REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

ELRIC AUXILIARY SERVICES CORPORATION/SACRED HEART GAS STATION,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL, REVENUE, AND PERFECTO L. ARANAS, REGIONAL DIRECTOR OF REVENUE REGION NO. 19, DAVAO CITY,
Respondents.

CTA CASE NO. 8315

Members:

Castañeda, *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

Promulgated:

FEB 17 2014

2:35 p.m.

x- x

DECISION

COTANGCO-MANALASTAS, *J.:*

This is a petition for review seeking to annul the Forty Eight (48) Hour Notice dated May 26, 2011 and the Five (5) Day VAT Compliance Notice (VCN) dated June 9, 2011, requiring petitioner to issue sales invoices/official receipts that reflect the information required therein, and to pay the alleged deficiency VAT amounting to P1,196,583.13.

Facts

Petitioner Elric Auxiliary Services Corporation/Sacred Heart Gas Station is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business and office at Cogon, Digos City, Davao del Sur.[1]

Respondent Commissioner of Internal Revenue is the chief or head of the Bureau of Internal Revenue, with the

[1] Docket, p. 2.

powers and duties to comprehend the assessment and collection of taxes, fees, and charges, and the enforcement of all forfeitures, penalties and fines connected therewith. The respondent's principal place of business is at BIR National Office Building, Agham Road, Diliman, Quezon City, where she may be served with summons and other court processes. Likewise, respondent Perfecto L. Aranas is the Regional Director of Revenue Region No. 19, Bolton Extension, Davao City, where he may be served with summons and other court processes.[2]

Petitioner received on June 1, 2011 the 48-Hour Notice dated May 26, 2011. The 48-Hour Notice alleged that respondents conducted a ten-day surveillance from April 16, 2010 to April 25, 2010 of the gas station located at Cogon, Digos City, Davao del Sur. As a result of the said ten-day surveillance, respondents found petitioner liable for alleged deficiency VAT amounting to P1,196,583.13.[3]

On June 3, 2011, petitioner filed its explanation under oath arguing and declaring that it is not liable for the alleged VAT deficiency of P1,196,583.13. On June 21, 2011, petitioner received the 5-Day VCN dated June 9, 2011 reiterating the demand for payment of the alleged deficiency VAT.[4]

On June 24, 2011, petitioner, through counsel, sent a follow-up letter requesting a response to their letter-explanation under oath dated June 1, 2011. On July 5, 2011, petitioner received respondents' letter-response dated June 28, 2011 denying petitioner's plea and holding petitioner liable for the alleged deficiency VAT of P1,196,583.13.[5]

Counting thirty (30) days from July 5, 2011, the date of receipt of the letter-response, petitioner filed this Petition for Review with the Court of Tax Appeals on August 4, 2011.

Petitioner also included a motion for the issuance of a *status quo ante* order and/or an order suspending the collection of the alleged VAT deficiency.[6]

On September 1, 2011, a hearing was held for oral arguments on the Urgent Prayer for the Issuance of Status

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[2] *Ibid.*
[3] Docket, p. 3.
[4] *Ibid.*
[5] Docket, p. 4.
[6] Docket, pp. 13-14.

Quo Ante Order and/or the Suspension of the Collection of Tax Liability. The Court granted the motion subject to petitioner's posting of a surety bond within ten (10) days from receipt of the court's Resolution.[7] The surety bond filed by petitioner was approved in the Resolution dated January 5, 2012.[8]

Respondents filed an Answer on September 9, 2011. In addition to specific denials of the petitioner's averments, respondents also pleaded special and affirmative defenses, arguing mainly that the instant case is not within the jurisdiction of the Court of Tax Appeals.[9] Respondents argued further that petitioner's reliance on Section 228 as implemented by Revenue Regulation No. 12-99 is misplaced, as the 48-Hour Notice and the 5-Day VCN should not be treated as assessment notices under Section 228.[10]

The Court ordered the filing of pre-trial brief, and scheduled the pre-trial conference on October 13, 2011.[11] Respondents and petitioner filed their pre-trial brief on September 19, 2011, and November 9, 2011, respectively.[12] At the motion of the petitioner, the pre-trial conference was reset and held on November 24, 2011, during which the parties were ordered to submit a joint stipulation of facts and issues.[13]

On January 25, 2012, petitioner manifested that despite the earnest efforts of the parties-litigants, they have failed to agree on a joint stipulation of facts and issues.[14] The Court noted the manifestation and ordered the initial presentation of petitioner's evidence.[15]

On March 15, 2012, petitioner submitted the Judicial Affidavit of its witness, Mr. Edwin B. Jurial.[16] As rescheduled, the presentation of petitioner's sole witness was held on March 19, 2012.[17] Petitioner was ordered to file its Formal Offer of Evidence.[18]

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[7] Docket, p. 49, and pp. 51-54.
[8] Docket, p. 166-167.
[9] Docket, p. 53.
[10] Docket, p. 70.
[11] Docket, p. 81.
[12] Docket, pp. 82-89, and pp. 130-135.
[13] Docket, p. 157.
[14] Docket, pp. 193-200.
[15] Docket, p. 204.
[16] Docket, pp. 217-243.
[17] Docket, p. 245.
[18] *Ibid.*

Petitioner filed its Formal Offer of Exhibits on May 3, 2012, through registered mail.[19] On May 28, 2012, respondents filed its Motion to Admit Attached Comment with Comment (on Petitioner's Formal Offer of Exhibits).[20]

The Court admitted petitioner's exhibits through Resolutions dated June 6, 2012[21] and September 19, 2012.[22]

On July 24, 2012, respondents filed a Motion to Dismiss arguing that the instant petition is not within the Court of Tax Appeals' jurisdiction.[23] Petitioner failed to file a comment on respondent's motion.

On September 19, 2012, this Court denied respondents' motion to dismiss for lack of merit.[24]

On October 17, 2012, respondents presented its Exhibits for marking and comparison. The initial presentation of the evidence for respondents was set on November 28, 2012.[25] Respondents presented two witnesses, Ms. Meriam Nahine-Abalos and Mr. Raymond Austria, before resting its case.[26]

On January 22, 2013, after extensions were granted, respondents filed its Formal Offer of Documentary Evidence.[27] Petitioner failed to comment on respondents' Formal Offer. On April 5, 2013, this Court resolved to admit respondents' Exhibits, except for Exhibits "1", "5", "6", and "15".[28] Upon motion for reconsideration, Exhibit "1" was also admitted through this Court's resolution dated June 10, 2013.[29]

This case was submitted for decision on August 13, 2013, considering that petitioner filed its Memorandum[30], through registered mail on May 24, 2013 and received by this Court on June 6, 2013, and respondents filed its Memorandum[31] on July 12, 2013.

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[19] Docket, pp. 246-285.
[20] Docket, pp. 287-297.
[21] Docket, pp. 299-300.
[22] Docket, pp. 359-364.
[23] Docket, pp. 335-356.
[24] *Supra*, Note 22.
[25] Docket, p. 391.
[26] Docket, pp. 403-405.
[27] Docket, pp. 429-437.
[28] Docket, pp. 447-448.
[29] Docket, pp. 482-483.
[30] Docket, pp. 461-479.
[31] Docket, pp. 484-506.

Issues

Petitioner raised the following issues:

A. Whether or not the Forty-Eight (48) Hour Notice and the Five (5) Day VAT Compliance Notice (VCN) issued by the respondents are valid?

B. Whether or not the petitioner is liable to pay the VAT discrepancy of Php1,196,583.13?

On the other hand, respondents raised the following issues:

1. Whether the Honorable Court has jurisdiction over the case.

2. Whether petitioner violated Section 113 of the National Internal Revenue Code.

3. Whether the Forty-Eight (48) Hour Notice dated May 26, 2011 and the Five (5) Day VAT Compliance Notice dated June 9, 2011 are tantamount to a "Final Assessment Notice" contemplated under Section 228 of the NIRC.

Ruling

The issue of this Court's jurisdiction over the instant case has already been settled in the Resolution[32] dated September 19, 2012, as follows:

> "...Contrary to respondents' contentions, the jurisdiction of this Court is not limited to cases involving disputed assessment but also decisions over 'other matters'. Section 7 of Republic Act (R.A.) No. 1125, as amended, pertinently provides that:
>
> xxx
>
> Based on the abovequoted provision and in conformity with the principle of *ejusdem generis*, the term 'other matters' would refer to those cases which do not necessarily involve disputed assessments or refunds but

[32] Docket, pp. 359-364.

controversies arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue (BIR).

xxx

The subject matter of this case is the nullification of the Forty-Eight (48) Hour Notice and Five-Day (5) Compliance Notice, due to the circumstances that led to their issuance. Admittedly, they were issued pursuant to the power of the CIR enunciated in Section 115 of the NIRC of 1997, *that is*, the power to suspend the business operations of a taxpayer. Without dispute, the controversy clearly falls within the meaning of '**other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue**'.

Lastly, a taxpayer adversely affected by a decision of the BIR should appeal to this Court within thirty days from receipt of the said decision. xxx

In this case, the Forty-Eight (48) Hour Notice was received by petitioner on June 1, 2011. On June 3, 2011, respondents received petitioner's explanation letter under oath. On June 21, 2011, petitioner received a Five (5)-Day Compliance Notice. Petitioner, through a letter dated June 23, 2011, requested respondents to respond to its explanation letter under oath, alleging therein that the compliance notice did not delve into its explanation letter under oath. In a letter received by petitioner on July 5, 2011, respondents denied petitioner's request for reconsideration. Counting thirty (30) days from the denial, petitioner had until August 4, 2011 to appeal before this Court. Considering that the instant case was filed on August 4, 2011, this Court has jurisdiction over the case for being filed on time."[33] (*Emphasis on the original; citations omitted*)

With respect to the conduct of the surveillance and the issuance of the 48-Hour Notice and the 5-Day VCN, reference must be made to the provisions of Revenue Memorandum Order (RMO) No. 003-09[34]. Petitioner argues that the issuance of the 48-Hour Notice and the 5-Day VCN are void for not having complied with the guidelines as provided in RMO 003-09.

A review of the BIR Records attached to this case shows that respondents followed the procedure after the conduct of surveillance and prior to the issuance of the 48-Hour Notice and the 5-Day VCN: that is the revenue officers who

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[33] Docket, pp. 360-362.
[34] Dated January 15, 2009.

conducted the surveillance submitted their report, which report was reviewed by the Review Board before the issuance of the 48-Hour Notice and the 5-Day VCN.[35] This is consistent with RMO 003-09, Part V, Subsection (B), paragraphs 3.1 to 3.1.3.[36]

Petitioner argues that it was not furnished with a copy of, nor required to sign, the Surveillance Form and the summary of sales and/or official receipts at the end of each day for the entire duration of the ten-day surveillance.

Under RMO 003-09, an overt surveillance must be conducted as follows:

> "V. GUIDELINES AND PROCEDURES
>
> A. Surveillance Activities
>
> xxx
>
> 2.4.2 Overt Surveillance
>
> The most important factor in overt surveillance is the element of surprise. The SUBJECT must be caught unaware to prevent him from committing acts which may defeat the purpose of the surveillance. Those caught in the act of committing crimes punishable under the Tax Code must be immediately apprehended.
>
> After the covert surveillance has been undertaken, the following procedures shall be performed by the implementing officers who should always be ready to present their BIR Identification Cards:
>
> a. Inform the SUBJECT of the purpose and duties of the implementing officer as stated in the MO.
>
> b. Conduct an inventory of all unused sales invoices, official receipts and such other documents used in the movement of goods.

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[35] BIR Records, pp. 44-99; Exhibits "8", "9", "10", "11", "12", "13", and "14".

[36] "3.1 Consistent with the requirements of due process, the report of the handling Revenue Officer shall be concurred in by the Head of the investigating office. The findings of the investigating office shall be reviewed by a Review Board composed of the following: xxx

xxx

3.1.3 The Commissioner of Internal Revenue shall serve as the Overall Chairman of the Regional Office Review Boards and the National Office Review Board.

The Review Boards must act on reports within five (5) days from receipt thereof. The Review Boards shall convene, upon the initiative of the chairperson, whenever necessary.

If a report is approved by a Review Board, the concerned Regional Director or the ACIR, Enforcement Service/LTS, as the case may be, shall, in his capacity as Chair of the Review Board, sign and issue to the taxpayer concerned a Forty-Eight (48) Hour Notice, requiring him to explain under oath within forty-eight (48) hours why he should not be dealt with administratively, by suspension of business or temporary closure of his establishment, and/or criminally, for violation of pertinent provisions of the Tax Code.xxx"

c. **List all the above documents in the Surveillance Form** (SF) [Annex "C"].

d. Seize unauthorized official receipts or invoices and accomplish the AS in duplicate. Issue the original copy to the SUBJECT. Report immediately to the Head of the Investigating Office/Division the results of the apprehension not later than the following day from the issuance of the AS.

e. After all the unused official receipts/invoices are listed in the Surveillance Form, sign the first and last receipts/invoices in each booklet stating therein the date and time when the inventory was made.

f. For official receipts or invoices from partly used booklets, sign the duplicate/file copy of the last invoice used. In case there is no chronological issuance of invoices/official receipts, list down the unused invoices/official receipts, sign the first and last pages of the un-issued invoices/official receipts in each booklet and indicate the date and time when the inventory was made.

g. Return all the official receipts to the SUBJECT or his authorized representative and inform him that official receipts/invoices must be issued chronologically. **Request the SUBJECT or his authorized representative to sign the Surveillance Form. If acknowledgement of the Surveillance Form is refused, have the certificate signed by at least two (2) witnesses present and leave a copy of the Surveillance Form with the SUBJECT or his authorized representative**.

h. Observe/monitor the daily sales in the stores or the daily production and daily removal from or deliveries to the factories, from the time they open to the time they close.

i. Summarize all the sales/official receipts at the end of each day for the entire duration of the surveillance and enter the figures on the space provided in the Surveillance Form." (*Emphasis supplied*)

A perusal of RMO 003-09 shows that the taxpayer is not required to be furnished with a copy of the Surveillance Form. The taxpayer is only required to sign the Surveillance Form as a form of acknowledgment. If the taxpayer refuses, then the Surveillance Form must be signed by two witnesses. It is only in the case of refusal by the taxpayer that a copy is required to be left with the taxpayer or his authorized representative. This is in contrast with the Mission Order and the Apprehension Slip, which have specific provisions for their issuance, *to wit*:

"IV. POLICIES

xxx

2. All surveillance activities shall be covered by Mission Orders (MOs) [Annex "A"]. The MOs shall be printed as accountable forms to be requisitioned by the Revenue Officials authorized to sign said MOs. MOs issued should be chronologically recorded in the Mission Order Register. The MOs shall be issued in triplicate/quadruplicate, to be distributed as follows:

Original: Revenue Officer(s) directed to conduct the surveillance, and to be attached to the report on the surveillance after termination of the activity

2nd copy: Investigating Office's/Division's file copy

3rd copy: Issuing Office's file copy

4th copy: Taxpayer's copy (in case of overt surveillance)

V. GUIDELINES AND PROCEDURES

A. Surveillance Activities

xxx

2.4.1 Covert Surveillance

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e. Apprehend the taxpayer by issuing on the spot an Apprehension slip (AS) [Annex "B"], in duplicate, once caught in the act of not issuing official receipts/invoices, or issuing unregistered official receipts/invoices or otherwise, found to be in violation of the provisions of Section 113, 236, 237 and 238 of the NIRC of 1997.

xxx

2.4.2. Overt Surveillance

xxx

d. Seize unauthorized official receipts or invoices and accomplish the AS in duplicate. **Issue the original copy to the SUBJECT.** Report immediately to the Head of the Investigating Office/Division the results of the

> apprehension not later than the following day from the issuance of the AS." (*Emphasis supplied*)

As to petitioner's argument that it was not required to sign the Surveillance Form, an examination of Exhibit "4" presented by respondents, shows that the signature of petitioner's witness, Mr. Edwin B. Jurial, appears therein on the space for the proprietor or general manager. Thus, there is compliance with the requirement under RMO 003-09.

