REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

LUBWELL CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 143
(C.T.A. Case No. 6609)

Present:

Acosta, P.J.,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.:

Promulgated:

MAR 0 7 2007

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D E C I S I O N

CASTAÑEDA, JR., *J.:*

A BIR ruling rendered under a delegated authority cannot expand a ruling of first impression under the same principle that a spring cannot rise above its source.

STATEMENT OF THE CASE

Before us is a Petition for Review assailing the Decision dated July 4, 2005 and the subsequent Resolution dated November 15, 2005, both issued by the Second Division of the Court ("Court in Division"). The Court in Division affirmed the findings of the respondent on the liability of petitioner to pay unpaid excise taxes and deficiency interest for taxable year 1998 arising from its possession of petroleum products but reduced petitioner's liability for surcharge to twenty-five percent (25%). Hence, the Court in Division ordered petitioner to pay the respondent the reduced amount of P84,130,394.80 plus 20% delinquency interest from January 10, 2003 until the same is fully paid.

On April 4, 2006, this case was raffled for study and report to Associate Justice Lovell R. Bautista. In the deliberations of this case, Justice Bautista expressed his opinion that the assailed Decision and Resolution of the Second Division of this Court should be reversed on the following grounds:

- The manufacturer, TWA, Inc., being a duly registered Countryside and Barangay Business Enterprise (CBBE) under Republic Act No. 6810 is exempt from excise taxes imposed under Section 148 of the 1997 Tax Code; and

- Petitioner is exempt from payment of the excise taxes because of BIR Ruling No. DA-291-99 dated May 13, 1999 issued to TWA, Inc.

Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova concurred with the opinion of Associate Justice Bautista.

However, Associate Justice Juanito C. Castañeda, Jr., Associate Justice Erlinda P. Uy, and Associate Justice Olga Palanca-Enriquez voted to affirm the assailed Decision on the following grounds:

- Petitioner failed to prove that it is only an agent of TWA, Inc.;

- Petitioner as the owner or possessor of the petroleum products is liable for the excise taxes pursuant to Sec. 130 of the 1997 National Internal Revenue Code (NIRC);

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- BIR Ruling No. DA-291-99 is not a ruling of first impression and was issued in gross violation of par. b of Section 7 of the 1997 NIRC.; and

- Taxation is the rule and exemption is the exception. Petitioner failed to overcome the burden of proof that the legislature intended to exempt him by words too plain to be mistaken.

Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9282, requires the affirmative votes of four (4) members of the Court *en banc* for the rendition of a decision or resolution. Considering that the required number of votes was not obtained in this case, the appealed Decision shall stand AFFIRMED, pursuant to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA) which provides as follows:

> SEC. 3. *Court en banc; quorum and voting.* – The presiding justice or, in his absence, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of four justices of the Court shall constitute a quorum for its session *en banc*. The presence at the deliberation and affirmative vote of four justices of the Court *en banc* shall be necessary for the rendition of a decision or resolution on any case or matter submitted for its consideration. **Where the necessary majority vote cannot be had,** the petition shall be dismissed; **in appealed cases, the judgment or order appealed from shall stand affirmed;** and on all incidental matters, the petition or motion shall be denied.
>
> **No decision of a Division of the Court may be reversed or modified except by the affirmative vote of four justices of the Court *en banc* acting on the case.**
>
> Interlocutory orders or resolutions shall be acted upon by majority vote of the justices present constituting a quorum. *(Emphasis supplied)*

In view of the foregoing considerations, Associate Justice Baustista, who was originally the *ponente* of this case, was instead tasked to write the

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Dissenting Opinion and Associate Justice Castañeda, Jr. became the *ponente* of the Majority Opinion.

STATEMENT OF THE FACTS

The facts as found by the Court in Division are as follows:

> Petitioner is a corporation organized and existing under the laws of the Republic of the Philippines, with business address at Unit 96 Columbia Tower, Ortigas Avenue, Mandaluyong City, Metro Manila. On the other hand, respondent is the Commissioner of Internal Revenue, duly appointed and empowered to perform the duties of his office, including, among others, the power to decide, cancel and abate tax liabilities, with office address at the BIR National Office Building, East Triangle, Diliman, Quezon City, Metro Manila.
>
> As stipulated, petitioner is not a manufacturer of petroleum products, and its primary purpose is to engage in, conduct, and carry on the business of buying, selling, distributing, marketing at wholesale and retail insofar as may be permitted by law, all kinds of goods, commodities, wares and merchandise of every kind and description; to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale or retail and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products whether natural or artificial. Hence, its activities do not fall within the ambit of Section 148 of the Tax Code.
>
> Records show that respondent, through its authorized officer, issued Letter of Authority No. 00005677 dated June 1, 1999 to petitioner for the examination of its books of accounts and other accounting records for the taxable year 1998 as part of a routine verification for internal revenue purposes conducted by the Bureau of Internal Revenue. This served as first notice for petitioner to present its records and other documents necessary for the audit.
>
> A Second Request for Presentation of Records dated July 20, 2000 was issued due to failure of petitioner to present all the documents and records listed in respondent's First Notice, and subsequently, a Final Request was issued for the Presentation of Records dated March 8, 2001, which appears to have been received by the latter on March 12, 2001.
>
> Thereafter, Assistant Commissioner Percival T. Salazar of the Enforcement Division of the Bureau sent a Letter dated December 3, 2001 informing petitioner that the examination of books of accounts and other accounting records had been reassigned to the Policy Cases

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Division for the purpose of continuation of audit, and petitioner was requested to extend all necessary assistance to the named revenue officers therein for the early completion of audit.

The investigating team of the Policy Cases Division submitted its Memorandum dated June 6, 2002 to the Chief of the Tax Fraud Division recommending that the case be referred to the Tax Fraud Division for further investigation based on the following findings:

> '1. TWA, INC., an affiliate of Lubwell, requested for rulings that it was a Country and Baranggay Enterprise (CBBE). However, it failed to disclose the following requirement of Kalakalan 20;
>
> Assets, at the time of registration as CBBE, do not exceed Five Hundred Thousand Pesos (P500,000.00) **before financing** [Section 2 (b)];
>
> Query — [Can] TWA, INC., being a CBBE, [sic] afford to put up MILLIONS of pesos in order to manufacture aviation fuel or jet fuel or import raw materials for such production?
>
> We believe that TWA, INC., was used as an instrument in order to circumvent the tax laws. TWA, INC. was also controlled by Mr. Ramon F. Villavicencio. At present, Mr. Villavicencio controls Asiaoil Corporation, Filpride Resources, Inc., and Filpride Energy Corp.
>
> It is a basic principle in Corporation Law that the **'veil of corporate entity must be pierced'** when it was used to *evade taxes*. (Laguna Trans. Co. Inc. v SSS 107 Phil 833).
>
> 2. Based on the facts presented below, subject taxpayer may have used two sets of books by using three sales invoices that **overlapped** as far as series are concerned. In 1998, Lubwell had an address at Room 103 Ding Velayo Sports Center, Domestic Road, Pasay City. Its printer, Rodan Printers, printed 60 booklets 50 x 5 (5251-8250) and 50 booklets (5251-7750) BIR permit number 5211-167 dated December 27, 1996 and 20 booklets 50 x 5 (7501-8500) **with same BIR permit numbers 5211-167** dated March 17, 1998.
>
> 3. Examples of duplication of invoices are the following:
>
> > a. Sales Invoice issued to Grand International Airways on January 5, 1998 amounting to P231,374.46 with invoice number 7611 issued to PLDT on the same date amounting to P15,449.60 was not recorded in the Sales Book;
> >
> > b. Sales Invoice issued to SEAIR on January 5, 1998 amounting to P48,099.60 with invoice number 7612

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> did not appear in the Sales Book; while the same invoice number 7612 issued to Corporate Air on the same date amounting to P16,541.33 was also recorded in the Sales Book.
>
> These are prima facie evidences of fraud.'

Subsequently, on September 16, 2002, petitioner's counsel received a "Notice To Taxpayer" dated September 10, 2002 and was informed of its deficiency excise tax liabilities in the amount of NINETY FOUR MILLION THREE HUNDRED NINETY THOUSAND ONE HUNDRED NINETY NINE PESOS AND FIVE CENTAVOS (P94,390,199.05). On October 14, 2002, petitioner received an undated Preliminary Assessment Notice ("PAN") from the respondent with attached Details of Discrepancy. Consequently, petitioner filed its Protest Letter dated October 28, 2002, alleging among others, that it is not subject to excise tax because the manufacturer of the petroleum products, TWA Inc. is exempt from payment of taxes and it is a mere marketing arm of said manufacturer.

Upon recommendation of the investigation team, petitioner received on December 11, 2002, an undated Formal Assessment Notice ("FAN") No. TRD-98-XS-070-02 for deficiency excise taxes in the total amount of NINETY FOUR MILLION THREE HUNDRED NINETY THOUSAND ONE HUNDRED NINETY NINE AND FIVE CENTAVOS (P94,390,199.05), Philippine Currency, inclusive of surcharge and interest, for the taxable year 1998.

The deficiency assessment for excise taxes was broken down as follows:

	Amount
Total Volume in Liter	11,182,347.95
Excise Tax Rate [Sec. 148(g)]	3.67
Excise Tax Due	P41,039,216.98
Less: Excise Tax Paid	0.00
Deficiency Excise Tax – Basic	P41,039,216.98
Add: 50% Surcharge for willful neglect to file the return w/in the period prescribed [Sec. 248 (B) & Sec. 222 (a)]	20,519,608.49
20% Interest (Sec 249) (12.31.98-12.31.02)	32,831,373.58
TOTAL AMOUNT DUE	P94,390,199.05

Petitioner filed its Formal Protest of Assessment No. TRD-98-L-6-070-02 on January 9, 2003 with the Office of the Assistant Commissioner, Enforcement Service, Bureau of Internal Revenue. On February 10, 2003, petitioner received respondent's Letter dated January 17, 2003 denying the protest and reiterating its assessment for deficiency excise taxes.

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Consequently, petitioner filed a Petition for Review with the Court in Division on March 10, 2003. It argued that the liability for the payment of excise tax under Section 148(a) of the 1997 Tax Code is imposed on the manufacturers or producers of petroleum products, and the same is to be paid before removal thereof from the place of production. Since petitioner is neither a manufacturer nor producer of petroleum products, it is not liable for the 5% excise tax. In addition, petitioner contended that the manufacturer of the petroleum products which it sold is TWA, Inc., a tax-exempt entity for being a "Kalakalan 20" Enterprise or Countryside and Barangay Business Enterprise ("CBBE") pursuant to Section 3 of Republic Act No. 6810 ("R.A. 6810").[1] By virtue of an Agency Agreement executed on December 15, 1995 between TWA, Inc. and herein petitioner, the latter became the marketing arm of the former, and as such, it is also tax-exempt.

Disputing petitioner's claim, the respondent asserted that although TWA, Inc.'s registration as a CBBE enterprise exempts it from the payment of excise tax, the same does not extend to petitioner as its marketing arm. Respondent also averred that petitioner, as possessor of petroleum products can be held liable for excise tax because only those registered under "Kalakalan 20" enterprise are exempt from all taxes.

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[1] An Act Establishing the Magna Carta for Countryside and Barangay Business Enterprises, Granting Exemptions from any and all Government Rules and Regulations and other Incentives and Benefits therefore, and for other purposes.

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THE RULING OF THE COURT IN DIVISION

The Court in Division ruled in favor of the respondent and held that (1) the Agency Agreement failed to establish that petitioner is a marketing arm or agent of TWA, Inc. because the same does not specify an effectivity period and did not empower petitioner to act as a representative of TWA, Inc., and (2) petitioner as possessor of the petroleum products produced and sold by TWA, Inc. should be held liable for excise taxes thereon, pursuant to Section 130(A)(1) of the 1997 Tax Code. The dispositive portion of the assailed Decision of the Court in Division reads as follows:

> **WHEREFORE**, premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. Petitioner is **ORDERED TO PAY** the respondent the amount of EIGHTY FOUR MILLION ONE HUNDRED THIRTY THOUSAND THREE HUNDRED NINETY FOUR PESOS AND EIGHTY CENTAVOS (P84,130,394.80) plus 20% delinquency interest from January 10, 2003 until the same is fully paid pursuant to Section 249(C) of the 1997 Tax Code.
>
> **SO ORDERED**.

Not satisfied, petitioner filed a Motion for Reconsideration on July 26, 2005. The Court in Division denied the motion in the assailed Resolution dated November 15, 2005. Hence, this appeal to the Court *en banc*.

ASSIGNMENT OF ERRORS

I. The Honorable Court erred in holding that there is no agency agreement between the petitioner and the TWA, Inc. because said agreement failed to specify an effectivity period, hence, petitioner is liable for excise taxes on its sale of petroleum products manufactured by TWA, Inc.;

II. The Honorable Court erred in holding that there is no agency agreement between the petitioner and the TWA, Inc. because

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said agreement does not empower petitioner to act as a representative of TWA, Inc. nor did it grant TWA, Inc. the right of control over the petitioner, hence, petitioner is liable for excise taxes on its sale of petroleum products manufactured by TWA, Inc.;

III. The Honorable Court erred in holding that petitioner, as possessor of petroleum products, is liable for excise taxes on petroleum products produced and sold by TWA, Inc.;

IV. The Honorable Court erred in considering and making reference to the List of Deliveries of TWA, Inc. and Sales Book; and

V. The Honorable Court erred in holding that petitioner is liable to pay the penalty equivalent to twenty-five percent (25%) of the amount due as provided under Section 248(A)(1) of the Tax Code.

PETITIONER'S ARGUMENTS

Petitioner argues that there exists a valid and binding Agency Agreement between TWA, Inc. and petitioner. The fact that said Agreement does not bear an effectivity date does not *ipso facto* render the same invalid or ineffective. Petitioner claims that the "non filling-up" of the date was a plain and simple inadvertence of the parties. Petitioner also argues that such "non filling-up" of the date is not a blatant defect to obliterate the intention of the parties to form a "contract of agency to sell and distribute fuel" inasmuch as its "effectivity" can be established from the date of notarization of the said Agreement, since there is no other date appearing therein. Petitioner further avers that the Court in Division failed to give weight and credence to the testimonies of petitioner's witnesses regarding the subject Agreement.

As regards the second assigned error, petitioner contends that the Court in Division centered only on the nature of a contract of agency and

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failed to consider the purpose for which an agency is formed. Petitioner claims that the subject Agreement clearly manifests TWA, Inc.'s intention to appoint and in fact, has appointed petitioner because of its ability, as the former's "AGENT to Sell and Distribute its fuel." It further argues that in an agency to sell, control on the price and remittance is sufficient and in the subject Agreement, the ownership of fuels is not transferred to petitioner. Petitioner, upon receiving the fuels, is not obliged to pay their price. It simply delivers to TWA, Inc. the price it obtained from the sale of TWA, Inc.'s fuels to third parties. In addition, petitioner avers that assuming that the *parole evidence rule* applies in the subject agency agreement and because it lacks an effectivity date and does not reflect the very intention of the parties to create a contract of agency, then the parties may be validly allowed to present evidence to prove the very terms and nature of their agreement. Thus, the Court in Division should have given weight to the testimonial evidence presented by petitioner.

Anent the third assigned error, petitioner argues that the liability of the possessor on excise taxes depends on whether or not the manufacturer of the subject fuels is exempt from payment of the excise taxes. If the manufacturer is tax-exempt, then no excise tax is passed upon the possessor. Since its principal, TWA, Inc., is tax-exempt because it is a duly registered CBBE, then petitioner, as a mere agent, is also tax-exempt.

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Furthermore, petitioner likewise claims exemption from the payment of excise tax by citing a BIR Ruling[2] requested by TWA, Inc. which according to petitioner "categorically states in clear and unequivocal terms that [p]etitioner is not subject to excise taxes simply because the excise tax on the manufactured petroleum products purchased from TWA, Inc., a CBBE registered enterprise, are deemed to have been paid at the time the same came into existence."[3] The said ruling also states that "upon your transfer/sale of the finished products to your marketing arm, Lubwell and Filpride, the corresponding excise tax are *(sic)* considered fully paid."

As regards the fourth issue, petitioner avers that the Court erred in considering and making reference to the List of Deliveries of TWA, Inc. and Sales Book inasmuch as these documents were not identified, much less, offered in evidence by the respondent in accordance with the Rules of Court.

Finally, petitioner argues that it should not be held liable for the 20% interest arising from the alleged deficiency assessment considering that petitioner is not liable for the excise tax imposed by the respondent.

RESPONDENT'S ARGUMENTS

Respondent argues that the petitioner failed to prove that the Agency Agreement was effective during the taxable year the assessments were made. The Honorable Court, in its Decision, correctly found that the Agency Agreement executed between the petitioner and TWA Incorporated failed to

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2 DA-291-99 dated May 13, 1999 issued to TWA, Inc., pp. 44-45, CTA Records.
3 Par. 44, Petition for Review *En Banc*, , p. 17.

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specify a period for its effectivity because the agreement shows a blank space where the date of effectivity should have been indicated. Moreover, respondent avers that the Agency Agreement itself did not empower petitioner to act as a representative of TWA, Inc., which is the essence of an agency agreement. On the contrary, it was stated therein that petitioner, as the agent, is an independent business entity. Accordingly, the petitioner shall be held liable for the unpaid excise taxes as possessor of the petroleum products because there is no declaration in R.A. 6810 that the petroleum products manufactured by CBBEs shall be treated as "deemed paid", so that petitioner, as the person having possession of the taxable petroleum products shall enjoy the same tax exemptions or privileges given to TWA, Inc. Otherwise, Congress would have expressly provided therein that there will be no excise taxes imposable on goods manufactured by CBBEs or that the excise taxes on such manufactured goods as "deemed paid" pursuant to its inherent power to grant tax exemptions. Basic is the rule that one who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute. It cannot be allowed to exist upon a mere vague implication or inference.

THIS COURT'S RULING

The Petition for Review is not meritorious.

Petitioner failed to prove that it is a mere agent of TWA, Inc.

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The Agency Agreement dated December 15, 1995 between TWA, Inc. and herein petitioner *(Exhibit C-1)* is not a contract of agency. Article 1868 of the New Civil Code defines a contract of agency as follows:

> "Art. 1868. By the contract of agency a person binds himself to render some service or to do something **in representation or on behalf of another**, with the consent or authority of the latter." *(Emphasis supplied)*

The essential elements of the contract of agency are: (1) there is consent, express or implied, of the parties to establish the relationship; (2) the object is the execution of a juridical act in relation to a third person; (3) **the agent acts as a representative and not for himself**; and (4) the agent acts within the scope of his authority.[4] The essence of the contract of agency is representation which was clearly explained in the assailed decision, thus:

> Article 1868 of the New Civil Code states that by the contract of agency **a person binds himself to render some service or to do something in representation or on behalf of another,** with the consent or authority of the latter. It is therefore clear from Article 1868 that the basis of agency is representation. On the part of the principal, there must be an actual intention to appoint or an intention naturally inferable from his words or actions; and on the part of the agent, there must be an intention to accept the appointment and act on it, and in the absence of such intent, there is generally no agency. One factor which most clearly distinguishes agency from other legal concepts is control; one person — the agent — agrees to act under the control or direction of another — the principal. Indeed, the very word 'agency' has come to connote control by the principal. The control factor, more than any other, has caused the courts to put contracts between principal and agent in a separate category. *(Emphasis supplied)*

A perusal of the alleged Agency Agreement reveals that **Lubwell is not authorized to represent TWA, Inc.** in any of its (Lubwell's) transactions.

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[4] Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. 5, 1999 Reprint, p. 396.

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In fact, the petitioner is even prohibited from entering into any contract in the name or in behalf of the TWA, Inc. Said prohibition is expressly stated in the alleged Agency Agreement, as follows:

> 6. For all legal intents and purposes, the AGENT is an independent business entity and as such shall be solely responsible and liable for all expenses incurred in connection with the *(illegible)* of its business. **The AGENT or any of its employees or** *(illegible)* **shall make no contract in the name or in behalf of the COMPANY.** Neither shall the COMPANY be liable for damages or injuries to person or properties caused by the AGENT, or any of its employees and the AGENT hereby agree to release the COMPANY free and harmless from any of all liabilities thereof. *(Emphasis supplied)*

Thus, the alleged Agency Agreement lacks one of the essential elements of a contract of agency. Where a so-called "agent" is prohibited from representing the principal, there is certainly no contract of agency. As correctly ruled by the Court in Division, [t]he Agency Agreement did not empower petitioner to act as a representative of TWA, Incorporated. Neither did it grant TWA, Inc., as the alleged principal, the right of control over the petitioner, as the alleged agent of the former. Rather, it was stated therein that petitioner, as the "AGENT", is an independent business entity.

Moreover, the alleged Agency Agreement provides that TWA, Inc. shall not be liable for damages or injuries to persons or properties caused by the agent, or any of its employees and that the agent agrees to release TWA, Inc. free and harmless from any and all liabilities thereof. This is contrary to the ruling of the Supreme Court that in agency, the agent is exempted from all liability in the discharge of his commission provided he acts in accordance with the instructions received from his principal, and the latter must indemnify the

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former for all damages which he may incur in carrying out the agency without fault or imprudence on his part.[5]

It is well-settled that in order to classify a contract, due regard must be given to its essential clauses. A contract is what the law defines it to be and not what it is called by the contracting parties.[6] The Agency Agreement between TWA, Inc. and herein petitioner *(Exhibit C-1)* cannot be considered as a contract of agency.

Lastly, the Court in Division found that petitioner's financial statements did not reflect any commission income although the alleged agency agreement provides that petitioner is entitled to a commission of P0.20 centavos per liter of jet fuel sold.

Sec. 130 of the NIRC provides that the owner or person having possession of domestic products shall be liable for the excise taxes due thereon

Petitioner's argument that since its principal, TWA, Inc. is tax-exempt because it is a duly registered CBBE, then petitioner, as a mere agent, is also tax-exempt cannot be sustained. *First.* As discussed above, petitioner failed to prove that it is an agent of TWA, Inc. *Second.* The tax exemption granted to a *Countryside and Barangay Business Enterprise* (CBBE) under R.A. No. 6810 is personal, that is, it pertains only to the registered CBBE. In much

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5 *Gonzalo Puyat & Sons, Inc. v. Arco Amusement Company (formerly known as Teatro Arco)*, 72 Phil. 402 (1941).

6 De Leon and De Leon Jr., Comments and Cases on Partnership, Agency, and Trusts, 5th Edition, 2002, p. 368, *citing Quiroga v. Parsons Hardware Co.*, 38 Phil. 501, 1918.

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the same way that taxes are personal, tax exemptions likewise are personal.[7] It is the entity that has been granted tax exemptions as distinguished from the tax-exempt transactions. Being personal to a CBBE, it is non-transferable. Hence, the Court in Division ruled as follows:

> Petitioner as the possessor of the petroleum products should be held liable for excise taxes thereon produced and sold by TWA, Inc. in the light of the provisions of R.A. 6810, specifically, Section 3 thereof. In said section, ***the imposition of excise taxes on petroleum products manufactured by CBBEs has not been removed, but the same merely granted tax exemptions in favor of CBBEs*** in the pursuit of its business activities. Additionally, there is no declaration, that excise taxes on petroleum products manufactured by CBBEs shall be treated as "deemed paid", so that petitioner, as the person having possession of the taxable petroleum products, shall enjoy the same tax exemptions or privileges given to TWA, Inc. **Otherwise, Congress would have expressly provided therein that there will be no excise taxes imposable on goods manufactured by CBBEs or that the excises taxes on such manufactured goods as "deemed paid" pursuant to its inherent power to grant tax exemptions.** *(Emphasis supplied)*

Congress is presumed to have enacted a later law (R.A. No. 8424) with the knowledge of all other existing laws (R.A. No. 6810). Consequently, Congress is aware that R.A. No. 6810 granted tax exemptions to CBBEs when it incorporated the second paragraph of Sec. 130 (A) (1) of the NIRC of 1997 making the owner or possessor of domestic products liable to the excise taxes. Said Section provides:

> SEC. 130. *Filing of Return and Payment of Excise Tax on Domestic Products.* —
>
> (A) Persons Liable to File a Return, Filing of Return on Removal and Payment of Tax. —
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> > (1) Persons Liable to File a Return. — Every person liable to pay excise tax imposed under this Title shall file a separate return for each place of production setting

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7 Aban, Law of Basic Taxation in the Philippines, First Edition, 1994, p. 78.

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> forth, among others, the description and quantity or volume of products to be removed, the applicable tax base and the amount of tax due thereon: *Provided, however*, That in the case of indigenous petroleum, natural gas or liquefied natural gas, the excise tax shall be paid by the first buyer, purchaser or transferee for local sale, barter or transfer, while the excise tax on exported products shall be paid by the owner, lessee, concessionaire or operator of the mining claim.
>
> **Should domestic products be removed from the place of production without the payment of the tax, the owner or person having possession thereof shall be liable for the tax due thereon**. *(Emphasis supplied)*

Under the foregoing provision, the general rule is that excise taxes on domestic products shall be paid by the manufacturer or producer before removal from the place of production. However, should domestic products be removed from the place of production without the payment of the tax, the owner or person having possession thereof shall be liable for the tax due thereon.

It is a rule of statutory construction that the use of the disjunctive word "or" signifies disassociation and independence of one thing from another. It should, as a rule, be construed in the sense in which it ordinarily implies.[8] In the afore-quoted provision, the use of the word "or" between the words "owner" and "person having possession thereof" connotes a variance in their meaning. Hence, such provision contemplates two situations --- the one liable for the tax due could be either (1) the owner of the domestic products, or (2) the person having possession of the domestic products. There is no basis for

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[8] *Melchor V. Kataniag v. The People of the Philippines*, 74 Phil. 45 (1942) as cited in Agpalo, Statutory Construction, 5th Edition (2003).

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petitioner's argument that the foregoing provision contemplates that the person having possession of the domestic products possesses the same in the concept of owner. *Generalia verba sunt generaliter intelligenda.* A general word should not be given a restricted meaning where no restriction is indicated.[9] For if the legislature has intended to limit the meaning of a word, it would have been easy for it to have done so. That it did not, gives rise to the presumption that it has not limited nor intended to limit the meaning of the word.[10] Hence, the words "person having possession" without any modifying word or phrase accompanying it, should be construed in its generic sense.

The intention of the legislature is to ensure the collection of excise taxes on domestic products removed from the place of production without the payment of the tax. Said provision is not inconsistent with R.A. No. 6810 which granted tax exemptions to CBBEs since R.A. No. 6810 did not remove the excise taxes on manufactured petroleum products. To reiterate, R.A. No. 6810 made the CBBEs as tax-exempt entities but the manufacture itself of petroleum products is still subject to tax. This is why the Court in Division ruled that the imposition of excise taxes on petroleum products manufactured by CBBEs has not been removed, but the same merely granted tax exemptions in favor of CBBEs in the pursuit of its business activities. Additionally, there is no declaration in R.A. 6810 that excise taxes on petroleum products

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9 *Getz Corporation of the Phils., Inc. v. Court of Appeals,* 116 SCRA 86 (1982) as cited in Agpalo, Statutory Construction, 5th Edition (2003), page 184.

10 *Phil. Acetylene Co. v. Central Bank,* 120 Phil. 829 (1964) as cited in Agpalo, Statutory Construction, 5th Edition (2003), page 184.

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manufactured by CBBEs shall be treated as "deemed paid", so that petitioner, as the person having possession of the taxable petroleum products, shall enjoy the same tax exemptions or privileges given to TWA, Inc. In fact, BIR Ruling [DA-232-04-14-99] issued to TWA, Inc. expressly states that the jet fuel it produces is subject to excise tax, thus:

> "B. **The jet fuel you produced** from kerosene through a manufacturing process using chemical and filtration elements to eliminate water, sediments and mercaptan, **is subject to excise tax under Section 148(g) of the Tax Code**. *(Emphasis supplied)*

Considering that the manufacture of petroleum products is not exempt from excise taxes but since the manufacturer thereof being a registered CBBE is not liable to the excise taxes being a tax-exempt entity, the excise taxes due shall be collected from the owner or possessor of domestic products that have been removed from the place of production without payment of the excise taxes due thereon pursuant to the second paragraph of Sec. 130 (A) (1) of the NIRC of 1997. In this case, it is the petitioner as owner or possessor of the jet fuel who is liable for the excise taxes.

Petitioner likewise claims exemption from the payment of the subject excise taxes by citing a BIR Ruling[11] issued to TWA, Inc., which according to petitioner "categorically states in clear and unequivocal terms that [p]etitioner is not subject to excise taxes simply because the excise tax on the manufactured petroleum products purchased from TWA, Inc., a CBBE registered enterprise, are deemed to have been paid at the time the same

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11 [DA-291-99] dated May 13, 1999 issued to TWA, Inc., page 44-45, CTA Records.

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came into existence."[12] The said ruling also states that "upon your transfer/sale of the finished products to your marketing arm, Lubwell and Filpride, the corresponding excise tax are [sic] considered fully paid."

BIR RULING [DA-291-99] issued to TWA, Inc. cannot be relied upon by petitioner

BIR Ruling [DA-291-99] dated May 13, 1999 relied upon by the petitioner is **invalid** insofar as it provides that the excise taxes on the manufactured petroleum products by CBBEs are deemed to have been paid at the time the same come into existence and that upon its sale to a marketing arm, the corresponding excise taxes are considered fully paid citing BIR Ruling 152-88 dated April 19, 1988. The pertinent portion of BIR Ruling [DA-291-99] is quoted hereunder:

> Such being the case, excise taxes on your manufactured petroleum products are deemed to have been paid at the time the same come into existence. **Henceforth, upon your transfer/sale of the finished products to your marketing arm, Lubwell and Filpride, the corresponding excise tax are considered fully paid** (BIR Ruling No. 152-88 dated April 19, 1988).
>
> Likewise, as mere distributing/marketing arms, both Lubwell and Filpride, there being no excise taxes passed on to them as a result of the tax exemption privilege of the manufacturer-producer TWA, Inc., they cannot pass on any excise tax as a component cost of the product to the end-user. *(Emphasis supplied)*

In the interpretation of the laws, courts are not bound by the rulings of administrative agencies. In a recent case, the Supreme Court had ruled that a favorable BIR Ruling secured by a taxpayer on a particular matter is not

[12] Par. 44, Petition for Review *En Banc*, p. 17.

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conclusive upon the courts[13]. Hence, this Court cannot render a Decision based only on a BIR Ruling, more so, on an erroneous Delegated Authority (DA) Ruling.

BIR Ruling [DA-291-99] is invalid not only because it lacks the formal requisites pursuant to Sec. 7 of the NIRC of 1997 but more importantly, it is likewise erroneous in substance. As to formal requisites, Sec. 7 (b) of the NIRC of 1997 provides that the power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau properly pertains to the Commissioner of the Bureau of Internal Revenue only. The pertinent portion of Sec. 7 of the NIRC of 1997 provides as follows:

> SEC. 7. Authority of the Commissioner to Delegate Power. — The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner: Provided, however, That the following powers of the Commissioner shall not be delegated:
>
> xxx xxx xxx
>
> (b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;

The above provision provides that the power to issue **rulings of first impression** belongs to and can only be exercised by the Commissioner of Internal Revenue. As a corollary, Revenue Administrative Order No. 1-99 dated February 5, 1999 has defined the term *rulings of first impression* as follows:

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13 *Commissioner of Internal Revenue v. Philippine Long Distance Telephone Company,* G.R. No. 140230, December 15, 2005 (478 SCRA 61).

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SECTION 3. *Classification of BIR Rulings and Issuances.* – The following terms shall have the meaning described below:

(a) *Rulings of First Impression* – These **refers to the rulings, opinion and interpretations of the Commissioner of Internal Revenue with respect to the provisions of the NIRC and other tax laws without established precedents**. Provided, however, that the term shall include reversal, modification or revocation of any existing ruling. *(Emphasis supplied)*

(b) *Rulings with established precedents* – These shall refer to mere reiteration of previous rulings, opinion and interpretations of the Commissioner, as delegated to duly authorized internal revenue officers.

xxx xxx xxx

BIR Ruling [DA-291-99] properly belongs to the latter type of rulings, that is, under Sec. 3 (b) pertaining to *rulings with established precedents* because it is, as indicated by its number, a ruling issued pursuant to a "delegated authority". As such it was signed by the Deputy Commissioner of the Legal & Enforcement Group of the Bureau of Internal Revenue. However, BIR Ruling [DA-291-99] went beyond reiterating BIR Ruling No. 152-88, a ruling of first impression, cited therein. BIR Ruling [DA-291-99] did not only expand but likewise misapplied BIR Ruling 152-88 dated April 19, 1988 issued by the Commissioner of Internal Revenue. BIR Ruling 152-88 reads as follows:

Gentlemen:

This refers to your letter dated February 16, 1988, in effect, requesting a ruling that the specific tax on the basestocks purchased from BOI-registered local refiners such as the Philippine Petroleum Corporation (PPC) are already considered fully paid such that lubricating oils and greases manufactured out of these basestocks are no longer subject to the payment of any specific tax.

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> In reply, please be informed that the lubricating oils and greases produced from basestocks and additives on which the specific tax has already been paid are no longer subject to specific tax. (Sec. 145 (a) (1), Tax Code, as amended by Executive Order No. 273). Accordingly, since under the foregoing facts, the specific tax on the basestocks purchased by you from PPC is considered fully paid, specific tax on the lubricating oils and greases produced out of said basestocks are, likewise paid. However, the sale of manufactured lubricating oils and greases is subject to the value-added tax of 10% pursuant to Section 103(d) both of the Tax Code as amended by Executive Order No. 273.
>
> Very truly yours,
>
> (SGD.) BIENVENIDO A. TAN, JR.
> Commissioner

The foregoing ruling provides that the specific tax on the basestocks ***purchased from BOI-registered local refiners*** such as the Philippine Petroleum Corporation (PPC) are already considered fully paid and that the lubricating oils and greases produced from basestocks and additives on which the specific tax has already been paid are no longer subject to specific tax pursuant to Sec. 145 (a) (1) of the Tax Code, as amended by Executive Order No. 273. Clearly, the ruling speaks of tax exemptions found in Sec. 145 (a) (1) of the Tax Code as amended by E.O. No. 273. This is completely different from the subject of BIR Ruling [DA-291-99] which pertains to the tax-exemption of TWA, Inc. as a CBBE pursuant to R.A. 6810 otherwise known as the "Kalakalan 20".

In other words, the cited ruling of first impression [BIR Ruling 152-88] does not pertain to excise tax granted to CBBEs. It refers to specific tax on basestocks purchased from BOI-registered local refiners such as the Philippine Petroleum Corporation (PPC) which is totally distinct from the subject of BIR Ruling [DA-291-99] which deals with the excise tax exemption of CBBEs

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granted by R.A. 6810. Therefore, on its face, BIR Ruling [DA-291-99] has no basis in view of its failure to cite a ruling of first impression dealing with the same subject as what it supposedly reiterates.

What made matters worse is that BIR Ruling [DA-291-99] extended the tax exemptions of a CBBE (TWA, Inc.) to other entities (Lubwell and Filpride) that are not entitled to the tax exemptions granted to CBBEs. TWA, Inc. is the manufacturer entitled to tax exemptions under R.A. 6810 whereas Lubwell is the "owner or possessor" of the manufactured petroleum products. As stated above, the tax exemptions of a CBBE is personal in the sense that it refers to the entity only but BIR Ruling [DA-291-99] extended such exemption to Lubwell and Filpride which are not duly registered CBBE's under R.A. 6810. Thus, the Deputy Commissioner of the BIR Legal and Enforcement Group had ***exceeded his delegated authority*** to render rulings that merely reiterates previous rulings of first impression validly issued by the BIR Commissioner. In effect, said Deputy Commissioner rendered a ruling of first impression which he has no authority to do under Sec. 7 (a) of the NIRC of 1997. Hence, BIR Ruling [DA-291-99] is void and of no effect.

It cannot be over-emphasized that tax exemption represents a loss of revenue to the government and must, therefore, not rest on vague inference. When claimed, it must be strictly construed against the taxpayer who must prove that he falls under the exception. And, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all xxx.[14]

Moreover, it is noteworthy that in BIR Ruling [DA-232-04-14-99] likewise issued to TWA, Inc. and referred to in BIR Ruling [DA-291-99] it is categorically stated therein that the jet fuel produced by TWA, Inc. is subject to excise tax under Section 148(g) of the NIRC of 1997, thus:

> (b) The jet fuel you produced from kerosene through a manufacturing process using chemical and filtration elements to eliminate water, sediments and mercaptan, **is subject to excise tax under Section 148(g) of the Tax Code**. However, as a CBB registered enterprise, you are exempt from the excise tax for which you are directly liable to pay pursuant to paragraph III (A) (2) (c) of Revenue Memorandum Order No. 39-90 implementing R.A. No. 6810 otherwise known as the "Kalakalan 20". *(Emphasis supplied)*

Undeniably, the production of jet fuel by TWA, Inc. is still subject to the payment of excise tax, however, TWA, Inc. enjoys tax exemptions pursuant to R.A. 6810 which is the reason why it is not liable to pay the excise tax due on the jet fuel. It can readily be observed that a distinction was made between the tax exemption of a transaction vis-à-vis the tax exemption of CBBEs under R.A. 6810. This is where the second paragraph of Art. 130 (A) (1) of the 1997 finds applicability, the excise tax due on the domestic products which have been removed from the place of production becomes the liability of the owner or possessor thereof. Hence, petitioner as owner of the jet fuel is the one liable for the unpaid excise taxes on the jet fuel produced by TWA, Inc.

We also find unmeritorious petitioner's interpretation of the phrase "should domestic products be removed from the place of production without

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[14] *Commissioner of Internal Revenue v. Philippine Long Distance Telephone Company, supra.*

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the payment of tax" in that there is a difference between the "non-payment" of tax liability and the "non-liability" to pay any tax. It is a well-recognized rule that where the law does not distinguish, courts should not distinguish. *Ubi lex non distinguit, nec nos distinguere debemus.* There should be no distinction in the application of a statute where none is indicated. The rule is a corollary of the principle that general words and phrases in a statute should ordinarily be accorded their natural and general significance.[15] Hence, the phrase "without the payment of tax" contemplates a situation where no excise tax was paid, regardless of the reason for the absence of payment whether for failure to pay or exemption from payment of the tax.

It bears emphasis that exemptions from taxation are highly disfavored in law and he who claims an exemption must be able to justify his claim by the clearest grant of organic or statute law.[16] He who claims an exemption from his share of the common burden in taxation must justify his claim by showing that the Legislature intended to exempt him by words too plain to be mistaken.[17]

Relative to the fourth assigned error, petitioner submits that the Court in Division erred in considering and making reference to the List of Deliveries of TWA, Inc. and Sales Book since these documents were not identified, much less offered in evidence by respondent in accordance with the Rules of Court.

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15 Agpalo, Statutory Construction, 5th Edition (2003), pp. 197-198.

16 *Asiatic Petroleum Co. v. Llanas,* 49 Phil. 466 cited in *Collector v. Manila Jockey Club, Inc.*, L-8755, March 23, 1956; *Davao Light & Power Co., Inc. v. Commissioner of Customs,* L-28731, 28902, March 29, 1972.

17 *Surigao Consolidated Mining Co., Inc. v. Collector,* L-14878, December 26, 1963; *PLDT vs. City of Davao,* 399 SCRA 447.

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The argument is unmeritorious. As discussed in the assailed Resolution, the BIR Records submitted to this Court forms part of the records of the case, thus:

> "...this Court has the power to receive evidence and require the production of papers or documents as contained in the Order dated April 14, 2003 wherein respondent was advised to certify and forward to this Court, within ten (10) days after filing his Answer, all the records of this case in his possession, pursuant to Section 2, Rule 7 of the Rules of this Court *(Records, p.55)*. And as correctly pointed out by the respondent in his Comment, it was respondent's examiners who obtained the said documents during the audit of petitioner's books, and are part of the records of the case, as the docket was submitted to this Court *(Comment, Records, p. 243)*."

The witness for the respondent, a revenue examiner who examined petitioner's books of accounts, identified during the hearing held on March 10, 2004 a document described as a "Memorandum for the BIR Assistant Commissioner – Enforcement Service" prepared and signed by the revenue officers who conducted the examination of the books of accounts of the petitioner. Said Memorandum was duly marked as *"Exhibit 1"* for the respondent and contains the findings and recommendation of the revenue examiners with respect to petitioner's excise tax liabilities. A summary of petitioner's monthly deliveries of jet fuel for the year 1998 is presented on the first page of *"Exhibit 1"*. Subsequently, respondent formally offered *"Exhibit 1"* and *"Exhibit 1-a"* together with the testimony of his witness. In a Resolution dated June 22, 2004, the Court in Division admitted the aforementioned exhibits as part of respondent's evidence. Thus, respondent had satisfied the requirements in the presentation and formal offer of evidence.

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Parenthetically, the Supreme Court had recognized that the courts may consider evidence which has not been formally offered under certain conditions. It ruled as follows:

> From the foregoing provision, it is clear that for the evidence to be considered, the same must be formally offered. xxx xxx xxx
>
> However, in *People v. Napat-a* citing *People v. Mate*, we relaxed the foregoing rule and allowed evidence not formally offered to be admitted and considered by the tiral court provided the following requirements are present, viz: first, **the same must have been duly identified by testimony duly recorded** and, second, **the same must have been incorporated in the records of the case.**[18] *(Citations omitted; Emphasis supplied)*

As pointed out by the Court in Division, the respondent was ordered to certify and submit the entire BIR Records of this case to the Court, thus, the same forms part of the records of this case.

In view of the foregoing, this Court finds no merit in petitioner's assertion that the Court in Division erred in considering and making reference to documents that were not identified and offered in evidence by respondent in accordance with the Rules of Court.

As regards the last assigned error, petitioner avers that the Court in Division erred in holding that petitioner is liable to pay the penalty equivalent to twenty-five percent (25%) of the amount due as provided under Section 248 (A) (1) of the Tax Code.

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[18] *Vda. De Oñate v. Court of Appeals, et al.*, G.R. No. 116149, November 23, 1995 (250 SCRA 283).

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The Court in Division committed no reversible error in imposing the penalties provided by law. Petitioner is liable for excise taxes due on the products it purchased from TWA, Inc. pursuant to Section 130 (A) (1) of the NIRC of 1997, consequently, it is also liable for the penalties imposed on taxpayers with deficiency tax liabilities, namely: 20% deficiency interest, 25% surcharge, and 20% delinquency interest. The Court in Division, in fact, reduced the 50% surcharge imposed by the respondent pursuant to Sec. 248 (B) for willful neglect to file return to only 25% for failure to file return under Sec. 248 (A) (1) since respondent failed to prove that petitioner intended to defraud the government. There were allegations to the effect that not all of petitioner's sales were recorded and that petitioner have three sets of sales invoices with overlapping series. However, respondent failed to present any evidence on this point.

As stated at the outset, considering that the required number of votes was not obtained in this case, the appealed Decision shall stand AFFIRMED pursuant to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA).

WHEREFORE, the instant petition for review is hereby **DENIED.** Accordingly, the assailed Decision promulgated on July 4, 2005 and Resolution dated November 15, 2005 are hereby **DEEMED AFFIRMED**.

SO ORDERED.

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

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WE CONCUR:

(Concurs with Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(Concurs with Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

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 this Court.

ERNESTO D. ACOSTA
Presiding Justice

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