

**REPUBLIC OF THE PHILIPPINES  
COURT OF TAX APPEALS  
QUEZON CITY**

**SPECIAL FIRST DIVISION**

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**GBH POWER RESOURCES, INC.**  
**[Formerly: Mirant (Philippines)**  
**Island Generation Corporation],**

Petitioner,

- versus -

**C.T.A. CASE NO. 7462**

Members:

**ACOSTA**, *Chairperson*

**BAUTISTA**, and

**CASANOVA**, JJ.

**COMMISSIONER OF INTERNAL  
REVENUE,**

Respondent.

**Promulgated:**

**MAR 26 2010 ; 2:10 pm**

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**DECISION**

**CASANOVA, J.:**

The instant Petition for Review seeks the issuance of a tax credit certificate or refund of the amount of P4,046,166.95, allegedly representing unutilized input VAT on domestic purchases of goods other than capital goods, domestic purchases of services and importation of goods other than capital goods for the four quarters of the year 2004.

Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws, with principal office at Suite 501 CTC Building, 2232 Roxas Boulevard, Pasay City, Metro Manila.<sup>1</sup>

Respondent is the Commissioner of the Bureau of Internal Revenue who is duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or issuance of tax credit certificate of overpaid internal revenue taxes as provided by law, with 

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<sup>1</sup> Petition for Review (Petition), par. 1, Docket, p. 1

office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.<sup>2</sup>

Petitioner is registered with the Bureau of Internal Revenue (BIR) as a Value-Added Tax (VAT) taxpayer in accordance with Section 236 of the National Internal Revenue Code (Tax Code) with Tax Identification No. 214-835-639-000 as shown on its BIR Certificate of Registration bearing OCN 9RC0000056695.<sup>3</sup>

Effective 26 June 2001, sales of generated power by generation companies became VAT zero-rated by virtue of Section 4(x) in relation to Section 6 of the EPIRA and Rule 5, Section 6 of the Rules and Regulations to Implement the EPIRA.<sup>4</sup>

Pursuant to the procedure prescribed in Revenue Regulations No. 7-95, as amended, petitioner filed an administrative claim for refund or issuance of tax credit certificate of unutilized input VAT with the BIR Revenue District Office No. 91 at Pasay City on December 29, 2005 in the total amount of PhP4,046,166.95 for the four quarters of the year 2004.<sup>5</sup>

To date, respondent has not favorably acted upon said administrative claim for refund, thus, petitioner filed the instant Petition for Review on April 21, 2006.

In his Answer<sup>6</sup> filed on June 16, 2006, respondent averred the following Special and Affirmative Defense:

"4. The Petition is filed out of time. The claim for refund was allegedly filed before Revenue District Office No. 5, Alaminos City on December 15, 2004. Under Section 112 of the NIRC of 1997, respondent has 120 days from the submission of complete documents in support of the application for refund within which to grant or deny the claim. Petitioner filed the Petition only on April 21, 2006, way beyond the 30-day reglementary period from 

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<sup>2</sup> Joint Stipulation of Facts and Issues (JSFI), Admitted facts, par. 1, Docket, p. 182

<sup>3</sup> JSFI, Jointly Stipulated Facts, par. 1, Ibid, p. 184

<sup>4</sup> JSFI, Admitted Facts, par. 2, Ibid, p. 182

<sup>5</sup> JSFI, Jointly Stipulated Facts, par. 2, Ibid, p. 185

<sup>6</sup> Docket, pp. 136-138

the time constructive denial of the claim set-in. Thus, this Honorable Court is without jurisdiction to even entertain this claim for refund, much more, grant the same."

The parties filed their Joint Stipulation of Facts and Issues<sup>7</sup> on October 6, 2006, which was subsequently approved in a Resolution<sup>8</sup> dated October 10, 2006.

After the presentation of its testimonial and documentary evidence, petitioner filed its Formal Offer of Evidence<sup>9</sup> on April 14, 2008 which was partially admitted in a Resolution<sup>10</sup> dated June 4, 2008; and, its Omnibus Motion<sup>11</sup> filed on June 25, 2008, which was resolved via Resolution<sup>12</sup> dated July 31, 2008.

On September 29, 2008, petitioner filed its Supplemental Offer of Evidence<sup>13</sup> which was admitted by the Court in Resolutions dated October 17, 2008<sup>14</sup> and March 16, 2009<sup>15</sup>.

On January 20, 2009, upon admission of respondent's documentary evidence, the Court ordered the parties to file their respective Memorandum within thirty days from receipt of the said Resolution.

In a Resolution<sup>16</sup> dated April 8, 2009, the case was submitted for decision taking into consideration the respondent's Memorandum filed on March 24, 2009<sup>17</sup> and petitioner's Memorandum filed on April 7, 2009<sup>18</sup>.

The parties submitted the following issues<sup>19</sup> for this Court's resolution: 

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<sup>7</sup> Ibid, pp. 182-187

<sup>8</sup> Id., p. 191

<sup>9</sup> Id., pp. 359-391

<sup>10</sup> Id., pp. 393-394

<sup>11</sup> Id., pp. 395-402

<sup>12</sup> Id., pp. 463-464

<sup>13</sup> Id., pp. 481-487

<sup>14</sup> Id., p. 555

<sup>15</sup> Id., p. 584

<sup>16</sup> Docket, p. 641

<sup>17</sup> Docket, pp. 592-607

<sup>18</sup> Docket, pp. 609-640

<sup>19</sup> JSFI, Docket, pp. 185-186

"1. Whether or not Petitioner generated zero-rated sales for the period beginning the 1<sup>st</sup> quarter to the 4<sup>th</sup> quarter of 2004 pursuant to Petitioner's zero rated sales of power generation services under the EPIRA.

2. Whether or not Petitioner has excess/unitized (sic) input VAT in the amount of PhP4,046,166.95 for the period covering the 1<sup>st</sup> quarter to the 4<sup>th</sup> quarter of 2004 (i.e. January 1 to December 31, 2004).

3. Whether or not Petitioner's excess/unutilized input VAT from its domestic purchases and importation of goods are directly attributable to its zero-rated sales.

4. Whether or not the unutilized creditable input taxes for the period covering the 1<sup>st</sup> quarter to the 4<sup>th</sup> quarter of 2004 are properly substantiated by invoices and official receipts.

5. Whether or not Petitioner's excess/unutilized input VAT were not applied/utilized in the subsequent quarters of 2005.

6. Whether or not the Petitioner filed the judicial claim for refund within the prescribed period set by law.

7. Depending on the Court's resolution of the foregoing issues, whether or not petitioner is entitled to a refund and/or issuance of a tax credit certificate for the unutilized input VAT payments in the amount of P4,046,166.95 representing unutilized/excess input VAT paid by Petitioner for the period covering the 1<sup>st</sup> quarter to the 4<sup>th</sup> quarter of 2004 (i.e. January 1 to December 31, 2004)."

The above-enumerated issues can be summarized into a single issue, to wit:

"Whether or not petitioner is entitled to the refund or issuance of tax credit certificate in the amount of P4,046,166.95, allegedly representing unutilized input VAT on domestic purchases of goods other than capital goods, domestic purchases of services and importation of goods other than capital goods for the four quarters of the year 2004."

Petitioner maintains that its sale of power generation services is subject to zero percent (0%) VAT pursuant to Sec. 4(x) in relation to Sec. 6 of R.A. No. 9136 of the Electric Power Industry Reform Act of 2001 (EPIRA) and Rule 5, Sec. 6 of the Rules and Regulations to Implement R.A. 9136 ("EPIRA IRR"), to wit:

"R.A. 9136 (EPIRA)

Section 4. Definition of Terms. –

x x x                      x x x                      x x x

(x) 'Generation Company' refers to any person or entity authorized by the ERC [Energy Regulatory Commission] to operate facilities used in the generation of electricity;

x x x                      x x x                      x x x

Sec. 6. Generation Sector. – Generation of electric power, a business affected with public interest, shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

Upon implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by ERC except as otherwise provided in this Act.

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value-added tax zero-rated. 

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their individual pricing formulas as well as their financial statements.

#### Rules and Regulations to Implement R.A. 9136 (EPIRA "IRR")

##### RULE 5.

##### Generation Sector

x x x                      x x x                      x x x

##### SECTION 6. Generation Charges and VAT. –

##### (a) xxx

Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOF, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these Rules."

Furthermore, petitioner points out that in BIR Ruling No. 20-02 dated May 13, 2002, addressed to the Power Sector Assets and Liabilities Management Corporation (PSALM), respondent confirmed that the sale of electricity by the PSALM, an ERC-registered generation company, is subject to zero percent (0%) VAT by virtue of the EPIRA:

"Section 102 of the Tax Code of 1997 imposes VAT equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services in the course of trade or business in the Philippines, provided the annual gross receipts exceed P550,000.00."

Section 6(b), Rule 5 30 (sic) of the IRR in relation to Section 4(x) of the EPIRA 31 (sic), however, expressly provides that the sale of generated power by generation companies shall, upon the effectivity of the Act, be subject to zero percent (0%) VAT. Since PSALM, once registered with the ERC will fall within the definition of a Generation Company, under Rule 5 of the aforesaid IRR with respect to its sale of generated power, we confirm your opinion that its sale of generated power will be subject to VAT at the rate of zero percent (0%)."

Petitioner further argues that the foregoing ruling was also cited in VAT Ruling No. 050-03 dated December 1, 2003, to wit:

". . . Sale of generated power by generation companies is entitled to the benefit of zero percent (0%) VAT pursuant to Section 6, R.A. No. 9136, without any qualification that it is merely entitled to effectively zero rated VAT."

Finally, petitioner cites the ruling of this Court in the case of *Mindanao I Geothermal Partnership vs. Commissioner of Internal Revenue*<sup>20</sup>, where this Court ruled that:

"Anent the first issue, it is undisputed that Republic Act No. 6136 otherwise known as the "Electric Power Industry Reform Act of 2001" provided for VAT zero-rating of sales of generated power by generation companies beginning June 26, 2001. Thus, the pertinent provisions of the National Internal Revenue Code of 1997 are deemed amended by the provisions of R.A. No. 6136 by modifying the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent.

To qualify for VAT zero-rating under R.A. No. 6136, petitioner must prove that: 1) it is a generation company and 2) it derived sales from power generation." 

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<sup>20</sup> C.T.A. Case No. 6788, October 13, 2005

On the other hand, respondent contends, among others, that petitioner failed to show that its purchases of non-capital goods and services were made in the course of its trade and business; that the said purchases were properly supported by VAT invoices and/or official receipts and other documents showing that it actually paid VAT in accordance with Sections 110(A)(2) and 113 of the Tax Code, as amended, and in pursuance to Section 4.104-5(a) & (b) of Revenue Regulations No. 7-95 (Re: Substantiation of Claims for Input Tax Credit). Respondent also argues that petitioner failed to prove that the input taxes allegedly paid on its domestic purchases of goods and services attributable to its zero-rated sales for the first to fourth quarters of taxable year 2004 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters.

The Petition is without merit.

Pertinent to the resolution of this case is Section 112(A) in relation to Section 112(D) of the NIRC of 1997, as amended, which, respectively, provides:

**"SEC.112. Refunds or Tax Credits of Input Tax-**

**(A) *Zero-rated or Effectively Zero-rated***

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

to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

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

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

Pursuant to the afore-quoted provisions of Section 112(A), for a VAT taxpayer to be entitled to a refund/tax credit of unutilized input VAT, the following requisites must be complied with:

1. there must be zero-rated or effectively zero-rated sales;
2. that input taxes were incurred or paid;
3. that such input taxes were attributable to zero-rated or effectively zero-rated sales;
4. that the input taxes were not applied against any output VAT liability; and
5. that the claim for refund was filed within the two-year prescriptive period.

This Court finds it appropriate to determine first the timeliness of the filing of the instant claim. 

The reckoning of the two-year prescriptive period for the filing of a claim for input VAT refund under Section 112(A) of the NIRC of 1997 starts from the close of the taxable quarter when the relevant sales were made pertaining to the input VAT regardless of whether said tax was paid or not<sup>21</sup>. As prayed for by petitioner in its Petition for Review and Memorandum, the claimed amount of P4,046,166.95 pertains to input VAT incurred for the four quarters of 2004. However, a careful perusal of the records, as well as the report of the Court-Commissioned Independent CPA (ICPA), reveal that the claimed amount of P4,046,166.95 pertains to the second, third and fourth quarters of 2004, to wit:

| <b>Period Covered</b> | <b>Amount</b>         |
|-----------------------|-----------------------|
| 2nd Quarter 2004      | P 2,067,647.26        |
| 3rd Quarter 2004      | 1,214,636.29          |
| 4th Quarter 2004      | 763,883.40            |
| <b>Total</b>          | <b>P 4,046,166.95</b> |

Counting from June 30, 2004, September 30, 2004 and December 31, 2004, the end of the second, third and fourth quarters of 2004, respectively, petitioner had until June 30, 2006, September 30, 2006 and December 31, 2006, respectively, within which to file its input VAT refund claim for the said taxable quarters both in the administrative and judicial levels. Thus, petitioner's administrative claim filed on December 29, 2005<sup>22</sup> and the Petition for Review filed on April 21, 2006 fall within the two-year prescriptive period.

Proceeding on to the first requisite, it is undisputed that effective June 26, 2001, sales of generated power by generation companies achieved VAT zero-rated status by virtue of Section 4(x) in relation to Section 6 of Republic Act No. 9136 ("RA 9136") or the Electric Power Industry Reform Act of 2001 ("EPIRA"), and Rule 5, Section 6 of the Rules and Regulations to Implement Republic Act No. 9136 ("EPIRA IRR"), promulgated by the Department of 

<sup>21</sup> Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation, G.R. No. 172129, September 12, 2008

<sup>22</sup> JSFI, Jointly Stipulated Facts, par. 2, Docket, p. 185

Energy<sup>23</sup>. This was affirmed by the Court in the case of *Visayas Geothermal Power Company vs. Commissioner of Internal Revenue*<sup>24</sup>, wherein it was held that:

"...Section 6 of the EPIRA Law provides that "sales of generated power by generation companies shall be value-added tax zero-rated". Thus, effective June 26, 2001, the pertinent provisions of the Tax Code are deemed amended by the EPIRA Law by modifying the VAT rate applicable to sales of generated companies from ten (10%) percent to zero (0%) percent.

As to whether petitioner generated zero-rated sales for the subject period, it must establish the following requisites: 1) it is a generation company, and 2) it derived sales from power generation."

In its amended Quarterly VAT Returns for the second, third and fourth quarters of 2004, petitioner reported a total amount of P58,669,503.87 zero-rated sales/receipts, broken down as follows:

| <b>Exhibit</b> | <b>Taxable Year 2004</b> | <b>Zero-Rated Sales/Receipts</b> |
|----------------|--------------------------|----------------------------------|
| H              | 2nd Quarter              | P 40,162,712.49                  |
| J              | 3rd Quarter              | 13,900,377.31                    |
| L              | 4th Quarter              | 4,606,414.07                     |
| <b>Total</b>   |                          | <b>P 58,669,503.87</b>           |

As shown in the Schedule of Zero-Rated Sales<sup>25</sup> for the second, third and fourth quarters of 2004 and the supporting VAT official receipts/invoices<sup>26</sup>, the reported zero-rated sales of P58,669,503.87 represent petitioner's sales of electricity solely to Oriental Mindoro Electric Cooperative (ORMECO) for the said periods. While these documents proved that petitioner actually derived sales

<sup>23</sup> JSFI, Admitted Facts, par. 2, Docket, p. 182

<sup>24</sup> C.T.A. Case Nos. 6790 and 6838, January 18, 2007

<sup>25</sup> Exhibit "PP", Annexes C-2 to C-4

<sup>26</sup> Exhibits JJ-1 to JJ-3, JJ-1a to JJ-3a, KK-1 to KK-1a, LL-1 to LL-1a

from power generation, it, however, failed to establish that petitioner is a generation company as defined under Section 4(x) in relation to Section 6 of the EPIRA, which states:

*"SEC. 4. Definition of Terms. –*

xxx

xxx

xxx

'Generation Company' refers to any person or entity authorized by the ERC (Energy Regulatory Commission) to operate facilities used in the generation of electricity;"

Moreover, Section 4, Rule 5 of the "EPIRA IRR" provides:

*"Section. 4. Obligations of a Generation Company.*

(a) A COC<sup>27</sup> shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. 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 operation history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility."

Nowhere in the records of the case is it shown that petitioner is duly authorized by the ERC to operate facilities used in the generation of electricity. 

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<sup>27</sup> Certificate of Compliance

Petitioner did not submit its ERC registration and Certificate of Compliance. Thus, in the absence of evidence that petitioner is a generation company, all of the reported sales of P58,669,503.87 cannot qualify for VAT zero-rating under the EPIRA. Consequently, the alleged input VAT attributable thereto in the amount of P4,046,166.95 cannot be refunded.

Even assuming *arguendo*, that petitioner's sales/receipts qualify for VAT zero-rating under the EPIRA, still the input VAT claim of P4,046,166.95 cannot be granted.

Based on petitioner's amended Quarterly VAT Returns<sup>28</sup> for the second, third and fourth quarters of 2004, the input VAT claim of P4,046,166.95 was computed as follows:

|                                                     |                                             |                       |
|-----------------------------------------------------|---------------------------------------------|-----------------------|
| Total Input VAT Carried Over from Previous Quarters |                                             | P 19,859,305.31       |
| Add:                                                | Input VAT for the 2nd to 4th Quarters 2004  | 6,013,218.39          |
| Total Available Input VAT                           |                                             | P 25,872,523.70       |
| Less:                                               | Output VAT for the 2nd to 4th Quarters 2004 | 21,826,356.75         |
| <b>Total Input VAT being claimed for tax refund</b> |                                             | <b>P 4,046,166.95</b> |

The above computation shows that petitioner had an output VAT liability for the second, third and fourth quarters of 2004 in the amount of P21,826,356.75 which was deducted from the total available input tax of P25,872,523.70 leaving an excess input VAT of P4,046,166.95.

Thus, in order to be entitled to a refund of the excess input VAT of P4,046,166.95, petitioner must substantiate the total available input VAT of P25,872,523.70 representing the sum of the input VAT carried-over from previous quarters in the amount of P19,859,305.31 and input VAT incurred for the second, third and fourth quarters of 2004 in the amount of P6,013,218.39. *ea*

<sup>28</sup> Exhibits "H", "J" and "L"

As correctly found by the Court-Commissioned ICPA, out of the P6,013,218.39 input VAT reported for the second, third and fourth quarters of 2004, petitioner was able to substantiate by proper VAT invoices or official receipts only the amount of P3,251,986.50<sup>29</sup>.

As regards the input VAT carried-over from previous quarters in the amount of P19,859,305.31, petitioner failed to present VAT invoices or official receipts to substantiate such amount. Hence, the input VAT carry-over of P19,859,305.31 cannot be validly applied against petitioner's output VAT for the second, third and fourth quarters of 2004.

After applying petitioner's valid input tax credits of P3,251,986.50 against its output VAT liability for the second, third and fourth quarters of 2004, there is no excess input VAT which may be the proper subject of a claim for refund or issuance of tax credit certificate under Section 112(A) of the NIRC of 1997, as shown below:

|                                             |                                                  |                       |
|---------------------------------------------|--------------------------------------------------|-----------------------|
| Output VAT for the 2nd to 4th Quarters 2004 |                                                  | P 21,826,356.75       |
| Less:                                       | Valid Input VAT for the 2nd to 4th Quarters 2004 | 3,251,986.50          |
| <b>VAT Still Payable</b>                    |                                                  | <b>P18,574,370.25</b> |

**WHEREFORE**, petitioner's claim for refund or issuance of tax credit certificate is hereby **DENIED** due to insufficiency of evidence.

**SO ORDERED.**

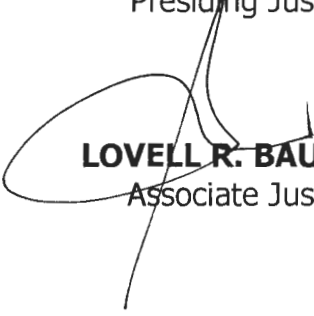
  
**CAESAR A. CASANOVA**  
Associate Justice

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<sup>29</sup> No. 1, Findings and Observations, page 4, Exhibit "PP"

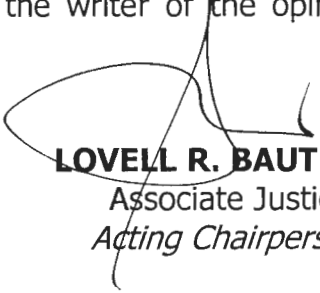
WE CONCUR:

(On Leave)  
**ERNESTO D. ACOSTA**  
Presiding Justice

  
**LOVELL R. BAUTISTA**  
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.

  
**LOVELL R. BAUTISTA**  
Associate Justice  
*Acting 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.

  
**JUANITO C. CASTANEDA, JR.**  
Acting Presiding Justice