REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF CUSTOMS, Petitioner,	**CTA EB CASE No. 136** (CTA CASE NO. 5290)
-versus-	Members: ACOSTA, *P.J.*, CASTAÑEDA JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, *JJ.*
AGFHA INCORPORATED, Respondent.	Promulgated: FEB 25 2009 10:00 a.m.

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DECISION

Casanova, J.:

This is a Petition for Review[1] filed on November 29, 2005, questioning the Resolution[2] *(Assailed Resolution)*, promulgated on October 18, 2005, of the Court of Tax Appeals' Second Division (*CTA Second Division*) in CTA Case No. 5290 entitled, "Agfha Incorporated, petitioner, vs. Commissioner of Customs, respondent."

The facts of the case, as culled from the records[3] of the case, are as follows:

> "On October 5, 1995, Agfha, Incorporated (hereafter 'petitioner') filed a Petition for Review before this Court appealing the decision dated August 25, 1995, of the Commissioner of Customs (hereafter

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[1] En Banc Rollo, pp. 6-34.
[2] Annex "A", En Banc Rollo, pp. 36-56.
[3] Resolution promulgated by the CTA Second Division on May 17, 2005, pp. 1-6.

'respondent') dismissing the appeal and affirming the decision of the Manila International Container Port (hereafter 'MICP') District Collector of Customs dated September 5, 1994. This case was raffled to the Second Division of this Court on November 26, 2004. Due to the retirement of the then Ponente, Associate Judge Ramon O. de Veyra, subsequently, this case was raffled to Associate Justice Olga Palanca-Enriquez, as the new ponente.

On November 4, 1996, this Court rendered judgment in favor of the petitioner, the dispositive portion of which reads as follows:

> 'WHEREFORE, in view of the foregoing premises, the instant Petition for Review is hereby GRANTED. Accordingly, the decision of the respondent in Customs Case No. 94-017, dated August 25, 1995, affirming the decision of the MICP Collector, dated September 5, 1994, which declared the forfeiture of the subject shipments in favor of the government, is hereby REVERSED and SET ASIDE. Respondent is hereby ORDERED to effect the immediate RELEASE of the subject shipment of goods in favor of the petitioner. No costs.
>
> SO ORDERED.'

Upon appeal of the respondent by way of Petition For Review, docketed as CA-G.R. SP No. 42590, the Court of Appeals rendered judgment on May 31, 1999, dismissing the petition for lack of merit, the dispositive portion of which reads as follows:

> 'WHEREFORE, the instant petition is hereby DENIED DUE COURSE and DISMISSED for lack of merit. Accordingly, the Commissioner of Customs is hereby ordered to effect the immediate release of the shipment of the AGFHA, Incorporated described as '2 x 40' Cont. No. NYKU-6772906 and NYKU-6632117 STA 197 Bales of Textile Grey Cloth' placed under Hold Order No. H/C1/01/2293/01 dated 22 January 1993.
>
> No costs.
>
> SO ORDERED.'

The case was elevated by the respondent to the Supreme Court, *via* a Petition for Review on Certiorari, docketed as G.R. No. 139050. On October 2, 2001, the Supreme Court rendered judgment affirming the decision of the Court of Appeals, the dispositive portion of which reads as follows:

> 'WHEREFORE, the petition is hereby DENIED and the assailed decision of the Court of Appeals is AFFIRMED.
>
> SO ORDERED.'

On March 18, 2002, the Supreme Court issued an Entry of Judgment. Upon motion of the petitioner, this Court issued a Writ of Execution directing respondent and his authorized representative to effect the immediate release of the subject shipment to the petitioner.

The writ, however, was returned unsatisfied.

On July 24, 2003, petitioner filed a 'Motion For Show Cause Order' praying that respondent be ordered to show cause why he should not be cited for contempt of court for defying the writ of execution.

On August 13, 2003, this Court granted petitioner's 'Motion For Show Cause Order' and ordered the respondent to show cause, within fifteen (15) days from receipt thereof, why he should not be disciplinarily dealt with for his failure to comply with the Writ of Execution issued by this Court on October 16, 2002.

On September 1, 2003, respondent filed a Manifestation and Motion stating that despite diligent efforts to obtain the necessary information and considering the length of time that had lapsed since the subject shipment arrived at the Bureau of Customs, the Chief of the Collection and Cargo Disposal Division of the Manila International Container Port was unable to determine the status, whereabouts and disposition of said shipment.

On September 5, 2003, petitioner filed a 'Reply (To Respondent's Explanation With Motion For Clarification) and Motion To Set Case For Hearing'.

On September 13, 2003, petitioner filed a 'Motion to Cite Respondent In Contempt Of Court'.

On November 17, 2003, this Court denied petitioner's 'Motion To Expunge' and 'Motion To Cite Respondent In Contempt' for lack of merit.

On April 12, 2004, petitioner filed a 'Motion To Set Case For Hearing' to determine:

1.) whether petitioner's shipment was actually lost;
2.) the cause and/or circumstances surrounding the loss; and
3.) the amount respondent should pay or indemnify should the latter's shipment be found to have been actually lost.

The motion was set for hearing on July 28, 2004.

At the scheduled hearing, after the oral arguments, this Court directed the parties to file their respective memoranda to ventilate their respective positions on the issues presented by the petitioner. Both parties have complied."

On May 17, 2005, the *CTA Second Division* promulgated a Resolution[4], the dispositive portion of which reads as follows:

> "**WHEREFORE,** premises considered, the Bureau of Customs is adjudged liable to petitioner AGFHA, INC. for the value of the subject shipment in the amount of ONE HUNDRED SIXTY THOUSAND THREE HUNDRED FORTY EIGHT AND 08/100 US DOLLARS (US$160,348.08). The Bureau of Custom's liability may be paid in Philippine Currency, computed at the exchange rate prevailing at the time of actual payment, with legal interests thereon at the rate of 6% per annum computed from February 1993 up to the finality of this Resolution. In lieu of the 6% interest, the rate of legal interest shall be 12% per annum upon finality of this Resolution until the value of the subject shipment is fully paid.
>
> The payment shall be taken from the sale or sales of the goods or properties which were seized or forfeited by the Bureau of Customs in other cases.
>
> SO ORDERED."

Not satisfied with the above quoted Resolution, both parties filed their respective[5] Motions for Partial Reconsideration on June 10, 2005. In the scheduled hearing[6] on June 23, 2005, counsel for the AGFHA orally moved that the COC's motion be expunged from the records for violation of Rule 15 of the Rules of Court. The Court granted AGFHA's request for a period of 15 days from

[4] CTA Second Division Rollo, pp. 435-461.
[5] COCs Motion for Reconsideration, CTA Second Division Rollo, pp. 463-482; AGFHA's Motion for Reconsideration, CTA Second Division Rollo, pp. 484-490.
[6] CTA Second Division Rollo, p. 498.

the said hearing to file its Motion to Expunge. On the other hand, counsel for the COC requested for 15 days from receipt thereof to file his Opposition thereto. The same was granted by the CTA Second Division. Further, counsel for the COC requested for 10 days from the date of hearing to file his Reply to AGFHA's Opposition[7] filed on June 23, 2005. The said request was granted.

On July 8, 2005, COC filed his "Reply to Petitioner's Opposition (To Respondent's Motion for Partial Reconsideration dated June 22, 2005)[8]. AGFHA filed a "Rejoinder to Respondent's Reply to Petitioner's Opposition (Re: Respondent's Motion for Partial Reconsideration Dated June 22, 2005)" and "Motion to Expunge Respondent's Motion for Partial Reconsideration" on July 20, 2005[9].

On October 18, 2005, the *CTA Second Division* promulgated the assailed Resolution[10], to wit:

> "**WHEREFORE**, premises considered, respondent Commissioner of Customs' 'Motion For Partial Reconsideration' is hereby **PARTIALLY GRANTED**. The Resolution dated May 17, 2005 is hereby **MODIFIED** but only insofar as the Court did not impose the payment of the proper duties and taxes on the subject shipment. Accordingly, the dispositive portion of Our Resolution, dated May 17, 2005, is hereby **MODIFIED** to read as follows:
>
>> '**WHEREFORE**, premises considered, the Bureau of Customs is adjudged liable to petitioner AGFHA, Inc. for the value of the subject shipment in the amount of ONE HUNDRED SIXTY THOUSAND THREE HUNDRED FORTY EIGHT and 08/100 US Dollars (US$160,348.08), <u>subject, however, to the payment of the prescribed taxes and duties, at the time of the importation.</u> The Bureau of Customs' liability may be paid in Philippine Currency, computed at the exchange rate prevailing at the time of actual payment, with legal interests thereon at the rate of 6% per annum computed from February 1993 up to the finality of this Resolution. In lieu of the 6% interest, the

[7] CTA Second Division Rollo, pp. 494-496.
[8] CTA Second Division Rollo, pp. 499-518.
[9] CTA Second Division Rollo, pp. 522-528.
[10] Supra, note 2.

> rate of legal interest shall be 12% per annum upon finality of this Resolution until the value of the subject shipment is fully paid.
>
> The payment shall be taken from the sale or sales of the goods or properties which were seized or forfeited by the Bureau of Customs in other cases.
>
> SO ORDERED.'

Petitioner AGFHA, Inc.'s 'Motion For Partial Reconsideration' is hereby **DENIED** for lack of merit.

SO ORDERED."

On November 15, 2005, AGFHA filed a "Motion for Partial Reconsideration"[11] praying that the October 18, 2005 Resolution be partially reconsidered and set aside by: a) deleting that portion of the resolution requiring petitioner to pay customs duties and taxes on its shipment lost by the BOC; and b) expunging respondent's Motion for Partial Reconsideration dated 9 June 2005. COC, on the other hand, filed through registered mail a "Comment (On Petitioner's Motion for Partial Reconsideration dated November 14, 2005)"[12] on December 2, 2005. On December 5, 2005, AGFHA filed a "Reply (To Respondent's Comment)[13]. In a Resolution[14] promulgated on February 3, 2006, the CTA Second Division denied AGFHA's Motion for Partial Reconsideration for lack of merit.

On November 11, 2005, COC filed a "Motion for Extension of Time to File Petition for Review"[15] with the *CTA En Banc*. In a Resolution[16] dated November 14, 2005, the CTA *En Banc* granted the said motion thereby giving petitioner a final and non-extendible period of fifteen (15) days from November 12, 2005 or

[11] CTA Second Division Rollo, pp. 554-560.
[12] CTA Second Division Rollo, pp. 572-581.
[13] CTA Second Division Rollo, pp. 564-571.
[14] CTA Second Division Rollo, pp. 586-590.
[15] CTA En Banc Rollo, p. 1.
[16] CTA En Banc Rollo, p. 4.

until November 29, 2005 (as November 27, 2005 fell on a Sunday and November 28, 2005 was declared as non-working holiday), within which to file a Petition for Review. On November 29, 2005, COC filed, through registered mail, the instant Petition for Review[17] with the *CTA En Banc*, praying that a decision be rendered setting aside the Resolution of the Honorable Court's Second Division in CTA Case No. 5290 for want of legal basis and a new one be issued: (a) adjudging petitioner and the Bureau of Customs' liability to pay respondent in the amount of US$160,340.08[18], with conversion rate of Php20.00 per US$1.00 or Php3,206,961.60 plus interest thereon in accordance with applicable laws; and (b) directing respondent to file its money claim with the Commission on Audit in accordance with Act No. 3083 and Commonwealth Act No. 327 and P.D No. 1445.

Petitioner raised the following grounds[19] in the instant Petition for Review, to wit:

> THE HONORABLE COURT'S SECOND (2ND) DIVISION GRAVELY ERRED IN HOLDING THAT:
>
> A. RESPONDENT IS ENTITLED TO BE PAID ONE HUNDRED SIXTY THOUSAND THREE HUNDRED FORTY EIGHT AND 08/100 US DOLLARS (US$160,340.08) *(sic)* PAYABLE IN PHILIPPINE CURRENCY, TO BE COMPUTED AT THE EXCHANGE RATE PREVAILING AT THE TIIME OF ACTUAL PAYMENT.
>
> B. THE PAYMENT OF RESPONDENT'S CLAIMS SHALL BE TAKEN FROM THE SALES OF THE GOODS OR PROPERTIES WHICH WERE SEIZED OR FORFEITED BY THE BUREAU OF CUSTOMS IN OTHER CASES.

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[17] Supra, note 1.
[18] Should be US$160,348.08 as adjudged by the CTA Second Division in its October 18, 2005 Resolution.
[19] Petition for Review En Banc, p. 13.

On December 1, 2005, AGFHA filed a "Motion to Dismiss"[20] praying for the dismissal of the instant petition on the ground that the petition for review was not the proper remedy to challenge interlocutory orders and/or orders of execution.

On February 23, 2006, the *CTA En Banc* promulgated a Resolution[21] ordering the COC, through the Office of the Solicitor General (OSG) to file a duplicate original or a certified true copy of the resolution appealed from. On February 27, 2006, AGFHA filed a "Motion to Resolve (Motion to Dismiss)"[22]. In compliance with the February 23, 2006 Resolution, the OSG submitted a certified true copy of the Resolution promulgated on September 18, 2001[23].

On April 24, 2006, the *CTA En Banc* promulgated a Resolution[24], to wit:

> "WHEREFORE, premises considered, respondent's Motion to Dismiss filed on December 1, 2005 is hereby EXPUNGED from the record of this case. Consequently, respondent's Motion to Resolve (Motion to Dismiss) is DENIED.
>
> Without necessarily giving due course to the petition for review, respondent is hereby ordered to file its Comment on the Petition for Review within ten (10) days from receipt hereof. Upon submission of the requisite Comment or the expiration of the period for filing the same, the petition shall be deemed submitted for resolution, unless the Court en banc decides to require the parties to submit their respective Memoranda.
>
> SO ORDERED."

AGFHA filed a Motion for Reconsideration (With Prayer for Oral Argument)[25] on May 9, 2006. On June 14, 2006, the *CTA En Banc* promulgated a

[20] CTA En Banc Rollo, pp. 58-61.
[21] CTA En Banc Rollo, pp. 65-66.
[22] CTA En Banc Rollo, pp. 67-68.
[23] Should be October 18, 2005.
[24] CTA En Banc Rollo, pp. 94-97.
[25] CTA En Banc Rollo, pp. 98-103.

Resolution[26] denying the same for lack of merit. Accordingly, the Court's order requiring AGFHA to file its Comment on the Petition for Review was reiterated.

On August 28, 2006, the *CTA En Banc* promulgated a Resolution[27] giving due course the Petition for Review filed by petitioner-Commissioner of Customs (COC) thus, requiring both parties to submit their respective Memorandum within a non-extendible period of 30 days from receipt thereof. On the same date, AGFHA filed a "Manifestation and Motion"[28] stating therein that AGFHA filed with the Supreme Court which was raffled to the High Court's Second Division, a Petition for Certiorari[29] under Rule 65 of the Rules of Court docketed therein as G.R. No. 173813 entitled, *"Agfha Incorporated vs. Hon. Court of Tax Appeals (En Banc) and Commissioner of Customs".* The petition challenged the Resolutions of the *CTA En Banc* dated April 24, 2006 expunging AGFHA's Motion to Dismiss petitioner's appeal, and June 14, 2006 denying AGFHA's Motion for Reconsideration over the earlier resolution. Thus, AGFHA prayed that the *CTA En Banc* refrain from further acting/proceeding with this case as not to render moot and academic the Petition for Review filed before the Supreme Court.

The *CTA En Banc*, in a Resolution[30] dated September 18, 2006, noted and granted the above-mentioned Manifestation and Motion. Accordingly, the proceedings with regard to the instant case were held in abeyance.

Records also show that AGFHA filed with the Supreme Court a Petition for Certiorari[31] entitled, "Agfha Incorporated vs. Court of Tax Appeals and Commissioner of Customs" challenging the Resolutions promulgated by CTA Second Division on October 18, 2005 and February 3, 2006, docketed as G.R. No. 172051.

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[26] CTA En Banc Rollo, pp. 106-108.
[27] CTA En Banc Rollo, pp. 109-110.
[28] CTA En Banc Rollo, pp. 111-112.
[29] CTA En Banc Rollo, pp. 114-128.
[30] CTA En Banc Rollo, pp. 130-131.
[31] CTA Second Division Rollo, pp. 603-629.

On October 2, 2006, the petitioner-Commissioner of Customs, represented by the Office of the Solicitor General (OSG), filed, through registered mail, a Memorandum[32] with the *CTA En Banc* in compliance with the Court's Resolution (CTA En Banc Case No. 136), dated August 28, 2006.

On October 16, 2006, the Supreme Court Third Division promulgated a Resolution[33] in G.R. No. 172051, directing the Clerk of Court of the CTA to elevate to the Supreme Court the complete records of CTA Case No. 5290. In compliance with the said SC Resolution, Atty. Elvessa P. Apolinario, then Acting Executive Clerk of Court IV, transmitted to the Supreme Court the entire records of CTA Case No. 5290 consisting of the CTA records, CTA En Banc No. 136 and transcripts of stenographic notes dated February 5, 1996 and March 4, 1996[34].

On February 19, 2007, The SC Second Division promulgated a Resolution[35] consolidating G.R. No. 173813 with G.R. No. 172051. On July 27, 2007, the Supreme Court promulgated a Decision[36] dismissing the two Petitions for Certiorari in G.R. No. 172051 and G.R. No. 173813 filed by AGFHA. AGFHA filed a Motion for Reconsideration[37], dated August 28, 2007, with the Supreme Court which was denied with finality by the Highest Tribunal in a Resolution[38] promulgated by the SC Second Division and recorded in the Supreme Court Entry of Judgment[39] on November 26, 2007.

On December 26, 2007, respondent-AGFHA, filed a Memorandum[40] with the *CTA En Banc*, in compliance with the Court's Resolution (CTA En Banc Case No. 136) dated August 28, 2006.

[32] CTA En Banc Rollo, pp. 132-160.
[33] CTA Second Division Rollo, p. 1840
[34] CTA Second Division Rollo, p. 1844.
[35] CTA Second Division Rollo, p. 1859.
[36] CTA Second Division Rollo, pp. 1873-1883.
[37] CTA Second Division Rollo, pp. 1865-1868.
[38] CTA Second Division Rollo, p. 759.
[39] CTA Second Division Rollo, p. 1896.
[40] CTA En Banc Rollo, pp. 163-179.

On February 4, 2008, the *CTA En Banc* promulgated a Resolution[41] submitting the case for decision noting the Memorandum filed by the respondent-AGFHA on December 26, 2007 and the failure of petitioner-COC to file its Memorandum.

However, as stated above, petitioner-COC, through the OSG has already filed a Memorandum on October 2, 2006. In addition, upon verification from the CTA Records Division, the Court found that the records of CTA Case No. 5290 [G.R. No. 172051 entitled "Agfha Incorporated vs. Court of Tax Appeals and Commissioner of Customs"] have not yet been returned by the Supreme Court despite follow-ups done by Mr. Geronimo Tolentino, CTA Process Server.

On March 6, 2008, Ms. Ma. Lourdes C. Perfecto, Acting Chief Judicial Records Office, Supreme Court, forwarded to the CTA the records of G.R. No. 172051 entitled, *"Agfha Incorporated vs. Hon. Court of Tax Appeals and Commissioner of Customs"*, and G.R. No. 173813 entitled, *"Agfha Incorporated vs. Hon. Court of Tax Appeals (En Banc) and Commissioner of Customs"*, consisting of the following:

ITEM	**NO. OF PIECES**
1. Original CTA En Banc	one (1) folder
2. Original CTA Records	one (1) folder
3. Duplicate TSNs	six (6) folders

together with a photocopy of the decision dated July 27, 2007 rendered by the Supreme Court with regard to the above mentioned cases and a photocopy of the Entry of Judgment made therein. In a Resolution[42] dated April 2, 2008, the *CTA En Banc* noted the "Return of Case Records". Accordingly, the instant petition for review was submitted for decision.

[41] CTA En Banc Rollo, p. 184.
[42] CTA En Banc Rollo, pp. 198-199.

On August 27, 2008, respondent Agfha Incorporated (AGFHA) filed a "Motion to Resolve"[43]. Considering that the instant case has been submitted for decision in a Resolution dated April 2, 2008, the said motion is hereby rendered MOOT and ACADEMIC.

After a careful and thorough evaluation and consideration of the records of the case including both parties' arguments in their respective pleadings, the *CTA En Banc* finds no new matters which have not yet been considered and passed upon by the *CTA Second Division* in its assailed Resolution.

Records disclose that petitioner-COCs grounds relied upon for review in the instant petition, and its respective discussions thereof are the same grounds and discussions petitioner stated in its Motion for Partial Reconsideration[44] filed with the *CTA Second Division* on June 10, 2005.

And the same grounds have been resolved by the *CTA Second Division* in this wise, and We quote with approval:

> *"We find no merit on the first ground. The instant case does not involve a money claim against the government, which must be filed and pursued with the Commission on Audit, pursuant to P.D. No. 1445. It bears stressing that the Bureau of Customs' (hereafter 'BOC') obligation to return the subject shipment did not arise from an import-export contract, but from a quasi contract, particularly solutio indebiti, enshrined in Article 2154 of the Civil Code, which provides:*
>
> > *'ART. 2154. If something is received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises.'*
>
> *Consequently, when the subject shipment was lost under the custody of the BOC, this Court ordered the Commissioner to compensate petitioner of its loss by paying the subject shipment's value in accordance with Article 2159 of the Civil Code, to wit:*
>
> > *'ART. 2159. Whoever in bad faith accepts an undue payment, shall pay legal interest if a sum of money*

[43] CTA En Banc Rollo, pp. 200-202.
[44] Supra, note 5.

> *is involved, or shall be liable for fruits received or which should have been received if the thing produces fruits.*
>
> *He shall furthermore be answerable for any loss or impairment of the thing from any cause, and for damages to the person who delivered the thing, until it is recovered.'*

As discussed in Our Resolution dated May 17, 2005, the shipment of the petitioner was actually lost while under the physical and legal custody of the Bureau of Customs. This fact constitutes a supervening event, warranting the modification of the decision of this Court, promulgated on November 4, 1996, since it is now beyond the capability of the Commissioner of Customs to release the subject shipment to petitioner in compliance with the decree in Our decision. We therefore modified said decision of this Court, dated November 4, 1996, in order to harmonize the disposition with the prevailing circumstances, and ordered instead, the respondent to pay the petitioner the value of the subject shipment.

There is no dispute, therefore, that petitioner was not able to withdraw its shipment from Customs custody because the shipment was lost while under the physical and legal custody of the Bureau of Customs. Petitioner's right to be indemnified of the commercial value of the lost shipment stems from the government's obligation to deliver and release the subject shipment to petitioner, as decreed in the decision of this Court dated November 4, 1996.

In a similar case, C.T.A Case No. 6329 entitled 'Unimex Micro-Electronics, GmBH vs. Commissioner of Customs', promulgated on September 19, 2002, wherein the subject importation ordered by this Court to be released was also lost by the Bureau of Customs, this Court held the Commissioner of Customs liable to pay the value of the lost shipment. Thusly:

> *'Anent the first issue, it is undisputed that the goods subject of this case can no longer be found in the warehouses that are under the Auction and Cargo Dispose Division of the Bureau of Customs (TSN, January 30, 2002, pages 11 & 12). As testified to by the person who conducted the inventory, the subject articles are nowhere to be found (ibid, pages 21-23). There is no iota of doubt that the officers and employees of the Bureau of Customs involved were negligent in the performance of their duties. Section 604 of the Tariff and Customs Code, provides:*

> *'The Bureau of Customs shall, for customs purposes, have exclusive control, direction and management of customhouses, warehouses, offices, wharves and other premises in the respective ports of entry, in all cases without prejudice to the general powers of the city or municipality and the Philippine Coast Guard in the exercise of its functions wherein such premises are situated.'*

For as long as the goods are under the Bureau of Customs control as in the case at bar, the Bureau of Customs is responsible for the safekeeping of the same. It should have taken adequate measures to preserve the said goods. If the goods are lost while under its custody, the Bureau of Customs should be made liable therefore.

Stated otherwise, with the existence of circumstances unique and peculiar in this case and in the interest of justice and fair play, the rule on immunity from suit of the Bureau of Customs should not apply. For it is glaringly evident that the goods were lost while in its custody to the great detriment of herein petitioner. In the case of Mison vs. Commission on Audit (187 SCRA 445), the Supreme Court upheld the decision of the Commissioner who ordered the Bureau of Customs to pay a vessel owner the value of the vessel which had been taken under illegal custody by the Bureau and sank while under its custody. Moreover, no less than the Constitution mandates that all public officers and employees should serve with responsibility, integrity and efficiency. Were it not for the negligence of the Bureau's officers and employees, the goods would still be in its warehouse. Negligence is defined as the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. There is negligence when there is a breach of duty, or failure to perform an obligation xxx (Juan vs. Arias, 72 SCRA 410).

In view of the negligence of the Bureau of Customs officers and employees and pursuant to the principle of command responsibility, the Commissioner of Customs is liable to pay the value of the lost shipment at that time net of the due taxes, duties, fees and other charges. Based on

Sales Invoice No. UX-502 dated May 28, 2985 issued by Unimex (Exhibit C, CTA Case No. 4317), the value of the subject goods amounted to Deutsche Mark (DM)1,310,372.00, detailed hereunder:

Deutsche Mark (DM)

xxx xxx xxx

The execution shall not be directly against the government but against the items or properties which have been seized or forfeited by the government. That means, the payment shall be taken from the proceeds of the sale or sales of such seized or forfeited articles. This payment by substitution or replacement of goods has long been supported by the Supreme Court, viz:

> *'In the execution of this decision the Provincial Government of Sorsogon is expected to immediately pay as directed. Should any further delays be encountered, the trial court is directed to seize any of the patrimonial property or cash savings of the province in the amount necessary to implement this decision.' (Provincial Government of Sorsogon vs. Vda. De Villaroya, 153 SCRA 291).'*

On appeal, the above ruling of this Court was affirmed by the Court of Appeals in the consolidated cases of 'Commissioner of Customs vs. Unimex Micro-Electronics, GmBH', CA-G.R. SP No. 75359 and 'Unimex Micro-Electronics GmBH vs. Commissioner of Customs', CA-G.R. SP No. 75366, August 30, 2004, as follows:

> *'As regards the Commissioner's third assigned error, suffice it to state that, as correctly declared by the CTA, 'with the existence of circumstances unique and peculiar in this case and in the interest of justice and fair play, the rule on immunity from suit of the Bureau of Customs should not apply. For it is glaringly evident that the goods were lost while in its custody to the great detriment of herein petitioner. In the case of Mison vs. Commission on Audit (187 SCRA 445), the Supreme Court upheld the decision of the Commissioner who ordered the Bureau of Customs to pay a vessel owner the value of the vessel which had been taken under illegal custody by the Bureau and sank while under its custody. Moreover, no less than the Constitution mandates that all public officers*

and employees should serve with responsibility, integrity and efficiency. Were it not for the negligence of the Bureau's officers and employees, the goods would still be in its warehouse.

As admitted by the officers of BOC, they were not able to find the subject shipment in their warehouse. Worse, they cannot trace what happened to the subject shipment through papers because there were no transition records involving the same. It was not even included in its inventory list. As it is, the subject shipment mysteriously vanished under the very nose of the responsible government agency, which is supposed to be its committed custodian. Such gross and unacceptable negligence should not and must not be countenanced.

Relevantly, in the case of EPG Construction Co. vs. Vigilar [354 SCRA 566(2001)], the Supreme Court disregarded the doctrine of state immunity and held the State liable, thus:

> *'Thus, in Amigable vs. Cuenca, this Court, in effect, shred the protective shroud which shields the State from suit, reiterating our decree in the landmark case of Ministerio vs. CFI of Cebu that the 'doctrine of government immunity from suit cannot serve as an instrument for perpetrating an injustice on a citizen.' It is just as important, if not more so, that there be fidelity to legal norms on the part of officialdom if the rule of law were to be maintained.*
>
> *Although the Amigable and Ministerio cases generously tackled the issue of the State's immunity from suit vis a vis the payment of just compensation for expropriated property, this Court nonetheless finds the doctrine enunciated in the aforementioned cases applicable to the instant controversy, considering that the ends of justice would be subverted if we were to uphold, in this particular instance, the State's immunity from suit.*
>
> *To be sure, this Court – as the staunch guardian of the citizen's rights and welfare – cannot sanction an injustice so patent in its face, and allow itself to be an instrument in the*

> *perpetration thereof. Justice and equity sternly demand that the State's cloak of invincibility against suit be shred in this particular instance, and that petitioners-contractors be duly compensated – on the basis of quantum meruit – for construction done on the public works housing project.'*

Anent the second ground, respondent Commissioner of Customs claims that petitioner is entitled only to the value of the lost shipment based on its acquisition at the time of importation in 1992 or P3,206,961.60, as this amount represents petitioner's true and actual expense in importing the subject shipment. Respondent further argues that petitioner cannot certainly be allowed to recover an amount higher than this, otherwise, that would be unjustly enriching petitioner at the expense of the government.

We disagree.

Under R.A. No. 529 ('An Act To Assure Uniform Value To Philippine Coin and Currency', approved on June 16, 1960), stipulations on the satisfaction of obligations in foreign currency are void. Subsequently, to encourage foreign investments and to cope with the requirements of international trade and banking transactions, R.A. No. 4100 (approved on June 19, 1969) was enacted, amending R.A. No. 529 by exempting the following transactions from the prohibition contained under R.A. No. 529, to wit:

> *'a) transactions where the funds involved are the proceeds of loans and investments made directly or indirectly, through bona fide intermediaries or agents, by foreign governments, their agencies and instrumentalities, and international financial banking institutions so long as the funds are identifiable, as having emanated from the sources enumerated above;*
>
> *b) transactions affecting high-priority economic projects for agricultural, industrial and power development as may be determined by the National Economic Council which are financed by or through foreign funds;*
>
> *c) forward exchange transactions entered into between banks or between banks and individuals or juridical persons;*

> *d) import-export and other international banking, financial investment and industrial transactions.' (Section 1, R.A. No. 4100)*

However, on June 11, 1996 R.A. No. 8183 was enacted, expressly repealing R.A. No. 529, as amended.

As the law now stands, the prohibition on payment of domestic incurred obligations in foreign currency is effectively lifted. Nonetheless, R.A. No. 8183 did not provide for the applicable rate of exchange for the conversion of foreign currency incurred obligations in their peso equivalent.

Thus, in C. F. Sharp & Co. vs. Northwest Airlines, Inc. (381 SCRA 314), the Supreme Court held:

> *'The repeal of R.A. 529 by R.A. 8183 has the effect of removing the prohibition on the stipulation of currency other than Philippine currency, such that obligations or transactions may now be paid in the currency agreed upon by the parties. Just like R.A. 529, however, the new law does not provide for the applicable rate of exchange for the conversion of foreign currency-incurred obligations in their peso equivalent. It follows, therefore, that the jurisprudence established in R.A. No. 529 regarding the rate of conversion remains applicable. Thus in Asia World Recruitment, Inc. v. National Labor Relations Commission (313 SCRA 1, 17 [1999]), the Court, applying R.A. No. 8183, sustained the ruling of the NLRC that obligations in foreign currency may be discharged in Philippine currency based on the prevailing rate at the time of payment. The wisdom on which the jurisprudence interpreting R.A. No. 529 is based equally holds true with R.A. No. 8183. Verily, it is just and fair to preserve the real value of the foreign exchange-incurred obligation to the date of its payment.'*

Hence, it is now a settled rule that foreign currency incurred obligations may be discharged in Philippine currency based on the prevailing rate at the time of payment in order to preserve its real value to the date of its payment.

Consequently, in line with the prevailing jurisprudence on the matter, the applicable peso dollar exchange rate should be that prevailing at the time of actual payment in order to preserve the real value of the subject shipment to the date of its payment.

Thus, in the aforecited appealed case of Unimex, the Court of Appeals in its Decision in CA-G.R. SP Nos. 75359 and 75366 promulgated on August 30, 2004, ruled as follows:

> *'Consequently, in line with the prevailing jurisprudence on the matter and considering that the government's obligation was incurred after the enactment of RA 529, the applicable peso-dollar exchange rate should be that prevailing at the time of actual payment in order to preserve the value of the subject shipment. Thus, Unimex is entitled to actual damages pertaining to the value of the subject shipment in the amount of $466,885.54 to be converted at the peso-dollar exchange rate prevailing at the time of actual payment'*

In sum, the *CTA En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the assailed October 18, 2005 Resolution of the *CTA Second Division*. What the instant petition seeks is for the Court *En Banc* to view and appreciate the arguments/discussions raised by the petitioner in his own perspective of things, which unfortunately had already been considered and passed upon.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, the October 18, 2005 Resolution of the *CTA Second Division* in CTA Case No. 5290 entitled *"Agfha, Incorporated vs. Commissioner of Customs"*, is hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

Olga Palanca-Enriquez
OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice