REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PILIPINAS SHELL PETROLEUM CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 6003

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

AUG 0 2 2004

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DECISION

This case involves an assessment for deficiency excise taxes in the total amount of P684,692,881.93 comprising of allegedly unpaid excise taxes of P285,766,987.00 surcharge of P142,883,493.50 and interest of P256,042,401.43, arising from the cancellation of the tax debit memos issued against petitioner's tax credit certificates which were used by petitioner in the payment of its excise taxes for the years 1992 and 1994 to 1997.

Petitioner is a corporation organized and existing under and by virtue of Philippine law, with address at Shell House, 156 Valero Street, Salcedo Village, Makati City, and duly registered with the Board of Investments (BOI)[1]. It is engaged in the business of refining and marketing a wide range of petroleum products *(TSN, June 15, 2000, page 7)*.

[1] Joint Stipulation of Facts, par. 1.

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On certain years during the period 1988 to 1997, petitioner paid certain excise tax liabilities using tax credit certificates (TCCs) assigned and transferred to petitioner by entities that, like itself, are registered with the BOI[2].

The TCC transfers to, and utilization thereof by, petitioner were all approved by the appropriate government agencies, namely the BOI and subsequently, the One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (the Center) and were all approved, and accepted, by the Bureau of Internal Revenue (BIR), as payment of petitioner's excise tax liabilities. The government agency comprising the Center are the Department of Finance (DOF), the BIR, the Bureau of Customs and the BOI[3].

Part of the process and procedures relating to said TCC transfers and utilization were[4]:

a. Petitioner and the transferor executed Deeds of Assignment over the TCCs, subject to the due approval by the relevant government agencies.

b. Petitioner was advised of the BOI's or the Center's approval of the transfer when the transferor presented to it the TCC, with an annotation by the BOI or the Center of such approval at the reverse side of the TCC.

c. Petitioner then requested the BOI or the Center for authority to utilize the transferred TCCs as payment of its tax liabilities and thereafter, Tax Debit Memoranda (TDM) were issued by the BOI or the Center to signify such authority.

d. Thereafter, petitioner presented the BOI's or the Center's TDMs and the corresponding TCCs to the BIR with written requests for the BIR to accept the transferred TCCs as payment of its excise tax liabilities. The BIR then issued its own TDMs in exchange for the TCCs which it then retained to signify its acceptance of the said TCCs as valid tax payments by petitioner.

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[2] *Ibid.*, par. 3.
[3] *Id.*, par. 4.
[4] *Id.*, par. 5.

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e. Petitioner then requested the BIR Regional District Office to issue an "Authority to Accept Payment of Excise Taxes" (ATAPET), which served as the return for excise taxes being paid by petitioner, as well as an instruction to the BIR's Authorized Agent Banks (AABs) to accept petitioner's payments in the form of BIR TDMs and petitioner's checks for any balance or difference between the excise taxes being paid and the BIR TDMs.

f. Petitioner then tendered/turned over the BIR TDMs and petitioner's checks to the BIR's AABs in full and final payment of the relevant excise taxes, as evidenced by the AAB's stamped acknowledged of receipt on the face of the ATAPET.

Petitioner's acceptance of TCC transfers, and utilization of the same in payment of taxes, were never subject to any question, challenge or dispute. However, on April 22, 1998, the Revenue District Officer of Revenue District No. 50 of the BIR sent a collection letter to petitioner, demanding payment in the total amount of P1,705,028,008.06 allegedly representing unpaid specific taxes for the years 1992 and 1994 to 1997, inclusive of delinquency surcharges and interest *(Exhibit NN)*. The excise taxes subject of the collection letter were already paid by petitioner with duly transferred TCCs as authorized by the Center through their TDMs and accepted by the BIR through their own TDMs, as well as the ATAPETs issued also by the BIR and acknowledged by its AABs which received the said BIR-issued TDMs and petitioner's checks in full and final payment of petitioner's relevant excise tax liabilities[5].

In a letter dated April 29, 1998, petitioner protested the said collection letter[6]. Thereafter, petitioner received a reply dated June 16, 1998 signed by the Regional Director of Revenue Region No. 8 of the BIR, denying petitioner's protest, and reiterating the demand on petitioner to pay the aforementioned amount of taxes[7].

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[5] *Id.*, par. 6.
[6] *Id.*, par. 7.
[7] *Id.*, par. 8.

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Eventually, petitioner elevated the matter to respondent by way of a request for reconsideration dated July 9, 1998[8].

Before respondent could act on the request for reconsideration, the Regional Director issued warrants of garnishment against the bank accounts of petitioner. As such, petitioner was constrained to file a Petition for Review with the Court of Tax Appeals on July 21, 1998 (docketed as CTA Case No. 5660), mainly to suspend the collection of the taxes being collected through the warrants of garnishment[9].

On July 22, 1998, upon request by petitioner, respondent issued a letter lifting the aforesaid warrants of garnishment[10].

On November 16, 1998, the Court of Tax Appeals dismissed said petition for having been prematurely filed in view of petitioner's request for reconsideration (which was deemed an administrative appeal) with respondent still pending at that time[11].

Due to the inaction of respondent on petitioner's administrative appeal despite the lapse of the one hundred eighty (180)-day period provided for under Section 228 of the National Internal Revenue Code (the Tax Code), petitioner filed on February 2, 1999 another Petition for Review, docketed as CTA Case No. 5728[12].

On July 23, 1999, this court rendered its decision in said CTA Case No. 5728 holding, among others, that the transfers to an utilization by the petitioner of the TCCs 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. Accordingly, the collection letter issued by the respondent dated April 22, 1993 was

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[8] *Id.*, par. 9.
[9] *Id.*, par. 10.
[10] *Id.*, par. 11.
[11] *Id.*, par. 12.
[12] *Id.*, par. 13.

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considered withdrawn and respondent was enjoined from collecting from petitioner the specific tax, surcharge and interest subject of the said petition.

Respondent filed a motion for reconsideration thereof on August 10, 1999 which petitioner duly opposed[13]. On September 7, 1999, the court issued a resolution denying respondent's motion for reconsideration[14]. On November 3, 1999, petitioner was served a copy of a Petition for Review dated October 8, 1999 that respondent filed with the Court of Appeals *(Exhibit B)*. Said petition questions the aforesaid decision and resolution of this court[15].

In the meantime, despite the pronouncement of this court in its July 23, 1999 decision that "the transfers to and utilization by Petitioner of the TCCs were valid and legal", the DOF/Center, in a series of letters to petitioner dated August 31, September 1, and October 18, 1999 *(Exhibits C, D & E, respectively)*, revived the issue relating to the transfers to and utilization by petitioner of certain TCCs subject of CTA Case No. 5728, by requiring the latter to submit to the Center copies of sales invoices and delivery receipts showing consummation of sale transactions of petitioner's products to certain TCC transferors, purportedly in connection with an ongoing post-audit of TCC issuances and transfers, under pain of cancellation of the TCC transfers if petitioner fails to comply with the requirement[16].

Petitioner requested for time to respond to the said DOF/Center letters by way of a letter to the DOF/Center dated September 29, 1999 wherein it requested to be given until October 29, 1999 to respond. In its reply dated October 18, 1999, the DOF/Center

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[13] *Id.*, par. 15.
[14] *Id.*, par. 16.
[15] *Id.*, par. 17.
[16] *Id.*, par. 18.

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gave petitioner until October 31, 1999 to file its response[17]. October 31, 1999 being a Sunday, and the next two days being holidays, petitioner's response was delivered to, and received by the DOF/Center on November 3, 1999, which was the deadline granted. In its response, petitioner stated, among other matters, that the requirement to submit the documents mentioned in the DOF/Center letters, and the threatened sanction if petitioner fails to comply, have no legal basis because the applicable law, rules and regulations only require that both transferor and transferee are BOI-registered entities[18]. On the very same date (November 3, 1999) that the DOF/Center received the aforesaid October 29, 1999 response of petitioner, the former wrote a letter dated November 3, 1999 *(Exhibit G)* stating that the TDMs enumerated in the list attached thereto, as well as the corresponding TCCs and TCC transfers had been cancelled by the DOF/Center[19].

In a letter dated November 4, 1999, petitioner asked the DOF/Center to reconsider the cancellation of the TDMs, related TCCs and their transfers, as set forth in its letter dated November 3, 1999 *(Exhibit H)*. In said request for reconsideration, petitioner argued that the cancellation was made without the DOF/Center having had the opportunity and benefit of considering petitioner's letter response dated October 29, 1999 and without petitioner having been heard on the matter of Center Excom Resolution No. 03-05-99 (the Excom Resolution), which petitioner learned of for the very first time through reference thereto made in the November 3, 1999 DOF/Center letter[20]. To date, the DOF/Center had not replied petitioner's request for reconsideration[21].

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[17] *Id.*, par. 20.
[18] *Id.*, par. 21.
[19] *Id.*, par 22.
[20] *Id.*, par. 23.
[21] *Id.*, par. 24.

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

TRANSFEROR	*BASIC TAX*	*SURCHARGE*	*INTEREST*	*TOTAL*
Alliance Thread Co., Inc.	26,913,843.00	13,456,921.50	25,252,519.88	65,623,284.38
Allstar Spinning, Inc.	78,646,612.00	39,323,306.00	68,073,877.13	186,043,795.13
Diamond Knitting, Inc.	37,740,161.00	18,870,080.50	37,049,776.48	93,660,017.98
Express Colour Inds., Inc.	37,478,551.00	18,739,275.50	30,121,602.68	86,339,429.18
Fiber Technology Corp.	34,802,087.00	17,401,043.50	32,346,287.03	84,549,417.53
Filstar Textile Ind'l. Corp.	3,893,671.00	1,946,835.50	3,893,671.00	9,734,177.50
FLB Int'l Fiber Corp.	28,147,962.00	14,073,981.00	24,674,190.40	66,896,133.40
Jantex Phils., Inc.	38,144,100.00	19,072,050.00	34,630,476.83	91,846,626.83
Sub-Total	285,766,987.00	142,883,493.50	256,042,401.43	684,692,881.93

Attached to this purported "Assessment" is a list of the allegedly cancelled TDMs and the TCCs for which these TDMs were issued. Said TDMs and related TCCs are all part of the TDMs and related TCCs subject matter of CTA Case No. 5728 (as listed in the attachment to the April 22, 1998 collection letter sent by the Revenue District Officer of Revenue District No. 50 of the BIR[22].

Petitioner protested the said assessment in a letter dated December 2, 1999 *(Exhibit K)*. Respondent denied petitioner's protest on December 28, 1999 *(Exhibit A)*. The instant petition was filed on January 31, 2000.

In addition, the parties have jointly admitted the following facts in open court during the pre-trial held on April 7, 2000, to wit:

1. Respondent and/or the BIR based the purported "Assessment" dated November 15, 1999 solely on findings made by the DOF/Center.

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[22] Id., par. 26.

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2. The BIR never served Petitioner a notice for preliminary conference nor was any preliminary conference under BIR Regulations No. 12-99 ever held between Petitioner and the BIR prior to issuance of the purported "Assessment" dated November 15, 1999.

3. No preliminary assessment pursuant to Revenue Regulations No. 12-99 was ever issued by the BIR against Petitioner.

4. The ATAPETs issued by the BIR for the taxes covered by the TCCs involved in this case serve as confirmation of the correctness of the amount of excise taxes paid by Petitioner during the tax years in question.

5. The excise taxes and TCCs involved in this case are part of those included and passed upon by the Honorable Court in CTA Case No. 5728, now subject of a pending petition with the Court of Appeals in CA-G.R. SP No. 55329.

6. More than three (3) years have passed since the deadline for filing of excise tax returns for tax years 1992, 1994, 1995 and 1996.

7. The BIR never conducted any preliminary investigation pursuant to Revenue Memorandum Order No. 15-95 dated June 9, 1995 to establish any indication of fraud in this case.

In his answer, respondent raised the following Special and Affirmative Defenses:

a) The assessment is based on the fact that the Tax Debit Memos (TDM's) issued to petitioner and their related Tax Credit Certificates (TCC's) and TCC transfers, which were used by it in the payment of excise taxes, were cancelled by the Secretary of Finance. With such cancellation, the TDM's and TCC's have no value in money or money's worth and, therefore, the excise taxes for which they were used as payment are now deemed unpaid;

b) The cancellation by the Secretary of Finance of the TDM's and TCC's issued to petitioner and their related TCC's and TCC transfers has the presumption of regularity upon which respondent may validly rely;

c) Since the assessment involves non-payment of excise taxes, a pre-assessment notice is not required pursuant to Section 228 of the Tax Code;

d) Prior to the issuance of the assessment, petitioner was informed by the Secretary of Finance of the cancellation of the TDM's issued to it and their related TCC's and TCC transfers, which were used by

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it in the payment of excise taxes, and the reasons for their cancellation. Since the assessment is based on such cancellation, as stated in the assessment itself, petitioner is deemed to have been informed of the law and the facts on which the assessment is made in compliance with Section 228 of the Tax Code;

e) Based on the findings of the One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center of the Department of Finance, the TCC's transferred to petitioner were fraudulently obtained, hence, null and void from the very beginning. Furthermore, the transfers of the TCC's to petitioner were fraudulent since it executed fictitious supply agreements whereby it was made to appear that petitioner delivered fuel oil to textile mills in consideration for the TCC's when in fact there were no such deliveries;

f) Petitioner used the TCC's fraudulently obtained and fraudulently transferred to it in the payment of excise taxes declared in its excise tax returns with intent to evade tax, to the extent of the value represented by the TCC's, thereby rendering the returns fraudulent;

g) Since petitioner filed fraudulent returns with intent to evade tax, the right of the government to assess the tax is ten (10) years from the discovery of the fraud pursuant to Section 222 of the Tax Code;

h) Since petitioner willfully filed fraudulent returns, it is liable for the 50% surcharge and 20% annual interest imposed under Sections 248 and 249 of the Tax Code;

i) The government is never estopped from collecting legitimate taxes due to the error committed by its agents[23]. The acceptance by the Bureau of Internal Revenue of the TCC's fraudulently obtained and fraudulently transferred to petitioner in the payment of the excise taxes turned out to be a mistake. Hence, said payments were void, and the excise taxes may be validly collected from the petitioner;

j) The rule on litis pendentia does not apply. The case pending in the Court of Appeals, [C.A.-G.R. Sp. No. 55329 (CTA Case No. 5728)] and the case at bar have distinct causes of action. The former involves the invalid transfers of the TCC's to petitioner on the theory that it is not a qualified transferee thereof, while the latter involves the fraudulent procurement of said TCC's and the fraudulent transfers thereof to petitioner;

[23] Citations deleted.

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> k) The assessment was issued in accordance with law and regulations; and
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> l) All presumptions are in favor of the correctness of tax assessments[21].

To bolster its case petitioner submitted voluminous documents and presented its lone witness in the person of Mr. Pacifico R. Cruz, the General Manager for Treasury and Taxation of petitioner. Respondent, for his part, likewise submitted numerous documents to support his stand and presented Mrs. Beverly Taneza-Basman, Tax Specialist II of the One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center of the Department of Finance.

Upon the admission of petitioner's reply memorandum, the case was deemed submitted for decision on September 20, 2002. However, on April 25, 2003, respondent filed an Urgent Motion to Withdraw Certain Admissions which this court denied for the reason, among others, that respondent failed to convincingly demonstrate that the admissions sought to be withdrawn were made through palpable mistake *(CTA Records, pages 696-701)*.

The parties have jointly stipulated the issues to be resolved in this case, as follows:

> 1) Whether or not the issuance of the "Assessment", the Letter-Denial and the enforcement of the Excom Resolution constitute violations of Petitioner's right to due process of law.
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> 2) Whether or not the "Assessment" fails to comply with statutory, as well as administrative requirements.
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> 3) Whether or not the BIR/Respondent can still validly issue the "Assessment", considering that the taxes subject thereof are included in and have already been made subject of CTA Case No.

[21] Citation deleted.

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5728, now presently pending before the Court of Appeals in CA-G.R. SP No. 55329.

4) Whether or not the TDMs and the related TCCs, and the transfers and utilization thereof can be validly, legally, and justly cancelled.

5) Whether or not the TCCs transferred to Petitioner were fraudulently obtained.

6) Assuming *arguendo* that the TCCs transferred to petitioner were fraudulently obtained, whether or not such fraud will work to the prejudice of Petitioner.

7) Whether or not Petitioner executed fictitious supply agreements.

8) Whether or not the TDMs and the related TCCs are already *functus officio* and can no longer be cancelled.

9) Whether or not the use by Petitioner of the TCCs transferred to it constitute fraud with intent to evade tax.

10) Whether or not Respondent's authority to assess and collect the excise taxes subject of the Petition has already prescribed.

11) Whether or not Respondent can validly, legally and justly impose surcharge and interest on the deficient taxes.

Some of the issues so stipulated are interrelated and intertwined that we deem it proper and orderly to simplify them into:

(1) Whether or not the assessment issued against petitioner fails to comply with the statutory as well as administrative requirements thereby constituting a violation of petitioner's constitutional right to due process;

(2) Whether or not respondent's right to assess and collect the excise taxes subject of the petition has already prescribed;

(3) Whether or not the respondent can still validly issue the subject assessment considering that the taxes subject thereof are included in and have already been made subject of CTA Case No. 5728, now presently pending before the Court of Appeals in CA-G.R. Sp. No. 55329;

(4) Whether or not the TCCs transferred to petitioner were fraudulently obtained;

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(5) Assuming *arguendo* that the TCCs transferred to petitioner were fraudulently obtained, whether or not petitioner participated in the fraudulently procurement thereof. If not, whether or not such fraud will work to the prejudice of the petitioner;

(6) Whether or not the use by petitioner of the TCCs transferred to it constitute fraud with intent to evade tax so that respondent can validly, legally and justly impose surcharge and interest on the deficient taxes; and

(7) Whether or not the TDMs and the related TCCs and the transfers and utilization thereof can be validly, legally and justly cancelled.

Petitioner strongly argues that its constitutional right to due process has been violated for it was not informed of the facts and the law on which the assessment was based. Respondent asserts otherwise.

On this issue, we agree with the respondent.

On August 31, 1999 *(Exhibit C)* and September 1, 1999 *(Exhibit D)*, the Secretary of Finance informed petitioner of the post-audit being conducted by the Center on all previously issued and transferred TCCs pursuant to Section 3 of Administrative Order No. 266 *(Creating a One-Stop-Shop Inter-Agency Tax Credit and Duty Drawback Center for the Processing of All Tax Credits and Duty Drawbacks, Defining its Powers, Duties and Functions, and for Other Purposes)*. Petitioner was then requested to submit to the Center certified copies of the sales invoices and delivery receipts showing consummation of the sales transactions of the involved TCCs. And failure to submit the required documents would result to the cancellation of the transferred TCCs. On October 18, 1999, the Secretary of Finance made another follow-up letter to the petitioner *(Exhibit E)*. Petitioner was further informed that the Center could not furnish petitioner the Deeds of

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Assignment and attachments it requested due to the voluminous number of documents involved. However, petitioner may send a representative to the Center to look over and examine the same. Petitioner, instead of complying with the request of the Secretary of Finance wrote a letter on October 29, 1999 *(Exhibit F)* alleging, among other things, that the requirement to furnish the Center of the sales invoices and delivery receipts has no legal basis. Petitioner even went on to surmise that the submission requirement of the said documents was based on Memorandum of Agreement dated August 29, 1989 which required that the assignee or transferee of a TCC must be a supplier of raw materials or components to the assignor or transferee, in addition to the requirement set forth under the 1982 Memorandum of Agreement that the assignee or transferee be likewise a BOI registered company. These belie petitioner's averments that it was not informed of the facts and the law leading to the cancellation of the TDMs and the related TCCs and TCC transfers which in turn led to the subject assessment. Petitioner knew all along that it could not submit the documents required by the Center because it admitted that other than the Deeds of Assignment, it executed no other documents to support the Deeds of Assignment. Petitioner claimed that it had no reason to do so.

In a letter dated November 3, 1999, petitioner was informed of the cancellation of the listed TDMs issued to it and the related TCCs and TCC transfers that were used in the payment of duties and taxes pursuant to Center Excom Resolution No. 03-05-99. Accordingly, it was advised to pay the agency concerned the corresponding amount utilized on the subject TCCs as evidenced by the TDMs *(Exhibit G)*.

All in all, it can be gleaned that petitioner was aware of the antecedent facts and proceedings leading to the issuance of the assessment by the BIR on November 15, 1999 *(Exhibit J)*. It was forewarned that its failure to submit the sales invoices and delivery

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receipts would result to the cancellation of the TCCs and TDMs. It was informed of the basis for the cancellation of the TCC and TDMs which cancellation, in turn, was the basis for the assessment. In this respect, the constitutional right to due process has been complied with.

Petitioner further asseverates that the right of the respondent to assess and to collect the excise taxes subject of this petition has already prescribed. It is undisputed that more than three years have passed since the deadline for the filing of excise returns for tax years 1992, 1994, 1995 and 1996 *(Admitted Fact, Pre-Trial conference, April 7, 2000)*. Nevertheless, respondent is of the firm belief that the assessment he issued has not prescribed because he has ten (10) years within which to assess petitioner. He contends that the TCCs transferred to petitioner were fraudulently obtained, thus, null and void *ab initio*. Furthermore, the transfers of the TCCs to petitioner were fraudulent since petitioner executed fictitious supply agreements wherein it was made to appear that petitioner delivered fuel oil to textile mills in consideration for the TCCs when in fact there were no such deliveries. In addition, petitioner used the TCCs fraudulently obtained and fraudulently transferred to it in the payment of excise taxes declared in its excise tax returns with intent to evade tax, to the extent of the value represented by the TCCs, thereby rendering the returns fraudulent. According to the respondent, since petitioner filed fraudulent returns with intent to evade tax, the right of the government to assess the tax is ten years from the discovery of the fraud pursuant to Section 222 of the Tax Code.

We are initially persuaded by respondent's position insofar as the counting of the prescriptive period is concerned. It must be borne in mind that the assessment came about because the corresponding TDMs and their related TCCs transfers were cancelled

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by the Center. The cancellation was due to the finding of fraudulent procurement and fraudulent transfer thereof. Without such finding, there would have been no cancellation leading to the issuance of the subject assessment by the respondent. This does not mean, however, that we are in agreement with the respondent that fraud existed in this case. Fraud is a question of fact which must be alleged and proved. It is a serious charge and to be sustained, it must be supported by clear and convincing proof[25]. In other words, respondent must prove with incontrovertible evidence the existence of fraud in this case for fraud cannot be imputed by mere assumptions.

We will now delve on the third issue of whether or not the respondent can still validly issue the challenged assessment considering that the excise taxes subject thereof are included in and have already been made subject of CTA Case No. 5728.

We rule in the affirmative.

While the TCCs subject of this case are admittedly the same TCCs subject of CTA Case No. 5728 [now presently pending before the Court of Appeals], it is our considered opinion that the two cases have distinct causes of action. The petition before the appellate court assails this court's ruling upholding the validity of the transfers of the TCCs to petitioner on the theory that the latter is not a qualified transferee thereof. The validity of the issuance of said TCCs was never an issue. Thus, it would seem that the subject TCCs were considered valid and the same could be validly transferred. The controversy arose only when the status of petitioner as a transferee was put into question because it is respondent's view that petroleum products do not form part of the goods manufactured by the transferors. However, in the present case, the very issuance of the

[25]Republic vs. Ker & Co.,Ltd., 18 SCRA 207; Commissioner of Internal Revenue vs. Ayala Securities, 70 SCRA 204.

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same TCCs is being questioned as well as the fraudulent transfers thereof to petitioner. It must also be emphasized that when the appealed case was filed before this court, the post audit had not yet been conducted. Logic dictates that respondent could not have raised the issue of fraudulent procurement and fraudulent transfers of said TCCs.

Anent the fourth issue, we find that respondent failed to prove with clear and convincing evidence that the TCCs transferred to the petitioner were fraudulently issued.

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

The post-audit on the controversial TCCs showed that the companies to which they were issued did not export at the volume they had represented to the Center, and therefore, the basis for the approval of the TCCs were spurious export documents. According to respondent's witness, the TCCs were granted based on the applicant's alleged export transactions. However, these export transactions were not declared or reflected in the audited financial statements as represented to the Center for the tax credit claim (*TSN, June 26, 2001, pages 17-18; page 32, TSN, August 16, 2001, pages 8-9*). The conclusion reached by the Center was that these export transactions represented to the Center did not take place (*TSN, June 26, 2001, page 19*) or that either the company-applicant did not export at the volume it had represented to the Center or underdeclared its sales figures in the financial statements (*TSN, June 26, 2001, pages 33-34*).

We are not convinced.

An assessment fixes and determines the tax liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. Hence, an assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be *(Collector of Internal Revenue vs. Benipayo, 4 SCRA 182)*.

The respondent likewise submitted the BOI Certificates of Registration of the involved companies (*Exhibits 2-I, 2-J, 3-H, 6-J, 7-I, 8-I, 9-I, 10-I*) to show the registered capacity of the respective firm or the volume of registered product that each could produce in a year (*Exhibits 2-I-1-a, 2-J-1-a, 3-H-1-a, 6-J-1-a, 7-I-1-a, 8-I-1-a, 9-I-1-a, 10-I-1-a*). Further, respondent theorized that the cost of the machinery and equipment of the plant of each firm as reflected in the financial statements (*Exhibits 2-H-1 to 2-H-8, 3-G to 3-G-6, 5-b to 5-c-1, 6-H to 6-I-5, 7-H to 7-H-6, 8-H to 8-H-5, 9-H to 9-H-4, 10-H to 10-H-5*) could not have produced the volume of registered product that it can produce in a year as set forth in the BOI Certificate of Registration. Consequently, the corresponding cancellation memoranda were issued (*Exhibits 2, 2-a, 2-b, 2-c, 3, 3-a, 3-b, 3-c, 4, 4-a, 4-b, 5, 5-a, 6, 6-A, 6-B, 7, 7-A, 7-B, 7-C, 8, 8-A, 8-B, 8-C, 9, 9-A, 9-B, 9-C, 10, 10-A, 10-B, 10-C*). Invariably, the conclusion in the said cancellation memoranda was that there were two possibilities. One: the grantee of the TCC did not actually export the volume it represented to the Center on the basis of which the TCCs were issued. Two: the company committed massive fraud in the declaration of the financial performance (*TSN, August 16, 2001, pages 9 & 10*). Financial performance meant export

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sales or export transactions and massive fraud meant that there were really export sales in the volume as represented but the company did not declare the correct volume of sales. In either case, the grantee should have been disqualified to be granted with TCC as well as use the same (*ibid, page 11*). Fraud must be proved to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by mere speculation because fraud is never lightly to be presumed *(Philippines Commercial Bank vs. Commissioner of Internal Revenue, CTA Case No. 5003, February 4, 1997).*

Surprisingly, respondent is not certain if there is such a requirement from the Omnibus Investments Code (E.O. 226) that export sales on the basis of which the TCCs were issued, should be reflected in the audited financial statements of the company. Nor can respondent state with certitude that there is a provision in the Rules and Regulations Implementing E.O. 226, requiring that the export sales or transactions be reflected in the audited financial statement before they can be used as bases for the issuance of the TCCs *(TSN, August 26, 2001, pages 12 & 13)*. Moreover, as testified to by respondent's witness, a company may apply for a tax credit anytime after the export subject to certain documentary requirements *(TSN, July 18, 2001, pages 45 & 46)*. So it was possible that TCCs were issued sixty days or ninety days after the export. *(ibid, page 47)*. And a company which was issued a TCC may be able to utilize the same for the payment of its taxes and duties within a month or even two weeks *(TSN, August 16, 2001, pages 13-17)*. Therefore, a TCC issued in March for a sale transaction made in January may have been used to pay the taxes and duties in June or even earlier, long before the required audited financial statements was prepared. In short, this export transaction naturally could not have been disclosed or reported in the audited financial statement before the company may utilize the TCCs issued to it *(ibid, pages 18-30)*. In other words, for purposes of

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utilization of the TCCs by a company, a declaration of its export sales in the financial statement is not necessary because an audited financial statement is required only in April 15 of the next taxable year (assuming that a calendar basis of accounting is being adopted). The same is true with the granting of the TCCs. Besides, absent the sales invoices or equivalent documents setting forth the export sales reported by the TCC applicant, there is nothing with which the sales figure reported in the financial statements could be compared with. Neither the Center nor the respondent could unequivocally state what sales figure was used as basis of the TCCs being issued. In the same way that the cost of the claimant's machinery and equipment could not be taken as the basis in concluding that said machinery and equipment could not have produced the volume of products indicated in the firm's BOI Certificate of Registration as its registered capacity in view of respondent's failure to show the correlation between the cost of a plant and the volume of products it could produce.

Worse still, the Center based its findings (which findings were adopted by the respondent) on two possibilities: either the company-applicant did not declare its export sales or underdeclared the same. Therefore, it was not even able to identify the specific fraudulent acts, if any, made by the claimant/s in the procurement of the subject TCCs. It is imperative that fraud be proven by clear and convincing evidence, and not by mere conjectures or speculations[26]. Fraud must be established by clear and convincing evidence - mere preponderance of evidence is not even adequate to prove fraud[26a]. The Supreme Court steadfastly ruled that the fraud contemplated by law must be actual and not constructive. It must be intentional, consisting of deception willfully and deliberately

[26] Sanchez vs. Court of Appeals, 279 SCRA 647.
[26a] Maestrado vs. Court of Appeals, 327 SCRA 678.

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done or resorted to in order to induce another to give up some right *(Transglobe International, Inc. vs. Court of Appeals, 302 SCRA, 57, citing Aznar vs. Court of Tax Appeals, 58 SCRA 519 and Farolan, Jr. vs. Court of Tax Appeals, 217 SCRA 298).*

Respondent also contends that the transfers of the TCCs to petitioner were fraudulent since petitioner executed fictitious supply agreements whereby it was made to appear it delivered fuel oil to textile mills in consideration for the TCCs when in fact there were no such deliveries. The financial statements of the companies show that they were not using fuel oil at the levels disclosed to the Center. These supposed transactions were the bases for the approval of the transfers of the said TCCs. According to the respondent, the fact that petitioner failed to submit copies of the sales invoices and delivery receipts showing consummation of said transactions is enough proof of its fraudulent participation. Moreover, the Center has in its possession duly executed affidavits of the former General Managers of the companies stating that they have not signed any document transferring TCCs to oil companies or entering into delivery contracts with any oil company as found in the transfer folders of the companies *(Exhibits 2-g, 3-f, 6-G, 8-G, 9-G and 10-G).*

We disagree.

Even before the cancellation of the TDMs and their related TCCs and TCC transfers, petitioner already admitted to the Center that, save for the Deeds of Assignment it executed, it did not furnish the transferors with sales agreements, certifications, pro forma invoices or other equivalent documents to support the said deeds *(see Exhibit F).* Nor did such Deeds of Assignments make reference to said documents *(Exhibit QQ to IIIII).* It was for this reason that petitioner could not furnish the Center copies of the sales invoices and delivery receipts and not because it refused to submit the documents it purportedly executed. In fact, petitioner has challenged respondent to produce these fictitious supply agreements allegedly executed by the former together with the other documents referred to in the cancellation memoranda as "spurious, tampered, altered or fake". Respondent was not able to do so. Having alleged fraud, respondent has the burden of proving the same. In the present case, we find that respondent miserably failed to do so.

The above-mentioned affidavits cannot be given credence by this court either. The supposed affiants were never presented before this court to testify on the due execution of said affidavits thereby rendering the same as hearsay evidence. A sworn statement is absolute inadmissible in evidence for being hearsay, where the affiant himself never took the witness stand during trial *(People vs. Santos, G.R. 62072, November 11, 1985; People vs. Mosquerra, 362 SCRA 441)*. In fact, during the hearing of December 3, 2001, these persons who purportedly executed the alleged affidavits did not appear and counsel for the respondent dispensed with the testimonies of said persons *(CTA Records, page 523)*. Besides, petitioner persists that it is not required to execute any supply agreement to be a transferee of the TCCs. Being a BOI registered entity was enough. Hence, there was never a cause for petitioner to execute the questioned documents. It is worth mentioning also that it has been found by both the Office of the Ombudsman and the Sandiganbayan that petitioner, thru Mr. Pacifico R. Cruz, did not participate or execute any supply agreement relative to the issuance of the questioned TCCs. And the participation of Mr. Cruz came after the applications for transfer were processed and approved *(Exhibit P^{17} & Q^{17})*.

We notice that the above postulation of the respondent is premised on the assumption that there is a legal requirement that a TCC may be transferred only to the petitioner if the latter makes fuel oil deliveries to the transferor in consideration for the transfer. Simply put, the assignee or transferee must be a supplier of raw materials or components to the assignor or transferor. Petitioner's principal stand is that it had no reason to do so nor required to be so, relying upon the provisions of the E.O. No. 226 as implemented by Rule VII of the Rules and Regulations and as supplemented by Memorandum of Agreement dated October 5, 1982 (1982 MOA).

Section 39(k) of E.O. 226 is hereunder quoted for clarity:

> (k) *Tax Credit for Taxes and Duties on Raw Materials.* – Every registered enterprises shall enjoy a tax credit equivalent to the National Internal Revenue Taxes and Customs duties <u>paid on the supplies, raw materials and semi-manufactured products used in the manufactured products used in the manufacture, processing or production of its export products and forming parts thereof</u>: *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. (Underscoring supplied.)

Clearly from the foregoing, the requirement that supplies should form part of the export product before a BOI-registered enterprise can enjoy a tax credit applies only to an export producer or original grantee of the TCCs and not to a transferee thereof. The law does not require that the transferee must be a component supplier of the export producer as it in fact doest not contain any provision regarding the transfer of a TCC. It is Article 21 of the same law which governs the conditions affecting the transferability of TCCs, *viz*:

> ART. 21. *"Tax Credit"* shall mean any 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. <u>The tax credit certificates including those issued by the Board pursuant to law 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</u>. The tax credit

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certificate shall be used to pay taxes, duties, charges and fees due to the National Government. (Underlining ours.)

Corollary thereto, Rule VII of the BOI Rules and Regulations provides:

RULE VII. TRANSFERABILITY OF TAX
CREDIT CERTIFICATE

Tax credit certificates for taxes and duties that would have been paid on domestic capital equipment purchased, and on raw materials, supplies and semi-manufactured products used in the manufacture, processing or production of its export products and forming part thereof shall be issued by the Secretary of Finance or his representative, or by the Board, if so delegated by the Secretary of Finance.

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

The requirement that the transferee must be a domestic raw material or component supplier of the transferor refers only to tax credits not covered by the memorandum of agreement. Otherwise, the memorandum of agreement between the Department of Finance and the Board of Investments dated October 5, 1982 (Exhibit MM) shall govern. The 1982 MOA is being partly reproduced below:

NOW, THEREFORE, for and in consideration of the foregoing premises, the MOF and the BOI, through their respective representatives, have agreed on the following guidelines to govern the transferability of tax credit certificates:

1) All tax credit certificates issued to BOI-registered enterprises under P.D. 1789 may be transferred under conditions provided herein;

2) The transferee should be a BOI-registered firm;

3) The transferee may apply such tax credit certificates for payment of taxes, duties, charges or fees directly due to the national government for as long as it enjoys incentives under P.D. 1789.

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Notably, Memorandum of Agreement dated August 29, 1989 (1989 MOA) made some changes, as follows:

> "Sec. 2. The first three (3) paragraphs of the guidelines contained in the aforementioned Memorandum of Agreement are hereby reworded to read as follows:
>
> "1) Henceforth, all tax credit certificates, except for net local content (NCL) and Net Value Earned (NVE), issued to BOI-registered enterprises under EO 226, PD 1789 and PD 1789 as amended by BP 391 on or after the effectivity date hereof, may be transferred under conditions provided herein.
>
> "2) **The transferee should be a BOI-registered firm which is a domestic capital equipment supplier or a raw material and/or component supplier of the transferor.**
>
> "3) The transferee may apply such tax credit certificates for payment of taxes, duties, charges or fees directly due to the national government for as long as it enjoys BOI incentives under its law of registration.

In the conduct of the post-audit, the Center used the 1989 MOA as basis for the transfer of the TCCs *(TSN, July 18, 2001, pages 35-39)*. Yet, petitioner vehemently avows that 1989 MOA is invalid and ineffective and therefore could not have amended the 1982 MOA.

We are inclined to agree with the petitioner.

If the 1989 MOA has validly amended the 1982 MOA, it would have been incorporated either expressly or by reference in Rule VII of the Implementing Rules and Regulations (IRRs) of E.O. 226. To date, said Rule VII has not been repealed, amended or otherwise modified. It is noteworthy that the 1999 edition of the official publication by the BOI of E.O. 226 and its IRRs *(Exhibit R)* which is the latest version, as amended, has not mentioned expressly or by reference 1989 MOA. The MOA mentioned therein is still the 1982 MOA.

The 1982 MOA, although executed as a mere agreement between the DOF and the BOI, was elevated to the status of a rule and regulation applicable to the general public by reason of its having been expressly incorporated in Rule VII of the IRRs. On the other hand, the 1989 MOA which purportedly amended the 1982 MOA, remained a mere agreement between the DOF and the BOI because, unlike the 1982 MOA, it was never incorporated either expressly or by reference to any amendment or revision of the said IRRs. Thus, it cannot be the basis of any invalidation of the transfers of TCCs to petitioner nor of any other sanction against petitioner.

Even assuming, for the sake of argument, that the 1989 MOA could be considered an amendatory rule or regulation, still, it could not be valid and effective as such, particularly, as a basis to impose a sanction on a third party like herein petitioner, because the mandatory requirements of Book VII, Chapter 2 of Executive Order No. 292, otherwise known as the Administrative Code of 1987, have not been complied with.

The pertinent provisions of said law state:

> "**Section 3**. ***Filing*** – (1) Every agency shall file with the University of the Philippines Law Center three (3) certified copies of every rule adopted by it. **Rules in force on the date of effectivity of this Code which are not file within three (3) months from the date shall not thereafter be the basis of any sanction against any party or persons.**
>
> (2) The records officer of the agency, or his equivalent functionary, shall carry out the requirements of this section under pain of disciplinary action.
>
> (3) A permanent register of all rules shall be kept by the issuing agency and shall be open to public inspection.
>
> **Section 4**. ***Effectivity***. – In addition to other rule-making requirement provided by law not inconsistent with this Book, **each rule shall become effective fifteen (15) days from the date of filing as above provided** unless a different date is fixed by law, or specified in the rule in cases of imminent danger to public health, safety and welfare, the

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> existence of which must be expressed in a statement accompanying the rule. The agency shall take appropriate measures to make emergency rules know to persons who may be affected by them.
>
> Section 5. x x x
>
> xxx xxx xxx
>
> (2) Every rule establishing an offense or defining an act which, pursuant to law, is punishable as a crime or subject to a penalty shall in all cases be published in full text." (Emphasis supplied.)

A certification from the Office of the National Administrative Register, UP Law Center, dated October 8, 1999 *(Exhibit P)* attests to the fact that the 1989 MOA or, for that matter, any amendment to the Rules and Regulations Implementing E.O. No. 226, has not been filed and published, as required by the aforequoted provisions of E.O. No. 292. *A fortiori*, the 1989 MOA never became effective as an administrative rule or regulation. The Supreme Court has consistently declared as legally invalid, defective and unenforceable administrative rules and regulations that have failed to comply with the publication requirements of said law[27].

Proceeding to the next issue, we rule that the use by petitioner of the TCCs transferred to it does not constitute fraud with intent to evade taxes. Therefore, respondent cannot validly, legally and justly impose surcharge and interest on the alleged deficient excise taxes.

As earlier discussed, respondent failed to establish with absolute proof that petitioner has any participation in the procurement of the TCCs. Respondent did not prove to the satisfaction of the court that the procurement of the TCCs was fraudulent and that petitioner had any hand on it. As a matter of fact, respondent did not present the

[27] Phil. Int'l Trading Corp. vs. Angeles, 263 SCRA 421; Phil. Asso. Of Service Exporters, Inc. vs. Torres, 212 SCRA 298; Al-Amanah Islamic Investment Bank of the Phils., vs. CSC, 207 SCRA 801.

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alleged fictitious supply agreements and other spurious documents executed by petitioner allegedly used as bases by the Center in the approval of the issuance of the TCCs. All in all, respondent's allegations without sufficient foundation, must, like a sandcastle, crumble.

Petitioner believes that its tax obligations for 1992, 1994 to 1997 had been paid when it utilized the TCCs transferred to it, taking into account that all the necessary authorizations and approvals attendant to the TCC transfers and utilization were present. These facts are undisputed[28]. The transfers of the TCC from the original holders thereof to petitioner were duly approved by the Center, composed of not just one, but a number of government agencies, the BIR being one of them. Such approval was indicated by an annotation on the reverse side of the TCCs. To further indicate its approval and utilization for petitioner to utilize the transferred TCCs as payment of its tax liabilities, the Center issued the TDMs. *(Exhibits UUUUUUUUU to CCCCCCCCCCCCC).* Likewise, the BIR signified its approval and acceptance of the TCCs as valid payments for petitioner's tax liabilities when it issued its own TDMs *(Exhibits DDDDDDDDDDDDD to NNNNNNNNNNNNNNNN)* in response to petitioner's request to utilize subject TCCs upon presentation of these TCCs and the Center's TDMs to the BIR. The acceptance of the TCCs as valid tax payments is further evidenced by the issuance by the BIR of its Authority to Accept Payment of Excise Taxes (ATAPETs) covering the said BIR-issued TDMs *(Exhibit L, M, N, S to LL & OO)*, which, together with petitioner's checks forming part of the total tax payments, were duly acknowledged and received by the BIR's authorized agents banks *(Exhibits S-1, S-2, T-1, T-2, U-1, U-2, V-1, V-2, W-1, W-2, X-1 X-2, Y-1, Y-2, Z-1, Z-2, AA-1, AA-2, BB-1, BB-2, CC-1, CC-2,*

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DD-1, DD-2, EE-1, EE-2, FF-1, FF-2, GG-1, GG-2, HH-1, HH-2, II-1, II-2, JJ-1, JJ-2, KK-1, KK-2, LL-1, LL-2, OO-1 & OO-2). Again, it cannot be refuted that not just one approval, but several approvals were secured by the petitioner before it utilized the transferred TCCs. And in each approval, it can be assumed that the government agencies concerned scrutinized meticulously and exhaustively verified the genuineness and authenticity of the TCCs as well as the validity of the issuances thereof. In sum, the utilization by the petitioner of the transferred TCCs did not constitute fraud with intent to evade taxes. Moreover, the parties jointly stipulated in open court that the ATAPETs issued by the BIR for the taxes covered by the TCCs involved in this case serve as confirmation of the correctness of the amount of excise taxes paid by petitioner during the tax years in question[29].

As regards the final issue of whether or not the TDMs and the related TCCs and the transfers and utilization thereof can be validly, legally and justly cancelled, we rule in the negative.

All things considered, the alleged fraud on which respondent appears to rely upon is the fraud attendant to the issuance and transfers of the original TCCs. We find that the TCCs themselves are genuine and authentic for the respondent failed to prove otherwise. It cannot be over emphasized that neither the Center nor the respondent has challenged, questioned or disputed the genuineness or authenticity of the TCCs. All the allegations of fraud relate to the documents supporting the application for the issuance and transfers of the said TCCs. To repeat, the original TCCs on their face were reviewed by the different government agencies involved and represented in the Center prior to their

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[28] Joint Stipulation of Facts, par. 5.
[29] April 7, 2000.

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issuance. The said TCCs were issued and signed by the proper government officials. The transfers of the TCCs and their utilization as payment for certain excise tax obligations of petitioner as well as the issuance of the Center TDMs and the BIR TDMs were also duly authorized, approved and accepted by the government agencies concerned.

We agree with the petitioner that the TDMs and their related TCCs are for all intents and purposes checks and warrants issued by the government. This is precisely the reason why they are acceptable as tax payments. TDMs and TCCs only differ from ordinary checks in a sense that the former have limited negotiability and that they could be used only for payment of taxes. When a check has been honored by the drawee bank, the drawer may no longer cancel the same or, in banking parlance, ask the bank to "stop payment". By parity of reasoning, after a TDM and its corresponding TCC had been applied in payment of a tax, they may no longer be cancelled. In both instances, the document or instrument has already expired and no longer exists or has become *functus officio*.

> The phrase "functus officio" literally means "having discharged his duty", and practically it describes a legal document which has fulfilled its purpose and hence has spent its force and lost its motive power, as where a judgment has once been entered upon a confession and warrant, a subsequent judgment cannot be entered even if the purpose is to correct an error in that judgment[30]
>
> The term "functus officio" is applied to something which once has had life and power but which has become of no virtue whatsoever. The term is applied to an officer whose term has expired, and who has consequently no further official capacity; and also to an instrument, power, agency, etc., which has fulfilled the purposes of its creation and is

[30] In re Borough of Derry, 70 A.2d 127, 129, 168 Pa. Super 415, cited in 17A Words and Phrases, at 540-541.

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> therefore of no further virtue or effect. The term also applied to something which once had validity and power but which has become of no value[30a].

In the same manner, the TCCs and TDMs having been applied for payment, have spent their force and ceased to exist and can no longer be cancelled. For if the full value of the TCC has been utilized, the same become worthless or valueless[31]. Yet, what is clear in the case at bench is the fact that the Center cancelled the subject TCCs which have been fully utilized, meaning, they have already been used and have zero balance, so that the government can initiate measures to recover what were utilized and for the users to return whatever were utilized as payment of tax obligations[32].

We consider petitioner to be on solid ground for insisting that what the government is actually trying to do in the present case, is not really to cancel the TCCs since they are already valueless and there is nothing more to cancel, but to collect taxes which have already been paid. And the basis for said cancellation was Center Excom Resolution No. 03-05-00.

We declare that the Center is not vested with authority to cancel the TCCs.

The law which governs the grant of incentives to BOI registered enterprises, such as the tax credits, is Executive Order No. 226 or the Omnibus Investments Code. Article 3 of Chapter II thereof explicitly provides that "The Board of Investments shall implement the provisions of Book One to Five of this Code." *Ergo*, any cancellation or revocation of incentives granted to qualified entities falls within the powers of the Board of Investments and not with the Center. This is so because the Center was created by Administrative Order No. 266 mainly for the purpose of achieving an orderly and

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[30a] Words and Phrases, Perm. Ed., Vol. 17, page 800.
[31] TSN, August 16, 2001, page 47.
[32] *Ibid*, page 48.

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expeditious processing of tax credit availments or duty drawbacks, then administered by various government agencies, which resulted in varying documentation requirements, longer processing time and a considerable number of pending applications. The powers, duties and functions of the Center are hereunder enumerated for easy reference:

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

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

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

Without any doubt, the authority to invalidate or cancel TCCs, TDMs or TCC transfers has not been vested upon the Center. It follows that the Center's authority to promulgate rules and regulations under Section 3.a cannot be the basis for Excom Resolution's providing for the cancellation of the TCCs relative to Section 3.e. It is enlightening that Committee Report No. 510 *(Exhibit 15)* contains the following preliminary recommendations:

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

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

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

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

Apparently, any amendment or modification in connection to the grant of tax credits falls within the functions of the legislature. If the present law contains any

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loopholes, it is for the legislators to correct the same. The Center cannot summarily cancel the TCCs pursuant to Section 3.a in relation to Section 3.e of A.O. No. 266. It is axiomatic that the legal authority and power of administrative agencies are limited to those expressly granted or necessarily implied from those granted in the legislation creating such body. Any action taken by the agency without or beyond such authority or power is void and ineffective.

Even assuming, for purposes of academic discussion, that the Center possesses of the power to cancel the subject TCCs, nevertheless, Excom Resolution No. 03-05-99 cannot be a valid basis for the cancellation thereof.

Indeed, said Excom Resolution provides for the "Guidelines and Procedures for the Cancellation, Recall and Recovery of Fraudulently Issued Tax Credit Certificates". But a painstaking review of the same *(Exhibit I)* will reveal that no identification has been made on any "fraudulently issued and transferred" TCCs. Therefore, this should not have been made as the sole basis for the assessment *(Exhibit J & Admitted Fact, pre-trial conference, April 7, 2000)*. Added to that, Excom Resolution No. 03-05-99 abounds with legal infirmities. Being a set of procedure which carries a penal sanction, it should be first published. A certification from the U.P. Law Center, Office of the National Administrative Registers *(Exhibit O)* proves that the requirement under Book VII, Chapter 2 of E.O. No. 292 has not been complied with. Also, Excom Resolution No. 03-05-99 contains unfair and arbitrary provision inasmuch as only the claimant/transferor that is notified of the results of the post-audit conducted by the Center and given the right to explain why the TCCs should not be cancelled and revoked. The transferee, the prejudiced party, is not given such right *(TSN, August 16, 2001, page 46)*. Thus, we reiterate that the TDMs and the related TCCs and their transfers and utilization can no longer be cancelled.

We rule that fraud has to be proved in this case because except for the assessment for taxable year 1997, all the years involved already prescribed. So granting for purposes of argument, that the DOF/Center can still validly cancel the subject TCCs and TDMs and demand payment, the same can no longer prosper due to prescription. Without clear and convincing evidence showing actual fraud, the assessment must fail.

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

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(With Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

CERTIFICATION

I hereby certify that the above 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 Justice

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