REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CE LUZON GEOTHERMAL POWER COMPANY, INC., *Petitioner,*	**C.T.A. EB NO. 553 (C.T.A. CASE NOS. 7180 & 7279)**
-versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**C.T.A. EB NO. 554 (C.T.A. CASE NOS. 7180 & 7279)**
-versus-	Present: ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ.
CE LUZON GEOTHERMAL POWER COMPANY, INC., *Respondent.*	**Promulgated:** JUN 27 2011 3:30 pm

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AMENDED DECISION

PALANCA-ENRIQUEZ, J.:

This resolves:

1) CE Luzon's "Motion for Reconsideration (Re: Amended Decision

dated November 22, 2010)" filed on December 10, 2010; and

2) CIR's "Comment" filed on February 23, 2011.

CE Luzon's motion is anchored on the following grounds:

1) The CTA–Division's finding that the administrative and judicial claims for refund must be filed within the two-year period under Section 229, Tax Code must be respected as an established point of law;

2) The rule is settled that a taxpayer need not wait for the lapse of the 120-day period before filing the judicial claim for refund, the prevailing rule on the issue ought to be applied.

    a) The Honorable Court's reliance on the Supreme Court's pronouncement in Aichi is bereft of any basis;

    b) The interpretation that the 120-day period under Section 112 (D), Tax Code is a condition imposed upon petitioner's right to appeal rather than as a mandate on the CIR to fulfill her duties with dispatch, is against the standards of fairness, equity and due process.

3) The amended decision's impact on the entire power generation industry and other investors is indubitable and thus, it needs to be revisited. In any event, the novel interpretation of the law in Aichi should not be made to apply to CE Luzon. The amended decision is contrary to existing jurisprudence at the time CE Luzon filed its administrative and judicial claims for refund;

4) The amended decision failed to consider the records of the case insofar as it held that CE Luzon violated the doctrine of non-exhaustion of administrative remedies.

The motion is partly meritorious.

First Ground

As regards the first ground, CE Luzon contends that the issue of jurisdiction in this case had already been settled when the former Second Division denied CIR's "Motion to Dismiss" in its Resolutions dated October 1, 2007 and January 29, 2008, which has become the law of the case since the CIR failed to file her Petition for Review in C.T.A. EB No. 362, which was subsequently considered by the Court *En Banc* as having been abandoned; hence, the same cannot be subject to review or reversal in any court.

Records show that C.T.A. EB No. 362 was docketed in view of the CIR's filing a "Motion for Extension of Time to File Petition for Review" on February 15, 2008 to assail the Resolutions of the former Second Division dated October 1, 2007 and January 29, 2008 in C.T.A. Case Nos. 7180 and 7279. However, it must be emphasized that the aforesaid Resolutions dated October 1, 2007 and January 29, 2008 of the former Second Division are mere interlocutory orders denying CIR's "Motion to Dismiss" the Petitions for Review filed in C.T.A. Case Nos. 7180 and 7279; hence, not appealable. The rationale behind the rule proscribing the remedy of appeal from an interlocutory order is to prevent undue delay, useless appeals and undue inconvenience to the appealing party by having to assail orders as they are promulgated by the court, when they can be contested in a single appeal. The appropriate remedy is, thus, for the party to wait for the final judgment or order and assign such interlocutory order as an error of the court on appeal *(Apuyan vs. Haldeman, 438 SCRA 402, 418-419).*

The CIR was, therefore, correct when she did not pursue her appeal to the Court *En Banc* to question the Resolutions dated October 1, 2007 and January 29, 2008, as her remedy is to appeal the same, together with the decision of the former Second Division, and assign the denial of her "Motion to Dismiss" as an error of the court on appeal. Thus, CE Luzon's contention that said Resolutions became the "law of the case" has no merit. Accordingly, CIR's abandonment of C.T.A. EB No. 362 was proper. Therefore, the Court *En Banc*'s Resolution dated May 9, 2008 declaring C.T.A. EB No. 362 as having been abandoned, and closed and terminated, for failure of the CIR to file her Petition for Review, and the subsequent recording of the same in the Book of Entries of Judgment for having become final and executory, is not an issue in this case. The ruling of the former Second Division in its Resolutions dated October 1, 2007 and January 29, 2008 cannot be said to have become the "law of the case" since the CIR has availed of the proper remedy, which is to appeal via a Petition for Review to

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the Court *En Banc* the decision of the former Second Division, which was docketed as C.T.A. EB No. 554.

Settled is the rule that courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings *(Ace Publications, Inc., vs. Commissioner of Customs and the Collector of Customs, 11 SCRA 153).*

Furthermore, the non-applicability of *Section 229 of the NIRC of 1997, as amended*, to input VAT refunds had already been settled by the Supreme Court in the case of *CIR vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc., 565 SCRA 154).*

<u>Second, Third and Fourth Grounds</u>

Being interrelated, CE Luzon's second, third and fourth grounds will be discussed jointly.

At the outset, the other issues raised by CE Luzon had already been settled by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.,G.R. No. 184823, October 6, 2010 ("Aichi Case"),* to wit:

"The filing of the judicial claim was premature

However, notwithstanding the timely filing of the administrative claim, we are constrained to deny respondent's claim for tax refund/credit for having been filed in violation of Section 112(D) of the NIRC, which provides that:

> SEC. 112. Refund or Tax Credits of Input Tax. –
>
> 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 Subsection (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 tax on the application within the period prescribed above, the taxpayer affected may, within (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals. *(Emphasis supplied.)*

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 refund/credit, the remedy of the taxpayer is to appeal the inaction of the CIR to CTA within 30 days.

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.

There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that 'any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years xxx apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. 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 Subsection (A) and (B)' within which to decide on the claim.

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

With regard to Commissioner of Internal Revenue vs. 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."

Pursuant to the above ruling, the periods provided under *Section 112 (D) of the NIRC of 1997, as amended*, are crucial in filing an appeal with the CTA. Again, CE Luzon cannot now rely on the provision of *Section 229 of the NIRC of 1997, as amended*, since it is already settled that said provision is not applicable to claims for VAT refund *(CIR vs. Mirant Pagbilao Corporation, supra)*. Thus, the two (2)-year period is applicable to administrative claims for VAT refund only, pursuant to *Section 112 (A)* of the same Code, and not to judicial claims.

As to CE Luzon's contention that the Aichi case should not be applied to this case since decisions of the Supreme Court should have a prospective application, we must emphasize that the Aichi case is a mere reiteration of what *Section 112 of the NIRC of 1997, as amended*, clearly provides and does not establish a rule which is not familiar to petitioner. Considering that *Section 112 of the NIRC of 1997, as amended*, is the law in force and applicable to CE Luzon's claim for taxable year 2003, CE Luzon cannot

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claim that it is legally impossible to comply with the same, and that the Aichi case was still non-existent at the time CE Luzon filed its Petitions for Review. Consequently, CE Luzon's contention that the doctrine in Atlas case is the one applicable in the instant case cannot be sustained.

Basic is the rule that judicial interpretation of the law retroacts to the date when the said law became effective. Thus, the ruling in the Aichi case retroacts to the date when *Section 112* took effect.

At any rate, the ruling in the Aichi case partakes of the nature of a procedural rule. Settled is the rule that one does not have a vested right in procedural rules.

Applying the foregoing to the instant case, this Court rules:

a) Claim for the 1st Quarter of Taxable Year 2003

As regards CE Luzon's VAT refund for the 1st quarter of taxable year 2003, we maintain our ruling in our Amended Decision dated November 22, 2010 that the Petition for Review, docketed as C.T.A. Case No. 7180, filed before the former Second Division, was prematurely filed. Records show that CE Luzon filed its administrative claim with the BIR on January 20, 2005. Counting from said date, the CIR's 120-days to decide said claim expired on May 20, 2005. However, records show that CE Luzon filed its Petition for Review on March 30, 2005, alleging inaction of the CIR.

Clearly, the Petition for Review was prematurely filed as CE Luzon did not wait for the lapse of the 120-day period prior to the filing of its appeal with the CTA.

b) Claim for the 2nd Quarter of Taxable Year 2003

As to the 2nd quarter claim, CE Luzon contends that the non-exhaustion of administrative remedy cannot be applied to its claim for refund for the 2nd quarter of 2003, as the counting of the period to appeal must be reckoned from CE Luzon's receipt on June 24, 2005 of the BIR's denial of its 2nd quarter claim in a letter dated April 28, 2005.

Records show that on May 21, 2006, CE Luzon manifested before the former Second Division of this Court that it received on June 24, 2005 the BIR's denial of its administrative claim for refund for the second quarter of 2003. Before the Aichi case, the ruling then was both the administrative and judicial claims for refund must be filed within the two-year prescriptive period. Hence, the receipt of the denial of petitioner's administrative claim for refund for the second quarter of 2003 was then not material for purposes of counting the period to file the judicial claim for refund.

However, in view of the Aichi case, we reckon CE Luzon's 30-day prescribed period to appeal to this Court from its receipt of the CIR's denial of its administrative claim for refund. Thus, counting from CE Luzon's receipt on June 24, 2005 of the CIR's denial, CE Luzon has thirty (30) days from June 24, 2005 or until July 25, 2005 to appeal to the CTA. Consequently, we find CE Luzon's Petition for Review in C.T.A. Case No. 7279, as having been timely filed on June 30, 2005, in so far as the claim for the 2nd quarter of taxable year 2003 is concerned. For this reason, we recall and set aside our Amended Decision dated November 22, 2010, but only as regards CE Luzon's 2nd quarter claim.

Records further show that CE Luzon claims for the refund of its unutilized input VAT in the total amount of P4,568,458.49 for the 2nd quarter of taxable year 2003. However, as aptly ruled by the former Second Division, the amount of P804,072.02 was disallowed from CE Luzon's 2nd quarter claim. Details of the said disallowances, as found by the former Second Division, are, as follows:

	Findings	**Reference (Annex to Exhibit HH)**	**Input VAT**
1	**Input VAT on domestic purchases of goods supported by pre-printed TIN-V invoice.**		
	2nd qtr	L-2Q-A12	11,114.74
2	**Input VAT on domestic purchase of services supported by pre-printed TIN-V *official receipt* (OR).**		
	2nd qtr	L-2Q-B12	47,128.98
3	**Input VAT on importation of goods supported by a certified true copy of the IEIRD.**		
	2nd qtr	L-2Q-C18	238,536.00
4	**Input VAT on payments to travel agencies.**		
	2nd qtr	L-2Q-G2	531.98
5	**Input VAT on domestic purchases of goods supported by documents other than a VAT invoice.**		

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	2nd qtr	L-2Q-A1	76,465.48
6	**Input VAT on domestic purchases of goods supported by a VAT invoice but not an original copy.**		
	2nd qtr	L-2Q-A3	45,990.26
7	**Input VAT on domestic purchases of goods supported by a VAT invoice not issued in the name of the Company.**		
	2nd qtr	L-2Q-A4	2,187.04
8	**Input VAT on domestic purchases of goods supported by a VAT invoice issued in the name of the Calenergy / CE Cebu / VGPC (whichever is applicable)**		
	2nd qtr	L-2Q-A5	109.09
9	**Input VAT on domestic purchases of goods supported by TIN only: TIN-NV / NON VAT invoice; stamped / handwritten TIN-V / VAT.**		
	2nd qtr	L-2Q-A7	10,558.08
10	**Input VAT on domestic purchase of goods supported by tape receipt but without the Company's name and / or TIN.**		
	2nd qtr	L-2Q-A8	484.60
11	**Input VAT on domestic purchases of goods not dated within the VAT taxable year.**		
	2nd qtr	L-2Q-A14	13,103.14
12	**Input VAT on domestic purchases of goods supported by a VAT invoice with changes in the name of the Company.**		
	2nd qtr	L-2Q-A15	152.73
13	**Input VAT on domestic purchases of goods supported by an invoice which are not BIR-registered.**		
	2nd qtr	L-2Q-A17	28,782.47
14	**Input VAT on domestic purchases of services supported by documents other that a VAT OR.**		
	2nd qtr	L-2Q-B1	89,282.49
15	**Input VAT on domestic purchases of services supported by a VAT OR but not an original copy.**		
	2nd qtr	L-2Q-B3	10,893.40
16	**Input VAT on domestic purchases of services supported by TIN-NV/ NON VAT OR but stamped with "VAT"/ "TIN VAT" or the word "NON" was erased.**		
	2nd qtr	L-2Q-B6	22,426.71
17	**Input VAT on domestic purchases of services supported by a TIN only; TIN-NV / NON VAT OR; stamped / handwritten TIN-V / VAT.**		
	2nd qtr	L-2Q-B7	13,942.00
18	**Input VAT on domestic purchases of services with changes in the name of the Company.**		
	2nd qtr	L-2Q-B15	4,175.00
19	**Over-claimed input VAT on domestic purchases of goods / services due to erroneous computation.**		
	2nd qtr	L-2Q-E1	8.60
20	**Input VAT on payments for printing services supported with documents other than VAT OR.**		
	2nd qtr	L-2Q-G6	172.73

21	**Over-claimed portion of input tax arising from foreign exchange rate used on foreign currency denominated purchases of goods and services.**		
	2nd qtr	L-2Q-J1	162.98
22	**Supporting documents not available.**		
	2nd qtr	L-2Q-F	187,863.52
TOTAL			**P804,072.02**

Consequently, of the total claim of P4,568,458.49, CE Luzon is entitled to the amount of P3,764,386.47 only, representing its unutilized input VAT for the 2nd quarter of taxable year 2003.

c) Claims for the 3rd and 4th Quarters of Taxable Year 2003

With respect to CE Luzon's claims for the 3rd and 4th quarters, it is evident that CE Luzon's judicial claim was likewise prematurely filed. Records show that CE Luzon filed its 3rd and 4th quarter administrative claims on June 7, 2005; hence, the CIR's 120-day period to decide the said claims expired on October 5, 2005. However, records show that CE Luzon filed its judicial claims for the 3rd and 4th quarters, together with its 2nd quarter claim, on June 30, 2005 *(C.T.A. Case No. 7279)*. Clearly, CE Luzon prematurely filed its judicial claim as it did not wait for the lapse of the CIR's 120-day period to decide the claim. Consequently, applying the Aichi case, the former Second Division has not acquired jurisdiction over CE Luzon's claims for the 3rd and 4th quarters of taxable year 2003 for having been prematurely filed.

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For all the foregoing, we hereby reconsider our Amended Decision dated November 22, 2010, but only as regards CE Luzon Geothermal Power Company, Inc.'s 2nd quarter claim for VAT for taxable year 2003, and maintain our findings of premature filing of the Petition for Review as regards the 1st, 3rd and 4th quarters of taxable year 2003.

WHEREFORE, premises considered, CE Luzon Geothermal Power Company, Inc.'s "Motion for Reconsideration" is hereby **PARTLY GRANTED**. Accordingly, our Amended Decision dated November 22, 2010 only in so far as it dismissed CE Luzon Geothermal Power Company, Inc.'s 2nd quarter claim, is hereby **LIFTED** and **SET ASIDE**, and another one is hereby entered ordering the Commissioner of Internal Revenue to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** in favor of CE Luzon Geothermal Power Company, Inc. in the reduced amount of **THREE MILLION SEVEN HUNDRED SIXTY FOUR THOUSAND THREE HUNDRED EIGHTY SIX AND 47/100 PESOS (P3,764,386.47),** representing its unutilized input VAT for the second quarter of taxable year 2003.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my Dissenting Opinion dated November 22, 2010)

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Justice