Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

DEUTSCHE KNOWLEDGE SERVICES PTE. LTD.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 596
(CTA Case No. 7921)

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

Promulgated:
JUL 2 2 2011 Apolinario 3:00 p.m.

X---X

DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as

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[1] Sec. 2. *Cases within the jurisdiction of the Court en banc*.- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

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amended, of the Resolution[2] October 28, 2009, rendered by the Former Second Division[3] of this Court in CTA Case No. 7921, and its Resolution[4] dated February 8, 2010.

Petitioner assailed both the aforesaid Resolutions, the dispositive portions of which, respectively, read as follows:

<u>Resolution dated October 28, 2009:</u>

> *"**WHEREFORE**, premises considered respondent's "Motion to Dismiss" is hereby **GRANTED**. Accordingly, the instant Petition for Review is hereby **DISMISSED** for being filed out of time.*
>
> ***SO ORDERED.***"

<u>Resolution dated February 8, 2010:</u>

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

Sec. 4. *Where to appeal; mode of appeal.-*

(a) xxx.

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.

(c) xxx.

[2] En Banc Docket, pp. 60-65.

[3]Composed of Associate Justice Juanito C. Castañeda, Jr., Associate Justice Erlinda P. Uy and Associate Justice Olga Palanca-Enriquez.

[4] En Banc Docket, pp. 66-72.

On April 17, 2009, petitioner filed a Petition for Review which was raffled to the former Second Division of this Court.

Petitioner avers that on March 31, 2009, it filed an application for Tax Credit/Refund of its allegedly excess and unutilized input VAT for the 1st quarter of the calendar year 2007 in the amount of P12,549,446.30 with respondent Commissioner of Internal Revenue(empowered to act upon and approve claims for refund or tax credit as provided by law) through its BIR Revenue District No. 47.[5]

Citing inaction on the part of respondent, petitioner on April 17, 2009 filed a Petition for Review or Seventeen (17) days after petitioner filed an application for tax credit/refund with respondent based on Section 112 and 229 of the National Internal Revenue Code of 1997, as amended.

However, on June 8, 2009, instead of an Answer respondent filed a Motion to Dismiss on ground of prescription. Citing the case of Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation[6] (Mirant Case), respondent alleged that the Petition for Review was filed

[5] Ibid. p12
[6] G.R. No. 172129, September 12, 2008

out of time on the ground of having been filed beyond the two-year prescriptive period.

A day after or on June 9, 2009, respondent filed an Answer again citing the same grounds in the Motion to Dismiss in her Special and Affirmative defenses.

After hearing and the filing of Comment/ Opposition[7] on the Motion to Dismiss, the former Second Division of this Court resolved to grant said motion on October 28, 2009. Petitioner filed a motion for reconsideration thereon on November 16, 2009.[8]

However, in an Order[9] dated January 11, 2010, the case was ordered to be transferred to the Third Division of this Court pursuant to CTA Administrative Circular No. 01-2010, "Implementing the Fully Expanded Membership in the Court of Tax Appeals".

Notwithstanding, on February 8, 2010, the former Second Division of this Court promulgated a Resolution which denied petitioner's Motion for Reconsideration.

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[7] En Banc Docket, pp. 73-102.
[8] Division Docket, pp. 149-179
[9] Ibid. p103

Hence, the filing of this instant Petition for Review before this Court en banc.

Petitioner assigns the following errors:

> *"Based on procedural law:*
>
> *18.1 The Second Division erred in denying Petitioner's Motion for Reconsideration after it had lost Jurisdiction over the case upon the transfer of the case to the Third Division on 11 January 2010;*
>
> *18.2 The Second Division failed to consider and resolve Petitioner's Motion to set Case for Pre-Trial;*
>
>> *18.2.1 The Second division failed to address vital procedural issues which if considered, would have been sufficient to render Respondent's Motion to dismiss moot and academic;*
>>
>> *18.2.2 Respondent defied the Second Division's order. The Second Division intended to hear the case in its entirety when it ordered Respondent to file an answer instead of a Motion to Dismiss, in line with the Integrated Bar of the Philippines - Office of the Court Administrator Memorandum on Policy Guidelines dated 12 March 2002 ("IBP–COA Memorandum").;*
>>
>> *18.2.3 Respondent lost his right to assail the Second Division's jurisdiction when he sought relief from the court by filing a Motion for Extension of Time to File an Answer; and*
>>
>> *18.2.4 The issues of the case have been joined upon the Respondent's filing of the Answer, and thus, pre-trial and trial should have proceeded as a matter of procedure; and*
>
> *Based on substantive law:*

18.3 The Second Division erred in applying Mirant in this case as a basis to deprive petitioner of its right to claim refund of input VAT.

18.3.1 As held by the Third Division of the Supreme Court in Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue ("Atlas"), the two-year prescriptive period for the filing of administrative and judicial claims for refund or tax credit of excess and unutilized input VAT is reckoned from the date of the filing of the quarterly VAT return and the payment of the output VAT;

18.3.2 The application of Mirant is misplace considering the substantial distinction between this case and Mirant;

18.3.3 By mandate of Article VIII, Section 4(3), Constitution, the decision of the Supreme Court's Second Division in Mirant relied upon by the Second Division could not have overturned and did not validly overturn the doctrine laid down in Atlas; and

18.3.4 the seemingly conflicting rulings in Atlas and Mirant cannot be reconciled by ratiocinating that Atlas was decided under the National Internal Revenue Code of 1977("1977 Tax Code"), as amended by Executive Order (EO) No. 273, while Mirant was decided under 1997 tax Code, as amended, because there is no change in the relevant provisions of the laws that would warrant the change of interpretation.

In sum, petitioner assails the propriety of the former Second Division to resolve its Motion for Reconsideration despite an Order transferring the said case to the Third Division of this Court and the application of the Mirant Case instead of the Atllas Case in resolving the Motion to Dismiss.

Petitioner asseverates that the former Second Division of this Court is bereft of power and authority to resolve the Motion for Reconsideration of its Resolution granting the Motion to Dismiss, but nevertheless faults the same Court in allegedly failing to resolve its Motion to Set Case for Pre Trial. Moreover, petitioner maintains that respondent's filing of the Motion to Dismiss violates the Court's directive not to file a Motion to Dismiss but an Answer and the subsequent filing of an Answer by respondent a day after is but an abandonment of the Motion to Dismiss.

Further, petitioner argues that the former Second Division erred in applying the Mirant Case instead of the Atlas Case considering that there is a substantial distinction between the Mirant Case and the instant case; that the Mirant case which was decided in Division by the Supreme Court cannot overturn the Atlas Case; and that there is no relevant change in the provisions in the 1977 Tax Code as interpreted in the Atlas Case and the 1997 Tax Code as interpreted in the Mirant Case.

We find no merit.

By virtue of Republic Act No. 9503 [10] which increased to nine the number of justices of the Court of Tax Appeals (CTA) and adds a third division vis-a-vis only two divisions and six members, and pursuant to the CTA Administrative Circular No. 01-2010, "Implementing the Fully Expanded Membership in the Court of Tax Appeals", an Order was issued transferring the instant case to the Third Division.

Notwithstanding, the Motion for Reconsideration of the Resolution issued by the former Second Division is still pending and the purpose of a motion for reconsideration is precisely to request the Court to take a second look on its earlier judgment and to correct any errors it may have committed therein, thus, Section 3(a), Rule 7 of the Internal Rules of the Court of Tax Appeals , provides:

> *Sec. 3. The justices who shall act on motions. – (a) A motion for reconsideration of a decision or resolution shall be acted upon by the ponente and other members of the Division, whether regular or acting, who participated in the rendition of the decision or resolution sought to be reconsidered, irrespective of whether such members are already in other divisions at the time the motion for reconsideration is filed or acted upon.* L

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[10] An Act Enlarging the Organizational Structure of the Court of Tax Appeals, Amending for the Purpose Certain Sections of the Law Creating the Court of Tax Appeals, and for Other Purposes.

Evidently, it is the members of the former Second Division[11] who participated and deliberated on the Resolution dated October 28, 2009 which is the subject of petitioner's motion for reconsideration. Hence, it is only but proper that the same members should participate and deliberate on the Motion for Reconsideration thereon in accordance with the above-mentioned provision. Moreover it would defeat the very purpose of a Motion for Reconsideration which is to request the Court, in the instant case, the former Second Division, to take a second look on its earlier judgment and to correct any errors committed therein, if any. In compliance therewith, it was the same composition of members[12] of the former Second Division that ruled both in the assailed October 28, 2009 and February 8, 2010 Resolutions.

Consequently, the substance of petitioner's argument is the alleged applicability of the Decision of the Supreme Court in the case of Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue[13] ***(Atlas Case)*** promulgated on June 8, 2007 and the non-applicability of the case of Commissioner of

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[11] Supra Note 4.
[12] Ibid.
[13] G.R. Nos. 141104 & 1487636, June 8, 2007

Internal Revenue vs. Mirant Pagbilao Corporation [14] ***(Mirant Case)***, promulgated on September 12, 2008.

In applying the Mirant Case in relation to Section 112, the former Second Division held that the administrative claim was filed on time while the Petition for Review before this Court's Division was filed out of time or beyond the two year prescriptive period, the close of the taxable first quarter of the calendar year 2007 or March 31, 2007 as the reckoning period, it appearing that the application for tax credit/refund was filed with the respondent on March 31, 2009 and the petition for review was filed on April 17, 2009.

However, in the case of Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.[15], reiterating the "Mirant Case", the Supreme Court categorically ruled that unutilized input VAT must be claimed within two years after the close of the taxable quarter when the sales were made and that the 120-day period is crucial in filing an appeal with this Court. The pertinent portion of which reads as follows:

> "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

[14] G.R. No. 172129, September 12, 2008
[15] G.R. No. 184823, October 6, 2010.

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."xxx.

xxx xxx xxx.

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.

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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.

In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.

Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two years** after the close of the taxable quarter when the sales were made, **apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales." The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection

> (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)" within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.
>
> With regard to *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc.* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.
>
> 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."

In the instant case, the administrative claim or application for tax credit/refund of its allegedly excess and unutilized input VAT for the first quarter of taxable year 2007 was filed on March 31, 2009 or within the two-year prescriptive period. Respondent had 120 days or until July 29, 2009 to determine the validity of the claim. However, petitioner filed an appeal by way of a petition for review on April 17, 2009 or 17 days after the filing of the administrative claim. Apparently, petitioner did not wait for the decision of the CIR or the lapse of the 120-day period and this is in clear contravention of Section 112 (D)[now Section 112 (C)] of the 1997 NIRC, as amended, and of the doctrine laid down in the Aichi Case.

Accordingly, we find that the filing of an appeal by way of a petition for review before this Court's former Second Division is strikingly similar with that of the facts in the Aichi Case. In both cases, the taxpayer (petitioner in the instant case) did not wait for the decision of the CIR or the lapse of the 120-day period before the filing of an appeal by way of a petition for review before this Court.

Pertinently, our disquisitions in the case of Marubeni Philippines Corporation vs. Commissioner of Internal Revenue[16] of the applicability of Section 112 of the 1997 NIRC and Aichi Case in the instant case are hereby adopted, as follows:

> "A careful analysis of the above-mentioned cases Atlas, Mirant and Aichi clearly shows that the Atlas Case was an interpretation by the Supreme Court of the 1977 NIRC, prior to its amendment by R.A. 7716; while the Mirant and Aichi cases was an interpretation of the 1997 NIRC or the application and interpretation of the amendatory provisions of Tax Reform Act of 1977.
>
> Significantly, it is emphasized that the premise of the Supreme Court's ruling in the Atlas Case was anchored on the need to harmonize the provisions on Refund or Tax Credits of Input Tax under Section 106(now Section 112) with the two-year prescriptive period for instituting a suit or proceeding for the Recovery of Tax Erroneously or Illegally paid under Section 230(now Section 229) of the Tax Code of 1977, as amended,

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[16] CTA EB Case No. 557 (CTA Case No. 6469), March 23, 2011.

> citing the cases of ACCRA Investments Corporation v. Court of Appeals and Commissioner of Internal Revenue v. TMX Sales, Inc. xxx.
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> It was the advent of R.A. No. 7716 and R.A. 8424 when the legislature specifically provided for a judicial recourse with the Court of Tax Appeals in claiming unutilized input VAT refund/credit under Section 106(D) of the NIRC of 1977(now Section 112 of the NIRC of 1997) within which the period of thirty (30) days reckoned from the receipt of the decision of the CIR denying the claim or after the expiration of a given period (now 120 days).
>
> Accordingly, petitioner cannot blindly invoke the doctrine enunciated in Atlas case in the instant case. As discussed above, the need to harmonize the provisions of Section 106 and Section 230 of the Tax Code of 1977 is no longer necessary nor applicable due to the clear legislative intent embodied in the provisions of R.A. No. 7716 and R.A. 8424, which delineated specific amendatory provision for the prescriptive period in claiming and judicial claims for unutilized input VAT refund/credit. "

In fine, we find that the Aichi Case is the prevailing doctrine in so far as the mandatory observance of the 120-30 day period under Section 112 of the NIRC of 1997 before filing an appeal with the Court of Tax Appeals and that the Atlas Case and Section 229 of the 1997 NIRC are not applicable in the instant case.

WHEREFORE, premises considered, the Resolution of the former Second Division of this Court in CTA Case No. 7921, dated October 28, 2009 and its Resolution, dated February 8, 2010, are hereby **AFFIRMED with MODIFICATION.** Accordingly, CTA Case No. 7921 is hereby **DISMISSED** for having been prematurely filed pursuant to the case of

Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.[17] No pronouncement as to costs.

SO ORDERED.

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

WE CONCUR:

(concurs with the Dissenting Opinion of AJ Victorino)
ERNESTO D. ACOSTA
Presiding Justice

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

(with Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(with Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Leave)

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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

CERTIFICATION

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

ERNESTO D ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

DEUTSCHE KNOWLEDGE SERVICES, PTE. LTD., Petitioner,	C.T.A. EB NO. 596 (C.T.A. Case No. 7921)
	Members:
- versus -	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 2 2 2011

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DISSENTING OPINION

Fabon-Victorino, J.:

I vote to grant the Petition for Review filed by petitioner Deutsche Knowledge Services, PTE. LTC. against respondent Commissioner of Internal Revenue (CIR), as stated in my Draft Decision, which failed to get the nod of the majority.

All of us are in agreement that the primordial issue in a claim for refund or tax credit of creditable and unutilized input

VAT attributable to zero-rated or effectively zero-rated sales is the **timeliness of the filing** of such claim, **both in the administrative and judicial levels**.

There is no quarrel as well in the application of Section 112 of the NIRC, as amended, which prescribes a period of **two (2) years after the close of the taxable quarter when the sales were made,** within which a taxpayer may apply with respondent a claim for tax refund or credit. This much has been settled in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc*. (Aichi case),[1] which cited the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation* (Mirant case).[2]

With the ruling, the conflicting views between the *Atlas* and the *Mirant* cases pertaining to the reckoning of the two-year period for the application for administrative claim for refund of unutilized and creditable input VAT has necessarily been obliterated. In fact, in *Marubini Philippines Corporation v. CIR,* CTA EB Case No. 557, March 23, 2011, this Court ruled that the need to harmonize the provisions of Section 112 and Section 230 of the NIRC of 1997 is no longer necessary nor applicable due to

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

the clear legislative intent embodied in the provisions of R.A. No. 7716 and R.A. No. 8424, which delineated specific amendatory provision for the prescriptive period in claiming refunds of unutilized input VAT.

Conflicting views however manifested in the application of Section 112(D) [now Section 112(C)] of the 1997 Tax Code relative to the filing of judicial claim for refund. Allow me at this point to state my view.

The law provides that respondent 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 claim. **Upon notice of denial or expiration of the allowable period of 120 days without any action on the part of respondent, the taxpayer has 30 days, within which to appeal the adverse decision or the inaction of respondent to the Court of Tax Appeals**.

Note that in the Aichi case, the Supreme Court emphasized that the phrase "within two (2) years" in Section 112 of the NIRC refers only to the filing of the administrative claim for refund or tax credit with respondent." It was also ruled therein that the applicant has to wait for the adverse decision of respondent or the lapse of the 120-day period prescribed in Section 112(D) before seeking judicial intervention. Failure to observe the said 120-day period amounts to premature filing of the appeal.

To be sure, the filing of the administrative claim by petitioner with respondent of its alleged excess creditable and unutilized input tax for the first quarter of CY 2007 on March 31, 2009 is within the two-year prescriptive period.

But it is not true insofar as petitioner's judicial claim for refund or tax/credit is concerned. Admittedly, the Petition for Review was lodged with the Court in Division on April 17, 2009 or **barely seventeen (17) days from petitioner's filing of its administrative claim** in violation of the 120-day period granted unto respondent. Thus, the Petition for Review was prematurely filed.

Well settled is the rule that a party with an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court.[3] If a litigant goes to court without first pursuing his administrative remedies, his action is premature as he has no cause of action to ventilate in Court. His case is not ripe for judicial determination.[4]

However, the failure to exhaust available administrative remedies will not deny the Court of its jurisdiction over the case as the same will amount only to a judicial petition wanting a cause of action. **It is not jurisdictional.** The non-exhaustion of administrative remedies only renders the action premature, meaning that 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.[5]

Instructive is the ruling in *Merida Water District, et al. vs. Francisco Bacarro, et al.*,[6] where the Highest Tribunal remarked, thus:

> "xxx. Their **failure to exhaust administrative remedies, however, does**

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[3] Carale vs. Abarintos, 269 SCRA 142.
[4] Aboitiz vs. Collector of Customs, 83 SCRA 271; Abe-Abe vs. Manila, 90 SCRA 531.
[5] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.
[6] G.R. No. 165993, September 30, 2008 citing Rosario v. CA, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; Carale v. Abarintos, G.R. No. 120704, March 03, 1997, 269 SCRA 132, 141.

> **<u>not affect the jurisdiction of the RTC. Non-exhaustion of administrative remedies only renders the action premature, that the "claimed cause of action is not ripe for judicial determination</u>**." (*Boldfacing and underscoring supplied*)

Therefore, the defense of failure to exhaust administrative remedies is waivable or may be considered waived if not raised in a motion to dismiss or in the Answer. Under Section 1, Rule 9 of the Rules of Court,[7] defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if dismissal is based on (1) lack of jurisdiction; (2) *litis pendencia*; (3) *res judicata*; and (4) prescription, none of which is obtaining in the case at bar.

The record shows that although respondent filed a *Motion to Dismiss*, the ground of non-exhaustion of administrative remedies was not among those she invoked. Neither was the same at the very least intimated in her *Answer*. She is therefore deemed to have waived such defense. That being the case, the

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[7] Rule 9, Sec. 1. Defenses and objections 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.

Court may properly take cognizance of the instant *Petition for Review* and proceed to its conclusion.

