REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

SARA LEE KIWI HOLDINGS, LLC.,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8741

Members:

Castañeda, Jr., *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

Promulgated:

SEP 04 2015

3:55 p.m.

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D E C I S I O N

COTANGCO-MANALASTAS, *J.:*

This case involves a Petition for Review filed by Sara Lee Kiwi Holdings, LLC (petitioner) to seek the refund of the total amount of Fifty-Seven Million Eight Hundred Twenty-Nine Thousand Six Hundred Pesos and 50/100 (₱57,829,600.50), allegedly representing donor's tax erroneously paid based on capital loss, or at least Fifteen Million One Hundred Sixty-Seven Thousand Six Hundred Sixty-Three Pesos and 21/100 (₱15,167,663.21) allegedly representing overpaid donor's tax, arising from the decrease in capital loss due to the upward adjustment in the selling price of the shares of stock sold by petitioner.[1]

STATEMENT OF FACTS

Petitioner Sara Lee Kiwi Holdings, LLC is a non-resident foreign corporation, organized and existing under, and by virtue of the laws of the State of Delaware, U.S.A., with office address at 400 South Jefferson Street, Chicago, Illinois,

[1] Summary of the Case, Pre-Trial Order, docket, p. 335.

60607, United States (formerly at 3500 Lacey Road, Downer's Grove, Illinois, 60615, United States of America).[2]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credits of erroneously paid taxes, as provided by law. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On April 4, 2011, petitioner sold its entire holdings and interest, consisting of One Million Four Hundred Sixty Thousand Seven Hundred Thirty-Six (1,460,736) common shares and subscription rights in Sara Lee Household Care (Philippines), Inc., ("SLHCPI") to S.C. Johnson & Son, Inc. ("SC Johnson") for the price of Three Million Eight Hundred Seven Thousand Euros (€3,807,000) [3] or Two Hundred Thirty-Five Million Two Hundred Ninety-One Thousand Two Hundred Fifty-Four Pesos and 30/100 (₱235,291,254.30).[4]

On May 4, 2011, petitioner filed a Capital Gains Tax Return[5] on the said sale, showing a net capital loss of One Hundred Ninety-Two Million Seven Hundred Sixty-Five Thousand Three Hundred Thirty- Four Pesos and 75/100 (₱192,765,334.75), computed as follows:

Taxable Base – For Cash Sale	₱ 235,291,254.30
Less: Cost and Other Allowable Expenses[6]	₱ 428,056,589.05
Net Capital Gain/(Loss)	(₱192,765,334.75)

On December 5, 2011, petitioner filed a Donor's Tax Return[7] with the BIR and paid the Donor's Tax[8] due in the

[2] Par. 1, Admitted Facts by Petitioner and Respondent, Joint Stipulation of Facts and Issues (JSFI), docket, p. 331.
[3] Exhibit "P-8", Deed of Absolute Sale of Shares of Stock and Assignment of Subscription of Rights, docket, pp. 414 to 417.
[4] Using the conversion rate of ₱61.8049 per 1 Euro at the close of business on April 4, 2011.
[5] Exhibit "P-9", docket, p. 419.
[6] Book Value of the shares based on the unaudited financial position of Sara Lee Household Care (Philippines), Inc. as of the April 4, 2011; Exhibit "P-9", docket, p. 426.
[7] Exhibit "P-10", docket, p. 451.
[8] Exhibit "P-11", docket, p. 452.

amount of Fifty-Seven Million Eight Hundred Twenty-Nine Thousand Six Hundred Pesos and 50/100 (₱57,829,600.50).

On June 11, 2012, petitioner and SC Johnson executed an Amendment Agreement (to the Deed of Absolute Sale of shares of Stock and Assignment of Subscription Rights dated April 4, 2011)[9], whereby both parties agreed to an upward adjustment in the purchase price, in the amount of Nine Hundred Thirty-Five Thousand Three Hundred Ninety-Nine Euros (€935,399) or Fifty Million Five Hundred Fifty-Eight Thousand Eight Hundred Seventy-Seven Pesos and 19/100 (₱50,558,877.19),[10] as additional purchase price. This increased the purchase price to Two Hundred Eighty-Five Million, Eight Hundred Fifty Thousand One Hundred Thirty-One Pesos and 49/100 (₱285,850,131.49).

On June 19, 2012, because of the increase in the purchase price and a consequent decrease of capital loss, petitioner amended its Donor's Tax Return[11], showing an overpayment of Fifteen Million One Hundred Sixty-Seven Thousand Six Hundred Sixty-Three Pesos and 23/100 (₱15,167,663.23).

Thereafter, on July 20, 2012, petitioner filed a claim for refund of the purported overpaid donor's tax amounting to ₱15,167,663.21,[12] citing Section 204(C)[13] of the National Internal Revenue Code (NIRC) of 1997, as amended.

On November 26, 2013, petitioner amended its application for tax refund, requesting the refund of the entire donor's tax paid on December 5, 2011 in the amount of

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[9] Exhibit "P-12", docket, pp. 453 to 456.
[10] Using the conversion rate of ₱54.0506 per 1 Euro at the close of business on June 11, 2012.
[11] Exhibit "P-13", docket, p. 458.
[12] Exhibits "P-14" and "P-15", docket, pp. 466 to 470.
[13] SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
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(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 stamps 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. xxx

₱57,829,600.50, allegedly representing capital loss arising from the sale of shares of stock of SLHCPI to SC Johnson.[14]

In order to meet the two-year prescriptive period for filing a claim for refund or issuance of tax credit certificate, petitioner filed the present Petition for Review before this Court on December 4, 2013.

Among petitioner's arguments is that the sale did not result in a capital loss because the book value of the shares sold is lower than the selling price thereof as per SLHCPI's Audited Financial Statements as of June 30, 2011.[15] It further claims that the sale is a *bona fide* transaction and at arm's length between independent and distinct entities, who are not related parties, and that the resulting capital loss was merely a consequence of the negotiation between them.

Petitioner adds that it has no reason to understate the selling price because had the sale resulted in a capital gain, such gain is not subject to capital gains tax under Article 14 of the Tax Treaty between the Republic of the Philippines and the United States of America.[16] Petitioner likewise posits that even assuming that capital loss is subject to donor's tax, it is still entitled to the refund of the excess donor's tax erroneously paid to respondent in the amount of ₱15,167,663.21, under the doctrine of *solutio indebiti*, because of the upward adjustment in the selling price of the shares of stock agreed upon by the parties.[17] It further claims that the quantum of proof required in its claim for refund is preponderance of evidence and that it has clearly shown its entitlement to a refund.[18]

In her Answer[19] filed on January 30, 2014, respondent interposed the following Special and Affirmative Defenses:

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[14] Exhibits "P-16" and "P-17", docket, pp. 471 to 474.
[15] Memorandum, docket, p. 552.
[16] Petition for Review, docket, p. 10.
[17] Petition for Review, docket, p. 11.
[18] Memorandum, docket, p. 563.
[19] Docket, pp. 109 to 112.

"SPECIAL AND AFFIRMATIVE DEFENSES

6. Respondent reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses;

7. Petitioner's claim for the issuance of tax refund/tax credit certificate is subject to administrative investigation/examination by respondent's Bureau;

8. Taxes paid and collected by the BIR are presumed to have been paid in accordance with law, rules and regulations and the burden to prove otherwise is incumbent upon the petitioner;

9. Section 100 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides that:

> *'**SEC. 100. Transfer for Less than Adequate and Full Consideration.** - Where property, other than real property referred to in Section 24(D), is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.'*

10. Section 100 does not require donative intent since its purpose is to close any avenue for tax avoidance by encompassing all transactions where there is a disparity in the consideration. It is indicative or a strong proof however, that a gratuity is intended, thus, ordinarily transfer for insufficient consideration is deemed gift;

11. Additionally, Revenue Regulations No. 6-2008 provides that:

> ***'SEC. 7. Sale, Barter or Exchange of Shares of Stock Not Traded Through a Local Stock Exchange Pursuant to SECs. 24(C), 25(A)(3), 25(B), 27(D)(2), 28(A)(7)(c), 28(B)(5)(c) of the Tax Code, as amended. –***

xxx xxx xxx

> *(c.1)* ***Determination of Selling Price.*** *– In determining the selling price, the following rules shall apply:*
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> xxx xxx xxx
>
> *(c.1.4) In case the fair market value of the shares of the stock sold, bartered, or exchanged is greater than the amount of money and/or fair market value of the property received, the excess of the fair market value of the shares of stock sold, bartered or exchanged over the amount of money and the fair market value of the property, if any, received as consideration shall be deemed a gift subject to the donor's tax under Sec. 100 of the Tax Code, as amended.'*

12. Revenue Memorandum Circular (RMC) No. 25-2011 dated March 2, 2011 applies squarely to this case. The above-cited provisions of law do not admit of any exceptions, thus, in the absence of doubt or ambiguity, their application is in order;

13. In an action for tax credit/refund, the burden of proof rests upon the taxpayer to establish by sufficient and competent evidence its entitlement to a claim for refund."

On February 7, 2014, petitioner filed its Reply[20] to respondent's Answer.

Petitioner filed its Pre-Trial Brief (For the Petitioner)[21] on March 7, 2014; while respondent filed her Respondent's Pre-Trial Brief[22] on March 10, 2014. Thereafter, on March 28, 2014, the parties submitted their Joint Stipulation of Facts and Issues[23], which the Court adopted in its Pre-Trial Order[24] promulgated on April 8, 2014.

In support of its claim for refund, petitioner presented the following witnesses: Atty. Antonio Cardiño[25] — former Corporate Secretary of petitioner; Ms. Dolores G. Gallo[26] —

[20] Docket, pp. 114 to 115.
[21] Docket, pp. 307 to 315.
[22] Docket, pp. 316 to 318.
[23] Docket, pp. 331 to 333.
[24] Docket, pp. 335 to 339.
[25] Minutes of the Hearing, docket, p. 340.
[26] Minutes of the Hearing, docket, p. 341.

Accountant of A.M. Sison, Jr. & Partners; Mr. Benito S. Villocillo[27] — Liaison Officer of A.M. Sison, Jr. & Partners; and Mr. Reydante E. Roque[28] — Liaison Officer of A.M. Sison, Jr. & Partners.

Petitioner likewise formally offered its documentary evidence on June 25, 2014, consisting of Exhibits "P-1" to "P-22-a", inclusive of submarkings.[29] Respondent failed to file her comment to petitioner's Formal Offer of Evidence.[30]

On August 4, 2014, the Court issued a Resolution[31], admitting as petitioner's evidence, Exhibits "P-1" to "P-5" and "P-7" to "P-22-1". However, the Court denied the admission of Exhibit "P-6" for failure of petitioner to submit the original for comparison.

On the other hand, respondent's counsel manifested that respondent would no longer present evidence and will instead submit the instant case for decision.[32]

Pursuant to this Court's order, petitioner filed its Memorandum[33] on September 5, 2014; while respondent filed her Memorandum through registered mail on October 7, 2014 and received by the Court on October 16, 2014.

Consequently, the case was submitted for decision via Resolution[34] promulgated on October 10, 2014.

STATEMENT OF ISSUES

The issues submitted by the parties for resolution can be summarized as follows:

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[27] Minutes of the Hearing, docket, p. 342.
[28] Minutes of the Hearing, docket, p. 344.
[29] Formal Offer of Evidence (For the Petitioner), docket, pp. 348 to 355.
[30] Records Verification, docket, p. 545.
[31] Docket, pp. 547 to 548.
[32] Minutes of the Hearing, docket, p. 344.
[33] Docket, pp. 549 to 566.
[34] Docket, p. 574.

1. Whether or not respondent should refund to petitioner the amount of ₱57,829,600.50, allegedly representing donor's tax erroneously paid on capital loss;

2. In case capital loss is subject to donor's tax, whether or not respondent should refund to petitioner the amount of ₱15,167,663.21, allegedly representing overpaid donor's tax arising from the decrease in capital loss due to upward adjustment in the selling price of the shares of stock agreed upon by the parties; and

3. Whether or not this Court has jurisdiction over petitioner's claim for refund.

DISCUSSION/RULING

The issues basically boil down to whether or not petitioner is entitled to a refund in the amount of ₱57,829,600.50, allegedly representing donor's tax erroneously paid on capital loss.

It is a generally accepted principle in taxation that in a claim for tax refund or tax credit certificate, the claimant has the burden of proof to establish the factual basis of such refund claim.[35] Tax refunds are in the nature of tax exemptions, and thus they are to be construed *strictissimi juris* against the person or entity claiming the refund.[36]

In order for petitioner to be entitled to a refund of erroneously paid taxes, it must comply with the requisites provided by law. Section 229 of the NIRC of 1997, as amended, provides:

> "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

[35] *Citibank, N.A. vs. Court of Appeals and Commissioner of Internal Revenue,* G.R. No. 107434, October 10, 1997.
[36] *Commissioner of Internal Revenue vs. S.C. Johnson & Son, Inc., et al.,* G.R. No. 127105, June 25, 1999.

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, penalty, or sum has been paid under protest or duress.

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 claim therefor, 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."

Based on the afore-quoted provision, in order to be entitled to a refund, petitioner must be able to prove the following:

1. That the tax has been erroneously or illegally collected, or the penalty has been collected without authority, and/or any sum has been excessively or in any manner wrongfully collected; and

2. That the claim for refund or credit must have been filed within two (2) years from the date of payment of the tax or penalty, regardless of any supervening cause that may arise after payment.

Anent the first requisite, petitioner argues that the tax has been erroneously collected because the sale of the SLHCPI shares is not subject to donor's tax. To determine whether or not the sale is subject to donor's tax, it is necessary to examine the relevant provision of the NIRC of 1997, as amended, on transfers for less than adequate and full consideration.

Section 100 of the NIRC of 1997, as amended, provides:

"SEC. 100. *Transfer for Less Than Adequate and Full Consideration.* – Where property, other than real property

> referred to in Section 24(D), is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

In addition, Revenue Regulations (RR) No. 6-2008[37] provides for the determination of the selling price and the rules which shall apply to every sale, barter or exchange of shares of stock not traded through a local stock exchange. The pertinent provisions of RR No. 6-2008 are quoted hereunder for easy reference:

> "SECTION 7. Sale, Barter or Exchange of Shares of Stock Not Traded Through a Local Stock Exchange Pursuant to Secs. 24 (C), 25 (A) (3), 25 (B), 27 (D) (2), 28 (A) (7) (c), 28 (b) (5) (c) of the Tax Code, as amended.
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> xxx xxx xxx
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> (c.1) *Determination of Selling Price.* – In determining the selling price, the following rules shall apply:
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> xxx xxx xxx
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> (c.1.4) In case the fair market value of the shares of the stock sold, bartered, or exchanged is greater than the amount of money and/or fair market value of the property received, **the excess of the fair market value of the shares of stock sold, bartered or exchanged over the amount of money and the fair market value of the property, if any, received as consideration shall be deemed a gift subject to the donor's tax** under Sec. 100 of the Tax Code, as amended.
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> (c.2) *Definition of 'fair market value' of the Shares of Stock.* – For purposes of this Section, 'fair market value' of the shares of stock shall be:
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> xxx xxx xxx

[37] Consolidated Regulations Prescribing the Rules on the Taxation of Sale, Barter, Exchange or Other Disposition of Shares of Stock Held as Capital Assets.

> (c.2.2) In the case of shares of stock not listed and traded in the local stock exchanges, **the book value of the shares of stock as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale shall be the fair market value.**" *(Emphasis supplied)*

Thus, as correctly argued by petitioner, the fair market value of the SLHCPI shares sold should be the book value based on the Audited Financial Statements, as of the date nearest to the sale. The fair market value should be Twenty-One Million Eight Hundred Thirty-Two Thousand Two Hundred Four Pesos (₱21,832,204.00), which is based on the Audited Financial Statements of SLHCPI, as certified by the auditing firm SyCip Gorres Velayo & Co.,[38] and not Four Hundred Twenty-Eight Million Fifty-Six Thousand Five Hundred Eighty-Nine Pesos and 05/100 (₱428,056,589.05), which was previously based on SLHCPI's unaudited Statement of Financial Position.[39]

Pursuant to RR No. 6-2008, the gain incurred on the sale was ₱208,410,849.38, computed as follows:

Total stockholder's equity per FS for FY ended June 30, 2011	₱ 21,832,204.00
Divided by total shares issued and outstanding as Of June 30, 2011[40]	1,186,848
Equals Book Value per share	₱ 18.40
Multiplied by the total number of shares sold per Deed of Absolute Sale	1,460,736
Equals Book Value = Fair Market Value	₱ 26,870,404.92
Less selling price per Deed of Absolute Sale – 4/4/2011 (€3,807,000 x 61.8049[41])	235,291,254.30
Capital Gain/(Loss)	**₱208,420,849.38**

It is noteworthy that the basis of the fair market value of the shares of stock is not exactly the shareholders' equity of SLHCPI but the book value based on the shares issued and

[38] Exhibit "P-18", Sara Lee Household Care (Philippines) Inc. Financial Statements as of June 30, 2011 and Independent Auditor's Report, docket, p. 475

[39] Book Value of the shares based on the unaudited financial position of Sara Lee Household Care (Philippines), Inc. as of the April 4, 2011; Exhibit "P-9", docket, p. 426

[40] Note 8: Equity, Audited Financial Statements for the Fiscal Year ended June 30, 2011, Exhibit "P-18", docket, p. 500

[41] Conversion rate at the close of business on April 4, 2011.

outstanding as of June 30, 2011. Per the Audited Financial Statements of SLHCPI, the total authorized shares of 1,460,736 are reduced by the subscription receivable of 273,888 shares to arrive at the shares issued and outstanding (1,186,848).

Petitioner is therefore correct in claiming that Section 100 of the NIRC of 1997, as amended, is not applicable since the fair market value of the shares of stock did not exceed the value of the consideration. In fact, the value of the consideration exceeded the fair market value of the shares by ₱208,420,849.38. Thus, the sale of SLHCPI shares is not subject to donor's tax, and consequently, petitioner's payment of donor's tax in the amount of ₱57,829,600.50 was erroneous.

As regards the second requisite or the two-year prescriptive period for filing the claim of refund, verification of pertinent supporting documents reveals that petitioner filed and paid donor's tax in the amount of ₱57,829,600.50 on December 5, 2011, as evidenced by BIR Form No. 1800[42] and Development Bank of the Philippines (DBP) BIR Tax Payment Slip[43].

Thereafter, petitioner filed its administrative claim via BIR Form No. 1914 and a written letter to respondent on July 20, 2012[44], which were both subsequently amended on November 26, 2013[45]. On the other hand, the judicial claim was filed via the present Petition for Review on December 4, 2013[46]. Therefore, the claim for refund was timely filed, in the administrative and judicial levels, within two (2) years from the date of payment of the tax, satisfying the second requisite of filing the claim for refund within two years as provided under Section 229 of the NIRC of 1997, as amended.

Moreover, as correctly argued by petitioner, the quantum of proof required in a claim for refund is preponderance of evidence. In the case of *Commissioner of Internal Revenue vs.*

[42] Exhibit "P-10", docket, p. 451.
[43] Exhibit "P-11", docket, p. 452.
[44] Exhibits "P-14" and "P-15", docket, pp. 466 to 470.
[45] Exhibits "P-16" and "P-17", docket, pp. 471 to 474.
[46] Petition for Review, docket, p. 6.

Fortune Tobacco Corporation[47], the Supreme Court held that "a claim for tax refund necessitates only preponderance of evidence for its approbation like in any other ordinary civil case."

The Highest Tribunal explained the concept of preponderance of evidence in the case of *Encinas and Balboa vs. National Bookstore, Inc.*[48], to wit:

> "xxx 'Preponderance of evidence' is the weight, credit, and value of the aggregate evidence on either side and is usually considered to be synonymous with the term 'greater weight of the evidence' or 'greater weight of the credible evidence'. Preponderance of evidence is a phrase which, in the last analysis, means probability of the truth. It is evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto."

It must be noted that greater weight of evidence rests on the side of petitioner, especially considering that respondent failed to submit her evidence.

In recapitulation, petitioner was able to substantiate and establish its entitlement to a refund of erroneously paid donor's tax from its sale of shares of stock to S.C. Johnson & Son, Inc. in the amount of ₱57,829,600.50.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** in favor of petitioner the amount of **Fifty-Seven Million Eight Hundred Twenty-Nine Thousand Six Hundred Pesos and 50/100 (₱57,829,600.50)** representing erroneously paid donor's tax.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[47] G.R. Nos. 167274-75, July 21, 2008.
[48] G.R. No. 162704, November 19, 2004.

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
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.
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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice