REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

HEDCOR SIBULAN, INC., Petitioner,	**CTA EB CASE No. 798** (CTA Case No. 8166)
	Members: ACOSTA, *P.J.,* CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
-versus-	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: DEC 06 2012 4:15pm

X- X

DECISION

Casanova, J.:

This is an appeal by way of a verified Petition for Review[1], under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals, seeking the reversal of the Resolutions dated April 12, 2011[2] and June 14, 2011[3] (Assailed Resolutions) rendered by the CTA Second Division in CTA Case No. 8166 entitled ***"Hedcor Sibulan, Inc. vs. Commissioner of Internal***

[1] En Banc Rollo, pp. 7-66.
[2] Annex "A" of Petition for Review, *Ibid.*, pp. 70-75.
[3] Annex "B" of Petition for Review, *Id.*, pp. 77-82.

Revenue," granting respondent's Motion to Dismiss and denying petitioner's Motion for Reconsideration of the said resolution.

Petitioner prays for this Honorable Court to proceed with the trial of its claim for refund or issuance of tax credit certificate in the amount of Thirty-Nine Million Five Hundred Fourteen Thousand Forty-Five Pesos and 36/100 (P39,514,045.36), representing its alleged excess and unutilized input value-added tax (VAT) for the third (3rd) quarter of the calendar year (CY) 2008.

The facts of the case, as culled from the records, are briefly narrated as follows:

Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Sta. Cruz, Davao Del Sur. It may be served orders, notices, resolutions, and other processes of this Court through its undersigned counsel at its office address at 8/F, Tower One and Exchange Plaza, Ayala Triangle, Ayala Avenue 1226 Makati City.[4]

Respondent is the duly appointed Commissioner of Internal Revenue 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, as provided by law. She may be served summons, pleadings and other processes at his office at the BIR National Office Building, BIR Road, Diliman, Quezon City.[5]

On October 20, 2008, petitioner filed with the Revenue District Office (RDO) No. 115 of the Bureau of Internal Revenue (BIR) its Original Quarterly VAT Return for the 3rd quarter of CY 2008. Thereafter, petitioner filed its Amended Quarterly VAT Return for the same period on June 23, 2010.[6]

On June 25, 2010, petitioner filed with BIR RDO No. 115 a written application for the refund or issuance of a tax credit certificate (TCC) in the amount of P107,888,643.12 for its unutilized input VAT for the 2nd to 4th

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[4], Par. 1, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Division Docket, p.226.
[5], Par. 2, Admitted Facts, JSFI, *Ibid.,* p.227.
[6] Pars. 10 & 11, Admitted Facts , JSFI, *Id.,* p.229.

quarters of CY 2008. The said application includes the amount subject of the present petition.[7]

On September 30, 2010, petitioner filed its Petition for Review before the CTA in Division, claiming for refund or issuance of TCC in the amount of P39,514,045.36, representing its alleged excess and unutilized input VAT for the 3rd quarter of CY 2008.[8]

On October 21, 2010, respondent filed her Answer[9] and interposed the following Special and Affirmative Defenses, to wit:

> **"Special and Affirmative Defenses**
>
> 5. Taxes paid and collected by the Bureau of Internal Revenue (BIR) are presumed to have been made in accordance with law, rules and regulations and the burden to prove otherwise is upon the petitioner.
>
> 6. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau.
>
> 7. Petitioner must prove it is entitled to a claim for refund under the strictest terms.
>
> 8. Petitioner must prove that it paid the alleged VAT input taxes for the period in question.
>
> 9. Petitioner must prove that the same alleged VAT input taxes was not utilized against any output tax liability.
>
> 10. Petitioner must prove that the alleged VAT input taxes for the period in question are attributable to its alleged VAT zero-rated sales.
>
> 11. Petitioner must prove that the administrative and judicial claims were filed within the period prescribed by law.
>
> 12. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112(A) of the NIRC of 1997.
>
> 13. The claim for refund in the amount of Thirty Nine Million Five Hundred Fourteen Thousand Forty Five and 36/100 Pesos

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[7] Pars. 12, Admitted Facts , JSFI, Id., p.229-230.
[8] Par. 9, Statement of Facts, Petition for Review, En Banc Rollo, pp. 9-10.
[9] Division Docket, pp. 175-184.

(P39,514,045.36) allegedly representing accumulated and unutilized VAT input taxes it paid for the 3rd quarter of CY 2008 is not properly documented. To support its claim, it is indispensable for petitioner to prove the following:

a) Registration requirements of a value-added taxpayer in compliance with Section 9.236.1 (a) of Revenue Regulations No. 16-2005 and Section 236 of the NIRC of 1997, as amended;

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

c) Petitioner must prove that it has fully complied with the requirements of Section 9.236.1.a of RR No. 16-2005 and Revenue Memorandum Order No. 53-98, otherwise, there would be no sufficient compliance with regard to the filing of administrative claim for tax credit/refund which is a condition *sine qua non* prior to the filing of judicial claim;

d) In relation thereto, Section 112(C) of the NIRC of 1997, as amended, requires submission of complete documents in support of the application for tax refund filed with respondent before the one hundred twenty (120) day period shall apply and before petitioner could avail of the judicial remedies provided by law. Ergo, petitioner's failure to submit proof of compliance with the aforesaid requirements warrants the dismissal of the instant Petition for Review.

14. In the case entitled *'San Roque Power Corp. vs. Commissioner of Internal Revenue',* the Supreme Court had the occasion to say:

"In order to claim a refund or tax credit under Section 112(A), petitioner must comply with the following criteria:

1. The taxpayer is VAT-registered;
2. The taxpayer is engaged in zero-rated or effectively zero-rated sales;

3. The input taxes are due or paid;
4. The input taxes are not transitional input taxes;
5. The input taxes have not applied against output taxes during and in the succeeding quarters;
6. The input taxes claimed are attributable to zero-rated or effectively zero-rated sales;
7. For zero-rated sales under Section 106(A)(2)(1) and (2); 106 (B), and 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with BSP rules and regulations;
8. Where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales, and that the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume; and
9. The claim is filed within 2 years after the close of the taxable quarter when such sales were made."

15. For a judicial claim for refund of input VAT to prosper, the petitioner must prove that there must be (a) zero-rated or effectively zero-rated sales; (b) that input taxes were incurred or paid; (c) that the input taxes are attributable to zero-rated or effectively zero-rated sales; (d) that the input taxes were not applied against any output VAT liability; and (e) the claim for refund/tax credit must be filed within the two year prescriptive period. *(EG & G Omni, Inc. v. CIR, CTA Case No. 5987, March 26, 2004)*

16. Corollary thereto, Sec. 4.110.8 of RR 16-2005 explicitly provides:

> "Input Taxes for tie (sic) importation of goods or the domestic purchases of goods, properties or services is made in the course of trade or business, whether such input taxes shall be credited against zero-rated sales, or subject to the 5% Final Withholding VAT must be substantiated and supported by the following documents and must be reported in the information returns required to be submitted to the Bureau: (1) For the importation of goods-import entry or other equivalent document showing actual payment of VAT on imported goods; (2) For domestic purchases of goods and properties-invoice showing the information required under Sections 113 and 237 of the Tax Code."

17. Likewise, for a judicial claim to prosper, the party must not only prove that it is a VAT-registered entity, it must substantiate the

input VAT paid by purchase invoice or official receipts *(Commissioner of Internal Revenue vs. Manila Mining Corporation, 468 SCRA 571).* Such that failure to comply with the requirements for a valid request for refund including the requirement for a valid sales invoice is fatal to the claim for refund. *(EG & G Omni, Inc. v. CIR, CTA Case No. 5987, March 26, 2004).*

18. In its Petition for Review, petitioner stated that it filed an Amended Quarterly VAT Return for the 3rd quarter of CY 2008 on June 23, 2010. Moreover, petitioner alleged that it filed an administrative claim for tax credit/refund on its unutilized input VAT covering the same period on June 25, 2010.

19. The filing of the Petition for Review on September 30, 2010 was premature based on the pertinent provision of Section 112 (C) of the NIRC of 1997, as amended, to wit:

> (C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, <u>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) hereof.</u>
>
> 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 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. (Underscoring supplied)

20. Suffice it to say respondent was not given an opportunity to act on the matter. As clearly provided for in the abovementioned provision, respondent should have been given a period of one hundred twenty (120) days from the filing of petitioner's application for refund or issuance of TCC and Application for Tax Credits/Refunds within which to resolve the administrative application for refund. Manifestly, it is only after the expiration of the aforesaid period that petitioner is given 30 days within which to elevate the same before the Honorable Court of Tax Appeals. Ergo, since petitioner prematurely filed its judicial claim prior to the lapse of the period provided for in Section 112 (C) of the NIRC of 1997, as amended the Honorable Court cannot acquire jurisdiction over the instant case.

21. To recapitulate, since petitioner prematurely filed the Petition for Review on September 30, 2010, the Honorable Court has no jurisdiction to hear and decide the instant case.

22. The provision of law regarding prescriptive periods is jurisdictional, compliance with which is essential for this Honorable Court to exercise authority over the instant case. Such statutes or rules are construed as mandatory as they have been absolutely indispensable to the prevention of needless delays and to the orderly and speedy discharger (sic) of business and are necessary incident to the proper, efficient and orderly discharge of official functions.

23. Furthermore, it is well-established in this jurisdiction that claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation and are therefore held against the claimant. Petitioner must present clear and convincing evidence to merit a tax refund. The taxpayer bears the burden of establishing the factual basis of its claim for refund.

24. Basic is the rule that tax refunds are regarded as tax exemptions that are in derogation of the sovereign authority and are to be construed *strictissimi juris* against the person or entity claiming the exemption. *(Philippine Phosphate Fertilizer Corporation v. Commission of Internal Revenue, G.R. No. 141973, June 28, 2005).* The burden of proof is upon him who claims the exemption and he must be able to justify his claim by the clearest grant under Constitutional or statutory law and he cannot be permitted to rely upon vague implications. *(BPI Leasing Corporation v. the Honorable Court of Appeals, et. al., G.R. No. 127624, November 18, 2003).* The law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted *(Sea-Land Service vs. Court of Appeals, 357 SCRA 444).*

On November 25, 2010, the parties submitted their Joint Stipulation of Facts and Issues[10] (JSFI). The CTA Second Division, in a Resolution[11] dated January 17, 2011, approved the parties' JSFI.

On March 9, 2011, respondent filed a Motion to Dismiss[12] on the ground of lack of jurisdiction for failure on the part of petitioner to file a judicial claim for refund within the period prescribed by law, in violation of Section 112 (C) of the NIRC of 1997, as amended. Respondent alleges that

[10] *Ibid.*, pp. 226-232.
[11] *Id.*, p. 234.
[12] *Id.*, pp. 265-272.

the petitioner filed its judicial claim prematurely, hence, the Honorable Court has no jurisdiction to take cognizance of the case and should dismiss the petition.

On April 5, 2011, petitioner filed its Comment/Opposition (Re: Respondent's Motion to Dismiss dated 4 March 2011)[13], in compliance with the CTA Second Division's order in Resolution[14] dated March 11, 2011. In its Comment/Opposition, petitioner avers that the Supreme Court has consistently held that non-exhaustion of administrative remedies does not necessarily result in the dismissal of action as a matter of course; that regulations, circulars and recent jurisprudence expressly confirm that the 120-day period under Section 112(D) of the NIRC of 1997 is not mandatory and jurisdictional and that Section 229 of the NIRC of 1997 should be complied with; and that the prospective application of the Aichi doctrine is reasonable and founded on the Civil Code and prevailing jurisprudence.

The CTA Second Division, in a Resolution[15] dated April 12, 2011, dismissed petitioner's judicial claim for being prematurely filed, stating that:

> "In this case, petitioner filed its administrative claim for refund on June 25, 2010 and filed its judicial claim on September 30, 2010. In other words, petitioner filed its judicial claim ninety-six (96) days after it filed its administrative claim for refund. Clearly, the 120 day-day period provided under the law and jurisprudence is not complied; which would warrant the dismissal of this case for lack of jurisdiction.
>
> With respect to petitioner's argument on the prospective application of the *Aichi doctrine*, We find the same untenable. The instant case falls within the coverage of the 1997 Tax Code, as amended, which took effect on January 1, 1998. In the *Aichi case,* the Supreme Court merely made an outright application of the terms of Sections 112 (A) and (D) of the said Code. The Supreme Court's application thereof is part of the said law as of the date of its enactment since it merely

[13] *Id.*, pp. 300-319.
[14] *Id.*, p. 274.
[15] *Id.*, pp. 321-326.

> establishes the contemporary legislative intent that the construed law purports to carry into effect.
>
> **WHEREFORE**, premises considered the instant **Petition for Review** is hereby **DISMISSED** for having been prematurely filed.
>
> **SO ORDERED.**"

On April 29, 2011, petitioner filed its Motion for Reconsideration[16] and on May 27, 2011, respondent filed her Comment Petitioner's Motion for Reconsideration (Re: Resolution dated 12 April 2011)[17].

On June 14, 2011, the CTA Second Division issued a Resolution[18] denying petitioner's Motion for Reconsideration for lack of merit.

Hence, petitioner filed the instant Petition for Review alleging that the CTA Second Division erred in the following respects:

> In not holding that Sections 112 and 229, Tax Code could stand together, as they are not irreconcilable;
>
> In holding that the 120-day period provided under Section 112, Tax Code is mandatory and jurisdictional despite the Supreme Court decisions subsequent to *Aichi* clearly negating the interpretation that the 120-day period is jurisdictional; and
>
> In applying *Aichi* to this case, which was filed before the said decision was even issued.

On August 9, 2011, this Court issued a Resolution[19] ordering respondent to file her Comment within ten (10) days from the receipt thereof. On September 5, 2011, respondent filed her Comment (Re: Petition for Review) (Resolution dated August 9, 2011)[20].

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[16] *Id.*, pp. 330-367.
[17] *Id.*, pp. 376-401.
[18] *Id.*, pp. 403-408.
[19] CTA En Banc Rollo, pp. 84-85.
[20] *Ibid.*, pp. 93-111.

In a Resolution[21] dated October 3, 2011, this Court ordered the parties to submit their respective memorandum within thirty (30) days from receipt thereof. On November 15, 2011, respondent filed her Memorandum[22] while petitioner to filed its Memorandum on November 16, 2011.[23] On December 6, 2011, the instant case was submitted for Decision.[24]

Petitioner argues that Sections 112 and 229 of the 1997 NIRC, as amended, can be reconciled. It contends that the two provisions should be read harmoniously as Section 112 pertains to administrative claim for refund of input VAT attributable to zero-rated sales while Section 229 governs the judicial remedy for tax refund, hence, the latter remains to be the governing law with respect to the periods within which to institute judicial claims. Anent the second issue, petitioner submits that the 120-day period provided in Section 112 (C) of the 1997 NIRC, as amended, is not jurisdictional. Petitioner claims that this position finds support in the rulings of the Supreme Court in recent cases[25] promulgated after the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[26] *(Aichi)*. Petitioner further claims that the prevailing doctrine at the time of the filing of the Petition for Review shows that the Honorable Court has jurisdiction, which could not have been lost by the promulgation of the *Aichi* case. Finally, as to the application of the doctrine in the Aichi case to the case at bench, petitioner alleges that the *Aichi* case should be applied prospectively arguing that just as laws should be applied prospectively judicial decisions should also be applied prospectively if it were to be regarded as laws.

Respondent counters petitioner's claim that Sections 112 and 129 can stand together, thus reconcilable. Respondent posits that Section 112 (A) and

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[21] *Id.*, pp. 114-115.
[22] *Id.*, pp. 128-148.
[23] *Id.*, pp. 149-211.
[24] *Id.*, pp. 214-215.
[25] Microsoft Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 180173, April 6, 2011, Silicon Philippines, Inc, (Formerly Intel Philippines Manufacturing, Inc.) vs. Commissioner of Internal Revenue, G.R. 172378, January 17, 2011, Kepco Philippines Corporation vs. Commissioner of Internal Revenue, G.R. No. 179961, January 31, 2011.
[26] G.R. 184823, October 6, 2010.

(D) (now paragraph C) of the 1997 NIRC, as amended, is the governing provision of law with respect to petitioner's claim for refund of alleged excess input VAT. Respondent submits that the issue on the proper application of Section 112(D) and 229 had already been amply resolved in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation*[27] *(Mirant* case) where the Supreme Court ruled that Section 112 (A) of the 1997 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 and 229 are inapplicable as both provisions apply to instances of erroneous payment or illegal collection of internal revenue taxes. As regards the second issue, respondent posits that Section 112 is mandatory and jurisdictional in the light of the express provision of the law and the judicial pronouncement of the Supreme Court in the *Aichi* case. Respondent notes that Section 112 is already enforced even prior to the promulgation of the *Aichi* case, and that the ruling in the *Aichi* case merely interpreted what the law plainly provides. Lastly, respondent alleges that Aichi case is controlling and for petitioner's failure to comply with the 120-day period mandated by Section (D), the present petition is dismissible on the ground of lack of jurisdiction.

After a careful and thorough evaluation and consideration of the records of the case, including both parties' arguments in their respective pleading, the CTA *En Banc* finds no new matters which have not yet been considered and passed upon by the CTA Second Division in the Assailed Resolutions.

The CTA Second Division was correct in granting respondent's Motion to Dismiss. Petitioner's argument on the harmonization and applicability of Sections 112 and 229 to the case at bench is scant of merit. A careful reading of the provisions of Sections 112 and 229 of the 1997 NIRC reveals that there is, indeed, a clear distinction between these two sections. Section 112 specifically relates to refund/credit of input VAT while Section 229 pertains to

[27] G.R. No. 172129, September 12, 2008.

the refund of erroneously or illegally collected tax. This position is supported by the Supreme Court ruling in the Mirant case where it was held that Section 112(A) of the 1997 NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT. The Supreme Court further held that Sections 204(C) and 229 of the 1997 NIRC find applicability to erroneous payment and illegal collection of internal revenue taxes.

Considering that the present case involves the refund or issuance of a tax credit for unutilized input VAT and in view of the explicit provisions of Sections 112 and 229 of the 1997 NIRC and the pronouncement of the Supreme Court in the Mirant case, this Honorable Court holds that Section 112 of the 1997 NIRC is the applicable provision.

Anent the issue of premature filing and lack of jurisdiction, this Court finds that the premature filing of the instant Petition for Review is tantamount to a violation of the doctrine of exhaustion of administrative remedies. Petitioner filed its judicial claim before the CTA in division without giving the respondent ample opportunity to decide on its claim for refund at the administrative level, in defiance of the procedure and periods clearly prescribed in the 1997 NIRC.

It is a well-settled rule that failure to exhaust administrative remedies is crucial to one's cause of action. In the recent case of *National Electrification Administration vs. Val L. Villanueva*[28], the Supreme Court held that:

> "It is settled that under the doctrine of exhaustion of administrative remedies, recourse through court action cannot prosper until after all such administrative remedies have first been exhausted. If remedy is available within the administrative machinery, this should be resorted to before recourse can be made to courts. The party with an administrative remedy must not only initiate the prescribed administrative procedure to obtain relief but also pursue it to its appropriate conclusion before seeking judicial intervention in

[28] G.R. No. 168203, March 9, 2010 *citing* Josefina Teotico v. Rosario Baer, G.R. No. 147464, June 8, 2006 and Montanez v. Provincial Agrarian Reform Adjudicator, G.R. No. 183142, September 17, 2009.

> order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to the court. The non-observance of the doctrine of exhaustion of administrative remedies results in lack of cause of action, which is one of the grounds in the Rules of Court justifying the dismissal of the complaint."

If a litigant goes to court without first pursuing his administrative remedies, his action is premature or he has no cause of action to ventilate in court. His case is not ripe for judicial determination.[29]

We quote with approval the CTA Second Division's ruling in the Assailed Resolution dated April 12, 2011 that:

> "The 120-day period provided under Section 112 of the 1997 Tax Code, as amended, is a mandatory requirement: Non-compliance thereof will result to the dismissal of the case on the ground of lack of jurisdiction. In the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[30], the Supreme Court ruled, to quote:
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>> **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.
>>
>> xxx xxx xxx
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>> Respondent's assertion that the non-observance of the 120-day period is not fatal to the filling of a judicial

[29] Aboitiz and Co., Inc., Visayan Coconut Growers, Inc., Lu Do and Lu Ym Corp., Federal Marketing Corp., Overseas Commodity Corp., Southern Products Import and Export Corp., International Copra Export Corp., East Visayas Products, Gran Export Corp., Aic Development Corp., Kaylin International, Inc., and Jomasco, Inc., vs. The Collector of Customs of Cebu, in his capacity as Acting General Manager of the Cebu Customs Arrastre Service, and Cebu Port Terminal, Inc., G.R. No. L-29466, May 18, 1978 *citing* Allied Brokerage Corporation vs. Commissioner of Customs, L-27641, August 31, 1971, Pestanas vs. Dyogi L-25786, February 27, 1978, per Santos, G. S., J.; and Pineda vs. Court of First Instance of Davao, 111 Phil 643.
[30] G.R. 184823, October 6, 2010.

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 issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.' The phrase 'within two (2) years x x x apply for the issuance of a tax credit certificate or refund' refers to applications for refund/credit filed with the CIR and not to appeals made to the CTA. This is apparent in the first paragraph of subsection (D) of the same provision, which states that the CIR has '120 days from the submission of complete documents in support of the application filed in accordance with Subsections (A) and (B)' within which to decide on the claim.

In fact, applying the two-year period to judicial claims would render nugatory Section 112 (D) of the NIRC, which already provides 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 v. Victoria's Milling, Co., Inc. relied upon by respondent, we find the same inapplicable as the tax provision involved in that case is Section 306, now Section 229 of the NIRC. And as already discussed, Section 229 does not apply to refunds/credits of input VAT, such as the instant case.

In fine, the premature filing of respondent's claim for refund/credit of input VAT before the CTA warrants a dismissal inasmuch as no

> **jurisdiction was acquired by the CTA."** *(Emphasis supplied)*[31]

In sum, the *CTA En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the Assailed Resolutions dated April 12, 2011 and June 14, 2011, both promulgated by the CTA Second Division. What the instant petition seeks is for the Court *En Banc* to view and appreciate the arguments/discussions raised by the petitioner in its own perspective of things, which unfortunately had already been considered and passed upon by the Court.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the Assailed Resolutions dated April 12, 2011 and June 14, 2011 in CTA Case No. 8166 entitled *"Hedcor Sibulan, Inc. vs. Commissioner of Internal Revenue"*, are hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(Concurs with the ***Concurring and Dissenting Opinion*** of Justice Manalastas)
ERNESTO D. ACOSTA
Presiding Justice

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[31] CTA En Banc Rollo, pp. 70-74.

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

(With Separate ***Dissenting Opinion***)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(Concurs with the ***Concurring and Dissenting Opinion*** of Justice Manalastas)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(With ***Concurring and Dissenting Opinion***)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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

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

HEDCOR SIBULAN, INC.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 798
(CTA Case No. 8166)

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

Promulgated:

DEC 06 2012 4:15pm

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DISSENTING OPINION

BAUTISTA, J.:

Contrary to the disquisitions made by the Court *En Banc*, I find the Petition for Review filed with the Second Division of the Court made within the period provided under the 1997 National Internal Revenue Code ("NIRC"), as amended, and therefore, should be given its due course, considering the factual milieu present in the case at bench.

Indeed, in not a few instances did this Court hold that the use of the word *"may"* in Section 112(C) of the 1997 NIRC, as amended, indicates that the judicial recourse within thirty (30) days after the lapse of the one hundred twenty (120)-day period is directory and permissive, and not mandatory nor jurisdictional as long as the said period is within the two (2)-year prescriptive period under Sections 112[1] and 229[2] of the same Code.[3]

Therefore, if the two (2)-year prescriptive period is about to expire, there is no need to wait for the denial of the claim by the Commissioner of Internal Revenue or its inaction after the expiration of the one hundred twenty (120)-day period before the taxpayer can lodge its appeal with this Court.[4]

In addition, the reckoning of the two (2)-year prescriptive period should be from the then prevailing doctrine advocated in law and jurisprudence when the actions were made - from the close of the pertinent quarter.[5]

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[1] SEC. 112. *Refunds or Tax Credits of Input Tax.* –

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

[2] SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[3] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., CTA EB Case No. 416, February 4, 2009.

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

[5] Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.

With this, it is wise to quote the oft-cited case of *Chicot County Drainage District v. Baxter States Bank*,[6] which set forth a compelling rationalization as follows:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. **The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects** — with respect to particular conduct, private and official. **Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.** These questions are among the most difficult of those who have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[7] (*Boldfacing supplied.*)

Further, the pronouncements made in the case of *Magtoto v. Manguera, et al.*,[8] are enlightening, to wit:

> The final authority of this Court rests upon public respect for its decisions. **That public respect is based upon an image which represents this Court as declaring legal principles with an authority and certainty that the people may place upon it their *bona fide* reliance and reasonable expectations.** To hold now that public officers, who have acted in justifiable reliance on Our aforecited doctrines, have transgressed the Constitution, would certainly not strengthen public respect on the authority of Our judgments.
>
> **Where there has been justifiable reliance on Our decisions, and those who have so relied may be substantially harmed if retroactive effect is given, where the purpose of the new rule can be adequately effectuated without giving it retroactive operation, or where retroactive operation might greatly burden the administration of justice, then it is Our duty to apply the new rule prospectively.**

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[6] 308 US 371, 374 [1940].
[7] Albino S. Co *v.* Court of Appeals, *et al.*, G.R. No. 100776, October 28, 1993, 277 SCRA 444, *citing Chicot County Drainage District v. Baxter States Bank, supra note 6.*
[8] G.R. Nos. L-37201-02, L-37424, and L-38929, March 3, 1975, 63 SCRA 4, Concurring Opinion penned by Justice Felix Q. Antonio, with Justices Antonio P. Barredo and Cecilia Muñoz-Palma, concurring.

> The factual and textual bases for a contrary rule, are at best, less than compelling. Relevant is the Court's duty to assess the consequences of its action. More than the human dignity of the accused in these cases is involved. There is the compelling realization that substantial interests of society may be prejudiced by a retrospective application of the new exclusionary rule. Thus, the values reflected transcend the individual interests of the herein accused, and involve the general security of society. The unusual force of the countervailing considerations strengthens my conclusion in favor of prospective application. xxx. (*Boldfacing supplied.*)

Therefore, rulings of the court modifying or reversing a doctrine or principle, operates prospectively, and rights acquired under such doctrine or principle prior to its modification or reversal may not be affected thereby.[9]

To stress, the administrative claim filed on June 25, 2010, and the Petition for Review filed on September 30, 2010, albeit before the lapse of the one hundred and twenty (120) days, were made *before* the Supreme Court even enunciated the strict ruling of only thirty (30) days from receipt of the decision denying the claim, or after the one hundred twenty (120)-day period given to the Commissioner to act thereon.[10]

The Court cannot expect the taxpayer-claimant to observe a prescriptive period that has yet to be set by the Supreme Court at that time. Not even the taxpayer-claimant itself could have foreseen that after it had filed its claims before the administrative and judicial *fora*, a subsequent ruling, either modifying or overruling a previous one, would be issued that would put to naught its claims. It would be the height of injustice for this Court to impose a ruling that was yet in effect at the time the claims were filed.

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[9] People *v.* Jabinal, G.R. No. 30061, February 27, 1974, 55 SCRA 607.
[10] Commissioner of Internal Revenue *v.* Aichi Forging Company of Asia, Inc., G.R. No. 184823, October 6, 2010.

Consistent with the foregoing, I bring forth no reason to rule that the Petition for Review filed with the Second Division of the Court on September 30, 2010 was prematurely made.

Accordingly, I vote that the Petition for Review be **GIVEN DUE COURSE**.

LOVELL R. BAUTISTA
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

HEDCOR SIBULAN, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 798
(CTA Case No. 8166)

Present:

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

Promulgated:

DEC 06 2012 9:15pm

x---x

CONCURRING AND DISSENTING OPINION

COTANGCO-MANALASTAS, J.:

I agree with the dismissal of the instant Petition for Review for having been prematurely filed.

However, at the outset let me clarify that, although I agree with the conclusion dismissing the instant petition, I maintain my view that premature filing of a judicial claim for refund or non-observance of the doctrine of exhaustion of administrative remedies is not jurisdictional; it only renders the action premature and not ripe for judicial determination.

The premature invocation of court's intervention is a violation of the *doctrine of exhaustion of administrative remedies.* This failure to observe the doctrine of exhaustion of administrative remedies is fatal to one's cause of action, thus, absent any waiver or *estoppel,* the case is susceptible of dismissal for *lack of cause of action*[1]. It bears to stress, however, that said failure to exhaust administrative remedies does not affect the jurisdiction of the court. Non-exhaustion of administrative remedies only renders the action premature, that the claimed cause of action is not ripe for judicial determination[2]. Since the premature filing of a claim for refund and/or tax credit or the failure to exhaust administrative remedy is not jurisdictional and, at the most, only renders the case susceptible of dismissal for *lack of cause of action,* such defense of premature filing of judicial claim for refund is therefore **waivable** or may be considered **waived** pursuant to Section 1, Rule 9 of the Rules of Court[3].

Records show that petitioner's judicial claim was filed prematurely. Petitioner failed to wait for the lapse of the 120 days from the filing of its administrative claim, before filing its judicial

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[1] *Montanez vs. PARAD, et al.*, G.R. No. 183142, September 17, 2009.
[2] Merida Water District, et al. vs. Francisco Bacarro, et al., G.R. No. 165993, September 30, 2008 citing *Rosario v. Court of Appeals*, G.R. No. 89554, July 10, 1992, 211 SCRA 384, 387; *Carale v. Abarintos*, G.R. No. 120704, March 3, 1997, 269 SCRA 132, 141.
[3] Section 1, Rule 9 of the Rules of Court states that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if dismissal is based on the ff. grounds, to wit: lack of jurisdiction, *litis pendentia*, *res judicata*, and prescription.

claim pursuant to Section 112 (C) of the NIRC of 1997, as amended. Below are the relevant dates as culled from the records of this case:

2008 Taxable Quarter	CTA Case No.	Administrative Claim Filed	End of 120 Days for the BIR Commissioner to Decide the Claim	Date Judicial Claim Filed
3rd	8166	June 25, 2010	October 23, 2010	September 30, 2010

Given that respondent alleged in her Answer[4] the special and affirmative defense of prematurity of petitioner's judicial claim for refund based on Section 112 (C) of the NIRC of 1997, as amended, it cannot be said that respondent waived such defense of premature filing, thus, said defense was properly raised for the consideration of this Court as a valid ground for dismissal.

Hence, considering that petitioner's judicial claim for refund or issuance of a tax credit of unutilized input VAT for the 3rd quarter of CY 2008 was prematurely filed, and the said defense of premature filing was timely raised in respondent's Answer, I vote for the dismissal of the present Petition for Review on the ground of prematurity resulting to lack of cause of action and not due to lack of jurisdiction.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

[4] *Docket*, pp. 175-183.