565 Phil. 613

SECOND DIVISION

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

PILIPINAS SHELL PETROLEUM CORPORATION, PETITIONER, VS COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

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 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 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.

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.

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 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 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 | P285,766,987.00 |
> | Add: | |
> | Surcharge (25%) | 71,441,746.75 |
> | Interest (20%) | 213,368,667.86 |
> | Total Tax Due | P570,577,401.61 |
>
> 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 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 canceled 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.

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 (P285,766,987.00), 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