

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

**KEPCO PHILIPPINES
CORPORATION,**

Petitioner,

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

EB Case No. 698
(CTA Case No. 7474)

Members:

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

Promulgated:

OCT 25 2011

Asst. Secretary
12:15 p.m.

X-

-X

DECISION

CASANOVA, J.:

This is a Petition for Review,¹ filed by petitioner- Kepco Philippines Corporation on November 25, 2010, challenging the Amended Decision (the "Assailed Decision")² of the Court of Tax Appeals (CTA) Former Second Division dated October 21, 2010 in CTA Case No. 7474 entitled "*Kepco Philippines Corporation vs. Commissioner of Internal Revenue*," which denied petitioner's claim for tax refund of its unutilized input VAT arising from purchases of goods and services for the sale of electricity to National *a*

¹ Petition for Review, CTA En Banc Rollo, pp. 8-46.

² Petition for Review, Annex "A", Ibid, pp. 49-59.

Power Corporation (NPC). The dispositive portion of the Assailed Decision reads as follows:

"WHEREFORE, in view of the foregoing considerations, petitioner's Motion for Partial Reconsideration is hereby **DENIED** for lack of merit, while respondent's Motion for Reconsideration is **GRANTED** on jurisdictional grounds.

Accordingly, our Decision dated April 12, 2010, in the above captioned case is hereby **RECALLED** and **SET ASIDE** and the Petition for Review is hereby **DISMISSED** for lack of jurisdiction.

SO ORDERED."

The antecedent facts, as summarized by the CTA Former Second Division, are hereunder adopted, to wit:

"Petitioner is a domestic corporation, duly registered with the Securities and Exchange Commission (SEC), and is engaged in the production and sale of electricity to the National Power Corporation (NPC) as its only customer. Its registered address is at Suite 2501, 25th Floor, Tektite Tower I, Exchange Road, Ortigas Center, Pasig City. It is also registered as a value added tax (VAT) taxpayer with the Bureau of Internal Revenue (BIR), with Taxpayer Identification No. 004-738-553-000, as evidenced by its Certificate of Registration No. 3RCOOOO154314.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue, vested under the appropriate laws with the authority to carry out all the functions, duties, and responsibilities of the said office, including, *inter alia*, the power to decide, approve, and grant refunds and tax credits of erroneously paid or illegally collected internal revenue taxes. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

On December 22, 2003, petitioner filed with respondent an Application for VAT Zero-Rate for its sales of electricity to NPC for taxable year 2004. 

For the four (4) quarters of taxable year 2004, petitioner timely filed its Quarterly VAT Returns allegedly showing that it incurred input VAT from its expenses on purchases of goods and services.

On October 28, 2005, petitioner filed with respondent, through BIR Revenue District Office No. 50, the appropriate administrative claim for refund in the total amount of P15,512,529.73, representing the input VAT incurred by petitioner for the four (4) quarters of taxable year 2004, paid on its purchases of goods and services for the sale of electricity to NPC. Despite repeated follow-ups, the respondent Commissioner has not acted upon petitioner's claim for refund, nor issued a TCC relative to said claim. Due to respondent's inaction on petitioner's claim for refund and in order to suspend the running of the two-year prescriptive period, petitioner filed this Petition for Review on April 25, 2006.

On July 12, 2006, respondent filed his Answer, alleging the following Special and Affirmative Defenses:

'SPECIAL AND AFFIRMATIVE DEFENSES

7. Assuming but without admitting that Petitioner filed a claim for a tax credit certificate, the same is still subject to investigation by the Bureau of Internal Revenue;

8. Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;

9. Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not creditable or refundable;

10. It is incumbent upon the Petitioner to show that it has complied with the provisions of Sections 112, 204(C) and 229 of the Tax Code, as amended;

11. In an action for tax credit or refund, the burden is upon the taxpayer to prove that he is 

entitled thereto, and failure to discharge said burden is fatal to the claim (*Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 206*);

12. Claims for refund are construed strictly against the claimant 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 121*).'

During trial, petitioner presented the following witnesses: Marvin Chan, its Senior Accountant, Atty. Fredieric B. Landicho, the Independent Certified Public Accountant (CPA) duly commissioned by this Court; Jeniffer Castejon, its Tax Specialist and Records Custodian, and Juanita S. Carumba, its Budget Officer.

Thereafter, petitioner's Formal Offer of Documentary Exhibits, filed on May 23, 2007, submitting Exhibits 'A' to 'V', inclusive of their sub-markings was approved by this Court in the Resolution dated August 7, 2007.

On the other hand, respondent's counsel manifested during the hearing held on January 14, 2008 that he will submit this case for decision based on the records of the case. Thus, the Court directed the parties to submit their respective Memorandum within thirty (30) days from said date.

On March 14, 2008, petitioner filed its Memorandum. However, on May 8, 2008, petitioner filed an 'Urgent Motion to Reopen the Case to Allow Petitioner to Present Additional Evidence'. As no Comment was filed by respondent within the given period of ten (10) days from notice, the Court granted petitioner's urgent motion in the Resolution dated July 25, 2008 and correspondingly recalled and set aside the Resolution dated April 1, 2008 considering this case submitted for resolution. This case was set for the presentation of petitioner's additional evidence on August 27, 2008. 

On said date and on November 10, 2008, petitioner recalled its witness Jennifer Castejon to prove that petitioner sells electricity solely to the National Power Corporation, that all of its sales are VAT zero-rated, that the input taxes incurred were not offset against any output VAT liability, that all zero-rated sales to NPC for the year 2004 have been properly declared in KEPHILCO's Income Tax Return for 2004, that petitioner's zero-rated sales to the National Power Corporation for 2004 have been properly declared in Kepco Philippines Corporation's 2004 VAT returns.

Subsequently, petitioner filed its Supplemental Formal Offer of Evidence on March 11, 2009, offering Exhibits 'W' to 'ZZ', 'BBB', 'CCC', and 'HHH' to 'TTT' and were admitted by the Court in the Resolution dated May 15, 2009.(sic)

On August 11, 2009, this case was submitted for decision, considering petitioner's Memorandum filed on March 14, 2008, and Supplement to Memorandum filed on July 30, 2009, sans respondent's Memorandum."

The CTA Former Second Division promulgated its Decision³ on April 12, 2010 and ruled as follows:

"WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in the amount of **EIGHT MILLION EIGHTY THREE THOUSAND THREE HUNDRED TWENTY SIX PESOS AND FIFTY FIVE CENTAVOS (P 8,083,326.55)** in favor of petitioner Kepco Philippines Corporation, representing unutilized input VAT for taxable year 2004.

SO ORDERED."

Not satisfied with the said Decision, petitioner filed a Motion for Partial Reconsideration⁴ on April 30, 2010 praying that the April 12, 2010 Decision be modified,

³ Division Docket, pp. 355-380.

and that it be granted an additional P6,138,517.05 over and above the P8,083,326.55 already granted by this Court's Former Second Division. A Motion for Reconsideration⁵ was likewise filed by respondent on April 30, 2011.

Thereafter, the CTA Former Second Division promulgated an Amended Decision dated October 21, 2010, recalling and setting aside the April 12, 2010 Decision and dismissing petitioner's Petition for Review for lack of jurisdiction. Dissatisfied, petitioner elevated the case on appeal before the CTA *En Banc* on November 25, 2010.

Subsequently, the Court issued a Resolution⁶ on March 1, 2011 ordering respondent to file her Comment to the instant petition. However, as per records verification⁷ on April 5, 2011, respondent failed to file her Comment, thus, on April 15, 2011, both parties were ordered⁸ to file their respective memorandum.

On August 31, 2011, the case was submitted⁹ for decision taking into consideration petitioner's Memorandum¹⁰ dated June 3, 2011 sans respondent's Memorandum.

Petitioner raised the following grounds in support of the instant petition, to wit:

"I.

Petitioner seasonably filed its administrative and judicial claim for refund, consonant with the pronouncement of the Supreme Court *en banc in Atlas Consolidated* and then applicable BIR regulations. 

⁴ Ibid, pp. 384-405.

⁵ Ibid, pp. 410-416.

⁶ CTA En Banc Rollo, pp. 89-90.

⁷ Ibid, pp. 91.

⁸ Ibid, pp. 93-94.

⁹ Ibid, pp. 153-154.

¹⁰ Ibid, 101-150.

II.

The ruling in the *Mirant* and *Aichi Forging* cases finds no application in the instant case, for settled is the rule that laws apply prospectively.

III.

The Honorable Court of Tax Appeals has jurisdiction to hear and take cognizance of the instant claim for refund or issuance of a tax credit certificate.

IV.

Petitioner has sufficient basis, both in fact and in law, to support the instant claim for refund or issuance of a tax credit certificate."¹¹

After a careful evaluation of the arguments, as well as jurisprudence on the matter, *We* find the Petition bereft of merit.

Petitioner claims that the *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Mirant Case)*¹² and *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., (Aichi Case)*¹³ should not apply in the instant case following the prospective application of laws and jurisprudence. Consequently, the Court *En Banc* deems it proper to resolve first the propriety of the application of *Aichi Case* because the resolution of the same would likewise settle the other issues raised by petitioner. 

¹¹ Petition for Review, Ibid, pp. 17-18.

¹² G.R. No. 172129, September 12, 2008.

¹³ G.R. No. 184823, October 6, 2010.

The *Aichi Case* merely reiterated the ruling in the *Mirant Case* regarding the reckoning period within which a claim for tax refund/credit should be made, to wit:

"The pivotal question of when to reckon the running of the two-year prescriptive period, however, has already been resolved in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation*, where we ruled that Section 112 (A) of the NIRC is the applicable provision in determining the start of the two-year period for claiming a refund/credit of unutilized input VAT, and that Sections 204 (C) and 229 of the NIRC are inapplicable as 'both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes.' We explained that:

The above proviso [Section 112 (A) of the NIRC] clearly provides in no uncertain terms that **unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not.** x x x

x x x x x x x x x

Considering the foregoing discussion, **it is clear that Sec. 112(A) of the NIRC, providing a two-year prescriptive period reckoned from the close of the taxable quarter when the relevant sales or transactions were made pertaining to the creditable input VAT, applies to the instant case, and not to the other actions which refer to erroneous payment of taxes.** (Emphasis supplied)

In view of the foregoing, we find that the CTA *En Banc* erroneously applied Sections 114(A) and 229 of the NIRC in computing the two-year prescriptive period for claiming refund/credit of unutilized input VAT. To be clear, Section 112 of the NIRC is the pertinent provision for the refund/credit of input VAT. Thus, the two-year period 

should be reckoned from the close of the taxable quarter when the sales were made."

The same likewise emphasized the mandatory requirement to observe the 120-30 day period provided under Section 112(D) of the 1997 Tax Code, as amended, prior to instituting a judicial claim with the CTA. The Supreme Court thus ruled:

"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. Refunds or Tax Credits of Input Tax. —

xxx

xxx

xxx

(D) Period within which Refund or Tax Credit of Input Taxes shall be Made. — In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals. (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 tax 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."

In the light of the ruling in the *Aichi Case*, the CTA Former Second Division is correct in its findings that petitioner's administrative claim for refund of its unutilized input VAT for the four (4) quarters of 2004 was timely filed on October 28, 2005. Applying subsections (A) and (D) of Section 112 of the 1997 Tax Code, as amended, CIR has one hundred twenty (120)-days or until February 25, 2006 to act on the said application. After the lapse of the 120-day period, petitioner may appeal the unacted administrative claim within thirty (30) days therefrom or until March 27, 2006.

As can be gleaned from the records, notwithstanding the timely filing of the administrative claim, the judicial claim was filed only on April 25, 2006, twenty-nine (29) days after the lapse of the prescribed period. Thus, due to the late filing of petitioner's Petition for Review, the Court is, therefore, bereft of jurisdiction to act on the said judicial claim.

Being the latest ruling of the High Tribunal on the matter, *We* have no option but to uphold and apply the ruling of the Supreme Court, it being the final arbiter of justifiable controversy.

"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 justifiable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings."¹⁴

Furthermore, the Court of Tax Appeals in *CBK Power Company Limited vs. Commissioner of Internal Revenue* (CTA Case Nos. 7771 and 7814, December 3, 2010) justifies the retroactive application of the *Aichi Case* in this wise:

"To hold otherwise would not only offend the above-cited principles, but would altogether undermine the very foundations upon which the afore-cited principles were pronounced by the Supreme Court in the aforementioned decisions.

Under the principle of *stare decisis et non quieta movere*, past judicial precedents should be followed in subsequent cases by all courts in the land. Hence, the cases of *Mirant* and *Aichi* constitute as *stare decisis* to the case at bar."

Following the above-cited principle of *stare decisis et non quieta movere* which simply means follow past precedents and do not disturb what has been settled, it is worthy of emphasis that the principles laid down in *Aichi Case* have been adopted in several recent decisions¹⁵ of the Court of Tax Appeals *En Banc* for the purpose of maintaining stability in our jurisprudence.

Corollary thereto, well-settled is the rule that tax refunds are in the nature of tax exemptions, and are to be construed *strictissimi juris* against the entity claiming the

¹⁴ *Commissioner of Internal Revenue vs. Michael J. Lhuiller Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, citing the case of *GSIS vs. Court of Appeals*, 334 Phil. 163, 175; 266 SCRA 187 (1997).

¹⁵ *Kepeco Ilijan Corporation vs. CIR*, CTA EB Case No. 611 (CTA Case No. 6682), June 13, 2011; *Crescent Park 18-2 Property Holdings, Inc., vs. CIR*, CTA EB Case No. 684 (CTA Case No. 8061), June 8, 2011; *CIR vs. Mindanao I Geothermal Partnership*, CTA EB Case Nos. 673 & 675 (CTA Case No. 6906), April 19, 2011; *CIR vs. Taganito Mining Corporation*, CTA EB Case No. 559 (CTA Case No. 6867), April 18, 2011; *CIR vs. Team Energy Corporation*, CTA EB Case No. 603 (CTA Case No. 7229 & 7298), April 8, 2011.

same. Thus, the burden of proof rests upon the taxpayer to establish by sufficient and competent evidence, its entitlement to a claim for refund.¹⁶

Having definitely resolved the principal issue, *We* find no need to pass upon the other incidental issues raised for being moot and academic.

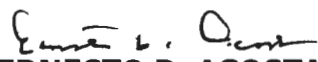
In sum, the Court *En Banc* finds no cogent justification to disturb the findings and conclusions spelled out in the assailed October 21, 2010 Amended Decision. What the instant Petition for Review seeks is for the Court *En Banc* to view and appreciate the evidence in their own perspective of things, which unfortunately had already been considered and passed upon.

WHEREFORE, premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the October 21, 2010 Amended Decision of Former Second Division is hereby **AFFIRMED**.

SO ORDERED.


CAESAR A. CASANOVA
Associate Justice

WE CONCUR:


ERNESTO D. ACOSTA
Presiding Justice

¹⁶ Philippine Geothermal vs. CIR, G.R. No. 154028, July 29, 2005.


JUANITO C. CASTAÑEDA, JR.
Associate Justice


(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice


ERLINDA P. UY
Associate Justice

(On Leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

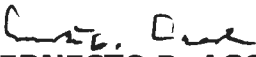

ESPERANZA R. FABON-VICTORINO
Associate Justice


CIELITO N. MINDARO-GRULLA
Associate Justice


AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

KEPCO PHILIPPINES CORPORATION,
Petitioner,

CTA EB CASE NO. 698
(CTA Case No. 7474)

-versus-

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

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Promulgated :

OCT 25 2011

Res. Polinario
1:15 p.m.

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Dissenting Opinion

BAUTISTA, J.:

The factual milieu in the case at bench should make the Court sitting *En Banc* to apply the doctrine that “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.”¹

When respondent filed its claim in the administrative level on October 28, 2005 and the Petition for Review with the Former Second Division of the Court on April 25, 2006, the then prevailing doctrine, is that, the two (2)-year prescriptive period is reckoned from the filing of the pertinent return,² and not from the close of the quarter.³

Before the Supreme Court even reckoned the two (2)-year prescriptive period from the close of the pertinent quarter, this Court, in not a few instances, ruled that the date of filing of the relevant return is the determinative factor.

However, during the pendency of the case at bench, the Supreme Court issued a ruling wherein the two (2)-year period is reckoned, not from the filing of the return, but from the close of the taxable quarter when the sales were made.

Albeit I agree that the said ruling is in accordance with the letter and spirit of Section 112 of the 1997 National Internal Revenue Code (“NIRC”), as amended, it would be the height of injustice to impose a new ruling wherein after a taxpayer-claimant had faithfully relied and complied therein, this Court will only nullify the same on the basis of the so-called “adherence to precedence.”

¹ Magtoto *v.* Manguera, *et al.*, 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.

² Atlas Consolidated Mining and Development Corporation *v.* Commissioner of Internal Revenue, G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 73.

³ Commissioner of Internal Revenue *v.* Mirant Pagbilao Corporation [Formerly Southern Energy Quezon, Inc.], G.R. No. 172129, September 12, 2008, 565 SCRA 154.



Even the taxpayer-claimant itself could not 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 is true that this Court has the duty to obey the decisions of the Supreme Court and render obeisance to its status as the apex of the hierarchy of courts.⁴ Nonetheless, this Court should not decide a case by merely adhering to precedence; idolatrous reverence for precedent, simply as precedent, no longer holds true, for more important than anything else is that the Court should be right.⁵

Therefore, the Court cannot merely impose a ruling that was yet to be enunciated at the time a claim was lodged in this forum.

As the Supreme Court aptly ruled that 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.⁶

Therefore, prior determinations deemed to have finality and acted upon accordingly, demands examination. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects. It may have consequences which

⁴ Commission on Higher Education v. Atty. Felina S. Dasig, G.R. No. 172776, December 17, 2008, 574 SCRA 227, citing *Albert v. Court of First Instance of Manila*, No. L-26364, May 29, 1968, 23 SCRA 948, 961.

⁵ *Philippine Trust Company and Smith, Bell and Co. v. Mitchell*, 59 Phil. 30, 36.

⁶ *Supra*, note 1.



cannot just be ignored. Thus, an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.⁷

Further, 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 112⁸ and 229⁹ of the 1997 NIRC, as amended.¹⁰

Stated differently, 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.¹¹

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*, 308 US 371, 374 [1940].

⁸ 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.

⁹ 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.

¹⁰ Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc., CTA EB No. 416, February 4, 2009.

¹¹ Commissioner of Internal Revenue v. CE Cebu Geothermal Power Company, Inc., CTA EB No. 426, May 29, 2009.

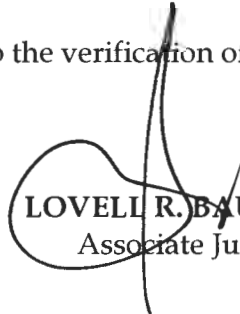


Otherwise, the Court will be deprived of jurisdiction to entertain the case.¹²

To stress, based on the records of the case, the administrative claim and Petition for Review were made even *before* the Supreme Court enunciated the reckoning of the two (2)-year prescriptive period from the close of the taxable quarter when the pertinent sales were made.

Taking into consideration that a taxpayer-claimant cannot observe a prescriptive period that has yet to be enunciated by the Supreme Court at the time it filed its claim, I, therefore, bring forth no reason to rule that the Petition for Review filed with the Former Second Division of this Court should be dismissed for lack of jurisdiction.

Accordingly, I vote that the Petition for Review, claiming for refund of unutilized input value-added tax arising from purchases of goods and services for the sale of electricity to National Power Corporation covering the four (4) quarters of taxable year 2004, be **GRANTED**, subject to the verification of the claims involved.


LOVELL R. BAUTISTA
Associate Justice

¹² Commissioner of Internal Revenue *v.* Accenture, Inc., CTA EB No. 410 (CTA Case No. 7387), March 18, 2009.