REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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MIRANT (PHILIPPINES) OPERATIONS CORPORATION (formerly SOUTHERN ENERGY ASIA-PACIFIC OPERATIONS PHILS.), INC.,
Petitioner,

C.T.A. CASE NO. 6340

Members:

- versus -

ACOSTA, *Chairman*
BAUTISTA, and
CASANOVA, ***JJ.***

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 18 2005

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DECISION

BAUTISTA, L., J.:

This case involves a claim for refund or issuance of a tax credit certificate in the amount of P87,345,116.00 allegedly representing excess creditable withholding taxes for the fiscal year ended June 30, 1999, the interim period from July 1, 1999 to December 31, 1999 and for calendar year ended December 31, 2000.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province (*par. 1, Stipulation of Facts*).

Petitioner secured with the Securities and Exchange Commission (SEC) its Certificate of Filing of Amended Articles of Incorporation, reflecting its change of name from Southern Energy Asia-Pacific Operations (Phils.), Inc. to Mirant (Philippines) Operations Corporation on April 30, 2001. Prior to its use of the name Southern Energy Asia-Pacific Operations (Phils.), Inc., petitioner operated under the corporate names CEPA Operations (Philippines) Corporation, CEPA Tileman Project Management Corporation and Hopewell Tileman Project Management Corporation. The change of petitioner's corporate name from CEPA Operations (Philippines) Corp. to Southern Energy Asia-Pacific Operations (Phils.) Inc., from CEPA Tileman Project Management Corporation to CEPA Operations (Philippines) Corp. and from Hopewell Tileman Project Management Corp. to CEPA Tileman Project Management Corp. were approved by the SEC on November 24, 2000, November 21, 1997 and July 29, 1994 respectively (*pars. 4 - 6, Stipulation of Facts*).

Petitioner is duly licensed to do business in the Philippines and is primarily engaged in the business of designing, constructing, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plants and related facilities for the conversion into electricity of coal, distillate and other fuel provided by and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government owned or controlled corporations or other entity engaged in the development, supply or distribution of energy (*par. 2, Stipulation of Facts*).

Petitioner then entered into Operating and Management Agreements with Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.) and Mirant Sual Corporation (formerly Southern Energy Pangasinan, Inc.) to provide these corporations with maintenance and management services in connection with the operation, construction and commissioning of the coal-fired power stations situated in Pagbilao, Province of Quezon and Sual, Province of Pangasinan, respectively.

On October 15, 1999, petitioner filed with the Bureau of Internal Revenue (BIR) its income tax return for the fiscal year ended June 30, 1999 (*Exhibit L*) declaring a net loss of P235,291,064.00 and unutilized tax credits of P32,263,388.00, detailed as follows:

Gross Income	P (64,438,434.00)
Less: Deductions	170,852,630.00
Net Loss	P (235,291,064.00)
Income Tax Due	P -
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	P 32,263,388.00

Petitioner opted to have the excess amount of P32,263,388.00 refunded.

On April 17, 2000, petitioner filed with the BIR an amended income tax return for fiscal year ended June 30, 1999 (*Exhibit M*) reporting an increased net loss amount of P379,324,340.00 but reporting the same unutilized tax credits of P32,263,388.00 which petitioner opted to carry-over as tax credit to the succeeding taxable year, thus:

Gross Income	P (131,113,036.00)
Less: Deductions	248,211,204.00
Net Loss	P (379,324,240.00)
Tax Due	P -

Less:	Prior Year's Excess Credits	4,714,516.00
	Creditable Tax Withheld	
	First Three Quarters	21,702,771.00
	Fourth Quarter	5,846,101.00
Tax Overpayment		P 32,263,388.00

To allegedly synchronize its accounting period with those of its affiliates, petitioner allegedly secured the approval of the BIR to change its accounting period from fiscal year (FY) to calendar year (CY), effective December 31, 1999. Thus, on April 17, 2000, petitioner filed its income tax return for the interim period July 1, 1999 to December 31, 1999 (*Exhibit N*) declaring a net loss in the amount of P381,874,076.00 and unutilized tax credits of P48,626,793.00, computed as follows:

Gross Income		P (320,895,462.00)
Less:	Deductions	60,978,614.00
Net Loss		P (381,874,076.00)
Income Tax Due		P -
Less:	Prior Year's Excess Credits	32,263,388.00
	Creditable Taxes Withheld	
	First Three Quarters	16,363,405.00
	Fourth Quarter	-
Tax Overpayment		P 48,626,793.00

Petitioner indicated the excess amount of P48,626,793.00 as "To be carried over as tax credit next year/quarter".

On April 10, 2001, petitioner filed with the BIR its income tax return for the calendar year ended December 31, 2000 (*Exhibit O*) reflecting a net loss of P56,901,850.00 and unutilized tax credits of P87,345,116.00, computed as follows:

Gross Income		P (4,080,541.00)
Less:	Deductions	52,821,309.00
Net Loss		P (56,901,850.00)
Tax Due		P -
Less:	Prior Year's Excess Credits	48,626,793.00
	Creditable Tax Withheld	
	First Three Quarters	25,336,971.00
	Fourth Quarter	13,381,352.00
Tax Overpayment		P 87,345,116.00

Petitioner indicated the excess amount of P87,345,116.00 as "To be refunded".

On September 20, 2001, petitioner filed with the BIR a letter claiming for the refund of the amount of P87,345,116.00 representing overpaid income tax for the FY ended June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 and CY ended December 31, 2000 (*Exhibit GG*).

As the two-year prescriptive period for the filing of a judicial claim under Section 229 of the National Internal Revenue Code (NIRC) of 1997 was about to lapse without action on the part of the respondent, petitioner elevated its case before Us on October 12, 2001.

Respondent, in his Answer filed on November 21, 2001, interposed the following Special and Affirmative Defenses:

1. Petitioner's alleged claim for tax refund/tax credit is subject to administrative investigation/examination by the respondent's Bureau;

2. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;

3. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable;

4. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to adduce sufficient proof is fatal to the action for tax refund/credit;

5. Moreover, petitioner must show compliance with the provisions of Sections 76, 204(C) and 229 of the Tax Code, as amended;

6. Finally, there is no way to dispute the cardinal rule in taxation that tax exemptions are highly disfavored in law and he who claims tax exemption must be able to justify his claim or right. The exemption cannot be established by mere implication but it must be clearly

expressed (Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, et al., 64 SCRA 555).

During the trial on the merits, petitioner presented documentary and testimonial evidence. Respondent, on the other hand, submitted his case for decision based on the pleadings (*page 211, Records*). After having received the memoranda of both parties, this Court considered the case submitted for decision on January 25, 2005.

The parties jointly stipulated that the sole issue for this Court's resolution is: Whether or not the petitioner is entitled to the refund of P87,345,116.00 representing excess creditable withholding tax for the fiscal year ended June 30, 1999, the interim period from July 1, 1999 to December 31, 1999 and for the calendar year ended December 31, 2000 by showing that –

a. the creditable withholding taxes amounting to P87,345,116.00 are duly supported by Certificates of Creditable Tax Withheld at Source;

b. the income from which these creditable taxes were withheld were duly declared as part of petitioner's income in its annual income tax return for the fiscal year ended June 30, 1999, the interim period from July 1, 1999 to December 31, 1999 and for calendar year ended December 31, 2000;

c. Petitioner had shown that it did not carry-over its unutilized creditable withholding taxes for the fiscal year ended June 30, 1999, the interim period from July 1, 1999 to December 31, 1999 and for calendar year ended December 31, 2000 to the succeeding taxable year;

d. Petitioner had duly filed both the administrative and judicial claim for refund within the two-year prescriptive period provided under Sections 204 and 229 of the NIRC, as amended.

Petitioner anchors its claim on Section 76 of the NIRC of 1997 in relation to Sections 204(C) and 229 quoted hereunder for easy reference:

"**SEC. 76.** ***Final Adjustment Return.*** – Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:

"(A) Pay the balance of tax still due; or

"(B) Carry-over the excess credit; or

"(C) Be credited or refunded with the excess amount paid, as the case may be.

"In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor."

"**SEC. 204.** ***Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*** – The Commissioner may—

xxx xxx xxx

"(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 petitioner, 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."

"**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 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 a written claim therefore, 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 Section 76 afore-cited, the corporate taxpayer's excess tax credits or overpaid income tax in a given taxable year may either be refunded (either in the form of cash or tax credit certificate) or carried-over/applied to the succeeding taxable years. However, once the option to carry-over has been made, the same becomes irrevocable for that taxable period.

A closer look at petitioner's income tax returns for the Fiscal Year ended June 30, 1999 (original & amended), the interim period July 1, 1999 to December 31, 1999 and calendar year ended December 31, 2000 shows that the total claim of P87,345,116.00 is composed of the following:

Unutilized Tax Credits for:		
FY ended June 30, 1998	P 4,714,516.00	
FY ended June 30, 1999	27,548,872.00	
Interim period July 1 - Dec. 31, 1999	16,363,405.00	P 48,626,793.00
CY ended December 31, 2000		38,718,323.00
Total Claimed Unutilized Tax Credits		P 87,345,116.00

Inasmuch as the reported unutilized tax credits for FY ending June 30, 1998, FY ending June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 were accumulated and carried-over to the succeeding taxable years until the year 2000 in the aggregate sum of P48,626,793.00, the same should be denied outright pursuant to Section 76 of the NIRC of 1997. Petitioner exercised the option of carry-over with regard to the said unutilized tax credits of P48,626,793.00. The same option once made is considered irrevocable and petitioner cannot claim a refund/tax credit certificate therefor. Petitioner's only recourse is to carry-over the unutilized tax credits of P48,626,793.00 to the succeeding taxable years until the same is fully utilized (***Pilipinas Transport Industries, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6073, March 1, 2002***).

We now discuss the remaining claim of P38,718,323.00 which pertains to the creditable taxes withheld during the taxable year 2000. In its income tax return for the year 2000, petitioner marked the option "To be refunded" (*Exhibit O-10*). Further, in its 2001 income tax return, petitioner reflected no amount of prior year's excess credits (*Exhibit II-1*). In which case, petitioner's creditable taxes withheld for taxable year 2000 of P38,718,323.00 maybe the proper subject of a claim for refund under Section 76 of the NIRC of 1997.

Nonetheless, petitioner must prove compliance with the following basic requirements in order to be entitled to the refund claim of P38,718,323.00:

1.) That the claim for refund was filed within the two-year prescriptive period provided under Section 204(C) in relation to Section 229 of the NIRC of 1997;

2.) That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and

3.) That the income upon which the taxes were withheld were included in the return of the recipient *[**Section 2.58, Revenue Regulations No. 2-98, as amended; Citibank N.A. vs. Court of Appeals and CIR, 280 SCRA 459; ACCRA Investments Corporation vs. CA, 204 SCRA 957**]*.

Based on the evidence on record, petitioner complied with the first requirement. The reckoning of the two-year prescriptive period for the filing of a claim for refund/tax credit certificate of excess creditable withholding tax/quarterly income tax payment starts from the date of filing of the annual income tax return. ***[ACCRA Investments Corporation vs. Court Appeals, supra; Commissioner of Internal Revenue vs. TMX Sales, Inc., 205 SCRA 184 (1992)].*** Petitioner filed its income tax return for taxable year ended December 31, 2000 on April 10, 2001 (*Exhibit O*). Counting from this date, petitioner had until April 10, 2003 within which to file its claim for refund/tax credit certificate both administratively and judicially. Therefore, petitioner's administrative claim filed on September 20, 2001 (*Exhibit GG*) and the Petition for Review filed on October 12, 2001 fall within the two-year period prescribed under Section 229 in relation to Section 204(C) of the NIRC of 1997.

Respondent, however, alleges that petitioner failed to prove its compliance through the submission of the documentary requirements, as prescribed in Revenue Memorandum Order No. 53-98 in connection with the filing of administrative claim for refund. Respondent further claims that since the judicial claim for refund was filed on October 12, 2001, barely several days after the filing of the administrative claim for refund on September 20, 2001, said administrative claim for refund is but a mere pro-forma and this Court cannot take cognizance of the instant case.

We disagree.

First, it is well-settled that when the two-year period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon, for the protection of the interest of the taxpayer, he should file a petition for review with this Court within the said two-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the two-year period he can no longer appeal the same to this Court *[**Commissioner of Internal Revenue vs. Hitachi Computed Products (Asia) Corporation, CA-G.R. SP No. 63340, February 7, 2002 citing Gibbs vs. Collector of Internal Revenue and Court of Tax Appeals, 107 Phil 232, Johnson Lumber Co. vs. CTA, 101 Phil 151**].* The claim for refund with the Bureau of Internal Revenue and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period. If, however, the Collector takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector (***Commissioner of Internal Revenue vs. Victorias Milling Co., Inc., 22 SCRA 12***).

Second, let it be stressed that Revenue Memorandum Order (RMO) No. 53-98 dated June 1, 1998, entitled "Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket" refers mainly to the requirements for refund/tax credit in the administrative level when the taxpayer is required to submit for audit all his/its pertinent documents/records for the purpose of establishing the veracity of his/its claim for refund/credit. However, in the judicial level, i.e., when the case is elevated to this Court, We are governed by Our own Rules of Court on the matter of proving a case.

Moreover, We have already laid down in a number of similar cases the three requisites which the taxpayer, in claiming for a refund of excess creditable withholding tax, must comply with which We have quoted earlier. These requisites were subsequently affirmed by the Supreme Court in the case of ***Citibank, N.A. vs. Court of Appeals, 280 SCRA 459 dated October 10, 1997***.

In compliance with the second requirement, petitioner presented the Certificates of Creditable Tax Withheld at Source duly issued to it by Southern Energy Pangasinan, Inc.and Southern Energy Quezon, Inc. for the year 2000. As stated by the Court commissioned auditing firm, SGV & Co., in its supplementary report dated March 24, 2003 (*Exhibit RR*), these certificates were found to be faithful reproductions of the original copies. Since the certificates were duly signed and prepared under the penalties of perjury, the figures appearing therein are presumed to be true and correct. Contrary to respondent's view, the testimony of the various payors need not be presented to validate the authenticity of the certificates.

The creditable withholding taxes reflected in the certificates amounted to P48,011,168.13, broken down as follows:

Exh	Period Covered	Withholding Agent	Income Amount	Income Tax Withheld
Y	01/01/00 - 01/31/00	Southern Energy Pangasinan, Inc.	P 88,581,677.40	P 4,429,083.87
Z	01/01/00 - 01/31/00	Southern Energy Quezon, Inc.	132,060,489.00	6,603,024.45
AA	04/01/00 - 06/30/00	Southern Energy Pangasinan, Inc.	99,590,894.00	4,979,544.70
BB	04/01/00 - 06/30/00	Southern Energy Quezon, Inc.	184,485,461.80	9,224,273.00
CC	07/01/00 - 09/30/00	Southern Energy Pangasinan, Inc.	90,336,556.60	4,516,827.83
DD	07/01/00 - 09/30/00	Southern Energy Quezon, Inc.	97,541,259.80	4,877,062.00
EE	10/01/00 - 12/31/00	Southern Energy Quezon, Inc.	176,685,602.20	8,834,280.11
FF	10/01/00 - 12/31/00	Southern Energy Pangasinan, Inc.	90,941,443.40	4,547,072.17
			P 960,223,384.20	P 48,011,168.13

However, as indicated in petitioner's "Schedule of CWT Certificates as of December 31, 2000" (*Exhibit PP*), the said creditable withholding taxes were claimed in its income tax return either FY ending June 30, 1998, or for interim period covering July 1, 1999 to December 31, 1999 or CY ending December 31, 2000, as shown below:

	Income Tax	Period CWTs were claimed			
Exh	Withheld	FY Jun 98	SP Dec '99	CY Dec '00	
Y	P 4,429,083.87			P 4,429,083.87	
Z	6,603,024.45		P 6,603,024.45		
AA	4,979,544.70		388,928.79	4,590,615.91	
BB	9,224,273.00			9,224,273.00	
CC	4,516,827.83			4,516,827.83	
DD	4,877,062.00			4,877,062.99	
EE	8,834,280.11	P (2,108,556.00)	504,362.92	8,416,036.02	P 2,022,438.06
FF	4,547,072.17			4,547,072.17	
	48,011,168.13	P (2,108,556.00)	P 7,496,316.16	P 40,600,971.79	P 2,022,438.06

The creditable withholding taxes of P40,600,971.79 reflected in the certificates were higher by P1,882,648.79 when compared with the creditable withholding taxes of P38,718,323.00 reported by petitioner in its income tax return for taxable year 2000 (*Exhibit O-7*). As stated by SGV & Co. in its report dated February 21, 2003 *(Exhibit NN)*, tax credits were claimed by petitioner in its income tax return for taxable year 2000 prior to its receipt of the certificates from the withholding agents. At the time it recognized and accrued its income, petitioner also reported the related creditable withholding taxes, which was prior to the receipt of the certificates from the withholding agents. Hence, the discrepancy of P1,882,648.79 in creditable withholding taxes was mainly brought about by the difference between the foreign exchange (forex) rates used at the time when petitioner recorded its income and the related tax credits and the forex rates used by the withholding agents at the time when income payments were made to petitioner and creditable taxes were withheld therefrom as summarized in *Exhibit QQ*. Considering that most of the forex rates used by the withholding agents were higher than those used by petitioner in reporting its tax credits, the same do not have a bearing on petitioner's total claim because the resulting increase in the amounts of creditable withholding taxes reflected in the certificates were not declared by the petitioner in its income tax return for the said year. However, for the creditable taxes withheld by Southern Energy Quezon, Inc. for the period October 1, 2000 to December 31, 2000 totalling P7,670,746.00 (which formed part of the creditable withholding taxes of P8,834,280.11 shown in the certificate marked as *Exhibit EE*), the same were based on forex rates which were lower than those used by petitioner in recognizing the tax credits of P7,763,742.00 for the same transactions. In other words, petitioner's claimed unutilized tax credits of P92,996.00 (P7,763,742.00 less P7,670,746.00) were not covered by the withholding tax certificate issued by Southern Energy, Quezon Inc. for the period October 1, 2000 to December 31, 2000 and should therefore be deducted from the total claim of P38,718,323.00. Below is the breakdown of the amount of P92,996.00:

			Creditable Withholding Taxes		Overclaimed
Exhibits	Period Covered	Withholding Agent	Per Certificate (a)	Per ITR (b)	Tax Credits (b) - (a)
EE, QQ	10/01/00 - 12/31/00	Southern Energy Quezon, Inc.	P 4,298,892.00	P 4,350,327.00	P 51,435.00
			3,371,854.00	3,413,415.00	41,561.00
			P 7,670,746.00	P 7,763,742.00	P 92,996.00

The reconciliation schedule also shows that for the creditable taxes of P745,290.00 withheld by Southern Energy Quezon Inc. for the period October 1, 2000 to December 31, 2000 on petitioner's Philippine peso billings under Invoice No. 0015, the corresponding creditable taxes claimed by petitioner in its 2000 income tax return amounted to P750,190.00 which were higher by P4,900.00 than those reflected in the certificate. Accordingly, the amount of P4,900.00 shall be deducted from petitioner's total claim.

In fine, this Court finds that of the total unutilized tax credits of P38,718,323.00 declared by petitioner in its 2000 income tax return, only the amount of P38,620,427.00 (P38,718,323.00 less P92,996.00 less P4,900.00) was duly substantiated by withholding tax certificates.

Anent the third requirement, records reveal that the reported creditable taxes of P38,718,323.00 were withheld from services fees of P871,127,253.00 received by petitioner from its affiliates, Southern Energy Quezon, Inc.and Southern Energy Pangasinan, Inc., pursuant to the Operating and Maintenance Service Agreements entered into by petitioner with the said entities. The gross income figure of P871,127,253.00 was the very same amount declared by petitioner in its income tax return for taxable year 2000 (*Exhibits O-11 & O-12*). Evidently, petitioner also complied with the third requisite.

IN VIEW OF ALL THE FOREGOING, the instant Petition for Review is hereby **GRANTED** but in a reduced amount of P38,620,427.00. Accordingly, respondent is **ORDERED TO REFUND**, or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P38,620,427.00 representing unutilized creditable withholding taxes for taxable year 2000.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Chairman, First Division
Presiding Justice