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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

KEPCO ILIJAN CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 516
(C.T.A. Case No.7473)

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

KEPCO ILIJAN CORPORATION,
Respondent.

C.T.A. EB NO. 518
(C.T.A. Case No. 7473)

Members:

ACOSTA, *PJ*
CASTAÑEDA, JR.
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:
JAN 27 2011 *Apolinario 11:25 p.m.*

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DECISION

Fabon-Victorino, J.:

The instant consolidated Petitions for Review separately filed by Kepco Ilijan Corporation (Kepco) and the Commissioner of

Internal Revenue (CIR)[1] assail the Decision[2] dated January 5, 2009 and the Resolution dated July 21, 2009, both rendered by the Court in Division in CTA Case No. 7473, entitled Kepco Ilijan Corporation vs. Commissioner of Internal Revenue.

The respective decretal portions of the assailed Decision, which partially granted Kepco's claim for refund, and the Resolution which effectively sustained the assailed Decision read as follows:

> **WHEREFORE**, the Petition for Review is hereby **PARTIALLY GRANTED. ACCORDINGLY**, respondent Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** amounting to **THIRTY TWO MILLION TWO HUNDRED SEVENTY SIX THOUSAND EIGHTY AND 88/100 PESOS (P32,276,080.88)** to petitioner Kepco Ilijan Corporation, representing its unutilized input VAT for the second, third, and fourth quarters of calendar year 2004.
>
> **SO ORDERED.**
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> xxx xxx xxx
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> **WHEREFORE**, premises considered, petitioner's *Motion for Partial Reconsideration* and respondent's *Motion for Reconsideration* are hereby **DENIED** for lack of merit.
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> **SO ORDERED.**

[1] En Banc Docket, pp. 8-45; 6-14.
[2] Penned by Associate Justice Juanito C. Castañeda, Jr. and concurred by Associate Justices Erlinda P. Uy and Olga Palanca-Enriquez.

In its Petition for Review filed on August 20, 2009 and docketed as CTA EB No. 516, Kepco prays that the assailed Decision and Resolution be reversed and an order be issued directing the CIR to refund the sum of P10,749,850.41, over and above the amount of P32,276,080.88 already awarded in its favor by the Court in Division.

On the other hand, the CIR, in complete disagreement with the finding of the Court in Division on the ground that it lacks factual and legal bases, prays in its Petition for Review posted on August 28, 2009 and docketed as CTA EB No. 518, that the claim for refund of Kepco in the total amount of Php45,357,998.44 be denied.

Per En Banc Resolution No. 01-2009 dated September 8, 2009, the two petitions were consolidated pursuant to Section 1, Rule 31 of the Revised Rules of Court.

The following antecedents are undisputed:

Kepco is a VAT-registered domestic corporation engaged in the production and sale of electricity solely to the National Power Corporation ("NPC"). Its principal place of business is located at the

18th Floor, Citibank Tower, 8741 Paseo de Roxas, Salcedo Village, Makati City.

On the other hand, CIR is the duly appointed government officer vested with the power to decide, approve, and grant applications for refund and tax credit, with office address at the 5^{th} Floor, Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Quezon City.

On December 22, 2003, Kepco filed with the BIR an Application for VAT Zero-rate for its sales of electricity to its lone client NPC from January 1, 2004 to December 31, 2004, which was subsequently approved.

During the four quarters of calendar year 2004, Kepco, in the course of its operation, made domestic purchases of goods and services out of which accumulated creditable input taxes in the aggregate amount of P45,357,998.44. The said amount represents the costs incurred by Kepco for the production and sale of electricity solely to NPC from January 1, 2004 to December 31, 2004.

In its VAT Returns for the four quarters of calendar year 2004, petitioner declared the following zero-rated sales/receipts:

Exhibit	Year 2004	Zero-rated Sales/Receipts
D	1st quarter	P 1,637,748,690.31
E	2nd quarter	1,820,980,585.76
F	3rd quarter	1,706,051,141.96
G	4th quarter	1,698,793,509.30
	Total	**P 6,863,573,927.33**

On October 28, 2005, Kepco filed with the CIR a claim for refund of accumulated creditable and unutilized input VAT from its importations and domestic purchases of goods and services used in the production and sale of electricity to NPC for calendar year 2004. However, the CIR failed to act on the said administrative claim for refund prompting Kepco to file a Petition for Review with the Court in Division on April 25, 2006.

In his Answer, the CIR interposed the following Special and Affirmative Defenses:

> "7. Assuming but without admitting that Petitioner filed a claim for refund, the same is still subject to investigation by the Bureau of Internal Revenue;
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> 8. Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;
>
> 9. Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not creditable or refundable;

> 10. It is incumbent upon the Petitioner to show that it has complied with the provisions of Sections 112, 204(C) and 229 of the Tax Code, as amended;
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> 11. In an action for tax credit or refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge said burden is fatal to the claim (Emmanuel & Zenaida Aguilar v. Commissioner, CA-G.R. No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 206);
>
> 12. Claims for refund are construed strictly against the claimant the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and as such, they are looked upon with disfavor. (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)."

Trial ensued and thereafter the case was submitted for decision on March 19, 2008, considering the parties' respective Memoranda filed in compliance with the Resolution of December 10, 2009, issued by the Court in Division.[3]

On January 5, 2009, the Court in Division promulgated the impugned Decision partially granting Kepco's Petition for Review and ordering the CIR to refund or issue a tax credit certificate amounting to Php32,276,080.88 in favor of Kepco, representing the

[3] Docket, CTA Case No. 7473, p. 435.

latter's creditable and unutilized input VAT for the second, third, and fourth quarters of the calendar year 2004.

On January 28, 2009, Kepco filed a Motion for Partial Reconsideration, while the CIR, on even date, a Motion for Reconsideration. Both were denied for lack of merit in the assailed Resolution of July 21, 2009. Hence, the instant consolidated Petitions for Review.

On December 10, 2009, Kepco and the CIR were required to submit their respective memoranda within 30 days from notice, thereafter, both petitions shall be deemed submitted for decision.

On January 13, 2010, the consolidated petitions were deemed submitted for decision *sans* the memorandum of the CIR, who failed to file any.

THE ISSUES:

Kepco assigns the following issues for the resolution of the Court *En Banc*:

I. WHETHER THE COURT IN DIVISION IS CORRECT IN RULING THAT KEPCO'S SUBMISSION OF PURCHASE

INVOICES/RECEIPTS WITH THE IMPRINTED TEXT "TIN-V" INSTEAD OF "TIN-VAT" WARRANTS AN OUTRIGHT DENIAL OF ITS CLAIM FOR REFUND OF UNUTILIZED INPUT VAT.

II. WHETHER THE COURT IN DIVISION IS CORRECT IN APPLYING THE MIRANT DOCTRINE RETROACTIVELY TO THE PRESENT CASE.

On the other hand, the CIR submits the following lone issue in its own Petition for Review, to wit:

I. WHETHER THE COURT IN DIVISION ERRED IN RULING THAT THE MERE STAMPING OF THE WORD "ZERO-RATED" INSTEAD OF BEING IMPRINTED IS SUBSTANTIAL COMPLIANCE WITH SECTION 4.108-1 OF REVENUE REGULATIONS NO. 7-95.

Reiterating its position in its Motion for Partial Reconsideration, Kepco asserts that the Court in Division erred when it disallowed its claim for tax credit/refund on the sole ground that its unutilized input tax credits were supported by invoices/official receipts containing the imprinted words "TIN-V" instead of the required "TIN-VAT". Citing *Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue*[4], Kepco argues that the word or the abbreviation "TIN-V" is already considered sufficient compliance with the requirements for a VAT refund. Kepco also invokes some rulings where this Court allegedly held that the words TIN-V may be used in invoices and receipts and where it interchangeably used

[4] G.R. No. 166732, April 27, 2007.

TIN-VAT and TIN-V. Technicalities, according to Kepco should give way to substantive rights

Kepco further posits the new reckoning period for the two-year limits enunciated in the *Mirant Case* should not be applied retroactively, particularly in its case. Allegedly, its right to file a tax refund/credit was already vested when it filed a petition for review in 2006 or prior to the Mirant Doctrine. The retroactive application of the Mirant Doctrine operates to amend a substantive right. Contrary to the pronouncement of the Court *a quo,* the Mirant Doctrine is not a procedural law that may be given retroactive effect.

The CIR, on the other hand, claims Section 4.108-1 of Revenue Regulations No. 7-95 requires the **imprinting** of the word "zero-rated" on sales invoices or official receipts of a VAT-registered person. Section 4.108-1 thereof uses the word "shall" which under the rule on statutory construction indicates the intent to the legislature to make the law **mandatory**. The word "shall" is not just an idle word included in the requirement out of whim. Thus, imprinting of the word "zero-rated on the sales invoices or official receipts is warranted and mere stamping of the same on the cited documents cannot be deemed a substantial compliance as erroneously ruled by the Court in Division.

Ruling of the Court En Banc

An examination of the record of C.T.A. Case No. 7473 creates a nagging doubt on whether the Court in Division, in the first place, had the authority to take cognisance of the Petition for Review filed by Kepco against the CIR on April 25, 2006. Thus, the Court *En Banc* deemed it wise to first analyze and scrutinize the undisputed facts, more specifically the relevant dates, to determine the competence of the Court in Division to hear and determine Kepco's appeal brought before it due to the CIR inaction to the subject claim for refund or issuance of tax credit certificate for unutilized input VAT. Obviously, the resolution on this issue will determine the necessity to address the other issues raised by both Kepco and the CIR in their respective Petitions for Review.

Settled is the rule that a claim for refund or tax credit of input tax attributable to zero-rated sales or effectively zero-rated sales is specifically governed by Section 112 of the National Internal Revenue Code (NIRC) of 1997, as amended. The relevant portion of the provision reads as follows:

> "SEC. 112. **Refunds or Tax Credits of Input Tax**. —
>
> (A) Zero-Rated or Effectively Zero-Rated Sales. — **Any VAT-registered person,**

whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

xxx xxx xxx

(D) Period Within Which Refund or Tax Credit of Input Taxes Shall be Made. — **In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed** in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals." (*Emphasis supplied*)

From the foregoing, it is clear that a VAT-registered person has two **(2) years after the close of the taxable quarter when the pertinent sales were made,** within which to apply with the CIR a claim for refund or tax credit of creditable input tax which remains unutilized. The CIR, on the other hand, has **120 days from the date of submission of complete documents in support of the application for refund or tax credit of input tax** to grant or deny the same, pursuant to Section 112(D). Upon notice of denial or expiration of the allowable period of 120 days without any action on the part of the CIR, the VAT-registered person has **30 days, within which to appeal the adverse decision or the inaction of the CIR to the Court of Tax Appeals**.

As early as *Intel v. CIR*,[5] the Supreme Court already ruled that the two-year prescriptive limit is only for filing of an administrative claim for refund or tax credit for creditable and unutilized input VAT with the CIR and not resort to Court, thus:

> Under Section 106 (A)(2)(a)(1) in relation to 112 (A) of the Tax Code, a taxpayer engaged in zero-rated or effectively zero-rated transactions may apply for a refund or issuance of a tax credit certificate for input taxes paid attributable to such sales upon complying with the following requisites: (1) the taxpayer is

[5] G.R. No. 166732, April 27, 2007.

> engaged in sales which are zero-rated (like export sales) or effectively zero-rated; (2) the taxpayer is VAT-registered; (3) **the claim must be filed within two years after the close of the taxable quarter when such sale were made;** (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; and (5) in case of zero-rated sales under Section 106(A)(2)(a)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with BSP rules and regulations.

And very recently in the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc,*[6] the Final Arbiter squarely addressed the same issue and ruled that the two (2) year limit provided under Section 112 of the Tax Code, as amended, refers only to the filing of the administrative claim for refund or credit with the BIR and does not include judicial recourse. The Supreme Court clarified, thus:

> "There is nothing in Section 112 of the NIRC to support respondent's view. Subsection (A) of the said provision states that "any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two 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." <u>The phrase "within two (2) years xxx apply for the issuance of a tax credit certificate or refund" refers to application for refund/credit filed with the CIR and not to appeals made to the CTA.</u> This is

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[6] G.R. No. 184823, dated October 6, 2010.

> apparent in the first paragraph of Subsection (D) of the same provision, which states that the CIR has "120 days from the submission of complete documents in support of the **application** filed in accordance with **Subsections (A)** and (B)" within which to decide on the claim.
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> In fact, applying the two-year period to judicial claims would render nugatory Section 112(D) of the NIRC, which already provides for a specific period within which a taxpayer should appeal the decision or inaction of the CIR. The second paragraph of Section 112(D) of the NIRC envisions two scenarios: (1) when a decision is issued by the CIR before the lapse of the 120-day period; and (2) when no decision is made after the 120-day period. In both instances, the taxpayer has 30 days within which to file an appeal with the CTA. As we see it then, the 120-day period is crucial in filing an appeal with the CTA. (*Underscoring ours*)

Plainly, an aggrieved VAT-registered person, whose claim for tax refund or credit has been denied or has not been acted upon in the administrative level, may within 30 days from receipt of the adverse decision or after the expiration of the 120-day period, seek judicial relief via a petition for review with this Court seating in Division.

It is undisputed that Kepco filed its **administrative claim** for refund or tax credit of the input VAT incurred for the four quarters of the calendar year 2004 on **October 28, 2005,** hence, well within the two-year prescriptive period provided under Section 112 of the NIRC, as amended. Applying the same provision and jurisprudence, the CIR had 120 days from October 28, 2005 or until February 25, 2006, within which to decide on the claim. Undeniably, the CIR failed to act on Kepco's claim within the allotted period of 120 days. Hence, Kepco had 30 days from the expiration of the 120 days or until **March 27, 2006**, within which to invoke the Court's competence via a petition for review. But for reason only known to it, Kepco allowed the appeal period to lapse only to belatedly file its Petition for Review on April 25, 2006. Verily at that time, the Petition for Review was already time-barred and the Court was already deprived of its authority to entertain it having been filed way beyond the 30-day period provided in Section 112(D) of the Tax Code, as amended. The Court of Tax Appeals is a court of special jurisdiction and as such, it can take cognizance only of such matters as are clearly within its province.

The 30-day period to appeal the decision or inaction of the CIR is also explicitly mandated in Section 11 of Republic Act No. 9282,[7] which amended Republic Act No. 1125 (The Law Creating the Court of Tax Appeals), to wit:

> "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

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[7] 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 of Republic Act No. 1125, as mended, otherwise known as the Law Creating the Court of Tax Appeals, and for other purposes.

> 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.
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> "**Appeal shall be made by filing a petition for review under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure with the CTA within thirty (30) days from the receipt of the decision or ruling or in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon.**" xxx xxx xxx

Note, that an appeal is neither a natural nor constitutional right but a mere statutory privilege. Hence, parties who seek to avail of the privilege must comply with the statutes or rules allowing it.[8] The perfection of an appeal in the manner and within the period set by law is not only mandatory, but jurisdictional as well. And failure to perfect an appeal within the reglementary period deprived the court - otherwise competent - of jurisdiction to hear and determine it.

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[8] Air France Philippines v. Leachon, 472 SCRA 439, 442-443 [2005].

In the 1996 case of Videogram Regulatory Board v. Court of Appeals[9], the Supreme Court, no less, chronicled the inviolability of the period of perfecting an appeal in this fashion:

> x x x There are certain procedural rules that must remain inviolable, like those setting the periods for perfecting an appeal or filing a petition for review, for it is doctrinally entrenched that the right to appeal is a statutory right and one who seeks to avail of that right must comply with the statute or rules. **The rules, particularly the requirements for perfecting an appeal within the reglementary period specified in the law, must be strictly followed as they are considered indispensable interdictions against needless delays and for orderly discharge of judicial business. Furthermore, the perfection of an appeal in the manner and within the period permitted by law is not only mandatory but also jurisdictional** and the failure to perfect the appeal renders the judgment of the court final and executory. Just as a losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to enjoy the finality of the resolution of his/her case. These periods are carefully guarded and lawyers are well-advised to keep track of their applications. After all, a denial of a petition for being time-barred is a decision on the merits.

Indeed, the timeliness of an appeal is a jurisdictional caveat that not even the Supreme Court can trifle with.[10] Precisely this Court, in a number of cases, echoed the ruling in *Aichi Case* that a taxpayer claimant must prove not only his entitlement to a refund, but also his compliance with the procedural due process as non-

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[9] G.R. No. 106564, November 28, 1996.
[10] BA vs. Gerochi, Jr. 230 SCRA 9 [1994].

observance of the prescriptive periods, within which to file the administrative and judicial claims will result in the denial of the relief sought.

Contrary to Kepco's claim, rules on technicalities are tools of procedure which should not to be ignored or discarded. Procedural rules should not to be belittled or dismissed simply because their non-observance may have resulted in prejudice to a party's substantive rights.[11] Significant on the point is the case of Spouses *Baniqued v. Teresita S. Ramos and the Register of Deeds o Manila,*[12] where the Supreme Court unequivocally declared, thus:

> In a catena of cases, the Court has ruled that the right to appeal is neither a natural right nor a part of due process. It is merely a procedural remedy of statutory origin, a remedy that may be exercised only in the manner prescribed by the provisions of law authorizing such exercise. Hence, the legal requirements must be strictly complied with. **It would be incorrect to consider the requirements of the rules on appeal as merely harmless and trivial technicalities that can be discarded. Indeed, deviations from the rules cannot be tolerated.** In these times when court dockets are clogged with numerous litigations, such rules have to be followed by parties with greater fidelity, so as to facilitate the orderly disposition of cases. After a judgment has become final, vested rights reacquired by the winning party. If the proper losing has the right to file an appeal within the prescribed period, then the former has the correlative right to enjoy the finality of the resolution of the case.

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[11] Pedrosa vs. Hill, 257 SCRA 373 [1996].
[12] G.R. No. 158615, March 4, 2005.

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> Thus, we agree with the Court of Appeals that the trial court did not commit any grave abuse of discretion amounting to lack or excess of jurisdiction when it denied the petitioners' motion to elevate the records to the CA.

Finally, basic is the rule that jurisdiction may be raised at any time of the proceedings even on appeal.[13] And even if not raised as a defense, a case could be dismissed *ex mero motu*, if it appears that the appeal was filed out of time.[14] The fact that the Court in Division had no jurisdiction over the petition rendered all the proceedings therein null and void.

In view of the foregoing disquisition, the issues raised by the parties become inconsequential.

WHEREFORE, the Petition for Review filed by Kepco Ilijan Corporation docketed as C.T.A EB No. 516 is hereby **DENIED,** for lack of merit.

On the other hand, the Petition for Review filed by the Commissioner of Internal Revenue docketed as C.T.A. EB No. 518, is **GRANTED**. The assailed Decision dated January 5, 2009 and the Resolution dated July 21, 2009 are **REVERSED** and **SET ASIDE**.

[13] Caro vs. CA, 158 SCRA 270 [1988]; Estoesta vs. CA 179 SCRA 203 [1989].
[14] Ker vs. Co. Ltd. vs. CTA. 4 SCRA 160 [1962].

Accordingly, the claim for refund or issuance of Tax Credit Certificate filed by Kepco Ilijan Corporation is **DENIED,** for lack of jurisdiction.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(On Leave)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice