpired prior to such adjudication.** *(Boldfacing supplied)*

This principle was also applied in the case of *Rolando Santos v. Sandiganbayan and the People of the Philippines*[11] citing *Co vs. Court of Appeals*[12] wherein the Supreme Court ruled that:

> In accordance with Article 8 of the Civil Code providing that "(j)udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines," and Article 4 of the same Code stating that "(l)aws shall have no retroactive effect, unless

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[9] Spouses Gauvain and Bernardita Benzonan v. Court of Appeals, G.R. No. 97973, January 27, 1992, 205 SCRA 515, *citing Francisco v. Certeza, No. L-16849, November 29, 1961, 3 SCRA 565.*
[10] G.R. No. 110318, August 28, 1996, 261 SCRA 144.
[11] G.R. Nos. 71523-25, December 8, 2000, 347 SCRA 386, 420.
[12] G.R. No. 100776, October 28, 1993, 277 SCRA 444, 448-449 [1993].

> the contrary is provided," the principle of prospectivity of statutes, original or amendatory, shall apply to judicial decisions, which, although in themselves are not laws, are nevertheless evidences of what the law means.

In *Chicot County Drainage District v. Baxter States Bank*,[13] the High Court also discussed why the "principle of absolute retroactive invalidity"[14] has been negated, to wit:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those who have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[15]

Applying the doctrines laid down in the aforecited cases, the prescriptive period applicable herein would be the then well-established doctrine adopted by this Court in *Atlas case*, wherein the 2-year prescriptive period is reckoned not from the close of the pertinent quarter but from the date of filing of the VAT return, considering that the respondent filed its filed its claim before the advent of the *Mirant case*.

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[13] 308 US 371, 374 [1940].
[14] Felicisimo Rieta v. People, G.R. No. 147817, August 12, 2004, 436 SCRA 273.
[15] Albino S. Co v. Court of Appeals, *et al.*, G.R. No. 100776, October 28, 1993, 277 SCRA 444, *citing Chicot County Drainage District v. Baxter States Bank, supra note 13.*

In the case of *JIDECO Manufacturing Philippines, Inc. v. CIR,*[16] the Court *En Banc* affirmed the matter as follows:

> As we have already elucidated in our Resolution dated July 20, 1998 in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5296,* the two-year prescriptive period for the filing of claims for VAT refund should be reckoned from the date of filing of the corresponding quarterly VAT returns in order to harmonize the provisions of Section 112(B) of the NIRC of 1997 with Sections 114(A) and 229 of the same Code.
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> xxx xxx xxx
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> In the cases of *Commissioner of Internal Revenue vs. TMX Sales, Inc. and the Court of Appeals, G.R. No. 83736, dated January 15, 1992 and ACCRA Investments Corporation vs. Commissioner of Internal Revenue, 204 SCRA 957,* the Supreme Court held that the two (2)-year period should be counted from the filing of the final income tax return, because it is only during that date that the exact tax liability or refundability of the tax can be determined. In the same manner, it is only after the filing of the quarterly VAT return that we can determine the VAT liability or refundability of VAT. It should be noted that the basic requirement is that VAT refund can only be granted to the extent that the input taxes have not been applied against output tax. All these matters can only be determined if a return is filed. It is logical therefore, that the two-year period should not immediately be counted from the close of the quarter but from the prescribed date of filing of the VAT return.[17]

Thus, in the case of *Team Energy Corporation (Formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.) v. Commissioner of Internal Revenue,*[18] the First Division of this Court made the following pronouncement:

> Although there is a recent case entitled *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly SOUTHERN ENERGY QUEZON, INC.),* wherein the Supreme Court held that the

[16] CTA Case No. 6552, September 16, 2004.
[17] CTA EB No. 53, June 7, 2005.
[18] CTA Case Nos. 7229 and 7298, October 5, 2009.

reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund starts from the close of the taxable quarter when the relevant sales were made, this Court finds it proper to apply said ruling to cases filed after the promulgation date of the *Mirant Case.* **To apply said ruling in the present case will in effect be giving the new doctrine retroactive application thereby impairing vested rights.** *(Boldfacing supplied)*

Based on the records, the respondent made the following filings:

Period	Filing of Quarterly VAT Return	Administrative Claim	Judicial Claim
3rd Quarter – 2003	October 27, 2003	December 1, 2004	October 25, 2005
4th Quarter – 2003	January 27, 2004		
1st Quarter – 2004	April 26, 2004	May 10, 2005	April 24, 2006
2nd Quarter – 2004	July 26, 2004		
3rd Quarter – 2004	October 25, 2004		
4th Quarter – 2004	January 25, 2005		

It is therefore clear, that the respondent was able to file both its administrative and judicial claim within the periods prescribed under the law.

Accordingly, I vote that the Petition for Review be **DENIED**. Therefore, the Decision dated April 21, 2010 and the Resolution dated September 28, 2010 be affirmed. Respondent Keihin-Everett Forwarding Co., Inc. is entitled to a Tax Credit Certificate amounting to Four Hundred Thirty-Seven Thousand One Hundred Ninety-Three Pesos and 46/100 (P437,193.46).

LOVELL R. BAUTISTA
Associate Justice