REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CE PHILIPPINES LTD., Petitioner,	C.T.A. EB No. 730 (C.T.A. CASE NO. 7641)
	Members:
- versus -	ACOSTA, PJ CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 06 2012 ... 10:00 a.m.

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DECISION

Fabon-Victorino, J.:

For disposition is the Petition for Review filed by petitioner CE Philippines Ltd. (CEP Ltd.) on March 18, 2011, assailing the Decision dated September 23, 2010, and the Resolution dated February 14, 2011, which denied its Motion for Reconsideration, both rendered by the Former Second Division of the Court.

The case involves petitioner's claim for refund or issuance of Tax Credit Certificate (TCC) in the amount of P2,972,537.54 allegedly representing excess capital gains tax (CGT) it erroneously paid on the gain realized from the redemption of Series A Preferred shares by CE Philippines II, Inc. (CEP II) on May 17, 2005.

The following facts as found by the Court in Division and as established by evidence on record, are undisputed, viz.:

Petitioner is a non-resident foreign corporation organized and existing under the laws of Bermuda.[1] It is not registered in the Philippines either as a corporation or partnership per Certificate of Non-Registration of Corporation/Partnership issued by the Securities and Exchange Commission (SEC) on May 25, 2007.[2]

Respondent is the Commissioner of Internal Revenue with the authority, among others, to act and approve claims for refund or tax credit, as provided by law, with office address at

[1] Exhibit A and A-1.
[2] Joint Stipulation of Facts and Issues dated November 16, 2007, Division docket page 90.

the 5th Floor, Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.

CEP II is a duly organized and existing domestic corporation[3] that redeemed the Series A Preferred shares from petitioner. It has the following primary purpose:

> To acquire by purchase, exchange, assignment, gift or otherwise, and to hold, own and use for investment or otherwise, and to sell, assign, transfer, exchange, lease, let, develop, mortgage, pledge, traffic, deal in, and with, and otherwise operate, manage, enjoy and dispose of, any and all properties of every kind and description and wherever situated, as and to the extent permitted by law, including but not limited to, buildings, tenements, warehouses, factories, edifices and structures and other improvements, and bonds, debentures, promissory notes, shares of capital stock, or other securities or obligations created, negotiated or issued by any corporation, association or other entity, foreign or domestic and while the owner, holder or possessor thereof, to exercise all the rights, powers and privileges of ownership or any other interest therein, including the right to receive, collect and dispose of, any and all rentals, dividends, interests and income, derived therefrom, and the right to vote on any proprietary or other interest, on any shares of the capital stock, and upon any bonds, debentures, or other securities having voting power, so owned or held; and provided that it shall not engage in the business of an open-end or close-end investment company as defined in the Investment Company Act (Republic Act No. 2629).

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[3] Exhibit H.

On August 31, 2000, the Board of Directors of CEP II conducted a special meeting where it adopted the following resolution for the purpose of increasing its authorized capital stock, thus:

> "**BE IT RESOLVED,** That the board of directors approve the **increase of the authorized capital stock of the corporation from Eighty Thousand Pesos (Php80,000.00)** divided into Forty Thousand (40,000) common shares of stock with a par value of One Peso each, and Forty Thousand (40,000) Series A Preferred Stock with a par value of One Peso each, **to Eleven Million Six Hundred Forty Seven Thousand Nine Hundred Forty Eight Pesos (11,647,948)** divided into Two Million Eight Hundred Forty Thousand (2,840,000) common shares of the par value of Php1.00 per share, and Eight Million Eight Hundred Seven Thousand Nine Hundred Forty Eight (8,807,948) Series A Preferred Shares with a par value of Php1.00 per share, **with all of the increase in capital to be subscribed by CE Philippines, Ltd. by way of assignment of One Hundred Thousand (100,000) common shares with a par value of Php28.00 per share, and Three Hundred Thirteen Thousand One Hundred Forty One Thousand (313,141) Series A Preferred Shares with a par value of Php28.00 per share, in CE Cebu Geothermal Power Company, Inc.,** and for this purpose, Article Seventh of the Amended Articles of Incorporation of the Corporation is hereby amended to read as follows:
>
>> 'SEVENTH. - That the capital stock of said corporation is Eleven Million Six Hundred Forty Seven Thousand Nine Hundred Forty Eight Pesos (PHP11,647,948) Philippine Currency and said capital stock is divided into Two Million Eight Hundred Forty Thousand (2,840,000) common shares of the par value of Php1.00 per share, and Eight Million Eight Hundred Seven Thousand Nine Hundred Forty Eight (8,807,948) Series A

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> Preferred Shares with a par value of Php1.00 per share. [4]

In his Treasurer's Affidavit executed on September 15, 2000,[5] Joseph Gregson A. Castillo, who was then the elected Treasurer of CEP II, acknowledged receipt of payment from petitioner for the subscription of the total increase in the company's capitalization, in this wise:

> 2. Of the increase in the authorized capital stock of Eleven Million Five Hundred Sixty Seven Thousand Nine Hundred Forty Eight (11,567,948), the amount of Eleven Million Five Hundred Sixty Seven Thousand Nine Hundred Forty Eight (Php11,567,948) worth of shares have been subscribed, and **the amount of Eleven Million Five Hundred Sixty Seven Thousand Nine Hundred Forty Eight (Php11,567,948) has been paid to me** by way of assignment of 100,000 common shares and 313,141 Series a Preferred Shares of CE Cebu Geothermal Power Company, Inc., to the benefit and credit of the Corporation, which constitute fresh and additional capital.

On November 6, 2000, petitioner, by virtue of a Deed of Assignment, assigned unto CEP II all of its right and interest over its 100,000 common shares of stock and 313,141 Series A preferred shares of stock, both with par value of P28.00 in CE

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[4] Exhibits K and K-1.
[5] Exhibit K-2.

Cebu Geothermal Power Company, Inc. [6] as and by way of full payment of its subscription to 11,567,948 shares of stock with a par value of P1.00 per share,

More than three years thereafter, or on March 25, 2004, CEP II obtained an approval from the SEC to use the U.S. dollar as its functional currency other than Philippine Peso in presenting its financial statements, pursuant to SEC Memorandum Circular 14, Series of 2003.

On May 17, 2005, the Board of Directors of CEP II adopted a resolution authorizing the redemption of its 187,348 Series A preferred shares issued to petitioner at a redemption price of US$8.59, or a total redemption amount of US$1,609,319.32.[7]

On June 16, 2005, petitioner filed Capital Gains Tax Return and paid the amount of P5,982,071.77 for the gain it realized from the redemption of the 187,348 Series A preferred shares by CEP II. [8]

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[6] Exhibit M.
[7] Exhibit E.
[8] Exhibit D.

On June 1, 2007, petitioner filed with the BIR Revenue District Office No. 47 an administrative claim for refund saying that it erroneously used the peso equivalent of the redemption price and cost per share resulting in a capital gain of P59,570,717.67. However, based on tax regulations, the capital gain it realized and the corresponding CGT should only be P30,145,342.35 and P3,009,534.23, respectively. In view thereof, it is entitled to a refund in the amount of P2,972,537.54, representing the excess CGT it paid in relation to the redemption of 187,348 Series A preferred shares by CEP II.

On June 15, 2007, petitioner filed with the Court in Division a Petition for Review alleging respondent's inaction on its administrative claim for refund.

In her Answer, respondent banked on the following Special and Affirmative Defenses:

> "6. Assuming but without admitting that Petitioner filed a claim for refund, the same is still subject to investigation by the Bureau of Internal Revenue;
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> 7. Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;
>
> 8. Taxes paid and collected are presumed to be made in accordance with the laws

and regulations, hence, not creditable or refundable;

9. It is incumbent upon the Petitioner to show that it has complied with the provision of Section 204 (C) in relation to Section 229 of the 1997 Tax Code, as amended;

10. In an action for tax credit or refund, the burden is upon the taxpayer to prove that it is entitled thereto, and failure to discharge the said burden is fatal to its claim *(Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban; Law of Basic Taxation in the Philippines, 1st Edition, p. 206);*

11. Claims for refund are construed strictly against the claimant, the same partake the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesman, 31 SCRA 95)* and as such, they are looked upon with disfavour. *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)"*

During the trial, only petitioner presented evidence - both documentary and testimonial - to substantiate its claim. Respondent did not present any, claiming that no investigation report from RDO 47 was submitted leaving counsel without any choice but to submit the case for decision based on the pleadings filed.

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On October 9, 2009, the Petition was submitted for Decision before the Court in Division.

On September 23, 2010, the Court in Division denied the petition ruling that "the investment of petitioner to CEP II was made in Philippine pesos", thus, "the gain realized from the redemption by CEP II of 187,348 series A Preferred shares should be computed using the Philippine peso cost and the Philippine peso selling price of the shares". The dispositive portion of the assailed Decision reads as follows:

> "WHEREFORE, the instant Petition for Review is hereby DENIED for lack of merit.
>
> SO ORDERED."

Unconvinced, petitioner's filed a Motion for Reconsideration, which was denied in the impugned Resolution of February 14, 2011, in this fashion:

> "WHEREFORE, finding no cogent reason to disturb, reverse or modify the Decision dated September 23, 2010, petitioner's *Motion for Reconsideration* is hereby DENIED for lack of merit.
>
> SO ORDERED."

Hence, this Petition for Review filed on March 18, 2011 where petitioner merely reiterates the arguments raised in its pleadings filed during the trial and which have been passed upon and determined by the Court in Division in the assailed Decision of September 23, 2010 and Resolution of February 14, 2011.

Petitioner restates that its 100,000 common shares and 313,141 Series A Preferred Shares in CE Cebu, assigned in favor of CEP II in full payment of its subscription to the 2,800,000 common shares and 8,767,948 Series A Preferred shares, were acquired using US dollars. That being the case, the gain or loss incurred from the redemption by CEP II of the 187,348 Series A Preferred shares should as well be computed using US dollar as functional currency pursuant to Section 12 of Revenue Regulations (RR) No. 6-2006 dated March 16, 2006.

Petitioner further complains the finding that petitioner's investment in CEP II was made in Philippine pesos based on the par value of the subject shares in peso as appearing on the Deed of Assignment of Shares dated November 6, 2000 and the Treasurer's Affidavit dated September 15, 2000, both of which are documentary evidence for petitioner. According to petitioner, the use of peso value in the documents was only in compliance with the SEC requirement to use Philippine Peso in transactions involving capital stock and par value of shares of all domestic corporations for submission to the SEC regardless of the currency actually used in the transaction. Such use of peso value in the documents does not negate the fact that petitioner's original investment in CE Cebu was paid in US dollars. Additionally, it is not the peso denomination of the capital stock that determines if the investment is made in Philippine pesos or foreign currency but the manner in which the investment was made or paid for.

Also the fact that CE Cebu and CEP II obtained the approval from the SEC to use the US dollar as functional currency only on March 25, 2004 should not be taken against it. For one, SEC Memorandum Circular No. 14 requiring companies to secure its approval for the use functional currency other than the Philippine peso was issued only on December 11, 2003, or after its execution of the Deed of Assignment in favor of CEP II on November 06, 2000.

Besides, CE Cebu and CEP II have been keeping audited financial statements in US dollars as early as the year 2000 or prior to securing SEC approval to use functional currency other than the Philippine peso.

Finally, the BIR itself issued BIR Ruling No. 2-2009 dated February 10, 2009 stating that the gain realized by petitioner from the redemption by CEP II of its Series A Preferred Shares should be computed in US dollars being its functional currency, using the conversion rate at the time of redemption. Given that the administrative interpretations of agencies charged with the enforcement of the law should be accorded weight and respect, BIR Ruling No. 2-2009 dated February 10, 2009 should be sustained.

Despite the opportunity granted, respondent failed to file any responsive pleading in this case, which was deemed submitted for decision by the Resolution dated September 06, 2011.

The petition is bereft of merit, hence should be denied.

As stated by respondent, a tax credit or refund, like tax exemption, is strictly construed against the taxpayer. The taxpayer claiming the tax credit or refund has the burden of proving that he is entitled to the refund or credit, x x by submitting evidence that he has complied with the requirements laid down in the tax code and the BIR's revenue regulations under which such privilege of credit or refund is accorded.[9]

It is not for the government or respondent to disprove a taxpayer's claim for refund, for the burden of establishing the factual basis of a claim for a refund rests on the taxpayer. It is only upon presentation of sufficient and credible evidence that the claim for refund will be granted. There is no automatic grant of a tax refund.[10] The taxpayer, such as petitioner, is charged with the burden of proving his entitlement to a claim for refund,[11] failure to do so is lethal to the taxpayer's cause.

Contrary to petitioner's claim, the Court in Division scrupulously and fastidiously examined each and every piece of documentary evidence presented by petitioner precisely it was able to discern that the transaction was entered into and consummated using Philippine peso for its valuation.

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[9] Microsoft Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 180173, April 06, 2011.
[10] Commissioner of Internal Revenue vs. Far East Bank, G.R. No. 173854, March 16, 2010.
[11] Philippine Geothermal vs. Commissioner of Internal Revenue, G.R. No. 154028. July 29, 2005.

It is beyond debate that petitioner presented voluminous documents showing that both CE Cebu and CEP II use US dollar as their functional currency. However, this is not the issue. The issue is what currency was used as payment when petitioner invested with CEP II by subscribing to the shares of stock of CEP II as this will determine the correct amount of CGT that petitioner ought to pay the government for the gain realized from the transaction. Verily, the deluge of documents showing the use of US dollar as functional currency of CE Cebu and CEP II is of no moment. In the first place, they failed to overcome the clear import of the terms expressed in the Deed of Assignment[12] dated November 6, 2000 and the Treasurer's Affidavit[13] dated September 15, 2000, both of which clearly established that petitioner made its investment in CEP II using the Philippine peso and not in dollar or any other currency.

Significantly, the Deed of Assignment dated November 6, 2000 and the accompanying Treasure's Affidavit are those of petitioner's. By offering them, petitioner virtually admits the veracity and truthfulness of their contents. It is repugnant to the rules to allow petitioner at this point to repudiate its own submission as reflected in its documents. To permit petitioner to

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[12] Exhibit M.
[13] Exhibit K-2.

use these documents to establish the subject transaction but in the same breath disregard or repudiate the portion not in its favor or inimical to its cause will trivialize if not ravage the rules on evidence.

To add light to the cited documents is the Resolution of August 31, 2000 adopted by the Board of Directors of CEP II, which dovetailed the origin of the shares of stock subject of the redemption with par value P1.00 per share, thus:

> "BE IT RESOLVED, That the board of directors approve the **increase of the authorized capital stock of the corporation from Eighty Thousand Pesos (Php80,000.00)** divided into Forty Thousand (40,000) common shares of stock with a par value of One Peso each, and Forty Thousand (40,000) Series A Preferred Stock **with a par value of One Peso each, to Eleven Million Six Hundred Forty Seven Thousand Nine Hundred Forty Eight Pesos (11,647,948)** divided into Two Million Eight Hundred Forty Thousand (2,840,000) common shares of the par value of Php1.00 per share, and Eight Million Eight Hundred Seven Thousand Nine Hundred Forty Eight (8,807,948) Series A Preferred Shares **with a par value of Php1.00 per share, with all of the increase in capital to be subscribed by CE Philippines, Ltd. by way of assignment of One Hundred Thousand (100,000) common shares with a par value of Php28.00 per share, and Three Hundred Thirteen Thousand One Hundred Forty One Thousand (313,141) Series A Preferred Shares with a par value of Php28.00 per share, in CE Cebu Geothermal Power Company, Inc.,** and for this purpose, Article Seventh of the Amended Articles of Incorporation of the Corporation is hereby amended to read as follows:
>
> > 'SEVENTH. – That the capital stock of said corporation is Eleven Million Six

> Hundred Forty Seven Thousand Nine Hundred Forty Eight Pesos (PHP11,647,948) Philippine Currency and said capital stock is divided into Two Million Eight Hundred Forty Thousand (2,840,000) common shares of the par value of Php1.00 per share, and Eight Million Eight Hundred Seven Thousand Nine Hundred Forty Eight (8,807,948) Series A Preferred Shares with a par value of Php1.00 per share. [14]

Thus, from the beginning the parties to the transactions were well aware that they were dealing with shares of stock valued and denominated in Philippine peso and that the medium of exchange for purposes of subscription of such shares shall also be the same.

In his Treasurer's Affidavit executed on September 15, 2000,[15] Joseph Gregson A. Castillo, who was then the elected Treasurer of CEP II, acknowledged and confirmed receipt of payment valued in Philippine peso from petitioner for the subscription of the total increase in the company's capitalization, in this wise:

> 2. Of the increase in the authorized capital stock of Eleven Million Five Hundred Sixty Seven Thousand Nine Hundred Forty Eight (11,567,948), the amount of Eleven Million Five Hundred Sixty Seven Thousand

[14] Exhibits K and K-1.
[15] Exhibit K-2.

> Nine Hundred Forty Eight (Php11,567,948) worth of shares have been subscribed, and **the amount of Eleven Million Five Hundred Sixty Seven Thousand Nine Hundred Forty Eight (Php11,567,948) has been paid to me** by way of assignment of 100,000 common shares and 313,141 Series a Preferred Shares of CE Cebu Geothermal Power Company, Inc., to the benefit and credit of the Corporation, which constitute fresh and additional capital.

To seal the transaction, petitioner, on November 6, 2000, executed a Deed of Assignment in favor of CEP II of all its right and interest over its 100,000 common shares of stock and 313,141 Series A preferred shares of stock, valued at P28.00 per share in CE Cebu Geothermal Power Company, Inc. [16] as and by way of full payment of its subscription to 11,567,948 shares of stock with a par value of P1.00 per share.

Anent petitioner's reliance on BIR Ruling No. 2-2009 dated February 10, 2009 stating that the gain realized by petitioner from the redemption by CEP II of its Series A Preferred Shares should be computed on the basis of the functional currency which is the US dollar, suffice it to say that such interpretation is not binding upon the Court. The interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is

[16] Exhibit M.

entitled to great respect by the courts. However, such interpretation is not conclusive and will be ignored if judicially found to be erroneous.[17] Although "[i]t is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts," this interpretation is not conclusive and will have to be "ignored if judicially found to be erroneous" and "clearly absurd x x x or improper." An administrative issuance that overrides the law it merely seeks to interpret, instead of remaining consistent and in harmony with it, will not be countenanced.[18]

The Court *En Banc* cannot agree more with the Court in Division in its finding that the investment of petitioner to CEP II was made in Philippine peso, viz.:

> "A careful perusal of the records, however reveals that the transaction between petitioner and CEP II started when petitioner and CEP II executed a Deed of Assignment on November 2000. By virtue of such Deed of Assignment, petitioner invested and wholly subscribed to the increased shares of stock amounting to P11,567,948.00, by assigning to CEP II its shares of stocks in CE Cebu Geothermal Power Company, Inc., consisting of 100,000 common shares of stock with par value of P28.00 and 313,141 Series A preferred

[17] Philippine Bank of Communications vs. Commissioner of Internal Revenue, G.R. No. 112024. January 28, 1999.
[18] Commissioner of Internal Revenue vs. American Express, G.R. No. 152609, June 29, 2005.

> shares of stock with a par value of P28.00, by way of full payment, when CEP II increased its capital stock on April 23, 2001.
>
> Based on the above discussion, therefore, it is evident that the investment of petitioner to CEP II was made in Philippine peso, since as indicated in the Deed of Assignment as well as in the Treasurer's Affidavit, petitioner has made its investment to CEP II, in Philippine peso, by assigning to CEP II, petitioner's shares in CE Cebu Geothermal Power Company, Inc., consisting of 100,000 common shares of stock with par value of P28.00 and 313,141 Series A preferred shares of stock with a par value of P28.00, and amounting to P11,567,948.00 worth of shares. Even assuming that CEP II obtained approval from the Securities and Exchange Commission to use the U.S. Dollar as its functional currency, such approval was only obtained on March 24, 2005. Hence, when the Board of Directors of CEP II issued a resolution authorizing the redemption of its shares from petitioner, consisting of 187,348 Series A Preferred Shares, it computed the redemption price using its U.S. Dollar functional currency. However, despite of (sic) the fact that at the time CEP II redeemed its shares from petitioner, it was already using the U.S. Dollar as its functional currency, it remains undisputed that when petitioner made its investment to CEP II, it did so by using the Philippine Peso."

Thus, as ruled by the Court in Division in the assailed Resolution of February 14, 2011, the gain/loss from the sale of the investment shall be computed using the Philippine peso cost and Philippine peso selling price since the investment by petitioner was made in Philippine peso. This is in accord with

Section 12 of Revenue Regulations (RR) No. 6-2006 dated March 16, 2006, which reads as follows:

"**SEC. 12. Treatment of Gain or Loss on Sale of Investment under Functional Currency.** – An investor which invests in functional currency (other than Philippine peso) securities can compute its gain or loss from the sale of said investment using the functional currency.

For example, if Company A invests in a US dollar bond at US$100,000 when the US$:P rate was US$1:40 and sells the same investment at US$102,000 when the US$:P rate was US$1:50, the computation of the capital gain shall be as follows:

	USD	Pesos
Selling price	102,000	5,100,000
Cost	100,000	4,000,000
Taxable Gain	2,000	

In the above illustration, the taxable gain that should be reported is only $2,000. Thus, in reporting for tax purposes of the $2,000 gain in equivalent or converted Philippine peso denomination, the equivalent peso denomination is the peso equivalent of 2,000 U.S. dollars using the conversion rate on the date of the consummation of the transaction.

The above rule shall also apply to non-resident stockholders of an investee company where such investee company in the Philippines uses a functional currency other than the Philippine peso for its financial statements.

However, **if an investor makes an investment in Philippine peso, then it shall compute the gain or loss from sale of said investment using the Philippine peso cost and Philippine peso selling price."**

WHEREFORE, the Petition for Review dated March 18, 2011, filed by petitioner CE Philippines Ltd., is hereby **DENIED**, for lack of merit. Accordingly, the Decision dated September 23, 2010 and the Resolution dated February 14, 2011, are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice