REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PHILEX MINING CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 790
(C.T.A. CASE NO. 8003)

Present:

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

Promulgated:

MAY 14 2012 9:30 a.m.

x -- x

DECISION

PALANCA-ENRIQUEZ, J.:

Settled is the rule that jurisdiction over the subject matter in a judicial proceeding is conferred by the sovereign authority which establishes and organizes the court. It is given only by law and in the manner prescribed by law *(Hasegawa vs. Kitamura, 538 SCRA 274, citing U.S. vs. De La Santa, 9 Phil. 22, 25-26)*.

THE CASE

This is a Petition for Review filed by Philex Mining Corporation (hereafter "petitioner") under *Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks to reverse the Resolutions dated April 1, 2011 and June 1, 2011 rendered by the Second Division of this Court in C.T.A. Case No. 8003, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, premises considered, respondent's **Motion to Dismiss** is hereby **GRANTED**. Accordingly, the Petition for Review docketed as CTA Case No. 8003 is **DISMISSED** for having been prematurely filed.
>
> **SO ORDERED**."
>
> "**WHEREFORE,** premises considered, petitioner's Motion for Reconsideration is **DENIED** for lack of merit.
>
> **SO ORDERED**."

THE PARTIES

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines, which is principally engaged in the mining business, which includes the exploration and operation of mining properties for commercial production and marketing of mine products, with principal office at Brixton Street, Pasig City.

Respondent, on the other hand, is the duly appointed government official charged with the administration and enforcement of national internal revenue laws, including the duty to act on claims for tax refund or tax credit, as provided by law, with office address at the BIR National Office Bldg., Agham Road, Diliman, Quezon City.

THE FACTS

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

On January 23, 2008, petitioner filed its original VAT return for the 4th quarter of 2007. Petitioner subsequently filed an amended return on September 14, 2009, which reflected total zero-rated sales of P2,739,168,147.07, importation of goods of P151,125,625.00 with input

Obl

tax of P18,135,075.00, and purchases of services of P9,343,919.90 with input tax of P1,121,270.39.

On October 23, 2009, petitioner filed its administrative claim for refund/tax credit with the One Stop Shop Center of the Department of Finance for the excess input taxes for the 4th quarter of 2007 in the amount of P19,256,345.39.

On December 2, 2009, petitioner filed a Petition for Review with this Court, docketed as C.T.A. Case No. 8003, praying for the refund of the amount of P19,256,345.39, representing petitioner's excess and unutilized input taxes for the 4th quarter of 2007.

In her Answer, respondent CIR alleged the following special and affirmative defenses:

> "5. He reiterates and re-pleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses;
>
> 6. Petitioner's claim for tax refund is subject to administrative investigation/examination by respondent's Bureau;
>
> 7. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable.
>
> 8. Moreover, in order to validly claim for tax refund, it is imperative for petitioner to prove its compliance with the following, *viz*:

a. The registration requirements of a value-added taxpayer under the pertinent provision of the 1997 NIRC, as amended, and its implementing revenue regulations.

b. The invoicing and accounting requirements for VAT-registered persons, as well as the filing and payment of VAT pursuant to the provisions of Sections 113 and 114 of the 1997 NIRC, as amended. Failure to comply with the invoicing requirements on the documents supporting the sale of goods and services will result in the disallowance of the claim for input tax of the taxpayer claimant *(Revenue Memorandum Circular No. 42-2003)*.

c. The submission of complete documents in support of the administrative claim for tax refund pursuant to Section 112 (C) of the 1997 NIRC, as amended, otherwise, there would be no sufficient compliance with regard to the filing of administrative claim for tax refund which is a condition *sine qua non* prior to the filing of such claim.

d. That the input taxes of P19,356,345.39 allegedly representing unutilized input VAT from its purchases of imported goods and domestic services attributed/allocated to its export sales, were:

   i. Paid by petitioner;
   ii. Attributable to its zero-rated or effectively zero-rated sales; and,
   iii. Such input taxes paid should not have been applied against any output tax.

e. That petitioner's claim for tax refund allegedly representing unutilized input VAT in the amount of P19,356,345.39 was filed within two (2) years after the close of the taxable quarter when the sales were made in

OlU

accordance with Section 112 (A) of the 1997 NIRC, as amended.

9. In an action for tax refund, the burden of proof rests upon the taxpayer to establish by sufficient and competent evidence its entitlement to a claim for refund.

10. Finally, basic is the rule that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the entity claiming the same *(Philippine Geothermal, Inc. vs. Commissioner of Internal Revenue, G.R. No. 154028, July 27, 2005)*. Moreover, statutes in derogation of sovereignty such as those containing exemption from taxation should be strictly construed in favor of the State. In this regard, taxation is the rule and exemption is the exception. The law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted *(Sea-Land Service, Inc. vs. Court of Appeals, 357 SCRA 444)*."

Petitioner presented Eileen C. Rodriguez and Albert Alba, as witnesses, and documentary evidence, marked as *Exhibits "A" to K-16*", which were admitted by the Court in its Resolution dated December 7, 2010, except for *Exhibits "I-40"* and *"L" and "L-1"*.

After petitioner rested its case, on February 24, 2011, respondent CIR filed a "Motion to Dismiss" anchored on the ground that the judicial claim was prematurely filed before the Second Division, in violation of *Section 112 (C) of the NIRC of 1997, as amended*, and the case of

Cue

Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., 632 SCRA 422.

On March 11, 2011, petitioner filed its "Comment (On Respondent's Motion to Dismiss)" alleging that the motion was filed late; respondent is deemed to have waived her defense of premature filing of the Petition for Review; and assuming that the motion was not filed late, still it should be denied because the Petition for Review was not prematurely filed on the basis of prevailing jurisprudence that petitioner relied on in good faith at the time it filed the Petition for Review.

On April 1, 2011, the Second Division issued the assailed Resolution granting the Motion To Dismiss.

On April 19, 2011, petitioner filed a "Motion for Reconsideration", which was denied for lack of merit in a Resolution dated June 1, 2011.

Hence, the instant Petition for Review raising the following:

ISSUES

I

THE SECOND DIVISION ERRED IN NOT RULING THAT RESPONDENT IS DEEMED TO HAVE WAIVED THE DEFENSE OF PREMATURE FILING OF THE JUDICIAL CLAIM WITH THE CTA,

PURSUANT TO RULE 9, SECTION 1, OF THE RULES OF COURT; THUS, THE SECOND DIVISION COULD ENTERTAIN AND EXERCISE JURISDICTION OVER THE CASE AND RIGHTFULLY RENDER A DECISION THEREON BASED ON THE EVIDENCE FORMALLY OFFERED AND ADMITTED.

II

THE SECOND DIVISION ERRED IN DENYING THE PETITION DUE TO ALLEGED PREMATURE FILING. THE FACT IS THAT THE PETITION WAS FILED WITH THE CTA WITHIN THE PERIOD SET BY PREVAILING COURT RULINGS AT THE TIME IT WAS FILED.

III

THE SECOND DIVISION ERRED IN RETROACTIVELY APPLYING THE AICHI RULING IN DENYING THE PETITION IN THIS INSTANT CASE.

On July 12, 2011, without necessarily giving due course to the petition, we required the respondent to file her comment, not a motion to dismiss, within ten (10) days from notice, and granted petitioner five (5) days from receipt of respondent's Comment to file its Reply.

On July 26, 2011, respondent filed her "Comment", without petitioner's Reply.

Ael

In a Resolution dated August 18, 2011, we ordered both parties to file their simultaneous memoranda, within thirty (30) days from notice, afterwhich, the case shall be deemed submitted for decision.

On September 21, 2011, petitioner filed its Memorandum.

Despite notice, respondent failed to file her memorandum. Thus, the petition was deemed submitted for decision on November 15, 2011.

Petitioner Philex Mining Corporation's Arguments

Petitioner contends that under *Section 1, Rule 9 of the 1997 Rules of Civil Procedure, as amended*, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. Here, respondent did not file a Motion to Dismiss before filing her answer. Also, respondent did not plead in the answer as a special and affirmative defense the failure of the petition to state a cause of action due to premature filing. Such being the case, respondent is deemed to have waived this defense; hence, the Second Division could entertain the case and exercise jurisdiction over it, and can render a decision thereon on the merits.

Petitioner also argues that it was an error on the part of the Second Division to dismiss or deny the petition due to premature filing. *Section 1 of Rule 9* mentions only three grounds where the court may deny a claim or petition even if such ground is not pleaded in the motion to dismiss or in the answer. The first covers cases where the court has no jurisdiction over the subject matter. In the instant case, the subject matter is "refund of internal revenue taxes", as provided in *Section 7 of RA 1125*, which provides: "Sec. 7. Jurisdiction. The CTA shall exercise: (a) Exclusive appellate jurisdiction to review by appeal, as herein provided: (1) xxx (2) Inaction by the Commissioner of Internal Revenue in cases involving xxx refunds of internal revenue taxes, fees or other charges, xxx". Based on this provision, the CTA has jurisdiction over the subject matter.

Further, the Second Division, citing *Section 112 (D), (*now *112 (C) of the NIRC, as amended),* and the recent decision of the Supreme Court in the Aichi case, ruled that the Petition for Review was prematurely filed as it was filed before the lapse of the 120-day period stated in *Section 112 (C)* for the respondent to act on the administrative claim. However, long before, on the date, and even after petitioner filed with the CTA the

abl

Petition for Review in this case, the prevailing ruling that was followed in the CTA was, claims for refund or tax credit of input VAT, both in the administrative and judicial levels, must be filed within two years counted from the date of filing of the corresponding VAT return, as ruled in the Atlas case on July 20, 1998. When petitioner filed its Petition for Review on December 2, 2009, the Atlas case was the most recent and prevailing jurisprudence that governed prescriptive period for filing judicial claims for input VAT refund.

Petitioner should not be penalized for simply following in good faith the prevailing rule at that time.

<u>Respondent CIR's Counter-Arguments</u>

Respondent counter-argues that *Section 1, Rule 9 of the 1997 Rules of Civil Procedure, as amended*, provides that "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 court has no jurisdiction over the subject matter, xxx the court shall dismiss the claim"; that courts are bound to take notice of the limits of their authority, and they may, by their own motion, even though

Ofl

the question is not raised in the pleadings, or not even suggested by counsel, recognized the want of jurisdiction and act accordingly; that the mandate of *Section 112 (C) of the NIRC of 1997, as amended,* is very clear that respondent has 120 days from the date of the submission of 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, the taxpayer's recourse is to file an appeal before the CTA, within 30 days from receipt of the decision. If after the expiration of the 120-day period, the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal such inaction to this Court, within 30 days. Assuming that petitioner was penalized and made to suffer when the Second Division retroactively applied the Aichi case, the Second Division was just abiding with the ruling of the Supreme Court, being the court of last resort and final arbiter of all legal questions.

THE COURT *EN BANC'S* RULING

The petition has no merit.

<u>The issue of lack of jurisdiction may be raised at any stage of the proceedings</u>

Section 1, Rule 9 of the 1997 Rules of Civil Procedure, as amended, provides:

> "SEC. 1. Defenses and objections not pleaded. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. **<u>However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter</u>**, 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, **<u>the court shall dismiss the claim</u>**." *(Emphasis supplied)*

Pursuant to the above provision, when the court has no jurisdiction over the subject matter, the court shall dismiss the claim.

Corollary thereto, the general rule remains that a court's lack of jurisdiction may be raised at any stage of the proceedings, even on appeal *(Francel Realty Corporation vs. Sycip, 469 SCRA 431)*.

In the case of *Municipality of Sta. Fe vs. Municipality of Aritao, 533 SCRA 599*, the Supreme Court ruled that the general rule is that dismissal of a case for lack of jurisdiction may be raised at any stage of the proceedings since jurisdiction is conferred by law. The lack of jurisdiction affects the very authority of the court to take cognizance of and to render judgment on the action; otherwise, the inevitable consequence would make the court's discretion a 'lawless' thing.

In the instant case, records show that petitioner filed its administrative claim for refund or credit on October 23, 2009. However, forty (40) days thereafter, or on December 2, 2009, petitioner filed its judicial claim for refund or credit of input VAT with the Second Division, in violation of *Section 112(C) of the NIRC of 1997, as amended*, which provides that the taxpayer affected may within thirty (30) days from receipt of the decision denying the claim or after the expiration of the one hundred twenty (120)-day period for the CIR to decide, appeal the decision or the unacted claim to the CTA. Evidently, petitioner filed its judicial claim for refund or credit barely eighty (80) days before the lapse of the 120-day period on February 20, 2010.

It must be emphasized that *RA 9282, as amended,* is the law that elevated the rank of the CTA to the level of a collegiate court with special jurisdiction. Basic is the rule that jurisdiction over the subject matter in a judicial proceeding is conferred by the sovereign authority, which organizes the court; it is given only by law and in the manner prescribed

Ollle

by law *(Hasegawa vs. Kitamura, supra)*. Therefore, the jurisdiction of the CTA is limited only to those provided in *RA 9282, as amended.*

Section 7 of RA 9282, as amended, explicitly provides that the CTA shall exercise exclusive appellate jurisdiction to review by appeal **decisions** of the CIR or **inaction** by the CIR on refunds of internal revenue taxes, to wit:

> "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 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 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 xxx." *(Emphasis supplied)*

ow

Hence, contrary to petitioner's contention, the jurisdiction of the CTA in *Section 7 (a) (1) and (2)* is limited not only to "refunds of internal revenue taxes", but also to "Decisions of the Commissioner of Internal Revenue in cases involving xxx refunds of internal revenue taxes xxx" and "Inaction by the Commissioner of Internal Revenue in cases involving xxx refunds of internal revenue taxes xxx". For the CTA, therefore, to acquire jurisdiction over refunds of internal revenue taxes, there must be a decision or inaction by the CIR. Otherwise, the CTA will not acquire jurisdiction over the claim for refund or credit. In the instant case, no decision has yet been rendered by the CIR, neither was there inaction on her part, as the 120-day period to decide has not yet lapsed. Thus, the CTA has not acquired jurisdiction over petitioner's claim for refund or credit of unutilized input VAT for the 4th quarter of 2007 for having been prematurely filed.

Petitioner's contention that respondent is deemed to have waived the issue of lack of jurisdiction for failure to file a motion to dismiss before filing her answer cannot be sustained. It is a doctrinal rule that the issue of lack of jurisdiction may be raised at any stage of the proceeding.

Ob

The NIRC of 1997, as amended, is the law in force at the time petitioner filed its judicial claim for refund or credit of unutilized input VAT with the CTA

Petitioner's reliance on the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, 524 SCRA 94* ("Atlas case") that claims for refund or credit of input VAT, both in the administrative and judicial levels, must be filed within two years reckoned from the date of filing of the corresponding VAT returns, is misplaced.

The Atlas case relied on by petitioner involved a claim for refund of unutilized input VAT on purchases of capital goods and zero-rated sales covering taxable years 1990 and 1992. What was interpreted, therefore, by the Supreme Court in the Atlas case was not the *NIRC of 1997*, but the *Tax Code of 1977, as amended by EO 273.*

The *Tax Code of 1977* does not provide for a period within which to file the judicial claim for refund, unlike in the present *NIRC of 1997, as amended,* which explicitly provides for a thirty (30)-day period within which to appeal to the CTA the decision or unacted claim of the CIR after the expiration of the 120-day period to decide *(Section 112 (C) thereof)*. For

OW

this reason, in the Atlas case, the Supreme Court applied the provision of the *Tax Code of 1977* on *Recovery of tax erroneously or illegally collected*, that "In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment xxx" as regards the period to file the judicial claim for refund/credit. In this case, the Supreme Court ruled, as follows: "The very same reasons set forth in the afore-cited cases concerning the two-year prescriptive period for claims for refund of illegally or erroneously collected income tax may also apply to the petitions at bar involving the same prescriptive period for claims for refund/credit of input VAT on zero-rated sales."

In this case, records show, however, that petitioner filed its judicial claim for refund with the Second Division on December 2, 2009, covering its unutilized input taxes for the 4th quarter of 2007. Clearly, the law in force at the time petitioner filed its claim for refund is the *NIRC of 1997, as amended*, and not the *Tax Code of 1977, as amended*. Thus, the provision of *Section 112 of the NIRC of 1997, as amended*, prescribing

120-day and 30-day periods as to claim for refund or credit of unutilized input VAT, applies to petitioner.

The Second Division did not retroactively apply the Aichi ruling

Petitioner's contention that the Second Division retroactively applied the Aichi ruling is devoid of merit.

Even before the promulgation of the Aichi ruling, the requirement for the observance of the 120-day and 30-day periods has already been in existence as early as January 1, 1998, upon the effectivity of the *NIRC of 1997, as amended.*

The Aichi ruling merely clarified the provisions of *Section 112 of the NIRC of 1997, as amended*, that the phrase in *Section 112 (A)* "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. On the other hand, *Section 112 (C), as amended*, provides for the period within which to file the judicial claim with the CTA, which is, within 30 days from receipt of the decision of the CIR denying the claim, or within 30 days from the expiration of the 120-day period.

Once the Supreme Court has interpreted a law, such interpretation becomes a part of the law itself. Judicial interpretation of a statute constitutes 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. Such judicial doctrine does not amount to the passage of a new law, but consists merely of a construction or interpretation of a pre-existing one, which is the situation in this case *(Eagle Realty Corporation vs. Republic of the Philippines, 594 SCRA 558)*. Considering that *Section 112 (A)* prescribing the period to apply the claim for refund/credit within two years after the close of the taxable quarter when the sales were made, and *Section 112 (C)* prescribing the period to appeal to the CTA the decision or the unacted claim, are provisions in the *NIRC of 1997 as amended*, which were interpreted by the Supreme Court in the Aichi case, then such judicial interpretation constitutes part of the *NIRC of 1997* as of the date it took effect on January 1, 1998.

With the Aichi ruling, the Supreme Court laid down a jurisprudential precedent that must be applied in the present case in

CAW

accordance with the doctrine of *stare decisis et non quieta movere*. Follow past precedents and do not disturb what has been settled. A point of law, once established by the court, will generally be followed by the same court and by all courts of lower rank in subsequent cases in which the same legal issue is raised *(Garcia vs. J.G. Summit Petrochemical Corporation, 516 SCRA 505)*. *Stare decisis* proceeds from the first principle of justice that, absent powerful countervailing considerations, like cases ought to be decided alike *(CDCP Mining Corporation v. Commissioner of Internal Revenue, 464 SCRA 278)*.

Pursuant to the Aichi case, a violation of *Section 112(D) of the NIRC of 1997, as amended* (now subsection (C) of Section 112, as amended) warrants a dismissal inasmuch as no jurisdiction was acquired by the CTA; hence, the Second Division has not acquired jurisdiction over the Petition for Review filed in C.T.A. Case No. 8003 for having been prematurely filed.

Finding no reversible error, we affirm the assailed Resolutions dated April 19, 2011 of the Second Division granting respondent CIR's

"Motion to Dismiss" and June 1, 2011 denying petitioner's "Motion for Reconsideration" for lack of merit.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE,** and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(I concur with the Concurring and Dissenting Opinion of PJ Acosta)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

PHILEX MINING CORPORATION, *Petitioner,*	**CTA EB No. 790** **(CTA Case No. 8003)** **Members:** ACOSTA, *P.J.,* CASTAÑEDA, Jr., BAUTISTA, UY,
-versus-	CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** MAY 14 2012 [illegible signature] 9:30 a.m.

x -- x

CONCURRING AND DISSENTING OPINION

While I concur that the Petition for Review filed by petitioner must be dismissed, it is my humble opinion that said dismissal must be grounded not on lack of jurisdiction but for petitioner's failure to exhaust administrative remedies on account of its judicial claim being premature.

Section 112 of the NIRC unequivocally provides for the basis and procedure for tax refunds or credits of input tax attributable to zero-rated sales, *viz:*

Section 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, <u>within two (2) years after the close of the taxable quarter when the sales were made</u>, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales,** except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

XXX XXX XXX

(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 <u>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)</u> 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

Ga

> of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may, <u>within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period</u>, appeal the decision or the unacted claim with the Court of Tax Appeals.** (Emphasis Supplied.)

The foregoing provisions clearly state that a VAT-registered taxpayer who desires to refund its unutilized or excess input VAT attributable to zero-rated sales may apply for the issuance of a tax credit certificate within two (2) years from the close of the taxable quarter. The Commissioner of Internal Revenue (Commissioner) shall, in this case, issue a tax credit certificate within one hundred twenty (120) days from the submission of complete documents. In case of a denial or inaction by the Commissioner within the 120-day period, the VAT-registered taxpayer may appeal to the Court within thirty (30) days from receipt of the decision or the lapse of the 120-day period.

Such a position has been upheld by the Supreme Court in the recent case of ***Commissioner of Internal Revenue vs. Aichi Forging Company, Inc.***,[1] when the High Court ruled that:

> "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." (Emphasis supplied.)

---

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

Ew

Having filed its administrative claim for refund for unutilized input VAT for the fourth quarter of the taxable year 2007 on October 23, 2009, the respondent Commissioner had one-hundred twenty (120) days to act on the claim of petitioner or until February 20, 2010. However, petitioner filed its claim before this Court on December 2, 2009, or barely forty (40) days after it filed its administrative claim.

Clearly, the judicial claim filed by petitioner (CTA Case No. 8003) without observing the 120-day period in Section 112(C) is premature. Such filing is a violation of the doctrine of exhaustion of administrative remedies.

Expounding on the prematurity of the petitions, it is a sound rule that, before one resorts to the courts, the administrative remedy provided by law must first be exhausted.[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]

This non-exhaustion of administrative remedies renders the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[4] The premature invocation of court's intervention is fatal to one's cause of action. Accordingly, absent any finding of waiver or *estoppel,* the case is susceptible of dismissal for lack of cause of action.[5]

Anent petitioner's claim that respondent Commissioner already waived her defense of premature filing of the Petition for Review because the Motion

---

[2] Rufino Lopez & Sons, Inc. vs. Court of Tax Appeals, 100 Phil 580.
[3] Commissioner of Internal Revenue vs. Rosemarie Acosta, G.R. No. 154068, August 3, 2007.
[4] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.
[5] Paat vs. Court of Appeals, G.R. No. 111107, January 10, 1997; 266 SCRA 167, pp. 175-177.

Em

to Dismiss was belatedly filed, the Supreme Court already ruled in the case of ***Fidel Dabuco, et. al. vs. Court of Appeals***[6]**,** that the ground of lack of cause of action may be raised at any time. Specifically, the Supreme Court ruled:

> "As a preliminary matter, we wish to stress the distinction between the two grounds for dismissal of an action: failure to state a cause of action, on the one hand, and lack of cause of action, on the other hand. The former refers to the insufficiency of allegation in the pleading, the latter to the insufficiency of factual basis for the action. Failure to state a cause may be raised in a Motion to Dismiss under Rule 16, **while lack of cause may be raised any time.** Dismissal for failure to state a cause can be made at the earliest stages of an action. Dismissal for lack of cause is usually made after questions of fact have been resolved on the basis of stipulations, admissions or evidence presented."

Accordingly, for reasons stated above, I vote for the **DENIAL** of the instant petition.

ERNESTO D. ACOSTA
Presiding Justice

I CONCUR:

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

---

[6] G.R. No. 133775, January 20, 2000.

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

PHILEX MINING CORPORATION, Petitioner,	**CTA EB CASE NO. 790** (CTA Case No. 8003)
	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:** MAY 14 2012 Apolinario 9:30 a.m.

x---x

DISSENTING OPINION

BAUTISTA, J.:

While the Court sitting *En Banc* denied the Petition for Review its due course, and accordingly, dismissed the same for lack of merit, it is my considered view that the factual circumstances present in the case at bench supports the application of *the then prevailing jurisprudence at the time the claim was made.*

Based on the records of the case, petitioner filed its administrative claim for refund or issuance of tax credit certificate with the One Stop Shop Center of the Department of Finance for the excess input taxes covering the fourth (4^{th}) quarter of the taxable year 2007, on October 23, 2009; while it filed the Petition for Review with the Court, raffled to the Second Division and docketed as CTA Case No. 8003, on December 2, 2009.

And at the time petitioner filed its claims as mentioned above, the then controlling doctrine is that of the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.]*.[1]

It cannot be overly emphasized that where there has been justifiable reliance on Our decisions, and those who have so relied may be substantially harmed if retroactive effect is given, where the purpose of the new rule can be adequately effectuated without giving it retroactive operation, or where retroactive operation might greatly burden the administration of justice, then it is Our duty to apply the new rule prospectively;[2]

Thus, albeit the ruling in the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*,[3] is more in accordance with the letter and spirit of Section 112 of the 1997 NIRC, as amended, it would be the height of injustice to impose a new ruling, on the basis of the so-called "adherence to precedence," for the same is clearly promulgated *after* the taxpayer-claimant had faithfully relied and complied with the Court's former ruling.

Further, the same would run counter with the use of the word *"may"* in Section 112(C) of the same Code, which indicates that the judicial recourse within

[1] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[2] Magtoto *v.* Manguera, *et al.*, G.R. Nos. L-37201-02, L-37424, and L-38929, March 3, 1975, 63 SCRA 4, Concurring Opinion penned by Justice Felix Q. Antonio, with Justices Antonio P. Barredo and Cecilia Muñoz-Palma, concurring.
[3] G.R. No. 184823, October 6, 2010.

thirty (30) days after the lapse of the one hundred twenty (120)-day period is directory and permissive, and not mandatory nor jurisdictional as long as the claim is made within the two (2)-year prescriptive period under Sections 112[4] and 229[5] of the 1997 NIRC, as amended.[6]

With the pronouncements made in the cases of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[7] and *Commissioner of Internal Revenue v. San Roque Power Corporation*,[8] 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. Therefore, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one

---

[4] SEC. 112. *Refunds or Tax Credits of Input Tax.* –
(A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.
[5] SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
In any case, no such suit or proceeding shall be 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: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.
[6] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB Case No. 416, February 4, 2009.
[7] CTA EB Case No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.
[8] CTA EB Case No. 408 (CTA Case No. 6647), March 25, 2009.

hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[9]

Applying the above disquisitions, I find the administrative and judicial claims filed within the prescribed period.

Accordingly, I vote that the Petition for Review filed by Philex Mining Corporation be **GIVEN DUE COURSE**.

LOVELL R. BAUTISTA
Associate Justice

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