REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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AMADEUS MARKETING PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 1532
(CTA Case No. 8578)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:

OCT 24 2018
3:10 p.m.

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RESOLUTION

UY, *J.*:

For this Court's resolution is petitioner's "**MOTION FOR RECONSIDERATION**" filed on May 8, 2018, praying for the reversal of the Court *En Banc*'s Decision dated April 5, 2018, the dispositive portion of which reads:

> "**WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit. The Decision dated June 21, 2016 and Resolution dated September 26, 2016 rendered by the Court in Division in CTA Case No. 8578 are hereby **AFFIRMED**.
>
> **SO ORDERED.**"

In its *Motion for Reconsideration*, petitioner argues that the Court *En Banc* erred in ruling that Amadeus IT Group S.A. is doing business in the Philippines. Allegedly, the relationship between petitioner and the transaction under the Distribution Agreement and the ACO Agreement do not constitute *"doing business in the Philippines"*. Moreover, the mere acceptance of royalties for the use of a property right in the instant case is not allegedly constitutive of doing business in the Philippines as the foreign counterpart does not play an active role in the pursuit of business. Lastly, petitioner claims that it is entitled to the refund in the amount of ₱23,355,841.61 representing its unutilized input VAT attributable to its zero-rated sales for the 2nd, 3rd and 4th quarters of calendar year 2010.

Respondent failed to file Comment to the instant motion as directed by the Court *En Banc* in the Resolution dated May 25, 2018, despite due notice. Hence, this resolution.

THE COURT *EN BANC'S* RULING

Petitioner's *Motion for Reconsideration* lacks merit.

There is no showing that petitioner is transacting business in its own name.

In arguing that the relationship between petitioner and Amadeus IT Group S.A. under the Distribution Agreement and the ACO Agreement do not constitute *"doing business in the Philippines"*, petitioner points to Section 3(d) of Republic Act (RA) No. 7042 (Foreign Investments Act), and Section 1(f), Rule I, of the Implementing Rules and Regulations of the said RA, wherein it is explicitly stated that *"appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account"* is not included in the phrase *"doing business in the Philippines"*. Thus, according to petitioner, since certain provisions in the said ACO Agreement and Distribution Agreement show that petitioner is transacting business in its own name and account, its appointment as distributor do not constitute as "doing business" in the Philippines.

Petitioner's argument is untenable.

For easy reference, quoted herewith are Section 3(d) of Republic Act (RA) No. 7042, and Section 1(f), Rule I, of the Implementing Rules and Regulations of the said law, *viz*:

> "SEC. 3. *Definitions.* — As used in this Act:
>
> xxx xxx xxx
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> d) xxx the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, **nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account**." *(Emphasis supplied)*
>
> "SECTION 1. DEFINITION OF TERMS. – For purposes of these Rules and Regulations:
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> xxx xxx xxx
>
> f. xxx. The following acts shall **<u>not</u>** be deemed 'doing business' in the Philippines:
>
> xxx xxx xxx
>
> (3) **Appointing a representative or distributor domiciled in the Philippines which transacts business in the <u>representative's or distributor's own name and account</u>**;" *(Emphases and underscoring supplied)*

Based on the foregoing, the appointment of a representative or distributor by a foreign corporation, when such representative or distributor transacts business in his/its own name **and** account, the said appointment shall not be deemed as "doing business" in the Philippines. In other words, an appointment by a foreign corporation of a representative or distributor will not be considered as "doing business" in the Philippines, not only when the appointee transacts business in his/its own name, but also when he/it does so in his/its own account.

In this case, however, while it may be true that there are provisions in the subject ACO Agreement (*e.g.*, Paragraphs 12.3, and 12.8) and Distributor Agreement (*e.g.*, Paragraphs 6, and 10.1) which indicate that petitioner is transacting business in its own account, **there is no showing that it is doing so in its own name**. There is no evidence, nor provision in the said Agreements, to suggest that petitioner is transacting business in its own name. On the contrary, it appears that under the ACO Agreement, a subscriber obtained by petitioner, may be sanctioned by Amadeus IT Group S.A. itself, even without the intervention or permission of petitioner, *viz*:

> "9.3. **Abuse.** If it appears to AMADEUS that Subscriber is abusing the AMADEUS System, either by excessive use in relation to the number of Bookings generated by the Subscriber or otherwise, (a) AMADEUS may require the Subscriber to stop such misuse and/or (b) exercise its right to terminate the agreement with the Subscriber on account of such abuse and/or (c) in the case that such abuse consists of excessive use in relation to the number of Bookings generated or of such other abuse as can reasonably be ameliorated by payment of financial compensation, require the Subscriber to pay a fee for such use."[1]

The foregoing provision empowers Amadeus IT Group S.A. to do certain actions to correct any abuse or misuse, or to prevent any further abuse or misuse, of the AMADEUS System by a particular subscriber. Particularly, on the basis of the said provision, for any subscriber obtained by petitioner, Amadeus IT Group S.A. could *motu propio* either stop any misuse of the AMADEUS System, or terminate the agreement with the said subscriber, or in a specific case, demand payment of a fee for the abuse. Such being the case, it cannot be said that when petitioner transacted business with the said subscriber, it was doing so in its own name. With the said authority of Amadeus IT Group S.A. to make corrective or preventive action upon the erring subscriber, petitioner have to initially disclose to the latter that it has no ultimate power to decide on the said matters.

Correspondingly, We maintain Our ruling that Amadeus IT Group S.A. is doing business in the Philippines.

Amadeus IT Group S.A. is in active pursuit of business in the

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[1] Exhibit "D", Division Docket (CTA Case No. 8578) – Vol. 3, p. 973.

Philippines. Thus, the payments it received from petitioner are not passive income.

In contending that mere acceptance of royalties for the use of a property right in the instant case is not constitutive of doing business in the Philippines as the foreign counterpart does not play an active role in the pursuit of business, petitioner made the following statements, to wit:

> "12. The Honorable Court points out that if the recipient of the royalty is a citizen, resident alien or a domestic corporation, then the royalty is considered as 'passive income', hence, the service provider is not deemed as doing business. On the other hand, if the recipient of the royalty is a foreign corporation or a non-resident alien, then the royalty is not considered received in the concept of 'passive income', hence, the service provider is considered as doing business.
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> 13. Petitioner respectfully disagree. xxx."[2]

Petitioner's conclusions are erroneous.

While it may true that We have discussed in the assailed Decision that under the law: (1) if the recipient of the royalty is a citizen, resident alien or a domestic corporation, the royalty is considered "passive income"; and (2) if the recipient of the royalty is a foreign corporation or a non-resident alien, there is no distinction as to whether the payments received are "passive income", the Court *En Banc* did **<u>not</u>** decree that in the former, the service provider is not deemed as doing business, and that in the latter, it is otherwise. Even a plain reading of the assailed Decision would reveal that it is so.

The said discussions were brought up to merely refute and address petitioner's stance that the National Internal Revenue Code (NIRC) of 1997, as amended, consistently treated as a passive income source. To be clear, such discussions were never meant to establish the determination of whether a foreign corporation is doing

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[2] EB Docket, p. 205.

business in the Philippines.

To repeat, Amadeus IT Group S.A. is considered doing business in the Philippines because it has a continuous business therein; and it is not because it is receiving payments which petitioner treats as "royalties" or "passive income".

In this connection, it must be emphasized that petitioner cannot simply treat the payments to Amadeus IT Group S.A. as "royalties" or "passive income" [such as assigning the Alphanumeric Code (ATC) No. "WV050") when remitting the value-added tax (VAT) withheld thereon], in the guise of making the said payments as stemming from the arrangement that petitioner was given the right to use the intellectual property belonging to Amadeus IT Group S.A., and benefit therefrom. Such treatment of petitioner, without considering other factual circumstances, is not conclusive upon this Court.

We do not doubt the definition given by the BIR on the term *"passive income"* by stating what it is not,[3] as adopted in the case of *Chamber of Real Estate and Builders' Association, Inc. vs. The Hon. Executive Secretary Alberto Romulo, et al.*[4], as follows: *"...if the income is generated in the active pursuit and performance of the corporation's primary purposes, the same is not passive income...".*

In this case, it is clearly shown that the income of Amadeus IT Group S.A. paid by petitioner is generated in the active pursuit and performance of its corporate purpose, and this fact is borne out by petitioner's own evidence.

The corporate purpose of Amadeus IT Group S.A. is stated in its *Notes to the Consolidated Annual Accounts for the years ended December 31, 2010 and 2009,*[5] as follows:

> "The Company's corporate purpose, as set out in article 2 of its by-laws, is the following:
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> (a) transfer data from and/or through computer reservation systems, including offers, reservations, tariffs, transport tickets and/or similar, as well as any

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[3] BIR Ruling No. DA-501-2004, September 24, 2004.
[4] G.R. No. 160756, March 9, 2010.
[5] Exhibit "K", Division Docket (CTA Case No. 8578) – Vol. 3, pp. 1022 to 1023.

other services, including information technology services, all of them mainly related to the transport and tourism industry, provision of computer services and data processing systems, management and consultancy related information systems;

(b) **provision of services related to the supply and distribution of any type of product through computer means, <u>including manufacture, sale and distribution of software, hardware and accessories of any type</u>**;

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

Relative thereto, the premises for entering the subject ACO Agreement and Distribution Agreement are stated in their respective preambles, to wit:

<u>ACO Agreement</u>:

"Whereas, the AMADEUS Group has developed a fully automated reservations and distribution system knows as the AMADEUS System, with the ability to perform comprehensive information, communications, reservations, ticketing and related functions on a world-wide basis;

Whereas, AMADEUS, within the AMADEUS Group structure, is responsible for, among other marketing and commercial activities, the widespread availability of the computerised information, products and services stored in the AMADEUS Global Core;

Whereas, AMADEUS contracts with airlines and other Providers of travel related services for display and sale of their information, products and services through the AMADEUS System;

Whereas, AMADEUS ACO is willing to market, promote, offer and distribute the AMADEUS System in the Philippines and will be engaged on a commission basis, to negotiate contracts relative to the Amadeus System with the custody of which the former has no concern for all AMADEUS participants and subscribers under this agreement;

Whereas, AMADEUS and AMADEUS ACO believe that the implementation of this Agreement will facilitate the further automation and increase the efficiency of Providers, provide a source of neutral and unbiased information for members of the travel and travel related industry, provide improved services to consumers, and enhance competition."[6]

Distribution Agreement:

"WHEREAS the AMADEUS group of companies has developed a fully automated reservation and distribution system knows as the AMADEUS Global Travel Distribution System which is marketed by AMADEUS NMC according to the terms and conditions of the AMADEUS Marketing – NMC Agreement executed as of the 1st of July 1997 (the 'Main Agreement');

WHEREAS the AMADEUS group of companies has developed, and will further develop, a Travel Agency Management System (hereinafter referred to as 'the Product') that interacts and is compatible with the AMADEUS Global Travel Distribution System;

WHEREAS, the Product is intended to provide functions facilitating the provision of reservations and related customer services by travel agents, and to interface with travel agency back-office systems that include accounting, billing and management information functions; and

WHEREAS AMADEUS and AMADEUS NMC have agreed that the distribution of the Product in AMADEUS NMC's Territory shall be made by AMADEUS NMC on the terms and conditions set forth below."

Considering the above-stated corporate purpose of Amadeus IT Group S.A. vis-à-vis the said premises to the said agreements, it is easy to discern that the income generated by virtue thereof is in the active pursuit and performance of the said purpose. Simply put, the above-quoted purpose of Amadeus IT Group S.A. will be further

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[6] Exhibit "D", Division Docket (CTA Case No. 8578) – Vol. 3, p. 968.

realized because of those agreements.

In the assailed Decision, the Court *En Banc* enumerates five (5) indications in the ACO Agreement which shows Amadeus IT Group S.A.'s active participation, to wit:

> "In addition, Amadeus IT Group S.A.'s active participation in the pursuit of the same purpose or object is shown in the following undertaking under the same ACO Agreement, to wit:
>
> 1. Amadeus IT Group S.A. can undertake any obligation with a third-party licensor, including obligations with respect to the marketing, offering and promotion of, and technical and other support for, the licensed AMADEUS Product; and petitioner is required to honor any of such undertaking within the Philippines (Par. 5, ACO Agreement);
> 2. In case of abuse of the AMADEUS System by Subscriber in the Philippines, Amadeus IT Group S.A. may: (a) require the Subscriber to stop such misuse, and/or, (b) exercise its right to terminate the agreement with the same Subscriber on account of such abuse, and/or (c) in the case that such abuse consists of excessive use in relation to the number of Bookings generated or of such other abuse as can reasonably be ameliorated by payment of financial compensation, require the Subscriber to pay a fee for such use (Par. 9.3, ACO Agreement);
> 3. Amadeus IT Group S.A. shall contract directly to Multinational Subscribers that have their headquarters or Branches in the Philippines (Par. 9.4, ACO Agreement);
> 4. Amadeus IT Group S.A. has the right to contract with Subscribers within the Philippines relative to the CRS services through AMADEUS on-line and corporate products (Par. 9.4, ACO Agreement); and
> 5. Amadeus IT Group S.A. undertakes to provide basic training program covering the use of the AMADEUS products for marketing, offering and promoting purposes, and initial training materials, to petitioner to facilitate the introduction of the same products (Par. 11.1, ACO Agreement)."

Regarding No. 1, *i.e.*, that Amadeus IT Group S.A. is allowed to undertake any obligation with a third-party licensor, and petitioner is required to honor any of such undertaking within the Philippines—this means that there are certain acts of Amadeus IT Group S.A. which will have an effect on the transactions entered into by petitioner, on its behalf, in the Philippines.

For No. 2, *i.e.*, in case there is abuse or misuse of the AMADEUS System by a subscriber in the Philippines, as already pointed out earlier, Amadeus IT Group S.A. may take certain corrective or preventive actions—this means that Amadeus IT Group S.A. will be monitoring subscribers in the Philippines to determine whether any of them is abusing or misusing the said System, and this can be done even without the consent or participation of petitioner.

For No. 3, *i.e.*, Amadeus IT Group S.A. shall contract directly to Multinational Subscribers that have their headquarters or branches in the Philippines—this entails that Amadeus IT Group S.A. can directly do so in the Philippines, even without the participation of petitioner.

Anent No. 4, *i.e.*, the existence of Amadeus IT Group S.A.'s right to contract with Subscribers within the Philippines relative to the CRS services through AMADEUS on-line and corporate products—this signifies that there will be instances when Amadeus IT Group S.A. will be directly contracting to subscribers within the Philippines relative to the said CRS services.

Lastly, with reference to No. 5, *i.e.*, Amadeus IT Group S.A. undertakes to provide basic training program covering the use of the AMADEUS products for marketing, offering and promoting purposes, and initial training materials, to petitioner to facilitate the introduction of the same products—this shows that in conducting the said basic training program, Amadeus IT Group S.A.'s products will be further promoted in the Philippines.

With the foregoing indications of the active pursuit and participation of Amadeus IT Group S.A. in its business operation in the Philippines, it would be blatantly erroneous to rule that the income generated therefrom is merely passive income.

The BIR Rulings being invoked cannot be applied to the instant case.

Petitioner invokes BIR ITAD Ruling Nos. 191-15, 182-15, 153-13, and 147-13, which granted tax treaty reliefs for non-residents deriving some form of income from the Philippines as a result of certain transactions similar with the subject transaction.

We disagree with petitioner.

The said BIR ITAD Rulings, individually or collectively, are not in all-fours with the instant case. There is no showing, in the said Rulings, that when a foreign corporation is actively pursuing and performing certain acts in the Philippines, like in the case of Amadeus IT Group S.A. herein, the foreign corporation may still be deemed as not doing business in the Philippines, and the income generated therefrom may still be considered as passive income.

Furthermore, it is noteworthy that the said BIR ITAD Rulings involve the application and interpretation of certain tax treaties, namely, the Philippines-UK tax treaty,[7] the Philippines-Singapore tax treaty,[8] the Philippines-Japan tax treaty,[9] and the Philippines-Switzerland tax treaty.[10] These tax treaties, however, are limited in scope or application, as respectively stated therein, to wit:

<u>Article 1 (Personal Scope), Philippines-United Kingdom</u>

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[7] Formally known as the "CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION <u>WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS</u>". *(Underscoring supplied)*

[8] Formally known as the "CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE REPUBLIC OF SINGAPORE FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION <u>WITH RESPECT TO TAXES ON INCOME</u>". *(Underscoring supplied)*

[9] Formally known as the "CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION <u>WITH RESPECT TO TAXES ON INCOME</u>". *(Underscoring supplied)*

[10] Formally known as the "CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION <u>WITH RESPECT TO TAXES ON INCOME</u>". *(Underscoring supplied)*

(UK) tax treaty:
"This Convention **shall apply to persons who are residents of one or both of the Contracting States.**" *(Emphasis and underscoring supplied)*

Article 1 (Personal Scope), Philippines-Singapore tax treaty:
"This Convention **shall apply to persons who are residents of one or both of the Contracting States.**" *(Emphasis and underscoring supplied)*

Article 1, Philippines-Japan tax treaty:
"This Convention **shall apply to persons who are residents of one or both of the Contracting States.**" *(Emphasis and underscoring supplied)*

Article 1 (Personal Scope), Philippines-Switzerland tax treaty:
"This Convention **shall apply to persons who are residents of one or both of the Contracting States.**" *(Emphasis and underscoring supplied)*

In other words, the provisions of the said tax treaties cannot be universally applied. Specifically, the provisions of the foregoing tax treaties may only be invoked by residents of the said Contracting States, since the same are applicable to them. In this case, it is never established that Amadeus IT Group S.A. is a resident of the UK, Singapore, Japan, or Switzerland. Thus, the said BIR ITAD Rulings cannot be relied upon by petitioner, nor can be availed of by Amadeus IT Group S.A.

But even granting that it can be shown that Amadeus IT Group S.A. is a resident of any or all the said countries, the same is still of no moment. This is because the above-stated tax treaties are not only limited in personal scope, but also that the taxes that are covered thereby are limited to income taxes, as shown in their respective titles[11] and the following provisions, to wit:

Article 1 (Personal Scope), Philippines-UK tax treaty:
"1. The taxes which are the subject of this Convention are:

a) in the United Kingdom of Great Britain and Northern

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[11] *Supra.*

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Ireland:
(i) the income tax;
(ii) the corporation tax; and
(iii) the capital gains tax;

b) in the Philippines:

the income tax imposed by the Government of the Republic of the Philippines except the tax on gross billings in respect of international carriers (Section 24, Paragraph (b), sub-paragraph (2), Internal Revenue Code)." *(Emphasis and underscoring supplied)*

Article 2 (Taxes), Philippines-Singapore tax treaty:
"1. This Convention **shall apply to taxes on income imposed on behalf of each Contracting State, irrespective of the manner in which they are levied**." *(Emphasis and underscoring supplied)*

Article 2, Philippines-Japan tax treaty:
"1. The taxes which are the subject of this Convention are:

c) In the case of Japan, the income tax and the corporation tax (hereinafter referred to as 'Japanese tax'); and

d) In the case of the Philippines, **the Philippine income tax** (hereinafter referred to as 'Philippine tax')." *(Emphasis and underscoring supplied)*

Article 2 (Taxes Covered), Philippines-Switzerland tax treaty:
"1. This Convention **shall apply to taxes on income imposed on behalf of each Contracting State, irrespective of the manner in which they are levied**." *(Emphasis and underscoring supplied)*

It must be remembered that the tax that is being applied in the instant case is the VAT, not income tax.

More importantly, the concept of "permanent establishment", as respectively stated in the said tax treaties, cannot take the place of the principle of the phrase "doing business" in the Philippines as

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embodied in our domestic laws, and as the latter principle is being applied to this case. The said concept of "permanent establishment", as applied in the subject BIR ITAD Rulings, is rooted on the purpose for which tax treaties are entered into by the Government of the Philippines. In *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., et al.*,[12] the Supreme Court identified the purpose of tax treaties, *viz*:

> "The RP-US Tax Treaty is just one of a number of bilateral treaties which **the Philippines has entered into <u>for the avoidance of double taxation</u>. The purpose of these international agreements is to reconcile the national fiscal legislations of the contracting parties in order <u>to help the taxpayer avoid simultaneous taxation in two different jurisdictions</u>.** More precisely, **the tax conventions are drafted with a view toward <u>the elimination of international juridical double taxation</u>**, 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. xxx." *(Emphases and underscoring supplied)*

Such purpose of tax treaties is not being considered in the instant case. No international juridical double taxation is being prevented here. *Cessante ratione legis, cessat et ipsa lex* (The reason for the law ceasing, the law itself also ceases).[13]

Lest it be forgotten, the purpose for the determination of whether Amadeus IT Group S.A. is doing business in the Philippines is related to the resolution whether petitioner's sales may be subject to the zero-percent (0%) VAT rate under Section 108(B)(2) of the NIRC of 1997, as amended. Nothing more.

Hence, petitioner's invocation of BIR ITAD Ruling Nos. 191-15, 182-15, 153-13, and 147-13 is misplaced.

In sum, this Court finds no cogent reason to deviate from the previous ruling that petitioner is not entitled to refund.

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[12] G.R. No. 127105, June 25, 1999.

[13] *People of the Philippines vs. Plateros, et al.*, G.R. No. L-37162, May 30, 1978; *People of the Philippines vs. Fronda, et al.*, G.R. No. L-26551, February 27, 1976.

WHEREFORE, premises considered, petitioner's *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(I maintain my Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice