REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

UCPB PROPERTIES, INC., Petitioner,	CTA EB NO. 645 (CTA CASE NOS. 6543 & 6589)
	Present:
- 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 18 2011 *Apolinario 3:30 p.m.*

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DECISION

UY, J.:

This Petition for Review filed before the Court of Tax Appeals *En Banc* on July 5, 2010 seeks a review of the Decision and Resolution by the Former First Division of this Court (Court in Division)[1] in the consolidated CTA Case Nos. 6543 and 6589, entitled "UCPB Properties, Inc., petitioner, vs. Commissioner of Internal Revenue, respondent"[2], to wit:

1) Decision promulgated on June 24, 2009[3] denying the Petition for Review on the ground of prescription; and

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[1] Chaired by Presiding Justice Ernesto D. Acosta., with Associate Justice Lovell R. Bautista and Associate Justice Caesar A. Casanova as members.

[2] Ponencia of Associate Justice Caesar A. Casanova, concurred by Associate Justice Lovell R. Bautista, with concurring and dissenting opinion by Presiding Justice Ernesto D. Acosta.

[3] Docket, pp. 56-62.

2) Resolution promulgated on May 31, 2010[4] denying herein petitioner's Motion for Reconsideration for lack of merit.

THE FACTS

The factual antecedents of the case are undisputed.

Petitioner is a domestic corporation duly organized and existing under and by virtue of Philippine laws, with principal office at 8th Floor, UCPB Building, 7907 Makati Avenue, Makati City.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue with authority to act as such, including, among others, the power to decide, approve and grant refunds or tax credit of overpaid internal revenue taxes as provided by law with office at the BIR National Office Building, Diliman, Quezon City, where she may be served summons and other court processes.

Petitioner is principally engaged in the business of home building and home development, real estate buying and selling, subdividing and developing lands and other properties.

As such, it is registered as a Value-Added Tax (VAT) taxpayer in accordance with Section 236 of the Tax Reform Act of 1997 (Tax Code) with Taxpayer Identification Number (TIN) 000-172-912-000 and with Bureau of Internal Revenue (BIR) Certificate of Registration No. 15797.

For the period July 1, 2000 to September 30, 2000, petitioner filed its Quarterly VAT Return on October 12, 2000, and reflected therein its current

[4] Ibid, at pp. 81-83.

input taxes arising from domestic purchases in the total amount of P17,591,169.71.

For the period October 1, 2000 to December 31, 2000, petitioner filed its Quarterly VAT Return on January 24, 2001, and reflected therein its current input taxes arising from domestic purchases in the total amount of P9,180,142.60.

On September 27, 2002, petitioner filed an administrative claim for refund or issuance of a tax credit certificate of unutilized input VAT with the BIR in the amount of P10,176,254.15 covering the period July 1, 2000 to September 30, 2000.

On December 18, 2002, petitioner filed an administrative claim for refund or issuance of a tax credit certificate of unutilized input VAT with the BIR in the amount of P5,112,531.00 covering the period October 1, 2000 to December 31, 2000.

On October 3, 2002, petitioner filed before the Court in Division a Petition for Review praying for a judgment ordering respondent to refund or to issue a tax credit certificate in the amount of P10,176,254.15, representing alleged unutilized input taxes paid on its purchases of capital goods for the period July 1, 2000 to September 30, 2000 (3rd Quarter of taxable year 2000). This was docketed as CTA Case No. 6543.

Subsequently, on January 21, 2003, petitioner filed another Petition for Review praying for a judgment ordering respondent to refund or to issue a tax credit certificate in the amount of P5,112,531.00, representing alleged unutilized input taxes paid on its purchases of capital goods for the period

October 1, 2000 to December 31, 2000 (4th Quarter of taxable year 2000). This was docketed as CTA Case No. 6589.

On April 8, 2003, upon motion of the petitioner, the Court in Division issued a Resolution consolidating the above-captioned cases.

During trial, petitioner presented its testimonial and documentary evidence. On the other hand, respondent was declared to have waived her right to present further evidence, and to formally offer her evidence marked and identified during trial.

The cases were considered submitted for decision on December 24, 2008, after petitioner filed its Memorandum on December 5, 2008.

On June 24, 2009, the Court in Division rendered its assailed Decision, denying petitioner's claim for refund and/or issuance of a tax credit certificate in its favor of the alleged unutilized input VAT paid on purchases of capital goods for the 3rd and 4th Quarters of taxable year 2000 in the total amount of P15,288,785.15, on the sole ground that both Petitions for Review in CTA Case Nos. 6543 and 6589 were belatedly filed (beyond the two-year prescriptive period), in violation of Section 112(B) of the Tax Code; hence, petitioner is barred by prescription.

A Concurring and Dissenting Opinion[5] was rendered by the Honorable Presiding Justice Ernesto D. Acosta, stating that he concurs with the majority view that the consolidated petitions be denied. However, he holds the view that under Section 112(B) of the National Internal Revenue Code (NIRC) of 1997, although a taxpayer has two years to file its administrative claim, counted from the close of the taxable quarter involved, such two-year period

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[5] Id., at pp. 63-70.

does not cover the judicial appeal. He emphasizes that even beyond said two-year prescriptive period, the Commissioner has 120 days to decide on a taxpayer's claim; while a taxpayer can appeal before this Court within 30 days upon the expiration thereof in case of inaction or upon receipt of the adverse decision of the Commissioner. Failure to adhere with the 120-day period will render the action/appeal premature, as in the instant case where the claims were not formally acted upon by the Commissioner.

A Motion for Reconsideration of the assailed Decision was filed by petitioner before the Court *a quo* on July 15, 2009. Although the Court in Division considered the consolidated petitions to have been filed within the two-year prescriptive period in accordance with Section 112(B) of the NIRC of 1997 and found the *Mirant case*[6] not applicable to the subject appealed cases, the Court *a quo* still denied petitioner's motion in the Resolution dated May 31, 2010[7] on evidentiary grounds.

The Court in Division held that petitioner failed to substantiate its claim pursuant to the requisites prescribed under the same Section, particularly that the claimed input taxes were paid on capital goods purchased. It explained that petitioner failed to show that the subject residential condominium units (the Forbes Tower's units), were used directly or indirectly in the production or sale of taxable goods or services; and that petitioner should have complied with Section 4.106-1(b) of Revenue Regulations No. 7-95 which allows the refund/tax credit of input VAT on capital goods or properties only to the extent that such capital goods or properties are used in VAT taxable business. In

[6] *Mirant Pagbilao Corporation vs. Commissioner of Internal Revenue,* G.R. No. 172129, September 12, 2008.
[7] Docket, p.p. 72-81

other words, the subject condominium units can only be considered as used in petitioner's leasing business only when it is shown that the rental revenues derived therefrom and the corresponding output VAT was declared in petitioner's VAT returns, of which petitioner likewise failed to comply with.

Hence, this recourse before the Court *En Banc* praying that the assailed Decision dated June 24, 2009, and Resolution dated May 31, 2010 of the Court in Division, be reversed and set aside, and that a new decision be rendered ordering respondent to refund or to issue a tax credit certificate in favor of petitioner the amount of P15,288,785.15, allegedly representing the latter's unutilized input VAT generated from its purchases of capital goods for the 3rd and 4th Quarters of taxable year 2000.

In the Resolution dated July 20, 2010[8], respondent was directed by the Court *En Banc* to file her comment in this case, with an extension period of thirty (30) days granted in the Resolution dated August 25, 2010[9]. As no comment was filed by respondent within the extended period until September 12, 2010 despite notices, both parties were directed to file their respective memorandum in the Resolution dated November 23, 2010[10]. Thereafter, this case was considered submitted for decision on February 17, 2011, after petitioner posted its Memorandum[11] on December 28, 2010 and received by this Court on January 17, 2011, sans respondent's memorandum.

Hence, this Decision.

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[8] Docket, pp. 153-154
[9] Docket, p. 158
[10] Docket, pp. 161-163
[11] Docket, pp. 213-254

THE ISSUE

Petitioner submits the sole issue for the consideration of this Court, to wit: whether or not petitioner is entitled to its claim for refund of its unutilized input VAT which it paid and incurred on its purchases of capital goods for the 3rd and 4th Quarters of taxable year 2000.

At the outset, petitioner emphasizes the ruling of the Court in Division in the assailed Resolution dated May 31, 2010 that its claim for refund has not prescribed considering that the two-year prescriptive period provided in Section 112(B) of the NIRC of 1997 is reckoned from the date of the filing of the quarterly VAT return and the payment of the output VAT, as held in *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 141104 and 148763, June 8, 2007*. However, its claim was still denied on the ground that petitioner has failed to prove that the Forbes Tower was used directly or indirectly in the production or sale of taxable goods or services. Thus, it is petitioner's position that:

> (a) Based on substantive law, the Court in Division clearly erred in denying petitioner's claim for refund despite compliance with the duly mandated legal requirements under Section 112(B), NIRC of 1997, as amended. The Supreme Court has settled the rule that a claim for tax refund necessitates only preponderance of evidence like in any ordinary civil case; and
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> (b) Based on procedural law, the Court in Division erred when it failed to consider the respondent's failure to rebut petitioner's clear convincing evidence despite plenty of opportunities to evaluate the veracity and the completeness of petitioner's evidence, both at the administrative and judicial levels.

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In support thereof, petitioner contends that it has substantially complied with the following requisites in order to be entitled to the claim for refund of its input VAT on purchases of capital goods:

> 1. Petitioner proved that it was a VAT-registered taxpayer as jointly stipulated by the parties, which is in the nature of a judicial admission;
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> 2. Petitioner proved that its unutilized input VAT was duly substantiated and supported by VAT invoices and official receipts upon submission of Exhibits "Y" to "Y-102", inclusive, as verified and attested to by the independent certified public accountant (ICPA), which were neither questioned nor rebutted by the respondent;
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> 3. Petitioner proved that its unutilized input VAT has not been applied against any output VAT liability considering that it has not made or recorded any sale subject to VAT; hence, petitioner had no chance of applying any of its input VAT claimed for refund against any of its output VAT liability;
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> 4. Petitioner proved that it timely filed its administrative and judicial claims for refund as correctly ruled in the Court in Division's Resolution dated May 31, 2010;
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> 5. Petitioner proved that its Forbes Tower is a capital asset as defined by the Tax Code and relevant jurisprudence since: (a) it was subjected to depreciation because the individual units are being offered for lease as serviced apartments; (b) the Court in Division made a positive finding that by the very nature of the Forbes Tower, it is depreciable asset and has a useful life greater than one year; and (c) petitioner reported the same as one of its assets in its Audited Financial Statements; and
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> 6. Petitioner has substantially presented sufficient evidence to prove that the Forbes Tower had been used by petitioner directly in the sale of services, such as: (a) Audited Financial Statements for CY 2002 and 2003; (b) Management Agreement between petitioner and FSRPI dated June 1, 2001; (c) Trademark License Agreement between petitioner and Fraser Serviced Residences, Pte., Ltd., a Singaporean corporation; (d) Lease contracts for long-term lease of units; (e) various amendment forms for short-term guests at the Forbes Tower; (f) various official receipts evidencing payments of business taxes for operation of serviced apartments issued by

> the City of Makati and various business permits issued by the City of Makati; and (g) various financial statements of Fraser Place Serviced Residences-UPI.

In addition, petitioner argues that it is not required under the NIRC of 1997, as amended, and other relevant rules and regulations to prove that it declared its rental revenues and paid the corresponding output VAT in its Quarterly VAT Returns in order for it to be entitled to its claim for refund. This is tantamount to judicial legislation. However, notwithstanding the fact that it was able to present ample evidence to prove that the subject condominium units at the Forbes Tower were actually used in its leasing business, petitioner still believes that it is already sufficient that the taxpayer merely proves that the capital goods in question are goods and properties with estimated useful life greater than one year and which are treated as depreciable assets under Section 29(f) of the NIRC of 1997, used directly or indirectly in the production or sale of taxable goods or services, in order to be entitled to its claim for refund.

Lastly, petitioner concludes that only preponderance of evidence is required in civil cases. While it concedes that claims for refund, like tax exemptions, must be construed strictly against the taxpayer, petitioner stresses that this rule does not justify depriving it of its just and valid claims, for purely technical reasons. It would be the height of inequity and injustice if petitioner would be denied the entire amount of input VAT sought to be refunded by mere reason of its alleged failure to prove a fact which petitioner however proved by compelling evidence; while respondent never acquired better right to the amounts sought to be refunded.

THE COURT EN BANC'S RULING

Before considering the arguments raised by petitioner, and in the light of the decision of the Supreme Court in the case of ***Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010***, the Court finds it necessary to squarely determine whether or not this Court has jurisdiction to entertain the present appeal as allowed under paragraph 2 of Section 1 of Rule 14 of the Revised Rules of the Court of Tax Appeals, which states that "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case".