However, this Court finds that the 5-Day VCN failed to comply with the content requirements provided in RMO 003-09, as follows:

> "V. GUIDELINES AND PROCEDURES
>
> xxx
>
> B. Suspension or Temporary Closure of Business
>
> xxx
>
> 3.3.1 The 5-Day VCN, **with details of the findings of the investigating office**, as approved by the Review Board, shall be served immediately to the taxpayer by the Regional Director/ACIR-LTS/ACIR-Enforcement Service, as the case may be.
>
> 3.3.2 The 5-Day VCN shall likewise **state the particular provision(s) of the NIRC that was/were violated by the taxpayer**, and for which rectification must be done, including payment of the required deficiency taxes and penalties due therefor." (*Emphasis supplied*)

The 5-Day VCN[37], on its face, shows that it did not state the provisions violated by the petitioner, in contravention of the requirements abovestated in RMO 003-09. This Court also finds that the 48-Hour Notice and the 5-Day VCN did not provide details of the findings of the investigating office. Both notices only had a one-page attachment which contained: "Result of the Ten (10) Day Surveillance" and "Computation of Under Declaration and VAT Liability".[38]

The 48-Hour Notice and 5-Day VCN did not have the details of petitioner's violations with respect to the issuance of sales invoices/official receipts; and or failure to reflect the information required in said sales invoices/official receipts.

[37] Exhibit "C", Docket, p. 44; BIR Records, p. 115.
[38] Exhibits "A-1" and "C-1", Docket, pp. 39 and 45; BIR records, pp. 103 and 114.

Also, the result of the 10-day surveillance is merely a summary of the alleged daily sales that the respondents noted during the surveillance.

On this ground, the Court finds that the 48-Hour Notice and the 5-Day VCN failed to sufficiently inform the taxpayer of the issues/violations that should be rectified.

We shall now discuss petitioner's argument that the assessment for deficiency VAT of P1,196,583.13 is arbitrary, erroneous, and without factual basis.

The basis and the method of how respondents computed the said sales amounts were not set forth in the notice. The results of the 10-day surveillance show only the following information:

Date	Sales
16-Apr-2010	P 328,577.55
17-Apr-2010	336,630.90
18-Apr-2010	271,235.96
19-Apr-2010	314,074.80
20-Apr-2010	268,616.57
21-Apr-2010	317,500.00
22-Apr-2010	281,673.87
23-Apr-2010	306,973.59
24-Apr-2010	319,836.62
25-Apr-2010	290,845.01
Total	**P 3,035,964.87**

Divided by:	
No. of Days of Surveillance	10
Average Sales per Day	303,596.49
Average Sales per Day – Net of VAT	271,068.29
Multiplied by:	
No. of Days in a year	365
Annual Sales per Surveillance	**98,939,926.57**

The computed Average Sales per Day-Net of VAT, as shown in respondents' results of the surveillance, was used to extrapolate the following underdeclared Sales and consequent discrepancy VAT liability: /

	June 2008 to May 2009 (365 Days)	June 2009 to March 2010 (301 Days)	TOTAL
Annual Sales per Surveillance	P 98,939,926.57	81,591,555.88	180,531,482.45
Sales per VAT returns	95,128,108.25	75,431,848.09	170,559,956.34
Under Declared Sales	3,811,818.32	6,159,707.79	9,971,526.11
x Tax Rate	12%	12%	12%
VAT Liability	**P 457,418.20**	**739,164.93**	**1,196,583.13**

Respondents argue that the assessment for deficiency VAT was made pursuant to Section 6(C) of the NIRC of 1997, as amended, *to wit*:

> "Sec. 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. –
>
> xxx
>
> (C) Authority to Conduct Inventory-taking, Surveillance and to Prescribe Presumptive Gross Sales and Receipts. – The Commissioner may, at any time during the taxable year, order inventory-taking of goods of any taxpayer as a basis for determining his internal revenue tax liabilities, or may place the business operations of any person, natural or juridical, under observation or surveillance if there is reason to believe that such person is not declaring his correct income, sales or receipts for internal revenue tax purposes. **The findings may be used as the basis for assessing the taxes for the other months or quarters of the same or different taxable years and such assessment shall be deemed *prima facie* correct.**
>
> When it is found that a person has failed to issue receipts and invoices in violation of the requirements of Section 113 and 237 of this Code, or when there is reason to believe that the books of accounts or other records do not correctly reflect the declarations made or to be made in a return required to be filed under the provisions of this Code, the Commissioner, after taking into account the sales, receipts, income or other taxable base of other persons engaged in similar businesses under similar situations or circumstances or after considering other relevant information may prescribe a minimum amount of such gross receipts, sales and taxable base, and such amount so prescribed shall be *prima facie* correct for purposes of determining the internal revenue tax liabilities of such person."(*Emphasis supplied*)

Admittedly, respondents may use the findings of the surveillance as basis for assessing the taxes for the other months or quarters of the same or taxable years. Indeed, it is accepted that even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously.[39]

Unfortunately, in the instant case, this Court cannot determine the basis of respondents' findings regarding the sales amounts during the surveillance period. Respondents did not describe how the surveillance was conducted nor did they explain the methods used in arriving at their estimates. There is no way for this Court to determine the factual basis used by respondents, and whether the same gives rise to a reasonable estimate. Without such information, the sales amounts used by respondent cannot be considered as *prima facie* valid as they appear to have been arrived at without any basis.

Absent any explanation regarding the factual basis of the results of the surveillance, the taxpayer cannot be deemed to be sufficiently informed about the basis for the assessment of the VAT liability, in order to adequately respond to or specifically refute the computed VAT liability.

Furthermore, We agree with petitioner that the results of surveillance cannot be the basis of the assessment for the other quarters of different taxable years. It is true that Section 6(C) of the NIRC of 1997, as amended, specifically states that the "findings may be used as the basis for assessing the taxes for the other months or quarters of the *same or different taxable years*." However, such assessment must still comply with the test of reasonableness, and must not be arbitrary and capricious.

In the instant case, the factual basis of the surveillance was not explained in notices sent to petitioner. Even assuming that the amount of sales as found during the surveillance has factual basis, the fluctuations in the daily sales gives credence to petitioner's argument that the extrapolation is "inaccurate because the daily sales made during a certain period or during a particular year are not uniform or are actually inconsistent throughout the year."[40] There are peak and non-peak periods

[39] *Marcos II vs. Court of Appeals*, G.R. No. 120880, June 5, 1997.
[40] Docket, p. 465.

of sales during the year.[41] This Court further recognizes that in the petroleum and gasoline business, prices may change throughout the year and from year-to-year. Respondents should have considered these fluctuations in sales and prices before using the results of the 10-day surveillance to assess VAT deficiencies for the other quarters of the same and previous years.

Under Section 6(C) of the NIRC of 1997, as amended, assessments based on the findings from surveillance are deemed *prima facie* correct. But, that presumption cannot be applied to the instant case since respondent failed to comply with the requirements of due process. Indeed, while taxes are the lifeblood of the government, it is a requirement that taxation be exercised reasonably and in accordance with the prescribed procedure.[42]

WHEREFORE, finding merit, the instant Petition for Review is hereby **GRANTED**. The 48-Hour Notice and the 5-Day VCN, dated May 26, 2011 and June 9, 2011, respectively, are hereby declared **NULL** and **VOID**. Respondents are hereby enjoined from enforcing the same.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CONCURS:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[41] *Ibid.*

[42] *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010.

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice