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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

VISAYAS GEOTHERMAL POWER COMPANY, Petitioner,	**CTA EB NO. 520** (CTA Case No. 7394)
- versus -	
COMMISSIONER OF INTERNAL REVENUE, Respondent,	

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 521** (CTA Case No. 7394) Present:
- versus -	**ACOSTA, *P.J.*,** **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **PALANCA-ENRIQUEZ,** **FABON-VICTORINO,** **MINDARO-GRULLA, and** **COTANGCO-MANALASTAS, *JJ.***
VISAYAS GEOTHERMAL POWER COMPANY, Respondent.	**Promulgated:** DEC 10 2010 1:05 p.m.

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DECISION

COTANGCO-MANALASTAS, *J.*:

Before the Court of Tax Appeals *En Banc* are consolidated Petitions for Review separately filed by Visayas Geothermal Power Company (hereafter referred to as "VGPC") docketed as CTA EB No. 520 and by the Commissioner of Internal Revenue (hereafter referred to as "the CIR") docketed as CTA EB No. 521, seeking the review of the Decision dated February 26, 2009 and the Resolution dated July 31, 2009 rendered by the Second Division of this Court in the case entitled "Visayas Geothermal Power Company vs. Commissioner of Internal Revenue, CTA Case No. 7394."

The facts as stipulated by the parties in their Joint Stipulation of Facts and Issues and as borne by the records of the case are as follows:

VGPC is a special purpose limited partnership duly organized and existing under Philippine laws, with principal office at Milagro, Ormoc City, Province of Leyte. It is principally engaged in the business of power generation and operates a geothermal power plant in Leyte and all the electricity produced by the facility is sold to the Philippine National Oil Corporation-Energy Development Corporation (PNOC-EDC), pursuant to an Energy Conversion Agreement. VGPC had been accredited and certified as such by the Department of Energy (DOE) on June 15, 1994. It is a registered value-added tax (VAT) taxpayer, with Tax Identification No. 003-832-538-VAT.

On the other hand, the Commissioner of the Bureau of Internal Revenue is the duly appointed official empowered to perform the duties of the said office including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes. She holds office at the 5th Floor, Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.

VGPC filed with the BIR its original Quarterly VAT Returns for taxable year 2004 on the following dates.

Taxable Quarter	Date of Filing of Original Return
First	April 24, 2004
Second	July 26, 2004
Third	October 25, 2004
Fourth	January 25, 2005

VGPC also filed its final amended Quarterly VAT Returns for the same year, the details of which are as follows:

2004 TAXABLE QUARTER	DATE OF FILING	EXCESS/UNUTILIZED INPUT VAT CREDITS			TOTAL
		DOMESTIC PURCHASES	SERVICES RENDERED BY NON-RESIDENTS	IMPORTATION OF GOODS	
First	November 26, 2004	P 7,536,137.17	P 29,886.44	P 96,153.06	P 7,662,196.67
Second	November 18, 2005	2,973,765.99	51,129.33	356,141.00	3,381.036.32
Third	November 18, 2005	2,973,552.47	54,373.00	111,418.88	3,139,344.35
Fourth	November 18, 2005	3,230,092.46	493,812.34	573,229.00	4,297,133.80
TOTAL					**P18,479,711.14**

Believing that the amount incurred and the accumulated input VAT on its domestic purchases of goods and services, services rendered by non-residents, and importation of goods are attributable to its zero-rated sales of power generation services to PNOC-EDC and such was not utilized against any output VAT liability for the said period and subsequent quarters, petitioner filed its administrative claim for refund with the BIR on the following dates:

Taxable Quarter	Date of Filing of Administrative Claim
First	June 7, 2005
Second to Fourth	December 19, 2005

Claiming inaction on the part of the CIR on its refund claim and in order to suspend the running of the two-year prescriptive period under Section 112(D) of the National Internal Revenue Code (NIRC) of 1997 and Section 4.106-2(c) of Revenue Regulations No. 7-95, as amended, petitioner filed a Petition for Review on December 29, 2005.

The CIR filed her Answer on March 14, 2006, stating her Special and Affirmative Defenses.

During trial, petitioner presented and formally offered documentary and testimonial evidence; while the CIR did not present evidence.

On February 26, 2009, the Court of Tax Appeals Second Division (hereafter referred to as the "Court in Division") rendered its Decision, partially granting VGPC's claim for refund of its unutilized input VAT. The dispositive portion of the Decision states:

> "**WHEREFORE**, in view of the foregoing considerations, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** or, in the alternative, **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner the reduced amount of **SIXTEEN MILLION EIGHTY-FOUR THOUSAND FOUR HUNDRED FIFTY NINE PESOS AND 81/100** (P16,084,459.81) representing unutilized input VAT from its domestic purchases of goods and services, services rendered by non-residents, and importations of goods for the four quarters of taxable year 2004.
>
> **SO ORDERED.**"

On March 19, 2009, VGPC filed a Motion for Partial Reconsideration of the Decision. On the other hand, the CIR filed a Motion for Partial Reconsideration on March 20, 2009. Both motions were denied by the Court in Division in the Resolution dated July 31, 2009.

On August 20, 2009, VGPC filed with this Court a Motion for Additional Time to File Petition for Review docketed as CTA EB No. 520; while the CIR also filed her Motion for Extension of Time (to File Petition for Review) on August 24, 2009, which was docketed as CTA EB No. 521. Both motions were granted by this Court on August 24, 2009 and August 25, 2009, respectively.

VGPC filed its Petition for Review on September 8, 2009; while the CIR filed her Petition for Review on September 10, 2009.

On September 14, 2009, this Court ordered CTA EB No. 521 consolidated with CTA EB No. 520, the latter being the lower docket number.

In a Resolution dated September 23, 2009, the parties were ordered to file their respective Comment. On October 9, 2009, VGPC filed its Motion for Additional Time to File Comment, which was granted by this Court via Resolution dated October 12, 2009. VGPC filed its Comment on October 20, 2009.

On October 28, 2009, both parties were required to submit their respective Memorandum within thirty (30) days from notice.

These consolidated cases were submitted for decision on January 12, 2010, after VGPC filed its Memorandum on December 10, 2009 and the CIR filed her Memorandum on December 18, 2009.

In its Petition for Review, VGPC questioned the disallowance of a portion of its input VAT claim for 2004 in the amount of P2,395,251.33 and prayed that its entire input VAT claim for the said period in the amount of P18,479,711.14 be granted.

The CIR, on the other hand, interposed the following assigned errors in support of her Petition for Review:

> "THE JUDICIAL CLAIMS (SIC) FOR THE FIRST QUARTER OF 2004 WAS FILED BEYOND THE PERIOD ALLOWED BY LAW AND HENCE, THE HONORABLE COURT OF TAX APPEALS SECOND DIVISION HAS NO JURISDICTION OVER THE SAME
>
> THE JUDICIAL CLAIMS FOR THE SECOND TO FOURTH QUARTERS OF 2004 WERE PREMATURELY FILED, IN VIOLATION OF THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES
>
> RESPONDENT'S CLAIM FOR REFUND WAS NOT PROPERLY DOCUMENTED IN THE ADMINISTRATIVE PROCEEDINGS AND THUS, RESPONDENT IS NOT ENTITLED TO THE RELIEF IT SOUGHT"

Section 112(A) of the National Internal Revenue Code of 1997, as amended, provides a period of two (2) years, after the close of the taxable quarter when the sales were made, within which a VAT-registered person whose sales are zero-rated or effectively zero-rated, may file an administrative claim for the issuance of tax credit certificate or the refund of its unutilized input tax. On the other hand, Section 112(D) of the same Code clearly states that the affected taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the decision or from inaction of the CIR after the lapse of one hundred twenty (120) days. This was affirmed by the Supreme Court in the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[1], the pertinent portions of which are quoted as follows:

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

"However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:

> SEC. 112. Refunds or Tax Credits of Input Tax. -
>
> 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.**
>
> 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.** (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 tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.

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

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

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two years** after the close of the taxable quarter when the sales were made, **apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years 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.**
>
> xxx xxx xxx
>
> 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 supplied)*

Based on the foregoing provisions and jurisprudence, a VAT-registered person is provided a period of two years, after the close of the taxable quarter when the sales were made, within which he may file an administrative claim for the issuance of tax credit certificate or the refund of its unutilized input tax. Should the CIR deny the claim or fail to act upon the claim within the 120-day period, the affected taxpayer is granted a period of thirty (30) days from the denial or inaction to appeal his case before the CTA.

In the present case, the administrative claims for refund filed by VGPC covering the first and the last three quarters of 2004 were filed on June 7, 2005 and December 19, 2005, respectively. Counting from the close of each taxable quarter, it is clear that VGPC filed its administrative claims within the two-year prescriptive period.

However, despite the timely filing of the administrative claims, this Court is constrained to deny VGPC's refund claim on the grounds that its judicial claim for the first quarter of 2004 was filed out of time, while its judicial claim for the last three quarters was prematurely filed.

The administrative claims for the first and last three quarters of taxable year 2004 were filed by VGPC on June 7, 2005 and December 19, 2005, respectively. The last days of the 120-day period within which the CIR shall act upon the administrative claims were October 5, 2005 and April 18, 2006. Consequently, VGPC had until November 4, 2005 and May 18, 2006 (the last day of the 30-day period) within which to file a Petition for Review before this Court's Division. Unfortunately, VGPC filed its Petition for Review on December 29, 2005. Clearly, VGPC's judicial claim for the first quarter of 2004 was filed out of time, while its judicial claim for the last three quarters was prematurely filed.

WHEREFORE, premises considered, the CIR's Petition for Review docketed as CTA EB No. 521 is hereby **GRANTED**, while VGPC's Petition for Review docketed as CTA EB No. 520 is hereby **DISMISSED**. Accordingly, the Decision of this Court in Division dated February 26, 2009, ordering the CIR to refund or to issue a tax credit certificate in favor of VGPC in the amount of P16,084,459.81, representing the latter's unutilized input VAT for the period covering the four quarters of 2004 and the Resolution dated July 31, 2009 is **SET ASIDE** and another one is hereby entered denying VGPC's entire input VAT claim.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were 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

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 521** (CTA Case No. 7394)
- versus -	Present: *Acosta, P.J. Castañeda, Jr., Bautista, Uy, Casanova, Palanca-Enriquez, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, JJ.*
VISAYAS GEOTHERMAL POWER COMPANY, Respondent.	Promulgated : DEC 10 2010 1:05 p.m.

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DISSENTING OPINION

BAUTISTA, J.

With the Court *En Banc* denying the Petition for Review filed by Visayas Geothermal Power Company ("VGPC"), docketed as CTA EB No. 520, on the ground that its judicial claim for the first quarter of taxable year 2004 was filed out of time, while its judicial claim for the last three quarters of the same taxable year was prematurely filed, and accordingly granted the Petition for Review filed by the Commissioner of Internal Revenue ("CIR"), docketed as CTA EB No. 521, I am compelled to vary from the said disposition considering that I maintain the view that the judicial recourse under Section 112(C)[1] of the 1997 National Internal Revenue Code ("NIRC") is directory and permissive and not mandatory nor jurisdictional as long as the claim is filed within the two (2)-year prescriptive period provided under Sections 112 and 229 of the 1997 NIRC, as amended.

It is a well-settled doctrine in statutory construction that the word *"may"* when used in a statute, is merely permissive and operates to confer discretion. It cannot be construed as having a mandatory effect.

Thus, as this Court consistently ruled, the taxpayer-claimant has the option of seeking judicial redress for refund of excess or unutilized input value-added tax ("VAT") attributable to zero-rated sales or effectively zero-rated sales with this Court either within thirty (30) days from receipt of the denial of its claim for refund or tax credit, or after the lapse of the one hundred twenty (120)-day period in the event of inaction by the CIR; provided that both the administrative and judicial remedies must be undertaken within the 2-year period.

It is to be stressed further that if the 2-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the CIR or its inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal

[1] As Amended by Republic Act No. 9337.

with this Court.[2] Otherwise, the claim for refund of unutilized input tax attributable to zero-rated sales or effectively zero-rated sales will be time-barred.

Likewise, the factual milieu present in the case at bench should be considered in determining the timeliness of the filing of VGPC's claim.

When VGPC's filed its administrative claims for refund on June 7, 2005 covering the first quarter of the taxable year 2004, and on December 19, 2005 covering the last three quarters of the same taxable year, and the consequent Petition for Review with this Court on December 29, 2005, the then well-established doctrine adopted in numerous decisions is that enunciated in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* (*"Atlas case"*),[3] wherein the 2-year prescriptive period within which to file both the administrative and judicial claim is reckoned not from the close of the pertinent quarter but from the date of filing of the VAT return.

In the case of *Co. v. Court of Appeals*,[4] the Supreme Court aptly elucidated the prospectivity principle of judicial decisions to wit:

> The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . .'"
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> So did this Court hold, for example, in *Peo. v. Jabinal*, 55 SCRA 607, 611:
>
>> It will be noted that when appellant was appointed Secret Agent by the Provincial Government in 1962, and Confidential Agent by

[2] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009, Commissioner of Internal Revenue *v.* San Roque Power Corporation, CTA EB No. 408, March 25, 2009, Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[3] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[4] G.R. No. 100776, October 28, 1993, 277 SCRA 444.

> the Provincial Commander in 1964, the prevailing doctrine on the matter was that laid down by Us in *People v. Macarandang* (1959) and *People v. Lucero* (1958). Our decision in *People v. Mapa*, reversing the aforesaid doctrine, came only in 1967. The sole question in this appeal is: should appellant be acquitted on the basis of Our rulings in *Macarandang* and *Lucero*, or should his conviction stand in view of the complete reverse of the Macarandang and Lucero doctrine in Mapa? . . .
>
> Decisions of this Court, although in themselves not laws, are nevertheless evidence of what the laws mean, and this is the reason why under Article 8 of the New Civil Code, "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . ." The interpretation upon a law by this Court constitutes, in a way, a part of the law as of the date that law was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the law thus construed intends to effectuate. The settled rule supported by numerous authorities is a restatement of the legal maxim "*legis interpretation legis vim obtine*" — the interpretation placed upon the written law by a competent court has the force of law. The doctrine laid down in *Lucero* and *Macarandang* was part of the jurisprudence, hence, of the law of the land at the time appellant was found in possession of the firearm in question and where he was arraigned by the trial court. **It is true that the doctrine was overruled in the Mapa case in 1967, but when a doctrine of this Court is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted on the faith thereof.** This is especially true in the construction and application of criminal laws, where it is necessary that the punishment of an act be reasonably foreseen for the guidance of society. *(Boldfacing supplied)*

Therefore, while rulings of the Supreme Court are laws in their own right for they interpret what the law says or mean,[5] and that pursuant to Article 8 of the Civil Code which expressly provides that "judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines," it is still subject to Article 4 of the same Code which states that "laws shall have no

[5] Philippine Veterans Affairs Office *v.* Segundo, G.R. No. L-51570, August 15, 1988, 164 SCRA 365.

retroactive effect unless the contrary is provided." It follows then that the principle of prospectivity of statutes, original or amendatory, shall also apply to judicial decisions, which although in themselves are not laws, are nevertheless evidence of what the law means.[6]

Guided by the doctrine that rulings of the court modifying or reversing a doctrine or principle, operates prospectively, and rights acquired under such doctrine or principle prior to its modification or reversal may not be affected thereby,[7] it is my opinion that the ruling in the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*,[8] wherein the 2-year prescriptive period within which to make a claim for refund or tax credit is from the close of the taxable quarter when the sales were made, should be applied prospectively *i.e.*, only to administrative and judicial claims filed after September 12, 2008. With this, the *Atlas case* should be applied in the case at bench.

Based on the records of the case, VGPC filed its Quarter VAT Returns as follows:

2004 Taxable Quarter	Date of Filing of the VAT Return
1st Quarter	April 24, 2004
2nd Quarter	July 26, 2004
3rd Quarter	October 25, 2004
4th Quarter	January 25, 2005

From the foregoing, VGPC has 2-years from the filing of the Original VAT Returns within which to make its administrative and judicial claims for refund or tax credit.

[6] Filoteo, Jr. *v.* Sandiganbayan, G.R. No. 79543, October 16, 1996, 263 SCRA 222.
[7] People *v.* Jabinal, G.R. No. 30061, February 27, 1974, 55 SCRA 607.
[8] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

Pursuant to my discussion, I find the administrative claims filed on June 7, 2005 and December 19, 2005, and the Petition for Review filed on December 29, 2005 to be made within the prescribe periods.

Accordingly, I vote for that the Petition for Review filed by Visayas Goethermal Power Company be **GIVEN DUE COURSE**, while the Petition for Review filed by the Commissioner of Internal Revenue be **DISMISSED**.

LOVELL R. BAUTISTA
Associate Justice