REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

TEAM ENERGY CORPORATION (formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.),
Respondent.

CTA EB NO. 652
(CTA CASE NO. 7461)

Present:

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

Promulgated:

JUL 12 2011 3:25pm

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D E C I S I O N

UY, J.:

This Petition for Review filed on July 1, 2010 assails the Decision dated January 5, 2010 and the Resolution dated June 7, 2010, both rendered by the Special First Division of this Court (Court in Division) in CTA Case No. 7461"[1], entitled "Team Energy Corporation (formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.), petitioner, v. Commissioner of Internal Revenue, respondent", which were resolved as follows:

1) The Decision promulgated on January 5, 2010[2] partially granted the Petition for Review, and ordered herein petitioner to refund

[1] Ponencia of Associate Justice Lovell R. Bautista, concurred by Associate Justice Caesar A. Casanova, with Concurring and Dissenting Opinion of Presiding Justice Ernesto D. Acosta.
[2] Docket, pp. 25-44.

or issue a tax credit certificate the amount of P107,187,401.77 in favor of herein respondent, representing its unutilized excess input VAT attributable to its effectively zero-rated sales to NPC for the four quarters of taxable year 2004; and

2) The Resolution promulgated on June 7, 2010[3] denied herein petitioner's Motion for Reconsideration of the assailed Decision for lack of merit.

THE FACTS

The factual antecedents of the case are undisputed.

Petitioner is the duly appointed Commissioner of Internal Revenue vested with authority to act as such, including, *inter alia,* the power to decide disputed assessments, refunds of internal revenue taxes, fees and other charges, penalties in relation thereto, or other matters arising under the tax laws. She holds office at the BIR National Office Building, Diliman, Quezon City.

Respondent is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at Pagbilao Grande Island, Pagbilao, Quezon. It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer in accordance with Section 107 of the 1977 Tax Code (now Section 236 of the National Internal Revenue Code of 1997), with BIR Certificate of Registration bearing RDO Control No. 96-600-00248 and Taxpayer Identification No. 001-726-870. It is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC) under a Build, Operate, Transfer scheme.

[3] Ibid, at pp. 19-24.

Respondent was originally registered with the Securities and Exchange Commission (SEC) as "Hopewell Power (Philippines), Corporation", which was subsequently changed to "Southern Energy Quezon, Inc." on September 22, 1999. On June 28, 2001, the SEC issued another Certificate of Filing of Amended Articles of Incorporation, approving the application of herein respondent for a change of its corporate name to "Mirant Pagbilao Corporation", which was thereafter changed to "TeaM Energy Corporation" on July 23, 2007.

On December 19, 2003, respondent filed with the BIR Audit Information, Tax Exemption and Incentives Division an Application for Effective Zero-Rate for the supply of electricity to NPC for the period covering January 1, 2004 to December 31, 2004, which was subsequently approved by the BIR.

Thereafter on April 26, 2004, July 26, 2004, October 25, 2004, and January 25, 2005, respondent filed its Quarterly VAT Returns for the four quarters of taxable year 2004 and its Amended Quarterly VAT Return for the fourth quarter of the same year on April 25, 2005, showing excess input VAT paid on domestic purchases and importations of taxable goods and services attributable to its zero-rated sales of power generation services to NPC in the amount of P114,379,790.83, detailed as follows:

Exhibit	Year 2004	Zero-Rated Sales	Taxable Sales	Output VAT	Input VAT
QQ	1st Quarter	P 3,139,226,564.73	P 830.46	P 83.05	P13,773,439.14
RR	2nd Quarter	3,095,243,127.54	2,370.76	237.08	27,011,754.10
SS	3rd Quarter	3,097,411,778.69	726,791.35	72,679.13	34,332,257.36
TT	4th Quarter	3,120,591,238.44	-	-	39,262,340.23
	Total	**P12,452,472,709.40**	**P729,992.57**	**P72,999.26**	**P114,379,790.83**

On December 19, 2005, respondent filed its administrative claim for refund with the BIR in the amount of P114,379,790.80 for the four quarters of taxable year 2004. Due to the alleged inaction of herein petitioner, respondent filed its judicial claim on April 21, 2006 before the former First Division of this Court in CTA Case No. 7461. During trial, respondent presented documentary and testimonial evidence to prove its claim, while petitioner manifested that she is waiving her right to present evidence. The case was submitted for decision on January 12, 2009, taking into consideration respondent's Memorandum filed on November 18, 2008, and herein petitioner's Memorandum filed on January 8, 2009.

On January 5, 2010, the Court in Division rendered its assailed Decision, the dispositive portion thereof reads:

> "**WHEREFORE**, premises considered, petitioner's (respondent herein) claim for refund or issuance of tax credit certificate is hereby **PARTIALLY GRANTED**. Accordingly, respondent (petitioner herein) is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of P107,187,401.77, representing unutilized excess input VAT attributable to its effectively zero-rated sales to NPC for the four quarters of taxable year 2004.
>
> **SO ORDERED.**"

The partial denial of respondent's remaining claim in the assailed Decision was due to its failure to comply with substantiation requirements set forth under Sections 110(A) and 113(A) of the NIRC of 1997, as implemented by Sections 4.104-1, 4.104-5, and 4,108-1 of Revenue Regulations No. 7-95.

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A Concurring and Dissenting Opinion[4] was rendered by the Honorable Presiding Justice Ernesto D. Acosta stating his concurrence with the majority's conclusion to partially grant respondent's claim for refund but dissents on their opinion that in counting the two-year prescriptive period for refunds of excess/unutilized input taxes, Section 112 is to be read in conjunction with Section 229 of the 1997 Tax Code. According to him, Section 112 of the NIRC of 1997 specifically governs refunds of tax credits of input tax in contrast to Section 229 of the same Code, which pertains to recovery of taxes erroneously or illegally collected. And in determining whether a claim has prescribed or not, the more appropriate method is to decide the case within the framework of Section 112 alone.

A Motion for Partial Reconsideration of the assailed Decision was filed by respondent before the Court *a quo* on January 29, 2010. Finding no valid or cogent reason to either disturb, reverse or modify the assailed Decision, the Court in Division denied said Motion for Partial Reconsideration in the Resolution dated June 7, 2010. Hence, this recourse before the Court *En Banc* praying that the assailed Decision dated January 5, 2010 and Resolution dated June 7, 2010 of the Court in Division, be reversed and set aside, and another one be entered denying the entire claim for refund.

As directed in the Resolution dated August 23, 2010[5], respondent filed its Comment/Opposition[6] to the instant Petition for Review on September 6,

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[4] Id., at pp. 42-44.
[5] Id., at pp. 49-50.
[6] Id., at pp. 51-72.

2010. Thereafter, on October 4, 2010[7], the parties were ordered to file their respective Memorandum within thirty (30) days from notice. Respondent complied thereto on November 8, 2010[8] while petitioner filed a Manifestation on October 13, 2010[9] stating that she is adopting her Petition for Review as her Memorandum. Consequently, this case was considered submitted for decision on December 1, 2010.[10]

Hence, this Decision.

ASSIGNED ERROR

Petitioner submits an assigned error, to wit:

> "THE FORMER FIRST DIVISION ERRED IN PARTIALLY GRANTING RESPONDENT'S CLAIM FOR REFUND IN THE REDUCED AMOUNT OF P107,187,401.77 ALLEGEDLY REPRESENTING UNUTILIZED EXCESS INPUT VAT ATTRIBUTABLE TO ITS EFFECTIVELY ZERO-RATED SALES TO THE NATIONAL POWER COMPANY (NPC) FOR TAXABLE YEAR 2004, BECAUSE THE HONORABLE COURT HAD NO JURISDICTION TO ACT ON THE PETITION FOR REVIEW AND THAT RESPONDENT HAD NOT SUFFICIENTLY PROVEN ITS ENTITLEMENT TO A REFUND."

THE ISSUE

Based on the foregoing assigned error, the issue boils down to whether or not the Court in Division erred in partially granting respondent's claim for refund in the reduced amount of P107,187,401.77 representing unutilized excess input VAT attributable to its effectively zero-rated sales to the National Power Corporation (NPC) for taxable year 2004, considering

[7] Resolution dated October 4, 2010, Docket pp. 74-76.
[8] Respondent's Memorandum, Docket pp.90-132.
[9] Petitioner's Manifestation, Docket pp.77-78.
[10] Resolution dated December 1, 2010.

that: it allegedly had no jurisdiction to act on the Petition for Review; and it had not sufficiently proven its entitlement to the claim for refund.

Petitioner's Arguments:

Petitioner submits the following arguments:

1) The honorable court had no jurisdiction to act on the instant Petition for Review

Petitioner contends that the Honorable Court had no jurisdiction to act on the subject judicial appeal for failure of respondent to comply with Section 112(D) of the NIRC of 1997 pertaining to the prescriptive periods for filing a claim for refund or tax credit of unutilized and/or unapplied input VAT.

According to petitioner, the instant case involves a claim for refund or tax credit of alleged unutilized and/or unapplied input Value Added Tax (VAT), hence, Section 112(D) of the NIRC of 1997 should apply as regards the prescriptive period for filing a claim for refund. Under said section, respondent should give petitioner 120 days within which to process claims for refund of unutilized input tax. It can allegedly appeal to the Court of Tax Appeals only after the expiration of the 120-day period granted by law, or within 30 days from the decision of petitioner denying its claim for refund.

Thus, a distinction should allegedly be made in the application of Sections 112(D) and 229 of the NIRC of 1997. Section 112(D) specifically refers to refunds or tax credits of "creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that said input tax has not been applied against output tax", while Section 229 of the same Code refers to "any national internal revenue taxes alleged to have been erroneously or illegally assessed or collected". Moreover, Section 112(D) allegedly provides for the specific periods (120 days and 30 days) within which the claim for refund or tax credit of input VAT shall be made while there is no specific period provided under Section 229 which merely provides for two (2) years from the date of payment of any national internal revenue tax.

Considering therefore that respondent allegedly submitted documents in support of its subject administrative claim for refund as indicated under Section 112(D) of the NIRC of 1997 only on May 15, 2006, the 120-day prescriptive period started to run only on said date. The said period is allegedly yet to expire on September 12, 2006, hence the 30-day period within which to file the petition for review before this Court commenced only from September 13, 2006 to October 12, 2006. This being so, the Honorable Court had no jurisdiction to act on the instant petition for review.

2) Respondent has not sufficiently proven its entitlement to a refund

Assuming that the Honorable Court has jurisdiction to act on the petition for review, petitioner still avers that respondent still failed to sufficiently prove its entitlement to the subject claim for refund. Petitioner begs to disagree with the Court in Division's finding that respondent has sufficiently proven its entitlement to the subject refund. Petitioner explains that it is imperative for respondent to prove that it has complied with the registration requirements of a value-added taxpayer pursuant to Sections 6(a) and (b) of Revenue Regulations No. (RR) 6-97, in relation to Section 4.107-1(a) of RR 7-95, and Section 236 of the NIRC of 1997.

Likewise, respondent allegedly failed to show that: (a) its purchases of goods and services were made in the course of its trade or business; (b) the said purchases were properly supported by VAT invoices and/or official receipts and other documents, showing that it actually paid VAT in accordance with Sections 110(A)(2) and 113 of the NIRC of 1997, and pursuant to Section 4.104-5(a) and (b) of RR 7-95; and (c) it has complied with the requirements set forth under Section 2(c)(1)(2)(4) of RR 3-88.

Respondent's Counter-Arguments:

Respondent, on the other hand, counters that the Court in Division had jurisdiction to act on the Petition for Review filed on April 21, 2006 considering that:

(a) it has already attached complete documentary support when it filed its administrative claim for refund or issuance of tax credit certificate on December 19, 2005, which fact was never disputed by petitioner during the entire proceedings of the case;

(b) even assuming that it failed to attach any supporting documents in its administrative claim, the Honorable Court had consistently held that the law does not require the taxpayer to submit documents prescribed by Revenue Memorandum Order No. (RMO) 53-98 as a pre-condition to the claim for refund of unutilized input VAT payments, citing *Commissioner of Internal Revenue vs. Visayas Geothermal Power Company, Inc., CTA EB No. 282, November 20, 2007*;

(c) the Court in Division had correctly concluded that respondent's claim was timely filed within the two-year prescriptive period since Section 112(D), providing for the 120-day period must be read in conjunction with Section 229. In other words, the 120 days given to the Commissioner within which to act upon the application, and the 30 days given to the taxpayer within which to elevate the case to this Court, must be made within the two-year prescriptive period. Therefore, the Court in Division was allegedly correct in ruling that as long as respondent's administrative claim is filed prior to the filing of its judicial claim, and both within the two-year prescriptive period, it has jurisdiction to take cognizance of the subject claim[11]; and

(d) the applicable jurisprudence in this case is *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007*, and not the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, G.R. No. 172129, September 12, 2008*, consistent with the doctrine that judicial decision should have prospective application, meaning the prevailing doctrines when the case was filed should govern. Otherwise, such retroactive application would be prejudicial to the taxpayer.

Moreover, it is respondent's position that the Court in Division was correct in ruling that it had sufficiently proven its entitlement to the claim for refund based on the documentary and testimonial evidence it presented. This

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[11] Citing Commissioner of Internal Revenue vs. Hitachi Computer Products (Asia) Corporation, CA-G.R. SP No. 63340, February 7, 2002; Commissioner of Internal Revenue vs. Visayas Geothermal Power Company, CTA EB No. 429, June 11, 2009; Commissioner of Internal Revenue vs. San Roque Power Corporation, CTA EB No. 408, May 25, 2009; Commissioner of Internal Revenue vs. Matsushita Business Machine Corporation of the Philippines, CTA EB No. 290, January 17, 2008; and Oranbo Realty Corp. vs. Commissioner of Internal Revenue, CTA Case No. 5222, April 7, 1997.

finding was further bolstered by the fact that petitioner failed to present any controverting evidence to show otherwise as she decided to waive her right to present evidence during the proceedings before the Court in Division.

THE COURT EN BANC'S RULING

The petition has no merit.

The issues raised in this case pertain to the jurisdiction of the Court of Tax Appeals, specifically pertaining to the applicable prescriptive periods in the filing of a claim for refund of creditable input tax attributable to zero-rated or effectively zero-rated sales; and to respondent's compliance with substantiation requirements in proving its claim.

Section 7 of Republic Act (R.A.) No. 1125[12], as amended by R.A. No. 9282[13], defines the appellate jurisdiction of the Court of Tax Appeals. The said provision, in part, reads:

> "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;
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> (2) **Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments,**

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

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

> **refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial**; xxx" *(Emphasis Ours)*

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

> "SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* – **Any party adversely affected by** a decision, ruling or **inaction of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days** after the receipt of such decision or ruling or **after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein**.
>
> **Appeal should be made by filing a petition for review** under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure **with the CTA within thirty (30) days** from the receipt of the decision or ruling or **in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. xxx" *(Emphases Ours)*

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

> "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**

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

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

Thus, contrary to the pronouncements made by the Court in Division in its assailed Decision dated January 5, 2010, the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under said section **starts from the close of the taxable quarter when the relevant sales or purchases were made** pertaining to the input VAT regardless of whether said tax was paid or not. This was the clear pronouncement of the Supreme Court in the case of ***Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc)***,[14] which is the applicable ruling in the instant case. In said case, the Supreme Court held that:

> "The above proviso (Sec. 112 [A]) clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer **must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. **The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid**. xxx" (*Emphasis Ours)*

Additionally, a further reading of the provisions of Section 112 shows that under paragraph (D) thereof, the Commissioner of Internal Revenue is granted a **120-day period**, from submission of complete documents in support of the administrative claim within which to act on claims for refund/applications for issuance of the tax credit certificate. Upon denial of the claim or application, or upon expiration of the **120-day period**, the

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

taxpayer only has a **30-day period** within which to appeal said adverse decision or unacted claim before the Court of Tax Appeals.

Moreover, in ***Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc. (Aichi case)***,[15] the Supreme Court elaborated on the significance of the **120-day** and **30-day** periods as follows:

> "Section 112(D)[16] 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**.
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> xxx xxx xxx
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> xxx. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' **The phrase 'within two (2) years x x x apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA**. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has '120 days from the submission of complete documents in support of the application filed in accordance with Subsections (A) and (B)' within which to decide on the claim.
>
> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides a specific period within which a taxpayer should appeal the decision or inaction of the CIR. **The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is**

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

> **made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA.**
>
> xxx xxx xxx." *(Emphasis and underscoring Ours)*

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

Thus, as correctly pointed out by petitioner, it becomes incumbent upon the taxpayer-claimant to comply, not only with the two-year period within which to file a refund/tax credit claim with the Bureau of Internal Revenue, but must also give the Commissioner of Internal Revenue a period of one hundred twenty (120) days to either partially or fully deny the claim. Subsequently, upon denial of the claim, or after the expiration of the 120-day period without any action by the Commissioner thereon, only then may the taxpayer-claimant seek judicial recourse to appeal the Commissioner's action or inaction on a refund/tax credit claim, within a period of 30 days therefrom.

At this point, it is worthy of emphasis that judicial interpretation of a statute constitutes a part of the law as of the date it was originally passed, since the Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.[17]

As the Supreme Court is merely interpreting a law (Section 112 of the NIRC of 1997) which had long been effective[18] and covers respondent's claim herein, without actually modifying or reversing any existing jurisprudence, the pronouncements made in the ***Mirant case*** and ***Aichi case*** (although promulgated only on September 12, 2008 and October 6, 2010, respectively) must be applied herein. Consequently, neither the doctrine of *stare decisis* nor any vested right was violated in applying the said rulings in the present case.

In relation thereto, We adhere to the position of the Honorable Presiding Justice Ernesto D. Acosta in his Concurring and Dissenting Opinion[19] that Section 112 of the NIRC of 1997 specifically governs refunds of tax credits of input tax; while Section 229 of the same Code, pertains only to recovery of taxes erroneously or illegally collected. Apparently, the two-year prescriptive period is applicable only to administrative claims for VAT refund, pursuant to Section 112(A), and not to judicial actions.

Therefore, in determining whether the subject claim has prescribed or not, the prescriptive periods provided in Section 112 should be observed. This is consistent with the rulings in both the ***Mirant case*** and ***Aichi case***.

Thus, in the ***Aichi case***, it was pronounced that:

> "With regard to Commissioner of Internal Revenue vs.

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[17] *Eagle Realty vs. Republic of the Philippines,* G.R. No. 151424, July 31, 2009.
[18] The NIRC of 1997 took effect on January 1, 1998
[19] Supra., see note 5.

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> Victorias Milling, Co., Inc. (22 SCRA 12) 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 Ours)*

Thus, although We agree with petitioner as to the prescriptive periods set by law for filing claims for refund of excess VAT paid, still, this Court finds no merit in petitioner's contention that the Petition for Review of herein respondent filed before the Court in Division was premature.

A perusal of the records reveals that herein respondent filed its administrative claim on December 19, 2005.[20] Counting from said date, petitioner's 120-days to decide on the claim expires on April 18, 2006. From April 18, 2006, respondent has thirty (30) days to appeal the inaction to the Court of Tax Appeals. Thus, the Petition for Review filed with the Court in Division on April 21, 2006, is well within the 30-day period to appeal.

It is petitioner's position that the counting of the 120-day period should commence from the alleged submission of the documents in support of respondent's claim for refund, which was allegedly on May 15, 2006. Further, in her Answer filed before the Court in Division, petitioner alleged that in a Memorandum dated May 17, 2006, Revenue District Officer Muriel P. Flores,

[20] Exhibit "B", CTA Case No. 7461, Docket p. 379.

RDO No. 60, Lucena City, stated that petitioner submitted documents in support of its claim for refund on May 15, 2006.

However, based on the undisputed factual findings of the Court in Division, We agree that the reckoning date of the 120-day period under Section 112(D) of the NIRC of 1997 commenced simultaneously with the filing of respondent's administrative claim as it was not shown that subsequent supporting documents were further submitted by it. As a matter of fact, petitioner waived her right to present evidence during trial before the Court *a quo*.

Clearly therefore, the Court in Division acquired jurisdiction over respondent's judicial appeal when it timely filed the Petition for Review on April 21, 2006.

As regards petitioner's argument that respondent has not sufficiently proven its entitlement to refund, this Court finds that respondent has substantially complied with the requisites for claiming a refund of unutilized excess input VAT. Section 112(A) of the NIRC of 1997 provides:

> "**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: *Provided, finally*, That for a person making sales that are zero-rated under Section 108 (B) (6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."

Again, the requisites for proving its entitlement to a refund or issuance of tax credit certificate of unutilized input VAT paid pursuant to the above quoted provision are as follows:

1. that the claimant must be a VAT-registered person;
2. that there must be zero-rated or effectively zero-rated sales;
3. that input taxes were incurred or paid;
4. that such input taxes are attributable to said zero-rated or effectively zero-rated sales;
5. that said input taxes were not applied against any output VAT liability; and
6. that the claim for refund was filed within the prescriptive period.

Contrary to petitioner's allegations, this Court finds sufficient compliance with the above requisites, as respondent's claim was supported by substantial evidence relative to its claim for VAT refund.

At the outset, We sustain the findings of the Court in Division that respondent was able to prove that it is a VAT-registered person with effectively zero-rated sales. Respondent likewise was able to establish that it generated gross receipts from sale of power generation services to the

National Power Corporation (NPC) for the four quarters of taxable year 2004. Respondent presented various invoices and official receipts it issued to NPC in the total amount of P12,452,472,709.40,[21] and Schedules of Input VAT[22] and the related suppliers' invoices and official receipts, Bureau of Customs (BOC) Import Entries and Internal Revenue Declarations (IEIRDs), BOC official receipts, bank debit advices, and other documents[23] in support of the P114,379,790.83 input VAT reflected in its Quarterly VAT Returns for the four quarters of taxable year 2004.

However, as aptly found by the Court in Division, respondent failed to meet the substantiation requirements of its input VAT claim of P7,119,389.60 under Sections 110(A) and 113(A) of the NIRC of 1997, as implemented by Sections 4.104-1, 4.104-5, and 4.108-1 of Revenue Regulations No. (RR) 7-95.

As regards the alleged non-compliance with Revenue Regulations No. (RR) 3-88, petitioner failed to substantiate its argument before the Court in Division. In fact, petitioner even failed to submit the BIR records to show respondent's non-compliance with its rules.

True, the burden is on the respondent taxpayer to show not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit. Nevertheless, when the taxpayer has sufficiently established its claim, it is entitled to a refund under the

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[21] Exhibits "MM-1" to "MM-10b", "NN-1" to "NN-11b", "OO-1" to "OO-9b", and "PP-1" to "PP-9d".
[22] Exhibits "U", "V", "W", and "X".
[23] Exhibits "Y-1" to "Y-1170", "Z-1" to "Z-1769", "AA-1" to "AA-1945", and "BB-11" to "BB-2451".

principle of *solutio indebiti*. Thus, in the ***Mirant case***[24], the Supreme Court ruled:

> "xxx Verily, a claim for tax refund may be based on a statute granting tax exemption, or, as *Commissioner of Internal Revenue v. Fortune Tobacco Corporation* would have it, the result of legislative grace. In such case, the claim is to be construed *strictissimi juris* against the taxpayer, meaning that the claim cannot be made to rest on vague inference. Where the rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, the claimant must show that he clearly falls under the exempting statute. On the other hand, a tax refund may be, as usually it is, predicated on tax refund provisions allowing a refund of erroneous or excess payment of tax. ***The return of what was erroneously paid is founded on the principle of solutio indebiti, a basic postulate that no one should unjustly enrich himself at the expense of another. The caveat against unjust enrichment covers the government. And as decisional law teaches, a claim for tax refund proper, as here, necessitates only the preponderance-of-evidence threshold like in any ordinary civil case.***" *(Emphasis Ours)*

In light of all the foregoing considerations, We see no compelling reason or substantial argument that would merit a reversal of the assailed Decision dated January 5, 2010 and Resolution dated June 7, 2010 of the Court in Division in CTA Case No. 7461.

WHEREFORE, premises considered, the instant petition is hereby **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TEAM ENERGY CORPORATION (formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.),
Respondent.

CTA EB NO. 652
(CTA Case No. 7461)

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

Promulgated:

JUL 12 2011

x--x

CONCURRING AND DISSENTING OPINION

BAUTISTA, J.:

While I agree with the denial of the Petition for Review filed by the Commissioner of Internal Revenue, I find that I must dissent on the grounds specified by the Court *En Banc* in the present case.

The Court *En Banc* applied the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.) ("Mirant case")*,[1] in determining when the counting of the prescriptive period begins. According to the

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

Mirant case, it should be applied from the close of the taxable quarter when the sales or purchases were made. The decision also determined that a taxpayer can only file its judicial recourse within thirty (30) days upon the denial of the claim or application, or upon the expiration of the one hundred twenty (120)-day period, as interpreted in the case of *Commissioner of Internal Revenue v. Aichi Forging Company of Asia Inc.* ("*Aichi case*").[2]

I maintain that the judicial recourse to this Court allowed by Section 112(C) of the 1997 NIRC, wherein a taxpayer-claimant may file an appeal within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the Commissioner of Internal Revenue shall decide on the claim, or after the receipt of the decision denying the same, is directory and permissive, and not mandatory nor jurisdictional, as long as it is made within the two (2)-year prescriptive period prescribed under Section 229 of the same Code.[3]

A perusal of the provision will show that it contains the word "may," thus denoting that it is merely permissive and operates to confer discretion.[4] Thus, a taxpayer has an option to pursue the claim with the Court, provided that the judicial claim is filed pursuant to the settled 2-year prescriptive period. The same issue had been thoroughly addressed in the case of *Commissioner of Internal Revenue v. San Roque Power Corporation*,[5] to wit:

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[2] G.R. No. 184823, October 6, 2010.
[3] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.
[4] Bersabal *v.* Salvador, G.R. No. L-35910, July 21, 1978, 84 SCRA 176, *citing Dizon v. Encarnacion, G.R. No. L-18615, December 24, 1963, 9 SCRA 714.*
[5] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

It bears stressing that the use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229 of the NIRC. It is a well-settled doctrine in statutory construction that the word "may" when used in a statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.

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

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

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

Thus, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or even the inaction after the expiration of the 120-day period before the taxpayer can lodge its appeal with this Court,[6] for claims for refund or tax credit, both in the administrative and judicial fora must be filed within the 2-year period[7]and beyond that period, the taxpayer can no longer appeal to this Court.[8]

Further, it has been my stand that claims for refund or tax credit of value-added tax ("VAT") on zero-rated sales or effectively zero-rated sales transactions filed prior to the promulgation of the *Mirant case*, on September 12, 2008 should follow the doctrine set in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* ("*Atlas case*").[9]

It should be recalled that prior to the *Mirant case* and at the time of filing of the claim for refund by the petitioner, the controlling doctrine was that enunciated in the *Atlas case*. Judicial decisions become part of the law of the land, however, the Court should keep in mind the principle behind Article 4 of the New Civil Code which states that "laws shall have no retroactive effect unless the contrary is provided;" the

[6] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[7] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[8] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.
[9] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.

same provision expressed in the familiar legal maxim *lex prospicit, non respicit*, the law looks forward not backward.[10]

This principle was applied in the case of *Rolando Santos v. Sandiganbayan and the People of the Philippines*,[11] citing *Co vs. Court of Appeals*,[12] wherein the Supreme Court ruled that:

> In accordance with Article 8 of the Civil Code providing that "(j)udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines," and Article 4 of the same Code stating that "(l)aws shall have no retroactive effect, unless the contrary is provided," the principle of prospectivity of statutes, original or amendatory, shall apply to judicial decisions, which, although in themselves are not laws, are nevertheless evidences of what the law means.

In *Chicot County Drainage District v. Baxter States Bank*,[13] the High Court also discussed why the "principle of absolute retroactive invalidity"[14] has been negated, to wit:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those who have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-

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[10] Spouses Gauvain and Bernardita Benzonan v. Court of Appeals, G.R. No. 97973, January 27, 1992, 205 SCRA 515, *citing Francisco v. Certeza, No. L-16849, November 29, 1961, 3 SCRA 565.*
[11] G.R. Nos. 71523-25, December 8, 2000, 347 SCRA 386, 420.
[12] G.R. No. 100776, October 28, 1993, 277 SCRA 444, 448-449.
[13] 308 US 371, 374 [1940].
[14] Felicisimo Rieta v. People, G.R. No. 147817, August 12, 2004, 436 SCRA 273.

> inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[15]

Again in the case of *Columbia Pictures, Inc., et al. v. Court of Appeals, et al.,*[16] the Supreme Court ruled that:

> The reasoning behind *Senarillos vs. Hermosisima* that 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, is all too familiar. 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, and that is precisely the situation obtaining in this case.
>
> It is consequently clear that a judicial interpretation becomes a part of the law as of the date that law was originally passed, **subject only to the qualification that when a doctrine of this Court is overruled and a different view is adopted, and more so when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith. To hold otherwise would be to deprive the law of its quality of fairness and justice then, if there is no recognition of what had transpired prior to such adjudication.** *(Boldfacing supplied)*

Therefore, applying the doctrines laid down in the aforecited cases, the prescriptive period applicable herein would be the then well-established doctrine adopted by this Court in *Atlas case*, wherein the 2-year prescriptive period is reckoned not from the close of the pertinent quarter but from the date of filing of the VAT return.

In the case of *JIDECO Manufacturing Philippines, Inc. v. CIR,*[17] the Court *En Banc* affirmed the matter as follows:

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[15] Albino S. Co v. Court of Appeals, *et al.*, G.R. No. 100776, October 28, 1993, 277 SCRA 444, *citing Chicot County Drainage District v. Baxter States Bank, supra note 13.*
[16] G.R. No. 110318, August 28, 1996, 261 SCRA 144.

> As we have already elucidated in our Resolution dated July 20, 1998 in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5296,* the two-year prescriptive period for the filing of claims for VAT refund should be reckoned from the date of filing of the corresponding quarterly VAT returns in order to harmonize the provisions of Section 112(B) of the NIRC of 1997 with Sections 114(A) and 229 of the same Code.
>
> xxx xxx xxx
>
> In the cases of *Commissioner of Internal Revenue vs. TMX Sales, Inc. and the Court of Appeals, G.R. No. 83736, dated January 15, 1992 and ACCRA Investments Corporation vs. Commissioner of Internal Revenue, 204 SCRA 957,* the Supreme Court held that the two (2)-year period should be counted from the filing of the final income tax return, because it is only during that date that the exact tax liability or refundability of the tax can be determined. In the same manner, it is only after the filing of the quarterly VAT return that we can determine the VAT liability or refundability of VAT. It should be noted that the basic requirement is that VAT refund can only be granted to the extent that the input taxes have not been applied against output tax. All these matters can only be determined if a return is filed. It is logical therefore, that the two-year period should not immediately be counted from the close of the quarter but from the prescribed date of filing of the VAT return.[18]

In the present case, respondent filed its Quarterly VAT Returns on the following dates: April 26, 2004, July 26, 2004, October 25, 2004 and January 25, 2005. Respondent filed its administrative claim for refund on December 19, 2005, while its judicial claim was made on April 21, 2006.

Therefore, it is my opinion that both the administrative and judicial claims were filed within the two (2)-year prescriptive period, applying the doctrine for computing the said period in the *Atlas case*. Petitioner's argument that the Court has no jurisdiction to act on the instant case deserves scant consideration.

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[17] CTA Case No. 6552, September 16, 2004.
[18] CTA EB No. 53, June 7, 2005.

Accordingly, I vote for the **DENIAL** of the Petition for Review filed by the respondent.

LOVELL R. BAUTISTA
Associate Justice