REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE ASSOCIATED SMELTING AND REFINING CORPORATION,
Petitioner,

- versus -

THE HONORABLE COMMISSIONER OF OF INTERNAL REVENUE,
Respondent.

C. T. A. EB Case No. <u>351</u>
(C. T. A. Case No. 7565)

Present:
Acosta, P.J.,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez, JJ.

Promulgated:
NOV 1 2 2008 GnApolinario 1:15 p.m.

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<u>D E C I S I O N</u>

CASANOVA, J.:

This is a Petition for Review filed by Philippine Associated Smelting and Refining Corporation (PASAR), pursuant to paragraph 2, Section 18 of R. A. No. 1125, as amended, seeking the review and nullification of the Resolutions (the

Assailed Resolutions) of the CTA Second Division dated September 19, 2007[1] and December 3, 2007[2]. The Assailed Resolutions dismissed, with finality, petitioner's claim for refund/tax credit of excise taxes it had paid to Petron for the period January to October 2005, amounting to P11,687,467.62 for the purchase of petroleum products. Petron imports these petroleum products and pays the corresponding customs duties to the Bureau of Customs and the excise taxes to the Bureau of Internal Revenue and, in turn, bills petitioner the duties and excise taxes it paid on the petroleum products.

The Assailed Resolutions resolved that petitioner is not the proper party to claim for a tax refund/credit.

The facts of the case, as culled from the records, are as follows:

Petitioner is a domestic corporation, duly organized and existing under Philippine laws with principal offices at the 37th Floor, Philamlife Tower, 8767 Paseo de Roxas, Makati City.

Respondent is the Commissioner of the Bureau of Internal Revenue (BIR), duly appointed to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or tax credit as provided by law, with office at the 5th Floor, Room 511, BIR National Office Building, Agham Road, East Triangle, Diliman, Quezon City.

Petitioner is duly registered as a Zone Export Enterprise with the Export Processing Zone Authority ("EPZA") pursuant to the provisions of P. D. No. 66, as

[1] CTA En Banc Rollo, pp. 42 to 45
[2] CTA En Banc Rollo, pp. 46 & 47

amended and E. O. No. 567.[3] It is allegedly engaged in the business of exporting processing, smelting and refining metals. Its plant is located at the Leyte Industrial Development Estate ("LIDE"), Isabel, Leyte, a Special Export Processing Zone established pursuant to Presidential Decree (P.D.) No. 66, as amended, and Executive Order (E.O.) No. 567, dated November 13, 1979.[4]

In its operations, petitioner uses petroleum products such as industrial diesel oil ("IDO"), automotive diesel oil (ADO"), bunker fuel oil ("BFO") or industrial fuel oil ("IFO") and lubricants. These are purchased from local distributors like Petron Corporation ("Petron"), which imports the same and pays the corresponding customs duties to the Bureau of Customs ("BOC") and the excise taxes to the Bureau of Internal Revenue ("BIR"). Petron, in turn, bills PASAR the duties and excise taxes it paid on the petroleum products.[5]

On November 23, 2006, petitioner, invoking the provisions of Section 17 (1) of P.D. No. 66 and Article 77 of E.O. No. 226, filed an application with respondent, thru Assistant Commissioner Nestor Valeroso of the Large Taxpayers Service Division of the main office of the BIR, for tax credit and/or refund arising from excise tax payments in connection with its purchase of petroleum products from Petron for the period January to October 2005 in the total amount of P11,687,467.62[6].

On December 28, 2006, petitioner refiled its claim for tax credit and/or refund with the Office of the Regional Director of Revenue Region No. 14, Palo, Leyte due to the fact that the claim for refund was forwarded to the BIR

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[3] Petition for Review dated January 7, 2008, CTA En Banc Rollo, p. 14
[4] Ibid
[5] Supra, note 3
[6] Ibid

Regional Office in Tacloban, Leyte because petitioner was not categorized as a Large Taxpayer per information given by the staff of Assistant Commissioner Valeroso[7].

The specific amounts of petitioner's application for tax credit and/or refund of excise taxes billed by Petron for petitioner's purchases of petroleum products for the period January to December 2005, are as follows:

For the Period January 2005 to October 2005[8]

	ADO	IDO	IFO
January	P 149,960.00	P 508,494.80	P 586,480.50
February	120,620.00	465,576.90	501,628.50
March	130,400.00	593,690.01	539,125.50
April	104,320.00	464,233.78	527,462.71
May	130,400.00	359,846.95	386,992.80
June	156,480.00	673,706,71	575,115.00
July	114,100.00	549,968.52	585,039.60
August	146,700.00	419,337.06	566,356.50
September	130,400.00	445,821.30	565,431.00
October	117,360.00	528,238.99	544,180.50
Total	**P1,300,740.00**	**P5,008,915.02**	**P5,377,812.60**

Grand Total of Credits and/or Refunds: Php11,687,467.62

In a letter dated January 3, 2007, received by petitioner on January 4, 2007, respondent, thru Regional Director Estrella V. Martinez of Revenue Region No. 14, Palo, Leyte, denied petitioner's application for tax credit and/or refund of excise tax payments[9].

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[7] Ibid, p. 16
[8] Petition for Review dated January 8, 2007, CTA Second Division Rollo, p. 51
[9] Ibid, p. 52

On January 9, 2007, petitioner filed, with the Honorable Court of Tax Appeals, a Petition for Review pursuant to Section 7, Paragraph 1 of Republic Act No. 1125 and Section 229 of the NIRC, seeking "to declare petitioner entitled to the credit and/or refund of excise taxes paid on petroleum products purchased from Petron and to order respondent Commissioner to grant such credit and/or refund[10].

On January 29, 2007, respondent filed a Motion for Extension of Time to File Answer[11] which Motion was granted per Order[12] of the Court dated February 7, 2007 thus giving the respondent an extension of fifteen (15) days from January 29, 2007 or until February 13, 2007 within which to file his Answer.

On February 06, 2007, respondent filed his Answer[13] to petitioner's Petition for Review and alleged, among others, the following:

> *"x x x x x x x x x*
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> *7. Section 17 (1) of P.D. No. 66 and BIR Ruling No. 126-86 does not state clearly that petroleum products sold and delivered to EPZA registered enterprises are exempt from taxes. It is a settled rule in taxation that tax exemptions cannot be created by implication because exemptions from taxation are highly disfavored in law and one who claims exemption from tax must be able to justify his claim by the clearest grant of organic or statute law.*
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> *8. Section 18 (i) of P.D. No. 66, as amended by P.D. No. 1449, states that the tax credit to be given to a registered zone enterprise shall cover the sales, compensating and specific taxes and duties on supplies,*

[10] Supra, note 8, p. 48-58
[11] CTA Second Division Rollo, pp. 36-38
[12] Ibid, p. 47
[13] Ibid, pp. 40-46

raw materials and semi-manufactured products used in the manufacturing or processing or production of its export products and forming part thereof. Certainly, the specific taxes herein sought to be refunded/credited by the petitioner do not form part of the export products manufactured by it and therefore, not refundable.

9. Assuming arguendo, that petitioner qualifies for exemption under Section 17, P.D. No. 66, yet it does not have the right to claim for tax refund of the alleged erroneous payment of excise taxes on its purchase of petroleum products. Being qualified for the exemption is different from the right to claim therefore.

10. The Supreme Court, in Cebu Portland Cement Co[.] vs. Collector of Internal Revenue (25 SCRA 789), declared that in indirect taxes, like, an excise tax, the proper party who can question or seek a refund of the tax is the person on whom the tax is imposed by law and who paid the tax even when he shifts the burden thereof to another. This is bearing in mind that indirect tax is paid by the manufacturer or dealer of the product which was passed on to the purchaser as part of the purchase price.

11. Clearly, that the right to claim for refund of taxes erroneously paid lies with the person statutorily liable to pay the tax being claimed. In Section 204(c) of the NIRC of 1997, the person contemplated, as taxpayer is the manufacturer or seller of petroleum products as referred to in Section 130(2) of the same code. Upon removal of the petroleum products from the place of production, the manufacturer or producer pays the corresponding taxes thereon who may later on pass or shift the burden to its purchasers.

12. The liability for excise tax on petroleum products that are being removed from its refinery is imposed on the manufacturer/producer (Section 130 of the NIRC of 1997). Considering that excise tax on petroleum products are being levied at the point of removal from refinery, the seller of these petroleum products will necessarily pass on the tax burden to its buyers. Section 135 of the NIRC of 1997, however, provides for an exemption of certain entities from the payment of excise *tax on its purchase of petroleum products. In the case of buyers who are exempt from the payment of the excise tax under this section, they should invoke their exemption from the excise tax to the seller before proceeding to buy, in order to give the latter the option of whether or not to pass on the tax burden. Where the tax burden is not passed on to the buyer, the seller may claim for the refund of the excise taxes, which were paid upon removal of the petroleum products from the refinery.*

13. While it is true that in the case of excise tax imposed on petroleum products, the seller thereof may shift the tax burden to the buyer, the latter is the proper party to claim for the refund in case of exemption from excise tax. Since the excise tax was imposed upon Petron Corporation as the manufacturer of petroleum products, pursuant to Section 130(A)(2) of the NIRC of 1997, and that the corresponding excise taxes were indeed, paid by it, hence, any claim for refund of the subject excise taxes should be filed by Petron Corporation as the taxpayer contemplated under the law. Petitioner cannot be considered as the taxpayer because it merely shouldered the burden of the excise tax and not the excise tax itself.

14. Therefore, the right to claim for the refund of excise taxes paid on petroleum products lies with Petron Corporation who paid and remitted the excise tax to the BIR. Petitioner, on the other hand, may only claim from Petron Corporation the reimbursement of the tax burden shifted to the former by the latter. The excise tax partaking the nature of an indirect tax is clearly the liability of the manufacturer or seller who has the option whether or not to shift the burden of the tax to the purchaser. Where the burden of the tax is shifted to the seller, the amount passed on to it is no longer a tax but becomes an added cost on the goods purchased which constitutes a part of the purchase price. The incidence of taxation or the person statutorily liable to pay the tax falls on Petron Corporation though the impact of taxation or the burden of taxation falls on another person, which in this case is petitioner.

15. Furthermore, that at the time the products in question were sold and delivered to the petitioner by

> *Petron, the same were already tax paid and the use of these not in any way show much less provide that the alleged specific tax erroneously billed to petitioner by Petron Corporation in the total amount of P11,687,467.62 for the period January 2005 to October 2005 is refundable to the former on its purchases of petroleum products from the latter.*
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> *16. In an action for tax refund/credit, the burden of proof is upon the taxpayer to show that the tax paid was erroneously or illegally collected and failure to substantiate the same is fatal to the action.*
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> *17. Taxes paid and collected by respondent are presumed to have been made in accordance with law, and the burden of proof to prove otherwise is upon the petitioner.*
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> *18. Petitioner must show that it has complied with the provisions of Section 204(C) and 229 of the NIRC of 1997."*

On February 23, 2007, petitioner filed its Reply to the Answer of Respondent.[14]

The case was set for pre-trial conference on March 22, 2007 per Notice of Pre-Trial Conference[15] dated March 1, 2007.

On March 19, 2007, respondent filed an Omnibus Motion[16]: A) For Extension of Time to File Pre-Trial Brief; B) to Defer Pre-Trial Conference which Omnibus Motion was granted by the Court per Resolution[17] dated April 4, 2007 of CTA Second Division thereby giving respondent a non-extendible period of fifteen (15) days from notice and resetting the pre-trial on May 17, 2007.

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[14] Ibid, pp. 48-54
[15] Ibid, p. 65
[16] Ibid, pp. 74-76
[17] Ibid, p. 80

On May 8, 2007, respondent filed his Pre-Trial Brief.[18] At the pre-trial held on June 14, 2007 and, upon motion orally made, the Honorable Court granted respondent twenty (20) days from June 14, 2007, to file a written "Motion to Preliminary Resolve First Whether or not petitioner is the proper party to claim the refund". Petitioner was, likewise, given twenty (20) days from June 14, 2007 to submit the parties' Joint Stipulation of Facts and Issues.[19]

On June 20, 2007, respondent filed a Motion to Preliminary Resolve the Issue of Whether or Not Petitioner is the Proper Party That May Ask For a Refund.[20]

On July 10, 2007, petitioner filed its Comment/Opposition[21] (To Respondent's Motion To Preliminary Resolve The Issue of Whether or Not Petitioner Is The Proper Party That May Ask For a Refund).

On July 30, 2007, the parties filed a Joint Stipulation of Facts and Issues,[22] and stipulated the following issues to be resolved by the Honorable Court:

> *"1. Whether or not petroleum products purchased from Petron and delivered to PASAR to be used in its operation in LIDE are exempt from excise taxes under Section 17 of P.D. No. 66 and thus entitled to a refund or issuance of a tax credit certificate.*

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[18] Ibid, pp. 81-84
[19] Ibid, p. 88
[20] Ibid, pp. 93-101
[21] Ibid, pp. 111-117
[22] Ibid, pp. 124-128

> *2. Whether or not PASAR is the proper party to claim for refund or issuance of tax credit certificate for excise taxes paid.*
>
> *3. Whether or not the claim for tax credit/refund is properly substantiated by receipts and invoices.*
>
> *4. Whether or not the claim for tax credit/refund is timely filed."*[23]

On September 19, 2007, the CTA Second Division rendered a Resolution[24] granting respondent's Motion To Preliminary Resolve The Issue of Whether or Not Petitioner Is The Proper Party That May Ask For A Refund and dismissing petitioner's Petition for Review dated January 8, 2007.

On October 9, 2007, petitioner filed a Motion for Reconsideration (of the Resolution dated 19 September 2007)[25] which was subsequently denied for lack of merit by the CTA Second Division in a Resolution[26] rendered on December 3, 2007.

Petitioner, hence, filed the instant Petition for Review to resolve the issue on "Whether or not PASAR is the proper party that may ask for a refund or issuance of a tax credit certificate." In support of the petition, petitioner raised the following ground:

> *"Petitioner is the proper party to claim for the refund and/or issuance of a tax credit for excise taxes, being exempt from taxes and duties, in the aggregate amount of Php11,687,467.62 paid for its purchases of petroleum products. This is pursuant to the provisions of Presidential Decree No. 66 (The "EPZA Law") Republic Act No. 7916 or the Special Economic Zone Act of 1995 (The "PEZA Law"). The Rules and Regulations to Implement Republic Act No. 7916 or the "Special Economic*

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[23] Ibid, p. 127
[24] CTA En Banc Rollo, pp. 42-45
[25] CTA En Banc Rollo, pp. 89-97
[26] CTA En Banc Rollo, pp. 46 & 47

Zone Act of 1995" (The "PEZA IRR") and the Rulings of the Supreme Court in Commissioner of Customs vs. Philippine Phosphate Fertilizer Corporation and Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue."[27]

On February 11, 2008, respondent filed his Comment (On Petitioner's Petition for Review filed on 10 January 2008).[28]

Pursuant to the Resolution[29] of the CTA *En Banc* dated April 9, 2008, ordering both parties to simultaneously submit their respective memorandum, petitioner filed its Memorandum[30] on May 30, 2008, while respondent's counsel filed a Manifestation[31] on May 2, 2008, stating, among others, that she is adopting her Comment on petitioner's Petition for Review filed on February 11, 2008, as her Memorandum.

In a Resolution[32] dated June 5, 2008, the CTA *En Banc* deemed the case submitted for resolution.

The main issue to be resolved in the Petition for Review before Us revolves on whether or not petitioner is the proper party to claim the tax refund/credit for the payment of excise taxes on petroleum products delivered by Petron to petitioner for the period July to December 2005.

Petitioner, on the one hand, argues that, being a duly registered Zone Export Enterprise with the Export Processing Zone Authority ("EPZA"), it is

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[27] CTA En Banc Rollo, p. 23
[28] Ibid, pp. 119-129
[29] Ibid, p. 132
[30] Ibid, pp. 143-167
[31] Ibid, pp. 133-135
[32] Ibid, p. 170

entitled to the privileges under Section 17 (1) of P.D. No. 66, which provides that:

> ***"Section 17. Tax Treatment of Merchandise in the Zone. –***
>
> *(1) Except as otherwise provided in this Decree, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the Zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleared, graded or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise or used whether directly or indirectly in such activity, shall not be subject to customs and internal revenue laws and regulations nor to the local tax ordinances, the provisions of the law to the contrary notwithstanding."*

Respondent, on the other hand, submits that petitioner is not the proper party to claim for the tax refund/credit for the excise tax payments made on its petroleum purchases since the Supreme Court and the Court of Appeals, in a number of analogous cases[33] held that cases of indirect tax like the excise tax, the buyer is not the proper party that may ask for a refund.

After a careful and thorough evaluation of the records of the case as well as the jurisprudence on the matter, this Court finds petitioner's contentions to be meritorious.

Clearly in point in settling the issue on whether or not petitioner is the proper party to claim for tax refund/credit of the excise tax paid on purchases of petroleum products are the cases of *Commissioner of Customs vs. Philippine*

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[33] *Contex Corporation vs. Commissioner of Internal Revenue*, G. R. No. 151135, July 2, 2004 and Silkair *Singapore Pte., Ltd. Vs. Commissioner of Internal Revenue*, CA-GR-SP-82902, September 13, 2004.

Phosphate Fertilizer Corporation[34] and *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue*.[35] Except for the issues involved, the factual circumstances obtaining in the aforecited Supreme Court decisions are similar to the case at bar.

In the case of *Commissioner of Customs vs. Philippine Phosphate Fertilizer Corporation*,[36] the Supreme Court, affirmed the CTA and CA rulings in favor of therein respondent, Philippine Phosphate Fertilizer Corporation, stated thus:

> *"The grant of exemption under Section 17 (1) is clear and unambiguous. There is neither logic nor need to cast a speck of uncertainty on a doubt-free situation to resolve the resulting forced question in favor of the government. The disposition arises not out of a blind solicitude towards the concerns of business, but from the duty to affirm and enforce a crystal clear legislative policy and initiative intent. Indeed, the revenue collectors of the government should be cautious before attempting to gut away concessions the State itself has deemed worthy of award to deserving investors. It is unsound practice and uncouth behavior to initiate over guests to dinner at home, then charge them for the use of the silverware before allowing them to dine." (Underscoring supplied.)*

Likewise, in its more recent decision, the Supreme Court did not dispute or reverse the CTA Decision finding the petitioner (Philippine Phosphate Fertilizer Corporation) exempt from the excise taxes, stating thus:

> *"In this case, there is no dispute that petitioner is entitled to exemption from the payment of excise taxes by virtue of its being an EPZA registered enterprise. As stated by the CTA, the only thing left to be determined is whether or not petitioner is entitled to the amount claimed for refund." (Underscoring supplied)*

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[34] G. R. No. 144440, Sept. 1, 2004
[35] G. R. No. 141973, June 28, 2005
[36] Supra, note 34

Also,

> *"Since it is not disputed that petitioner is entitled to tax exemption, it should be precluded from presenting evidence to substantiate the amount of refund it is claiming. x x x   x x x x x x."* *(Underscoring supplied)*

While it may be argued that the EPZA Law (P. D. No. 66), under which the favorable ruling on the tax exemption from excise taxes of EPZA registered enterprise is anchored, has long been superseded by R.A. No. 7916, still, this tax exemption privilege is retained and still subsists under Section 24 of R.A. 7916, which provides that:

> ***"Section 24. Exemption from Taxes Under the National Internal Revenue Code. –*** *Any provision of existing laws, rules and regulations to the contrary notwithstanding, no taxes, local and national, shall be imposed on business establishments operating within the ECOZONE. In lieu of paying taxes, five percent (5%) of the gross income earned by all businesses and enterprises within the ECOZONE shall be remitted to the national government. This five percent (5%) shall be shared and distributed as follows:*
>
> *x x x   x x x   x x x."*

All told, We are of the opinion that petitioner, being a PEZA registered entity, enjoys the tax exemption privilege under Sec. 24 of R.A. 7916. It is thus exempt from the payment of excise taxes on petroleum products purchased from Petron Corporation for the period January to October 2005. However, even with such tax exemption, can the petitioner seek the refund of the excise taxes it paid to Petron for its petroleum purchases? We rule in the affirmative. As settled by the Supreme Court in the most recent decision of *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue*, the Highest Tribunal in affirming the CTA Decision findings that the petitioner is entitled to the tax exemptions on payment of excise taxes cited the following relevant portions in the CTA Decision, to wit:

> *"x x x. The CTA rationalized thus:*
>
> *. . . [P]etitioner, as an EPZA registered enterprise is exempted from the payment of excise taxes, and if said taxes were passed on by the supplier to EPZA registered enterprise like the petitioner, tax credit shall be granted to the latter. The fact that it was not petitioner who had paid the taxes directly to the Bureau of Internal Revenue does not have an adverse effect on petitioner's action for refund. The law granting the exemption makes no distinction as to the circumstance when the law shall apply. Since the law makes no distinction, neither should we. The exemption is so broad as to cover the present situation. Since an export processing zone is not considered to be covered by customs and internal revenue laws, the taxes paid by the petitioner on the petroleum products should be refunded or credited in its favor. Thus, the only thing left to do is to determine whether or not petitioner is entitled to the amount claimed for refund."*[37]

Moreover, as aptly argued by the petitioner in its Memorandum dated May 22, 2008:

> *"Petron cannot be considered as the real-party-in-interest with respect to the claim for refund of the excise taxes paid. A real party-in-interest is defined as 'the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit' (Rule 3, Section 2, Rules of Court). x x x x x x x x x*
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> *It is PASAR who will now be benefited or injured by the judgment in the suit or entitled to the avails of the suit and is therefore the proper party to file this case."*[38]

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[37] Supra, note 35
[38] Petitioner's Memorandum dated May 22, 2008, pp. 20 & 21

WHEREFORE, premises considered, the Assailed Resolutions dated September 19, 2007 and December 3, 2007, are hereby **SET ASIDE** and the present Petition for Review is hereby remanded to the CTA Second Division for the reception of evidence and for the proper and immediate determination of the amount to be refunded to the petitioner.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice