REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

CBK POWER COMPANY LIMITED,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 10157

Members:

BACORRO-VILLENA, *Acting Chairperson, and*
CUI-DAVID, *JJ.*

Promulgated:

JUN 29 2023

4:1 p.m.

x - x

DECISION

BACORRO-VILLENA, J.:

At bar is a Petition for Review[1] filed on 30 August 2019 by petitioner CBK Power Company Limited (**petitioner/CBK**) pursuant to Section 3(a)[2], Rule 8 of the Revised Rules of the Court of Tax Appeals (**RRCTA**). It appealed the denial of its claim for refund of Value-Added

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1 Division Docket, Volume I, pp. 10-278, including annexes.

2 SEC. 3. *Who may appeal; period to file petition.* –
(a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.

Tax (**VAT**) or for the issuance of a tax credit certificate (**TCC**) for the excess or unutilized input taxes in the total amount of ₱35,593,569.57, incurred from 01 April 2017 to 31 December 2017 or from the second (2^{nd}) to fourth (4^{th}) quarters of Calendar Year (**CY**) 2017.

PARTIES OF THE CASE

Petitioner is a partnership duly organized and existing under, and by virtue of the laws of the Philippines, with principal office address at National Power Corporation (**NPC**)-CBK Compound, Purok 6, National Highway, Brgy. San Juan, Kalayaan 4015 Laguna.[3] It has been incorporated to engage in all aspects of (*i*) the design, financing, construction, testing, commissioning, operation, maintenance, management and ownership of Kalayaan II, pumped-storage hydroelectric power plant, the new Caliraya Spillway, and other assets located in the Province of Laguna, and (*ii*) the rehabilitation, upgrade, expansion, testing, commissioning, operation, maintenance and management of the Caliraya, Botocan, and Kalayaan I [and II] hydroelectric power plants and their related facilities located in the Province of Laguna.[4] It is registered with the Bureau of Internal Revenue (**BIR**) for VAT purposes pursuant to Certificate of Registration (**COR**) No. OCN8RC0001649021E with Revenue District Office (**RDO**) No. 121 – Excise Large Taxpayer Division 1 (**ELTAD 1**).[5]

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue (**respondent/CIR**) who is vested with the authority to carry out the functions, duties, and responsibilities of the said office including, *inter alia*, to decide disputed assessments, refunds of internal revenue taxes, fees, other charges, and penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (**NIRC**) of 1997, as amended, or other laws or portions thereof administered by the BIR.

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3 Paragraph 6, Petition for Review, supra at note 1, p. 14.

4 Article 3 of the Amended Certificate of Limited Partnership, Exhibit "P-12", Division Docket, Volume III, p. 1168.

5 Exhibit "P-13", id., pp. 1186-1187.

FACTS OF THE CASE

On 06 November 1998, NPC and *Industrias Metalúrgicas Pescarmona* S.A. (**IMPSA**) entered into an Accession Undertaking for the rehabilitation and operation of the Caliraya, Botocan, and Kalayaan hydroelectric power plant complex (otherwise known as the CBK Project) under a Build-Rehabilitate-Operate-Transfer (**BROT**) scheme.[6] Pursuant to this undertaking, IMPSA, as the contractor, agreed to generate and supply electricity to NPC during the duration thereof.[7] In turn, NPC shall pay IMPSA the necessary fees, including the capital recovery fee and operation and maintenance (**O&M**) fees.[8]

Later, another Accession Undertaking dated 18 February 1999 was forged, and a Supplemental Agreement dated 14 September 1999 was likewise entered into wherein CBK Power Corporation (**CBK Power**) took part and agreed to manage the CBK Project.[9]

Subsequently, on 20 September 2000, NPC, IMPSA, CBK Power, and petitioner executed a Second Accession Undertaking wherein the latter became a party to the BROT agreement. There, petitioner assumed CBK Power's rights and obligations to operate the hydroelectric power plants.[10] In addition to the Second Accession Undertaking, petitioner also earlier executed a Turnkey Contract with IMPSA Construction Corporation with the same objective of transferring the operation of the power plant facilities.[11] Ultimately, petitioner managed the operations of the CBK Project and supplied electricity to NPC according to the terms of the executed agreements. As a result, it was petitioner who then billed NPC for the necessary fees.

Thereafter, in 2006, petitioner requested for an opinion from the BIR on the taxable consequences of the billed fees to NPC; particularly, if the sale of electricity generated through hydropower is subject to zero percent (0%) VAT pursuant to Section 108(B)(7)[12] of the NIRC of 1997,

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6 Exhibit "P-8", id., pp. 947-1029.
7 Par. 7.1, Article 7 of the Accession Undertaking, id., p. 988.
8 Par. 7.5, id., p. 989.
9 Letter A of the Whereas clause in the Second Accession Agreement, Exhibit "P-9, id., p. 1031.
10 Exhibit "P-9", id., pp. 1030-1035.
11 Executed on 18 August 2000, Exhibit "P-10", id., pp. 1036-1164.
12 **SEC. 108.** *Value-Added Tax on Sale of Services and Use or Lease of Properties.* —
. . .

as amended. In response thereto, on 17 March 2006, respondent issued BIR Ruling [DA-146-06] which affirmed that petitioner's billings for its sale of electricity to NPC are subject to 0% VAT.[13]

From the period of 01 April 2017 to 31 December 2017, petitioner sold hydropower electricity to NPC. In the same period, it incurred creditable input taxes in the total amount of ₱37,978,467.96 from the domestic purchases of goods and services other than capital goods, importation of goods other than capital goods, payment to services rendered by non-residents, and domestic purchases and importation (both exceeding ₱1 Million and not exceeding ₱1 Million), all of which are attributable to the sale of electricity to NPC. The quarterly VAT returns for CY 2017[14] evidenced said expenses and taxes.

On 31 May 2019, petitioner filed an administrative claim[15] before the BIR for the VAT refund or TCC of its unutilized or excess creditable input taxes of ₱37,731,282.57 for the 2nd to the 4th quarter of CY 2017. It based its claim on Section 108(B)(7)[16] of the NIRC of 1997, as amended, and BIR Ruling [DA-146-06]. A revenue officer from the ELTAD 1 received petitioner's request letter for refund[17], Application for Tax Credits/Refunds (BIR Form No. 1914)[18], and Revised Checklist of Mandatory Requirements for Claim for VAT refund.[19]

On 11 July 2019, petitioner received a Tax Verification Notice with No. TVN201800064479 (dated 09 July 2019) for the verification of the supporting documents it submitted in support of the refund claim.[20] On 31 July 2019, petitioner received respondent's letter dated 12 July 2019 which partially approved its claim for VAT refund or TCC in the amount of ₱2,137,713.00.[21]

(B) *Transactions Subject to Zero Percent (0%) Rate* — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate.

...

(7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.

13 Exhibit "P-17", Division Docket, Volume III, pp. 1191-1196.
14 See Annexes D, E, and F of the Petition for Review, id., Volume I, pp. 73-75; 93-97; and pp. 116-118.
15 Exhibit "P-1", id., Volume III, pp. 918-941.
16 Supra at note 12.
17 Supra at note 15.
18 See Exhibit "P-2", Division Docket, Volume III, pp. 942.
19 See Exhibit "P-4", id., p. 943.
20 Exhibit "P-18", id., p. 1197.
21 Exhibit "P-19", id., p. 1198.

Unsatisfied with the result, petitioner filed the instant petition before this Court.[22] The petition was raffled to the Second Division and docketed as CTA Case No. 10157.

PROCEEDINGS BEFORE THE SECOND DIVISION

Within the extended period[23], respondent filed its Answer[24] on 31 October 2019. He or she alleged that petitioner is not the proper party to claim the VAT refund or TCC. Respondent pointed out that under Republic Act (**RA**) No. 9513 or the *Renewable Energy Act of 2008*, petitioner is considered as a Renewable Energy (**RE**) Developer, entitled to a zero-rate VAT on its purchases of local supply of goods, properties and services. Thus, no output taxes should be shifted or passed on to the RE Developer. In this case, petitioner should not have paid input taxes on the said purchases; otherwise, the proper recourse is against the supplier or seller and not against the Government as enunciated in the case of *Coral Bay Nickel Corporation v. Commissioner of Internal Revenue* (**Coral Bay**).[25]

On 05 November 2019, the Court issued a Notice of Pre-Trial Conference.[26] Respondent filed his or her Pre-Trial Brief[27] on 02 December 2019 while petitioner filed its Pre-Trial Brief[28] on 04 December 2019.

During the pre-trial proper conducted on 13 February 2020, the parties were granted a period of fifteen (15) days to file their Joint Stipulation of Facts and Issues (**JSFI**).[29] After an extension of time was granted, the parties submitted their JSFI on 11 March 2020.[30] On 22 June 2020, the Court issued a Pre-Trial Order adopting the parties' JSFI and setting the hearing dates.[31]

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22 Supra at note 1.
23 See Motion for Extension of Time to File Answer filed on 30 September 2019, Division Docket, Volume I, pp. 281-283; and Order dated 08 October 2019, id., p. 286.
24 Id., pp. 287-294.
25 G.R. No. 190506, 13 June 2016.
26 Division Docket, Volume I, pp. 296-297.
27 Id., pp. 298-301.
28 Id., pp. 303-323.
29 See Order dated 13 February 2020, id., Volume II, p. 646.
30 Id., pp. 665-676.
31 Id., pp. 678-685.

After a change in counsel[32] and postponement of the initial settings[33], petitioner moved for the commissioning of Myra Celeste O. Dabalos (**Dabalos**) as the Independent Certified Public Accountant (**ICPA**).[34] In the Order dated 12 October 2020[35], Dabalos became the court-commissioned ICPA and was directed to file the ICPA Report within sixty (60) days from hearing date. On 11 December 2020, Dabalos duly filed the ICPA Report.[36] Later on, or on 18 January 2021, Dabalos filed an Amended ICPA Report.[37]

On 10 March 2021, petitioner presented its witnesses, namely: (1) Fernando J. De La Paz (**De La Paz**), the company's Chief Financial Officer (**CFO**); and, (2) Dabalos, the court-commissioned ICPA.[38]

Dabalos was presented to the witness stand first. In her Judicial Affidavit[39], she testified that: (1) she conducted a special audit and examination of petitioner's documents in relation to the claim for VAT refund or TCC (the subject matter of the instant petition); (2) the result of the special audit was contained in a Final Report and in a USB[40] that she filed before this Court on 11 December 2020; (3) there were errors in the Final Report that required rectification and in some exhibits that were inadvertently excluded; and, (4) correspondingly, she filed an Amended Final Report and another USB containing all the corrections on 18 January 2021. No cross and re-direct examinations were conducted.

Next to assume the witness stand was De La Paz. By way of his Judicial Affidavit[41], he testified that: (1) petitioner is a limited partnership that generates electricity through the four (4) hydroelectric power plants; (2) pursuant to the Accession Undertaking, petitioner

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32 See Withdrawal of Appearance as Counsel filed on 26 August 2020 (through private courier), id., pp. 687-689; Formal Entry of Appearance as Counsel filed on 27 August 2020 (through private courier), id., pp. 715-717.

33 See Motion for Postponement of Hearing of Mr. Fernando J. Dela Paz filed on 26 August 2020 (through private courier), id., pp. 692-694; Motion for Postponement of Hearing of the Motion for Commissioning of Petitioner's Independent Certified Public Accountant (ICPA) filed on 26 August 2020 (through private courier), id., pp. 710-712.

34 See Motion for the Adoption of Procedures on the Presentation of Voluminous Documents Pursuant to Rules 12 and 13 of the Revised Rules of Court of Tax Appeals, id., pp. 697-699.

35 Id., p. 730.

36 See Exhibit "P-102".

37 See Exhibit "P-252".

38 See Order dated 10 March 2021, Division Docket, Volume III, p. 849.

39 Exhibit "P-253", id., pp. 743-786.

40 See Exhibit "P-254".

41 See Exhibit "P-22", Judicial Affidavit of Mr. Fernando J. De La Paz, Division Docket, Volume II, pp. 347-377.

assumed the obligations of the contractor to rehabilitate and operate the CBK Power, and supply electricity to NPC; (3) in turn, NPC pays petitioner for the capital recovery fees and O&M fees; (4) according to Sections 108(B)(7) and 112 of the NIRC of 1997, as amended, and BIR Ruling [DA-146-06], petitioner's sale of electricity to NPC are considered as zero-rated sales; (5) attributable to the said zero-rated sales, petitioner incurred unutilized and excess input taxes in the amount of ₱37,731,282.57 for the period of 01 April 2017 to 31 December 2017; (6) petitioner filed an administrative claim for VAT refund or TCC on 31 May 2019; (7) on 31 July 2019, respondent partially granted the VAT refund claim in the amount of ₱2,137,713.00 only; (8) respondent denied the remaining balance of ₱35,593,569.57 due to its reliance on the allegedly erroneous decision of the First Division in CTA Case No. 8784[42] wherein it was ruled that under RA 9513, petitioner (as an RE Developer entitled to zero-rated VAT on purchases of local supply of goods, properties and services) is not entitled to any claim for VAT refund or TCC; (9) in a later ruling of the *En Banc* in CTA EB Case No. 1861[43], the Court already clarified that petitioner is not availing the incentives under RA 9513, hence its refund claim was then granted; (10) in consonance with the said *En Banc* decision, petitioner secured Negative Certifications[44] from the Department of Energy (**DOE**) to prove that it was not registered with the latter agency under RA 9513 and has no pending application for registration under it; and, (11) using the said negative certifications, petitioner then filed the instant petition on 30 August 2019 to appeal the denied claim.

On cross-examination[45], Dabalos clarified that from 2001 up to the present, petitioner used the regular corporate income tax (**CIT**) rate. She also confirmed that in the DOE Negative Certifications, it was specified that petitioner did not avail any incentives under RA 9513.

Subsequently, on 17 March 2021, petitioner filed its "Formal Offer of Evidence"[46] (**FOE**) and offered Exhibits "**P-1**" to "**P-255**" (inclusive of

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[42] *CBK Power Company Limited v. Commissioner of Internal Revenue*, 23 February 2017. Decision was penned by (Ret.) Associate Justice Cielito N. Mindaro-Grulla and was concurred by Presiding Justice Roman G. Del Rosario and Associate Justice Erlinda P. Uy.

[43] *Commissioner of Internal Revenue v. CBK Power Company Limited*, 25 October 2019.

[44] See Exhibits "P-5", "P-6" and "P-7", Division Docket, Volume III, pp. 944-946.

[45] TSN dated 10 March 2021, pp. 12-14.

[46] Division Docket, Volume. III, pp. 851-1417, including attached exhibits.

while respondent filed his or her Memorandum on 18 May 2022.[53] Thereafter, the case was submitted for decision.[54]

ISSUE

The main issue for this Court's determination is –

> WHETHER PETITIONER CBK POWER COMPANY LIMITED IS ENTITLED TO THE VALUE-ADDED TAX (VAT) REFUND OR TO THE ISSUANCE OF A TAX CREDIT CERTIFICATE (TCC) OF ITS UNUTILIZED OR EXCESS CREDITABLE INPUT TAXES IN THE AMOUNT OF ₱35,593,569.57 ATTRIBUTABLE TO THE ALLEGEDLY ZERO-RATED SALES OF ELECTRICITY TO NATIONAL POWER CORPORATION (NPC) FOR THE PERIOD OF 01 APRIL 2017 TO 31 DECEMBER 2017.

ARGUMENTS

In support of the instant petition, petitioner insists that it has sufficiently established all the elements and/or requisites that would entitle it to a VAT refund or TCC under Section 112[55] of the NIRC of 1997, as amended. Thus, respondent erred when its administrative claims were denied.

Petitioner argues that pursuant to Section 108(B)(7) of the NIRC of 1997, as amended, and BIR Ruling [DA-146-06], its sales of electricity to NPC are considered as zero-rated sales. As a result, the incurred input taxes (the VAT passed on to petitioner by its suppliers) that are attributable from the said sales can be applied for refund.

Petitioner faults respondent's reliance on RA 9513 despite its vehement insistence that it is not covered by the said law. To bolster its claim, petitioner presented the DOE Negative Certifications which showed that: (1) it is not registered with the DOE; (2) it is not availing the incentives under RA 9513; and, (3) and it has no pending application for registration under RA 9513 with DOE.

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[53] Id., pp. 1476-1482.

[54] See Resolution dated 30 May 2022, id., p. 1485.

[55] **Sec. 112.** *Refunds or Tax Credits of Input Tax.* —

sub-markings). Respondent failed to file a comment to petitioner's FOE.[47]

In the Resolution dated 07 July 2021[48], the Court admitted all of petitioner's exhibits except Exhibits "**P-122-2-342**", "**P-122-2-358**", "**P-122-7-153**", "**P-122-9-79**", "**P-122-9-122**" and "**P-125-216**" for petitioner's failure to submit the duly marked documents.[49] Moreover, the Court noted discrepancies and observations in some of the exhibits.[50]

During the hearing conducted on 18 April 2022, respondent manifested that he or she will no longer present any evidence. Thus, the Court ordered the parties to submit their Memoranda within thirty (30) days therefrom.[51] Petitioner filed its Memorandum[52] on 21 April 2022

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47 See Resolution dated 28 May 2021, id., Volume IV, p. 1419.

48 Id., pp. 1421-1424.

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Exhibits	Documents
"P-122-2-342"	Invoices, Official Receipts, BIR Form 1600 and Other Documents Supporting Petitioner's Input VAT claim for the month of May 2017.
"P-122-2-358"	Invoices, Official Receipts, BIR Form 1600 and Other Documents Supporting Petitioner's Input VAT claim for the month of May 2017.
"P-122-7-153"	Invoices, Official Receipts, BIR Form 1600 and Other Documents Supporting Petitioner's Input VAT claim for the month of October 2017.
"P-122-9-79"	Invoices, Official Receipts, BIR Form 1600 and Other Documents Supporting Petitioner's Input VAT claim for the month of December 2017.
"P-122-9-122"	Invoices, Official Receipts, BIR Form 1600 and Other Documents Supporting Petitioner's Input VAT claim for the month of December 2017.
"P-125-216"	Official Receipts (ORs) issued by Petitioner from January to December 2017.

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Exhibits	Discrepancies and/or Observations
"P-100-b"	Instead of BOA Certificate of Accreditation No. **6541d**, it is BOA Certificate of Accreditation No. **6541.**
"P-104; P-104-1 to P-104-8" inclusive of sub-markings	Petitioner's Quarterly VAT Return (BIR Form 2550Q) originally filed for the first quarter of 2017 was filed on July 7, 2017, not July **1**7, 2017.
"P-101", inclusive of all sub-markings	It is the **6**-paged Judicial Affidavit of Myra Celeste O. Dabalos executed on 19 August 2020, not 7-pages.
"P-122-2-413", "P-122-2-435", "P-122-2-436", "P-122-2-437", "P-122-2-438", "P-122-2-459", "P-122-7-28", "P-122-9-1", "P-122-9-148", "P-122-9-411", "P-122-9-445", "P-122-10-281", "P-122-10-289", and "P-122-12-91"	The documents are unreadable, blurred or not properly scanned.
"P-122-8-241"	Unmarked document.

51 See Order dated 18 April 2022, Division Docket, Volume IV, p. 1429.

52 Id., pp. 1430-1472.

Petitioner adds that respondent's reference to this Court's Decision in CTA Case No. 8784 and CTA EB No. 1685 (the appealed division case) is misplaced since it is still pending appeal before the Supreme Court. Moreover, the incentives involved in the said cases (under RA 9513 and RA 7916 [also known as the Special Economic Zone Act]) are not relevant to its claims. Furthermore, the Decision in the said cases was effectively reversed by a later ruling in CTA EB No. 1861 and CTA Case No. 9793[56] which particularly held that petitioner is not availing the incentives under RA 9513 because it did not present any documentary proof that it was registered with the DOE to avail of said incentives. Consequently, finding that petitioner complied with the requirements for refund under NIRC of 1997, as amended, its prayer for refund in the said later cases (CTA EB No. 1861 and CTA Case No. 9793) were granted.

On the other hand, respondent merely reiterates the arguments raised in the Answer; particularly, that petitioner is an RE Developer under RA 9513 and it should not have paid any input VAT on its purchases. Respondent maintains that petitioner is not the proper party to claim the VAT refund or TCC as ruled in *Coral Bay*.

RULING OF THE COURT

As regards the basis of petitioner's claim for VAT refund or TCC, respondent insists that petitioner could only validly claim for refund or for a TCC if it complied with the requirements of RA 9513. According to respondent, petitioner is an RE Developer and is governed by the said requirements.

We do not share respondent's view. In the recent decision in *CBK Power Company Limited v. Commissioner of Internal Revenue*[57], the Supreme Court had the occasion to rule on the appealed CTA Case No. 8784 and CTA EB No. 1685. There, the Supreme Court declared:

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> Stated more simply, the DOE, pursuant to its power to implement Republic Act No. 9513, imposes various criteria for an RE

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56 *CBK Power Company Limited v. Commissioner of Internal Revenue.* Decision promulgated on 21 October 2021 penned by Associate Justice Catherine T. Manahan and was concurred by Presiding Justice Roman G. Del Rosario and Associate Justice Marian Ivy F. Reyes-Fajardo.

57 G.R. No. 247918, 01 February 2023; Citation omitted and emphasis supplied.

> Developer to qualify for registration to avail of the fiscal incentives. **To reiterate, it is not the mere fact that an entity is an RE eveloper that makes such an entity entitled to the fiscal incentives under Republic Act No. 9513.** In addition to the registration requirement expressly provided in Republic Act No. 9513, the DOE, pursuant to its power under Section 26 of the law, also has the authority to provide for a set of criteria which would qualify an RE Developer for registration in order to avail of the fiscal incentives. Moreover, the DOE IRR also requires RE Developers and manufacturers, fabricators, and suppliers of locally-produced RE equipment to register with the Board of Investments (**BOI**) as a condition for entitlement to the fiscal incentives under Republic Act No. 9513.
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> **It is therefore clear error to conclude that all RE Developers are entitled to the fiscal incentives granted by Republic Act No. 9513. The law, as enforced through the DOE IRR, is categorical that RE Developers must meet certain standards and must register with the DOE before it can be considered as an RE Developer duly entitled to fiscal incentives.**
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> ...

Applying the foregoing in this case, a perusal of the case records reveals that there are Negative Certifications[58] which categorically show that petitioner is not registered with DOE under RA 9513. It has also not availed of incentives under the said law nor has applied for registration under RA 9513 with DOE.

More importantly, the Certifications themselves state rather clearly that "*CBK is mandated to comply with Electric Power Industry Reform Act of 2001 or EPIRA and its Implementing Rules and Regulations (IRR)*". With this, there could be no other interpretation but that petitioner is availing the 0% VAT rating pursuant to EPIRA.

Proceeding to the prayer for VAT refund or TCC, petitioner anchors its claim for refund on Section 110(B), in relation to Section 112(A) and (C) of the NIRC of 1997, as amended by RA 10963[59], otherwise

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[58] Supra at note 44.

[59] AN ACT AMENDING SECTIONS 5, 6, 24, 25, 27, 31, 32, 33, 34, 51, 52, 56, 57, 58, 74, 79, 84, 86, 90, 91, 97, 99, 100, 101, 106, 107, 108, 109, 110, 112, 114, 116, 127, 128, 129, 145, 148, 149, 151, 155, 171, 174, 175, 177, 178, 179, 180, 181, 182, 183, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 232, 236, 237, 249, 254, 264, 269, AND 288; CREATING NEW SECTIONS 51-A, 148-A, 150-A, 150-B, 237-A, 264-A, 264-B, AND 265-A; AND REPEALING SECTIONS 35, 62, AND 89; ALL UNDER REPUBLIC ACT NO.

known as Tax Reform for Acceleration and Inclusion (**TRAIN Law**). The said provisions read as follows:

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> **Sec. 110.** *Tax Credits.* —
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> (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 other internal revenue taxes, subject to the provisions of Section 112.
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> ...
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> **Sec. 112.** *Refunds or Tax Credits of Input Tax.* —
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> (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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> ...
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> (C) *Period within which Refund of Input Taxes shall be Made.* — In proper cases, the Commissioner shall grant a refund for creditable input taxes within ninety (90) days from the date of submission of the official receipts or invoices and other documents in support of the application filed in accordance with Subsections (A) and (B)

8424, OTHERWISE KNOWN AS THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

hereof: *Provided,* That should the Commissioner find that the grant of refund is not proper, the Commissioner must state in writing the legal and factual basis for the denial.

In case of full or partial denial of the claim for tax refund, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim, appeal the decision with the Court of Tax Appeals: *Provided, however,* That failure on the part of any official, agent, or employee of the BIR to act on the application within the ninety (90)-day period shall be punishable under Section 269 of this Code.

...

In *Commissioner of Internal Revenue v. Deutsche Knowledge Services Pte. Ltd.*[60] (**Deutsche Knowledge Services**), the Supreme Court set forth the requisites for a claimant's entitlement to a tax refund or credit of excess input VAT attributable to zero-rated sales, to wit:

...

Under Section 4.112-1(a) of Revenue Regulations No. (RR) 16-05, otherwise known as the Consolidated VAT Regulations of 2005, in relation to Section 112 of the Tax Code, a claimant's entitlement to a tax refund or credit of excess input VAT attributable to zero-rated sales hinges upon the following requisites: "(1) the taxpayer must be VAT-registered; (2) the taxpayer must be engaged in sales which are zero-rated or effectively zero-rated; (3) the claim must be filed within two years after the close of the taxable quarter when such sales were made; and (4) the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax."

...

Before proceeding with the *first requisite*, the Court deems it more appropriate to primarily discuss whether the petition was timely filed and whether the Court has jurisdiction over the instant case (*third requisite).*

<u>THIRD (3RD) REQUISITE:</u>
THE CLAIM MUST BE FILED WITHIN TWO (2) YEARS AFTER THE CLOSE OF THE TAXABLE QUARTER WHEN SUCH SALES WERE MADE.

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[60] G.R. No. 234445, 15 July 2020; Citations omitted.

In accordance with Section 112(A) and (C) of the NIRC of 1997, as amended by the TRAIN Law, the administrative claim for refund of unutilized input VAT must be filed with the BIR within two (2) years after the close of the taxable quarter when the zero-rated or effectively zero-rated sales were made.

The administrative claim subject of this case covers the 2nd to 4th quarters of CY 2017 hence, petitioner's last day for filing of its administrative claim therefor and the actual filing of its administrative claim for the said periods fell on the following dates:

Period Covered	Last Day to File Administrative Claim	Actual Date of Filing of Administrative Claim
April to June 2017 (2nd Quarter)	30 June 2019	31 May 2019[61]
July to September 2017 (3rd Quarter)	30 September 2019	
October to December 2017 (4th Quarter)	31 December 2019	

As can be gleaned from the above, petitioner's administrative claim was filed within the reglementary period.

As to the timeliness of petitioner's judicial claim before this Court, pursuant to the TRAIN Law, amending Section 112(C) of the NIRC of 1997, as amended, respondent had ninety (90) days from the date of submission of the official receipts (**ORs**) or invoices and other documents in support of the administrative claim, or until <u>29 August 2019</u>, to decide on petitioner's claim. <u>On 31 July 2019</u>, respondent denied petitioner's administrative claim.

Section 11 of RA 1125[62], as amended by RA 9282[63], states:

61 Supra at note 15.

62 AN ACT CREATING THE COURT OF TAX APPEALS.

63 AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OR REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

> ...
>
> SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* — **Any party adversely affected by** a decision, ruling or **inaction of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling** or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.[64]
>
> ...

Based on the foregoing, petitioner had 30 days from 31 July 2019, or until 30 August 2019, to appeal such decision to this Court. Evidently, petitioner's judicial claim for refund was likewise timely filed on 30 August 2019.[65]

The Court shall now proceed with the determination of petitioner's compliance with the remaining requisites.

FIRST (1ST) REQUISITE:
PETITIONER IS A VALUE-ADDED TAX (VAT)-REGISTERED ENTITY.

The records indisputably show that petitioner is registered with the BIR as a VAT taxpayer, with Tax Identification Number (**TIN**) 205-760-474-00000 as evidenced by its COR No. OCN8RC0001649021E, with its TIN issue date of 10 April 2000.[66]

SECOND (2ND) REQUISITE:
PETITIONER IS ENGAGED IN ZERO-RATED OR EFFECTIVELY ZERO-RATED SALES.

Petitioner claims that during the 2nd to 4th quarters of CY 2017, it sold electric power generated through hydropower, a renewable source

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64 Emphasis supplied.
65 Supra at note 1.
66 Supra at note 5.

of energy pursuant to Section 108(B)(7) of the NIRC of 1997, as amended[67], which states:

> ...
>
> **SEC. 108.** *Value-Added Tax on Sale of Services and Use or Lease of Properties.* —
>
> ...
>
> (B) *Transactions Subject to Zero Percent (0%) Rate* — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate.
>
> ...
>
> (7) **Sale of power** or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, **hydropower**, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels.[68]
>
> ...

Section 4.108-3(f) of Revenue Regulations (RR) No. 16-2005[69], which implements the foregoing provision states that:

> ...
>
> SEC. 4.108-3. *Definitions and Specific Rules on Selected Services.* —
>
> ...
>
> (f) Sale of electricity by generation, transmission, and distribution companies shall be subject to 10% VAT on their gross receipts; *Provided*, That **sale of power or fuel generated through renewable sources of energy** such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels shall be **subject to 0% VAT.**
>
> "*Generation companies*" refer to persons or entities authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. For this purpose, generation of electricity refers to the production of electricity by a generation company or a co-generation facility **pursuant to the provisions of the RA No. 9136 (EPIRA).** They shall include all Independent Power

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67 Before the amendments introduced by TRAIN.
68 Emphasis supplied.
69 Consolidated Value-Added Tax Regulations of 2005.

> Producers (IPPs) and NPC/Power Sector Assets and Liabilities Management Corporation (PSALM)-owned generation facilities.[70]
>
> ...

Anent thereto, Section 4(x) of RA 9136 or the *Electric Power Industry Reform Act of 2001* (**EPIRA**) defines a generation company as follows:

> ...
> SEC. 4. *Definition of Terms.* —
>
> (x) "Generation Company" refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity[.]
>
> ...

Moreover, Section 6 of the EPIRA provides that a Certificate of Compliance (**COC**) from the Energy Regulatory Commission (**ERC**) is a prerequisite before a generation company could operate and henceforth avail of 0% VAT, to wit:

> ...
> SEC. 6. *Generation Sector.* — Generation of electric power, a business affected with public interest, shall be competitive and open.
>
> Upon the effectivity of this Act, **any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance** pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.
>
> ...
>
> Pursuant to the objective of lowering electricity rates to end-users, **sales of generated power by generation companies shall be value-added tax zero-rated.**[71]
>
> ...

Corollarily, Section 4(a) Rule 5 of the Implementing Rules and Regulation (**IRR**) of the EPIRA[72] provides:

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[70] Emphasis supplied and italics in the original text.
[71] Emphasis and underscoring supplied.
[72] Rules and Regulations to Implement Republic Act No. 9136, entitled "Electric Power Industry Reform Act of 2001", 27 February 2002.

...

RULE 5
GENERATION SECTOR

...

SEC. 4. Obligations of a Generation Company.

(a) **A <u>COC</u> shall be secured from the ERC <u>before</u> commercial operation of a new Generation Facility.** The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. **A COC shall be issued upon compliance with such standards and requirements.**

(i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3)-year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility.[73]

...

From the foregoing, it is only upon the issuance of the prerequisite COC that a generation company, like petitioner, may be regarded as authorized by the ERC to operate a generation facility, and thus, entitled to VAT zero-rating of its sale of power or electricity.[74]

In the instant case, petitioner proffered as evidence the three (3) COCs issued by the ERC for the Kalayaan I and II (COC No. 19-07-M-0049AL)[75], Caliraya (COC No. 19-07-M-0049BL)[76] and Botocan (COC No. 19-07-M-0049CL)[77] Hydroelectric Power Plants, as identified by petitioner's witness – De La Paz, as follows:[78]

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[73] Emphasis and underscoring supplied.
[74] *Trans-Asia Renewable Energy Corporation (Now known as "Guimaras Wind Corporation") v. Commissioner of Internal Revenue*, CTA EB Case Nos. 2314 & 2347, 17 May 2022.
[75] Exhibit "P-14", Division Docket, Volume III, p. 1188.
[76] Exhibit "P-15", id, p. 1189.
[77] Exhibit "P-16", id, p. 1190.
[78] Supra at note 41; Emphasis in the original text and underscoring supplied.

...

Q24. If you know, why do the [p]etitioner's sales for the period April 1, 2017 to December 31, 2017 (2nd to 4th [Quarters] of CY 2017) qualify as zero-rated sales pursuant to Sections 108(B)(7) of the Tax Code of 1997?

A24. Pursuant to the BROT Agreement, [petitioner] sold and generated electricity through hydropower for the National Power Corporation (NPC) for the period **April 1, 2017 to December 31, 2017 (2nd to 4th [Quarters] of CY 2017).**

...

In this regard, [p]etitioner filed with the Energy Regulatory Commission (ERC) applications for the issuance and renewal of its Certificates of Compliance (COC) as a generation company to operate generation facilities pursuant to R.A. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA) and its Implementing Rules and Regulations. Accordingly, the ERC issued and granted the following renewal Certificates of Compliance (COC) to [p]etitioner, as a hydropower generation company, marked as Exhibits "P-14" to "P-16," inclusive of all sub-markings, respectively, to wit:

Exhibit Numbers	**Descriptions**
P-14	**Petitioner's ERC Certificate of Compliance (COC) COC No. 19-07-M-0049AL for the Kalayaan Hydro Pump Storage Power Plant dated July 4, 2019.**
P-15	**Petitioner's ERC Certificate of Compliance (COC) COC No. 19-07-M-0049BL for the Kalayaan Hydroelectric Power Plant dated July 4, 2019.**
P-16	**Petitioner's ERC Certificate of Compliance (COC) COC No. 19-07-M-0049CL for the Kalayaan Hydroelectric Power Plant dated July 4, 2019.**

...

However, a close scrutiny of the COCs would reveal that these were issued on **04 July 2019** with a validity period of **19 July 2019 to 20 July 2024** hence outside petitioner's subject period of claim *i.e.*, 01 April 2017 to 31 December 2017.

The Court is not unaware that in the same COCs, it was indicated that these are renewal COCs. Nonetheless, petitioner failed to proffer as evidence the original COCs, if any, which would have been relevant to the subject period of claim. To put it differently, there is then nothing in the records that could *ably* show that when petitioner sold electricity generated through hydropower to NPC *during* the 2nd to 4th quarters of CY 2017, it was armed with the requisite COC from the ERC. With this, it had thus failed to meet the requirements under the EPIRA and the NIRC of 1997, as amended.

In the case of *Commissioner of Internal Revenue v. Toledo Power Company*[79] (**Toledo**), Toledo Power Company (**TPC**) prayed for the refund of its unutilized input taxes allegedly attributable to its zero-rated sales of electricity to Cebu Electric Cooperative III (**CEBECO**), Atlas Consolidated Mining and Development Corporation (**ACMDC**), and Atlas Fertilizer Corporation (**AFC**). In denying the said claim, the Supreme Court ruled that TPC's failure to submit the required COC from ERC invalidates the sales of electricity to CEBECO, ACMDC and AFC as zero-rated. The significant portions of the said decision read:

> ...
>
> Section 6 of the EPIRA provides that the sale of generated power by generation companies shall be zero-rated. Section 4(x) of the same law states that a generation company "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." Corollarily, to be entitled to a refund or credit of unutilized input VAT attributable to the sale of electricity under the EPIRA, a taxpayer must establish: (1) that it is a generation company, and (2) that it derived sales from power generation.
>
> ...
>
> At this point, a distinction must be made between a generation facility and a generation company. A generation facility is defined under the EPIRA Rules and Regulations as "a facility for the production of electricity." While a generation company, as previously mentioned, "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." **Based on the foregoing definitions, what differentiates a generation facility from a generation company is that the latter is authorized by the ERC to operate, as evidenced by a COC.**
>
> Under the EPIRA, all new generation companies and existing generation facilities are required to obtain a COC from the ERC. New generation companies must show that they have complied with the requirements, standards, and guidelines of the ERC before

[79] G.R. No. 196415, 02 December 2015; Citations omitted and emphasis supplied.

they can operate. As for existing generation facilities, they must submit to the ERC an application for a COC together with the required documents within ninety (90) days from the effectivity of the EPIRA Rules and Regulations. Based on the documents submitted, the ERC will determine whether the applicant has complied with the standards and requirements for operating a generation company. If the applicant is found compliant, only then will the ERC issue a COC.

In this case, when the EPIRA took effect in 2001, TPC was an existing generation facility. And at the time the sales of electricity to CEBECO, ACMDC, and AFC were made in 2002, TPC was not yet a generation company under EPIRA. Although it filed an application for a COC on June 20, 2002, it did not automatically become a generation company. **It was only on June 23, 2005, when the ERC issued a COC in favor of TPC, that it became a generation company under EPIRA. Consequently, TPC's sales of electricity to CEBECO, ACMDC, and AFC cannot qualify for VAT zero-rating under the EPIRA.**

...

All told, we find no error on the part of the CTA *En Banc* in considering TPC's sales of electricity to CEBECO, ACMDC, and AFC for taxable year 2002 as invalid zero-rated sales, and in consequently denying TPC's claim for refund or credit of unutilized input VAT attributable to the said sales of electricity.[80]

...

We are cognizant that in *Toledo*, the CTA Division granted TPC's claim for VAT refund or TCC for those attributable to the sales of electricity to NPC. However, the Supreme Court in *Commissioner of Internal Revenue v. Team Energy Corporation (Formerly Mirant Pagbilao Corporation)*[81], already categorically settled and ruled that a taxpayer must comply with the requirements of the EPIRA *only* when the basis of refund claim is under the EPIRA, *viz*:

...

Petitioner was less than truthful when he lifted only portions of the CTA Decision in *Toledo* that were favorable to him. In the said case, while it may be true that the CTA ruled that the failure of Toledo to submit its approved COC from the ERC cannot qualify its sales of generated power for VAT zero-rating under the EPIRA, the same decision likewise granted Toledo's claim for refund of unutilized input

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80 Emphasis supplied.

81 G.R. No. 230412, 27 March 2019; Citations omitted, emphasis and underscoring supplied.

> VAT attributable to its sales of electricity to NPC under Section 108(B)(3) of the Tax Code. In short, **the decision differentiated the requirements for a claim for refund under the EPIRA, and a claim for refund based on Section 108(B)(3) of the Tax Code.** In *Commissioner of Internal Revenue v. Toledo Power Company* which affirmed the said CTA decision, **this Court essentially held that the requirements of the EPIRA must be complied with only if the claim for refund is based on EPIRA.** ...
>
> ...

Here, it is clear that petitioner based its claim for VAT refund or TCC on Section 108(B)(7) of the NIRC of 1997, as amended, in relation to RA 9316 or the EPIRA. Having indubitably anchored its claim on these grounds (that include EPIRA), it behooves petitioner to show compliance with the EPIRA's requirements to successfully claim for a tax refund or TCC.

In conclusion, the Court would like to reiterate that actions for tax refund or credit, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven. The burden is on the taxpayer-claimant to show that it has strictly complied with the conditions for the grant of the tax refund or credit.[82] Since taxes are the lifeblood of the government, tax laws must be faithfully and strictly implemented as they are not intended to be liberally construed.[83]

From the foregoing, for petitioner's utter failure to substantiate the alleged zero-rated sales, it cannot claim the input taxes attributable thereto. Accordingly, the Court finds it unnecessary to discuss petitioner's compliance with the rest of the requisites pursuant to Section 112(A) of the NIRC of 1997, as amended. Without the supporting documents needed to prove petitioner's alleged zero-rated sales, the Court is left with no other recourse but to deny the present petition.

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[82] *Coca-Cola Bottlers Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 222428, 19 February 2018, citing *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue*, G.R. No. 159490, 18 February 2008.

[83] Id., citing *Commissioner of Internal Revenue v. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*, 746 Phil. 139 (2014); *Commissioner of Internal Revenue v. Dash Engineering Philippines, Inc.*, 723 Phil. 433 (2013).

WHEREFORE, the foregoing premises considered, the instant Petition for Review filed by petitioner CBK Power Company Limited on 30 August 2019 is hereby **DENIED** for lack of merit.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

LANEE S. CUI-DAVID
Associate Justice

<u>ATTESTATION</u>

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

JEAN MARIE A. BACORRO-VILLENA
Associate Justice
Special 2nd Division Acting Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Special 2nd Division Acting Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice