REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

NESTLE PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 4406

HON. SALVADOR M. MISON,
in his official capacity
as Commissioner of Customs,
Respondent.

x - - - - - - - - - - - - - - - - x

2/21/92

D E C I S I O N

This refers to petitioner's petition for review seeking the refund of the total sum of P2,822,621.00 representing customs duties paid on imported milk and milk products which were subsequently ordered reexported to their countries of origin.

As borne out by the pleadings and evidence presented, petitioner is a domestic corporation engaged in the business of, among others, regular importation of milk and milk products for processing, distribution and sale. It has an office address at Jade Building, Sen. Gil J. Puyat Avenue, Makati, Metro Manila.

Sometime in April and May 1986, petitioner imported from different European countries various milk and milk products, which arrived at the Port of Manila on various dates from July 10, 1986 to September 14, 1986. The corresponding duties and advance sales taxes on said importations were paid by it in the sums of P2,822,621.00 and P5,953,606.00, respectively (Annexes "B", "B-1", pp. 20-21, CTA record).

While some of the goods were already in the customshouse and others were in transit, the Bureau of Food and Drugs (BFAD for short) issued a Memorandum Circular on July 1, 1986 concerning the importation of foodstuffs from Europe and China contaminated with radioactive substances. This was subsequently amended by BFAD Memorandum Circular No. 1-A which for ready reference, respectively state as follows:

"MEMORANDUM CIRCULAR

TO : All Concerned

RE : Guidelines for Monitoring of Foodstuffs Imported from Europe and China for Contamination with Radioactive Substances

DATE : 01 July 1986

Pursuant to the directive of the Minister of Health and the recommendation of the government Interagency Nuclear Accident Preparedness Committee of the Office of Civil Defense, the following guidelines are hereby promulgated for the purpose of monitoring foodstuffs imported *from Europe and China for radioactive contamination as a consequence of the Chernobyl Nuclear reactor accident in Kiev, USSR.*

1. Importers shall be required to secure a Certificate of Analysis for Radioactive Content or a Certificate of Assurance/Commodity Clearance from the responsible government of foodstuff being exported to the Philippines is safe and free from radioactive substances.

2. Importers shall notify the BFAD Unit at the Bureau of Customs of the expected date of arrival of their shipment.

3. Samples shall be collected by BFAD officials from entries without the required certificate/commodity clearance which shall be submitted to the Philippine Atomic Energy Commission (PAEC). The BFAD shall not authorize the release or distribution of the shipment in question until satisfactory result of analysis has been contained.

4. Samples may be collected from entries with the required certificate/ commodity clearance for confirmatory tests. In this case, no fee shall be charged to the importer.

5. Foodstuffs found contaminated with radioactive substances shall be declared unfit for consumption and shall be disposed of accordingly as deemed appropriate by authorized BFAD officials.

For the information, guidance and strict compliance of all concerned.

(SGD)
CATALINA C. SANCHEZ
Director"

"MEMORANDUM CIRCULAR
No. 1-A s. 1986

TO : All Concerned

RE : Amendments to BFAD Memorandum Circular dated 01 July 1986 concerning the guidelines for monitoring of foodstuffs imported from Europe and China for contamination with radio-active substances.

DATE : 19 September 1986

Pursuant to further directives of the Minister of Health, the monitoring of foodstuffs for radioactive contamination as a consequence of the Chernobyl nuclear reactor accident in Kiev, USSR, shall include foodstuffs imported from all countries, instead of only China and European countries.

The following amended guidelines are, therefore, promulgated for this purpose for the information, guidance and strict compliance of all concerned.

1. <u>Importers are required to secure a Certificate of Analysis for Radioactive Content or a Certificate of Assurance/Clearance from the responsible government authority in the country of origin</u>. The Certificate/Clearance should state that the particular shipment of foodstuffs being exported to the Philippines is not contaminated with fallout radionuclides and the levels of Cesium 137 and Cesium 134 therein do not exceed the limits for these radioactive elements set forth by the Philippine Government.

2. Importers shall notify the BFAD Unit at the Bureau of Customs of the expected date of arrival of their shipment.

> *3. Samples will be collected by BFAD officials from every incoming shipment with or without the required radioactivity certificate/clearance from the country of origin and these samples shall be immediately submitted to the Philippine Atomic Energy Commission (PAEC) for radioactivity tests. The BFAD shall not authorize release from the bonded warehouse nor the sale/distribution of the shipment of foodstuffs in question until a satisfactory result of analysis has been obtained from PAEC, in which case the BFAD shall inform the importers accordingly in writing.*
>
> *4. Imported foodstuffs subject to monitoring for radioactive elements are listed in Annex "A".*
>
> *5. All shipments of foodstuffs found exceeding the radioactivity limits shall not be given clearance for domestic sale/distribution and shall be disposed of in accordance with the guidelines set forth in Annex "B".*
>
> *This Memorandum Circular supersedes all other Circulars on the same subject matter and shall take effect immediately.*
>
> *(SGD)*
> *CATALINA C. SANCHEZ*
> *Director"*

Pursuant to the foregoing circulars, the imported milk and milk products, while still in the custody of the Bureau of Customs, were subjected to a radioactive test by the Philippine Atomic Energy Commission, and the result thereof showed that said products had radioactive substances in excess of the allowable limits fixed by the government;

therefore, they would be disposed of in accordance with the guidelines set forth in Annex "B" of Memorandum Circular No. I-A which states as follows:

> *PROCEDURES FOR DISPOSAL OF IMPORTED FOOD FOUND TO HAVE EXCEEDED ALLOWABLE LIMITS FOR RADIOACTIVITY IN THE PHILIPPINES*
>
> *1. All shipments of foodstuffs containing radioactivity in excess of levels set by Philippine Government shall be disposed of as follows:*
>
> *a. <u>Aforesaid shipments still intact in bonded warehouses may be allowed to be shipped out of the country under the supervision and control of the Bureau of Customs, the Bureau of Food and Drugs (BFAD), and other concerned agencies.</u>*
>
> *b. Items from aforesaid shipments that were removed from bonded warehouses and are in the custody of dealers or retailers may be returned to the distributor/importer for reshipment in accordance with paragraph a.*
>
> *c. Items from aforesaid shipments already in the hands of consumers can be disposed of by dissolving, diluting and pouring into the sewerage system in accordance with PAEC regulations on the disposal of radioactive wastes containing marginal amounts of radioactivity.*
>
> *d. All other items that cannot be disposed of through the sewer may be referred to*

> *PAEC or the Ministry of Health radiation safety officer in the nearest government hospital for appropriate disposal.*
>
> 2. *All costs of recovery of aforementioned items from consumers, retailers and other outlets, and transhipment of the same items to other countries shall be borne by the importers.* (Exh. "F-5", p. 84, CTA rec.)

As a consequence of the test, petitioner was ordered by the BFAD and the Department of Health to reexport said milk and milk products and, thereafter, after compliance by petitioner, BFAD issued to it a certification dated August 17, 1987, attesting to facts of reexportation (Exh. XX, p. 79, CTA record).

Subsequently, in June 1987, petitioner filed claims for refund of the duties and taxes it paid on the shipments. The Bureau of Internal Revenue granted the refund of the advance sales tax in the form of tax credit in the sum of P5,953,606.00 with Tax Credit Memo. No. 5040 dated October 13, 1987. (p. 85, CTA record). *However, the claim for refund of customs duties was denied by the Collector of Customs and later affirmed by the Commissioner of Customs in his decision dated October 17, 1989* (Annexes "A" and "A-1", pp. 16, 17, 18, 19, CTA record).

Hence this appeal.

To determine whether or not petitioner is entitled to the refund of customs duties paid on the importation of milk and milk products which were ordered reexported by the Bureau of Food and Drugs, the following issues have been raised by the parties in their various pleadings and memoranda:

1. Whether or not the non-observance of subject BFAD Memorandum Circular which requires the submission of a certificate of analysis for radioactivity content or a Certificate of Issuance/Clearance from the responsible government authority in the country of origin, will deprive the importer of his right to refund the duties paid on the shipments subsequently exported.

2. Whether or not there was a completed importation of the subject shipment under Section 1202 of the Tariff and Customs Code in relation to Section 101 of the same Code.

3. Whether or not subject shipments which were reexported for being injurious to public health may be considered exempted from customs duties under the provisions of Section 2608 of the Tariff and Customs Code.

The Court believes that the failure of petitioner to submit the required certificate of *analysis from the responsible government authority in the country of origin does not affect its right to the refund of the duties paid. First of all, the subject BFAD Circular, prior to its amendment, provides an alternative remedy in case entries are made without the required Certificate/Commodity Clearance from country of origin. Under paragraph (3), samples shall be submitted to the Philippine Atomic Energy Commission (PAEC) for radioactivity test and no shipments shall be released until satisfactory result of analysis is obtained. After its amendment, the Circular likewise provides an alternative remedy in case of failure to submit the required Certificate/Commodity Clearance from country of origin. Paragraph (3) thereof, similarly requires a certification from PAEC. However, the said paragraph states "with or without the required radioactivity certificate/clearance from the country of origin". Meaning, the first requirement indicated in the Circular is not mandatory but only directory and, in fact, may be considered optional. Moreover, there is nothing in the BFAD Memorandum Circular which provides for forfeiture of duties paid as a consequence of exceeding the radioactivity limits. Verily, said Circular provides only that "foodstuffs xxx shall* not be given clearance for domestic sale/distribution and shall be disposed of in accordance with the guidelines set forth in Annex "B" thereof. Annex "B", as quoted earlier, refers to "Procedures for Disposal of Imported Food Found to have Exceeded Allowable Limits for Radioactivity in the Philippines", and its pertinent provision states that:

> "a. Aforesaid shipments still intact in bonded warehouses may be allowed to be shipped out of the country under the supervision and control of the Bureau of Customs, the Bureau of Food and Drugs (BFAD), and other concerned agencies. A certificate of receipt issued by proper authorities at the destination shall be presented by the importer to the BFAD and other concerned agencies." (Underscoring supplied)

Clear from the foregoing is that only shipments still intact and "in bonded warehouses" may be reexported or shipped out of the country.

Coming to the question of whether or not there was a completed importation in this case in the light of the provisions of Section 1202 of the Tariff and Customs Code, the facts of the case show that the shipments in question were still in the customs premises and were not withdrawn because petitioner was not granted a permit for withdrawal thereof. Said importations were held in the *customs warehouses pending the test made by the Philippine Atomic Energy Commission on the radioactivity standard set by the BFAD.*

Respondent alleges that after petitioner paid the customs duties and taxes due on the importations, the corresponding import entries were finally liquidated on various dates, and the legal permit for withdrawal of the importations was granted by the Bureau of Customs, there was already a completed importation. Thus, he claims that petitioner is not entitled to the refund since the importation is deemed terminated when it paid the corresponding customs duties.

A close scrutiny of the records and evidence, however, fails to substantiate respondent's claim that a permit for withdrawal of said goods had been issued to petitioner. In fact, the decision of the Commissioner of Customs would support the finding that the goods were never released from customs custody when it stated that: "Before release were effected said shipments were subjected to radioactivity tests x x x. Finding the shipments to have exceeded the radioactivity limit x x x, BFAD directed their exportation, x x x." Since respondent alleges that he has issued the withdrawal permit, the burden of proof was on him *under the circumstances to prove by evidence such an allegation* (**Sec. 1, Rule 131** of the **Rules of Court**). *The failure of respondent to present evidence of the withdrawal permit which originates from his office opens him to unfavorable inferences. Here, it can be inferred that the permit to withdraw was not produced by respondent because there was actually none issued by him.*

Indeed, the issuance of a legal permit for withdrawal is indispensable to complete the process of importation. This is clear from the following provisions of Section 1202 of the Tariff and Customs Code wherein the concurrence of two conditions have to be met, viz:

a) payment of duties, taxes and other charges; and

b) granting of the legal permit for withdrawal.

> *"Importation begins when the carrying vessel or aircraft enters the jurisdiction of the Philippines with intention to unlade therein. <u>Importation is deemed terminated upon payment of the duties, taxes and other charges due upon the articles, or secured to be paid at the port of entry and the legal permit for withdrawal shall have been granted, or in case said articles are free of duties, taxes and other charges, until they have legally left the jurisdiction of customs.</u>" (Underscoring supplied)*

In the cases of **Llamado v. Commissioner of Customs**, G.R. No. L-28809, May 16, 1983, 122 SCRA 118; *and* **Good Day Trading Corporation v. Board of Tax Appeals**, G.R. No. L-6574, July 31, 1954, 50 O.G. 4803, *the Supreme Court, in interpreting Section 1202 of the Tariff and Customs Code, said that "Importation is not terminated until the duties due on the merchandise have been paid and the legal permit for withdrawal has been issued." In the instant case, there was no completed importation, and considering that the immediate cause was the government's own action, this court believes that the liability to pay the duties on the imported articles did not accrue and, if payment had been made, a refund is properly due the importer.*

On the third point of controversy, the situation here may find analogy to cases of articles declared unfit for human consumption under Section 2608 of the Tariff and Customs Code which provide as follows:

> ***SEC. 2608. Disposition of Articles Unfit for Use or Sale or Injurious to Public Health.****- When any article, which in the opinion of the Collector, is a* <u>*menace to public health, is seized or otherwise comes into the custody of the Bureau of Customs*</u>*, the collector of the port shall,* <u>*if the matter is not disposable under the provisions relating*</u>

> *to food and drugs, appoint a board of three members to examine the article. Whenever possible, one member shall be a representative of the Ministry of Health, officials of the Bureau of Customs, at least one of whom shall examine said article, and if the same is found to be unfit or a menace to the public health, the board shall so report in writing to the collector, who shall forthwith order its destruction in such manner as the case may require.*
>
> *Health authorities at port of entry shall collaborate with the collectors in such matters with reasonable dispatch. (Underscoring Supplied).*

An authority in customs law opines that, in cases of disposition by destruction under Section 2608, the effect is to exempt the affected merchandise from duties and taxes and any such duties and taxes collected thereon should be refunded (**Tejam, Commentaries on the Revised Tariff and Customs Code**, Vol. IV, 1986 ed., p. 2370). *Here, although the articles were considered unfit for use or sale or injurious to public health, they were not disposed of by destruction, but were disposed of by reexportation, a mode of disposition provided for in the said BFAD Circular. Reading Section 2608, however, disposition by destruction is only an alternative mode of disposition as it shall apply "if the matter is not disposable under the provisions relating to food and drugs". It could be that even if the subject articles were disposed* *of by reexportation, a mode of disposition relating to food and drug, the theory of exemption may still apply. However, strictly speaking, we cannot adopt* in toto *the theory of tax exemption because of the time honored rule in statutory construction that tax exemption is never presumed but must be granted in a clear and unequivocal manner* (**Collector vs. Manila Jockey Club**, 98 Phil. 670).

Inasmuch as Section 2608 of the Code does not provide for the consequences or disposition of the duties and taxes paid on the goods to be destroyed or disposed of, our alternative is to look for other provisions of the Code which may supply the deficiency or remedy. The more relevant approach is to interpret the provision of Section 2608 in relation to Section 1704 of the Tariff and Customs Code providing abatements and refunds, the pertinent provision of which is quoted as follows:

> *"**SEC. 1704. Abatement or Refund of Duties on Articles Lost or Destroyed after Arrival.** - A Collector may abate or refund the amount of duties accruing or paid, and may likewise make a corresponding allowance on the irrevocable domestic letter of credit, bank guarantee, or the entry bond or other document, upon satisfactory proof of injury, destruction, or loss by theft, fire or other causes of any articles as follows:*
>
> *a. x x x*
>
> *b. While remaining in customs custody after unlading;*

c. x x x

d. x x x

(Underscoring supplied.)

Under said provision of law, the Collector of Customs may abate or refund the amount of duties paid upon satisfactory proof of injury, destruction, or loss by theft, fire or other causes of any article, among others, while remaining in customs custody after unlading. The law conceives of a situation where after shipments were unloaded, proper entries were filed and the corresponding duties paid, the shipments suffer injury for any cause, while remaining in customs custody. While in this case the injury by reason of radioactivity did not occur while the shipments were in customs custody, nevertheless the required satisfactory proof of injury occurred only when samples were submitted to the Philippine Atomic Energy Commission and the latter failed to issue the necessary clearance. In other words, the milk products became injurious to public health only after they failed to meet the standards set forth by the Philippine government and this occurred at the time the shipments were still in customs custody. The said shipments were not injurious per se *when they were imported. They may have met the* *international standard on allowable radioactivity limit but when they arrived in the Philippines and subjected to testing, they failed to meet our required Philippine standard.*

Verily, it may be argued that this interpretation is stretching too much the meaning of Section 1704. We may admit so, but this mode of interpretation is based on sound rules of statutory construction and one such rule or doctrine states: "That which is implied in a statute is as much a part of it as that which is expressed" (**Martin Country vs. Hansen**, Ill. Fld. 40, cited in the **Handbook on Statutory Construction, by Ruperto G. Martin**, p. 122). *This doctrine is necessary for very rarely, if at all, are statutes framed with minute particularity as to cover every conceivable situation. It aids the courts to infer legislative purpose and intention in such a way as to determine whether certain minor or specific matters are covered by the general or broad terms used in a statute. This is not judicial legislation but rather a method of discovering legislative intent by the logical process of deduction* (**Black on Interpretation of Laws**, 2nd ed., p. 84).

Certainly, in the case at bar, the lawmakers could not have possibly conceived all situations *whereby shipments still in Customs custody would be damaged, injured or proven to be injurious to public health for any cause whatsoever. The phrase "other causes" in Section 1704 of the Code aforesaid, is broad enough to cover radioactivity. This Court's conclusion finds further support in the case of* **Zamora vs. City of Manila**, 7 Phil. 585, *which enunciates that "a remedial statute, such as the one in question providing for a refund of taxes which appears to have been collected unjustly, should be construed liberally."*

WHEREFORE, respondent Commissioner of Customs is hereby ordered to grant petitioner NESTLE Philippines, Inc. a refund of the amount of P2,822,621.00 representing customs duties paid on the imported milk and milk products in question.

SO ORDERED.

Quezon City, Metro Manila, February 21, 1992.

ERNESTO D. ACOSTA
Associate Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation between the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

CONSTANTE C. ROAQUIN
Associate Judge
Court of Tax Appeals