REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EB No. 897 (C.T.A. CASE NO. 8070)
	Present:
- versus -	DEL ROSARIO, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, *JJ.*
PHILIPPINE REALTY AND HOLDINGS CORPORATION, Respondent.	Promulgated: JUL 29 2013 8:00 a.m.

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DECISION

***Fabon-Victorino, J.*:**

In this appeal via the instant Petition for Review dated May 12, 2012, petitioner Commissioner of Internal Revenue assails the Decision dated December 20, 2011, which granted respondent's claim for refund of unutilized creditable tax withheld for the year 2007, and the Resolution dated April 4, 2012 which denied her Motion for Reconsideration, both rendered by the Court in Division.

First, the facts.

Petitioner is the Commissioner of Internal Revenue (CIR), vested by law with the power to implement and enforce the provisions of the National Internal Revenue Code (NIRC) and other tax laws, and in particular, to decide claims for refund of internal revenue taxes.

Respondent Philippine Realty and Holdings Corporation, Inc. is a domestic corporation with principal offices and business address at 33/F East Tower, Philippine Stock Exchange, Exchange Road, Ortigas Center, Pasig City. It is registered with the Bureau of Internal Revenue (BIR) with Tax Identification Number (TIN) 000-188-233-000 and BIR Certificate of Registration bearing RDO Control No. 3RC0000419979.

Respondent is engaged in the business of dealing, engaging, investing, and transacting directly or indirectly, in all forms of business and mercantile acts and transaction concerning all kinds of real property including but not limited to the acquisition, development, utilization, and disposition of residential, industrial and commercial property and concerning all kinds of personal property, including but not limited to technical and industrial equipment and machineries, commercial paper and documents, securities, evidences of indebtedness, instruments of value, and other forms of obligations, service and all rights to personal properties.

On April 14, 2008, respondent electronically filed its original Annual Income Tax Return (ITR) for taxable year 2007.

On October 21, 2009, it filed its administrative claim for refund of its unutilized creditable taxes withheld at source for taxable year 2007 in the amount of P9,783,619.00.

On April 13, 2010, respondent filed a Petition for Review with the Court in Division claiming inaction on the part of petitioner.

In her Answer, petitioner mainly invoked the burden on the part of respondent to prove its entitlement to the claim for refund by presenting clear and convincing evidence that all the requirements for that purpose have been satisfied.

After trial, the Court in Division rendered the assailed Decision dated December 20, 2011, partially granting respondent's claim for refund in this wise:

> WHEREFORE, premises considered, the instant Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent (herein petitioner) is hereby ordered to refund/issue tax credit certificate in favor of petitioner (herein respondent) the reduced amount of EIGHT MILLION SEVEN HUNDRED SEVENTY THOUSAND FIFTY THREE AND 85/100 PESOS (P8,770,053.85), representing petitioner's unutilized creditable taxes withheld at source for taxable year 2007.
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> SO ORDERED.

Both the Motion for Reconsideration of petitioner and the Motion to Present Additional Evidence in Support of the Opposition of respondent were denied by the Court in Division in the assailed Resolution dated April 4, 2012, the dispositive portion of which reads as follows:

> Premises considered petitioner Motion To Allow Presentation of Additional Evidence in Support of the Opposition is hereby DENIED for lack of merit. Petitioner's Motion for Reconsideration is, likewise, DENIED for lack of merit.
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> SO ORDERED.

Hence, this appeal.

The sole issue raised by petitioner is hinged on the irrevocability rule as provided under Section 76 of the NIRC, as amended, which provides that a taxpayer who has excess creditable withholding tax (CWT) has the option to ask for a refund or to simply carry over and apply such excess CWT to the succeeding year's income tax due. Once the option to carry over has been made, such option shall be considered irrevocable and no application for tax refund shall be allowed therefor.

For petitioner, the Court in Division erred when it partially granted respondent's claim for refund of excess CWT for 2007 as it failed to present its Original Quarterly ITR for year 2008 to prove that it did not carry over and apply to the succeeding year the excess CWT for 2007 subject of the instant claim for refund. Considering that the claim for refund is strictly construed against respondent, any doubt that it carried over and applied its 2007 excess CWT to its 2008 income tax due must result in the denial of the relief prayed for.

Respondent does not agree. In its Comment it argues that both the law and jurisprudence on the matter do not require the presentation of the original quarterly returns of the succeeding taxable year to be entitled to a refund of excess CWT. The taxpayer-claimant such as respondent, needs only to prove that: (a) both the administrative and judicial claims for refund were filed within two (2) years from the date of payment of the tax; (b) that the income payment received on which the tax was withheld was declared in its return as part of its gross income; and (c) that the fact of withholding is established by a copy of the statement duly issued by the payor to the taxpayer-claimant showing the amount paid and the amount of tax withheld therefrom. All these, according to respondent, have been complied with, precisely the Court in Division partially granted its petition.

There is also no need to present respondent's original quarterly ITRs for the succeeding year to establish that it did not carry over the subject excess CWT to the succeeding year or quarters. Its Original and Amended ITRs for 2007, both of which indicated its option to apply for a tax credit certificate, prove that its excess CWT for 2007 were not carried over and applied to the succeeding year. Pursuant to Section 76 of the NIRC, once a choice has been made, the same is irrevocable thus, the other option to carry over its excess CWT is no longer available.

In any event, the alleged need to present the original quarterly ITRs was obviated by the presentation of respondents' Amended Quarterly ITRs for 2008 which show that it did not carry over its 2007 excess CWT to the succeeding year. The original quarterly ITRs have been replaced and superseded by the Amended Quarterly ITRs.

More importantly, respondent submitted to the Court in Division copies of its Original Quarterly ITRs for 2008 as attachments to its Opposition[1] to petitioner's Motion for Reconsideration. The said documents clearly show that no excess CWT for 2007 was carried over by respondent to taxable year 2008. This is not to mention that respondent also presented its Annual ITR for the year 2008 for the same purpose.

Respondent continues to say that the issue of carry over as a defense is deemed waived as it was never raised by petitioner in her Answer or in the Joint Stipulation of Facts and Issues they filed with the Court in Division. Pursuant to Section 1, Rule 9 of the Rules of Court, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. Thus, the issue of carry over as a defense can no longer be raised this late in the proceedings.

Finally, under Section 7, Rule 118 of the Rules of Court, the court can receive evidence only on the issues agreed upon by the parties during the pre-trial as reflected in the Pre-Trial Order issued by the court. Considering that the issue of carry over is not among those enumerated in the Pre-Trial Order issued by the Court in Division, it can no longer be raised on appeal before the Court *En Banc.*

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[1] Division docket pp. 570-590.

In the Resolution dated September 12, 2012, the instant case was submitted for decision.

THE RULING OF THE COURT

Sections 204(C) and 229 of the NIRC of 1997, as amended, relevantly state:

> **SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*** – The Commissioner may-
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> xxx xxx xxx
>
> **(C)** Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamped that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund...
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> **SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.***- No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax,

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> penalty, or sum has been paid under protest or duress.
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> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefore, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

As stated in the foregoing provisions, the two-year prescriptive period is reckoned from the filing of the final adjusted return (FAR),[2] for both administrative and judicial claims. The present action covers the taxable year 2007 for which respondent filed its original Annual ITR on April 14, 2008. Counting from this date, the administrative claim filed by respondent on October 21, 2009 as well as the Petition for Review filed with the Court in Division on April 13, 2010, were within the two-year prescriptive period thus are deemed seasonably filed.

Further, Section 76 of the NIRC of 1997, as amended, provides, as follows:

> **SEC. 76. *Final Adjustment Return*.** — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
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> (A) Pay the balance of tax still due; or
> (B) Carry-over the excess credit; or

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[2] Commissioner of Internal Revenue vs. Primetown Property, G.R. No. 162155, August 28, 2007.

> (C) Be credited or refunded with the excess amount paid, as the case may be.
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> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor.

Under the above provision, a corporation entitled to a tax credit or refund of the excess estimated quarterly income taxes paid has two options: (1) to carry over the excess credit or (2) to apply for the issuance of a tax credit certificate or to claim a cash refund. If the option to carry over the excess credit is exercised, the same shall be irrevocable for that taxable period. In exercising its option, the corporation must signify in its annual corporate adjustment return (by marking the option box provided in the BIR form) its intention either to carry over the excess credit or to claim a refund. To facilitate tax collection, these remedies are in the alternative and the choice of one precludes the other.[3] Respondent clearly indicated its option to be issued a Tax Credit Certificate in its Annual Income Tax Return for year 2007,[4] pursuant to Section 76 of the NIRC.

On the entitlement of respondent to the refund sought, the Supreme Court enumerated the requisites for claiming a tax credit or a refund of creditable withholding tax: 1) The

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[3] Systra Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 176290, September 21, 2007.
[4] Exhibit I, Division docket pp. 267-268.

claim must be filed with the CIR within the two-year period from the date of payment of the tax; 2) It must be shown on the return that the income received was declared as part of the gross income; and 3) The fact of withholding must be established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld.[5]

As earlier observed, respondent complied with the first requisite as it timely filed both its administrative and judicial claims within the two-year prescriptive period mandated by law.

Respondent likewise complied with the second requisite as comprehensively held by the Court in Division in the assailed Decision of December 20, 2011, in the following manner:

> A perusal of the certificates revealed that the creditable withholding taxes (CWT) of P11,442,371.73 were withheld on gross income payments of P211,761,354.86 broken down as follows:

Nature	Income Payments	Income Tax Withheld
Payments for Rental	P 12,050,078.41	P 602,482.23
Payments for Sale of Services		
Payments for Prime Contractors/Sub-Contractors	52,301.50	2,096.03
Payments made by Top 10,000 Corporations	57,880.72	1,157.62
Subtotal	110,182.22	3,253.65
Refund from MERALCO to Customers	3,172,522.80	1,015,207.28
Payment from Sale of Real Property	196,428,571.43	9,821,428.57
Total	P 211,761,354.86	P 11,442,371.73

> On the other hand, (respondent's) amended 2007 Annual Income Tax Return disclosed the following amounts of income:

[5] Commissioner of Internal Revenue vs. Mirant (Philippines) Operations, Corporation, G.R. No. 171742, June 15, 2011 and Mirant (Philippines) Operations Corporation (Formerly: Southern Energy Asia-Pacific Operations (Phils.), Inc.) vs. Commissioner of Internal Revenue, G.R. No. 176165.

	Amount
Sale of Real Estate	P 196,428,571.00
Lease of Properties	27,953,702.00
Subtotal	*P 224,382,273.00*
Non Operating and Other Income	
Interest Discount	P 80,486,937.00
Liabilities Written Off	66,025,975.00
Meralco Refund	3,172,523.00
Interest Income	457,477.00
Miscellaneous Income	439,032.00
Subtotal	*P 150,581,944.00*
TOTAL	P 374,964,217.00

Evidently, (respondent) was able to establish that the income payments arising from its sale of real estate in the amount of P196,428,571.43 and refunds from Meralco in the amount of P3,172,522.80 from which the claimed creditable taxes for P9,821,428.57 and P1,015,207.28 were withheld, respectively, were the very same figures (except for rounding off differences) declared in its 2007 Annual Income Tax Return.

As to the rental income payments of P12,050,078.41, related to the claimed CWT of P602,482.23, records reveal that there is a discrepancy of P15,903,623.59 between the rental income of P27,953,702.00 as reflected in (respondent's) 2007 Annual Income Tax Return and the total rental income of P12,050,078.41 as shown in the certificates. Since (respondent) failed to account for the said discrepancy and it cannot be verified whether the rental income payments of P12,050,078.41 were actually declared in (respondent's) return, the claimed CWT in the amount of P602,482.23 shall be denied.

With regard to the income payments from (respondent's) sale of services in the amount of P110,182.22 related to the claimed CWT of P3,253.65, (respondent) failed to prove that it declared the said income payments in its income tax return as no amount of

> "Sale of Services" was indicated in its returns. While (respondent) reported a "Miscellaneous Income" of P439,032.00, it cannot be verified whether the same included the income payments of P110,182.22. (Respondent) should have submitted documents wherein the income payments of P110,182.22 can be traced as forming part of its reported miscellaneous income of P439,032.00. Thus, the CWT of P3,253.65 related to the income payments of P110,182.22 shall, likewise, be denied.

On the third requisite, the Court in Division ruled on the compliance by respondent as follows:

> Anent compliance with the third requirement, (respondent) submitted various Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307) for taxable year 2007, to prove the fact of withholding x x x.
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> However, the CWT reflected per certificates in the total amount of P11,442,527.98 is lower than the total tax credits of P11,824,848.00 reported per (respondent's) Annual Income Tax Return for taxable year 2007. Thus, the discrepancy of P382,320.02 shall be denied from (respondent's) claim.
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> Moreover, (respondent's) claimed CWT, in the amount of P156.25, shall be disallowed because the corresponding certificate was denied admission by the Court in its Resolution dated February 16, 2011 for being merely provisionally marked.
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> In sum, (respondent) proved compliance with the third requirement but only to the extent of P11,442,371.73 (P11,442,527.98 less 156.25) out of the

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> declared CWT for taxable year 2007 in the amount of P11,824,848.00.

The foregoing ruling by the Court in Division being in accord with the pertinent laws and jurisprudence, and remains undisputed by the parties, the Court *En Banc* sees no reason to deviate therefrom.

Finally, the non-presentation of respondent's Original Quarterly ITR for the year 2008 to prove that respondent did not carry-over and apply its excess CWT for 2007 to the succeeding year is of no moment. Jurisprudence has long dispensed with the presentation of the succeeding year's returns in claims for refund of excess CWT, thus:

> Requiring that the ITR or the FAR of the *succeeding* year be presented to the BIR in requesting a *tax refund* has no basis in law and jurisprudence.
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> *First,* Section 76 of the Tax Code does not mandate it. The law merely requires the filing of the FAR for the *preceding* -- not the succeeding -- taxable year. Indeed, any refundable amount indicated in the FAR of the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. However, nowhere is there even a tinge of a hint in any of the provisions of the Tax Code that the FAR of the taxable year following the period to which the *tax credits* are originally being applied should also be presented to the BIR.
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> *Second,* Section 5 of RR 12-94, amending Section 10(a) of RR 6-85, merely provides that claims for the refund of income taxes deducted and withheld from income payments shall be given due course only (1) when it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and (2) when the fact of withholding is established by a copy of the withholding tax statement, duly issued by the payor to the

> payee, showing the amount paid and the income tax withheld from that amount.
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> x x x x x x x x x
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> The established procedure is that a taxpayer that wants a cash refund shall make a written request for it, and the ITR showing the excess expanded withholding tax credits shall then be examined by the BIR. For the grant of refund, RRs 12-94 and 6-85 state that all pertinent accounting records should be submitted by the taxpayer. These records, however, actually refer only to (1) the withholding tax statements; (2) the ITR of the present quarter to which the excess withholding tax credits are being applied; and (3) the ITR of the quarter for the previous taxable year in which the excess credits arose.[6]

While the cited case mentions only that there is no need to present the FAR of the succeeding year, it is also clear that there is also no need to present the quarterly returns for the succeeding year. The cited decision also enumerated the documents that must be submitted in evidence to prove entitlement to refund or tax credit, to wit: "(1) the withholding tax statements; (2) the ITR of the present quarter to which the excess withholding tax credits are being applied; and (3) the ITR of the quarter for the previous taxable year in which the excess credits arose."

Under the familiar maxim in statutory construction, *expressio unius est exclusio alterius,* the express mention of one person, thing, or consequence implies the exclusion of all others.[7] Hence, when the Supreme Court listed the documents needed to be entitled to a claim for refund of excess CWT, such is deemed an exclusive list and everything else must be excluded. Since submission of the FAR or the quarterly returns of the succeeding year to be entitled to a refund of excess CWT is not included, then there is no need to present these documents.

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[6] Philam Asset Management vs. Commissioner of Internal Revenue, G.R. Nos. 156637/162004, December 14, 2005.

[7] Sario Malinias vs. The Commission on Elections, Teofilo Corpuz, Anacleto Tangilag and Victor Dominguez, G.R. No. 146943, October 04, 2002.

To repeat, the submission in evidence of the returns of the succeeding year is unnecessary as "the Tax Code merely **requires the filing of the final adjustment return for the preceding – not the succeeding – taxable year.** Indeed, any refundable amount indicated therein corresponding to the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. Requiring that the income tax return or the final adjustment return of the succeeding year be presented to the BIR in requesting a tax refund has no basis in law and jurisprudence."[8]

Relevantly, the Supreme Court has ruled that it is not incumbent upon the taxpayer to prove that it did not carry-over its excess CWT to the succeeding year since it is the duty of the petitioner CIR to verify whether or not a taxpayer carried over its excess income taxes subject of the claim for refund.[9]

Lastly, while the respondent's Original Quarterly Returns for the first three (3) quarters of the succeeding year were not formally offered in evidence, nonetheless, the same became part of the record of the case when they were submitted to the Court in Division as attachments to respondent's Opposition [10] to petitioner's Motion for Reconsideration. The Court cannot simply ignore the import of these documents. In the interest of justice, documents deemed part of the record though not admitted in evidence may be considered by the court in arriving at its ruling as emphasized by the High Court, as follows:

> The CIR takes the view that the CA erred in considering the 1998 ITR of PERF. It was not formally offered in evidence. Section 34, Rule 132 of the Revised Rules of Court states that the court shall consider no evidence which has not been formally offered.

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[8] State Land Investment Corporation vs. Commissioner of Internal Revenue, G.R. No. 171956, January 18, 2008.
[9] Please see Commissioner of Internal Revenue vs. PERF Realty Corporation, G.R. No. 163345, July 04, 2008.
[10] Division docket pp. 570-590.

> The reasoning is specious.
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> PERF attached its 1998 ITR to its motion for reconsideration. The 1998 ITR is a part of the records of the case and clearly showed that income taxes in the amount of P1,280,504.00 were not claimed as tax credit in 1998.
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> In *Filinvest Development Corporation v. Commissioner of Internal Revenue*, the Court held that the 1997 ITR attached to the motion for reconsideration is part of the records of that case and cannot be simply ignored by the CTA. Moreover, technicalities should not be used to defeat substantive rights, especially those that have been held as a matter of right.[11]

Considering that the 2008 Original Quarterly Income Tax Returns[12] of respondent for the first two (2) quarters indicated a zero amount for "Prior year's Excess Credits," while that for the 3rd quarter did not indicate any excess credits from the previous year, it is clear that respondent did not carry-over or apply its 2007 excess CWT to its income tax due for year 2008.

WHEREFORE, the Petition for Review dated May 12, 2012 filed by petitioner Commissioner of Internal Revenue, is hereby **DENIED,** for lack of merit.

Consequently, the Decision dated December 20, 2011 and the Resolution dated April 4, 2012, both rendered by the Court in Division, are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

[11] Commissioner of Internal Revenue vs. PERF Realty Corporation, G.R. No. 163345, July 04, 2008.
[12] See Division docket pp. 583-590.

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(On Leave)
LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice