REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

TOLEDO POWER COMPANY,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 590
(CTA Case Nos. 7352 & 7400)

Present:

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

Promulgated:

JUL 07 2011
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DECISION

ACOSTA, *PJ:*

Before this Court of Tax Appeals *En Banc*[1] is a Petition for Review filed on February 24, 2010, assailing the Decision of the Court of Tax Appeals Second Division[2] dated September 30, 2009 which dismissed petitioner's claim for refund or issuance of tax credit certificate of unutilized input value-added tax ("VAT") arising from its domestic purchases of goods and services, and importation of goods attributable to its zero-rated sales of power generation services for the third and fourth quarters of the taxable year 2003 in the amounts of P3,120,366.79 and

[1] CTA *En Banc*.
[2] CTA Second Division.

P6,685,541.75, respectively, due to prescription, and the subsequent Resolution dated January 20, 2010, affirming the assailed Decision.

The Facts

The CTA Second Division found the pertinent facts to be as follows:

> Petitioner Toledo Power Company, is a general partnership duly organized and existing under Philippine laws, with principal office at Sangi, Toledo City, Cebu, principally engaged in the business of power generation and subsequent sale thereof to the National Power Corporation (NPC), Cebu Electric Cooperative III (CEBECO), Atlas Consolidated Mining and Development Corporation, and Atlas Fertilizer Corporation. It is registered with the BIR as a VAT taxpayer in accordance with Section 236 of the National Internal Revenue Code (NIRC) with Tax Identification No. 003-883-626 and BIR Certificate of Registration bearing RDO Control No. 94-083-000300. It was also issued a Certificate of Compliance under COC No. 04-06-GXT61-0066 dated June 23, 2004 by the Energy Regulatory Commission.
>
> Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of said office, including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.
>
> It appears that petitioner entered into separate Electric Power Purchase Agreements with Cebu Electric Cooperative III (CEBECO) and the Visayan Electric Cooperative Company (VECO), dated August 9, 2002 and November 19, 2002, respectively.
>
> On June 26, 2001, Republic Act No. (RA) 9136, also known as the "Electric Power Industry Reform Act of 2001" (EPIRA), took effect and the relevant provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, on zero-rated sales were deemed modified. Said law was enacted by Congress to ordain reforms in the electric power industry, highlighting, among others, the importance of ensuring the reliability, security and affordability of the supply of electric power to end-users. The pertinent provisions of RA 9136 and the Rules and Regulations to Implement Republic Act No. 9136, entitled "Electric Power Industry Reform Act of 2001" respectively provides as follows:

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> "SEC. 6. Generation Sector. — . . .
> Pursuant to the objective of lowering electricity rates to end-users, **sales of generated power by generation companies shall be value added tax zero-rated.**
> xxx xxx xxx."
>
> (*Emphasis supplied*)
>
> "RULE 5
> Generation Sector
>
> xxx xxx xxx
>
> SECTION 6. Generation Charges and VAT. — . . .
> (b) **Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax**. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these Rules." (*Emphases supplied*)

On October 27, 2003, petitioner filed its Quarterly VAT Return for the third quarter of taxable year 2003. Thereafter, on January 26, 2004, petitioner filed its Quarterly VAT Return for the fourth quarter of taxable year 2003. Said return was amended on July 26, 2004.

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed on December 23, 2004 with BIR RDO No. 83 an administrative claim for refund of unutilized input VAT for the four (4) quarters of 2003 in the total amount of P15,838,539.48, invoking Section 112 (A) of the NIRC of 1997, as amended, as its basis for the instant claim for refund or issuance of tax credit certificate.

Due to respondent's failure to act on petitioner's claim, petitioner filed a Petition for Review on October 26, 2005, docketed as CTA Case No. 7352 (assigned to this Division), for its supposed unutilized input VAT in the amount of P3,120,366.79 for the third quarter of 2003. Subsequently, petitioner filed a second Petition for Review on January 18, 2006, docketed as CTA Case No. 7400 (assigned to the First Division of this Court), for its supposed unutilized input VAT in the amount of P6,685,541.75, for the fourth quarter of 2003.

In the Answers filed in CTA Case No. 7352 and 7400, except as to the respective amounts involved in both cases and quoted in italicized manner in paragraph 5 thereof, respondent similarly interposes the following special and affirmative defenses:

"4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau;
5. The amount of "*P3,120,366.79 (for CTA Case No. 7352) and P6,685,541.75 (for CTA Case No. 7400)*" being claimed by petitioner allegedly representing unutilized input VAT from its domestic purchases of taxable goods and services and importation of goods attributable to zero-rated sales for the third quarter of calendar year 2003 was not properly documented;
6. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;
7. Petitioner must show that it has complied with the provisions of Section 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;
8. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and such, they are looked upon with disfavor (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)."

On January 31, 2006, petitioner moved for the consolidation of CTA Case No. 7400 with CTA Case No. 7352 before the First Division of this Court. The motion, however, was denied by said Division in the Resolution dated March 8, 2006. Upon petitioner's motion for reconsideration of such denial, the same was granted on April 18, 2006, as both cases involve the same parties and subject matter pertaining to claims for refund or issuance of tax credit certificate for excess input VAT attributable to VAT zero-rated sales, and the difference lies only on the taxable periods and the amounts involved in each Petition.

Thereafter, a consolidated pre-trial was held on June 8, 2006, and the parties jointly agreed to submit a Joint Stipulation of Facts and Issues within fifteen (15) days from said date. On June 22, 2006, parties submitted the required pleading and was approved in the Resolution dated July 3, 2006.

During trial, petitioner presented testimonial and documentary evidence primarily aimed at proving its supposed entitlement to the refund or issuance of a tax credit certificate in the total amount of P9,805,908.54, representing alleged unutilized input VAT for third and fourth quarters of taxable year 2003.

When it was respondent's turn to present evidence on September 15, 2008, his counsel manifested that he is submitting the case for decision based on the pleadings. Accordingly, the parties were granted thirty (30) days to file their respective memorandum, after which this case shall be deemed submitted for decision. Petitioner and respondent filed their Memoranda on April 7, 2009 and April 8, 2009, respectively.[3]

The Ruling of the Court in Division

On September 30, 2009, the Court in Division dismissed the consolidated Petitions for Review filed by the petitioner on the ground of prescription. In particular, it ruled that under Section 112 (A) of the NIRC of 1997, as amended, the following are the requisites for refunds or tax credits of input tax due or paid attributable to zero-rated or effectively zero-rated sales, *viz*:

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

Anent the fifth requirement, the Court in Division stated that:

> The prevailing jurisprudence that establishes the period within which to file the claim for refund or tax credits of unutilized input VAT attributable to zero-rated or effectively zero-rated sales is ***Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)***. The pertinent portion of the High Tribunal's Decision reads:
>
>> "The claim for refund or tax credit for the creditable input VAT payment made by MPC embodied in OR No. 0189 was filed beyond the period provided by law for such claim. Sec. 112(A) of the NIRC pertinently reads:
>>
>>> (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 <u>when the sales were made</u>, apply for the issuance of a tax credit certificate or refund of creditable input tax <u>due or paid</u> attributable to such sales**, except transitional input tax, to the extent that such input tax has not been applied against output tax: . . . . (Emphasis ours.)

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[3] *Rollo*, pp. 53-57.

> The above proviso 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. . . . " (Emphasis supplied)
>
> Based on the afore-quoted jurisprudence, the reckoning of the prescriptive period shall commence 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.[4]

Having pointed out the same, the Court in Division ruled that since the claim involves petitioner's input VAT incurred for the third and fourth quarters of 2003, and counting from the close thereof, petitioner had until September 30, 2005 and December 31, 2005, respectively, within which to file the instant claim, both in the administrative and the judicial levels. While the administrative claim was filed within the two-year prescriptive period, both judicial claims were filed out of time. Thus, petitioner's claims for refund have prescribed and it is therefore barred from pursuing its claims for refund. Consequently, the Court in Division found the resolution of the other issues raised by the parties is no longer warranted.

Accordingly, the Court in Division disposed of the case as follows:

> **WHEREFORE**, premises considered, the instant consolidated cases are hereby **DISMISSED** due to prescription.
>
> **SO ORDERED.**

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[4] *Rollo*, pp. 59-60.

Aggrieved, petitioner filed a Motion for Reconsideration on October 12, 2009. The same was denied for lack of merit by the Court in Division in its Resolution promulgated on January 20, 2010.[5]

<u>The Issue</u>

Petitioner alleges that the Court in Division erred in dismissing the case, by applying the Supreme Court's ruling in the case of Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)[6] ('*Mirant case*') and concluding that petitioner's judicial claims for refund of excess input VAT for the 3rd and 4th quarters of CY 2003 were filed beyond the two-year prescriptive period provided under Section 112 9A) of the Tax Code.

Petitioner's Arguments

Petitioner asserts that as held by the Supreme Court in the case of *Atlas Consolidated Mining and Development* Corporation *vs. Commissioner of Internal Revenue*[7], ('*Atlas case*') the two-year prescriptive period for the filing of the administrative and judicial claims for refund or tax credit of excess and unutilized input VAT should be reckoned from the date of filing of the quarterly VAT return and the payment of the output VAT. Likewise, it maintains that by mandate of Article VIII, Section 4 (3) of the Constitution, the ruling of the Second Division of the Supreme Court in the Mirant case could not have overturned and did not validly overturn the doctrine laid down in the Atlas case which was decided by the Supreme Court *En banc*. Further, it submits that there are peculiar factual circumstances in the Mirant case which prompted the Supreme Court to apply a different ruling, and such circumstances are not present in the case at bar. There is nothing in the Mirant case which would clearly show powerful countervailing considerations, so as to justify sudden departure from established points of law. Petitioner asserts further that even assuming for the sake of argument that the

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[5] *Rollo*, pp. 63-70
[6] G.R. No. 172129, September 12, 2008
[7] G.R. Nos 141104 & 148763, June 8, 2007; 524 SCRA 73

Mirant case validly overturned the doctrine laid down in the Atlas case, the ruling in the Mirant case should only be applied prospectively, and should not be made to apply to judicial claims for refund of excess input VAT pending with the courts at the time the Mirant case was decided. Lastly, petitioner claims that the seemingly conflicting rulings in Atlas case and Mirant case cannot be reconciled by ratiocinating that Atlas was decided under the National Internal Revenue Code of 1977 as amended by Executive Order No. 273, while Mirant was decided under the 1997 Tax Code, as amended, because there is no change in the relevant provisions of the laws that would warrant the change of interpretation.[8]

Respondent's Arguments

Respondent, on the other hand, submits that the Court in Division correctly dismissed petitioner's claim for refund for lack of jurisdiction. She maintains that, under Section 112 (D) of the NIRC, after the submission of complete documents in support of the application for refund, a one hundred twenty(120)-day audit period shall apply before the taxpayer could avail of its judicial remedies as provided under the law. This period is reckoned from December 23, 2004, the date when the petitioner filed its administrative claim for refund. The 120-day period expired therefore on April 21, 2005. Hence, the thirty(30)-day period to file its judicial claim likewise expired on May 21, 2005. Having filed the cases on October 26, 2006 and January 18, 2006, the Court has lost its jurisdiction to act on the petitions.

THE COURT *EN BANC*'S RULING

The CTA *En Banc* finds the petition for review bereft of merit.

The pivotal issue in this case is whether the Court of Tax Appeals has jurisdiction to rule on the petitions. Pertinent therefore is a discussion on the basis in law of every application for tax refund or credit of unutilized input VAT.

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[8] *Rollo*, pp. 16-17.

<u>Reckoning of the Period to File A Claim for Refund of Input Taxes</u>

An application for refund or tax credit over input taxes is governed by Section 112 of the 1997 National Internal Revenue Code (NIRC).

An application for refund or tax credit over input taxes arising from *<u>zero-rated or effectively zero-rated sales</u>* is governed by Section 112(A) of the 1997 NIRC, to wit:

> **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, 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 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. (Emphasis Ours).

On the other hand, an application for refund or tax credit over input taxes paid on *<u>capital goods</u>* imported or locally purchased is governed by Section 112(B) of the 1997 NIRC, to wit:

> (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.** (Emphasis Ours).

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In both aforementioned provisions, it is worthy to note that the 1997 NIRC specifically set forth the reckoning of the two-year period for filing a claim for refund/tax credit over input taxes to be the close of the taxable quarter when the sales were made.

In the recent case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[9], the Supreme Court has cited the Mirant case wherein it was ruled that the two-year period to file a refund for input tax arising from zero-rated sales should be reckoned from the close of the taxable quarter when the sales were made, *viz*:

> The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation*, **where we ruled that Section 112(A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT,** and that Sections 204(C) and 229 of the NIRC are inapplicable as "both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes." We explained that:
>
> The above proviso [Section 112 (A) of the NIRC] 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. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed.

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[9] GR No. 184823, October 6, 2010.

Reckoning for prescriptive period under Secs. 204(C) and 229 of the NIRC inapplicable

To be sure, MPC cannot avail itself of the provisions of either Sec. 204(C) or 229 of the NIRC which, for the purpose of refund, prescribes a different starting point for the two-year prescriptive limit for the filing of a claim therefor. Secs. 204(C) and 229 respectively provide:

> Sec. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
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> x x x x
>
> (c) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
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> x x x x
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> 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, of any sum alleged to have been excessively or in any manner wrongfully 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.

Notably, the above provisions also set a two-year prescriptive period, reckoned from date of payment of the tax or penalty, for the filing of a claim of refund or tax credit. Notably too, both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.

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> ***MPC's creditable input VAT not erroneously paid***
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> For perspective, under Sec. 105 of the NIRC, creditable input VAT is an indirect tax which can be shifted or passed on to the buyer, transferee, or lessee of the goods, properties, or services of the taxpayer. The fact that the subsequent sale or transaction involves a wholly-tax exempt client, resulting in a zero-rated or effectively zero-rated transaction, does not, standing alone, deprive the taxpayer of its right to a refund for any unutilized creditable input VAT, albeit the erroneous, illegal, or wrongful payment angle does not enter the equation.
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> Considering the foregoing discussion, **<u>it is clear that Sec. 112 (A) of the NIRC, providing a two-year prescriptive period reckoned from the close of the taxable quarter when the relevant sales or transactions were made pertaining to the creditable input VAT, applies to the instant case, and not to the other actions which refer to erroneous payment of taxes.</u>** (Emphasis supplied.)
>
> In view of the foregoing, we find that the CTA *En Banc* erroneously applied Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT. **To be clear, Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. <u>Thus, the two-year period should be reckoned from the close of the taxable quarter when the sales were made.</u>**

Thus, it is clear that the reckoning of the two year period on claims for refunds/credit for input tax on zero-rated sales should be from the close of the taxable quarter when the sales were made.

<u>The Period to File the Administrative Claim and Judicial Claim for Refund of Input Taxes</u>

In the same *Aichi Forging case*, the Supreme Court has applied Section 112(A) in ascertaining whether the taxpayer timely filed its administrative claim for refund, thus:

> Applying this to the present case, the two-year period to file a claim for tax refund/credit for the period July 1, 2002 to September 30, 2002 expired on September 30, 2004. Hence, respondent's administrative claim was timely filed.

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As to the filing of the judicial claim for refunds on both Sections 112(A) and (B) of the 1997 NIRC, the provision of Section 112(D) thereto is pertinent, *viz*:

> SEC. 112. Refunds or Tax Credits of Input Tax. – x x x x
> (D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes **within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.**
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals**. (Emphasis Ours)

Again, in the *Aichi Forging case*, the High Court explained the application of this provision, *to wit*:

> "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.)

Having filed its administrative claim for refund for unutilized input VAT for the four quarters of the taxable year 2003 on December 23, 2004, the respondent Commissioner had 120 days to act on the claim of petitioner or only until April 22, 2005. Thereafter, petitioner had 30 days or until May 22, 2005 to file its judicial claim for refund following the inaction of the respondent Commissioner. However, petitioner only filed its claim before this Court on October 26, 2005 for the third quarter VAT refund and January 18, 2006 for the fourth quarter VAT refund, both for taxable year 2006. Clearly, having filed its appeal beyond the 30-day period, the Court no longer has jurisdiction to entertain the claims.

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WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit. The assailed Decision dated September 30, 2009 and Resolution dated January 20, 2010 of the CTA Second Division are hereby **AFFIRMED.**

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

JUANITO C. CASTANEDA, JR.
Associate Justice

(with Separate Opinion)
LOVELL R. BAUTISTA
Associate Justice

(concurs with Separate Opinion of Justice Bautista)
ERLINDA P. UY
Associate Justice

(concurs with Separate Opinion of Justice Bautista)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(on wellness leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

(on wellness leave)
AMELIA C. MANALASTAS
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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Mindaro-Grulla, and
Cotangco-Manalastas, JJ.

Promulgated:

JUL 07 2011 2:10pm

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SEPARATE OPINION

BAUTISTA, J.:

It is an elementary rule that "judicial decisions applying or interpreting the law or the Constitution shall form part of the legal system of the Philippines;"[1] and as part of the law of the land, judicial decisions are also subject to the principle that

[1] Article 8 of Republic Act No. 386, as amended, otherwise known as the "*Civil Code of the Philippines.*"

"laws shall have no retroactive effect unless the contrary is provided."[2] *Lex prospicit, non respicit*, the law looks forward, not backward.[3]

At the time petitioner filed its administrative claims with the Bureau of Internal Revenue on December 23, 2004, and its subsequent Petitions for Review before the Second Division of this Court ("Court in Division") on October 26, 2005 and January 18, 2006, the well-entrenched ruling on the matter then is that established in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue ("Atlas Case")*,[4] wherein the two (2)-year period is reckoned not from the close of the pertinent quarter, but from the date of filing of the return, for it is only during that time that the tax liability or refundability can be determined. The Court *En Banc* affirmed such ruling in the case of *JIDECO Manufacturing Philippines, Inc. v. CIR*,[5] stating:

> 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.
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> 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

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[2] Article 4, *Ibid.*
[3] Spouses Gauvain and Bernardita Benzonan *v.* Court of Appeals, *et al.*, G.R. No. 97973, January 27, 1992, 205 SCRA 515, *citing Francisco v. Certeza, No. L- 16849, November 29, 1961, 3 SCRA 565.*
[4] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[5] CTA Case No. 6552, September 16, 2004.

> 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.[6]

In seeking refuge to this Court, taxpayers and litigants alike rely in good faith on law and existing doctrines and rulings to enforce their rights. The afore-quoted jurisprudence is not one to be exempted from this. To apply a new doctrine to a pending case involving a party who already invoked a contrary view and who acted in good faith thereon prior to the issuance of the said doctrine would violate the rules on equity and fair play.[7]

Further, the Supreme Court aptly elucidated the prospectivity principle of judicial decisions in the case of *Albino S. Co, v. Court of Appeals*,[8] wherein it ruled that when a doctrine is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted on the faith thereof.

Thus, in the case of *Team Energy Corporation (Formerly Mirant Pagbilao Corporation and Southern Energy Quezon, Inc.) v. Commissioner of Internal Revenue*,[9] the First Division of this Court made the following pronouncement:

> Although there is a recent case entitled *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly SOUTHERN ENERGY QUEZON, INC.)*, wherein the Supreme Court held that the reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund starts from the close of the taxable quarter when the relevant sales

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[6] CTA EB No. 53, June 7, 2005.
[7] Land Bank of the Philippines *v.* De Leon, G.R. No.143275, March 20, 2003, 399 SCRA 376.
[8] G.R. No. 100776, October 28, 1993, 277 SCRA 444.
[9] CTA Case Nos. 7229 and 7298, October 5, 2009.

> were made, this Court finds it proper to apply said ruling to cases filed after the promulgation date of the *Mirant Case.* **To apply said ruling in the present case will in effect be giving the new doctrine retroactive application thereby impairing vested rights.** *(Boldfacing supplied.)*

And in the case of *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue,*[10] the following disquisition was made:

> The CTA has been consistent with the foregoing rule that, even after petitioner filed its Petitions for Review with the Court in Division in 2005, the CTA has continued to invoke the rule that the reckoning of the two-year prescriptive period for the filing of claims for VAT refund/tax credit certificate starts from the date of filing of the corresponding quarterly VAT returns, in similar cases such as *Takenaka Corp. Phil. Branch v. CIR, CTA Case No. 6762, March 20, 2006, Mirant (Navotas 11) Corporation v. CIR, CTA Case Nos. 7234 & 7295, October 2, 2008, CE Luzon Geothermal Power Co. v. CIR, CTA Case Nos. 6792 & 6837, November 25, 2008.*
>
> Moreover, even after the promulgation of the *Mirant SC Case,* the CTA has continued to apply the rule that the reckoning of the two-year prescriptive period for the filing of claims for VAT refund/tax credit certificate starts from the date of filing of the corresponding quarterly VAT returns, citing as basis the ruling of the Supreme Court in the Atlas SC case.
>
> Thus, the rule that the reckoning of the 2-year period is the date of filing of the quarterly VAT return has become a well-established doctrine and adopted in numerous decisions of the CTA, the Court of Appeals and even the Supreme Court until the Supreme Court rendered its decision in the *Mirant SC Case* on September 12, 2008.
>
> Consequently, taxpayers and litigants relied in good faith on such prevailing CTA jurisprudence.

In light of the foregoing, the ruling in the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.]* (*"Mirant Case"*),[11] wherein the reckoning of the two (2)-year prescriptive period is

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[10] CTA EB No. 513 (CTA Case Nos. 7227, 7287 and 7317), March 10, 2010, Concurring and Dissenting Opinion penned by Associate Justice Lovell R. Bautista, with Associate Justice Caesar A. Casanova, concurring.
[11] G.R. No. 172129, September 12, 2008, 565 SCRA 154.

from the close of the taxable quarter should be applied prospectively, that is, to administrative and judicial claims filed after September 12, 2008.

Moreover, the judicial recourse to this Court by a taxpayer-claimant within thirty (30) days, either from the lapse of the one hundred twenty (120)-day period within which the Commissioner of Internal Revenue shall decide on the claim, or after the receipt of the decision denying the same, pursuant to Section 112(C)[12] of the 1997 National Internal Revenue Code ("NIRC"), as amended, is directory and permissive, and not mandatory nor jurisdictional, as long as it is made within the two (2)-year prescriptive period prescribed under Sections 112 and 229 of the same Code.[13]

To stress, the same issue had been thoroughly addressed in the cases of *Commissioner of Internal Revenue v. Toledo Power, Inc.*,[14] and *Commissioner of Internal Revenue v. San Roque Power Corporation*.[15]

Based on the records of the case, petitioner filed its Original Value-Added Tax ("VAT") Return for the third (3rd) quarter of the taxable year 2003 on October 27, 2003. Thereafter, on January 26, 2004, petitioner filed its Quarterly VAT Return for the fourth (4th) quarter of taxable year 2003, and its Amended VAT Return on July 26, 2004; counting two (2) years from such filings, petitioner had until October 27, 2005 and January 26, 2006, respectively, within which to file its claims for refund of excess input VAT attributable to its zero-rated sales both in the administrative and judicial fora. Thus, both Petitions for Review filed by petitioner with the Court in

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[12] As amended by Republic Act No. 9337.
[13] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.
[14] CTA EB No. 321 (CTA Case Nos. 6805 & 6851), May 7, 2008.
[15] CTA EB No. 408 (CTA Case No. 6647), March 25, 2009.

Division on October 26, 2005 and January 18, 2006 were made within the prescriptive period.

Be that as it may, petitioner's entire claim for refund or issuance of tax credit certificate of input VAT must be denied.

Petitioner hinges its claim for refund of its excess input VAT on the provisions of Republic Act ("RA") No. 9136, also known as the "*Electric Power Industry Reform Act of 2001,*" ("EPIRA"), purposely the following:

> SECTION 6. *Generation Sector.* – Generation of electric power, a business affected with public interest shall be competitive and open.
>
> Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.
>
> Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.
>
> **Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.** (*Boldfacing supplied.*)

Pursuant thereto, the Implementing Rules and Regulations ("IRR") of the EPIRA provides as follows:

RULE 5
GENERATION SECTOR

xxx xxx xxx

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Section 6. *Generation Charges and VAT.*

xxx xxx xxx

(b) **Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax.** Towards this end, **the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user.** The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these Rules. *(Boldfacing supplied.)*

On point in this matter is the case of *Visayas Geothermal Power Company v. Commissioner of Internal Revenue,*[16] where this Court held:

xxx Section 6 of the EPIRA Law provides that "sales of generated power by generation companies shall be value-added tax zero-rated." Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated companies from ten (10%) percent to zero (0%) percent.

As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: **1) it is a generation company**, and **2) it derived sales from power generation**. *(Boldfacing supplied.)*

To qualify for VAT zero-rating in accordance with the EPIRA, the law requires that petitioner must first prove that it is a generation company, and likewise deriving its sales from power generation. Pursuant thereto, Section 4(x) of the EPIRA defines the term "generation company" as follows:

Section 4. *Definition of Terms.* –

xxx xxx xxx

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[16] CTA Case Nos. 6790 and 6838, dated January 18, 2007.

> (x) "Generation Company" refers to any person or entity authorized by the ERC[17] to operate facilities used in the generation of electricity; xxx

Corollary thereto, Section 4 of Rule 5 of the IRR of the EPIRA provides the following:

> Section 4. *Obligations of a Generation Company.*
>
> (a) A COC[18] shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.
>
> (i) **A Person owning an existing Generation Facility** or a Generation Facility under construction, **shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operation history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by ERC to operate such existing Generation Facility.** (*Boldfacing supplied.*)

From the foregoing, a "generation company" refers to any person or entity authorized by the Energy Regulatory Commission ("ERC") to operate facilities used in the generation of electricity.

Based on the foregoing, a person or entity owning an existing generation facility, as in the present case, or a generation facility under construction, is required under the EPIRA to submit, within ninety (90) days from effectivity of the Rules to ERC, when applicable, a certificate of Department of Energy/National Power

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[17] Energy Regulatory Commission.
[18] Certificate of Compliance.

Corporation accreditation, a three (3) year operation history, a general company profile and other information that ERC may require, and upon making a complete submission to the ERC, such person shall be issued a Certificate of Compliance ("COC") by the ERC to operate such generation facility.

Thus, the authority to operate a generation facility as a generation company referred to in the preceding provisions pertains to the duly issued COC which must be secured by both new generation company and existing generation company to operate new and existing generation facility, respectively.

To address this requirement, petitioner filed an application with the ERC for the issuance of a COC pursuant to the IRR of the EPIRA on June 20, 2002. A copy of the application was attached by petitioner as *Annex "B"* to its Petition for Review.[19] Likewise, a copy of the Certificate of Compliance under COC No. 04-06-GXT61-0066 issued by the ERC dated June 23, 2004 was attached by petitioner and made part of *Annex "B,"* which states that it shall be valid for a period of five (5) years from the date of issuance.[20]

However, a perusal of the records show that the present claim pertains to the third (3rd) and fourth (4th) quarters of the taxable year 2003, while the required COC was issued only on June 23, 2004; thus the same failed to prove that petitioner is duly authorized by the ERC to operate facilities used in the generation of electricity for the subject period of claim.

Moreover, petitioner failed to submit its ERC registration. Hence, in the absence of evidence that petitioner is a generation company as defined under RA

[19] *Records,* (CTA Case Nos. 7352 & 7400), p. 54.
[20] *Exhibit "NN."*

9136 and its implementing rules and regulations, all of the reported sales of P505,187,907.10 cannot qualify for VAT zero-rating. Consequently, the alleged input VAT attributable thereto in the amount of P9,805,908.54 cannot be refunded.

It is well to remind petitioner that as a claimant, it has the burden of proof to present all that is required for the successful prosecution of its claim.

Where the taxpayer claims a refund, this Court as a court of record is required to conduct a formal trial (*trial de novo*) to prove every minute aspect of the claim.[21]

Further, it may not be amiss to note that while petitioner invokes Section 6 of the EPIRA to claim its zero-rated sale of power generation services, it particularly left out the provision - Section 4(a)(i) of Rule 5 - which particularly provides for the required COC to be considered a generation company.

In sum, petitioner failed to comply with the provisions of the EPIRA law and is thus not entitled to the refund of its unutilized input VAT for the third (3rd) and fourth (4th) quarters of taxable year 2003.

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

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[21] Commissioner of Internal Revenue *v.* Manila Mining Corporation, G.R. No. 153204, August 31, 2005, 469 SCRA 571.