REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EB No. 845 (C.T.A. CASE NO. 6907)
	Present:
- versus -	DEL ROSARIO, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
AT & T COMMUNICATIONS SERVICES PHILIPPINES, INC., Respondent.	Promulgated: MAY 27 2013 CaApolinario 2:10 p.m.

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DECISION

***Fabon-Victorino, J.*:**

This Petition for Review filed by the Commissioner of Internal Revenue prays for the reversal of the Amended Decision dated August 9, 2011, which granted respondent's claim for refund of unutilized input VAT attributable to zero-rated sales for the year 2002 in the amount of P1,785,242.87, and the subsequent Resolution of October 6, 2011, which denied her Motion for Reconsideration, both rendered by the Court in Division.

The following facts remain undisputed:

Petitioner is the Commissioner of the Bureau of Internal Revenue (BIR), authorized to act on claims for refund or tax credit of excess or unutilized input VAT, with office address at the 4th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent, on the other hand, is a duly organized and existing domestic corporation with principal place of business at the 18th floor, BA-Lepanto Building, 8747 Paseo de Roxas, Makati City. It is principally engaged in the business of rendering information, promotional, supportive and liaison services, particularly to Subic Bay Freeport Enterprises and AT&T Communications Services International, Inc. (AT&T-US), AT&T Solutions, Inc. (AT&T-SI), and to its other affiliates, which are all non-resident foreign corporations not engaged in trade or business in the Philippines. It is a registered VAT taxpayer with Taxpayer Identification No. 050-004-519-384.

On January 1, 1999, respondent entered into a Service Agreement with AT&T-US whereby compensation for its services would be paid in US Dollars.

On July 21, 1999, respondent executed an Assignment Agreement with AT&T-SI for its services also to be paid in US Dollars. Part of such agreement was for respondent to render services to Acer Information Products (Philippines), Inc., a Subic Bay Freeport Enterprise to be paid in US Dollars to be inwardly remitted to the Philippines by AT&T Singapore acting as collecting agent.

Subsequently, respondent filed with the BIR its Quarterly VAT Returns and Amended Quarterly Returns for the year 2002 on the following dates:

Period (2002)	Exhibit	Date of Filing
1st Quarter	D	April 17, 2002
2nd Quarter	G	July 9, 2002
3rd Quarter	J	October 24, 2002
4th Quarter	L	January 27, 2003

For the year 2002, respondent paid input VAT of P2,836,770.71 on its domestic purchases of capital goods and other taxable goods and services, and importation of capital goods in the amount of P28,367,712.52. Also in 2002, respondent generated and recorded zero-rated sales from services rendered, in the aggregate amount of P56,898,744.05, which was paid in US Dollars inwardly remitted in accordance with existing rules and regulations of the Bangko Sentral ng Pilipinas (BSP). Respondent applied the input VAT of P2,836,770.71, against its output VAT of P786,034.02, thus an excess of unutilized input VAT of P2,050,736.69 resulting in an excess and unutilized input VAT of P2,050,736.69. This excess input VAT was not applied nor carried over to any succeeding quarter(s) and were supported by corresponding documents as follows:

Taxable Quarter	Total Domestic Purchases	Input VAT Payment	Zero-rated Sales	Domestic Sales of Taxable Services	VAT Output Tax Due
1st (Exhs. E & F)	P11,828,776.24	P1,182,877.71	P19,613,455.23	P3,351,504.85	P335,153.29
2nd (Exhs. H & I)	5,042,780.90	504,278.14	9,120,971.54	1,031,147.98	103,025.36
3rd (Exh. K)	4,325,645.55	432,561.67	12,351,060.35	1,406,553.58	140,656.23
4th (Exh. M)	7,170,509.82	717,053.19	15,813,256.93	2,071,960.22	207,199.14
	P28,367,712.51	P2,836,770.71	P56,898,744.05	P7,860,166.63	P786,034.02

Total Input VAT Payment	P2,836,770.71
Total Output VAT Due	(786,034.02)
Excess and unutilized Input VAT	P2,050,736.69

Since the entire amount of unutilized input VAT for calendar year 2002 could not be directly and exclusively attributed to either of its zero-rated sales or its domestic sales, an allocation was made to determine the input VAT on its zero-rated sales. Out of total unutilized input VAT of P2,050,736.69 only P1,801,826.82 pertained to respondent's allowable input VAT attributable to its zero-rated sales of services, computed as follows.

$$\frac{\text{Domestic Sales}}{\text{domestic sales}} \times \text{Total unutilized VAT input taxes} = \text{input taxes allocated to Total Sales}$$

Thus,

$$\frac{P7,860,166.62}{P64,758,910.67} \times P2,050,736.69 = P248,909.87$$

Then,

Total unutilized input VAT	P2,050,736.69
Less: input VAT allocated to domestic sales	248,909.87
Allowable input VAT attributable to zero-rated sales	P1,801,826.82

On March 26, 2004, respondent applied for refund and/or tax credit of its alleged unutilized input VAT for calendar year 2002. However, petitioner did not act on the claim. Some five (5) days thereafter or on March 31, 2004, respondent filed a Petition for Review with the Court in Division.

On February 23, 2007, the Court in Division denied the Petition for Review for lack of substantiation. It was ruled that the sales invoices presented by respondent failed to prove its zero-rated sales of services. Under Sections 106(A) and (D)(1), and Sections 108(A) and (C) of the National Internal Revenue Code (NIRC) official receipts must be presented to satisfy the requirement. The ruling was effectively sustained when the Court in Division denied respondent's Motion for Reconsideration in the Resolution of June 19, 2007.

Respondent elevated the adverse Decision with the Court *En Banc* which the appeal in its February 18, 2008 Decision. In the Resolution dated April 2, 2008, the Court *En Banc* denied respondent's Motion for Reconsideration.

Resolute, respondent elevated the case to the Supreme Court on certiorari, docketed as G.R. No. 182364.

In a Decision dated August 3, 2010, the Supreme Court reversed the CTA Court *En Banc* ruling that both Sections 110 and 113 of the Tax Code do not create a distinction between a sales invoice and an official receipt. Provided that the requirements under Sections 113 and 237 of the Tax Code are met, the claim for refund/tax credit may be substantiated by either sales invoices or official receipts. The Supreme Court held that respondent "has complied with the substantiation requirements to prove entitlement to refund/tax credit." Be that as it may, the Supreme Court remanded the case to the First Division of the Court for computation and determination of the amount for refund or tax credit. The Decision became final and executory on August 26, 2010.

In the Amended Decision dated April 20, 2011, the CTA Special First Division once again denied respondent's judicial claim for refund/tax credit for lack of substantiation. The Special First Division, instead of merely determining the amount for refund/tax credit as instructed by the Supreme Court in its Decision dated August 3, 2010, considered the subsequent decision of the High Court in the case of *Kepco Philippines Corporation vs. Commissioner of Internal Revenue (Kepco).*[1]

The said *Kepco* case differentiated a receipt from an invoice and held that a VAT invoice is necessary for every sale, barter or exchange of goods or properties while a VAT official receipt properly pertains to every lease of goods or properties, and for every sale, barter or exchange of services. In other words, a VAT invoice is the seller's best proof of the sale of the goods or services to the buyer while the VAT official receipt is the buyer's best evidence of the payment of goods or services received from the seller. The law does not intend the two to be used alternatively or interchangeably. In view thereof, the Special First Division maintained that the VAT invoices presented by petitioner are insufficient proof of its zero-rated sales of services, which must be substantiated by VAT official receipts.

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[1] G.R. No. 181858, November 24, 2010.

On reconsideration, the Special First Division reversed itself and issued the Amended Decision of August 9, 2011 in favor of respondent, directing petitioner "to refund or, in the alternative, to issue a tax credit certificate in favor of (respondent) in the reduced amount of ONE MILLION SEVEN HUNDRED EIGHTY FIVE THOUSAND TWO HUNDRED FORTY-TWO PESOS AND 87/100 (P1,785,242.87) representing unutilized input VAT attributable to zero-rated sales of services for the first to fourth quarters of taxable year 2002."

In the Amended Decision of August 9, 2011, the Special First Division of the Court found merit in respondent's argument that the Supreme Court Decision of August 3, 2010 in G.R. No. 182364 holding that there is no distinction between a VAT receipt and a VAT invoice, has become final and executory and that has become the law of the case. In view thereof, the subsequent ruling of the High Court in the recent *Kepco* case which held that a VAT invoice cannot be used interchangeably with a VAT receipt, is not binding and cannot be applied to respondent's case.

Aggrieved, petitioner moved for a reconsideration of the adverse decision which the Special First Division denied for lack of merit on October 6, 2011.

Hence, the instant Petition for Review.

Petitioner invokes Section 112 of the NIRC, as amended, which provides that respondent has 120 days from the date of submission of complete documents to act on the claim for refund and 30 days thereafter without any action, to elevate the matter to the CTA. According to respondent, the observance of the 120 day period is mandatory and jurisdictional as ruled in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia.*[2]

Petitioner elaborates that respondent filed its administrative claim for refund on March 26, 2004. Thus,

[2] G.R. No. 184823, October 6, 2010.

petitioner had 120 days or until July 25, 2004 to act on the claim. Thereafter, respondent had 30 days or until August 24, 2004 to file an appeal with the CTA. Respondent however did not wait for the lapse of the 120 day period and prematurely rushed to the Court on March 31, 2004, depriving petitioner of the opportunity act in her level. Since there was no inaction deemed as a denial of the claim for refund, there was nothing to appeal to this Court pursuant to Section 7(a)(2) of Republic Act No. 1125, as amended. In view thereof, the Court in Division had no jurisdiction to entertain the appeal. The CTA, being a court of special jurisdiction, can take cognizance only of matters that are clearly within its jurisdiction.

Petitioner adds that lack of jurisdiction as a defense can be raised at any time, even on appeal. Moreover, it is not covered by Section 9 of the Rules of Court which states that all defenses and objections, except lack of jurisdiction, must be pleaded in a motion to dismiss or in the answer, otherwise they are deemed waived. Jurisdiction is conferred by law, and the lack of it affects the very authority of the court to take cognizance of and to render judgement on the matter.

By way of comment, respondent points out that the Decision dated August 3, 2010 in G.R. No. 182364 rendered by the Supreme Court pertaining to this case, has already become final and executory. As such, by virtue of the doctrine of *res judicata*, the ruling in the said Decision has become immutable, and cannot subsequently be modified, even by later cases rendered by the High Court itself. And since the said Decision of August 3, 2010 has become final and executory, the ruling therein has become the law of the case which cannot be affected nor altered by any subsequent ruling, even including those rendered by the Supreme Court itself in other cases. Thus, as directed by the Supreme Court, the Special First Division needed only to compute the amount of respondent's refund.

Per respondent, the principle laid down in the case of *Commissioner of Internal Revenue vs. Aichi Forging*

Company of Asia (Aichi),[3] declaring that the 120-day period under Section 112 of the NIRC is mandatory and jurisdictional, has no bearing and finds no application to the instant case.

Had the Supreme Court intended to strictly apply the 120-day period pursuant to Section 112 as ruled in the *Aichi* case, then it would have easily dismissed the Petition filed by respondent in G.R. No. 182364, but it did not.

The foregoing treatment of Section 112 is more in accord with the jurisprudence prevailing at the time of the filing of the instant claim for refund, as stated in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue.* In the said *Atlas case*, the Supreme Court ruled that pursuant to Section 229 of the NIRC, both the administrative and judicial claims for refund of input VAT are deemed timely instituted if both were filed within two years from the close of the taxable quarter when the relevant sales were made.

Further, the failure to comply with the 120-day period under Section 112 of the NIRC only amounts to non-exhaustion of administrative remedies which is not jurisdictional and merely renders the action premature for lack of cause of action. As such, this defense can be waived upon failure of a party to invoke the same at the earliest possible time pursuant to Section 1, Rule 9 of the Rules of Court which provides that defenses and objections not pleaded in a motion to dismiss or in the answer are deemed waived.

Also significant is the fact that petitioner never raised this issue of premature filing of the petition both in the Division and in the *En Banc.* Not even with the Supreme Court. That being the case, petitioner is deemed to have waived this defense pursuant to Section 1, Rule 9 of the Rules of Court.

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[3] G.R. No. 184823, October 6, 2010.

Petitioner is also estopped from questioning the jurisdiction of the Court to act on respondent's claim for refund. Petitioner actively participated in the proceedings before the Court in Division and *En Banc* without raising the issue of the prematurity of filing of the petition. The same was true when the case was remanded to the Court's Special First Division. By allowing the case to be submitted anew for decision without raising the issue of prematurity, petitioner is already estopped from invoking the same at this stage in the proceedings.

Significantly, the BIR had issued regulations and circulars which categorically declared that a taxpayer need not wait for the lapse of the 120-day period mandated under Section 112 of the NIRC on condition that both the administrative and judicial claims are filed within the two-year prescriptive period as provided under Section 229 of the NIRC. Among these regulations and circulars are Section 4.104-2 of Revenue Regulations (RR) No. 7-95, Revenue Memorandum Circular (RMC) No. 42-99, RMC No. 42-2003 as amended by RMC No. 49-2003, RMC No. 29-2009, and BIR Ruling [DA-489-03] dated December 10, 2003. It is violative of the principles of fair play that petitioner is allowed to contradict her previous pronouncements and use the same against the very taxpayers who relied on them.

Also granting that petitioner may still question the jurisdiction of the Court at this late stage of the proceedings, the non-observance of the 120/30 day period in Section 112 does not make the judicial claim dismissible. The prevailing jurisprudence at the time of the filing of the instant claim held that the 120-day period for petitioner to act on the claim for refund is neither mandatory nor compulsory, thus may be dispensed with provided that both the administrative and judicial claims are filed within the two-year prescriptive period under Section 229 of the Tax Code.

Further, the 30 day period to appeal is merely directory and is not meant to supersede the two-year prescriptive period to seek judicial recourse as provided under Section 229 of the NIRC. The legislative history of the amendment of Section 112 of the Tax Code even supports its contention that the 120/30 day period was never intended to supplant the two-year prescriptive period under Section 229 of the same Code.

Finally, unlike Section 229, Section 112(C) is silent on the legal consequences of the failure to comply with the 120/30 day period, showing its permissive or directory nature. On the other hand, Section 229 expressly and categorically bars any claim for refund initiated beyond the two-year prescriptive period.

THE RULING OF THE COURT

Of paramount consideration is the fact that the instant case has been elevated on certiorari before the Supreme Court whose Decision of August 3, 2010 became final and executory, as early as August 26, 2010, per Entry Of Judgment.

The pertinent portion of the said Decision dated August 3, 2010, states, as follows:

> IN FINE, the Court finds that petitioner has complied with the substantiation requirements to prove entitlement to refund/tax credit. The Court is not a trier of facts, however, hence the need to remand the case to the CTA for determination and computation of petitioner's refund/tax credit.
>
> WHEREFORE, the petition is GRANTED. The Decision of February 18, 2008 of the Court of Tax Appeals *En Banc* is REVERSED and SET ASIDE. Let the case be REMANDED to the Court of Tax Appeals

> First Division for the determination of petitioner's tax credit/refund.
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> SO ORDERED.

To repeat, the Supreme Court directive has long become final and executory, therefore, it has become immutable and free from the vices of change. The case was remanded to the Court of origin only for the sole purpose of determining the amount for refund or tax credit. In fine, the Supreme Court has already resolved the issue of respondent's entitlement to refund/tax credit and only the mathematical computation of the amount due for refund/tax credit is left for the Court in Division to determine. No more, no less. In fact, the Supreme Court has categorically declared that respondent has established its entitlement to the relief sought. Thus, the Court in Division needs only to compute what is due on the basis of the evidence - i.e. sales invoices – presented, thereafter direct petitioner to refund respondent with the said amount.

The Supreme Court decision has attained finality and its ruling became the law of the case, whether or not said decision is erroneous. Having been rendered by a court of competent jurisdiction acting within its authority, the judgment may no longer be altered even at the risk of legal infirmities and errors it may contain.[4]

The *law of the case* doctrine applies in a situation where an appellate court has made a ruling on a question on appeal and thereafter remands the case to the lower court for further proceedings; the question settled by the appellate court becomes the *law of the case* at the lower court and in any subsequent appeal.[5]

Whatever is once irrevocably established as the controlling legal rule or final decision between the same parties in the same case continues to be the law of the case,

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[4] Banco De Oro-Epci, Inc. (Formerly Equitable PCI Bank) vs. John Tansipek, G.R. No. 181235, July 22, 2009.
[5] Eloisa L. Tolentino, vs. Atty. Roy M. Loyola, et al., All From Carmona, Cavite, G.R. No. 153809, July 27, 2011.

whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts of the case before the court, [6] as in the case at bar. Thus, the declaration in favor of respondent continues to hold. Reasons of public policy, judicial orderliness and economy require such stability in the final judgments of courts or tribunals of competent jurisdiction.[7]

As the Final Arbiter of all legal questions properly brought before it, a decision by the High Court in any given case constitutes the law of that particular case, from which there is no appeal.[8]

Equally applicable is the legal tenet that litigation must end and terminate sometime and somewhere, and it is essential for an effective and efficient administration of justice that, once a judgment has become final, the winning party be not deprived of the fruits of the verdict.[9]

Also by tradition and in our system of judicial administration, the Supreme Court has the last word on what the law is; it is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.[10]

Finally, even if the Court will erroneously ignore all the foregoing well-established principles, still the instant Petition must fail in view of the ruling in the recent case of *Commissioner of Internal Revenue vs. San Roque Power Corporation (San Roque)* [11] where the Supreme Court

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[6] Clement L. Cucueco vs. Court of Appeals, Golden "L" International, Orlando Lapid, Francisco Lapid, Diosdado Lapid, Lea Productions, Inc., and Emilia S. Blas, G.R. No. 139278, October 25, 2004.

[7] Adelaida Escobar and Lolita Escobar vs. Ligaya Oligario Luna, Clarita Luna, Emma Luna, Teresita Ambrosio Luna, Omer Luna, Efren Luna, Patria Luna, Pinky Luna, and Pacquing and Portia Luna As Heirs Of Deceased Clodualdo Luna, G.R. NO. 169204, March 23, 2007.

[8] Mayor Anwar Berua Balindong, Lt. Col. Jalandoni Cota, Mayor Amer Oden Balindong, Ali Balindong and Hon. Hernando Perez as Secretary of Justice, vs. The Hon. Court Of Appeals and Zenaida Limbona, G.R. No. 159962, December 16, 2004.

[9] 3rd Alert Security and Detective Services, Inc. vs. Carpio, (Chairperson), Brion, Perez, Sereno, and Reyes, JJ. Romualdo Navia, G.R. No. 200653, June 13, 2012.

[10] Commissioner of Internal Revenue vs. Michel J. Lhuillier Pawnshop, Inc., G.R. No. 150947, July 15, 2003.

[11] Commissioner of Internal Revenue vs. San Roque Power Corporation, G.R. No. 187485; Taganito Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 196113; Philex Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 197156, February 12, 2013.

enriched the jurisprudence by declaring as follows:

> To repeat, a claim for tax refund or credit, like a claim for tax exemption, is construed strictly against the taxpayer. One of the conditions for a judicial claim of refund or credit under the VAT System is compliance with the 120+30 day mandatory and jurisdictional periods. Thus, strict compliance with the 120+30 day periods is necessary for such a claim to prosper, whether before, during, or after the effectivity of the *Atlas* doctrine, except for the period from the issuance of BIR Ruling No. DA-489-03 on 10 December 2003 to 6 October 2010 when the *Aichi* doctrine was adopted, which again reinstated the 120+30 day periods as mandatory and jurisdictional.
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> x x x x x x x x x
>
> BIR Ruling No. DA-489-03 does provide a valid claim for equitable estoppels under Section 246 of the Tax Code. BIR Ruling No. DA-489-03 *expressly* states that the "taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA by way of Petition for Review." Prior to this ruling, the BIR held, as shown by its position in the Court of Appeals, that the expiration of the 120-day period is mandatory and jurisdictional before a judicial claim can be filed.
>
> There is no dispute that the 120-day period is mandatory and jurisdictional, and that the CTA does not acquire jurisdiction over a judicial claim that is filed before the expiration of the 120-day period. There are, however, two exceptions to this rule. The first exception is if the Commissioner, through a specific ruling, misleads a particular taxpayer to prematurely file a

> judicial claim with the CTA. Such specific ruling is applicable only to such particular taxpayer. The second exception is where the Commissioner, *through a general interpretative rule* issued under Section 4 of the Tax Code, misleads all taxpayers into filing prematurely judicial claims with the CTA. In these cases, the Commissioner cannot be allowed to later on question the CTA's assumption of jurisdiction over such claim since equitable estoppels has set in as expressly authorized under Section 246 of the Tax Code.
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> x x x x x x x x x
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> Clearly, BIR Ruling No. DA-489-03 is a general interpretative rule. Thus, all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on 10 December 2003 up to its reversal by this Court in *Aichi* on 6 October 2010, where this Court held that the 120+30 day periods are mandatory and jurisdictional. x x x BIR Ruling No. DA-489-03 allowed premature filing of a judicial claim, which means non-exhaustion of the 120-day period for the Commissioner to act on an administrative claim.

Clear as a day that the instant claim for refund falls squarely within the exception. Respondent filed its administrative claim for refund on March 26, 2004. Only five (5) days later, or on March 31, 2004, it filed its judicial claim via a Petition for Review with this Court.

Indeed, respondent is shielded by the ruling in the *San Roque* case. Its failure to exhaust administrative remedies is clearly covered by the exception under BIR Ruling No. DA-489-03 issued on December 10, 2003, which states that the taxpayer-claimant need not wait for the lapse of the 120-day period before it could seek judicial relief with the CTA. By virtue of BIR Ruling No. DA-489-03, petitioner is clearly estopped from invoking the defense of the prematurity of the filing of the judicial claim by respondent. On account of the foregoing, respondent is deemed to have seasonably filed its Petition for Review with the Court in Division which consequently acquired jurisdiction over the case.

WHEREFORE, the Petition for Review dated November 11, 2011 filed by petitioner Commissioner of Internal Revenue, is hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
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