REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PETRON CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5657

COMMISSIONER OF INTERNAL REVENUE AND THE BIR REGIONAL DIRECTOR OF MAKATI, REGION NO. 8,
Respondents.

Promulgated:

JUL 23 1999

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DECISION

Submitted before Us for review is the adverse decision of Respondent Antonio I. Ortega, Regional Director of Revenue Region No. 8 of the Bureau of Internal ("BIR", for brevity) at Makati City, Metro Manila, acting on behalf of likewise herein Respondent Commissioner of Internal Revenue, concerning the collection of Petitioner's alleged delinquent specific taxes in the aggregate amount of ₱1,107,542,547.08, inclusive of surcharges and interests, covering the years 1993 to 1997.

Petitioner is a corporation organized under Philippine laws with principal place of business at 7901 Makati Avenue, Makati City. It is a producer of petroleum products and has been granted Certificates of Registration bearing Nos. 89-1037 and DP 95-136 by the Board of Investments ("BOI" for short) pursuant to the provisions of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987.

The facts are as hereunder stated.

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During the years 1993 to 1997, Petitioner supplied and sold bunker oil and other fuel products to various BOI-registered export producers in the processing and manufacturing of their exported products.

Payments for aforesaid fuel products were effected through the transfer and assignment of Tax Credit Certificates ("TCC" for brevity) duly issued to each of the export producers by the Department of Finance's One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, heretofore called "DOF Center", from years 1992 to 1997, as tax credits on their raw materials, supplies and equipment purchased in accordance with the Omnibus Investments Code.

Such transfer and assignment of TCCs' to herein Petitioner from 1993 to 1997 were duly approved by the DOF Center which correspondingly issued DOF Tax Debit Memos ("TDM" for short) addressed to the Collection Programs Division of the BIR National Office.

Petitioner then used the DOF Center approved TCCs' in payment for its excise tax liabilities for the years 1993 to 1997. Upon its written requests, the Collection Programs Division approved the TCCs' as payments by issuing TDMs signed by the Assistant Commissioner of Collection Service of the BIR.

On April 24, 1998, however, Petitioner received a collection letter from the BIR Revenue District Office of

Makati South, Metro Manila, headed by Ruperto Somera, Ph.D., informing Petitioner that the TCCs' used by it for payments were invalid and in violation of Rule IX of the Rules and Regulations promulgated by the BOI to implement P.D. No. 1789 and B.P. 391, because they were issued in the name of companies other than itself. Consequently, the district office demanded the payment of delinquent specific taxes, the equivalent of the sum of TCCs which were allegedly invalid, in the total amount of P1,107,542,547.08, inclusive of surcharges and interests for the years 1993 to 1997. (Annex "C" of Petition)

Petitioner protested the demand for payment through letters dated May 14, 1998, May 21, 1998 and June 18, 1998. (Annexes "G" to "G-2" of Petition)[1] In the first two letters, it was argued that under Rule IX of the Rules and Regulations issued by the BOI to implement P.D. 1789 and B.P. 391, the TCCs' transferred to Petitioner were issued for taxes and duties that would have been paid on domestic capital equipment purchased, withholding tax on interest, raw materials used in the manufactured export products; and that being a BOI-registered enterprise, Petitioner was a qualified transferee of the same pursuant to the Memorandum of Agreement between the Ministry of Finance and the BOI, dated October 5, 1982.

1 Letters of Protests were prepared by Petitioner's legal counsel, the law office of A.M. Sison, Jr. & Associates.

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It was pointed out that the transfer of the TCCs' to another BOI-registered enterprise was authorized by BIR Ruling No. 0094-87-360-87; and that even if the TCCs' were issued pursuant to Executive Order No. 226, instead of P.D. 1789 as amended by B.P. 391, the same were still transferrable and could be used to pay taxes and duties, charges and fees due to the National Government, as explained in a letter of endorsement, dated September 29, 1997, of the BOI to Secretary R. de Ocampo of the DOF regarding problems being encountered by Pilipinas Shell Petroleum Corporation in the application of similar TCC payments with the BIR. Another letter of the BOI, dated May 15, 1998, addressed to Atty. Luis Maglaya was also quoted in order to justify Petitioner's being a qualified transferee of TCCs'. Thus:

> "2. Hydraulic oil and penetrating oil shall be classified as supplies in the same manner as diesel fuel oil and industrial gases have been classified and <u>suppliers of the same should be considered as qualified transferees of tax credits</u>. (underscoring supplied)"

The two letters of protest further insisted that under Section 246 of the Tax Code, as amended, on non-retroactivity of rulings, the BIR is proscribed from giving retroactive effect to any reversal of its position if it would cause prejudice to the taxpayer; that no prior assessment notice was sent to the Petitioner in violation of due process; that the BIR, as a subordinate agency, cannot overrule the Secretary of DOF, through his representative, Undersecretary Antonio P. Belicena, who issued and authorized the transfer and use of TCCs' in payment of taxes; that pursuant to Article 63 of P.D. 1789 as amended by B.P. 391 and Article 79 of Executive Order No. 226, all doubts concerning the benefits and incentives granted enterprises and investors by the Omnibus Investment Code should be resolved in favor of investors and registered enterprises; and that under paragraph 4 of Article 7 of Executive Order No. 226, the BOI is the government body vested with authority to decide controversies between registered enterprises and investors and government agencies.

Finally, in the last letter of protest of June 18, 1999, new arguments were introduced. It was contended that the TCCs' transferred to herein Petitioner were those issued to BOI-registered export producers under Administrative Order No. 266 in relation to Executive Order No. 226; that the same were transferable under Article 21 of said Executive Order and Rule VII of its implementing rules; that only the proper tax without surcharge and interest should be "assessed" because Petitioner relied on the approvals of concerned government agencies in good faith[2]; and that the alleged

2 Citing the cases of **ABS-CBN vs. Court of Tax Appeals, 108 SCRA 142; Advertising Associate vs. Court of Tax Appeals, 133 SCRA 765; Cagayan Electric**

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"deficiency" specific taxes for the years 1992 to June 18, 1995 had already prescribed pursuant to Section 203 of Republic Act No. 8424 inasmuch as more than three years had elapsed from the time said taxes were paid through the use of TDMs.

In a letter dated June 17, 1998 and received by the Petitioner on June 22, 1998, Respondent Regional Director sent his response to the above argumentation of the Petitioner contained in its letters of May 14 and May 21, 1998. He underscored the fact that since all the aforementioned TCCs were issued under the authority of the Omnibus Investments Code of 1987, as amended by Executive Order No. 226, the rules applicable thereto are governed by the provisions of Article 21 of the said Code, as implemented by Rule VII of the BOI implementing rules and DOF-BOI Memorandum of Agreement, dated August 29, 1989[3].

Respondent Regional Director asseverated, *inter alia*, that the action of the Collection Programs Division in accepting TCCs' and issuing TDMs in order to effect payment may not be legally treated as a BIR ruling because as provided in Section 245 of the old National Internal Revenue Code, the law allegedly applicable to

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Power & Light Co. Inc. vs. Commissioner of Internal Revenue, 138 SCRA 629.

3 Amended DOF-BOI Memorandum of Agreement dated October 5, 1982.

the case, the power to issue BIR rulings is vested by law exclusively upon the Commissioner of Internal Revenue; that the doctrine applicable to the case is not on non-retroactivity of BIR rulings but the doctrine that estoppel does not apply against the Government; that BIR Ruling No. 009487-360-87 is inconsistent with the BIR's system of numbering rulings and that it cannot be located from the records; that the case does not require assessment notice because what is involved is a collection case for a delinquent tax account and not a deficiency assessment; that as regards the BIR overruling the DOF, his office is merely implementing the clear provisions of Article 21 of Executive Order No. 226 as implemented by Rule VII of the BOI implementing rules and DOF-BOI Memorandum of Agreement, dated August 29, 1989; that the construction on interpreting all doubts in favor of registered enterprises as provided in the Omnibus Investments Code is not applicable because from the clear facts of the case, doubt does not exist; that the word "supplies" as contained in the letter of the BOI, dated May 15, 1998, refers to such supplies as are used by the transferors of TCCs in the manufacture of their products for export and forming part of said products; and lastly, that the BIR in collecting the delinquent taxes is not encroaching upon the domain of the BOI but is merely exercising the powers and duties provided under Section 3 of the Tax Code which comprehend the assessment and collection of all internal revenue taxes.

With the looming threat to collect the delinquent specific taxes through warrant of distraint and levy if not paid immediately upon receipt of said letter of Respondent Regional Director, Petitioner felt that it had no alternative but to elevate its case before this Court. On July 7, 1998, Petitioner filed the instant "Petition for Review with Motion for Temporary Restraining Order and after due notice and hearing for Issuance of Writ of Injunction".

At bar, Petitioner reasserts its stance *a quo* and contends further, among others, that the BIR has no moral nor legal right to collect again the excise taxes in question on the ground that the TCCs were already cancelled and the BIR's obligation to refund the BOI-registered export producers has been extinguished; that to require Petitioner to pay again the excise taxes is tantamount to unjustly enriching the BIR at its expense[4]; that Respondents' lack of attempt to return the TCCs to the Petitioner before sending the collection letter shows a pattern of bad faith on their part, contrary to the language of the Supreme Court in **Commissioner of Internal Revenue vs. Procter & Gamble Manufacturing Corporation**

4 Citing the case of **Commissioner of Internal Revenue vs. Fireman's Fund Insurance Company and the Court of Tax Appeals, 148 SCRA 315.**

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and the Court of Tax Appeals, G.R. 66838, December 2, 1991, 204 SCRA 377, that " a sovereign government should act honorably and fairly at all time, even *vis-a-vis* taxpayers"; and that, the acceptance of the TCCs and issuance of TDMs following the procedures contained in Revenue Memorandum Order No. 20-91 have the same effect as a ruling which Respondents cannot revoke retroactively.

In their Answer, Respondents interpose, *inter alia*, the following special and affirmative defenses, to wit:

> 8) The mandatory requirements of Pre-assessment and Assessment Notices have no application in the instant case as said prerequisites apply only to deficiency tax assessments after audit investigation pursuant to Section 229 of the old NIRC as implemented by Revenue Regulations No. 12-85. This case involves a collection case against petitioner for its delinquent specific taxes covering the years 1993 to 1997;
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> 9) While the Tax Credit Certificates duly issued by the BOI were accepted by the BIR through the issuances of the corresponding Tax Debit Memos, their assignment, conveyance, transfer and use by herein petitioner in payment of its specific tax liabilities were invalidly made being contrary to the provisions of Article 21 of the Omnibus Investments Code of 1997 (sic), as amended by E.O. No. 226, as implemented by Rule VII of the BOI Rules and Regulations and DOF-BOI MOA, dated August 29, 1989;
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> 10) Tax Credit Certificates may only be assigned, conveyed and transferred by a BOI registered enterprise/grantee to another BOI registered enterprise provided that in connection with TCC for raw materials, supplies and semi-manufactured products sold and supplied by herein petitioner, such raw

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materials, supplies and semi-manufactured products must be used by the TCC transferor in the manufactured (sic), processing or production of the export products and must form part of such export products (Rule VII, supra);

11) Petitioner does not qualify as a transferee of the TCCs even if it is a BOI registered enterprise because the petroleum fuel products (e.g. Bunker fuel oil) that it supplied and sold to TCC transferors did not form part of the transferor's manufactured products for export;

x-x-x x-x-x x-x-x

15) The respondents' acceptance of the TCC's (sic) thru the issuance of the Tax Debit Memos cannot be treated as a BIR ruling, hence, the non-retroactivity doctrine does apply in the instant case;

16) Moreover, the action of the Collections Program Division in accepting the TCC's (sic) and issuing the Tax Debit Memos to effect payment cannot legally prevent the government from collecting the rightful taxes due and demandable from the petitioner. It has been held that "an erroneous construction of the law does not preclude or estop the government from collecting a tax which is legally due." (Hilado v. CIR, 100 Phil. 288);

x-x-x x-x-x x-x-x

During the trial of herein case, Petitioner filed a "Manifestation and Urgent Motion", dated July 20, 1998, praying that any Writ of Preliminary Injunction that may be issued by this Court based on its Motion for Temporary Restraining Order and/or Writ of Preliminary Injunction which was heard in the morning of July 17, 1998, should include the cancellation or dissolution of the Warrant of

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Garnishment issued by Respondent Regional Director in the afternoon of that same day, July 17, 1998.

On July 21, 1998, however, or a day after, Petitioner filed another manifestation informing this Court that the aforesaid Warrant of Garnishment has been lifted by Respondent Commissioner himself on July 20, 1998, the day it filed the urgent motion. In view of this development, Petitioner declared in open court in the hearing of July 24, 1998 that said urgent motion has been rendered "academic".

The parties submitted their Pre-trial Briefs and succeeded in coming out with a Joint Stipulation of Facts and Issues. There being no other evidence to be presented, both parties opted to file their respective memorandum.

Petitioner elaborates in its memorandum that it did not violate the general conditions for availment of incentives prescribed under Rule IX of the Rules and Regulations issued by the BOI to implement P.D. No. 1789 and B.P. 391, as stated in the collection letter of Revenue District Officer Somera, because the assignment of the TCCs by the transferors in payment of diesel oil and fuel products it supplied to them is a mode of payment which has been continuously accepted and approved by the BIR, particularly in 1993 to 1997.

It observes that the disavowal of such practice by the BIR five (5) years thereafter is contrary to the Supreme Court's dictum in **ABS-CBN Broadcasting Corp. vs. Court of Tax Appeals, *supra*, at pp. 151-152,** where it was stated that the Commissioner is precluded from adopting a position inconsistent with one previously taken where injustice would result therefrom, or where there has been a misrepresentation to the taxpayer.

It likewise emphasized on the application to its case of the well-entrenched principle that great weight must be accorded on the interpretation or construction of a statute by the government agency called upon to implement the same[5], in view of the fact that the BOI, which is the agency tasked to implement the provisions of the Omnibus Investments Code, had ruled as far back as 1990 that diesel fuel oil is classified as "supplies" and that suppliers of the same are "qualified transferees of tax credits.

In addition, it refutes Respondents' interpretation that bunker fuel and fuel products should *form part of the finished products* in order to be considered "supplies" when such products must necessarily be consumed in their use for the processing and manufacture

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5 Citing the cases of **Madrigal vs. Rafferty, 38 Phil. 414 and Soriano vs. Offshore Shipping and Manning Corporation, 177 SCRA 513.**

of export products. It deduces that if machinery and equipment imported by the export producers for the processing and manufacture of their export products are given exemption from customs duties and taxes under Article 39 (c) of the Omnibus Investments Code, there is no reason why the oil and fuel supplies used to run such machineries and equipment cannot be considered supplies under Article 39 (k) of the said Code which, as a public policy[6], grants tax credits to "supplies, raw materials, and semi-manufactured products used in the manufacture, processing or production" of the export products.

Citing the cases of **Commissioner of Customs vs. Caltex (Phils.) Inc., et. al., 106 Phil 830-832; Philippine Phosphate Fertilizer Corporation vs. The Hon. Commissioner of Customs, CTA Case No. 4661, May 31, 1993** and **United States Fidelity and Guaranty Co. vs. Feenaughty Machinery Co., 85 P2d 1085, 1089, 197 Wash.**, it holds that "gasoline and oil" and "petroleum products like bunker oil or fuel" have been considered as supplies and that while they do not enter into and become a physical part of a finished structure, such supplies become as much part of the structure.

On their part, Respondents reiterated most of their arguments except on the imposition of surcharges and

6 Citing paragraph 1, Article 2, Chapter 1 of the Omnibus Investments Code and I Mertens, Law of Federal Income Taxation, 1991-94 ed., p. 76.

interest on the specific taxes herein being demanded and the right of the government to collect the same having prescribed.

While they acknowledge that the Supreme Court has deemed it wise not to impose surcharges and interest in some cases when the taxpayers relied in good faith on rules or circulars or rulings or when the assessments are controversial, they nonetheless remonstrate against the applicability of such principle in this case. They contend that Petitioner "was not at all in good faith in accepting the TCCs of the export producers in payment of the bunker oil and fuel products supplied to them and then applying said TCCs in payment of its excise tax liabilities incurred"; and that, neither could they assent that the acceptance is controversial because there was a clear error on the part of the officials of the Respondents on the interpretation of the applicable law and rules and regulations, thereby negating any controversial nature of the matter.

Based on the factual and legal milieu obtaining in the case at bar, the parties have stipulated on the following issues, to wit:

> 1. Whether Petitioner's payment of its excise tax liabilities for the years 1993 to 1997 thru the use of the Tax Credit Certificates assigned to it by the export

producers in payment of bunker oil and fuel products supplied to them is valid.

2. Whether the bunker oil and other fuel products supplied by Petitioner to the export producers constitute "Supplies" under Art. 21 of the Omnibus Investments Code and Rule VII of the BOI Rules and Regulations used in the manufacture, processing and production of export products which may be paid by the export producers thru assignment or transfer of Tax Credit Certificates issued as tax credits for the use and purchase of such supplies, raw materials and equipment.

3. Whether an adverse ruling by the BIR invalidating the use and approval of Tax Credit Certificates in payment of Petitioner's excise tax liabilities can apply retroactively to nullify the payments made by Petitioner for excise tax liabilities in the years 1993 to 1997.

4. Whether Petitioner can be held liable for surcharges, interests and other charges as a result of the invalidation of the use and approval of Tax Credit Certificates as payment for Petron's excise tax liabilities for the years 1993 to 1997 assuming *arguendo* that the BIR ruling is correct.

5. Whether the right of the Government to collect the excise tax liabilities of Petitioner has prescribed.

For a better picture of the issues, the pertinent provisions of law, rules and regulations, opinions and agreements cited are hereby reproduced, to wit:

1. ARTICLE 21 of *Omnibus Investments Code of 1987:*

"ART. 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 a 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."

2. Section 39(k) of the Omnibus Investments Code of 1987:

"(K) Tax Credit for taxes and duties on raw materials.-Every registered enterprise shall enjoy a tax credit equivalent to the National Internal Revenue taxes and Customs duties paid on the supplies, raw materials and semi-manufactured products used in the manufacture, processing or production of its export products and forming part thereof, exported directly or indirectly by the registered enterprise: *Provided*, however, That the taxes on the supplies, raw materials and semi-manufactured products domestically purchased or indicated as a separate item in the sales invoice."

3. RULE VII of BOI Rules and Regulations implementing the Omnibus Investments Code:

"RULE VII. TRANSFERABILITY OF TAX CREDIT CERTIFICATE

"Tax credit certificates for taxes and duties that would have been paid on domestic capital equipment purchased, and on **raw materials, supplies and semi-manufactured products used in the manufacture, processing or production of its export products and forming**

part thereof shall be issued by the Secretary of Finance or his representative, or by the Board, if so delegated by the Secretary of Finance.

"**Said certificate may be transferred in accordance with the memorandum of agreement between the Department 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."

4. Memorandum of Agreement between the Department of Finance and the Board of Investment, dated October 5, 1982, as amended by DOF-BOI MOA, dated August 29, 1989, to implement ARTICLE 21 of the Omnibus Investments Code of 1987:

"Sec. 2. The first three (3) paragraphs of the guidelines contained in the aforementioned Memorandum of Agreement are hereby reworded to read as follows:

"1) Henceforth, all tax credit certificates, except for net local content (NCL) and Net Value Earned (NVE), issued to BOI-registered enterprises under EO 226, PD 1789 and PD 1789 as amended by BP 391 on or after the effectivity date hereof, may be transferred under conditions provided herein.

"2) **The transferee should be a BOI-registered firm which is a domestic** capital equipment supplier or a **raw material and/or component supplier of the transferor.**

"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 BOI incentives under its law of registration,

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"Sec. 3. All other provisions in the aforementioned Memorandum of Agreement not otherwise amended herein shall continue to have full force and effect.

"Sec. 4. The transferability of all tax credit certificates, except those for NLC and NVE, issued to BOI-registered enterprises prior to the effectivity of herein amendments shall continue to be governed by guidelines/conditions existing at the time said certificates were issued."

5. BOI Letter dated May 15, 1998:

"During the BOI Board of Governors' meetings of July 27, August 17 and 29, 1990, the following issues regarding transferability of tax credits were clarified and approved:

1. Assignee should be a BOI-registered company and at the same time a domestic producer of the raw materials and components being supplied. However, its registration need not be the product that it supplies. The condition that the assignee should be a BOI-registered company shall only apply to tax credits issued after January 30, 1990.

2. Hydraulic oil and penetrating oil shall be classified as supplies in the same manner as diesel fuel oil and industrial gases have been classified and suppliers of the same should be considered as qualified transferees of tax credits.

(Emphasis supplied on the above provisions)

We shall discuss the first two issues jointly, both being interrelated. A painstaking review of the attending facts and circumstances surrounding the current issues would reveal that herein parties are at odds with each other over the validity of the transfer of TCCs to

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the Petitioner and the consequent use by the latter of such TCCs in payment of its excise tax liabilities.

Respondents are steadfast in their belief that Petitioner is not a valid transferee of the TCCs originally issued to BOI-registered export producers on the ground that the bunker oil and other fuel products that it sold to said producers are not considered "supplies" and "forming part" of export products within the contemplation of Article 39 (k) of the Omnibus Investments Code and Rule VII of its implementing rules.

Not to be outdone, Petitioner cries foul over Respondents' interpretation. It primarily invokes BOI's classification of diesel fuel oil as "supplies" and its approval that suppliers of the same are qualified as transferee of tax credits. It likewise impresses upon the fact that the transfer of tax credits in its name has been duly approved by the DOF Center[7] for five years from 1993 to 1997 before Respondents issued a collection letter for delinquent taxes.

Without any qualm or quibble, this Court rules in favor of the Petitioner. Respondents' non-acceptance of the TCCs' is premised on hollowed grounds. They have imprudently misconstrued the provisions of BOI laws,

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7 A government office created under Administrative Order No. 266, dated February 7, 1992 of the Office of the President.

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rules and regulations and agreements in point in the case at bar.

Correlating the aforementioned provisions, Article 21 of the Omnibus Investments Code sets the legal basis for the transferability of TCCs' when it provided that the same are "*transferable under such conditions as may be determined by the Board after consultation with the Department of Finance.*" Pursuant thereto and as prescribed under Rule VII of the BOI Rules and Regulations implementing said Code, the conditions governing the transferability of TCCs' were embodied in the Memorandum of Agreement, dated October 5, 1982 (amended on August 29, 1989) by and between the DOF and the BOI. In part, it is required in the latter agreement that the transferee of the TCCs' should be a BOI-registered firm which is a raw material and/or component supplier of the transferor. Along this line, Respondents insist on the disqualification of the Petitioner as a qualified transferee of TCCs in view of their observation that the bunker fuel oil it supplied to export producers owning the TCCs did not form part of their export products. We strongly disagree.

The BOI letter, dated May 15, 1998, *supra*, relied upon by the Petitioner holds the key to the resolution of the instant case. It is plainly stated therein that in the meetings of the BOI Board of Governors held on July

27, August 17 and 29, 1990, suppliers of diesel fuel oil, hydraulic and penetrating oils as well as industrial gases have been considered and clarified as qualified transferees of tax credits. Said letter undoubtedly contains the latest "conditions" affecting the transferability of TCCs as determined by the BOI pursuant to Article 21 of the Omnibus Investments Code. The DOF-BOI MOA, dated October 5, 1982, as amended on August 29, 1989 is for all intents and purposes was clarified by the said BOI letter.

As regards the additional requirement that such conditions should be determined "after consultation with the Department of Finance", the presumption is that the DOF has been duly consulted before the BOI Board of Governors made any clarification on the entitlement of oil and gas suppliers as qualified transferees of TCCs. Be it noted that no allegation or contrary evidence obtains at bar to show that the DOF was not priorly consulted nor has objected to the said interpretation. Hence, it is presumed that the law has been obeyed and that official duty has been regularly performed by the BOI in determining new conditions for transferability of TCCs. (pars. ff and m, Section 3, Rule 131 of the Revised Rules of Court)

For another reason, the long practice of the DOF Center in approving the transfer of the TCCs to herein

Petitioner is a concrete proof that the DOF, a representative of which acts as ex-officio chairman of the DOF Center, has agreed to the clarification made by the BOI. As one of its powers, duties and functions under Administrative Order No. 266, promulgated on February 7, 1992, the DOF Center is empowered to enforce compliance with tax credit policy and procedural guidelines. Actual events show that based on BOI guidelines, the DOF Center approved the transfer to herein Petitioner the TCCs in question. Knowledge and consent of the DOF to the new conditions as determined by the BOI is therefore more than apparent and well nigh incontrovertible.

The belief of the Respondents that "supplies" sold by the Petitioner to export producers should form part of their export products in order that it can be a qualified transferee of TCCs is untenable. While it is true that Article 39(k) of the Omnibus Investments Code requires that supplies should form part of the export product before a BOI-registered enterprise can enjoy tax credit, such a requirement only applies to an export producer or original grantee of TCCs and not to transferees thereof. A minutiose scrutiny of the provision of law reveals nary a requirement that the transferee should be a component supplier of the export producer. What the provision simply demands is that supplies should form part of the export product of the export producer before it can enjoy tax credits.

It must be observed that the conditions affecting the transferability of TCCs is solely governed by Article 21 of the Omnibus Investments Code. As it is worded, the conditions are left open to the determination of the BOI after consultation with the DOF. The conditions can therefore be anything.

The condition under Rule VII of the BOI Rules and Regulations and DOF-BOI MOA, dated October 5, 1982, as amended on August 29, 1989 that the transferee could be a capital equipment supplier or a raw material and/or component supplier of the export producer is one of such conditions. Please note that not only a component supplier is a qualified transferee but also a capital equipment supplier and other raw material supplier. Later event will show, however, that the BOI decided to clarify said condition, as shown lucidly in the BOI letter, dated May 15, 1998.

Of grave concern to this Court is the penchant attitude of the Respondents to disregard the official acts of other government agencies such as the BOI and the DOF Center based solely on their personal interpretation of the laws, rules and regulations and policies of said agencies.

While it is settled that the BIR possesses the authority and the expertise when it comes to matters on taxes, one has to concede that it pales in the area of administering the Omnibus Investments Code, most especially in the policy of granting tax incentives, the wisdom of which is reposed by law to the BOI and the DOF Center.

Administrative regulations and policies enacted by administrative bodies to interpret the law have the force and effect of law and are entitled to great respect. **(Warren Manufacturing Workers Union (WMWU) vs. Bureau of Labor Relations, 159 SCRA 387)** It was thus held in **Eslao vs. Commission on Audit, 236 SCRA 161,** that the Commission on Audit is not authorized to substitute its own judgment for any applicable law or administrative regulation with the wisdom or propriety of which it does not agree at least not before such law or regulation is set aside by the authorized agency of government.

Applying the preceding principle laid down by the Supreme Court to herein case, the BIR cannot simply question the regulations and policies promulgated by the BOI and the DOF Center and invalidate the TCCs.

It is worth noticing that aside from the legal infirmity of the aforementioned interpretations by the Respondents on BOI laws, rules and regulations and policies, their complete disregard to the BOI and DOF opinions and consequently, their demand to the Petitioner for the payment of delinquent taxes is irregular. Respondents should have observed the procedure or mechanism prescribed under Chapter 14, Book IV of Executive Order No. 292, otherwise known as the Administrative Code of 1991, that is, to bring the matters they dispute with the BOI and DOF Center before the Solicitor General or the Secretary of Justice, as the case may be, *prior* to any decision to collect delinquent taxes. If the Secretary of Justice decides in favor of the actions taken by the BOI, then the BIR is bound to respect the validity of the TCCs. If, however, the BIR is upheld, then and only then can the BIR be legally authorized to collect any delinquent tax. At least administratively, the BIR has a stand to lean on. This is without prejudice, however, to the right of any private person or entity to bring an action before a Court of Law should his or its right is violated in the process.

We note that the right of the Petitioner to due process and fair play has also been violated in this case due to the non-observance by the Respondents of the abovestated procedure under the Administrative Code on controversies between government agencies and offices. It has been caught in a crossfire not of its doing.

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> Any government act that militates against **the ordinary norms of justice or fair play** is considered an infraction of the great guaranty of due process; and this is true whether the denial involves violation merely of the **procedure prescribed by the law** or affects the very validity of the law itself. **(Constitutional Law by Justice Isagani Cruz, 1995 ed., p. 95;** emphasis supplied)

Although no longer crucial to the disposition of the case at bar, We chose to dwell into the propriety of the other issues raised by the parties for the sake of legal clarity and enlightenment of disputes to come.

Dealing with the third and fourth issues which are intertwined, we refuse to be drawn into a discussion on the retroactive effect of a BIR ruling on the Petitioner. Facts of the instant case is bereft of any BIR ruling as having been duly issued by Respondent Commissioner of Internal Revenue to the Petitioner. By practice, a BIR ruling is numbered and contains the official written interpretative opinion of the Commissioner of Internal Revenue addressed to an individual taxpayer regarding his taxability over certain matters. It cannot grow from mere acquiescence or long practice nor can it be implied. Petitioner at bar failed to cite any specific ruling duly issued to it by Respondent Commissioner of Internal Revenue. Herein issues are therefore moot and academic and present no actual and particular justifiable controversy.

> A ruling is a written statement issued to a taxpayer or his authorized representative by

> the National Office which interprets and applies the tax laws to a specific set of facts. (Mertens Law of Federal Income Taxation, Section 49A.09)
>
> A ruling is an interpretation by an administrative agency of the law under which it operates applicable to a given statement of facts. (Webster Third New International Dictionary)

We would just like to mention in passing though that the retroactivity or non-retroactivity of BIR rulings is well governed by Section 246 of the Tax Code and that the liability for surcharges, interests and other charges has in some cases been deleted by the Supreme Court e.g. in **C.M. Hoskins vs. Commissioner of Internal Revenue, 71 SCRA 511** and **Cagayan Electric Power & Light Co., Inc. vs. Commissioner of Internal Revenue and Court of Tax Appeals, G.R. No. 60126, 25 September 1985.**

On the last issue of whether or not the right of the government to collect the subject taxes has prescribed, while petitioner alleged that prescription has set in especially taxes covering taxable years 1993 to 1995, respondent on the other hand alleged otherwise, that the government is not legally prevented from collecting the rightful taxes due and demandable from the petitioner there being a wrong interpretation of the law involved. Petitioner alleged that pursuant to Section 203 of the Tax Code, assessment should have been issued within three (3) years from the filing of the corresponding tax return. Respondent alleged however, that there is no requirement for pre-assessment and assessment notices in the instant case as said prerequisites apply only to deficiency tax assessment after audit investigation pursuant to Section 229 of the NIRC as implemented by Revenue Regulations No. 12-85 and this case only involves a collection case.

This Court believes that the parties in their respective desire to defend their position failed to realize that the letter dated April 22, 1999 of the Revenue District Officer Ruperto P. Somera to Petron Corporation demanding the payment of P1,107,542,547.08 inclusive of delinquency surcharge and interest and stating his reason therefore is an assessment. It has all the peculiarities of an assessment which is commonly defined as a written notice and demand for payment of tax liability that is definitely set and fixed. A written communication containing a computation by a revenue officer of the tax liability, giving the taxpayer an opportunity to contest or disprove the BIR examiner's findings is not an assessment since it is yet indefinite (Justice Jose Vitug, Compendium of Tax Law and Jurisprudence, Third ed., p. 243). As held in the case of **Alhambra Cigar and Cigarette Manufacturing Co. v. Collector of Internal Revenue, 105 Phil. 1337 and Estate of Maria Lina Vda. de Uy vs. Pacita Uy, 57 OG 526,** assessment is merely a notice to the effect that the amount stated therein is due as tax and a demand for the payment thereof. It is not an action or proceeding for the collection of taxes. It is a step preliminary, but essential, to warrant of distraint, if still feasible, and also to establish a cause for judicial action. Without an assessment, there is no debt from the taxpayer and there is no obligation on his part which can be enforced in an action (**Galusha vs. Wendt, 14 IOWA 604,** cited in the book of Jose Arañas, Annotation and Jurisprudence on the National Internal Revenue Code, Vol. I, 1978 ed., pp. 20-21). Consequently, a worse legal consequence will befall on the respondent if no assessment at all is issued under the circumstances, just because of a wrong notion that by doing so the three (3) year prescription will not run. Aside from the above legal consequences the non-issuance of a formal assessment will constitute violation of the due process clause of the Constitution considering the express requirement of the law under Section 228 of the Tax Code requiring the Commissioner to first notify the taxpayer of his findings and allowing the taxpayer to file a formal protest therefore. This is an administrative due process provided by law which must be followed.

Granting for the sake of argument that there is no need for the issuance of an assessment and that the letter of RDO Somera is a mere collection letter, the

Supreme Court in **Republic vs. Ledesma, G.R. No. L-18759, February 28, 1976; 19 SCRA 455,** has already enunciated the rule under the old Tax Code, more particularly Section 331 thereof, that the prescriptive period for the collection of taxes is within five years from assessment and "*if there is no assessment, a proceeding in court for collection must be commenced within the same period*". Said Section 331 has been subsequently renumbered as Section 203 under the applicable Tax Code of 1992 but the period has been reduced from five years to three years. Thus:

> **SEC. 203. *Period of limitation upon assessment and collection.*** - Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the 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*: x-x-x (italics supplied)

In other words, with or without the requirement of an assessment, the right of the government to collect has mostly prescribed.

Going into the allegation of the respondent that the government is not legally prevented from collecting the tax there being a wrong interpretation of the law involved. This is correct but this principle admits certain exceptions as when grave injustice would result if government is allowed to adopt a position inconsistent

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with one previously taken. In the case of **ABS-CBN Broadcasting Corporation vs. Court of Tax Appeals, 108 SCRA 142**, the Supreme Court held that:

> "This Court is not unaware of the well-entrenched principle that the Government is never estopped from collecting taxes because of mistakes or errors on the part of the agents. In fact, utmost caution should be taken in this regard. But, like other principles of law, this admits of exceptions in the interest of justice and fair play. The insertion of Sec. 338-A (now Section 246) into the National Internal Revenue Code, as held in the case of Tuason vs. Lingad, is indicative of legislative intention to support the principle of good faith x x."

The application of the above principle is especially true to the instant case considering the long acquiescence by the Board of Investment, Department of Finance and the Bureau of Internal Revenue itself of the acceptability of the tax credit certificates transferred to the oil companies in payment of their own tax liabilities. To conclude otherwise would violate the principle of justice and fair play.

Even granting the government can still validly collect, as discussed above without such assessment if we will adopt the stand of the respondent and absent any proceeding in court commenced by the Respondents for the collection of Petitioner's delinquent taxes, prescription has started to set in. Definitely, the period covering years 1993, 1994, 1995 and the first half of 1996 where respective returns has been duly filed, has already prescribed following the three-year prescriptive period for judicial action to collect the delinquent taxes involved herein. If ever thus, only a small portion of the delinquent taxes is recoverable by the Respondents.

WHEREFORE, in view of the foregoing, the instant Petition for Review is hereby **GRANTED.** The collection of the alleged delinquent excise taxes in the amount of ₱1,107,542,547.08 is hereby **CANCELLED AND SET ASIDE** for being contrary to law. Accordingly, Respondents are **ENJOINED** from collecting the said amount of taxes against the Petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals