REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1988 (CTA Case No. 9135)
	Present:
-versus-	DEL ROSARIO, *PJ*, CASTAÑEDA, JR., UY, FABON-VICTORINO, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, and MODESTO-SAN PEDRO, *JJ*.
HARD ROCK CAFÉ (MAKATI CITY), INC., Respondent.	Promulgated: JUN 29 2020 4:02 p.m.

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DECISION

Fabon-Victorino, J.:

In this Petition for Review[1] dated January 7, 2019, petitioner Commissioner of Internal Revenue (CIR), challenges the Decision[2] dated August 10, 2018 and the Resolution[3] dated December 6, 2018, both rendered by the Court in Division in CTA Case No. 9135, invalidating the deficiency percentage tax assessment, together with interest he issued against respondent Hard Rock Café (Makati City), Inc., covering calendar year (CY) 2012.

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1 *Rollo*, pp. 6-25.
2 Ibid. at pp. 34-60.
3 Id. at pp. 62-66

First, the facts as established before the Court in Division.

Petitioner is the Commissioner of Internal Revenue vested with authority to decide disputed assessments, cancel and abate tax liabilities. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.

Respondent, on the other hand, is a domestic corporation with principal office address at Level III, Glorietta 3, Ayala Center, Makati City. It is registered with the BIR under Tax Identification Number (TIN) 004-730-226-000.

On October 21, 2014, respondent received a copy of Preliminary Assessment Notice (PAN) dated October 13, 2014 from Revenue Region (RR) No. 8- Makati City, finding it liable for deficiency percentage tax, plus interest for CY 2012 amounting to ₱21,773,118.44. Respondent filed a Reply to the PAN on November 3, 2014.

On November 11, 2014, respondent received a Formal Assessment Notice with Assessment No. PT-ELA52816-12-14-1024 and Details of Discrepancy dated November 6, 2014 (FAN/FLD), assessing it for deficiency percentage tax for the same CY 2012, this time, in the sum of ₱22,098,415.04, inclusive of interest.

On December 10, 2014, respondent protested the FAN by requesting for a reinvestigation and submitted supporting documents on February 6, 2015.

On September 4, 2015, respondent filed a Petition for Review before the Court in Division, claiming inaction on the part of petitioner in relation to its request for reinvestigation.

In its Decision[4] promulgated on August 10, 2018, the Court in Division cancelled and set aside the deficiency assessment issued by petitioner in the following manner:

> **WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the Formal Assessment Notices dated November 6, 2014 issued by (petitioner) Commissioner of Internal Revenue against (respondent) Hard Rock Café (Makati City) for alleged deficiency percentage tax for calendar year 2012, are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**.

In ruling in favor of respondent, the Court in Division explained that respondent's business does not fall under the definition of a bar and café or night club against which percentage tax may be imposed pursuant to Section 125(b) of the National Internal Revenue Code (NIRC), as amended, since: 1) the entertainment it provides to its patrons is merely incidental to its restaurant business; 2) its premises has no designated dance floor; and 3) it does not have dancers hired specifically for the purpose of dancing with its patrons or customers.

Aggrieved, petitioner sought,[5] but failed[6] to secure a reconsideration of the adverse decision, hence, this appeal.

Petitioner insists that respondent's business activities in its establishment indicate that it is 'night and day club' and/or a 'cabaret' envisaged under Section 125(b) of the NIRC, as amended, as implemented by Revenue Memorandum Circular (RMC) No. 18-2010. He points out that per observation of investigating revenue officer: 1) respondent's premises has a dining area where food and/or drinks are served; 2) there is an entertainment stage where artists perform on a nightly basis; 3) multiple billiard tables are also provided for patrons to linger longer inside the premises; and 4) either live bands or a disc jockey (DJ) provide loud music. For petitioner, the concurrence of all the foregoing factors in the business operation of respondent

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4 See Note 2.

5 Petitioner's Motion for Reconsideration dated August 30, 2018, docket (CTA Case No. 9135), pp. 1001-1016.

6 See Note 3.

means that it is deemed a cabaret and/or night club, against which 18% amusement tax could be imposed.

Citing fragments of the challenged Decision of August 10, 2018, petitioner further claims that since the Court in Division recognized respondent's business both as a restaurant and a club under Revenue Regulations (RR) No. 14-67, the factual basis of the subject assessment has been satisfactorily satisfied.

In any event, the advent of various technological advances in modern day setting rendered RR. No. 14-67 obsolete. It is for this reason that he issued RMC No. 18-2010 to include videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges under the category of cabaret, night and day club in consonance with his quasi-legislative power enshrined in Section 4 of the NIRC, as amended. As such, the definition of cabaret, night and day club under RR No. 14-67, as interpreted by the Supreme Court in the case of *Junior Women's Club*[7] case is deemed superseded with the issuance of RMC No. 18-2010, hence, could no longer be utilized by the Court in Division as basis in resolving the present case.

Assuming for the sake of argument that he crossed the legal bounds of his quasi-legislative power, it is the Regional Trial Court (RTC) and not the Court of Tax Appeals (CTA) that has legal competence to settle issues affecting the constitutionality/validity of administrative issuances. He claims that the phrase "other matters" arising under tax laws found in the second sentence of Section 7(1) of RA No. 1125, as amended, does not embrace issues relating to the exercise of his quasi-legislative power, such as the issuance of RMC No. 18-2010. On this account, the Court in Division has no authority to declare RMC No. 18-2010 repugnant to existing tax laws and jurisprudence.

To punctuate his arguments, petitioner invokes the principle that tax assessments are presumed to be correct in the absence of proof to the contrary, as allegedly obtaining in the case at bench.

[7] *Collector of Internal Revenue vs. Junior Women's Club of the Philippines,* G.R. No. L-6992, February 28, 1956.

In its *Comment* dated March 29, 2019,[8] respondent counters that for a taxpayer to be categorized as a cabaret, or night and day club, there must be credible and convincing evidence showing that it provides dancers or hostesses to its patrons or customers in its business premises. Given that there was no proof showing that: 1) it employs dancers to dance with customers; and 2) its patrons do not visit its establishment to dance with professional dancers, it could not be deemed as a cabaret, or night and day club subject to amusement tax under Section 125(b) of the NIRC, as amended.

Respondent agrees with observation of the Court in Division that its establishment is similar to a club under RR No. 14-67. However, the Court in Division itself clarified in the challenged Decision that its business undertaking is not a night club in its true sense since it neither hires dancers and/or ballerinas to dance with its patrons or customers, nor does its patrons or customers visit its establishment to dance with professional dancers or hostesses. Thus, petitioner is incorrect in claiming that it is a night club within the contemplation of Section 125(b) of the NIRC, as amended.

Further, petitioner's inclusion of videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges in RMC No. 18-2010 expanded the legal interpretation of cabarets, day and night clubs set forth in RR No. 14-67 and existing jurisprudence on the matter. In other words, petitioner arrogated upon himself a power belonging to the legislative branch of the government which should not be countenanced.

Finally, contrary to petitioner's contention, the Court of Tax Appeals may entertain questions relative to the constitutionality or validity of petitioner's revenue issuance in the exercise of his quasi-legislative power, citing jurisprudence[9] as respondent's authority.

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8 *Rollo,* pp. 91-107.

9 *Banco de Oro, et al., vs. Republic of the Philippines,* G.R. No. 198576, August 16, 2016; *Philippine American Life and General Insurance Company vs. Secretary of Finance,* G.R. No. 210987, November 24, 2014; *Asia International Auctioneers vs. Parayno,* G.R. No. 163445, December 18, 2007.

THE RULING OF THE COURT

We deny the instant petition.

Section 125(b) of the NIRC, as amended, subjects *inter alia,* proprietors or operators of cabarets, night or day clubs to amusement tax at the rate of eighteen percent (18%) based on its gross receipts. It reads:

> SEC. 125. *Amusement Taxes.* - There shall be collected from the proprietor, lessee or operator of cockpits, cabarets, night or day clubs, boxing exhibitions, professional basketball games, Jai-Alai and racetracks, a tax equivalent to:
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> xxx xxx xxx
>
> (b) **Eighteen percent (18%) in the case of cabarets, night or day clubs**;
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> xxx xxx xxx
>
> For the purpose of the amusement tax, the term "*gross receipts*" embraces all the receipts of the proprietor, lessee or operator of the amusement place. Said gross receipts also include income from television, radio and motion picture rights, if any. A person or entity or association conducting any activity subject to the tax herein imposed shall be similarly liable for said tax with respect to such portion of the receipts derived by him or it.
>
> The taxes imposed herein shall be payable at the end of each quarter and it shall be the duty of the proprietor, lessee or operator concerned, as well as any party liable, within twenty (20) days after the end of each quarter, to make a true and complete return of the amount of the gross receipts derived during the preceding quarter and pay the tax due thereon. (boldfacing supplied)

RR No. 14-67 defines cabaret, night or day clubs, in the following fashion:

> (m) "Cabaret" includes cafes, restaurants and all similar establishments where patrons are entertained by performers who dance and sing and/or **where the patrons are allowed to dance with said performers or**

> **entertainers who are ordinarily professional hostesses.**
>
> (n) "Night Clubs" are resorts frequented by pleasure seekers at night where foods and wines and drinks are served and music furnished and **the patrons allowed to dance whether with their own partners or professional hostesses furnished by such resorts.**
>
> (o) "Day Clubs" are resorts frequented by pleasure seekers during the day where foods and wines and drinks are served and music furnished and **the patrons allowed to dance whether with their own partners or professional hostesses furnished by such resorts.**
>
> (p) "Professional hostess" shall include any woman employed in public resorts, such as cabarets, night clubs, and day clubs, to provide partners for pleasure seekers who may desire for one, usually for an honorarium in an amount discretionary to the pleasure seekers.
>
> (q) "Professional dancer" shall include any woman employed in cabarets or similar establishments who offers herself as dancing partner for a fixed fee for all such who may pick her. (*Emphasis supplied*)

Case-law construes a cabaret as a place of amusement where customers go because of their desire to dance and where the "bailarinas" are the main attraction. Dancing is the main business and customers patronize the place attracted by the "bailarinas". As a matter of fact, "bailarinas" are the indispensable factor in the operation of the business. Whatever is paid to them should, therefore, be considered as paid on account of the business, and as such it should be considered as part of [taxpayer's] gross receipts. [10] On the other hand, a night club was interpreted to mean as a place or establishment selling to the public food or drinks, where the customers are allowed to dance.[11]

Note that under the principle of *stare decisis et non quieta movere*, as embodied in Article 8 of the Civil Code of the Philippines enjoins adherence to judicial precedent. It requires courts to follow a rule already established in a final decision of the Supreme Court such as the foregoing construction. That decision becomes a judicial precedent to

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[10] *Chiuco vs. Collector of Internal Revenue*, G.R. No. L-13387, March 28, 1960.

[11] *Collector of Internal Revenue vs. Junior Women's Club of the Philippines*, G.R. No. L-6992, February 28, 1956.

be followed in subsequent cases by all courts in the land,[12] and this Court is no exception.

Indeed, for a business or industry to be deemed as a cabaret, or night and day club within the purview of Section 125(b) of the NIRC, as amended, it must be established by concrete and credible evidence that the taxpayer's commercial operations principally involve dancing and customers patronize the place in order to dance either with their own partners or with professional hostesses engaged to render such service to its customers.

Guided by the above observations, respondent's commercial undertaking may not be treated as a cabaret, night or day club subject to amusement tax under Section 125(b) of the NIRC, as amended. Petitioner failed to present formidable proof showing that respondent hires hostesses, ballerinas, or dancers for the purpose of dancing with its customers or patrons in its premises. Neither does it have a specific dance floor in its business premises as demonstrated in a diagram indicating the partition of areas comprising its business establishment.[13] This much was confirmed by witness Joseph Y. Ang, testifying that respondent has no dance floor and in fact does not encourage or accept any dancing activities in the establishment. Customers spontaneously sing and/or dance with the music it provides in the area where they are seated and where ordered food and/or drinks are served.[14]

Besides, numerous indicators suggest that respondent's *principal* business activity is that of a restaurant. For one, the primary purpose for its incorporation is to establish and maintain restaurants, coffee shops, refreshment parlors, cocktail lounges, and in the furtherance of such business, to provide its customers with entertainment, including music, and disco dancing, as well as the selling of souvenir items and goods, and catering services in relation to its restaurant business.[15] In essence, its industry consists of service of

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12 *Filinvest Development Corporation vs. Commissioner of Internal Revenue and Court of Tax Appeals*, G.R. No. 146941, August 9, 2007.

13 Exhibits P-9-3 to P-9-3-c, and P-9-4 to P-9-4a.

14 Answer to Question No. 66, Sworn Statement of Joseph Y. Ang dated March 11, 2016, Exhibit P-20, docket (CTA Case No. 9135), p. 205.

15 Primary Purpose, respondent's Amended Articles of Incorporation, Exhibit P-1.

food and drinks, entertainment being incidental to its restaurant operation.

Significantly, respondent was duly licensed and recognized by the City of Makati as a restaurant per the latter's Certifications dated July 6, 2011 and March 7, 2012.[16] By the same token, it has been accredited by the Department of Tourism as a restaurant with Accreditation No. RST-NCR-00000190-2013.[17]

Moreover, respondent's menu[18] solely composed of food and drinks positively affirms conclusion that its business is to serve food and drinks to its customers or patrons. This as well was validated by its Audited Financial Statements ending December 31, 2012,[19] particularly Note 12 thereof,[20] showing that its revenues were generated from its sales of food, drinks, catering and banquet services rendered to its customers and/or patrons.

All the foregoing inevitably sustains the conclusion that respondent's commerce-in-chief is the sale of food and drinks to its customers, with entertainment being ancillary or an addition to enhance its restaurant business operation. Since respondent is not engaged in the commercial endeavors of a cabaret, or a night and day club as contemplated under Section 125(b) of the NIRC, as amended, and settled jurisprudence, the invalidation of petitioner's assessment against it is in order.

Petitioner cannot also seek refuge under the mantle of RMC No. 18-2010[21] to rationalize the assessment in

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16 Exhibit P-10.
17 Exhibit P-14.
18 Exhibits P-16 and P-18.
19 Exhibit P-9.
20 Exhibit P-9-1.
21 Section 125 (b) of the Tax Code, as amended, provides that an 18% amusement tax be imposed on proprietors, lessees or operators of cabarets, night or day clubs.

Night and day clubs are drinking, dancing and entertainment venues which oftentimes also serve food and provide entertainment. Cabarets, on the other hand, are restaurants or clubs where liquor and food are served, with a stage provided for performances by musicians, dancers or comedians, including a venue for dancing by patrons/customers, similar to that of nightclubs. With the advent of modern interactive entertainment, along with recorded music (and/or music video) using a microphone and public address system, the question. As discussed earlier, a business may only be deemed a cabaret, or day or night club for purposes of Section 125(b) of the NIRC, as amended, when it has a designated dance floor; and dancers or hostesses are hired or employed by the proprietor or operator thereof to dance with its customers in its establishment. By attempting to unilaterally equate videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges, with cabarets, night and day clubs via RMC No. 18-2010, petitioner did not simply construe Section 125(b) of the NIRC, as amended. Rather, he impermissibly stretched to the point of breakage the legal import thereof way beyond the intention of the Congress. This cannot be allowed. On this point, the ruling in *University Physicians Services, Inc. –Management, Inc. vs. Commissioner of Internal Revenue*[22] is *apropos*:

> It 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. Nevertheless, such interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, courts will not countenance administrative issuances that override, instead of remaining consistent and in harmony with, the law they seek to apply and implement.

Lastly, petitioner egregiously erred in his theory that the CTA is without competence to adjudicate matters involving the legality or constitutionality of revenue circulars such as RMC No. 18-2010. Myriad of cases[23] have it that the

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proprietors/lessees or operators of these amusements places have pursued a new form of lounge and club entertainment. Most of these establishments provide facilities to allow patrons to sing with the expectation that sufficient revenue will be made selling food and drinks to the customers. The 'terms' night and day clubs and cabarets have become passe. Amusement places which offer the same pleasurable diversion entertainment and function now include videoke bars, karaoke bars, karaoke televisions, karaoke boxes and music lounges.

As such, the proprietors, lessees or operators of the aforementioned establishments are deemed also subject to the 18% amusement tax under Section 125 (b) of the Tax Code of 1997, as amended, and not to the 12% VAT on gross receipts.

22 G.R. No. 205955, March 7, 2018. See also *ING Bank N.V., engaged in banking operations in the Philippines as ING Bank N.V. Manila Branch vs. Commissioner of Internal Revenue,* G.R. No. 167679, April 20, 2016; and *Philippine Bank of Communications vs. Commissioner of Internal Revenue,* G.R. No. 112024, January 28, 1999.

23 *Confederation for Unity and Advancement of Government Employees (COURAGE), et al. vs. Commissioner, Bureau of Internal Revenue,* G.R. Nos. 213446 & 213658, July 3, 2018; *Commissioner of Internal Revenue vs. Court of Tax Appeals and Petron Corporation*, G.R. No. 207843 (Resolution on Motion for Reconsideration), February 14, 2018; *Banco De Oro et. al. vs.*

Court of Tax Appeals has exclusive jurisdiction to determine the validity or constitutionality of rules and regulations, and other administrative issuances promulgated by the CIR such as RMC No. 18-2010, when the such issue was raised by the taxpayer in contesting an assessment as obtaining in this case. As meticulously discussed by the Supreme Court *En Banc* in *Banco De Oro, et. al. vs. Republic of the Philippines*, thus:[24]

> We revert to the earlier rulings in *Rodriguez*, *Leal*, and *Asia International Auctioneers, Inc.* *The Court of Tax Appeals has exclusive jurisdiction to determine the constitutionality or validity of tax laws, rules and regulations, and other administrative issuances of the Commissioner of Internal Revenue.*
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> *Section 7, as amended, grants the Court of Tax Appeals the exclusive jurisdiction to resolve all tax-related issues:*
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> Section 7. Jurisdiction. — The CTA shall exercise:
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> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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> 1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;
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> 2) Inaction by the Commissioner of Internal Revenue in cases involving disputed

Republic of the Philippines, G.R. No. 198756 (Resolution on Motion for Reconsideration), August 16, 2016; *Bloomberry Resorts and Hotels, Inc. vs. Bureau of Internal Revenue*, G.R. No. 212530, August 10, 2016; *The Philippine American Life and General Insurance Company vs. The Secretary of Finance and the Commissioner of Internal Revenue*, G.R. No. 210987, November 24, 2014; *Asia International Auctioneers, Inc. vs. Parayno, Jr.*, G.R. No. 163445, December 18, 2007; *Commissioner of Internal Revenue vs. Leal*, G.R. No. 113459, November 18, 2002; and *Rodriguez vs. Blaquera*, G.R. No. L-13941, September 30, 1960.

24 G.R. No. 198756, August 16, 2016.

> assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;
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> xxx xxx xxx

The Court of Tax Appeals has undoubted jurisdiction to pass upon the constitutionality or validity of a tax law or regulation when raised by the taxpayer as a defense in disputing or contesting an assessment or claiming a refund. It is only in the lawful exercise of its power to pass upon all matters brought before it, as sanctioned by Section 7 of Republic Act No. 1125, as amended.

This Court, however, declares that the Court of Tax Appeals may likewise take cognizance of cases directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance (revenue orders, revenue memorandum circulars, rulings).

Section 7 of Republic Act No. 1125, as amended, is explicit that, except for local taxes, appeals from the decisions of quasi-judicial agencies (Commissioner of Internal Revenue, Commissioner of Customs, Secretary of Finance, Central Board of Assessment Appeals, Secretary of Trade and Industry) on tax-related problems must be brought exclusively to the Court of Tax Appeals.

In other words, within the judicial system, the law intends the Court of Tax Appeals to have exclusive jurisdiction to resolve all tax problems. Petitions for writs of certiorari against the acts and omissions of the said quasi-judicial agencies should, thus, be filed before the Court of Tax Appeals.

Republic Act No. 9282, a special and later law than Batas Pambansa Blg. 129 provides an exception to the original jurisdiction of the Regional Trial Courts over actions questioning the constitutionality or validity of tax laws or regulations. *Except for local tax cases, actions directly challenging the constitutionality or validity of a tax law or regulation or administrative issuance may be filed directly before the Court of Tax Appeals.*

> Furthermore, with respect to administrative issuances (revenue orders, revenue memorandum circulars, or rulings), these are issued by the Commissioner under its power to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws. Tax rulings, on the other hand, are official positions of the Bureau on inquiries of taxpayers who request clarification on certain provisions of the National Internal Revenue Code, other tax laws, or their implementing regulations. Hence, the determination of the validity of these issuances clearly falls within the exclusive appellate jurisdiction of the Court of Tax Appeals under Section 7 (1) of Republic Act No. 1125, as amended, subject to prior review by the Secretary of Finance, as required under Republic Act No. 8424. *(Emphasis and underscoring supplied; citations omitted)*

Such doctrinal precept was reaffirmed in the case of *Commissioner of Internal Revenue vs. Court of Tax Appeals and Petron Corporation*,[25] where the High Court explicitly declared that its pronouncement in the *Banco De Oro* case is the prevailing rule on the matter, *i.e.*, the CTA has jurisdiction to determine the validity or constitutionality of a particular tax regulation, ruling, or issuance.

WHEREFORE, the Petition for Review dated January 7, 2019, filed by the Commissioner of Internal Revenue is **DENIED**. The challenged Decision dated August 10, 2018 and the Resolution dated December 6, 2018, both rendered by the Court in Division are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[25] G.R. No. 207843 (Resolution on Motion for Reconsideration), February 14, 2018.

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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.

ROMAN G. DEL ROSARIO
Presiding Justice