Commissioner of Internal Revenue v. Mirant Pagbilao Corporation: Prescribing the Correct Prescriptive Period?

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I. INTRODUCTION

Tax actions, whether for assessment of deficiency tax or claims for refund, like many civil and criminal actions, are bound by the rules on prescription.

For the Bureau of Internal Revenue (BIR), prescription is important for them to validly institute an action or assessment within a stipulated period. For taxpayers, however, prescription can be a valid defense especially when faced with a difficult assessment case.[1] In claims for tax refunds, prescription

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can also spell the death of an otherwise valid claim. Thus, without a doubt, the rules on prescription for tax refunds and assessments are inviolate not just for the BIR, but also for every tax practitioner and taxpayer. Accordingly, changing the rules or the interpretation of rules on prescription and applying those changes on cases or assessments which are already pending may result in the dismissal of various claims, amounting to billions of pesos. It could result to an impairment of vested rights.

For years, taxpayers have been guided by the long-standing rule that claims for refund of unutilized input Value-Added Tax (VAT) attributable to zero-rated sales, whether administrative or judicial, must be filed within two years from the date of the filing of the relevant quarterly VAT returns which, under existing regulations, are due within 25 days from the close of the relevant taxable quarter.[2] In its decision in *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation,*[3] however, the Supreme Court adhered to a stricter interpretation. In *Mirant*, the Supreme Court, through its Second Division, stated that unutilized input VAT payments 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."[4]

On the basis of *Mirant*, the Court of Tax Appeals (CTA) has denied over a billion pesos of claims for refund of excess input VAT which were filed before the promulgation of *Mirant*. Most of these claims, however, were not filed without basis. They were filed on the basis of an earlier decision of the Third Division of the Supreme Court in *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue,*[5] where the Supreme Court held that the reckoning point of the two-year prescriptive period is the date of the *filing* of the quarterly VAT returns. This brings forth

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1. Commissioner of Internal Revenue v. B.F. Goodrich, 303 SCRA 546, 554 (2009).
2. An Act Amending the National Internal Revenue Code, as Amended, and For Other Purposes [TAX REFORM ACT OF 1997], Republic Act No. 8424, § 114 (A) (1997).
3. Commissioner of Internal Revenue v. Mirant Pagbilao Corporation, 565 SCRA 154 (2008).
4. *Mirant*, 565 SCRA at 171 (emphasis supplied).
5. Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue, 524 SCRA 73 (2007).

the legal question — whether *Mirant* established a definitive rule on the proper reading of the two-year prescriptive period under Section 112 of the National Internal Revenue Code (Tax Code),[6] and certainly, whether the *Mirant* interpretation should be applied retroactively to actions for claims of refund filed way before its promulgation.

This Comment discusses the soundness of the *Mirant* decision in light of the Supreme Court's earlier pronouncement in *Atlas* vis-à-vis the far-reaching implications of the issue on pending and future VAT refund cases.

II. THE VALUE-ADDED TAX SYSTEM

The VAT is ultimately a tax on consumption, even though it is assessed on many levels of transactions on the basis of a fixed percentage.[7] It is levied on every importation of goods, whether or not in the course of trade or business, or imposed on each sale, barter, exchange, or lease of goods or properties, or on each rendition of services in the course of trade or business as they pass along the production and distribution chain. The end-user of consumer goods or services ultimately shoulders the tax, as the liability therefrom is passed on to the end-users by the providers of these goods or services.[8] These providers, however, may credit the input VAT (or VAT passed on to them by their own suppliers) from their output VAT which they can also pass on to their final consumers.[9]

As VAT is passed along the production and distribution chain, the tax effectively becomes limited only to the *value added* to such goods, properties, or services because the providers of these goods or services are entitled to credit their input VAT, or VAT passed on to them by their suppliers, against their output VAT, or the VAT on their sale or provision of services to their final consumer. Because VAT may thus be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services, it is also considered as an indirect tax.[10]

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6. TAX REFORM ACT OF 1997, § 112.

7. Commissioner of Internal Revenue v. Magsaysay Lines, Inc., et al., 497 SCRA 63 (2006).

8. Contex Corporation v. Commissioner of Internal Revenue, 433 SCRA 376 (2004).

9. *Magsaysay*, 497 SCRA at 69.

10. Commissioner of Internal Revenue v. Seagate Technology (Philippines), 451 SCRA 132 (2005).

Our Tax Code, however, recognizes that some transactions are subject to VAT at zero per cent.[11] In effect, no output VAT, against which any input VAT passed-on could be offset, is payable on these transactions. Thus, in zero-rated transactions, the Tax Code grants the taxpayer an option to seek refund of the input VAT passed on to them by their suppliers as follows:

> 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.[12]

The interpretation of the above provision, especially the manner in which the two-year period is determined, is at the crux of the Supreme Court decision in *Mirant*.

III. THE *MIRANT* DECISION

A. Facts of the Case

Mirant Pagbilao Corporation (MPC) is engaged in the business of power generation. For the construction of the electrical and mechanical equipment portion of its plant in Pagbilao, Quezon, MPC secured the services of Mitsubishi Corporation of Japan (Mitsubishi).[13] For the services rendered, Mitsubishi issued progress billings to MPC for the period from April 1993 to September 1996. Consistent with its belief to be VAT zero-rated, however, MPC opted not to pay immediately the input VAT component that was passed on to it by its supplier. Instead, it was only on 14 April 1998 that

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11. TAX REFORM ACT OF 1997, §§ 106 (A) (2) & 108 (B). These transactions include services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero per cent rate. Thus, the sale of power generation services to the National Power Corporation (NPC) is subject to zero per cent VAT because under Section 13 of Republic Act No. 6395, NPC's revised charter, NPC is exempt from all taxes. See Maceda vs. Macaraig, 197 SCRA 771 (1991). (The Supreme Court construed the exemption as covering both direct and indirect taxes).

12. TAX REFORM ACT OF 1997, § 112 (A) (2) (emphasis supplied).

13. *Mirant*, 565 SCRA at 158.

MPC separately paid the input VAT in the amount of ₱135,993,570.00, pursuant to which its supplier issued VAT official receipt (OR) No. 0189 as evidence of payment.[14] Thereafter, MPC recognized the input VAT paid only in its quarterly VAT return for the *second quarter of 1998*, which return it filed with the BIR on 25 August 1998. For the same period, MPC reported VAT zero-rated sales. [15]

Since MPC's sales were all VAT zero-rated and no input VAT was applied against output VAT, MPC filed on *20 December 1999* with the BIR a claim for refund of its unutilized input VAT of ₱148,003,047.62 (which amount included the ₱135,993,570.00 covered by VAT OR No. 0189). Due to the BIR's inaction, MPC elevated the administrative claim for refund to the CTA on *4 July 2000*.[16]

B. The CTA Decision

On 18 March 2003, the CTA partially granted MPC's claim for refund in the reduced amount of ₱10,766,939.48 but denied the rest of the input VAT on the ground that most of MPC's purchases upon which it anchored its claims for refund or tax credit have not been amply substantiated by pertinent documents, such as VAT ORs and invoices.[17] Specifically, the CTA disallowed the input VAT of ₱135,993,570.00 on purchases of services from Mitsubishi for being substantiated by dubious ORs. It was noted that while the said input VAT is supported by VAT OR No. 0189, the VAT paid "pertains to services which were rendered for the period 1993 to 1996."[18]

The CTA did not, however, find it relevant to discuss in detail whether MPC's claim for refund was filed within the two-year prescriptive period under the law, although this conclusion may be implied from the fact that it partially granted the refund of input VAT in the amount of ₱10,766,939.48.

C. The Court of Appeals Decision

On 13 April 2003, MPC appealed the CTA Decision to the Court of Appeals. This time, the Commissioner of Internal Revenue (CIR) raised the issue of prescription in his Comment to MPC's appeal. On 22 December

14. *Id.* at 160.

15. *Id.* (emphasis supplied).

16. *Id.* (emphasis supplied).

17. *Id.* at 161-62.

18. *Id.* at 163.

2005, the Court of Appeals modified the CTA Decision by allowing the refund of the previously disallowed input VAT of ₱135,993,570.00.[19] Further, it found VAT OR No. 0819 to be a conclusive proof of payment and a valid supporting document to claim the input VAT. The Court of Appeals held that MPC's claim had not prescribed, as follows:

> The law is clear. [The] prescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued. *In the case at bar, petitioner filed its claim within two (2) years after the close of the taxable quarter when the sales were made. The two-year prescriptive period should be correctly counted from the close of the second quarter of 1998,* or on July 30, 1998. It was at this date that the petitioner filed its amended return, showing zero-rated sales of P2,297,007,686.10 and a corresponding input VAT of P148,003,047.62. Accordingly, when it filed its claim for refund and/or issuance of a tax credit certificate on December 20, 1999 with the BIR, it is still within the two-year prescriptive period prescribed by Section 112(A) of the Tax Code.[20]

D. The Supreme Court Decision

Aggrieved by the Court of Appeals Decision, the CIR appealed to the Supreme Court. On 12 September 2008, the Supreme Court rendered a decision sustaining the Court of Appeals in its findings that VAT OR No. 0819, by itself, sufficiently proves payment of VAT on 14 April 1998.[21] Nonetheless, the Supreme Court denied MPC's claim for refund with respect to the subject input VAT of ₱135,993,570.00 for being filed beyond the period prescribed under Section 112(A) of the Tax Code, as previously quoted in this Comment.[22]

The Supreme Court held that based on the said provision, "the reckoning frame would *always be the end of the quarter when the pertinent sales or transaction* was made, regardless when the input VAT was paid."[23] This period pertains to the close of the third quarter of 1996 (when the pertinent purchases by MPC were made) considering that the "last creditable input VAT due for the period covering the progress billing of September 6, 1996 is

19. *Mirant*, 565 SCRA at 163.

20. Commissioner of Internal Revenue v. Mirant Pagbilao Corporation, CA-G.R. SP No. 78280, Dec. 22, 2005 (emphasis supplied).

21. *Mirant*, 565 SCRA at 168.

22. *Id.* at 171.

23. *Id.* at 172 (emphasis supplied).

the third quarter of 1996 ending on September 30, 1996."[24] Thus, the Supreme Court held that MPC's administrative claim for refund filed on 19 December 1999 had already prescribed, for having been filed more than two years from September 1996.[25]

The Supreme Court also explained that MPC cannot invoke either Section 204(C) or Section 229 of the Tax Code, which prescribes the reckoning point for the two-year prescriptive limit from the payment of the tax.[26] Section 204(C) of the Tax Code provides the general rule that "no credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two years *after the payment of the tax or penalty*."[27] Section 229, on the other hand, states that to recover tax erroneously or illegally collected, *no such suit or proceeding shall likewise be filed after the expiration of two years from the date of payment of the tax or penalty* regardless of any supervening cause that may arise after payment.[28]

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24. *Id.*

25. *Id.*

26. *Id.*

27. TAX REFORM ACT OF 1997, § 204 (C) (emphasis supplied). This section provides:

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

28. TAX REFORM ACT OF 1997, § 229 (emphasis supplied). This section provides:

> Sec. 229. Recovery of Tax Erroneously or Illegally Collected. — No suit or proceeding shall be maintained in any court for the recovery of any 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 without authority,

The Supreme Court reasoned that both Sections 204(C) and 229 do not apply on MPC's claim because they refer to erroneous payment or illegal collection of internal revenue taxes, while MPC's creditable input VAT is not erroneously paid.[29]

IV. PRE-*MIRANT* RULE

As earlier mentioned, at the time of filing of MPC's administrative and judicial claims for refund in 1999, the prevailing interpretation was that the two-year prescriptive period in claims for refund of input VAT is reckoned from the date of the *filing* of the quarterly VAT return, which is also the date of the payment of tax. This interpretation is based on the view that Section 112(A) must be harmonized with Sections 204(C) and 229 of the Tax Code, which the CTA has consistently applied in its decisions and was finally confirmed by the Supreme Court in *Atlas*.

A. CTA Cases

As early as 1998,[30] the CTA had the occasion to clarify that the two-year prescriptive period for the filing of claims for refund of excess input VAT should be counted from the filing of the quarterly VAT returns similar to the rule on refunds of final income tax return. The CTA explained that similar to income tax, it is only during the date of filing of the quarterly VAT return that the exact VAT liability or the refundability of VAT can be determined. The CTA explained as follows:

> 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 therefore, 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.

29. *Mirant*, 565 SCRA at 173.

30. Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue, CTA Case No. 5296, July 20, 1998.

> [T]he two-year period should be counted from the date of filing of the corresponding VAT quarterly return which is within twenty (20) days after the close of each taxable quarter. This will harmonize Section 106 with Section 230 of the Tax Code[31] which was interpreted by the Supreme Court in the cases of Commissioner of Internal Revenue vs. TMX Sales, Inc. and the Court of Appeals, G.R. No. 83736, dated January 15, 1992; and ACCRA Investments Corporation vs. Commissioner of Internal Revenue, 204 SCRA 957, that the two (2) year period should be counted from the filing of the final income tax return, because it is only during that date that the exact tax liability or refundability of tax can be determined. *In the same manner, it is only after the filing of the quarterly VAT return that we can determine the VAT liability or refundability of VAT.*[32]

It may be important to note that for VAT purposes, the VAT is paid upon the filing of the quarterly VAT return. Such return is not consolidated into any annual return, and thus, deemed a final return for VAT purposes.[33] Because of this, the quarterly VAT return is deemed to be like the annual income tax return.

Prior to *Mirant*, the above interpretation of the two-year prescriptive period had been adopted in several decisions of the CTA divisions,[34] as well as the CTA En Banc.[35] It has also not been disturbed even when these said

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31. Now TAX REFORM ACT OF 1997, §§ 112 & 229.

32. *Atlas*, CTA Case No. 5296, July 20, 1998 (emphasis supplied).

33. TAX REFORM ACT OF 1997, § 114 (A).

34. *See generally* Nichimen Corporation – Philippine Branch v. Commissioner of Internal Revenue, CTA Case No. 5384, Aug. 18, 1998; Hopewell Power (Philippines) Corp. v. Commissioner of Internal Revenue, CTA Case No. 5389, Jan. 4, 1999; American Express International, Inc. – Philippine Branch v. Commissioner of Internal Revenue, CTA Case No. 5475, June 16, 2000; Benguet Corporation v. Commissioner of Internal Revenue, CTA Case No. 5532, Oct. 12, 1999; Hitachi Computer Products (Asia) Corporation v. Commissioner of Internal Revenue, CTA Case No. 5707, June 20, 2001; NEC Components Philippines, Incorporated v. Commissioner of Internal Revenue, CTA Case No. 6145, June 3, 2002; JIDECO Manufacturing Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 6552, Sep. 16, 2004; Mirant Pagbilao Corporation v. Commissioner of Internal Revenue, CTA Case Nos. 6228 & 6732, July 31, 2006; Dash Engineering Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 7243, Oct. 4, 2007.

35. *See generally* JIDECO Manufacturing Philippines, Inc. v. Commissioner of Internal Revenue, CTA EB No. 53, June 7, 2005; Commissioner of Internal

cases were elevated to the Supreme Court.[36] Thus, for years, the said interpretation has guided taxpayers and tax practitioners alike in determining when their claims for VAT refund become due for filing, administratively and judicially.

In other words, the Supreme Court decisions prior to *Mirant* never discussed or addressed the issue on the proper interpretation of the two-year prescriptive period in claims for refund of input VAT. Instead, the Supreme Court had consistently affirmed CTA decisions granting VAT refunds where the taxpayer filed its claim for refund "within the two-year prescriptive period"[37] reckoned from the date of filing of the quarterly VAT return.[38]

B. Atlas Case

It was not until *Atlas* when the Supreme Court, through its Third Division, addressed the issue on the proper counting of the two-year prescriptive period. *Atlas* involves Atlas Consolidated Mining and Development Corporation's (ACMDC) various claims for refund of input VAT on purchases of capital goods and on zero-rated sales in the taxable years 1990 and 1992, which were filed using the "date of filing of quarterly VAT return" as the reckoning point for the two-year prescriptive period.[39] The Supreme Court construed the phrase "within two years after the close of the

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Revenue v. Mitsubishi Motors Philippines Corporation, CTA EB No. 296, Dec. 18, 2007; Dash Engineering Philippines, Inc. v. Commissioner of Internal Revenue, CTA EB No. 357, July 17, 2008.

36. *See Hopewell Power*, CTA Case No. 5389, Jan. 4, 1999, where the CTA granted the taxpayer's claim for refund, after finding that it filed its claim for refund of input VAT within the two-year prescriptive period reckoned from the date of filing of the relevant quarterly VAT return. When the CIR appealed the CTA decision to the Court of Appeals, the Court of Appeals denied the appeal sans any extensive discussion on the issue of prescription. On appeal by the CIR to the Supreme Court, the CIR's appeal was also denied in a minute resolution, resulting in the CTA decision becoming final and executory.

37. Commissioner of Internal Revenue v. Sekisui Jushi Philippines, Inc., 496 SCRA 206, 210 (2006).

38. Commissioner of Internal Revenue v. American Express International, Inc. (Philippine Branch), 462 SCRA 197 (2005); Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.), 504 SCRA 484 (2006).

39. *Atlas*, 524 SCRA at 96.

taxable quarter when the sales were made" to mean two years from the filing of the quarterly VAT return,[40] as follows:

> By a plain reading of the foregoing provision, the two-year prescriptive period for filing the application for refund/credit of input VAT on zero-rated sales shall be determined from the close of the quarter when such sales were made.
>
> Petitioner contends, however, that the said two-year prescriptive period should be counted, not from the close of the quarter when the zero-rated sales were made, but from the date of filing of the quarterly VAT return and payment of the tax due 20[41] days thereafter, in accordance with Section 110(b) of the Tax Code of 1977, as amended, quoted as follows —
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> ...
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> It is already well-settled that the two-year prescriptive period for instituting a suit or proceeding for recovery of corporate income tax erroneously or illegally paid under Section 230[42] of the Tax Code of 1977, as amended, was to be counted from the filing of the final adjustment return.
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> ...
>
> The very same reasons set forth in the afore-cited cases concerning the two-year prescriptive period for claims for refund of illegally or erroneously collected income tax may also apply to the Petitions at bar involving the same prescriptive period for claims for refund/credit of input VAT on zero-rated sales.
>
> It is true that unlike corporate income tax, which is reported and paid on installment every quarter, but is eventually subjected to a final adjustment at the end of the taxable year, VAT is computed and paid on a purely quarterly basis without need for a final adjustment at the end of the taxable year. *However, it is also equally true that until and unless the VAT-registered taxpayer prepares and submits to the BIR its quarterly VAT return, there is no way of knowing with certainty just how much input VAT the taxpayer may apply against its output VAT; how much output VAT it is due to pay for the quarter or how much excess input VAT it may carry-over to the following quarter; or how much of its input VAT it may claim as refund/credit.* It should be recalled that

40. The Supreme Court affirmed the Court of Appeals insofar as the latter held that the two-year prescriptive period for the filing of claims for refund/credit of input VAT must be counted from the date of filing of the quarterly VAT return and thus reversed the CTA's earlier pronouncement that ACMDC's claims for refund had prescribed since more than two years had elapsed from the close of each quarter when ACMDC filed its petitions for review.

41. Now 25 days under TAX REFORM ACT OF 1997, § 114 (A).

42. Now TAX REFORM ACT OF 1997, § 229.

> not only may a VAT-registered taxpayer directly apply against his output VAT due the input VAT it had paid on its importation or local purchases of goods and services during the quarter; the taxpayer is also given the option to either (1) carry over any excess input VAT to the succeeding quarters for application against its future output VAT liabilities, or (2) file an application for refund or issuance of a tax credit certificate covering the amount of such input VAT. Hence, even in the absence of a final adjustment return, the determination of any output VAT payable necessarily requires that the VAT-registered taxpayer make adjustments in its VAT return every quarter, taking into consideration the input VAT which are creditable for the present quarter or had been carried over from the previous quarters.[43]

The Supreme Court held in *Atlas* that "when claiming refund/credit, the VAT-registered taxpayer must be able to establish that it does have refundable or creditable input VAT, and the same has not been applied against its output VAT liabilities — information which are supposed to be reflected in the taxpayer's VAT returns."[44] For this reason, the Supreme Court found it reasonable and imperative to count the two-year prescriptive period from the date of filing of the quarterly VAT return.

The CTA began citing the *Atlas* case in its decisions,[45] until the *Mirant* Decision came out.[46]

V. REVISITING *MIRANT*

A. Mirant Ramifications

In view of the *Mirant* Decision, the CTA (both the former First and Second Divisions) readily abandoned *Atlas* and proceeded to deny[47] and dismiss[48]

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43. *Atlas*, 524 SCRA at 90-95 (emphasis supplied).

44. *Id.* at 95.

45. *See generally* CE Cebu Geothermal Power Company, Inc. v. Commissioner of Internal Revenue, CTA Case No. 6791, May 15, 2008; Accenture, Inc. v. Commissioner of Internal Revenue, CTA Case No. 7158, Aug. 7, 2008.

46. In a Resolution dated Nov. 26, 2008, the Supreme Court denied MPC's Motion for Reconsideration of the Sep. 12, 2008 decision.

47. *See generally* Kepko Ilijan Corporation v. Commissioner of Internal Revenue, CTA Case No. 7473, Jan. 5, 2009; Nippon Express (Phils.) Corporation v. Commissioner of Internal Revenue, CTA Case No. 6688, Mar. 24, 2009; Philex Mining Corporation v. Commissioner of Internal Revenue, CTA Case No. 7657, May 12, 2009; Mindanao I Geothermal Partnership v. Commissioner of Internal Revenue, CTA Case No. 7506, May 12, 2009; Kepko Ilijan

claims for VAT refund that were filed in accordance with the *Atlas* decision, but violating the rule held in *Mirant*. In other words, the CTA applied *Mirant* to all cases submitted for resolution or decision, regardless if the claims for refund were filed before the date of the *Mirant* Decision, and dismissed claims amounting to billions of pesos for being out of period.

In an interesting development on the issue, however, the former First Division[49] of the CTA reconsidered its initial position in *Team Energy Corporation vs. Commissioner of Internal Revenue*[50] when it held that *Mirant* should be applied to cases "filed after the promulgation date of the *Mirant Case*."[51] It held that to apply *Mirant* in the present case will, in effect, be giving the new doctrine retroactive application, thereby impairing vested rights. Several cases decided by the former First Division of the CTA followed suit by prospectively applying *Mirant*,[52] holding that a "new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith."[53] For the rest of the VAT refund cases *albeit* similarly filed before the date of the *Mirant Decision*, the former First Division simply cited *Atlas* and dispensed with any discussion on the prospective application of *Mirant*.[54]

Corporation v. Commissioner of Internal Revenue, May 7, 2009; Panay Power Corporation v. Commissioner of Internal Revenue, CTA Case Nos. 7353 & 7401, May 15, 2009; Marubeni Philippines Corporation v. Commissioner of Internal Revenue, CTA Case No. 6469, June 2, 2009.

48. Deustche Knowledge Services, Pte Ltd. v. Commissioner of Internal Revenue, CTA Case No. 7921, Oct. 28, 2009.

49. The Former First Division of the CTA was composed of Honorable Presiding Justice Ernesto D. Acosta, Associate Justice Lovell R. Bautista and Associate Justice Caesar A. Casanova.

50. Team Energy Corporation v. Commissioner of Internal Revenue, CTA Case Nos. 7229 & 7298, Oct. 5, 2009.

51. *Id.*

52. *See generally* Team Sual Corporation v. Commissioner of Internal Revenue, CTA Case Nos. 7230 & 7299, Nov. 26, 2009; Steag State Power, Inc. v. Commissioner of Internal Revenue, CTA Case Nos. 7458 & 7554, Jan. 5, 2010; Kepco Ilijan Corporation v. Commissioner of Internal Revenue, CTA Case No. 6682, Mar. 11, 2010.

53. Philex Mining Corporation v. Commissioner of Internal Revenue, CTA Case Nos. 7528 & 7564, Feb. 8, 2010 (citing People v. Jabinal, 55 SCRA 607 (1974)).

54. *See generally* Kepco Ilijan Corporation v. Commissioner of Internal Revenue, CTA Case No. 7237, Jan. 15, 2009; Toledo Power Company v. Commissioner

The former Second Division[55] of the CTA, however, has continued to adhere to the retroactive application of *Mirant*. In one case, it ruled that the *Mirant* doctrine partakes of the nature of a procedural rule which may be given retroactive effect as there are no vested rights in rules of procedure. It also held that *Mirant* is merely an interpretation of an existing law under the 1997 Tax Code which has been effective as early as 1 January 1998, while *Atlas* is a construction of the 1977 Tax Code, hence, the former may not be said to have overturned the latter. [56]

With the recent reorganization in the CTA in view of the addition of a third division, it can only be anticipated that the CTA may continue to be divided on the issue on the proper calculation of the two-year prescriptive period, unless and until *Mirant* is revisited by the Supreme Court.[57]

B. Reexamining Mirant

Did *Mirant* actually overturn *Atlas*? If it did, should it affect taxpayers who filed their claims for refund on the basis of the *Atlas* interpretation? More importantly, did *Mirant* establish a controlling point of law? With the present conflicting decisions rendered by the CTA on the issue of prescription in VAT refund cases, it only becomes imperative that the *Mirant* rule be re-examined in the light of the Supreme Court's earlier declaration in *Atlas*.

First, *Mirant* did not expressly reverse *Atlas*. *Mirant* did not show any definite and clear intention to overturn the *Atlas* interpretation of the two-

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of Internal Revenue, CTA Case No. 6961, Nov. 11, 2009; Marubeni Philippines Corporation v. Commissioner of Internal Revenue, CTA Case No. 6898, Nov. 11, 2009.

55. The Former Second Division of the CTA was composed of Associate Justice Juanito C. Castaneda, Jr., Associate Justice Erlinda P. Uy and Associate Justice Olga Palanca-Enriquez.

56. *See generally* CBK Power Limited Company v. Commissioner of Internal Revenue, CTA Case No. 7621, Mar. 3, 2010; Sitel Philippines Corporation v. Commissioner of Internal Revenue, CTA Case No. 7623, Mar. 3, 2010; Kepko Philippines Corporation v. Commissioner of Internal Revenue, CTA Case No. 7474, Apr. 12, 2010.

57. *See* Taganito Mining Corporation v. Commissioner of Internal Revenue, CTA Case No. 7769, Apr. 8, 2010, where the present Second Division applied Atlas relative to a 2006 claim for refund of input VAT. The present Second Division is now composed of Associate Justice Juanito C. Castañeda, Jr. (from the Former Second Division), Associate Justice Caesar A. Casanova (from the Former First Division) and Associate Justice Cielito N. Mindaro-Grulla.

year prescriptive period. If such was the intention, the Supreme Court could have readily stated that it was abandoning the *Atlas* doctrine and that it was setting a definitive rule that the proper reckoning point of the two-year prescriptive period is the date of the filing of the quarterly VAT return. Yet it did not. Strangely, *Atlas* was never even mentioned in the case.

Besides, *Mirant* could not have validly overturned *Atlas* without violating the constitutional mandate that no doctrine or principle laid down by the Supreme Court may be modified except by the Supreme Court sitting *en banc*.[58] The *Mirant* and *Atlas* decisions were rendered by the Second and Third divisions of the Supreme Court, respectively. Thus, until the Supreme Court sitting *en banc* modifies or reverses *Atlas*, it may not be prudent to assume that Mirant is now the prevailing rule on the matter.

Second, the factual circumstances of *Mirant* are markedly peculiar. *Mirant* involves the payment by MPC of VAT in *1998* with respect to progress billings from Mitsubishi covering, however, the period from *1993 to 1996*.[59] In short, there was a belated payment of VAT. This belated payment by MPC of input VAT to its supplier gave rise to the issue on when the two-year prescriptive period under Section 112(A) of the Tax Code should be reckoned from: (i) the close of the quarter when MPC actually paid the input VAT to its supplier and correspondingly, claimed the amount paid as input VAT in 1998, or (ii) the close of the taxable quarter when the "*pertinent sales or transaction were made*"[60] regardless of when the input VAT was paid. The Supreme Court, in upholding that it should be the latter period, reckoned the two-year prescriptive period from the quarter when MPC's supplier, Mitsubishi, made its last progress billings or sales in 1996. This was the only issue relevant to prescription that the Supreme Court was called upon to resolve in the case.[61]

In other words, the question whether or not the reckoning point of the two-year prescriptive period remains to be the date of the filing of the quarterly VAT returns was never an issue in *Mirant*. Therefore, *Mirant* could not be said to have established a judicial precedent on the matter, so as to make the same invariably applicable to all other VAT refund cases. It has been said that where the facts are essentially different, the adherence to an existing principle does not apply, in that a perfectly sound principle as

58. PHIL. CONST. art VIII, § 4, ¶ 3.

59. *Mirant*, 565 SCRA at 159-60 (emphasis supplied).

60. *Id.* at 172 (emphasis supplied).

61. *Id.* at 164.

applied to one set of facts might be entirely inappropriate when a factual variance is introduced.[62] The peculiarity of the facts and issues in *Mirant* may be sufficient motivation for the courts and taxpayers to be cautious in invoking the rule as a judicial precedent.

Third, even the interpretation that the two-year prescriptive should be reckoned from the "close of the taxable quarter when the relevant sales were made"[63] is not free from doubt. Whose sales is Section 112(A) referring to? In *Mirant*, the Supreme Court effectively reckoned the two-year period from the time Mitsubishi, the supplier, billed MPC, but not from the time MPC, the taxpayer, generated zero-rated sales, thereby implying that the "sales" referred to in Section 112(A) are the sales of the suppliers to the VAT taxpayer, Mitsubishi, in said case. This interpretation, however, is not consistent with the clear provision of Section 112(A), where the term zero-rated sales refer to the sales *of the taxpayer* (not its suppliers') seeking the refund.[64]

The title of the provision speaks for itself — it refers to the taxpayers whose sales are zero-rated or effectively zero-rated who are seeking to recover the creditable input VAT that have remained unutilized because of such sales. Clearly, the sales under Section 112(A) pertain to the zero-rated sales *of the taxpayer* claiming refund, which in this case is MPC, not the sales of the suppliers to the taxpayer.[65] This is the only point of reference. In fact, there is nothing in the above provision that makes the time of purchase and the time of payment of input VAT relevant. Therefore, it is the period of MPC's sale, which happened only in 1998,[66] not its purchases, which happened in 1993 to 1996, that should matter in applying Section 112(A)of the Tax Code.

Fourth, the ruling in *Mirant* that Section 229[67] does not apply to claims for VAT refund is also doubtful of legal basis. If *Mirant* had only considered *Atlas*, it would have readily seen that *Atlas* had already ruled upon the issue and it would have not found the need, as it did, to create a dichotomy between Sections 112 and 229. As *Atlas* pointed out, the taxpayer seeking

62. Hacienda Bino/Hortencia Starke, Inc. v. Cuenca, 456 SCRA 300, 309 (2005).

63. TAX REFORM ACT OF 1997, § 112 (A) (emphasis supplied).

64. TAX REFORM ACT OF 1997, § 112 (A) (emphasis supplied).

65. *See* Intel Technology Phils. v. Commissioner of Internal Revenue, 522 SCRA 657 (2007).

66. *Mirant*, 565 SCRA at 158.

67. TAX REFORM ACT OF 1997, § 229.

claim for refund of input VAT is as equally entitled to invoke Section 229 considering that such "input VAT, the same as any illegally or erroneously collected national internal revenue tax, consists of monetary amounts which are currently in the hands of the government but must rightfully be returned to the taxpayer."[68]

Fifth, the apparent conflicting opinions in *Atlas* and *Mirant* cannot be reconciled by ratiocinating that *Atlas* was decided under the 1977 Tax Code, as amended by Republic Act No. 7716,[69] while *Mirant* was decided under the 1997 Tax Code, because there is no change in the relevant provisions of the laws that would warrant the change of interpretation. It may be gleaned that both the 1977 Tax Code and the 1997 Tax Code use substantially the same wordings with respect to the reckoning of the two-year prescriptive period. In statutory construction, the reenactment of a statute by Congress without substantial change is an implied legislative approval and adoption of the previous law (and its interpretation).[70]

Finally, assuming *Mirant* is deemed to have abandoned the *Atlas* interpretation, the new doctrine is normally applied prospectively. Fairness and equity dictate that taxpayers should not be penalized for relying in good faith on previous interpretations of the CTA that was even affirmed by the Supreme Court in *Atlas*. The Supreme Court has held that decisions enunciating new doctrines, overruling a previous one, should be applied prospectively and cannot be applied to parties who had relied on the previous decision and acted on the faith thereof.[71] In another case, the Supreme Court, in announcing a new doctrine which would have affected the right to appeal of a litigant, made a specific directive that the new doctrine should be applied prospectively.[72] It was noted that that it would be unfair to deprive the parties of the right to appeal simply because they availed themselves of a procedure which was not then expressly prohibited or allowed. In *Mirant*, the issue was used to be settled as far as the CTA is concerned, and it was also affirmed by the Supreme Court in *Atlas*.

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68. *Atlas*, 524 SCRA at 96.

69. An Act Restructuring the Value Added Tax System (VAT), Widening Its Tax Based and Enhancing Its Administration and for These Purposes Amending and Repealing the Relevant Provisions of the National Internal Revenue Code, As Amended, and for Other Purposes, Republic Act No. 7716 (1994).

70. Department of Agrarian Reform v. Uy, 515 SCRA 376, 401 (2007).

71. *Jabinal*, 55 SCRA at 612.

72. Habulayas Enterprises, Inc. v. Japson, 142 SCRA 208, 211 (1986).

VI. CONCLUSION

In conclusion, the need for an equal opportunity to present claims should be afforded to each taxpayer. *Atlas* held that: "*[t]herefore, whether claiming refund/credit of illegally or erroneously collected national internal revenue tax, or input VAT, the taxpayer must be given equal opportunity for filing and pursuing its claim.*"[73]

The implications of *Mirant* cannot be taken too lightly. In the last two years since the decision came out, taxpayers have been in legal quandary over the pending VAT refund cases that have been affected by the rule. It bears stating that most of these claims were filed by companies belonging to vital economic industries, such as the power generating industry, export business, and the business process outsourcing (BPO) industry. It does not help either that the CTA simply adopted the *Mirant* Decision without really having to fully ascertain if such indeed has become the controlling judicial declaration on the issue.

Did *Mirant* in fact establish a controlling point of law with respect to the correct interpretation of the two-year prescriptive period under Section 112(A)?

As above-discussed, it did not. *Atlas* remains as good law and should be the controlling rule with respect to the issue of whether the two-year prescriptive period can be reckoned from the date of the filing of the quarterly VAT return. Therefore, the *Mirant* Decision deserves to be revisited in light of the discussion above and the conflicting decisions of the CTA on the issue. Unless and until the Supreme Court reevaluates *Mirant* and *Atlas* and rules squarely, the issue will linger and will continue to baffle and affect taxpayers in their VAT refund cases as well as on the financial and tax regulatory aspects of their businesses.

73. *Atlas*, 524 SCRA 73 at 96 (emphasis supplied).