

REPUBLIC OF THE PHILIPPINES  
*Court of Tax Appeals*  
QUEZON CITY

**EN BANC**

**COMMISSIONER OF INTERNAL  
REVENUE,**

Petitioner,

**CTA EB NO. 1176**  
(CTA Case No. 8435)

*Present:*

- versus -

**DEL ROSARIO, PJ,  
CASTAÑEDA, JR.,  
BAUTISTA,  
UY,  
CASANOVA,  
FABON-VICTORINO,  
MINDARO-GRULLA,  
COTANGCO-MANALASTAS, *and*  
RINGPIS-LIBAN, JJ.**

**FABTECH EXPORT  
INDUSTRIES, INC.,**

Respondent.

Promulgated:

JAN 28 2015

X- -----  - 2:12 p.m. - X

**DECISION**

***DEL ROSARIO, PJ:***

This is a Petition for Review filed on July 6, 2014 by the Commissioner of Internal Revenue (CIR) seeking the reversal of the Decision dated February 18, 2014 and Resolution dated April 30, 2014 rendered by the Second Division<sup>1</sup> of this Court in CTA Case No. 8435, entitled *Fabtech Export Industries, Inc., vs. Commissioner of Internal Revenue*, which granted the Petition for Review filed by Fabtech Export Industries Inc. and cancelled the Formal Letter of Demand and Formal Assessment Notice No. 56/2007 dated April 11, 2011.

<sup>1</sup> Composed of Senior Associate Justice Juanito C. Castañeda as Chairperson, Associate Justice Caesar A. Casanova and Associate Justice Amelia R. Cotangco-Manalastas.



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The dispositive portions of the assailed Decision and Resolution read, as follows:

**Decision dated February 18, 2014:**

**“IN VIEW THEREOF**, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Formal Letter of Demand, Details of Discrepancies and Audit Results/Assessment Notices No. 56/2007, all dated April 11, 2011, assessing petitioner for deficiency value-added tax and compromise penalty for taxable year 2007, in the total amount of ₱3,190,514.96, inclusive of interest, 25% surcharge and compromise penalty, are hereby **CANCELLED** and **WITHDRAWN**.

**SO ORDERED.”**

**Resolution dated April 30, 2014:**

**“WHEREFORE**, respondent’s **“Motion for Reconsideration (of the Decision dated 18 February 2014)”** is hereby **DENIED** for lack of merit.

**SO ORDERED.”**

**THE FACTS**

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), authorized to review protests on deficiency tax assessment based on Section 3.1.5 of Revenue Regulations No. 12-99 (RR 12-99), implementing Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, with office address at the 5<sup>th</sup> Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.<sup>2</sup>

Respondent Fabtech Export Industries, Inc. (FEI), a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, is primarily engaged in the manufacturing of goods, such as foodservice equipment, utensils and architectural designs, and trading the same on wholesale/retail basis, with principal place of business located at Block 6A Lot 1-A Filinvest Technology Park, Calamba City, Laguna.<sup>3</sup>

On September 11, 2008, the BIR, through Revenue Region No. 9, San Pablo City, issued Letter of Authority<sup>4</sup> (LOA) No. 200800007920, for the examination of FEI’s books of accounts and other accounting records for all

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<sup>2</sup> *Rollo*, p. 23.

<sup>3</sup> *Rollo*, pp. 22-23.

<sup>4</sup> Exhibit “J”, *Division Docket*, p. 348.





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internal revenue taxes for calendar year 2007.<sup>5</sup> The said LOA was revalidated on January 20, 2009<sup>6</sup> and a Post Reporting Notice<sup>7</sup> was issued on January 29, 2010 for deficiency Value-Added Tax (VAT), deficiency withholding tax and compromise penalty in the aggregate amount of ₱3,114,471.15.

In addition to LOA No. 200800007920, petitioner through BIR Letter Notice Task Force – National Office (BIR, LN Task Force) issued LOA No. 2009 00010290<sup>8</sup> dated May 11, 2010, for the examination of FEI's books of accounts and other accounting records for income tax, VAT and withholding tax issues per LN No. 056 TRS 07-00-00014 and the corresponding preprocessed data under TRS for taxable year 2007. Subsequently, petitioner issued a Notice for Informal Conference<sup>9</sup> and Preliminary Assessment Notice.<sup>10</sup>

On February 18, 2011, FEI received a Final Assessment Notice (FAN)<sup>11</sup> dated January 24, 2011 pursuant to LOA No. 2009 00010290 and Letter Notices 056-TRS-07-00-00014 issued by petitioner (BIR, LN Task Force), for deficiency VAT, in the amount of ₱16,732,142.72 and for deficiency income tax, in the amount of ₱266,921.85.

On March 3, 2011, FEI filed its formal protest<sup>12</sup> against the FAN dated January 24, 2011, pursuant to Section 228 of the 1997 NIRC. On May 11, 2011, petitioner (BIR, LN Task Force) sent a letter<sup>13</sup> to FEI informing the withdrawal and cancellation of the FAN, dated January 24, 2011.

Despite the cancellation of the FAN dated January 24, 2011, petitioner, through BIR, Revenue Region No. 9, San Pablo City, issued the subject Formal Letter of Demand (FLD)<sup>14</sup> dated April 11, 2011, Details of Discrepancies and Audit Results/Assessment Notice for deficiency VAT and compromise penalty, in the amount of ₱3,190,514.96. The FAN dated April 11, 2011 was received by FEI on May 11, 2011.

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<sup>5</sup> Rollo, pp. 23-24.

<sup>6</sup> Exhibit "K", *Division Docket*, p. 349.

<sup>7</sup> Exhibit "L", *Division Docket*, pp. 350-353.

<sup>8</sup> Exhibit "M", *Division Docket*, p. 354.

<sup>9</sup> Exhibit "N", *Division Docket*, p. 355.

<sup>10</sup> Exhibit "O", *Division Docket*, pp. 356-358.

<sup>11</sup> Exhibit "P", *Division Docket*, pp. 359-361.

<sup>12</sup> Exhibit "T", *Division Docket*, pp. 364-374.

<sup>13</sup> Exhibit "Z", *Division Docket*, p. 382.

<sup>14</sup> Exhibit "V", *Division Docket*, pp. 376-379.



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On June 9, 2011, FEI filed its formal protest<sup>15</sup> against the subject FLD, pursuant to Section 228 of the NIRC of 1997, as amended.

The CIR failed to act on FEI's protest within the 180-day period from August 2, 2011, the date when FEI submitted documents in support of its protest.<sup>16</sup>

Hence, on February 28, 2012, FEI filed a Petition for Review<sup>17</sup> before the Court in Division.

On May 8, 2012, the CIR filed her Answer<sup>18</sup> raising special and affirmative defenses which are summarized hereunder:

- a) The deficiency tax assessment is rendered final, executory and unappealable for FEI did not timely appeal the inaction of the CIR from the lapse of the 180-day period from the filing of FEI's formal protest on June 9, 2011;
- b) The FAN was valid and binding as it was issued within the prescriptive period for assessments and that assessments are presumed correct and made in good faith;
- c) The CIR observed due process in the issuance of the Letter of Authority and conduct of its examination;
- d) As a PEZA-registered entity, FEI is only exempt from the payment of income tax; hence, liable to pay VAT;
- e) Due process of law was accorded to FEI relative to the issuance of the FAN and Formal Letter of Demand; and,
- f) The FAN that was withdrawn was pursuant to a letter notice issued by the LN Task Force and not from the Letter of Authority No. 00007920.

After the pre-trial has been terminated, trial ensued during which both parties presented their respective testimonial and documentary evidence. On August 30, 2013, the case was deemed submitted for decision<sup>19</sup> after FEI filed its Memorandum<sup>20</sup> on August 2, 2013, *sans* petitioner's memorandum.

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<sup>15</sup> Exhibit "AA", *Division Docket*, pp. 383-394.

<sup>16</sup> Exhibit "BB", *Division Docket*, pp. 395-398.

<sup>17</sup> Petition for Review dated February 27, 2012 docketed as CTA Case No. 8435, *Division Docket*, pp. 6 to 38.

<sup>18</sup> Answer dated May 8, 2012, *Division Docket*, pp. 163 to 184.

<sup>19</sup> Resolution, *Division Docket*, p. 499.

<sup>20</sup> *Division Docket*, pp. 480 to 494.



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On February 18, 2014, the Court in Division issued the assailed Decision granting FEI's Petition for Review. Aggrieved, on March 6, 2014, the CIR filed a Motion for Reconsideration, which was denied for lack of merit.

Hence, on June 6, 2014, the CIR filed the subject Petition for Review praying that the assailed Decision and Resolution be set aside and judgment be rendered declaring respondent liable for deficiency VAT and compromise penalty for taxable year 2007, in the amount of **Three Million, One Hundred Ninety Thousand Five Hundred Fourteen Pesos and Ninety-Six Centavos** (P3,190,514.96) plus twenty five percent (25%) surcharge and twenty percent (20%) deficiency interest and delinquency interest, pursuant to Sections 248 and 249 of the NIRC of 1997, as amended.

On July 22, 2014, without necessarily giving due course to the Petition for Review, the Court *En Banc* issued a Resolution<sup>21</sup> ordering FEI to file its comment on the Petition for Review, within ten (10) days from receipt thereof. On August 14, 2014, FEI filed its Comment (To the Petition for Review).

In a Resolution<sup>22</sup> dated September 8, 2014, the Court *En Banc* gave due course to the Petition for Review and ordered the parties to file their simultaneous memoranda within thirty (30) days from notice, afterwhich the petition shall be deemed submitted for decision.

Considering petitioner's Manifestation<sup>23</sup> filed on October 15, 2014 stating that petitioner is adopting her Petition for Review filed on June 6, 2014 as her memorandum, and with the filing of respondent's Memorandum on October 20, 2014, the petition was deemed submitted for decision on November 13, 2014.

## ISSUES

Petitioner raised the following issues for the Court *En Banc*'s resolution:

- (1) Whether or not petitioner's assessment of respondent's deficiency VAT liability was undertaken in accordance with

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<sup>21</sup> *Rollo*, pp. 125-126.

<sup>22</sup> *Rollo*, pp. 155-156.

<sup>23</sup> *Rollo*, p. 157.

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law, jurisprudence, as well as administrative rules and regulations; and,

- (2) Whether or not petitioner fully observed the due process requirements when she issued the preliminary assessment notice and sent it to respondent through registered mail.<sup>24</sup>

Being inter-related, the foregoing issues will be resolved jointly.

**PETITIONER'S ARGUMENTS**

Petitioner argues that there was no error or illegality on the manner she assessed respondent's deficiency tax liability; that she observed and fully complied with the procedural due process requirements in issuing the assessment; that she notified respondent of the assessment by issuing a PAN dated February 25, 2011 and transmitted the same through registered mail. Pursuant to Section 3(v) of Rule 131 of the Revised Rules of Court, the PAN was presumed delivered to and received by respondent. Petitioner further argues that it is the sending, release, mailing or transmittal of the PAN which determines compliance with procedural due process.

**RESPONDENT'S COUNTER-ARGUMENTS**

Respondent counters that the assailed FLD is void for failure to comply with the prescribed requisites for a valid assessment. Respondent invokes the principle under Section 228 of the NIRC of 1997, as amended which explicitly provides that the taxpayer should first be notified in writing of the law and facts upon which the assessment is made; otherwise, the assessment is void.

Respondent insists that it did not receive a Notice of Informal Conference, PAN and FAN in connection with LOA No. 200800007920 from petitioner, through Revenue Region No. 9, San Pablo City. The non-issuance of the Notice of Informal Conference, PAN and FAN prior to the issuance of the FLD violated respondent's right to due process.

Moreover, though petitioner alleged that she issued a PAN and sent it through registered mail, petitioner failed to present evidence to prove the existence, due issuance, and receipt of the alleged PAN. The CIR merely attached an alleged photocopy of the PAN and an alleged mailing envelope

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<sup>24</sup> Petition for Review dated June 6, 2014, *Rollo*, p. 11.



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containing the said PAN to the present Petition for Review. Respondent posits that the Court should not consider any evidence which has not been formally offered.

Finally, respondent avers that the issuance of the FLD violated its right to due process because petitioner still issued the same notwithstanding the previous findings of no liability made by BIR, LN Task Force, pursuant to LOA No. 2009 00010290 covering the same taxable year and internal revenue taxes.

### RULING OF THE COURT *EN BANC*

Section 228 of the NIRC of 1997, as amended, provides:

**“SEC. 228. Protesting of Assessment.** - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: provided, however, That a preassessment notice shall not be required in the following cases:

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**The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.**

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.

Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

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Corollary thereto, Section 3.1.2 of RR 12-99<sup>25</sup> provides:

**“3.1.2 Preliminary Assessment Notice (PAN).** – If after review and evaluation by the Assessment Division or by the Commissioner or his duly

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<sup>25</sup> Dated September 6, 1999.

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authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, **the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and law, rules and regulations, or jurisprudence on which the proposed assessment is based.....** If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

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Pursuant to the afore-quoted provisions, the taxpayer must be informed in writing of the facts and the law on which the assessment is made through the issuance and receipt of the PAN.

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,<sup>26</sup> the Supreme Court held that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the due process requirement in the issuance of a deficiency tax assessment, the absence of which renders nugatory any assessment made by the tax authorities. The use of the word “shall” in subsection 3.1.2 describes the mandatory nature of the service of a PAN.

In the case at bar, respondent confirms that it received a Notice of Informal Conference, PAN and FAN, pursuant to LOA No. 2009 00010290 issued by BIR, LN Task Force. Respondent filed a protest against the said FAN and petitioner granted the protest and cancelled the said assessment.

In connection with LOA No. 200800007920 issued by Revenue Region No. 9, San Pablo City, respondent, however, vehemently denies receipt of the corresponding PAN. On the other hand, petitioner insists that the PAN dated February 25, 2011 was sent to petitioner by registered mail.

Under the afore-quoted Section of RR No. 12-99, service of the PAN to the taxpayer may be made by at least registered mail. If the PAN is served by registered mail, and the original was not returned to the BIR, the presumption is that the taxpayer received the said PAN in the regular course of mail, pursuant to Section 3 (v), Rule 131 of the Rules of Court.<sup>27</sup>

<sup>26</sup> G.R. No. 185371, December 8, 2010.

<sup>27</sup> “Sec. 3. Disputable presumptions. – The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:



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The facts to be proven in order to give rise to aforesated disputable presumption are: (a) that the letter was properly addressed with postage prepaid; and, (b) that it was mailed. Once these facts are established, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail.<sup>28</sup>

In *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*,<sup>29</sup> the Supreme Court ruled that while a mailed letter is deemed received by the addressee in the ordinary course of mail, this remains merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee, thus:

“In *Protector’s Services, Inc. v. Court of Appeals*, this Court ruled that when a mail matter is sent by registered mail, there exists a presumption, set forth under Section 3(v), Rule 131 of the Rules of Court, that it was received in the regular course of mail. The facts to be proved in order to raise this presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. **While a mailed matter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.**

In the present case, petitioner denies receiving the assessment notice, and the respondent was unable to present substantial evidence that such notice was, indeed, mailed or sent by the respondent before the BIR’s right to assess had prescribed and that said notice was received by the petitioner. The respondent presented the BIR record book where the name of the taxpayer, the kind of tax assessed, the registry receipt number and the date of mailing were noted. The BIR records custodian, Ingrid Versola, also testified that she made the entries therein. Xxx

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In this case, the entries made by Ingrid Versola were not based on her personal knowledge as she did not attest to the fact that she personally prepared and mailed the assessment notice. Nor was it stated in the transcript of stenographic notes how and from whom she obtained the

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(v) That a letter duly directed and mailed was received in the regular course of the mail;”

<sup>28</sup> Gonzalo P. Nava vs. Commissioner of Internal Revenue, G.R. No. L-19470, January 30, 1965.

<sup>29</sup> G.R. No. 157064, August 7, 2006, citing *Protector’s Services, Inc. vs. Court of Appeals*, 386 Phil. 611, 623 (2000).



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pertinent information. Moreover, she did not attest to the fact that she acquired the reports from persons under a legal duty to submit the same. Hence, Rule 130, Section 44 finds no application in the present case. Thus, the evidence offered by respondent does not qualify as an exception to the rule against hearsay evidence.

Furthermore, independent evidence, such as the registry receipt of the assessment notice, or a certification from the Bureau of Posts, could have easily been obtained. Yet, respondent failed to present such evidence.” (*Emphasis supplied*)

It bears stressing that respondent vigorously denied receiving the PAN.<sup>30</sup> Respondent insisted that aside from receiving a copy of LOA No. 200800007920, it only received a Revalidation Notice, dated January 20, 2009 and a Post Reporting Notice, dated January 29, 2010 prior to the receipt of the FLD.

On the other hand, petitioner failed to present substantial evidence that the PAN was indeed mailed or sent and that the same was received by respondent. Records reveal that petitioner merely alleged that the PAN dated February 25, 2011 was sent to respondent by registered mail. Petitioner, however, failed to present independent evidence, such as the Registry Receipt or a certification from the Bureau of Posts, which could have easily been obtained. It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof.<sup>31</sup>

As aptly ruled by the Second Division in the assailed Resolution:

“It is clear from the foregoing that even the mere fact of mailing, release or sending of the notice must be proved with clear and convincing evidence and not just bare allegations of such facts.

The records of this case bear out that respondent (herein petitioner) failed to present any evidence to prove that the Preliminary Assessment Notice was indeed issued against petitioner (herein respondent) and that the same was sent by registered mail. Further, respondent has not even forwarded to this Court a copy of the Preliminary Assessment Notice in connection with the Letter of Authority No. 200800007920. As pronounced in the assailed Decision, respondent only issued PAN against petitioner in connection with Letter of Authority No. 2009 00010290, to wit:

‘ xxx. It is worthy to note that the Preliminary Assessment Notice attached in the record was issued in connection with the Letter of Authority No. 2009 00010290.’

<sup>30</sup> *Division Docket*, pp. 486 to 489.

<sup>31</sup> *Domingo vs. Robles, et al.*, G.R. No. 153743, March 18, 2005.



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Since respondent cannot prove the existence of the PAN or the fact that it was mailed, released or sent to petitioner, it is clear that respondent violated the required due process on the issuance of the assessment notice.”

Furthermore, the Court cannot give probative value to the photocopy of the alleged PAN and alleged mailing envelope attached to the instant Petition for Review considering that the same were not formally offered during trial, in violation of Section 34, Rule 132 of the Revised Rules of Court.

Interestingly, a careful perusal of the BIR records shows that the original copy of the mailing envelope<sup>32</sup> is tucked inside the said folder, still sealed and unopened. This clearly shows that the PAN dated February 25, 2011 contained inside the envelope was not received by the respondent.

For failure of petitioner to prove that the PAN was mailed or sent to respondent and that the said PAN was received by respondent and considering further that the original copy of the envelope containing the PAN is in the BIR records, the Second Division of this Court did not err in ruling that no PAN was issued against respondent. In the absence of a valid PAN, respondent’s right to due process was violated, rendering the assessment null and void.

Well settled is the rule that a void assessment bears no fruit and it cannot give rise to an obligation to pay deficiency taxes. Consequently, there is no factual and legal basis for the CIR to formally demand the payment or to collect the deficiency taxes which are not covered by a valid PAN.

Finding no reversible error, the Court *En Banc* affirms the assailed Decision dated February 18, 2014 and Resolution dated April 30, 2014.

**WHEREFORE**, premises considered, the present Petition for Review filed by the Commissioner of Internal Revenue is hereby **DENIED** for lack of merit. Accordingly, the assailed Decision dated February 18, 2014 and Resolution dated April 30, 2014 of the Second Division are hereby **AFFIRMED** *in toto*.

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<sup>32</sup> Annex “E”, Petition for Review, *Rollo*, p. 63.

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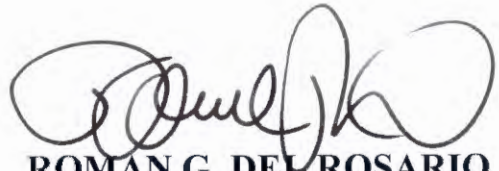
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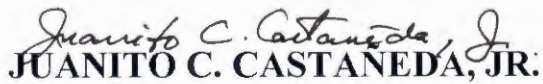
**SO ORDERED.**



**ROMAN G. DEL ROSARIO**

Presiding Justice

**WE CONCUR:**



**JUANITO C. CASTANEDA, JR.**

Associate Justice



**LOVELL R. BAUTISTA**

Associate Justice



**ERLINDA P. UY**

Associate Justice



**CAESAR A. CASANOVA**

Associate Justice



**ESPERANZA R. FABON-VICTORINO**

Associate Justice



**CIELITO N. MINDARO-GRULLA**

Associate Justice



**AMELIA R. COTANGCO-MANALASTAS**

Associate Justice



**MA. BELEN M. RINGPIS-LIBAN**

Associate Justice

**CERTIFICATION**

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the conclusion in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.



**ROMAN G. DEL ROSARIO**

Presiding Justice