REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PILIPINAS SHELL PETROLEUM CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5728

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 23 1999

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DECISION

The case at bar seeks (1) for the cancellation and withdrawal of the collection letter dated April 22, 1998 sent by respondent to petitioner, (2) the validation of the transfer to and utilization by petitioner of the tax credit certificates assigned to it by BOI-registered enterprises in payment of the former's excise tax liabilities for the years 1992 and 1994 to 1997, and (3) the enjoinment of the respondent and his agents from any and all attempts to collect from petitioner the amount of P1,705,028,008.06, allegedly representing petitioner's excise tax liabilities for the years 1992, 1994-1997, inclusive of surcharges and interest.

As represented, petitioner is a corporation organized and existing under and by virtue of Philippine law with address at the Shell House, 156 Valero Street, Salcedo Village, City of Makati.

The facts, by and large, are not in dispute, as the same were jointly admitted by the parties in their Joint Stipulation of Facts & Issues dated April 22, 1999.

151

Over the years, 1992 and 1994 to 1997 included, the Petitioner paid part of its specific tax liabilities utilizing tax credit certificates ("TCCs") duly transferred to it by entities registered with the Board of Investments ("BOI").

The transfers and utilization of these TCCs were, duly approved by the Department of Finance ("DOF") One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (the "Center") comprised of representatives from the DOF, the Bureau of Internal Revenue ("BIR"), the BOI, and the Bureau of Customs. Approval by the Center of said transfer and utilization of TCCs was evidenced by the issuance of a Tax Debit Memorandum addressed to the Collection Program Division of the BIR.

The BIR, in turn, as evidence of its acceptance of these TCCs as valid payment of petitioner's excise tax liabilities, issued its own Tax Debit Memoranda signed by the Assistant Commissioner for Collection Service of the BIR.

On April 22, 1998, the BIR Revenue District No. 50, South Makati, through Revenue District Officer ("RDO") Ruperto P. Somera, wrote the Petitioner a **collection** letter ***(not an assessment),*** (as agreed in their Joint Stipulation of Facts) demanding payment of the sum of One Billion Seven Hundred Five Million Twenty Eight Thousand Pesos and Six Centavos (P1,705,028,008.06) as unpaid specific taxes for the years 1992 and 1994 to 1997, inclusive of delinquency surcharges and interest.

The above-mentioned April 22, 1998 collection letter was issued by the BIR and served upon the Petitioner without a prior pre-assessment and/or assessment notice.

Prior to April 22, 1998, the BIR has never questioned the transfers to and use by the Petitioner of duly transferred TCCs including the disputed TCC's, as payment of its excise tax liabilities.

In its April 29, 1998 letter to RDO Somera, the Petitioner disputed the BIR's baseless attempt to collect the above amount.

On June 16, 1998, Regional Director for Revenue Region No. 8, Antonio I. Ortega, wrote the Petitioner, disputing the latter's contentions.

Consequently, on July 9, 1998, the Petitioner filed with the Commissioner of the BIR a request for reconsideration/appeal of Regional Director Ortega's letter-reply.

On August 6, 1998, the BOI wrote the Commissioner of Internal Revenue a letter confirming the validity of the transfers of TCCs to the oil companies, Petitioner included, and stating its legal grounds therefor.

On January 4, 1999, Petitioner filed with the Commissioner of Internal Revenue, a supplement to its request for reconsideration.

Due to Respondent's inaction on Petitioner's request for reconsideration/appeal within the One Hundred Eighty (180) day period provided for under Section 228 of the National Internal Revenue Code ("NIRC"), the Petitioner filed the instant Petition for Review with this Honorable Court.

The issues of this case which are presented by the parties to the Court for resolution were likewise stipulated by them in the same Joint Stipulation aforestated, to wit:

1. Whether or not the transfers to and utilization by the Petitioner of the TCCs in question are valid and legal;

2. Whether or not the BIR's actuations, among them its failure to serve Petitioner a pre-assessment and/or assessment notice, constitute a denial of due process;
3. Whether or not the BIR is estopped from now invalidating the transfers to and utilization by the Petitioners of the subject TCCs, which transfer and utilization the DOF and the BIR had all for several years previously approved;
4. Whether or not the period to collect taxes for tax years 1992, 1994 and 1995 has already lapsed;
5. Whether or not in the circumstances, the BIR may impose surcharge, interest, and compromise penalty; and
6. Whether or not the BIR's attempts to nullify the transfer and use of the TCCs in question is tantamount to a reversal of a previous ruling which cannot be given retroactive effect.

It is the principal submission of petitioner that it is a qualified transferee of the tax credit certificates (TCC). It said that the Omnibus Investments Code (Executive Order No. 226) was enacted to, among others, "encourage investments in desirable areas of activities"" thus, to attain this objective, enterprises registered under E.O. 226 were granted incentives under the law, among them, tax credits "equivalent to the National Internal Revenue Taxes and Customs duties paid on the supplies, raw materials and semi-manufactured products used in the manufacture, processing or production of its export products and forming part thereof, exported directly or indirectly by the registered

154

enterprise" (Art. 39 (K), E.O. 226, as amended) *infra.* It claimed that as an additional incentive to these registered enterprise, E.O. 226, specifically Art. 21 thereof, quoted hereunder, allows the transfer of these tax credits under the terms laid down by the said law.

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

To shore up its position, petitioner cites the Memorandum of Agreement (MOA) between the Department of Finance (DOF) and the Board of Investments (BOI) dated October 5, 1982, as amended on August 29, 1989. The said MOA set forth the guidelines on the transferability of the tax credit certificates, as follows:

> "1) Henceforth, all tax credit certificates, except for Net Local Content (NLC) and Net Value Earned (NVE), issued to BOI-registered enterprises under EO 226, PD 1789 and PD 1789 as amended by BP 391 on or after the effectivity date hereof, may be transferred under conditions provided herein;
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> "2) The transferee should be a BOI-registered firm which is a domestic capital equipment supplier or a raw material and/or component supplier of the transferor;

155

"3) The transferee may apply such tax credit certificates for payment of taxes, duties, charges or fees directly due to the national government for as long as it enjoys BOI incentives under its law of registration.

"4) The transferee may no longer transfer tax credit certificates transferred to it;

"5) Splitting of tax credit certificates already issued into smaller denominations shall not be allowed. However, upon request, any tax credit due may be issued in smaller denominations in several tax credit certificates which shall not exceed three;

"6) Advance tax credit certificates are not transferable;

"7) Tax credit certificates which have been partly utilized by the original grantee may be transferred with respect to the balance;

"8) All requests for transfer of tax credit certificates <u>shall indicate the consideration for the transfer</u>, the <u>purpose</u> for transferring the same and a certification from the <u>Bureau of Internal Revenue</u> and Bureau of Customs that the transferor has no outstanding obligations with the said agencies;

"9) All requests for transfer of tax credit certificates shall be filed with the BOI which shall review compliance with the herein guidelines. Its findings shall be transmitted to the BIR and/or the BC as the case may be for approval;

"10) Tax credit certificates issued by the BIR or the BC may be freely applied in payment of obligations owed by the grantee or transferee to both agencies."

Petitioner argued that the transfers to and utilization of the TCC's subject of the petition were all made in accordance with the above guidelines on the grounds that (1) petitioner who is the transferee of said TCC's, is a BOI-registered firm which supplied the transferors with petroleum products used by the latter as raw materials (and/or components) in the manufacture of its products for export, (2) it applied the TCC's in payment of excise taxes due under the NIRC, (3) the TCC's were transferred only once and were never split into smaller denominations, (4) the TCC's were not advance tax

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credit certificates, (5) these TCC's were never applied in excess of their total face amounts or their balance in the case of partially utilized certificates, (6) the transfers of these TCC's to petitioner were duly approved by the BOI, the DOF and the Bureau of Internal Revenue (BIR). Moreover, it said that the DOF and the BIR issued Tax Debit Memos (TDM) which served as authority for petitioner to utilize the subject TCC's in payment of its excise tax liabilities for the years 1992, 1994, 1995, 1996 and 1997, thus, it stressed that the BIR, in issuing TDM's, in effect, accepted the TCC's as petitioner's payment of the latter's excise tax liabilities for the years in question.

It is further represented that, in a recent letter to the respondent by the BOI, the latter re-affirmed the legality of the transfers of the subject TCC's to the petitioner, thus:

> "To effectively implement the foregoing provisions of the law and its implementing rules, a Memorandum of Agreement was entered into by and between the BOI and DOF on October 5, 1982 on the mechanics relative to the transfers of tax credit certificates. This was amended on August 29, 1989.
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> "In the present case, the BOI allowed the transfer of TCC's to oil companies having established that the latter meet the requirements set in the law, its rules as well as in the MOA, that is :
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> 1. That the oil companies are likewise BOI-registered; and
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> 2. That they are domestic suppliers of raw materials and/or components of the transferor.
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> "The Board has ruled in its meetings of July 27, August 17, and 29, 1990 that hydraulic oil and penetrating oil should be classified as supplies in the same manner as diesel fuel oil and industrial gases have been classified and suppliers of the same should be considered as qualified transferees of tax credits. *From the ruling, it can be deduced that the bunker fuel purchases from the oil companies are considered as supplies, therefore, a component of production of the final product. Component materials need not strictly and integrally form part of finished product.*

157

> "In previous investment laws, i.e., PD 1789 as amended by BP 391, there was a clear stipulation that "x x x x x x where the cost for certain supplies or raw materials constitutes at least forty percent (40%) of the cost of production of the registered export product, tax credit on sales, specific taxes and duties paid thereon may also be granted even of they do not from part of the registered export product" (Article 48[1]). This is a clear indication that the law recognizes that the presence of other elements or components of production which significantly affects the cost of producing the final product and these are considered in the proper determination of the amount of the tax credit certificates. <u>In view of the policy of the Board that the bunker fuel is a supply, therefore, a component part of the production of the final product, these supplier-companies are eligible as transferees of the TCC's.</u>
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> x x x
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> "Lastly, we would like to bring to your attention a case in point, where there was an approval of the transfer of a similar TCC, specifically the TCC issued to Indophil Cotton Mills, Inc. that was transferred to Pilipinas Shell Petroleum Corporation. The transfer of TCC No. 005976 to Pilipinas Shell has been approved by One-Stop Shop Tax Credit and Duty Drawback Center-Department of Finance. The approval was based on the eligibility of both the transferor and transferee as well as the guidelines and provisions of the two MOA of October 5, 1982 and August 29, 1989. The validity of the transfer was further confirmed on two occasions: first, by the Center, when it issued a Tax Debit Memo on February 11, 1997 allowing TCC No. 005976 to be used by Pilipinas Shell Petroleum Corporation for payment of its excise tax; and second, by the BIR when it authorized Shell to use the same TCC for the same purpose through the issuance of its own Tax Debit Memo on February 24, 1997. x x x"

Hence, petitioner concluded that the requirements for the transferability of the TCC's in dispute were clearly met.

Corollary to the above, petitioner in furtherance of its argument contends that the respondent's interpretation of Art. 39 (K) of E.O. 226, quoted below, is clearly erroneous.

It said that the phrase "forming part thereof" is a requirement for the issuance of TCC's, and not for their transferability. It said that the only requirement for the transferability of the TCC" is compliance with the guidelines embodied in the MOA between the DOF and the BOI dated October 5, 1992, as amended on August 29, 1989, which was complied by it as discussed above.

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

Furthermore, as an additional argument for the cancellation of the subject assessment, petitioner articulated that (1) when the BIR, without any legal basis whatsoever, declared the petitioner as delinquent in paying the specific taxes for the years in question and sent the petitioner a collection letter demanding payment of said taxes without the benefit of a pre-assessment/assessment notice, the BIR contravened the right of petitioner not to be deprived of property without due process of law, (2) the BIR, being part of the aforesaid Center which approved the transfers of the disputed TCC's and issued the corresponding Tax Debit Memos therefor, admitted to the validity of these transfers, thus, the BIR cannot now, years after, arbitrarily declare the transfer and use of the TCC's as invalid, when by its own prior acts, they have led the petitioner to believe them to be valid, (3) the BIR can assess and collect taxes only within three (3) years from the deadline for the payment of subject taxes, hence, since more than three (3) years have

159

passed since the deadline for filing returns for the years 1992, 1994 and 1995, and considering that petitioner does not fall under any of the exceptions provided for in Section 222 of the NIRC, the BIR's efforts to collect alleged delinquent taxes from petitioner is patently illegal, (4) the surcharge, interest and compromise penalty imposed by and sought to be collected by the BIR from petitioner finds no justification in established jurisprudence, and (5) the BIR's acceptance of the TCC's as petitioner's payment of the latter's excise tax liabilities, as evidenced by the TDM's it issued, is in effect, a ruling on the validity of the transfers of the TCC's to petitioner, hence, to allow the BIR to now invalidate the payments made by the petitioner would amount to a clear transgression of the very law which the BIR is mandated to enforce, specifically Section 246 of the NIRC, on the non-retroactivity of rulings.

On the other hand, respondent propositioned that the petitioner is not a qualified transferee of the subject TCC's, hence, petitioner's application and utilization of said TCC's to pay its specific tax liabilities for the years 1992, 1994, 1995, 1996 and 1997 are null and void. He argued that while in general, BOI tax credit certificates issued to certain BOI-registered enterprises may be transferred, conveyed and assigned to another BOI-registered enterprise for use by the latter in payment of its national internal revenue taxes, such transferability is, however, subject to a condition that the transferee is the transferor's supplier of raw materials; and components (i.e., semi-manufactured products) for use by such transferor in the manufacture of its export products, provided that such raw materials and components shall form part of the said transferor's manufactured products for export, thus, since the petroleum products which were supplied to the transferor's of the BOI TCC's by the petitioner were not used by the

140

transferors as raw materials forming part of their finished products for export, as the same were used as fuel, the transfers to petitioner of said tax credit certificates were invalid, invoking BIR Ruling No. 181-94. He argued that while the BOI has classified hydraulic oil, diesel fuel oil and industrial gases as "supplies" and considered petitioner as a qualified transferee of TCC's, he cannot acquiesce with the same on the reason that the petroleum fuel products supplied by petitioner to the transferors of the subject TCCs did not form part of the latter's manufactured products for export. He stressed that the fuel is not a raw material or supply that form part of the finished product.

In furtherance of its stand, respondent said that his acceptance, thru the Collection Programs Division of the Tax Credit Certificates and Issuance of Tax Debit Memos cannot have the effect of and be treated as a ruling contemplated under the provisions of Section 244 of the 1997 NIRC, hence, there is no revocation or retroactive application of rulings pursuant to the provisions of Section 246, NIRC. He emphasized that petitioner being not a qualified transferee of the subject TCC's, the government cannot be legally prevented from collecting the rightful taxes due, invoking the case of *Hilado vs. CIR, 100 Phil. 288*, which states among others that "an erroneous construction of law does not preclude or stop the government from collecting a tax which is legally due.

Respondent asseverates that petitioner's assertion that the BIR's impositions of surcharges, interest and penalty is illegal, is without basis, as the petitioner was <u>not at all in good faith</u> in accepting the TCC's of the export producers in payment of the bunker oil and fuel products supplied by it and then applying said TCC's in payment of its excise taxes for the years in question. He argued that there was a clear error on the part of the respondent's officials on the interpretation of the applicable laws, rules and regulations,

161

hence, the invalidation of the use and approval of the TCC's as payment of petitioner's excise tax liabilities for the years in question is not controversial to justify the non-imposition of penalties. Moreover, he said that the Court should place a scant regard to the ratiocination of petitioner, that respondent's right to collect taxes for the years 1992, 1994 and 1995 has already lapsed, as the government may not be legally prevented from collecting the rightful taxes due and demandable from the taxpayer. He said that in demanding payment from petitioner of the excise taxes for the years 1992, 1994, 1995, 1996 and 1997, respondent did not encroach the domain of the function of the BOI but was merely exercising its powers and duties provided under Section 3 of the Tax Code, thus, he concluded that the right of the government to collect the above-mentioned excise taxes has not yet prescribed.

After a circumspect study of the instant case, the Court is constrained to confirm the BOI Opinion in its letter to Commissioner Beethoven Rualo dated August 6, 1998 (Annex J of the petition for review), and thus, uphold herein petitioner's stance.

It is a rule of ancient respectability, which has earned judicial acceptance ever since, that a mere interpretative ruling or regulation cannot amend or modify, much less repeal, the law it seeks to implement. To the extent that BIR Ruling No. 181-94 considers bunker fuel purchased from Petron by the transferors of the TCC's as neither raw material nor component of the finished product of the transferors under Art. 39 (K) of the Omnibus Investment Code, *infra*, said ruling conflicts grossly with the law it is tasked to implement, there being no such condition precedent in said provision of Omnibus Investment Code, and, hence, must be deemed to be an ultra vires act or issued in excess of authority. The requirement that the "supplies, raw materials and semi-manufactured products" forms part of the finished product refers only to the issuance of the tax credit certificates and not to the transfer of the same. Art. 39 (K) uses the phrase "shall enjoy a tax credit", without mentioning its transferability. It merely provides that a registered enterprise may avail of a tax credit for taxes and duties paid on supplies, raw materials and semi-manufactured products used in the manufacture, processing and production of exported products upon the existence of certain conditions.

The transferability of tax credit is governed by Article 21 of the same Code which specifically allows such transfer as may be determined by the Board after consultation with the Department of Finance. As correctly stated by petitioner, the requirements for the transferability of the tax credit certificates are contained in Rule VII of the Rules and Regulations implementing said provision of Executive Order No. 226, which provides:

> RULE VII. TRANSFERABILITY OF TAX CREDIT CERTIFICATES
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> "Tax credit certificates for taxes and duties that would have been paid on domestic capital equipment purchased, and on raw materials, supplies and semi-manufactured products used in the manufacture, processing or production of its export products and forming part thereof shall be issued by the Secretary of Finance or his representative, or by the Board, if so delegated by the Secretary of Finance.
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> **"Said certificate may be transferred in accordance with the memorandum of agreement between the Department of Finance and the Board of Investments dated October 5, 1982.** However, for tax credits not covered by the said memorandum, i.e., net value earned and net local content tax credit certificates issued under P.D. 1789, as amended, they shall be transferable only to domestic raw material or component suppliers of the registered enterprise." (Emphasis and underscoring ours)

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Moreover, there is nothing in the Omnibus Investments Code, its implementing rules and regulations, the Memorandum of Agreement between the DOF and the BOI

163

dated October 5, 1982 or the amendment thereto which requires that the "supplies, raw materials and semi-manufactured products" supplied by the transferee (petitioner in the case at bar) should form part of the finished product of the transferor in order for the TCC's of the latter to be transferable. To effectuate the validity of the transfer of the TCC's, the law requires that the transfer of the said TCC's should be in accordance with the guidelines embodied in the MOA between the DOF and the BOI, as amended. The arguments of respondent shows no doubt that petitioner has complied with the abovementioned guidelines, except, No. 2 thereof which states that "the transferee should be a BOI-registered firm which is a domestic capital equipment supplier or a raw material and/or component supplier of the transferor. Respondent argued that such raw materials and components shall form part of the transferor's manufactured product for export. A reading of the MOA, particularly the No. 2 requirement of the same, convinces the Court that there is nothing in the said requirement that the article supplied should "form part of" the transferor's manufactured products. It merely commands that the transfer of TCC's must be between a transferor who is a BOI registered firm and a transferee who is also BOI-registered, which is a domestic capital equipment supplier or a raw material and/or component supplier of the transferor.

In other words, the transferee of the subject TCC's must be BOI-registered and is a domestic supplier of raw materials or components supplier of the transferor. It is undisputed in the case at bar that petitioner is a BOI-registered enterprise, hence, the only issue left for our consideration in this regard is whether or not the bunker fuel supplied by petitioner to the transferors are considered "supplies", therefore a component of production of a final product. The same was answered by the BOI in the affirmative that the <u>bunker fuel is a supply</u>, therefore, a component part of the production of the final product. It said in its letter dated August 6, 1998 to Commissioner Rualo, thus:

> The Board has ruled in its meetings of July 27, August 17 and 29, 1990 that hydraulic oil and penetrating oil should be classified as supplies in the same manner as diesel fuel oil and industrial gases have been classifed and suppliers of the same should be considered as qualified transferees of tax credits. From the ruling, it can be deduced that the bunker fuel purchased from the oil companies are considered as supplies, therefore, a component of production of the final product. <u>Component materials need not strictly and integrally form part of finished product.</u>
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> In previous investment laws, i.e. PD 1789 as amended by BP 391, there was a clear stipulation that "xxx xxx **where the cost for certain supplies or raw materials <u>constitutes at least forty percent (40%) of the cost of production</u>** of the registered export product, <u>tax credit</u> on sales, **specific taxes and duties paid thereon <u>may also be granted even if they do not form part of the registered export product" (Article 48(1).</u>** This is a clear indication that the law recognizes that the presence of other elements or components of production which significantly affects the cost of producing the final product and these are considered in the proper determination of the amount of the tax credit certificates. <u>In view of the policy of the Board that the bunker fuel is a supply, therefore, a component part of the production of the final product, these supplier-companies are eligible as transferees of the TCC's. (underscoring supplied)</u>

We do not think any different conclusion might be reached in the case at bar. The BOI is conferred with the power to promulgate such rules and regulations as may be necessary to implement the intent and provisions of E.O. 226, thus, it has the sole authority to interpret the Investments Code and its implementing rules, just as the BIR has been vested with the power to interpret the provisions of the NIRC, thus the Court gives great weight to the interpretation of the BOI. Moreover, this Court in the case of *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Customs (CTA Case*

No. 4664, May 31, 1993 has ruled that oil products supplied by oil companies may be classified as materials and supplies, thus:

> "Section 17 (1) covers domestic merchandise, raw materials, supplies, articles and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded or otherwise processed, manipulated, manufactured, mixed or used directly or indirectly in such activity shall not be subject to customs and internal revenue laws and regulations. **Oil products produced by oil companies may be classified as domestic merchandise, raw materials or supplies as legally defined in the Supreme Court case of *Commissioner of Customs v. Caltex (Philippines), Inc.* (G.R. No. L-13067, December 29, 1959, 106 Phil 829) which states that supplies or materials shall include gasoline and other petroleum products for purposes of exemption from customs duties under Article 103 of Republic No. 387. For what purpose, among others, these products may be brought into the zone for processing, manipulation, manufacture, mixed with foreign and domestic merchandise or used directly or indirectly in such activity. In our particular case, the petroleum products delivered to Petitioner is used in the processing of fertilizer for export. While respondent may be correct that these products did not form part of the fertilizer exported, nevertheless, the law does not provide for such requirement but only requires the use of such materials directly or indirectly in such activity. The use of petroleum products like bunker oil as fuel will easily fall under the phrase 'used directly or indirectly in such activity'.** Clearly the petroleum products can easily qualify for tax and duty free privileges under Section 17 (1) of P.D. 66." (Emphasis and underscoring ours)

As stated above, the Supreme Court in a prior date in the case of *Commissioner of Customs vs. Caltex (Phils.), Inc., et.al. (106 PHIL. 829)* ruled that petroleum products such as gasoline and oil fall under the category of supplies, thus:

> "It would appear that under the above provision any concessionaire may import free of custom duty 'all equipment, machinery, material, intruments, supplies and accessories' during the first five years following the granting of the

> concession. Here it cannot be disputed that the **petroleum products imported by the respondent for its use during the construction of the refinery such as gasoline and oil furnished its drivers during the construction job come within the import of the words material and supplies for it has been held that gasoline and oil used by drivers in a construction fall under the category of supplies** (West vs. Detroit Fidelity and Surety Co., 225 N.W. 673, 118 Neb. 544 cited on page 790 Vol. 40 Words and Phrases). To the same effect is the opinion rendered by the Secretary of Justice on June 28, 1954 upon the request of respondent who held that its importation of crude oil for the use of its refinery can be considered as 'materials' within the purview of the exemption statute. It is, therefore, clear that by express provision of the law the petroleum products imported by respondent for the use of its cars during construction of its refinery are exempt from the customs duties imposed by petitioner." (Emphasis and underscoring ours)

Ergo, finding that petitioner clearly met the requirements for transferability of the tax credit certificates (TCC's) in dispute, the Court rules that the transfer to and utilization by the petitioner of the TCC's in question are valid and legal.

Anent the second issue raised by both parties, this Court after careful consideration finds and agrees with petitioner's ratiocination that the BIR's attempt to collect supposedly delinquent taxes and penalties from the petitioner without an assessment or pre-assessment notice constitutes a denial of due process.

One of the basic and fundamental precept of law mandated by our Constitution is that no person shall be deprived of his life, liberty or property without due process of law (Section 1, Art. III, 1987 Constitution). The pervasiveness of the right to due process reaches out to both substantive and procedural rights, regardless of their source, be it the Constitution, or only a statute or a rule of Court (Tupas vs. Court of Appeals, 193 SCRA 597). The procedure granted by law under Section 228 of the Tax Code, stated

167

hereunder, is a statutory right of the taxpayer which cannot be wantonly disregarded without violating the taxpayer's right to due process.

> "Sec. 228. Protesting of assessment,-When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he **shall first notify the taxpayer of his findings**; *provided, however,* that a pre-assessment notice shall not be required in the following cases:
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> > "(a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
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> > "(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
> >
> > "(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
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> > "(d) When the excise tax due on excisable articles has not been paid; or
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> > "(e) When an article locally purchased or imported by an exempt person such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.
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> "**The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise the assessment shall be void.**
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> "Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
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> "Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of

the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

"If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the 180-day period; otherwise, the decision shall become final, executory and demandable." (Emphasis and underscoring ours)

In the instant case, it is undisputed that no assessment or pre-assessment notice pursuant to the above mentioned law was ever sent by the BIR to the petitioner. What was sent was a collection letter demanding payment of the subject delinquent excise taxes and penalties. This fact was admitted by respondent in the Joint Stipulation of Facts and Issues by the parties, No. 5 thereof. (page 92, CTA records).

Considering that the case of petitioner does not fall under the exceptions where a pre-assessment notice shall not be required, it is mandatory for respondent to furnish the petitioner a pre-assessment and/or assessment notice and to afford petitioner a chance to dispute the same before respondent resorts to remedies for the collection of said taxes, such as the issuance of Warrants of Garnishment against bank deposits of petitioner. Clearly respondent violated Section 228, *supra*. This Court will not countenance the same as it will be a contravention of the fundamental dictates of due process.

We suspect that respondent purposely avoided the issuance of a formal assessment because bulk of the alleged claimable amount has already prescribed pursuant to Section 203 of the Tax Code. The reason advanced by the respondent counsel that what is needed only is a mere collection letter because of the wrong interpretation of the law, the government is not prevented from collecting the rightful taxes due and demandable, is too shallow a reason to be accepted by this Court. First of all, erroneous interpretation of a law is not a ground or an exception provided under Section 228 for the respondent to clearly disregard its requirement. Moreover, erroneous interpretation of the law by a taxpayer is a good ground for the respondent to issue an assessment. This is clearly implied when Section 228 requires the respondent to inform the taxpayer of the law and the facts on which the assessment is made. Necessarily, respondent has to inform the taxpayer of his correct interpretation of the law and to grant the taxpayer an opportunity to answer. This requirement is completely disregarded by the respondent. Secondly, respondent should be aware of the principle enumerated in the ABS-CBN Broadcasting Corp. vs. Court of Tax Appeals (108 SCRA 142), which held that:

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

While it is not disputed that the collection and payment of taxes is a necessity for a government to exist, the same, should not be a valid excuse or justification for taxing authorities to disregard the statutory requirements provided by law aimed specifically to safeguard the common weal. As clearly stated by the Supreme Court in the case of *Marcos II vs. Court of Appeals, 273 SCRA 47*, "xxx such collection should be made in accordance with law as any arbitrariness will negate the very reason for government itself. It is therefore necessary to reconcile the apparently conflicting interests of the authorities and the taxpayers so that the real purpose of taxation, which is the promotion of the common good, may be achieved".

Thus, principally, under the view which we have taken in the first and second issues raised in this appeal, and secondarily in the interrelated third and fourth issues incidentally discussed, we deemed it unnecessary to resolve the remaining issues presented. We therefore hold that the transfers to and utilization by the petitioner of the TCC's were valid and legal, and the respondent's attempt to collect supposedly delinquent taxes and penalties from petitioner without an assessment constitutes a denial of due process. The interrelated issues are likewise resolved in favor of the petitioner.

IN THE LIGHT OF ALL THE FOREGOING, the instant petition for review is **GRANTED**. The collection letter issued by the Respondent dated April 22, 1998 is considered withdrawn and he is **ENJOINED** from any attempts to collect from petitioner the specific tax, surcharge and interest subject of this petition.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

171

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals