REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EB No. 537 (C.T.A. CASE NO. 7469)
- versus -	Members: ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
MIRANT (NAVOTAS II) CORPORATION (formerly: Southern Energy Navotas II Power, Inc.), Respondent.	Promulgated: SEP 01 2010 [illegible] 1:30 p.m.

x- x

DECISION

FABON-VICTORINO, J.:

For decision is the Petition for Review filed by petitioner Commissioner of Internal Revenue (CIR), assailing the **Decision dated March 24, 2009** as well as the **Resolution dated August 25, 2009**, rendered by the Second Division of the Court in C.T.A. Case No. 7469, in favor of respondent Mirant (Navotas II) (formerly Southern Energy Navotas II Power, Inc.) the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, with the foregoing disquisitions, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby ORDERED to REFUND or to ISSUE TAX CREDIT CERTIFICATE in favor of petitioner in the reduced amount of P1,810,295.07, representing unutilized excess input VAT attributable to its zero-rated sales to NPC for the four quarters of taxable year 2004.
>
> **SO ORDERED**."

> "**WHEREFORE**, premises considered, respondent's *Motion for Reconsideration* is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

While petitioner assails the conclusion and the directive issued by the Court in Division, he appears to be in agreement with its finding of facts which he adopts *verbatim* in his petition as follows:

> Petitioner (herein respondent) Mirant (Navotas II) Corporation is a corporation duly organized and existing by virtue of Philippine laws, with principal office located at 5F, CTC Building, 2232 Roxas Boulevard, Pasay City. It is engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate and Transfer (BOT) Scheme. Petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT Taxpayer with Taxpayer Identification Number (TIN) 001-726-862. It also has a duly approved application for VAT Zero-Rate dated December 19, 2003 for its supply of electricity to NPC.
>
> Respondent (herein petitioner) is the duly appointed Commissioner of the BIR, with the authority to act as such, including the power to decide, approve, and grant claims for refunds or to issue tax credit certificates of overpaid internal revenue taxes as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner was originally registered with the Securities and Exchange Commission (SEC) under the name Hopewell Tileman (Philippines) Corporation. On March 3, 1999, petitioner's name was officially changed to Southern Energy Navotas II Power, Inc. On April 26, the SEC approved the application of petitioner to further change its corporate name to Mirant (Navotas II) Corporation.

Petitioner filed its Quarterly VAT Returns for taxable year 2004 on the following dates:

Period	Date Filed	Exhibit
1st Quarter		
Original VAT Return	April 26, 2004	"A"
Amended AT Return	July 26, 2004	"B"
2nd Quarter	July 26, 2004	"C"
3rd Quarter	October 25, 2004	"D"
4th Quarter		
Original VAT Return	January 24, 2005	"E"
Amended VAT Return	January 25, 2005	"F"
Second Amended VAT Return	April 25, 2005	"G"

On December 21, 2005, petitioner filed an administrative claim with BIR Revenue District Office No. 51 - Pasay City for the refund or issuance of tax credit certificate in the total amount of P2,306,862.22, representing its unutilized input VAT for the four quarters of taxable year 2004.

Due to respondent's inaction and in order to suspend the running of the two-year prescriptive period under the National Internal Revenue Code (NIRC) and Revenue Regulations No. 7-95, petitioner filed the present Petition for Review on April 24, 2006.

On June 1, 2006, respondent filed his Answer interposing the following Special and Affirmative Defenses:

4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;

5. Petitioner must prove that it paid for the input VAT so alleged;

6. Petitioner must prove that the same input VAT was not utilized against any output VAT liability;

7. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112(A) of the Tax Code of 1997;

8. Petitioner must prove that the claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;

9. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;

10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation.

After the parties submitted their Joint Stipulation of Facts and Issues, trial was conducted during which only respondent adduced evidence. On the other hand, petitioner opted not to present any and just submitted the case for decision based on the pleadings filed with the Court in Division.

On March 24, 2009, the assailed Decision was promulgated which was sealed when petitioner's Motion for Reconsideration was denied in the likewise assailed Resolution of August 25, 2009.

Aggrieved, petitioner CIR is now before the Court En Banc claiming that the Court in Division erred in partially granting respondent's claim for refund in the amount of P1,810,295.07, representing unutilized excess input VAT attributable to its zero-rated sales to NPC for the four quarters of taxable year 2004 as it was not filed in accordance with the procedure prescribed by law.

Petitioner posits that respondent's administrative claim for refund was not properly documented. There is no indication that respondent ever submitted complete documents to substantiate its administrative claim for refund as required under Section 112(C) of the NIRC. The failure of respondent to discharge this bounden duty justified denial of the claim for refund through his inaction in the administrative proceeding. Allegedly before judicial inquiry could be had, the claimant taxpayer must first prove that it complied with all the administrative requirements lest court intervention could not be availed of. Since respondent failed to comply with the procedural pre-requisite to judicial claim, this Court should deny respondent's claim for refund as well.

In rejecting petitioner's claim, respondent invokes the Rules of Court which is suppletory to the Rules of the Court of Tax Appeals. Section 1, Rule 9 particularly states that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. And since petitioner utterly failed to raise in his Answer the alleged inability of respondent to submit complete documents in the administrative inquiry, the same is deemed waived and could not be raised for the first time on appeal.

Contrary to petitioner's claim, respondent filed all the required documents to substantiate its administrative claim for refund in accord with Section 112 (D) of the NIRC and Revenue Regulation No. 3-88, which enumerates the documents that should be submitted by an applicant such as respondent. The Court in Division in its Resolution of August 25, 2009 recognized this compliance on the part of respondent. Moreover, petitioner did not require respondent at any point during the administrative proceeding to file or submit additional documents for purposes of examination and verification. Petitioner also opted not to present any evidence during the trial on the merits to establish respondent's alleged non-compliance with the rules. Since the proceedings before the Court in Division was a trial *de novo,* it was incumbent upon petitioner to adduce evidence to prove this defense. But petitioner failed. In any event, respondent's alleged inability to submit complete documents to petitioner does not affect the jurisdiction and power of the Court to allow refund, provided the evidence presented before it warrant the grant of such claim.

Nothing perhaps demonstrates more clearly the follies of petitioner's lone assignment of error than his Answer dated June 1, 2006, particularly his Special and Affirmative Defenses, outlined as follows:

> 4. Petitioner's (respondent herein) alleged claim for refund is subject to administrative investigation by the Bureau;
>
> 5. Petitioner (respondent herein) must prove that it paid for the input VAT so alleged;
>
> 6. Petitioner (respondent herein) must prove that the same input VAT was not utilized against any output VAT liability;
>
> 7. Petitioner (respondent herein) must prove that its sales are VAT zero-rated as contemplated under Section 112(A) of the Tax Code of 1997;
>
> 8. Petitioner (respondent herein) must prove that the claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;
>
> 9. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;
>
> 10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation.

Undeniably, none of the foregoing, even if stretched to the limit, indicates that petitioner objected to the judicial claim for refund on the ground that respondent failed to submit complete documents in the administrative proceeding depriving him of the opportunity to act accordingly. In view thereof, the said objection is deemed waived pursuant to the mandate of Section 1, Rule 9 of the Rules of Court which reads as follows:

> "Sec. 1. *Defenses and objections not pleaded.* – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim." (underscoring ours)

In addition, a judicial claim for refund or tax credit in this Court is by no means an original action but rather an *appeal* by way of petition for review of a previous, unsuccessful administrative claim.[1] As the object of the pleadings is to draw the lines of battle, so to speak, between the litigants and to indicate fairly the nature of the claims or defenses of both parties, a party cannot subsequently take a position contrary to, or inconsistent, with his pleadings. It is a matter of law that when a party adopts a particular theory and the case is tried and decided upon that theory in the court below, he will not be permitted to change his theory on appeal. The case will be reviewed and decided on that theory and not approached and resolved from a different point of view. To permit a party to change his theory on appeal will be unfair to the adverse party.[2]

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[1] Atlas Consolidated Mining vs. CIR, G.R. No. 145526, March 16, 2007
[2] Cocomangas Hotel Beach Resort vs. Visca, G.R. No. 167045, August 29, 2008

Also critical is the fact that during the trial, petitioner kept mum on the alleged lapses on the part of respondent in the administrative level and submitted the case for decision without him presenting any evidence in support of his defense or espoused theory, which is not uncommon. Worse, he prayed that the controversy be decided based on the pleadings filed where respondent's alleged non-compliance with the administrative prerequisites was never invoked. Certainly, petitioner cannot validly raise this issue for the first time on appeal as it would be offensive to the basic rules of fair play of justice and due process on the part of respondent.

Corollarily, the parties, in their Joint Stipulation of Facts and Issues dated July 28, 2006, agreed to limit the determination of their conflict to the following issues:

> 1. Whether or not the power generation services rendered by petitioner to NPC are subject to zero-percent (0%) pursuant to Section 108(B)(3) of the Tax Code.
>
> 2. Whether or not petitioner has unapplied and unutilized input VAT for the four quarters of calendar year 2004 in the total amount of P2,306,862.22 arising from its domestic purchases of taxable goods and services and importation of goods.
>
> 3. Whether or not petitioner's unapplied and unutilized input VAT for the four quarters of 2004 are attributable to its zero-rated sale of power generation services to NPC.
>
> 4. Whether or not petitioner's administrative claim for refund was seasonably filed.

> 5. Whether or not petitioner's unapplied and unutilized input VAT for the four quarters of 2004 are properly substantiated by invoices and official receipts and other relevant documents.
>
> 6. Whether or not petitioner's unapplied and unutilized input VAT for the four quarters of 2004 were carried over to and utilized in the succeeding taxable quarters or applied against any of the output VAT liability of petitioner.
>
> 7. Whether or not petitioner is entitled to a refund or issuance of TCC for its unapplied and unutilized input VAT for the four quarter (sic) of 2004 in the total amount of P2,306,862.22.

Obviously, the alleged failure of respondent to file complete documents in the administrative claim for refund was never part of the stipulated issues, let alone included in petitioner's battle list, otherwise it would have been invoked at the first instance. The stipulation made during the pre-trial before the Court in Division is binding upon the parties. It has been ruled that "the determination of issues during the pre-trial conference bars the consideration of other questions, whether during trial or on appeal."[3] The rationale for this principle is simple - "parties are not allowed to flip-flop. Courts have neither the time nor the resources to accommodate parties who choose to go to trial haphazardly. Moreover, it would be grossly unfair to allow petitioner the luxury of changing his mind to the detriment of respondent at this late stage." [4]

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[3] Villanueva vs. Court of Appeals, G.R. No. 143286. April 14, 2004
[4] Id.

Significantly, the Court in Division which heard the case and evaluated the evidence presented found respondent to have complied with all the administrative requirements before resorting to judicial review. As ruled in a myriad of cases, the trial court is best equipped to make the assessment on the issues raised by the parties during the trial and therefore, its factual finding are generally not disturbed on appeal unless the court *a quo* is perceived to have overlooked, misunderstood or misinterpreted certain facts or circumstances of weight, which, if properly considered, would affect the result of the case and warrant a reversal of the decision involved[5], which is not obtaining in the case at bar.

In any event, the merit of respondent's claim for refund for the second to the fourth quarters of taxable year 2004 and its entitlement thereto were sufficiently substantiated, as found by the Court in Division in the assailed Decision of March 24, 2009, to wit:

> "This Court and the High Tribunal had already declared in several occasions that sale of electricity of a VAT-registered entity to NPC is a zero-rated transaction, pursuant to Section 108(B)(3) of the NIRC of 1997, in relation to Section 13 of Republic Act No. 6395,[6] as amended.
>
> x x x x x x x x x

[5] Diamante vs. People, G.R. No. 180992, September 4, 2009
[6] An Act Revising the Charter of the National Power Corporation

Moreover, Section 108(B)(3) of the NIRC of 1997, as amended, provides:

> SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties.
>
> x x x x x x x x x
>
> (B) Transaction Subject to Zero Percent (0%) Rate. – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> x x x x x x x x x
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate.

Records confirm that petitioner is engaged in the business of power generation and subsequently sells the same to NPC under a Build, Operate and Tansfer Scheme,[7] and has a duly approved Application for VAT Zero-Rate.[8] Therefore, petitioner's sales to NPC are zero-rated sales.

In its Quarterly VAT Returns for taxable year 2004, petitioner declared zero-rated sales in the total amount of P293,191,510.36, as follows:

Exhibit	2004 Period	Zero-Rated Sales	
"B"	1st Quarter	P	79,832,138.47
"C"	2dn Quarter		79,487,130.50
"D"	3rd Quarter		53,357,214.39
"G"	4th Quarter		80,515,027.00
	TOTAL	P	293,191,510.36

In order to prove its zero-rated sales, petitioner submitted official receipts and invoices,[9] and the Report of the Independent CPA, which had the following *Findings and Observations:*[10]

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[7] Joint Stipulation of Facts and Issues dated July 28, 2006
[8] Annex "D" of Petition to the Second Division
[9] Exhibits "V-1" to "V-22"
[10] Page 3, Independent CPA's Final Report; Exhibits "S-3" and "S-4"

1. The zero-rated sales reported in the 'Schedule of Zero-Rates sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter consisted of sales of electricity to the National Power Corporation (NPC).

