**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

-versus-

**PENN PHILIPPINES, INC.,**
Respondent.

**CTA EB No. 1002**
(CTA Case No. 7686)

Present:

Del Rosario, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, *JJ.*

**Promulgated:**
FEB 12 2014 Apolinario 1:40 p.m.

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# DECISION

**CASTAÑEDA, JR., *J.*:**

For review are a) the Decision dated December 11, 2012, and b) the Resolution dated March 27, 2013 issued by the Court of Tax Appeals' Third Division in the case docketed as CTA Case No. 7686.

Petitioner seeks respondent to pay the amount of P15,068,187.73 representing final withholding tax deficiency assessment on management and consultancy fee paid to Dogi International Fabrics, S.A. ("DIF") in the amount of P23,123,444.00, and to disallow respondent to claim the latter amount as deduction in its income tax return covering taxable year 2002 due to its failure to withhold.

## THE FACTS

Penn Philippines ("respondent") is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, while the Commissioner of Internal Revenue ("petitioner") as a public official is tasked to decide disputed assessments, collection, refund of erroneously or excessively paid internal revenue taxes, fees or other charges, penalties, or other matters under the 1997 National Internal Revenue Code ("NIRC"), as amended, or other laws administered by the Bureau of Internal Revenue ("BIR").[1]

Petitioner, through a letter of authority dated October 30, 2003 authorized BIR representatives to examine respondent's books of accounts and other accounting records concerning internal revenue taxes for taxable year 2002.[2]

On September 7, 2006, respondent received a notice requesting it to appear for an informal conference before the BIR.[3]

On November 20, 2006, respondent received a Preliminary Assessment Notice ("PAN") together with Details of Discrepancies and filed its Preliminary Reply concerning the total amount of P73,954,576.49 representing 2002 income tax, expanded withholding tax, final withholding tax, final tax on non-resident alien engaged in trade or business ("NRAETB"), withholding tax on compensation and improperly accumulated tax deficiencies and late filing of BIR Form 1603 for the second quarter of 2002.[4]

In the final assessment notice/formal letter of demand with details of discrepancies ("FAN") received by respondent on December 12, 2006, petitioner demanded payment of 2002 deficiency taxes and penalties in the aggregate amount of P76,034,555.22.[5] Je

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[1] Docket, CTA Case No. 7686, pp. 111-112.
[2] Docket, CTA Case No. 7686, p. 112.
[3] *Id.*
[4] See Exhibit "20" and Joint Stipulation of Facts and Issues, Docket CTA Case No. 7686, p. 113.
[5] Docket, CTA Case No. 7686, p. 113.

On January 11, 2007, respondent protested the FAN, and in a supplemental letter dated March 12, 2007, it attached all relevant documents in support of the protest.[6]

Petitioner's inaction on the protest on the FAN prompted respondent to file a Petition for Review on October 8, 2007 with the Court of Tax Appeals.[7]

In the Decision dated December 11, 2012, the Court's Third Division partly granted the Petition for Review as follows:

> **WHEREFORE**, premises considered, the present Petition for Review is hereby **PARTLY GRANTED.**
>
> Accordingly, the Assessments issued by respondent against petitioner covering deficiency final tax and improperly accumulated earnings tax for the year 2002 in the amounts of P15,068,187.73 and P5,665,333.81, respectively are hereby ordered **CANCELLED** and **SET ASIDE**.
>
> However, the Assessments covering deficiency Income Tax, Expanded Withholding Tax, Final Tax on NRAETB, Withholding Tax on Compensation, and Penalties on Late Filing of BIR Form No. 1603 for the 2nd Quarter of 2002 are hereby sustained with some modifications. Accordingly, petitioner is **ORDERED** to pay respondent the following amounts, inclusive of surcharge imposed under Section 248 (A) of the NIRC of 1997, as follows:

| **Kind of Tax** | **Basic** | **25% Surcharge** | **20% Interest** | **Total** |
|---|---|---|---|---|
| Income Tax | P 374,139.64 | P 93,534.91 | | P 467,674.55 |
| Expanded Withholding Tax | 25,945.95 | 6,486.49 | | 32,432.44 |
| Final Tax on NRAETB | 1,497,109.52 | 374,277.38 | | 1,871,386.90 |
| Withholding Tax On Compensation | 222,570.60 | 55,642.65 | | 278,213.25 |

[6] Docket, CTA Case No.7686, p. 114.
[7] Docket, CTA Case No.7686, p. 115.

| | | | | |
|---|---|---|---|---|
| Penalty for late Filing 1603(Basis P13,165.77) | - | 3,291.44 | P 7.90 | 3,299.34 |
| **Total** | **P2,119,765.7** | **P533,232.87** | **P 7.90** | **P2,653,006.48** |

In addition, petitioner is hereby **ORDERED** to pay (a) deficiency interest at the rate of twenty (20%) per annum on the basic deficiency income tax of P374,139.64 computed from April 15, 2003, EWT of P25,945.95, computed from January 25, 2003, on Final Tax on NRAETB of P1,497,109.52, computed from January 25, 2003 and Withholding Tax on Compensation of P222,570.60, computed from January 15, 2003, until full payment thereof, pursuant to Section 249 (B) of the NIRC of 1997, as amended; and b) delinquency interest at the rate of twenty percent (20%) per annum on the total amount of P2,653,006.48 and on the 20% deficiency interest which have accrued as afore-stated in (a) from January 31, 2007 until full payment thereof, pursuant to Section 249 (C) of the NIRC of 1997.

**SO ORDERED.**[8]

Dissatisfied, petitioner moved for a partial reconsideration of the Decision dated December 11, 2012; however, in the Resolution dated March 27, 2013, the Court in Division denied the same for lack of merit. The Court reasoned that petitioner's allegation on respondent's failure to obtain a tax treaty relief ruling under Revenue Memorandum Order ("RMO") No. 01-2000 cannot be interposed as a new issue as it was not earlier raised in the answer, motion to dismiss, pre-trial brief or in her memorandum.[9] *gr*

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[8] Penned by Associate Justice Olga Palanca-Enriquez(retired) and concurred in by Associate Justices Lovell R. Bautista and Amelia R. Cotangco-Manalastas, Rollo, pp.17-49.
[9] Rollo, pp. 51-52.

## THE ISSUES

Petitioner elevated her appeal to the Court of Tax Appeals *en banc* raising the following grounds:

**(1) THE CTA-3RD DIVISION ERRED IN HOLDING THAT PETITIONER'S RELIANCE OF RMO 1-2000 IN HER MOTION FOR PARTIAL RECONSIDERATION IS A NEW ISSUE.**

**(2) THE CTA-3RD DIVISION ERRED IN NOT HOLDING THAT BEFORE ONE MAY INVOKE THE PROVISIONS OF A TAX TREATY, ONE MUST FILE AN APPLICATION FOR TAX TREATY RELIEF WITH THE INTERNATIONAL TAX AFFAIRS DIVISION (ITAD).**[10]

According to petitioner, since the relief provided under RP-Spain Tax Treaty is not automatic, respondent has the burden of proving it complied with the provisions of RMO No. 1-2000.

The requirement of an application for tax treaty relief filed prior to the payment of the tax and prior to the availment of the preferential tax rate has been consistently ruled in a number of Court of Tax Appeals cases and minute resolutions issued by the Supreme Court, such as *Mirant (Philippines) Operations Corporation [formerly: Southern Energy Asia-Pacific Operations [Philippines], Inc. vs. CIR*, CTA EB Case No. 40 (CTA Case No. 6382), June 7, 2005 which was affirmed by the Supreme Court in a Minute Resolution under G.R. No. 168531 dated November 12, 2007 and *CDL Hotel (Phils.) Corporation vs. Commissioner of Internal Revenue*, CTA EB No. 339 (CTA Case No. 6585), August 10, 2009 which was likewise affirmed by the Supreme Court in a Minute Resolution under G.R. No. 190195 dated December 14, 2009. Other Court of Tax Appeals cases are *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue*[11], *Commissioner of Internal Revenue v. CBK Power Company Limited and CBK Power Company Limited vs. Commissioner of Internal Revenue*[12], *SAL Oppenheim Jr. & Cie Kommanditgesellschaft Auf Aktien v. Commissioner of*

[10] Rollo, pp. 9-10.
[11] CTA EB No. 456, May 29, 2009.
[12] CTA EB Nos. 469 & 494, March 29, 2010.

*Internal Revenue*[13] and *Manila North Tollways Corporation v. Commissioner of Internal Revenue*.[14]

Although respondent failed to present any evidence that it filed the necessary application for tax treaty relief with the BIR ITAD other than its mere allegation that its management and consultancy fees paid to DIF are covered by the RP-Spain Tax Treaty, the said management and consultancy fees are still subject to final withholding tax. The disallowance of the management and consultancy fees paid to DIF as a deduction to net income for failure to withhold the corresponding withholding tax is valid.

Petitioner also asserts that the question of the applicability of the provisions of RP-Spain Tax Treaty in relation to the requirement of RMO 1-2000 was already an issue as it correlates with the issue of whether the management fees paid to DIF is subject to final withholding tax.

Respondent on the other hand, argues that the management and consultancy fee of P23,123,444.00 paid to DIF is not taxable under Articles 7 & 5 of the "RP-Spain Tax Treaty".

Respondent also insists that the Court in Division correctly ruled that petitioner is barred from raising a new issue on petitioner's reliance on RMO No. 1-2000

Petitioner can no longer raise the applicability of RMO 1-2000 as a defense since this was not pointed in the Answer pursuant to Section 1 of Rule 9 of the Rules of Court.

The joint stipulations of facts and issues also did not include the applicability of RMO 1-2000 as an issue. The facts and issue jointly stipulated by the parties are incorporated in the pre-trial order. The determination of issues during pre-trial conference bars the consideration of other questions, whether during trial or on appeal.

RMO 1-2000 cannot prevail over the RP-Spain Tax Treaty. As a result of the President's ratification and the Senate's concurrence of the RP-Spain Tax Treaty, the Philippines became bound by the terms of the said treaty, with the obligation to carry out the terms of the agreement. Je

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[13] CTA Case No. 7923, February 27, 2012.
[14] CTA EB No. 812, October 11, 2012.

This includes the obligation to provide tax treaty relief if qualified under the provisions of the tax treaty.

Assuming arguendo that petitioner is not barred from raising the applicability of RMO No. 1-2000 as an issue, respondent submits that it is not required to comply with the provisions of RMO No. 1-2000 to file an application for tax treaty relief before invoking the provisions of the RP-Spain Tax treaty for tax exemption.

Petitioner only relied on minute resolutions not on Supreme Court rulings as basis for her assertion that the requirement under RMO No. 1-2000 is already established.

## THE COURT'S RULING

The crux of the controversy is the applicability and relevance of RMO 1-2000 to ascertain if respondent is exempt from 2002 FWT on management and consultancy fees paid to DIF under RP-Spain Tax Treaty.

Under RMO No. 1-2000, before one may invoke the provisions of a tax treaty and claim for tax exemption or application of special or preferential tax rates, one must file an application for tax-treaty relief with the International Tax Affairs Division ("ITAD") of the BIR fifteen (15) days before the transaction.

We find the petition unmeritorious.

In the case of *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue,*[15] the Supreme Court declared as unnecessary the (15)-day period of application for tax treaty relief under RMO No. 1-2000 as a requirement to enjoy the benefits of a tax treaty. A tax treaty takes precedence over an administrative issuance such as RMO No. 1-2000. The Highest Tribunal explained that:

> **Our Constitution provides for adherence to the general principles of international law as part of the law of the land. The time-honored international principle of *pacta sunt servanda* demands the performance in good faith of treaty obligations on the part of the states that**

[15] G.R. No. 188550, August 19, 2013.

**enter into the agreement.** Every treaty in force is binding upon the parties, and obligations under the treaty must be performed by them in good faith. **More importantly, treaties have the force and effect of law in this jurisdiction.**

Tax treaties are entered into "to reconcile the national fiscal legislations of the contracting parties and, in turn, help the taxpayer avoid simultaneous taxations in two different jurisdictions." *CIR v. S.C. Johnson and Son, Inc.* further clarifies that "tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods.

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"A state that has contracted valid international obligations is bound to make in its legislations those modifications that may be necessary to ensure the fulfilment of the obligations undertaken. Thus, laws and issuances must ensure that the reliefs granted under tax treaties are accorded to the parties entitled thereto. **The BIR must not impose additional requirements that would negate the availment of the reliefs provided for under international agreements.** More so, when the RP-Germany Tax Treaty does not provide for any pre-requisite for the availment of the benefits under said agreement.

Likewise, it must be stressed that **there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period.** We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.

Bearing in mind the rationale of tax treaties, **the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to** ge

> **divest the entitlement to the relief as it would constitute a violation of the duty required in good faith in complying with a tax treaty. The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty.** At most, the application of a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to relief. (Emphasis supplied.)

Thus, the 15-day period of application for the availment of a tax treaty relief is not enforceable.

We also agree with respondent that Supreme Court's minute resolution relied on by petitioner as basis in applying RMO No. 1-2000 cannot be treated as a precedent. In the case of *Philippine National Bank v. Parayno Lim*[16], the Supreme Court clarified the nature of minute resolutions in this manner:

> In *Alonso*, we declared that a **"minute resolution may amount to a final action on the case but it is not a precedent." However, we continued to state that "it can not bind non-parties to the action."** Corollary thereto, we can conclude that a minute resolution, while not a precedent relative to strangers to an action, nonetheless binds the parties therein, and calls for *res judicata's* application.
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> *Nationwide Security and Allied Services, Inc. v. Valderama* is instructive anent the effects of the issuance of a minute resolution, *viz.*:
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> **It is true that, although contained in a minute resolution, our dismissal of the petition was a disposition of the merits of the case. When we dismissed the petition, we effectively affirmed the CA ruling being questioned. As a result, our ruling in that case has already become final. xxx**
>
> **With respect to the same subject matter and the same issues concerning the same parties, it constitutes res judicata. However, if other parties or another subject matter (even with the same parties and issues)**

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[16] G.R. No. 171677, January 30, 2013.

> **is involved, the minute resolution is not binding precedent. . . . .** (Emphasis supplied.)

Clearly, only Supreme Court decisions and not minute resolutions are binding judicial precedents.

It also bears stressing that only Supreme Court decisions form part of the legal system of the Philippines as pointed in the case of *Amelia D. Demesa et al. v. Pepsi Cola Products Philippines, Inc. and Pepsico*, Inc.[17] as follows:

> ART. 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.
>
> It enjoins adherence to judicial precedents. It requires our courts to follow a rule already established in a final decision of the Supreme Court. That decision becomes a judicial precedent to be followed in subsequent cases by all courts in the land. The doctrine of stare decisis is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument.

Citing the cases of *Philippine Veterans Affairs Office v. Brigida V. Segundo*[18] and *De Mesa v. Pepsi Cola Products Phils., Inc.*[19], the Supreme Court in the consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation*, *Taganito Mining Corporation v. Commissioner of Internal Revenue* and *Philex Mining Corporation v. Commissioner of Internal Revenue*[20] described the nature and effect of Supreme Court rulings in contrast with the decisions of other courts such as the Court of Tax Appeals in this wise:

> There is also the claim that there are numerous CTA decisions allegedly supporting the argument that the filing dates of the administrative and judicial claims are inconsequential, as long as they are within the two-year prescriptive period. Suffice it to state that CTA decisions do not constitute precedents, and do not bind this Court or the public.

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[17] G.R. Nos. 153063-70, August 19, 2005, 467 SCRA 433.
[18] G.R. No. L-51570, August 15, 1988, 164 SCRA 365.
[19] *De Mesa v. Pepsi Cola Products Phils., Inc., supra.* G.R. Nos. 153063-70, August 19, 2005.
[20] G.R. Nos. 187485 & 196113, & 197156, February 12, 2013.

That is why CTA decisions are appealable to this Court, which may affirm, reverse or modify the CTA decisions as the facts and the law may warrant. Only decisions of this Court constitute binding precedents, forming part of the Philippine legal system. As held by this Court in *The Philippine Veterans Affairs Office v. Segundo*:

> . . . **Let it be admonished that decisions of the Supreme Court "applying or interpreting the laws or the Constitution . . . form part of the legal system of the Philippines," and, as it were, "laws" by their own right because they interpret what the laws say or mean. Unlike rulings of the lower courts, which bind the parties to specific cases alone, our judgments are universal in their scope and application, and equally mandatory in character.** Let it be warned that to defy our decisions is to court contempt. (Emphasis supplied)

Clearly, CTA rulings are persuasive in nature, and are not binding unless affirmed by the Supreme Court. By tradition and in our system of judicial administration, the Supreme Court has the last word on what the law is. It is the final arbiter of any justiciable controversy.[21] *All courts must take their bearings from the decisions of this Court.*[22]

The Supreme Court's ruling dispensing compliance with RMO No. 1-2000 on tax treaty relief application before the BIR pursuant to the *Deutsche* case, is binding and must be duly observed.

We also subscribe to the Court in Division's findings that the management and consultancy fee of P23,123,444 paid to DIF cannot be considered business profits because this was not earned through a permanent establishment situated here, hence, not taxable pursuant to the Agreement dated January 1, 2002 and Articles 5 & 7 of the RP-Spain Tax Treaty. The Court in Division correctly observed that:

> However, we agree with petitioner that the Management and Consultancy Fee in the amount of P23,123,444.00 paid to

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[21] *Dante Nacuray, et al. v. National Labor Relations Commission and BMC-Benguet Management Corporation*, G.R. Nos. 114924-27, March 18, 1997, 270 SCRA 9.
[22] *Systra Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 176290, Resolution dated September 21, 2007, 533 SCRA 776, 781.

Dogi International Fabrics, S.A. ("DIF"), pursuant to an Agreement dated January 1, 2002 ("Exhibit "P"), is not taxable.

DIF is a company based in Barcelona, with business address at Calle Domenech Farre n 13-15 08320 El Masnou, Barcelona, Spain (Agreement dated January 1, 2002, p. 1, Exhibit "P"), whose entire capital stock is listed on the stock exchange of Barcelona, Spain (Exhibit "O-4").

Article 7 of the Convention Between the Republic of the Philippines and Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income ("RP-Spain Tax Treaty"), on the taxability of business profits of an enterprise of the Contracting State, provides:

"Article 7

BUSINESS PROFITS

1. **The profits of an enterprise of a Contracting State shall be taxable only in the State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.** If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment or are derived within such other Contracting State from sales of goods or merchandise of the same or similar kind as those sold, or from other business transactions of the same or similar kind as those effected through the permanent establishment. The competent authorities of the Contracting States shall consult each other on the similarity of goods sold or business transactions.

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Hence, pursuant to the above provision, the profits of an enterprise of a contracting state shall be taxable only in that state, unless the enterprise has a business in the other contracting state, through a permanent establishment situated therein.

Article 5 of the said RP-Spain Tax Treaty defines "permanent establishment", as follows:

"ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholy or partly carried on.

2. The term 'permanent establishment' includes, but is not limited to:

   (a) a place of management;

   (b) a branch;

   (c) an office;

   (d) a factory;

   (e) a workshop;

   (f) a warehouse, in relation to a person providing storage facilities for others;

   (g) a store or premises where sales are performed;

   (h) a mine, an oil-well, quarry or other place of extraction of natural resources;

   (i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activity continues for more than six (6) months;

(j) the furnishing of services including consultancy services by an enterprise through an employee or other personnel provided where activities of that nature (for the same or connected project) within the other Contracting States continue within a Contracting State of a period or period exceeding 180 days within any twelve-month period.

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7. The fact that a corporation of a Contracting State controls or is controlled by a corporation of the other Contracting State or a corporation which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either corporation a permanent establishment of the other.

Considering **that the services enumerated in Article I.2 of the Agreement dated January 1, 2002 rendered by DIF to petitioner will be rendered in Spain, HongKong and the United Kingdom, where DIF has its satellite offices responsible for monitoring its operations in the Asia Pacific region (Exhibit "P"), and none of said services are rendered in the Philippines, then DIF has no "permanent establishment" in the Philippines, as defined above.** (Emphasis supplied.)

The fact that petitioner is a wholly-owned subsidiary of DIF (Exhibit "O-3") would not constitute either corporation a permanent establishment of the other as provided in paragraph *7 of Article 5*.

Thus, in the case of *Commissioner of Internal Revenue v. Smart Communication, Inc.*, 629 SCRA 358, the Supreme Court ruled, as follows:

**"In the instant case, it was established during the trial that Prism does not have a permanent**

> **establishment in the Philippines. Hence, 'business profits' derived from Prism's dealings with respondent are not taxable."**

> Since DIF has no permanent establishment in the Philippines, it is clear that the management and consultancy fee that DIF received from petitioner by virtue of the Agreement dated January 1, 2002 is not taxable, pursuant to Section 7(1) of the RP-Spain Tax Treaty and the above ruling of the Supreme Court. Accordingly, petitioner has no obligation to withhold taxes on the management and consultancy fee paid to DIF. Thus, respondent cannot disallow as a deduction from net income the payment of management and consultancy fee to DIF for the reason that no Expanded Withholding Tax was withheld thereof by petitioner.[23] (Emphasis supplied.)

Clearly, the Court in Division correctly cancelled the final withholding tax deficiency assessment of P15,068,187.73 corresponding to the management and consultancy fee of P23,123,444 paid to DIF.

**WHEREFORE,** premises considered, the petition for review is hereby **DISMISSED**.

**SO ORDERED.**

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

**WE CONCUR:**

**ROMAN G. DEL ROSARIO**
Presiding Justice

[23]Rollo, pp. 32-36.

**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

**ESPERANZA R. FABON- VICTORINO**
Associate Justice

(On Leave)
**CIELITO N. MINDARO-GRULLA**
Associate Justice

**AMELIA R. COTANGCO- MANALASTAS**
Associate Justice

Ma. Belen M. Li

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

## CERTIFICATION

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

**ROMAN G. DEL ROSARIO**
Presiding Justice