REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

MIRANT (NAVOTAS II) CORPORATION (formerly Southern Energy Navotas II Power, Inc.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7469

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

MAR 2 4 2009

3:30 p.m.

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DECISION

CASTAÑEDA, JR., J.:

The instant Petition for Review seeks the refund or issuance of tax credit certificate in the amount of P2,306,862.22, allegedly representing unutilized input value-added tax (VAT) incurred from its domestic purchases of taxable goods and services and importation of goods attributable to its zero-rated sales of electricity to the National Power Corporation (NPC) for taxable year 2004.

Mirant (Navotas II) Corporation (Petitioner) is a corporation duly organized and existing by virtue of Philippine laws, with principal office located at 5F, CTC Building, 2232 Roxas Boulevard, Pasay City. It is engaged in the business of power generation and the subsequent sale thereof to NPC under a Build, Operate and Transfer (BOT) Scheme.[1] Petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT Taxpayer, with Taxpayer Identification Number (TIN) 001-726-862.[2] It also has a duly approved Application for VAT Zero-Rate dated December 19, 2003 for its supply of electricity to NPC.[3]

Respondent is the duly appointed Commissioner of the BIR, with the authority to act as such, including the power to decide, approve and grant claims for refunds or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner was originally registered with the Securities and Exchange Commission (SEC) under the name Hopewell Tileman (Philippines) Corporation. On March 23, 1999, petitioner's name was officially changed to Southern Energy Navotas II Power, Inc. On April 26, 2001, the SEC approved the application of petitioner to further change its corporate name to Mirant (Navotas II) Corporation.[4]

Petitioner filed its Quarterly VAT Returns for taxable year 2004 on the following dates:

Period	Date Filed	Exhibit
1st Quarter		
Original VAT Return	April 26, 2004	"A"
Amended VAT Return	July 26, 2004	"B"
2nd Quarter	July 26, 2004	"C"
3rd Quarter	October 25, 2004	"D"

[1] Annex "D", Petition for Review.
[2] Annex "A", Petition for Review.
[3] Annex "D", Petition for Review.
[4] Annexes "B" and "C", Petition for Review.

4th Quarter		
Original VAT Return	January 24, 2005	"E"
Amended VAT Return	January 25, 2005	"F"
Second Amended VAT Return	April 25, 2005	"G"

On December 21, 2005, petitioner filed an administrative claim with BIR Revenue District Office No. 51–Pasay City for the refund or issuance of tax credit certificate in the total amount of P2,306,862.22, representing its unutilized input VAT for the four quarters of taxable year 2004.[5]

Due to respondent's inaction and in order to suspend the running of the two-year prescriptive period under the National Internal Revenue Code (NIRC) and Revenue Regulations No. 7-95, petitioner filed the present Petition for Review on April 24, 2006.

On June 1, 2006, respondent filed his Answer interposing the following Special and Affirmative Defenses:

"4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;

5. Petitioner must prove that it paid for the input VAT so alleged;

6. Petitioner must prove that the same input VAT was not utilized against any output VAT liability;

7. Petitioner must prove that its sales are VAT zero-rated as contemplated under Section 112 (A) of the Tax Code of 1997;

8. Petitioner must prove that the claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;

9. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund; gr

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[5] Annex "L", Petition for Review.

10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation."

Respondent and petitioner filed their respective Pre-Trial Brief on July 5, 2006 and on July 17, 2006.[6]

After the Pre-Trial on July 20, 2006,[7] the parties submitted their Joint Stipulation of Facts and Issues on August 10, 2006; which the Court approved on August 30, 2006.[8]

On November 23, 2006, the Court granted petitioner's Motion to Avail of the Provisions of Rule 13 of the Revised Rules of the Court of Tax Appeals filed on September 7, 2006, wherein Mr. Henry M. Tan was commissioned as Independent Certified Public Accountant (CPA).[9]

The Independent CPA filed his Partial Report[10] on December 29, 2006 and his Final Report[11] on February 23, 2007.

After trial, petitioner filed its Formal Offer of Evidence on December 21, 2007, wherein it proffered Exhibits "A" to "EE", inclusive of submarkings.[12] The Court, in a Resolution dated March 6, 2008, admitted petitioner's exhibits except Exhibits "A-1", "B-1", "B-2", "C-1", "D-1", "E-1", "F-1", and "G-1" for petitioner's failure to identify the same during trial.[13]

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[6] Docket, pp. 86-89 and 91-101.
[7] Docket, p. 105.
[8] Docket, p. 122.
[9] Docket, pp. 127-129 and 141.
[10] Docket, pp. 142-162.
[11] Docket, pp. 176-206.
[12] Docket, pp. 238-257.
[13] Docket, pp. 259-260.

On May 28, 2008, counsel for respondent manifested that she has no witness to present and is submitting the case for decision based on the pleadings.[14]

In a Resolution[15] dated August 6, 2008,. the case was submitted for decision considering petitioner's Memorandum for the Petitioner[16] filed on July 11, 2008, *sans* respondent's Memorandum.

The parties have jointly stipulated on the following issues for this Court's resolution:

"1. Whether or not the power generation services rendered by petitioner to NPC are subject to zero-percent (0%) pursuant to Section 108(B)(3) of the Tax Code.

2. Whether or not petitioner has unapplied and unutilized input VAT for the four quarters of calendar year 2004 in the total amount of P2,306,862.22 arising from its domestic purchases of taxable goods and services and importation of goods.

3. Whether or not petitioner's unapplied and unutilized input VAT for the four quarters of 2004 are attributable to its zero-rated sale of power generation services to NPC.

4. Whether or not petitioner's administrative claim for refund was seasonably filed.

5. Whether or not petitioner's unapplied or unutilized input VAT for the four quarters of 2004 are properly substantiated by invoices and official receipts and other relevant documents.

6. Whether or not petitioner's unapplied or unutilized input VAT for the four quarters of 2004 were carried over to and utilized in the succeeding taxable quarters or applied against any of the output VAT liability of petitioner.

[14] Docket, p. 263.
[15] Docket, p. 304.
[16] Docket, pp. 272-302.

7. Whether or not petitioner is entitled to a refund or issuance of TCC for its unapplied and unutilized input VAT for the four quarter of 2004 in the total amount of P2,306,862.22."

The foregoing issues boil down to the sole issue of whether or not petitioner is entitled to a refund or issuance of tax credit certificate in the amount of P2,306,862.22, representing unutilized input VAT covering the four quarters of taxable year 2004.

In order for petitioner to be entitled to a refund or issuance of tax credit certificate, it has to comply with the requisites provided by Section 112(A) of the NIRC of 1997; which is quoted hereunder for ready reference, to wit:

> "**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 or 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."

Based on the above provisions, in order to be entitled to a refund or tax credit of input taxes attributable to zero-rated or effectively zero-rated sales, petitioner must satisfy the following requirements:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid; gr

3. that such input taxes are attributable to zero-rated sales or effectively zero-rated sales;
4. that the input taxes were not applied against any output tax liability during and in the succeeding quarters; and
5. that the claim for the refund was filed within the two-year prescriptive period.

The Court will first ascertain petitioner's compliance with the fifth requirement.

In the recent case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (Formerly Southern Energy Quezon, Inc.)*[17], the Supreme Court declared that:

> "The claim for refund or tax credit for the creditable input VAT payment made by MPC embodied in OR No. 0189 was filed beyond the period provided by law for such claim. Sec. 112(A) of the NIRC pertinently reads:
>
> (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 <u>when the sales were made</u>, apply for the issuance of a tax credit certificate or refund of creditable input tax <u>due or paid</u> attributable to such sales,** except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx. (Emphasis ours.)
>
> The above proviso clearly provides in no uncertain terms that unutilized input VAT payments not otherwise used for any internal revenue tax due the taxpayer must be claimed within two years **reckoned from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not**. As the CA aptly puts it, albeit it erroneously applied the aforequoted Sec. 112(A), '[P]rescriptive period commences from the close of the taxable quarter when the sales were made and not from the time the input VAT was paid nor from the time the official receipt was issued.' Thus, when a zero-

[17] G.R. No. 172129, September 12, 2008.

> rated VAT taxpayer pays its input VAT a year after the pertinent transaction, said taxpayer only has a year to file a claim for refund or tax credit of the unutilized creditable input VAT. The reckoning frame would always be the end of the quarter when the pertinent sales or transaction was made, regardless when the input VAT was paid. Be that as it may, and given that the last creditable input VAT due for the period covering the progress billing of September 6, 1996 is the third quarter of 1996 ending on September 30, 1996, any claim for unutilized creditable input VAT refund or tax credit for said quarter prescribed two years after September 30, 1996 or, to be precise, on September 30, 1998. Consequently, MPC's claim for refund or tax credit filed on December 10, 1999 had already prescribed."

According to the afore-quoted provision, the two-year prescriptive period provided in Section 112(A) of the NIRC of 1997, as amended, should be reckoned not from the payment of the tax but from the close of the taxable quarter when the sales were made. Applying the same to the present case, petitioner had until the following dates to file its refund claim:

Period (2004)	**Close of Taxable Quarter**	**Last Day for Filing**	**Input Tax**
1st Quarter	March 31, 2004	March 31, 2006	P 249,660.45
2nd Quarter	June 30, 2004	June 30, 2006	1,106,438.96
3rd Quarter	September 30, 2004	September 30, 2006	221,977.03
4th Quarter	December 31, 2004	December 31, 2006	728,785.78
	TOTAL		**P 2,306,862.22**

Based on the records of the case, petitioner filed its administrative claim on December 21, 2005, while its judicial claim *via* Petition for Review was filed on April 24, 2006.[18] Clearly, petitioner's first quarter claim in the amount of P249,660.45 was filed beyond the two-year prescriptive period; hence, the said amount will be disallowed.

The Court will now proceed to determine petitioner's compliance with the other requisites.

[18] Par. 16, Jointly Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, pp. 108-109.

This Court and the High Tribunal had already declared in several occasions that sale of electricity of a VAT-registered entity to NPC is a zero-rated transaction, pursuant to Section 108(B)(3) of the NIRC of 1997, in relation to Section 13 of Republic Act No. 6395[19], as amended. The pertinent provisions and jurisprudence are quoted as follows:

> "**SECTION 13.** *Non-profit Character of the Corporation, Exemption from All Taxes, Duties, Fees, Imposts and Other Charges by the Government and Government Instrumentalities.* – The Corporation shall be non-profit and shall devote all its returns from its capital investments, as well as excess revenues from its operation, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance of effective implementation of the policy enunciated in Section one of this Act, the Corporation, including its subsidiaries, is hereby declared exempt from the payment of all forms of taxes, duties, fees, imposts as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds in any court or administrative proceedings."

Likewise, the Supreme Court in the case of *Ernesto M. Maceda vs. Catalino Macaraig, Jr., et al.*[20], explained that:

> "The NPC is a non-profit public corporation created for the general good and welfare, wholly owned by the government of the Republic of the Philippines. From the very beginning of its corporate existence, the NPC enjoyed preferential tax treatment, to enable the Corporation to pay the indebtedness and obligation and in furtherance and effective implementation of the policy enunciated in Section one of Republic Act No. 6395...
>
> xxx xxx xxx
>
> It is noted that in the earlier law, R.A. No. 358 the exemption was worded in general terms, as to cover 'all taxes, duties, fees, imposts, charges, etc...'. However, the amendment under Republic Act No. 6395 enumerated the details covered by the exemptions. Subsequently, P.D. No. 380, made even more specific the details of the exemption of

[19] "An Act Revising the Charter of the National Power Corporation".
[20] 197 SCRA 771.

> NPC to cover, among others, both direct and indirect taxes on all petroleum products used in its operation. Presidential Decree No. 938 amended the tax exemption by simplifying the same law in general terms. It succinctly exempts NPC from 'all forms of taxes, duties, fees, imposts, as well as costs and service fees including filing fees, appeal bonds, supersedeas bonds, in any court or administrative proceedings.'
>
> The use of the phrase 'all forms' of taxes demonstrate the intention of the law to give NPC all the tax exemptions it has been enjoying before. The rationale for this exemption is that being non-profit the NPC 'shall devote all its returns from its capital investment as well as excess revenues from its operation, for expansion...
>
> xxx xxx xxx
>
> It is evident from the provisions of P.D. No. 938 that its purpose is to maintain the tax exemption of NPC from all forms of taxes including indirect taxes as provided for under R.A. No. 6395 and P.D. No. 380 if it is to attain its goals."

Moreover, Section 108(B)(3) of the NIRC of 1997, as amended, provides:

> "**SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties.** —
>
> xxx xxx xxx
>
> **(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:
>
> xxx xxx xxx
>
> (3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%) rate."

Records confirm that petitioner is engaged in the business of power generation and subsequently sells the same to NPC under a Build, Operate and Transfer Scheme[21], and has a duly approved Application for VAT Zero-Rate[22]. Therefore, petitioner's sales to NPC are zero-rated sales.

In its Quarterly VAT Returns for taxable year 2004, petitioner declared zero-rated sales in the total amount of P293,191,510.36, as follows:

Exhibit	2004 Period	Zero-Rated Sales
"B"	1st Quarter	P 79,832,138.47
"C"	2nd Quarter	79,487,130.50
"D"	3rd Quarter	53,357,214.39
"G"	4th Quarter	80,515,027.00
	TOTAL	**P 293,191,510.36**

In order to prove its zero-rated sales, petitioner submitted official receipts and invoices,[23] and the Report of the Independent CPA, which had the following *Findings and Observations*:[24]

> "1. The zero-rated sales reported in the 'Schedule of Zero-Rates sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter consisted of sales of electricity to the National Power Corporation (NPC).
>
> 2. The total quarterly zero-rated gross receipts for the calendar year 2004 in the 'Schedule of Zero-Rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter amounting to P293,191,510.36 is equal to the total zero-rated gross receipts declared in the Company's first, second, third and fourth quarter VAT returns, electronically filed via EFPS with filing reference numbers 100400000178932, 100400000178937, 100400000273655 and 100500000514417, respectively. ***(Annex 1)***
>
> 3. The amounts in the 'Schedule of Zero-rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the

[21] Par. 1, Jointly Stipulated Facts, JSFI, Docket, p. 107.
[22] Annex "D", Petition for Review; Par. 4, Jointly Stipulated Facts, JSFI, Docket, p. 107.
[23] Exhibits "V-1" to "V-22".
[24] Page 3, Independent CPA's Final Report; Exhibits "S-3" and "S-4".

3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter with a total of 293,191,510.36 is lower by P614,724.10 when compared to the amounts recorded as collections in the books of the Company. We noted that the difference was caused by the different exchange rates used by the Company in its books and in the 'Schedule of Zero-Rated Sales' for the first two zero rated transactions of the 1st quarter. However, we would like to note that the said differences do not affect the Company's claim for refund/tax credit as these pertain to gross receipts subject to 0% VAT. ***(Annex 2)***

4. These zero-rated sales were supported by original duplicate copies of VAT invoices and VAT ORs issued by the Company stamped 'zero-rated' and with the BIR's authority to print.

5. We noted differences between the gross receipts per 'Schedule of Zero-Rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter and the amounts per VAT ORs. We noted that the differences represent the 2% Expanded Withholding Tax (EWT) withheld by NPC and the cable cost charged by NPC as presented under the 'Reconciliation of Zero-Rated Gross Receipts per Schedule of Zero-Rated Sales/Schedule of Taxable and Zero-Rated Sales and Zero-Rated Gross Receipts per VAT ORs. ***(Annex 3)***

6. We noted differences between the gross receipts per 'Schedule of Zero-Rated Sales' for the 1st quarter, 'Schedule of Zero-Rated Sales' for the 2nd quarter, 'Schedule of Taxable and Zero-Rated Sales' for the 3rd quarter and 'Schedule of Taxable and Zero-Rated Sales' for the 4th quarter and the amounts per VAT Invoices. We noted that the differences represent the uncollected portion of the invoice amounts and recorded as credits to the 'Accounts Receivable Trade-Short Term' account in the General Ledger Journal as presented under the 'Reconciliation of Zero-Rated Gross Receipts per Schedule of Zero-Rated Sales/Schedule of Taxable and Zero-Rated Sales and Zero-Rated Gross Receipts per VAT Invoices'. ***(Annex 4)***"

This Court finds the Independent CPA's Report in order. However, as previously disallowed on the ground of prescription, the zero-rated sales for the first quarter in the amount of P79,832,138.47 shall be excluded. Accordingly, only the zero-rated sales for the second to the fourth quarters of taxable year 2004, in the amount of P213,359,371.89, shall be considered as fully substantiated.

The Independent CPA also made the following findings:[25]

Findings	Reference	Total Amount for 2004
I. Input taxes in purchases of goods supported by VAT invoices and purchases of services supported by VAT ORs	Annex 8	P 971,832.62
II. Input taxes on purchases of goods:		
1. Supporting documents not yet available	Annex 9	72.50
III. Input taxes on purchases of services:		
1. Supporting documents not yet available	Annex 10-1	1,300,259.63
2. Supported by VAT OR issued not in the name of the Company	Annex 10-2	4,163.01
3. Claimed twice	Annex 10-3	490.92
4. Supported by documents other than VAT ORs	Annex 10-4	7,032.86
5. Erroneously computed input taxes--disallowed portion	Annex 10-5	23,010.68
TOTAL		**P 2,306,862.22**

Petitioner submitted additional documents to support *Annex 10-1* of the Independent CPA Report, to wit:

Exhibit	Vendor	OR Date	Input VAT
"DD-3"	Alexander Forbes Phils. Risk Services, Inc.	12/1/2004	P 494,819.86
"DD-4"	Alexander Forbes Phils. Risk Services, Inc.	5/24/2004	674,874.76
	TOTAL		**P 1,169,694.62**

Thus, *Items II and III* of the Independent CPA's findings, except for P1,169,694.62 of *Item III. Number 1 (Annex 10-1)*, will be disallowed for the reasons stated.

In addition, petitioner showed an output VAT in its Quarterly VAT Returns, detailed as follows:

[25] Exhibit "S-8".

Exhibit	Period	Taxable Sales	Output VAT
"A"	1st	P 148,740.90	P 14,874.09
"C"	2nd	-	-
"D"	3rd	132,409.10	13,240.91
"E"	4th	715,454.50	71,545.45
	TOTAL	**P 996,604.50**	**P 99,660.45**

In sum, petitioner's valid creditable input tax attributable to its substantiated zero-rated sales is P1,810,295.07, computed as follows:

Claimed input VAT		P 2,306,862.22
Less:		
Output VAT		(99,660.45)
Disallowances		
Barred by prescription		(249,660.45)
Per ICPA:		
1.) Supporting documents not available:		
Purchase of services	P 1,300,259.63	
Less: Additional documents submitted	(1,169,694.62)	
Disallowances in the first quarter-included above as barred by prescription	(6,892.86)	
Net disallowance	P 123,672.15	
Purchase of goods	72.50	
2.) Claimed twice	490.92	
3.) Erroneously computed input taxes	23,010.68	(147,246.25)
Valid input VAT		P 1,810,295.07

The Court also determined that in the third amended Quarterly VAT Return[26] for the fourth quarter of taxable year 2005, petitioner deducted the amount of P3,778,673.12, of which the valid input VAT of P1,810,295.07 forms part, as "Any VAT Refund/TCC Claimed" from the available input tax of P4,436,975.51 at the end of the third quarter of taxable year 2005. Thus, petitioner could not have possibly utilized the input VAT of P1,810,295.07 in the succeeding quarters.

WHEREFORE, with the foregoing disquisitions, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby

[26] Exhibit "N"

ORDERED to **REFUND** or to **ISSUE TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of P1,810,295.07, representing unutilized excess input VAT attributable to its zero-rated sales to NPC for the four quarters of taxable year 2004.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

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.

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

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice