Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

LUBWELL CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6609

Members:

CASTAÑEDA, JR., *Chairman*
UY, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

JUL 04 2005

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DECISION

UY, *J.*:

This Petition for Review was filed on March 10, 2003 by petitioner, Lubwell Corporation, to assail the assessment for deficiency excise taxes issued against it by respondent, Commissioner of Internal Revenue, in the total amount **of Ninety Four Million Three Hundred Ninety Thousand One Hundred Ninety Nine Pesos and Five Centavos (₱94,390,199.05), Philippine Currency,** for the taxable calendar year 1998 arising from its possession of petroleum products.

THE FACTS

Petitioner is a corporation organized and existing under the laws of the Republic of the Philippines, with business address at Unit 96 Columbia Tower, Ortigas Avenue, Mandaluyong City, Metro Manila. On the other hand, respondent is the Commissioner of Internal Revenue, duly appointed and empowered to perform the duties of his office, including, among others, the power to decide, cancel and abate tax liabilities, with office address at the BIR National Office Building, East Triangle, Diliman, Quezon City, Metro Manila.

As stipulated, petitioner is not a manufacturer of petroleum products, and its primary purpose is to engage in, conduct, and carry on the business of buying, selling, distributing, marketing at wholesale and retail insofar as may be permitted by law, all kinds of goods, commodities, wares and merchandise of every kind and description; to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale or retail and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products whether natural or artificial. Hence, its activities do not fall within the ambit of Section 148 of the Tax Code.[1]

Records show that respondent, through its authorized officer, issued Letter of Authority No. 00005677 dated June 1, 1999 to petitioner for the examination of its books of accounts and other accounting records for the taxable year 1998 as part of a routine

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1 Joint Stipulation of Facts and Statement of the Issues, Records, pp. 87-91

verification for internal revenue purposes conducted by the Bureau of Internal Revenue.[2] This served as first notice for petitioner to present its records and other documents necessary for the audit.[3]

A Second Request for Presentation of Records dated July 20, 2000 was issued due to failure of petitioner to present all the documents and records listed in respondent's First Notice, and subsequently, a Final Request was issued for the Presentation of Records dated March 8, 2001, which appears to have been received by the latter on March 12, 2001.[4]

Thereafter, Assistant Commissioner Percival T. Salazar of the Enforcement Division of the Bureau sent a Letter dated December 3, 2001 informing petitioner that the examination of books of accounts and other accounting records had been reassigned to the Policy Cases Division for the purpose of continuation of audit, and petitioner was requested to extend all necessary assistance to the named revenue officers therein for the early completion of audit.[5]

The investigating team of the Policy Cases Division submitted its Memorandum dated June 6, 2002 to the Chief of the Tax Fraud Division[6] recommending that the case be referred to the Tax Fraud Division for further investigation based on the following findings:

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2 The Letter of Authority was revalidated on February 6, 2002, BIR Records, p. 275.
3 BIR Records, pp. 9-10 and 275.
4 BIR Records, pp. 6-7.
5 Composed of Revenue Officers Ma. Velez N. Liwag, Gina P. Dongon, Imogene B. Usison, Rex Paul R. Recoter and Michael Aldrin A. Bumanglag,BIR Records, p. 43.
6 Composed of Group Supervisor Maria Velez N. Liwag, and Revenue Officers Rex Paul R. Recoter, Imogene Usison, Gina Dongon and Michael Aldrin Bumanglag.

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"1. TWA, INC., an affiliate of Lubwell, requested for rulings that it was a Country and Baranggay Enterprises (CBBE).
However, it failed to disclose the following requirement of Kalakalan 20;

Assets, at the time of registration as CBBE, do not exceed Five Hundred Thousand Pesos (₱500,000.00) **before financing** [Section 2 (b)];

Query – [Can] TWA, INC., being a CBBE, [sic] afford to put up MILLIONS of pesos in order to manufacture aviation fuel or jet fuel or import raw materials for such production?

We believe that TWA, INC., was used as an instrument in order to circumvent the tax laws. TWA, INC. was also controlled by Mr. Ramon F. Villavicencio. At present, Mr. Villavicencio controls Asiaoil Corporation, Filpride Resources, Inc., and Filpride Energy Corp.

It is a basic principle in Corporation Law that the '**veil of corporate entity must be pierced**' when it was used to *evade taxes. (*Laguna Trans. Co. Inc. v SSS 107 Phil 833*).*

2. Based on the facts presented below, subject taxpayer may have used two sets of books by using three sales invoices that **overlapped** as far as series are concerned. In 1998, Lubwell had an address at Room 103 Ding Velayo Sports Center, Domestic Road, Pasay City. Its printer, Rodan Printers, printed 60 booklets 50 x 5 (5251-8250) and 50 booklets (5251-7750) BIR permit number 5211-167 dated December 27, 1996 and 20 booklets 50 x 5 (7501-8500) **with same BIR permit numbers 5211-167** dated March 17, 1998.

3. Examples of duplication of invoices are the following:

a. Sales Invoice issued to Grand International Airways on January 5, 1998 amounting to ₱231,374.46 with invoice number 7611 issued to PLDT on the same date amounting to ₱15,449.60 was not recorded in the Sales Book;
b. Sales Invoice issued to SEAIR on January 5, 1998 amounting to ₱48,099.60 with invoice number 7612 did not appear in the Sales Book; while the same invoice number 7612 issued to Corporate Air on the same date amounting to ₱16,541.33 was also recorded in the Sales Book.

These are prima facie evidences of fraud."[7]

Subsequently, on September 16, 2002, petitioner's counsel received a "Notice To Taxpayer" dated September 10, 2002 and was informed of its deficiency excise tax liabilities in the amount of NINETY FOUR MILLION THREE HUNDRED NINETY THOUSAND ONE HUNDRED NINETY NINE PESOS AND FIVE CENTAVOS (₱94,390,199.05). On October 14, 2002, petitioner received an undated Preliminary Assessment Notice ("PAN") from the respondent with attached Details of Discrepancy.[8] Consequently, petitioner filed its Protest Letter dated October 28, 2002, alleging among others, that it is not subject to excise tax because the manufacturer of the petroleum products, TWA Inc. is exempt from payment of taxes and it is a mere marketing arm of said manufacturer.[9]

Upon recommendation of the investigation team,[10] petitioner received on December 11, 2002, an undated Formal Assessment Notice ("FAN") No. TRD-98-XS-070-02 for deficiency excise taxes in the total amount of NINETY FOUR MILLION THREE HUNDRED NINETY THOUSAND ONE HUNDRED NINETY NINE AND FIVE CENTAVOS (₱94,390,199.05), Philippine Currency, inclusive of surcharge and interest, for the taxable year 1998.

The deficiency assessment for excises taxes was broken down as follows:[11]

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7 BIR Records, pp. 87-88.
8 *Ibid,* pp. 262-266.
9 *Ibid*, p. 268.
10 Memorandum Report, Exhibit "1", BIR Records, pp. 283-295.
11 Joint Stipulation of Facts and Statement of the Issues, par. 1.3; Records, pp. 87-88.

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	Amount
Total Volume in Liter	₱11,182,347.95
Excise Tax Rate [Sec. 148 (g)]	3.67
Excise Tax Due	₱41,039,216.98
Less: Excise Tax Paid	0.00
Deficiency Excise Tax – Basic	₱41,039,216.98
Add: 50% Surcharge for willful neglect to file the return w/in the period prescribed [Sec. 248 (B) & Sec. 222 (a)]	20,519,608.49
20% Interest (Sec. 249) (12.31.98-12.31.02)	32,831,373.58
TOTAL AMOUNT DUE	**₱94,390,199.05**

Petitioner filed its Formal Protest of Assessment No. TRD-98-L-6-070-02 on January 9, 2003 with the Office of the Assistant Commissioner, Enforcement Service, Bureau of Internal Revenue. On February 10, 2003, petitioner received respondent's Letter dated January 17, 2003 denying the protest and reiterating its assessment for deficiency excise taxes.[12] Hence, this petition filed on March 10, 2003.

THE ISSUES

The following are the stipulated issues for the Court's determination:

"FACTUAL

Whether or not TWA, Inc. is a duly registered CBBE enterprise?

LEGAL

Whether or not Petitioner, as marketing arm of TWA, Inc., should be held liable for excise taxes on its sale of petroleum products which were manufactured by TWA, Inc?;

Whether or not Petitioner, as possessor of petroleum products, should be held liable for excise taxes on the petroleum products produced and sold by TWA, Inc.?;

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12 *Ibid.*, pars. 1.5 & 1.6, p. 88 (Also, BIR Records, pp. 334-336)

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Whether or not Petitioner should be liable for the 50% surcharge for willfully neglecting to file excise tax returns and for failing to pay the corresponding excise taxes for the taxable year 1998 ?; and

Whether or not Petitioner should be liable for the 20% interest arising from the deficiency assessment?"[13]

PETITIONER'S CLAIM

It is petitioner's contention that the primary liability for the payment of excise tax required under Section 148 (a) of the Tax Code of 1997 is imposed on the manufacturers or producers of petroleum products, and the same is to be paid before removal thereof, from the place of production. And since petitioner is neither a manufacturer nor producer of petroleum products, it is not liable for the 5% excise tax.

Moreover, petitioner asserts that the manufacturer of the petroleum products, which it sold, is TWA Inc., and the latter is a tax-exempt entity for being a "Kalakalan" 20 Enterprise or Countryside and Barangay Business Enterprise (CBBE). As a duly registered CBBE, TWA, Inc. is exempt from the payment of all taxes and fees for activities that pertain to the production, processing or manufacturing of products or commodities in the countryside. Petitioner claims that by virtue of an Agency Agreement executed on December 15, 1995, it became the marketing arm of TWA, Inc., a domestic corporation "engaged in the manufacture, processing and converting refined oils, process oils, chemicals, fuels and all kinds of petroleum products, oil, gas and other volatile substances, ores, coal nitrates, phosphates, hydrocarbon substances, carbon black, carbon,

[13] *Ibid.*, pars. 3, 3.1 to 3.5, Records, p. 90

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bituminous substances, clays, sulphur, ozokerite, minerals, and mineral substances of all grades, kinds forms, descriptions, and combinations, and in general subsoil products and subsurface deposits of every nature and description and the products and by-products which may be derived, produced, prepared, developed, compounded, made or manufactured therefrom and substances obtained by mixing any of the foregoing with other substances."[14]

As the supposed marketing arm of TWA, Inc., petitioner allegedly undertook to distribute fuel and to collect the accounts for TWA, Inc. for which it shall receive a fixed amount of TWENTY CENTAVOS (₱0.20) per liter of Jet A fuel sold.

RESPONDENT'S DEFENSES

Respondent claims that although TWA, Incorporated's registration as a CBEE enterprise exempts it from the payment of excise tax, the same does not extend to its marketing arm, petitioner in this case. And petitioner as a marketing arm of TWA, Inc., should be held liable for excise taxes on its sale of petroleum products, which were manufactured by TWA, Inc. and subsequently sold by petitioner. Further, it is respondent's submission that petitioner, as possessor of petroleum products can be held liable for excise tax because only those registered under "Kalakalan 20" is exempt from all taxes.

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14 As stated in the Agency Agreement, TWA, Inc. is "engaged in the manufacture, processing and converting, retail/wholesale and import/export of refined oil, chemicals, fuels and all kinds of petroleum products, oil, gas and other volatile substances." (Exhibit "C-1", Records, pp. 110-111).

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THIS COURT'S RULING

Excise tax is "a tax on the performance of the act, the engaging in an occupation, or the enjoyment of a privilege. It is a tax laid on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer of property".[15] Section 129 of the National Internal Revenue Code of 1997 ("NIRC") provides that excise taxes apply to goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported.

In the present case, TWA, Inc., as the alleged manufacturer of the petroleum products sold by petitioner, is the entity liable to pay excise taxes on the manufactured petroleum products. Its liability attaches as soon as the petroleum products come into existence.[16] However, TWA, Inc., is apparently exempt from the payment of excise taxes as a duly registered CBBE pursuant to Section 3 of R.A. No. 6810, otherwise known as "An Act Establishing The Magna Carta For Countryside Barangay Business Enterprises". The pertinent provisions of said section read as follows:

> "Section 3. Countryside business entities shall, upon registration, pay Two hundred fifty pesos (P250.00) to the municipality or city where its principal place of office and business operations is located, to cover the cost of the issuance of the license to operate known as the CBBE authority.
>
> All CBBEs shall be exempted from all taxes, national or local, license and building permit fees and other business taxes, except real property and capital gains taxes, import duties and other taxes on imported articles. In addition, any and all income, receipts and proceeds derived from the business operations of the CBBE shall be excluded from

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[15] *Black's Law Dictionary With Pronunciation*, 6th ed.

[16] Sec. 149 of the Tax Code. See also *Commissioner of Internal Revenue vs. Mobil Philippines, Inc.*, 232 SCRA 9 (1994).

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the computation of gross income for purposes of computing the individual income tax of the owners/members thereof.

It shall be exempted from any and all government rules and regulations in respect of assets, income, and other activities indispensable and directly utilized in, proceeding from or connected with the business of the enterprise."

"xxx xxx xxx"

Evidently, TWA, Inc. is a duly registered CBBE enterprise as shown by the CBEE Certificate of Authority under CBBE Registration No. 008 issued by the Province of Bulacan, Municipality of San Rafael on November 25, 1994, with a validity period of five (5) years.[17] Hence, the factual issue as to whether or not TWA, Inc. is a duly registered CBEE enterprise is resolved in the affirmative.

We now proceed to resolve the legal issues raised in this petition which we shall discuss in *seriatim.*

The first legal issue is whether or not petitioner, as marketing arm of TWA Inc., should be held liable for excise taxes on its sale of petroleum products which were manufactured by TWA, Inc.

In resolving this issue, We look into the contractual basis by which petitioner became the marketing arm of TWA, Inc., the Agency Agreement executed on the 15th day of December, 1995 between petitioner, referred to therein as the "AGENT", and TWA, Inc., referred to therein as the "COMPANY".

After careful consideration of the terms and conditions set forth in the subject Agency Agreement, it appears that the same has failed to appropriately establish

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17 CBBE Certificate of Authority, Exhibit "A", Records, p. 107

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petitioner as a marketing arm or an agent of TWA, Inc. as evidenced by the following observations:

First Observation: The Agency Agreement failed to specify an effectivity period under paragraph (1) thereof, to wit:

> "1. The term of this Agreement shall take effect on ____________ and shall continue until terminated by either party provided that a thirty (30) days written notice be served on the other party."[18]

Article 1193 of the New Civil Code provides that obligations whose fulfillment a day certain has been fixed, shall be demandable only when that day comes. In the case at bar, paragraph (1) is a stipulation as to the supposed term thereof, but the space provided for the effectivity period was left blank. Because of this, the Court is unable to determine when the Agency Agreement became demandable and enforceable. In other words, We are unable to determine whether the agency was in effect during the calendar year of 1998. In view of this observation, petitioner cannot be allowed to invoke the terms and conditions of said Agency Agreement for purposes of claiming tax-exemption.

Second Observation: The Agency Agreement did not empower petitioner to act as a representative of TWA, Incorporated. Neither did it grant TWA, Inc., as the alleged principal, the right of control over the petitioner, as the alleged agent of the former. Rather, it was stated therein that petitioner, as the AGENT, is an independent business entity. The other pertinent conditions of the Agreement merely provide, thus:

> "2. The prices to be charged by the COMPANY for the product to be marketed by the AGENT is the COMPANY's Official Wholesale Price at the time of delivery.

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[18] Exhibit "C", Records, p. 110

> "3. That the COMPANY undertakes to pay the AGENT a fixed amount of TWENTY (₱0.20) CENTAVOS per liter of Jet A fuel sold by the AGENT. The AGENT shall be responsible for the collection of the accounts which will be immediately remitted to the COMPANY."
>
> "4. The AGENT shall, at his own expense, provide a sufficient staff for the transaction of his business which transactions include into-plane service to customers.
>
> "6 (sic) For all legal intents and purposes, the AGENT is an independent business entity and as such shall be solely responsible and liable for all expenses incurred in connection with the ------------ of its business. **The AGENT or any of its employee or --------- shall make no contract in the name or in behalf of the COMPANY.** Neither shall the COMPANY be liable for damages or injuries to person or properties caused by the AGENT, or any of its employees and the AGENT hereby agree to release the COMPANY free and harmless from any of all liabilities thereof (Emphasis supplied.)"

Article 1868 of the New Civil Code states that by the contract of agency a person binds himself to render some service or to do something **in representation or on behalf of another,** with the consent or authority of the latter. It is therefore clear from Article 1868 that the basis of agency is representation. On the part of the principal, there must be an actual intention to appoint or an intention naturally inferable from his words or actions; and on the part of the agent, there must be an intention to accept the appointment and act on it, and in the absence of such intent, there is generally no agency. One factor which most clearly distinguishes agency from other legal concepts is control; one person - the agent – agrees to act under the control or direction of another – the principal. Indeed, the very word 'agency' has come to connote control by the principal. The control

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factor, more than any other, has caused the courts to put contracts between principal and agent in a separate category.[19]

The second legal issue is likewise ruled in the affirmative. Petitioner as the possessor of the petroleum products should be held liable for excise taxes thereon produced and sold by TWA, Inc. in the light of the provisions of R.A. 6810, specifically, Section 3 thereof. In said section, the imposition of excise taxes on petroleum products manufactured by CBBEs has not been removed, but the same merely granted tax exemptions in favor of CBBEs in the pursuit of its business activities. Additionally, there is no declaration, that excise taxes on petroleum products manufactured by CBBEs shall be treated as "deemed paid", so that petitioner, as the person having possession of the taxable petroleum products, shall enjoy the same tax exemptions or privileges given to TWA, Inc. Otherwise, Congress would have expressly provided therein that there will be no excise taxes imposable on goods manufactured by CBBEs or that the excises taxes on such manufactured goods as "deemed-paid" pursuant to its inherent power to grant tax exemptions.[20]

Basic is the rule that one who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute. This is because tax exemptions are strictly construed against the taxpayer and highly disfavored. The Court will not declare that the power of taxation had been surrendered unless the intention to surrender the same is manifested by words too plain to be mistaken. When

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19 *Victorias Milling Co., Inc. vs. Court of Appeals,* 333 SCRA 663 (2000)
20 *Manila Electric Co. vs. Vera*, 67 SCRA 351 (1975).

exemption is claimed, it must be shown indubitably to exist and the **one claiming tax exemption must be able to point to some positive provision of law creating the right.** It cannot be allowed to exist upon a mere vague implication or inference.[21]

Proceeding from the foregoing, the Tax Code complements R.A. No. 6810 and provides:

> "**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.'*
>
> "**SEC. 130**. *Filing of Return and Payment of Excise Tax on Domestic Products*. –
>
> "(A) *Persons Liable to File a Return, Filing of Return on Removal and Payment of Tax*. –
>
> "(1) *Persons Liable to File a Return*. – Every person liable to pay excise tax imposed under this Title shall file a separate return for each place of production setting forth, among others, the description and quantity or volume of products to be removed, the applicable tax base and the amount of tax due thereon: *Provided, however*, That in the case of indigenous petroleum, natural gas or liquefied natural gas, the excise tax shall be paid by the first buyer, purchaser or transferee for local sale, barter or transfer, while the excise tax on exported products shall be paid by the owner, lessee, concessionaire or operator of the mining claim.
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> **"Should domestic products be removed from the place of production without the payment of the tax, the owner or person having possession thereof shall be liable for the tax due thereon."** (Emphasis supplied.)

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21 *Gomez vs. Palomar*, 25 SCRA 827 (1968).

The Court notes that under the last paragraph of paragraph (A)(1) of Section 130 of the NIRC, the owner or person, petitioner in the case at bar, having in possession of domestically produced petroleum which were removed from place of production without payment of the required tax, shall be liable for the tax due thereon. The rationale behind the above provisions is to ensure that the excise tax on the product is paid, whoever may be liable therefor.[22]

A further evaluation of the records of this case, specifically, the BIR Records hereof, reveals that the sourcing of petitioner of the petroleum products it sold had not been distinctly established to be from TWA, Inc. To illustrate:

Based on the List of Deliveries of TWA Inc., (*BIR Records, pp. 164-185*) the total number of fuel in liters delivered to petitioner for the year 1998, is 10,918,500 liters with peso value equivalent of P98,772,426.00, summarized as follows:

Month	No. of Liters	Amount
JAN	673,500	P 6,098,542.50
FEB	582,500	5,274,927.70
MAR	1,017,000	9,209,821.30
APR	1,118,000	10,122,464.55
MAY	1,178,500	10,630,504.00
JUN	1,139,500	10,311,317.00
JUL	1,388,000	12,558,214.50
AUG	659,500	5,966,393.25
SEP	803,500	7,269,352.25
OCT	362,000	3,275,267.75
NOV	909,000	8,226,266.00
DEC	1,087,500	9,829,355.20
TOTAL	10,918,500.00	P98,772,426.00

22 *CIR vs. CTA*, CA-G.R. SP No. 27349, March 26, 1996.

A closer look into petitioner's **Sales Book**[23] shows that it sold a total of **11,182,347.95 liters** of fuel for an aggregate consideration of **P115,682,671.69**, detailed as follows:

Month	No. of Liters	Amount
JAN	670,205	P 7,469,868.19
FEB	584,015	6,866,073.89
MAR	1,111,798	11,616,399.77
APR	1,151,844	11,723,670.03
MAY	1,167,347.95	12,072,758.96
JUN	1,139,949	11,767,329.65
JUL	1,402,050	14,377,897.31
AUG	639,989	6,527,981.50
SEP	867,716	8,909,967.17
OCT	405,578	3,976,808.30
NOV	910,134	9,224,013.58
DEC	1,131,722	11,149,903.34
TOTAL	**11,182,347.95**	**P 115,682,671.69**

The above sales were not supported by source documents (sales invoices or official receipts). The deliveries of fuels by TWA, Inc. while exempt from excise tax, cannot be traced if included in the fuels sold by petitioner because upon this Court's verification petitioner was also distributing fuels for V Jet and Valvoline. Hence, it cannot be ascertained that all the 10,918,500 liters of fuel delivered by TWA formed part of the 11,182,347.95 liters sold by petitioner absent any proof thereto.

Likewise, this Court cannot verify with accuracy if the fuels sold by petitioner came from TWA, Inc. In the alleged Agency Agreement, petitioner was to be paid on commission basis of P0.20 per liter of Jet A fuel sold. However, in the financial statements, no commission income was reflected.

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23 *BIR Records, pp. 193-250.*

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With respect to petitioner's claim that its tax status was allegedly confirmed by BIR Ruling No. DA-291-99, it must be pointed out that this Court is not bound by the BIR Ruling No. DA-291-99. It is settled that respondent cannot issue rulings that are not consistent with the law sought to be applied. Only the legislature can repeal or amend the law.[24] And to reiterate, this Court already ruled that petitioner is not an agent of TWA, Inc.

Petitioner also assails the validity of the assessment issued by the respondent. As a general rule, our tax laws provide for a period of limitation within which the government must assess and collect taxes. Specifically, Section 203 of the National Internal Revenue Code of 1997 ("Tax Code") provides:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, **the three (3)-year period shall be counted from the day the return was filed**. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day." (Emphasis supplied.)

However, based on the evidence and on petitioner's admission, it did not file excise tax return asserting tax exemption as its reason therefor. As no return was filed, which to the mind of this Court is required, the applicable provision is Section 222 of the same Code, to wit:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –

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24 *CIR vs. Michel J. Lhuiller Pawnshop, Inc.*, 406 SCRA 178.

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> (a) In the case of a false or fraudulent return with intent to evade tax or **of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud, or omission**: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. xxx:" (Emphasis supplied.)

Moreover, in issuing the assailed assessment, it has been shown that respondent complied with the requirements laid down in Section 229 of the Tax Code and Section 3.1.4 of the Revenue Regulation 12-99 requiring that taxpayers shall be informed in writing of the law and the facts on which the assessment is made, otherwise, the assessment shall be void.

The assessment in question validly informed the petitioner about its non-filing of the required excise tax return, and that it was being assessed for deficiency excise tax in the aggregate amount of ₱94,390,199.05. The Formal Letter of Demand and Details of Discrepancy received by petitioner on December 11, 2002 provided petitioner with the necessary and pertinent informations, such as the computation of the monthly assessments, the pertinent sections in the Tax Code and the reasons for the assessment.

On the other hand, the Court notes that petitioner refused to assist and to cooperate with the authorized officers of the BIR despite the latter's repeated requests during the routine verification and subsequent investigation, and likewise failed to voluntarily submit its complete accounting records despite lawful notices and subpoenas issued by the BIR for the alleged reason that the same could no longer be located.

Finally, in resolving the last two issues of whether petitioner should be held liable for 50% surcharge and 20% deficiency interest arising from deficiency assessment, We look into the pertinent provisions of the 1997 Tax Code, to wit:

> "Section 248. Civil Penalties. –
>
> "(A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:
>
> "(1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or
>
> (2) Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return the return is required to be filed; or
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> (3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
>
> (4) Failure to pay the full or part of the amount shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.
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> " (B) In case of willful neglect to file the return within the period prescribed by this Code or the rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payments has been made on the basis of such return before the discovery of the falsity or fraud xxx"
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> "Section 249. *Interest.* –
>
> "(A) *In General* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.

> "(B) *Deficiency Interest.* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof."

Taking into consideration that petitioner failed to file the required return under the mistaken notion that it was exempt from the payment of excise taxes in the case at bar, the Court finds the 50% surcharge as fraud penalty under Section 248(B) of the NIRC not imposable as fraud was not directly proven. Instead, petitioner shall be liable to pay the penalty equivalent to twenty-five percent (25%) of the amount due as provided under Section 248(A)(1) of the same Code.

Records show that no direct proof of fraud or willful neglect to file the required return by the taxpayer was presented by respondent who bears the burden of proving fraud. Fraud is a question of fact which must be alleged and proved. It is a serious charge and to be sustained, it must be supported by clear and convincing evidence.[25]

As held in the case of Aznar v. Court of Tax Appeals,[26] the fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrong-doing with the sole object of avoiding the tax.

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[25] Commissioner of Internal Revenue v. Ayala Securities, 70 SCRA 204.
[26] 58 SCRA 519-545, at 543.

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Petitioner is likewise liable to pay interest equivalent to twenty (20%) percent per annum of the deficiency excise tax due from the date prescribed for payment until the amount is fully paid.

In sum, it is well settled that taxation is the rule and exemption is the exception. The burden of proof rests upon the party claiming exemption to prove that it is in fact covered by exemption so claimed.[27] Petitioner, in this case, dismally failed to discharge this burden.

Hence, the Court affirms respondent's findings on the liability of petitioner to pay the unpaid excise taxes and deficiency interest, but reduces petitioner's liability for surcharge to twenty five (25%) percent, computed as follows:

MONTHS	VOLUME IN LITERS
January	670,205
February	584,015
March	1,111,798
April	1,151,844
May	1,167,347.95
June	1,139,949
July	1,402,050
August	639,989
September	867,716
October	405,578
November	910,134
December	1,131,722
Total Volume in Liter	P11,182,347.95
Excise Tax Rate	P 3.67
Deficiency Excise Tax	P41,039,216.98
Add: 25% Surcharge	10,259,804.24
20% Interest 12/31/98-12/31/02	32,831,373.58
Total Amount Payable	**P84,130,394.80**

27 *Commissioner of Internal Revenue v. Mitsubishi Metal Corp. et al.*, 181 SCRA 214.

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WHEREFORE, premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. Petitioner is **ORDERED TO PAY** the respondent the amount of EIGHTY FOUR MILLION ONE HUNDRED THIRTY THOUSAND THREE HUNDRED NINETY FOUR PESOS AND EIGHTY CENTAVOS (₱84,130,394.80) plus 20% delinquency interest from January 10, 2003 until the same is fully paid pursuant to Section 249(C) of the 1997 Tax Code.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Chairman

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

I hereby certify that this Decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

JUANITO C. CASTAÑEDA, JR.
Chairman

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