REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

HEDCOR SIBULAN, INC.,
Petitioner,

CTA *EB* No. 1641
(CTA Case No. 8166)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA *EB* No. 1643
(CTA Case No. 8166)

-versus-

HEDCOR SIBULAN, INC.,
Respondent.

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:
SEP 19 2018 3:27 p.m.

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DECISION

MANAHAN, J.:

Before the Court *En Banc* are Petitions for Review filed by Hedcor Sibulan, Inc. (Hedcor) and the Commissioner of Internal Revenue (CIR) appealing the Decision[1] dated December 21, 2016, and Resolution[2] dated April 12, 2017, of the Court of Tax Appeals Special Second Division (CTA in Division) in CTA Case No. 8166. The assailed Decision and Resolution partially granted Hedcor's claim for refund of unutilized input tax for the 3rd quarter of 2008 attributable to its zero-rated sales.

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[1] *Rollo*, CTA EB Case No. 1641, pp. 33-61.
[2] *Rollo*, pp. 63-74.

The Facts

Hedcor Sibulan, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office at Sta. Cruz, Davao del Sur.[3] It is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer with Taxpayer's Identification No. 005-633-984-000.[4] Hedcor was incorporated on December 2, 2005, the primary purpose of which is to "engage in the business of owning, developing, constructing, operating, repairing, and maintaining of hydroelectric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations."[5]

The Commissioner of Internal Revenue is the duly appointed Commissioner of the 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 or excessively paid taxes, as provided by law.[6]

Hedcor owns a hydroelectric power plant (42 MW Sibulan Hydro Electric Power Plant) which consists of two (2) independent hydroelectric projects (Upstream Plant A and Downstream Plant B), and which has been duly certified by the Department of Energy (DOE) as consistent with the Power Development Plan (PDP) of the government.[7]

On March 7, 2007, Hedcor entered into a Power Supply Agreement (PSA) with Davao Light and Power Company, Inc. (DLPCI), wherein Hedcor will sell its generated power through its hydroelectric plants to DLPCI.[8]

On October 20, 2008, Hedcor filed with the BIR Revenue District Office (RDO) No. 115, its Original Quarterly VAT

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[3] *Rollo*, Decision dated December 21, 2016, p. 34.
[4] *Id.*
[5] *Id.*
[6] *Rollo*, Decision dated December 21, 2016, p. 35.
[7] *Rollo*, Decision dated December 21, 2016, p. 35.
[8] *Rollo*, Decision dated December 21, 2016, p. 35. *an*

Return for the 3rd quarter of calendar year 2008, which was later amended on June 23, 2010.[9]

On June 25, 2010, Hedcor filed its written application for the refund or issuance of tax credit certificate (TCC) and an Application for Tax Credits/Refund (BIR Form No. 1914) for its unutilized input VAT for the second to fourth quarters of CY 2008 in the total amount of Php107,888,643.12.[10] The said application includes the unutilized input VAT paid and incurred by Hedcor during the 3rd quarter of CY 2008 in the total amount of Php39,514,045.36.[11]

Hedcor filed its judicial claim, via a Petition for Review, on September 30, 2010.[12]

Said petition was dismissed by the CTA Former Second Division for being prematurely filed. Upon appeal to the CTA *En Banc* and after the promulgation by the Supreme Court of the *San Roque*[13] and *Aichi*[14] cases, the CTA *En Banc* ruled that Hedcor's judicial claim, though premature, was filed within the period of exception established by the *San Roque* case.[15]

The CIR questioned the CTA *En Banc* decision and resolution before the Supreme Court. The Supreme Court denied the CIR's appeal for failure to show any reversible error in the assailed judgment.[16] Consequently, the CTA Case No. 8166 was remanded to the CTA in Division.[17]

After trial, the CTA in Division rendered the assailed Decision and Resolution, which read as follows:

> **WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent [CIR] is **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE**

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[9] *Rollo*, Decision dated December 21, 2016, p. 35.
[10] *Rollo*, Decision dated December 21, 2016, p. 36.
[11] *Rollo*, Decision dated December 21, 2016, p. 36.
[12] *Rollo*, Decision dated December 21, 2016, p. 36.
[13] *Commissioner of Internal Revenue v. San Roque Power Corporation, Taganito Mining Corporation v. Commissioner of Internal Revenue, and Philex Mining Corporation v. Commissioner of Internal Revenue*, G.R. Nos. 187485, 196113, and 197156, February 12, 2013.
[14] *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*, G.R. No. 184823, October 6, 2010.
[15] *Rollo*, Decision dated December 21, 2016, pp. 42-44.
[16] *Rollo*, Decision dated December 21, 2016, p. 44.
[17] *Rollo*, Decision dated December 21, 2016, pp. 44-45.

> to petitioner [Hedcor] in the reduced amount of P32,779,572.33 representing [Hedcor]'s unutilized input taxes for the 3rd quarter of 2008 attributable to its zero-rated sales.[18]
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> *****　　*****　　*****
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> **WHEREFORE,** premises considered, [Hedcor]'s **Omnibus Motion (I) For Partial Reconsideration of the Decision dated December 21, 2016 (II) For Reopening of Trial** and [CIR]'s **Motion for Partial Reconsideration** are **DENIED** for lack of merit.
>
> **SO ORDERED.**[19]

On May 18, 2017, Hedcor, within the extended period granted,[20] filed its Petition for Review[21] docketed as CTA EB No. 1641. The CIR, within the extended period granted,[22] filed his Petition for Review[23] on May 22, 2017,[24] which was docketed as CTA EB No. 1643. The cases were consolidated being appeals from the Decision and Resolution promulgated on December 21, 2016 and April 12, 2017, respectively, in CTA Case No. 8166.[25]

On June 7, 2017, the parties were ordered to file their respective comments.[26] After extensions were granted,[27] the CIR filed his Comment[28] on July 14, 2017, while Hedcor filed its Comment (Re: Petition for Review dated May 22, 2017)[29] on July 31, 2017.

On October 30, 2017, the CIR filed his Memorandum,[30] while Hedcor filed its Memorandum[31] through registered mail on October 30, 2017, and received by the Court on November 8, 2017. Thus, the case was deemed submitted for decision on November 27, 2017.

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[18] *Rollo*, Decision dated December 21, 2016, p. 60.
[19] *Rollo*, Resolution dated April 12, 2017, p. 74.
[20] *Rollo*, Minute Resolution dated May 9, 2017, p. 7.
[21] *Rollo*, pp. 8-27.
[22] *Rollo*, CTA EB No. 1643, Minute Resolution dated May 10, 2017, p. 5.
[23] *Rollo*, CTA EB No. 1643, pp. 6-16.
[24] The extended due date of May 20, 2017 fell on a Saturday.
[25] *Rollo*, Minute Resolution dated May 23, 2017, p. 76.
[26] *Rollo*, Resolution dated June 7, 2017, pp. 78-79.
[27] *Rollo*, Minute Resolutions dated July 5, 2017 and July 21, 2017, pp. 84 and 98, respectively.
[28] *Rollo*, pp. 85-90.
[29] *Rollo*, pp. 98-109.
[30] *Rollo*, pp. 122-129.
[31] *Rollo*, pp. 130-157.

Issues

In CTA EB No. 1641, Hedcor submits that the CTA in Division erred in partially denying a substantial portion of the claim for refund of excess unutilized input VAT attributable to its zero-rated sales for the 3rd quarter of CY 2008 amounting to Php6,734,473.03 for allegedly failing to comply with the substantiation requirements under the law and regulations.

In CTA EB No. 1643, the CIR submits that the CTA in Division erred in partially granting the claim for refund considering that at the time of the claim, Hedcor did not have any certification from the Energy Regulatory Commission (ERC).

Hedcor's Arguments

Hedcor argues that it sufficiently proved and substantiated its claim for input taxes arising from the purchase of goods and services in the 3rd quarter of 2008 amounting to Php39,514,045.36 by presenting the receipts, invoices, and import-entry documents covering the said input VAT.

Hedcor specifically questions the CTA in Division's disallowance of Php3,286,697.43 (part of the total disallowed amount of Php6,734,473.03) because the supporting VAT invoices and/or official receipts did not reflect the BIR's Authority to Print (ATP). Hedcor argues that nowhere in the 1997 National Internal Revenue Code, as amended (NIRC) or the pertinent VAT regulations is it required that the ATP should be reflected in the official receipts or invoices issued to it as evidence of its purchases; that said purchases were from Phelps Dodge Philippines Energy Products Corp. (Phelps Dodge) which is registered and issued a Permit to Use Computerized Accounting System or Components; and, that taxpayers who have registered under a computerized accounting system need not apply for the ATP for invoices and receipts.

Finally, Hedcor argues that the CTA in Division erred in denying its motion to re-open trial, contrary to the interest of substantial justice.

As to the CIR's appeal, Hedcor counter-argues that the same should be dismissed outright for failing to raise said issues at the earliest opportunity, and that the same raises new issues for the first time on appeal. Hedcor reiterates that its sales were attributable to its sales of power generated from renewable sources; and, that at the time of said zero-rated sales in 2010, Hedcor already had its Certificates of Compliance (COC) from the ERC.

CIR's Arguments

The CIR argues that Hedcor cannot be considered a generation company during the period of the claim (the 3rd quarter of 2008), since the ERC COCs were only issued on August 9, 2010 for Plant A and on May 24, 2010 for Plant B. Absent such COC, Hedcor cannot be considered as a generation company and ultimately, Hedcor is not entitled to zero-percent VAT and cannot claim refund of input VAT.

In his Memorandum, the CIR also argues that Hedcor is not entitled to the claimed refund because Hedcor's recourse is not against the government, but to seek reimbursement of its input VAT paid against the seller/supplier who shifted to it the output VAT.

Ruling of the Court

The Court will now rule on the parties' respective petitions.

The Petitions for Review were timely filed before the Court *En Banc*.

The CTA in Division issued the assailed Resolution on April 12, 2017 which was received by Hedcor on April 19, 2017, and by the CIR on April 20, 2017.

Both parties requested for extension to file their respective Petitions for Review before the Court *En Banc* which were subsequently granted. Hedcor was granted an extension until May 19, 2017,[32] hence, its Petition for Review filed on

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[32] *Rollo*, Minute Resolution dated May 9, 2017, p. 7.

May 18, 2017 was timely filed. On the other hand, the CIR was granted an extension until May 20, 2017,[33] hence, the CIR's Petition for Review was timely filed on May 22, 2017, considering that May 20, 2017 was a Saturday.

The CIR's petition has merit; Hedcor failed to prove that its sales for the 1st quarter of 2010 qualify for zero-rating.

The CTA in Division thoroughly discussed Hedcor's compliance with the requisites in order to be entitled to a refund or tax credit of unutilized input VAT attributable to zero-rated sales.

As to timeliness of the judicial claim, it has been established that Hedcor's judicial claim was filed within the exception period provided in the *San Roque* case, thereby escaping the defect of prematurity.

With respect to the administrative claim, the CTA in Division held that the same was timely filed counting from the close of the 1st quarter of 2010, as follows:

> Section 112(A) is clear that for VAT-registered persons whose sales are zero-rated, a claim for refund or credit of creditable input tax that is due or paid, and that is attributable to zero-rated or effectively zero-rated sales, must be filed within two years after the close of the taxable quarter when such sales were made. <u>The reckoning would always be the end of the quarter when the pertinent sales or transaction were made, regardless of when the input VAT was paid</u>.
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> xxx xxx xxx
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> As found by the Court-commissioned Independent CPA, Mr. Emmanuel Y. Mendoza, [Hedcor] did not have sales from its generated power for the 3rd quarter of CY 2008 since during this period, construction of its two hydroelectric power plants was still ongoing. <u>It was only in the year 2010 when these power plants became operational and generated power which was sold to DLPCI</u>. Thus, [Hedcor] declared zero-rated sales in its 2010 Quarterly VAT Returns.

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[33] *Rollo*, CTA EB No. 1643, Minute Resolution dated May 10, 2017, p. 5. *un*

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> ... the Court finds that as of the date of filing of [Hedcor]'s administrative claim on June 25, 2010, the entire unutilized input VAT for the 3rd quarter of 2008 amounting to P39,514,045.36 may be the subject of a claim for refund or issuance of TCC as it is in the nature of an excess "Input Tax Carried Over from Previous Period", which may be attributed to the reported zero-rated sales for the first quarter of 2010.
>
> Therefore, counting from March 31, 2010, the close of the first quarter of 2010, [Hedcor]'s administrative claim filed on June 25,2 010, was well within the two-year prescriptive period.[34] (*Underscoring supplied, citations omitted*)

There is no question that Hedcor is a VAT-registered entity with Taxpayer Identification No. 005-633-948-VAT.[35]

It was also established that Hedcor had sales of electricity generated through a renewable source of energy, which in this case is hydropower.[36] However, the CIR argues that for a generation company to be entitled to zero-percent (0%) VAT, it must secure a certificate of compliance (COC) from the Energy Regulations Commission (ERC). The CIR argues that based on Hedcor's evidence, the COCs were issued on May 24, 2010[37] and August 9, 2010,[38] for Plant B and A, respectively. Thus, the CIR argues that with respect to the claimed input VAT for the 3rd quarter of 2008, Hedcor had as yet no COC which would qualify it for zero-percent VAT.

After a careful review of the evidence, the Court *En Banc* partially agrees with the CIR.

It is true that under Section 108(B)(7) of the NIRC, sale of power generated through renewable sources of energy is subject to zero-percent VAT. This was clarified in Section 4.108-3(f) of Revenue Regulations (RR) No. 16-2005,[39] which states:

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[34] *Rollo*, Decision dated December 21, 2016, pp. 50-52.
[35] Docket, CTA Case No. 8166, Vol. II, Amended Joint Stipulation of Facts and Issues (JSFI), p. 1064.
[36] *Rollo*, Decision dated December 21, 2016, pp.55-56.
[37] Docket, CTA Case No. 8166, Vol. III, Exhibit "P-2-1", p. 1118.
[38] Docket, CTA Case No. 8166, Vol. III, Exhibit "P-2-2", p. 1119.
[39] Consolidated Value-Added Tax Regulations of 2005, November 1, 2005. *um*

> SEC. 4.108-3. Definitions and Specific Rules on Selected Services. –
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> xxx xxx xxx
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> (f) Sale of electricity by generation, transmission, and distribution companies shall be subject to 10% VAT on their gross receipts: *Provided* That sale of power or fuel generated through renewable sources of energy, such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels shall be subject to 0% VAT.
>
> "Generation companies" refers to persons or entities authorized by the Energy Regulatory Commision (ERC) to operate facilities used in the generation of electricity. xxx xxx xxx (*Underscoring supplied*)

In determining that Hedcor is qualified for zero-rating, the CTA in Division made the following findings:

> [Hedcor] was incorporated on December 2, 2005, the primary purpose of which is "to engage in the business of owning, developing, constructing, operating, repairing, and maintaining hydroelectric power plant systems, renewable and indigenous power generation plants and other types of power generation and/or converting stations, and to act as holding company or joint venture partners or investors in the business of developing, operating, and/or owning power generation plants and/or converting stations."
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> [Hedcor]'s 42 MW Sibulan Hydro Electric Power Plant consisting of two (2) independent hydroelectric projects namely, Upstream Plant A with installed capacity of about 16.5 MW and Downstream Plant B with installed capacity of about 26 MW have been duly certified by the DOE as consistent with the Power Development Plan of the government. Both Plants A and B were duly issued with Certificates of Compliance by the Energy Regulatory Commission.
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> Pursuant to the Power Supply Agreement executed between [Hedcor] and DLPCI on March 7, 2007, the former undertook to supply the latter with its electricity requirements in its Franchise Area. Accordingly, the agreement shall expire on the twelfth

> (12th) year from Phase I Supply or early commencement thereof.
>
> In its Amended Quarterly VAT Return for the first quarter of 2010, [Hedcor] reflected zero-rated sales/receipts in the amount of P20,316,218.41, pertaining to its gross receipts from sales of electricity to DLPCI as evidenced by the VAT zero-rated invoice and official receipt (OR) issued by [Hedcor] to DLPCI for the same period.
>
> Such sales of electricity generated through a renewable source of energy, particularly, hydropower, qualify for VAT zero-rating under Section 108(B)(7) fo the NIRC of 1997, as amended. (*Underscoring supplied, citations omitted*)

The CTA in Division acknowledged the existence of the COCs for Plants A and B, however, it does not appear that the dates of issuance of the said COC were considered.

As correctly pointed out by the CIR, the COCs were issued on May 24, 2010[40] and August 9, 2010.[41] The dates of issuance of the COCs are especially relevant in determining whether Hedcor has zero-rated sales for the 1st quarter of 2010. In a case involving the same parties, but for a different taxable year, it has been explained that:

> For an entity to be considered a generation company, it should be authorized by the Energy Regulatory Commission (ERC) to operate the generation facility. <u>Specifically, both new and existing generation facilities are required to secure a Certificate of Compliance (COC) from the ERC before it can operate the facilities used for generation of electricity</u>, as provided under *Rule 5, Section 4(a) of the Implementing Rules and Regulations of RA No. 9136,* to wit:
>
> > SECTION 4. *Obligations of a Generation Company.* –
> >
> > (a) <u>A COC shall be secured from the ERC before commercial operation of a new Generation Facility</u>. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish.

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[40] Docket, CTA Case No. 8166, Vol. III, Exhibit "P-2-1", p. 1118.
[41] Docket, CTA Case No. 8166, Vol. III, Exhibit "P-2-2", p. 1119.

> The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.
>
> (i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. <u>Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facitility</u>.[42] (*Underscoring supplied and in the original*)

The CTA *En Banc* also had occasion to explain the effect of sales made prior to the issuance of the COC, as follows:

> Still on this issue, the consolidated cases of *Commissioner of Internal Revenue v. Toledo Power Company*[43] are relevant and in point.
>
> In *Toledo*, the Supreme Court ruled that Toledo's sales of electricity *cannot qualify as zero-rated sales* because it was able to secure the COC only in June 23, 2005, *after* the period of its sales of electricity in 2002. The Court, thus, concluded that Toledo was *not yet a generation company* when the sales were made and, consequently, was not entitled to the refund of input VAT attributable to said sales. The Court also emphasized that although there was a pending application for a COC in 2002, the application did not automatically entitle Toledo to the rights of a generation company under the EPIRA, xxx xxx xxx[44] (*Italics in the original*)

The instant claim for refund covers input tax incurred for the 3rd quarter of 2008 allegedly attributable to zero-rated sales for the 1st quarter of 2010. Both these periods come

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[42] *Hedcor Sibulan, Inc. v. Commissioner of Internal Revenue*, CTA Case No. 8014, August 15, 2017.
[43] G.R. No. 196415, December 2, 2015.
[44] *CE Cebu Geothermal Power Co., Inc. v. Commissioner of Internal Revenue*, CTA EB No. 741, September 22, 2017.

before the issuance of either COC for Plant A or B. However, contrary to the CIR's reckoning, what is significant is the period when the alleged zero-rated sales were made, and not the period when the input tax was paid. Thus, the 1st quarter of 2010, covering the months of January to March 2010, clearly came before the issuance of the COCs on May 24, 2010 and August 9, 2010. Applying the ruling in the *Toledo* case, the sales for the 1st quarter of 2010 were conducted prior to the issuance of the COC and does not qualify for zero-rating, and therefore, Hedcor is not entitled to the refund of input VAT attributable to said sales. Although the COCs were eventually issued, the privilege of VAT zero-rating did not retroact[45] to cover the 1st quarter of 2010.

Based on these circumstances, Hedcor's claim for refund of input taxes attributable to zero-rated sales for the 1st quarter of 2010 must fail. Hedcor's other arguments with respect to proof and substantiation of its input tax will no longer be discussed.

WHEREFORE, the Petition for Review filed by Hedcor Sibulan, Inc., docketed as CTA EB No. 1641 is **DISMISSED** for lack of merit. On the other hand, the Commissioner of Internal Revenue's Petition for Review, docketed as CTA EB No. 1643 is **GRANTED**. The Decision and Resolution in CTA Case No. 8166, dated December 21, 2016 and April 12, 2017 are **REVERSED** and **SET ASIDE**. Accordingly, Hedcor Sibulan, Inc.'s claim for refund or tax credit is denied.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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[45] *CE Cebu Geothermal Power Co., Inc. v. Commissioner of Internal Revenue*, CTA EB No. 741, September 22, 2017.

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

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Official Business)
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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.

ROMAN G. DEL ROSARIO
Presiding Justice