Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

***En Banc***

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| **COMMISSIONER OF INTERNAL REVENUE,** Petitioner, | **CTA EB No. 639** (C.T.A. Case No. 7220) |
| -versus- | Present: DEL ROSARIO, P.J. CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, J.J. |
| **CBK POWER COMPANY LIMITED,** Respondent. | Promulgated: JUN 3 0 2015 11:20 a.m. |

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## AMENDED DECISION

***CASANOVA, J.:***

This Petition for Review[1] filed on June 10, 2010, seeks to reverse and set aside the portion of the Decision[2] dated February 6, 2009, Amended Decision[3] dated February 8, 2010 and Resolution[4] dated May 20, 2010, promulgated by the Court of Tax Appeals (CTA) *Former* Second Division in CTA Case No. 7220, entitled *"CBK Power Company Limited vs. Commissioner of Internal Revenue"*, granting the claim for the issuance of a tax credit certificate in favor of respondent CBK Power Company Limited.

Petitioner is the duly appointed Commissioner of Internal Revenue (CIR) vested with authority to act as such, including inter alia,

[1] En Banc Rollo, pp. 1-16.
[2] Annex "A" to the Petition for Review, En Banc Rollo, pp. 17-48.
[3] Annex "B" to the Petition for Review, En Banc Rollo, pp. 49-60.
[4] Annex "C" to the Petition for Review, En Banc Rollo, pp. 61-67.

the power to decide, approve and grant refunds or tax credit of erroneously or illegally collected internal revenue taxes as provided by law. She holds office at the Bureau of Internal Revenue (BIR), National Office Building, Diliman, Quezon City.[5]

Respondent CBK Power Company Limited (CBK) is a partnership duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at the National Power Corporation (NPC) Compound, Kalayaan, Laguna. It is a special purpose entity and was formed for the sole purpose of engaging in all aspects of (a) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna; and (b) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan, and Kalayaan I hydroelectric power plants and their related facilities located in the Province of Laguna. It is registered as a value-added tax (VAT) entity since April 10, 2000, with Tax Identification Number (TIN)/VAT No. 205-760-474-000 and BIR Certificate of Registration 1R0000195405.[6]

In the February 6, 2009 Decision[7], the CTA *Former* Second Division found that respondent CBK has sufficiently proven its entitlement to the issuance of a tax credit certificate in the reduced amount of P215,998,263.13.

The dispositive portion of the said Decision is hereby quoted for ready reference:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED.** Accordingly, respondent[8] is hereby **ORDERED to ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner[9] in the reduced amount of **TWO HUNDRED FIFTEEN MILLION NINE HUNDRED NINETY EIGHT THOUSAND TWO HUNDRED SIXTY THREE PESOS and 13/100 (P215,998,263.13)**, representing unutilized input value-added tax on local purchases of goods and services attributable to zero-rated sales for

[5] Par. 1, The Parties, Petition for Review, En Banc Rollo, p. 2.
[6] Par. 2, The Parties, Petition for Review, En Banc Rollo, p.2.
[7] See footnote no. 2.
[8] Petitioner herein.
[9] Respondent herein.

> the period covering January 1, 2003 to December 31, 2003.
>
> **SO ORDERED."**

Unsatisfied, respondent CBK filed its Motion for Partial Reconsideration[10] on February 24, 2009, praying for the Court in Division to partially reconsider and modify its judgment rendered on February 6, 2009, and grant the denied portion of its total claim of P295,994,518.00 amounting to P74,049,089.00. It further moved that it be allowed to recall Ms. Ma. Milagros F. Padernal and/or Mr. Joey L. Polintan, who will present and identify, in open court, the remaining pages of the General Ledgers of its Property, Plant and Equipment Accounts for 2003.

Petitioner CIR, likewise, filed her Motion for Partial Reconsideration[11] on February 25, 2009, asserting therein that the Court of Tax Appeals has no jurisdiction over the instant Petition on account of respondent CBK's failure to comply with the provision of Section 112 (D) of the 1997 NIRC, as amended.

In an Amended Decision[12] dated February 8, 2010, the Court in Division denied petitioner CIR's Motion for Partial Reconsideration for lack of merit and partially granted respondent CBK's Motion for Partial Reconsideration, to wit:

> "**WHEREFORE,** in view of the foregoing considerations, respondent's[13] Motion for Partial Reconsideration is hereby **DENIED** for lack of merit, while petitioner's[14] Motion for Partial Reconsideration is **PARTIALLY GRANTED**. Accordingly, the dispositive portion of the Decision promulgated on February 6, 2009 is hereby **MODIFIED** as follows:
>
> > '**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWO HUNDRED EIGHTY**

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[10] Division Docket (Vol. II), pp. 1079-1097.
[11] Ibid, pp. 1098-1105.
[12] See footnote no. 3.
[13] Petitioner herein.
[14] Respondent herein.

> **SIX MILLION SEVEN HUNDRED EIGHTY THREE THOUSAND EIGHT HUNDRED FORTY SEVEN PESOS AND THRITY** (sic)[15] **SEVEN CENTAVOS (P286,783,847.37),** representing unutilized input value-added tax attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003.
>
> **SO ORDERED."**

Petitioner CIR filed her Motion for Reconsideration[16] on March 3, 2010, without CBK's comment or opposition thereto, seeking reconsideration of the afore-cited Amended Decision. Said Motion for Reconsideration was denied in a Resolution[17] promulgated on May 20, 2010.

Petitioner CIR, thereafter, filed an appeal, by way of Petition for Review,[18] before the Court *En Banc* on June 10, 2010, primarily arguing that CBK failed to submit all necessary and relevant documents at the administrative level.

Finding that respondent CBK's judicial claim was prematurely filed without awaiting for the decision of the petitioner CIR or the lapse of the 120-day period pursuant to the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc.*[19] *(Aichi Case),* the Court *En Banc* granted petitioner CIR's Petition for Review, in its Decision[20] promulgated on July 20, 2011, the *fallo* of which reads:

> "**WHEREFORE**, the instant Petition for Review filed by petitioner-Commissioner of Internal Revenue, on June 10, 2010, is hereby **GRANTED**. The Assailed Decision dated February 6, 2009 and the Amended Decision dated February 8, 2010, are hereby both **REVERSED** and **SET ASIDE.** Consequently, the Petition for Review (CTA Case No. 7220) filed on April 18, 2005 is hereby **DISMISSED** for premature filing.
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> **SO ORDERED."**

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[15] Should be Thirty.
[16] Division Docket (Vol. II), pp. 1540-1553.
[17] See footnote no. 4.
[18] See footnote no. 1.
[19] G.R. No. 184823, October 6, 2010.
[20] En Banc Rollo, pp. 88-101.

Aggrieved, respondent CBK filed a Motion for Reconsideration[21] on August 11, 2011, praying to reconsider, reverse and set aside the Court *En Banc*'s judgment rendered on July 20, 2011, and accordingly, grant its total claim for the issuance of a tax credit certificate in the amount of P286,783,847.37. However, the same was denied for lack of merit in a Resolution[22] promulgated on October 5, 2011.

Perforce, respondent CBK elevated the instant case to the Supreme Court via Petition for Review on *Certiorari* under Rule 45 of the Revised Rules of Court, which was docketed as G.R. No. 198928 entitled, *"CBK Power Company Limited vs. Commissioner of Internal Revenue"*, praying for the following: (i) that the CIR's Petition for Review filed before the Court *En Banc* on June 10, 2010, which was docketed as CTA EB Case No. 639, be denied; (ii) that the CTA *Former* Second Division's Amended Decision and Resolution dated February 8, 2010 and May 20, 2010, respectively, in CTA Case No. 7220, be both affirmed by the Supreme Court; and, (iii) that CIR be ordered to issue a tax credit certificate in favor of CBK in the total amount of P286,783,847.37.

Applying the ruling in *Taganito Mining Corporation vs. Commissioner of Internal Revenue*[23], the High Tribunal granted CBK's Petition for Review on *Certiorari* in its Decision promulgated on December 3, 2014, pertinent portions of which are herein below quoted for ready reference:

> "Reconciling the pronouncements in the *Aichi* and *San Roque* cases, the rule must therefore be that **during the period December 10, 2003** (when BIR Ruling No. DA-489-03 was issued) **to October 6, 2010** (when the *Aichi* case was promulgated), **taxpayers-claimants need not observe the 120-day period** before it could file a judicial claim for refund of excess input VAT before the CTA. **Before and after the aforementioned period (i.e., December 10, 2003 to October 6, 2010), the observance of the 120-day period is mandatory and jurisdictional to the filing of such claim.** (Emphases and underscoring supplied)

[21] En Banc Rollo, pp. 120-193.
[22] En banc Rollo, pp. 207-211.
[23] G.R. No. 197591, June 18, 2014.

In this case, records disclose that CBK Power filed its administrative and judicial claims for issuance of tax credits on March 29, 2005 and April 18, 2005, respectively or during the period when BIR Ruling No. DA-489-03 was in place, *i.e.,* from December 10, 2003 to October 6, 2010. As such, it need not wait for the expiration of the 120-day period before filing its judicial claim before the CTA, which was timely filed. In view of the foregoing, the CTA *En Banc* erred in dismissing CBK Power's claim on the ground of prematurity and, thus, its ruling must be corrected accordingly.

Considering, however, that the CTA *En Banc* dismissed CBK Power's claim for refund solely on procedural ground and no longer delved on its substantive merits, i.e., whether or not CBK Power was able to substantiate its claim for issuance of a tax credit certificate, the Court deems it prudent to remand the case to the CTA *En Banc* for resolution on the merits.

**WHEREFORE**, the petition is **GRANTED**. The Decision dated July 20, 2011 and the Resolution dated October 5, 2011 of the Court of Tax Appeals (CTA) *En Banc* in CTA EB Case No. 639 are hereby **REVERSED** and **SET ASIDE**. For reasons aforestated, the instant case is **REMANDED** to the CTA *En Banc* for resolution on the merits.

**SO ORDERED."**

Hence, this Amended Decision.

In support of the subject Petition for Review, petitioner CIR raised the following issues for the resolution of the Court:

1. The Court in Division erred in stating that petitioner CIR has waived its right to raise the issue or claim that respondent CBK has failed to submit all necessary and relevant documents at the administrative level;

2. The Court in Division erred in granting respondent CBK's claim for issuance of a tax credit certificate in the amount of

P286,783,847.37, representing unutilized input value-added tax for taxable year 2003; and,

3. The Honorable Supreme Court has ruled that Section 229 is inapplicable to cases such as this, contrary to the ruling of the Court in Division.

Anent the issue on whether the Court in Division erred in stating that petitioner CIR has waived its right to raise the issue or claim that respondent CBK has failed to submit all necessary and relevant documents at the administrative level, suffice it to say that the same has already been sufficiently passed upon in the Assailed Resolution of the CTA *Former* Second Division in this wise:

> "Considering respondent's[24] failure to timely plead and prove before the Court the defense or objection that petitioner[25] failed to submit all necessary and relevant documents at the administrative level, respondent is deemed to have waived the same.
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> Section 1, Rule 9 of the Rules of Court provides:
>
> > 'SECTION 1. **Defenses and objections not pleaded.**— Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.'
>
> A perusal of respondent's Answer and Pre-Trial Brief readily show that said pleadings are bereft of any statement alleging that petitioner failed to submit the necessary and relevant documents at the administrative level. Furthermore, the actuation of respondent's counsel in not presenting any evidence during trial and merely submitting this case for decision based on the pleadings bolster the Court's findings that respondent waived his right to timely

[24] Petitioner herein.
[25] Respondent herein.

> plead the defense and claim that petitioner failed to submit all necessary and relevant documents at the administrative level. He likewise missed another opportunity to raise said issue when he failed to discuss or even mention the same in his Memorandum.
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> Again, in his Motion for Partial Reconsideration filed on February 24, 2009 of the Decision rendered by this Court on February 6, 2009, he did not also raise this issue. Respondent waited until this Court rendered its assailed Amended Decision before he asserted the matter in his subject Motion for Reconsideration.
>
> It must be noted that said defense or objection was already available to respondent when he filed his Answer to the instant Petition for Review, yet for unknown reason/s, he chose not to raise the same at that point in time.
>
> It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings. This Court cannot simply ignore or relax procedural rules which are designed to facilitate the adjudication of cases."[26]

Further, the Supreme Court in the case of *Commissioner of Internal Revenue vs. First Express Pawnshop Company, Inc.,*[27] ruled that it is the taxpayer and not the BIR who determines what relevant supporting documents to submit as basis of its claim. The Bureau of Internal Revenue can only inform the taxpayer to submit additional documents but cannot demand what type of supporting documents should be submitted. Otherwise, a taxpayer will be at the mercy of the BIR, which may require the production of documents that a taxpayer cannot submit.

Considering that the records of this case are bereft of any showing that petitioner CIR sent a written notice to respondent CBK informing the latter that the documents it submitted in support of its administrative claim for the issuance of a tax credit certificate were incomplete, the presumption is that complete documents had been

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[26] Pages 2-4 of the May 20, 2010 Resolution, Annex "C" to the Petition for Review, En Banc Rollo, pp. 62-64.

[27] G.R. Nos. 172045-46, June 16, 2009

submitted by respondent CBK when it filed its administrative claim[28] on March 29, 2005.

With regard to petitioner CIR's position that Section 229 is inapplicable to claims for tax credit or refund of unutilized input VAT, *We* find the same meritorious.

The Supreme Court categorically stated in *Taganito Mining Corporation vs. Commissioner of Internal Revenue,*[29] citing the cases of *Commissioner of Internal Revenue vs. San Roque Power Corporation*[30] *and Visayas Geothermal Power Company vs. Commissioner of Internal Revenue*[31] *("Taganito, et. al. case")* that it is Section 112 and, not Section 229 that should be made applicable to claims for refund or tax credit of unutilized creditable input VAT. Pertinent portions of the *Taganito et. al.* case read as follows:

> "It has been definitively settled in the recent En Banc case of *CIR v. San Roque Power Corporation (San Roque)*, <u>that it is Section 112 of the NIRC which applies</u> to claims for tax credit certificates and tax refunds arising from sales of VAT-registered persons that are zero-rated or effectively zero-rated, which are, simply put, claims for unutilized creditable input VAT.
>
> Thus, under Section 112(A), the taxpayer may, within 2 years after the close of the taxable quarter when the sales were made, via an administrative claim with the CIR, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales. Under Section 112(D), the CIR must then act on the claim within 120 days from the submission of the taxpayer's complete documents. In case of (a) a full or partial denial by the CIR of the claim, or (b) the CIR's failure to act on the claim within 120 days, the taxpayer may file a judicial claim via an appeal with the CTA of the CIR decision or unacted claim, within 30 days (a) from receipt of the decision; or (b) after the expiration of the 120-day period.
>
> **The 2-year period under Section 229 does not apply to appeals before the CTA in relation to claims for a refund or tax credit for unutilized creditable**

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[28] Division Docket (Vol. I), pp. 243-250.
[29] G.R. No. 201195, November 26, 2014.
[30] G.R. No. 187485, February 12, 2013.
[31] G.R. No. 197525, June 4, 2014

**input VAT.** Section 229 pertains to the recovery of taxes erroneously, illegally, or excessively collected. San Roque stressed that 'input VAT is not 'excessively' collected as understood under Section 229 because, at the time the input VAT is collected, the amount paid is correct and proper.' It is, therefore, Section 112 which applies specifically with regard to claiming a refund or tax credit for unutilized creditable input VAT."

Based from the foregoing, it is clear that Section 229 is inapplicable to appeals filed before the CTA with respect to claims for refund or tax credit of unutilized input VAT.

It should, likewise, be stressed that the rulings in the aforementioned cases were the very bases of the Supreme Court in reversing the July 20, 2011 Decision and October 5, 2011 Resolution of the CTA *En Banc*.

We shall now resolve the last issue on whether the Court in Division erred in granting respondent CBK's claim for issuance of a tax credit certificate in the reduced amount of P286,783,847.37, representing unutilized input value-added tax for taxable year 2003.

After thorough scrutiny and re-evaluation of the case records, the Court *En Banc* agrees with the findings of the CTA *Former* Second Division that respondent CBK was able to properly substantiate its claim for tax credit certificate in the reduced amount of P286,783,847.37, to wit:

"In fine, petitioner's[32] total valid input VAT amounts to P286,783,847.37, computed as follows:

| | | |
|---|---|---|
| Input VAT on domestic purchases of Capital Goods | P278,669,281.17 | |
| Less: Disallowance per ICPA | 1,407,094.56 | |
| Valid input VAT on domestic purchases of Capital Goods | | P277,262,186.61 |
| Input VAT on domestic purchases of Other Goods/Services | P 17,325,236.83 | |
| Less: Disallowance per ICPA | 1,611,439.73 | |
| Disallowances per Court's verification | 2,928,631.58 | |
| Subtotal | P 12,785,165.52 | |

[32] Respondent herein.

| | | |
|---|---|---|
| Multiply by rate of supported zero-rated sales | 74.47428619%[33] | |
| Valid input VAT on domestic purchases of Other Goods/Services | | 9,521,660.76 |
| **Total Valid Input Taxes for Refund** | | **P286,783,847.37** |

x x x x x x x x x

**WHEREFORE** in view of the foregoing considerations, xxx. Accordingly, the dispositive portion of the Decision promulgated on February 6, 2009 is hereby **MODIFIED** as follows:

> '**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent[34] is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWO HUNDRED EIGHTY SIX MILLION SEVEN HUNDRED EIGHTY THREE THOUSAND EIGHT HUNDRED FORTY SEVEN PESOS AND THRITY** (sic)[35] **SEVEN CENTAVOS (P286,783,847.37)**, representing unutilized input value-added tax attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003.
>
> **SO ORDERED.**"

Further, it is worthy to note that during the proceedings before the CTA Court *En Banc* until the case was elevated to the Supreme Court, respondent CBK, in its Motion for Reconsideration filed before the CTA *En Banc* and its Petition for Review filed before the Supreme Court, prayed the amount of tax credit granted by the CTA *Former* Second Division in its Amended Decision dated February 8, 2010 be sustained. And, such fact is clearly shown in its pleadings filed before the CTA and Supreme Court:

[33]

| | |
|---|---|
| Supported zero-rated receipts | P 2,651,928,988.85 |
| Divided by total declared zero-rated receipts | 3,560,865,265.70 |
| Rate of supported zero-rated receipts | 74.47428619% |

(Decision, p. 18)

[34] Petitioner herein.

[35] Should be THIRTY.

Motion for Reconsideration[36]
filed before the *CTA En Banc*:

"**ACCORDINGLY,** premises considered, **RESPONDENT**, now respectfully, moves and prays unto this Honorable Court *En Banc*, to **RECONSIDER, REVERSE and SET ASIDE** its judgment rendered on July 20, 2011, and accordingly grant to herein Respondent, the Respondent's total claim for the issuance of a tax credit certificate in the amount of Two Hundred Eighty Six Million Seven Hundred Eighty Three Thousand Eight Hundred Forty Seven Pesos And Thirty Seven Centavos (P286,783,847.37), representing unutilized input value-added tax attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003, in accordance with then Sections 112(A), 112(B) and 112(D) of the Tax Code of 1997, as amended, in relation to Section 229 of the same Code.

x x x x"

Petition for Review on *Certiorari*
filed before the Supreme Court:

"x x x x

**PETITIONER**[37], further prays, of this Honorable Supreme Court, that the instant **PETITION FOR REVIEW ON CERTIORARI BE GRANTED** and accordingly, the Honorable Court of Tax Appeals *En Banc's* Decision and Resolution dated July 20, 2011 and October 5, 2011, respectively, in C.T.A. EB Case No. 639 [CTA Case No. 7220], be **REVERSED AND SET ASIDE.**

Likewise, **PETITIONER** most respectfully prays that:

1. That the Commissioner of Internal Revenue's Petition for Review dated June 9, 2010 and filed on June 10, 2010, docketed as C.T.A. EB Case No. 639 [CTA Case No. 7220], be **DENIED** by this Honorable Supreme Court;

2. Accordingly, that the Honorable Court of Tax Appeals Former Second Division's Amended Decision and Resolution dated February 8, 2010 and May 20, 2010,

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[36] See footnote no. 21.
[37] Respondent herein.

respectively, in C.T.A. Case No. 7220, be **BOTH AFFIRMED** by this Honorable Supreme Court; and

3. That the Respondent[38] Commissioner of Internal Revenue **BE ORDERED TO ISSUE TO PETITIONER, CBK POWER COMPANY LIMITED, A TAX CREDIT CERTIFICATE IN THE TOTAL AMOUNT OF TWO HUNDRED EIGHTY SIX MILLION SEVEN HUNDRED EIGHTY THREE THOUSAND EIGHT HUNDRED FORTY SEVEN PESOS AND THIRTY SEVEN CENTAVOS (P286,783,847.37)**, representing unutilized input value-added tax attributable to zero-rated sales for the period covering January 1, 2003 to December 31, 2003, in accordance with then Sections 112(A), 112(B) and 112(D) of the Tax Code of 1997, as amended, in relation to Section 229 of the same Code.

x x x x."

Hence, with this in mind and, in light of the foregoing considerations, *We* find no cogent reason to disturb the findings and conclusions of the Court in Division in the assailed Amended Decision and Resolution as it is supported by the evidence on record and is consistent with prevailing law and jurisprudence.

**WHEREFORE,** premises considered, the Decision dated July 20, 2011 and the Resolution dated October 5, 2011, both of the Court of Tax Appeals *En Banc* are **REVERSED** and **SET ASIDE**. Thus, the instant Petition for Review, filed by petitioner Commissioner of Internal Revenue, on June 10, 2010, is hereby **DENIED.** Accordingly, the Assailed Amended Decision dated February 8, 2010 and Resolution dated May 20, 2010, both of the CTA *Former* Second Division are hereby **REINSTATED** and **AFFIRMED**.

**SO ORDERED.**

**CAESAR A. CASANOVA**
Associate Justice

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[38] Petitioner herein.

WE CONCUR:

**ROMAN G. DEL ROSARIO**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

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

**CIELITO N. MINDARO-GRULLA**
Associate Justice

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

**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 opinion of the Court.

**ROMAN G. DEL ROSARIO**
Presiding Justice