REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

CBK POWER COMPANY LIMITED,
Respondent.

CTA EB CASE No. 639
(CTA Case No. 7220)

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

Promulgated:
JUL 20 2011

x- x

DECISION

CASANOVA, *J.*:

This is an appeal, by way of Petition for Review[1], filed by petitioner-Commissioner of Internal Revenue (CIR) from the Decision[2] (the "Assailed Decision") and Amended Decision[3] (the "Amended Decision") of the Court of Tax Appeals, Former Second Division (CTA Former Second Division), praying that the portion of the Decision and the Amended Decision granting the refund or issuance of tax credit certificate in favor of respondent be set aside and another one be entered denying the claim in its entirety.

The facts of the case, as found by the CTA Former Second Division, are as follows:

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[1] CTA En Banc Rollo, pp. 1-16
[2] Division Docket, Vol. II, pp. 1047-1078
[3] Ibid, pp. 1528-1539

"Petitioner is a partnership duly organized and existing under and by virtue of the laws of the Philippines, with principal office at the National Power Corporation (NPC) Compound, Kalayaan, Laguna. On the other hand, respondent is the duly appointed Commissioner of Internal Revenue vested with authority to act as such, including *inter alia*, the power to decide, approve and grant refunds or tax credit of erroneously or illegally collected internal revenue taxes as provided by law. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Diliman, Quezon City.

Petitioner is a special purpose entity and was formed for the sole purpose of engaging in all aspects of (a) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna; and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna. It is registered as a value-added tax (VAT) entity since April 10, 2000, with Tax Identification Number (TIN/VAT No. 205-760-474-000 and BIR Certificate of Registration 1RC0000195405.

On January 2, 2003, petitioner filed an Application for VAT zero-rate with the BIR which was duly approved on January 29, 2003 pursuant to VAT Review Committee Ruling No. 018-03.

During the period from January 1, 2003 to December 31, 2003, petitioner filed with the BIR its Monthly VAT Declarations and Quarterly VAT Returns. It filed its Original Quarterly VAT Returns for the first, second, third, and fourth quarters of calendar year 2003 on the following dates:[4]

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[4] Par. 6, Facts Admitted, Joint Stipulation of Facts and Issues (JSFI); Division Docket, Vol. I, pp. 304-305.

Quarter	Date filed
First	April 24, 2003
Second	July 25, 2003
Third	October 24, 2003
Fourth	January 26, 2004

Subsequently, petitioner amended its Monthly VAT Declarations and Quarterly VAT Returns for calendar year 2003, wherein the Amended Quarterly VAT Returns reflected unutilized/excess input taxes amounting to P298,430,362.42. Petitioner filed its Amended Quarterly VAT Returns on the following dates:[5]

Quarter	Date filed
First	June 10, 2003 and March 23, 2005
Second	March 23, 2005
Third	March 23, 2005
Fourth	March 23, 2005

On March 29, 2005, petitioner filed with the BIR Revenue District Office (RDO) No. 55 of Laguna an administrative claim for the issuance of a tax credit certificate for a total amount of P295,994,518.00 for its unutilized input taxes on the purchase of capital goods for calendar year 2003, amounting to P278,669.281.17, and on its unutilized input taxes on its local purchase of goods and services, other than capital goods for calendar year 2003, amounting to P17,325,236.83, attributable to its zero-rated sales.[6]

[5] Par. 7, Ibid.; Division Docket, p. 305.
[6] Par. 8, Id.; Division Docket, p. 305.

To toll the running of the two-year prescriptive period to judicially claim a tax refund/credit, petitioner filed the instant Petition for Review on April 18, 2005 pursuant to Section 229 of the National Internal Revenue Code (NIRC) of 1997.

Respondent, in his Answer filed on June 3, 2005, raised the following Special and Affirmative Defenses:

> "4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by respondent's Bureau;
>
> 5. The amount of P295,994,518.00 being claimed by petitioner as alleged unutilized input taxes for the period January 1, 2003 to December 31, 2003 was not properly documented;
>
> 6. In an action for refund/credit, 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 Sections 204 (C) and 229 of the 1997 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 as such, they are looked upon with disfavor **(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)**."

To support its claim, petitioner presented testimonial and documentary evidence. Respondent, on the other hand, submitted the case for decision based on the pleadings as there was no report of investigation in this case.[7]

On February 7, 2008, respondent filed his *Memorandum*, while petitioner filed its *Memorandum* on March 14, 2008. On March 26, 2008, this case was deemed submitted for decision.[8]"

[7] Minutes of the hearing held on January 16, 2008; Division Docket, Vol. II, p. 947.
[8] Resolution dated March 26, 2008; Division Docket, p. 1045.

On February 6, 2009, the CTA Former Second Division promulgated its Decision, the dispositive portion of which reads as follows:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED to ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWO HUNDRED FIFTEEN MILLION NINE HUNDRED NINETY EIGHT THOUSAND TWO HUNDRED SIXTY THREE PESOS and 13/100 (P215,998,263.13)**, representing unutilized input value-added tax on local purchases of goods and services attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003.
>
> **SO ORDERED**."

On February 24, 2009, respondent sought reconsideration[9] of the Assailed Decision and prayed that the Decision dated February 6, 2009, be partially reconsidered and modified by granting the denied portion of its total claim of P295,994,518.00 amounting to P74,049,089.00.

On February 25, 2009, petitioner-CIR filed a Motion for Partial Reconsideration[10] praying that the Assailed Decision be partially reconsidered and set aside and another one be rendered denying petitioner's (respondent herein) claim in its entirety.

On February 8, 2010, the CTA Former Second Division promulgated the Amended Decision, the dispositive portion of which reads as follows:

> "**WHEREFORE**, in view of the foregoing considerations, respondent's Motion for Partial Reconsideration is hereby **DENIED** for lack of merit, while petitioner's Motion for Partial Reconsideration is **PARTIALLY GRANTED**. Accordingly, the dispositive portion of the Decision promulgated on February 6, 2009 is hereby **MODIFIED** as follows:

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[9] Motion for Reconsideration, Division Docket, pp. 1079-1097
[10] Division Docket, pp. 1098-1105

> **WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWO HUNDRED EIGHTY SIX MILLION SEVEN HUNDRED EIGHTY THREE THOUSAND EIGHT HUNDRED FORTY SEVEN PESOS AND THIRTY SEVEN CENTAVOS (P286,783,847.37)**, representing unutilized input value-added tax attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003.
>
> **SO ORDERED**."

Respondent (petitioner herein) filed a Motion for Reconsideration[11] of the Amended Decision on March 3, 2010, which was subsequently denied by the Court in a Resolution[12] promulgated on May 20, 2010.

On June 10, 2010, petitioner filed the instant Petition for Review with the CTA *En Banc*.

After respondent filed its Comment on Petition for Review[13] on July 7, 2010, the CTA En Banc promulgated a Resolution[14] submitting the instant case for resolution.

Petitioner-CIR, in support of the Petition for Review, presented the following grounds/arguments:

> 1. The Honorable Court erred in stating that petitioner has waived its right to raise the issue that respondent has failed to submit all necessary and relevant documents at the administrative level;
>
> 2. The Honorable Court erred in granting respondent's claim for issuance of a tax credit certificate in the amount of P286,783,847.37

[11] Ibid, pp. 1540-1553
[12] Ibid, pp. 1556-1562
[13] CTA En Banc Rollo, pp. 74-81
[14] Ibid, pp. 85-86

> representing unutilized input value-added tax for taxable year 2003;
>
> 3. The Honorable Supreme Court has ruled that Section 229 is inapplicable to cases such as this, contrary to the ruling of the Honorable Court.

Respondent, on the other hand, contends that, contrary to petitioner's allegations, it had sufficiently proven and established that it is entitled to the issuance of a tax credit certificate for P286,783,847.37, representing its unutilized input VAT on local purchases of goods and services attributable to zero-rated sales for the period January to December 2003; that it has, likewise, proven its compliance with all of the basic requirements under then Section 112(A) and (B), in relation to Section 229, of the 1997 Tax Code; and, that the Court's Former Second Division had already addressed petitioner's assigned errors in its Resolution promulgated on May 20, 2010.

After a careful and thorough evaluation and consideration of the records of the case, the Court *En Banc* finds the Petition for Review to be meritorious.

Respondent filed its administrative claim for refund on March 29, 2005 and, barely 20 days thereafter, its judicial claim on April 18, 2005 (CTA Case No. 7220), in clear violation of the provisions of Section 112(D) of the 1997 Tax Code.

The non-observance of the 120-day period under Section 112 (D) [15] of the NIRC of 1997 results in prematurity of claim which warrants a dismissal as no jurisdiction was acquired by the CTA.

Under Section 7 of Republic Act (RA) No. 1125, as amended by RA 9282 it provides that:

> Sec. 7. Jurisdiction. — The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

[15] Now Section 112 (C), as amended by Republic Act (RA) No. 9337

> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;
>
> (2) **Inaction by the Commissioner of Internal Revenue in cases involving** disputed assessments, **refunds of internal revenue taxes**, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial**; (emphasis ours)

The CTA shall exercise exclusive appellate jurisdiction to review by appeal the decisions as well as the inaction by the CIR in cases involving refunds of internal revenue taxes. In case where the NIRC provides a specific period for action, the CIR's inaction shall be deemed a denial.

In this case, Section 112 (D) of the NIRC provides specific period of action, that is, the 120-day period within which the CIR shall render a decision. When no decision is made after the 120-day period, the taxpayer has 30 days within which to file an appeal with the CTA. At this point, there was neither a showing that a decision was rendered by the CIR nor that the 120-day period has already lapsed.

Evidently, there is nothing yet to be reviewed by the CTA. Thus, the 120-day period is crucial in filing an appeal with the CTA.[16]

Also, the case of *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue* [17] should be applied by analogy to the present case. The pertinent portion of the ruling states:

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[16] *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010. The *Aichi* case became final as per Supreme Court's Resolution dated December 6, 2010

[17] Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 168498, April 24, 2007

> "The decisions, rulings or inaction of the Commissioner are necessary in order to vest the Court of Tax Appeals with jurisdiction to entertain the appeal, provided it is filed within 30 days after the receipt of such decision or ruling, or within 30 days after the expiration of the 180-day period fixed by law for the Commissioner to act on the disputed assessments. **This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction** to entertain and determine the correctness of the assessments. **Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same.**[18]" (emphasis ours)

The Supreme Court ruled that the **30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction**. This applies to cases of refund under Section 112 where the taxpayer may, within 30 days from receipt of the decision denying the claim or after the expiration of the 120-day period, appeal the decision or the unacted claim with the CTA.

Similarly in the case of *Commissioner of Internal Revenue vs. Fort Bonifacio Development Corporation,*[19] the Supreme Court reiterated that **perfection of an appeal in the manner and within the period laid down by law is not only mandatory but also jurisdictional**. "The failure to perfect an appeal as required by the rules has the effect of defeating the right to appeal of a party and precluding the appellate court from acquiring jurisdiction over the case. At the risk of being repetitious, We declare that the right to appeal is not a natural right nor a part of due process. It is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law."[20]

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[18] *Ibid*
[19] G.R. No. 167606, August 11, 2010, 628 SCRA 96
[20] *Ibid*

The principles and doctrines laid down in the recent cases promulgated by the Supreme Court in *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.* [21] (*Aichi* case) and *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Corporation, Inc.)* [22] (*Mirant* case) are **controlling and should be applied outright** in all cases where the facts are substantially the same as the mentioned cases. The *Aichi* and *Mirant* cases are actual applications of Section 112(A) and (D)[23] of the NIRC of 1997, hence, their applications must be from the time the NIRC of 1997 took effect and not from the promulgation of said cases.

It should be emphasized 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. 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. [24]

While it is true that respondent's claim for refund was filed even before the *Aichi* case was promulgated, however, this does not mean that the doctrine laid down in *Aichi* should only be applied prospectively. As held in *Cemco Holdings, Inc. vs. National Life Insurance Company of the Philippines, Inc.,*[25] citing *Serrano vs. National Labor Relations Commission,*[26] the argument on the prospective application of a new ruling was ignored by the Court when it ruled:

> "While a judicial interpretation becomes a part of the law as of the date that law was originally passed, this is subject 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

[21] *Supra*, note 3
[22] G.R. No. 172129, September 12, 2008
[23] *Supra*, note 2
[24] *Eagle Realty Corporation vs. Republic, et al.*, G.R. No. 151424, July 31, 2009, 594 SCRA 555
[25] G.R. No. 171815, August 7, 2007, 529 SCRA 355
[26] 387 Phil.345,357;331 SCRA 331,342-343 (2000)

> 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.
>
> It is apparent that private respondent misconceived the import of the ruling. **The decision in Columbia Pictures does not mean that if a new rule is laid down in a case, it should not be applied in that case but that said rule should apply prospectively to cases arising afterwards. Private respondents view of the principle of prospective application of new judicial doctrines would turn the judicial function into a mere academic exercise with the result that the doctrine laid down would be no more than a dictum and would deprive the holding in the case of any force.**
>
> **Indeed, when the Court formulated the Wenphil doctrine, which we reversed in this case, the Court did not defer application of the rule laid down imposing a fine on the employer for failure to give notice in a case of dismissal for cause. To the contrary, the new rule was applied right then and there.** xxx" (emphasis ours)

As held in the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue* [27] penned by then Associate Justice Renato Corona (now Chief Justice), all rulings of the Supreme Court on questions of law are conclusive and binding on all courts. All courts must take their bearings from the decisions of the Supreme Court. Thus, We do not presume to reverse the current decision of the Supreme Court on the ground that a new ruling or doctrine violates any constitutional provision absent any pronouncement from it as such. It should be noted that the Supreme Court, by tradition and in our system of judicial administration has the last word on what the law is; it is the final arbiter of any

[27] G.R. No. 176290, Resolution dated September 21, 2007, 533 SCRA 776, 781

justifiable controversy. Indeed, there is only one Supreme Court from whose decisions all other courts should take bearings.[28]

Accordingly, in *Aichi* case, the Supreme Court unqualifiedly disallowed the refund for having been prematurely filed as "no jurisdiction was acquired by the CTA":

> "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)

Applying the same to the present case, it can be clearly gleaned that the judicial claim was prematurely filed without awaiting the decision of the CIR or the lapse of the 120-day period. Thus, the CTA should dismiss the claim for refund for all the quarters of taxable year 2003 inasmuch as no jurisdiction was acquired by the Court.

More so, the law clearly states the claim for refund of unutilized input VAT has to be made within two (2) years after the close of the taxable quarter when the sales were made. In proper cases, the Commissioner shall grant a refund or in case of denial or failure on the part of the Commissioner to act on the application within 120 days, the taxpayer, within 30 days from receipt of decision or expiration of the given period in case of inaction, may file an appeal with the CTA.

In this case, the Court may not construe a statute that is free from doubt. Where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application. The Court has no choice but to see to it that its mandate is obeyed. [29]

WHEREFORE, the instant Petition for Review filed by petitioner-Commissioner of Internal Revenue, on June 10, 2010, is hereby **GRANTED**. The Assailed Decision dated February 6, 2009 and the Amended Decision dated

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[28] *Commissioner of Internal Revenue vs. Michel J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178 citing the case of *GSIS vs. Court of Appeals*, 334 Phils. 163, 175, 266 SCRA 187 (1997).

[29] *Commissioner of Internal Revenue vs. American Express International, Inc. (Philippine Branch)*, G.R. No. 152609, June 29, 2005, 462 SCRA 197, 220

February 8, 2010, are hereby both **REVERSED** and **SET ASIDE**. Consequently, the Petition for Review (CTA Case No. 7220) filed on April 18, 2005 is hereby **DISMISSED** for premature filing.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(Concurs with the Dissenting
Opinion of Justice Fabon-Victorino
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(With Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO GRULLA
Associate Justice

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

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB CASE NO. 639
(CTA Case No. 7220)

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

-versus-

CBK POWER COMPANY LIMITED,
Respondent.

Promulgated:
JUL 20 2011 2:17pm

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DISSENTING OPINION

BAUTISTA, J.:

Based on the records of the case, respondent's claim for the issuance of tax credit certificate involves the period covering January 1, 2003 to December 31, 2003, in which it filed the following Quarterly Value-Added Tax Returns:

YEAR 2003	DATE FILED
1st Quarter	April 24, 2003
2nd Quarter	July 25, 2003

3rd Quarter	October 24, 2003
4th Quarter	January 26, 2004

When respondent filed its administrative claim on March 29, 2005 and its Petition for Review on April 18, 2005, the then prevailing doctrine on the reckoning of the prescriptive period within which to file an administrative and judicial claims for refund or tax credit is that enunciated in the case of *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* (*"Atlas case"*),[1] wherein the period is counted not from the close of the taxable quarter as ruled in the case of *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.]* (*"Mirant case"*),[2] but from the filing of the relevant return.

It need not be stated that the Supreme Court, being the court of last resort, is the final arbiter of all legal questions properly brought before it, and that its decision in any given case constitutes the law of that particular case. Once its judgment become final it is binding on all inferior courts, and hence beyond their power and authority to alter or modify.[3]

However, the Court's decisions should not be, as to a given period of time, upon the same or similar facts and under the same or similar circumstances, as fluctuating as to engender the phenomenon described by Mr. Justice Thompson of the Supreme Court of Virginia as *ignis fatuus*.[4]

With this, the reckoning of the prescriptive period prescribed under the *Atlas case* should apply to the case at bench.

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[1] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.
[2] G.R. No. 172129, September 12, 2008, 565 SCRA 154.
[3] Jose Kabigting *v.* The Acting Director of Prisons, G.R. No. L-15548, October 30, 1962.
[4] Ramon Torres *v.* Tan Chim, G.R. No. L-46593, February 3, 1940, 69 Phil. 518, *citing Perkins v. Clemente et al., 1 Pat and (Va.) 153.*

In the same vein, a reading of Section 112(C) of the 1997 NIRC, as amended, will show that the provision use the word *"may,"* which as settled in statutory construction connotes permissiveness, rather than of a restrictive or mandatory in nature. Consistent with the provision's permissive nature, the judicial recourse to this Court within thirty (30) days after the lapse of the one hundred twenty (120)-day period, therefore, is merely directory, and not mandatory nor jurisdictional; subject only to the period provided under Sections 112(A) and 229 of the same Code.

And, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[5]

To stress, both the administrative and judicial claims must be filed within the two (2)-year period,[6] for beyond that period, the taxpayer can no longer appeal to this Court.[7]

Consequently, respondent had until the following dates within which to file both its administrative and judicial claims, *viz*:

YEAR 2003	DATE FILED	END OF THE TWO (2)-YEAR PERIOD
1st Quarter	April 24, 2003	April 24, 2005
2nd Quarter	July 25, 2003	July 25, 2005
3rd Quarter	October 24, 2003	October 24, 2005
4th Quarter	January 26, 2004	January 26, 2006

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[5] Commissioner of Internal Revenue *v.* CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.
[6] Commissioner of Internal Revenue *v.* Victorias Milling Co., Inc., No. L-24108, January 3, 1968, 22 SCRA 12.
[7] Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.

In sum, I find respondent's administrative claim filed on March 29, 2005 and its Petition for Review filed on April 18, 2005, made within the prescribed period.

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

LOVELL R. BAUTISTA
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner, - versus - CBK POWER COMPANY LIMITED, Respondent.	C.T.A. EB No. 639 (C.T.A. CASE NO. 7220) Members: ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.* Promulgated: JUL 20 2011

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DISSENTING OPINION

Fabon-Victorino, *J.*:

Failure to exhaust administrative remedies deprives a complainant or a petitioner a cause of action rendering the case dismissible on ground of prematurity. However, this doctrine of exhaustion of administrative remedies is merely a rule of procedure and does not go to the power of the Court to hear and determine a case. In fine, **it does not affect the jurisdiction**

of the court. Thus, if the said ground is not seasonably invoked, it is deemed waived.[1] Hence, this dissent to the majority opinion that "none-observance of the 120-day period under Section 112(D) of the NIRC of 1997 results in prematurity of claim which warrants a dismissal as no jurisdiction was acquired by the CTA."

With high respect to the majority, I submit the relevant portion of my discussion in the draft decision that I prepared as previously assigned *ponente,* as my dissenting opinion thus:

Indeed, it is unfortunate that petitioner belatedly interposed the defense of premature filing of the Petition for Review with the Court in Division. Respondent never denied that the administrative claim for issuance of tax credit certificate for unutilized input value added tax in the amount of P295,994,518.00 was filed on March 29, 2005. Barely 20 days thereafter or on April 18, 2005, respondent lodged its judicial claim for the same amount with the Court in Division via a Petition for Review in complete disregard of the mandate under Section 112 of the NIRC, as amended. The provision grants petitioner 120 days to assess and determine the merit of the

[1] Soto v. Jareno, 144 SCRA; Eastern Shipping Lines v. POEA, 166 SCRA 533.

claim for refund or tax credit. Specifically in this case, petitioner had until July 27, 2005 to either grant or deny respondent's application for issuance of a tax credit certificate. But respondent came to Court in haste without pursuing its administrative claim to its logical conclusion and instituted its judicial claim in less than a month from seeking relief from petitioner rendering its judicial recourse premature.

The need to wait for the 120-day period for petitioner to act on claim for refund before judicial action is taken has been laid to rest in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*,[2] where the Supreme Court enriched the jurisprudence by squarely resolving the issue in this wise, thus:

> "Section 112(D) of the NIRC clearly provides that the CIR has "120 days, from the date of the submission of the complete documents in support of the application [for tax refund/credit]," within which to grant or deny the claim. In case of full or partial denial by the CIR, the taxpayer's recourse is to file an appeal before the CTA within 30 days from receipt of the decision of the CIR. However, if after the 120-day period the CIR fails to act on the application for tax refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.

[2] G.R. No. 184823, October 06, 2010.

> In this case, the administrative and the judicial claims were simultaneously filed on September 30, 2004. Obviously, respondent did not wait for the decision of the CIR or the lapse of the 120-day period. For this reason, we find the filing of the judicial claim with the CTA premature.
>
> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filing of a judicial claim as long as both the administrative and the judicial claims are filed within the two-year prescriptive period has no legal basis."

However, the doctrine of exhaustion of administrative remedies is merely a rule of procedure and does not go to the power of the court, and will not be adhered to where its application will result in an unjust decision. [3] It is not jurisdictional. It only renders the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court. [4] A direct action in court without prior exhaustion of administrative remedies, when required, is premature, warranting its dismissal on a motion to dismiss grounded on lack of cause of action.[5] Thus, the failure of respondent to exhaust

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[3] Mercury Group of Companies, Inc. vs. Home Development Mutual Fund, G.R. No. 171438, December 19, 2007.
[4] Carale vs. Abarintos, G.R. No. 120704, March 03, 1997.
[5] RP vs. Sandiganbayan, G.R. No. 112708-09, March 29, 1996.

available administrative remedies rendered the Petition for Review dismissible for lack of cause of action to ventilate in court.

But non-exhaustion of administrative remedies as objection or defense may be waived. Note that in the instant case, petitioner never raised during the trial before the Court *a quo* the issue of respondent's failure to submit complete documents at the administrative level or await the expiration of the 120-day period before seeking judicial intervention. Neither did petitioner raise them in his pleadings, particularly in the Answer. It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.[6]

The same issues were never part of the parties' stipulation during the pre-trial conference. It has been ruled that the determination of issues during the pre-trial conference bars the consideration of other questions, whether during trial or on appeal.[7]

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[6] Toshiba Information Equipment (Phils.), Inc. vs. CIR, G.R. No. 157594, March 15, 2010.
[7] Villanueva vs. Court of Appeals, G.R. No. 143286. April 14, 2004.

Ultimately, petitioner wrote *finis* to his case and submitted it for decision without presenting any evidence citing lack of case investigation report as reason therefor. Thus, crying foul at this point is perplexing to say the least.

A significant ground laid down in the suppletory provision of Section 1, Rule 9 of the Rules of Court, also has not lost its appeal, thus:[8]

> "Sec. 1. *Defenses and objections not pleaded*. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim." (underscoring ours)

Hence, all objections and defense not pleaded, either in a motion to dismiss or in an answer, are deemed waived. The only exceptions to this rule are: (1) when the court has no jurisdiction over the subject matter, (2) when there is another action pending between the parties for the same cause, or (3) when the

[8] Section 3, Rule 1 of the Revised Rules of the Court of Tax Appeals.

action is barred by prior judgment or by statute of limitations, in which cases, the court may dismiss the claim.[9] The spirit that surrounds the foregoing statutory norm is to require the party filing a pleading or motion to raise all available exceptions for relief during the single opportunity so that single or multiple objections may be avoided. The provision is unequivocal thus statutory construction is not warranted. The law is clear and free from any doubt or ambiguity hence there is no room for construction or interpretation.[10] The Court needs only to apply it.

In fine, for petitioner's failure to raise the issue of exhaustion of administrative remedies at the first instance, and considering that the circumstances of the case do not fall under any of the stated exceptions, petitioner is deemed to have waived any objections relating thereto and cannot invoke this defense this late in the day. As explained by the Supreme Court, "parties are not allowed to flip-flop. Courts have neither the time nor the resources to accommodate parties who choose to go to trial haphazardly. Moreover, it would be grossly unfair to allow

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[9] Sarsaba vs. Vda. De Te, G.R. No. 175910, July 30, 2009.
[10] Aquino vs. Aure, G.R. No. 153567, February 18, 2008.

petitioners the luxury of changing their mind to the detriment of private respondents at this late stage."[11]

Moreover, as the object of the pleadings is to draw the lines of battle between the litigants and to indicate fairly the nature of the claims or defenses of both parties, a party cannot subsequently take a position contrary to, or inconsistent, with his pleadings as petitioner did in this appeal. It is a matter of law that when a party adopts a particular theory and the case is tried and decided upon that theory in the court below, he will not be permitted to change his theory on appeal. The case will be reviewed and decided on that theory and not approached and resolved from a different point of view. To permit a party to change his theory on appeal will be unfair to the adverse party.[12]

Finally, allow me to quote an absorbing reflection from the Dissenting Opinion of Chief Justice Reynato S. Puno in the very significant case of *Kilosbayan, Incorporated, et al., v. Teofisto Guingona, Jr. et al.,*[13]

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[11] Toshiba Entertainment Equipment (Phils.), Inc. v. CIR, G.R. No. 157594, March 15, 2010.
[12] Cocomangas Hotel Beach Resort vs. Visca, G.R. No. 167045, August 29, 2008.
[13] G.R. No. 113375, May 5, 1995.

> Given the sparseness of our resources, the capacity of courts to render efficient judicial service to our people is severely limited. For courts to indiscriminately open their doors to all types of suits and suitors is for them to unduly overburden their dockets, and ultimately render themselves ineffective dispensers of justice. To be sure, this is an evil that clearly confronts our judiciary today.

I therefore vote to deny the instant Petition for Review and affirm the assailed Amended Decision of February 8, 2010 and the subsequent Resolution of May 20, 2010.

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice

I concur:

ERNESTO D. ACOSTA
Presiding Justice