



by

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Rice being the staple food for Filipinos is a viable product to sell; there will always be a market for rice in the Philippines.

The government, the rice farmers, the domestic traders, as well as the importers are very well aware of its significance.

The government sees to it that there is enough supply in the market. The rice farmers want a reasonably high price for the product. The traders want a low price for the product to be sellable. It appears that the role of rice importers is to balance the desires of both the farmers and the domestic traders. However, the importers are able to find a "loophole" in the system, hence the problem of rice smuggling is in our midst.

¹ The first article on rice smuggling was published in the STSRO Taxbits, entitled Rice Smuggling: have we learned yet, May-June 2013, Volume IV, 19th Issue, written by Atty. Emmanuel M. Alonzo.

The Senate Report 15th Congress

During the 15th Congress, the Senate Committee on Accountability of Public Officers and Investigations, otherwise known as Blue Ribbon Committee together with Committees on Agriculture and Food; and Ways and Means conducted eleven (11) public hearings from August 1 to December 17, 2012.

As a result of such hearings, the Committees confirm rice cartels were operating in the country, financed by certain persons. The cartels control the importation of rice allotted to the private sector by the NFA (National Food Authority). The cartels started their operations by identifying the farmer's cooperatives willing to be involved by promising certain remunerations.

The cooperatives were then gathered to form federations for easy manipulation and control. Once a federation has been formed, the necessary government documentations were secured to have the appearance of legality. The required documents were from the NFA and the NBI (National Bureau of Investigation), among others.

On the part of the NFA, rice importations were awarded to the private sector when the supply of domestic rice was at its lowest level. The farmer's federations were the ones most likely to get an import permit because the government wants the financial benefits of such importations to accrue to as many rice farmers as possible. Unfortunately, the financial benefits of rice importations were pocketed by the financiers who were not the actual importers of the rice. What is worse was that the NFA import permit allocations were used over and over again, they were recycled. The Senate also found out that certain employees and officials of the Bureau of Customs (BOC) and the NFA were involved in the scheme.

Follow-up on the Senate report On rice smuggling during the 16th Congress

The current Senate (16th Congress) is continuing the queries following up the findings of the 15th Congress as contained in Committee Report 763. The report mandated the NFA, the Department of Agriculture (DA) and the Department of Finance (DOF) to submit their proposed policy recommendations both to the President and the Senate on the issue of rice liberalization as a result of the conflict between the country's World Trade Organization (WTO) agreements and the pertinent domestic laws. Among the matters to be submitted is about the role of the NFA, both as regulatory and corporate entity, as well as the possibility of amending RA 8178 (the Agricultural Tarrification Act of 1996) and the removal

of the NFA's power to impose quantitative restrictions on rice importations.



Likewise, the DA is mandated by the committee report to study and make policy recommendations to the President and Congress. The main issue to be resolved is whether the Philippines must continue its quantitative restrictions (QRs) on rice importations as mandated by PD No. 4. From the point of view of the DA, unless PD No. 4 is amended, the country will continue to impose QRs on rice. However, the QRs committed by the Philippines under the WTO already expired on June 30, 2012. As a result, the Philippines is currently holding bilateral negotiations for the continued special treatment (continued imposition of the QRs by the Philippines) for rice until 2017. Out of the nine countries negotiating with the Philippines, only four remains, namely: Thailand, the United States, Canada and Australia.

For its part, the BOC formulated the policy that before the rice is imported into the country, the importer must first present the necessary import permit, else the BOC will consider the importation as technical smuggling. In case of transshipments, the entry documents must indicate the final port of destination. Failing on the new BOC requirements means that such importations would be held "under alert", meaning, that the BOC will not process the importation. The instruction of the BOC Commissioner to its District Collectors is that any rice importation without necessary import permit 30 days after arrival would result in the BOC's issuance of a warrant of seizure. Once the warrant of seizure is issued, the BOC will forfeit the import to be later sold in public auction.

The problem with the BOC innovation is that the importers are successful in obtaining court injunctions. Once a court issues an injunction, the BOC has no choice but to release the rice import. Court injunctions challenge the seizure proceedings of the BOC. The private sector is now vigilant by monitoring closely any information on the amount of imports declared in the BOC. Unfortunately, not all imported rice passes through the BOC. In order to know the correct extent

of rice smuggling, the private sector computes the difference between the declared importation in the BOC and international statistics regarding the total rice importations entering the Philippines. The difference is the quantity of smuggled rice.

The committee report is able to identify specific persons and entities involved in rice smuggling. The DOJ is still studying the Senate recommendation to file charges against persons both in the private and the public sector. It is still investigating the case of the named financiers as identified by the Senate public hearings, among them - Willy Sy, Danny Ngo, Danilo Garcia, and David Tan. Recent developments focus on the personality of David Tan.

David Tan and his scheme



GMA NEWS ONLINE Businessman Davidson Bangayan, believed to be the David Tan being linked to rice smuggling, turned himself in to Justice Secretary Leila De Lima on Tuesday, January 14, to deny involvement in rice smuggling activities. He was later arrested by the NBI for violation of RA 7832 or the Anti-Electricity and Electric Transmission Lines/Materials Pilferage.
<http://www.gmanetwork.com/news/story/343790/news/nation/alleged-rice-smuggler-david-tan-freed-lawyer>

From the public hearing held on January 22, 2014, the Senate took a glimpse on the identity of David Tan. The NBI is of the opinion that Davidson Bangayan and David Tan are one and the same person. In spite of the findings of the NBI, David Bangayan still denied that he is David Tan.

During the public hearing of the Senate Committee on Agriculture held on February 6, 2014, Sen. Enrile called the attention of Mr. Davidson Bangayan regarding an affidavit made by the latter as contained in an affidavit² executed by Mr. Bangayan in a libel case before the trial court, it states the following:

*“...Clearly, the foregoing publication categorically imputed to me and our company, Advance Scrap Metal Specialists Corporation, the following wrongful acts, namely: (a) swindling, and contraband shipments. Likewise, the identification of the person in the subject publication referred to me, considering that **there is no other person by the name of Davidson Bangayan, a.k.a. David Tan. There is no question that I was clearly and directly identified on subject publication.**”*

The affidavit had two (2) witnesses. The libel case arose due to some statements of Mr. Jesus Arranza regarding the use of farmers cooperatives in rice importation. The witnesses further stated that Davidson Bangayan uses the initial D.T. for his alias David Tan.

Another case was filed in Caloocan City RTC against Davidson (David) Tan for violation of RA 7832, the Anti-Electricity Pilferage Act of 1994. He had a standing warrant of arrest, however, the identity of Davidson Bangayan as David Tan was not established because the trial court did not allow the NBI to have the pertinent documents for the reason that the NBI is not a real party of interest to that particular case.

On December 17, 2013³, BIR Commissioner Kim Henares communicated with Mayor Rodrigo Duterte of Davao City, seeking his help in addressing the problem of rice smuggling in the Port of Davao. As a result of the request, Mayor Duterte met with the officials of the Philippine Ports Authority (PPA), Philippine Coast Guard, the BIR, the BOC, the NBI, the CIDG (PNP-Criminal Investigation and Detection Group), the Philippine Navy and other government agencies. On January 10, 2014, Mayor Duterte met with the local rice traders. As a result of the meeting a sketch of Mr. David Tan was submitted. The sketch submitted resembled that of Mr. Davidson Bangayan. Likewise, based on “intelligence reports” Mr. Davidson Bangayan is the same person as Mr. David Tan (or DT).

As per Senate records⁴ DT uses farmers cooperatives. He paid for the cooperatives’ license fees, documentation/form fees as required by both the NFA and the BOC. He shouldered all the expenses such air fares, accommodations of the authorized representatives of the cooperatives. The cooperatives participated in NFA bidding for quota allocations.

A day before the bidding, the representatives of the farmers cooperatives would troop to DT’s office in Dagat-Dagatan, Caloocan City. There, they prepared and finalized the pre-qualifying bid documents

² The libel case was filed by Davidson Bangayan against Mr. Jess Arranza. It was contained in page 16 of the affidavit submitted by Mr. Bangayan to the trial court.

³ The facts were taken from the minutes of the public hearing of the Senate Committee on Agriculture, chaired by Sen. Cynthia Villar on February 3, 2014.

⁴ January 22 and February 3, 2014 records on rice smuggling, Committee of Agriculture.

Including the bid offer of DT. The cooperatives were supposed to receive a commission of P10.00 per bag once the cooperative wins with local or old stock bidding. An additional amount of incentive is given the cooperatives to the amount of P3.00 per bag for winning farmers cooperatives. For importation bidding, a P20.00 per bag is promised to the winning cooperative.

The cooperatives were used as fronts by DT. He would have the discretion in the sale and distribution of the imported rice. One form of smuggling is misdeclaration, wherein imported rice was declared hardwares, construction materials, cements, or plywood. Another form was that the holder of the license to import will not give pre-arrival notice to the NFA. Once the rice was successfully smuggled, the same permit would be used over and over again for future importations. However, when the BOC came to know of the practice, the smugglers submitted the import permit to be marked by the BOC as "consumed". Another method was misdeclaring the real quantity inside the vessel. Once the NFA gets the rice import, it was delivered to the NFA warehouse in order to pay the supplier. The undeclared portion was delivered to other persons (diverted) in Manila, aside from the NFA.

DT admitted that he participated in the NFA biddings for rice importations. He was also engaged in metal trading, trading on other commodities, trading in agricultural products, and general trading. DT likewise admitted that through joint ventures, he persuaded people and cooperatives to join the rice importation program in exchange for an amount of money based on the volume of rice that had been allocated to them. Such industry practice was called "consolidation".

The BOC had a participation in the smuggling process through the "tara system". Under the system, the BOC placed a fixed amount of money to be paid to the BOC in lieu of duties and taxes. Once the amount was paid, the containers were released to the domestic market without inspection, making the X-ray inspection system inutile.

Court intervention in rice smuggling cases

In order to curb rice smuggling, the BOC issued the warrant of seizure and detention in favor of the government if the consignees leave the rice imports unclaimed for 30 days. The importers on the other hand filed a petition in court for the issuance of a writ of preliminary injunction against the BOC action. Unfortunately, the court granted the petition of the importers against the BOC action. The RTC judges involved were the following:

1. Judge Eutiquio Quitain, Batangas RTC Branch 5 ,
2. Judge Emmanuel Carpio, Davao RTC Branch 16, and
3. Judge Maria Paz R. Reyes-Yson, Manila RTC Branch 54.

Related to said cases, the Supreme Court in a similar case⁵ has ruled on the role of the trial courts in smuggling, to wit:

1. *"The court a quo has no jurisdiction over the res subject of the warrant of seizure and detention. The respondent Judge, therefore, acted arbitrarily and despotically in issuing the temporary restraining order, granting the writ of preliminary injunction and denying the motion to dismiss, thereby removing the rest from the control of the Collector of Customs and depriving him of his exclusive original jurisdiction over the controversy. Respondent Judge exercised a power he never had and encroached upon the original jurisdiction of the Collector of Customs. By express provision of law, amply supported by well-settled jurisprudence, the Collector of Customs has exclusive jurisdiction over seizure and forfeiture proceedings and regular courts cannot interfere with his exercise thereof or stifle or put it to naught."*
2. *"A warrant of seizure and detention having already been issued, presumably in the regular course of official duty, the Regional Trial Court of Pampanga was indisputably precluded from interfering in the said proceedings. That in his complaint in Civil Case No. 8109 private respondent alleges ownership over several vehicles which were legally registered in his name, having paid all taxes and corresponding licenses incident thereto, neither divests the Collector of Customs of such jurisdiction nor confers upon the said trial court regular jurisdiction over the case. Ownership of goods or the legality of its acquisition can be raised as defences in a seizure proceeding; if it were not so, the procedure carefully delineated by law for seizure and forfeiture cases may easily be thwarted and set to naught by scheming parties. Even the illegality of the warrant of seizure and detention cannot justify the trial court's interference with the Collector's jurisdiction. In the first place, there is a distinction between the existence of the Collector's power to issue it and the regularity of the proceeding taken under such power. In the second place, the Regional trial Court does not have the*

⁵ G.R. No. 82586, September 11, 1992, penned by Justice Davide, case of Hon. Salvador M. Mison, Commissioner of Customs, and Carlos L. Lazo, Collector of Customs of the subport of Clark, Petitioners, v. Hon. Eli C.G. Natividad, Presiding Judge of the Regional Trial Court, Branch XLVIII, San Fernando, Pampanga, and Cesar Sonny Carlos/ CVC Trading, Respondents.

competence to review, modify or reverse whatever conclusions may result therefrom.”

The Supreme Court issued an Administrative Circular No. 07-99 on June 25, 1999 stating that – “...judges should never forget what the Court categorically declared in *Mison v. Natividad* [213 SCRA 734, 742 (1992)] that ‘by express provision of law, amply supported by well-settled jurisprudence, the Collector of Customs has **exclusive jurisdiction** over seizure and forfeiture proceedings, and the regular courts cannot interfere with his exercise thereof or stifle or put it to naught’.

The ACEF (Agricultural Competitiveness Enhancement Fund)

The Agricultural Tariffication Act (RA 8178) created the ACEF (Agricultural Competitiveness Enhancement Fund) from the proceeds of the importation of minimum access volume. The entire proceeds are set aside and earmarked by Congress for irrigation, farm-to-market roads, post-harvest equipment and facilities, credit, research and development, other marketing infrastructure, provision of market information, retraining, extension services, and other forms of assistance and support to the agricultural sector.

During the Senate 15th Congress public hearings, it was revealed that very little disbursement of the fund benefited the farmers except scholarships loans. Unfortunately, the payment rate on the loans was very low. In a way, it may be said that the purpose for the creation of the ACEF has not been attained.

The opinion of the NFA⁶



Rice as basic staple grain of the Philippines was given special treatment under WTO Agreement by being exempted from tariffication, which means, the lifting of all existing QRs such as import quotas or prohibitions imposed and replacing these restrictions with tariffs, **will not apply to rice importation**. However, MAV (minimum access volume) shall still be provided based on the WTO Agreement.

1. Section 2 of RA 8178 provides that “The State adopts the use of tariffs in lieu of non-tariff import restrictions to protect local producers of agricultural products, except in the case of rice, which will continue to have quantitative import restrictions”.
2. Section 6 of Presidential Decree No. 4, as amended by Section 5 of RA No. 8178, provides that the National Food Authority (NFA) has the power “to establish rules and regulations governing the importation of rice and to license, impose and collect fees and charges for said importation...”.
3. The Office of the Government Corporate Counsel (OGCC) in its opinion dated 3 February 2014, opined that the NFA is empowered to establish rules and regulations on rice importations and to require licenses such as Import Permits. They further stated that PD 4, as amended, provides that only the NFA has the sole power to undertake direct importation of rice. In other words, only the government may directly import rice through the NFA.
4. The expiry of the special treatment extension does not automatically result in the lack of authority of the NFA to require or issue import permits for the rice importation, unless the above statutory provisions are repealed by Congress or declared invalid by the Supreme Court.
5. WTO agreements do not have automatic effect on Philippine domestic law but rather, require implementing legislation and adjustment of administrative processes.
6. The NFA is of the opinion that a domestic law prevails over an international law⁷, citing the following:

*“The rule of **pacta sunt servanda**, one of the oldest and most fundamental maxims of international law, requires the parties to a treaty to keep their agreement therein in good faith. The observance of our country’s legal duties*

⁶ The NFA submitted a written opinion on February 21, 2014, addressed to Sen. Cynthia Villar in connection with the Senate public hearing on rice smuggling on February 24, 2014.

⁷ Secretary of Justice vs. Hon. Ralph C. Lantion, et al, G.R. No. 139465, 18 January 2000, 322 SCRA 160.

under a treaty is also compelled by Section 2, Article II of the Constitution which provides that 'the Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with nations.' Under the doctrine of incorporation, rules on international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere (Salonga & Yap, *Public International Law*, 1992 ed., p.12)

7. Seeing that there is a conflict between a treaty (WTO agreements) and domestic laws (RA 8178/PD 4), the NFA made the following opinion:

*"The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state. Efforts should first be exerted to harmonize them, so as to give effect to both since it is presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause in the above – cited provision (Cruz, *Philippine International Law*, 1996 ed., p. 55). In a situation however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts (Ichong vs. Hernandez, 101 Phil 1155 [1957]); Gonzales vs. Hechanova, 9 SCRA 230 [1963]); for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances. The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules on international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle **lex posterior derogate priori** takes effect – a treaty may repeal a statute and a statute may repeal a treaty..."*

Always remember that in rice smuggling, the problem is the clash between domestic laws and an international agreement, in this case the WTO. In the event that the exporting country feels aggrieved in the importation procedure of the Philippines and decided to bring the case before the WTO arbitration tribunal, would such foreign tribunal uphold our government's position?



Opinion of the Department of Agriculture (DA)⁸

The P8.0 billion government revenue loss due to rice smuggling would have otherwise benefitted us, thus:

1. It will enable the government to procure substantial volume of palay for buffer stocking and in rice distribution operation especially in highly urbanized areas and rice-deficit areas observed to have a growing gap in the price of commercial rice.
2. It will enable the government to procure 459,770 MT based on the existing buying price of P17.40/kg, inclusive of incentive, if procured from individual farmers (IFs). About 18,391 IFs would benefit from the P2.7 million net profit.
3. It will mean a savings of about P30 million, representing the interest, if the NFA will borrow the said amount (P8.0 billion).
4. On the part of the consumers, it will mean a net savings ranging from P2.8 – 2.9 billion that can be derived from a more visible and affordable NFA rice at P27.00/kg compared with the prevailing annual average retail price of regular milled rice at P36.74/kg.

⁸ The DA opinion was submitted to the Senate rice smuggling public hearing on February 4, 2014.



Bureau of Customs (BOC)⁹

The BOC made the following comments regarding rice smuggling:

1. In rice imports seized and auctioned from 2010 to February 2014, no additional duties were charged in the auction of rice. Note that rice imports are subject to duties but not VAT¹⁰. Safeguard duties are charged upon import, not upon auction, and only when safeguard duties are imposed in accordance with RA 8800. There are, as of today (February 20, 2014), no

safeguard duties on rice imports.¹¹

2. Since the court injunctions, the BOC has filed motions for reconsiderations for all of them. The motion for reconsideration for the injunction in Davao has already been denied; the rest are ongoing.
3. Regarding the BOC intelligence work¹², the Intelligence Group of the Bureau of Customs did not receive any Intelligence Funds until 2013, and these have yet to be utilized. Under its current leadership, the work of the Intelligence Group has resulted in the issuance of 276 alert orders covering 775 containers from October 2013. Of those 276 alert orders, 100% physical examinations have been conducted on 133. The remainder have either been examined and are waiting for final recommendations of the officers-in-charge, or are being scheduled for examination. The results of those physical examinations on the 133 shipments are as follows:

- a. 87 shipments, covering 224 containers, were

Summary of Rice Shipments that were Subject to Court Injunctions

Court	Petitioner	Type of document	Ports covered	Importer of record	Amount of bond (in pesos)
Manila RTC, Branch 54, Judge Maria Paz R. Reyes-Yson	Marvin Mendoza, Silent Royalty Marketing	Preliminary Injunction	Port of Manila, North and South Harbor	Silent Royalty	10,000,000
Manila RTC, Branch 54, Judge Maria Paz R. Reyes-Yson	Starcraft International Trading Corp., represented by Mr. Eugene Pioquinto	Preliminary Injunction	Port of Manila	Starcraft International Trading	None
Manila RTC, Branch 11, Judge Cicero Jurado	Danilo G. Galang doing business under the name and style St. Hildegard Grains Enterprises	Temporary Restraining Order	Port of Manila, South and North Harbor	None cited bought from Ivy Souza (Ivy Souza later wrote BOC that she is the manager of Bold Bidder)	None
Batangas RTC, Region IV, Branch 5, Lemery, Judge Eugenio Quitain	Bold Bidder Marketing and General Merchandise	Temporary Restraining Order	Port of Batangas	Bold Bidder Marketing and General Merchandise	1,250
Davao RTC, Region 11, Branch 16, Judge Emmanuel Carpio	Joseph Mangupag Ngo	Preliminary Injunction	Port of Davao	None cited (bought from Starcraft)	1,950

⁹ The BOC letter was dated February 20, 2014 for the February 24, 2014 public hearing.

¹⁰ Rice importation is not subject to VAT because of Section 109 of the Philippine National Internal Revenue Code of 1997 which states – “(1) ...the following transactions shall be exempt from the value-added tax: (A) Sale or importation of agricultural and marine food products in their original state...”.

¹¹ This is in response to the questions posed by Senator Peter Cayetano during the previous public hearing.

¹² This is in response to the questions of Senator Grace Poe during the previous public hearing.

charged additional duties and taxes totalling P1.5 million, or about P151,752 in additional duties and taxes per container.

- b. 40 alert orders, covering 105 containers, were found to have grounds for seizure.
- c. One alert order, covering two containers, were abandoned by its consignees.
- d. Only five alert orders, covering nine

containers, had no adverse findings.

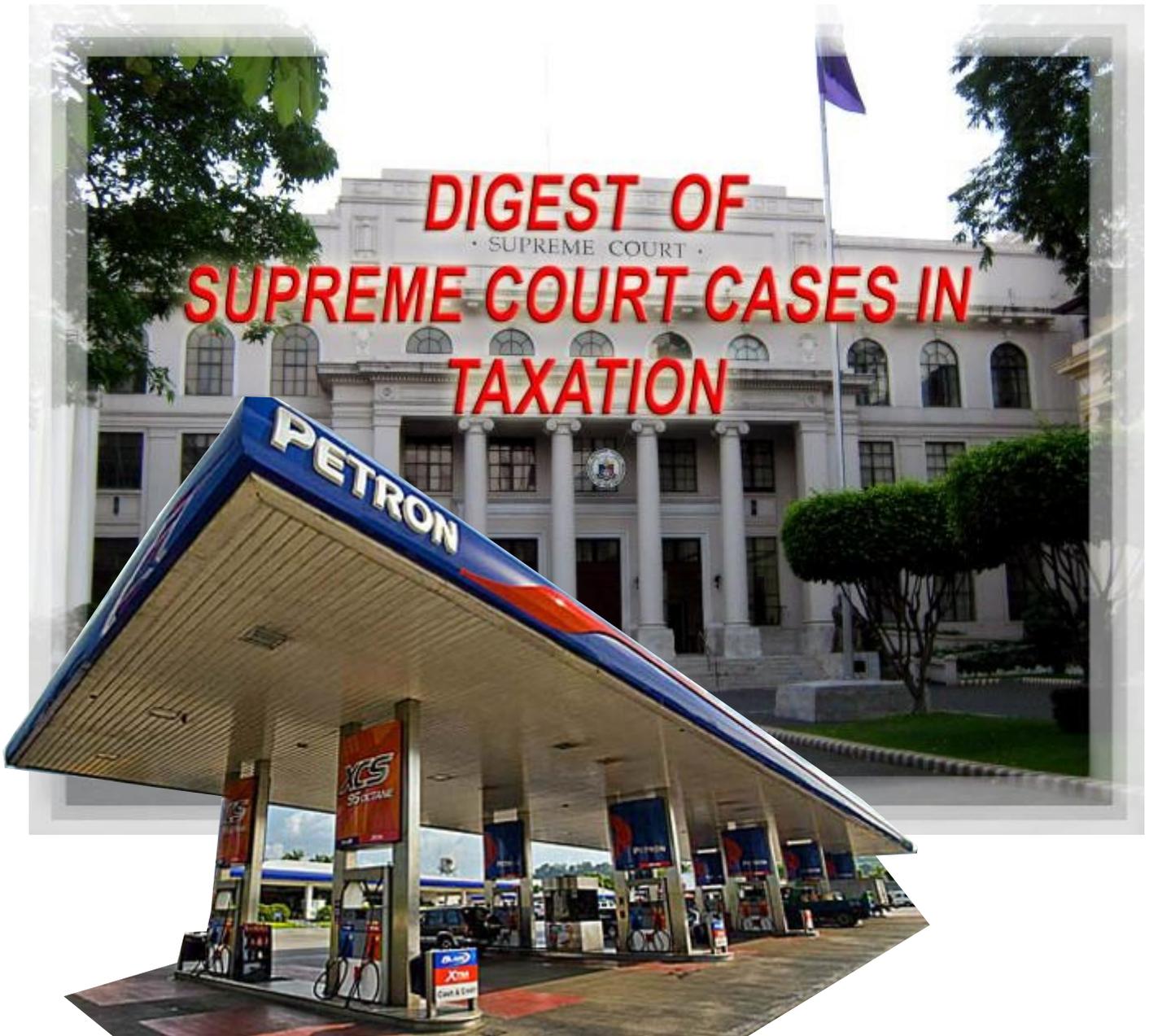
**Comparative practices¹³
Philippines, Singapore, and Indonesia**

It is worthwhile to know customs procedures in other countries so as to adopt to the most viable and effective practices. It is especially relevant for the Senate considering that it is currently evaluating (in the process of legislating) the several anti-smuggling bills.

Government Agencies Issuing Import Permits for Agricultural Products

Philippines	Singapore	Indonesia	Comments
<p>The Bureau of Plant Industry (BPI) issues import permits for plant and plant products</p> <p>The Bureau of Animal Industry (BAI) issues import permits for livestock and animal products</p>	<p>There is a centralized Food Control Division of the Agri-Food and Veterinary Authority</p> <p>The issuance of import permits is through the Online Business Licensing Service (OBLIS)</p>	<p>Import permit issuances is centralized through the Ministry of Trade</p> <p>The application of the permit is done online through the Single Window System (SWS)</p>	<p>Under the WTO rules, before an agricultural product is exported to a particular country, the products must pass the requirements on sanitary and phytosanitary standards. This is done by the issuance of import licences by the appropriate government agencies.</p> <p><u>Recommendation:</u> The Issuance of import licences for agricultural products must be centralized and through an online system.</p>
Boarding protocol			
BOC first and BOC last	<p>First to board are the safety and quarantine agency staff (Agri-Food and Veterinary Authority [AVA] personnel followed by the Immigration and Checkpoints Authority (ICA) personnel</p> <p>AVA administers all the regulatory and safety statutes while Immigration and Checkpoints Authority is the one in charge on matters related to tax collection.</p>	<p>First to board are the safety and quarantine agency staff (Ministry of Agriculture).</p> <p>Imported agricultural commodities will not be given pre-border clearance without the approval of the quarantine/regulatory officers.</p>	<p>In the Philippines, once the import permit is given by either the BPI or the BAI, as the case may be, it will be the BOC who will be in charge of the boarding protocol.</p> <p>Recommendation: The BAI and BPI should be involved while the product is being boarded. The BPI and the BAI should not confine themselves only in the issuance of sanitary and phytosanitary import permits for imported agricultural products.</p>
Operation of X-ray Machine			
The BOC has the sole authority over the x-ray machine.	<p>The Immigration and Checkpoints Authority (the Singaporean Customs) controls and operates the x-ray machines.</p> <p>The AVA (Agri-Food and Veterinary Authority) can have real time access to the X-ray machines.</p> <p>AVA may subject the whole (100%) shipment to inspection.</p>	<p>X-ray machines are operated by the Indonesian Bureau of Customs.</p> <p>Other attached agencies can have access to the x-ray machines.</p>	<p>Recommendation: In order to minimize smuggling of agricultural products, the operation of the X-ray machines on imports should be shared by other concerned agencies.</p>
Penalty and sanctions			
Penalty of up to 2.5 times the value of smuggled commodities	Stiff monetary penalties are accompanied with social sanctions by publication of offenders in broad mass media outlets	The penalty is to pay 1,000% of the value of the smuggled goods for outright apprehension.	<p>Recommendation: While the Senate is currently evaluating the merits of the several anti-smuggling bills, it is timely to consider the increase in fines and penalties for smugglers.</p>

¹³ The study was made by the following: (a) Prudenciano U. Gordoncillo, (b) Cesar B. Quicoy, (c) Julieta A. delos Reyes, and (d) Arvin B. Vista, entitled – An Assessment of Smuggling of Selected Agricultural Commodities in the Philippines (Department of Agricultural Economic, CEM, UP Los Banos). The study was presented on February 24, 2014 during the Senate public hearing on rice smuggling.



1. Commissioner of Internal Revenue, *Petitioner*, vs. Petron Corporation, *Respondent*. (G.R. No. 185568, March 21, 2012), Sereno, J.

Facts:

Respondent Petron Corporation paid its excise tax liabilities with the Commissioner of Internal Revenue (CIR) using Tax Credit Certificates (TCCs) it received from several BOI-registered companies, in the course of its business undertakings. In a post-audit, TCCs were later on declared by the Department of Finance (DOF) as having been fraudulently obtained by the companies and likewise fraudulently transferred to Petron. The TCCs and Tax Debit Memos (TDBs) were cancelled by the DOF due to this finding. The taxes are now deemed as not having been paid and settled.

The Court of Tax Appeals' (CTA) Second Division decided in favor of the CIR. However, on appeal to the CTA *En Banc*, it ruled in favor of Petron citing the Supreme Court's (SCs) pronouncement in the case of *Pilipinas Shell vs. CIR* (G.R. No. 172598, 21 December 2007, 541 SCRA 316).

Issues:

The CTA committed error in declaring that Petron is not liable for its excise tax liabilities using the TCCs which the DOF declared as having been obtained and transferred to it fraudulently.

Held:

The SC denied CIR's Petition for lack of merit.

The SC cited Article 21 of Executive Order (EO) No. 226 (Omnibus Investment Code of 1987), defining a tax credit, to wit:

Article 21. "Tax credit" shall mean 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, if so delegated by the Secretary of Finance. The tax credit certificates including those issued by the Board pursuant to laws repealed by this Code but without in any way diminishing the scope of negotiability under their laws of issue are transferable under such conditions as may be determined by the Board after consultation with the Department of Finance. The tax credit certificate shall be used to pay taxes, duties, charges and fees due to the National Government; Provided, That the tax credits issued under this Code shall not form part of the gross income of the grantee/transferee for income tax purposes under Section 29 of the National Internal Revenue Code and are therefore not taxable: Provided, further, That such tax credits shall be valid only for a period of ten (10) years from date of issuance.

The Court also defined a Tax Credit Certificate (TCC), viz:

B. Tax Credit Certificate — means 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 (Revenue Regulation [RR] No. 5-2000).

The SC proclaimed that Petron is a transferee in good faith and for value of the subject TCCs. The SC said: "From the records, we observe that the CIR had no allegation that there was a deviation from the process for the approval of the TCCs, which Petron used as payment to settle its excise tax liabilities for the years 1995 to 1998." Moreover, the Joint Stipulation entered into by the CIR with Petron negates its allegation of fraud in the transfer and issuance of the TCCs.

Alluding to the *Petition for Review on Certiorari*, the SC declared:

"The fundamental rule is that the scope of our judicial review under Rule 45 of the Rules of Court is confined only to errors of law and does not extend to questions of fact. It is basic that where it is the sufficiency of evidence that is being questioned, there is a question of fact. Evidently, the CIR does not point out any specific provision of law that was wrongly interpreted by the CTA En Banc in the latter's assailed Decision. Petitioner anchors its contention on the alleged existence of the sufficiency of evidence it had proffered to prove that Petron was involved in the perpetration of fraud in the transfer and utilization of the subject TCCs, an allegation that the CTA En Banc failed to consider. We have consistently held that it is not the function of this Court to analyze or weigh the evidence all over again, unless there is a showing that the findings of the lower court are totally devoid of support or are glaringly erroneous as to constitute palpable error or grave abuse of discretion. Such an exception does not obtain in the circumstances of this case."

To further stress its point on the payment by Petron of its tax liabilities using the TCCs, the Court adverted:

"The Liability Clause of the TCCs reads:

"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 scope of this solidary liability, as stated in the TCCs, was clarified by this Court in Shell, as follows:

“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 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.”

The CIR propounds that TCCs are subject to post-audit procedures. The SC decided otherwise. It said:

“We held in Petron v. CIR (Petron), which is on all fours with the instant case, that TCCs are valid and effective from their issuance and are not subject to a post-audit as a suspensive condition for their validity. Our ruling in Petron finds guidance from our earlier ruling in Shell, which categorically states that a TCC is valid and effective upon its issuance and is not

subject to a post-audit. The implication on the instant case of the said earlier ruling is that Petron has the right to rely on the validity and effectivity of the TCCs that were assigned to it. In finally determining their effectivity in the settlement of respondent's excise tax liabilities, the validity of those TCCs should not depend on the results of the DOF's post-audit findings.”

The next issue tackled by the Court involves the doctrine of Estoppel. The CIR insists that the government is not stopped from collecting the tax liabilities of Petron that accrued as a result of the declaration of invalidity of the TCCs; that the government should not be blamed for the inimical acts of its employees. The Court proclaimed:

“We recognize the well-entrenched principle that estoppel does not apply to the government, especially on matters of taxation. Taxes are the nation's lifeblood through which government agencies continue to operate and with which the State discharges its functions for the welfare of its constituents. As an exception, however, this general rule cannot be applied if it would work injustice against an innocent party.” (Emphasis supplied)

Finally, it was decided by the SC:

“In the light of the main ruling in this case, we affirm the CTA En Banc Decision finding Petron to be an innocent transferee for value of the subject TCCs. Consequently, the Tax Returns it filed for the years 1995 to 1998 are not considered fraudulent. Hence, the CIR had no legal basis to assess the excise taxes or any penalty surcharge or interest thereon, as respondent had already paid the appropriate excise taxes using the subject TCCs.”

The Court affirmed *in toto* the CTA En Banc decision of December 3, 2008, which reversed and set aside the proclamation of the Second Division. Hence, Petron is absolved from any deficiency excise tax liability for taxable years 1995 to 1998.

With respect to estoppel, it has been declared: *“When a party has, by his declaration, act or omission, intentionally and deliberately led the other to believe a particular thing true, and to act, upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”* (De Castro vs. Ginete, 27 SCRA 623).

In the case of PNB vs. CA 94 SCRA 357, the SC referring to the doctrine of estoppel, proclaimed: *“The doctrine of estoppel is based upon the grounds of*

public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied upon.” [Cited in Jose Agaton Sibal: Philippine Legal Encyclopedia]



2. Commissioner of Internal Revenue, *Petitioner*, vs. Pilipinas Shell Petroleum Corporation, *Respondent* (GR No. 188497; April 25, 2012), Villarama, Jr., J.

Facts:

Respondent Pilipinas Shell Petroleum Corporation (Shell) filed a claim for refund of the excise taxes it paid on petroleum products it sold to international carriers of foreign registry for their use or consumption outside the Philippines, with the Large Taxpayers Audit & Investigation Division II of the Bureau of Internal Revenue (BIR). No action was taken by the BIR, prompting Shell to file a petition for review with the Court of Tax Appeals (CTA). The CTA ruled in favor of respondent.

Issues:

Three questions are to be resolved in this case:

1. “Section 148 of the national internal revenue code expressly subjects the petroleum products to an excise tax before they are removed from the place of production.”

2. “The only specific provision of the law which grants tax credit or tax refund of the excise taxes paid refers to those cases where goods locally produced or manufactured are actually exported which is not so in this case.”
3. “The principles laid down in *Maceda vs. Macaraig, Jr. and Philippine Acetylene Co. vs. CIR* are applicable to this case.”

Held:

The claim for refund was denied.

Respondent asserts that it is entitled to a claim for tax refund since those petroleum products it sold to international carriers are not subject to excise tax. The Supreme Court (SC) ruled in favor of petitioner, stating that:

“Under Chapter II “Exemption or Conditional Tax-Free Removal of Certain Goods” of Title VI, Sections 133, 137, 138, 139 and 140 cover conditional tax-free removal of specified goods or articles, whereas Sections 134 and 135 provide for tax exemptions. While the exemption found in Sec. 134 makes reference to the nature and quality of the goods manufactured (domestic denatured alcohol) without regard to the tax status of the buyer of the said goods, Sec. 135 deals with the tax treatment of a specified article (petroleum products) in relation to its buyer or consumer. Respondent’s failure to make this important distinction apparently led it to mistakenly assume that the tax exemption under Sec. 135 (a) “attaches to the goods themselves” such that the excise tax should not have been paid in the first place.”

The SC made mention of BIR Revenue Regulation (RR) No. 8-96 which states that: “*The specific tax on petroleum products locally manufactured or produced in the Philippines shall be paid by the manufacturer, producer, owner or person having possession of the same, and such tax shall be paid within fifteen (15) days from date of removal from the place of production.*” “X x x . The Excise tax imposed on petroleum products under Sec. 148 is the direct liability of the manufacturer who cannot thus

invoke the excise tax exemption granted to its buyers who are international carriers."

Alluding to its ruling in the case of *Commissioner of Internal Revenue v. Philippine Long Distance Telephone Company*, G.R. No. 140230, December 15, 2005, 478 SCRA 61, 72, citing *Commissioner of Internal Revenue v. Tours Specialists Inc.*, the SC said:

"An excise tax is basically an indirect tax. Indirect taxes are those that are demanded, in the first instance, from, or are paid by, one person in the expectation and intention that he can shift the burden to someone else. Stated otherwise, indirect taxes are taxes wherein the liability for the payment of the tax falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. When the seller passes on the tax to his buyer, he, in effect, shifts the tax burden, not the liability to pay it, to the purchaser as part of the price of goods sold or services rendered."

In the case of *Maceda*, the Court ruled that the tax exemption privileges being enjoyed by the National Power Corporation (NPC) cannot be used by oil companies to shift the tax burden to NPC. The oil companies remain liable to pay the tax thereon. The SC stressed:

*"In view of all the foregoing, the Court rules and declares that the oil companies which supply bunker fuel oil to NPC have to pay the taxes imposed upon said bunker fuel oil sold to NPC. By the very nature of indirect taxation, the economic burden of such taxation is expected to be passed on through the channels of commerce to the user or consumer of the goods sold. **Because, however, the NPC has been exempted from both direct and indirect taxation, the NPC must be held exempted from absorbing the economic burden of indirect taxation. This means, on the one hand, that the oil companies which wish to sell to NPC absorb all or part of the economic burden of the taxes previously paid to BIR, which they could shift to NPC if NPC did not enjoy exemption from indirect taxes.** This means also, on the other hand, that the NPC may refuse to pay that part of the "normal" purchase price of bunker fuel oil which represents all or part of the taxes previously paid by the oil companies to BIR. If NPC nonetheless purchases such oil from the oil companies – because to do so may be more convenient and ultimately less costly for NPC than NPC itself importing and hauling and*

storing the oil from overseas – NPC is entitled to be reimbursed by the BIR for that part of the buying price of NPC which verifiably represents the tax already paid by the oil company-vendor to the BIR."

Referring to international carriers, the Court said that the exemption from tax given under Section 135(a) is based on international understanding that fuel used for international air services should be exempt from tax. *"The provisions of the 1944 Convention of International Civil Aviation or the "Chicago Convention", which form binding international law, requires the contracting parties not to charge duty on aviation fuel already on board any aircraft that has arrived in their territory from another contracting state."* Moreover, citing Presidential Decree (PD) No. 1359 (Amending Sec. 134 of the 1977 Tax Code), the SC said: *"X x x. Founded on the principles of international comity and reciprocity, P.D. No. 1359 granted exemption from payment of excise tax but only to foreign international carriers who are allowed to purchase petroleum products free of specific tax provided the country of said carrier also grants tax exemption to Philippine carriers. Both the earlier amendment in the 1977 Tax Code and the present Sec. 135 of the 1997 NIRC did not exempt the oil companies from the payment of excise tax on petroleum products manufactured and sold by them to international carriers."*

Finally, the Court reminded the parties that:

"Time and again, we have held that tax refunds are in the nature of tax exemptions which result to loss of revenue for the government. Upon the person claiming an exemption from tax payments rests the burden of justifying the exemption by words too plain to be mistaken and too categorical to be misinterpreted, it is never presumed nor be allowed solely on the ground of equity. These exemptions, therefore, must not rest on vague, uncertain or indefinite inference, but should be granted only by a clear and unequivocal provision of law on the basis of language too plain to be mistaken. Such exemptions must be strictly construed against the taxpayer, as taxes are the lifeblood of the government."

The Petition for review on Certiorari filed by the CIR was granted. The claim for refund or credit filed by Shell was denied.



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Chairman of Committee on Ways and Means



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