Anent the issue of whether the Former Second Division still had the competence when it issued the assailed Resolution of February 8, 2010, Section 3(a), Rule 7 of the *Internal Rules of the Court of Tax Appeals,* is apropos:

> Sec. 3. *The justices who shall act on motions,* - (a) **A motion for reconsideration of a decision or resolution shall be acted upon by the *ponente* and other members of the Division, whether regular or acting, who participated in the rendition of the decision or resolution sought to be reconsidered,** irrespective of whether such members are already in other Divisions at the time the motion for reconsideration is filed or acted upon. *(Emphasis supplied)*

In the instant case, the members of the Former Second Division were the ones who participated in the deliberation and rendition of both assailed Resolutions. In other words, it was the same composition of the Court that ruled on both incidents which is in accord with the above quoted internal rules. Besides, it was the same Court which already acquired jurisdiction over the case.

And once jurisdiction is acquired by the court, it remains with it until the full termination of the case.[8]

In view of the foregoing ratiocination, I vote to grant the instant Petition for Review and to order the remand of the docket of the instant case to the Third Division for the pre-trial conference.

ESPERANZA R. FABON-VICTORINO
Associate Justice

I concur:

ERNESTO D. ACOSTA
Presiding Justice

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[8] Republic v. Asiapro Cooperative, G.R. No. 172101, November 27, 2007.

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En Banc

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-*versus*-

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

Promulgated:
JUL 2 2 2011 aosApolinario 3:00 p.m.

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SEPARATE OPINION

BAUTISTA, J.:

The provision prescribing the requisites for claim for refund or issuance of a tax credit certificate is Section 112(A) of the 1997 National Internal Revenue Code ("NIRC"), as amended,[1] which expressly enumerates as follows:

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[1] As amended by Republic Act No. 9337

1. That there must be zero-rated or effectively zero-rated sales;

2. That input taxes were incurred or paid;

3. That such input value-added tax ("VAT") payments are directly attributable to zero-rated sales or effectively zero-rated sales;

4. That the input VAT payments were not applied against any output VAT liability; and

5. That the claim for refund/tax credit was filed within the two (2)-year prescriptive period.

On the reckoning of the prescriptive period, the aforementioned provision expressly states, "within two (2) years after the close of the taxable quarter when the sales were made." The prevailing jurisprudence, *i.e.*, the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.]* (*"Mirant case"*),[2] likewise, enunciates for the same period – within two (2) 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.

In the same vein, a reading of Section 112(C) of the 1997 NIRC, as amended, will show that the provision use the word "*may*," which as settled in statutory construction connotes permissiveness, rather than of a restrictive or mandatory in nature. Consistent with the provision's permissive nature, the judicial recourse to this Court within thirty (30) days after the lapse of the one hundred twenty (120)-day period, therefore, is merely directory, and not mandatory nor jurisdictional; subject only to the period provided under Section 112(A) of the same Code, *i.e.*, within two (2) years after the close of the taxable quarter when the sales were made.

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

Stated differently, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[3]

To stress, the same issue had been thoroughly addressed in the cases of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[4] and *Commissioner of Internal Revenue v. San Roque Power Corporation*.[5]

Based on the records of the case, petitioner claims for a tax refund or issuance of a tax credit certificate covering the first (1st) quarter of the calendar year 2007.

With the above discussion, petitioner thus, had until March 31, 2009 within which to file *both* its administrative and judicial actions.

Consequently, petitioner's administrative claim filed on March 31, 2009 was made within the prescribed period; however, as to its Petition for Review, which was filed only on April 17, 2009, I consider the same as filed out of time.

For emphasis, both the administrative and judicial claims must be filed within the two (2)-year period,[6] for beyond that period, the taxpayer can no longer appeal to this Court.[7]

In conclusion, petitioner failed to comply with the clear provisions of the 1997 NIRC, as amended. The Petition for Review filed with the Court in Division,

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[3] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[4] CTA EB No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.
[5] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.
[6] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[7] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

docketed as CTA Case No. 7921 should be **DISMISSED**, not for being prematurely filed, but for being made beyond the prescriptive period.

Accordingly, I vote for the **DISMISSAL** of the Petition for Review.

LOVELL R. BAUTISTA
Associate Justice