2. The total quarterly zero-rated gross receipts for the calendar year 2004 in the 'Schedule of Zero-Rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4tgh quarter amounting to P293,191,510.36 is equal to the total zero-rated gross receipts declared in the Company's first, second, third and fourth quarter VAT returns, electronically filed via EFPS with filing reference numbers 100400000178932, 100400000178937, 100400000273655 and 10050000014417, respectively. (*Annex 1*)

3. The amounts in the 'Schedule of Zero-rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter with a total of 293,191,510.36 is lower by P614,724.10 when compared to the amounts recorded as collections in the books of the Company. We noted that the difference was caused by the different exchange rates used by the Company in its books and in the 'Schedule of Zero-Rated Sales' for the first two zero rated transactions of the 1st quarter. However, we would like to note that the said differences do not affect the Company's claim for refund/tax credit as these pertain to gross receipts subject to 0% VAT. (*Annex 2*)

4. These zero-rated sales were supported by original duplicate copies of VAT invoices and VAT Ors issued by the Company stamped 'zero-rated' and with the BIR's authority to print.

5. We noted differences between the gross receipts per 'Schedule of Zero-Rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter and the amounts per VAT Ors. We noted that the differences represent the 2% Expanded Withholding Tax (EWT) withheld by NPC and the cable cost charged by NPC as presented under the 'Reconciliation of Zero-Rated Gross Receipts per Schedule of Zero-Rated Sales/Schedule of Taxable and Zero-Rated Sales and Zero-Rated Gross Receipts per VAT Ors. (*Annex 3*)

6. We noted the differences between the gross receipts per 'Schedule of Zero-Rated Sales' for the 1st quarter, "Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter and the amounts per VAT Invoices. We noted that the differences represent the uncollected portion of the invoice amounts and recorded as credits to the 'Accounts Receivable Trade-Short Term' account in the General Ledger Journal as presented under the 'Reconciliation of Zero-Rated Gross Receipts per Schedule of Zero-Rated Sales/Schedule of Taxable and Zero-Rated Sales and Zero-Rated Gross Receipts per VAT Invoices.' (*Annex 4*)

This Court finds the Independent CPA's Report in order. However, as previously disallowed on the ground of prescription, the zero-rated sales for the first quarter in the amount of P79,832,138.47 shall be excluded.

Accordingly, only the zero-rated sales for the second to the fourth quarters of taxable year 2004, in the amount of P213,359,371.89, shall be considered as fully substantiated.

The Independent CPA also made the following findings:[11]

Findings	Reference	Total Amount for 2004
I. Input taxes in purchases of goods supported by VAT invoices and purchases of services supported by VAT Ors	Annex 8	P 971,832.62
II. Input taxes on purchases of goods:		
1. Supporting documents not yet available	Annex 9	72.50
III. Input taxes on purchases of services:		
1. Supporting documents not yet available	Annex 10-1	1,300,259.63
2. Supported by VAT OR issued not in the name of the Company	Annex 10-2	4,163.01
3. Claimed twice	Annex 10-3	490.92
4. Supported by documents other than VAT Ors	Annex 10-4	7,032.86
5. Erroneously computed input taxes—disallowed portion	Annex 10-5	23,010.68
TOTAL		**P 2,306,862.22**

Petitioner submitted additional documents to support *Annex 10-1* of the Independent CPA Report, to wit:

Exhibit	Vendor	OR Date	Input VAT
"DD-3"	Alexander Forbes Phils. Risk Services, Inc.	12/1/2004	P 494,819.86
"DD-4"	Alexander Forbes Phils. Risk Services, Inc.	5/24/2004	674,874.76
	TOTAL		P 1,169,694.62

Thus, *Items II and III* of the Independent CPA's findings, except for P1,169,694.62 of *Item III. Number 1 (Annex 10-1),* will be disallowed for the reason stated.

In addition, petitioner showed an output VAT in its Quarterly VAT Returns, detailed as follows:

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[11] Exhibit "S-8"

Exhibit	Period	Taxable Sales		Output VAT	
"A"	1st	P	148,740.90	P	14,874.09
"C"	2nd		-		-
"D"	3rd		132,409.10		13,240.91
"E"	4th		715,454.50		71,545.45
	TOTAL	P	996,604,.50	P	99,660.45

In sum, petitioner's valid creditable input tax attributable to its substantiated zero-rated sales is P1,810,295.07, computed as follows:

Claimed input VAT		P	2,306,862.22
Less:			
Output VAT			(99,660.45)
Disallowances			
Barred by prescription			(249,660.45)
Per ICPA:			
1.) Supporting documents not available			
Purchase of services	P1,300,259.63		
Less: Additional documents submitted	(1,169,694.62)		
Disallowances in the first quarter-included above as barred by prescription	(6,892.86)		
Net disallowance	P 123,672.15		
Purchase of goods	72.50		
2.) Claimed twice	490.92		
3.) Erroneously computed input taxes	23,010.68		(147,246.25)
Valid input VAT		P	1,810,295.07

The Court also determined that in the third amended Quarterly VAT Return[12] for the fourth quarter of taxable year 2005, petitioner deducted the amount of P3,778,673.12, of which the valid input VAT of P1,810,295.07 forms part, as "Any VAT Refund/TCC Claimed" from the available input tax of P4,436,975.51 at the end of the third quarter of taxable year 2005. Thus, petitioner could not have possibly utilized the input VAT of P1,810,295.07 in the succeeding quarters."

In fine, petitioner failed to show that the Court in Division erred in rendering the assailed Decision of March 24, 2009 and the Resolution of August 25, 2009.

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[12] Exhibit "N"

WHEREFORE, the Petition for Review filed by petitioner Commissioner of Internal Revenue dated September 28, 2009, is hereby DENIED, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Concurring and Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(concurs with the CDO of Justice Bautista)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

MIRANT (NAVOTAS II) CORPORATION (formerly Southern Energy Navotas II Power, Inc.),
Respondent.

CTA EB NO. 537
(CTA Case No. 7469)

Present:

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

Promulgated:
SEP 0 1 2010 Apolinario 1:30 p.m.

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CONCURRING AND DISSENTING OPINION

BAUTISTA, J.

While I concur with the Court *En Banc* that the case at bench must be denied for the only assignment of error raised by petitioner Commissioner of Internal Revenue in his Petition for Review had been considered waived pursuant to Section 1 of Rule 9 of the Revised Rules of Court, and that the Second Division of this Court

("Court in Division") had already established that respondent Mirant (Navotas II) Corporation complied with all the administrative requirements before resorting to judicial review; I must dissent, however, to the disallowance of respondent's claim for the first quarter of the year 2004 due to prescription for I stand by my adherence to the prospectivity principle of judicial decisions as emphasized in the cases of *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue,*[1] and *Team Energy Corporation (Formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.) v. Commissioner of Internal Revenue.*[2]

In the case at bench, the Court in Division in its Decision dated March 24, 2009, denied respondent's claim for the first quarter of the year 2004 in the amount of P249,660.45 for being filed beyond the two (2)-year prescriptive period following the ruling of the Supreme Court in the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.) ("Mirant case"),*[3] wherein the reckoning of the 2-year period within which to make a claim for refund or tax credit granted under Section 112(A) of the 1997 National Internal Revenue Code is from the close of the taxable quarter when the sales were made.[4]

In the landmark case of *Albino S. Co v. Court of Appeals et al.,*[5] the Supreme Court made the following disquisitions, to wit:

> The principle of prospectivity of statutes, original or amendatory, has been applied in many cases. These include: *Buyco v. PNB, 961 2 SCRA 682 (June 30, 1961),* holding that Republic Act No. 1576 which

[1] CTA EB No. 513 (CTA Case Nos. 7227, 7287 and 7317), March 10, 2010, Concurring and Dissenting Opinion penned by Associate Justice Lovell R. Bautista, with Associate Justice Caesar A. Casanova, concurring.
[2] CTA Case Nos. 7229 & 7298, October 5, 2009.
[3] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[4] *Rollo*, pp. 28-29.
[5] G.R. No. 100776, October 28, 1993, 277 SCRA 444.

divested the Philippine National Bank of authority to accept back pay certificates in payment of loans, does not apply to an offer of payment made before effectivity of the act; *Largado v. Masaganda, et al., 5 SCRA 522 (June 30, 1962)*, ruling that RA 2613, as amended by RA 3090 on June, 1961, granting to inferior courts jurisdiction over guardianship cases, could not be given retroactive effect, in the absence of a saving clause; *Larga v. Ranada, Jr., 64 SCRA 18*, to the effect that Sections 9 and 10 of Executive Order No. 90, amending Section 4 of PD 1752, could have no retroactive application; *People v. Que Po Lay, 94 Phil. 640*, holding that a person cannot be convicted of violating Circular No. 20 of the Central, when the alleged violation occurred before publication of the Circular in the Official Gazette; *Baltazar v. C.A., 104 SCRA 619*, denying retroactive application to P.D. No. 27 decreeing the emancipation of tenants from the bondage of the soil, and P.D. No. 316 prohibiting ejectment of tenants from rice and corn farmholdings, pending the promulgation of rules and regulations implementing P.D. No. 27; *Nilo v. Court of Appeals, 128 SCRA 519*, adjudging that RA 6389 which removed "personal cultivation" as a ground for the ejectment of a tenant cannot be given retroactive effect in the absence of a statutory statement for retroactivity; *Tac-An v. CA, 129 SCRA 319*, ruling that the repeal of the old Administrative Code by RA 4252 could not be accorded retroactive effect; *Ballardo v. Borromeo, 161 SCRA 500*, holding that RA 6389 should have only prospective application; (*see also Bonifacio v. Dizon, 177 SCRA 294 and Balatbat v. CA, 205 SCRA 419*).

The prospectivity principle has also been made to apply to administrative rulings and circulars, to wit: *ABS-CBN Broadcasting Corporation v. CTA, Oct. 12, 1981, 108 SCRA 142*, holding that a circular or ruling of the Commissioner of Internal Revenue may not be given retroactive effect adversely to a taxpayer; *Sanchez v. COMELEC, 193 SCRA 317*, ruling that Resolution No. 90-0590 of the Commission on Elections, which directed the holding of recall proceedings, had no retroactive application; *Romualdez v. CSC, 197 SCRA 168*, where it was ruled that CSC Memorandum Circular No. 29, s. 1989 cannot be given retrospective effect so as to entitle to permanent appointment an employee whose temporary appointment had expired before the Circular was issued.

The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . .'" *(Boldfacing supplied)*

Also, a compelling rationalization of the prospectivity principle of judicial decisions is well set forth in the oft-cited case of *Chicot County Drainage District v. Baxter States Bank.*[6] The said case advocates the imperative necessity to take account of the actual existence of a statute prior to its nullification, as an operative fact negating the acceptance of "a principle of absolute retroactive invalidity."[7]

It follows then that the *Mirant case* should be applied prospectively and not retroactively to the prejudice of taxpayers and litigants had who relied in good faith on the prevailing jurisprudence at the time of the filing of the judicial claim for refund. [8]

When respondent filed its administrative claim with the BIR on December 21, 2005, and the Petition for Review with the Court in Division on April 24, 2006, the rule that the reckoning of the two-year period is the date of filing of the quarterly VAT return has become a well-established doctrine and adopted in numerous decisions of this Court, citing as basis the ruling in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue ("Atlas case")*.[9] Thus, it would be the height of injustice to apply a new doctrine to a pending case involving a party who already invoked a contrary view and who acted in good faith thereon prior to the issuance of the said doctrine.[10]

Based on the foregoing discussion, it is my opinion that the ruling in the *Mirant case* where the reckoning of the 2-year prescriptive period is from the close of

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[6] 308 US 371, 374 [1940].
[7] *Supra* note 5. See also Felicisimo Rieta v. People, G.R. No. 147817, August 12, 2004, 436 SCRA 273.
[8] Land Bank of the Philippines v. De Leon, G.R. No.143275, March 20, 2003, 399 SCRA 376.
[9] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[10] *Supra* note 8.

the taxable quarter should be applied prospectively *i.e.*, only to administrative and judicial claims filed after September 12, 2008. With this, respondent's claim for the first quarter of the year 2004 in the amount of P249,660.45 should be considered as filed within the 2-year period, counted from the filing of the respondent's quarterly VAT returns.

Accordingly, I vote for the denial of the Petition for Review.

LOVELL R. BAUTISTA
Associate Justice

I CONCUR:

CAESAR A. CASANOVA
Associate Justice