No. 09-233

In the
Supreme Court of the United States

TRIPLE S MANAGEMENT, CORP; TRIPLE S SALUD, INC.

Petitioners,

v.

MUNICIPAL REVENUE COLLECTION CENTER (CRIM)

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIRARI

ANGEL X. VIERA-VARGAS
Counsel of Record

GOLDMAN ANTONETTI & CÓRDOVA, P.S.C.
P.O. Box 70364
San Juan, PR 00936-8364
Tel. No. (787) 759-4132

Attorneys for Respondent Municipal Revenue Collection Center

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QUESTION PRESENTED

Whether Petitioners failed to present any issues worthy of consideration by this Court.

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STATEMENT OF THE CASE

In their statement of the case Petitioners venture far outside of the facts as affirmed by the Puerto Rico Court of Appeals[1], and rely on a version that was rejected both by the appellate panel Judges and by the Judges of the Court of First Instance. The critical facts found by the courts who entertained this case below are:

> Petitioners' corporate predecessor, Seguros de Salud de Puerto Rico, Inc., better known as Triple S, was organized in 1959 as **a for-profit** corporation and insurer, pursuant to the General Corporations Law of Puerto Rico of 1956 and the Insurance Code of Puerto Rico, **App. 6**[2]
>
> On July 16, 1976, through an administrative determination, the Puerto Rico Department of the Treasury (hereinafter PRTD) granted an income tax exemption to Triple S, in conformity with Section 101(8) of the Income Tax Act of 1954. **App. 6**
>
> On June 12, 1987, the PRTD extended the tax exemption granted to Triple S in order to cover its real and personal property based on the

[1] The Supreme Court of Puerto Rico refused to hear this case.

[2] Of Petitioners' brief.

provisions set forth in Article 291(t) of the Political Code of Puerto Rico, **App. 7**

On November 6, 1998, the PRTD again ratified the tax exemption originally granted to Triple S under the then repealed Income Tax Act of 1954, now section 1101(6) of the Puerto Rico Internal Revenue Code of 1994 (hereinafter the PR Code), 13 L.P.R.A. sec. 8501(6). Likewise, on December 15, 1998, Respondent CRIM ratified Triple S's tax exemption over its personal and real property. **App. 7**

By letter dated July 31, 2003, the PRTD gave notice to Triple S of its intention to repeal the administrative determination it had issued on November 6, 1998, under section 1101(6) of the PR Code. **App. 7**

On that same date, the PRTD and Triple S executed a "Final Agreement" in which both parties stipulated that Triple S would pay 37 million dollars as a tax against the assigned dividends as of the date of the Agreement, covering retained earnings generated from to 1979 to 2002. Triple S also agreed it would pay $14.7 million dollars as income tax corresponding to the 2003 tax year by April 15, 2004. **App. 8**

On February 1, 2006 Respondent CRIM notified Triple S of its decision to retroactively

revoke the administrative determination issued on December 15, 1998, through which it had granted a tax exemption against its personal and real property. **App. 9**

Subsequently, on March 1 and March 3 of 2006, respectively, the CRIM sent Triple S notice and demands for payment of tax over personal and real property. With regards to real property, the CRIM demanded from Triple S the payment of $1,326,024.52. With regards to personal property, it demanded the payment of $3,998,341.27. **App. 10**

Act No. 80 of August 30, 1991, known as the "Municipal Revenue Collection Center Act", 21 L.P.R.A. sec 5801 *et* seq., created Respondent as a municipal entity independent and separate from any other agency or instrumentality of the state, with the ultimate purpose of granting municipalities more control over the revenue from property taxes and in this way preventing the central government from unduly controlling the fiscal process of the municipalities. **App. 18**

CRIM is in charge of fiscal services, and its primary responsibility is "to collect, receive and distribute the public funds" that correspond to the municipalities, 21 L.P.R.A. sec. 5802. The Municipal Property Tax Act, 21 L.P.R.A. sec 5001et seq, (hereinafter the MPTA) was also enacted into law in August

30, 1991. Its purpose was to transfer to the Respondent the powers, faculties, and functions that up until then had been possessed by the PRTD with regards to personal and property tax. Article 5.01, subsections (e) and (g) of the MPTA, 21 L.P.R.A. sec. 5151, provides as follows:

> "The following assets shall be exempt from the payment of all personal and real property taxes:
> ...
> (e) The real and personal property belonging to and registered in the name of any nonprofit corporation, institution, partnership or entity organized under the laws of Puerto Rico dedicated to religious, charitable, scientific, literary, educational, and recreational purposes, among other, as well as commercial leagues, chambers of commerce, civic leagues or organizations, boards of proprietors, tenant associations, employee associations, and any other nonprofit organization in general, whose net properties and utilities do not benefit any shareholder or person in particular . . .
>
> (g) Real and personal property belonging to every nonprofit association organized under the laws of Puerto Rico for the purpose of selling prepaid

> programs or plans for medical and hospital services provided it complies with the requirements of Act No. 142 of May 9, 1942, as amended."

App. 19-21

Section 7.03 of the MPTA establishes that "[t]he acquired rights of the taxpayers under the prior legislation or any other special laws, will continue in effect so long as they are not in conflict with the provisions of this law." **App. 21**

This suggests that should there be a provision contrary to the MPTA, supra, issued in the past by the PRTD, Respondent CRIM could revoke it and would not be obligated to accept it. **App. 36**

Article 5.01, subsections (e) and (g), of the MPTA, supra, provide expressly that the benefit of personal and real property tax exemption is exclusively reserved for entities incorporated as not-for-profit. This was established in the same manner by its predecessor statute, Article 291(t) of the Political Code, as well as (for income tax purposes) by Section 101(8) of the Income Tax Act of 1954, and by Section 1101(6) of the PR Code. **App. 37**

There is no doubt that the legal provisions pursuant to which Triple S was granted diverse tax exemptions from 1976 to 2003 did not allow the concession of such benefits to a for-profit entity. Therefore, it must be concluded that the tax exemption granted to Triple S by the PRTD is in clear conflict with what is provided in the cited statutes and Respondent CRIM was not compelled, as Triple S claims, to give deference to the same. **App. 37**

Faced with this situation, the CRIM could revoke the administrative determinations issued by the PRTD for being in conflict with the provisions of the MPTA, supra. **App. 37.**

Since the administrative determinations issued by the PRTD were ***ab initio*** null and void, Respondent could validly revoke the same and demand the payment of the taxes not paid by Triple S. Incidentally, Petitioner agreed with the PRTD on a global payment of Thirty Seven Million Dollars ($37,000,000.00) attributable to the periods of effectiveness of the exemption, which, evidently signified the recovery of the income tax that the Petitioner failed to pay when benefiting from the exemption granted. To that effect, as part of the Agreement, Triple S would be allowed to distribute the balance of its retained earnings to its shareholders. Said action would not

have been possible if they were treated as a non profit entity. **App. 38**

The Puerto Rico Court of First Instance and the Court of Appeals concluded that the PRTD incurred in ***ultra vires*** conduct by granting Petitioners, corporations organized for-profit, a tax exemption over its personal and real property. Such action did not generate any right in favor of Petitioners, does not obligate Respondent, nor does it impede it from effectuating its correction. **App. 38**

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REASONS FOR DENYING WRIT

The retroactivity doctrine invoked by Petitioners is not applicable to the facts of the case.

Petitioners cite various decisions of this Court, among them Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) in support of their argument against the retroactivity in the imposition of taxes. In Bowen, this Court faced a controversy related to the retroactive application of a regulation and determined that such course of action was only permissible when the language of its enabling statute provided for such result. See Bowen at 208. Said doctrine is inapposite and clearly distinguishable from the facts currently present before this Court.

The case at bar is about a determination by an agency of the executive (the PRTD) which granted a tax exemption to a corporation organized for-profit, when the black letter of the law allowed for such benefit to be granted solely to non-profit corporations. This transaction was determined by all three (3) state courts who have examined the matter, as well as by two (2) legislative investigations to be ***ultra vires*** inasmuch as the PRTD lacked authority to act as it did. This state of matters is susceptible to be corrected at any time, just as Respondent did, without the entity who benefited from the irregular treatment having a right to claim that such correction only be done prospectively.

This is not a case of arbitrary and capricious retroactive application of its taxation power by a state Government. The situation before this Court is rather one of a private for-profit entity trying to avail itself of tax benefits to which it had no right under the clear letter of the law, a situation that was amended by subsequent actions taken in conjunction by the legislative and executive branches of the Commonwealth of Puerto Rico.

During the course of the year 2002 both chambers of the Legislative Assembly of Puerto Rico witnessed the filing of Resolutions where the granting of income tax exemption status to Petitioners and/or their corporate predecessors was questioned. This in view of the fact that the clear letter of section 1101(6) of the PR Code did not allow for the concession of tax exempt status to

corporations organized for-profit.[3] During the year 2003 various House and Senate Committees conducted extensive public hearings, whose findings are vital to the present case, and which can be summarized as follows:

1) The tax exemption granted to Petitioners and/or their corporate predecessors by the PRTD lacked any basis under Puerto Rico law.
2) No other of Petitioners' competitors in the insurance business has enjoyed tax exempt status under section 1101(6) of the PR Code.
3) Petitioners had accumulated earnings in the amount of One Hundred Seventy Two Million Dollars ($172,000,000.00) between 1979 and 2003.
4) The PRTD calculated the income taxes owed by Petitioners to be the amount of Fifty One Million Dollars ($51,000,000.00), a matter over which it reached a closing agreement with Triple S that provided for the payment by Petitioners of Thirty Seven Million Dollars ($37,000,000.00) by July 31, 2003 and $14.5 million dollars by April 14, 2004.

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[3] See House Resolution No. 4490 filed on May 28, 2002 and Senate Resolution No. 2096, filed on September 6, 2002.

See: Final Report on House Resolution 4490, dated August 1, 2003 and Final Report on Senate Resolution 2096, dated August 8, 2003. No claim of arbitrary and capricious retroactive taxation was raised by Petitioners in their dealings with the PRTD during the year 2003. Petitioners can not have it both ways! We respectfully submit that they do not come before this Court with clean hands.

The doctrine of Estoppel cannot be raised against Respondent in the present circumstances.

What Petitioners are really arguing is that Respondent is estopped from demanding the payment of taxes which were not originally collected due to what resulted to be a clearly erroneous interpretation of the letter of the law. This was precisely the issue before this Court in the case of Automobile Club of Michigan v. Commissioner of Internal Revenue, 353 U.S. 180 (1957). There, respondent revoked petitioner's tax exempt status granted under section 101(9) of the Internal Revenue Code of 1939. Said status was based upon an erroneous interpretation of the term "club" and thus, based upon a mistake of law. Upon demand of the payment of retroactive taxes by respondent, the petitioner argued that the Government was banned from seeking retroactive payment of the taxes. Both the Tax Court and the Court of Appeals sustained the authority of the Commissioner to retroactively impose and collect such taxes. This Court confirmed the courts below and held:

> "The petitioner argues that, in light of the 1934 and 1938 rulings, the Commissioner was equitably estopped from applying the revocation retroactively. This argument is without merit. The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."

Automobile Club of Michigan, 353 U.S. at page 183.

The fact that a private entity cannot rely on and seek succor in ***ultra vires*** actions by a Government agent has been recognized by this Court.

> "Whatever the form in which the government functions, any one entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947).

In Heckler, Secretary of Health and Human Services v. Community Health Services of Crawford County, 467 U.S. 51 (1984) respondent received and expended federal monies to which it was not entitled due to an incorrect interpretation of federal

regulations. It later claimed that the Government was estopped from recovering those funds because it has relied on the express authorization of a Government agent. The Third Circuit Court of Appeals agreed with respondent's position. This Court reversed, based on the fact that, even though it could not rule that estoppel cannot run against the Government under any circumstances:

> "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."

Heckler at 60.

The Court went on to explain the stringent circumstances that must be shown to be able to invoke estoppel against the Government; we quote *in extenso*:

> "To analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse. In this case the consequences of

> the Government's misconduct were not entirely adverse. Respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which the respondent has lost any legal right, either vested or contingent, or suffered any adverse change in its status. When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position. Here respondent lost no rights but merely was induced to do something which could be corrected at a later time."

Heckler at 61-62.

> Finally, the Court held at page 62:
>
> "A for-profit corporation could hardly base an estoppel on the fact that the Government wrongfully allowed it the interest free use of tax payer's money for a period of two or three years, enabling it to expand its operation."

This is precisely what Petitioners in the present case did. During the years where they enjoyed an incorrectly granted total exemption from

the payment of income and property taxes to the Commonwealth of Puerto Rico they accumulated One Hundred Seventy Two Million Dollars ($172,000,000.00) in earnings and became an insurance giant to the detriment of other competitors in the industry who, even though legally organized in the same manner as Petitioners, never enjoyed similar tax exemption and complied with their fiscal responsibilities. Further, it is worth repeating that Petitioners' objection to Respondent's retroactive tax assessment is, at best, selective in view of the Fifty One Million Dollars ($51,000,000.00) they paid to the PRTD in lieu of the taxes they failed to pay during the years they enjoyed an ***ultra vires*** tax exemption.

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CONCLUSION

The petition for writ of Certiorari should be denied. Respondent requests attorneys' fees and costs, including double costs for Petitioners' filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

ANGEL X. VIERA-VARGAS
Counsel of Record

GOLDMAN ANTONETTI & CÓRDOVA, P.S.C.
P.O. Box 70364
San Juan, PR 00936-8364
Tel. No. (787) 759-4132

Attorneys for Respondent Municipal Revenue Collection Center

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