REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC
****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 999** (CTA Case No.8040)
	Present:
- versus -	**DEL ROSARIO,** PJ, **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS,** and **RINGPIS-LIBAN,** JJ.
ABUNDANCE PROVIDERS AND ENTREPRENEURS CORPORATION, Respondent.	**Promulgated:** AUG 1 8 2014 11:00 am

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DECISION

UY, J.:

Before Us is a Petition for Review filed on April 15, 2013, seeking the reversal and setting aside of the Resolutions dated October 31, 2012[1] and March 11, 2013[2], both promulgated by the former Third Division of this Court[3] in CTA Case No. 8040, entitled *"Abundance Providers and Entrepreneurs Corporation, petitioner, vs. Commissioner of Internal Revenue and the Bureau of Internal Revenue, respondents"*.

The Resolution dated October 31, 2012 granted the Motion

[1] Docket (Vol. 1), pp. 34 to 70.
[2] Docket (Vol. 1), pp. 72 to 76.
[3] The Third Division of this Court was then composed of Associate Justice Lovell R. Bautista, Chairperson, Associate Justices Olga Palanca-Enriquez (Retired) Senior member, and Amelia R. Cotangco-Manalastas (ponente), Junior Member.

for Summary Judgment filed by Abundance Providers and Entrepreneurs Corporation in said case, which in effect cancelled and declared as null and void, the Warrant of Distraint and/or Levy dated February 11, 2010 issued by the Commissioner of Internal Revenue and enjoined the latter from enforcing the collection of deficiency VAT for taxable year 2001 against the former. The Resolution dated March 11, 2013 denied the Motion for Reconsideration filed by the Commissioner of Internal Revenue in said case for lack of merit.

THE PARTIES

Petitioner is the Commissioner of the Bureau of Internal Revenue (or Commissioner) with the power to, among others, decide disputed assessments, refunds of internal revenue taxes, fees and other charges, penalties imposed in relation thereto, or other matters arising under Republic Act No. 8424, or the National Internal Revenue Code (NIRC), or other laws or portions thereof administered by the BIR. She holds office at the Bureau of Internal Revenue (BIR), National Office Building, BIR Road, Diliman, Quezon City.

On the other hand, respondent Abundance Providers and Entrepreneurs Corporation (or APEC), is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal place of business at the 18th and 21st Floors, Peak Tower, 107 Leviste St., Salcedo Village, Makati City.

THE FACTS

The antecedent facts of the instant Petition for Review are as follows.

On December 18, 2003, APEC received a Preliminary Assessment Notice (PAN) dated August 29, 2003 issued by then Deputy Commissioner Estelita C. Aguirre, Officer-In-Charge of the Large Taxpayers Service of the BIR, assessing Abundance Providers for deficiency value added tax (VAT) for the year 2001 in the amount of ₱ 146,477,392.05, inclusive of penalties.[4]

[4] Paragraph 3.5, Petition for Review (CTA Case No. 8040) Division Docket (Vol. 1), pp. 10 to 11, vis-a-vis Paragraph 3, Answer With Motion to Dismiss the Petition (CTA Case No. 8040), Division Docket (Vol. 1), p. 232.

On March 15, 2004, APEC sent a Letter dated March 12, 2004 to the LTS of the BIR requesting that the issuance of the Final Assessment Notice (FAN) be held in abeyance pending resolution of the pre-need industry issue concerning RMC 13-96.[5]

Subsequently, on April 1, 2004, APEC, through its Executive Vice-President, Liwayway F. Gener, executed a *Waiver of the Defense of Prescription under the Statute of Limitations of the NIRC*, waiving the defense of prescription under the statute of limitations in Sections 203 and 222 and other related provisions of the NIRC, but not later than October 15, 2004.[6]

However, on April 26, 2004, the examiners of the BIR served upon APEC: (a) a *Formal Letter of Demand* dated February 5, 2004; (b) the *Audit Result/Assessment Notice No. VT-01-000112* dated February 5, 2004; and (c) a Letter dated March 16, 2004, all issued by then Deputy Commissioner Aguirre.[7] In the said *Formal Letter of Demand*, APEC was requested to pay, by March 31, 2004, its alleged deficiency VAT liability in the amount of ₱155,492,011.33, inclusive of penalties, based on the alleged failure to indicate the amount of trust fund contributions in the official receipts,[8] computed as follows:

Value Added Tax on Trust Fund Contributions

Total Trust Fund Contributions per FS		₱ 1,190,405,906.00
Divided by Rate		110%
Trust Fund Contribution net of VAT		₱ 1,082,187,187.27
Multiplied by Rate		10%
Basic Deficiency Value Added Tax Due		₱ 108,218,718.73
Add: Penalties		
Interest from 26-Jan-02 to 31-Mar-04	₱ 47,248,292.60	
Compromise Penalty	25,000	47,273,292.60
Total Deficiency Value Added Tax Due		**₱ 155,492,011.33**

[5] Petition for Review, *En Banc* Docket (Vol. 1), p. 10; Assailed Resolution dated October 31, 2012 at p. 10, *En Banc* Docket (Vol. 1), p. 34.

[6] Paragraph 3.8, Petition for Review (CTA Case No. 8040), Division Docket (Vol. 1), pp. 12 to 13, vis-a-vis Paragraph 3, Answer With Motion to Dismiss the Petition (CTA Case No. 8040), Division Docket (Vol. 1), p. 232.

[7] Paragraph 3.9, Petition for Review (CTA Case No. 8040), Division Docket (Vol. 1), p. 13, vis-a-vis Paragraph 3, Answer With Motion to Dismiss the Petition (CTA Case No. 8040), Division Docket (Vol. 1), p. 232.

[8] Paragraph 3.9.1, Petition for Review (CTA Case No. 8040), Division Docket (Vol. 1), p. 13, vis-a-vis Paragraph 3, Answer With Motion to Dismiss the Petition (CTA Case No. 8040), Division Docket (Vol. 1), p. 232.

APEC filed its Protest Letter dated April 29, 2004. Subsequently, on July 15, 2004, it received the Letter dated May 27, 2004 of Deputy Commissioner Aguirre, affirming the findings in the *Formal Letter of Demand* and the *Audit Result/Assessment Notice No. VT-01-000112*, both dated February 5, 2004, and demanding, upon receipt thereof, the immediate payment of the amount of ₱ 159,961,444.41, as alleged deficiency VAT, with penalties.[9] It was further stated in the said Letter dated May 27, 2004 that since it involves an industry issue, the case shall be forwarded to the Legal Service of the BIR, where respondent may address all its succeeding communications.[10]

On February 22, 2010, a representative of the Commissioner served upon APEC the *Warrant of Distraint and/or Levy* dated February 11, 2010 enforcing the collection of its deficiency VAT, for the year 2001, covered by *Assessment Notice No. VT-01-000112* dated February 5, 2004[11], in connection with respondent's alleged liability for deficiency VAT, in the amount of ₱ 155,492,011.33.

APEC thereafter filed a Petition for Review[12] before the former Third Division of this Court on March 23, 2010 docketed as CTA Case No. 8040, seeking the quashal, declaration of nullity and invalidation of the *Warrant of Distraint and/or Levy* dated February 11, 2010.

On April 28, 2010, the Commissioner filed her Answer with Motion to Dismiss[13] in CTA Case No. 8040, raising certain special and affirmative defenses, and stating grounds for her motion to dismiss.

Subsequently on February 2, 2011, APEC filed a Supplemental Petition for Review[14] in CTA Case No. 8040 seeking the reversal and nullification of the Decision dated

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[9] Petition for Review (CTA Case No. 8040), par. 3.12, Division Docket, Vol. 1, p. 15, vis-a-vis Answer With Motion to Dismiss the Petition (CTA Case No. 8040), par. 3, Division Docket, Vol. 1, p. 232.
[10] Petition for Review (CTA Case No. 8040), par. 3.12.1, Division Docket,Vol. 1, p. 15, vis-a-vis Answer With Motion to Dismiss the Petition (CTA Case No. 8040), par. 3, Division Docket, Vol. 1, p. 232.
[11] Petition for Review, EB No. 999, *En Banc* Docket, Vol.1, p. 11
[12] CTA Case No. 8040, Division Docket, Vol. 1, pp. 1 to 51.
[13] Division Docket, Vol. 1, pp. 232 to 239.
[14] Division Docket,Vol. 1, pp. 379 to 397.

December 7, 2010 rendered by the Commissioner, in the case entitled "*In the Matter of the Request for Reconsideration of Pacific Plans, Inc. (Now Abundance Providers and Entrepreneurs Corp.) on the Denial of Its Protest Against the Assessment Involving the Amount of P155,492,011.33 Representing Deficiency Value-Added Tax for the Taxable Year of 2001*". The Commissioner filed her Supplemental Answer on June 21, 2011[15] in said case.

During the Pre-Trial Conference held on June 7, 2012 in CTA Case No. 8040,[16] the Court in Division granted APEC, upon motion, a period of 15 days to file a Motion for Summary Judgment. On the other hand, the Commissioner was granted the same period from notice to file comment thereto, while APEC was granted a fifteen (15)-day from notice to file a Reply thereto.

Thus, on June 22, 2010, APEC filed its Motion for Summary Judgment[17] in CTA Case No. 8040 raising, among others, the following arguments:

(a) There is no genuine issue that the attempt to collect alleged VAT deficiency from respondent APEC patently violates law, rules, regulations and jurisprudence;

(b) There is no genuine issue that the alleged right of petitioners to collect the purported deficiency VAT from respondent APEC has already prescribed; and

(c) There is no genuine issue that respondent APEC's omission to indicate in its official receipts the amount it contributed to the trust fund did not prejudice the government since respondent APEC dutifully paid its VAT liabilities.

On July 17, 2012, the Commissioner filed its Comment/Opposition thereto within the extension period of ten

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[15] Division Docket, Vol. 1, pp. 609 to 615. This Supplemental Answer was admitted by the Court in Division in its Resolution dated August 18, 2011, Division Docket, Vol. 1, pp. 655 to 659, at p. 657.
[16] Minute Resolution dated June 7, 2012, Division Docket (Vol. 2), p. 910.
[17] Division Docket, Vol. 2, pp. 911 to 953.

(10) days to file the same[18], opposing and praying for the denial of said motion, as there are allegedly genuine issues as to the material facts that would entail the presentation of evidence in a full blown trial.

APEC filed its Reply thereto on August 13, 2012[19], negating the Commissioner's claim and insisting that there are no genuine, factual and triable issues raised in her Answer in CTA Case No. 8040.

