REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CE CASECNAN WATER AND ENERGY COMPANY, INC.
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent

CTA CASE NO. 7891

Members:

ACOSTA, ***Chairman***
UY, ***and***
FABON-VICTORINO, ***JJ.***

Promulgated:
MAY 19 2011 ; 10:25 am

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RESOLUTION

Acosta, PJ:

For resolution is the Motion to Dismiss filed by the respondent Commissioner of Internal Revenue (CIR) on 20 January 2011, moving for the dismissal of petitioner's Petition for Review on the ground of lack of cause of action and/or lack of jurisdiction by this Court to hear and decide the same. A Comment/Opposition to respondent's motion was filed by petitioner on 03 March 2011.

Respondent's motion is anchored on the fact that petitioner's recourse to this Court is premature since the Petition for Review was filed before the lapse of the 120-day period accorded to the CIR by Section 112 of the National Internal Revenue

Code (NIRC) of 1997, as amended, to decide a claim for refund of input Value Added Tax (VAT).

Section 112 of the 1997 NIRC, as amended, states in part:

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: ...
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> "(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof.
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> "In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.
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Respondent maintains that, as provided by law, the instant case will only be ripe for judicial determination within thirty (30) days after petitioner's receipt of a decision denying the claim or after the expiration of one hundred twenty (120) days from the date of the submission of complete documents in support of the administrative claim for refund. Respondent further avers that the required period is

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jurisdictional and the failure of the petitioner to comply therewith would deprive this Court of the jurisdiction to decide on the case.[1]

In opposition, petitioner counters that the motion should be denied for the following reasons:

1. Respondent's Motion to Dismiss is based on the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* (GR No. 184823, 06 October 2010) (hereinafter, ***Aichi***), which case could not have reversed the doctrine laid down by the earlier Supreme Court case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* (GR No. 141104 and 148763, 08 June 2007) (hereinafter, ***Atlas***) since *Aichi* was decided by a Division of the Supreme Court and not by the Supreme Court *En Banc*;
2. ***Aichi*** should not be applied retroactively pursuant to Articles 4 and 8 of the Civil Code[2]; and
3. The ***Aichi*** case is based on an erroneous application of the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation* (GR No. 172129) (hereinafter, ***Mirant***).

Petitioner's reliance on ***Atlas*** as the controlling doctrine, with respect to the filing of the judicial claim for a refund case of input VAT, and which could not have been reversed by ***Aichi***, is erroneous.

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[1] Respondent's Motion to Dismiss dated 18 January 2010.
[2] Article 4. Laws shall have no retroactive effect, unless the contrary is provided.
Article 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.

The Supreme Court lucidly pointed out in ***Atlas*** that—

> It is already well-settled that the two-year prescriptive period for instituting a suit or proceeding for recovery of corporate income tax erroneously or illegally paid under Section 230 of the Tax Code of 1977, as amended, was to be counted from the filing of the final adjustment return. This Court already set out in *ACCRA Investments Corporation v. Court of Appeals* [GR No. 96322, 20 December 1991], the rationale for such a rule, thus –
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> The very same reasons set forth in the afore-cited cases concerning the two-year prescriptive period for claims for refund of illegally or erroneously collected income tax may also apply to the Petitions at bar involving the same prescriptive period for claims for refund/credit of input VAT on zero-rated sales. (Underscoring supplied.)

Clearly, ***Atlas*** was decided using as basis the NIRC of 1977. As the old tax code did not contain a provision similar to Section 112 (C), as amended, of the 1997 NIRC, which provides for the 120-day period for the CIR to decide on a refund claim involving unutilized input VAT, the Supreme Court in the said ***Atlas*** case, applied Section 230[3], correlated to Section 106[4], of the 1977 NIRC concerning the judicial

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[3] SEC. 230. *Recovery of tax erroneously or illegally collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.
In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment; *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[4] SEC. 106. *Refunds or tax credits of input tax.* – x x x.
(b) *Zero-rated or effectively zero-rated sales.* – Any person, except those covered by paragraph (a) above, whose sales are zero-rated may, within two years after the close of the quarter when such sales were made, apply for the issuance of a tax credit certificate or refund of the input taxes attributable to such sales to the extent that such input tax has not been applied against output tax.

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proceedings of a refund application for input VAT. Consequently, the Supreme Court ruled that **even the judicial appeal of an application for refund or tax credit of input VAT** should be filed before the expiration of two years from the date of payment of the tax or penalty.

Given that ***Aichi*** is a judicial interpretation of the subsections of Section 112 of the 1997 NIRC, this Court thus need not belabor further the point that ***Aichi*** did not reverse ***Atlas,*** a Decision by the Supreme Court interpreting provisions of the 1977 NIRC.

The above discussion likewise proves correct with respect to the ***Mirant*** doctrine that petitioner posits never had the intention of overturning ***Atlas***. ***Mirant*** was governed by the provisions of the 1997 NIRC already and hence should not be considered as a judicial pronouncement intended to supplant the ***Atlas*** doctrine. This detail, patently lacking in petitioner's position, should properly dispose of the third issue regarding ***Aichi's*** application of the ***Mirant*** doctrine.

On the issue of the retroactive application of the ***Aichi*** case, it has already been settled that the interpretation placed upon the written law by a competent court has the force of law. The interpretation or construction placed by the courts establishes the contemporaneous legislative intent of the law. The latter as so interpreted and construed would thus constitute a part of that law as of the date the statute is enacted. It is only when a prior ruling of the Supreme Court involving the

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(e) *Period within which refund of input taxes may be made by the Commissioner.* – The Commissioner shall refund input taxes within 60 days from the date the application for refund was filed with him or his duly authorized representative. No refund of input taxes shall be allowed unless the VAT-registered person files an application for refund within the period prescribed in paragraphs (a), (b) and (c) as the case may be.

same provision of law finds itself later overruled, and a different view is adopted, that the new doctrine may have to be applied prospectively in favor of parties who have relied on the old doctrine and have acted in good faith in accordance therewith under the familiar rule of "lex prospicit, non respicit".[5] Such is not true however in the case of ***Aichi***, where a different provision of law is involved.

Certainly, the case of ***Aichi***, in interpreting the periods provided in Section 112 of the 1997 NIRC, may be given retroactive effect up to the date when the statute, i.e. the 1997 NIRC, was enacted. Petitioner's argument that a retroactive application of ***Aichi*** would only result in a travesty of justice, for it had relied, in good faith, upon the prevailing doctrine in force when it filed its petition with this Court, must perforce fail. Prior to promulgation of the said case, there has never yet been a doctrinal pronouncement by the Supreme Court construing or interpreting the pertinent portions of said Section 112 of the 1997 NIRC. Without any prior contrary ruling that was overruled, the doctrine laid down by ***Aichi*** need not be applied prospectively, supposedly in favor of parties who have relied on an old doctrine in good faith.

According to ***Aichi***, in cases of a claim for a tax refund or tax credit of unutilized input VAT, the controlling provision is Section 112, as amended, of the 1997 NIRC. Accordingly, an administrative claim for the refund should be filed within two years after the close of the taxable quarter when the sales were made[6]. The judicial remedy, on the other hand, is laid down by Section 112 (C), which provides that the taxpayer may, within thirty (30) days from receipt of an adverse decision or

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[5] Pesca vs. Pesca, GR No. 136921, 17 April 2001
[6] Section 112 (A), as amended, 1997 NIRC

after the expiration of the 120-day period, appeal the decision or the unacted claim with this Court.

Although this Court subscribes to the periods laid down by Section 112 of the 1997 NIRC and echoed in ***Aichi***, it however takes exception to the respondent's claim that the 120-day period thereunder is jurisdictional. *The 30-day period to elevate to this Court an adverse decision or inaction is jurisdictional; however, the 120-day period to administratively act on a case is not.*

As culled from the records, petitioner timely filed its administrative claim for the refund of its unutilized input VAT for taxable year 2007 on 20 February 2009, however, it failed to wait for the respondent CIR's grant or denial of the claim, or the lapse of the 120-day period provided by the NIRC, before elevating the claim to this Court. The Petition for Review was filed on 30 March 2009, merely thirty eight days after petitioner's filing of the administrative case for refund.

The failure though of petitioner to await the decision of the respondent CIR on its claim or, at most, the lapse of the 120 days from the filing of its administrative claim is merely a violation of the doctrine of exhaustion of administrative remedies.

The rule on exhaustion of administrative remedies before resorting to the courts means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiar within the competence of the administrative agency, avoidance of interference with functions of such administrative agency by withholding judicial action until the administrative process has run its course, and prevention of attempts to swamp the courts by a resort to them in the first instance[7]. A party seeking an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to court action[8].

The failure to exhaust available administrative remedies nonetheless will not rob the courts of its jurisdiction over a case as the same is tantamount only to a judicial petition *lacking a cause of action*. In our jurisdiction, the defense of lack of cause of action is not jurisdictional and may be deemed waived if not timely raised in a Motion to Dismiss or in the Answer[9].

Settled is the rule that the non-exhaustion of administrative remedies is not jurisdictional and it renders only 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[10]. The premature invocation of the court's intervention is thus only fatal to one's cause of action, though the case is still susceptible of dismissal for such failure to state a cause of action absent any finding of waiver or estoppel[11].

Notably, in the instant case, there was the absence of waiver by respondent of the defense of non-exhaustion of administrative remedies or the lack of a cause of action, as she raised the issue of petitioner's premature filing of the Petition for

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[7] *Abe-Abe vs. Manta*, L-4827, 31 May 1979.
[8] *Commissioner of Internal Revenue vs. Rosemarie Acosta*, GR No. 154068, 03 August 2007.
[9] Sec. 1, Rule 9 of the Rules of Court
[10] *Carale vs. Abarintos*, GR No. 120704, 03 March 1997.
[11] *Iloilo City Zoning Board of Adjustment and Appeals vs. Gegato Abecia Funeral Homes, Inc.*, GR No. 157118, 08 December 2003.

Review in her Special and Administrative Defenses contained in her Answer dated 08 May 2009.

In her Answer, respondent stated—

> As provided by law, petitioner has to file its judicial claim with the Honorable Court within [thirty] (30) days from receipt of the decision denying the claim or after the expiration of the one hundred twenty (120) day period from the date of filing of the administrative claim. This requirement is jurisdictional, failure to do so would deprive this Honorable Court of jurisdiction to decide on the case.
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> In the case at hand, the administrative protest was filed by petitioner on February 20, 2009. Respondent should be given an opportunity to act on the administrative claim filed by petitioner within a period of 120 days from February 20, 2009 or until June 20, 2009. Afterwards, the petitioner may file the Petition for Review within 30 days from June 20, 2009 or until July [20], 2009.
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> However, as it can be gleaned, petitioner filed the Petition for Review on March 30, 2009 or after only a lapse of 30 days from the filing of the administrative claim. Therefore on the basis of [Section 112 of the 1997 NIRC], the Petition for Review was prematurely filed on March 30, 2009. Hence this Honorable Court is bereft of jurisdiction to try and hear the case at hand.

Without touching on this Court's jurisdiction, the premature filing of the Petition for Review exposes it to an attack that it lacks a cause of action, which defense is waivable at the election of the opposing party. Upon a finding that there was no waiver of said defense or estoppel, the petition is susceptible of dismissal.

Since there was clearly no waiver or estoppel in the instant case, the petition should properly be dismissed on the ground that it states no cause of action.

WHEREFORE, in view of the foregoing, the Motion to Dismiss is hereby **GRANTED** and the Petition for Review is **DISMISSED** based on the ground of lack of cause of action, the judicial claim having been prematurely filed with this Court.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

We concur:

(With Separate Opinion)
ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice