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SECOND DIVISION

[G.R. No. 172598. December 21, 2007]

PILIPINAS SHELL PETROLEUM CORPORATION, *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent.*

SYLLABUS

1. CIVIL LAW; OBLIGATIONS AND CONTRACTS; CONDITIONAL OBLIGATIONS; ARTICLE 1181 OF THE CIVIL CODE DOES NOT APPLY TO THE PRESENT CASE SINCE THE PARTIES DID NOT AGREE TO A SUSPENSIVE CONDITION.— Art.1181 tells us that the condition is suspensive when the acquisition of rights or demandability of the obligation must await the occurrence of the condition. However, Art. 1181 does not apply to the present case since the parties did ***NOT*** agree to a suspensive condition. Rather, specific laws, rules, and regulations govern the subject TCCs, not the general provisions of the Civil Code. Among the applicable laws that cover the TCCs are EO 226 or the Omnibus Investments Code, Letter of Instructions No. 1355, EO 765, RP-US Military Agreement, Sec. 106(c) of the Tariff and Customs Code, Sec. 106 of the NIRC, BIR Revenue Regulations (RRs), and others. Nowhere in the aforementioned laws does the post-audit become necessary for the validity or effectivity of the TCCs. Nowhere in the aforementioned laws is it provided that a TCC is issued subject to a suspensive condition.

2. ID.; ID.; ID.; THE SUBJECT TAX CREDIT CERTIFICATES (TCC's) ARE IMMEDIATELY VALID AND EFFECTIVE AFTER THEIR ISSUANCE AND IS NOT SUBJECT TO A SUSPENSIVE CONDITION.— We cannot subscribe to the CTA *En Banc*'s holding that the suspensive condition suspends the effectivity of the TCCs as payment until after the post-audit. This strains the very nature of a TCC. A tax credit is not specifically defined in our Tax Code, but Art. 21 of EO 226 defines a tax credit as "any of the credits against taxes and/or duties equal to those actually paid or would have been paid to evidence which a tax credit certificate shall be issued by the Secretary of Finance or his representative, or the Board

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(of Investments), if so delegated by the Secretary of Finance." Tax credits were granted under EO 226 as incentives to encourage investments in certain businesses. A tax credit generally refers to an amount that may be "subtracted directly from one's total tax liability." It is therefore an "allowance against the tax itself" or "a deduction from what is owed" by a taxpayer to the government. In RR 5-2000, a tax credit is defined as "the amount due to a taxpayer resulting from an overpayment of a tax liability or erroneous payment of a tax due." A TCC is a certification, duly issued to the taxpayer named therein, by the Commissioner or his duly authorized representative, reduced in a BIR Accountable Form in accordance with the prescribed formalities, acknowledging that the grantee-taxpayer named therein is legally entitled a tax credit, the money value of which may be used in payment or in satisfaction of any of his internal revenue tax liability (except those excluded), or may be converted as a cash refund, or may otherwise be disposed of in the manner and in accordance with the limitations, if any, as may be prescribed by the provisions of these Regulations. From the above definitions, it is clear that a TCC is an undertaking by the government through the BIR or DOF, acknowledging that a taxpayer is entitled to a certain amount of tax credit from either an overpayment of income taxes, a direct benefit granted by law or other sources and instances granted by law such as on specific unused input taxes and excise taxes on certain goods. As such, tax credit is transferable in accordance with pertinent laws, rules, and regulations. Therefore, the TCCs are immediately valid and effective after their issuance.

3. TAXATION; EXCISE TAX; TAX CREDITS; A TAX PAYMENT THROUGH A TAX CREDIT CERTIFICATE CANNOT BE BOTH EFFECTIVE WHEN MADE AND DEPENDENT ON A FUTURE EVENT FOR ITS EFFECTIVITY.— As aptly pointed out in the dissent of Justice Lovell Bautista in CTA EB No. 64, this is clear from the Guidelines and Instructions found at the back of each TCC, which provide: 1. This Tax Credit Certificate (TCC) shall entitle the grantee to apply the tax credit against taxes and duties until the amount is fully utilized, in accordance with the pertinent tax and customs laws, rules and regulations. x x x 4. To acknowledge application of payment, the One-Stop-Shop Tax Credit Center shall issue the

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corresponding Tax Debit Memo (TDM) to the grantee. The authorized Revenue Officer/Customs Collector to which payment/utilization was made shall accomplish the Application of Tax Credit portion at the back of the certificate and affix his signature on the column provided. The foregoing guidelines cannot be clearer on the validity and effectivity of the TCC to pay or settle tax liabilities of the grantee or transferee, as they do not make the effectivity and validity of the TCC dependent on the outcome of a post-audit. In fact, if we are to sustain the appellate tax court, it would be absurd to make the effectivity of the payment of a TCC dependent on a post-audit since there is no contemplation of the situation wherein there is no post-audit. Does the payment made become effective if no post-audit is conducted? Or does the so-called suspensive condition still apply as no law, rule, or regulation specifies a period when a post-audit should or could be conducted with a prescriptive period? Clearly, a tax payment through a TCC cannot be both effective when made and dependent on a future event for its effectivity. Our system of laws and procedures abhors ambiguity.

4. ID.; ID.; ID.; TO RULE THAT TAX CREDIT CERTIFICATES ARE SUBJECT TO POST AUDIT AS A SUSPENSIVE CONDITION WOULD DEFEAT ITS VERY PURPOSE AS THERE WOULD BE NO GUARANTEE THAT IT WOULD BE HONORED BY THE GOVERNMENT AS PAYMENT FOR TAXES.— If the TCCs are considered to be subject to post-audit as a suspensive condition, the very purpose of the TCC would be defeated as there would be no guarantee that the TCC would be honored by the government as payment for taxes. No investor would take the risk of utilizing TCCs if these were subject to a post-audit that may invalidate them, without prescribed grounds or limits as to the exercise of said post-audit. The inescapable conclusion is that the TCCs are not subject to post-audit as a suspensive condition, and are thus valid and effective from their issuance. As such, in the present case, if the TCCs have already been applied as partial payment for the tax liability of PSPC, a post-audit of the TCCs cannot simply annul them and the tax payment made through said TCCs. Payment has already been made and is as valid and effective as the issued TCCs. The subsequent post-audit cannot void the TCCs and allow the respondent to declare that utilizing canceled TCCs results in nonpayment on the part of PSPC. As

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will be discussed, respondent and the Center expressly recognize the TCCs as valid payment of PSPC's tax liability.

5. ID.; ID.; ID.; THE POST AUDIT CONTEMPLATED IN THE TAX CREDIT CERTIFICATES DOES NOT PERTAIN TO THEIR GENUINENESS OR VALIDITY, BUT ON COMPUTATIONAL DISCREPANCIES THAT MAY HAVE RESULTED FROM ITS TRANSFER AND UTILIZATION.— The only conditions the TCCs are subjected to are those found on its face. And these are: 1. Post-audit and subsequent adjustment in the event of computational discrepancy; 2. A reduction for any outstanding account/obligation of herein claimant with the BIR and/or BOC; and 3. Revalidation with the Center in case the TCC is not utilized or applied within one (1) year from date of issuance/date of last utilization. The above conditions clearly show that the post-audit contemplated in the TCCs does not pertain to their genuineness or validity, but on computational discrepancies that may have resulted from the transfer and utilization of the TCC. This is shown by a close reading of the first and second conditions above; the third condition is self explanatory. Since a tax credit partakes of what is owed by the State to a taxpayer, if the taxpayer has an outstanding liability with the BIR or the BOC, the money value of the tax credit covered by the TCC is primarily applied to such internal revenue liabilities of the holder as provided under condition number two. Elsewise put, the TCC issued to a claimant is applied first and foremost to any outstanding liability the claimant may have with the government. Thus, it may happen that upon post-audit, a TCC of a taxpayer may be reduced for whatever liability the taxpayer may have with the BIR which remains unpaid due to inadvertence or computational errors, and such reduction necessarily affects the balance of the monetary value of the tax credit of the TCC.

6. ID.; ID.; PETITIONER IS NOT REQUIRED BY LAW TO BE THE CAPITAL EQUIPMENT PROVIDER OR A SUPPLIER OF RAW MATERIAL AND/OR COMPONENT SUPPLIER TO THE TRANSFERORS; THE LAW ONLY REQUIRES THAT THE TRANSFEREE BE A BOARD OF INVESTMENT-REGISTERED COMPANY SIMILAR TO THE BOARD OF INVESTMENT REGISTERED TRANSFERORS.— The post-audit the Center conducted on the transferred TCCs, delving into their issuance and validity on alleged violations by PSPC

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of the August 29, 1989 MOA between the DOF and BOI, is completely misplaced. As may be recalled, the Center required PSPC to submit copies of pertinent sales invoices and delivery receipts covering sale transactions of PSPC products to the TCC assignors/transferors purportedly in connection with an ongoing post audit. As correctly protested by PSPC but which was completely ignored by the Center, PSPC is not required by law to be a capital equipment provider or a supplier of raw material and/or component supplier to the transferors. What the law requires is that the transferee be a BOI-registered company similar to the BOI-registered transferors. The IRR of EO 226, which incorporated the October 5, 1982 MOA between the MOF and BOI, pertinently provides for the guidelines concerning the transferability of TCCs: [T]he 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. The above requirement has not been amended or repealed during the unfolding of the instant controversy. Thus, it is clear from the above proviso that it is only required that a TCC transferee be BOI-registered. In requiring PSPC to submit sales documents for its purported post-audit of the TCCs, the Center gravely abused its discretion as these are not required of the transferee PSPC by law and by the rules.

7. ID.; ID.; ID.; EVEN IF THE AUGUST 29, MEMORANDUM OF AGREEMENT (MOA) HAS AMENDED THE IMPLEMENTING RULES AND REGULATIONS (IRR) OF EO 226, IT IS INEFFECTIVE AND CANNOT PREJUDICE THIRD PARTIES FOR LACK OF PUBLICATION AS MANDATORILY REQUIRED UNDER CHAPTER 2 OF BOOK VII, EO 292, OTHERWISE KNOWN AS THE ADMINISTRATIVE CODE OF 1987.— While the October 5, 1982 MOA appears to have been amended by the August 29, 1989 MOA between the DOF and BOI, such may not operate to prejudice transferees like PSPC. For one, the August 29,

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1989 MOA remains only an internal agreement as it has neither been elevated to the level of nor incorporated as an amendment in the IRR of EO 226. For another, even if the August 29, 1989 MOA has indeed amended the IRR, which it has not, still, it is ineffective and cannot prejudice third parties for lack of publication as mandatorily required under Chapter 2 of Book VII, EO 292, otherwise known as the Administrative Code of 1987. It is clear that the Center or DOF cannot compel PSPC to submit sales documents for the purported post-audit, as PSPC has duly complied with the requirements of the law and rules to be a qualified transferee of the subject TCCs.

8. ID.; ID.; ID.; ANY FRAUD OR BREACH OF LAW OR RULE RELATING TO THE ISSUANCE OF THE TAX CREDIT CERTIFICATE BY THE ONE STOP SHOP INTER-AGENCY TAX CREDIT AND DUTY DRAWBACK CENTER ("CENTER") TO THE TRANSFEROR OR THE ORIGINAL GRANTEE IS THE LATTER'S RESPONSIBILITY AND LIABILITY; THE TRANSFEREE IN GOOD FAITH AND FOR VALUE MAY NOT BE UNJUSTLY PREJUDICED BY FRAUD COMMITTED BY THE CLAIMANT OR TRANSFEROR IN THE PROCUREMENT OR ISSUANCE OF A CERTIFICATE FROM THE CENTER.— We likewise fail to see the liability clause at the dorsal portion of the TCCs to be a suspensive condition relative to the result of the post-audit. Said liability clause indicates: LIABILITY CLAUSE Both the TRANSFEROR and the TRANSFEREE shall be jointly and severally liable for any fraudulent act or violation of the pertinent laws, rules and regulations relating to the transfer of this TAX CREDIT CERTIFICATE. The above clause to our mind clearly provides only for the solidary liability relative to the transfer of the TCCs from the original grantee to a transferee. There is nothing in the above clause that provides for the liability of the transferee in the event that the validity of the TCC issued to the original grantee by the Center is impugned or where the TCC is declared to have been fraudulently procured by the said original grantee. Thus, the solidary liability, if any, applies only to the sale of the TCC to the transferee by the original grantee. Any fraud or breach of law or rule relating to the issuance of the TCC by the Center to the transferor or the original grantee is the latter's responsibility and liability. The transferee in good faith and for value may not be unjustly

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prejudiced by the fraud committed by the claimant or transferor in the procurement or issuance of the TCC from the Center. It is not only unjust but well-nigh violative of the constitutional right not to be deprived of one's property without due process of law. Thus, a re-assessment of tax liabilities previously paid through TCCs by a transferee in good faith and for value is utterly confiscatory, more so when surcharges and interests are likewise assessed.

9. ID.; ID.; ID.; A TRANSFEREE IN GOOD FAITH AND FOR VALUE OF A TAX CREDIT CERTIFICATE WHO HAS RELIED ON THE CENTER'S REPRESENTATION OF THE GENUINENESS AND VALIDITY OF THE CERTIFICATE TRANSFERRED TO IT MAY NOT BE LEGALLY REQUIRED TO PAY AGAIN THE TAX COVERED BY THE CERTIFICATE.— A transferee in good faith and for value of a TCC who has relied on the Center's representation of the genuineness and validity of the TCC transferred to it may not be legally required to pay again the tax covered by the TCC which has been belatedly declared null and void, that is, after the TCCs have been fully utilized through settlement of internal revenue tax liabilities. Conversely, when the transferee is party to the fraud as when it did not obtain the TCC for value or was a party to or has knowledge of its fraudulent issuance, said transferee is liable for the taxes and for the fraud committed as provided for by law. In the instant case, a close review of the factual milieu and the records reveals that PSPC is a transferee in good faith and for value. No evidence was adduced that PSPC participated in any way in the issuance of the subject TCCs to the corporations who in turn conveyed the same to PSPC. It has likewise been shown that PSPC was not involved in the processing for the approval of the transfers of the subject TCCs from the various BOI-registered transferors.

10. ID.; ID.; ID.; THE THREE-YEAR PRESCRIPTIVE PERIOD FOR ASSESSMENT UNDER ARTICLE 203 OF THE NATIONAL INTERNAL REVENUE CODE HAS ALREADY SET IN AND BARS RESPONDENT FROM ASSESSING ANEW PETITIONER FOR THE EXCISE TAXES ALREADY PAID IN 1992 AND 1994 TO 1997; EVEN IF THE PERIOD FOR ASSESSMENT HAS NOT PRESCRIBED, STILL THERE IS NO VALID GROUND FOR ASSESSMENT AS THE EXCISE TAX LIABILITIES OF PETITIONER HAVE

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BEEN DULY SETTLED AND PAID.— It is clear that PSPC is a transferee in good faith and for value of the subject TCCs and may not be prejudiced with a re-assessment of excise tax liabilities it has already settled when due with the use of the subject TCCs. Logically, therefore, the excise tax returns filed by PSPC duly covered by the TDM and ATAPETs issued by the BIR confirming the full payment and satisfaction of the excise tax liabilities of PSPC, have not been fraudulently filed. Consequently, as PSPC is a transferee in good faith and for value, Sec. 222(a) of the NIRC does not apply in the instant case as PSPC has neither been shown nor proven to have committed any fraudulent act in the transfer and utilization of the subject TCCs. With more reason, therefore, that the three-year prescriptive period for assessment under Art. 203 of the NIRC has already set in and bars respondent from assessing anew PSPC for the excise taxes already paid in 1992 and 1994 to 1997. Besides, even if the period for assessment has not prescribed, still, there is no valid ground for the assessment as the excise tax liabilities of PSPC have been duly settled and paid.

11. ID.; ID.; ID.; PETITIONER CANNOT BE FAULTED IN RELYING ON THE BUREAU OF INTERNAL REVENUE'S ACCEPTANCE OF THE SUBJECT TRANSFER CREDIT CERTIFICATES AS PAYMENT FOR ITS EXCISE TAX LIABILITIES; THE RELIANCE IS SUPPORTED BY THE FACT THAT THE SUBJECT CERTIFICATES HAVE PASSED THROUGH STRINGENT REVIEWS, THE CENTER'S APPROVAL, AND FINALLY THE ACCEPTANCE BY THE BUREAU OF INTERNAL REVENUE AS PAYMENT THROUGH THE ISSUANCE OF ITS OWN TAX DEBIT MEMORANDA (TDM) AND AUTHORITIES TO ACCEPT PAYMENT OF EXCISE TAXES (ATAPET).— PSPC cannot be blamed for relying on the Center's approval for the transfers of the subject TCCs and the Center's acceptance of the TCCs for the payment of its excise tax liabilities. Likewise, PSPC cannot be faulted in relying on the BIR's acceptance of the subject TCCs as payment for its excise tax liabilities. This reliance is supported by the fact that the subject TCCs have passed through stringent reviews starting from the claims of the transferors, their issuance by the Center, the Center's approval for their transfer to PSPC,

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the Center's acceptance of the TCCs to pay PSPC's excise tax liabilities through the issuance of the Center's TDM, and finally the acceptance by the BIR of the subject TCCs as payment through the issuance of its own TDM and ATAPETs. Therefore, PSPC cannot be prejudiced by the Center's turnaround in assailing the validity of the subject TCCs which it issued in due course.

12. ID.; ID.; ID.; THE SUBJECT TAX CREDIT CERTIFICATES MAY NO LONGER BE CANCELLED AS THEY HAVE ALREADY BEEN CANCELLED AND USED UP AFTER THEIR ACCEPTANCE AS PAYMENT FOR PETITIONER'S EXCISE TAX LIABILITIES.— We are of the view that the subject TCCs cannot be canceled by the Center as these had already been cancelled after their application to PSPC's excise tax liabilities. PSPC contends they are already *functus officio*, not quite in the sense of being no longer effective, but in the sense that they have been used up. When the subject TCCs were accepted by the BIR through the latter's issuance of TDM and the ATAPETs, the subject TCCs were duly cancelled. The tax credit of a taxpayer evidenced by a TCC is used up or, in accounting parlance, debited when applied to the taxpayer's internal revenue tax liability, and the TCC cancelled after the tax credit it represented is fully debited or used up. A credit is a payable or a liability. A tax credit, therefore, is a liability of the government evidenced by a TCC. Thus, the tax credit of a taxpayer evidenced by a TCC is debited by the BIR through a TDM, not only evidencing the payment of the tax by the taxpayer, but likewise deducting or debiting the existing tax credit with the amount of the tax paid. In the instant case, with due application, approval, and acceptance of the payment by PSPC of the subject TCCs for its then outstanding excise tax liabilities in 1992 and 1994 to 1997, the subject TCCs have been cancelled as the money value of the tax credits these represented have been used up. Therefore, the DOF through the Center may not now cancelled the subject TCCs as these have already been cancelled and used up after their acceptance as payment for PSPC's excise tax liabilities. What has been used up, debited, and cancelled cannot anymore be declared to be void, ineffective, and cancelled anew.

13. ID.; ID.; ID.; EVEN ASSUMING THAT FRAUD ATTENDED THE PROCUREMENT OF THE SUBJECT TAX CREDIT

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CERTIFICATES, IT CANNOT PREJUDICE PETITIONER'S RIGHTS, SINCE IT HAS NOT BEEN SHOWN OR PROVEN THAT PETITIONER PARTICIPATED IN THE PERPETRATION OF THE FRAUDULENT ACTS, NOR IS IT SHOWN THAT IT COMMITTED FRAUD IN THE TRANSFER AND UTILIZATION OF THE SUBJECT CERTIFICATES.— On the issue of the fraudulent procurement of the TCCs, it has been asseverated that fraud was committed by the TCC claimants who were the transferors of the subject TCCs. We see no need to rule on this issue in view of our finding that the real issue in this petition does not dwell on the validity of the TCCs procured by the transferor from the Center but on whether fraud or breach of law attended the transfer of said TCCs by the transferor to the transferee. The finding of the CTA *En Banc* that there was fraud in the procurement of the subject TCCs is, therefore, irrelevant and immaterial to the instant petition. Moreover, there are pending criminal cases arising from the alleged fraud. We leave the matter to the anti-graft court especially considering the failure of the affiants to the affidavits to appear, making these hearsay evidence. But even assuming that fraud attended the procurement of the subject TCCs, it cannot prejudice PSPC's rights as earlier explained since PSPC has not been shown or proven to have participated in the perpetration of the fraudulent acts, nor is it shown that PSPC committed fraud in the transfer and utilization of the subject TCCs.

14. ID.; ID.; ID.; SINCE EXCOM RESOLUTION NO. 03-05-99 PROVIDING FOR THE "GUIDELINES AND PROCEDURES FOR THE CANCELLATION, RECALL AND RECOVERY OF FRAUDULENTLY ISSUED TAX CREDIT CERTIFICATES" WAS NEITHER REGISTERED WITH THE U.P. LAW CENTER NOR PUBLISHED, IT IS INEFFECTIVE AND UNENFORCEABLE.— On the issue of the publication of the Center's Excom Resolution No. 03-05-99 providing for the "Guidelines and Procedures for the Cancellation, Recall and Recovery of Fraudulently Issued Tax Credit Certificates," we find that the resolution is invalid and unenforceable. It authorizes the cancellation of TCCs and TDM which are found to have been granted without legal basis or based on fraudulent documents. The cancellation of the TCCs

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and TDM is covered by a penal provision of the assailed resolution. Such being the case, it should have been published and filed with the National Administrative Register of the U.P. Law Center in accordance with Secs. 3, 4, and 5, Chapter 2 of Book VII, EO 292 or the Administrative Code of 1987. We explained in *People v. Que Po Lay* that a rule which carries a penal sanction will bind the public if the public is officially and specifically informed of the contents and penalties prescribed for the breach of the rule. Since Excom Resolution No. 03-05-99 was neither registered with the U.P. Law Center nor published, it is ineffective and unenforceable. Even if the resolution need not be published, the punishment for any alleged fraudulent act in the procurement of the TCCs must not be visited on PSPC, an innocent transferee for value, which has not been shown to have participated in the fraud. Respondent must go after the perpetrators of the fraud.

15. ID.; ID.; ID.; RESPONDENT DID NOT COMPLY WITH THE REQUIREMENTS OF STATUTORY AND PROCEDURAL DUE PROCESS.— PSPC claims that having no deficiency excise tax liabilities, it may not be liable for the late payment surcharges and annual interests. This issue has been mooted by our disquisition above resolving the first issue in that PSPC has duly settled its excise tax liabilities for 1992 and 1994 to 1997. Consequently, there is no basis for the imposition of a late payment surcharges and for interests, and no need for further discussion on the matter.

APPEARANCES OF COUNSEL

Arthur Autea & Associates for petitioner.
The Solicitor General for respondent.

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D E C I S I O N

VELASCO, JR., *J.*:

The Case

Before us is a Petition for Review on *Certiorari* under Rule 45 assailing the April 28, 2006 Decision[1] of the Court of Tax Appeals (CTA) *En Banc* in CTA EB No. 64, which upheld respondent's assessment against petitioner for deficiency excise taxes for the taxable years 1992 and 1994 to 1997. Said *En Banc* decision reversed and set aside the August 2, 2004 Decision[2] and January 20, 2005 Resolution[3] of the CTA Division in CTA Case No. 6003 entitled *Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue*, which ordered the withdrawal of the April 22, 1998 collection letter of respondent and enjoined him from collecting said deficiency excise taxes.

The Facts

Petitioner Pilipinas Shell Petroleum Corporation (PSPC) is the Philippine subsidiary of the international petroleum giant Shell, and is engaged in the importation, refining and sale of petroleum products in the country.

From 1988 to 1997, PSPC paid part of its excise tax liabilities with Tax Credit Certificates (TCCs) which it acquired through the Department of Finance (DOF) One Stop Shop Inter-Agency Tax Credit and Duty Drawback Center (Center) from other Board of Investment (BOI)-registered companies. The Center

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[1] *Rollo*, pp. 109-130. Penned by Associate Justice Erlinda P. Uy and concurred in by Associate Justices Juanito C. Castañeda, Jr., Caesar A. Casanova and Olga Palanca-Enriquez; with Dissenting Opinion of Associate Justice Lovell R. Bautista, concurred in by Presiding Justice Ernesto D. Acosta, *id*. at 131-145.

[2] *Id*. at 1708-1742. Penned by Associate Justice Lovell R. Bautista and concurred in by Presiding Justice Ernesto D. Acosta; with Dissenting Opinion of Associate Justice Juanito C. Castañeda, Jr., *id*. at 1743-1757.

[3] *Id*. at 1758-1761, with Dissenting Opinion of Associate Justice Juanito C. Castañeda, Jr., *id*. at 1762-1767.

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is a composite body run by four government agencies, namely: the DOF, Bureau of Internal Revenue (BIR), Bureau of Customs (BOC), and BOI.

Through the Center, PSPC acquired for value various Center-issued TCCs which were correspondingly transferred to it by other BOI-registered companies through Center-approved Deeds of Assignments. Subsequently, when PSPC signified its intent to use the TCCs to pay part of its excise tax liabilities, said payments were duly approved by the Center through the issuance of Tax Debit Memoranda (TDM), and the BIR likewise accepted as payments the TCCs by issuing its own TDM covering said TCCs, and the corresponding Authorities to Accept Payment for Excise Taxes (ATAPETs).

However, on April 22, 1998, the BIR sent a collection letter[4] to PSPC for alleged deficiency excise tax liabilities of PhP 1,705,028,008.06 for the taxable years 1992 and 1994 to 1997, inclusive of delinquency surcharges and interest. As basis for the collection letter, the BIR alleged that PSPC is not a qualified transferee of the TCCs it acquired from other BOI-registered companies. These alleged excise tax deficiencies covered by the collection letter were already paid by PSPC with TCCs acquired through, and issued and duly authorized by the Center, and duly covered by TDMs of both the Center and BIR, with the latter also issuing the corresponding ATAPETs.

PSPC protested the April 22, 1998 collection letter, but the protest was denied by the BIR through the Regional Director of Revenue Region No. 8. PSPC filed its motion for reconsideration. However, due to respondent's inaction on the motion, on February 2, 1999, PSPC filed a petition for review before the CTA, docketed as CTA Case No. 5728.

On July 23, 1999, the CTA rendered a Decision[5] in CTA Case No. 5728 ruling, *inter alia*, that the use by PSPC of the

[4] *Id*. at 651.

[5] CA *rollo*, pp. 19-40. Penned by Associate Justice Amancio Q. Saga and concurred in by Presiding Justice Ernesto D. Acosta and Associate Justice Ramon O. De Veyra.

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TCCs was legal and valid, and that respondent's attempt to collect alleged delinquent taxes and penalties from PSPC without an assessment constitutes denial of due process. The dispositive portion of the July 23, 1999 CTA Decision reads:

> [T]he instant petition for review is GRANTED. The collection letter issued by the Respondent dated April 22, 1998 is considered withdrawn and he is ENJOINED from any attempts to collect from petitioner the specific tax, surcharge and interest subject of this petition.[6]

Respondent elevated the July 23, 1999 CTA Decision in CTA Case No. 5728 to the Court of Appeals (CA) through a petition for review[7] docketed as CA-G.R. SP No. 55329. This case was subsequently consolidated with the similarly situated case of Petron Corporation under CA-G.R. SP No. 55330. To date, these consolidated cases are still pending resolution before the CA.

Meanwhile, in late 1999, and despite the pendency of CA-G.R. SP No. 55329, the Center sent several letters to PSPC dated August 31, 1999,[8] September 1, 1999,[9] and October 18, 1999.[10] The first required PSPC to submit copies of pertinent sales invoices and delivery receipts covering sale transactions of PSPC products to the TCC assignors/transferors purportedly in connection with an ongoing post audit. The second letter similarly required submission of the same documents covering PSPC Industrial Fuel Oil (IFO) deliveries to Spintex International, Inc. The third letter is in reply to the September 29, 1999 letter sent by PSPC requesting a list of the serial numbers of the TCCs assigned or transferred to it by various BOI-registered companies, either assignors or transferors.

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[6] *Id.* at 39.

[7] *Rollo*, pp. 511-526.

[8] *Id.* at 163-164.

[9] *Id.* at 165.

[10] *Id.* at 166-177.

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In its letter dated October 29, 1999 and received by the Center on November 3, 1999, PSPC emphasized that the required submission of these documents had no legal basis, for the applicable rules and regulations on the matter only require that both the assignor and assignee of TCCs be BOI-registered entities.[11] On November 3, 1999, the Center informed PSPC of the cancellation of the first batch of TCCs transferred to PSPC and the TDM covering PSPC's use of these TCCs as well as the corresponding TCC assignments. PSPC's motion for reconsideration was not acted upon.

On November 22, 1999, PSPC received the November 15, 1999 assessment letter[12] from respondent for excise tax deficiencies, surcharges, and interest based on the first batch of cancelled TCCs and TDM covering PSPC's use of the TCCs. All these cancelled TDM and TCCs were also part of the subject matter in CTA Case No. 5728, now pending before the CA in CA-G.R. SP No. 55329.

PSPC protested[13] the assessment letter, but the protest was denied by the BIR, constraining it to file another petition for review[14] before the CTA, docketed as CTA Case No. 6003.

Parenthetically, on March 30, 2004, Republic Act No. (RA) 9282[15] was promulgated amending RA 1125,[16] expanding the jurisdiction of the CTA and enlarging its membership. It became effective on April 23, 2004 after its due publication. Thus, CTA Case No. 6003 was heard and decided by a CTA Division.

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[11] *Id*. at 178-184.

[12] *Id*. at 193-208.

[13] *Id*. at 209-222, Letter-Protest of PSPC dated December 2, 1999.

[14] *Id*. at 227-286.

[15] "An Act Expanding the Jurisdiction of the Court of Tax Appeals, Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Sections of Republic Act No. 1125, otherwise known as the Law Creating the Court of Tax Appeals."

[16] Enacted on June 16, 1954.

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The Ruling of the Court of Tax Appeals Division (CTA Case No. 6003)

On August 2, 2004, the CTA Division rendered a Decision[17] granting the PSPC's petition for review. The dispositive portion reads:

> [T]he instant petition is hereby GRANTED. Accordingly, the assessment issued by the respondent dated November 15, 1999 against petitioner is hereby CANCELLED and SET ASIDE.[18]

In granting PSPC's petition for review, the CTA Division held that respondent failed to prove with convincing evidence that the TCCs transferred to PSPC were fraudulently issued as respondent's finding of alleged fraud was merely speculative. The CTA Division found that neither the respondent nor the Center could state what sales figures were used as basis for the TCCs to issue, as they merely based their conclusions on the audited financial statements of the transferors which did not clearly show the actual export sales of transactions from which the TCCs were issued.

In the same vein, the CTA Division held that the machinery and equipment cannot be the basis in concluding that transferor could not have produced the volume of products indicated in its BOI registration. It further ruled that the Center erroneously based its findings of fraud on two possibilities: either the transferor did not declare its export sales or underdeclare them. Thus, no specific fraudulent acts were identified or proven. The CTA Division concluded that the TCCs transferred to PSPC were not fraudulently issued.

On the issue of whether a TCC transferee should be a supplier of either capital equipment, materials, or supplies, the CTA Division ruled in the negative as the Memorandum of Agreement (MOA)[19] between the DOF and BOI executed on August 29, 1989 specifying such requirement was not incorporated in the

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[17] *Supra* note 3.

[18] *Rollo*, p. 1741.

[19] *Id.* at 159-160.

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Implementing Rules and Regulations (IRR) of Executive Order No. (EO) 226.[20] The CTA Division found that only the October 5, 1982 MOA between the then Ministry of Finance (MOF) and BOI was incorporated in the IRR of EO 226. It held that while the August 29, 1989 MOA indeed amended the October 5, 1982 MOA still it was not incorporated in the IRR. Moreover, according to the CTA Division, even if the August 29, 1989 MOA was elevated or incorporated in the IRR of EO 226, still, it is ineffective and could not bind nor prejudice third parties as it was never published.

Anent the affidavits of former Officers or General Managers of transferors attesting that no IFO deliveries were made by PSPC, the CTA Division ruled that such cannot be given probative value as the affiants were not presented during trial of the case. However, the CTA Division said that the November 15, 1999 assessment was not precluded by the prior CTA Case No. 5728 as the latter concerned the validity of the transfer of the TCCs, while CTA Case No. 6003 involved alleged fraudulent procurement and transfer of the TCCs.

Respondent forthwith filed his motion for reconsideration of the above decision which was rejected on January 20, 2005. And, pursuant to Section 11[21] of RA 9282, respondent appealed

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[20] THE OMNIBUS INVESTMENTS CODE of 1987, as Amended.

[21] Section 11. Section 18 of [RA 1125] is hereby amended as follows:

SEC. 18. Appeal to the Court of Tax Appeals *En Banc*.—No civil proceeding involving matter arising under the National Internal Revenue Code, the Tariff and Customs Code or the Local Government Code shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the CTA and disposed of in accordance with the provisions of this Act.

A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA *en banc*.

SEC. 19. Review by *Certiorari*.—A party adversely affected by a decision or ruling of the CTA *en banc* may file with the Supreme Court a verified petition for review on *certiorari* pursuant to Rule 45 of the 1997 Rules of Civil Procedure.

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the above decision through a petition for review [22] before the CTA *En Banc*.

The Ruling of the Court of Tax Appeals *En Banc*
(CTA EB No. 64)

The CTA *En Banc*, however, rendered the assailed April 28, 2006 Decision [23] setting aside the August 2, 2004 Decision and the January 20, 2005 Resolution of the CTA Division. The *fallo* reads:

> WHEREFORE, premises considered, the Petition for Review is hereby GRANTED. The assailed Decision and Resolution dated August 2, 2004 and January 20, 2005, respectively, are hereby SET ASIDE and a new one entered dismissing respondent Pilipinas Shell Petroleum Corporation's Petition for Review filed in C.T.A. Case No. 6003 for lack of merit. Accordingly, respondent is ORDERED TO PAY the petitioner the amount of P570,577,401.61 as deficiency excise tax for the taxable years 1992 and 1994 to 1997, inclusive of 25% surcharge and 20% interest, computed as follows:
>
> | | |
> |---|---|
> | Basic Tax | ₱285,766,987.00 |
> | Add: | |
> | Surcharge (25%) | 71,441,746.75 |
> | Interest (20%) | 213,368,667.86 |
> | Total Tax Due | ₱570,577,401.61 |
>
> In addition, respondent is hereby ORDERED TO PAY 20% delinquency interest thereon per annum computed from December 4, 1999 until full payment thereof, pursuant to Sections 248 and 249 of the NIRC of 1997.
>
> SO ORDERED.[24]

The CTA *En Banc* resolved respondent's appeal by holding that PSPC was liable to pay the alleged excise tax deficiencies arising from the cancellation of the TDM issued against its TCCs which were used to pay some of its excise tax liabilities for the

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[22] *Rollo*, pp. 1768-1863, dated March 28, 2005.

[23] *Supra* note 2.

[24] *Rollo*, p. 129.

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years 1992 and 1994 to 1997. It ratiocinated in this wise, to wit:

First, the finding of the DOF that the TCCs had no monetary value was undisputed. Consequently, there was a non-payment of excise taxes corresponding to the value of the TCCs used for payment. Since it was PSPC which acquired the subject TCCs from a third party and utilized the same to discharge its own obligations, then it must bear the loss.

Second, the TCCs carry a suspensive condition, that is, their issuance was subject to post audit in order to determine if the holder is indeed qualified to use it. Thus, until final determination of the holder's right to the issuance of the TCCs, there is no obligation on the part of the DOF or BIR to recognize the rights of the holder or assignee. And, considering that the subject TCCs were cancelled after the DOF's finding of fraud in its issuance, the assignees must bear the consequence of such cancellation.

Third, PSPC was not an innocent purchaser for value of the TCCs as they contained liability clauses expressly stipulating that the transferees are solidarily liable with the transferors for any fraudulent act or violation of pertinent laws, rules, or regulations relating to the transfer of the TCC.

Fourth, the BIR was not barred by estoppel as it is a settled rule that in the performance of its governmental functions, the State cannot be estopped by the neglect of its agents and officers. Although the TCCs were confirmed to be valid in view of the TDM, the subsequent finding on post audit by the Center declaring the TCCs to be fraudulently issued is entitled to the presumption of regularity. Thus, the cancellation of the TCCs was legal and valid.

Fifth, the BIR's assessment did not prescribe considering that no payment took effect as the subject TCCs were canceled upon post audit. Consequently, the filing of the tax return sans payment due to the cancellation of the TCCs resulted in the falsity and/or omission in the filing of the tax return which put them in the ambit of the applicability of the 10-year prescriptive period from the discovery of falsity, fraud, or omission.

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Finally, however, the CTA *En Banc* applied *Aznar v. Court of Tax Appeals*,[25] where this Court held that without proof that the taxpayer participated in the fraud, the 50% fraud surcharge is not imposed, but the 25% late payment and the 20% interest per annum are applicable.

Thus, PSPC filed this petition with the following issues:

I

WHETHER OR NOT THE COURT OF TAX APPEALS GRAVELY ERRED IN ORDERING PETITIONER PSPC TO PAY THE AMOUNT OF TWO HUNDRED EIGHTY FIVE MILLION SEVEN HUNDRED SIXTY SIX THOUSAND NINE HUNDRED EIGHTY SEVEN PESOS (₱285,766,987.00), AS ALLEGED DEFICIENCY EXCISE TAXES, FOR THE TAXABLE YEARS, 1992 AND 1994 TO 1997.

II

WHETHER OR NOT THE COURT OF TAX APPEALS GRAVELY ERRED IN ISSUING THE QUESTIONED DECISION DATED 28 APRIL 2006 UPHOLDING THE CANCELLATION OF THE TAX CREDIT CERTIFICATES UTILIZED BY PETITIONER PSPC IN PAYING ITS EXCISE TAX LIABILITIES.

III

WHETHER OR NOT THE COURT OF TAX APPEALS GRAVELY ERRED IN IMPOSING SURCHARGES AND INTERESTS ON THE ALLEGED DEFICIENCY EXCISE TAX OF PETITIONER PSPC.

IV

WHETHER OR NOT THE ASSESSMENT DATED 15 NOVEMBER 1999 IS VOID CONSIDERING THAT IT FAILED TO COMPLY WITH THE STATUTORY AS WELL AS REGULATORY REQUIREMENTS IN THE ISSUANCE OF ASSESSMENTS.[26]

The Court's Ruling

The petition is meritorious.

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[25] No. L-20569, August 23, 1974, 58 SCRA 519.

[26] *Rollo*, pp. 26-27. Original in boldface.

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First Issue: Assessment of excise tax deficiencies

PSPC contends that respondent had no basis in issuing the November 15, 1999 assessment as PSPC had no pending unpaid excise tax liabilities. PSPC argues that under the IRR of EO 226, it is allowed to use TCCs transferred from other BOI-registered entities. On one hand, relative to the validity of the transferred TCCs, PSPC asserts that the TCCs are not subject to a suspensive condition; that the post-audit of a transferred TCC refers only to computational discrepancy; that the solidary liability of the transferor and transferee refers to computational discrepancy resulting from the transfer and not from the issuance of the TCC; that a post-audit cannot affect the validity and effectivity of a TCC after it has been utilized by the transferee; and that the BIR duly acknowledged the use of the subject TCCs, accepting them as payment for the excise tax liabilities of PSPC. On the other hand, PSPC maintains that if there was indeed fraud in the issuance of the subject TCCs, of which it had no knowledge nor participation, the Center's remedy is to go after the transferor for the value of the TCCs the Center may have erroneously issued.

PSPC likewise assails the BIR assessment on prescription for having been issued beyond the three-year prescriptive period under Sec. 203 of the National Internal Revenue Code (NIRC); and neither can the BIR use the 10-year prescriptive period under Sec. 222(a) of the NIRC, as PSPC has neither failed to file a return nor filed a false or fraudulent return with intent to evade taxes.

Respondent, on the other hand, counters that petitioner is liable for the tax liabilities adjudged by the CTA *En Banc* since PSPC, as transferee of the subject TCCs, is bound by the liability clause found at the dorsal side of the TCCs which subjects the genuineness, validity, and value of the TCCs to the outcome of the post-audit to be conducted by the Center. He relies on the CTA *En Banc*'s finding of the presence of a suspensive condition in the issuance of the TCCs. Thus, according to him, with the finding by the Center that the TCCs were fraudulently procured

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the subsequent cancellation of the TCCs resulted in the non-payment by PSPC of its excise tax liabilities equivalent to the value of the cancelled TCCs.

Respondent likewise posits that the Center erred in approving the transfer and issuance of the TDM, and of the TDM and ATAPETs issued by the BIR in accepting the utilization by PSPC of the subject TCCs, as payments for excise taxes cannot prejudice the BIR from assessing the tax deficiencies of PSPC resulting from the non-payment of the deficiencies after due cancellation by the Center of the subject TCCs and corresponding TDM.

Respondent concludes that due to the fraudulent procurement of the subject TCCs, his right to assess has not yet prescribed. He relies on the finding of the Center that the fraud was discovered only after the post-audit was conducted; hence, Sec. 222(a) of the NIRC applies, reckoned from October 24, 1999 or the date of the post-audit report. *In fine*, he points that what is at issue is the resulting non-payment of PSPC's excise tax liabilities from the cancellation of subject TCCs and not the amount of deficiency taxes due from PSPC, as what was properly assessed on November 15, 1999 was the amount of tax declared and found in PSPC's excise tax returns covered by the subject TCCs.

We find for PSPC.

The CTA *En Banc* upheld respondent's theory by holding that the Center has the authority to do a post-audit on the TCCs it issued; the TCCs are subject to the results of the post-audit since their issuance is subject to a suspensive condition; the transferees of the TCCs are solidarily liable with the transferors on the result of the post-audit; and the cancellation of the subject TCCs resulted in PSPC having to bear the loss anchored on its solidary liability with the transferor of the subject TCCs.

We can neither sustain respondent's theory nor that of the CTA *En Banc*.

First, in overturning the August 2, 2004 Decision of the CTA Division, the CTA *En Banc* applied Article 1181 of the Civil Code in this manner:

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To completely understand the matter presented before Us, it is worth emphasizing that the statement on the subject certificate stating that it is issued subject to post-audit is in the nature of a suspensive condition under Article 1181 of the Civil Code, which is quoted hereunder for ready reference, to wit:

> 'In conditional obligations, the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition.'

The above-quoted article speaks of obligations. 'These conditions affect obligations 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. On the other hand, the resolutory condition extinguishes rights and obligations already existing; in other words, the obligations and rights already exist, but under the threat of extinction upon the happening of the resolutory condition'. (8 Manresa 130-131, cited on page 140, Civil Code of the Philippines, Tolentino, 1962 ed., Vol. IV).

In adopting the foregoing provision of law, this Court rules that the issuance of the tax credit certificate is subject to the condition that a post-audit will subsequently be conducted in order to determine if the holder is indeed qualified for its issuance. As stated earlier, the holder takes the same subject to the outcome of the post-audit. Thus, unless and until there is a final determination of the holder's right to the issuance of the certificate, there exists no obligation on the part of the DOF or the BIR to recognize the rights of then holder or transferee. x x x

xxx xxx xxx

The validity and propriety of the TCC to effectively constitute payment of taxes to the government are still subject to the outcome of the post-audit. In other words, when the issuing authority (DOF) finds, as in the case at bar, circumstances which may warrant the cancellation of the certificate, the holder is inevitably bound by the outcome by the virtue of the express provisions of the TCCs.[27]

The CTA *En Banc* is incorrect.

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[27] *Id.* at 119-120.

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Art.1181 tells us that the condition is **suspensive** when the acquisition of rights or demandability of the obligation must await the occurrence of the condition.[28] However, Art. 1181 does not apply to the present case since the parties did **NOT** agree to a suspensive condition. Rather, specific laws, rules, and regulations govern the subject TCCs, not the general provisions of the Civil Code. Among the applicable laws that cover the TCCs are EO 226 or the Omnibus Investments Code, Letter of Instructions No. 1355, EO 765, RP-US Military Agreement, Sec. 106(c) of the Tariff and Customs Code, Sec. 106 of the NIRC, BIR Revenue Regulations (RRs), and others. Nowhere in the aforementioned laws does the post-audit become necessary for the validity or effectivity of the TCCs. Nowhere in the aforementioned laws is it provided that a TCC is issued subject to a suspensive condition.

The CTA *En Banc*'s holding of the presence of a suspensive condition is untenable as the subject TCCs duly issued by the Center are immediately effective and valid. The suspensive condition as ratiocinated by the CTA *En Banc* is one where the transfer contract was duly effected on the day it was executed between the transferee and the transferor but the TCC cannot be enforced until after the post-audit has been conducted. In short, under the ruling of the CTA *En Banc*, even if the TCC has been issued, the real and true application of the tax credit happens only after the post-audit confirms the TCC's validity and not before the confirmation; thus, the TCC can still be cancelled even if it has already been ostensibly applied to specific internal revenue tax liabilities.

We are not convinced.

We cannot subscribe to the CTA *En Banc*'s holding that the suspensive condition suspends the effectivity of the TCCs as payment until after the post-audit. This strains the very nature of a TCC.

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[28] III J. Vitug, *CIVIL LAW OBLIGATIONS AND CONTRACTS 27* (2003); citation omitted.

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A tax credit is not specifically defined in our Tax Code,[29] but Art. 21 of EO 226 defines a tax credit as "any of the credits against taxes and/or duties equal to those actually paid or would have been paid to evidence which a tax credit certificate shall be issued by the Secretary of Finance or his representative, or the Board (of Investments), if so delegated by the Secretary of Finance." Tax credits were granted under EO 226 as incentives to encourage investments in certain businesses. A tax credit generally refers to an amount that may be "subtracted directly from one's total tax liability."[30] It is therefore an "allowance against the tax itself"[31] or "a deduction from what is owed"[32] by a taxpayer to the government. In RR 5-2000,[33] a tax credit is defined as "the amount due to a taxpayer resulting from an overpayment of a tax liability or erroneous payment of a tax due."[34]

A TCC is

> a certification, duly issued to the taxpayer named therein, by the Commissioner or his duly authorized representative, reduced in a BIR Accountable Form in accordance with the prescribed formalities, acknowledging that the grantee-taxpayer named therein is legally entitled a tax credit, the money value of which may be used in payment or in satisfaction of any of his internal revenue tax liability (except those excluded), or may be converted as a cash refund, or may otherwise be disposed of in the manner and

[29] RA 8424 as amended by RAs 8761 and 9010. Likewise, the term "tax credit" is not defined in PD 1158, otherwise known as the NATIONAL INTERNAL REVENUE CODE of 1977, as amended.

[30] Garner, ed., *BLACK'S LAW DICTIONARY* 1501 (8th ed., 1999).

[31] Smith, *WEST'S TAX LAW DICTIONARY* 177-178 (1993).

[32] Oran and Tosti, *ORAN'S DICTIONARY OF THE LAW* 124 (3rd ed., 2000).

[33] "Prescribing the Regulations Governing the Manner of the Issuance of Tax Credit Certificates, and the Conditions for their Use, Revalidation and Transfer," issued by then Secretary of Finance Jose T. Pardo on July 19, 2000.

[34] *Id.,* Section 1, A.

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in accordance with the limitations, if any, as may be prescribed by the provisions of these Regulations.[35]

From the above definitions, it is clear that a TCC is an undertaking by the government through the BIR or DOF, acknowledging that a taxpayer is entitled to a certain amount of tax credit from either an overpayment of income taxes, a direct benefit granted by law or other sources and instances granted by law such as on specific unused input taxes and excise taxes on certain goods. As such, tax credit is transferable in accordance with pertinent laws, rules, and regulations.

Therefore, the TCCs are immediately valid and effective after their issuance. As aptly pointed out in the dissent of Justice Lovell Bautista in CTA EB No. 64, this is clear from the Guidelines and Instructions found at the back of each TCC, which provide:

1. This Tax Credit Certificate (TCC) **shall entitle the grantee to apply the tax credit against taxes and duties until the amount is fully utilized,** in accordance with the pertinent tax and customs laws, rules and regulations.

xxx xxx xxx

4. To acknowledge application of payment, the One-Stop-Shop Tax Credit Center shall issue the corresponding Tax Debit Memo (TDM) to the grantee.

The authorized Revenue Officer/Customs Collector to which payment/utilization was made shall accomplish the Application of Tax Credit portion at the back of the certificate and affix his signature on the column provided. (Emphasis supplied.)

The foregoing guidelines cannot be clearer on the validity and effectivity of the TCC to pay or settle tax liabilities of the grantee or transferee, as they do not make the effectivity and validity of the TCC dependent on the outcome of a post-audit. In fact, if we are to sustain the appellate tax court, it would be absurd to make the effectivity of the payment of a TCC dependent on a post-audit since there is no contemplation of the situation wherein there is no post-audit. Does the payment made become

[35] *Id.,* Section 1, B.

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effective if no post-audit is conducted? Or does the so-called suspensive condition still apply as no law, rule, or regulation specifies a period when a post-audit should or could be conducted with a prescriptive period? Clearly, a tax payment through a TCC cannot be both effective when made and dependent on a future event for its effectivity. Our system of laws and procedures abhors ambiguity.

Moreover, if the TCCs are considered to be subject to post-audit as a suspensive condition, the very purpose of the TCC would be defeated as there would be no guarantee that the TCC would be honored by the government as payment for taxes. No investor would take the risk of utilizing TCCs if these were subject to a post-audit that may invalidate them, without prescribed grounds or limits as to the exercise of said post-audit.

The inescapable conclusion is that the TCCs are not subject to post-audit as a suspensive condition, and are thus valid and effective from their issuance. As such, in the present case, if the TCCs have already been applied as partial payment for the tax liability of PSPC, a post-audit of the TCCs cannot simply annul them and the tax payment made through said TCCs. Payment has already been made and is as valid and effective as the issued TCCs. The subsequent post-audit cannot void the TCCs and allow the respondent to declare that utilizing cancelled TCCs results in nonpayment on the part of PSPC. As will be discussed, respondent and the Center expressly recognize the TCCs as valid payment of PSPC's tax liability.

Second, the only conditions the TCCs are subjected to are those found on its face. And these are:

1. Post-audit and subsequent adjustment in the event of computational discrepancy;

2. A reduction for any outstanding account/obligation of herein claimant with the BIR and/or BOC; and

3. Revalidation with the Center in case the TCC is not utilized or applied within one (1) year from date of issuance/date of last utilization.

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The above conditions clearly show that the post-audit contemplated in the TCCs does not pertain to their genuineness or validity, but on computational discrepancies that may have resulted from the transfer and utilization of the TCC.

This is shown by a close reading of the first and second conditions above; the third condition is self explanatory. Since a tax credit partakes of what is owed by the State to a taxpayer, if the taxpayer has an outstanding liability with the BIR or the BOC, the money value of the tax credit covered by the TCC is primarily applied to such internal revenue liabilities of the holder as provided under condition number two. Elsewise put, the TCC issued to a claimant is applied first and foremost to any outstanding liability the claimant may have with the government. Thus, it may happen that upon post-audit, a TCC of a taxpayer may be reduced for whatever liability the taxpayer may have with the BIR which remains unpaid due to inadvertence or computational errors, and such reduction necessarily affects the balance of the monetary value of the tax credit of the TCC.

For example, Company A has been granted a TCC in the amount of PhP 500,000 through its export transactions, but it has an outstanding excise tax liability of PhP 250,000 which due to inadvertence was erroneously assessed and paid at PhP 225,000. On post-audit, with the finding of a deficiency of PhP 25,000, the utilization of the TCC is accordingly corrected and the tax credit remaining in the TCC correspondingly reduced by PhP 25,000. This is a concrete example of a computational discrepancy which comes to light after a post-audit is conducted on the utilization of the TCC. The same holds true for a transferee's use of the TCC in paying its outstanding internal revenue tax liabilities.

Other examples of computational errors would include the utilization of a single TCC to settle several internal revenue tax liabilities of the taxpayer or transferee, where errors committed in the reduction of the credit tax running balance are discovered in the post-audit resulting in the adjustment of the TCC utilization and remaining tax credit balance.

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Third, the post-audit the Center conducted on the transferred TCCs, delving into their issuance and validity on alleged violations by PSPC of the August 29, 1989 MOA between the DOF and BOI, is completely misplaced. As may be recalled, the Center required PSPC to submit copies of pertinent sales invoices and delivery receipts covering sale transactions of PSPC products to the TCC assignors/transferors purportedly in connection with an ongoing post audit. As correctly protested by PSPC but which was completely ignored by the Center, PSPC is not required by law to be a capital equipment provider or a supplier of raw material and/or component supplier to the transferors. What the law requires is that the transferee be a BOI-registered company similar to the BOI-registered transferors.

The IRR of EO 226, which incorporated the October 5, 1982 MOA between the MOF and BOI, pertinently provides for the guidelines concerning the transferability of TCCs:

> [T]he 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. (Emphasis supplied.)

The above requirement has not been amended or repealed during the unfolding of the instant controversy. Thus, it is clear from the above proviso that it is only required that a TCC transferee be BOI-registered. In requiring PSPC to submit sales documents for its purported post-audit of the TCCs, the Center gravely abused its discretion as these are not required of the transferee PSPC by law and by the rules.

While the October 5, 1982 MOA appears to have been amended by the August 29, 1989 MOA between the DOF and BOI, such

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may not operate to prejudice transferees like PSPC. For one, the August 29, 1989 MOA remains only an internal agreement as it has neither been elevated to the level of nor incorporated as an amendment in the IRR of EO 226. As aptly put by the CTA Division:

> 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 [*sic*] 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.[36]

For another, even if the August 29, 1989 MOA has indeed amended the IRR, which it has not, still, it is ineffective and cannot prejudice third parties for lack of publication as mandatorily required under Chapter 2 of Book VII, EO 292, otherwise known as the Administrative Code of 1987, which pertinently provides:

> 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 filed within three (3) months from the date shall not thereafter be the basis of any sanction against any party or person.

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[36] *Rollo*, pp. 1731-1732.

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(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 existence of which must be expressed in a statement accompanying the rule. The agency shall take appropriate measures to make emergency rules known to persons who may be affected by them.

Section 5. x x x

(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.

It is clear that the Center or DOF cannot compel PSPC to submit sales documents for the purported post-audit, as PSPC has duly complied with the requirements of the law and rules to be a qualified transferee of the subject TCCs.

Fourth, we likewise fail to see the liability clause at the dorsal portion of the TCCs to be a suspensive condition relative to the result of the post-audit. Said liability clause indicates:

LIABILITY CLAUSE

Both the TRANSFEROR and the TRANSFEREE shall be jointly and severally liable for any fraudulent act or violation of the pertinent laws, rules and regulations relating to the **transfer** of this TAX CREDIT CERTIFICATE. (Emphasis supplied.)

The above clause to our mind clearly provides only for the solidary liability relative to the **transfer** of the TCCs from the original grantee to a transferee. There is nothing in the above clause that provides for the liability of the transferee in the event that the validity of the TCC issued to the original grantee by the Center is impugned or where the TCC is declared to

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have been fraudulently procured by the said original grantee. Thus, the solidary liability, if any, applies only to the sale of the TCC to the transferee by the original grantee. Any fraud or breach of law or rule relating to the issuance of the TCC by the Center to the transferor or the original grantee is the latter's responsibility and liability. The transferee in good faith and for value may not be unjustly prejudiced by the fraud committed by the claimant or transferor in the procurement or issuance of the TCC from the Center. It is not only unjust but well-nigh violative of the constitutional right not to be deprived of one's property without due process of law. Thus, a re-assessment of tax liabilities previously paid through TCCs by a transferee in good faith and for value is utterly confiscatory, more so when surcharges and interests are likewise assessed.

A transferee in good faith and for value of a TCC who has relied on the Center's representation of the genuineness and validity of the TCC transferred to it may not be legally required to pay again the tax covered by the TCC which has been belatedly declared null and void, that is, after the TCCs have been fully utilized through settlement of internal revenue tax liabilities. Conversely, when the transferee is party to the fraud as when it did not obtain the TCC for value or was a party to or has knowledge of its fraudulent issuance, said transferee is liable for the taxes and for the fraud committed as provided for by law.

In the instant case, a close review of the factual milieu and the records reveals that PSPC is a transferee in good faith and for value. No evidence was adduced that PSPC participated in any way in the issuance of the subject TCCs to the corporations who in turn conveyed the same to PSPC. It has likewise been shown that PSPC was not involved in the processing for the approval of the transfers of the subject TCCs from the various BOI-registered transferors.

Respondent, through the Center, made much of the alleged non-payment through non-delivery by PSPC of the IFOs it purportedly sold to the transferors covered by supply agreements which were allegedly the basis of the Center for the approval of the transfers. Respondent points to the requirement under

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the August 29, 1989 MOA between the DOF and BOI, specifying the requirement that "[t]he 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."[37]

As discussed above, the above amendment to the October 5, 1982 MOA between BOI and MOF cannot prejudice any transferee, like PSPC, as it was neither incorporated nor elevated to the IRR of EO 226, and for lack of due publication. The pro-forma supply agreements allegedly executed by PSPC and the transferors covering the sale of IFOs to the transferors have been specifically denied by PSPC. Moreover, the above-quoted requirement is not required under the IRR of EO 226. Therefore, it is incumbent for respondent to present said supply agreements to prove participation by PSPC in the approval of the transfers of the subject TCCs. Respondent failed to do this.

PSPC claims to be a transferee in good faith of the subject TCCs. It believed that its tax obligations for 1992 and 1994 to 1997 had in fact been paid when it applied the subject TCCs, considering that all the necessary authorizations and approvals attendant to the transfer and utilization of the TCCs were present. It is undisputed that the transfers of the TCCs from the original holders to PSPC were duly approved by the Center, which is composed of a number of government agencies, including the BIR. Such approval was annotated on the reverse side of the TCCs, and the Center even issued TDM which is proof of its approval for PSPC to apply the TCCs as payment for the tax liabilities. The BIR issued its own TDM, also signifying approval of the TCCs as payment for PSPC's tax liabilities. The BIR also issued ATAPETs covering the aforementioned BIR-issued TDM, further proving its acceptance of the TCCs as valid tax payments, which formed part of PSPC's total tax payments along with checks duly acknowledged and received by BIR's authorized agent banks.

Several approvals were secured by PSPC before it utilized the transferred TCCs, and it relied on the verification of the

[37] *Id*. at 160.

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various government agencies concerned of the genuineness and authenticity of the TCCs as well as the validity of their issuances. Furthermore, the parties stipulated in open court that the BIR-issued ATAPETs for the taxes covered by the subject TCCs confirm the correctness of the amount of excise taxes paid by PSPC during the tax years in question.

Thus, it is clear that PSPC is a transferee in good faith and for value of the subject TCCs and may not be prejudiced with a re-assessment of excise tax liabilities it has already settled when due with the use of the subject TCCs. Logically, therefore, the excise tax returns filed by PSPC duly covered by the TDM and ATAPETs issued by the BIR confirming the full payment and satisfaction of the excise tax liabilities of PSPC, have not been fraudulently filed. Consequently, as PSPC is a transferee in good faith and for value, Sec. 222(a) of the NIRC does not apply in the instant case as PSPC has neither been shown nor proven to have committed any fraudulent act in the transfer and utilization of the subject TCCs. With more reason, therefore, that the three-year prescriptive period for assessment under Art. 203 of the NIRC has already set in and bars respondent from assessing anew PSPC for the excise taxes already paid in 1992 and 1994 to 1997. Besides, even if the period for assessment has not prescribed, still, there is no valid ground for the assessment as the excise tax liabilities of PSPC have been duly settled and paid.

Fifth, PSPC cannot be blamed for relying on the Center's approval for the transfers of the subject TCCs and the Center's acceptance of the TCCs for the payment of its excise tax liabilities. Likewise, PSPC cannot be faulted in relying on the BIR's acceptance of the subject TCCs as payment for its excise tax liabilities. This reliance is supported by the fact that the subject TCCs have passed through stringent reviews starting from the claims of the transferors, their issuance by the Center, the Center's approval for their transfer to PSPC, the Center's acceptance of the TCCs to pay PSPC's excise tax liabilities through the issuance of the Center's TDM, and finally the acceptance by the BIR of the subject TCCs as payment through the issuance of its own TDM and ATAPETs.

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Therefore, PSPC cannot be prejudiced by the Center's turnaround in assailing the validity of the subject TCCs which it issued in due course.

Sixth, we are of the view that the subject TCCs cannot be cancelled by the Center as these had already been cancelled after their application to PSPC's excise tax liabilities. PSPC contends they are already *functus officio*, not quite in the sense of being no longer effective, but in the sense that they have been used up. When the subject TCCs were accepted by the BIR through the latter's issuance of TDM and the ATAPETs, the subject TCCs were duly cancelled.

The tax credit of a taxpayer evidenced by a TCC is used up or, in accounting parlance, debited when applied to the taxpayer's internal revenue tax liability, and the TCC cancelled after the tax credit it represented is fully debited or used up. A credit is a payable or a liability. A tax credit, therefore, is a liability of the government evidenced by a TCC. Thus, the tax credit of a taxpayer evidenced by a TCC is debited by the BIR through a TDM, not only evidencing the payment of the tax by the taxpayer, but likewise deducting or debiting the existing tax credit with the amount of the tax paid.

For example, a transferee or the tax claimant has a TCC of PhP 1 million, which was used to pay income tax liability of PhP 500,000, documentary stamp tax liability of PhP 100,000, and value-added tax liability of PhP 350,000, for an aggregate internal revenue tax liability of PhP 950,000. After the payments through the PhP 1 million TCC have been approved and accepted by the BIR through the issuance of corresponding TDM, the TCC money value is reduced to only PhP 50,000, that is, a credit balance of PhP 50,000. In this sense, the tax credit of the TCC has been cancelled or used up in the amount of PhP 950,000. Now, let us say the transferee or taxpayer has excise tax liability of PhP 250,000, s/he only has the remaining PhP 50,000 tax credit in the TCC to pay part of said excise tax. When the transferee or taxpayer applies such payment, the TCC is cancelled as the money value of the tax credit it represented has been fully debited or used up. In short, there is no more

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tax credit available for the taxpayer to settle his/her other tax liabilities.

In the instant case, with due application, approval, and acceptance of the payment by PSPC of the subject TCCs for its then outstanding excise tax liabilities in 1992 and 1994 to 1997, the subject TCCs have been cancelled as the money value of the tax credits these represented have been used up. Therefore, the DOF through the Center may not now cancel the subject TCCs as these have already been cancelled and used up after their acceptance as payment for PSPC's excise tax liabilities. What has been used up, debited, and canceled cannot anymore be declared to be void, ineffective, and cancelled anew.

Besides, it is indubitable that with the issuance of the corresponding TDM, not only is the TCC cancelled when fully utilized, but the payment is also final subject only to a post-audit on computational errors. Under RR 5-2000, a TDM is

> a certification, duly issued by the Commissioner or his duly authorized representative, reduced in a BIR Accountable Form in accordance with the prescribed formalities, acknowledging that the taxpayer named therein has duly paid his internal revenue tax liability in the form of and through the use of a Tax Credit Certificate, duly issued and existing in accordance with the provisions of these Regulations. The **Tax Debit Memo shall serve as the official receipt from the BIR evidencing a taxpayer's payment or satisfaction of his tax obligation.** The amount shown therein shall be charged against and deducted from the credit balance of the aforesaid Tax Credit Certificate.

Thus, with the due issuance of TDM by the Center and TDM by the BIR, the payments made by PSPC with the use of the subject TCCs have been effected and consummated as the TDMs serve as the official receipts evidencing PSPC's payment or satisfaction of its tax obligation. Moreover, the BIR not only issued the corresponding TDM, but it also issued ATAPETs which doubly show the payment of the subject excise taxes of PSPC.

Based on the above discussion, we hold that respondent erroneously and without factual and legal basis levied the

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assessment. Consequently, the CTA *En Banc* erred in sustaining respondent's assessment.

Second Issue: Cancellation of TCCs

PSPC argues that the CTA *En Banc* erred in upholding the cancellation by the Center of the subject TCCs it used in paying some of its excise tax liabilities as the subject TCCs were genuine and authentic, having been subjected to thorough and stringent procedures, and approvals by the Center. Moreover, PSPC posits that both the CTA's Division and *En Banc* duly found that PSPC had neither knowledge, involvement, nor participation in the alleged fraudulent issuance of the subject TCCs, and, thus, as a transferee in good faith and for value, it cannot be held solidarily liable for any fraud attendant to the issuance of the subject TCCs. PSPC further asserts that the Center has no authority to cancel the subject TCCs as such authority is lodged exclusively with the BOI. Lastly, PSPC said that the Center's Excom Resolution No. 03-05-99 which the Center relied upon as basis for the cancellation is defective, ineffective, and cannot prejudice third parties for lack of publication.

As we have explained above, the subject TCCs after being fully utilized in the settlement of PSPC's excise tax liabilities have been cancelled, and thus cannot be cancelled anymore. For being immediately effective and valid when issued, the subject TCCs have been duly utilized by transferee PSPC which is a transferee in good faith and for value.

On the issue of the fraudulent procurement of the TCCs, it has been asseverated that fraud was committed by the TCC claimants who were the transferors of the subject TCCs. We see no need to rule on this issue in view of our finding that the real issue in this petition does not dwell on the validity of the TCCs procured by the transferor from the Center but on whether fraud or breach of law attended the transfer of said TCCs by the transferor to the transferee.

The finding of the CTA *En Banc* that there was fraud in the procurement of the subject TCCs is, therefore, irrelevant and immaterial to the instant petition. Moreover, there are pending

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criminal cases arising from the alleged fraud. We leave the matter to the anti-graft court especially considering the failure of the affiants to the affidavits to appear, making these hearsay evidence.

We note in passing that PSPC and its officers were not involved in any fraudulent act that may have been undertaken by the transferors of subject TCCs, supported by the finding of the Ombudsman Special Prosecutor Leonardo P. Tamayo that Pacifico R. Cruz, PSPC General Manager of the Treasury and Taxation Department, who was earlier indicted as accused in OMB-0-99-2012 to 2034 for violation of Sec. 3(e) and (j) of RA 3019, as amended, otherwise known as the "Anti-Graft and Corrupt Practices Act," for allegedly conspiring with other accused in defrauding and causing undue injury to the government,[38] did not in any way participate in alleged fraudulent activities relative to the transfer and use of the subject TCCs.

In a Memorandum[39] addressed to then Ombudsman Aniano A. Desierto, the Special Prosecutor Leonardo P. Tamayo recommended dropping Pacifico Cruz as accused in Criminal Case Nos. 25940-25962 entitled *People of the Philippines v. Antonio P. Belicena, et al.*, pending before the Sandiganbayan Fifth Division for lack of probable cause. Special Prosecutor Tamayo found that Cruz's involvement in the transfers of the subject TCCs came after the applications for the transfers had been duly processed and approved; and that Cruz could not have been part of the conspiracy as he cannot be presumed to have knowledge of the irregularity, because the 1989 MOA, which prescribed the additional requirement that the transferee of a TCC should be a supplier of the transferor, was not yet published and made known to private parties at the time the subject TCCs were transferred to PSPC. The Memorandum of Special Prosecutor Tamayo was duly approved by then Ombudsman Desierto. Consequently, on May 31, 2000, the

[38] *Id*. at 1535-1584. March 27, 2000 Joint Resolution of the Office of the Ombudsman Evaluation and Preliminary Investigation Bureau.

[39] *Id*. at 4253-4257.

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Sandiganbayan Fifth Division, hearing Criminal Case Nos. 25940-25962, dropped Cruz as accused.[40]

But even assuming that fraud attended the procurement of the subject TCCs, it cannot prejudice PSPC's rights as earlier explained since PSPC has not been shown or proven to have participated in the perpetration of the fraudulent acts, nor is it shown that PSPC committed fraud in the transfer and utilization of the subject TCCs.

On the issue of the authority to cancel duly issued TCCs, we agree with respondent that the Center has concurrent authority with the BIR and BOC to cancel the TCCs it issued. The Center was created under Administrative Order No. (AO) 266 in relation to EO 226. A scrutiny of said executive issuances clearly shows that the Center was granted the authority to issue TCCs pursuant to its mandate under AO 266. Sec. 5 of AO 266 provides:

> SECTION 5. **Issuance of Tax Credit Certificates and/or Duty Drawback**.—The Secretary of Finance shall designate his representatives who shall, upon the recommendation of the CENTER, issue tax credit certificates within thirty (30) working days from acceptance of applications for the enjoyment thereof. (Emphasis supplied.)

On the other hand, it is undisputed that the BIR under the NIRC and related statutes has the authority to both issue and cancel TCCs it has issued and even those issued by the Center, either upon full utilization in the settlement of internal revenue tax liabilities or upon conversion into a tax refund of unutilized TCCs in specific cases under the conditions provided.[41] AO 266 however is silent on whether or not the Center has authority to cancel a TCC it itself issued. Sec. 3 of AO 266 reveals:

> SECTION 3. Powers, Duties and Functions.—The Center shall have the following powers, duties and functions:

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[40] *Id*. at 1258-1260. May 31, 2000 Resolution penned Associate Justice Minita V. Chico-Nazario (Chairperson, now a member of this Court) and concurred in by Associate Justices Rodolfo G. Palatiao and Ma. Cristina G. Cortez-Estrada.

[41] See Sec. 204 in relation to Sec. 230 of the NIRC.

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a. **To promulgate the necessary rules and regulations and/or guidelines for the effective implementation of this administrative order;**

xxx xxx xxx

g. **To enforce compliance with tax credit/duty drawback policy and procedural guidelines;**

xxx xxx xxx

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.** (Emphasis supplied.)

Sec. 3, letter l. of AO 266, in relation to letters a. and g., does give ample authority to the Center to cancel the TCCs it issued. Evidently, the Center cannot carry out its mandate if it cannot cancel the TCCs it may have erroneously issued or those that were fraudulently issued. It is axiomatic that when the law and its implementing rules are silent on the matter of cancellation while granting explicit authority to issue, an inherent and incidental power resides on the issuing authority to cancel that which was issued. A caveat however is required in that while the Center has authority to do so, it must bear in mind the nature of the TCC's immediate effectiveness and validity for which cancellation may only be exercised before a transferred TCC has been fully utilized or cancelled by the BIR after due application of the available tax credit to the internal revenue tax liabilities of an innocent transferee for value, unless of course the claimant or transferee was involved in the perpetration of the fraud in the TCC's issuance, transfer, or utilization. The utilization of the TCC will not shield a guilty party from the consequences of the fraud committed.

While we agree with respondent that the State in the performance of governmental function is not estopped by the neglect or omission of its agents, and nowhere is this truer than in the field of taxation,[42] yet this principle cannot be applied to

[42] See *Commissioner of Internal Revenue v. Proctor and Gamble PMC*, G.R. No. 66838, April 15, 1988, 160 SCRA 560.

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work injustice against an innocent party. In the case at bar, PSPC's rights as an innocent transferee for value must be protected. Therefore, the remedy for respondent is to go after the claimant companies who allegedly perpetrated the fraud. This is now the subject of a criminal prosecution before the Sandiganbayan docketed as Criminal Case Nos. 25940-25962 for violation of RA 3019.

On the issue of the publication of the Center's Excom Resolution No. 03-05-99 providing for the "Guidelines and Procedures for the Cancellation, Recall and Recovery of Fraudulently Issued Tax Credit Certificates," we find that the resolution is invalid and unenforceable. It authorizes the cancellation of TCCs and TDM which are found to have been granted without legal basis or based on fraudulent documents. The cancellation of the TCCs and TDM is covered by a penal provision of the assailed resolution. Such being the case, it should have been published and filed with the National Administrative Register of the U.P. Law Center in accordance with Secs. 3, 4, and 5, Chapter 2 of Book VII, EO 292 or the Administrative Code of 1987.

We explained in *People v. Que Po Lay*[43] that a rule which carries a penal sanction will bind the public if the public is officially and specifically informed of the contents and penalties prescribed for the breach of the rule. Since Excom Resolution No. 03-05-99 was neither registered with the U.P. Law Center nor published, it is ineffective and unenforceable. Even if the resolution need not be published, the punishment for any alleged fraudulent act in the procurement of the TCCs must not be visited on PSPC, an innocent transferee for value, which has not been shown to have participated in the fraud. Respondent must go after the perpetrators of the fraud.

Third Issue: Imposition of surcharges and interests

PSPC claims that having no deficiency excise tax liabilities, it may not be liable for the late payment surcharges and annual interests.

[43] 94 Phil. 640 (1954).

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This issue has been mooted by our disquisition above resolving the first issue in that PSPC has duly settled its excise tax liabilities for 1992 and 1994 to 1997. Consequently, there is no basis for the imposition of a late payment surcharges and for interests, and no need for further discussion on the matter.

Fourth Issue: Non-compliance with statutory and procedural due process

Finally, PSPC avers that its statutory and procedural right to due process was violated by respondent in the issuance of the assessment. PSPC claims respondent violated RR 12-99 since no pre-assessment notice was issued to PSPC before the November 15, 1999 assessment. Moreover, PSPC argues that the November 15, 1999 assessment effectively deprived it of its statutory right to protest the pre-assessment within 30 days from receipt of the disputed assessment letter.

While this has likewise been mooted by our discussion above, it would not be amiss to state that PSPC's rights to substantive and procedural due process have indeed been violated. The facts show that PSPC was not accorded due process before the assessment was levied on it. The Center required PSPC to submit certain sales documents relative to supposed delivery of IFOs by PSPC to the TCC transferors. PSPC contends that it could not submit these documents as the transfer of the subject TCCs did not require that it be a supplier of materials and/or component supplies to the transferors in a letter dated October 29, 1999 which was received by the Center on November 3, 1999. On the same day, the Center informed PSPC of the cancellation of the subject TCCs and the TDM covering the application of the TCCs to PSPC's excise tax liabilities. The objections of PSPC were brushed aside by the Center and the assessment was issued by respondent on November 15, 1999, without following the statutory and procedural requirements clearly provided under the NIRC and applicable regulations.

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What is applicable is RR 12-99, which superseded RR 12-85, pursuant to Sec. 244 in relation to Sec. 245 of the NIRC implementing Secs. 6, 7, 204, 228, 247, 248, and 249 on the assessment of national internal revenue taxes, fees, and charges. The procedures delineated in the said statutory provisos and RR 12-99 were not followed by respondent, depriving PSPC of due process in contesting the formal assessment levied against it. Respondent ignored RR 12-99 and did not issue PSPC a notice for informal conference[44] and a preliminary assessment notice, as required.[45] PSPC's November 4, 1999 motion for reconsideration of the purported Center findings and cancellation of the subject TCCs and the TDM was not even acted upon.

PSPC was merely informed that it is liable for the amount of excise taxes it declared in its excise tax returns for 1992 and 1994 to 1997 covered by the subject TCCs via the formal letter of demand and assessment notice. For being formally defective, the November 15, 1999 formal letter of demand and assessment notice is void. Paragraph 3.1.4 of Sec. 3, RR 12-99 pertinently provides:

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[44] RR 12-99, Sec. 3, par. 3.1.1 states:

3.1.1 Notice for informal conference.—The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of "Informal Conference," in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special Investigation Division of the Revenue Regional Office, or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

[45] RR 12-99, Sec. 3, par. 3.1.2 states:

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3.1.4 Formal Letter of Demand and Assessment Notice.—The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes **shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based**, **otherwise, the formal letter of demand and assessment notice shall be void**. The same shall be sent to the taxpayer only by registered mail or by personal delivery. x x x (Emphasis supplied.)

In short, respondent merely relied on the findings of the Center which did not give PSPC ample opportunity to air its side. While PSPC indeed protested the formal assessment, such does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued. Respondent must be more circumspect in the exercise of his functions, as this Court aptly held in *Roxas v. Court of Tax Appeals*:

> The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the "hen that lays the golden egg." And, in the order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously.[46]

3.1.2 Preliminary Assessment Notice (PAN).—If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

[46] No. L-25043, April 26, 1968, 23 SCRA 276, 282.

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WHEREFORE, the petition is *GRANTED*. The April 28, 2006 CTA *En Banc* Decision in CTA EB No. 64 is hereby *REVERSED* and *SET ASIDE*, and the August 2, 2004 CTA Decision in CTA Case No. 6003 disallowing the assessment is hereby *REINSTATED*. The assessment of respondent for deficiency excise taxes against petitioner for 1992 and 1994 to 1997 inclusive contained in the April 22, 1998 letter of respondent is cancelled and declared without force and effect for lack of legal basis. No pronouncement as to costs.

SO ORDERED.

Carpio and *CarpioMorales, JJ.*, concur.

Quisumbing, J., in the result.

Tinga, J., concurs in the result, based on perception only.

EN BANC

[A.M. No. P-05-2100. December 27, 2007]

A VERY CONCERNED EMPLOYEE AND CITIZEN, *complainant, vs.* **LOURDES S. DE MATEO, CLERK III, MUNICIPAL TRIAL COURT in CITIES, KORONADAL CITY, SOUTH COTABATO,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; COURT PERSONNEL; DISHONESTY AND GRAVE MISCONDUCT; RESPONDENT OFFERED NO EXPLANATION ON THE DISCREPANCY BETWEEN THE ENTRIES IN HER DAILY TIME RECORD AND THE ENTRIES LOGGED BY THE HEAD GUARD.—Based on the record of this administrative matter we note, first, that