REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

PILIPINAS SHELL PETROLEUM CORPORATION,
Respondent.

C.T.A. EB No. 64
(C.T.A. Case No. 6003)

Present:

ACOSTA, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

APR 28 2006 [signature]

x- x

DECISION

UY, ***J.:***

This is a Petition for Review before the Court of Tax Appeals *En Banc* filed on March 28, 2005 under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, of the Decision promulgated on August 2, 2004 and the Resolution promulgated on January 20, 2005 rendered by the then Court of Tax Appeals, which under R.A. No. 9282, is now a Division of the current Court of Tax Appeals, in C.T.A. Case No. 6003, entitled "Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue", the respective dispositive portions of which read as follows:

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> "**IN VIEW OF ALL THE FOREGOING**, the instant petition is hereby **GRANTED**. Accordingly, the assessment issued by the respondent dated November 15, 1999 against petitioner is hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**."

> "PREMISES CONSIDERED and there being no new matter or issue raised by the respondent which We have not passed upon or considered in resolving this case, the instant motion is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

THE FACTS

The antecedent facts are not in dispute.

Petitioner is the official of the Republic of the Philippines charged with the duty of assessing and collecting national internal revenue taxes. He holds office at the Bureau of Internal Revenue National Office Building, Diliman, Quezon City. On the other hand, respondent is a corporation organized and existing under and by virtue of Philippine laws, with address at Shell House, 156 Valero Street, Salcedo Village, Makati City. It is engaged in the business of refining and marketing a wide range of petroleum products and is duly registered with the Board of Investments (BOI).

On certain years during the period 1988 to 1997, respondent paid certain excise tax liabilities using tax credit certificates (TCCs) assigned and transferred to it by entities that, like itself, are registered with the BOI.

The TCC transfers to, and utilization thereof by, respondent were all approved by the appropriate government agencies, namely the BOI and subsequently, the One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (the Center) and were all approved, and accepted, by the Bureau of Internal Revenue (BIR), as payment of respondent's excise tax liabilities. The government agencies comprising the Center are the Department of Finance (DOF), the BIR, the Bureau of Customs (BOC) and the BOI.

Respondent's acceptance of TCC transfers and utilization of the same in payment of taxes, were never subjected to any question, challenge or dispute. However, on April 22, 1998, the Revenue District Officer of Revenue District No. 50 of the BIR sent a collection letter to respondent, demanding payment in the total amount of P1,705,028,008.06 allegedly representing unpaid specific taxes for the years 1992 and 1994 to 1997, inclusive of delinquency surcharges and interest. The excise taxes subject of the collection letter were already paid by respondent with duly transferred TCCs as authorized by the Center through their Tax Debit Memos (TDMs) and accepted by the BIR through their own TDMs, as well as the Authority to Accept Payment of Excise Taxes (ATAPETs) issued also by the BIR and acknowledged by its Authorized Agent Banks (AABs) which received the said BIR-issued TDMs and respondent's checks in full and final payment of respondent's relevant excise tax liabilities.

In a letter dated April 29, 1998, respondent protested the said collection letter. Thereafter, respondent received a reply dated June 16, 1998 signed by the Regional Director of Revenue Region No. 8 of the BIR, denying respondent's protest, and reiterating the demand on respondent to pay the aforementioned amount of taxes. Eventually, respondent elevated the matter to petitioner by way of a request for reconsideration dated July 9, 1998.

Before petitioner could act on the request for reconsideration, the Regional Director issued warrants of garnishment against the bank accounts of respondent. As such, respondent was constrained to file a Petition for Review with the Court of Tax

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Appeals on July 21, 1998 (docketed as CTA Case No. 5660), mainly to suspend the collection of the taxes being collected through the warrants of garnishment.

On July 22, 1998, upon request of the respondent, petitioner issued a letter lifting the aforesaid warrants of garnishment.

On November 16, 1998, the then Court of Tax Appeals dismissed said petition for having been prematurely filed in view of respondent's request for reconsideration (which was deemed an administrative appeal) with petitioner still pending at that time.

Due to the inaction of petitioner on respondent's administrative appeal despite the lapse of the one hundred eighty (180)-day period provided for under Section 228 of the National Internal Revenue Code (NIRC) of 1997, respondent filed on February 2, 1999 another Petition for Review, docketed as CTA Case No. 5728.

On July 23, 1999, this Court rendered its decision in said CTA Case No. 5728 holding, among others, that the transfers to and utilization by the respondent of the TCCs were valid and legal, and the petitioner's attempt to collect supposedly delinquent taxes and penalties from respondent without an assessment constitutes a denial of due process. Accordingly, the collection letter issued by the petitioner dated April 12, 1993 was considered withdrawn and petitioner was enjoined from collecting from respondent the specific taxes, surcharges and interests subject of the said petition.

Petitioner filed a motion for reconsideration of the aforesaid decision on August 10, 1999 and with respondent's opposition, the then Court of Tax Appeals on September 7, 1999 resolved to deny said motion. Petitioner elevated the matter to the Court of Appeals by way of Petition for Review dated October 8, 1999 assailing the aforesaid decision and resolution of this Court.

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In the meantime, despite the pronouncement of this Court in its July 23, 1999 decision that "the transfers to and utilization by respondent of the TCCs were valid and legal", the DOF/Center, in a series of letters to respondent dated August 31, September 1 and October 18, 1999, revived the issue relating to the transfers to and utilization by respondent of certain TCCs subject of CTA Case No. 5728, by requiring the latter to submit to the Center copies of sales invoices and delivery receipts showing consummation of sale transactions of respondent's products to certain TCC transferors, purportedly in connection with an on-going post audit of TCC issuances and transfers, under pain of cancellation of the TCC transfers if respondent fails to comply with the requirement.

Respondent requested for time to respond to the said DOF/Center letters by way of a letter to the DOF/Center dated September 29, 1999 wherein it requested to be given until October 29, 1999 to respond. In its reply dated October 18, 1999, the DOF/Center gave respondent until October 31, 1999 to file its response. October 31, 1999 being a Sunday, and the next two days being holidays, respondent's response was delivered to, and received by the DOF/Center on November 3, 1999, which was the deadline granted. In its response, respondent stated, among other things, that the requirement to submit the documents mentioned in the DOF/Center letters, and the threatened sanction if respondent fails to comply, have no legal basis because the applicable law, rules and regulations only require that both transferor and tranferee are BOI-registered entities. On the very same date (November 3, 1999) that the DOF/Center received the aforesaid October 29, 1999 response of respondent, the former wrote a letter dated November 3, 1999 stating that the TDMs enumerated in the list attached thereto, as well as the corresponding TCCs and TCC transfers had been cancelled by the DOF/Center.

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In a letter dated November 4, 1999, respondent asked the DOF/Center to reconsider the cancellation of the TDMs, related TCCs and their transfers, as set forth in its letter dated November 3, 1999. In said request for reconsideration, respondent argued that the cancellation was made without the DOF/Center having had the opportunity and benefit of considering respondent's letter response dated October 29, 1999 and without respondent having been heard on the matter of Center Excom Resolution No. 03-05-99 (the Excom Resolution), which respondent learned of for the very first time through reference thereto made in the November 3, 1999 DOF/Center letter. To date, the DOF/Center had not replied to respondent's request for reconsideration.

On November 22, 1999, respondent received an assessment letter dated November 15, 1999 from petitioner for deficiency excise taxes, surcharge and interest based on the first batch lists of cancelled TDMs issued against respondent's TCCs. A summary of the said tax assessment subject of this case is detailed below:

TRANFEROR	*BASIC TAX*	*SURCHARGE*	*INTEREST*	*TOTAL*
Alliance Thread Co., Inc.	P 26,913,843.00	P 13,456,921.50	P 25,252,519.88	P 65,623,284.38
All Star Spinning, Inc.	78,646,612.00	39,323,306.00	68,073,877.13	186,043,795.13
Diamond Knitting, Inc.	37,740,161.00	18,870,080.50	37,049,776.48	93,660,017.98
Express Colour Inds., Inc.	37,478,551.00	18,739,275.50	30,121,602.68	86,339,429.18
Fiber Technology Corp.	34,802,087.00	17,401,043.50	32,346,287.03	84,549,417.53
Filstar Textile Ind'l. Corp.	3,893,671.00	1,946,835.50	3,893,671.00	9,734,177.50
FLB Int'l Fiber Corp.	28,147,962.00	14,073,981.00	24,674,190.40	66,896,133.40
Jantex Phils., Inc.	38,144,100.00	19,072,050.00	34,630,476.83	91,846,626.83
Sub –Total	**P285,766,987.00**	**P142,883,493.50**	**P256,042,401.43**	**P684,692,881.93**

Attached to this purported "Assessment" is a list of the allegedly cancelled TDMs and the TCCs for which these TDMs were issued. Said TDMs and related TCCs were all

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part of the TDMs and related TCCs subject matter of CTA Case No. 5728 (as listed in the attachment to the April 22, 1998 collection letter sent by the Revenue District Officer of Revenue District No. 50 of the BIR).

Respondent protested the said assessment in a letter dated December 2, 1999 which petitioner in turn denied respondent's protest on December 28, 1999 *(Exhibit A)*. Thus, with no other alternative left, herein respondent filed a Petition for Review with this Court on January 31, 2000, docketed as CTA Case No. 6003.

After trial on the merits, the then Court of Tax Appeals rendered the assailed Decision on August 2, 2004.

Not satisfied, on August 24, 2004, herein petitioner filed a Motion For Reconsideration of the said Decision.

On January 20, 2005, petitioner's motion was denied for lack of merit.

Hence, the instant Petition for Review *En Banc*.

THE ASSIGNED ERRORS

In support of its petition, petitioner presented the following assigned errors:

I

SINCE THE FINDINGS OF THE ONE STOP SHOP TAX CREDIT AND DUTY DRAWBACK CENTER ARE PRESUMED TO BE VALID AND CORRECT, WHICH FINDINGS WERE ARRIVED AT IN THE PERFORMANCE OF ITS OFFICIAL MANDATE TO CONDUCT POST-AUDIT OF THE TAX CREDIT CERTIFICATES, THIS HONORABLE COURT ERRED IN NOT HOLDING THAT THE SUBJECT TAX CREDIT CERTIFICATES WERE FRAUDULENTLY SECURED.

II

SINCE RESPONDENT AND THE ORIGINAL GRANTEES OF THE SUBJECT TAX CREDIT CERTIFICATES MISREPRESENTED TO THE ONE STOP SHOP TAX CREDIT AND DUTY DRAWBACK CENTER THAT THERE WAS AN ASSIGNMENT AND TRANSFER OF SAID TAX CREDIT

CERTIFICATES IN CONSIDERATION OF AND AS PAYMENT FOR RESPONDENT'S SUPPLY OF FUEL PRODUCTS TO THE ORIGINAL GRANTEES, THIS HONORABLE COURT ERRED IN NOT HOLDING THAT THE SAID ASSIGNMENT/TRANSFER WAS TAINTED WITH FRAUD, MALICE AND BAD FAITH.

III

SINCE THE UTILIZATION OF THE SUBJECT TCCs DID NOT RESULT IN PAYMENT OF THE EXCISE TAX DUE FROM RESPONDENT, THE HONORABLE COURT ERRED IN HOLDING THAT PETITIONER'S RIGHT TO ASSESS HAD ALREADY PRESCRIBED.

On April 27, 2005, without necessarily giving due course to the petition, this Court required the respondent to file comment on the petition within ten (10) days from notice. However, on May 6, 2005, respondent filed a Motion for Time (To File Comment on the Petition for Review dated March 28, 2005) praying for an additional period of twenty (20) days from May 8, 2005 or up to May 28, 2005. This Court granted the said motion on May 11, 2005 but giving respondent only an additional period of fifteen (15) days or only until May 23, 2005 to file its comment. On May 23, 2005, respondent filed its Comment, which the Court *En Banc* admitted in its Resolution dated July 14, 2005 and further required the parties to file their respective memorandum within a non-extendible period of thirty (30) days from notice. Thereafter, the case was deemed submitted for decision.

THE ISSUE

The principal issue posed for resolution by this Court *En Banc* is whether or not respondent Pilipinas Shell is liable for the amount of P684,692,881.93 as deficiency excise taxes arising from the cancellation of the tax debit memos issued against its tax credit certificates which were utilized in the payment of its excise taxes for the years 1992 and 1994 to 1997.

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Petitioner asserts that:

A. The subject tax credit certificates were fraudulently secured;

B. The subject tax credit certificates were validly cancelled by the Center;

C. The subject tax credit certificates were fraudulently transferred and/or assigned;

D. The subject tax credit memos and the utilization of the same and of the subject tax credit certificate can be validly, legally and justifiably cancelled;

E. The utilization of the subject TCCs did not result in any payment of the excise taxes due from the respondent;

F. Petitioner's right to assess has not yet prescribed; and

G. It was incumbent upon respondent to prove that the November 15, 1999 assessment for deficiency excise taxes, surcharges and interest is erroneous and invalid.

For its part, respondent maintains that the petition does not raise new issues and matters which have not already been discussed and rendered in the questioned decision and resolution, and prayed that the petition be dismissed for lack of merit. Furthermore, respondent argues that: (a) petitioner failed to prove fraud in the issuance of the TCCs subject of this case; (b) the Center is not possessed with the authority to cancel the subject TCCs; (c) there was no fraud in the transfers of TCCs to respondent; (d) the TCCs, their related TDMs and the transfers and utilization thereof cannot be validly, legally and justly cancelled; (e) assuming that there was fraud in issuance of the subject TCCs, respondent cannot be prejudiced thereby being an innocent purchaser for value of these TCCs; (f) petitioner can no longer demand payment of the excise taxes being sought to be collected from respondent because prescription has already set in; and (g) respondent has adequately proven that the purported assessment of November 15, 1999 for deficiency excise taxes, surcharge and interest is without legal basis.

<u>THIS COURT EN BANC'S RULING</u>

The petition is meritorious.

At the outset, the DOF findings that the TCCs do not have monetary value is undisputed and was clearly established during the trial proper. Consequently, the effect would be non-payment of respondent's excise taxes corresponding to the value of the TCCs supposedly used for payment. This is so, because payment can only occur if the instrument used to discharge an obligation represented its stated value. A valueless instrument, even if delivered to and accepted by the creditor, not knowing that the same is worthless, would not produce payment. After all, the debtor warrants that his instrument is valid and valuable. Since it was the debtor (respondent) who acquired the subject TCCs from a third party and utilized the same to discharge its own obligations, then respondent must bear the loss.

It is an established procedure that whenever the Secretary of Finance issues a TCC, notwithstanding compliance of the holder with certain requirements, the same is **still subject to re-evaluation**.

A close examination of the petition and its annexes, respondent's comment thereto, as well as the memoranda of the parties, reveals that both the assailed Decision and Resolution promulgated on August 2, 2004 and January 20, 2005, respectively, failed to consider the fact that the subject TCCs involved in this case *(Exhibits "JJJJJ" to "TTTTTTTTT")* contain the express provision that "This Tax Credit is issued subject to: 1. **Post-audit** x x x". Furthermore, an important fact was overlooked that all the TCCs contain a "**LIABILITY CLAUSE**", wherein both the transferor and transferee (respondent) are held "jointly and severally liable for any fraudulent act or violation of the pertinent laws, rules and regulations relating to the transfer of" the subject TCCs.

To completely understand the matter presented before Us, it is worth emphasizing that the statement on the subject certificate stating that it is issued subject to post-audit is in the nature of a suspensive condition under Article 1181 of the Civil Code, which is quoted hereunder for ready reference, to wit:

> "In conditional obligations, the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition."

The above-quoted article speaks of obligations subject to conditions. "These conditions affect obligations in diametrically opposed ways. If the suspensive condition happens, the obligation arises; in other words, if the condition does not happen, the obligation does not come into existence. On the other hand, the resolutory condition extinguishes rights and obligations already existing; in other words, the obligations and rights already exist, but under the threat of extinction upon the happening of the resolutory condition ***(8 Manresa 130-131, cited on page 140, Civil Code of the Philippines, Tolentino, 1962 ed., Vol. IV)***."

In adopting the foregoing provision of law, this Court rules that the issuance of the tax credit certificate is subject to the condition that a post-audit will subsequently be conducted in order to determine if the holder is indeed qualified for its issuance. As stated earlier, the holder takes the same subject to the outcome of the post-audit. Thus, unless and until there is a final determination of the holder's right to the issuance of the certificate, there exists no obligation on the part of the DOF or the BIR to recognize the rights of the holder or transferee. And considering that the audit conducted by the DOF resulted to a finding of fraud which eventually led to the cancellation of the certificates, the claimants, together with the transferees, must suffer the consequences. **It bears stressing that a suspensive condition will only vest rights after its fulfillment. Therefore, when respondent used the tax credit certificates to discharge its obligations at the time when the post-audit has yet to be conducted, it did so at its own risk**.

By analogy, the Supreme Court in one case considered the phrase "automatic increase clause" in the policy a conditional obligation under Article 1181 of the New Civil Code and ruled that the amount insured by the policy at the time of its issuance necessarily includes the additional sum covered by the automatic increase clause because it is already determinate at the time the transaction entered into and forms part of the policy ***(Commissioner of Internal Revenue vs. Lincoln Philippine Life Insurance Company, Inc., 379 SCRA 423)***. Hence, applying the same principle in the case at bar, the companies in whose favor the certificates were issued took the same subject to whatever may be the result of the post-audit. As a matter of fact, as transferee, respondent has the duty to know that the tax credit certificate expressly states that it is being held solidarily liable with the transferor for any fraudulent act or violation of the pertinent laws, rules and regulations relating to the transfer of the certificate in view of the above-mentioned liability clause.

Having assumed solidary liability with the transferor, respondent is therefore liable for the loss of the thing due, even if such loss is caused by the fault of only one of them and regardless of whether or not there was knowledge of fraud on its part. Thus, respondent's arguments that it is an innocent purchaser in good faith and for value and that the petitioner and the DOF/Center are estopped from invalidating the transfer and utilization of the TCCs, are unacceptable for reasons hereinafter set forth.

The validity and propriety of the TCC to effectively constitute payment of taxes to the government are still **subject to the outcome of the post-audit**. In other words, when the issuing authority (DOF) finds, as in the case at bar, circumstances which may warrant the cancellation of the certificate, the holder is inevitably bound by the outcome by virtue of the express provisions of the TCCs.

Likewise, respondent's position that the TCCs were confirmed to be valid by petitioner considering that corresponding TDMs were already issued by the latter's agents will simply not hold water. It is worthy to mention that "[i]t is a settled rule of law that in the performance of its governmental functions, the State cannot be estopped by the neglect of its agents and officers. Nowhere is this more true than in the field of taxation ***(Commissioner of Internal Revenue vs. Armando Abad – Republic Alcohol Distillery, G.R. No. L-19627, June 27, 1968, 23 SCRA 1132; Commissioner vs. Procter & Gamble Co., G.R. No. 66838, April 15, 1988, cited on page 173, Law of Basic Taxation, 2001 Ed., Benjamin P.Aban, updated by Alicia de Leon-Tomacruz and Anita S. Regalado)***".

Hence, in stressing the rationale of the abovementioned rule, the Highest Court elucidated the matter as follows:

> "Regardless of the composition of the committee, however, the principle laid down in *Central Azucarera* holds true and it is this: the manufacturer is responsible for the quality of his products and he cannot escape this responsibility by showing that the denaturing committee of the BIR has certified his products to be denatured alcohol. The respondent cannot claim ignorance of this principle for indeed the very permit issued to him expressly stated that the manufacture of denatured alcohol should be under his "exclusive responsibility." This is as it should be, otherwise, it would be easy for manufacturers to evade liability on the pretext that some government official has certified to the quality of their products and that they have every right to rely on this certificate. A contrary rule would encourage irresponsibility on the part of manufacturers, let alone collusions between taxpayers and revenue officials to defraud the public treasury. It is a settled rule of law that in the performance of the governmental

> functions the State cannot be estopped by the neglect or omission of its agents. Nowhere is this more true than in the field of taxation ***(Commissioner of Internal Revenue vs. Armando Abad – Republic Alcohol Distillery, supra)***."

In addition, the cancellation of the TDMs and their related TCCs and TCC transfers by the Center was made pursuant to Center Excom Resolution No. 03-05-99. The aforesaid Excom Resolution prescribes the guidelines and procedures for the cancellation, recall and recovery of fraudulently issued TCCs. Under the said guidelines, TCCs and TDMs are classified as fraudulent when the "basis for the issuance of the Tax Credit Certificate, Tax Debit Memo or for the approval of the transfer of a Tax Credit Certificate are spurious, tampered, altered and fake commercial and public documents or other acts of gross misrepresentation and deceit employed by the claimant which would give rise to the release of the TCC."

During the trial conducted by the then Court of Tax Appeals, petitioner's witness testified that the TCCs were granted based on the applicant's alleged export transactions. However, after the post-audit process was conducted, it appeared that these export transactions were not declared or reflected in the audited financial statements as represented to the Center for the tax credit claim (*TSN, June 26, 2001, pages 17-18; page 32, TSN, August 16, 2001, pages 8-9*). Said post-audit on the controversial TCCs showed that the companies to which they were issued did not export at the volume they had represented to the Center, and therefore, the bases for the approval of the TCCs were spurious export documents. Consequently, the conclusions reached by the Center that the export transactions represented to the Center did not take place (*TSN, June 26, 2001, page 19*) or that either the company-applicant did not export at the volume it had represented to the Center or underdeclared its sales figures in the financial statements (*TSN, June 26, 2001, pages 33-34*) is logical and reasonable.

The corresponding cancellation memoranda were issued (*Exhibits 2, 2-a, 2-b, 2-c, 3, 3-a, 3-b, 3-c, 4, 4-a, 4-b, 5, 5-a, 6, 6-A, 6-B, 7, 7-A, 7-B, 7-C, 8, 8-A, 8-B, 8-C, 9, 9-A, 9-B, 9-C, 10, 10-A, 10-B, 10-C*) after petitioner was able to show the registered capacity of the respective firm or the volume of registered product that each could produce in a year (*Exhibits 2-I-1-a, 2-J-1-a, 3-H-1-a, 6-J-1-a, 7-I-1-a, 8-I-1-a, 9-I-1-a, 10-I-1-a*) by submitting the BOI Certificates of Registration of the involved companies (*Exhibits 2-I, 2-J, 3-H, 6-J, 7-I, 8-I, 9-I, 10-I*). Based on these certificates, petitioner's theory that the cost of the machinery and equipment of the plant of each firm as reflected in the financial statements (*Exhibits 2-H-1 to 2-H-8, 3-G to 3-G-6, 5-b to 5-c-1, 6-H to 6-I-5, 7-H to 7-H-6, 8-H to 8-H-5, 9-H to 9-H-4, 10-H to 10-H-5*) could not have produced the volume of registered product that it can produce in a year as set forth in the BOI Certificate of Registration was certainly established.

This Court takes notice of the conclusion in the said cancellation memoranda stating that there were two possibilities. First, the grantee of the TCC did not actually export the volume it represented to the Center on the basis of which the TCCs were issued. Second, the company committed massive fraud in the declaration of the financial performance (*TSN, August 16, 2001, pages 9 & 10*). Financial performance meant export sales or export transactions and massive fraud meant that there were really export sales in the volume as represented but the company did not declare the correct volume of sales. In either case, the grantee should have been disqualified to be granted with TCC as well as use the same (*ibid, page 11*).

Now, aside from the finding of fraud in the issuance of the TCCs, other relevant findings were made by the DOF/Center in the case of transfers to respondent, to wit:

> "First, there were no deliveries made of the fuel products from petitioner (respondent herein) to the companies that were alleged and disclosed in the Supply Agreements found in the transfer folders of the companies. It was precisely this alleged trade relation between petitioner (respondent herein) and the companies that prompted the previous Administrator of the Center to approve the transfers;
>
> Second, the financial statements of the companies clearly show that they were not using fuel oil at the levels disclosed to the Center and on which basis the approval of the transfers were made;
>
> Third, despite repeated extensions, petitioner (respondent herein) has not liquidated the alleged fuel oil deliveries it made to the companies; and
>
> Finally, **the Center has in its possession duly executed Affidavits of the former General Managers of the companies stating that they have not signed any document transferring TCCs to oil companies or entering delivery contracts with any oil company as found in the transfer folders of the companies**." *(Emphasis Ours)*

It must be stressed at this point that the BIR, being a subordinate government agency, is merely bound to adopt the findings of the DOF considering that the latter is the agency which actually conducted the investigation. It correctly pointed out that under the governing rules, regulations, guidelines and procedures for the application, issuance and transfer of tax credit certificates, the DOF/Center is the competent authority in this respect and when in the conduct of its official mandate, the said authority declared that certain TCCs originating from it are tainted with gross irregularity such that the same has in fact been cancelled for being both spuriously issued and transferred, that in itself is an administrative determination concerning a question of fact and which action is entitled to the presumption of regularity and has to be accorded great weight and credit. Hence, it is reasonable to say that petitioner cannot be expected to explain each and every detail of the basis of the cancellation

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since the DOF is not a party to the case and it was not the BIR that made the cancellation. However, it cannot be denied that in the case at bar, circumstances abound indicating fraud, both in the issuance of the tax credit certificates and their subsequent transfer to respondent.

Significantly, the Court noticed that respondent has not disproved the findings of the One-Stop Shop Inter-Agency Tax and Duty Drawback Center of the Department of Finance, which are presumed true in view of the presumption of regularity in the exercise of official functions. Therefore, this Court is convinced that the cancellation of the subject TCCs is valid and with legal basis.

Regarding the issue of prescription, and consistent with the discussion earlier, this Court likewise finds the ruling contained in the assailed decision as misplaced. It must be borne in mind that the assessment came about because the corresponding TDMs and their related TCCs and TCC transfers were cancelled by the Center. The cancellation was due to the finding of fraudulent procurement and fraudulent transfer thereof. Without such finding, there would have been no cancellation leading to the issuance of an assessment subject of this case by the petitioner.

In view of the foregoing, it is therefore irrelevant whether or not petitioner is actually involved in the fraud. **The primary consideration is the fact that no payment took effect since the TCCs involved were cancelled upon post-audit pursuant to the very terms of the TCCs themselves**. Consequently, since payment is an intrinsic part of the filing of the tax return, **there is falsity and/or omission in the filing of the tax return resulting in the applicability of the ten-year prescriptive period from discovery of the falsity, fraud or omission**. The pertinent provisions of law involved are Sections 203 and 222(a) of the NIRC of 1997, quoted hereunder, which provide:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* – **Except as provided in Section 222**, internal revenue taxes shall be assessed **within three (3) years after the last day prescribed by law for filing of the return**, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."
>
> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (a) **In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed**, or a proceeding in court for the collection of such tax may be filed without assessment, **at any time within ten (10) years after the discovery of the falsity, fraud or omission**: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof." *(Emphasis ours)*

In ***Aznar vs. Court of Tax Appeals,*** the Supreme Court, interpreting then Sections 331 (providing for a five [5] year ordinary prescriptive period) and 332(a), now Sections 203 and 222(a) of the NIRC of 1997, held:

> "x x x We believe that the proper and reasonable interpretation of said provision should be that in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) failure to file a return, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within ten years after the discovery of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three different classes, namely – "falsity", "fraud" and "omission". That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due.
>
> The ordinary period of prescription of 5 years within which to assess tax liabilities under Sec. 331 of the NIRC should be applicable to normal circumstances, **but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities** due to false returns, fraudulent return intended to evade payment of tax or failure to file returns, the period of ten years provided for in Sec. 332(a) NIRC, from the time of the

> discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced." *(58 SCRA 519[1974], Emphasis Ours)."*

Without cloud of doubt, in providing for a prescriptive period for tax assessment, the law does not intend to disadvantage the government so as to prevent its lawful agents from assessing the proper tax. Considering that it is only upon post-audit of the TCCs involved here that the government can determine the validity of the excise tax payments, Section 222(a) of the Tax Code applies in this instance and therefore, petitioner has ten (10) years from the post-audit within which to assess respondent. Consequently, petitioner's assessment dated November 15, 1999 and received by respondent for deficiency excise tax payments for the years 1992 and 1994 to 1997 are well within the ten (10) year period to assess the tax.

However, with regard to the imposition of a 50% fraud surcharge, We agree with respondent that that the same should not be imposed. There is no direct proof introduced by the petitioner in this case to the effect that respondent committed fraud. In the ***Aznar*** case**,** the Supreme Court ruled that no 50% fraud surcharge under then Section 72, now Section 247(b) of the NIRC of 1997, is applicable in the absence of proof of fraud on the part of taxpayer, notwithstanding the applicability of the ten (10)-year prescriptive period from discovery of the fraud, falsity or omission under then Section 332(a) now Section 222, of the NIRC of 1997 *(Supra)*. Thus,

> "From the above exposition of facts, we cannot but emphatically reiterate the well established doctrine that fraud cannot be presumed but must be proven. As a corollary thereto, we can also state that fraudulent intent could not be deduced from mistakes however frequent they may be, especially if such mistakes emanate from erroneous entries or erroneous classification of items in accounting methods utilized for determination of tax liabilities. The predecessor of the petitioner undoubtedly filed his income tax returns for the years 1946 to 1951 and those tax returns were prepared for him by his accountant and employees. It also appears that petitioner in his lifetime and during the investigation of his tax liabilities cooperated readily

> with the B.I.R. and there is no indication in the record of any act of bad faith committed by him.
>
> The lower court's conclusion regarding the existence of fraudulent intent to evade payment of taxes was based merely on a presumption and not on evidence establishing a willful filing of false and fraudulent returns so as to warrant the imposition of the fraud penalty. The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrong-doing with the sole object of avoiding the tax. It necessarily follows that a mere mistake cannot be considered as fraudulent intent, and if both petitioner and respondent Commissioner of Internal Revenue committing mistakes in making entries in the returns and in the assessment, respectively, under the inventory method of determining tax liability, it would be unfair to treat the mistakes of the petitioner as tainted with fraud and those of the respondent as made in good faith."

Applying the principles involved in the said ***Aznar*** decision, what can be deduced in this case is that respondent was negligent in obtaining the TCCs involved considering that it failed to investigate the validity of the TCCs in the face of express provisions in each certificate that the same is subject to post-audit and that under the liability clause, both the transferor and transferee (respondent) of such certificate are jointly and severally liable for any fraudulent act or violation of the pertinent laws, rules and regulations relating to the transfer of such certificate. Hence, there is no direct proof introduced in this case linking the respondent to any fraud.

Therefore, what is applicable in the case at bar is the 25% late payment surcharge under Section 248 (A) of the NIRC of 1997, not the 50% fraud surcharge under Section 248 (B). Both the 25% surcharge and the 20% interest per annum imposed under Sections 248 and 249 of the NIRC of 1997 cannot be waived. The same are meant to compensate the Government for the inability to use the taxes during the time such taxes remain unpaid ***(Aban, Law of Basic Taxation in the***

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Philippines, Revised 2001 Edition, pp. 208-209). As such, the Court *En Banc* finds no compelling reason to waive the late payment surcharge and interest in this case considering that respondent took the TCCs at its own risk.

WHEREFORE, premises considered, the Petition for Review is hereby **GRANTED**. The assailed Decision and Resolution dated August 2, 2004 and January 20, 2005, respectively, are hereby **SET ASIDE** and a new one entered dismissing respondent Pilipinas Shell Petroleum Corporation's Petition for Review filed in C.T.A. Case No. 6003 for lack of merit. Accordingly, respondent is **ORDERED TO PAY** the petitioner the amount of P570,577,401.61 as deficiency excise tax for the taxable years 1992 and 1994 to 1997, inclusive of 25% surcharge and 20% interest, computed as follows:

Basic Tax	P285,766,987.00
Add:	
Surcharge (25%)	71,441,746.75
Interest (20%)	213,368,667.86
Total Tax Due	P570,577,401.61

In addition, respondent is hereby **ORDERED TO PAY** 20% delinquency interest thereon per annum computed from December 4, 1999 until full payment thereof, pursuant to Sections 248 and 249 of the NIRC of 1997.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

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

(With Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

PILIPINAS SHELL PETROLEUM CORPORATION,
Respondent.

C.T.A. EB No. 64
(C.T.A. Case No. 6003)

Present:

ACOSTA, *P.J.*,
CASTAÑEDA. JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *J.J.*

Promulgated:
APR 28 2006

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DISSENTING OPINION

This Court *En Banc's* Decision, in granting the Petition for Review filed by the Commissioner of Internal Revenue, sets aside the Decision and Resolution promulgated on August 2, 2004 and January 20, 2005, respectively, and enters a new Decision ordering respondent Pilipinas Shell Petroleum Corporation to pay the petitioner the amount of P570,577,401.61 as deficiency excise taxes for taxable years 1992 and 1994 to 1997, inclusive of 25% surcharge and 20% interest, plus 20% delinquency interest until the amount is fully paid.

With due respect to my esteemed colleagues, I dissent from the opinion of the majority.

In rendering its decision, the majority's primary consideration is the fact that no payment took effect since the TCCs involved were cancelled upon post-audit pursuant to the very terms of the TCCs themselves. According to the majority, the statement that the TCCs were issued subject to post-audit is in the nature of a suspensive condition under Article 1181 of the Civil Code.

I beg to disagree. The Civil Code provisions do not apply to the subject TCCs as there are specific laws which govern the same.

Pursuant to Administrative Order (A.O.) No. 266, tax credit certificates are issued under: (a) Executive Order (E.O.) No. 226 (The Omnibus Investments Code of 1987);[1] (b) Letter of Instructions No. 1355 (Providing Incentives For Internal Exports);[2] (c) E.O. No. 765 (Granting Certain

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1 ARTICLE 21. "Tax credit" shall mean any of the credits against taxes and/or duties equal to those actually paid or would have been paid to evidence which tax credit certificate shall be issued by the Secretary of Finance or his representative, or the Board, if so delegated by the Secretary of Finance. **The tax credit certificates including those issued by the Board pursuant to laws repealed by this Code but without in any way diminishing the scope of negotiability under their laws of issue are transferable under such conditions as may be determined by the Board after consultation with the Department of Finance**. The tax credit certificate shall be used to pay taxes, duties, charges and fees due to the National Government; Provided, That the tax credits issued under this Code shall not form part of the gross income of the grantee/transferee for income tax purposes under Section 29 of the National Internal Revenue Code and are therefore not taxable: Provided, further, That such tax credits shall be valid only for a period of ten (10) years from date of issuance.

Par. 2 of Rule VII of its Implementing Rules and Regulations states:

"[Tax credit] certificate may be transferred in accordance with the memorandum of agreement between the Dept. of Finance and the Board of Investments dated October 5, 1982. However, for tax credits not covered by the said memorandum, i.e., net value earned and net local content tax credit certificates issued under P.D. 1789, as amended, they shall be transferable only to domestic raw material or component suppliers of the registered enterprise."

2 Par. 2(c) The manufacturers of the goods considered as internal exports shall be entitled to a tax credit equivalent to the sales, compensating, and specific taxes and duties on supplies, raw materials and semi-manufactured products used in the manufacture of the said internal exports. A provision for standard costing of the products may be established by the Inter-Agency Committee.

Incentives To Domestic Manufacturers Bidding In Government Projects Financed Out Of Foreign Loans);[3] (d) R.P.-U.S. Military Agreement; (e) Section 106(c) of the Tariff and Customs Code of the Philippines; (f) Section 106 of the National Internal Revenue Code; and (g) such other applicable laws.[4]

In the present case, the tax credit certificates were issued pursuant to A.O. 266 in relation to E.O. 226. Hence, such TCCs were issued in 1992, 1994 to 1997, subject to the following conditions:

1. Post-audit and subsequent adjustment in the event of computational discrepancy;
2. A deduction for any outstanding account/obligation of herein claimant with the BIR and/or BOC;
3. Revalidation with the Center in case the TCC is not utilized for payment within one (1) year from date of issuance/date of last utilization.

Therefore, the provision in the TCCs that they were issued subject to post-audit is already specifically provided under A.O. 266 in relation to E.O. 226 and not by the Revised Civil Code. Hence, the above conditions set forth in the TCCs are not suspensive conditions.

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3 (1) Every domestic manufacturer who has been awarded the bid to supply articles, materials or supplies for government projects financed out of the proceeds of foreign loans is entitled to a tax credit equivalent to the sales, compensating and specific taxes and duties on imported supplies, raw materials and semi-manufactured components used in the manufacture, processing or production of the articles, materials or supplies, subject of an international competitive bidding: Provided, that the tax credit shall accrue to the manufacturer only after actual sales of said articles, materials or supplies to the government agency implementing the project.
(2) The government agency implementing the project shall recommend to the Ministry of Finance the issuance of the corresponding tax credit certificates based on documents and receipts submitted to the said agency. Said certificate shall be used for payment of taxes, duties, charges and fees due to the national government.

4 Other laws have been repealed after A.O. No. 266 took effect.

In conditional obligations, the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition.[5] A suspensive condition (condition precedent) is a future and uncertain event upon the happening or fulfillment of which rights arising out of the obligation are acquired.[6] If an obligation is subject to a suspensive condition, the acquisition of rights shall depend upon the happening or fulfillment of the fact or event which constitutes the condition. In other words, the obligation shall become effective only upon the fulfillment of the condition. Consequently, what is acquired by the obligee or creditor upon the constitution of the obligation is only a mere hope or expectancy.[7]

In this case, upon the issuance of the subject TCCs by the proper government agencies and acquisition thereof by Pilipinas Shell Petroleum Corporation, the latter acquired the right to utilize the same in payment of its tax liabilities. Upon their issuance, the TCCs are immediately effective

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5 Article 1181, Civil Code of the Philippines

6 In contrast with the suspensive condition, a resolutory condition (condition subsequent) is a future and uncertain event upon the happening or fulfillment of which rights which are already acquired by virtue of the obligation are extinguished or lost.

Jurado, *Comments and Jurisprudence on Obligations and Contracts*, eleventh revised ed., p. 108-109.

7 On the other hand, if the obligation is subject to a resolutory condition, it becomes demandable immediately after its establishment or constitution. Rights arising out of the obligation are acquired immediately and vested in the oblige or creditor. However, this is without prejudice to the happening or fulfillment of the event which constitutes the condition. In other words, although rights are immediately vested in the obligee or creditor upon the constitution of the obligation, such rights are always subject to the threat or danger of extinction.

Ibid., pp. 109-110.

and may be utilized by the grantee at any time. This is clear from the Guidelines and Instructions found on the back of each TCC, which provide:

> 1. This Tax Credit Certificate (TCC) shall entitle the grantee to apply the tax credit against taxes and duties until the amount is fully utilized, in accordance with the pertinent tax and customs laws, rules and regulations.
> 2. xxx
> 3. xxx
> 4. To acknowledge application of payment, the One-Stop-Shop Tax Credit Center shall issue the corresponding Tax Debit Memo (TDM) to the grantee.
>
>   The authorized Revenue Officer/Customs Collector to which payment/utilization was made shall accomplish the Application of Tax Credit portion at the back of the certification and affix his signature on the column provided.

As the TCCs are immediately effective upon their issuance, the grantee may transfer the same. <u>These conditions do not make the effectivity or validity of the TCCs dependent on the outcome of the post-audit</u>. The post-audit requirement merely serves as a security which binds the grantee or transferee of TCCs to **"subsequent adjustment in the event of computational discrepancy**."

That the TCCs are immediately valid and effective is bolstered by the 1982 Memorandum of Agreement between the Department of Finance and the Board of Investments, which reads:

> xxx [G]uidelines to govern the transferability of tax credit certificates:
>
> 1) All tax credit certificates issued to BOI-registered enterprises under P.D. 1789 may be transferred under conditions provided herein;

2) The transferee should be a BOI-registered firm;
3) The transferee may apply such tax credit certificates for payment of taxes, duties, charges or fees directly due to the national government for as long as it enjoys incentives under P.D. 1789.

Once transfer is made with authority, the transferee may utilize the TCCs against its tax liability.

In the case under consideration, Pilipinas Shell Petroleum Corporation applied for the utilization of the tax credit certificates, which the One-Stop-Shop Tax Credit Center granted when it issued the corresponding Tax Debit Memos, authorizing the debit of the tax credit. Furthermore, the BIR also issued Tax Debit Memos which reflected the full utilization of tax credit. When Tax Debit Memos are issued, the taxpayer is considered to have fully paid its tax liability.

Based from the records of the case, the tax credits were fully utilized. Thus, the cancellation of the TCCs will not destroy the fact that the BIR issued tax debit memos and acknowledged the utilization of tax credit which effectively operates as full payment of Pilipinas Shell Petroleum Corporation's tax liabilities.

It would have been different if the TCCs were cancelled prior to the issuance by the Center and the BIR of tax debit memos. If such is the case, there is credence to the opinion that the TCCs do not have monetary value and, consequently, there is non-payment of excise taxes.

Another point mainly considered by the majority is the "Liability Clause in all TCCs which states that: "Both the TRANSFEROR and the

TRANSFEREE shall be jointly and severally liable for any fraudulent act or violation of the pertinent laws, rules and regulations **relating to the transfer** of this TAX CREDIT CERTIFICATE."

Clearly, the solidary liability referred to in the above clause relates to the TRANSFER of the TCCs and not to the issuance thereof. However, the majority decision declares that the said liability attaches not only in the **transfer** of the subject TCCs but even upon the **issuance** of the same. It holds that the TCCs being subject to post-audit and found to be fraudulently procured, respondent being the transferee thereof, became solidarily liable pursuant to the liability clause therein.

I disagree. The solidary liability refers to both the transferor and transferee's obligations that may arise from their fraudulent act or violation of pertinent laws, rules and regulations relating to their **transfer** of tax credit certificates. Consequently, a case may be filed against either or both the transferor and the transferee. But in the present case, such solidary liability does not extend to the transferee's tax obligation and payment already made. Simply put, solidary liability arises only in transactions involving fraudulent transfer of tax credit certificates or if such transfer is in violation of laws, rules and regulations.

Further, the majority decision may have overlooked the fact that the then Court of Tax Appeals already ruled in C.T.A Case No. 5728,[8] that the transfers and utilization by Pilipinas Shell Petroleum Corporation of the

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[8] On July 23, 1999

subject TCCs were valid and legal, and the BIR's attempt to collect alleged deficiency taxes without an assessment constitutes a denial of due process. But more importantly, the majority, in the present decision, admits that there is no direct proof that respondent Pilipinas Shell Petroleum Corporation indeed committed fraud. Thus, this goes without saying that the same respondent, **as transferee**, should not be held solidarily liable pursuant to the "liability clause" in the TCCs since no fraud can be directly attributed to the respondent-transferee.

Indeed, there is no dispute that the assessments came about because of the cancellation of the subject TCCs pursuant to Center Excom Resolution No. 03-05-99. What the respondent is controverting is the authority of the Center to cancel TCCs by a mere Excom Resolution.

As stated earlier, one law which governs the grant of incentives to BOI registered enterprises, such as the tax credits, is E.O. No. 226 or the Omnibus Investments Code. Article 3 of Chapter II thereof explicitly provides that "The Board of Investments shall implement the provisions of Book One to Five of this Code." It follows therefore, that any cancellation or revocation of the incentives granted to qualified entities falls within the powers of the Board of Investments and not with the Center. This is taking into account the fact that the Center was created by A.O. No. 266 mainly to facilitate the orderly and expeditious processing of tax credit availments or duty drawbacks, then administered by various government agencies, which resulted in varying documentation requirements, longer processing time and considerable number of pending applications. Thus, the Center was given the following powers, duties and functions:

> **Section 3.** *Powers, Duties and Functions.* – The Center shall have the following powers, duties and functions:
>
> a. To promulgate the necessary rules and regulations and/or guidelines for the effective implementation of this administrative order;
>
> b. To accept applications for tax credits and/or duty drawbacks and finish evaluation within thirty (30) working days from date of acceptance of complete applications;
>
> c. To regularly conduct dialogues with the private sector with the end in view of arriving at realistic standard/usage rates;
>
> d. To adopt and/or revise standard/usage rates on all raw materials and inputs used in export products *motu proprio* or upon petition by concerned exporters which shall be used for computing special tax credits/duty drawbacks;
>
> e. To conduct regular post-audit examinations on tax credit certificates issued using standard rates;
>
> f. To disseminate relevant information to the public on credit/drawback scheme/policies and procedures;
>
> g. To enforce compliance with tax credit/duty drawback policy and procedural guidelines;
>
> h. To manage the data processing for the storage and retrieval of data on tax credit/duty drawback scheme applications;
>
> i. To collect appropriate fees in connection with the processing of the applications, which may be expended to enhance its effectiveness and efficiency, including but not limited to granting allowance, overtime pays and other material benefits to its members and staff;
>
> j. To recruit, hire and train the necessary staff to process and evaluate applications for tax credit/drawback;

k. To accept donations pursuant to Section 8 of R.A. 7078 for purposes of the functions of the Center; and

l. To perform such other functions/duties as may be necessary or incidental in the furtherance of the purpose for which it has been established.

Without any doubt, the authority to invalidate or cancel TCCs, TDMs or TCC transfers has not been vested upon the Center. Therefore, the Center's authority to promulgate rules and regulations under Section 3.a cannot be the basis for Excom Resolution's providing for the cancellation of the TCCs relative to Section 3.e. It is enlightening that Committee Report No. 510[9] contains the following preliminary recommendations:

1. That legislative measures necessary for the proper grant of tax credits to export claimants be carefully studied and passed by the Senate, with a view to an efficient and effective implementation of the Omnibus Investments Code and other laws granting fiscal incentives;

2. That an immediate review of the Omnibus Investment Code be undertaken by the appropriate Senate Committee, with a view of ascertaining whether such policies and objectives of the National Government regarding the encouragement of foreign and domestic investments and simulation of growth need to be redefined.

Moreover, Senate P.S. Res. No. 95, "Resolution to Conduct and Investigation, in Aid of Legislation, on the Reported Scam at the Department of Finance Tax-Credit Window" resolved that:

"the Senate direct the Committee on Ways and Means, and other appropriate Committees, to conduct an inquiry, in aid of legislation, on the reported One-Stop-Shop anomaly, in order to ascertain the legitimacy of tax credit grants and if necessary,

[9] Exhibit 15

enact appropriate legislative measures to prevent further abuse of tax credits."

Apparently, any amendment or modification in connection to the grant of tax credits falls within the functions of the legislature. If the present law contains any loopholes, it is for the legislators to correct the same. The Center cannot summarily cancel the TCCs pursuant to Section 3.a in relation to Section 3.e of A.O. No. 266. It is axiomatic that the legal authority and power of administrative agencies are limited to those expressly granted or necessarily implied from those granted in the legislation creating such body. Any action taken by the agency without or beyond such authority or power is void and ineffective.

Even assuming, for purposes of academic discussion, that the Center possesses of the power to cancel the subject TCCs, nevertheless, Excom Resolution no. 03-05-99 cannot be a valid basis for the cancellation although it provides for the "Guidelines and Procedures for the Cancellation, Recall and Recovery of Fraudulently Issued Tax Credit Certificates". A painstaking review of the same[10] reveals that no identification has been made on any "fraudulently issued and transferred" TCCs. So this should not have been made as the sole basis for the assessment.[11] Added to that, Excom Resolution No. 03-05-99 abounds with legal infirmities. Being a set of procedure which carries a penal sanction, it should be first published. A certification from the U.P. Law Center, Office of the National Administrative

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[10] Exhibit I
[11] Exhibit J & Admitted Fact, pre-trial conference, April 7, 2000

Registers[12] proves that the requirement under Book VII, Chapter 2 of E.O. No. 292 has not been complied with. Also, Excom Resolution No. 03-05-99 contains unfair and arbitrary provision inasmuch as only the claimant/transferor was notified of the results of the post-audit conducted by the Center and given the right to explain why the TCCs should not be cancelled and revoked. The transferee, the prejudiced party, was not given such right.[13] Thus, we reiterate that the TDMs and the related TCCs and their transfers and utilization can no longer be cancelled.

In fact, the decision of the majority merely adopts the conclusions of the petitioner (who in turn adopted the findings of the Center) as to the existence of fraud on the assumption that either the export transactions represented to the Center did not take place or that the company-applicant did not export at the volume it had represented to the Center or underdeclared its sales figures in the financial statements. It then takes notice of two possibilities: *First*, the grantee of the TCCs did not actually export the volume it represented to the Center on the basis of which the TCCs were issued. *Second*, the company committed massive fraud in the declaration of the financial performance.[14]

It is very clear then that the act of fraud was merely presumed as the allegation was based on mere possibilities. This only proves that petitioner

[12] Exhibit O
[13] TSN, August 16, 2001, page 46
[14] See Majority Decision, pages 14 & 15

and the Center, could not pinpoint the actual and fraudulent act committed, if any.

Fraud is a question of fact which must be alleged and proved. It is a serious charge and to be sustained, it must be supported by clear and convincing proof.[15] Fraud must be actual and not constructive;[16] it must be proved to exist by clear and convincing evidence - mere preponderance of evidence is not even adequate to prove fraud.[17] In the present case, the presumptions made by the respondent caused the cancellation of the subject TDMs and their related TCCs and TCC transfers which then led to the assessments against Pilipinas Shell Petroleum Corporation. However, it is a settled rule that an assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.[18] It is imperative that fraud be proven by clear and convincing evidence, and not by mere conjectures and speculations.[19] Thus, failing to prove fraud on the part of the respondent, the assessment issued against it beyond the three-year period allowed by law is void.

Aside from the alleged finding of fraud in the issuance of the TCCs, the majority of this Court *En Banc* found relevant, among others, the finding of the DOF/Center in the case of transfers to respondent, that "the Center has in its possession duly executed Affidavits of the former General

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[15] Republic vs. Ker & Co., Ltd., 18 SCRA 207; Commissioner of Internal Revenue vs. Ayala Securities, 70 SCRA 204; Republic of the Philippines vs. The CTA & Agfha, Inc. G.R. No. 139050, October 2, 2001
[16] Farolan, Jr. vs. Court of Tax Appeals, 217 SCRA 298
[17] Maestrado vs. Court of Appeals, 327 SCRA 678
[18] Collector of Internal Revenue vs. Benipayo, 4 SCRA 182.
[19] Sanchez vs. Court of Appeals, 279 SCRA 647

Managers of the companies stating that they have not signed any document transferring TCCs to oil companies or entering delivery contracts with any oil company as found in the transfer folders of the companies."[20]

The above-mentioned affidavits should not be given credence since the supposed affiants were never presented before this Court to testify on the due execution of said affidavits thereby rendering the same as hearsay evidence. A sworn statement is absolute inadmissible in evidence for being hearsay, where the affiant himself never took the witness stand during trial.[21] In fact, during the hearing of December 3, 2001, these persons who purportedly executed the alleged affidavits did not appear and counsel for the petitioner dispensed with the testimonies of said persons.[22] Besides, respondent claimed that it is not required to execute any supply agreement to be a transferee of the TCCs. Being a BOI-registered entity was enough. Therefore, there was never a cause for the respondent to execute the questioned documents.

We laud the petitioner's efforts to recover any loss of revenue due the government. But in the pursuit thereof, the constitutional right to due process should always be observed. Records show that the Commissioner of Internal Revenue concentrated on the fraudulent acquisition of the TCCs by the garments companies as the latter failed to support their TCCs with the corresponding production and export requirements. But since he failed to

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[20] See Majority Decision, page 16
[21] People vs. Santos, G.R. 62072, November 11, 1985; People vs. Mosquerra, 362 SCRA 441
[22] Records, CTA Case No. 6003, page 523

run after these companies, he came to this Court to run after Pilipinas Shell Petroleum Corporation instead. We should not allow this Court to be used as the vehicle in making the Pilipinas Shell Petroleum Corporation liable just because it is convenient and on the pretext of the post-audit clause and solidary liability clause which as earlier discussed, do not really apply.

IN VIEW OF ALL THE FOREGOING, I manifest my position to deny the instant Petition for Review.

LOVELL R. BAUTISTA
Associate Justice

I CONCUR:

ERNESTO D. ACOSTA
Presiding Justice