REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

EN BANC

PETRON CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB CASE NO. 238
(C.T.A. Case No. 6136)

Members:

ACOSTA, Presiding Justice
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

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DECISION

PALANCA-ENRIQUEZ, J.:

When the tax credit certificates used to pay the excise tax liabilities of the petitioner-assignee were cancelled for having been fraudulently obtained, they have no monetary value even in the hands of the grantee-assignor. More so, in the hands of an assignee. The assignee cannot, after all, acquire a greater right than that pertaining to the assignor *(PNB vs. General Acceptance and Finance Corp., 161 SCRA 457).* Thus, valueless tax credit certificates would not discharge petitioner-assignee's excise tax liabilities.

THE CASE

This is a Petition for Review filed by Petron Corporation (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the Rules of Court*, which seeks the reversal of the Decision dated August 23, 2006, denying the Petition for Review, and the Resolution dated November 23, 2006, denying petitioner's Motion for Reconsideration of the decision, issued by the Second Division of this Court in C.T.A. Case No. 6136. The respective dispositive portions of the Decision and Resolution read as follows:

> "**WHEREFORE**, premises considered, this instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, petitioner is **ORDERED TO PAY** the respondent the amount of **FIVE HUNDRED EIGHTY MILLION TWO HUNDRED THIRTY SIX THOUSAND FIVE HUNDRED FIFTY TWO AND 67/100 PESOS (P580,236,552.67)**, representing deficiency excise taxes for the taxable years 1995 to 1997, computed as follows:
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> | Basic Tax | P284,390,845.00 |
> | Add: | |

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Late Payment		
Surcharge (25%)	P71,097,711.25	
Interest (20%)	224,747,996.42	295,845,707.67
Total		P580,236,552.67

In addition, petitioner is **ORDERED TO PAY** the respondent 20% delinquency interest per annum on the P580,236,552.67, computed from December 4, 1999 until the amount is fully paid.

SO ORDERED".

"**WHEREFORE**, in view of the foregoing, the instant Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

The antecedent facts, as summarized by the Second Division of this Court, are not disputed, thus, the same are hereunder adopted.

Petitioner, Petron Corporation, is a corporation organized and existing under and by virtue of Philippine Law, with principal place of business at Petron Mega Plaza, 358 Sen. Gil Puyat Avenue, Makati City. It is a producer of petroleum products and is a Board of Investments (BOI) registered enterprise in accordance with the provision of the Omnibus Investments Code of 1987 (E.O. 226), under Certificates of Registration No. 89-1037 and D95-136. Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR), the government agency tasked, among others, to collect national internal revenue taxes.

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During the period covering the years 1994 to 1997, petitioner had been an assignee of several Tax Credit Certificates (TCCs) from various BOI-registered entities (Diamond Knitting Corporation, Filstar Textile Industrial Corporation, Alliance Thread Co., Inc., Fiber Tech. Corporation, Jantex Phils., Inc., and Master Colour System Corporation), for which petitioner utilized in the payment of its excise tax liabilities for the taxable years 1995 to 1997. Such transfers and assignments of the said TCCs were duly approved by the Department of Finance One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (Center), a center which is composed of representatives from the appropriate government agencies, namely: the Department of Finance (DOF), the Board of Investments (BOI), the Bureau of Customs (BOC), and the Bureau of Internal Revenue (BIR).

Petitioner's acceptance and use of the TCCs as payment of its excise tax liabilities for the taxable years 1995 to 1997 had been continuously approved by the DOF, as well as the BIR's Collection Program Division through the issuance of the Tax Debit Memos (TDMs) duly signed by the Assistant Commissioner of the Collection Service of the BIR.

However, on November 15, 1999, respondent issued his assailed 'Assessment' against petitioner for deficiency excise taxes, in the total amount of P651,334,263.92, inclusive of surcharges and interests, based on the ground that the TCCs utilized by petitioner in payment of its excise taxes were found by the DOF, pursuant to Excom Resolution No. 03-05-99, to have been fraudulently issued and transferred. In view of this, petitioner, on August 31, 1999 and September 1, 1999, was required by the Center to submit copies of its sales invoices and delivery receipts showing the

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consummation of the sale transactions to the TCC transferors.

On December 9, 1999, petitioner filed its protest on the 'Assessment' issued against it. It argued that the excise taxes as reported in its returns filed were duly paid and the accuracy of such tax returns was never assailed by the respondent; that the subject TCCs were allegedly acquired from qualified recipients thereof and its acquisition was likewise approved by the appropriate government agencies. Moreover, the cancellation of the TDMs was done in violation of petitioner's right to due process considering that the actual cancellation was done without the involvement of petitioner, notwithstanding, that such cancellation was prejudicial to petitioner more than just financially. In its supplemental protest letter dated January 25, 2000, petitioner quoted the case of *Petron Corporation vs. Commissioner of Internal Revenue*, CTA Case No. 5657, promulgated on July 26, 1999, wherein this Court had resolved the issue of the validity of the TCCs and effectively declared that the cancellation of the TDMs was void and of no effect.

Having received no reply from the respondent, petitioner then elevated this case to the Second Division of this Court on July 10, 2000.

On August 29, 2000, respondent filed his Answer, raising special and affirmative defenses.

After the case was submitted for decision, on August 20, 2004, respondent filed an Urgent Motion to Reopen the Case on the ground that additional evidence consisting of documents presented to the Center in support of the TCC transferors' claims for tax credit, as well as documents supporting the applications for approval of the transfer of the TCCs to petitioner, must be presented to prove the

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fraudulent issuance and fraudulent transfer of the subject TCCs, which the Second Division granted in a Resolution dated September 24, 2004.

After trial on the merits, the Second Division rendered the assailed decision on August 23, 2006.

Not satisfied, petitioner moved for a reconsideration of the same, which this Court denied in its Resolution dated November 23, 2006.

Hence, this Petition for Review raising the following:

ISSUES

I

WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT THE SUBSEQUENT CANCELLATION OF THE TAX CREDIT CERTIFICATES PREVIOUSLY USED TO PAY PETRON'S TAX LIABILITIES WOULD HAVE THE EFFECT OF NON-PAYMENT OF PETRON'S EXCISE TAXES CORRESPONDING TO THE VALUE OF THE TAX CREDIT CERTIFICATES SUPPOSEDLY USED FOR PAYMENT UPON THE BASIS OF THE DECISION ENTITLED "COMMISSIONER OF INTERNAL REVENUE V. PILIPINAS SHELL PETROLEUM CORPORATION", DOCKETED AS C.T.A. EB NO. 64 DATED APRIL 28, 2006.

II

WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE

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> COURT'S SECOND DIVISION TO RULE THAT THERE WAS FRAUD IN THE TRANSFER OF SUBJECT TAX CREDIT CERTIFICATES.
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> III
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> WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT THE DEPARTMENT OF FINANCE CENTER IS THE COMPETENT AUTHORITY TO DECLARE THE TAX CREDIT CERTIFICATES AS FRAUDULENT.
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> IV
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> WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT PETRON IS LIABLE TO PAY TWENTY FIVE PERCENT (25%) LATE PAYMENT SURCHARGE PURSUANT TO SECTION 248(A) OF THE NATIONAL INTERNAL REVENUE CODE OF 1997.

Without necessarily giving due course to the Petition for Review, We required the respondent to file his comment on the petition.

On January 30, 2007, respondent filed his "Comment". Hence, the Petition was deemed submitted for decision.

However, on March 12, 2007, petitioner filed its "Motion For Leave To Admit Attached Reply To Comment", which the Court noted.

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Principal Issue

The principal issue is whether or not the subsequent cancellation of the TCCs previously used to pay Petron's tax liabilities would result to non-payment of Petron's excise taxes corresponding to the value of the TCCs supposedly used for payment.

Petitioner's Arguments

Petitioner argues that the *En Banc Decision in CTA EB No. 64* is not yet final, hence this Court cannot rely on the said decision; its acceptance of the TCCs is not a contract with the issuing authority subject to certain conditions; and the statement in the TCCs that the same is subject to post audit is not a suspensive condition contemplated by *Article 1181 of the New Civil Code.*

Respondent's Counter-Arguments

On the other hand, respondent counter-argues that the stipulation that the TCCs is subject to a post-audit is in the nature of a suspensive condition, hence the holder takes the same subject to the outcome of the post-audit, thus there exists no obligation on the part of the Department of Finance or the BIR to recognize the rights of the holder or transferee; the

"Liability Clause" in the TCC is a joint and several liability between the TCC transferors and petitioner; it is a mandatory requirement that claimants of TCCs must export their products, but the transferors did not export their products at the volumes they have represented to the center, hence the basis for the approval of the TCCs are spurious documents; the acts of the transferors were in violation of the mandatory provision of the Omnibus Investments Code of 1997, in accordance with Article 5 of the New Civil Code; since the TCCs are *void ab initio*, producing no legal effect whatsoever, they have no monetary value and, thus, could not be used for payment of taxes.

THE COURT EN BANC'S RULING

We deny the Petition.

Subsequent Cancellation of the TCCs Results to Non-Payment of Petron's Excise Tax Liabilities

We rule that the cancellation of the TCCs results to non-payment of petitioner's excise tax liability. It follows that payment can occur only if the instrument used to discharge it represents its stated value. A valueless instrument, even if delivered to and accepted by the creditor,

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not knowing that the same is worthless, would not produce payment. After all, the debtor warrants that his instrument is valid and valuable. Since it was the debtor (petitioner) who acquired the subject TCCs from a third party and utilized the same to discharge its own obligations, then the petitioner must bear the loss.

Corollarily, it has been held that a check or a draft given in payment of taxes even though accepted by the tax authorities does not operate to discharge the tax until it is in fact paid *(51 American Jurisprudence, 836)*. In the same vein, a TCC used to pay a tax even if accepted by the BIR and its corresponding Tax Debit Memo was issued by the DOF Center would not operate to discharge petitioner's excise tax liability, if the TCC used to pay the tax is valueless.

In the recent case of *Proton Pilipinas Corporation vs. Republic, 504 SCRA 540-541*, the Supreme Court enunciated that "it is the obligation of the petitioner to make good its obligation by paying the customs duties and taxes, which remain unpaid by reason of cancellation of the subject TCCs for having been found as fake and spurious. It should not make the Government suffer for its own misfortune."

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Thus, the Second Division aptly ruled:

> "At the outset, the DOF findings that the TCCs do not have monetary value is undisputed and was clearly established during the trial proper. Consequently, the effect would be non-payment of respondent's excise taxes corresponding to the value of the TCCs supposedly used for payment. This is so, because payment can only occur if the instrument used to discharge an obligation represented its stated value. A valueless instrument, even if delivered to and accepted by the creditor, not knowing that the same is worthless, would not produce payment. After all, the debtor warrants that his instrument is valid and valuable. Since it was the debtor (respondent) who acquired the subject TCCs from a third party and utilized the same to discharge its own obligations, then respondent must bear the loss."

Post-Audit is in the Nature of Suspensive Condition to Effect Payment

Under the rules, it is a prescribed procedure that whenever the Secretary of Finance issues a TCC, the same is still subject to re-evaluation. This is provided in the TCC itself, which states: "This Tax Credit is issued subject to: 1. Post-audit xxx". A post audit is being conducted to determine whether the TCCs issued by the government are genuine, validly obtained, validly transferred, and have actual values. This is necessary since TCCs are being used in payment of taxes, duties,

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charges and fees due to the National Government, in lieu of the money that should have been received by the government.

The post audit, therefore, is the final procedure undertaken by the government that would determine whether the TCC could be used in payment of the grantee's or transferee's taxes or duties. In effect, the result of the post audit is in the nature of a suspensive condition that would produce payment of tax liabilities or duties.

Petitioner's contention that the post audit is not a suspensive condition contemplated by *Article 1181 of the New Civil Code* is untenable. It must be noted that obligation arises not only from contract, but from law as well. Thus, the nomenclature of the relations between the issuing authority and the grantee and/or the transferee of the TCCs is immaterial. The undeniable fact remains that the post audit is in the nature of a suspensive condition for TCCs to produce payment of the tax liabilities or duties.

A suspensive condition affects the obligation in diametrically opposed ways. If the suspensive condition happens, the obligation arises; in other words, if the condition does not happen, the obligation does not come into existence *(8 Manresa 130-131, cited on page 140, Civil Code of the Philippines, Tolentino, 1962 ed., Vol IV).* Hence, if the result of the post audit shows that the TCCs issued are genuine, validly obtained or compliant of all the requirements prescribed by law, and/or validly transferred, in short, if it is established that the holder is indeed qualified for its issuance or transfer, then the TCCs will produce payment of the tax liabilities of the holder. Otherwise, the TCCs will not effect payment.

Post-Audit Conducted Results to a Finding of Fraud in Obtaining the TCCs

Pursuant to Executive Committee Resolution No. 03-05-99 prescribing the guidelines and procedures for the cancellation, recall and recovery of fraudulently issued TCCs, TCCs and TDMs are classified as fraudulent when the "basis for the issuance of the TCCs, TDMs or the approval of the transfer of the TCC is spurious, tampered, altered and fake commercial and public documents or other acts of gross misrepresentation and deceit employed by the claimant which would give rise to the release of the TCC."

Here, the audit conducted by the DOF Center clearly shows a finding of fraud, which eventually led to the cancellation of the TCCs.

First, the manner the subject TCCs were obtained violated *paragraph (k), Article 39, Title III of the Omnibus Investments Code of 1997*, which provides:

> "(k) Tax Credit for Taxes and Duties on Raw Materials. – Every registered enterprise shall enjoy a tax credit equivalent to the National Internal Revenue taxes and Customs duties paid on the supplies, raw materials and semi-manufactured products used in the manufacture, processing or production of its export products and forming part thereof; exported directly or indirectly by the registered enterprise: Provided, however, That the taxes on the supplies, raw materials and semi-manufactured products domestically purchased are indicated as a separate item in the sales invoice.
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Pursuant to the aforequoted provision, TCCs equivalent to the NIRC taxes and custom duties paid by BOI registered enterprises on the purchase of supplies, raw materials and semi-manufactured products are issued to registered enterprises on the premise that said purchases will be used in the manufacture, processing or production of their export products and forming part thereof. In short, for registered enterprises to be entitled to TCCs, the law expressly requires that they should export their products.

In the case at bench, the post-audit conducted by the Center reveals that the TCC grantees did not export their products at the volumes they represented to the Center, as reflected in their financial statements.

Specifically, the tax credits/sales ratios (obtained by dividing the average yearly TCCs by the average yearly sales) of the grantees are at incredulous level, ranging from 136% to as high as 3,604.30%, when the average industry level is at a maximum of 13% only *(Exhibits "2", "5", "6", "7", "8" and "11").*

The findings of the Executive Committee is corroborated by the partial report of the investigation conducted by the Committee on Ways and Means, which shows that the export sales of the grantees for the years 1995 to 1997 were way below the TCCs granted for each corresponding year *(Exhibit "12").* In fact, for the year 1997 alone, the investigation shows that except for Jantex Philippines, Inc., with a very minimal data of export sales, there are no records of export sales that were made by the

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other five companies *(Exhibit "12")*. This notwithstanding, records show that the following amounts of TCCs were granted in their favor:

Alliance Thread, Inc.	Diamond Knitting Corp.	Fiber Technology Corporation	Filstar Textile Industrial Corp.	Jantex Philippines, Inc.	Master Colour System, Inc.
72.22M	71.43M	173.45M	183.98M	98.5M	107.52M

(Exhibits "12-b" to " 12-c").

Second, as regards Diamond Knitting Corp., as borne by the records, on February 18, 1993, the National Pollution Control Commission ("NPCC") of the DENR has reinforced the "Cease and Desist Order" to Diamond Knitting Corp. for its non-compliance with the requirements imposed by NPCC *(Exhibits "4-A" and "4-C")*. As such, Diamond Knitting Corp. should not have been in operation and should not have continually obtained TCCs from that year on *(Exhibits "4-A" and "4-C")*.

Third, in the post audit conducted by the DOF Center, it was discovered that the cost of machinery and equipment of the plant of each company-grantee, as reflected in their financial statements *(Exhibits "2-H-2", "4-B-1", "5-H-2", "6-H-2", "7-H-2" and "8-H-2")* could not have produced the yearly volume of the company-grantees' respective registered products or their registered capacity, as set forth in their respective BOI Certificates of Registration *(Exhibits "2-I-1", "2-J-1", "5-I-1", "6-I-1", "7-I-1" and "8-I-1").*

Taking into consideration the above circumstances, it is evident that the provision of the Omnibus Investments Code on the requirements for the issuance of the TCCs was clearly violated. It is clear that gross misrepresentations were committed in obtaining the TCCs in question. Clearly, the bases for the approval of the TCCs are tampered and spurious documents.

Thus, the DOF Center aptly found as follows:

> "The company did not export at the volumes it had represented to the Center and therefore the basis for the approval of the Tax Credits were spurious export documents; or
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> The company committed massive fraud in its declaration of its financial performance with the Bureau of Internal Revenue and seriously violated pertinent provisions of the National Internal Revenue Code.
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> In either cases, we would like to point out that the firm would have been automatically disqualified from availing of these Tax Credit incentives have these facts been discovered in the beginning. We wish to underscore the fact that as a matter of policy for all other claimants, the Center disallows the granting and use of Tax Credits which are or were issued

on export transactions that were never disclosed or reported in the financial statements of the claimant."

Being spurious documents, there are no factual and legal bases for the issuance of the subject TCCs. Consequently, We rule that the TCCs are worthless pieces of paper that have no force and effect from the very beginning.

Thus, the TCCs in question would not produce payment even in the hands of the grantee-assignor.

Petitioner, as an Assignee, Succeeds to the Same Rights Available to Its Assignor

Petitioner, as a mere assignee of TCCs, takes the TCCs subject to the same conditions and succeeds to the same rights available to the grantees-assignors. The general rule is that an assignee of a non-negotiable acquires no greater right than what was possessed by his assignor and simply stands into the shoes of the latter (*Fidelita Mut. L. Ins. Co. vs. Clark, 203 U.S. 64, 51 L. ed., 91 27 s. Ct. 19' Judson vs. Corcoran, 17 How (US) 612, 156 L. ed. 231*). By virtue of the deed of assignment, the assignee is deemed subrogated to the rights and obligations of the assignor and is bound by exactly the same conditions, as those which bound the assignor

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(*Mercantile Ins. Co., Inc. vs. Felipe Ysmael, Jr. & Co., Inc., 169 SCRA 66; BPI Credit Corporation vs. Court of Appeals, 204 SCRA 601 [1991]*) *(Koa, et al. vs. Court of Appeals, et al., 219 SCRA 542).* In the same manner, when petitioner accepted the TCCs from the original grantees, it takes the same subject to the outcome of the post audit.

Considering that the post audit reveals that the TCCs were fraudulently obtained, and were subsequently cancelled, petitioner, as an assignee, is bound by the same findings. Hence, it cannot use the same to discharge its excise tax liabilities.

Second Issue

As to the second issue, petitioner contends that there was no fraudulent transfer or assignment of the TCCs to it considering that the transfer passed thru the three layers of review by different government agencies before the same were finally approved and allowed; it fulfilled its obligation to issue credit notes under the Deeds of Assignment where credit notes were availed of by the assignors, and fuel and other petroleum products were delivered upon order of the assignors; affidavits of general managers of the grantees attached to the Cancellation

Memorandum allegedly denying deliveries of fuel and petroleum products are hearsay; and the validity of petitioner's payments of excise taxes thru the use of assigned TCCs was upheld by this Court in *CTA Case No. 5657, entitled "Petron Corporation vs. Commissioner of Internal Revenue, et al."*, promulgated on July 26, 1999.

On the other hand, respondent counter-argues that there was fraud in the transfer of the TCCs; the state cannot be estopped by the mistake or neglect of its agents and officers; the general managers of the transferor companies executed affidavits denying deliveries of petroleum products from the petitioner to them; and petitioner's reliance in CTA Case No. 5657 upholding the validity of petitioner's excise tax payments through the use of the TCCs is misplaced.

The TCCs were Fraudulently Transferred from the Grantees to the Petitioner

We rule for the respondent.

Notwithstanding the approval by the DOF Center of the transfer of the TCCs from the grantees-transferors to the petitioner and the issuance by the BIR of the TDMs, the government cannot be estopped of the acts

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of the government agencies, if there are findings of fraud in the transfer. Well settled is the rule that in the performance of governmental functions, the State is not bound by the neglect of its agents and officers. Nowhere is this more true than in the field of taxation *(Philex Mining Corporation vs. Commissioner of Internal Revenue, 294 SCRA 699)*. It is axiomatic that the government cannot and must not be estopped particularly in the matter involving taxes *(Commissioner of Internal Revenue vs. Court of Appeals, 234 SCRA 356)*. The errors of certain administrative officers should never be allowed to jeopardize the Government's financial position *(Commissioner of Internal Revenue vs. Court of Appeals, supra)*. While We understand petitioner's predicament, it must be stressed that the same is not a valid reason for the non-payment of its tax liabilities *(Philex Mining Corporation vs. Commissioner of Internal Revenue, 294 SCRA 699)*.

Furthermore, the various memoranda approving the request for the transfer of the TCCs state that the TCCs are to be transferred by the grantees-assignor to the petitioner-assignee, as payment for the industrial fuel bought on credit from petitioner-assignee *(Exhibits "14" to "46")*. On

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the basis of such representations, the DOF Center approved the TCC transfers.

However, the post audit conducted by the DOF Center discloses that there were no deliveries made of petroleum products from petitioner to the grantees-assignors, as stated in the Supply Agreements found in the transfer folders of the companies *(Exhibits "2-B", "3-A", "5-B, "6-B", "7-B", and "8-B").* Moreover, a perusal of the Financial Statements of the TCCs grantees shows that they were not using fuel oil at the levels represented to the DOF Center *(Exhibits "2-B", "3-A", "5-B, "6-B", "7-B", and "8-B").* Also, despite repeated extensions, petitioner failed to liquidate the alleged fuel oil deliveries to the companies-grantees *(Exhibits "2-B", "3-A", "5-B, "6-B", "7-B", and "8-B").* Finally, former general managers of the companies-grantees executed affidavits stating that they have no knowledge of any transfer or assignment of the TCCs, nor were there any delivery of bunker fuel oil from petitioner, and requesting that the subject TCCs be cancelled *(Exhibits "2-G", "3-F", "5-G", "6-G", "7-G", and "8-G").*

As regards the findings of the DOF Center that there were no fuel deliveries made to the TCC grantees, petitioner presented the Audit

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Report of the Independent CPA, which contained a summary of delivery invoices. Petitioner, however, failed to present a single copy of the alleged delivery invoices. In fact, the Audit Report of the Independent CPA reveals that some of the fuel products were delivered to entities other than the transferors-grantees *(Exhibits "A-15-c", "A-15-d", "A-15-i", "A-15-j", "A-15-m", "A-15-n", "A-15-p", "A-15-r", "A-15-x", "A-15-z", "A-15-aa", "A-15-bb", "A-15-cc", and "A-15-dd").*

As correctly found by the Second Division:

> "Moreover, post-audit disclosed that there were no deliveries of fuel and other petroleum products from petitioner to the transferor-assignor-companies as stated in their Supply Agreements. This was confirmed by the court-commissioned independent CPA as found in Annex 10 of his report dated March 10, 2003 (*Exhibit* A). In fact, some of the deliveries of the fuel products which were supposed to be for Fiber Technology Corporation were made instead to Filstar Textile Industrial Corporation; those supposed to be delivered to Filstar Textile Industrial Corporation were delivered to Diamond Knitting Corporation and Alliance Thread Co., Inc.; those supposedly for Jantex Phils., Inc. were delivered instead to Diamond Knitting Corporation (*Exhibit 'A-15' to 'A-15-dd'*). Furthermore, the financial statements of the companies showed that they were not using fuel oil at the levels disclosed to the Center. It must be pointed out that Rule VII of the Rules and Regulations implementing the provisions of the Omnibus Investments Code of 1987 and the Memorandum of Agreement between the DOF and BOI specifically provide that 'a TCC transferee

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> should be a domestic capital equipment supplier or a raw material and/or component supplier of the transferor.'"

The foregoing acts violated *Rule VII of the Rules and Regulations Implementing the Omnibus Investments Code* and the *Memorandum of Agreement dated August 29, 1989 between the BOI and the DOF.* Rule VII provides that "the certificates may be transferred in accordance with the memorandum of agreement between the Department of Finance and the Board of Investments dated October 5, 1982, as amended." While the Memorandum of Agreement dated August 29, 1989 provides that the transferee of the TCC should be a BOI registered firm, which is a domestic capital equipment supplier or a raw material and/or component supplier transferor. A perusal of the Deeds of Assignment *(Exhibits "V^{73}" to "Z^{73}", "A^{74}" to "D^{74}", "E^{74}" to "P^{74}", "Q^{74}" to "X^{74}", "Y^{74}" to "Z^{74}", "A^{75}" to "E^{75}", "F^{75}" to "K^{75}", "L^{75}" and "M^{75}")* shows that the assignee of the subject TCCs is petitioner, and not any other company. However, the fuel products were delivered instead to Petrotrade, Duracom Mobile Power, Royale Fishing, and Filsyn *(Exhibits "A-15-c", "A-15-d", "A-15-i", "A-15-j", "A-15-m", "A-15-n", "A-15-p", A-15-r", "A-15-x", "A-15-z", "A-15-aa", "A-15-bb", "A-15-cc", and "A-15-dd").*

From the foregoing, it is clear that there was gross misrepresentation made by petitioner in requesting for the transfer of the TCCs. Without such gross misrepresentation, the DOF Center would have not approved the transfer of the subject TCCs. Thus, the Second Division correctly ruled that there is fraud both in the issuance of the subject TCCs and in their transfer to petitioner.

Finally, petitioner's reliance in the aforesaid *CTA Case No. 5657* is misplaced considering that the issue therein was whether the fuel products allegedly supplied by petitioner to the TCC transferors are domestic raw materials or component parts of the transferors' final products so as to make petitioner a qualified transferee of the TCCs. Furthermore, the ruling in that case was made prior to the post-audit, which makes it differently situated from the case at bar.

Third Issue

The DOF Center is the Competent Authority To Declare the TCCs as Fraudulently Issued and Transferred

As regards the third issue, the Second Division correctly ruled that the DOF Center is the competent authority to declare the TCCs as fraudulently issued and transferred.

Rule VII of the Rules and Regulations To Implement Executive Order No. 226 provides in part: "Tax credit certificates xxx shall be issued by the Secretary of Finance or his representative, or by the Board, if so delegated by the Secretary of Finance". The power to issue TCCs necessarily includes the power to cancel the same. Pursuant to the aforesaid provision, the Secretary of Finance, or his representative, or the Board of Investment may exercise such power. In this regard, on February 7, 1992, then President Corazon Aquino issued *Administrative Order No. 266*, creating the One-Stop-Shop Inter-Agency Tax Credit And Duty Drawback Center composed of representatives from the Department of Finance, Board of Investments, Bureau of Customs, and Bureau of Internal Revenue *(Section 2 of E.O. No. 266)*. The Center was created for the purpose of simplifying the availments of credits on taxes and duties, as well as safeguarding the system from the occurrence of undue claim *(last "Whereas" clause of Executive Order No. 266)*. In order to safeguard the

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system from undue claims on tax credits, the Center was vested with the following powers, among others:

> 1. To promulgate the necessary rules and regulations and/or guidelines for the effective implementation of this administrative order;
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> 2. To conduct regular post-audit examinations on tax credit certificates issued using standard rates;
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> 3. To enforce compliance with tax credit/duty drawback policy and procedural guidelines;
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> 4. To perform such other functions/duties as may be necessary or incidental in the furtherance of the purpose for which it has been established.

In addition, the Executive Committee of the Center was vested with the function "to adopt measures and/or penalties to ensure the integrity of the processing and evaluation of tax credit and duty drawback claims."

Pursuant to the abovementioned powers granted to the Center, in connection with the function vested to the Executive Committee, the Center, through the Executive Committee, adopted *Resolution No. 03-05-99* prescribing the guidelines and procedures for the cancellation, recall and recovery of fraudulently issued TCCs *(Exhibit "1")*. It is, therefore,

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within the power of the Center to declare the TCCs as fraudulently issued or fraudulently transferred.

Fourth Issue

Petitioner is Liable to the 25% Surcharge and 20% Interest Per Annum

As regards the last issue, We affirm the ruling of the Second Division that petitioner is liable to the 25% late payment surcharge, pursuant to *Section 248(A) of the NIRC of 1997, as amended.* Both the 25% surcharge and the 20% interest per annum imposed under *Sections 248 and 249 of the same Code* cannot be waived for the same are meant to compensate the government for its inability to utilize the taxes during the time such taxes remain unpaid.

The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge, pursuant to *Section 248A(3) of the Tax Code (San Agustin vs. Commissioner of Internal Revenue, 364 SCRA 810).* Corollary thereto, *Section 249 of the Tax Code* provides that any deficiency in the tax due would be subject to interest at the rate of twenty

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percent (20%) per annum, which interest shall be assessed and collected from the date prescribed for its payment until full payment is made *(San Agustin vs. Commissioner of Internal Revenue, supra)*.

Finding no reversible error, We affirm the assailed Decision dated August 23, 2006, and Resolution dated November 23, 2006 of the Second Division of this Court.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(Concurs with the Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PETRON CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 238
(C.T.A. Case No. 6136)

Present:

ACOSTA, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

OCT 3 0 2007

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Dissenting Opinion

This Court's *En Banc* Decision dismisses petitioner's Petition for Review which seeks the reversal of the Decision dated August 23, 2006 and Resolution dated November 23, 2006 of the Second Division, that ordered petitioner to pay its deficiency excise taxes for taxable years 1995 to 1997, on the ground that the Tax Credit Certificates (TCCs) which petitioner used to pay its excise tax liabilities were allegedly fraudulently obtained; thus when they were cancelled, petitioner's tax liability is considered unpaid.

With due respect to our esteemed colleagues, the undersigned wish to express their disagreement to the position of the majority inasmuch as the TCCs should not have been cancelled because fraud was not present during its issuance, transfer and use; and that the subsequent cancellation of the TCCs previously used to pay petitioner's excise taxes should not have the effect of non-payment of petitioner's tax liabilities.

At the outset, the undersigned would like to emphasize that 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.[1] Absence of such clear and convincing evidence will result in the validity of the questioned transaction.

A perusal of the Decision of the Court *En Banc* indicates that the basis of the majority opinion is the supposed fraud that attended (1) the issuance of the TCCs; (2) the transfer of the TCCs to petitioner; and (3) the use of the TCCs as payment of petitioner's tax liabilities despite its knowledge of fraud that attended their issuance.

The undersigned will address each point in *seriatim*.

<u>Fraud during issuance of TCC</u>

The standpoint of the majority that fraud attended the issuance of the TCCs is founded on the result of the post-audit on the TCCs, showing that the companies to which they were issued did not export at the volume they had represented to the Department of Finance (DOF) One-Stop Shop Inter-agency Tax Credit and Duty Drawback Center (DOF Center). The bases for the approval of the TCCs, therefore, were spurious export documents.

The TCCs were granted based on the applicant's export transactions. However, these export transactions were supposedly not declared or reflected in their audited financial statements and Schedule of Tax Credit Certificates/Sales Ratio as represented to the DOF Center for the tax credit claim. The conclusion reached was

[1] Philippines Commercial International Bank vs. Commissioner of Internal Revenue, CTA Case No. 5003, February 4, 1997.

that these export transactions did not take place or that either the company-applicant did not export at the volume it had represented to the DOF Center or underdeclared its sales figures in the financial statements. In either case, the grantee should have been disqualified to be granted with TCC.

Clearly from the foregoing, the claim of fraud in the issuance of the questioned TCCs was based purely on mere conjectures, speculations, or at most, circumstantial events. Respondent was not even able to identify the specific fraudulent acts, if any, made by the assignor-company (company-applicants) in the procurement of the subject TCCs.

The Supreme Court is steadfast in its ruling that the fraud contemplated by law must be actual and not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some right.[2] And in the absence of proof of such actual fraud, the validity of the issuance of the TCCs and all its legal and logical effects must be upheld.

Equally important is the fact that petitioner had no participation in the application of the assignor-companies (company-applicants) for tax credit and the issuance of the corresponding TCCs by the DOF Center. The TCCs were issued to these assignor-companies by the Government, which approved the subsequent assignment of these TCCs to petitioner and accepted the payments of petitioner of its taxes using the same TCCs. Petitioner should not be made to suffer from the alleged fraudulent acts of the assignor-companies in the absence of proof of actual connivance. If at all, the recourse of the Government is against the officials who issued the TCCs and the grantees (assignor-companies) of the TCCs.

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[2] Transglobe International, Inc. vs. Court of Appeals, 302 SCRA 57

Fraud during transfer

The Court *En Banc* opined 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 DOF Center. These supposed transactions were the bases for the approval of the transfers of the said TCCs. Petitioner's failure to submit copies of the sales invoices and delivery receipts showing consummation of said transactions, coupled with the affidavits of former General Managers of the assignor-companies stating that they have not signed any document transferring TCCs to oil companies or entering into delivery contracts with any oil company are sufficient proof of petitioner's participation in the commission of fraud.

Again, the undersigned disagree.

The procedure for the assignment of the TCCs prevents any possibility of fraudulent transfer. The assignment of the TCCs passes through three layers of review by different government agencies before it is finally approved and allowed. This long and tedious process is obviously intended to preclude any possibility that fraudulent transactions, like those alleged by respondent would go unnoticed.

Petitioner relied in good faith on the approvals by the DOF Center of the Deeds of Assignment of the TCCs, and on the Bureau of Internal Revenue (BIR) in accepting the TCCs as payment of its excise taxes. Equally important is the fact that the absence of any defect or flaw on the TCCs is confirmed by no less than the DOF Center, the BIR Makati Office and the BIR Head Office. Even the stipulations in the Joint Stipulation of Facts and Issues of respondent and petitioner that "petitioner Petron did

[initials]

not participate in the procurement and issuance of the TCCs, which TCCs were transferred to Petron and later utilized by Petron in payment of its excise taxes"[3] confirms this. Petitioner was not aware and not required to be aware of any fraud in obtaining the TCCs or of any flaw or defect on the TCCs. There is no such rule or regulation that petitioner, as assignee of a TCCs, is responsible for the integrity of the TCCs. The TCCs that were assigned were all genuine. The DOF, as issuing authority, attests to this.

Likewise, noteworthy is the undisputed testimony of Lilian Linsangan, the commissioned Independent CPA, that the credit notes equivalent to the amounts of the TCCs assigned to petitioner were indeed issued to petitioner and that the fuel and other petroleum products of the same amount were delivered by petitioner upon order of the credit note holders.

All these demonstrate that aside from the unwarranted speculation, there is no evidence to prove that the TCCs were fraudulently acquired or obtained by the grantees or that petitioner participated in its "fraudulent" acquisition.

Unwarranted use of TCCs

It is argued that the utilization of the TCC is subject to the condition that a post-audit will subsequently be conducted in order to determine if the grantee (assignor-company) is indeed qualified for its issuance. On the contrary, upon the issuance of TCCs, the grantee may readily use them in payment of any tax liability or transfer the same to another taxpayer, as what happened in the present case.

Post-audit is not imposed as a pre-condition for the legality and effectivity of the TCCs. The TCCs' validity does not depend upon the happening of an event or satisfaction of a suspensive or resolutory condition in order to be used as payment for

[3] Paragraph 3, Joint Stipulation of Fact and Issues, dated March 29, 2001.

tax liabilities. It is unjustified to say that unless and until a post-audit is conducted, the TCCs are considered worthless. There is nothing in the Omnibus Investment Code which provides for this. In fact, the conditions stated in the TCC simply provide that the TCC is subject to:

1. Post-audit and subsequent adjustment in the event of computational discrepancy.
2. A deduction for any outstanding account/obligation of herein claimant with the BIR and/or BOC.
3. Revalidation with the Center in the case the TCC is not utilized or applied for payment within one (1) year from date of issuance/date of last utilization.

Based on the foregoing, the post-audit is for the sole purpose of adjustment in the event of computational discrepancy; and not to confirm its validity. Upon the issuance of the TCCs, the issuing authority represented that the grantee can readily avail of the benefits of the same; hence, can be used to pay the grantee's or its assignor's tax liability.

The ruling of this Court in the case of ***Petron Corporation vs. Commissioner of Internal Revenue, et al.***, docketed as CTA Case No. 5657, supports the view that petitioner's payments of excise taxes through the use of the assigned TCCs is valid. This Court answered the issue of "Whether Petitioner's payment of its excise tax liabilities for the years 1993 to 1997 thru the use of the Tax Credit Certificates assigned to it by the export producers in payment of bunker oil and fuel products supplied to them is valid," in this wise:

> "**Without any qualm or quibble, this Court rule in favor of the petitioner.** Respondents' non-acceptance of the TCCs' is premised on hollowed grounds. They have imprudently misconstrued the provisions of BOI laws, rules and regulations and agreements in point in the case at bar.
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> xxx
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> For another reason, the long practice of the DOF Center in approving the transfer of the TCCs to herein Petitioner is a

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

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

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

xxx

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

It is worth noticing that aside from the legal infirmity of the aforementioned interpretations by the Respondents on BOI laws, rules and regulations and policies, their complete disregard to the BOI and DOF opinions and consequently, their demand to the Petitioner for the payment of delinquent taxes is irregular. xxx." (*Emphasis supplied*)

There is no reason why the afore-quoted ruling of this Court in CTA Case No. 5657, with respect to the issue of the validity of petitioner's use of the assigned TCCs, should not apply in the present case. This is especially significant inasmuch as some of the TCCs involved in this case are the same TCCs involved and resolved in CTA Case No. 5657.[4]

By way of resume, considering the failure to prove otherwise, the TCCs are considered genuine, authentic, and duly issued. The original TCCs on their face were reviewed by different government agencies involved and represented in the DOF Center prior to their issuance. The said TCCs were issued and signed by the proper government officials. The transfers of the TCCs and their utilization as payment for petitioner's excise tax obligations and the issuance of the Tax Debit Memo (TDM) were also duly authorized, approved and accepted by the government agencies concerned. Ergo, the TCCs and their utilization for payment of petitioner's tax liabilities are valid.

Anent the issue of propriety of the imposition of twenty-five percent (25%) late payment surcharge on the premise that petitioner is considered to have not paid its tax liabilities after the cancellation of the TCCs it used to pay said tax liability, the undersigned again find the same baseless.

Petitioner, for all intents and purposes, already paid its excise taxes for taxable years 1995 to 1997 when it used the subject TCCs; considering that all the necessary authorizations and approvals attendant to the TCC transfers and utilization were present. The transfer of the TCCs from the original holders to petitioner were duly approved by the DOF Center, composed of not just one, but a number of government agencies, respondent being one of them. And in each approval, it can be assumed that the government agencies concerned meticulously scrutinized and verified the genuineness and authenticity of the TCCs and the validity of their issuance. In other words, the utilization by petitioner of the transferred TCCs did not constitute fraud

[4] Paragraph 2, Joint Stipulation of Facts and Issues, CTA Case No. 6136.

with intent to evade taxes. As a matter of fact, respondent stipulated with petitioner that from 1992 to 1997, petitioner was never questioned nor assessed for deficiency delinquency in the payment of its excise taxes through the use of the aforesaid TCCs assigned to it by its customers; and that petitioner's tax returns were filed in accordance with law.[5] The subsequent assessment issued against petitioner because of the so-called fraudulent issuance of the TCCs cannot override the fact that petitioner paid those taxes in accordance with law. Therefore, respondent cannot legally and justly impose surcharge and interest on the alleged deficient excise taxes.

In view of all the foregoing, the undersigned manifest their dissent to the majority opinion.

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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[5] Paragraphs 9 and 15, Joint Stipulation of Facts and Issues, dated March 29, 2001.