REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MACONDRAY & CO., INC., as agent of the MS FERNBANK,
Petitioner,

- versus - C.T.A. CASE NO. 2656

COMMISSIONER OF CUSTOMS,
Respondent.

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D E C I S I O N

This is an appeal from the decision of respondent Commissioner of Customs dated January 10, 1975, imposing an administrative fine of ₱77,025.00 against the vessel MS "Fernbank" and/or its ship agent petitioner Macondray & Co., Inc. for violation of Section 2523 of the Tariff and Customs Code.

On September 25, 1969 the vessel MS "Fernbank" arrived at the Port of Manila from New York, conveying and discharging thereat a shipment of one hundred and ten (110) bales of cotton and rayon remnants consigned to Judicor Commercial. The gross weight of the said merchandise as declared in the cargo manifest and bill of lading was 59,938 lbs. but, after an examination and actual weighing by a customs

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examiner, the total weight thereof was found to be 131,388 lbs., or 71,450 lbs. more than the declared weight. On January 22, 1970, in a letter sent by the Chief of the Law Division of the Bureau of Customs, petitioner was informed of the violation committed by the vessel under Section 2523 of the Tariff and Customs Code and was required to submit in writing its explanation within five (5) days from receipt thereof.

In a reply dated February 20, 1970, petitioner, through counsel, explained that the weight of the cargo appearing on the manifest and bill of lading was furnished by the shipper; that the cargo was freighted on a measurement basis; and that the discrepancy between the actual and declared weight, if any, was not due to the carelessness or incompetence of the master of the vessel or the ship's agent but due to clerical error. The said explanation, however, was found unsatisfactory by the Bureau of Customs. Consequently, administrative proceeding was instituted against the vessel MS "Fernbank" with petitioner Macondray & Co., Inc. representing it as party-respondent.

On February 27, 1973, after proper hearing, the Collector of Customs rendered a decision imposing a fine of ₱77,025.00 on the MS "Fernbank" and/or petitioner herein for violation of Section 2523 of the Tariff and Customs Code. On January 10, 1975, on appeal by petitioner, said decision of the Collector was affirmed by the Commissioner of Customs. Hence, the present recourse.

The issue in this appeal is whether or not the imposition of the administrative fine on the vessel MS "Fernbank" and/or petitioner herein is in accordance with the provision of Section 2523 of the Tariff and Customs Code which provides as follows:

> Sec. 2523. <u>Discrepancy Between Actual and Declared Weight of Manifested Article</u>.- If the gross weight of any article or package described in the manifest exceeds by more than twenty <u>per centum</u> the gross weight as declared in the manifest or bill of lading thereof, and the Collector shall be of opinion that such discrepancy was due to the carelessness or incompentency of the master or pilot in command, owner or employee of the vessel or aircraft, a fine of not more than fifteen <u>per centum</u> of the value of the package or article in respect to which the deficiency exists, may be imposed upon the importing vessel or aircraft.

The defenses raised by petitioner against the propriety of the imposition of the fine may be summarized as follows:

(1) That the findings of the Bureau of Customs that the actual weight of the importation is 131,388 lbs. is not accurate and binding since there is no concrete proof thereof; and

(2) That even assuming that there is a discrepancy of more than 20% between the declared weight and actual weight of the shipment, the same was not due to the carelessness or incompetency of the captain, master, owner or employee of the vessel because the declared weight appearing on the bill of lading and the manifest was supplied by the shipper; that the shipment was freighted on a measurement basis; and that the duties of the captain or master of the vessel as defined under Article 612 of the Code of Commerce, and even under the Tariff and Customs Code, do not obligate or require him to ascertain the weight of any particular cargo.

Actually, the first objection of petitioner against the imposition of the fine, which touches on a factual and evidentiary matter, is being raised for the first time in its memorandum. Such a defense has neither been raised before the Bureau of Customs nor in its appeal before this Court. Having agreed to the submission of this case on the basis of the pleadings and Customs records, without even offering proof as to the truth of its own allegations, which were all denied by respondent, petitioner should not be allowed to raise such a defense, which involve a factual issue, for the first time in its memorandum, after it had already submitted the case for decision. Petitioner should be considered to have waived the right to set up such an objection after the Bureau of Customs had already decided the case and after petitioner had litigated and submitted its appeal for resolution of this Court.

Furthermore, the decision of the Commissioner of Customs appealed to this Court, and that of the Collector, state as a fact that the actual weight of the shipment in question, after examination by customs examiner Lazaro Malihan, is 131,388 lbs. and this statement of fact had not been challenged or disputed by petitioner before respondent or before this Court. Since its petition for review admits, in effect, the existence of a discrepancy between the declared weight and the actual weight of the subject importation (pars. IV, V, VI and VII); and the decision appealed from states that the actual weight of the importation is 131,388 lbs., which decision forms part of the petition for review as Annex "A" thereof; and petitioner merely disclaims liability therefrom for reasons stated under paragraph VII of its petition for review without offering proof as to the truth thereof, and which were all denied by respondent in his answer (par. 2); the finding of the Bureau of Customs that the actual weight of the shipment in question is in fact 131,381 lbs., which was not questioned by petitioner, must logically be binding upon it.

At any rate, that the actual weight of the subject importation, as found by the Bureau of Customs, is 131,388 lbs., is supported by the evidence. Customs Examiner Lazaro Malihan, on questioning by Atty. Wilfredo T. Manongdo, counsel for the Bureau of Customs, testified to this fact.

Q. And when you examined this shipment, did you also place your findings on the entry?

A. Yes, Your Honor.

Q. Presenting to you this handwritten notation which was previously marked as Exhibit "C-2", do you know whose notations were these?

A. I prepared it personally.

Q. These were your notations?

A. Yes.

Q. Now in this notation there appears a figure which reads: 131,388 lbs., what does this figure refer to?

A. Your Honor, we usually do not put the total weight when we prepare our report on the face of the entry because we believe that the machine which is being used in the computation will be much accurate and the total amount which is 131,388 lbs., is the total amount as being computed in the machine of the Liquidation or the Appraisal. I think the 131,388 lbs. represents the total weight of the shipment in question.

Atty. Manongdo:

May we request, Your Honor, that this figure 131,388 lbs. be encircled and be marked as Exhibit "D" for the prosecution.

HEARING OFFICER:

Mark it.

(see pp. 120-122, Customs rec.)

The testimony of Examiner Lazaro Malihan was cited by the Collector of Customs and the Commissioner of Customs in their decisions, to wit:

> "On the other hand, Examiner Malihan testified that he made a physical examination of the entire shipment and weighed the same in the scale in the presence of other customs authorities and a representative of the consignee, although, he said, he was only taking down notes of the results of his examination which he officially and finally transferred after the termination of the same and are reflected in the dorsal portion of the yellow copy of the entry covering the shipment. Moreover, he testified that the total weight is 131,388 lbs. as against the declared weight of 59,593, or a difference of 71,450 lbs. which remains incontroverted." (P. 2, Decision of Comm. of Customs, p. 173, Customs rec.; Annex "A", petition, p. 6, CTA rec.; p. 2 Decision of Collector of Customs, p. 158, Customs rec.; underlining supplied.)

And this statement of fact, as we have observed earlier, has not been disputed by petitioner before the said customs officers or in its petition for review filed in this Court.

Much is made, however, by petitioner that the fine imposed under Section 2523 of the Tariff and Customs Code is penal in character so that it was incumbent upon the government in the Bureau

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of Customs to have presented proof beyond reasonable doubt that the actual weight of the shipment was in fact 131,388 lbs. It will be noted that the penalties provided by law in connection with the importation or exportation of articles are classified into (a) administrative, and (b) criminal penalties. The administrative penalties are: (a) the surcharges provided in Sections 2501 to 2504 of the Tariff and Customs Code; (b) fines provided in Sections 2505 to 2529; and (c) forfeitures provided in Sections 2530 and 2533. Section 2523 upon which the imposition of the fine on petitioner is based falls under administrative penalties. The offenses for which specific criminal penalties are provided are enumerated in Sections 3601 to 3609 of the Tariff and Customs Code. Since the fine imposed under Section 2523 is not one of those offenses for which specific criminal penalties are provided as enumerated in Sections 3601 to 3609, under the penal provisions of the Tariff and Customs Code, it is thus evident that the said fine is not penal in character.

As regards the contention of petitioner that the discrepancy is not due to the carelessness or incompetence of the master, owner, or employee of the vessel because the weight declared in the bill of lading or manifest was supplied by the shipper, and that under Section 612 of the Code of Commerce, and even under the Tariff and Customs Code, the captain or master of the vessel is not required to ascertain the weight of the cargo, a similar issue was settled by this Court in the case of "F.E. Zuelig, Inc., in its capacity as agent of the M/V "Hongkong Grace", vs. Commissioner of Customs", CTA Case No. 2360, April 10, 1975, wherein it was ruled that the fact that the captain of a vessel is not careless on the bases of his duties under the Code of Commerce is no defense against this penalty. Because of its controlling effect on the present case, we will quote from the decision.

> . . . . On the other hand, petitioner claimed that the said discrepancy is by no means attributable to the master or captain of the vessel because, under Article 612 of the Code of Commerce listing the duties of the said official, he is not required to ascertain the actual weight of the cargo of any particular shipper. Consequently, it is argued that neither carelessness nor incompetence can be imputed against the captain of the vessel "Hongkong Grace" to justify the imposition of the penalty imposed by the Tariff and Customs Code.

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> It is not Article 612 of the Code of Commerce which deals with the duties of the captain of a vessel but Section 2523 of the Tariff and Customs Code that governs this case. Under the latter law the fact that the captain of a vessel is not careless on the bases of his duties as enumerated in the Code of Commerce is no defense against the penalty. The law includes the carelessness of the owner or employee of the vessel. The explanation of the manager of the Shipping Division of petitioner to the effect that no shipping line in the United States has facilities for checking the weight or contents of the goods shipped therefrom; <u>that the weight of the cargo is declared by the shipper and any discrepancy in weight is beyond the control of the shipping company is not a valid excuse.</u> Accepting petitioner's explanation as a valid defense is virtually nullifying Section 2523 of the Tariff and Customs Code, brushing aside the provisions of Section 2523 of the said Code as a dead letter. Doing business in the Philippines, it behooves petitioner to abide by our Customs laws and to ignore them is nothing short of gross carelessness. It is an omission of the concern that one with ordinary prudence should have of the Customs laws of the country with which it does business. (Underlining supplied.)

Anent petitioner's averment that the freightage of the subject shipment was made on a measurement basis, suffice it to state that freightage is merely the charge or compensation paid by the shipper or importer to the carrier, and is not a determinative factor in the assessment and imposition of duties and penalties on the imported goods. As aptly observed by the respondent, freightage is never a factor in determining the responsibility of the vessel under Section 2523 of the Tariff and Customs Code.

Accordingly, since it has been established that there is a discrepancy of 71,450 lbs. between the declared weight (59,938 lbs.) and the actual weight (131,388 lbs.) of the subject importation, which discrepancy is obviously more than 20% of the declared weight, and which is attributable to the carelessness or incompetence of the master, officer or employee of the vessel because of his reliance solely on the declared weight furnished by the shipper and failure to take steps to ascertain and verify the correct weight of the cargo before transporting the same, in utter disregard of his obligation imposed on him by the law, the vessel MS "Fernbank" and/or its ship agent are liable for the fine of not more than 15% of the value of said shipment pursuant to Section 2523 of the Tariff and Customs Code. As determined by the Bureau of Customs, the fine to be imposed for the violation in this case is ₱77,025.00, and this is not being questioned or assailed by petitioner as erroneous or excessive.

However, the law does not necessarily require that in violations of this nature the penalty imposable should always be the maximum. Apparently the law allows latitude in the determination of the amount of the fine as long as it will not exceed 15% of the value of the article in respect to which the discrepancy exists. While there is carelessness or incompetence here on the part of the master, officer or employee of the vessel, the circumstances at hand, in our opinion, do not warrant the conclusion that it amounted to <u>willful</u> negligence or <u>gross</u> incompetence, justifying the imposition of the maximum penalty. Consequently, a fine of ₱15,000.00 is deemed just and reasonable under premises, considering that this is not the first case brought to this Court involving the imposition of the same penalty on the same ship agent. (Macondray & Co., Inc., in the capacity as agent of the S/S "Fernlake" vs. Commissioner of Customs, CTA Case No. 2428, October 31, 1973.)

WHEREFORE, the decision appealed from is modified and petitioner Macondray & Co., Inc. is hereby

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ordered to pay to respondent Commissioner of Customs the sum of ₱15,000.00 for violation of Section 2523 of the Tariff and Customs Code. With costs against petitioner.

SO ORDERED.

Quezon City, January 21, 1977.

AMANTE FILLER
Acting Presiding Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

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