On October 31, 2012, the Court in Division issued the assailed Resolution[20] granting APEC'S Motion for Summary Judgment, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the *Motion for Summary Judgment* filed by petitioner is hereby **GRANTED**. The material facts relevant to the proper disposition of the issues in this case are undisputed, thereby leaving no genuine issues of fact which would require presentation of evidence in full blown trial.
>
> Accordingly, in light of the foregoing laws and jurisprudence, a Summary Judgment is hereby rendered, thus:
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> I. The *Warrant of Distraint and/or Levy* dated February 11, 2010 enforcing the collection of petitioner's deficiency VAT for 2001 covered by Assessment Notice No. VT-01-000112, is hereby CANCELLED and declared NULL and VOID on the ground of prescription of the statute of limitations on collection.
>
> II. Respondents are permanently enjoined from implementing the Warrant of Distraint and/or Levy dated February 11, 2010; and from collecting, in any manner, petitioner's deficiency VAT for 2001 covered by Assessment Notice No. VT-01-000112.
>
> **SO ORDERED**."

[18] Division Docket, Vol. 2, pp. 957 to 964.
[19] Division Docket, Vol. 2, pp. 972 to 1114.
[20] *En Banc* Docket, Vol. 1, pp. 34 to 70.

On November 21, 2012, a Motion for Reconsideration[21] of the said Resolution was filed by the Commissioner, but the same was denied by the Court in Division in the Resolution dated March 11, 2013[22] for lack of merit. The dispositive portion thereof reads as follows:

> "**WHEREFORE**, premises considered, respondent Commissioner of Internal Revenue's *Motion for Reconsideration* is hereby DENIED for lack of merit.
>
> **SO ORDERED**."

Consequently on April 15, 2013, the Commissioner filed the instant Petition for Review[23] before the Court *En Banc* praying that judgment be rendered reversing and setting aside the Resolutions dated October 31, 2012 and March 11, 2013 rendered by the Third Division of this Court and that respondent be ordered to pay in full the assessed deficiency VAT in the amount of ₱ 155,492011.33 for taxable year 2001, plus the accrued 25% surcharge for late payment and 20% interest per annum from April 26, 2004 until fully paid pursuant to Sections 248 and 249 of the Tax Code, as amended.

In the Resolution dated May 2, 2013[24], the Court *En Banc* directed APEC to file comment to the instant Petition for Review within ten (10) days from receipt thereof. Thereafter, two (2) motions for extension of time to file comment were filed on May 29, 2013[25] and on June 5, 2013[26] by APEC praying for a total period of twenty (20) days to file its Comment. Said motions were granted by the Court *En Banc.*

On June 17, 2013, APEC filed its "Comment/Opposition (Re: *Petition for Review* dated 12 April 2013)"[27].

In the Resolution dated July 31, 2013[28], the Court *En Banc*

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[21] Division Docket, Vol. 2, pp. 1155 to 1144.
[22] Division Docket, Vol. 2, pp. 1210 to 1214.
[23] *En Banc* Docket, Vol. 1, pp. 8 to 26.
[24] *En Banc* Docket, Vol. 1, pp. 79 to 80.
[25] *En Banc* Docket, Vol. 1, pp. 81 to 84.
[26] *En Banc* Docket, Vol. 1, pp. 88 to 92.
[27] *En Banc* Docket, Vol. 1, pp. 95 to 153.
[28] *En Banc* Docket, Vol. 2, pp. 776 to 777.

gave due course to the instant Petition for Review and directed both parties to file their respective memoranda within a period of thirty (30) days from notice.

The Commissioner, through a "Manifestation & Motion"[29] filed on September 10, 2013, manifested that she is adopting all her factual legal arguments found in her Petition for Review dated April 12, 2013, as well as the documentary and testimonial evidences found in the records of this case and moved that the same be considered as part of her Memorandum. On the other hand, APEC filed its Memorandum[30] on September 12, 2013.

On October 17, 2013, the Court *En Banc* noted the Commissioner's "Manifestation and Motion" and considered the case submitted for decision.

Hence, this Decision.

ASSIGNMENT OF ERRORS

Petitioner submits the following Assignment of Errors, to wit:

"<u>ASSIGNMENT OF ERRORS:</u>

I.

THE THIRD DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT IT HAS EXCLUSIVE APPELLATE JURISDICTION TO DETERMINE THE VALIDITY OF THE WARRANT OF DISTRAINT AND/OR LEVY DATED FEBRUARY 11, 2010 ISSUED TO RESPONDENT BY THE BIR, UNDER THE 'OTHER MATTERS ARISING FROM THE NIRC OF 1997, AS AMENDED OR OTHER LAWS ADMINISTERED BY THE BUREAU OF INTERNAL REVENUE.'

II.

THE THIRD DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT THE RIGHT OF

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[29] *En Banc* Docket, Vol. 2, pp. 778 to 779.
[30] *En Banc* Docket, Vol. 2, pp. 781 to 837.

THE BIR TO COLLECT THE ASSESSED DEFICIENCY VAT OF RESPONDENT FOR TAXABLE YEAR 2001 WAS NOT SUSPENDED, BUT HAS ALREADY PRESCRIBED.

THE ISSUE

Based on the assignment of errors submitted by the Commissioner in the instant Petition for Review, these are the issues for the resolution of the Court *En Banc,* to wit:

I.

WHETHER OR NOT THE THIRD DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT IT HAS EXCLUSIVE APPELLATE JURISDICTION TO DETERMINE THE VALIDITY OF THE WARRANT OF DISTRAINT AND/OR LEVY DATED FEBRUARY 11, 2010 ISSUED TO RESPONDENT BY THE BIR, UNDER THE "OTHER MATTERS ARISING FROM THE NIRC OF 1997, AS AMENDED OR OTHER LAWS ADMINISTERED BY THE BUREAU OF INTERNAL REVENUE."[31]

II.

WHETHER OR NOT THE THIRD DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT THE RIGHT OF THE BIR TO COLLECT THE ASSESSED DEFICIENCY VAT OF RESPONDENT FOR TAXABLE YEAR 2001 WAS NOT SUSPENDED, BUT HAS ALREADY PRESCRIBED.

Petitioner's Arguments:

The Commissioner argues that under Sections 7 and 11 of Republic Act No. (RA) 1125, as amended by RA 9282 and RA 9503, conferring jurisdiction on the Court of Tax Appeals, what is appealable to this Court is the decision of the Commissioner of Internal Revenue on the protest of the taxpayer against the disputed assessment. And considering that the Third Division of this Court already ruled that the disputed assessment of respondent has already become final, executory and demandable, thus, this Court allegedly has no authority to issue an order nullifying the Warrant of Distraint and/or Levy dated

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[31] *En Banc* Docket, Vol. 1, pp. 12 and 13.

February 11, 2010, and enjoining the BIR from collecting the subject deficiency VAT of respondent for taxable year 2001.

According to the Commissioner, settled is the rule that courts are bound to take notice of the limits of their authority and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings.

Further, as regards the issue on prescription, the Commissioner contends that the right of the BIR to collect respondent's deficiency VAT for 2001 has been suspended. First, during the time when APEC executed a *Waiver of the Defense of Prescription under the NIRC* until October 15, 2004; and second, during the time when APEC filed the Letter dated July 16, 2004 and Letter dated February 1, 2005, where APEC purposely requested the Appellate Division of the BIR to hold in abeyance pending action/resolution by the Commissioner of Internal Revenue relative to the industry issue it raised involving VAT on trust fund contributions of pre-need companies, until such time said Commissioner issued BIR Ruling No. DA-027-2006 dated January 31, 2006.

On the basis thereof, herein petitioner thus argues that the issuance of the subject Warrant of Distraint and Levy was made within the 5-year prescriptive period to collect.

Respondent's counter-arguments:

Respondent APEC counter-argues that contrary to the erroneous allegation of the Commissioner, the Court in Division has jurisdiction over the case *a quo* to nullify the subject Warrant of Distraint and/or Levy, pursuant to this Court's jurisdiction over decisions of petitioner involving "other matters" under Section 7, RA 1125, as amended by RA 9282.

Moreover, APEC asserts that the Court in Division correctly ruled that the alleged right of the Commissioner to collect the purported deficiency VAT from respondent APEC has already prescribed.

THE COURT *EN BANC*'S RULING

We rule for the respondent.

The Court in Division has jurisdiction.

Pertinent to the issue as to whether or not the Court in Division has jurisdiction to determine the validity of the subject warrant of distraint and/or levy, Section 7 paragraph (a)(1) of RA 1125[32], as amended by RA 9282,[33] provides as follows:

> "SEC. 7. *Jurisdiction.*— The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or **other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue**;" *(Emphasis supplied)*

In *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue*,[34] the Supreme Court held:

> "The appellate jurisdiction of the CTA is not limited to cases which involve decisions of the Commissioner of Internal Revenue on matters relating to assessments or refunds. The second part of the provision covers other cases that arise out of the NIRC or related laws administered by the Bureau of Internal Revenue. The wording of the provision is clear and simple. **It gives the CTA the jurisdiction**

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[32] AN ACT CREATING THE COURT OF TAX APPEALS.

[33] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

[34] G.R. No. 162852, December 16, 2004.

> **to determine if the warrant of distraint and levy issued by the BIR is valid** and to rule if the Waiver of Statute of Limitations was validly effected.
>
> This is not the first case where the CTA validly ruled on issues that did not relate directly to a disputed assessment or a claim for refund. **In *Pantoja v. David,*[35] we upheld the jurisdiction of the CTA to act on a petition to invalidate and annul the distraint orders of the Commissioner of Internal Revenue.** xxx" *(Emphasis supplied)*

Thus, the appellate jurisdiction of this Court is not limited only to decisions of the Commissioner of Internal Revenue involving disputed assessments or claims for refunds, but also those involving ***"other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue"***, which includes the authority to determine the validity of a warrant of distraint and levy issued by the Commissioner of Internal Revenue.

Correspondingly, it is without question that the Court in Division has jurisdiction to entertain respondent's Petition for Review in CTA Case No. 8040, which specifically prays for the quashal, nullification and/or declaration of invalidity of the Warrant of Distraint and/or Levy dated February 11, 2010 for lack of merit and/or prescription.

In this regard, We disagree with the following arguments of the Commissioner, to wit:

> "Obviously, the fact that respondent violated the requirements under Section 228 of the 1997 Tax Code, considering that its *Petition for Review in CTA Case No. 8040 was filed with this Honorable Court only* on *March 23, 2010*, or *long after the 30 days statutory period to appeal had lapsed counting from respondent's receipt of the CIR's Decision dated May 27, 2004 on July 15, 2004, therefore, its judicial appeal with this Honorable Court has already prescribed*. As such, the subject deficiency VAT of respondent for taxable year 2001 has already become final, executory and non-appealable,

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[35] 111 Phil. 197 (1961).

pursuant to Section 228 of the 1997 Tax Code."[36]

The flaw in this argument is that it presupposes that the subject of the Petition for Review in CTA Case No. 8040 is the supposed decision embodied in the Letter dated May 27, 2004 of then Deputy Commissioner Aguirre. To be clear, what is being questioned in the said Petition for Review is not the said supposed decision, but the validity of the Warrant of Distraint and/or Levy dated February 11, 2010 issued by the Commissioner of Internal Revenue beyond the prescriptive period to do so.

And it appearing that the Court in Division is clothed with jurisdiction to determine the validity of the issuance of the subject Warrant of Distraint and/or Levy, the Court *a quo* committed no reversible error in exercising jurisdiction over the Petition for Review filed in CTA Case No. 8040.

The subject tax assessment has not attained finality.

In the assailed Resolution dated October 31, 2012, the Court in Division found as follows:

"In this case, the admitted and deemed admitted facts reflect the following:

December 18, 2003	Petitioner received a **Preliminary Assessment Notice** dated August 29, 2003.
April 26, 2004	Petitioner received a ***Formal Letter of Demand*** and an ***Audit Result/ Assessment Notice No. VT-01-000112*** both dated February 5, 2004.
May 7, 2004	Petitioner filed with the LTS a ***Protest Letter*** dated April 29, 2004
July 15, 2004	Petitioner received the respondent's ***decision*** dated May 27, 2004 on its *Protest Letter* affirming the findings in the *Formal Letter of Demand*

[36] Petition for Review, pp. 8 to 9, EB Docket, Vol. 1, pp. 15 to 16.

	and Audit Result/Assessment Notice No. VT-01-000112 both dated February 5, 2004, and demanding petitioner to pay immediately the amount of P159,961,444.41, inclusive of penalties, as alleged deficiency VAT.
February 22, 2010	Representative of the BIR served upon petitioner the ***Warrant of Distraint and/or Levy*** dated February 11, 2010.

As can be gleaned from the foregoing, petitioner received on July 15, 2004 the ***decision*** dated May 27, 2004, issued by the Deputy Commissioner of the LTS of the respondent BIR, denying its *Protest Letter* and affirming the findings in the *Formal Letter of Demand and Audit Result/Assessment Notice No. VT-01-000112*; however, petitioner failed to avail of any of the remedies provided in Section 228 of the NIRC of 1997, as amended, [and] as implemented [by] Section 3.1.5 of Revenue Regulation No. 12-99. The petitioner neither filed an appeal of the said decision directly to this Court nor elevated its protest to the Commissioner of Internal Revenue within thirty (30) days from date of receipt of the final decision of the Commissioner's duly authorized representative.

It is indubitable that the above-mentioned ***decision*** dated May 27, 2004, issued by the Deputy Commissioner of the LTS of the respondent BIR, constitutes the final act/decision of the BIR on petitioner's protest that is the proper subject of appeal contemplated under Section 228 of the NIRC of 1997, as amended. The said ***decision*** dated May 27, 2004, which is in a form of a letter, contains: a notation making reference to petitioner's letter dated 29 April 2004 protesting the assessment under a *Formal Letter of Demand and Audit Result/Assessment Notice No. VT-01-000112*; affirmation of the assailed formal letter of demand and assessment notice stating that *'after reinvestigation and consideration of your protest, we still found that our assessment is valid on the basis of*

> *Memorandum Circular ('RMC') No. 13-96 dated 15 January 1996. xxx'*; reiteration of tax deficiency assessments due from petitioner and immediate payment of the petitioner's deficiency VAT liability."[37]

According to the above disquisition, respondent failed to avail of any of the remedies provided in Section 228 of the NIRC of 1997, as implemented by Section 3.1.5 of Revenue Regulations No. 12-99, particularly, the filing of an appeal before this Court or the elevation of APEC's protest to the Commissioner within thirty (30) days from date of receipt of the final decision of petitioner's duly authorized representative; and that the said decision dated May 27, 2004 is *"the final act/decision of the BIR"*.

We disagree.

The above-stated findings of the Court in Division is belied by the existence of the Commissioner's Decision dated December 7, 2010[38], which states, in part, as follows:

> "<u>Before this Office for resolution is the request for reconsideration filed by Pacific Plans, Inc. of the Final Decision on Disputed Assessment rendered by the OIC Deputy Commissioner, Large Taxpayer Service dated May 27, 2004</u>.
>
> xxx xxx xxx
>
> **WHEREFORE**, premises considered, the deficiency value-added tax for the taxable year 2001 covered by <u>Assessment Notice Nos. VT-01-000112 dated February 5, 2004</u>, involving the amount of P155,492,011.33 is hereby AFFIRMED in all respects. Consequently, Pacific Plans, Inc. (Now <u>ABUNDANCE PROVIDERS & ENTREPRENEURS CORP.</u>) is ordered to pay the aforestated amount, plus surcharges and increments that have accrued thereon until the actual date of payment, to the Collection Service, BIR, National Office, Diliman, Quezon City, within thirty (30) days from receipt hereof; otherwise, collection thereof will be effected through summary remedies provided by law.

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[37] *En Banc* Docket, Vol. 1, pp. 54 to 55.
[38] Division Docket, Vol. 1, pp. 398 to 405.

<u>This constitutes the **Final Decision** of this Office on the matter</u>.

(signed)
KIM S. JACINTO-HENARES
Commissioner of Internal Revenue"

(Underscoring supplied)

Based on the foregoing, the same was issued in response to APEC's *"request for reconsideration"* of the decision dated May 27, 2004 by OIC Deputy Commissioner Aguirre. Needless to state, by her own act or statement, the Commissioner did not treat the said decision dated May 27, 2004 as *"the final act/decision of the BIR"* anent the protest of respondent. Accordingly, the same decision could not have attained finality, pursuant to Section 3 of Revenue Regulations No. 12-99, which provides, in part, as follows:

"SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.*—

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

xxx xxx xxx

3.1.5 *Disputed Assessment.*— The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. xxx.

xxx xxx xxx

In general, if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable: Provided, however, that **if the taxpayer elevates his protest to the Commissioner within thirty (30) days from date of**

> **receipt of the final decision of the Commissioner's duly authorized representative, the latter's decision shall not be considered final, executory and demandable, in which case, the protest shall be decided by the Commissioner.**
>
> xxx xxx xxx." *(Emphasis and underscoring supplied)*

With the foregoing ruling, it may then be asked: Since the decision dated May 27, 2004 issued by Deputy Commissioner Aguirre may not be considered as the final act of the BIR regarding APEC's tax protest, but rather the Decision dated December 7, 2010 issued by the Commissioner, will the filing of the Petition for Review in CTA Case No. 8040 be treated as premature?

Not necessarily. It is *non-sequitur*.

It must be noted that on February 22, 2010 or before the issuance of the said Decision dated December 7, 2010 of petitioner, the BIR served upon APEC the Warrant of Distraint and/or Levy dated February 11, 2010.

In this connection, it must be emphasized that the issuance of the warrant of distraint and/or levy is sufficient to justify the filing of a Petition for Review in CTA Case No. 8040 by APEC before the Court in Division. This must be so because as a rule the warrant of distraint and levy is tantamount to an outright denial of a request for reconsideration and makes the said request deemed rejected.[39] Thus, it was proper for APEC to have filed its Petition for Review on March 23, 2010 (docketed as CTA Case No. 8040), notwithstanding the subsequent issuance of the Commissioner's Decision dated December 7, 2010. Correspondingly, as We have stated earlier, the Court in Division acquired jurisdiction over the subject Warrant of Distraint and/or Levy.

Parenthetically, the Commissioner's Decision dated December 7, 2010 has correctly been treated as the subject of APEC's Supplemental Petition for Review filed on February 2, 2011 which was subsequently allowed by the Court in Division in

[39] Refer to *Commissioner of Internal Revenue vs. Algue, Inc.*, G.R. No. L-28896, February 17, 1988.

CTA Case No. 8040.[40] In *Pentacapital Investment Corporation vs. Mahinay*[41] the Supreme Court held:

> "As a general rule, leave will be granted to a party who desires to file a supplemental pleading that alleges any material fact which happened or came within the party's knowledge after the original pleading was filed, such being the office of a supplemental pleading. **The application of the rule would ensure that the entire controversy might be settled in one action, avoid necessary repetition of effort and unwarranted expense of litigants, broaden the scope of the issues in an action owing to the light thrown on it by facts, events and occurrences which have accrued after the filing of the original pleading, and bring into record the fact enlarging or charging the kind of relief to which plaintiff is entitled. It is the policy of the law to grant relief as far as possible for wrongs complained of, growing out of the same transaction and thus put an end to litigation.**" *(Emphasis supplied)*

The right of the BIR to collect the assessed deficiency VAT is barred by prescription.

It is the strong belief of herein petitioner that the right of the BIR to collect respondent's deficiency VAT for 2001 has not prescribed. Allegedly, its right to do so was suspended on two (2) instances: (1) when APEC executed a *Waiver of the Defense of Prescription under the NIRC* until October 15, 2004; and (2) when APEC filed the Letter dated July 16, 2004 and Letter dated February 1, 2005, where APEC purposely requested the Appellate Division of the BIR to hold in abeyance pending action/resolution by the Commissioner of Internal Revenue relative to the industry issue it raised involving VAT on trust fund contributions of pre-need companies, until such time said Commissioner issued BIR Ruling No. DA-027-2006 dated January 31, 2006.

We are not persuaded.

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[40] Resolution dated May 12, 2011, Division Docket,Vol. 1, pp. 518 to 523, at p. 521.
[41] G.R. Nos. 171736 and 181482, July 5, 2010.

The pertinent provisions of the NIRC of 1997 dealing with, and relating to, the prescriptive periods in the assessment and collection of internal revenue taxes as provided under the NIRC of 1997 pertinently read as follows:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.*— Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in case where a return is filed beyond the period prescribed by law, the three (3) year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

Section 203 of the NIRC of 1997 mandates the government to assess internal revenue taxes within three (3) years from the last day prescribed by law for the filing of the tax return or the actual date of filing of such return, whichever comes later.[42]

Corollary thereto, the period of limitations can be affected, adjusted or suspended pursuant to the provisions of Sections 222 of the NIRC of 1997, which read as follows:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

[42] *Commissioner of Internal Revenue v. Kudos Metal Corporation*, G.R. No. 178087, May 5, 2010.

> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> (c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.
>
> (d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5) -year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.
>
> (e) *Provided, however,* That nothing in the immediately preceding and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree."

Additionally, Section 223 of the same NIRC of 1997 provides for the suspension of the running of statute of limitations, to wit:

> "SEC. 223. *Suspension of Running of Statute of Limitations.*— The running of the statute of limitations provided in Sections 203 and 222 on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty days thereafter; when the taxpayer requests for a re-

investigation which is granted by the Commissioner; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: *Provided,* That if the taxpayer informs the Commissioner of any change in address, the running of the statute of limitations will not be suspended; when the warrant of distraint and levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines."

Based on the aforequoted provisions, and subject to certain exceptions, the BIR has five (5) years, following the assessment of taxes, within which to initiate the collection of taxes. The collection of the assessed tax begins to run on the date the assessment notice had been released, mailed or sent to the taxpayer.[43]

APEC's Letter dated July 16, 2004 and Letter dated February 1, 2005, where APEC purposely requested the Appellate Division of the BIR to hold in abeyance pending action/resolution by the Commissioner relative to the industry issue it raised involving VAT on trust fund contributions of pre-need companies, until such time said Commissioner issued BIR Ruling No. DA-027-2006 dated January 31, 2006, did not have the effect of suspending the above-stated five-year prescriptive period for the collection of the assessed tax. This is simply because the said Letters are requests for reconsideration, not requests for reinvestigation as required under Section 223 of the NIRC of 1997.

Interpreting Section 224 of the Tax Code of 1977, as amended (now Section 223 of the NIRC of 1997), the Supreme Court, in *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*,[44] held as follows:

"Of particular importance to the present case is one of the circumstances enumerated in Section 224 of the Tax Code of 1977, as amended,[45] wherein the

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[43] *BPI v. Commissioner of Internal Revenue*, G.R. No. 139736, October 17, 2005, 473 SCRA 205.
[44] G.R. No. 139736, October 17, 2005.
[45] Now Section 223, NIRC of 1997.

running of the statute of limitations on assessment and collection of taxes is considered suspended 'when the taxpayer requests for a reinvestigation which is granted by the Commissioner.'

This Court gives credence to the argument of petitioner BPI that there is a distinction between a request for reconsideration and a request for reinvestigation. Revenue Regulations (RR) No. 12-85, issued on 27 November 1985 by the Secretary of Finance, upon the recommendation of the BIR Commissioner, governs the procedure for protesting an assessment and distinguishes between the two types of protest, as follows –

> SEC. 6. Protest. The taxpayer may protest administratively an assessment by filing a written request for reconsideration or reinvestigation. . .
>
> For purposes of the protest herein –
>
> (a) *Request for reconsideration.* – refers to a plea for a re-evaluation of an assessment ***on the basis of existing records*** without need of additional evidence. It may involve both a question of fact or of law or both.
>
> (b) *Request for reinvestigation.* – refers to a plea for re-evaluation of an assessment ***on the basis of newly-discovered or additional evidence*** that a taxpayer intends to present in the reinvestigation. It may also involve a question of fact or law or both.

With the issuance of RR No. 12-85 on 27 November 1987 providing the above quoted distinctions between a request for reconsideration and a request for reinvestigation, the two types of protest can no longer be used interchangeably and their differences so lightly brushed aside. **It bears to emphasize that under Section 224 of the Tax**

> **Code of 1977, as amended, the running of the prescriptive period for collection of taxes can only be suspended by a request for reinvestigation, not a request for reconsideration. Undoubtedly, a reinvestigation, which entails the reception and evaluation of additional evidence, will take more time than a reconsideration of a tax assessment, which will be limited to the evidence already at hand; this justifies why the former can suspend the running of the statute of limitations on collection of the assessed tax, while the latter cannot.**
>
> The protest letter of petitioner BPI, dated 16 November 1989 and filed with the BIR the next day, on 17 November 1989, did not specifically request for either a reconsideration or reinvestigation. **A close review of the contents thereof would reveal, however, that it protested Assessment No. FAS-5-85-89-002054 based on a question of law,** in particular, whether or not petitioner BPI was liable for DST on its sales of foreign currency to the Central Bank in taxable year 1985. **The same protest letter did not raise any question of fact; neither did it offer to present any new evidence.** In its own letter to petitioner BPI, dated 10 September 1992, **the BIR itself referred to the protest of petitioner BPI as a request for reconsideration.** These considerations would lead this Court to deduce that the protest letter of petitioner BPI was in the nature of a request for reconsideration, rather than a request for reinvestigation and, consequently, Section 224 of the Tax Code of 1977, as amended, on the suspension of the running of the statute of limitations should not apply." *(Emphases supplied)*

For easy reference, reproduced respectively are the bodies of APEC's Letter dated July 16, 2004 and Letter dated February 1, 2005, to wit:

Letter dated July 16, 2004:[46]

[46] Division Docket, Vol. 1, pp. 143 to 144.

"This refers to the above formal assessment notice issued by the Large Taxpayers Service of the BIR National Office against our client, Pacific Plans, Inc., assessing it for deficiency value-added tax (VAT) on trust fund contributions for the year 2001.

Pursuant to our protest letter dated April 29, 2004 and supplemental letter dated July 5, 2004, we requested for the referral of the docket of this case to the Legal Service considering that this involves a legal issue, which we believe will be best resolved by the same Legal Service. Hence, the Large Taxpayers Service has referred the docket of the case to your good Office.

Please be informed that on behalf of the Philippine Federation of Pre-Need Companies, Inc., where Pacific Plans is one of the members, we filed a Letter dated July 15, 2004 with the Office of Commissioner Parayno on July 16, 2004. A copy of which is attached herewith for your information and reference. Specifically, in said letter we requested before the Commissioner to study the issues affecting the pre-need industry and come up with a separate regulations clearly defining the proper basis for computing the VAT.

Accordingly, to the end that these issues affecting the pre-need industry can be best resolved, **we respectfully request that resolution of the legal issue by your Office be held in abeyance pending any action on our letter dated July 15, 2004 by the Commissioner of Internal Revenue.**

We hope for your kind consideration on this matter." *(Emphasis supplied)*

<u>Letter dated February 1, 2005:</u>[47]

"Pursuant to our letter dated July 16, 2004, we informed you that the Philippine Federation of Pre-Need Companies, Inc., through the undersigned, filed

[47] Division Docket, Vol. 1, p. 146.

a request before the Commissioner of Internal Revenue to study the issues affecting the pre-need industry and to come up with a separate regulations clearly defining the proper basis for computing the VAT.

By way of an update, the Office of the Deputy Commissioner for Legal and Inspection Group, Mr. Jose Mario Buñag, agreed to endorse our request to the Management Committee for proper disposition of the legal issue. In view thereof, we believe that any action by the Management Committee on our Request will clarify the issues affecting the pre-need industry, particularly on the treatment of the trust fund contribution, which is the subject of the tax assessment against Pacific Plans, Inc.

Accordingly, to the end that these issues affecting the pre-need industry can be best resolved, **we respectfully request that resolution of the legal issue by your Office be held in abeyance pending any action on our Request by the Management Committee.**

We hope for your kind consideration on this matter." *(Emphasis supplied)*

A cursory reading of the foregoing would reveal that they *"did not raise any question of fact; neither did it offer to present any new evidence."* In fact, it is clear that what is to be resolved is a *"legal issue"*, not a factual one.

Furthermore, a reading of the pertinent portions of the Commissioner's Decision dated December 7, 2010,[48] would reveal that the said letters of APEC, among others, were collectively treated by the Commissioner as a request for reconsideration, *viz*:

"Before this Office for resolution is the **request for reconsideration** filed by Pacific Plans, Inc. of the Final Decision on Disputed Assessment rendered by

[48] Division Docket, Vol. 1, pp. 398 to 405.

the OIC Deputy Commissioner, Large Taxpayer Service dated May 27, 2004.

THE FACTS:

xxx xxx xxx

A letter dated July 16, 2004, addressed to the Chief of the Appellate Division Atty. Angel G. Pasion was sent by SGV & Co. **requesting the resolution of the legal issue** by the Appellate Division be held in abeyance pending any action on its letter dated July 15, 2004 by the Commissioner of Internal Revenue.

A letter update dated February 1, 2005 was sent by SGV & Co., addressed again to the Chief of the Appellate Division Atty. Anger G. Pasion. In the said letter SGV & Co. alleged that the Office of the Deputy Commissioner for Legal and Inspection Mr. Jose Mario Buñag, agreed to endorse its request to the Management Committee for proper disposition of the legal issue. Accordingly, SGV & Co. **requests that the resolution of the legal issue** by the Appellate Division be held in abeyance pending any action on its request by the Management Committee.

xxx xxx xxx." *(Emphases and underscoring supplied)*

Correspondingly, the inevitable conclusion is that APEC's Letter dated July 16, 2004 and Letter dated February 1, 2005 are not requests for reinvestigation. Thus, they did not have the effect of suspending the five-year prescriptive period of the collection of the subject tax.

The other allegation of the Commissioner that APEC's execution of the *Waiver of the Defense of Prescription of the Statute of Limitations under the NIRC* until October 15, 2004 suspended the period of collection is misplaced. To be sure, said *Waiver* does not have the effect of *"suspending"* the prescriptive periods under the Sections 203 and 222 of the NIRC of 1997, but will only authorize the extension of the said periods. It must be emphasized that a waiver of the statute of limitations is *"an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is* ***extended*** *to a* *date certain."*[49] Nonetheless, the *Waiver* merely extended the period to assess the tax, pursuant to Section 222(b) of the NIRC of 1997, and not the period to collect the same. This is apparent in the fact that the said *Waiver* was executed (*i.e.*, on April 1, 2004) prior the service of the subject VAT assessment (on April 26, 2004); and on the intent and purpose of the said *Waiver*, to wit:

> "The intent and purpose of this waiver is to afford the Commissioner of Internal Revenue ample time to carefully consider the legal and/or factual questions involved **in the determination of the aforesaid tax liabilities**. It is understood, however, that **the undersigned taxpayer by the execution of this waiver, neither admits in advance the** correctness/**assessments <u>which may be made</u> for the year above-mentioned** nor waives the right to use any legal remedies accorded by law to secure a credit of refund of such tax that may have been paid for the same year pursuant to the provisions of Section 204 and 229 of the National Internal Revenue Code." *(Emphases and underscoring supplied)*

Simply put, the said Waiver has no bearing in the period to collect the assessed VAT, but is only relevant in the assessment of the said tax.

Following the ruling in the case of *Republic of the Philippines vs. Luis G. Ablaza*,[50] this is the rationale behind the prescriptive period for actions for collection, to wit:

> "The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful,

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[49] Revenue Memorandum Circular No. 6-2005.
[50] G.R. No. L-14519, July 26, 1960.

> law-abiding citizens. Without such legal defense, taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the positive purpose of affording protection to the taxpayer within the contemplation of the Commission which recommended the approval of the law."

In this case, when the **Formal Letter of Demand** and **Audit Result/Assessment Notice No. VT-01-000112** both dated February 5, 2004[51] in the amount of ₱ 155,492,011.33, for taxable year 2001 were issued and received by respondent on April 26, 2004[52], petitioner had a period of (5) five years to enforce collection from such date as required by law or until April 26, 2009. However, it was only on February 22, 2010 when the Warrant of Distraint and/or Levy dated February 11, 2010 was served on respondent, or after the lapse of the 5-year reglementary period. Thus, the right of petitioner to collect the same is deemed to have already prescribed.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. The assailed Resolution dated October 31, 2012 and Resolution dated March 11, 2013, both rendered by the Third Division of this Court in CTA Case No. 8040 are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

[51] Annex "H" and Annex "I", respectively of Petition for Review, Division Docket, Vol. I, pp. 98 to 99, and 101, respectively.
[52] Paragraph 3,9, Petition for Review, Division Docket , Vol. I, p. 13.

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

(On Leave)
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen M. R. L.
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice