REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

WILLORE PHARMA CORPORATION,
Petitioner,

- versus -

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8602

Members:

DEL ROSARIO, *P.J*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:
DEC 15 2016 ; 3:58 p.m.

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RESOLUTION

UY, *J.*:

In the Resolution dated September 15, 2016, the following motions were submitted for resolution, to wit:

1. petitioner's **Partial Motion for Reconsideration**, filed on July 7, 2016, and **Supplemental Partial Motion for Reconsideration (With Leave to Admit New Evidence)**, filed through registered mail on July 8, 2016 and received by the Court on July 14, 2016, without respondent's comments thereto; and

2. respondent's **Motion for Partial Reconsideration (Decision dated 22 June 2016)**, filed on July 11, 2016, with petitioner's **Comment (To the July 8, 2016 Partial Motion for Reconsideration)**, filed on July 26, 2016.

The dispositive portion of the assailed Decision promulgated on June 22, 2016, reads as follows:

"**WHEREFORE**, in light of all the foregoing, the instant Petition for Review is **PARTIALLY GRANTED**. The deficiency EWT on the rental of LCD/projector, training room and function room, on income payments to Hizon Laboratories, and the deficiency income tax resulting from the disallowance of said expenses and the donation which was found to be in the nature of an advertising expense, as well the compromise penalties imposed, are **CANCELLED** and **SET ASIDE**. Accordingly, the assessments issued by respondent against petitioner for taxable year 2008 covering deficiency EWT, FBT, FWT, FWVAT and income tax are **UPHELD** but **WITH MODIFICATIONS**. Petitioner is **ORDERED TO PAY** respondent the amount of **FIVE MILLION FIVE HUNDRED THIRTEEN THOUSAND ONE HUNDRED FOUR PESOS AND 9/100 (₱5,513,104.09)** representing basic deficiency EWT, FBT, FWT, FWVAT and income tax, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, to wit:

TYPE OF TAX	BASIC TAX	25% SURCHARGE	TOTAL
EWT	₱ 97,065.56	₱ 24,266.39	₱ 121,331.95
FBT	490,699.37	122,674.84	613,374.21
FWT	17,056.20	4,264.05	21,320.25
FWVAT	5,847.84	1,461.96	7,309.80
Income tax	3,799,814.30	949,953.58	4,749,767.88
Total	**₱4,410,483.27**	**₱1,102,620.82**	**₱5,513,104.09**

In addition, petitioner is **ORDERED TO PAY**:

a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax computed from April 15, 2009 until full payment thereof, pursuant to Section 249(B) of the NIRC of 1997; and

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱5,513,104.09 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from May 10, 2012 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997.

SO ORDERED."

Petitioner's Partial Motion for Reconsideration

Petitioner seeks reconsideration of the assailed Decision insofar as the Court upheld respondent's disallowance of petitioner's unsupported expenses as deduction from gross income in the reduced amount of ₱1,580,262.80.[1]

In its ***Partial Motion for Reconsideration***, petitioner prays for the Court to allow fifty percent (50%) of its unsupported expenses, citing as basis the case of *Zamora vs. Collector of Internal Revenue*,[2] which was also quoted in Section 2.4(c) of Revenue Memorandum Circular (RMC) No. 23-2000.

Petitioner argues that since the exact amount of its unsupported expenses cannot be ascertained due to absence of documentary evidence, it is the duty of the respondent to make an estimate of the deduction that may be allowable in computing its taxable income. Respondent allegedly failed to discharge the said duty. Hence, following the ruling in the Zamora case, petitioner prays that it be allowed 50% of its unsupported expenses.

The motion is bereft of merit.

The Court notes that petitioner is raising this matter for the first time in the instant motion. Well-settled is the rule that points of law, theories, issues and arguments not brought to the attention of the lower court, administrative agency or quasi-judicial body need not be considered by the reviewing court[3] as they cannot be raised for the first time on appeal, much more in a motion for reconsideration as in this case, because this would be offensive to the basic rules of fair play, justice and due process. This last ditch effort to shift to a new theory and raise a new matter in the hope of a favorable result is a pernicious practice that has consistently been rejected.[4]

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[1] Pages 35 to 40 of the assailed Decision.
[2] G.R. No. L-15290, May 31, 1963.
[3] *Nestor A. Jacot vs. Rogen T. Dal and Commission on Elections*, G.R. No. 179848, November 27, 2008.
[4] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007.

And even if, granting *arguendo,* that We allow petitioner to raise this new issue in the instant Motion, We find that Section 2.4(c) of RMC No. 23-2000 is not applicable in the case of petitioner.

It must be emphasized that RMC No. 23-2000[5] prescribes the procedures on the assessment of deficiency internal revenue taxes based on the *"Best Evidence Obtainable".* The pertinent provisions of RMC No. 23-2000 reads:

> "SECTION 1. *Scope.* — It has been observed that a very significant number of taxpayers either refuse or fail to present their respective accounting records when demanded for tax audit purposes, thereby resulting to the delay in the submission of the Revenue Officer's report of investigation as required by the existing Audit Program and inconsistency in the determination of the deficiency internal revenue tax that may properly be assessed and demanded from the taxpayer, to the damage and prejudice against the revenue.
>
> **In the absence of accounting records or other documents necessary for the proper determination of the taxpayer's internal revenue tax liability, Section 6 (B) of the National Internal Revenue Code of 1997 requires that the assessment of the tax be determined based on the '*Best Evidence Obtainable,*'** as follows:
>
> > *'When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.'*
>
> SECTION 2. ***Prescribed Revenue Procedures.*** —
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> xxx xxx xxx

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[5] SUBJECT: Existing Revenue Procedures on the Assessment of Deficiency Internal Revenue Taxes Based on the "Best Evidence Obtainable".

2.3 *Assessment Based on Best Evidence Obtainable.* — **An assessment based on best evidence obtainable is justified when any of the grounds provided by law is clearly established viz:**

1. **The report or records requested from the taxpayer are not forthcoming i.e. the records are lost; refusal of the taxpayer to submit such records;**

2. **The reports submitted are false, incomplete or erroneous.**

xxx xxx xxx." *(Emphases supplied)*

Based on the foregoing provisions, it is clear that RMC No. 23-2000 is applicable only when the assessment is based on the best evidence obtainable, which in turn is justifiable only when it is clearly established that the report or records are not forthcoming; that there was refusal on the part of the taxpayer to submit such records; or that the reports submitted are false, incomplete or erroneous.

In this case, there is no showing that the subject tax assessments were based by respondent on the best evidence obtainable. Thus, the provisions of RMC No. 23-2000 should not be applied to this case.

Nevertheless, even granting that the subject tax assessments were based on the best evidence obtainable, petitioner's case does not fall under the "50% rule" in accordance with Section 2.4(c) of RMC No. 23-2000.

Section 2.4(c) of RMC No. 23-2000 reads:

"2.4 ***Existing Revenue Procedures and Jurisprudence Governing Assessment Based on the Best Evidence Obtainable.*** — **Provided hereunder are the existing revenue procedures and jurisprudence governing issuance of a deficiency tax assessment based on the best evidence obtainable**:

xxx xxx xxx

(c) ***Assessment Based on Estimate; 50% Rule, in the Absence of Receipts to Prove Actual Amount of Expense Deduction.* — The Court held in the Mariano Zamora case that, if there is a showing that expenses have been incurred but the exact amount thereof cannot be ascertained due to absence of documentary evidence, it is the duty of the BIR to make an estimate of the deduction that may be allowable in computing the taxpayer's taxable income, bearing heavily against the taxpayer whose inexactitude is of his own making. That disallowance of 50% of the taxpayer's claimed deduction is valid.**

'It is alleged by Mariano Zamora that the CTA erred in disallowing P10,478.50 as promotion expenses incurred by his wife for the promotion of the Bay View Hotel and Farmacia Zamora. He contends that the whole amount of P20,957.00, as promotion expenses in his 1951 income tax returns, should be allowed and not merely one-half of it or P10,478.50, on the ground that, while not all the itemized expenses are supported by receipts, the absence of some supporting receipts has been sufficiently and satisfactorily established. For, as alleged, the said amount of P20,957.00 was spent by Mrs. Esperanza A. Zamora (wife of Mariano), during her travel to Japan and the United States to purchase machinery for a new Tiki-Tiki plant, and to observe hotel management in modern hotels. The CTA, however, found that for said trip, Mrs. Zamora obtained only the sum of P5,000.00 from the Central Bank and that in her application for dollar allocation, she stated that she was going abroad on a combined medical and business trip, which facts were not denied by Mariano Zamora. No evidence had been submitted as to where Mariano had obtained the amount in excess of P5,000.00 given to his wife which she spent abroad. No explanation had been made either that the statement contained in Mrs. Zamora's application for dollar allocation that she was going abroad on a combined medical and business trip, was not correct. The alleged

> expenses were not supported by receipts. Mrs. Zamora could not even remember how much money she had when she left abroad in 1951, and how the alleged amount of P20,957.00 was spent."

Based on the foregoing, the "50% rule" is to be resorted to by respondent when *"there is a showing that expenses have been incurred but the exact amount thereof cannot be ascertained due to absence of documentary evidence".*

In the *Zamora* case, the "50% rule" was applied because there was other evidence to show that the expenses were actually incurred in connection with petitioner's business. In the said case, the **evidence such as the application of Mrs. Zamora for dollar allocation shows that she went abroad on a combined medical and business trip**. It appears from the said evidence that business expense was actually incurred, although, the Supreme Court ruled that the same evidence also reveals that not all of her expenses came under the category of ordinary and necessary expenses since part thereof also constituted her personal expenses.

In other words, there must be other credible evidence showing that expenses were actually incurred in connection with petitioner's business before the "50% rule" can be applied. Such is not the case of herein petitioner. Unlike in the *Zamora* case, petitioner did not prove through credible documentary evidence that it actually incurred the disallowed expenses in connection with its business. Thus, the Court's ruling in relation to the disallowed expense shall remain.

Petitioner's Supplemental Partial Motion for Reconsideration (With Leave to Admit New Evidence)

In its *Supplemental Partial Motion for Reconsideration*, petitioner also seeks reconsideration of the Court's ruling wherein it upheld the disallowance of salaries and wages not subjected to withholding tax amounting to ₱808,098.39 as a deduction from gross income.[6]

Petitioner submits as new evidence the "Certifications of Premium Payment" from the Philippine Health Insurance Corporation

[6] Pages 33 to 34 of the assailed Decision.

(Philhealth) with reservation to submit the certifications from the Social Security System (SSS) and Home Development Mutual Fund (HDMF). These documents allegedly support its motion as regards the portion of the assailed Decision concerning the disallowance of salaries and wages amounting to ₱808,098.39. According to petitioner, these documents shall prove that the said amount pertains to employer contributions to the SSS, Philhealth, HDMF and such other contributions to other government agencies which should be deducted from the gross income.

The Court finds the motion untenable.

In the instant supplemental motion, petitioner prays that it be allowed to submit and present the alleged new documents at this stage of the proceedings, Thus, the said motion shall be considered as a motion for new trial.

Relative thereto, Section 5 of Rule 15 of the Revised Rules of Court of Tax Appeals (RRCTA) provides the grounds for the filing of a motion for new trial, as follows:

> "SEC. 5. *Grounds of motion for new trial.* – A motion for new trial may be based on one or more of the following causes materially affecting the substantial rights of the movant:
>
> (a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which the rights of such aggrieved party has probably been impaired in his rights; or
>
> (b) Newly discovered evidence, which the party could not, with reasonable diligence, have discovered and produced at the trial and, which, if presented, would probably alter the result.
>
> A motion for new trial shall include all grounds then available and those not included shall be deemed waived."

Moreover, Section 6 of Rule 15 of the RRCTA reads as follows:

> "SEC. 6. *Contents of motion for reconsideration or new trial and notice.* — The motion shall be in writing stating its grounds, a written notice of which shall be served by the movant on the adverse party.
>
> A motion for new trial shall be proved in the manner provided for proof of motions. A motion for the cause mentioned in subparagraph (a) of the preceding section shall be supported by affidavits of merits which may be rebutted by counter-affidavits. A motion for the cause mentioned in subparagraph (b) of the preceding section shall be supported by affidavits of the witnesses by whom such evidence is expected to be given, or by duly authenticated documents which are proposed to be introduced in evidence.
>
> A motion for reconsideration or new trial that does not comply with the foregoing provisions shall be deemed *pro forma*, which shall not toll the reglementary period for appeal."

It is clear from the foregoing that the rules allow the filing of a motion for new trial on grounds of fraud, accident, mistake or excusable negligence; or of newly discovered evidence which should be proved in the manner provided for proof of motions. It is also required that the motion must be accompanied by affidavits of merits or affidavits of pertinent witnesses.

A perusal of petitioner's allegations show that its supplemental motion was neither based on fraud, accident, mistake or excusable negligence, nor is the motion based on newly discovered evidence. In other words, there was nothing in petitioner's motion which would show that it invoked any of the grounds mentioned under the rules for the filing of the motion for new trial. Neither did petitioner submit affidavits of merits and/or affidavits of concerned witnesses.

At this juncture, it must be noted that procedural rules are not to be belittled or dismissed simply because their non-observance may have resulted in prejudice to a party's substantive rights. Like all rules, they are required to be followed except only for the most persuasive of reasons when they may be relaxed to relieve a litigant of an injustice not commensurate with the degree of his thoughtlessness in not complying with the procedure prescribed.[7]

In this case, petitioner had all the opportunity to establish, during trial, its assertion that the disallowed salaries and wages pertain to contributions to government agencies which should be deducted from the gross income. While the Court may, again, allow petitioner to present supplementary evidence to support its allegation at this stage of the proceedings by the filing of a motion for new trial, petitioner nevertheless failed to comply with the requirements of the rules when it had the opportunity to do so. Petitioner likewise did not provide any justifiable reason for its failure to present the said certifications during trial.

The Supreme Court in *Atlas Consolidated Mining and Development Corp. vs. Commissioner of Internal Revenue*,[8] held that:

> "*First*, Atlas is guilty of inexcusable negligence in the prosecution of its case. **It is duty-bound to ensure that all proofs required under the rules are duly presented**. Atlas has indeed repeatedly asserted that in its action for the instant judicial claim, the CTA is bound by its rules and suppletorily by the Rules of Court. It certainly has not exercised the diligence required of a litigant who has the burden of proof to present all that is required. *Second*, **forgotten evidence, not presented during the trial nor formally offered, is not newly found evidence that merits a new trial**. *Third*, and most importantly, **it goes against the orderly administration of justice to allow a party to submit forgotten evidence which it could have offered with the exercise of ordinary diligence, more so when a decision has already been rendered**." (*Emphasis supplied.*)

Applying the foregoing, and considering that a liberal application of rules of procedure in this case will only result in the wanton disregard of the rules, the Court finds no justifiable basis to grant petitioner's motion. Thus, the submission and presentation of the certifications from Philhealth, SSS and HDMF cannot be allowed.

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[7] *Spouses David Bergonia and Luzviminda Castillo vs. Court of Appeals (4th Division) and Amado Bravo, Jr.*, G.R. No. 189151, January 25, 2012.

[8] G.R. No. 159490, February 18, 2008.

Considering therefore that there is no evidence on record to support petitioner's motion for reconsideration as to the portion of the assailed Decision pertaining to the disallowance of salaries and wages amounting to ₱808,098.39, the Court's ruling on the matter is sustained.

Respondent's Motion for Partial Reconsideration (Decision dated 22 June 2016)

In his motion, respondent claims that this Court erred in ordering the cancellation of the assessments issued against petitioner for: deficiency expanded withholding tax (EWT) on the rental of LCD/Projector, Training Room and Function Room; and deficiency expanded withholding tax (EWT) on income payments to Hizon Laboratories and the deficiency income resulting from the disallowance of said expense and donation.

A. *Cancellation of Deficiency EWT Assessment on the Rental of LCD/Projector, Training Room and Function Room*

Respondent posits that the Court erred in cancelling and setting aside the deficiency EWT assessment issued against petitioner. Respondent points out that it was properly determined by the Revenue Officer during the examination of petitioner's books of accounts that the amount of ₱49,768.00 was paid for the rental of training room at Valle Verde while the amounts of ₱13,232.00 and ₱1,100.00 were paid for the rentals of function room. According to respondent, said finding is duly supported by documents.

Respondent maintains that based on petitioner's check voucher marked as Exhibit "P-174", the amount of ₱49,768.00 was made in payment for the use of training room and that there is also no clear indication in the Banquet Agreement that said amount was for the payment of food services. Furthermore, petitioner's check vouchers marked as Exhibits "P-171" and "P-179" allegedly show that the amounts of ₱1,100.00 and ₱13,232.00 were made as payments for use of function room.

For its part, petitioner opposes respondent's arguments and claims that the alleged rentals were actually payments for the use of the training room and function room and for the purchase of foods, and not for rentals. The nature of the said payments was allegedly indicated in the supporting official receipts, banquet agreements, function order, and cash/charge invoice.

The Court finds for petitioner.

We disagree with respondent's conclusion that the amounts of ₱49,768.00 and ₱13,232.00, are rentals for the use of function rooms wherein respondent merely relied on the description of the transaction in the respective check vouchers[9].

Notably, nothing in the respective Banquet Agreements[10] show that the payments were for food services. Apparently, respondent's evaluation of the documents is erroneous. A check voucher is a mere internal document of the taxpayer to facilitate and properly record check disbursements. It is self-serving and **does not by itself prove the true nature of the transaction**. To the mind of the Court, the appropriate documents to establish the nature of a transaction in order to come up with a proper assessment of the tax implication thereon are supporting documents from and/or executed with suppliers (*i.e.*, invoices, official receipts, agreements).

In the case of *Towne & City Development Corporation vs. Court of Appeals, et al.*,[11] the Supreme Court held that "a voucher is *not necessarily* an evidence of payment. It is merely a way or method of recording or keeping track of payments made. A procedure adopted by companies for the orderly and proper accounting of funds disbursed. Unless it is supported by an actual payment like the issuance of a check which is subsequently encashed or negotiated, or an actual payment of cash duly receipted for as is customary among businessmen, a voucher remains a piece of paper having no evidentiary weight".

While the Banquet Agreements do not categorically indicate that the payments were for food services, paragraph 1 thereof nevertheless referred to a document called "event order" as the basis for executing the agreement. The "event order" attached to the Banquet Agreements reflects the details of the costing for the said event and mainly comprises of food packages. This sufficiently

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[9] Exhibits "P-174" and "P-179".
[10] Exhibits "P-176" and "P-181".
[11] G.R. No. 135043, July 14, 2004.

shows that the transaction pertain to food services and not rental of function rooms. Clearly, the same are not subject to 5% EWT.

As regards the assessment for deficiency 5% EWT for the amount of ₱1,100.00, the same was upheld by the Court in the assailed Decision[12] and not contested by petitioner. Hence, there is no need to explain the same in this resolution.

B. *Cancellation of Deficiency EWT Assessment on Income Payments to Hizon Laboratories*

Respondent claims that the Court erred in cancelling and setting aside the deficiency tax assessment against petitioner for non-withholding of taxes on income payments made to Hizon Laboratories. According to respondent, petitioner merely alleged that it received a notice that it belongs to the Top 20,000 corporations only on January 29, 2009, but there was no allegation that petitioner was never aware that it belongs to the Top 20,000 corporations through Bureau of Internal Revenue (BIR) postings in its website or through other means before January 29, 2009.

Citing RR No. 14-08, petitioner counter-argues that "a corporation shall not be considered a withholding agent, unless such corporation has been determined and DULY NOTIFIED IN WRITING by the CIR that it has been selected as one of the top 20,000 private corporations and that such authority as a withholding agent shall be effective only UPON RECEIPT OF WRITTEN NOTICE from the CIR that it has been classified as a large taxpayer, as well as one of the top 20,000 private corporations".

Further, petitioner avers that nowhere in RR No. 14-08 does it state: (a) that the respondent shall post in the BIR's website the Notice that petitioner is one of the top 20,000 private corporations, and (b) that the said posting of the Notice in the BIR's website constitutes proper service to the petitioner.

Again, the Court finds for petitioner.

We quote the pertinent portions of RR No. 14-08, to wit:

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[12] Page 16 of the Assailed Decision.

"REVENUE REGULATIONS NO. 14-08

SUBJECT: Amending Further Section 2.57.2 (M) of Revenue Regulations No. 2-98, as Amended, Increasing the Coverage of Withholding Tax Agents Required to Withhold 1% from Regular Suppliers of Goods and 2% from Regular Suppliers of Services from the Top 10,000 Private Corporations to Top 20,000 Private Corporations

xxx xxx xxx

SECTION 2. *Amendment.* — Section 2.57.2 (M) of Revenue Regulations 2-98, as amended, is hereby further amended to read as follows:

xxx xxx xxx

"Sec. 2.57.2. *Income payment subject to creditable withholding tax and rates prescribed thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines.

xxx xxx xxx

'(M) *Income payments made by the top twenty thousand (20,000) private corporations to their local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax.* — Income payments made by any of the *top twenty thousand (20,000) private corporations*, as determined by the Commissioner, to their local/resident supplier of goods and local/resident supplier of services, including non-resident alien engaged in trade or business in the Philippines.

xxx xxx xxx

A corporation shall not be considered a withholding agent for purposes of this Section, **unless such corporation has been determined and duly notified in writing by the Commissioner that it has been selected as**

one of the top twenty thousand (20,000) private corporations.

Any corporation which has been duly classified and notified as large taxpayer by the Commissioner pursuant to RR 1-98, as amended, shall be automatically considered one of the *top twenty thousand (20,000) private corporations, provided, however,* that **its authority as a withholding agent shall be effective only upon receipt of written notice from the Commissioner that it has been classified as a large taxpayer, as well as one of the top twenty thousand (20,000) private corporations, for purposes of these regulations.**

xxx xxx xxx"

In this case, petitioner was able to present the Notice for Inclusion as Top 20,000 Private Corporation[13] showing that it is included in the top 20,000 private corporations and that it was notified only on January 29, 2009. Also, the notice states that petitioner will commence withholding on its purchases of goods and services from its actual receipt of the said notice.

Notably, respondent failed to present evidence to controvert the facts established by petitioner's document. Thus, the Court has no reason to change its ruling that petitioner was not yet required to withhold 1% EWT on its purchases of goods from Hizon Laboratories in 2008 because it was notified of its inclusion as top 20,000 private corporation only on January 29, 2009.

Consequently, the corresponding deficiency EWT assessment on petitioner's income payments to Hizon Laboratories was properly cancelled by the Court.

WHEREFORE, in view of the foregoing considerations, petitioner's **Partial Motion for Reconsideration** and **Supplemental Partial Motion for Reconsideration (With Leave to Admit New Evidence)** and respondent's **Motion for Partial Reconsideration** are **DENIED** for lack of merit.

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[13] Exhibit "P-276".

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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