Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

DEUTSCHE KNOWLEDGE SERVICES PTE LTD.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 667
(CTA Case No. 7979)

For: Refund or Issuance of a Tax Credit Certificate

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

Promulgated:
SEP 16 2011 9:00 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Section 18 of Republic Act (RA) No. 1125, as amended, as well as under *Section 2(a)(1), Rule 4,* in relation to *Section 4(b), Rule 8 of the 2005 Revised Rules of the Court of Tax* Appeals, as amended, of the Resolutions dated April 12, 2010[1] and July 20, 2010[2], respectively, rendered by the First Division[3] of this Court.

Petitioner seeks a reversal of the aforementioned Resolutions, the dispositive portions of which, respectively, read as follows:

Resolution dated April 12, 2010:

> "WHEREFORE, the Motion to Dismiss dated October 15, 2009, filed by respondent Commissioner of Internal Revenue, is hereby GRANTED. Consequently, the instant Petition for Review is hereby DISMISSED.
>
> SO ORDERED."

Resolution dated July 20, 2010:

> "WHEREFORE, premises considered, the Motion for Reconsideration (Re: Resolution dated April 12, 2010) filed by petitioner on April 30, 2010, is hereby DENIED for lack of merit.
>
> SO ORDERED."

The antecedent facts as culled from the records of the case are as follows:

Petitioner is licensed to do business as a regional operating headquarters in the Philippines by the Securities and Exchange Commission on April 25, 2005.[4] It is registered with the BIR as a VAT

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[1] *En Banc* Docket, pp. 54-60.
[2] *Id.* at 68-75.
[3] Approved by Presiding Justice Ernesto D. Acosta and Associate Justice Esperanza R. Fabon-Victorino, with Dissenting Opinion signed by Associate Justice Erlinda P. Uy.
[4] *En Banc* Docket, p. 8.

registered taxpayer with Taxpayer Identification No. (TIN) 238-763-115-000.[5]

Respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office, among others, the duty to act upon and approve claims for refund or tax credit as provided by law, with office address at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On the 3rd quarter of the taxable year 2007, petitioner allegedly rendered services in the Philippines to persons engaged in business conducted outside the Philippines, the payments for which were made in Euro and other acceptable foreign currency and accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas*.[6]

On October 18, 2007, petitioner filed with the BIR its original Quarterly VAT Return for the 3rd quarter of the taxable year 2007.[7] On November 17, 2007, petitioner filed an amended Quarterly VAT return for the 3rd quarter of the taxable year 2007.[8]

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[5] *Id.*
[6] *En Banc* Docket, p. 9.
[7] *Id.*
[8] *Id.*

For the 3rd quarter of the taxable year 2007, petitioner allegedly accumulated excess input VAT in the total amount of Fourteen Million Two Hundred Seventeen Thousand Two Hundred Twenty Two Pesos and Eighty Seven Centavos (**PHP**14,217,222.87) attributable to zero-rated sales which, to date, has remained unutilized and/or unapplied against petitioner's output VAT liability.[9]

On September 18, 2009, petitioner filed with the BIR-Revenue District Office No. 47 an Application for Tax Credits/Refunds (BIR Form No. 1914) of its excess and unutilized input VAT for the 3rd quarter of the taxable year 2007 in the amount of **PHP**14,217,222.87.[10]

On September 30, 2009, petitioner filed a Petition for Review before this Court in order to toll the running of the prescriptive period under *Section 229 of the National Internal Revenue Code of 1997, as amended* (the "*Tax Code*")[11]

On October 19, 2009, instead of filing an Answer, respondent filed a Motion to Dismiss the petition on the ground of lack of cause of action due to failure to exhaust administrative remedies.[12] She posits that the petition for review was prematurely filed before the Court of

[9] *En Banc* Docket, p. 10.
[10] *Id.*
[11] Division Docket, p. 5.
[12] *Id.* at 50-53.

Tax Appeals because the same was filed prior to the lapse of the 120-day period provided under *Section 112(C), Tax Code* for her to decide or act on the claim for tax refund/credit. Hence, she was not given sufficient time to act on the administrative claim for tax refund/credit.

On December 14, 2009, petitioner filed its Comment/Opposition (To Respondent's Motion to Dismiss Dated October 15, 2009) (With Motion to Declare Respondent in Default).[13] It alleges that respondent's filing of the Motion to Dismiss was in defiance of this Court's order to file an Answer instead of a Motion to Dismiss; hence, such failure to file an Answer is sufficient basis to declare respondent in default pursuant *to Sec. 3, Rule 9, Revised Rules of Court*.[14] Further, it asseverates that the filing of a petition for review before this Court prior to the lapse of 120-day period under *Sec. 112(C), Tax Code* is not fatal to its claim for refund and neither is it a violation of the doctrine of exhaustion of administrative remedies.[15]

Petitioner argues that the prevailing jurisprudence is that the 120-day period under *Section 112(C), Tax Code* is neither mandatory nor compulsory, and may be dispensed with as long as the claims for refund are filed within the two-year period prescribed under *Section*

[13] *Id*. at 60-85.
[14] *Id*. at 61.
[15] *Id*.

229, *Tax Code*.[16] Significantly, petitioner points out that respondent herself has made contemporaneous pronouncements on the non-mandatory nature of the periods stated under *Section 112(C), Tax Code* by way of issuance of various revenue regulations.[17]

On April 12, 2010, this Court's First Division rendered a Resolution[18] granting respondent's Motion to Dismiss and accordingly dismissed the Petition for Review based on lack of jurisdiction. The Court *a quo* held that the two-year prescriptive period under *Section 112(A), Tax Code* defines the limit for filing an administrative claim for tax refund or credit for input taxes with the Commissioner of Internal Revenue and not resort to Court action;[19] whereas, *Section 229, Tax Code* covers refund of internal revenue taxes other than input value-added tax, erroneously or illegally assessed or collected, penalties imposed without authority and any sum alleged to have been excessive or in any manner wrongfully collected.[20] Thus, the Court *a quo* concluded that it is only upon denial or the expiration of the allowable period of 120 days without any action on the part of respondent that petitioner may, with the period of 30 days from notice, invoke the Court's competence to

[16] Division Docket, p. 65.
[17] *Id.* at 77-82, *citing* Revenue Regulations No. 7-95; Revenue Regulations 16-05; Revenue Memorandum Circular No. 49-03; Revenue Memorandum Circular No. 029-09.
[18] *Id.* at 90-96.
[19] *Id.* at 94.
[20] *Id.* at 95.

hear its petition for review.[21] Prior to that, the Court has no jurisdiction to entertain petitioner's appeal.[22]

Petitioner filed a motion for reconsideration of the above-cited Resolution, which was subsequently denied in a Resolution[23] dated July 20, 2010.

Hence, petitioner filed the instant Petition for Review before the Court *En Banc* on August 26, 2010.[24] Respondent, on the other hand, failed to file her Comment to the Petition for Review.[25]

Petitioner raised the following arguments before the Court *En Banc*, to wit:

1. The CTA-Division erred in not granting petitioner's Motion to Declare Respondent in Default and failing to consider that respondent had defied the CTA-Division's order to file an Answer, instead of a motion to dismiss. Therefore, such failure to file an answer should be sufficient basis to declare respondent in default;[26] and

2. Petitioner's filing of its Petition for Review before the 120-day period under Section 112(c), Tax Code, has lapsed is not fatal to its claim for refund and does not render the Petition for Review dismissible.[27] ℓ

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[21] *Id.*
[22] *Id.*
[23] *Id.* at 164-171.
[24] The Petition for Review was filed within the extended period granted by the Court *En Banc* in a Resolution dated August 12, 2010.
[25] As per Records Verification Form dated November 3, 2010, *En Banc* Docket, p. 84.
[26] *En Banc* Docket, pp. 16-21.
[27] *Id.* at 21-46.

The principal issue is whether or not the taxpayer's compliance with the 120 and 30-day period provided under *Section 112(C), Tax Code,* is mandatory and jurisdictional. Hence, the crux of the controversy lies on the correct interpretation of *Sections 112(C) and 229, Tax Code* insofar as the prescriptive period for the filing judicial claims for unutilized input VAT refund/credit is concerned.

Petitioner strongly argues that the law confers a full two-year period within which to file both its administrative and judicial claims for tax refund/credit as the prevailing jurisprudence [28] on the matter provides that the 120-day period under *Section 112(C), Tax Code* is neither mandatory nor compulsory, and may be dispensed with as long as claims for refund are filed within the two-year period prescribed under *Section 229 of the same Code*.[29] Further, petitioner submits that *Section 112(C), Tax Code,* merely deals with VAT and the periods within which respondent shall grant a refund or issue a tax credit, and does not deal with the period within which a taxpayer can go to court and seek judicial remedy; whereas, *Section 229, Tax Code,* specifically provides that no suit or proceeding shall be maintained in any court for

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[28] *Citing* CTA En Banc's Decision on *CE Luzon Geothermal Power Company, Inc. v. Commissioner of Internal Revenue / Commissioner of Internal Revenue v. CE Luzon Geothermal Power Company, Inc.*, CTA EB Nos. 553 and 554, July 20, 2010.
[29] *En Banc* Docket, p. 22.

the recovery of taxes erroneously or illegally collected.[30] Hence, petitioner concludes that *Section 112 (C), Tax Code* should be harmonized with *Section 229 of the same Code*, which gives the taxpayer the benefit of the full two-year period from the date of payment of the tax within which to file its judicial claim for refund before the Court of Tax Appeals.[31]

We find no merit in petitioner's argument.

It is worthy of emphasis that the pivotal issue of when to file administrative and judicial claims for unutilized input VAT refund/credit is no longer novel as the Supreme Court has already settled the said issue in the recent case of ***Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc***. (the "***Aichi Case***").[32]

As to the prescriptive period for filing an administrative claim for unutilized input VAT refund/credit, the Supreme Court in the ***Aichi Case*** reiterated its ruling in the case of ***Commissioner of Internal Revenue v. Mirant Pagbilao Corporation***[33] that *Section 112(A), Tax Code is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT and not Sections 204(C)*

[30] *Id.* at 23-24.
[31] *Id.* at 24.
[32] G.R. No. 184823, October 6, 2010.
[33] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

and 229, Tax Code, which apply only to instances of erroneous payment or illegal collection of internal revenue taxes. Thus, the two-year period for claiming unutilized input VAT refund/credit before the Commissioner of Internal Revenue should be reckoned from the close of the taxable quarter when the sales were made. Thus, it ruled that:

> "The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [G.R. No. 172129, September 12, 2008, 565 SCRA 154]*, where we ruled that **Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.** xxx" [Emphasis supplied.]

On another score, in determining the period on when to file a judicial claim for unutilized input VAT refund/credit before the Court of Tax Appeals, *Section 112(C), Tax Code* is applicable, which reads:

> "Sec. 112(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.
>
> 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.]

In interpreting the foregoing provision, the Supreme Court in the ***Aichi Case*** clearly delineated the procedure insofar as judicial appeal before the Court of Tax Appeals is concerned, thus:

> "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.**" [Emphasis supplied.]

Moreover, in the same case, the Supreme Court categorically ruled that *the 120-day period under Section 112(D) (now, Section 112[C]), Tax Code, for the Commissioner of Internal Revenue to act on administrative claims for unutilized input VAT refund/credit is crucial in filing an appeal to the Court of Tax Appeals.* The pertinent portion of the said decision reads:

> "Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis.
>
> There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two years** after the close of the taxable quarter when the sales were made, **apply for the issuance of a tax credit certificate or refund** of creditable input tax due or paid attributable to such sales." **The phrase "within two (2) years x x x apply for the issuance of a tax credit certificate or refund" refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA.** This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has "120 days

from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)" within which to decide on the claim.

In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. **The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA.** As we see it then, **the 120-day period is crucial in filing an appeal with the CTA.**

With regard to *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc. [130 Phil. 12 (1968)]* relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.

In fine, **the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA."** [Emphasis supplied.]

Consequently, it is clear that compliance with the 120-day period provided under *Section 112(C), Tax Code,* is mandatory and jurisdictional. Thus, the inescapable conclusion is that *petitioner can only invoke the jurisdiction of this Court within the period of 30 days reckoned from the notice of denial or expiration of the 120-day period without any action on the part of respondent. Failure to heed the mandatory period of 120 and 30-days is crucial to its appeal and warrants a dismissal on the ground of lack of jurisdiction to hear and decide petitioner's appeal.*

In the instant case, petitioner filed its administrative claim for tax refund/credit of its excess and unutilized input VAT for the 3rd quarter of the taxable year 2007 with the BIR on September 18, 2009.[34] Clearly then, petitioner timely filed its administrative claim with the BIR, within two (2) years reckoned from the close of the taxable quarter when the sales were made.

As to its judicial claim, however, petitioner filed a Petition for Review before this Court in Division on September 30, 2009[35] or barely a month after petitioner filed its application for refund with the BIR. Indisputably, petitioner failed to comply with the mandatory period of 120 and 30 days under *Section 112(C), Tax Code*, which is crucial in filing an appeal before the Court of Tax Appeals, as held in the ***Aichi Case***.

Hence, the filing of petitioner's claim for unutilized input VAT refund/credit before the Court *a quo* was premature as there was no CIR decision for this Court to review nor was there inaction on the part of the CIR after the lapse of the 120-day period provided under *Section 112(C), Tax Code*. Therefore, the petition for review filed before this Court warrants a dismissal on the ground of absence of jurisdiction to take cognizance of the case.

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[34] Division Docket, p. 7.
[35] *Id.* at 5.

It is axiomatic that the "Court of Tax Appeals is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction."[36] A close scrutiny of ***Section 7 of Republic Act (R.A.) No. 9282***, *amending R.A. No. 1125, otherwise known as the Law Creating the Court of Tax Appeals*[37] *and* ***Section 3, Rule 4 and Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals***[38]

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[36] *Rizal Commercial Banking Corp. vs. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007, 522 SCRA 144.

[37] Sec. 7. *Jurisdiction.* — The CTA shall exercise:

> (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 or other laws administered by the Bureau of Internal Revenue;
>
> (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 of action, in which case the inaction shall be deemed a denial;
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> x x x

[38] *Rule 4*, Section 3. *Cases Within the Jurisdiction of the Court in Division.*- The Court in Division shall exercise:

> (a) Exclusive original or appellate jurisdiction to review by appeal the following:
>
> (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;
>
> (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

reveals that the jurisdiction of the Court of Tax Appeals has been expanded to include not only decisions or rulings but inaction as well of the Commissioner of Internal Revenue. Evidently, *the decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal,*[39] *specifically on claim for refund, provided it is filed within 30 days after the receipt of such decision or ruling, or within 30 days after the*

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arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code or other applicable law provides a specific period for action: Provided, that in case of disputed assessments, the inaction of the Commissioner of Internal Revenue within the one hundred eighty day-period under Section 228 of the National Internal Revenue Code shall be deemed a denial for purposes of allowing the taxpayer to appeal his case to the Court and does not necessarily constitute a formal decision of the Commissioner of Internal Revenue on the tax case; Provided, further, that should the taxpayer opt to await the final decision of the Commissioner of Internal Revenue on the disputed assessments beyond the one hundred eighty day-period abovementioned, the taxpayer may appeal such final decision to the Court under Section 3(a), Rule 8 of these Rules; and Provided, still further, that in the case of claims for refund of taxes erroneously or illegally collected, the taxpayer must file a petition for review with the Court prior to the expiration of the two-year period under Section 229 of the National Internal Revenue Code;

x x x

Rule 8, Section 3. Who may appeal; period to file petition. --

(a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.

[39] *Supra* note 36.

expiration of the 120-day period fixed by law for the Commissioner to act on claim for refund.[40] This 30-day period after the receipt of such decision or ruling, or inaction on the part of the CIR after the expiration of the 120-day period, within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction to entertain and determine the appeal or petition for review. Said period is not merely directory but mandatory and it is beyond the power of the courts to extend or shorten the same.

Further, jurisprudence is replete with cases in holding that "the right to appeal is not a natural right or a part of due process, it is merely a statutory privilege, and the same may be exercised only in the manner and in accordance with the provisions of law. The party who seeks to avail of the same must comply with the requirements of the law. Failing to do so, the right to appeal is lost."[41]

Finally, anent petitioner's argument that the Court *a quo* should have granted its motion to declare respondent in default on the

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[40] *See Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., supra* note 32.

[41] *Producers Bank of the Phil. vs. Court of Appeals*, G.R. No. 126620, 381 SCRA 185, April 17, 2002 *citing Ortiz vs. Court of Appeals*, 299 SCRA 708 (1998).

ground that the latter filed a Motion to Dismiss instead of an Answer, the same must necessarily fail.

Jurisdiction is defined as the authority to try, hear and decide a case.[42] Moreover, that jurisdiction of the court over the subject matter of the action is a matter of law and it may not be conferred by consent or agreement of the parties.[43] In fact, the lack of jurisdiction of a court may be raised at any stage of the proceedings, even on appeal.[44] Hence, where the court itself clearly has no jurisdiction over the subject matter, the action shall be dismissed.[45]

Section 1, Rule 9, Revised Rules of Court, aptly provides that when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter of the case, the court shall dismiss the claim, regardless of whether or not the same was pleaded either in a motion to dismiss or in the answer, thus:

> "Section 1. *Defenses and objections not pleaded.* – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, **when it appears from the pleadings or the evidence on record that the**

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[42] *Fort Bonifacio Development Corporation v. Hon. Edwin D. Sorongon, et al.*, G.R. No. 176709, May 8, 2009 *citing Tolentino v. Leviste*, G.R. No. 156118, 19 November 2004, 443 SCRA 274, 284; *Toyota v. The Director of the Bureau of Labor Relations*, 363 Phil. 437 (1999); *Zamora v. Court of Appeals*, G.R. No. 78206, 19 March 1990, 183 SCRA 279.
[43] Justice Jose Y. Feria and Maria Concepcion S. Noche, Civil Procedure Annotated, Vol. I, 2001 Ed., p. 318.
[44] *Id.*
[45] *La Naval Drug Corporation vs. Court of Appeals*, G.R. No. 103200, 31 August 1994 *citing* Section 2, Rule 9, Rules of Court (now, Section 1, Rule 9, Revised Rules of Court).

> **court has no jurisdiction over the subject matter**, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, **the court shall dismiss the claim.**" [Emphasis supplied.]

Evidently, the court can *motu proprio* dismiss the claim on the ground of lack of jurisdiction over the subject matter of the case. This belies petitioner's claim that the Court *a quo* should have declared respondent in default on the ground that the latter filed a Motion to Dismiss instead of an Answer.

WHEREFORE premises considered, the petition is **DENIED**. The Resolutions of the First Division of this Court in CTA Case No. 7979 dated April 12, 2010 and July 20, 2010 are hereby **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

DEUTSCHE KNOWLEDGE SERVICES, PTE. LTD., Petitioner,	**CTA EB CASE NO. 667** (CTA Case No. 7979)
- *versus* -	Present: *Acosta, P.J.* *Castañeda, Jr.,* *Bautista,* *Uy,* *Casanova,* *Palanca-Enriquez,* *Fabon-Victorino,* *Mindaro-Grulla, and* *Cotangco-Manalastas, JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 16 2011 9:00 a.m.

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Dissenting Opinion

BAUTISTA, J.:

While the Court *En Banc* denied the present Petition for Review, and accordingly, affirmed the assailed Resolutions of the First Division of the Court ("Court in Division") dated April 12, 2010 and July 20, 2010, which dismissed the Petition for Review before the Court in Division on the ground of lack of jurisdiction, I, on the other hand, opts to uphold the pronouncements made in the cases of

Commissioner of Internal Revenue v. Toledo Power, Inc.,[1] and *Commissioner of Internal Revenue v. San Roque Power Corporation*.[2]

A plain reading of Section 112 of the 1997 National Internal Revenue Code ("NIRC"), as amended, will show that the provision use the word "*may*" instead of a more restrictive or mandatory term.[3]

Since it is well-settled that the word "*may*" when used in a statute, is merely permissive and operates to confer discretion, the same word incorporated in Section 112 of the 1997 NIRC, particularly paragraph (C) thereof, should be construed as permissive and not restrictive in nature. And consistent with the provision's permissive nature, the preceding paragraph, specifically paragraph (A), likewise use the same word in stating that a "VAT-registered person whose sales are zero-rated or effectively-zero-rated *may* apply for the issuance of a tax credit certificate or refund xxx".

Therefore, the judicial recourse to this Court within thirty (30) days after the lapse of the one hundred twenty (120)-day period is merely directory and permissive, and not mandatory nor jurisdictional, however, subject only to the period provided under the same provision, *i.e.*, within two (2) years after the close of the taxable quarter when the sales were made.

With this, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim or the inaction by the Commissioner of

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[1] CTA EB No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.
[2] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.
[3] As amended by Republic Act No. 9337.

Internal Revenue after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[4]

Thus, it must be borne in mind that no claim can be had, whether in the administrative or judicial fora, beyond the two (2)-year period provided under Section 112 of the 1997 NIRC, as amended.

Based on the records of the case, the present claim involves a claim for refund of excess and unutilized input tax for the period covering the third (3rd) quarter of the calendar year 2007, or from July 1, 2007 to September 30, 2007, in the amount of ₱14,217,222.87.

Applying the foregoing, petitioner had until September 30, 2009, within which to file *both* its administrative and judicial claims.

Considering that petitioner filed its administrative claim on September 18, 2009, and its Petition for Review on September 30, 2009, I find the same to be made within the prescribed period.

Accordingly, I vote that the Petition for Review, claiming for refund of unutilized input value-added tax for the period covering the third (3rd) quarter of the calendar year 2007, in the amount of ₱14,217,222.87 be **GIVEN DUE COURSE.**

LOVELL R. BAUTISTA
Associate Justice

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[4] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.