Needless to state, to obviate the possibility that its decision may be rendered void, the Court can, by its own initiative, raise the question of jurisdiction, although not raised by the parties.[12] As a corollary thereto, to inquire into the existence of jurisdiction over the subject matter is the primary concern of a court, for thereon would depend the validity of its entire proceedings.[13]

Courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings.[14]

Thus, the principal issue for determination by this Court would center on whether or not it properly acquired jurisdiction to entertain the instant

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[12] *Ker & Company, Ltd. vs. Court of Tax Appeals, et al.*, G.R. No. L-12396, January 31, 1962.
[13] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.
[14] *Ace Publications, Inc. vs. The Commissioner of Customs, et al.*, G.R. No. L-18808, May 29, 1964.

claim, as dependent upon the timeliness of the filing of the judicial claim with the Court of Tax Appeals in accordance with Section 112 of the NIRC of 1997, as amended.

Section 7 of R.A. No. 1125[15], as amended by R.A. No. 9282[16], defines the appellate jurisdiction of the Court of Tax Appeals. The said provision, in part, reads:

> "SEC. 7. *Jurisdiction*. - The CTA shall exercise:
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> a) **Exclusive appellate jurisdiction to review by appeal**, as herein provided:
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;
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> (2) **Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial**; xxx" *(Emphasis Ours)*

Furthermore, Section 11 of the same law prescribes how the said appeal should be taken, to wit:

> "SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* – **Any party adversely affected by** a decision, ruling or **inaction of the Commissioner of Internal Revenue**, the

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[15] AN ACT CREATING THE COURT OF TAX APPEALS.

[16] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO.1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days** after the receipt of such decision or ruling or **after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein**.

Appeal should be made by filing a petition for review under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure **with the CTA within thirty (30) days** from the receipt of the decision or ruling or **in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. xxx" *(Emphases Ours)*

One of the "inactions" contemplated in the above-quoted provisions, pertinent to the instant case, is found in Section 112 of the NIRC of 1997, the pertinent provisions of which state:

"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: xxx

(B) *Capital Goods.* – A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only **within two (2) years after the close of the taxable quarter when the importation or purchase was made**.

xxx xxx xxx

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

Based on the foregoing provisions, prior to seeking judicial recourse before this Court, a VAT-registered person may apply for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated or effectively zero-rated sales **within two (2) years after the close of taxable quarter when the sales or purchases were made**.

Thus, contrary to pronouncements made by the Court in Division in its assailed Resolution dated May 31, 2010, the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under said section **starts from the close of the taxable quarter when the relevant sales or purchases were made** pertaining to the input VAT regardless of whether said tax was paid or not, as held in the case of ***Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc)***,[17] which is the applicable ruling in the instant case. In said case, the Supreme Court held that:

> "The above proviso (Sec. 112 [A]) clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer

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

> **must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. **The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid**. xxx" (*Emphasis Ours)*

Additionally, a further reading of the provisions of Section 112 shows that under paragraph (D) thereof, the Commissioner of Internal Revenue is granted a **120-day period**, from submission of complete documents in support of the administrative claim within which to act on claims for refund/applications for issuance of the tax credit certificate. Upon denial of the claim or application, <u>or upon expiration of the **120-day period**</u>, the taxpayer only has a **30-day period** within which to appeal said adverse decision or unacted claim before the Court of Tax Appeals.

Moreover, in ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.***,[18] the Supreme Court elaborated on the significance of the **120-day** and **30-day** periods as follows:

> "Section 112(D)[19] 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**

[18] G.R. No. 184823, October 6, 2010.
[19] Changed to Section 112(C) upon effectivity of Republic Act No. 9337 in November 1, 2005.

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.

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xxx. 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 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.**

xxx xxx xxx." *(Emphasis and underscoring Ours)*

In light of the foregoing jurisprudential pronouncements, it is clear that Section 112(D) of the NIRC of 1997 directs the Commissioner of Internal Revenue to act on administrative claims for refund/applications for issuance of the tax credit certificate within a period of one hundred twenty (120) days from submission of complete supporting documents. Upon partial or full denial of such claim, or the expiration thereof without any action by the Commissioner on said claim, the taxpayer only has a period of thirty (30) days within which to seek judicial recourse from the adverse decision or inaction of the Commissioner before the Court of Tax Appeals.

Thus, it becomes incumbent upon the taxpayer-claimant to comply, not only with the two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue, but must also give the Commissioner of Internal Revenue a period of one hundred twenty (120) days to either partially or fully deny the claim.

Subsequently, upon denial of the claim, or after the expiration of the 120-day period without any action by the Commissioner thereon, only then may the taxpayer-claimant seek judicial recourse to appeal the Commissioner's action or inaction on a refund/tax credit claim, within a period of 30 days therefrom.

At this point, it is worthy of emphasis that judicial interpretation of a statute constitutes a part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[20] As the Supreme Court is merely interpreting a law (Section 112 of the NIRC of 1997) which had long been effective, and not modifying or reversing any existing jurisprudence, the pronouncements made in the ***Mirant case*** and ***Aichi case*** (although promulgated only on September 12, 2008 and October 6, 2010, respectively) must be applied herein. Consequently, neither the doctrine of *stare decisis* nor any vested right was violated in applying the said rulings in the present case.

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[20] *Eagle Realty vs. Republic of the Philippines,* G.R. No. 151424, July 31, 2009.

Applying the foregoing discussion in the case at bench, the judicial claims before the Court in Division through the Petitions for Review filed on October 3, 2002 (CTA Case No. 6543) and January 31, 2003 (CTA Case No. 6589) were prematurely filed as the same were both done before the lapse of the 120-day period, detailed hereunder as follows:

Taxable year 2000	***Filing date of the administrative claim***	***Last day of the 120-day period under Section 112(D) from the filing of the administrative claim in case of inaction***	***Filing date of the petition for review***
3rd Quarter (Case No. 6543)	September 27, 2002	**January 25, 2003**	**October 3, 2002**
4th Quarter (Case No. 6589)	December 18, 2002	**April 17, 2003**	**January 21, 2003**

Based on the above undisputed factual findings, the reckoning date of the 120-day period under Section 112(D) of the NIRC of 1997 commenced simultaneously with the filing of petitioner's administrative claims since no subsequent supporting documents was submitted by petitioner, absent any evidence contrary thereto.

Indubitably, petitioner miserably failed to observe the 120-day period under Section 112(D) of the NIRC of 1997, to give the Commissioner of Internal Revenue the opportunity to act on its refund claim. Correspondingly, the premature filing of both its Petitions for Review before the Court in Division in CTA Case Nos. 6543 and 6589 warrants a dismissal inasmuch as no jurisdiction was acquired thereto. This jurisdictional nature of such premature filing is consistent with the pronouncements made in the ***Aichi case***[21], the prevailing jurisprudence on the matter.

In the ***Aichi*** case, the Supreme Court categorically ruled that the premature filing of claim for refund/credit of input VAT before this Court warrants its dismissal as no jurisdiction was acquired therein. The High Court said thus:

> "**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.**
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> 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.
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> xxx xxx xxx
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> 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**." *(Emphasis and underscoring supplied).*

Clearly therefore, the premature filing of the judicial claim before the Court of Tax Appeals makes the Petition for Review dismissible as no jurisdiction was acquired by the Court to entertain the case. And being jurisdictional in nature, this defense is not waivable. Otherwise, We run the risk of favoring a non-complying taxpayer-claimant, at the mere expedient of failing to invoke the defense of prematurity before this Court at the first instance.

[21] Supra, see note 13.

It must also be noted that the right to appeal is a mere statutory privilege and not an inherent constitutional right as aptly held in the case of ***Yao vs. Court of Appeals, et al.***[22], to wit:

> "The right to appeal is **not** a constitutional, natural or inherent right. It is a statutory privilege of statutory origin and, therefore, available only if granted or provided by statute. Since the right to appeal is not a natural right nor a part of due process, **it may be exercised only in the manner and in accordance with the provisions of law**. Corollary, **its requirements must be strictly complied with.**
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> **That an appeal must be perfected in the manner and within the period fixed by law is not only mandatory but jurisdictional**. Non-compliance with such legal requirements is fatal, for it renders the decision sought to be appealed final and executory, with the end result that no court can exercise appellate jurisdiction to review the decision." *(Emphases Ours)*

Parenthetically, it must be emphasized that jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy,[23] and is conferred only by law and not by the consent or waiver upon a court which, otherwise, would have no jurisdiction over the subject matter or nature of an action. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties.[24] If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[25]

Furthermore, the right of petitioner to refund unutilized input VAT is a mere statutory privilege and not a vested right. It bears emphasis that

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[22] G.R. No. 132428, October 24, 2000.
[23] *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 2, 1968.
[24] *Laresma vs. Abellana*, G.R. No. 140973, November 11, 2004.
[25] Please refer to *De Guzman, et al. vs. Escalona, et al.*, G.R. No. L-51773, May 16, 1980.

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. Evidently, 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.[26]

In this case, input VAT is taxes legally due to the government from the taxpayer and is not a kind of an erroneously or illegally collected tax. However, under certain exceptional circumstances (such as for sales or purchases that are zero-rated), the legislature provided a tax refund statute under Section 112 from which the taxpayer is given the benefit to refund such input VAT as a mere privilege granted by the government for having such kind of sales or transactions. Hence, it being a mere liberality granted to the taxpayer, it is with more reason that the Court must be cautious in interpreting the law governing the claim for such privilege.

To reiterate, the premature filing of the judicial claim before the Court of Tax Appeals makes the petition dismissible as no jurisdiction was acquired

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[26] *CIR vs. Fortune Tobacco Corporation*, G.R. Nos. 167274-75, July 21, 2008; *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.

by the Court to entertain the case. Consequently, the resolution of the other issues raised herein becomes unnecessary.

WHEREFORE, in light of the foregoing considerations, the Petition for Review is hereby **DENIED** for lack of merit. Consequently, the filing of the Petitions for Review in CTA Case No. 6543 and CTA Case No. 6589 are both deemed premature; and therefore, this Court has no jurisdiction to entertain the instant case.

Accordingly, the Decision dated June 24, 2009 and the Resolution dated May 31, 2010 of the Court in Division in CTA Case Nos. 6543 and 6589 are hereby **SET ASIDE**, and both Petitions for Review filed thereto are **DISMISSED** for lack of jurisdiction.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Concurs with Presiding Justice Acosta's view that the petition was prematurely filed)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On 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 conclusions in the above decision were reached in consultation 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

UCPB PROPERTIES, INC.
Petitioner,

CTA EB NO. 645
(CTA Case Nos. 6543 & 6589)

-versus-

Present:

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Promulgated:

JUL 18 2011 AoApolinario 3:30 p.m.

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CONCURRING AND DISSENTING OPINION

Acosta, PJ:

The Decision, penned by the Honorable Justice Erlinda P. Uy, DENIED the Petition for Review filed before the Court En Banc on 05 July 2010, ratiocinating that petitioner's Petitions for Review filed before the Court in Division should not have been given due course due to this Court having no jurisdiction to entertain the same.

The majority ruled that the judicial recourse of the petitioner, covering its claim for refund of its unutilized input value added tax (VAT), via its Petitions for

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Review filed on 03 October 2002 (CTA Case No. 6543) and 23 January 2003 (CTA Case No. 6589) were both premature having been filed without any action from the respondent Commissioner of Internal Revenue (CIR) on the claim in the administrative level; or at most, awaiting the lapse of the 120-day period granted by the National Internal Revenue Code of 1997 (NIRC) to the CIR to grant or deny an administrative claim for refund under Section 112 of the tax code. Being prematurely filed, the Court therefore has no jurisdiction over the judicial claims that were then filed before the Court's Special First Division.

With all due respect to my esteemed colleagues, as much as I agree that the provision governing the instant case is Section 112 of the NIRC, and that the Petitions for Review filed before the Court in Division were both premature as these were filed without any adverse decision from the respondent or before the lapse of the 120-day period under Section 112 (D)[1] of the NIRC, I have to register my dissent as to the position that this Court has no jurisdiction to entertain the case due to said prematurity.

The majority subscribes to the view that the absence of a decision from the CIR prior to the lapse of the 120 days to decide the claim in the administrative level does not constitute *inaction on the part the CIR* that will allow the claim to be elevated to this Court in accordance with the 2005 Rules of the Court of Tax Appeals, as amended. Consequently, this view of the majority is based on the ruling that the Court does not have jurisdiction over a prematurely filed judicial refund claim under Section 112 of the NIRC.

[1] Now Section 112 (C) of the NIRC.

I beg to disagree.

The failure of petitioner to await the decision of the respondent CIR on its claim or, at most, the lapse of the 120 day period from the filing of its administrative claim clearly constitutes 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.[2] 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.[3]

The non-exhaustion of administrative remedies is not at all times fatal to the claimant.

In the case of *Castro vs. Gloria*, GR No. 132174, 20 August 2001, the Supreme Court, citing the case of *Vidad vs. RTC of Negros Oriental*, Branch 42[4], declared that—

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[2] *Abe-Abe vs. Manta*, L-4827, 31 May 1979.
[3] *Commissioner of Internal Revenue vs. Rosemarie Acosta*, GR No. 154068, 03 August 2007.
[4] 227 SCRA 221.

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> Non-exhaustion of administrative remedies implies absence of cause of action. Where a remedy is available within the administrative machinery, this should be resorted to before recourse can be made to the courts. The doctrine of primary jurisdiction does not warrant a court to arrogate unto itself the authority to resolve a controversy the jurisdiction over which is initially lodged with an administrative body of special competence. (Underscoring supplied.)

The failure to exhaust available administrative remedies 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 in nature and may be deemed waived if not timely raised in a Motion to Dismiss or in the Answer.[5]

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.[6]

In the case of *Iloilo City Zoning Board of Adjustment and Appeals vs. Gegato Abecia Funeral Homes, Inc.*, GR No. 157118, 08 December 2003, the Supreme Court established that the premature invocation of the court's intervention is thus only fatal to *one's cause of action*. The case though is susceptible of dismissal for such failure to state a cause of action absent any finding of waiver or estoppel, *viz*:

> The settled rule is that before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on

[5] Sec. 1, Rule 9 of the Rules of Court.
[6] *Carale vs. Abarintos*, GR No. 120704, 03 March 1997.

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> a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. <u>The premature invocation of the court's intervention is fatal to one's cause of action.</u>
>
> Accordingly, absent <u>any finding of waiver or estoppels the case is susceptible of dismissal for failure to state a cause of action.</u> This doctrine of exhaustion of administrative remedies is not without practical and legal reasons, for one thing, availment of administrative remedy entails lesser expenses and provides for a speedier disposition of controversies. It is no less true to state that courts of justice for reasons of comity and convenience will shy away from a dispute until the system of administrative redress has been completed and complied with so as to give the administrative agency concerned every opportunity to correct its error and to dispose of the case.[7]

Notably, in the instant case, the CIR never raised the defense of non-exhaustion of administrative remedies or the lack of cause of action in her Answer or in a Motion to Dismiss in both petitions before the Court in Division; and thus such defense is considered waived and the claims ripe for judicial determination.

Nevertheless, despite the foregoing, I concur with the majority's Decision to dismiss the Petition for Review before the Court En Banc, not due to the Court's lack of jurisdiction but on the basis that I find no cogent reason to disturb the Resolution of the Court's Special First Division promulgated on 31 May 2010, finding that petitioner's seventy nine units located at Forbes Tower can not be considered capital properties since these were not proven to be part of petitioner's leasing business.

It is established that an action for a tax refund partakes of the nature of an exemption, which cannot be allowed unless granted in the most explicit and

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[7] Citing *Paat v. Court of Appeals*, 334 Phil. 146, 152–153 (1997)

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categorical language, it is strictly construed against the claimant who must discharge such burden convincingly.[8] Unfortunately, respondent in this case failed to discharge such burden.

ERNESTO D. ACOSTA
Presiding Justice

I concur:

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[8] *Commissioner of Internal Revenue vs. Acesite (Philippines) Hotel Corporation*, G.R. No. 147295, February 16, 2007.

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

UCPB PROPERTIES, INC.,
Petitioner,

CTA EB No. 645
(CTA Case Nos. 6543 & 6589)

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

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated: JUL 18 2011 3:30 p.m.

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SEPARATE CONCURRING AND DISSENTING OPINION

BAUTISTA, J.:

The Court *En Banc*, in resolving the Petition of Review disposed of the case as follows:

> **WHEREFORE**, in light of the foregoing considerations, the Petition for Review is hereby **DENIED** for lack of merit. Consequently, the filing of the Petitions for Review in CTA Case No. 6543 and CTA Case No. 6589 are both deemed premature; and therefore, this Court has no jurisdiction to entertain the instant case.

Accordingly, the Decision dated June 24, 2009 and the Resolution dated May 31, 2010 of the Court in Division in CTA Case Nos. 6543 and 6589 are hereby **SET ASIDE**, and both Petitions for Review filed thereto are **DISMISSED** for lack of jurisdiction.

SO ORDERED.

With all due respect to the Court *En Banc*, I must express my dissent from the majority opinion as the dismissal of the Petition for Review was anchored on the prematurity of the above stated actions.

I maintain my stand that the judicial recourse to this Court by a taxpayer-claimant within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the Commissioner of Internal Revenue shall decide on the claim, or after the receipt of the decision denying the same, pursuant to Section 112(C)[1] of the 1997 National Internal Revenue Code ("NIRC"), as amended, is directory and permissive, and not mandatory nor jurisdictional, as long as it is made within the two (2)-year prescriptive period prescribed under Sections 112 and 229 of the same Code.[2] Section 112 (C) provides:

> **SEC. 112. Refunds or Tax Credits of Input Tax.- xxx**
>
> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made. – xxx*
>
> 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**

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[1] As amended by Republic Act No. 9337.
[2] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.

> **hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals.** *(Boldfacing supplied)*

The word "may" when used in a statute commonly denotes that it is directory in nature.[3] The same term is generally permissive only and operates to confer discretion.[4]

Section 229 of the 1997 NIRC sets the 2-year limitation period; otherwise, the claim for refund or tax credit of input tax will be time-barred, to wit:

> **SEC. 229.** *Recovery of Tax Erroneously or Illegally Collected.* – xxx
>
> In any case, **no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment**: xxx *(Boldfacing supplied)*

Section 112(C) therefore merely provides that the taxpayer affected "may," or has the discretion within 30 days from the receipt of the decision denying the claim or after the expiration of the 120-day period to exercise his or her right to file a judicial claim with this Court, provided that such judicial claim is filed pursuant to the settled 2-year prescriptive period.

The case of *Commissioner of Internal Revenue v. San Roque Power Corporation*[5] provides clarity on this issue, to wit:

> **It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the**

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[3] De Ocampo *v.* Secretary of Justice, G.R. No. 147932, January 25, 2006, 480 SCRA 71.
[4] *Supra, citing Agpalo, Ruben E., Statutory Construction, Second Edition 1990, p. 239 citing Bersabel v. Salvador, G.R No. 35910, July 21, 1978, 84 SCRA 176.*
[5] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

said period is within the 2-year prescriptive period under Section 229 of the NIRC. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.

Corollary thereto, the Honorable Court of Appeals has ruled that when the 2-year prescriptive period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, the latter should file a Petition for Review with the Court of Tax Appeals within the said 2-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the 2-year period, he can no longer appeal the same to the Court of Tax Appeals. The Court of Appeals ratiocinated in this wise:

> "It appears therefore, **that it is not necessary for the Commissioner of Internal Revenue to first act unfavorably on the claim for refund before the Court of Tax Appeals could validly take cognizance of the case.** This is so because of the positive mandate of Section 230 of the Tax Code and also by virtue of the doctrine that the delay of the Commissioner in rendering his decision does not extend the reglementary period prescribed by statute.
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> Incidentally, **the taxpayer could not be faulted for taking advantage of the full two-year period set by law for filing his claim for refund. Indeed, no provision in the tax code requires that the claim for refund be filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal.** The law fixed the same period — two years — for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing of suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of the decision) before an appeal could be made in court. Indeed, only the latter case presupposes the existence of a prior decision of the Commissioner which could be subjected to review by the court. In

> fact, the Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner could be pending simultaneously with a suit for refund filed before the former (*Commissioner of Internal Revenue vs. Bank of the Philippine Islands as Liquidator of Paramount Acceptance Corporation and the Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994*)." (*Boldfacing supplied*)

Moreover, in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*,[6] the Supreme Court ruled as follows:

> Although the taxpayer's refundable or creditable input VAT may not be considered as illegally or erroneously collected, its refund/credit is a privilege extended to qualified and registered taxpayers by the very VAT system adopted by the Legislature. Such input VAT, the same as any illegally or erroneously collected national internal revenue tax, consists of monetary amounts which are currently in the hands of the government but must rightfully be returned to the taxpayer. Therefore, whether claiming refund/credit of illegally or erroneously collected national internal revenue tax, or input VAT, the taxpayer must be given equal opportunity for filing and pursuing its claim.

Hence, the taxpayer no longer has to wait for the denial of the claim by the Commissioner of Internal Revenue or even the inaction after the expiration of the 120-day period before the taxpayer can exercise its right to appeal with this Court,[7] for claims for refund or tax credit, both in the administrative and judicial claims must be filed within the 2-year period.[8]

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[6] G.R. No. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[7] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[8] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.

Otherwise, no appeal to this Court beyond the 2-year period can be resorted to.[9]

Despite the foregoing elucidation, I am one with the majority's Decision to dismiss the present action before the Court *En Banc*. As was held in the previous Resolution of the Court's Special First Division promulgated on May 31, 2010, the petitioner failed to prove that the Forbes Tower, upon which the claimed input VAT was incurred, was a capital property used in the petitioner's leasing business.

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

LOVELL R. BAUTISTA
Associate Justice

[9] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.