REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

THE COMMISSIONER OF CUSTOMS and THE UNDERSECRETARY OF THE DEPARTMENT OF FINANCE, Petitioners,	**CTA EB No. 825** (CTA Case No. 7671)
-versus-	Present: Acosta, *P.J.*, Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, *JJ.*
GOLD MARK SEA CARRIERS, INC. as the registered owner of the Barge "Cheryl Ann," Respondent.	**Promulgated:** DEC 28 2012 3:30pm

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D E C I S I O N

CASTAÑEDA, JR., *J.*:

This is a Petition for Review filed by petitioners Commissioner of Customs (COC) and Undersecretary of the Department of Finance before the Court of Tax Appeals (CTA) *En Banc* assailing the Decision[1] dated February 17, 2011 and the

[1] *Rollo*, pp. 251-270. Penned by Associate Justice Lovell R. Bautista with Associate Justice Olga Palanca-Enriquez and Associate Justice Amelia R. Cotangco-Manalastas, concurring.

Resolution[2] dated August 23, 2011 promulgated by the CTA Third Division ordering petitioner to immediately release the barge "Cheryl Ann" to respondent.

THE FACTS

The facts of the case as found by the CTA Third Division are as follows: [3]

> On August 23, 2006, M/T "Jacob 1," towing barge "Cheryl Ann," containing used oil from the Republic of Palau, entered the Port of Surigao. Upon derogatory information that said tugboat/barge contained prohibited cargoes, the vessels were detained by the Philippine Coast Guard upon the request of the District Collector of the Port of Surigao.
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> Finding the shipment of used oil without necessary permits from the concerned government agency, a Warrant of Seizure and Detention, docketed as S.I. No. 01-2006, was issued on September 4, 2006 against the barge "Cheryl Ann" and its cargo of used oil. A Supplemental Warrant of Seizure and Detention, docketed as S.I. No. 01-2006-A for the seizure of M/T "Jacob 1," was issued on September 12, 2006 for the importation, conveyance and/or transportation of unlawful materials in violation of Section 2530 of the TCCP, as amended.
>
> Upon agreement of the parties, the case against M/T "Jacob 1" and barge "Cheryl Ann" was separated from the case against the cargo and its owner/s, docketed as S.I. No. 2006-A, to distinguish/separate the issues raised against the tugboat and barge from the shipment of used oil.
>
> During the hearing, the government in essence presented evidence for the detention of the aforesaid vessels and cargo for failure of the claimants to present the necessary permits and clearances required in bringing such cargo of oil into the country.
>
> The claimants, on the other hand, interposed that:
>
> a. OSM Shipping Phils., Inc., is a legitimate private corporation and its vessel M/Tug Jacob 1 has complied with all the necessary legal requirements as a common carrier to operate towing services to any port in the Philippines for a period of ten (10) years.
> b. OSM entered into a Towhire Agreement with Fuel Zone Filipinas Corporation for towing services stipulating, among others, that "the Hirer shall arrange at his own cost and provide the Tugowner all necessary licenses, authorizations and permits required."
> c. For this engagement, M/T Jacob 1 is covered by a Special Permit from MARINA.
> d. The cargo was destined and intended for Malaysia.

[2] *Rollo*, pp. 79-83.
[3] *Rollo*, pp. 60-67.

e. The anchorage of M/T Jacob 1 at the Port of Surigao was caused by the need for "emergency bunkering" as it was running low on fuel, food provisions and suffering mechanical problem.

f. OSM properly notified the Port Authorities and concerned agencies of the arrival and anchorage of Jacob 1 at the Surigao City wharf for "emergency bunkering" and requested for assistance to facilitate and expedite its Entrance and Clearance formalities.

g. M/T Jacob 1 was given proper clearance by the Immigration Officer in Surigao City, the Bureau of Quarantine and other pertinent government agencies to depart for Manila or Cebu for repairs as these cannot be done in Surigao.

After due hearing, the District Collector of the Port of Surigao issued an Order dated December 18, 2006, the dispositive portion of which reads, as follows:

> WHEREFORE, premises considered, it is hereby ordered and decreed that the assailed Supplemental [W]arrant of Seizure and Detention issued against the tugboat M/Tug "JACOB 1" and the barge "CHERYL ANN" be DISMISSED for lack of legal and factual bases and that subject vessels be RELEASED to their respective registered owners, OSM Shipping Phils., Inc., for M/T "JACOB 1" and Gold Mark Sea Carriers, Inc., for barge "CHERYL ANN," upon proper identification, compliance with existing rules and regulations and subject to final approval of the Commissioner of Customs pursuant to Section 2313 of the Tariff and Customs Code of the Philippines, as amended.

On April 13, 2007, a Disposition Form with the subject "Republic of the Philippines v. Motor Tugboat Jacob 1 and Barge Cheryl Ann," prepared by Atty. Vener S. Baquiran of the Appellate Division, Legal Service; signed by Atty. Balmyrson M. Valdez of the Legal Service; noted with concurrence by Atty. Reynaldo V. Umali, Deputy Commissioner RCMG; and approved by Commissioner Napoleon L. Morales, recommended as follows:

> APPROVE the Decision of the District Collector of the Port of Surigao dated December 18, 2006, ordering the DISMISSAL of the Supplemental Warrant of Seizure and Detention issued against M/Tug "Jacob 1" and the RELEASE of the subject vessel to its respective registered owner, OSM Shipping Phils., Inc., for M/T "Jacob 1" upon proper identification, compliance with existing rules and regulations.
>
> REVERSE the Decision of the District Collector, Port of Surigao ordering the Dismissal of the Supplemental Warrant of Seizure and Detention issued against subject vessel and its release to its registered owner and instead, ORDER the immediate Forfeiture of the subject vessel.
>
> If in accord, attached is the Indorsement to the Secretary of Finance for signature.

On May 9, 2007, the Department of Finance through Undersecretary Gaudencio A. Mendoza, Jr., issued the 3rd indorsement, to wit:

> Premises considered, the within Decision of the District Collector, Port of Surigao, dated December [1]8, 2006, is hereby MODIFIED as recommended by that Bureau. Accordingly, the dismissal of the Supplemental WSD against the Tugboat Jacob 1 and its release to its registered owner OSM Shipping Phils., Inc., is hereby AFFIRMED. However, with respect to the Barge Cheryl Ann, registered to Gold Mark Sea Carriers, Inc., the Decision of the District Collector, Port of Surigao, is hereby REVERSED. Accordingly, the Barge Cheryl Ann is hereby forfeited in favor of the government to be disposed of in accordance with law pursuant to R.A. 7651, subject to the usual accounting, auditing rules and regulations on the matter.

On May 17, 2007, Commissioner Napoleon L. Morales issued the 4th Indorsement, to quote:

> Respectfully forwarded to the District Collector, Port of Surigao, the within case folder in Surigao S.I. No. 01-2006-A, Republic of the Philippines vs. Motor Tugboat Jacob 1 and Barge Cheryl Ann, inviting attention to the last paragraph of the herein preceding 3rd Indorsement dated May 9, 2007 of Undersecretary Gaudencio A. Mendoza, Jr., Legal and Revenue Operations Group, which is quoted hereunder, to wit:
>
> xxx xxx xxx
>
> For his information, appropriate action and implementation.

Thus, on August 13, 2007, petitioner filed the present Petition for Review.

In their Answer, respondents raised the following Special and Affirmative Defenses, *viz.*:

6. The admitted antecedent/factual background of the case is summarized by the Bureau of Customs (BoC) in its April 13, 2007 Disposition Form, thus:

xxx xxx xxx

6. On April 13, 2007, the appellate division of the BoC made the following observation and recommendation, thus: (sic)

xxx xxx xxx

7. The foregoing recommendation by the appellate division of the BoC was concurred in by the respondent BoC Commissioner.

8. On May 9, 2007, the Department of Finance issued a 3rd Indorsement which pertinently reads:

xxx xxx xxx

9. On May 17, 2007, respondent BoC Commissioner issued a 4th Indorsement which reads:

xxx xxx xxx

10. Admittedly, the instant petition is governed by the following provisions of R.A. Nos. 1125 and 9282 which read:

> *"Who May [A]ppeal; Mode of Appeal; Effect of Appeal. — Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts may file an appeal with the CTA within thirty (30) days after the receipt of such decision xxx*
>
> ***Appeal shall be made by filing a petition for review*** *under a procedure analogous to that provided for under Rule 42 of the 1997 Rules of Civil Procedure* ***with the CTA within thirty (30) days from the receipt of the decision or ruling*** *or in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon."*
>
> (Petition, pp. 1-3; Emphasis supplied)

11. Likewise, the Tariff and Customs Code of the Philippines (TCCP) provides that a taxpayer has the remedy of appeal to the Court of Tax Appeals within (30) days from the adverse decision of the Commissioner of Customs (please see Secs. 301, 2315 and 2402 of the TCCP).

12. Said thirty (30)-day period within which to appeal is jurisdictional (***Pangasinan Transportation vs. Balquera***, 107 Phil. 975 [1960]) and non-extendible (***Chan Kian vs. Court of Appeals***, 105 Phil. 904 [1959]). The right to appeal is a mere statutory privilege, and not being a natural right or a part of due process, the right to appeal may be exercised only in the manner and in accordance with the rules provided therefore (***El Reyno Homes, Inc. vs. Ong***, 397 SCRA 563 [2003]).

13. In the instant case, no less than petitioner itself stated that it received copies of the questioned Indorsements-Decision on July 12, 2007 and yet the petition was filed only on August 13, 2007, or two (2) days late. Thus:

> *"6. Through a letter from the District Collector of Customs for the Port of Surigao dated July 9, 2007 received by Petitioner itself on July 12, 2007, and to the undersigned counsel only on July 27, 2007, Petitioner became cognizant of the thereto attached 3rd Indorsement dated 9 May 2007 issued by Finance Undersecretary (Legal and Revenue Operations Group) Gaudencio A. Mendoza and 4th Indorsement dated May 17, 2007 issued by Customs Commissioner Napoleon L. Morales."*
>
> (Petition, p. 3; Underscoring * supplied)

14. As borne out by the records, there is nothing to show that petitioner participated in the proceeding below nor has it been represented by a counsel, much less by the counsel on record.

15. Significantly, petitioner cannot validly invoke that "notice to counsel is notice to client" because in the administrative case, which it did not participate in, it was not represented by a counsel.

16. For all intents and purposes, petitioner's appeal to this Honorable Court should have been filed within the 30-day period from July 12, 2007 or until August 11, 2007 in order to toll its finality.

17. Unfortunately, petitioner slept on its rights and filed the instant appeal only on August 13, 2007 or two (2) days after the questioned decision and/or ruling has become final and executory.

18. Since there was no appeal timely interposed by petitioner to this Honorable Court from receipt of said final decision/ruling, the same is now executory (***Mambulao Lumber Co. vs. Republic***, 132 SCRA 1 [1984]), and petitioner is now barred from disputing the correctness of the same (***Republic vs. Court of Appeals***, 149 SCRA 351 [1987]). The government's right becomes absolute upon the expiration of the reglementary period to appeal (***Callanta vs. Office of the Ombudsman***, 285 SCRA 648 [1998]).

19. The questioned ruling/decision having attained finality are no longer appealable, hence beyond the appellate jurisdiction of the Honorable Tribunal.

After several resetting of the Pre-Trial Conference, at the instance of both parties, the Court granted the oral motion of petitioner's counsel to declare respondents in default for failure of respondent's counsel to appear at the pre-trial conference. The Court affirmed the said order in a Resolution dated June 4, 2009. Thus, petitioner was allowed to present its evidence ex-parte.

The evidence adduced *ex-parte*, consisted of the testimony of petitioner's witness, Mr. Emmanuel Zapanta, and *Exhibits "A" to "E."*

On February 18, 2010, the Court considered the case submitted for decision, considering that petitioner filed its Memorandum 11 on July 21, 2009, while respondent filed their Manifestation and Motion in Lieu of Memorandum (Re: Recovery of the Missing Tanker/Barge Cheryl Ann), on January 4, 2010.

On February 17, 2011, the CTA Third Division rendered a Decision granting the Petition for Review. The dispositive portion of the assailed Decision reads as follows:

WHEREFORE, the Petition for Review is hereby **GRANTED.** Accordingly, the 3rd Indorsement dated May 9, 2007 issued by the

Department of Finance, Undersecretary of the Legal and Revenue Operations Group, Gaudencio A. Mendoza, and the 4th Indorsement dated May 17, 2007 issued by the Bureau of Customs, Commissioner Napoleon L. Morales, insofar as barge "Cheryl Ann" is concerned, are hereby **REVERSED** and **SET ASIDE.** The respondent Commissioner of Customs is hereby **ORDERED** to **IMMEDIATELY RELEASE** the barge "Cheryl Ann" to petitioner.

SO ORDERED. [4]

Aggrieved, petitioners filed a Motion for Reconsideration on March 10, 2011. The CTA Third Division issued a Resolution on August 23, 2011, the dispositive portion reads as follows:

WHEREFORE, premises considered, the Motion for Reconsideration filed by respondent is hereby **DENIED** for lack of merit.

SO ORDERED.[5]

Hence, this Petition for Review *En Banc.*

THE ISSUES

I. Whether or not the Third Division of this Honorable Court correctly relied on the antecedents involving the release of the supposed principal tugboat M/T Jacob I.

II. Whether or not the Third Division of this Honorable Court rightfully considered the tugboat and the towed barge as principal and accessory, respectively.

III. Whether or not the Third Division of this Honorable Court correctly granted the petition in CTA Case No. 7671, and rightfully reversed the 3rd Indorsement dated May 9, 2007 issued by the Finance Undersecretary for Legal and Revenue Operations Group and the 4th Indorsement dated May

[4] *Rollo*, p. 269.
[5] *Rollo*, p. 83.

17, 2007 issued by the Commissioner of Customs insofar as the barge "Cheryl Ann" is concerned.

THIS COURT'S RULING

The key issue to be decided by this Court is whether or not the barge CHERYL ANN should be forfeited in favor of the government.

It is undisputed fact that M/Tug JACOB I was towing barge CHERYL ANN containing used oil from the Republic of Palau when it entered the Port of Surigao.[6] The vessels were detained and seized upon derogatory information that said tugboat/barge contained prohibited cargoes. The District Collector, Port of Surigao ordered the release of both M/Tug JACOB 1 and the barge CHERYL ANN.[7] However, in the Disposition Form issued by the Legal Service of the Bureau of Customs (BOC), the Decision of the District Collector, Port of Surigao was modified. The tugboat M/Tug JACOB 1 was released while the barge CHERYL ANN was forfeited.[8] This was later on affirmed in the 3rd Indorsement dated May 9, 2007 issued by the Department of Finance (DOF).[9]

Petitioners argued that the CTA Third Division erred when it released the barge CHERYL ANN upon reliance on the antecedents involving the release of the principal tugboat M/T Jacob I. Petitioners challenged the application of the legal principle "accessory follows the principal." Furthermore, petitioners maintained that the Implementing Rules and Regulations of Republic Act (RA) 6969,

[6] Division Docket, Petition, p. 4.
[7] *Ibid.* p. 5.
[8] Exhibit "A", Annex "E"
[9] Exhibit "A", Annex "C"

otherwise known as "Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990" require that waste transporters are required to register and comply with all the requirements imposed by the Department of Environment and Natural Resources (DENR) relative to the transport of hazardous wastes, such as used oil. Hence, respondent's violation of RA 6969 should result to forfeiture of the barge.

In the Comment and Memorandum, respondent countered that: *first*, issues not raised in the answer cannot be raised for the first time after judgment on the merits has been rendered. It is too late for petitioners to invoke the applicability of RA 6969; *second*, respondent did not commit any illegal importation or an attempt thereof to commit the same.

We rule for the respondent, hence, barge CHERYL ANN should be released.

Petitioners failed to show that the CTA Third Division committed a reversible error.

We find no cogent reason to reverse the findings and conclusion of the CTA Third Division in the assailed ruling. The barge CHERYL ANN has been established as a vessel with a non-propelled engine make.[10] At the time the vessels were apprehended, barge CHERYL ANN was being towed by the MT Jacob 1. We agree on the findings of the CTA Third Division that the barge CHERYL ANN is a mere accessory of the principal MT Jacob 1. This being the

[10] Certificate of Vessel Registry, "Exhibit C", p. 244.

case, the ruling accorded MT Jacob 1 should be similarly accorded to barge CHERYL ANN. We quote the pertinent portion of the assailed Decision:

> Evident from the Towhire Agreement referred to in the Disposition Form, entered into by and between OSM Shipping Phils., Inc., the owner of M/T "Jacob 1," and petitioner, as the owner of the barge "Cheryl Ann," categorized as a contract of affreightment, that the owner of the tugboat mans the vessel with its own people and retains the possession, command and navigation of said the ship. **The "Cheryl Ann," being a non-motorized vessel, and only towed by "Jacob 1," malting the tugboat the principal and the barge a mere accessory, necessarily, has no means of controlling its route or destination.**
>
> With the above circumstances, the Court finds the element of intent on the part of the barge "Cheryl Ann" wanting.
>
> **Considering that in the Disposition Form, the aforequoted Section 2530 of the TCCP will not apply to M/T "Jacob 1" — the principal — which retains the possession, command and navigation thereto, engaged to tow the barge "Cheryl Ann" — the accessory — which is a non-motorized vessel, the latter should likewise be covered by the said ruling.** xxx xxx xxx (emphasis ours)

The barge CHERYL ANN, while physically tied up with MT Jacob 1, is subject to the latter's movement and direction, hence, cannot control its own destination. When MT Jacob 1 was released pursuant to petitioners findings stated on the Indorsements,[11] it is all the more the accessory barge should also be released, as it was is merely following the principal tugboat. Fundamental is the principle that accessory follows the principal.

[11] Exhibit "A", Annexes "C" and "D", pp. 231-232.

Also, the relevant provision of law on the forfeiture of vessels is found under Section 2530 (a) of the Tariff and Customs Code of the Philippines (TCCP), to wit:

> SEC. 2530. *Property Subject to Forfeiture Under Tariff and Customs Laws*. — Any vehicle, vessel or aircraft, cargo, article and other objects shall, under the following conditions, be subjected to forfeiture:
>
> a. Any vehicle, vessel or aircraft, including cargo, which shall be used unlawfully in the importation or exportation of articles or in conveying and/or transporting contraband or smuggled articles in commercial quantities into or from any Philippine port or place. The mere carrying or holding on board of contraband or smuggled articles in commercial quantities shall subject such vessel, vehicle, aircraft or any other craft to forfeiture; **Provided, That the vessel, or aircraft or any other craft is not used as duly authorized common carrier and as such a carrier it is not chartered or leased;** (emphasis ours)

Based on the above-mentioned provision, a vessel is subject to forfeiture when used unlawfully in the importation or exportation of articles or in conveying and/or transporting smuggled articles into or from the Philippines. The mere carrying or holding on board of smuggled articles shall subject the vessel to forfeiture. However, the vessel is NOT subject to forfeiture **if it is engaged as duly authorized common carrier and as such carrier it is not chartered or leased**.

The facts established, as shown by the evidence presented,[12] that respondent is a common carrier falling within the definition of a common carrier

[12] Judicial affidavit of Emmanuel Zapanta, "Exhibit A"; Certificate of Inspection, "Exhibit B"; Certificate of Vessel Registry, "Exhibit C"; and Certificate of Ownership, "Exhibit D".

under the Civil Code.[13] It transported the goods and offered its services to the public for compensation. The presence of the "The Charter Agreement (Time Charter)"[14] between Fuel Zone Filipinas Corp. (Charterer for the Used Oil) and respondent Goldmark Sea Carriers, Inc. (registered owner/operator of barge CHERYL ANN) did not convert respondent into a private carrier.

In the case of *Loadstar Shipping Co., Inc. vs. Pioneer Asia Insurance Inc.*,[15] the Supreme Court ruled that a time charter or voyage charter will not convert the common carrier into a private carrier. It was held:

> xxx The **voyage-charter** agreement between petitioner and Northern Mindanao Transport Company, Inc. **did not in any way convert the common carrier into a private carrier.** We have already resolved this issue with finality in *Planters Products, Inc. v. Court of Appeals* where we ruled that:
>
> > It is therefore imperative that a public carrier shall remain as such, **notwithstanding the charter of the whole or portion of a vessel by one or more persons, provided the charter is limited to the ship only, as in the case of a time-charter or voyage-charter.** It is only when the charter includes both the vessel and its crew, as in a bareboat or demise that a common carrier becomes private, at least insofar as the particular voyage covering the charter-party is concerned. Indubitably, a shipowner in a time or voyage charter retains possession and control of the ship, although her holds may, for the moment, be the property of the charterer.
>
> Conformably, **petitioner remains a common carrier notwithstanding the existence of the charter agreement** xxx. (emphasis ours)

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[13] Art. 1732. Common carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering their services to the public.
[14] Division Docket, Exhibit "E", p. 246.
[15] G.R. No. 157481, January 24, 2006, 479 SCRA 655 citing *Planters Products, Inc. v. Court of Appeals*, G.R. No. 101503, 15 September 1993, 226 SCRA 476.

Accordingly, barge CHERYL ANN as a common carrier and an accessory to the principal tugboat MT Jacob 1 is not subject to forfeiture under Section 2530 of the TCCP.

Petitioners did not timely raise the issue on the application of RA 6969.

The lone issue raised by petitioners in their Answer before the CTA Third Division was the timeliness of the filing of respondent's Petition for Review. It was only in the Motion for Reconsideration of the assailed Decision that petitioners raised the issue on the application of Republic Act (RA) 6969, otherwise known as "Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990." Petitioners argued that carrying of hazardous units is *malum prohibitum,* hence, the barge CHERYL ANN should be forfeited pursuant to RA 6969.

We cannot sustain petitioner's argument. As provided under Section 3, Rule 1 of the Revised Rules of the Court of Tax Appeals, the Rules of Court shall apply suppletorily. Thus, Section 1 Rule 9 of the Rules of Court finds application, to wit:

> Rule 9
> EFFECT OF FAILURE TO PLEAD
>
> SECTION 1. *Defenses and objections not pleaded.* – **Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived.** However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same

> cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim. (emphasis ours)

The same ruling was held in the case of *Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue*,[16] where the Supreme Court set aside the issue which was raised only in the Motion for Reconsideration before the CTA. It was held:

> The CIR did not offer any explanation as to why he did not argue the VAT-exemptions of Toshiba and its export sales before and during the trial held by the CTA, only doing so in his Motion for Reconsideration of the adverse CTA judgment. Surely, said defenses or objections were already available to the CIR when the CIR filed his Answer to the Petition for Review of Toshiba in CTA Case No. 5762.
>
> **It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.** The Court cannot simply grant the plea of the CIR that the procedural rules be relaxed based on the general averment of the interest of substantive justice. It should not be forgotten that the first and fundamental concern of the rules of procedure is to secure a just determination of every action. **Procedural rules are designed to facilitate the adjudication of cases. Courts and litigants alike are enjoined to abide strictly by the rules. While in certain instances, the Court allows a relaxation in the application of the rules, it never intends to forge a weapon for erring litigants to violate the rules with impunity. The liberal interpretation and application of rules apply only in proper cases of demonstrable merit and under justifiable causes and circumstances.** While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to ensure an orderly and speedy administration of justice. Party litigants and their counsel are well advised to abide by, rather than flaunt, procedural rules for these rules illumine the path of the law and rationalize the pursuit of justice. (emphasis ours)

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[16] G.R. No.157594, March 9, 2010, 614 SCRA 526.

Moreover, rule is well settled that no question will be considered by the appellate court which has not been raised in the court below. When a party deliberately adopts a certain theory, and the case is tried and decided upon the theory in the court below, he will not be permitted to change his theory on appeal, because to permit him to do so would be unfair to the adverse party. [17]

Similarly, the above cited doctrine was enunciated by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.),* [18] it held:

> It is already well-settled in this jurisdiction that a party may not change his theory of the case on appeal. Such a rule has been expressly adopted in Rule 44, Section 15 of the 1997 Rules of Civil Procedure, which provides-
>
> "SEC. 15. *Questions that may be raised on appeal.*- Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties."
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> Thus, in *Carantes v. Court of Appeals*, this Court emphasized that-
>
> "**The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal.** A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party." (emphasis ours)

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[17] *Ferrer vs. Commissioner of Internal Revenue*, No. L-16021, August 31, 1962, 5 SCRA 1022 citing the cases of *Northern Motors, Inc. v. Prince Line, et al.*, G.R. No. L-13884, February 29, 1960 citing *Toribio v. Decasa*, 55 Phil. 461; *San Agustin v. Barrios*, 68 Phil. 475; *Molina v. Somes*, 24 Phil. 49; and *Agoncillo and Mariño v. Javier*, 38 Phil. 424.

[18] G.R. No. 159593, October 16, 2006, 504 SCRA 484.

Thus, there being no cogent reason presented to reverse the findings and conclusions of the CTA Third Division, this Court affirms its finding that barge CHERYL ANN should be released.

WHEREFORE, premises considered, the Petition for Review *En Banc* is **DISMISSED** for lack of merit. Accordingly, the Decision dated February 17, 2011 and Resolution dated August 23, 2011 are **AFFIRMED.**

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding 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

CERTIFICATION

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice