**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***

**COMMISSIONER OF INTERNAL REVENUE,**
*Petitioner,*

-*versus*-

**TAGANITO HPAL NICKEL CORPORATION,**
*Respondent.*

**CTA *EB* NO. 2240**
(CTA Case No.9128)

Present:

**DEL ROSARIO,***P.J.,*
**CASTAÑEDA, JR.,**
**UY,**
**RINGPIS-LIBAN,**
**MANAHAN,**
**BACORRO-VILLENA,** and
**MODESTO-SAN PEDRO,** *JJ.*

Promulgated:
JUN 2 8 2021 4:20 pm

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## *DECISION*

***MANAHAN, J.:***

Before the Court of Tax Appeals *En Banc* is a Petition for Review filed by the Commissioner of Internal Revenue (CIR) on February 27, 2020, against Taganito HPAL Nickel Corporation (Taganito), seeking the reversal of the Decision dated November 8, 2019 (assailed Decision) and the Resolution dated February 6, 2020 (assailed Resolution) of the Court's Second Division (Court in Division) in CTA Case No. 9128 entitled *Taganito HPAL Nickel Corporation vs. Commissioner of Internal Revenue.*

The dispositive portions of the assailed Decision and Resolution are quoted hereunder:

**Decision dated November 8, 2019**

> "**WHEREFORE,** the present Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, respondent is hereby **ORDERED TO ISSUE A TAX CREDIT CERTIFICATE** in the reduced amount of **Thirty Eight Million Eight Hundred Twenty Eight Thousand Six Hundred Seventy Three and 65/100 Pesos (Php38,828,673.65),** representing petitioner's unutilized excess input VAT for the four quarters of taxable year 2013.
>
> **SO ORDERED."**

**Resolution dated February 6, 2020**

> "**WHEREFORE**, premises considered, respondent's Motion for Partial Reconsideration is **DENIED** for lack of merit."
>
> **SO ORDERED."**

## THE PARTIES

Petitioner is the duly appointed Commisioner of Internal Revenue (CIR), vested with the authority to carry out all the functions, duties and responsibilities of said office, including *inter alia* the power to decide, approve, and grant claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent is a domestic corporation engaged in the business of manufacturing and exporting nickel/cobalt mixed sulfide. It is registered with the Bureau of Internal Revenue (BIR) as a Value-Added Taxpayer under Certificate of Registration No. OCN-8RC0000050348 and is also registered with the Philippine Economic Zone Authority (PEZA) as an Ecozone Export Enterprise under Certificate of Registration No. 10-02.

## THE FACTS

The antecedent facts as narrated by the Court in Division are as follows :

"On March 30, 2015, petitioner filed a Letter Re: Application for Tax Credits/Refunds (BIR Form No. 1914) with the Excise Large Taxpayer Audit Division of the BIR, in the amount of P39,820,736.62 representing its unutilized input VAT payments for the taxable year 2013.

On August 11, 2015, petitioner received a Notice of Denial dated July 16, 2015 from the BIR's Excise Large Taxpayer Audit Division, declaring that the application for VAT credit/refund has been denied due to lack of legal basis. The Notice of Denial pointed out that the input taxes subject of petitioner's claim were from domestic purchase of service for the construction of a building outside PEZA whuch is definitely not attributable to zero-rated sales.

Aggrieved, petitioner filed with this Court the present Petition for Review on August 26, 2015.

On November 23, 2015, respondent filed through registered mail his Answer, stating the following special and affirmative defenses:

xxx xxx xxx

On December 11, 2015, a Notice of Pre-Trial Conference was issued setting the case for pre-trial conference on March 17, 2016 . As such, respondent's pre-trial brief was filed on March 11, 2016 while petitioner's Pre-Trial Brief was filed on March 14, 2016.

Meanwhile, on March 23, 2016, petitioner filed a Motion for Commissioning of Independent Certified Public Accountant (CPA) praying that Ms. Krista V. Bambao , Managing Partner of KB and Associates, be appointed as the independent certified public accountant (ICPA) for the present case pursuant to Rule 13 of the Revised Rules of the Court of Tax Appeals (RRCTA). Thus, in the Resolution dated March 31, 2016, this Court found merit in petitioner's Motion and granted the same.

Then, on April 6, 2016, the parties filed their Joint Stipulation of Facts and Issues. Accordingly, a Pre-Trial Order was issued by this Court on May 17, 2016 which deemed the pre-trial terminated.

> During trial, petitioner presented the following witnesses, who all testified on direct examination by way of judicial affidavit, viz:
>
> xxx xxx xxx
>
> Thereafter, petitioner filed its Formal Offer of Evidence on December 5, 2016. In the Resolutions respectively dated March 7, 2017 and November 3, 2017, this Court admitted all of petitioner's offered exhibits except for Exhibit "P-147" for failure to submit the duly marked exhibit. Petitioner was then deemed to have rested its case.
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> On the other hand, when called to present his case, respondent present *(sic)* his lone witness, Revenue Officer Dalisay C. Umlas, who also testified on direct examination by way of judicial affidavit.
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> After which, Respondent's Formal Offer of Evidence was filed on February 12, 2018. In the Resolution dated September 10, 2018, this Court admitted all of respondent's exhibits and further gave the parties a period of thirty (30) days within which to submit their respective memoranda.
>
> In compliance, petitioner filed its Memorandum on October 25, 2018, while respondent on the other hand, manifested that he is adopting the arguments raised in his Answer dated November 23, 2015 as his memorandum.
>
> Accordingly, in the Resolution dated November 16, 2018, the present case was deemed submitted for decision.

The Court in Division promulgated a Decision on November 8, 2019 in CTA Case No. 9128 partially granting the claim for refund in the amount of P38,828,673.65 representing petitioner's unutilized excess input VAT for the four quarters of taxable year (TY) 2013.

Aggrieved with the decision of the Court in Division, the CIR filed a Motion for Partial Reconsideration (Re: Decision promulgated 8 November 2019) on November 22, 2019. Taganito filed a Comment/Opposition (Re:Respondent's Motion for Partial Reconsideration dated 22 November 2019) on December 23, 2019.

A Resolution was issued by the Court in Division on February 6, 2020 denying the CIR's Motion for Partial Reconsideration.

On February 13, 2020, the CIR received the assailed Resolution denying his Motion for Partial Reconsideration.

On February 27, 2020, the CIR filed his Petition for Review with the Court *En Banc* docketed as CTA *EB* No. 2240 entitled *Commissioner of Internal Revenue vs. Taganito HPAL Nickel Corporation.*

On June 1, 2020, the Court issued a Resolution ordering respondent Taganito to file its comment to the Petition for Review, within ten (10) days from notice.

On June 25, 2020, Taganito filed its Comment on the Petition for Review.

In a Resolution dated July 6, 2020, the instant case was deemed submitted for decision.

## THE ISSUES

Petitioner CIR raises the following sole issue for the resolution of the Court *En Banc:*

> "Whether or not the Second Division of the Honorable Court erred in partially granting respondent's claim for refund of unutilized excess input VAT allegedly attributable to zero-rated sales for the four quarters of taxable year 2013."

The CIR argues that in claims for refund of this nature, attributability must be established between the input taxes incurred on its purchases and the zero-rated sales of the taxpayer-claimant in accordance with Section 112 (A) of the 1997 National Internal Revenue Code (NIRC), as amended. He would like to stress that only creditable input taxes that are directly attributable to zero-rated sales may be refunded and that this important connection must be established by solid evidence and not by mere assumption.

The CIR elucidates that the purchase of services for the construction of a new building was done outside the jurisdiction of the PEZA as shown by the official receipts which Taganito submitted during trial. According to the CIR, the construction of the building is not at all related to the export

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sales of Taganito, which in this case involves export sales of nickel cobalt mixed sulfide, nickel hydroxide and their by-products.

Based on his analysis of the VAT System adopted by European countries and introduced here in the Philippines, the CIR believes that only the VAT paid for the goods and/or services that a person or taxpayer makes or performs are refundable. The CIR pitches the theory that the wordings of Section 112 (A) and Section 110 of the 1997 NIRC, as amended, show quite clearly that not all input taxes of a VAT-registered person whose sales are zero-rated, are refundable. He reiterates his position that to be creditable, the input tax must come from purchases of goods that form part of the finished product of the taxpayer or it must be directly used in the chain of production. The CIR avers that after determining which input taxes are creditable, the second level of evaluation consists in determining which creditable input taxes are "attributable", which means that the relationship between purchases and the finished product must be concrete and not imaginary. The CIR goes on to assert that there is nothing in the assailed Decision that shows the direct attributability of the purchases or input tax to the finished product whose sale is zero-rated.

The CIR cites the case of *Atlas Consolidated Mining and Development Corporation vs. CIR*,[1] wherein the Supreme Court supposedly affirmed his theory of "direct attributability" of the input taxes to the goods exported.

Finally, the CIR invokes the oft-repeated doctrine that a tax refund is in the nature of a tax exemption and is thus construed strictly against the taxpayer-claimant. The CIR claims that Taganito failed to prove the veracity of its claim for refund, hence, should have been denied by the Court in Division.

**Taganito's Counter-Arguments to CIR's Petition for Review**

In its *Comment (To Petition for Review dated 20 February 2020)*, Taganito contravenes all the arguments propounded by the CIR in his Petition for Review for the following reasons, and we quote:

[1]G.R. No. 159471 dated January 26, 2011.

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> "I. The petitioner has misapplied the provisions of Section 112 (A) and Section 110 (A) of the 1997 Tax Code, as amended.
>
> II. Respondent has satisfactorily proven during trial that its purchases were attributable to its VAT zero-rated sales.
>
> III. Respondent has satisfactorily proven that it has complied with all the requisites provided under the law to claim for tax credit certificate of input VAT.
>
> IV. The ruling of the Supreme Court in the case of Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue ("Atlas Case") is not applicable to the instant case."

Taganito finds the analysis and interpetation of the CIR of the aforementioned Section112 (A) and Section 110 (A) of the 1997 NIRC, as amended, flawed. It particularly disagrees with the the CIR's proposition that there must be shown a direct attributability of the purchases or input tax to the finished product which sales are zero-rated.

Taganito maintains that "attribution" is only required in cases where a taxpayer has concurrently zero-rated or effectively zero-rated sales *and* taxable or exempt sales as can be seen in the clear wordings of the last portion of Section 112 (A) of the 1997 NIRC, as amended, which provides that "where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and *entirely attributed* to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

Taganito goes on to support its contention by concluding that Section 110 (A) (3) of the 1997 NIRC, as amended, suggests that attribution of input tax credit shall be required for purchases of goods and services and importation of goods that are not subject to VAT as against transactions subject to VAT. Taganito then asserts that the law simply requires that for the input tax to be refunded or credited, it must be attributable to a taxpayer's zero-rated or effectively zero-rated sales, and not to its taxable or exempt sales.

In response to the CIR's two-level evaluation of determining first if the input taxes are "creditable" and then

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determining whether the input taxes are "attributable" to the finished product which is eventually exported, Taganito assures the Court that all the claimed input taxes are both "creditable" and "attributable" to its zero-rated sales since the purchases made were all directly related to the zero-rated sales of nickel and/or cobalt mixed sulfide. Taganito alleges that it paid for the construction of the grizzly, fence and evacuation road in Taganito Claver Surigao del Norte. It claims that the processing and treating of metals, minerals and mined products used in the production of nickel cobalt mixed sulfide, requires the use of grizzly to separate the big particles such as boulders and rocks from the smaller ore particles where nickel and cobalt is abundant. The screening using the grizzly is a primary process of the ore before it will be transported to the processing plant where the minerals and metals are extracted. Taganito also reasoned that the construction of the fence was necessary to prevent any undesirable person from entry into the plant during the construction and operation phase of the plant to secure any valuables in the plant from pilferers.

Taganito reiterates that it has satisfactorily proven that it has complied with all the requisites provided under the law to claim for a tax credit certificate of input VAT and that it did not apply, utilize nor credit the amount of the claimed input VAT against any output VAT in TY 2013 and in succeeding taxable quarters.

Taganito prays for the denial of the Petition for Review filed by the CIR and for the affirmation of the assailed Decision of the Court in Division dated November 8, 2019.

## THE RULING OF THE COURT *EN BANC*

We first determine the timeliness of the appeal made by the CIR with the Court *En Banc.*

Records show that the CIR received the assailed Resolution (denying his Motion for Partial Reconsideration) dated February 6, 2020 on February 13, 2020.[2]

The CIR had fifteen (15) days from the date of receipt of the assailed Resolution within which to file his Petition for

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[2] Division Court Docket, Volume II, page 1400.

Review with the Court *En Banc* pursuant to Rule 8, Section 3 (b) of the Revised Rules of the Court of Tax Appeals (RRCTA).[3]

Counting fifteen (15) days from February 13, 2020, the CIR had until February 28, 2020 within which to file his Petition for Review with the Court *En Banc.*

On February 27, 2020, the CIR filed his Petition for Review with the Court *En Banc.* Hence, the subject Petition for Review of the CIR was filed on time.

In his Petition for Review, the CIR disputes the assailed Decision on the singular argument that the sets of input VAT being claimed by Taganito were not proven to be attributable to its zero-rated sales, hence it was erroneous on the part of the Court in Division to grant the claim for refund, albeit partially.

We find it appropriate at this point to compare the arguments of the CIR with that of Taganito with regard to the requirement of atrributability in claims for refund based on Section 112 (A) of the 1997 NIRC, as amended.

The CIR as earlier mentioned, maintains that only creditable input taxes that are directly attributable to zero-rated sales may be refunded. Outside of that, the CIR asserts that the input VAT not at all related to the finished product or export sales of the claimant should be denied.

Taganito initially expresses a different view and contends that the requirement of "attributability" mentioned in Section 112 (A) of the 1997 NIRC, as amended, only applies where a taxpayer concurrently has zero-rated or effectively zero-rated sales AND taxable or exempt sales. It follows then that if the taxpayer has only zero-rated sales, all input taxes incurred are deemed to be attributable to such sales.

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3 **"Rule 8**
**Procedure in Civil Cases**

Section 3. *Who may appeal; period to file petition.-*
xxx xxxxxx
(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution." xxx xxxxxx

On this particular legal tussle, we have to analyze the relevant provisions of the law.

The claim for refund filed by Taganito is anchored on the provisions of Section 112 (A) of the 1997 NIRC, as amended, quoted below:

> "SEC. 112. *Refunds or Tax Credits of Input Tax.* –
>
> (A) *Zero-Rated or Effectively Zero-Rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however,* That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.
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> xxx xxx xxx

It is well-entrenched in jurisprudence, that to be entitled to a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales based on the foregoing provision, the taxpayer must comply with the following requisites:[4]

1. that the taxpayer is VAT-registered;
2. that there must be zero-rated or effectively zero-rated sales;
3. that input taxes were incurred or paid;

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[4] *Southern Philippines Power Corporation vs. CIR,* G.R. No 179632, October 19, 2011, *citing San Roque Power Corporation vs. Commissioner of Internal Revenue,* G.R. No. 180345, November 25, 2009; *Intel Tecnhnology Philippines, Inc. vs. CIR,* G.R. No. 166732, April 27, 2007.

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4. that input taxes claimed are attributable to zero-rated or effectively zero-rated sales;
5. that input taxes have not been applied against any output VAT liability; and
6. that the claim was filed within the prescribed periods both in the administrative and judicial levels.

The foregoing requisites in claiming a refund of excess or unutilized input VAT under Section 112 (A) of the 1997 NIRC, as amended, have been affirmed and applied in a myriad of cases through the years and remain to be the gold standard in determining a claimant's entitlement to a tax refund of this nature. Not to be missed out in the enumerated requisites for a claim for refund of excess or unutilized input VAT under the afore-quoted Section 112 (A) of the 1997 NIRC, as amended, is that the input taxes claimed are *attributable* to zero-rated or effectively zero-rated sales.[5]

One of the incentives granted by law is that any unutilized or excess input VAT may be refunded to a VAT zero-rated taxpayer on the condition that these are attributable or used in the manufacture or exportation of its zero-rated sales. Section 110 (B) of the 1997 NIRC, as amended clearly provides, thus:

> Section 110. *Tax Credits.*-
>
> xxx xxx xxx
>
> (B) Excess Output or Input Tax – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. **Provided, however, That any input tax attributable to zero-rated sales by a VAT registered person may at his option be refunded or credited against any other internal revenue taxes, subject to the provisions of Section 112.**(emphasis supplied)

The argument that the requirement of "attributablity" only comes into play when the taxpayer has a combination of zero-rated sales, effectively zero-rated sales, taxable and exempt sales, is to ignore the first part of Section 112 (A) of the 1997 NIRC, as amended, and focus only on the last portion. Certainly, if a taxpayer has a combination of several types of sales in a taxable quarter, the proper step would be to allocate

[5] No. 4 Requisite.

the same proportionately, based on the volume of sales. The last part of Section 112 (A) does not negate the concept of attributability found in the first portion of Section 112 (A) but in fact, confirms it. Why would there be a need to allocate if there is no requirement of attribution in the first place? The aforementioned requisites for entitlement clearly confirm the requirement of attributability, i.e., that input taxes claimed are attributable to zero-rated or effectively zero-rated sales.

A taxpayer-claimant must therefore prove that the input taxes being claimed for refund is related to the production of the finished product or to the export sales (directly or indirectly), in order to be entitled to its claim for refund based on Section 112 (A) of the 1997 NIRC, as amended. One of the primary and basic rules in statutory construction is that where the words of a statute are clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation.[6]

We do not subscribe to the view that attribution in claims of this nature is only required when the taxpayer is engaged in a combination of several types of sales.

Given this Court's position on the matter on the attributability requirement under Section 112 (A) and Section 110 (B) of the 1997 NIRC, as amended, we cannot entirely rule out the rest of the allegations of Taganito as regards its entitlement to the claim for refund of excess input taxes. In its Comment to the Petition for Review, Taganito alleges that all the input taxes subject of the refund are both creditable and attributable to its zero-rated sales since the purchases made were all directly related to the zero-rated sales of nickel and/or cobalt mixed sulfide. We quote the relevant narration of facts found in the assailed Decision, thus:

> "However, petitioner claims that the input taxes made in taxable year 2013 in the total amount of Php39,820,736.62 are payments for (1) services for civil, building and construction works of grizzly, fence and evacuation road, rendered outside the Taganito special economic zone in Surigao, (2) construction work performed at Taguig's office (3) lease expenses on a building outside the PEZA zone, (4) hotel accommodations and transportation of some employees; and (5) purchase of office supplies, (6) salvaging and refloating of vessel and (7) purchase of a vehicle, which were outside of the PEZA zone. Petitioner submits that all of the mentioned purchases of goods are necessary expenses and costs to its operations and productions

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[6] *Francisco Chavez vs, Judicial and Bar Council, et.al,,* G.R. No. 202242, July 17, 2012.

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of nickel and/or cobalt mixed sulfide before it is exported to SMM."

The CIR, however, in his Answer to the Petition for Review, alleged that the input taxes subject of the claim were sourced from domestic purchase of services for the construction of a building outside of the PEZA which are not attributable to Taganito's zero-rated sales.

On this matter, the Court in Division ruled in favor of Taganito and partially granted its claim for refund based on the evidence it formally offered during trial. The Court in Division concluded that Taganito substantially complied with the aforementioned requisites for a refund or tax credit of input tax due or paid attributable to zero-rated or effectively zero-rated sales. The Court in Division presented a detailed computation of the amount finally granted to Taganito and outlined the reasons for the denial of the rest of the claimed amount resulting to a partial grant of the refund.

Based on the evaluation of Taganito's evidence during trial, the Court in Division found that the amount of Php38,828,673.65 is attributable to the valid zero-rated sales of Taganito.

On the other hand, the CIR did not present sufficient proof to rebut the evidence of Taganito during the trial conducted by the Court in Division. In his Motion for Partial Reconsideration filed with the Court in Division on November 22, 2019, the CIR failed to point out which of the amount granted should have been disallowed to support his allegation that the same are not attributable to Taganito's zero-rated sales or activities. He instead focused on the legal argument that direct attribution is required in tax refunds based on Section 112 (A) of the 1997 NIRC, as amended, and that the Court in Division did not show the direct attributability of the purchases or input tax to the finished product exported by Taganito. The evidence offered by respondent during trial, consisted of the following exhibits[7]:

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| "R-1" | Memorandum of Assignment dated March 31, 2015 |
| "R-2" | Checklist of Mandatory Requirement for Claims for VAT Credit Refund |
| "R-3" | Letter dated July 16, 2015 |

[7] Division Court Docket, Volume II, pp. 1264-1266.

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| "R-4" | Certified True Copy of the entire BIR Records |
| "R-5" | Judicial Affidavit of Revenue Officer Dalisay Umlas and her signature |

In the case of *Republic vs. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation),* [8] the Supreme Court ruled that when the taxpayer was able to establish *prima facie* its right to refund by testimonial and object evidence, the BIR should present rebuttal evidence to shift the burden to the taxpayer-claimant. This the CIR failed to do.

Similarly, in his Petition for Review with the Court *En Banc,* the CIR focused on the argument that only creditable input taxes that are directly attributable to Taganito's export sales may be refunded, without specifying which portion of the amount granted by the Court in Division should be excluded for failure to fulfill this requirement.

**WHEREFORE,** premises considered, the Petition for Review filed by the CIR on February 27, 2020 is hereby **DENIED** for lack of merit.

Accordingly, the assailed Decision dated November 8, 2019 and the assailed Resolution dated February 6, 2020, both rendered by the Second Division of this Court which ordered the CIR to issue a Tax Credit Certificate in the reduced amount of Php38,828,673.65, are hereby **AFFIRMED.**

**SO ORDERED.**

Catherine T. Manahan

**CATHERINE T. MANAHAN**
Associate Justice

**WE CONCUR:**

**ROMAN G. DEL ROSARIO**
Presiding Justice

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[8]G.R. No. 188016, January 14, 2015.

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

**ERLINDA P. UY**
Associate Justice

**MA. BELEN M. RINGPIS-LIBAN**
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