Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

PILIPINAS SHELL PETROLEUM CORPORATION, Petitioner, **- versus -** **COMMISSIONER OF CUSTOMS, COLLECTOR OF CUSTOMS OF THE PORT OF BATANGAS, BUREAU OF CUSTOMS, AND THE BUREAU OF INTERNAL REVENUE,** Respondents.	**CTA EB No. 1007** (CTA Case No. 8004)

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COMMISSIONER OF CUSTOMS, COLLECTOR OF CUSTOMS OF THE PORT OF BATANGAS, BUREAU OF CUSTOMS, COMMISSIONER OF INTERNAL REVENUE AND THE BUREAU OF INTERNAL REVENUE, Petitioners, **-versus -** **PILIPINAS SHELL PETROLEUM CORPORATION,** Respondent.	**CTA EB No. 1003** (CTA Case No. 8004) Present: **DEL ROSARIO,** *PJ,* **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **COTANGCO-MANALASTAS,** *and* **RINGPIS-LIBAN,** *JJ.* **Promulgated:** SEP 2 8 2015

x- 2:25 p.m. -x

DECISION

CASANOVA, *J.*:

These are appeals, *via* Petitions for Review, filed by petitioners Commissioner of Customs, Collector of Customs of the Port of Batangas, Bureau of Customs, Commissioner of Internal Revenue and the Bureau of Internal Revenue[1] (hereafter, "public petitioners"), and petitioner Pilipinas Shell Petroleum Corporation[2] (PSPC) from the Resolutions dated November 27, 2012[3] and March 26, 2013[4], respectively, promulgated by Court of Tax Appeal's (CTA) Third Division in CTA Case No. 8004, which granted PSPC's Motion for Summary Judgment in enjoining public petitioners from collecting the alleged unpaid excise taxes and VAT on petitioner's importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline.

Petitioner Commissioner of Customs (COC) is the Commissioner of petitioner Bureau of Customs (BOC), a government agency tasked to, among others, collect customs duties, taxes, fees and other charges under the Tariff and Customs Code of the Philippines (TCCP), and other related laws, rules and regulations. With respect to exactions under the National Internal Revenue Code (NIRC) such as excise taxes on imported goods, petitioner BOC serves as the collecting agent of the Bureau of Internal Revenue.

Petitioner Collector of Customs of the Port of Batangas ("Collector") is the District Collector of Customs of Collection District No. IV at the Port of Batangas who, with petitioner COC, will be tasked to collect the excise taxes and VAT on PSPC's future importations of the subject matter of this case, and who may enforce Section 1508 of the TCCP.

Petitioner Commissioner of Internal Revenue (CIR) is the Commissioner of petitioner Bureau of Internal Revenue, a government agency tasked to, among others, assess and collect all national internal revenue taxes, fees, and charges, and enforce all forfeitures, penalties, and fines connected therewith.

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[1] CTA *En Banc* Rollo (CTA EB No. 1003), Vol. I, pp. 12-90
[2] CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, pp. 12-119
[3] Annex "A" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, pp. 126-145
[4] Annex "B" of Petition for Review, *Ibid.*, pp. 147-151

Petitioner Bureau of Internal Revenue (BIR) is an instrumentality of the government of the Republic of the Philippines which issued the *Tan-Torres Ruling*[5] signed by then CIR Joel Tan-Torres. It has the capacity to sue and be sued.

All of the public petitioners may be served with the court's legal processes, orders and resolutions at the Office of the Solicitor General, their statutory counsel, located at 134 Amorsolo Street, Legaspi Village, Makati City.

On the other hand, petitioner PSPC is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at the Shell House, 156 Valero Street, Salcedo Village, Makati City, Metro Manila.[6]

PSPC may be served with the court's legal processes, orders and resolutions through its legal counsel, Villaraza Cruz Marcelo & Angangco, located at CVCLaw Center, 11th Avenue corner 39th Street, Bonifacio Triangle, Bonifacio Global City with P.O. Box 3559 Makati Central Post Office.

The antecedent facts[7] of the consolidated cases, as found by the CTA Third Division, are as follow:

> "On January 30, 2009, respondent *[petitioner herein]* District Collector of the Port of Batangas, Atty. Juan N. Tan, issued a Demand for Payment of Excise Tax, Value-added Tax (VAT) on the said Excise Tax, and Penalty, on Shipments Declared as Catalytic Cracked Gasoline (CCG) against petitioner, covering the years 2006 to 2008, pursuant to Sections 129 and 148 of the 1997 National Internal Revenue Code (NIRC), as amended, in relation to Section 107 of the same Code, demanding payment, within ten (10) days from receipt thereof, of the aggregate amount of P21,419,603,310.00; otherwise, the imposition of surcharges in accordance with Section 2501 of the Tariff and Customs Code of the Philippines (TCCP), as amended, shall be applied, including the holding of the delivery and

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[5] Annex "C" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, pp. 153-159
[6] Par. 2.1., Petition for Review, *Ibid.*, p. 18
[7] Resolution pp. 3-8, *Supra* No. 3

release of all shipments as mandated by Section 1508 of the same Code. The amount demanded is broken down as follows:

VAT	EXCISE TAX	PENALTY	TOTAL
P383,518,910.00	P3,186,414,975.00	P17,849,669,425.00	P21,419,603,310.00

Petitioner *[PSPC]* received the said demand on February 10, 2009.

On February 13, 2009, petitioner issued a Letter addressed to respondent District Collector of the Port of Batangas, in response to the Demand for Payment, requesting for the cancellation of the demand letter for lack of factual and legal basis, on the following grounds: (a) misplaced allegation of misdeclaration of unleaded gasoline (CCG); (b) primary jurisdiction of BIR on applicable internal revenue taxes for goods imported; and (c) absence of fraud to justify the imposition of penalty.

On February 18, 2009, respondent District Collector of the Port of Batangas, issued a Letter addressed to petitioner, reiterating the demand for the payment of the aggregate amount of P21,419,603,310.00, within ten (10) days from receipt hereof; otherwise, it will hold the release of all shipments pursuant to Section 1508 of the TCCP, as amended, without further notice. Petitioner received the same on February 25, 2009.

On March 5, 2009, petitioner issued a Letter addressed to respondent Commissioner of Customs, Napoleon L. Morales, appealing the Demand Letter dated January 30, 2009, and the Letter-Denial dated February 18, 2009.

On March 9, 2009, respondent Commissioner of Customs issued a Memorandum to Deputy Commissioner Reynaldo S. Nicolas, and respondent District Collector of the Port of Batangas, enjoining the collection and ordering them to observe the status quo, pending the resolution of the subject appeal pursuant to Customs Special Order no. 5-2009 dated February 20, 2009.

On June 9, 2009, Commissioner of Internal Revenue Sixto S. Esquivas, IV, issued a Memorandum to then Department of Finance Secretary, Margarito B. Teves, and Legal and Revenue Operations Group Undersecretary Estela V. Sales, confirming, *inter alia*, that Light Catalytic Cracked Gasoline (LCCG) and CCG are not subject to excise tax under Section 148 of the 1997 NIRC, as amended.

On September 9, 2009, respondent Commissioner of Customs issued a Memorandum to respondent District Collector of the Port of Batangas, recommending that unleaded gasoline (CCG) shall be subject to excise tax and VAT payable to the Bureau of Customs (BOC) upon filing of the import entry; that when used as a blending component to produce unleaded premium gasoline for domestic sale, the same shall be subject to excise tax and VAT payable to the Bureau of Internal Revenue, less the excise tax and input VAT paid to the BOC; that the same shall be applied prospectively; and that the Verification Committee sustains the demand for payment from petitioner the principal amount of P3,569,933,885.00 for the excise tax and VAT due covered by sixty-three (63) import entries.

On September 14, 2009, respondent District Collector of the Port of Batangas, issued a Final Demand for Payment of Excise Tax, VAT on the said Excise Tax and Penalty, on Shipments Declared as Catalytic Cracked Gasoline, against petitioner, demanding the payment of P3,778,834,048.00, covering the shipments of CCG made for the years 2004, 2005, and 2009, without payment of the excise tax and VAT, computed as:

VAT	EXCISE TAX	TOTAL
P12,459,141.00	P56,165,508.00	P3,778,834,048.00

The above amount is in addition to the amount of P3,569,933,885.00 (Excise tax of P3,186,414,975.00 + VAT of P383,518,910.00), as demanded in the Demand Letter dated January 20, 2009. Thus, the demand for payment in the aggregate amount of P7,348,767,933.00, exclusive of interests and penalties, within ten (10) days from receipt thereof.

On September 23, 2009, respondent Commissioner of Customs issued a Memorandum to respondent District Collector of the Port of Batangas, directing the same to defer any action against petitioner pending finality of the resolution of its appeal.

On September 28, 2009, petitioner issued a Letter addressed to respondent District Collector of the Port of Batangas, praying for the withholding of any action until its appeal has been resolved with finality by competent authorities at the administrative and judicial levels.

On November 11, 2009, respondent Commissioner of Customs issued a Letter addressed to petitioner, informing the latter of the denial of its appeal, and thus, ordering the payment, within ten (10) days from receipt thereof, of the principal liability of P7,348,767,933.00 as indicated in the Demand Letters dated January 30, 2009 and September 14, 2009, under threat of application of Section 1508 of the TCCP, and forthwith, ordering for the payment of all incoming shipments declared as CCG.

On November 18, 2009, petitioner issued a Letter addressed to respondent Commissioner of Customs, seeking reconsideration of the denial of its appeal.

On November 26, 2009, respondent Commissioner of Customs issued a Letter addressed to petitioner, denying the Motion for Reconsideration, and reiterating the demand for the payment of the amount of P7,348,767,933.00 as indicated in the Demand Letters dated January 30, 2009, and September 14, 2009; subject, however, to the Secretary of Finance's due consideration.

And, on December 3, 2009, petitioner filed the present Petition for Review, seeking the nullification of the Letters dated November 11, 2009 and November 26, 2009.

On December 15, 2009, respondent Commissioner of Internal Revenue Joel L. Tan-Torres, issued a Letter addressed to petitioner, ruling that the importation of LCCG and CCG shall be subject to excise tax at the rate of P4.35 per liter under Section 148(e), and further, the removal of finished products reprocessed or manufactured in the

> Philippines using imported LCCG and CCG as blending components for domestic sales or consumption or for any other disposition are also subject to excise tax at the rate of P4.35 per liter under the same provision.
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> Subsequently, petitioner filed a Supplemental Petition for Review, impleading respondent Commissioner of Internal Revenue, and the Bureau of Internal Revenue, and seeking as well the nullification of the Letter dated December 15, 2009." *(Citations Omitted)*

Thereafter, during Pre-Trial Conference held on January 26, 2012, both parties manifested their intention of filing their respective Motions for Summary Judgment. Thus, on March 15, 2012, public petitioners filed their Motion for Partial Summary Judgment[8], while PSPC filed its Motion for Summary Judgment[9] on March 16, 2012.

On November 27, 2012, the CTA Third Division promulgated a Resolution[10] granting PSPC's Motion for Summary Judgment, while denying that of public petitioners. The dispositive portion of said Resolution reads as follows:

> "**WHEREFORE**, premises considered, petitioner's *[PSPC]* Motion for Summary Judgment is hereby **GRANTED**. On the other hand, respondent's Motion for Partial Summary Judgment is hereby **DENIED**.
>
> Respondent is **ENJOINED** from collecting the alleged unpaid excise taxes and VAT thereon, on petitioner's importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline for the relevant periods in 2004 to 2009.
>
> **SO ORDERED.**"

On December 17, 2012, PSPC filed its Motion for Clarification and/or Partial Reconsideration[11], praying that the CTA Third Division

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[8] Annex "E" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007)
[9] Annex "D" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, pp. 161-283
[10] *Supra* No. 3
[11] Annex "D-3" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007)

declare the *Tan-Torres Ruling* ineffective, void and/or invalid, and to permanently enjoin public petitioners from imposing, demanding and collecting excise taxes upon entry of the imported CCG and LCCG.

Public petitioners, on the other hand, filed, on December 18, 2012, their Motion for Reconsideration[12], praying that the assailed Resolution be set aside and a new one be rendered in their favor.

Then, on March 26, 2013, the CTA Third Division promulgated a Resolution[13] denying both Motions for Reconsideration for lack of merit, while granting PSPC's Motion for Clarification. Hence, the *fallo* of the November 27, 2012 Resolution was amended to read as follows:

> "WHEREFORE, premises considered, petitioner's Motion for Summary Judgment is hereby <u>PARTIALLY</u> GRANTED. <u>Petitioner Pilipinas Shell Petroleum Corporation is NOT LIABLE for the alleged unpaid excise taxes and VAT thereon, for its subject Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline importations for the relevant periods in 2004 to 2009.</u>
>
> On the other hand, respondent's Motion for Partial Summary Judgment is hereby DENIED.
>
> Respondent is ENJOINED from collecting the alleged unpaid excise taxes and VAT thereon, on petitioner's importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline for the relevant periods in 2004 to 2009.
>
> SO ORDERED."

On May 10, 2013, public petitioners filed their Petition for Review[14] with the Court *En Banc* which was docketed as CTA EB No. 1003; while, PSPC filed its Petition for Review[15] on May 15, 2013 and was docketed as CTA EB No. 1007.

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[12] Annex "E-4" of Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007)
[13] *Supra* No. 4
[14] *Supra* No. 1
[15] *Supra* No. 2

On July 30, 2013, the Court *En Banc* issued a Minute Resolution[16] resolving to consolidate both Petitions for Review *via* CTA EB No. 1007 with CTA EB No. 1003, the case bearing the lower docket number.

Thereafter, on August 2, 2013, public petitioners filed their Comment[17] to PSPC's Petition for Review; while, on the other hand, PSPC filed, through registered mail, its Comment[18] to public petitioners' Petition for Review on August 7, 2013.

On August 16, 2013, PSPC filed a Motion for Leave and Time to File Reply [Re: Comment dated 31 July 2013][19], asking the Court *En Banc* for a period of fifteen (15) days, or until August 31, 2013, within which to file a Reply, so that it can better address the allegations made by public petitioners in their Comment.

In response, public petitioners filed an Opposition[20] on August 23, 2013, asserting that PSPC's Motion for Leave and Time to File Reply would only delay the resolution of the present consolidated Petitions, and PSPC will again attach voluminous irrelevant documents to further confuse the pure legal issues involved in the instant consolidated cases.

On August 29, 2013, PSPC filed a Motion for Additional Time to File Reply[21], praying that its earlier Motion for Leave and Time to File Reply [Re: Comment dated 31 July 2013] be granted, and also, to further allow it an extension of fifteen (15) days, or until September 15, 2013, within which to file its Reply.

Meanwhile, on August 30, 2013, the Court *En Banc* promulgated a Resolution[22] giving due course to the Petitions for Review and requiring the parties to file their respective Memorandum within thirty (30) days from notice thereof.

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[16] CTA *En Banc* Rollo (CTA EB No. 1003), Vol. I, pp. 127-128
[17] CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 18, pp. 9387-9441
[18] CTA *En Banc* Rollo (CTA EB No. 1003), Vol. I, pp. 251-361
[19] *Ibid*, pp. 370-372
[20] *Id.*, pp. 373-377
[21] *Id.*, pp. 378-380
[22] *Id.*, pp. 383-385

In the Resolution[23] dated October 2, 2013, the Court *En Banc* denied PSPC's Motions, and instead directed PSPC to include the contents of its intended reply to its Memorandum.

On September 20, 2013, PSPC's counsel filed an Entry of Appearance and Substitution of Counsel[24], praying that the entry of PSPC's new counsel of record, Cruz Marcelo & Tenefrancia, in substitution of CVCLaw be recognized. Accordingly, in the Minute Resolution[25] dated October 10, 2013, the Court *En Banc* noted PSPC's substitution of counsel.

After both parties requested for additional time within which to file their respective memorandum, public petitioners, on November 14, 2013 submitted their Memorandum[26], while, PSPC filed, through registered mail, its Memorandum[27] on November 18, 2013.

On January 3, 2014, the Court *En Banc* issued a Resolution[28] which deemed the consolidated cases submitted for decision.

However, on April 4, 2014, PSPC filed a Motion to Suspend and/or Defer Resolution[29], praying that the Court *En Banc* await the outcome of a similar case entitled *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue, et al.* (the "Alkylate Case") docketed as CTA Case No. 8535 with the CTA First Division, so as not to render prejudgment in said case since it involves the same issue; and, after which, consolidate the same with the instant cases for a joint resolution. In contention, public petitioners filed an Opposition[30], arguing that PSPC's attempt to misrepresent and delay the resolution of the consolidated cases is palpable. Public petitioners assert that not only are the subject matter and issues in the present consolidated cases totally different from the Alkylate Case; the said case is also, still at its pre-trial stage. Hence, to allow such suspension or deferment would result only in an interminable delay.

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[23] *Id.,* Vol. II, pp. 489-490
[24] *Id.,* Vol. II, pp. 482-484
[25] *Id.,* Vol. II, pp. 485-486
[26] *Id.,* Vol. II, pp. 501-584
[27] *Id.,* Vol. II, pp. 711-828
[28] *Id.,* Vol. III, pp. 834-835
[29] *Id.,* Vol. III, pp. 836-841
[30] *Id.,* Vol. III, pp. 842-847

On May 20, 2014, PSPC filed a Manifestation and Motion[31], signifying its intention to file a Reply to public petitioners' Opposition. Thus, PSPC prayed that it be allowed a period of fifteen (15) days, or until June 4, 2014, within which to file its Reply.

On June 4, 2014, PSPC filed a Motion for Extension of Time[32], praying for an extension of at least fifteen (15) days, or until June 19, 2014, within which to file its Reply to the Opposition. Then, on June 19, 2014, PSPC, again, filed a Motion for Further Extension of Time[33], asking for another extension of at least fifteen (15) days, or until July 4, 2014, within which to file its Reply.

In the Resolution[34] dated June 26, 2014, the Court *En Banc* granted PSPC's Manifestation and Motion.

On July 4, 2014, PSPC filed its Reply [To: Opposition dated 08 April 2014][35].

On July 3, 2014, public petitioners filed a Motion for Early Resolution[36], praying that the consolidated cases be resolved considering that the parties have already filed their respective Memorandum and that the consolidated cases have already been deemed submitted for decision.

On July 18, 2014, PSPC filed an Opposition [To: Motion for Early Resolution dated 03 July 2014][37], arguing that public petitioners' Motion for Early Resolution is premature, the grant of which would violate its right to due process since it would effectively deny its pending Motion to Suspend and/or Defer Resolution.

In the Resolution[38] dated September 2, 2014, the Court *En Banc* denied PSPC's Motion to Suspend and/or Defer Resolution, and also, noted public petitioners' Motion for Early Resolution.

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[31] *Id.*, Vol. III, pp. 852-856
[32] *Id.*, Vol. III, pp. 857-861
[33] *Id.*, Vol. III, pp. 862-866
[34] *Id.*, Vol. III, pp. 869-871
[35] *Id.*, Vol. III, pp. 877-892
[36] *Id.*, Vol. III, pp. 872-876
[37] *Id.*, Vol. IV, pp. 1270-1278
[38] *Id.*, Vol. IV, pp. 1281-1283

On October 24, 2014, PSPC filed a Motion for Reconsideration [Re: Resolution dated 02 September 2014][39], assailing the September 2, 2014 Resolution on the ground that it failed to clearly state the factual and legal reasons in denying the Motion to Suspend and/or Defer Resolution. PSPC again insisted that said denial will result in a prejudgment of the Alkylate Case.

On December 16, 2014, the Court *En Banc* issued a Resolution ordering public petitioners to comment on PSPC's Motion for Reconsideration [Re: Resolution dated 02 September 2014]. The Court *En Banc* also recalled the January 3, 2014 Resolution which initially deemed the case submitted for decision due to the pending incident.

On February 2, 2015, public petitioners filed their Comment[40], pointing out that the grounds raised by PSPC in its Motion for Reconsideration are mere rehash of the arguments proffered in its Motion to Suspend and/or Defer Resolution.

Accordingly, in the Resolution[41] dated April 8, 2015, the Court *En Banc* denied PSPC's Motion for Reconsideration [Re: Resolution dated 02 September 2014].

On April 8, 2015, PSPC filed a Manifestation[42] calling the attention of the Court *En Banc* to consider the case of *Philippine Amusement and Gaming Corporation vs. Bureau of Internal Revenue*[43], wherein the Supreme Court invalidated BIR's Revenue Memorandum Circular (RMC) No. 33-2013 for creating additional tax burden without due process.

On the same day, PSPC also filed a Motion for Leave to File and Admit Attached Reply [Re: Comment dated 09 February 2015][44] praying that it be granted leave to file and, likewise, admit the Reply attached to its Motion.

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[39] *Id.*, Vol. IV, pp. 1284-1295
[40] *Id.*, Vol. IV, pp. 1303-1310
[41] *Id.*, Vol. IV, pp. 1313-1319
[42] *Id.*, Vol. IV, pp. 1323-1335
[43] G.R. No. 215427, December 10, 2014
[44] *Id.*, Vol. IV, pp. 1336-1340

In the May 8, 2015 Resolution[45], the Court *En Banc* noted PSPC's Manifestation, considered the attached Reply as moot, and denied the Motion for Leave to File Reply [Re: Comment dated 09 February 2015].

Thereafter, on May 6, 2015, PSPC filed a Constancia[46], manifesting its intention to elevate, *via* a Petition for *Certiorari*, the denial of its Motion to Suspend and/or Defer Resolution to the Supreme Court. Thus, PSPC requests the indulgence of the Court *En Banc* to hold in abeyance the resolution of the consolidated cases to give the Supreme Court the opportunity to evaluate the merits of PSPC's Petition.

On May 12, 2015, public petitioners filed an Extremely Urgent Motion for Early Resolution[47], praying for the immediate resolution of the consolidated cases emphasizing the lengthy delay in the resolution of the consolidated cases, considering that it was already deemed submitted for decision as early as January of 2014.

On May 18, 2015, public petitioners filed, through registered mail, a Counter-Constancia[48], reiterating the numerous delays that the consolidated cases had already incurred. Public petitioners questioned the propriety of PSPC's plea considering that it had not yet even filed any petition with the Supreme Court. Nonetheless, public petitioners asserted that the fact of filing is not a ground to suspend or put off the promulgation of a decision, in accordance with Administrative Matter (A.M.) No. 07-7-12-SC[49] which amended Rule 65 of the Rules of Court.

On June 10, 2015, PSPC filed a Comment/Opposition [Re: Extremely Urgent Motion for Early Resolution Dated 12 May 2015], arguing that it had sixty (60) days, or until June 27, 2015, within which to file a Petition for *Certiorari* under Rule 65 of the Rules of Court. PSPC further elaborated that abeyance of the proceedings was a matter of judicial courtesy.

Therefore, in the Resolution dated June 22, 2015, the Court *En Banc* noted PSPC's Constancia, and public petitioners' Extremely Urgent

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[45] *Id.*, Vol. IV, pp. 1365-1367
[46] *Id.*, Vol. IV, pp. 1358-1363
[47] *Id.*, Vol. IV, pp. 1368-1373
[48] *Id.*, Vol. IV, pp. 1374-1379
[49] AMENDMENTS TO RULES 41, 45, 58 AND 65 OF THE RULES OF COURT, which took effect on December 27, 2007

Motion for Early Resolution and Counter-Constancia. Henceforth, the consolidated cases were deemed submitted for decision.

Public petitioners raised the following issues[50] in their Petition for Review in CTA EB No. 1003, to wit:

I

SECTION 129 OF THE TAX CODE IS CLEAR AND CATEGORICAL - EXCISE TAXES SHALL APPLY TO THINGS IMPORTED.

A. BEING UNAMBIGUOUS AND EXPLICIT, SECTION 129 SHOULD BE APPLIED AS WORDED OR WRITTEN.

B. BEING CLEAR AND SPECIFIC, SECTION 129 DOES NOT DEPEND ON MERE OFFICE LETTERS OR MEMORANDA OF BIR OFFICIALS FOR ITS IMPLEMENTATION.

II

RESPONDENT IS ESTOPPED FROM DENYING OR QUESTIONING ITS LIABILITY FOR EXCISE TAXES ON ITS IMPORTATIONS OF CCG AND LCCG IN 2004, 2005, 2006, 2007, 2008 AND 2009.

A. RESPONDENT PAID EXCISE TAXES ON ITS IMPORTATIONS OF CCG AND LCCG IN 2001, 2002, 2003 AND CERTAIN PERIODS IN 2004.

B. THE ATRIGs COVERING THE CCG AND LCCG IMPORTATIONS OF RESPONDENT FROM 2004 TO 2009 CONTAIN AN EXPRESS RESERVATION OR COLATILLA.

III

THE COLLECTION OF EXCISE TAXES ON RESPONDENT'S IMPORTATIONS OF CCG AND LCCG IN 2001, 2002, 2003 CERTAIN PERIODS OF 2004 EVINCED THE CLEAR STAND OF THE GOVERNMENT ON THE TAXABILITY OF SAID IMPORTED PRODUCTS.

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[50] Arguments, Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1003), Vol. I, pp. 25-27

A. RESPONSIBLE BIR OFFICIALS WERE OF THE VIEW THAT THE IMPORTED CCG AND LCCG ARE SUBJECT TO EXCISE TAX.

IV

THE IMPORTED CCG AND LCCG ARE GASOLINE, SPECIFICALLY A VARIANT OF UNLEADED GASOLINE.

A. THE ATRIGs COVERING THE CCG AND LCCG IMPORTATIONS OF RESPONDENT IN 2001, 2002 AND 2003 REVEAL THAT THEY WERE EXCLUSIVELY FOR SALE.

V

THE MEMORANDUM DATED MARCH 24, 2004 ISSUED BY DEPUTY COMMISSIONER BUÑAG, THE LETTER DATED APRIL 20, 2004 ISSUED BY DEPUTY COMMISSIONER AGUIRRE AND THE MEMORANDUM DATED JUNE 29 *[sic]*, 2009 ISSUED BY COMMISSIONER ESQUIVIAS, IV DO NOT CREATE ANY RIGHT IN FAVOR OF RESPONDENT SO AS TO ABSOLVE IT FROM PAYING EXCISE TAXES ON IMPORTATIONS OF CCG AND LCCG FROM 2004 TO 2009.

A. THE MEMORANDUM OF BUÑAG, THE LETTER OF AGUIRRE AND THE MEMORANDUM OF ESQUIVAS, IV ARE MERE OFFICE MEMORANDA OR COMMUNICATIONS.

B. ALL THE ATRIGs ISSUED BY THE BIR ITSELF AFTER THE BUÑAG MEMORANDUM, AGUIRRE LETTER AND ESQUIVIAS, IV MEMORANDUM, CONTAINED THE SAME COLATILLA THAT THE NON-PAYMENT OF EXCISE TAXES ON THE IMPORTED CCG AND LCCG WAS PROVISIONAL.

C. RESPONDENT CANNOT CLAIM ANY RIGHT UNDER AN UTTERLY WRONG ISSUANCE OF THE BIR.

VI

THE MEMORANDUM DATED MARCH 24, 2004, THE LETTER DATED APRIL 20, 2004 AND THE MEMORANDUM DATED JUNE 29 *[sic]*, 2009 ARE NOT BIR RULINGS WHICH

MAY BE INVOKED TO PREVENT THE RETROACTIVE APPLICATION OF THE TAN-TORRES RULING DATED DECEMBER 15, 2009.

VII

THE OPERATIVE FACT DOCTRINE IS ABSOLUTELY INAPPLICABLE TO THE PRESENT CASE.

VIII

RESPONDENT'S AVAILMENT OF TAX AMNESTY UNDER REPUBLIC ACT NO 9480 DOES NOT EXEMPT IT FROM PAYING THE ASSESSED EXCISE TAXES FOR THE TAXABLE YEARS 2004 AND 2005.

On the other hand, PSPC raised this sole issue[51] in its Petition for Review in CTA EB No. 1007, to wit:

WHETHER THE HONORABLE COURT'S THIRD DIVISION GRAVELY AND SERIOUSLY ERRED IN NOT DECLARING THE *TAN-TORRES RULING* INVALID, DESPITE THE GROUNDS HEREIN PLEADED.

After due consideration, *We* deem it best to summarize the issues raised herein by the parties as follows:

Whether or not *(a)* importations of CCG and LCCG may be subject to excise tax under Sections 129 and 148 of the Tax Code; *(b)* the Memorandum dated March 24, 2004 issued by Deputy Commissioner Buñag, the Letter dated April 20, 2004 written by Deputy Commissioner Aguirre, and the Memorandum dated June 9, 2009 issued by Commissioner Esquivas, IV absolve PSPC from paying excise taxes on importations of CCG and LCCG from 2004 to 2009; *(c)* the operative fact doctrine is applicable to the present case; *(d)* PSPC's availment of tax amnesty under Republic Act No. 9480 exempts it from paying the assessed excise taxes for the taxable years 2004 and 2005; and *(e)* the Letter-Ruling dated December 15, 2009 issued by then CIR

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[51] Issue, Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, p. 46

Joel L. Tan-Torres *(Tan-Torres Ruling)* should be declared invalid.

Importations of CCG and LCCG are subject to excise tax under Sections 129 and 148 of the Tax Code.

In the instant consolidated cases, PSPC claims that the CCG and LCCG were imported as intermediate or raw gasoline materials used as blending components, and not as finished gasoline products intended for domestic sale. Thus, they should not be subject to excise tax upon entry.

On the other hand, public petitioners assert that PSPC's use of the imported CCG and LCCG as blending component is irrelevant. The fact that PSPC admitted of importing billions of kilograms of CCG and LCCG from 2004 to 2009, is enough to qualify it to fall within "things imported" under Section 129 of the National Internal Revenue Code (NIRC) of 1997, as amended.

On this point, *We* agree with the public petitioners.

Excise tax is an indirect tax applicable to certain specified goods or articles manufactured or produced in the Philippines for domestic sales or consumption, and to things imported.

Verily, Section 129 of the NIRC of 1997, as amended, classifies the goods subject to excise tax into two categories, to *wit*:

1) goods manufactured or produced in the Philippines for domestic sales or consumption or for any other disposition, and

2) things imported.[52]

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[52] "**SEC.129.** ***Goods subject to Excise Taxes.*** - Excise taxes apply to goods manufactured or produced in the Philippines for domestic sales or consumption or for any other disposition and to things imported. The excise tax imposed herein shall be in addition to the value-added tax imposed under Title IV.

x x x *x x x* *x x x.*"

Since the phrase "things imported", was worded without any qualification, the Court is duty-bound to abide strictly by its literal meaning and to refrain from resorting to any convoluted attempt at construction.[53]

On the other hand, consumption is defined as "the use of a thing in a way that thereby exhausts it"[54]. Indubitably, PSPC utilized and mixed CCG and LCCG with other chemical components thereby exhausting them to come up with a new product. Therefore, a raw material can also be consumed within the mainstream definition of "consumption".

Now, assuming *arguendo* that the phrase "for domestic sales or consumption" equally applies to "things imported", CCG and LCCG still remain excisable inasmuch as these imported articles are being consumed or used as blending component in production, as mentioned earlier. Thus, PSPC's argument that only finished products can be consumed is flawed considering that the imported CCG and LCCG can also be consumed as raw materials.

Even supposing that the imported CCG and LCCG were not consumed or used or sold domestically, the importation would naturally fall under the phrase "for any other disposition"; and therefore, still excisable. Thus, imported articles falling within the categories of goods under Title VI of the NIRC of 1997, as amended, whether it be used or consumed as finished product or as raw material, are subject to excise tax except those items with specific provisos when used as raw materials.

CCG and LCCG are "other similar products of distillation" under Sec. 148(e) of the 1997 NIRC.

CCG and LCCG are excisable petroleum products falling under the "other similar products of distillation" enunciated Sec. 148(e), Chapter V, Title VI of the 1997 NIRC.

"CHAPTER V - EXCISE TAX ON PETROLEUM PRODUCTS

[53] Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. No. 124043, October 14, 1998

[54] Commissioner of Internal Revenue vs. American Express International, Inc., (Philippine Branch), G.R. No. 152609, June 29, 2005

> **SEC. 148. Manufactured Oils and Other Fuels.** - There shall be collected on refined and manufactured mineral oils and motor fuels, the following excise taxes which shall attach to the goods hereunder enumerated as soon as they are in existence as such:
>
> *xxx xxx xxx*
>
> (e) Naphtha, regular gasoline and ***other similar products of distillation***, per liter of volume capacity, Four pesos and thirty-five centavos (P4.35): Provided, however, That naphtha, when used as a raw material in the production of petrochemical products or as replacement fuel for natural-gas-fired-combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules and regulations to be promulgated by the Secretary of Energy, in consultation with the Secretary of Finance, per liter of volume capacity, Zero (P0.00): Provided, further, That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable excise tax specified in this Section, except when such by-products are transferred to any of the local oil refineries through sale, barter or exchange, for the purpose of further processing or blending into finished products which are subject to excise tax under this Section;" *(Emphasis Ours)*

More so, the Department of Energy (DOE) Opinion dated December 4, 2003 issued by DOE Undersecretary J.V. Emmanuel A. De Dios discussed the nature of CCG and LCCG as:

> "As its name implies, LCCG and CCG are products of a chemical conversion process called catalytic cracking. This process converts heavy oils into cracked gasoline, light fuel oil and heavy fuel oil. Cracked gasoline and alkylates are high-octane but low-aromatic substances, making them desirable blending components for gasoline production.
>
> LCCG and CCG are not finished gasoline products but are intermediate or raw gasoline components used as

> blendstock in the production of PSPC's particular brands of CAA-compliant unleaded gasoline and other types of gasoline variants. While they may have certain properties that meet gasoline specifications like octane, such properties cannot pass all the required specifications (Reid Vapor Pressure, aromatics and benzene content, anti-knock index) for finished gasoline products. These findings are affirmed by the comparison made by the DOE's Oil Industry Management Bureau (OIMB). (Annex 1)
>
> **While LCCG may generally be considered to have undergone a process of distillation at some point in its production, as is the case with all petroleum products,** it is our position that LCCG and CCG should not be subject to an excise tax of Php 4.80 per liter under Section 148 (e) of the 1997 NIRC since they are intermediate products or raw materials not intended for domestic sale or consumption but to be added as components in the blending process to produce finished petroleum products.
>
> *x x x*
>
> Interpretation of Section 148 (e)
>
> **While it was earlier stated that all petroleum products result from some form of distillation,** it cannot be presumed that all products of distillation are subject to the excise tax of Php4.80 per liter, imposed under Section 148 (e) of the NIRC."

Relative to this was the unrebutted Sworn Statement dated February 15, 2012[55] of PSPC's petroleum expert, **Mr. Claude A. Mallet**, who confirmed that CCG and LCCG, although not considered finished products, are called gasoline. He stated:

> **"35. Thus, CCG and LCCG are not finished products. They are not at the prescribed commercial and marketable grades of premium unleaded gasoline in the Philippines.**

[55] Page 56 of PSPC's Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, p. 67; Annex "A" of PSPC's Motion for Summary Judgment

> 35.1 By way of clarification, while CCGs and LCCGs are not finished products as explained above, they are called gasoline. However, in the petroleum industry, 'gasoline' is a generic term and technically means a product which is relatively 'light' (i.e., low boiling point). Thus, the term 'gasoline' does not denote a finished product."

Based on the description above, CCG and LCCG are petroleum products considered as gasoline in the general sense. According to DOE Opinion, **all petroleum products result from some form of distillation and LCCG may have undergone a process of distillation**.

"Distillation" is the process of driving off gas or vapor from liquids or solids by heating (as in a still or retort) and condensing to liquid products, such processes being used especially for purification, fractionation, or the formation of new substances by decomposition.[56]

"Cracking" is a chemical process; it is the conversion, by means of heat and usually pressure, of the complex hydrocarbon molecules of heavier oils into the molecular structure of the desired lighter oils.[57] It is the decomposition of petroleum by heat and pressure, with the consequent breaking up of the molecules and the production of both lighter and heavier hydrocarbons. One of the lighter hydrocarbons produced by this action is gasoline.[58]

Based on these definitions, distillation is also a process used for the formation of new substances by decomposition. Cracking is the decomposition of petroleum by heat and pressure, and one of the lighter hydrocarbons produced by this action is gasoline. At the time of importation, CCG and LCCG already passed through distillation. This therefore confirms that CCG and LCCG underwent the process of distillation.

Hence, in view of the foregoing, there is no doubt that CCG and LCCG fall within the category of *naphtha, regular gasoline and other*

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[56] Webster's Third New International Dictionary, p. 658

[57] Words and Phrases, Permanent Edition , Vol. 10, p. 321; *citing* Universal Oil Products Co. v. Skelly Oil Co., D.C.Del., 20 F.2d 995

[58] *Ibid., citing* Universal Oil Products Co. v. Winkler-Koch Engineering Co., D.C.Del., 6 F.Supp. 763, 764

similar products of distillation under Sec. 148 (e) of the 1997 NIRC, particularly under the phrase *other similar products of distillation.*

Intent of the law is ultimately determined by the language of the law that the lawmakers voted on.

A cardinal rule in the interpretation of statutes is that the meaning and intention of the law-making body must be sought, first of all, in the words of the statute itself, read and considered in their natural, ordinary, commonly-accepted and most obvious significations, according to good and approved usage and without resorting to forced or subtle construction. *x x x.*[59]

PSPC cited and relied on the opinion of a former Director, Mr. Vicente Quintos, of the National Tax Research Center during the meeting-hearing on November 14, 1995 of the Committee on Ways and Means in the course of deliberation of then House Bill, now Republic Act (RA) No. 8184[60], where the latter said:

> "MR. QUINTOS: No, but the point is that what used to be paid by the crude, since it is going to be translated into specific tax and specific tax is imposed on finished commodities, whether these be imported or locally produced, in effect, that is an increase now on the imposed insofar as the imported finished commodities are concerned, which they did not use to pay." [61]

It cannot be gainsaid that the opinion of one member of the assembly does not necessarily reflect the genuine legislative intent of the entire body. As held in the case of *Renato V. Diaz, et al. vs. Secretary of Finance, et al.*,[62] "statements made by individual members of Congress in the consideration of a bill do not necessarily reflect the sense of that body and are, consequently, not controlling in the interpretation of law."

[59] South African Airways vs. Commissioner of Internal Revenue, G.R. No. 180356, February 16, 2010; *citing* Espino vs. Cleofe, No. L-33410, July 13, 1973
[60] AN ACT RESTRUCTURING THE EXCISE TAX ON PETROLEUM PRODUCTS, AMENDING FOR THE PURPOSE PERTINENT SECTIONS OF THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, dated June 11, 1996
[61] Page 44 of PSPC's Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, p. 55; Annex "BBB" of PSPC's Motion for Summary Judgment
[62] G.R. No. 193007, July 19, 2011; *citing* South African Airways vs. Commissioner of Internal Revenue, *Supra* No. 59

The congressional will is ultimately determined by the language of the law that the lawmakers voted on. Consequently, the meaning and intention of the law must first be sought "in the words of the statute itself, read and considered in their natural, ordinary, commonly accepted and most obvious significations, according to good and approved usage and without resorting to forced or subtle construction."[63]

Furthermore, PSPC, likewise, quoted the portion of the committee's discussion on the tax treatment of CCG and LCCG as reflected in the Committee Report No. 2621. It said:

> "The ruling in effect levies an excise tax twice on CCG and LCCG, first as raw materials upon withdrawal from the port of entry and second as components of a finished product upon withdrawal from PSPC's refinery.
>
> This is naked, arbitrary, and whimsical abuse of administrative power by the Commissioner of Internal Revenue and a usurpation of the power to tax solely vested in Congress by the Constitution. The Torres ruling simply disregarded the past practice of the BIR allowing credit for tax paid for CCG and LCCG at the time of their withdrawal from the port of entry against the tax paid on unleaded premium gasoline at the time of withdrawal from the refinery of PSPC pursuant to a legal opinion of Assistant Commissioner of Internal Revenue Milagros Regalado, to avoid a double tax on the same product. The ruling is a heavy-handed overkill bereft of fairness, designed to bring PSPC down to its knees." [64]

However, an examination of the evolution of amendatory laws on taxation of petroleum products, particularly Sec. 148 (e) of the NIRC of 1997, as amended, would reveal the lack of legislative intent to exempt the importation of CCG and LCCG from excise tax.

It is worthy to note that the cited opinion during deliberation and the opinion in the committee report regarding taxation of CCG and LCCG were not reflected in the final language of the law then being

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[63] *Ibid.*

[64] Pages 44-45, Petition for Review, CTA *En Banc* Rollo (CTA EB No. 1007), Vol. 1, p. 55-56

deliberated, *i.e.* RA 8184. Despite the concern raised in the committee report regarding taxation of CCG and LCCG, the language of the law remained clear. Only naphtha, when used as a raw material, is subject to ₱0.00 excise tax. The supposed legislative intention was not evident in the language of neither RA No. 8184[65] or even the subsequent amendatory laws of RA No. 8424[66] and RA No. 9337[67].

The table below shows how Sec. 148 (e) of the NIRC of 1997, as amended, progresses. The highlighted portions are amendments introduced by the respective laws. It is under RA No. 6767[68] where naphtha became subject to zero percent (0%) excise tax when used as raw material. Thereafter, RA No. 6965[69] revised the form of taxation of petroleum products from *ad valorem* to specific tax. After that, RA No. 8184 integrated the former Section 145 (5) with Section 145 (13), and subsequently increased the excise tax rate for naphtha, regular gasoline and other similar products of distillation from ₱2.28 to ₱4.80. Then from RA No. 8184 to 8424, there has been no change in the language of the law except that the then Section 145 now became Section 148. Afterwards, the most recent amendment, RA No. 9337, merely decreased the tax rates of naphtha, regular gasoline and other similar products of distillation from ₱4.80 to ₱4.35. Thus:

RA No. 6767	RA No. 6965	RA No. 8184	RA No. 8424	RA No. 9337
DATE APPROVED				
Oct 30, 1989	Sept 19, 1990	Jun 11, 1996	Dec 11, 1997	May 24, 2005
"(4) Naptha when used as a raw material in the production of petrochemical products ____ 0% *Provided*, That naphtha	"(13) Naphtha, when used as a raw material in the production of petrochemical products, **per liter of volume**	"(5) Naphtha, **regular gasoline and other similar products of distillation, per liter of volume capacity, Four**	(e) Naphtha, regular gasoline and other similar products of distillation, per liter of volume capacity, Four pesos and	"(e) Naphtha, regular gasoline and other similar products of distillation, per liter of volume capacity, Four pesos and

[65] *Supra* No. 60
[66] AN ACT AMENDING THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, AND FOR OTHER PURPOSES, dated December 11, 1997
[67] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES, dated May 24, 2005
[68] AN ACT AMENDING SECTION 145, PARAGRAPH (B), OF THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED, dated October 30, 1989
[69] AN ACT REVISING THE FORM OF TAXATION ON PETROLEUM PRODUCTS FROM AD VALOREM TO SPECIFIC, AMENDING FOR THE PURPOSE SECTION 145 OF THE NATIONAL INTERNAL REVENUE CODE AS AMENDED BY REPUBLIC ACT NUMBERED SIXTY-SEVEN HUNDRED SIXTY-SEVEN, dated September 19, 1990

processed by domestic refineries, if available as determined by the Energy Regulatory Board, shall be utilized before any naphtha may be imported for this purpose: *Provided, further,* That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable *ad valorem* tax specified in paragraph (b) of this section, except when such by-products are transferred to any of the local oil refineries through sale, barter, or exchange, for the purpose of	**capacity, zero (P0.00):** provided, that naphtha processed by domestic refineries, if available as determined by the Energy Regulatory Board, shall be utilized before any naphtha may be imported for this purpose; provided, further, that the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable **specific tax** specified in **this section,** except when such by-products are transferred to any of the local oil refineries through sale,	**pesos and eighty centavos (P 4.80):** ***Provided, however,* That naphtha,** when used as a raw material in the production of petrochemical products **or as replacement fuel for natural gas-fired combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules to be promulgated by the <u>Secretary of Energy</u> in consultation with the <u>Secretary of Finance</u>,** per liter of volume capacity, Zero (P 0.00): *Provided, further,* That the byproduct including fuel oil, diesel fuel, kerosene, pyrolysis, gasoline, liquefied petroleum gases and	eighty centavos (P4.80): Provided, however, That naphtha, when used as a raw material in the production of petrochemical products or as replacement fuel for natural-gas-fired-combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules and regulations to be promulgated by the Secretary of Energy, in consultation with the Secretary of Finance, per liter of volume capacity, Zero (P0.00): Provided, further, That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same	**thirty-five** centavos **(P4.35):** *Provided, however,* That naphtha, when used as a raw material in the production of petrochemical products or as replacement fuel for natural gas-fired-combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules and regulations to be promulgated by the Secretary of Energy, in consultation with the Secretary of Finance, per liter of volume capacity, Zero (P0.00): *Provided, further,* That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or

further processing or blending into finished products which are subject to ad valorem tax under the said paragraph (b) of this section."	barter, or exchange, for the purpose of further processing or blending into finished products which are subject to **specific tax** under this section."	similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable specific tax specified in this section, except when such byproducts are transferred to any of the local oil refineries through sale, barter, or exchange, for the purpose of further processing or blending into finished products which are subject to specific tax under this section;"	generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable excise tax specified in this Section, except when such by-products are transferred to any of the local oil refineries through sale, barter or exchange, for the purpose of further processing or blending into finished products which are subject to excise tax under this Section;	less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable excise tax specified in this Section, except when such by-products are transferred to any of the local oil refineries through sale, barter or exchange, for the purpose of further processing or blending into finished products which are subject to excise tax under this Section;"

Hence, if it is truly the legislature's intent to exempt the importation of CCG and LCCG as raw materials from excise tax under Sec. 148 (e) of the NIRC of 1997, as amended, it would have done so by expressing it using clear, concise and appropriate language. As held by the High Court in the case of *Manila Jockey Club, Inc. vs. Games and Amusements Board et al.*[70]

[70] G.R. No. L- 12727, February 29, 1960

> "The intention of the legislature to which effect must be given is that expressed in the statute and the courts will not inquire into the motives which influence the legislature, or individual members, in voting for its passage; nor indeed as to the intention of the draftsman, or the legislators, so far as it has not been expressed in the act. To read into law the supposed intention of the legislators, where there is no ambiguity in it, would be to supply something that does not appear in the act."

Section 148 of the NIRC of 1997, as amended, lay down the tax treatment of specific petroleum products used as raw materials. However, there is nothing in Sec. 148 that exempts imported CCG and LCCG from excise tax when used as raw materials.

If Section 129 of the NIRC of 1997, as amended, were to be confined only to finished products, as interpreted by PSPC, then, Section 148 of the same code would not accord certain provisos which lay down the tax treatment of specific petroleum products used as raw materials in the production of excisable articles. For the imposition of excise taxes on petroleum products, the applicable provision is Section 148, Chapter V, Title VI of the NIRC of 1997, as amended. The pertinent portions of Section 148 state that:

> **"CHAPTER V - EXCISE TAX ON PETROLEUM PRODUCTS**
>
> **SEC. 148. Manufactured Oils and Other Fuels.** - There shall be collected on refined and manufactured mineral oils and motor fuels, the following excise taxes which shall attach to the goods hereunder enumerated as soon as they are in existence as such:
>
> (a) Lubricating oils and greases, including but not limited to, basestock for lube oils and greases, high vacuum distillates, aromatic extracts, and other similar preparations, and additives for lubricating oils and greases, whether such additives are petroleum based or not, per liter and kilogram respectively, of volume capacity or weight, Four pesos and fifty centavos (P4.50): ***Provided, however,*** **That the excise taxes paid on the purchased feedstock (bunker) used in the manufacture of excisable articles**

and forming part thereof shall be credited against the excise tax due therefrom: *Provided, further,* That lubricating oils and greases produced from basestocks and additives on which the excise tax has already been paid shall no longer be subject to excise tax: *Provided, finally,* That locally produced or imported oils previously taxed as such but are subsequently reprocessed, rerefined or recycled shall likewise be subject to the tax imposed under this Section.

xxx *xxx* *xxx*

(d) On denatured alcohol to be used for motive power, per liter of volume capacity, Five centavos (P0.05): ***Provided,* That unless otherwise provided by special laws, if the denatured alcohol is mixed with gasoline, the excise tax on which has already been paid, only the alcohol content shall be subject to the tax herein prescribed.** For purposes of this Subsection, the removal of denatured alcohol of not less than one hundred eighty degrees (180°) proof (ninety percent (90%) absolute alcohol) shall be deemed to have been removed for motive power, unless shown otherwise;

(e) Naphtha, regular gasoline and other similar products of distillation, per liter of volume capacity, Four pesos and thirty-five centavos (P4.35): ***Provided, however,* That naphtha, when used as a raw material in the production of petrochemical products or as replacement fuel for natural-gas-fired-combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules and regulations to be promulgated by the Secretary of Energy, in consultation with the Secretary of Finance, per liter of volume capacity, Zero (P0.00):** *Provided, further,* That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable excise tax specified in this Section, except when such by-products are transferred to any of the local oil refineries through sale, barter or exchange, for the purpose of further processing or blending into finished products which are subject to excise tax under this Section;" *(Emphases and Underscoring Ours)*

First, under paragraph (a), the excise tax paid on the "purchased feedstock (bunker)" used in the manufacture of excisable articles is allowed to be credited against the excise tax due therefrom. The succeeding proviso exempts from excise tax "the lubricating oils and greases produced from basestocks and additives on which the excise tax has already been paid".

Notably, the last proviso laid to rest the doubts on taxation of imported oils previously taxed but subsequently reprocessed, rerefined or recycled. Again, these imported oils are likewise excisable using the rate under Section 148 (a).

Second, under paragraph (d), when the denatured alcohol is mixed with gasoline, the excise tax on which has already been paid, only the alcohol content is subject to excise tax. Again, the law recognizes the previous excise taxes paid on articles used as raw materials but imported CCG and LCCG do not fall within this category.

And, third, under paragraph (e), the only raw material subject to ₱0.00 excise tax is naphtha, when used as a raw material in the production of petrochemical products or as replacement fuel for natural-gas-fired-combined-cycle power plant. There is nothing in the provision that expressly subject CCG and LCCG to ₱0.00 excise tax when used as a raw material.

Unfortunately for PSPC, Sec. 148 neither provides a specific rule nor an exempting proviso on imported CCG and LCCG when used or consumed as raw materials. If at all, imported CCG and LCCG once reprocessed, rerefined or recycled are subject again to excise tax pursuant to the principle on paragraph (a) of the said Section.

It is a basic precept of statutory construction that the express mention of one person, thing, act, or consequence excludes all others as expressed in the familiar maxim *expressio unius est exclusio alterius.*[71] The said rule is a canon of restrictive interpretation. Its application in

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[71] Philippine Amusement and Gaming Corporation (PAGCOR) vs. Bureau of Internal Revenue, G.R. No. 172087, March 15, 2011

this case is consistent with the construction of tax exemptions in *strictissimi juris* against the taxpayer.[72]

Thus, not being excepted, CCG and LCCG are regarded as coming within the purview of the general rule on the imposition of excise tax under the phrase "other similar products of distillation".

Tax exemptions are construed strictissimi juris against the taxpayer. A claim of statutory exemption from taxation should be manifest and unmistakable from the language of the law on which it is based.[73]

The transactions/instances of Exemption or Conditional Tax-free Removal of Certain Articles are found under Secs. 133 to 140, Chapter II, Title VI of the NIRC of 1997, as amended; enumerated below are the items exempted or conditionally tax-free, to wit:

> **"CHAPTER II - EXEMPTION OR CONDITIONAL TAX-FREE REMOVAL OF CERTAIN ARTICLES**
>
> **SEC. 133. Removal of Wines and Distilled Spirits for Treatment of Tobacco Leaf.** - *x x x*
>
> **SEC. 134. Domestic Denatured Alcohol.** – *x x x*
>
> **SEC. 135. Petroleum Products Sold to International Carriers and Exempt Entities or Agencies.** -Petroleum products sold to the following are exempt from excise tax:
>
> (a) International carriers of Philippine or foreign registry on their use or consumption outside the Philippines: Provided, That the petroleum products sold to these international carriers shall be stored in a bonded storage tank and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner;

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[72] San Pablo Manufacturing Corporation vs. Commissioner of Internal Revenue, G.R. No. 147749, June 22, 2006

[73] Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. No. 124043, October 14, 1998

(b) Exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use of consumption: Provided, however, That the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carriers, entities or agencies; and

(c) Entities which are by law exempt from direct and indirect taxes.

SEC. 136. Denaturation, Withdrawal and Use of Denatured Alcohol. - *x x x*

SEC. 137. Removal of Spirits Under Bond for Rectification.- *x x x*

SEC. 138. Removal of Fermented Liquors to Bonded Warehouse. - *x x x*

SEC. 139. Removal of Damaged Liquors Free of Tax. - *x x x*

SEC. 140. Removal of Tobacco Products without Prepayment of Tax. - *x x x*"

As gleaned above, importation of CCG and LCCG is not one of those exempted from excise tax. Tax exemptions must be clear and unequivocal. A taxpayer claiming a tax exemption must point to a specific provision of law conferring on the taxpayer, in clear and plain terms, exemption from a common burden. Any doubt whether a tax exemption exists is resolved against the taxpayer.[74]

The doctrines applied in PSPC's cited cases are not applicable in the present consolidated cases.

PSPC cited the case of *Asiatic Petroleum Company (Philippine Islands), Limited vs. Juan Posadas, Jr, et al.*[75] ("*Posadas* case"), to bolster its position that the tax on "things imported" means taxes only for imported articles intended for domestic sale or consumption.

[74] Digital Telecommunications Philippines, Inc. vs. City Government of Batangas, G.R. No. 156040, December 11, 2008
[75] G.R. No. L-30136, February 4, 1929

However, *We* are not persuaded.

A further reading of the *Posadas case* reveals that the claim for refund therein was premised on the defective imported articles re-shipped due to discoloration. The plaintiff-appellee therein discovered the discoloration of the imported kerosene after it paid the specific tax. Thus, it anchored its refund claim on the fact that the imported kerosene is not fit to be sold or consumed locally due to its defect.

In fine, the ruling in the *Posadas case* acknowledged the validity of the tax imposition; and, that the tax was paid under mistake of fact and not of law. The pertinent portion of the ruling in the *Posadas* case conceded that:

> "But in the instant case, when the plaintiff paid the tax, **there was no occasion to question the validity of the tax or the amount of it**, for the simple reason that its validity never arose until after the discovery of the discolored kerosene, and **in the final analysis the tax was paid under a mistake of fact and not of law**, between which there is a very marked difference in the authorities." *(Emphases Ours)*

Moreover, the *Posadas case* was decided in recognition of equity. Continuing from the above-quoted portion, the High Court then held that:

> "**Proceedings of this kind are more or less of an equitable nature and are to be decided upon and are governed by rules of equity.** Tested by that rule, why should the plaintiff be required to pay two specific taxes on the same amount of kerosene, of and for which, in the very nature of things, there was not and could not be but one domestic sale or consumption?
>
> *x x x*
>
> *x x x* **To deny the plaintiff's right of discovery, upon the undisputed facts, would be to compel it to pay a double tax upon the amount of kerosene in question, which**

> **equity and good conscience will not permit.**" *(Emphases Ours)*

To recapitulate, in the *Posadas case*, the refund of previously paid taxes on imported goods, which was subsequently re-exported to Singapore for refinement due to its defect, is dictated by equity. Contrary to the present case, there is no need to decide the case based on equity. The principle of equity and justice is applicable only in the absence of specific provision of law governing the matter in issue. Here, there exist specific provisions that impose excise tax on imported CCG and LCCG.

In the present consolidated cases, the imported CCG and LCCG were not defective. In fact, the imported CCG and LCCG were consumed and used without complaints of defect in quality. PSPC's assertion is buttressed on misplaced interpretation of the law. This is far from the issue in the *Posadas case* wherein the exemption from specific tax arose due to defect in the kerosene imported. When the phrase "things imported" was qualified by "for domestic sale or consumption in the Philippine Islands", it must be understood to mean as not "defective" for domestic sale or consumption regardless whether the imported articles are finished products or raw materials. Furthermore, in the said case, the plaintiff-appellee never questioned the law imposing the tax.[76]

Meanwhile, in the case of *The Asiatic Petroleum Company (Philippine Islands), Ltd. vs. James J. Rafferty, et al.*[77] ("*Rafferty* case"), the plaintiff-appellee's claim for refund was brought about by an accidental fire, which wholly destroyed the imported mineral oils during their transportation from the steamship before its arrival to the bonded warehouse. Again, the plaintiff-appellee therein did not question the imposition of tax on its importation of mineral oils, if not for the fact of its subsequent loss.

In the *Rafferty case*, plaintiff-appellee was absolved from the payment of tax because the imported mineral oils were lost in the interim before the accrual of tax. In the said case, the issue is not about "exemption *per se*" but "exemption due to loss". Also, an "exemption per se" from tax should not be confused with the "accrual" of tax. The

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[76] *See* Asiatic Petroleum Company (Philippine Islands), Limited vs. Juan Posadas, Jr, et al., *Ibid.*
[77] G.R. No. L-13051, August 10, 1918, as cited in the *Posadas* case

primordial issue in the *Rafferty case* was focused mainly on whether or not tax accrued despite the loss of the imported goods before it was put into commerce or trade. The High Court then made a pronouncement in this accord:

> "*x x x* The theory of the law, with reference to the internal revenue tax upon such merchandise, seems to be that the tax is not *due* and *payable* until it is about to be put into the commerce or trade of the country. *x x x*"

In this regard, Sec. 131 of the NIRC of 1997, as amended, clearly dictates that imported articles cannot be released from the customhouse until and unless the corresponding excise tax has been paid. Thus:

> **"SEC. 131. Payment of Excise Taxes on Imported Articles. -**
>
> **(A) Persons Liable. - Excise taxes on imported articles shall be paid** by the owner or importer to the Customs Officers, conformably with the regulations of the Department of Finance and **before the release of such articles from the customhouse**, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption.
>
> *xxx xxx xxx" (Emphases Ours)*

Evidently, based on the above-cited provision, the tax accrues from the time imported goods are to be released from the customhouse and not after its sale or consumption.

The Memorandum dated March 24, 2004 issued by Deputy Commissioner Buñag, the Letter dated April 20, 2004 by Deputy Commissioner Aguirre, and the Memorandum dated June 9, 2009 issued by Commissioner Esquivas, IV do not absolve PSPC from paying excise taxes

from the importations made during 2004 to 2009.

Corollarily, if a particular taxpayer has any queries regarding the applicability of a tax statue, implementing regulations or any provision thereof to specific act or acts, the taxpayer may request the CIR for a pronouncement, opinion, definition, interpretation or ruling based on the facts given.

In response to said query, the CIR renders an interpretative or declaratory pronouncement known as a "BIR Ruling", which is a written statement **issued to a taxpayer** or his authorized representative that officially interprets and applies the tax laws to a specific set of facts.[78] BIR Rulings are less formal interpretations by the CIR or his/her duly authorized subordinates involving Tax Code provisions and regulations, which are issued by him **in response to the query of taxpayers.**[79]

Going back to the present consolidated cases, scrutiny of the said memoranda and letter reveals that they cannot be considered as BIR Rulings but, rather, are mere internal communication. The Memorandum dated March 24, 2004 issued by Deputy Commissioner Jose Mario Buñag ("Buñag Memorandum") does not reflect that such was the stand of the BIR. The phrase, "it is the opinion of this Office *x x x*" used therein pertains to the office being held by Deputy Commissioner Buñag at that time, in his capacity as Head of the Legal and Inspection Group. More so, the Memorandum was addressed to the BIR's Large Taxpayer Service, thereby, stating the stand of the Office of Legal and Inspection Group with regard to the CCG and LCCG, and not to a particular taxpayer.

Anent the letter dated April 20, 2004 by Deputy Commissioner Estelita C. Aguirre ("Aguirre Letter"), reveals that the letter merely reiterated the findings reached by Commissioner Buñag, from which she received and accepted in her capacity as the Officer-In-Charge of the Large Taxpayer Service. Deputy Commissioner Aguirre's letter was addressed to then Commissioner of Customs Bernardo and, again, not to a particular taxpayer.

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[78] Eric R. Recalde, "A Treatise on Tax Principles and Remedies", 2009 Ed.
[79] Victorino C. Mamalateo, "Tax Rights and Remedies" With Bookkeeping Regulations, Taxpayer's Bill of Rights, Republic Act No. 9337 (VAT Law of 1995)

With regard to the Memorandum dated June 9, 2009 issued by Commissioner Esquivas, IV ("Esquivas Memorandum") to then Department of Finance Secretary Margarito B. Teves, the same reiterated the position taken by Deputy Commissioners Buñag and Aguirre.

All told, the Buñag Memorandum, Aguirre Letter and Esquivas Memorandum cannot be considered as BIR rulings, but rather only as mere internal communications. They are office memoranda or communications stating the respective position and opinion of the concerned BIR officials addressed to fellow government employees on the tax treatment of PSPC's CCG and LCCG importations. In other words, none of the memoranda or letter was communicated or sent to PSPC since they are merely intended as internal communications thereof. Therefore, such is not binding in the present consolidated cases since they are not the parties therein. That being so, the CCG and LCCG importations are clearly subject to excise taxes for the covered period under the law.

Nonetheless, assuming *arguendo* that the Esquivas Memorandum is a BIR ruling, this would still not cover early CCG and LCCG importations made by PSPC which will then be taxable. PSPC can only invoke excise tax exemption adopted by the Esquivias Memorandum **from June 9, 2009 until its reversal on December 15, 2009** upon the issuance of the *Tan-Torres Ruling* imposing excise taxes on the subject importations.

The operative fact doctrine is not applicable to the present consolidated cases.

The general rule is that a void law or administrative act cannot be the source of legal rights or duties. The doctrine of operative fact is an exception to the general rule, such that a judicial declaration of invalidity may not necessarily obliterate all the effects and consequences of a void act prior to such declaration.[80]

[80] Commissioner of Internal Revenue vs. San Roque Power Corporation, G.R. No. 187485, October 8, 2013

Clearly, for the operative fact doctrine to apply, there must be a "legislative or executive measure," meaning a law or executive issuance, that is invalidated by the court. From the passage of such law or promulgation of such executive issuance until its invalidation by the court, the effects of the law or executive issuance, when relied upon by the public in good faith, may have to be recognized as valid.[81]

In the present consolidated cases, *We* have already established that the Buñag Memorandum, Aguirre Letter and Esquivas Memorandum are mere internal communications and not BIR Rulings. Thus, the application of the doctrine of operative fact cannot be justified because internal communications is neither a law nor an executive issuance.

PSPC's availment of tax amnesty under Republic Act No. 9480 exempts it from paying the assessed excise taxes for the taxable years 2004 and 2005.

In resolving the issue, the CTA Third Division held that PSPC is immune from paying excise taxes by virtue of the tax amnesty program under RA No. 9480[82]. The court a *quo* ruled:

> "Finally, with the availment of tax amnesty program under RA No. 9480, on February 8, 2008, and considering that based on the records of the case, it has duly complied with the documentation requirements thereof, petitioner is, therefore, immune from the payment of taxes and additions thereto, as well as, the appurtenant civil, criminal or administrative penalties under 1997 NIRC, as amended, arising from failure to pay any and all internal revenue taxes." *(Citations omitted)*

We sustain the Court *a quo's* conclusion.

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[81] *Ibid.*

[82] An Act Enhancing Revenue Administration and Collection by granting an Amnesty on all Unpaid Internal Revenue Taxes imposed by the National Government for Taxable Years 2005 and Prior Years

Thus, since PSPC complied with the tax amnesty program under RA No. 9480, then PSPC is liable only to pay excise tax on the remaining contested periods, *i.e.*, from years 2006 to 2009.

The Tan-Torres Ruling dated December 15, 2009 issued by then CIR Joel L. Tan-Torres is valid and binding.

In its Petition for Review, PSPC alleges that the *Tan-Torres Ruling* is invalid considering that it is contrary to applicable laws and jurisprudence; it has no factual or legal basis; it amounts to unlawful direct duplicate taxation; it was issued in violation of PSPC's right to due process; and, it constitutes an unlawful usurpation of the exclusive power and jurisdiction of the court since the issue of proper imposition of excise taxes was then already pending with the CTA Third Division.

We find PSPC's argument bereft of merit.

The power to interpret provisions of the tax code belongs to the Commissioner of Internal Revenue. This is enshrined under Section 4 of the NIRC of 1997, as amended, which states that:

> "**SEC. 4. Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases -** The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.
>
> *xxx xxx xxx*"

Since the CIR has the exclusive and original jurisdiction to interpret tax laws, absent any abuse of discretion, it shall be accorded due respect. In the present consolidated cases, PSPC insists that the *Tan-Torres Ruling* runs contrary to existing jurisprudence, specifically citing the *Posadas case*. However, as *We* already discussed earlier, the Posadas case is inapplicable in the present consolidated cases.

Furthermore, to support its argument, PSPC cited the case of *Commissioner of Internal Revenue vs. Michel J. Lhuillier Pawnshop, Inc.*[83], asserting that "the CIR cannot, in the exercise of such power, issue administrative rulings or circulars not consistent with the law sought to be applied. Indeed, administrative issuances must not override, supplant or modify the law, but must remain consistent with the law they intend to carry out. Only Congress can repeal or amend the law."

While *We* agree with the cited case, *We* however, cannot see its application herein, since the Tan-Torres Ruling merely reiterated and, in fact, strengthened the BIR's position with regard to the application of excise tax. A portion of said ruling reads:

> "There is nothing in Section 148 of the NIRC or in its implementing rules and regulations that qualifies other similar product of distillation to be exempted from the payment of excise tax if it is still to be blended to comply with the Clean Air Act."[84]

As to the allegation of direct double taxation, *We* find that direct double taxation does not exist in this case. Imported CCG and LCCG are taxed only once, that is, upon their importation in relation to Sections 129, 131 and 148 (e) of the NIRC of 1997, as amended. The succeeding round of taxation is on the manufactured finished grade unleaded gasoline that contains not entirely CCG and LCCG but other chemical components as well. The subsequent tax imposition is on a whole new excisable product before removal from production site.

The subject matters of taxation are different. The first imposition is on imported CCG and LCCG while the later imposition is on the finished grade unleaded gasoline. Also, the first imposition is concerned on the importation of articles while the subsequent imposition is on the manufacturing or production of goods in the Philippines for domestic sale or consumption or for any other disposition.

Notably, the law itself affirms this theory of two different subject matters arising from same imported article. When imported goods go through reprocessing, the imposition of tax happens twice. The first imposition is upon importation of goods, and second, upon removal of

[83] G.R. No. 150947, July 15, 2003
[84] Par. 5 of the Tan-Torres Ruling

reprocessed goods from production site. The intent of the lawmakers is evident in Sec. 148 (a) of the NIRC of 1997:

> **"CHAPTER V - EXCISE TAX ON PETROLEUM PRODUCTS**
>
> **SEC. 148. Manufactured Oils and Other Fuels.** - *x x x*
>
> (a) Lubricating oils and greases, including but not limited to, basestock for lube oils and greases, high vacuum distillates, aromatic extracts, and other similar preparations, and additives for lubricating oils and greases, whether such additives are petroleum based or not, per liter and kilogram respectively, of volume capacity or weight, Four pesos and fifty centavos (P4.50): Provided, however, That the excise taxes paid on the purchased feedstock (bunker) used in the manufacture of excisable articles and forming part thereof shall be credited against the excise tax due therefrom: Provided, further, That lubricating oils and greases produced from basestocks and additives on which the excise tax has already been paid shall no longer be subject to excise tax: **Provided, finally, That locally produced or imported oils previously taxed as such but are subsequently reprocessed, rerefined or recycled shall likewise be subject to the tax imposed under this Section.**
>
> *xxx xxx xxx" (Emphasis Ours)*

Clearly, there is no double taxation when one of its elements is absent. Here, the imposition of tax is on two different subject matters. Hence, the element "same subject matter" is wanting.

Thus, finding partial merit in public petitioners' arguments, the Court *En Banc* modifies the conclusions reached by the Court *a quo.*

WHEREFORE, the public petitioners' Petition for Review is **PARTIALLY GRANTED**, while PSPC's Petition for Review is hereby **DENIED** for lack of merit.

Accordingly, the Resolutions dated November 27, 2012 and March 26, 2013, respectively, promulgated by the CTA Third Division is

MODIFIED. Pilipinas Shell Petroleum Corporation is **LIABLE** for the unpaid excise taxes and VAT for its subject Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline importations for the relevant periods in 2006 to 2009.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen
(With Concurring and Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

COMMISSIONER OF CUSTOMS, COLLECTOR OF CUSTOMS OF THE PORT OF BATANGAS, BUREAU OF CUSTOMS, COMMISSIONER OF INTERNAL REVENUE AND THE BUREAU OF INTERNAL REVENUE,
Petitioners,

-versus-

PILIPINAS SHELL PETROLEUM CORPORATION,
Respondent.

CTA EB No. 1003
(CTA Case No. 8004)

x- x

PILIPINAS SHELL PETROLEUM CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF CUSTOMS, COLLECTOR OF CUSTOMS OF THE PORT OF BATANGAS, BUREAU OF CUSTOMS, COMMISSIONER OF INTERNAL REVENUE AND THE BUREAU OF INTERNAL REVENUE,
Respondents.

CTA EB No. 1007
(CTA Case No. 8004)

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

Promulgated:
SEP 2 8 2015
2:25 p.m.

x- x

CONCURRING & DISSENTING OPINION

RINGPIS-LIBAN, *J.*:

With all due regard to the ponencia of my esteemed colleague, Justice Caesar A. Casanova, I respectfully **CONCUR** with and **DISSENT** from the majority opinion.

I wholly concur with the finding of the majority opinion that Pilipinas Shell Petroleum Corporation's (PSPC's) availment of tax amnesty under Republic Act No. 9480 exempts it from paying the assessed excise taxes for the taxable years 2004 and 2005. However, as regards all other matters, the undersigned is of the belief that the record bears out certain facts that have been misappreciated and undervalued that impacts the issues of law involved in this case.

The main premise of my Dissenting Opinion is that evidence cannot be ignored and ought not be ignored. As stewards of Justice, that is our mandate.

While the law determines which items are taxable and whether or not a certain item -- such as CCG/LCCG in the present case -- falls under that definition, substantial weight ought to be given to the opinions of experts who are in the best position to shed light on its chemical composition and the processes involved in any synthesized by-products thereof, especially when the taxable item/s have specific technical and scientific significance in the respective industry or field in which it is used.

While the Majority Opinion gave a brief narration of the antecedent facts of the consolidated cases, the undersigned feels that there are certain facts and incidents borne out by the records of this case that, if brought to light, would give a contextual backdrop for the discussion of my dissent.

THE FACTS AND TRIAL INCIDENTS

The records of this case reflect the following:

In 2001, PSPC started importing CCG and LCCG to be blended with other petroleum substances for the production of finished grade motor gasoline. In doing so, PSPC had to comply with Republic Act (R.A.) No. 8749, otherwise known as the Philippine Clean Air Act of 1999 (Clean Air Act) and the Philippine National Standards (PNS), in order that its manufactured petroleum products may be sold in the country. Section 26 of the Clean Air Act prohibits the distribution, sale, and introduction into commerce of fuels whose specifications are less than those provided by the law.[1]

[1] Section 26 of the R.A. No. 8749, "The Clean Air Act", provides:

PSPC paid excise taxes thereon to the Bureau of Customs, from 2001 to 2003, at the rate of ₱4.35 per liter, instead of ₱4.80 per liter.[2] The tax rate was ₱4.80/liter under Section 148(e) of R.A. No. 8424 (Tax Reform Act of 1997), before it was reduced to ₱4.35/liter by R.A. 9337 in 2005. The only petroleum product subject to excise tax at ₱4.35/liter under Section 148 of R.A. No. 8424 was unleaded premium gasoline (Section 148[f]).

The excise taxes paid by PSPC for the years 2001 to 2003 totalled Two Billion Three Hundred Thirty Nine Million Seventy-Two Thousand One Hundred and Seventy-Three Pesos (₱2,339,072,173.00), for an importation volume of 393,539,891 kilograms (kgs)[3]. Throughout these years up to early 2004, PSPC paid the assessed excise taxes on its imported CCG and LCCG upon entry to the BOC. **The BIR then allowed the deduction of the excise taxes previously paid upon entry or importation from the amount of excise taxes assessed by the BIR on its finished gasoline product upon withdrawal from PSPC's Tabangao Refinery**. In effect, PSPC paid for excise tax for CCG/LCCG upon entry or importation, and paid for the excise tax due on the finished gasoline product upon withdrawal from the refinery, excluding the CCG/LCCG the finished product contained.

In the days leading up to the resignation of former CIR Rene G. Bañez and before former CIR Cornelio C. Gison was appointed interim BIR Commissioner, BIR Assistant Commissioner (ACIR) Edwin R. Abella of the Large Taxpayers Service released a Memorandum addressed to the ACIR for Legal Service dated 3 August 2002[4] (Abella Memorandum) which opined that LCCG as a product of petroleum distillation is subject to excise tax at the rate of ₱4.80/liter.

The aforementioned **<u>practice of the BIR</u>** of deducting the excise taxes paid upon entry from the excise taxes paid by PSPC for the finished product was confirmed by respondent BIR in the Memorandum dated 29 April 2003[5] issued by BIR Assistant Commissioner Milagros V. Regalado:

"SEC. 26. Fuels and Additives. x x x 1. Not later than eighteen (18) months after the effectivity of this Act, no person shall manufacture, import, sell, supply, offer for sale, dispense, transport or introduce into commerce unleaded premium gasoline fuel which has an anti-knock index (AKI) of not less than 87.5 and Reid vapor pressure of not more than 9 psi. Within six (6) months after the effectivity of this Act, unleaded gasoline fuel shall contain aromatics not to exceed forty-five percent (45%) by volume and benzene not to exceed four percent (4%) by volume; Provided, That by the year 2003, unleaded gasoline fuel should contain aromatics not to exceed thirty-five percent (35%) by volume and benzene not to exceed two percent (2%) by volume x x x."

[2] Docket, p. 15. Annex 1 (par. 1) of petitioner's Manifestation and Motion dated January 18, 2010.

[3] Docket, CTA EB No. 1003, Per Public Parties' Petition for Review filed on 10 May 2013, p. 4. The excise taxes, however, were assessed and paid on a "per <u>liter</u> of volume capacity" basis, not kilograms.

[4] Docket, CTA EB No. 1007, Vol. 1, Annex 10 of petitioner's Addendum, March 8, 2011, p. 16.

[5] Exhibit "L" of petitioner PSPC's *Motion for Summary Judgment*, **Annex "D"** hereof.

> "After considering all options present, this Office hereby takes the Letter (c) opinion to be in harmony with the Tax Code. Accordingly, the imported Light Catalytic Cracked Gasoline (LCCG) should be subjected to excise tax at the rate of the removal of P4.80/liter before removal from customs custody; however, the removal of the finished product from LCCG shall no longer be subject to excise tax. Any differential tax between the tax-paid LCCG and the resultant product shall not give rise to any tax refund or credit." *(Emphasis supplied)*

Pursuant to a delegated power of the Commissioner to obtain information in order to determine the liability of any person or entity for any internal revenue tax under Section 5 of the 1997 NIRC[6], BIR Deputy Commissioner (DCIR) Estelita C. Aguirre sought the opinion of the Department of Energy (DOE) on whether PSPC's imported CCG and LCCG should be subject to excise tax.

In reply, by letter dated December 4, 2003[7], DOE Undersecretary J.V. Emmanuel A. De Dios concluded that while CCG and LCCG are products of distillation, *"only product(s) of distillation which, by themselves, constitute finished products, should be subject to excise tax under Section 148(e) at the rate of ₱4.80 per liter."* He further opined that *"products of distillation that are essentially raw materials or intermediate gasoline components should not be subject to excise tax."* As CCG and LCCG are not specifically mentioned as among the goods or products subject to excise tax under the NIRC and neither are they mentioned in the PNS, the DOE Opinion is the first instance of characterization of the specifications of CCG and LCCG.

Further, the DOE Opinion, which was based on the findings made by the DOE's Oil Industry Management Bureau (OIMB) in its Memorandum dated October 29, 2003[8], concluded that:

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[6] 1997 NIRC, "SEC. 5. Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons. - In ascertaining the correctness of any return, or in making a return when none has been made, or **in determining the liability of any person for any internal revenue tax**, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized: x x x

(B) **To obtain** on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation, **or from any office or officer of the national and local governments, government agencies and instrumentalities**, including the Bangko Sentral ng Pilipinas and government-owned or -controlled corporations, **any information** such as, but not limited to, costs and volume of production, receipts or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures of consortia and registered partnerships, and their members; x x x". *(Emphasis ours).*

[7] Docket, CTA EB No. 1007, Vol. 1, Annex 1 of respondent's Request for Admission, p. 17.

[8] *Rollo*, p. 499.

a. CCG and LCCG are not finished gasoline products but are intermediate or raw gasoline components used as blendstock in the production of finished grade unleaded motor gasoline;

b. CCG and LCCG properties cannot pass all the required specifications (Reid Vapor Pressure, aromatics and benzene content, anti-knock index) mandated by the Clean Air Act and the PNS for finished gasoline products;

c. CCG and LCCG should not be subject to excise tax since they are intermediate products or raw materials not intended for domestic sale or consumption;

d. CCG and LCCG are unsuitable for use as 100% motor fuel given their chemical properties that render them unfit as motor fuels; and

e. CCG and LCCG cannot be passed on as finished grade unleaded gasoline.

On the strength of the DOE Opinion, **the BIR continued to apply its then ongoing practice to tax PSPC for its CCG/LCCG importations only once**. However, the BIR took the position that **excise taxes should only be imposed on the finished grade motor gasoline instead of subjecting raw materials (CCG/LCCG) to excise tax immediately at the point of importation** and allowing the amount thereof to be deducted from the amount of excise tax due on the entire finished grade motor gasoline upon withdrawal from the refinery.

Despite the DOE Opinion, certain personalities within the BIR sought a second opinion in a bid to legitimize their desire to tax CCG/LCCG upon importation and upon withdrawal as a finished product. By Memorandum dated December 16, 2003[9], BIR Laboratory Section Chief Cleotilde M. Jose informed Head Revenue Executive Assistant Elvira R. Vera that *"CCG and LCCG are products of both cracking and distillation"* and are *"similar to naphtha"* and thus should be subject to the same excise tax rate as naphtha, *i.e.*, ₱4.80/liter.

As a result, Fegurita E. Lipio, OIC Chief of the BIR's Large Taxpayers Field Operations Division, by Memorandum dated February 10, 2004[10] addressed to Head Revenue Executive Assistant Elvira R. Vera, opined that regardless of the position of Energy Undersecretary J.V. Emmanuel A. De

[9] *Id.,* Annex 11 of petitioner's Addendum dated March 8, 2011, p. 16.
[10] *Id.,* Annex 12 of petitioner's Addendum dated March 8, 2011, p. 16.

Dios, CCG and LCCG are intermediate products, they are subject to excise tax under Sections 129, 131 and 148(e) of the Tax Code.

The conflicting opinions within the ranks of the BIR prompted DCIR Aguirre to seek the legal opinion of DCIR Jose Mario Buñag regarding the taxability of imported CCG and LCCG which she did so by Memorandum[11] dated February 16, 2004. DCIR Buñag then served as the Deputy Commissioner for the Legal and Inspection Group (LIG) of the BIR and eventually became CIR on July 11, 2005.[12]

The request of the LTS on the excise tax treatment of CCG and LCCG, as well as the findings of the DOE were discussed by the BIR ManCom (Management Committee) composed of then BIR Commissioner Guillermo Parayno, Jr. and the Deputy Commissioners. Accordingly, in his capacity as DCIR of the Legal Inspection Group which had authority to resolve a legal issue on the taxability of articles listed in an application for the issuance of an Authority to Release Imported Goods (ATRIG) as embodied in Revenue Memorandum Order (RMO) No. 35-02[13], DCIR Buñag issued a Memorandum[14] on 24 March 2004. In said Memorandum addressed to DCIR Aguirre, **DCIR Buñag opined that PSPC's imported CCG and LCCG are not subject to excise taxes because they are merely blending components in the production of a finished product.** It held, thus:

> "[I]t is clear that excise tax attaches upon the distribution of domestic products on the one hand, and removal of imported products, on the other, for sale or disposition to the consumers of the product. Thus, this presupposes that in order to be exciseable, the products should be finished products intended for consumption to the end consumers.
>
> In this particular case, LCCG and CCG are not finished gasoline products intended for consumption to end consumers. They are intermediate goods or raw gasoline components used in the production of unleaded gasoline and other types of gasoline variants. The doctrine in the Asiatic Petroleum case to the effect that unless exciseable products are placed in the market for domestic consumption by the public, the tax will not apply, still holds true at this point."[15]

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[11] *Id.*, Annex G of respondent's Petition for Review, p. 18.
[12] *Rollo*, p. 497, Annex "E" of PSPC's Petition for Review.
[13] RMO No. 35-02, "Prescribing the Guidelines and Procedures in the Processing and Issuance of Authority To Release Imported Goods (ATRIG) for Excise and Value-Added Tax Purposes".
[14] *Rollo*, CTA Case No. 8004, Vol. 1, Exhibit "W", Annex F-C, p. 65.
[15] *Rollo*, p. 509.

On April 20, 2004, to implement the Memorandum, Commissioner Guillermo L. Parayno Jr., through DCIR Aguirre, wrote Customs Commissioner (COC) Antonio Bernardo advising him that excise taxes should no longer be imposed on PSPC's importations of CCG and LCCG.[16]

Subsequently, from 2004 to 2009, PSPC increased its importations of CCG and LCCG. From an annual average of 131,179,897 kilograms from 2001 to 2003, its importations increased to 303,519,568 kg from 2004 to 2009. In view of the BIR's legal position that no excise taxes were due on the imported CCG and LCCG upon entry, **corresponding ATRIGs on the CCG and LCCG importations from 2004 to 2009 <u>stating that such goods were not subject to excise taxes upon entry were issued by the CIR</u>**. Instead, the BIR collected full excise taxes on all the withdrawals of PSPC's finished grade motor gasoline in which the CCG and LCCG were already blended.

The records show that **PSPC paid excise taxes on these importations from 2004 to 2009 upon withdrawal of the finished products** from their Tabangao Refinery.[17]

Notwithstanding said payments, on January 30, 2009, after an audit of PSPC's past importations, the District Collector of Customs of the Port of Batangas sent PSPC a demand for payment[18] of ₱3,609,337,145.00 as unpaid excise and VAT, plus penalty of ₱17,849,669,425.00, on 63 shipments of CCG and LCCG from 2006 to 2008. The aggregate amount demanded was ₱21,419,603,310.00. The Collector of Customs posited in the demand letter that PSPC's shipments of CCG and LCCG specified therein were allegedly released without the payment of excise tax and VAT thereon.[19]

On February 16, 2009, PSPC submitted a letter dated February 13, 2009[20] seeking cancellation of the Collector of Custom's demand letter.

On February 18, 2009, the Collector of Customs denied PSPC's position and reiterated the demand for the payment of the ₱21,419,603,310.00.[21]

On February 20, 2009, the Commissioner of Customs created a Verification Committee[22] to investigate reports that PSPC had not been paying excise taxes on importations of unleaded gasoline since 2006.

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[16] *Supra* at Note 6, Vol. 8, p. 3917.
[17] Testimony of BIR Officer Pelino, TSN, dated 22 January 2010; Memorandum dated 9 June 2009 by CIR Esquivias, BIR Certification dated 14 January 2010, Annex "D" of Petition for Review; Affidavit of Nicasio M. Manuel, *Rollo,* pp. 489-493; Affidavit of Janice De Los Reyes, *Rollo,* pp. 575-576.
[18] *Supra* at Note 6, Vol. 2, Exhibit "B", pp. 746-748.
[19] At p. 2 of COC's Demand Letter dated 30 January 2009, Annex "D" of Petition.
[20] *Id.,* Vol. 8, Exhibit "BB", pp. 3912-3917.
[21] *Id.,* Vol. 2, Exhibit "C", pp. 749-753.

On March 5, 2009, PSPC appealed to Commissioner of Customs Napoleon L. Morales[23] against the demand letter dated January 30, 2009 and letter-denial dated February 18, 2009 of the Collector of Customs of the Port of Batangas.

On March 9, 2009, the Commissioner of Customs issued a Memorandum[24] enjoining the collection of the taxes pending resolution of PSPC's appeal.

Subsequently, **BIR Commissioner Sixto S. Esquivias IV** issued the Memorandum dated June 9, 2009[25] addressed to the Secretary of Finance Margarito B. Teves **confirming and reiterating that under Section 148 of the 1997 NIRC, as amended, excise taxes may only be imposed for goods intended for domestic sale but not on intermediate products such as CCG and LCCG**.

On August 17, 2009, the Verification Committee submitted its Final Report[26] sustaining the findings and action of the Collector of Customs of the Port of Batangas.

On September 9, 2009, the Commissioner of Customs issued a Memorandum[27] to the District Collector of the Port of Batangas, that unleaded gasoline (CCG) be subjected to excise tax and VAT, payable to the Bureau of Customs upon filing of the import entry; that when used as a blending component in producing unleaded premium gasoline for domestic sale, the same shall be subject to excise tax and VAT, payable to the BIR, less the excise tax and input VAT paid to the BOC; that the same shall be applied prospectively; and that the Verification Committee sustains the demand for payment by PSPC of ₱3,569,933,885.00 for the excise tax and VAT due on 63 import entries.

On September 14, 2009, the District Collector of the Port of Batangas issued a Final Demand[28] to PSPC to pay ₱7,348,767,933.00 in excise taxes and VAT on importations of CCG and LCCG from 2004 to 2009, exclusive of interests and penalties.

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[22] *Id.*, Vol. 8, Exhibit "FF", p. 3924.
[23] *Id.*, Vol. 8, Exhibit "CC", pp. 3918-3919.
[24] *Id.*, Vol. 8, Exhibit "EE", p. 3923.
[25] *Supra* at Note 10, p. 69.
[26] *Supra* at Note 20, Exhibit "GG", pp. 3925-3931.
[27] *Supra* at Note 21, p. 74.
[28] *Supra* at Note 22, Exhibit "AA", pp. 3904-3910.

On September 23, 2009, the Commissioner of Customs directed the District Collector of the Port of Batangas to defer any action against PSPC pending finality of the resolution of its appeal.[29]

On November 11, 2009, the Verification Committee, through a Supplement to its Final Report[30], again sustained the position of the Collector of Customs of the Port of Batangas.

Also, on 11 November 11, 2009, the Commissioner of Customs denied PSPC's appeal and ordered the payment of the principal liability of ₱7,348,767,933.00 as indicated in the demand letters dated January 30, 2009 and September 14, 2009.[31]

On November 18, 2009, PSPC moved for reconsideration[32] of the denial of its appeal.

On November 26, 2009, the Commissioner of Customs denied PSPC's motion for reconsideration.[33]

Trial Incidents

On December 3, 2009, PSPC filed its Petition for Review, docketed as CTA Case No. 8004. On the same day, PSPC filed its *"Verified Motion for the Issuance of a Suspension Order Against the Collection of Taxes with a Prayer for Immediate Issuance of a Temporary Restraining Order dated 1 December 2009"* (Verified Motion for the Issuance of a Suspension Order) alleging, among others, that PSPC has already paid whatever proper taxes due and owing on the subject importations.[34]

On December 9, 2009, this Court's First Division issued a Temporary Restraining Order (TRO) effective for sixty (60) days from service thereof on the party or person sought to be enjoined.[35]

Not even a week after the TRO was issued, on December 15, 2009, BIR Commissioner Joel Tan-Torres issued a final letter-ruling[36] (Tan-Torres Ruling) to PSPC, **declaring that its importations of CCG are subject to**

[29] *Id.*, Exhibit "II", pp. 3953-3955.
[30] *Id.*, Vol. 2, Exhibit "D", pp. 755-756.
[31] *Id.*, Vol. 1, Annex "I" of respondent's Petition for Review, p. 20.
[32] *Id.*, Vol. 8, Exhibit "JJ", pp. 3955-3966.
[33] *Id.*, Exhibit "UU", pp. 3965-3966.
[34] Par. 12.2 at p.6 of PSPC's Verified Motion for Issuance of a Suspension Order, Annex "G" of the Petition.
[35] *Resolution* dated 9 December 2009, Annex "G-2" of PSPC's Petition.
[36] *Id.*, Exhibit "LL", pp. 3967-3974.

excise taxes, basing his findings that CCG and LCCG **are products of distillation**. The ruling stated, in part:

> "Thus, after a re-study of the legal opinions given by then Deputy Commissioner Buñag and confirmed by then Commissioner Esquivias, this Office finds basis in reversing said opinion and in ruling that the exemption of LCCG/CCG from excise tax has no legal and factual basis. The opinion of ACIR Regalado regarding the exemption from excise tax of finished products from LCCG is likewise revoked. Therefore, the importation of LCCG/CCG shall be subject to excise tax at the rate of P4.35 per liter under Section 148(e). The rate of P4.80 then prevailing during 2002 has been reduced to P4.35 per liter pursuant to Section 17 of Republic Act No. 9337. Moreover, the removals of finished products reprocessed or manufactured in the Philippines using imported LCCG and CCG as blending components for domestic sales or consumption or for any other disposition are also subject to excise tax at the rate of P4.35 per liter under the same section. This is the final position of the Bureau of Internal Revenue on this matter."

The *Tan-Torres Ruling* was, in turn, the basis of the *"Very Urgent Motion to Dissolve or Lift the Temporary Restraining Order (TRO) dated 09 December 2009"*(Very Urgent Motion to Dissolve) which was dated December 28, 2009. The Public Parties claimed that with the issuance of the *Tan-Torres Ruling*, the case had already become moot and academic. Further, they also claimed that the *Tan-Torres Ruling* retroactively invalidated all ATRIGs previously issued to PSPC, thus:

> "Indeed, the said ruling finally settles the condition expressly stated in the ATRIGs issued by the BIR authorizing the conditional release of petitioner's importation of unleaded gasoline/CCG that the release thereof without payment of the excise taxes is **WITHOUT PREJUDICE TO THE COLLECTION OF THE CORRESPONDING EXCISE TAXES, PENALTIES, INTERESTS PENDING ON THE VALIDITY OF DCIR BUNAG OPINION ON THE MATTER.**"[37] *(Capitals in the original, emphasis supplied)*

In a Resolution dated January 14, 2010, the Public Parties' *Very Urgent Motion to Dissolve* was denied by this Court's Special First Division.[38]

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[37] *Rollo*, p.5 of Very Urgent Motion to Dissolve.
[38] Exhibits "MM" and "NN", respectively, of PSPC's *Motion for Summary Judgment*, Annex "D" of *Petition*.

On January 18, 2010, the Public Parties prayed for the dismissal of CTA Case No. 8004 and denial of PSPC's application for a suspension order.[39]

On January 26, 2010, PSPC filed a Supplemental Petition[40], assailing the above-cited Letter-Ruling of BIR Commissioner Tan-Torres dated December 15, 2009. Consequently, this Court's First Division denied PSPC's *Verified Motion for the Issuance of a Suspension Order* in a Resolution dated February 9, 2010.

On March 15, 2012, the Public Parties moved for partial summary judgment[41], praying that the petition be dismissed and that PSPC be ordered to pay the assessed excise taxes. PSPC filed a *Motion for Summary Judgment*[42] dated March 16, 2012, seeking that it be declared not liable for the assessed taxes for the relevant periods in 2004 to 2009, and that the Letter-Ruling dated December 15, 2009 be declared "void, invalid and unconstitutional."

By Resolution dated June 29, 2012[43], the Third Division required the parties to submit their respective memoranda within thirty (30) days from receipt thereof. PSPC filed its *Memorandum*[44] on August 3, 2012, and the Public Parties filed theirs on August 15, 2012.[45]

By Resolution dated August 28, 2012[46], the Third Division declared the motions for summary/partial summary judgment submitted for resolution.

On November 27, 2012, the Third Division promulgated its Resolution[47], disposing as follows:

> "**WHEREFORE**, premises considered, petitioner's [PSPC's] Motion for Summary Judgment is hereby **GRANTED**. On the other hand, respondent's [Public Parties'] Motion for Partial Summary Judgment is hereby **DENIED**.
>
> Respondent is **ENJOINED** from collecting the alleged unpaid excise taxes and VAT thereon, on petitioner's importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline for relevant periods in 2004 to 2009.

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[39] *Rollo*, Vol. 2, pp. 670-671.
[40] *Rollo*, Vol. 2, p. 711.
[41] *Rollo*, Vol. 25.
[42] *Rollo*, Vol. 13, pp. 6835-6957.
[43] *Rollo*, Vol. 23, pp. 12494-12496.
[44] *Rollo*, Vol. 23, pp. 12499-12699.
[45] *Rollo*, Vol. 24, pp. 12817-12922.
[46] *Id.*, p. 12926.
[47] *Id.*, pp. 12929-12947.

SO ORDERED."

Against the above-quoted Resolution of the Third Division, the Public Parties moved for reconsideration[48], while PSPC filed, on December 17, 2012, a *Motion for Clarification and/or Partial Reconsideration.*

On March 26, 2013, the Third Division resolved as follows:

> "**WHEREFORE**, premises considered, the parties' Motions for Reconsideration are hereby **DENIED** for lack of merit.
>
> Petitioner's motion for clarification is **GRANTED**. The dispositive portion of the November 27, 2012 Resolution is therefore **AMENDED** to read as follows:
>
>> "**WHEREFORE**, premises considered, petitioner's Motion for Summary Judgment is hereby **<u>PARTIALLY</u> GRANTED**. <u>Petitioner Pilipinas Shell Petroleum Corporation is NOT LIABLE for the alleged unpaid excise taxes and VAT thereon, for its subject Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline importations for the relevant periods in 2004 to 2009</u>.
>>
>> On the other hand, respondent's Motion for Reconsideration is hereby **DENIED**.
>>
>> Respondent is **ENJOINED** from collecting the alleged unpaid excise taxes and VAT thereon, on petitioner's importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline for relevant periods in 2004 to 2009."

On May 10, 2013 the Public Parties filed their Petition for Review, docketed as CTA E.B. Case No. 1003.

On May 15, 2013, PSPC filed its Petition for Review, docketed as CTA E.B. Case No. 1007.

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[48] *Id.*, pp. 12950-13011.

The remainder of the trial incidents from this point henceforth, have been faithfully narrated in the Majority Opinion.

THE ISSUES

In the opinion of the undersigned, the principal issues in these consolidated petitions may be phrased as follows:

a) Whether or not PSPC is liable to pay excise taxes and VAT on its importations of CCG and LCCG during the relevant periods in 2004 to 2009, under the law; and

b) Whether or not the Tan-Torres Ruling is valid and can be applied retroactively to PSPC's excise tax liabilities for the relevant period, as well as prospectively.

THE APPLICABLE LAW

The applicable law is the National Internal Revenue Code ("NIRC"), as amended, particularly Section 148(e) thereof in relation to Sections 129 and 131(A). Both parties acknowledge this. PSPC, however, believes that *Tan-Torres Ruling* gave these sections of the NIRC an invalid interpretation violative of its constitutional rights. The Public Parties, in contrast, contend that the *Tan-Torres Ruling* is superfluous, inasmuch as it not even necessary to the implementation of the law.

The *Tan-Torres Ruling* adverted to Section 17 of R.A. No. 9337 as basis of excise tax at the rate of P4.35/liter. Section 17 of R.A. No. 9337 of 2005 amended Section 148(e) of R.A. No. 8424 (Tax Reform Act of 1997) to read as follows:

> "**SEC. 148.** *Manufactured Oils and Other Fuels.* - There shall be collected on refined and manufactured mineral oils and motor fuels, the following excise taxes which shall attach to the goods hereunder enumerated as soon as they are in existence as such:
>
> x x x
>
> "(e) Naphtha, regular gasoline and other similar products of distillation, per liter of volume capacity, Four pesos and thirty-five centavos (P4.35): *Provided, however,* That naphtha, when used as a raw material in the production of petrochemical products or as replacement

> fuel for natural gas-fired-combined cycle power plant, in lieu of locally-extracted natural gas during the non-availability thereof, subject to the rules and regulations to be promulgated by the Secretary of Energy, in consultation with the Secretary of Finance, per liter of volume capacity, Zero (P0.00): *Provided, further,* That the by-product including fuel oil, diesel fuel, kerosene, pyrolysis gasoline, liquefied petroleum gases and similar oils having more or less the same generating power, which are produced in the processing of naphtha into petrochemical products shall be subject to the applicable excise tax specified in this Section, except when such by-products are transferred to any of the local oil refineries through sale, barter or exchange, for the purpose of further processing or blending into finished products which are subject to excise tax under this Section;"

The Public Parties believe that CCG and LCCG fall under "other similar products of distillation" in Sec. 148(e). Hence, CCG and LCCG are among the specified articles subject to excise tax under Section 148 of the 1997 NIRC.

PSPC, on the other hand, believe otherwise. Instead, they insist that CCG and LCCG are products of cracking through Fluid Catalytic Cracking Units and not obtained by distillation of crude oil through a crude distillation unit.

The interpretation of Section 129 is also a bone of contention between the parties, to wit:

> "**SEC.129**. *Goods subject to Excise Taxes.* - Excise taxes apply to goods manufactured or produced in the Philippines for domestic sales or consumption or for any other disposition and to things imported. The excise tax imposed herein shall be in addition to the value-added tax imposed under Title IV.
>
> For purposes of this Title, excise taxes herein imposed and based on weight or volume capacity or any other physical unit of measurement shall be referred to as 'specific tax' and an excise tax herein imposed and based on selling price or other specified value of the good shall be referred to as 'ad valorem tax.'"

The Public Parties believe that the phrase *"to things imported"* under Sec. 129 is not qualified by the phrase *"for domestic sale or consumption or for any other* *disposition"*. Thus, the fact alone that CCG and LCCG are imported subjects them to excise tax regardless whether the product is fit to be consumed by the market or not. However, PSPC believes that since the imported CCG and LCCG is merely an intermediate product used as blendstock which is not fit for consumption as a finished product domestically, no excise tax can be due on it upon entry.

Finally, there is Section 131(A), quoted below:

> "**Sec. 131**. *Payment of Excise Taxes on Imported Articles*. – (A) Persons Liable. – Excise taxes on imported articles shall be paid by the owner or importer to the Customs Officers, conformably with the regulations of the Department of Finance and before the release of such articles from the customs house, or by the person who is found in possession of articles which are exempt from excise taxes other than those legally entitled to exemption."

The Public Parties believe that since CCG and LCCG is an exciseable article under 148(e), excise taxes must be paid to the Bureau of Customs prior to its release. PSPC, however, believes that it is only upon the release of the finished product containing the blended in CCG and LCCG from their Tabangao Refinery that excise taxes are due, and which, notably, have already been paid.

DISCUSSION

Summary Judgment; Requirements, Effects

First, a word on the propriety of summary judgment, to which the Third Division acceded after PSPC moved for summary judgment and the Public Parties moved for partial summary judgment.

Nowhere in the Public Parties' pleadings before the Court sitting *en banc* was the rendering of the summary judgment assailed, although they take exception to the Third Division's conclusions. "They agree that based on the pleadings, papers, supporting affidavits, and other documents submitted by the parties, summary judgment may be rendered.[49]"

[49] p. 9, CTA Case No. 8004, Resolution dated 27 November 2012.

The Supreme Court elucidates the consequences and repercussions of a summary judgment in ***Calubaquib vs. Republic***[50], thus:

> "'A summary judgment is permitted only if there is no genuine issue as to any material fact and [the] moving party is entitled to a judgment as a matter of law.'[51] The test of the propriety of rendering summary judgments is the existence of a genuine issue of fact,[52] 'as distinguished from a sham, fictitious, contrived or false claim.'[53] **'[A] factual issue raised by a party is considered as sham when by its nature it is evident that it cannot be proven or it is such that the party tendering the same has neither any sincere intention nor adequate evidence to prove it.** This usually happens in denials made by defendants merely for the sake of having an issue and thereby gaining delay, taking advantage of the fact that their answers are not under oath anyway.[54]
>
> In determining the genuineness of the issues, and hence the propriety of rendering a summary judgment, the court is obliged to carefully study and appraise, not the tenor or contents of the pleadings, but **the facts alleged under oath by the parties and/or their witnesses in the affidavits that they submitted with the motion and the corresponding opposition.** Thus, it is held that, **even if the pleadings on their face appear to raise issues, a summary judgment is proper so long as 'the affidavits, depositions, and admissions presented by the moving party show that such issues are not genuine.'**[55]
>
> The filing of a motion and the conduct of a hearing on the motion are therefore important because these enable the court to determine if the parties' pleadings, affidavits and exhibits in support of, or against, the motion are sufficient to overcome the opposing papers and adequately justify the finding that, as a matter of law, the claim is clearly meritorious or **<u>there is no defense to the action</u>**.[56]"

The Public Parties base its demand for payment on the fact that CCG and LCCG are alleged products of distillation or finished products for sale or

[50] G.R. No. 170658, June 22, 2011.
[51] *Id.* citing *Eland Philippines, Inc. v. Garcia*, G.R. No. 173289, February 17, 2010, 613 SCRA 66, 81-82.
[52] *Id.* at Note 68, citing *Estrada v. Consolacion*, 163 Phil. 540, 549 (1976).
[53] *Id.*, citing *Eland Philippines, Inc. v. Garcia*, *supra* at 68.
[54] Concurring Opinion of Justice Barredo in *Estrada v. Consolacion*, *supra*.
[55] Eland Philippines, Inc. v. Garcia, *supra*. Emphasis supplied.
[56] *Id.* at Note 68.

consumption in the Philippines. This is **an issue of fact which should have been proven by affidavits, depositions and other documents**, which documents should have been testified to in the same affidavits and depositions in accordance with Sections 2 and 3 of Rule 35[57] of the Rules of Court. **However, the Public Parties failed to present any such affidavits and depositions or other evidence to prove that CCG and LCCG are products of distillation**.

Although the Public Parties rely on the Memorandum dated December 16, 2003 of Ms. Cleotilde M. Jose, Chief of the BIR Laboratory Section, the Memorandum dated August 3, 2002 of ACIR Abella, and the Memorandum dated February 10, 2004 of Fergurita E. Lipio, OIC Chief, Large Taxpayers Filed Operations Division, **these were never presented in evidence by the Public Parties and authenticated by their authors through an affidavit or by deposition under oath, in accordance with the rules of summary judgments**.

Similarly, the *Tan-Torres Ruling* failed to cite any scientific or technical basis to support the ruling as well. Former CIR Tan-Torres failed to refer to any laboratory test or technical/chemical study as the basis for his pronouncement and did not even mention any countervailing technical or scientific evidence to refute the DOE's expert findings, and other expert evidence presented by PSPC. Instead, he admits that Section 148(e) does not specify what the products of distillation are[58], but propounds the theory that since Section 4(g) of R.A. No. 8180[59] defines petroleum products as including products formed in the course of refining crude petroleum through **distillation and cracking,** CCG and LCCG are exciseable articles under Section 148(e).

I find the reliance on this definition alone **insufficient to overcome PSPC's unrebutted expert evidence** that CCG and LCCG are products of catalytic cracking and not distillation, and moreover, are mere raw materials that cannot be used as finished products.

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[57] 1997, Rules of Civil Procedure. " Sec. 2. Summary judgment for defending party. - A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory relief is sought may, at any time, move with supporting affidavits, depositions or admissions for a summary judgment in his favor as to all or any part thereof.

Sec. 3. Motion and proceedings thereon. - The motion shall be served at least ten (10) days before the time specified for the hearing. The adverse party may serve opposing affidavits, depositions, or admissions at least three (3) days before the hearing. After the hearing, the judgment sought shall be rendered forthwith if the pleadings, supporting affidavits, depositions, and admissions on file, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[58] *Rollo,* p. 559.

[59] Republic Act No. 8180, "Downstream Oil Industry Deregulation Act of 1996.", March 28, 1996.

In sum, the Public Parties' failure to present such affidavits and depositions or other evidence during the summary proceedings before the court *a quo* to prove their claims of fact only established that their claims and defenses were not offered in good faith and that the same cannot be sustained.

This has been shown to be the necessary consequence in a long line of cases decided by the Supreme Court. In ***Asian Construction and Development Corporation vs. Philippine Commercial International Bank***[60], it was held that "[t]he failure of the [petitioner] to append to its 'Opposition' any 'Affidavits' showing that its defenses were not contrived or cosmetic to delay judgment x x x created a presumption that the defenses of the [petitioner] were not offered in good faith and that the same could not be sustained."[61] In the case of ***Carcon Development Corporation vs. Court of Appeals***[62], it was held that the absence of opposing affidavits to contradict the sworn declarations of the moving party demonstrates that the issues raised are sham and not genuine. Similarly, in ***Republic vs. Sandiganbayan***[63], the Supreme Court *en banc* held that "(t)he absence of opposing affidavits, depositions and admissions to contradict the sworn declarations in the Republic's motion only demonstrated that the averments of such opposition were not genuine and therefore unworthy of belief."

Despite being given ample opportunity to submit evidence before this Court's Third Division to support their contentions, the Public Parties failed to do so, rendering the undersigned to believe that they had neither sincere intention nor adequate evidence to prove them. As it stands, since the evidence submitted by PSPC **remain uncontroverted** and are attested to by competent witnesses, **the facts relevant thereto are deemed established**.

The undersigned finds no error in the grant of PSPC's Motion for Summary Judgment considering that the evidence PSPC presented remains uncontroverted. The weight that ought to have been attributed to the evidence presented by both parties, contrary to the majority opinion, will be reflected in the discussion below.

CCG and LCCG are Not Covered by Sec. 148(e)

The Public Parties seem to vacillate between which subsection under Sec. 148 CCG and LCCG ought to be classified.

[60] 488 SCRA 192, 205 (2006).
[61] *Id.*
[62] 180 SCRA 349 (1989).
[63] 406 SCRA 191, 224 (2003).

However, since their *Very Urgent Motion to Dissolve* anchors its claim on the validity of the *Tan-Torres Ruling* which, in turn, characterizes CCG and LCCG as products of both distillation and cracking therefore qualifying as "other similar products of distillation" under Sec. 148(e), their alternative claim that CCG and LCCG falls under Sec. 148(f) under "unleaded premium gasoline" must be considered abandoned.

Excise tax is a tax on certain specified goods or articles.[64] Section 148 seeks to tax certain specified petroleum products. The Public Parties propound the theory that CCG and LCCG are taxable because they are "other similar products of distillation." In support of their stance, they cite the Memorandum dated August 3, 2002[65] of ACIR-Large Taxpayer's Service Edwin R. Abella which was addressed to the ACIR of Legal Service. The said Memorandum states, in part:

> "The undersigned fully agrees with the stand of the Chief, BIR Laboratory Section that LCCG is a petroleum product that is neither regular gasoline or naphtha but a product of similar distillation which is taxed at Four pesos and eighty centavos (P4.80) per liter volume of capacity."

Second, the Public Parties presented the Memorandum dated December 16, 2003 of Chief, BIR Lab Section Cleotilde M. Jose which was addressed to Elvira R. Vera, Head Revenue Executive Assistant, Large Taxpayer Services.

A cursory reading of the Memo will show that she has laid out the following premises to support her conclusion:

a) Since CCG and LCCG are catalytically cracked gasoline, they are separated from the other products of cracking by means of distillation.

b) Sec 148(e) does not specify that the products of distillation must be those obtained only by direct distillation of crude oil or crude petroleum.

c) Sec 4(g) of R.A. 8180[66] defines petroleum products as "products formed in the course of refining crude

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[64] *Petron Corporation v. Mayor Tobias M. Tiangco, and Municipal Treasurer Manuel T. Enriquez of the Municipality of Navotas, Metro Manila*, G.R. No. 158881, April 16, 2008.
[65] *Rollo*, pp.44-45.
[66] Repblic Act No. 8180, *"An Act Deregulating the Downstream Oil Industry, and for Other Purposes"*, Section 4. Definition of Terms. - For purposes of this Act, the following terms are hereinbelow defined: x x x g) Petroleum products shall refer to products formed in the course of refining crude petroleum through

petroleum through distillation, cracking, solvent refining x x x".

d) Under R.A. 8180, the methods of refining crude petroleum, aside from distillation, include cracking the products of which are separated by means of distillation to give the desired type of compounds.

From those premises, this conclusion was drawn: Since CCG and LCCG are products of both cracking and distillation, they qualify as petroleum products, *i.e.* gasoline, and since gasoline is similar to naphtha in boiling range, then CCG and LCCG are distillation products that are similar to naphtha and, hence, must be given the same tax treatment as naphtha.

Lastly, the Public Parties presented a third Memorandum dated February 10, 2004 issued by OIC Chief, Large Taxpayers Field Operations Division Fergurita E. Lipio which was addressed to Executive Assistant Vera. That Memorandum provides that "Section 148(e) speaks of qualification for non-taxability with respect to naphtha only and does not apply to regular gasoline and other similar products of distillation, in this case CCG and LCCG."

The logic and the argument of the Public Parties relying on the evidence discussed above fail to persuade. Both the *Abella Memorandum* and the *Lipio Memorandum* rely on the Chief of the BIR Lab Section's Memorandum whose conclusion is inherently flawed as will be discussed below.

Much reliance is placed by the Chief BIR Lab Section on the definition of petroleum products in R.A. 8180 to inveigle a justification for subjecting CCG and LCCG to excise tax. However, R.A. 8180 is the ***"Downstream Oil Industry Deregulation Act of 1996"*** which declared it a policy of the state to deregulate the oil industry to foster a competitive market with fair prices and adequate, continuous supply of environmentally-clean and high-quality petroleum products.

As such, it must be construed liberally to include the various petroleum products within its reach in order to truly deregulate the oil industry. The court must look to the object to be accomplished, the evils to be remedied, or the

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distillation, cracking, solvent refining and chemical treatment coming out as primary stocks from the refinery such as, but not limited to, LPG, Naphtha, gasolines, solvent, kerosenes, aviation fuels, diesel oils, fuel oils, waxes and petrolatums, asphalts, bitumens, coke and refinery sludges, or such refinery petroleum fractions which have not undergone any process or treatment as to produce separate chemically-defined compounds in a pure or commercially pure state and to which various substances may have been added to render them suitable for particular uses: Provided, That the resultant product contains not less than fifty percent (50%) by weight of such petroleum products; x x x" purpose to be subserved, and should give the law a reasonable or liberal construction which will best effectuate its purpose.[67]

On the other hand, Sec. 148(e) is part of a tax statute and must be construed strictly against the government and liberally in favor of the taxpayer.[68] Where the question is whether a statute subjects a matter, property, or a person to tax, the statute is to be construed strictly against the subjection to tax liability, and it will not be construed as imposing a tax unless it does so clearly, expressly, and unambiguously.[69] Tax or customs laws may not be extended by implication beyond the clear import of their language, nor their operation enlarged so as to embrace matters not specifically provided.[70] Furthermore, the legislature may not, by defining a term, make the definition conclusive not only as regards the statute which defines the term, but also as regards other statutes or as used elsewhere.[71]

On the other hand, PSPC presented the sworn testimony of Claude A. Mallet, a Technical Consultant of Union T.E.C. Pte Ltd. with over forty (40) years of experience and exposure in the petroleum industry and its related technical services and operations.

Because of his professional background and expertise, specifically his work with gasoline blending components such as CCG and LCCG, as well as his analytical work with motor gasoline specifications and their behavior vis-à-vis vehicle engines and motors, PSPC engaged him as an expert to independently evaluate, study and verify the quality and chemical properties of its imported CCG and LCCG and confirm their industry usage and determine their suitability for use as fuel on motor vehicles.[72]

Amongst Mr. Mallet's findings included in his Final Report completed on February 13, 2012[73] and relevant to this discussion, are the following:

a) CCG and LCCG are products/fractions of cracking through Fluid Catalytic Cracking Units (FCCU) and not obtained by distillation of crude oil through a Crude Distillation Unit (CDU);

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[67] *Escribano v. Avila*, G.R. No. 30375, September 12, 1978, 85 SCRA 245 (1978); *Home Ins. Co. v. Eastern Shipping Lines*, G.R. No.34382, July 20, 1983, 123 SCRA 424.
[68] *Quimpo v. Mendoza*, G.R. No. 33092, August 31, 1981, 107 SCRA 73 (1981); *Froelich & Knutter v. Collector of Customs*, 18 Phil. 461 (1911); *Collector of Internal Revenue v. Angeles*, 101 Phil. 1026 (1957)
[69] *Marinduque Iron Mines Agents, Inc. v. Municipal Council of Hinabangon, Samar*, G.R. No. 18924, June 30, 1964, 11 SCRA 416 (1964).
[70] *Collector of Internal Revenue v. La Tondena, Inc.*, 115 Phil. 841 (1962).
[71] *City of Manila v. Manila Remnant Co., Inc.*, 100 Phil. 796 (1957); *Endecio v. David*, 93 Phil. 696 (1953).
[72] *Rollo*, p. 289.
[73] *Rollo*, p. 295-308.

b) The high presence of Olefins[74] in CCG and LCCG negates the possibility of their being products obtained from crude oil distillation via CDU;

c) In products of distillation from a CDU, Olefins content is 'Nil' because distillation is a mere a mere physical separation process, by simple application of heat, such that the nature of the crude oil constituents is not altered. The heat or temperature used in distillation is not high enough to produce double bonds found in Olefins. Consequently, CDU fractions do not contain Olefins;

d) Catalytic Cracking is one type of many cracking processes. In catalytic cracking, the feedstock composed of heavy fractions is cracked at high temperatures in cracking units containing a suitable catalyst like alumino-silicates. Fluid Catalytic Cracking (FCC) is the typical cracking used for the making of gasoline blending constituents; and

e) In addition to the high presence of Olefins, CCG and LCCG's boiling temperatures and Reid Vapour Pressure also indicate that they are products of Fluid Catalytic Cracking.

The **Department of Energy Opinion** dated December 4, 2003 from DOE Undersecretary J.V. Emmanuel A. De Dios addressed to DCIR Estelita C. Aguirre, OIC-Large Taxpayers Section, likewise lends support to PSPC's stance. It states, in part:

> "As its name implies, LCCG and CCG are products of a chemical conversion process called catalytic cracking. This process converts heavy oils into cracked gasoline, light fuel oil and heavy fuel oil. Cracked gasoline and alkylates are high-octane but low-aromatic substances, making them desirable blending components for gasoline products.
>
> LCCG and CCG are not finished gasoline products but are intermediate or raw gasoline components used as blendstock in the production of PSPC's particular brands of CAA-compliant unleaded gasoline and other types of gasoline variants. **While they may have certain properties that meet gasoline**

[74] Olefins are hydrocarbons characterized by their molecular structure. Their structure presents at least one double bond in their straight or branched structure. These double bonds must be the result of cracking processes like Fluid Catalytic Cracking.

specifications like octane, such properties cannot pass all the required specifications (Reid Vapor Pressure, aromatics and benzene content, anti-knock index) for finished gasoline products. These findings are affirmed by comparison made by the DOE's Oil Industry Management Bureau (OIMB) (Annex 1).

While LCCG may generally be considered to have undergone a process of distillation at some point in its production, as is the case with all petroleum products, it is our position that LCCG and CCG should not be subject to an excise tax of Php 4.80 per liter under Section 148(e) of the 1997 NIRC since they are intermediate products or raw materials not intended for domestic sale or consumption but to be added as components in the blending process to produce finished petroleum products.

x x x

Interpretation of Section 148(e)

While it was earlier stated that all petroleum products result from some form of distillation, it cannot be presumed that all products of distillation are subject to the excise tax of Php4.80 per liter, imposed under Section 148(e) of the NIRC. The fractions or distillation products derived primarily from the distillation of crude oil are (i) LPG; (ii) napththa; (iii) regular gasoline; (iv) kerosene; (v) light gas oil; (vi) heavy gas oil; (vii) fuel oil; and (viii) residue. Of these enumerated products, the NIRC expressly provides the applicable excise taxes for premium gasoline (Php4.35), regular gasoline (Php4.80), diesel (Php1.63), kerosene (Php0.60), bunker fuel(Php0.30) and LPG (0).

An interpretation that all products of distillation should be subject to the Php4.80 excise tax would render improper the imposition of the foregoing taxes and would even imply that residue would attract such a tax, which is clearly not the intention of the law. It is well-settled that a statute should not be given a meaning that would lead to absurdities. A statute must be construed in such a way as to avoid such consequences. If the words of a statute are susceptible of more than one meaning, the absurdity of the result of one construction is a strong argument against its adoption and in

> favor of such sensible interpretation as will avoid such result."[75] *(Emphasis supplied)*

Furthermore, Director Monsada of the DOE also **attested under oath** that "LCCG and CCG are products of a chemical conversion process called catalytic cracking x x x", and made reference to the DOE Opinion in confirming that CCG and LCCG are not products of distillation.

Although what is being construed is a tax statute which would seem to be the bailiwick of the BIR, it would be absurd to attribute expertise in operating cockpits, cabarets, night or day clubs, or boxing exhibitions to that government agency simply because it collects amusement taxes[76] from them.

It is the undersigned's opinion, therefore, that significant leverage must be given to the DOE Opinion in this regard. As the DOE is the government agency which has the expertise on the subject matter and is tasked to determine the chemical composition of a certain petroleum product, its factual findings are accorded great weight. Findings of fact by administrative agencies are generally accorded great respect, if not finality, by the courts[77] by reason of the special knowledge and expertise of said administrative agencies over matters falling under their jurisdiction.[78]

Given the foregoing, I believe that CCG and LCCG cannot be characterized under "other similar products of distillation", and hence, should not taxable under Sec. 148(e).

CCG and LCCG Importations are <u>Not</u> Subject to Excise Tax Under Section 129

Section 129 subjects to excise tax two (2) broad classes of specific goods or articles, namely, (1) goods manufactured or produced in the Philippines for domestic sale or consumption or any other disposition; and (2) things imported.

With respect to the first class goods, or the locally manufactured or produced goods, they are qualified by the phrase *"for domestic sale or consumption or for any other disposition."* In short, they must be intended for domestic sale or consumption or for any other disposition. The crux of the matter is whether

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[75] *Rollo*, pp. 533-540.
[76] Section 125, 1997, NIRC.
[77] Spouses *Hipolito vs. Cinco*, G.R. No. 174143, November 28, 2011 citing *Villaflor v. Court of Appeals*, 345 Phil. 524, 562 (1997); *Amigo Manufacturing, Inc. v. Cluett Peabody Co., Inc.*, 406 Phil. 905, 916 (2001).
[78] *Id.*

this same qualification also applies to *"things imported."* PSPC believes it does; while the Public Parties contend that the qualification is limited to goods manufactured or produced locally.

The Public Parties cite ***Petron v. Tiangco***[79] (Petron Case) in support of their construction where the Supreme Court expounds on the definition of excise tax and cites Jose Nolledo's commentaries, thus:

> "In contrast, after the Tax Code was amended to classify specific taxes as a subset of excise taxes, Nolledo, in his 1994 commentaries wrote:
>
> 1. *Excise taxes*, as used in the Tax Code, refer to taxes applicable to certain specified goods or articles manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported into the Philippines. They are either specific or ad valorem.
>
> 2. *Nature of excise taxes* - They are imposed directly on certain specified goods. *(infra)* They are, therefore, taxes on property. (see Medina vs. City of Baguio, 91 Phil. 854)
>
> A tax is not excise where it does not subject directly the produce or goods to tax but indirectly as an incident to, or in connection with, the business to be taxed."

However, the Supreme Court in the *Petron Case* also goes on to cite De Leon and De Leon's commentaries, thus:

> "In their 2004 commentaries, De Leon and De Leon restate the *Am Jur* definition of excise tax, and observe that the term is "synonymous with 'privilege tax' and [both terms] are often used interchangeably."At the same time, they offer a caveat that "[e]xcise tax, as [defined by *Am Jur*], is not to be confused with **excise tax imposed [by the NIRC] on certain specified articles manufactured or produced in, or imported into, the Philippines, 'for domestic sale or consumption or for any other disposition.'**" *(Citations omitted; emphasis ours).*

The undersigned believes that the Public Parties' reliance on this case is based on a misappreciation of its import. In the ***Petron Case***, as in other cases

[79] 551 SCRA 484 (2008)

that will be discussed below, the Supreme Court gives its imprimatur on the notion that while excise tax is imposed on specified articles imported into the Philippines, it is qualified by the phrase *"for domestic sale or consumption or for any other disposition"*.

The argument presented by the Public Parties as regards Section 129 is simple -- Section 129 is unambiguous and explicit and, therefore, should be applied as worded or written. Anything imported must be subject to excise tax regardless whether the imported articles are finished products or raw materials.

A preliminary question, however, must be resolved before delving into the intricacies of construing Section 129. ***Are CCG and LCCG finished products or are they intermediate products a.k.a. blendstock?***

PSPC presented overwhelming evidence that conclusively proves that its imported CCG and LCCG, while within the genre of unleaded gasoline, are nonetheless unfinished variants thereof which are used as mere blending components and, thus, not the same as unleaded premium gasoline under Section 148(f) of the NIRC.

PSPC's expert witness, Mr. Mallet, who was introduced a few paragraphs back, stated in his sworn testimony that CCG and LCCG remain blending components to produce state-compliant finished gasoline products and are not at the prescribed commercial and marketable grades of premium unleaded gasoline in the Philippines.[80]

Mr. Mallet further expounded on the fact that CCG and LCCG cannot be considered finished grade gasoline because their chemical properties render them unfit or not suitable for use as fuel for motor vehicles. He ratiocinates why in the following excerpts of his testimony, thus:

> "30. LCCG for example, with RVP[81] above 65kPa (kilo-Pascal), is not adapted to Philippine climate. LCCG as too much light or low-boiling components. Especially in the Philippines and Far East countries, the average ambient temperatures is *(sic)* high. Because of this high ambient temperature, using LCCG will induce many vapour-locking problems.
>
> 31. Further, **boiling point curves of LCCG and CCG show very unusual curves which do not correspond to the normal curve for finished grade gasolines**. Composition of these LCCG and CCG will affect the performance of the engines

[80] *Rollo,* pp. 290-291.
[81] Reid Vapor Pressure.

> in a number of ways like ease of starting, rate of warm-up, vapour-lock, or carburettor icing. The presence of light Olefins may also cause elastomer swelling which is the deterioration of the rubber parts of the fuel system such as gaskets, o-rings, filters, seals, etc., that in turn cause fuel leaks making it unsafe. Light Olefins have very small molecules that destroy the integrity of the elastomers in the fuel system.
>
> x x x
>
> 33. The above-mentioned chemical properties of CCGs and LCCGs make them unsuitable, even unsafe, for use as fuel for motor vehicles.
>
> x x x
>
> 35. Thus, CCG and LCCG are not finished products. They are not at the prescribed commercial and marketable grades of premium unleaded gasoline in the Philippines."[82] *(Emphasis supplied)*

The fact that CCG and LCCG are merely blending components and **cannot be characterized as a finished product** suitable for the market was also **independently confirmed** by the DOE through Director Monsada, thus:

> "Relative to the prescribed specifications for finished products per PNS, these gasoline components **<u>are not suitable for operating motor vehicles</u>**. High RVP of LCCG can lead to vapor-lock, or they will vaporize prematurely before reaching the engine.
>
> Conversely, due to its low RVP, CCG will not vaporize adequately so as to mix well with air, causing it to stay as a liquid. This will cause the fuel system too much fuel in the air, and **<u>consequently, improper combustion</u>**." *(Emphasis supplied)*

In PNS/DOE QS 001:2005[83], presented by PSPC, the evidence shows that PSPC is obliged to comply with the requirements of the Clean Air Act and the PNS *(Philippine National Standards)* for unleaded premium gasoline in the Philippines.

[82] *Rollo*, pp. 291-292.
[83] Exhibit "T" of PSPC's Motion for Summary Judgment, Annex "D" of the Petition.

Revenue Regulation No. 2-00[84] was issued to implement the provisions of the Clean Air Act. In Section 2, thereof, unleaded gasoline is defined as being synonymous with unleaded premium gasoline with a minimum octane number of 93 RON[85] and a maximum lead content of 0.013 gram per liter as prescribed by national standards.[86] This regulation echoed the definition of unleaded premium gasoline given in an earlier regulation, Revenue Regulation 8-96.

As the findings of Mr. Mallet in his Final Report indicate that CCG and LCCG have an average 92 RON[87], and the Public Parties even admit that PSPC's CCG and LCCG importations have a rating of 91 RON unleaded[88], **by law, CCG and LCCG cannot be characterized as unleaded premium gasoline suitable to be sold to the market**.

Since PSPC's CCG and LCCG importations do not comply with the specifications of the PNS issued by the DOE and the Department of Trade and Industry for unleaded premium gasoline and unleaded motor gasoline, **PSPC cannot sell its CCG and LCCG in the state they were imported to the Philippine market.**

The Operations Planner of PSPC, Andres E. Landicho, also determined and stated under oath that the CCG and LCCG imported by PSPC was used as a raw material in the blending phase of producing finished grade PNS-compliant unleaded gasoline.[89]

This was further confirmed by the independent audit conducted by Punongbayan & Araullo. In the affidavit[90] of Benjamin P. Valdez, partner in the said auditing firm, he summarized their accompanying Audit Report which found that the subject CCG and LCCG importations "were duly supported by relevant documents evidencing that the imported CCGs and LCCGs were used by PSPC as blending components and that excise taxes were paid upon withdrawal of the finished-grade petroleum products, which included the subject CCG and LCCG as blending components."[91]

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[84] BIR Revenue Regulation No. 2-00, "The Procedures to be Adopted During the Transition Period in the Phase-out of Leaded Gasoline in Metro Manila."

[85] Research Octane Number.

[86] *Ibid.*, "SECTION 2. *Definition of Terms.* For purposes of these Regulations, the following words and phrases shall have the meaning indicated below: x x x

d) Unleaded gasoline - synonymous with unleaded premium gasoline and defined under Revenue Regulations No. 8-96 as a gasoline containing a mixture of hydrocarbons, petrochemicals and/or additives, with a minimum octane number of 93 RON and a maximum lead content of 0.014 gram per liter as prescribed by the national standards. x x x "

[87] *Rollo*, pp. 310-345.

[88] At p. 31 of Public Parties' Motion for Partial Summary Judgment, Annex "E" of Petition.

[89] Landicho Affidavit, Annex "D" of PSPC's Motion for Summary Judgment, Annex "D" of Petition.

[90] Dated 13 March 2012.

[91] *Rollo*, p. 580.

As the facts stand, PSPC has proven that **not only does the very nature of CCG and LCCG oppose the premise that they are finished products for sale or consumption** in the Philippines; but **that its actual usage of the subject importations was that of a <u>blending component</u>**. In this regard, I vote to affirm the Third Division's finding in its Resolution dated November 27, 2012 that CCG and LCCG are intermediate or raw gasoline components and not finished gasoline products.[92]

Whether or not they should be subject to excise tax under Section 129 will be discussed further below.

Asiatic (Posadas) and Asiatic (Rafferty) Are Still Controlling and Effective

Article 8 of the New Civil Code states: "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

The decision of the Supreme Court applying or interpreting a statute is controlling with respect to the interpretation of that statute and is of greater weight than that of an executive or administrative officer in the construction of other statutes of similar import. The reason is that the interpretation of a statute by the Supreme Court forms part of the statute itself and of the legal system and comes from that branch of government entrusted with the duty to construe or interpret the law.[93]

Accordingly, a ruling of the Supreme Court as to the construction of a law should be followed in subsequent cases involving similar questions. In other words, once a case has been decided one way, then another case, involving exactly the same point at issue should be decided in the same manner.[94]

The undersigned believes that the landmark case of ***Asiatic Petroleum Company vs. Posadas***[95], as cited by PSPC, is still good, controlling law.

In the ***Asiatic (Posadas)*** case, Asiatic was seeking a refund of specific taxes it had previously paid for kerosene it had imported and for which a withdrawal permit was issued by the Collector of Customs. However, when

[92] At p. 14 of Resolution dated 27 November 2014, CTA Case No. 8004.
[93] *Endecia v. David,* 93 Phil. 696 (1953).
[94] *Associated Sugar, Inc. v. Commissioner of Customs*, G.R. No. 30391, Nov. 25, 1982, 118 SCRA 567 (1982); *Pines City Educational Center v. NLRC*, 227 SCRA 655 (1993).
[95] G.R. No. 30136, 4 February 1929, *en banc,* 52 Phil. 728.

the kerosene subject of the case was released from bond and transferred to Asiatic's supply tank, they discovered that it was discolored and unfit for market or use in the Philippine Islands. Asiatic then applied for leave to the Collector of Customs, which the Collector granted, to re-export the discolored kerosene to its refinery in Singapore to make it suitable for the market once more. The case arose when the Collector of Customs refused to give a refund of the specific taxes Asiatic paid on the theory that the tax accrued upon the importation of the kerosene, and that it became due and payable upon its transfer from the bonded tank to the supply tank of Asiatic, and that it was actually put into the commerce and trade of the country by its removal from Asiatic's bonded tank to its supply tank, regardless of whether it was discolored.

In other words, **the Court had to construe whether or not the tax was due on an imported article that could not be used for domestic sale or consumption** under Section 1478 of the Administrative Code which, historically, is a precursor to Sec. 129 of the 1997 NIRC.

Section 1478 of the Administrative Code provided:

> "SEC. 1478. Articles subject to specific tax. — **<u>Specific internal-revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported</u>** from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported to its original state or as an ingredient or part of any manufactured article or product.
>
> In case of importations the internal-revenue tax shall be in addition to the customs duties, if any.
>
> No specific tax shall be collected on the any articles sold and delivered directly to the United States Army or Navy for actual use or issue by the Army or Navy, or on any article sold to the Bureau of Coast and Geodetic Survey, purchased with funds furnished by the Government of the United States, and any taxes which have been paid on articles so sold and delivered for such use or issue shall be refunded upon such sale and delivery." *(Emphasis ours)*

The Court affirmed the decision of the trial court in favor of Asiatic and granted the refund, ratiocinating, thus:

"The very purpose and intent of the plaintiff herein removing the kerosene in question from the bonded warehouse to its supply tank was to place it on the market; otherwise, it would not have removed it or paid the tax, and the removal was made on the assumption that the kerosene was in a fit and suitable condition to sell to plaintiff's customers. At once upon the discovery that it was not, plaintiff called attention of that fact to the Collector of Customs and asked for and obtained a permit from him to ship the discolored kerosene out of the Philippine Islands to its plant in Singapore, to have it there refined and made suitable for the market. **In the very nature of things,** plaintiff would not want to sell the discolored kerosene in the Philippine Islands and could not do so without a substantial injury to its business reputation. It was for such reason that upon making the discovery, plaintiff applied for and obtained the permits and went to a large amount of trouble and expense in removing the kerosene from the Philippine Islands to its Singapore plant.

The real purpose and intent of the law in question is to require the payment of the specific tax on things imported from foreign countries for the purpose of domestic sale or consumption in the Philippine Islands. It is very apparent that the discolored kerosene in question was never imported by the plaintiff for domestic sale or consumption in the Philippine Islands; otherwise, it never would have gone to the trouble and heavy expense of removing it from the Islands to its Singapore plant for the purpose of having it refined and made suitable for the market. It never was the purpose or intent of the plaintiff to ship to the Philippine Islands discolored kerosene to be there sold and distributed to its customers, as there is no evidence that the plaintiff was ever engaged in the sale or distribution of colored kerosene. That is to say, **it was the purpose and intent of the plaintiff to import into the Philippine Islands kerosene which was fit and suitable for sale on the market**, and that it never was its intention to import discolored kerosene. That when it discovered that it had done so, it at once applied for and obtained a permit from the Government to reship it to its Singapore plant for refining purposes, which involved much trouble and a heavy expense, from all of which it is very apparent that the plaintiff never imported into the Philippine Islands discolored kerosene for domestic sale or consumption. If that it had been its purpose and intent, it never would have applied for and obtained a permit for its removal, and would never have reshipped the kerosene to its refining plant in Singapore, so as to have it refined and put in a fit and suitable condition for sale." *(Emphasis ours)*

Despite the fact that this case was decided almost a century ago, the Supreme Court *En Banc* had the perspicacity to point out a fundamental truth of human enterprise -- that *"in the very nature of things"*, a merchant would not want to sell a product that is unfit and in an unsuitable condition because to do so would cause substantial injury to his business reputation. It then follows that specific tax applies to things manufactured or produced in the Philippines and to things imported **as long as they are "for domestic sale or consumption."**

The Public Parties argue that ***Asiatic*** is inapplicable to the instant case because the relevant provision interpreted is markedly different from Sec. 129 of the 1997 NIRC. However, a side by side comparison of the two provisions will show that Section 1478 of the Administrative Code is very similarly worded as Sec. 129 of the 1997 NIRC:

ADMINISTRATIVE CODE	NIRC
SEC. 1478. ***Articles subject to specific tax.*** — *Specific internal-revenue taxes* apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported [from the United States or foreign countries, but not to any thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported to its original state or as an ingredient or part of any manufactured article or product.]	SEC. 129. ***Goods Subject to Excise Taxes.*** - *Excise taxes* apply to goods manufactured or produced in the Philippines for domestic sales or consumption **or for any other disposition** and to things imported.
[In case of importations the internal-revenue tax shall be in addition to the customs duties, if any.]	**The excise tax imposed herein shall be in addition to the value-added tax imposed under Title IV.**
[No specific tax shall be collected on the any articles sold and delivered directly to the United States Army or Navy for actual use or issue by the Army or Navy, or on any article sold to the Bureau of Coast and Geodetic Survey, purchased with funds furnished by the Government of the United States, and any taxes which have been paid on articles so sold and delivered for such use or issue shall be refunded upon such sale and delivery.]	**For purposes of this Title, excise taxes herein imposed and based on weight or volume capacity or any other physical unit or measurement shall be referred to as "specific tax" and an excise tax herein imposed and based on selling price or other specified value of the good shall be referred to as "ad valorem tax".**

[initials]

A perusal of both provisions will show that in the first and most substantive paragraph, a) "specific internal-revenue taxes" were replaced with "excise taxes" which bodes not much difference since excise taxes are currently understood in the nature of a "tax on certain specified goods or articles"[96]; and, b) the bracketed portion that has been deleted does not detract at all from the holding in the ***Asiatic (Posadas) case.*** In fact, the other bracketed portions of the provision have been deleted due to redundancy because they are addressed in other parts of the NIRC, or for being obsolete since we are no longer under American rule.

The holding in this case is not surprising because **ten years earlier, in 1918**, the Supreme Court already had occasion to hold in ***Asiatic Petroleum Co. v. Rafferty***[97] that unless exciseable products are placed in the market for domestic consumption by the public, the tax will not apply.

In that case, Asiatic imported a shipment of mineral oils from another country. Asiatic entered the oils into a bonded warehouse of the CIR and gave bond for payment of all internal revenue taxes that might accrue upon the mineral oils. The CIR issued a permit for the discharge of the mineral oils from the ship into the bonded warehouse. During the removal of the oils from the ship to the bonded warehouse, several cases of the oils were totally destroyed by fire and never reached the bonded warehouse. The CIR still required payment of specific taxes thereon which Asiatic paid under protest, and thereafter asked for a refund.

The Court held that:

> "**The theory of the law, with reference to the internal-revenue tax upon such merchandise, seems to be that the tax is not due and payable until it is about to be put into the commerce or trade of the country.** The condition of the market at a particular time, or the situation in business generally, might cause the producer to withhold his merchandise and not allow it to be removed from the place of production for months, or even years; could he, under the above quoted provision of the law, be required to pay the internal revenue taxes until he saw fit to place his product upon the market?" *(Emphasis ours)*

To that question, the Supreme Court answered in the affirmative, ratiocinating that "the payment of taxes cannot be enforced until they are due."[98] And when would they be due? **When the product is fit to be placed**

[96] Petron Corporation v. Tiangco, *supra.*
[97] G.R. No. L-13051, August 10, 1918; 38 Phil. 245.
[98] *Id.*

upon the market. In other words, when it is a **finished product suitable for consumption**.

It is apparent that even more than half a century ago, **judicial construction of the phrase *"to things imported"* meant that it was qualified by the phrase immediately preceding it -- *"for domestic sale and consumption"*.** The addition of the phrase *"or for any other disposition"* in Sec. 129 certainly does not take away the previous construction of *"for domestic sale and consumption"*, but merely adds the alternative that the importer may make other final arrangements, such as transferring the finished goods to a third-party, possibly a distributor, to be finally consumed by the end-user.

Certainly, in this day and age, using the English language in the way we do now, it would have been clearer had the law been phrased, thus: *"Excise taxes apply to goods manufactured or produced in the Philippines, and to things imported, for domestic sales or consumption or for any other disposition."*

It would be helpful to remember, though, that the Administrative Code which contains Section 1478 was crafted in **1917**, and this Court takes judicial notice of the fact that language is dynamic and the syntax of the English language changes over time. Since it is the duty of the judiciary to interpret or construe a statute, the interpretation of Section 1478 by the Supreme Court then is controlling.

It is not for the Court, however, to second-guess, edit, or rearrange and thereby amend statutes written by the Congress, for to do so would likely lead to judicial legislation. It is enshrined in our jurisprudence that the legislative intent --

> "[m]ust be determined from the language of the statute itself. This principle must be adhered to even though the court be convinced by extraneous circumstances that the Legislature intended to enact something very different from that which it did enact. An obscurity cannot be created to be cleared up by construction and hidden meanings at variance with the language used cannot be sought out. To attempt to do so is a perilous undertaking, and is quite apt to lead to an amendment of a law by judicial construction. To depart from the meaning expressed by the words is to alter the statute, is to legislate not to interpret.[99]"

The construction placed upon the phrase *"to things imported"* by the Supreme Court in the *Asiatic Cases* in the early 1900s is still being used today,

[99] *Juan Tañada v. Jose Yulo, Secretary of Justice*, G.R. No. 43575, 31 May 1935, *en banc*, per Justice George Arthur Malcolm.

almost a century later, as evidenced by the *Petron Case* (2008) the undersigned discussed earlier, wherein the Supreme Court quoted from De Leon and De Leon's 2004 commentaries on the subject.

A more fairly recent piece of jurisprudence, ***Exxonmobile Petroleum and Chemical Holdings, Inc. - Philippine Branch v. Commissioner of Internal Revenue***[100] also expounds on the subject, thus:

> "Excise taxes are imposed under Title VI of the NIRC. They apply to specific goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition, and to those that are imported. In effect, **these taxes are imposed when two conditions concur**: **first**, that the articles subject to tax belong to any of the categories of goods enumerated in Title VI of the NIRC; and **second**, that said articles are **for domestic sale or consumption**, excluding those that are actually exported."[101] *(Emphasis ours)*

No Second Guessing Legislative Intent When it is Patently Manifest in the House Deliberations

The Public Parties have succeeded in making the majority of the Court believe that the intent of the framers of the law was to levy an excise tax on **anything imported** without qualification. However, given the discussion above, this hardly seems to be the case. Even from the perspective of the framers of the law, specific/excise taxes may only be imposed on finished products for domestic sale or consumption, whether imported or locally produced.

This is evident in the minutes of the Committee on Ways and Means hearing on 14 November 1995 on the House Bill that eventually became R.A. No. 8184 *(An Act Restructuring the Excise Tax on Petroleum Products, Amending for the Purpose Pertinent Sections of the National Internal Revenue Code, as Amended)*.

Evident in the transcript of the hearing is the former Director Vicente Quintos of the National Tax Research Center's explaination that the said Act was meant to convert the seven percent (7%) tax supposedly paid on raw materials, such as crude oil, **into specific taxes that can only be imposed on finished products, whether imported or locally produced**:

[100] G.R. No. 180909, 19 January 2011.
[101] *Id.*, citing J.C. Vitug and E.D. Acosta, Tax Law and Jurisprudence, 271 (2006). See also Republic Act No. 8424 (1997), as amended, Sec. 129.

> "MR QUINTOS: No, but the point is that **what used to be paid by the crude, since it is going to be translated into specific tax and specific tax is imposed on finished commodities, whether these be imported or locally produced**, in effect, that is an increase now on the imposed insofar as the imported finished commodities are concerned, which they did not use to pay."[102] *(Emphasis ours)*

Although the excerpt above was from the House Deliberations before R.A. No. 8184 was passed, confirmation of legislative intent is seen in **Committee Report No. 2621** by the House Ways and Means Committee when it had opportunity to discuss the taxation of PSPC's CCG and LCCG imports as part of the finished product in the context of the issuance of the *Tan-Torres Ruling*. The report reads, in part:

> "**The ruling in effect levies an excise tax twice** on CCG and LCCG, **first as raw materials** upon withdrawal from the port of entry and **second as components of a finished product** upon withdrawal from PSPC's refinery.
>
> **This is naked, arbitrary, and whimsical abuse of administrative power by the Commissioner of Internal Revenue and a usurpation of the power to tax solely vested in Congress by the Constitution.** The Torres ruling simply disregarded the past practice of the BIR allowing credit for tax paid for CCG and LCCG at the time of their withdrawal from the port of entry against the tax paid on unleaded premium gasoline at the time of withdrawal from the refinery of PSPC pursuant to a legal opinion of Assistant Commissioner of Internal Revenue Milagros Regalado, to avoid a double tax on the same product. The ruling is a heavy-handed overkill bereft of fairness, designed to bring PSPC down to its knees."[103] *(Emphasis ours)*

From the above discourse, we can see that the **prior judicial construction** of Section 1478 of the old Administrative Code which was subsequently adopted and modified into Sec. 129 of the NIRC, **is actually in harmony with legislative intent**. Indubitably, for excise taxes to be imposed, it is essential that the article imported be intended for sale, consumption or disposition in the Philippines and not be mere raw materials or intermediate components in the making of a finished product.

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[102] At pp. 25-26 of the Committee of Ways and Means Meeting Minutes, 14 November 1995, Exhibit "BBB" of PSPC's *Motion for Summary Judgment*, Annex "D" of their Petition.
[103] House Committee on Ways and Means Committee Report No. 2621, Exhibit "DDD" of PSPC's *Motion for Summary Judgment*, Annex "D" of their Petition.

Majority of the BIR Rulings and Practice Reflect Prior Judicial Construction

It must be noted that when PSPC began importing CCG and LCCG in 2001 until around 2003, the practice of the BIR was to allow the deduction of the excise taxes previously paid upon entry or importation from the amount of excise taxes assessed by the BIR on its finished gasoline product upon withdrawal from PSPC's Tabangao Refinery.

This is not surprising considering that prior to that, on December 16, 1999, the BIR issued **BIR Ruling 201-99**[104] addressed to the counsels of Petron Corporation who requested a ruling on the "off-gas" produced by Petron, if such was covered by Sec. 148(f).

The BIR held that the test in the imposition of excise tax on an allegedly exciseable good is whether the "products are placed in the market for domestic consumption by the public". Since the "off-gas" produced by Petron was not sold in any way, nor was it produced for the purpose of consumption, the BIR ruled that it was not subject to excise tax citing the *Asiatic (Rafferty) Case.*

The practice of deducting the excise taxes previously paid upon entry or importation from the amount of excise taxes assessed on its finished gasoline product upon withdrawal continued in 2003 as evidenced by the *Regalado Memo* which declared that LCCG was subject to "excise tax at the rate of P4.80/liter before removal from customs custody; however, the removal of the finished product from LCCG shall no longer be subject to excise tax."[105]

On December 12, 2003, the BIR issued a ruling of similar import, **BIR Ruling DA-501-2003,** upon the request of San Miguel Corporation who wanted to know whether the transfer of beer in bulk from one brewery to another brewery for the purpose of packaging was a removal subject to excise tax.

Also citing BIR Ruling 201-99, the Ruling provided:

> "x x x It has to be understood under the foregoing provision that **excise tax should be imposed only upon removal of goods subject to excise tax if the removal is done purposely for domestic sale or consumption.** This

[104] *Rollo,* pp. 546-549.
[105] *Rollo,* p. 555.

> interpretation should not be confused with the phrase "or for any other disposition" which was interpreted to mean the final disposition of the manufactured goods for consumption by the end users and not merely for canning or packaging which is merely preparatory to its disposal or sale. x x x" *(Emphasis ours)*

Despite the seeming consistency of the BIR in applying Section 129, especially when it came to PSPC's CCG and LCCG importations, certain BIR officials from the Large Taxpayers Section sought its taxability upon entry **and also upon withdrawal**. This was squarely opposed to the stance of the BIR Legal and Inspection Group that the current practice of deducting the excise taxes previously paid upon entry or importation from the amount of excise taxes assessed on its finished gasoline product upon withdrawal was the correct application of Section 129.

To settle the issue, on March 24, 2004, the *Buñag Memo* was issued after the findings of the DOE were discussed by the BIR ManCom composed of then BIR Commissioner Guillermo Parayno, Jr. and the Deputy Commissioners. The *Buñag Memo* declared the imported CCG and LCCG as being intermediate goods not intended for domestic sale or consumption but as additional components in the production of gasoline and, hence, not subject to excise tax under Section 129 and 148 of the Tax Code.

The practice, however, changed after the *Buñag Memo* in that no excise taxes were paid by PSPC upon importation, but instead, **excise taxes were paid in full upon withdrawal of the finished product** from their Tabangao Refinery.

This is why the ATRIGs covering PSPC's CCG and LCCG importations from 2004 to 2009 all contain an express reservation or *colatilla* that provided:

> "This is without prejudice to the collection of the corresponding excise taxes, penalties and interests depending on the validity of DCIR Buñag's opinion on the matter."

A few other ATRIGs issued during the subject importations embody the following *colatilla* as well:

> "This ATRIG is issued without prejudice to the resolution of the final tax classification of the above product."

Despite the shift in the situs of payment of the tax, the practice of the BIR remained the same in that the CCG and LCCG importations were taxed **only once**. Instead of paying upon entry or importation to the BOC, PSPC was required by the BIR to pay excises taxes and VAT on its CCG and LCCG upon the withdrawal of the finished products from its refinery.

Even up until February 22, 2007 when **Ruling No. DA-117-07**[106] was issued, the BIR's tax treatment of exciseable products remained the same. This Ruling was requested by Chevron who wanted to know whether additional excise taxes were due on the resulting Regular and Premium Unleaded Gasoline it produced notwithstanding that the Light Straight Run Napththa and various Research Octane Number gasoline components of the finished products have already been subject to excise tax upon importation.

The BIR held that once an importer pays excise taxes for materials used for the production of gasoline, it shall no longer be liable for additional excise taxes after the processing.

Again, we see the continued practice of the BIR as regards taxing articles that are components of a finished product that is exciseable. Either they are taxed upon importation and that payment is deducted from the excise tax due on the finished product or they are not taxed at all upon importation, but are taxed upon withdrawal of the exciseable finished product.

It is to be noted that this practice of collecting excise taxes from PSPC on its CCG and LCCG importations, and, more importantly, **only once**, continued until 2009 through the tenure of four Commissioners of Internal Revenue since the *Buñag Memo* was issued. CIR Parayno, Jr. sustained the practice until the end of his tenure. When DCIR Buñag eventually became CIR himself, he sustained it as well, and so did the two CIRs who came after him, Lilian B. Hefti, and Sixto S. Esquivias IV.

In fact, the *colatilla* contained in the ATRIGs for the subject importations that collection of excise taxes *"depend[ed] on the validity of DCIR Buñag's opinion on the matter"* should have been settled with finality with the Memorandum issued by CIR Esquivias IV on June 9, 2009 directed to the Secretary of Finance (SOF).

The memorandum was submitted in compliance to the SOF's instructions for the BIR to adopt a definitive stand on the validity of the position taken by DCIR Buñag in the *Buñag Memo* on the tax treatment of imported CCG and LCCG for excise tax purposes. The Conclusion of the *Esquivias Memo* reads as follows:

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[106] *Rollo*, p. 96.

"x x x **CONCLUSION**

After a re-evaluation of the subject importation of LCCG/CCG, this Office hereby issues the following resolution:

1. Confirming that LCCG/CCG are intermediate products or blending components, not subject to excise tax under Section 148 of the 1997 NIRC, as amended;

2. Confirming the validity of the ATRIGs issued by the BIR for LCCG/CCG importation; and

3. **Confirming the validity of the position taken by then DCIR Buñag on the non-taxability of imported LCCG/CCG for excise tax purposes**.

(signed)
SIXTO S. ESQUIVIAS IV
Commissioner of Internal Revenue"

(Emphasis supplied)

The Public Parties argue that by virtue of the *colatilla*, and the subsequent issuance of the *Tan-Torres Ruling*, that PSPC is liable for excise tax for the subject CCG and LCCG importations. However, it is the undersigned's opinion that **the condition imposed by the COC in the ATRIGs has already been fulfilled by the issuance of the *Esquivias Memo*.** **First**, the BOC is a mere collection agent of the BIR when it comes to excise taxes of imported goods. **Second**, the BIR, is its principal, as represented by the CIR, who is the head of said agency. When the CIR, in his official capacity, ratifies the act of one of its deputies, in this case, DCIR Buñag, the BOC cannot overturn the instructions given by his principal. PSPC cannot interminably be subject to the whims and caprices of whoever heads the BIR.

Therefore, the undersigned agrees with the findings of the Third Division insofar as it held that:

"[P]etitioner's reliance on the Memorandum dated March 24, 2004, the Letter dated April 20, 2004, and the Memorandum dated June 9, 2009, which considered the LCCG and CCG as not subject to excise tax, during the period when the same were issued, binds respondents x x x

x x x

> Thus, in keeping with the principles of justice and fairplay, petitioner should not be faulted for relying on the BIR's interpretation and application of Sections 129 and 131."

Contemporaneous construction is entitled to great weight because it comes from the particular branch of government called upon to implement the law thus construed.[107] Executive officials are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the law, and to have formed an independent, conscientious and competent expert opinion thereon.[108]

The interpretation of a statute is primarily a judicial function, and given the discussion above which includes prior judicial construction, legislative intent, contemporaneous construction, and its consistent application by the BIR, the undersigned firmly believes that **<u>excise taxes on imported goods accrue when they are for domestic sale or consumption or any other disposition, *i.e.* when it is a finished product suitable to be placed on the market for consumption of the end-user</u>**.

As such, since PSPC's importations of CCG and LCCG do not qualify as exciseable articles or goods, no payment to the BOC is due thereon upon their importation, in accordance with Section 131(a) of the 1997 NIRC. However, **once they form part of a finished product that is exciseable under Section 148, then they become subject to excise tax upon their removal from the refinery <u>as a finished product</u>**.

Tan-Torres Ruling is Void, Invalid and Has No Legal Effect

On December 15, 2009, during the pendency of the case *a quo,* a few days after the issuance and service of this Court's Third Division's TRO dated December 9, 2009, former CIR Joel L. Tan-Torres issued the *Tan-Torres Ruling*, the validity of which is being assailed by PSPC.

The *Tan-Torres Ruling* reversed the legal opinions of DCIR Buñag and CIR Esquivias and ruled that the exemption of CCG and LCCG from excise tax had no legal and factual basis. The opinion of ACIR Regalado regarding "the exemption from excise tax of finished products from LCCG" was likewise revoked.[109]

[107] Agpalo, Ruben E., *Statutory Construction,* 3rd Ed., 1995, citing *Ramos v. Court of Industrial Relations*, G.R. No. 22754, Dec. 18, 1967, 21 SCRA 1282 (1967); *Salavaria v. Buenviaje*, G.R. No. 45642, Feb. 28, 1978, 81 SCRA 722 (1978).
[108] *Id.*
[109] *Rollo*, p. 562.

It also decreed the following:

> "Therefore, **the importation of LCCG/CCG shall be subject to excise tax** at the rate of P4.35 per liter under Section 148(e). The rate of P4.80 then prevailing during 2002 has been reduced to P4.35 per liter pursuant to Section 17 of Republic Act No. 9337. Moreover, **the removals of finished products reprocessed or manufactured in the Philippines using imported LCCG and CCG as blending components for domestic sales or consumption or for any other disposition are also subject to excise tax** at the rate of P4.35 per liter under the same section. This is the final position of the Bureau of Internal Revenue on this matter."[110] *(Emphasis ours)*

The conclusions reached by the *Tan-Torres Ruling* was based on the *Abella Memorandum* which stated that CCG and LCCG belonged to the classification "other similar products of distillation" under Section 148(e). The *Tan-Torres Ruling*, however, **failed to cite any technical or scientific analysis to support its finding**. Instead, it cited the definition of "petroleum products" in R.A. 8180, the "Downstream Oil Industry Deregulation Act of 1996", which included the words *"distillation"* and *"cracking"* in the same sentence. The weight ascribed to that argument has been previously discussed in this Dissenting Opinion.

For its legal basis, the *Tan-Torres Ruling* quoted Sections 129 and 131, and resolved that:

> "Given these fundamental precepts, excise tax attaches to the imported article/goods mentioned in the Tax Code as soon as they are in existence, due and payable upon removal from customs custody **regardless of disposition or of distinction whether intermediate or finished product unless subsequently exported**. Notwithstanding the DOE's allegation that LCCG and CCG are intermediate gasoline products to be used as blending components, and such are not to be subsequently exported, clearly LCCG and CCG shall be subject to tax pursuant to Sections 129 and 131 of the Tax Code."

PSPC impugns the *Tan-Torres Ruling* for: 1) having no factual and/or legal basis to support it; 2) being an oppressive and discriminatory measure; 3) amounting to an unlawful direct duplicate taxation in its retroactive and prospective application; and 4) having fatal substantive and procedural infirmities.

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[110] *Id.*

One of the findings of fact, as borne out by the evidence, is that CCG and LCCG are **not** products of distillation; hence, not taxable under Section 148(e).

On that point alone, the undersigned believes that the *Tan-Torres Ruling* is infirm.

The undersigned has also ascribed to Section 129, the judicial construction of the phrase *"to things imported"* which is properly qualified by the phrase *"for domestic sale or consumption or any other disposition"*. For an imported article to be subject to excise tax , it is essential that it be intended for sale, consumption or disposition in the Philippines and not be mere raw materials or intermediate components in the making of a finished product. Since CCG and LCCG are used as blendstock in the making of the finished product, they cannot be subject to excise tax in its imported state.

On this point also, the *Tan-Torres Ruling* fails.

Consequently, it is a ruling that lacks factual and legal basis; that, if implemented, would be contrary to prior judicial construction of the law, contrary to the legislative intent of the framers of the law, and contrary to long-standing practice and contemporaneous construction of the implementing agency. **For all those reasons, I vote that the *Tan-Torres Ruling* be declared void *ab initio*, invalid, and without legal effect.**

In issuing the *Tan-Torres Ruling*, the Commissioner of Internal Revenue went beyond the law and thus exceeded his authority and partook of administrative amendment of legislation. Indeed, even rulings issued by the CIR himself are not infallible or sacrosanct. Thus, in one of many examples, the Supreme Court upheld this Court in striking down RR 17-99 of the CIR, when the issuance – which was denounced as "unauthorized administrative legislation" – was shown to have gone "beyond the terms of the law it was supposed to implement."[111]

In ***Commissioner of Internal Revenue vs. Court of Appeals***[112], the Supreme Court struck down BIR's RMC 04-87 for saying that, the law granting tax amnesty for all unpaid taxes from 1981 to 1985 notwithstanding, cases of tax deficiencies that had priorly been subject of assessment are not entitled to amnesty.

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[111] *Commissioner of Internal Revenue v. Fortune Tabacco Corporation*, G.R. No. 180006, 28 September 2011.
[112] 240 SCRA 386.

> "The authority of the Minister of Finance (now Secretary of Finance), in conjuction with the Commissioner of Internal Revenue, to promulgate all needful rules and regulations for the effective enforcement of internal revenue laws cannot be controverted. Neither can it be disputed that such rules and regulations, as well as administrative opinions and rulings, ordinarily should deserve weight and respect by the courts. Much more fundamental than either of the above, however, is that **all such issuances must not override, but must remain consistent and in harmony with, the law they seek to apply and implement.** Administrative rules and regulations are intended to carry out, neither to supplant nor modify, the law." *(Emphasis ours)*

In another case, the Supreme Court *en banc* upheld the CIR in setting aside a compromise agreement entered into by his predecessor after finding it non-compliant with law. The Court declared that the compromise agreement "is void for being contrary to law and public policy, and is without force and effect."[113]

There is no dispute that in case of discrepancy between the basic law and the rules and regulations implementing the said law, the basic law prevails, because the rules and regulations cannot go beyond the terms and provisions of the basic law.[114] Thus, the Supreme Court enunciated in 2013 in *CIR v. San Roque Power Corporation*:[115]

> "The general rule is that <u>a void law or administrative act cannot be the source of legal rights or duties</u>. Article 7 of the Civil Code enunciates this general rule, as well as its exception: "Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary. When the courts declared a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern. <u>Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution</u>."[116]

As the undersigned is of the opinion that the *Tan-Torres Ruling* is void, its retroactive and/or prospective application ought to be proscribed.

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[113] *Philippine National Oil Company v. Court of Appeals, Commissioner of Internal Revenue and Tirso Savellano*, G.R. No. 109976, 26 April 2005, *en banc*.
[114] *Rodolfo G. Navarro, et al. v. Executive Secretary, et al.*, G.R. No. 180050, 10 February 2010, *En Banc*, citing *Hijo Plantation, Inc. v. Central Bank*, G.R. No. L-34526, 9 August 1988, 164 SCRA 192.
[115] G.R. No. 187485, 8 October 2013, *En Banc*.
[116] Underscoring added.

I therefore **VOTE** to dispose of the consolidated petitions as follows:

1. That the Petition for Review filed by Pilipinas Shell Petroleum Corporation of the Philippines, docketed as CTA E.B. No. 1007 be **GRANTED** and the *Letter-Ruling* issued by former CIR Joel L. Tan-Torres dated December 15, 2009 *(Tan-Torres Ruling)* be declared **VOID *ab initio* and INVALID;**

2. That the Public Parties be immediately and permanently **ENJOINED** from demanding payment and/or collecting excise taxes on importations of Catalytic Cracked Gasoline and Light Catalytic Cracked Gasoline upon entry;

3. That the Petition for Review filed by the Commissioner of Customs, *et. al.,* docketed as CTA E.B. No. 1003, be **DISMISSED** and the *Resolutions* dated 27 November 2012 and 26 March 2013 issued by the Court's Third Division be **AFFIRMED** insofar as it enjoined the collection of excise taxes on Pilipinas Shell Petroleum Corporation's past CCG and LCCG importations for the relevant period of 2004 to 2009, and the said injunction be made permanent.

Ma. Belen SC

MA. BELEN M. RINGPIS-LIBAN
Associate Justice