REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

INSTITUTIONAL SHAREHOLDER SERVICES, INC. – PHILIPPINE ROHQ,	**C.T.A. EB NO. 700** **(C.T.A. CASE NO. 7662)**
Petitioner,	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE,	**Promulgated:**
Respondent.	JUL 08 2011 4:10pm

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DECISION

PALANCA-ENRIQUEZ, J.:

The phrase "within two (2) years xxx 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 of 1997*, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR *(Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010)*.

THE CASE

This is a Petition for Review filed by Institutional Shareholder Services, Inc. – Philippine ROHQ (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Decision dated June 3, 2010 and Resolution dated November 4, 2010, rendered by the Special First Division of this Court in C.T.A. Case No. 7662, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

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"**WHEREFORE**, finding no reversible error committed by this Court in the assailed Decision, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

THE PARTIES

Petitioner is the regional operating headquarter (ROHQ) of Institutional Shareholder Services, Inc., a foreign multinational company organized under the laws of New York, United States of America. It was granted a license (amended on April 10, 2002) by the Philippine Securities and Exchange Commission on December 5, 2001, with office address at 28th Floor Philamlife Tower, 8767 Paseo de Roxas, Makati City.

Petitioner is a VAT-registered taxpayer with a Certificate of Registration bearing OCN No. 9RC0000062059 issued on December 14, 2001. It is currently engaged in the business of logistics services, research and development services, product development, data processing and communication, and business development.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), vested with the authority to carry out all functions, duties, and responsibilities of said office including, inter alia, the power to decide, approve, and grant refunds or tax credit of erroneously paid or illegally collected internal revenue taxes. For this particular case, respondent is represented by the legal officer of the BIR Revenue Region No. 8, with office address at the 5/F Legal Division, Atrium Bldg., Makati Ave., Makati City.

THE FACTS

The facts, as culled from the records, are, as follows:

For the second quarter of taxable year 2005 to the first quarter of taxable year 2007, petitioner filed with respondent its Quarterly VAT Returns and Amended Quarterly VAT Returns on the following dates:

Quarters	Exhibit	Date the Original Quarterly VAT Returns were filed	Exhibit	Date the Amended Quarterly VAT Returns were filed
2005				
2nd Qtr	"N"	July 25, 2005	"O"	November 18, 2005
3rd Qtr	"P"	October 25, 2005	"Q"	November 18, 2005
4th Qtr	"R"	January 25, 2006	-	-
2006				
1st Qtr	"S"	April 26, 2006	"T"	April 27, 2006
2nd Qtr	"U"	July 25, 2006	-	-
3rd Qtr	"V"	June 26, 2007	-	-
4th Qtr	"W"	January 25, 2007	-	-
2007				
1st Qtr	"X"	April 25, 2007	"Y"	April 30, 2007

On June 26, 2007, petitioner filed with respondent, through Revenue District Office No. 50, a claim for refund or issuance of tax credit certificate for the input VAT allegedly incurred during the second quarter of taxable year 2005 until the first quarter of taxable year 2007, in the total amount of P6,364,720.39.

Alleging inaction of respondent, on July 24, 2007, petitioner filed with the Special First Division of this Court a Petition for Review, docketed as C.T.A. Case No. 7662.

In her Answer, respondent alleged by way of special and affirmative defenses that assuming, but without admitting that petitioner filed a claim for refund, the same is still subject to investigation by the BIR; that petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected; taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not creditable or refundable; it is incumbent upon the petitioner to show that it has complied with the provision of Sections 112(A) and 204(C), in relation to Sections 229 of the 1997 Tax Code, as amended; in an action for tax credit or refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge the said burden is fatal to the claim; and claims for refund are construed strictly against the claimant, the same partakes of the nature of exemption from taxation, and as such, they are looked upon with disfavor.

After trial on the merits, on June 3, 2010, the Special First Division rendered a Decision denying the petition for failure of petitioner to prove that its sale of services to its mother company is zero-rated.

On June 23, 2010, petitioner filed a "Motion for Reconsideration", while respondent failed to file her comment thereto despite notice.

On November 4, 2010, the Special First Division denied petitioner's "Motion for Reconsideration".

Not satisfied, on December 8, 2010, petitioner filed the instant Petition for Review raising the sole issue:

ISSUE

WHETHER OR NOT THE CTA SPECIAL FIRST DIVISION ERRED WHEN IT DENIED THE PRESENT CLAIM FOR VAT REFUND UNDER SECTION 108 (B) (2).

On January 27, 2011, without necessarily giving due course to the petition, respondent was ordered to file her comment, within ten (10) days from notice. Respondent failed to file her comment, as per Report of the Judicial Records Division dated February 22, 2011.

Thereafter, both parties were ordered to submit their simultaneous memoranda, within thirty (30) days from notice.

Considering petitioner's "Memorandum" filed on May 4, 2011, and for failure of respondent to file her memorandum despite notice, this case was deemed submitted for decision on May 18, 2011.

THE COURT EN BANC'S RULING

The petition has no merit.

Petitioner contends that it is a separate taxpayer from ISSI-US, thus, it has the legal personality to file the present claim for refund; RA 8756 does not limit the rendering of services by the ROHQ only to the affiliates, subsidiaries or branches; the NIRC merely requires that the services be rendered to a person engaged in business conducted outside the Philippines or to a non-resident person not engaged in business, who is outside the Philippines when the services are performed; that ISSI-US, the parent company of ISSI-ROHQ is doing business outside the Philippines; and ISSI-ROHQ having a legal personality different from ISSI-US for purposes of taxation, the transactions between them are subject to zero-rated VAT; thus, it is entitled to a refund or issuance of a tax credit certificate for unutilized input taxes paid on importation and domestic purchases of goods and services.

The applicable law is *Section 112(A) of the National Internal Revenue Code (NIRC) of 1997, as amended*, which provides, as follows:

> **"SEC. 112. Refunds or Tax Credits of Input Tax. –**
>
> (A) **Zero-rated or Effectively Zero-rated Sales.** – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods 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 volume of sales."

Pursuant to the above provision, in order to be entitled to a refund or tax credit certificate of input VAT attributable to zero-rated or effectively zero-rated sales, the following requisites must be complied with:

1) there must be zero-rated or effectively zero-rated sales;

2) that input taxes were incurred or paid;

3) that such input taxes are attributable to zero-rated sales or effectively zero-rated sales;

4) that the input taxes were not applied against any output VAT liability; and

5) that the claim for refund was filed within the two-year prescriptive period.

The Court deems it necessary to first resolve whether or not the Petition for Review was filed on time.

At this point, we emphasize that claims for refund or credit of input taxes are covered by *Section 112 (D) of the NIRC of 1997, as amended,* and not *Section 229* of the same Code. Petitioner cannot now raise the timeliness of its judicial claim based on its compliance with *Section 229 of the NIRC of 1997, as amended*, as the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*, *565 SCRA 172-173,* categorically ruled that taxpayers cannot avail of the provisions of either *Sections 204(C) or 229* as regards the refund of any unutilized creditable input VAT. Both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes. A refund of unutilized input VAT is not an erroneously, illegally, or wrongfully collected tax.

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Thus, in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010,* the Supreme Court ruled:

> ***"The filing of the judicial claim was premature***
>
> However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent' claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:
>
>> SEC. 112. Refund or Tax Credits of Input Tax.– xxxx
>>
>> (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) and (B) hereof.
>>
>> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to tax on the application within the period prescribed above, the taxpayer affected may, within (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.)*
>
> 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 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 the 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 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 vs. 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."

Pursuant to the above ruling, the periods provided under *Section 112 (D) of the NIRC of 1997, as amended*, are crucial in filing an appeal with the CTA. Petitioner cannot now rely on the provision of *Section 229 of the NIRC of 1997, as amended*, since it is already settled that said provision is not applicable to claims for VAT refund *(CIR vs. Mirant Pagbilao Corporation, supra)*. Thus, the two (2)-year period is applicable to administrative claims for VAT refund only, pursuant to *Section 112 (A)* of the same Code, and not to judicial actions.

Applying the foregoing to the instant case, records show that petitioner filed its administrative claim for refund on June 26, 2007 for its unutilized input VAT for the 2nd quarter of taxable year 2005 to the 1st quarter of 2007, which is well within the two (2) year prescriptive period. On the other hand, applying *Section 112(C)* (previously Section 112 (D)) *of the NIRC of 1997, as amended,* the CIR has 120 days from June 26, 2007 or until October 24, 2007, within which to decide petitioner's administrative claim for refund. Within thirty (30) days from the lapse of the 120-day period, or until November 23, 2007, petitioner may elevate its claim for refund to this Court. However, records show that petitioner filed its judicial claim on July 24, 2007, docketed as C.T.A. Case No. 7662, or barely twenty-eight (28) days after it filed its administrative claim. Clearly, petitioner did not wait for the lapse of the 120-day period for the CIR to decide its claim. It is clear, therefore, that the Petition for Review in C.T.A. Case No. 7662 was prematurely filed, since the CIR was not given the full opportunity to decide petitioner's claim. Therefore, C.T.A. Case No. 7662 should have been dismissed for having been prematurely filed.

More importantly, the filing of an administrative claim with the Commissioner is a condition precedent to the filing of a judicial claim for refund with the CTA. Thus, failure of petitioner to comply with *Section*

112 (D), particularly the 120-day period, is tantamount to non-exhaustion of administrative remedies. Consequently, the Special First Division should not have entertained the said Petition for Review.

Worthy to stress is that the Aichi case is a mere reiteration of what *Section 112 of the NIRC of 1997, as amended*, clearly provides and does not establish a rule which is not familiar with petitioner, hence, it cannot claim that it is legally impossible to comply with such doctrine, as such was still non-existent at the time petitioner filed its Petition for Review. It cannot be mistaken that the law itself is very clear and unambiguous. Hence, we cannot disregard the letter of the law on the pretext of pursuing its spirit *(Tañada and Macapagal vs. Cuenco, et al., 103 Phil. 1051, 1086 [1957]).*

Basic is the rule that judicial interpretation of the law retroacts to the date when the said law became effective. Thus, the ruling in the Aichi case retroacts to the date when *Section 112* took effect.

At any rate, the ruling in the Aichi case partakes of the nature of a procedural rule. Elementary is the rule that one does not have a vested right in procedural rules.

Finally, the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right. Well-settled is the rule that recovery of excess input VAT is a refund which is in the nature of an exemption. There is parity between tax refund and tax exemption when the former is based either on a tax exemption statute or a tax refund statute. Clearly, a claim for tax refund may be based on statutes granting tax exemption or tax refund. In such case, the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, a legislative grace, which cannot be allowed unless granted in the most explicit and categorical language. The taxpayer must show that the legislature intended to exempt him from the tax by words too plain to be mistaken *(CIR vs. Fortune Tobacco Corporation, 559 SCRA 160, 178).*

To reiterate, tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption *(Commissioner of Internal Revenue vs. SC Johnson & Son, Inc., 368 Phil. 388, 411, June 25, 1999; Magsaysay Lines, Inc., vs. Court of Appeals, 329 Phil. 310, 324, August 12, 1996; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 314 Phil. 220, 228, May 26, 1995).*

With the above conclusion, we find no need to resolve the other issues raised by petitioner, for being moot and academic.

WHEREFORE, premises considered, the instant petition is hereby **DENIED,** and accordingly, **DISMISSED** for lack of merit. Accordingly, the Decision dated June 3, 2010 dismissing the Petition for Review rendered by the Special First Division is hereby **AFFIRMED,** with modification that the dismissal is on the ground that the Petition for Review was prematurely filed.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain the denial on the grounds stated in the Decision dated June 3, 2010 and the Resolution dated November 4, 2010)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(I concur with PJ Acosta in his Separate Concurring Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Wellness Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Wellness Leave)
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

INSTITUTIONAL SHAREHOLDER SERVICES, INC. – PHILIPPINE ROHQ,
Petitioner,

EB CASE NO. 700
(C.T.A. CASE NO. 7662)

Members:

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

\- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUL 08 2011 4:10pm

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SEPARATE CONCURRING OPINION

I am in agreement with the majority in the dismissal of the case. Indeed, the Petition for Review was prematurely filed when petitioner failed to comply with the requirement of the 120-day period prescribed in Section 112(D) of the 1997 National Internal Revenue Code (NIRC).

The observance of the 120-day period prescribed in Section 112(D) of the 1997 NIRC is mandatory, and if violated, renders the Petition for

Review premature.[1] The premature filing of the Petition for Review is a violation of the doctrine of exhaustion of administrative remedies.

It has already been sufficiently ruled that non-exhaustion of administrative remedies is not jurisdictional. It only renders the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[2] The premature invocation of court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel,* the case is susceptible of dismissal for lack of cause of action.[3]

Considering, however, that respondent failed to raise in her answer or allege in a motion to dismiss the defense of premature filing or lack of cause of action, the respondent is deemed to have waived said defense. The Court, therefore, may take cognizance of the case and decide the case on the merits.

Reviewing the allegations propounded by petitioner in its Petition for Review, however, I do not find any new assertions that would merit a second look to the Decision rendered by the Special First Division. Petitioner merely reiterated its aversions in the Division. I agree with the conclusion that ISSI-USA is not the one contemplated as "other person doing business outside the Philippines" because first, petitioner and ISSI-USA is considered one and the same person and second, ISSI-USA is considered as doing business in the Philippines through its Regional Operating Headquarters. I do agree that petitioner is not entitled to its claim for refund.

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[1] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, GR No. 184823, October 6, 2010.
[2] *Carale vs. Abarintos*, GR No. 120704, March 3, 1997.
[3] *Paat vs. Court of Appeals*, G.R. No. 111107, January 10, 1997; 266 SCRA 167, pp. 175-177.

In view thereof, I concur with the majority in dismissing the Petition for Review *En Banc*. The Decision of the First Division is affirmed.

ERNESTO D. ACOSTA
Presiding Justice

I CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice