REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

NESTLE PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NOS. 5258 & 5249

COMMISSIONER OF INTERNAL REVENUE AND THE COMMISSIONER OF CUSTOMS,
Respondents.

Promulgated:
JAN 06 2000

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DECISION

Before Us for consideration are two (2) Petitions for Review seeking for a refund of the aggregate amount of P13,142,945.00 (P8,017,208 for CTA Case No. 5258 and P5,125,737.00 for CTA Case No. 5249) allegedly representing excess duties and taxes unlawfully assessed and collected on Petitioner's twelve (12) importations of skimmed, sweet buttermilk powder and instant milk powder 28% from different European countries during the period August 1992 to February 1993.

The antecedent facts of these cases giving rise to the controversy at bar are as follows:

Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines, with office address at Jade Building, 335 Sen. Gil J. Puyat Avenue Extension, Makati City. It is a regular importer of milk and milk products, and is engaged in the manufacture, processing, distribution and sale of processed, manufactured, and formulated milk and milk products.

As borne by the records, Petitioner on several occasions in 1992 and 1993, made importations of Skimmed Milk Powder, Instant Milk Powder and Sweet Butter Milk Powder from different European countries.

On these importations, Petitioner accomplished and filed the corresponding Consumption Entries declaring the invoice cost as basis of their dutiable value.

However, upon pre-shipment inspection and valuation conducted by the Societe Generale de Surveillance ("SGS", for brevity), the latter, in its Clear Report of Findings ("CRF", for brevity) declared a higher valuation of the subject importations.

Triggered by the higher valuation and the assessment of additional duties and taxes on each of the subject importations, petitioner protested and appealed its grievance to the Bureau of Customs – SGS Import Valuation and Classification Committee (Committee, for brevity). Petitioner asserted that pursuant to Section 201 of the Tariff and Customs Code, the invoice value should be the basis of the dutiable value of its shipment of goods and not the higher valuation pronounced by the SGS on its CRF.

Later on, the SGS reduced its own valuation through amendments of its originally issued CRFs but which were still much higher than the invoice value. The Committee adopted the modified valuations and imposed, by way of final assessments, additional duties and taxes on the subject importations which petitioner paid under protest. The complete lists of the Committee's re-computations are tabulated hereunder:

For CTA Case No. 5258

ENTRY	COMMODITY	EXCESS DUTIES AND TAXES
13328-93	Buttermilk Powder	P 376,990.00
12413-93	Instant Milk Powder	1,278,410.00
09481-93	Instant Milk Powder	2,120,898.00
06146-93	Instant Milk Powder	3,388,063.00
20434-93	Instant Milk Powder	852,847.00
TOTAL AMOUNT OF CLAIMS FOR REFUND		P 8,017,208.00

For CTA Case No. 5249

ENTRY	COMMODITY	EXCESS DUTIES AND TAXES
64641-92	Skimmed Milk Powder	P 771,523.00
75615-92	Skimmed Milk Powder	641,046.00
71619-92	Skimmed Milk Powder HH	332,751.00
31365-92	Skimmed Milk Powder HH	385,795.00
60554-92	Sweet Buttermilk Powder	71,868.00
81636-92	Sweet Buttermilk Powder	173,791.00
01127-93a	Instant Milk Powder 28%	2,748,963.00
TOTAL AMOUNT OF CLAIMS FOR REFUND		P 5,125,737.00

Believing that the imposition of said additional duties and taxes were arbitrary, unjust and illegal, petitioner filed its twelve (12) formal letter protests with the Bureau of Customs on April 28, May 11, June 7, June 9 and July 2, 1993 and prayed that the same be refunded.

On April 20 and May 29, 1995, petitioner likewise filed its formal claims for refund of the value added tax portions thereof with the Commissioner of Internal Revenue.

Failing to obtain an affirmative response from the respondent, petitioner elevated its grievance to this Court on April 27 and June 2, 1995 via Petition for Review.

At bar, Petitioner maintains the view that under the provisions of Section 201 of the Tariff and Customs Code, if the invoice value reflects the correct fair market value of the imported articles, then it shall be the principal basis of determining its dutiable value.

Petitioner elaborates that to disregard the invoice value it is necessary to establish first the existence of a cloud of doubt as regards the value or price of the imported article declared in the entry; that after reasonable doubt has been ascertained, recourse to reports from commercial attaches' or other information must be shown to have been observed in coming out with the latest dutiable value. To further bolster its stance, petitioner cited the case of **Commissioner of Customs vs. Court of Tax Appeals,161 SCRA 376,** where the High Court declared that to serve as basis for determining the dutiable value of an article, it is necessary that the new dutiable value must be priorly published.

Petitioner argues that the Bureau of Customs failed to establish reasonable doubt as to the correctness of the declaration in the entry. Neither did the Commissioner of Customs show any material evidence as to how the SGS ascertained and established its CRF value of the imported articles. And that the respondent likewise failed to comply with the publication requirement.

In the same breath, petitioner, in its memorandum, impugned respondent's reliance on SGS valuation, thus:

> "Respondent's reliance on SGS valuations of imported articles is misplaced. SGS is not exempt from complying with the requirements of the law. In fact, SGS cannot be above the law.
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> Moreover, unlike government employees and agency, SGS does not enjoy the legal presumption of regularity in the performance of its functions, being a private and foreign owned enterprise with officers and

employees not covered by the Civil Service law. As such it must show competent proof as to how it arrived at its own valuations on the subject importations.

As it is, SGS bases and data sources are unknown. The methodology used, if any, is improper. Its scheme of mathematically adding to the invoice cost any amount which purportedly corresponds to subsidy of European countries being extended to their exporting companies, is highly anomalous, and bereft of legal and factual basis. This is so because:

> Firstly, it has not been established as to whether there was really such European subsidy, who grants the subsidy, who are the recipients, what forms of subsidy and kinds of benefit, who enjoys them, how much money was involved, how it off-set the selling price, and how much corresponds exactly for each exported dairy product, how was it computed, what are the sources of the data being used, and how reliable are those data;
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> Secondly, the supposed EEC subsidy, if any, must have been the result of competitive export pricing following the universal law of supply and demand - mainly an incentive to sustain a country's dairy industry, increase its foreign exchange inflows, and achieve a favorable balance of trade. As aptly observed by the Secretary of Justice, thus:
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> > "Contemporary history shows that economic progress of nations are achieved mainly by relying more on international trade than the development of the domestic market for the products of their agriculture and industry. Among the reasons for this is a developing country's need for foreign exchange and the desire to achieve a favorable balance of trade." (Department of Justice's Opinion No. 37, Series of 1992);
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> Thirdly, government subsidy is not a valid reason to increase dutiable value as the law explicitly provides the basis of dutiable value which is the cost or fair market value. And, the phrase "fair market value" had been defined as the price at which one is willing to sell, would sell, and a person willing to buy, would buy, both being

> familiar with all the facts, and the seller not being forced to sell or the buyer forced to buy." (French Dry Cleaning Co. v. Commissioner of Internal Revenue, C.C.A. Ga. 72 F .2d 167).
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> Fourthly, to add-up such government subsidy to the cost or price is incongruous with international laws on sovereignty of nations. For, in effect, herein respondents without any sanction of law, is taxing and penalizing Filipino importers and consumers on account of the foreign nations' liberality to their traders, even when the granting of subsidy by foreign countries is a matter of government policy in the exercise of their respective sovereignty, which is beyond the control of importing countries;

> Ineluctably, there is no valid reason to impose a higher dutiable value on the subject importations. The SGS valuations relied upon by the Customs Collector were made arbitrarily without the requisite publication, and are unjust, illegal, bereft of proper basis, and were done in gross contravention of the law.
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> (Memorandum for the Petitioner, pp. 11-13)

Upon the other hand, respondent Commissioner of Customs (COC) traverses petitioner's stance and maintains that the correct dutiable value of the article should be the value recommended by the SGS in its Clean Report of Findings and not the invoice value declared by Petitioner in its consumption entries. It is respondent's view that while petitioner is correct that the home consumption value of imported article should be the value or price declared in the consular, commercial, trade or sales invoice, the same finds no application in the case at bar inasmuch as there exist a reasonable doubt as to the correctness of the value or price of the imported article declared in the entry.

In support of the valuation pronounced by the SGS, Respondent COC defended the latter and declared that it is an international firm of good reputation hired by the

Philippine government to provide it with the real consumption value or price of goods imported into the country for Tariff and Customs purposes. But while admitting that the SGS valuation is merely recommendatory in nature and is not conclusive upon the Bureau of Customs, the respondent makes capital of the fact that once the Collector of Customs adopts the CRF value as endorsed by the Customs Examiner/Appraiser, the value is no longer considered a mere SGS-CRF value but the official customs value of articles. Such being the case, any party, including the importer, has the burden of proving that the same is wrong or arbitrary vis-à-vis its presumption of regularity.

As regards petitioner's contention on the requirement of publication, respondent argues that the publication of "established" or information" value is not a pre-requisite before it may be the basis of the imposition of customs duty and taxes and that said publication is merely intended as a guide in the assessment of future shipment of similar articles. Moreover, respondent asseverates that the law does not provide that it is only after the "established" or "information" value is published that such home consumption value may be the basis of assessment of the customs duty and taxes, on the contrary, it is explicitly provided that upon reasonable doubt as to the accuracy of the declared value of the article in the consular or commercial invoice, the Commissioner of Customs may determine its home consumption value from other available and more reliable sources which "established" or "information" value shall then be the basis of the imposition of customs duty and taxes.

Contradicting petitioner's assertions that it is necessary to establish first a reasonable doubt as to the declared value in the commercial invoice before resorting to other sources, respondent opines that since a higher assessment on imported goods had been recommended by SGS and which recommendation had been adopted by the Customs Appraiser, the same, in effect, created a reasonable doubt on the truthfulness and accuracy of the importer/shipper's commercial invoice.

In support of its adoption of the SGS valuation, Respondent asseverates that the basis of SGS value was the actual price as per seller's (exporter's) invoice, plus the restitution paid to the exporters according to the European Economic Community (EEC) agreements. Thus, having established the factual existence of the restitution paid or refund being enjoyed by the exporter/supplier, the Bureau is correct in adopting the SGS recommended value as the true and correct price of the goods in issue. This must be so since, according to the respondent, Section 201 of the Tariff and Customs Code explicitly speaks of home consumption value or price of an imported article base on some, like or similar articles, as bought and sold or offered for sale freely in the usual wholesale quantities in the ordinary course of trade, in the principal markets on the date of exportation to the Philippines. However, in the light of the European Governments' intervention in reducing the export prices of milk/milk products thru the so-called EXPORT SUBSIDY or REFUND, the seller's invoice value cannot be considered as the home consumption value as defined by Section 201 since it is not based on the price of same, like or similar articles, as bought and sold or offered for sale freely in the usual wholesale quantities in the ordinary course of trade in the principal markets.

Forming the crux of the matter as agreed upon by the contending parties in their Joint Stipulation of Facts and Simplification of Issues are:

1) Whether or not SGS' valuations are arbitrary and unjust; and

2) Whether or not petitioner is entitled to refund of the additionally imposed duties and taxes which were paid under protests.

For the proper resolution of the issues at hand, We deem it proper to reproduce the provisions of Section 201 of the Tariff and Customs Code, as amended by E.O. 153, to wit:

> **Section 201.** ***Basis of Dutiable Value.*** The dutiable value of an imported article subject to an ad valorem rate of duty shall be based on the cost (fair market value) of same, like or similar articles as bought and sold or offered for sale freely in the usual wholesale quantities in the ordinary course of trade in the principal markets of the exporting country on the date of exportation to the Philippines (excluding internal excise taxes to be remitted or rebated) or where there is none on such date, then on the cost (fair market value) nearest to the date of exportation, including the value of all containers, coverings and/or packings of any kind and all other costs, and charges incident to placing the article in a condition ready for shipment to the Philippines, and freight as well as insurance premium covering the transportation of such articles to the port of entry in the Philippines.
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> Where the fair market value or price of the article cannot be ascertained thereat or where there exists a reasonable doubt as to the fairness of such value or price, then the fair market value or price in the principal market in the country of manufacture or origin, if it is not the country of exportation, or in a third country with the same stage of economic development as the country of exportation shall be used.
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> When the dutiable value of the article cannot be ascertained in accordance with the preceding paragraphs or where there exists a reasonable doubt as to the cost (fair market value) of the imported article declared in the entry, the correct dutiable value of the article shall be ascertained by the Commissioner of Customs from the reports of the Revenue or Commercial Attache (Foreign Trade Promotion Attache), pursuant to Republic Act Numbered Fifty-four Hundred and Sixty-Six or other Philippine diplomatic officers or Customs Attaches and from such other information that may be available to the Bureau of Customs. Such values shall be published by the Commissioner of Customs from time to time.

> When the dutiable value cannot be ascertained as provided in the preceding paragraphs, or where there exists a reasonable doubt as to dutiable value of the imported article declared in the entry, it shall be the domestic wholesale selling price of such or similar article in Manila or other principal markets in the Philippines on the date the duty become payable on the article under appraisement, in the usual wholesale quantities and in the ordinary course of trade, minus –
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> (a) Not more than twenty-five (25) per cent thereof for expenses and profits; and
> (b) Duties and taxes paid thereon."

A cursory reading of the above cited provisions clearly suggests that the home consumption value or price of an imported article subject to an ad valorem rate of duty shall be the value or price declared in the consular, commercial, trade or sales invoice subject, however, to the exception that in case there exists a reasonable doubt as to the value or price of the imported article declared in the entry, the correct dutiable value of the article shall be ascertained from the receipts of the Revenue Attache or Commercial Attache (Foreign Trade Promotion Attache), pursuant to Republic Act Numbered Fifty Four Hundred and Sixty Six or other Philippine Domestic Officers and from such other information that may be available to the Bureau of Customs. In other words, these consular and commercial invoices are in no way conclusive upon the government. Thus, in **Caltex (Philippines), Inc. vs. Court of Appeals, 292 SCRA 273, G.R. No. 14781, July 10, 1998,** the High Court citing Lim Quinn vs. Collector of Customs, 23 Phil. 509 (1992), emphatically declared, thus:

> "Our conclusion is premised on the fact that sales, commercial or consular invoices are not conclusive on the government. Our customs laws should not be at the mercy of importers who may avail of schemes and other arrangements to lower and reduce the face value of the articles

> covered by such invoices. Noteworthy is the fact that: "If the customs authorities were bound by the invoice value, it is evident that they would be, to a considerable extent, at the mercy of foreign merchants and importers. The purpose of Congress in providing for an appraiser was to prevent fraud upon the customs, and thus protect the revenues of the Government."

From the foregoing, it is manifest that in the event there exists a reasonable doubt on the invoice value, the customs authorities may resort to other means in order to ascertain the fair market value of the imported articles.

But is there a reasonable doubt as regards the invoice value?

We agree with the Respondent that the higher valuations in the SGS' Clear Report of Findings in effect creates a reasonable doubt on the truthfulness and accuracy of the value or price of the imported article declared in the entry. Such being the case, Respondent COC may disregard the said invoice value and adopt instead the Committees' recommendation as to the fair market value of the subject articles which is the invoice value plus the restitution/refund paid to the sellers/exporters in accordance with the European Economic Community agreements. This fair market value represents the price existing in the domestic market in the country of supply (EEC) of the imported article based on source, like or similar articles, as bought and sold freely in the usual wholesale quantities in the ordinary source of trade, in the principal markets on the date of exportation to the Philippines. And there being a subsidy given by the EEC to its exporters, consequently, the imported articles has a price lower than that in the domestic market of the exporters. Accordingly, the subsidy given by the EEC should form part of the home consumption value of the imported article. In view of these considerations, Petitioner's invoice value, therefore, does not reflect the true and correct home consumption value it being a beneficiary of EEC government subsidy and it is therefore incumbent upon it, having disputed the SGS valuation, to overcome the presumption of correctness of the valuation and to show that the invoice value as declared in the entry are in fact true and correct **(Coca Cola Export Corporation vs. The Commissioner of Internal Revenue, 56 SCRA 5, cited in Commissioner of Customs vs. Court of Tax Appeals, 195 SCRA 12).**

We now tackle the issue on the necessity of publication which is another point invoked by the petitioner.

In this respect, We do not agree that the law requires a prior publication of new dutiable value before it can serve as the basis of the assessment of customs duties and taxes. This conclusion is difficult to resist since the text of the decision of the Supreme Court in the case of **Commissioner of Customs vs. Procter and Gamble Philippines Manufacturing Corp., 169 SCRA 693** veers towards the direction that a prior publication is not mandatory, and We quote, thus:

> "The posture taken by private respondent is untenable. A reading of Section 201 of the Tariff and Customs Code aforecited shows that where there exists reasonable doubt as to the value or price of the imported article declared in the entry, the correct dutiable value of the article shall be ascertained from the reports of the Revenue Attache or Commercial Attache (Foreign Trade promotion Attache) x x x or other Philippine diplomatic officers and from such other information that may be available to the Bureau of Customs.' This is what is called the "established" or "information" value. Such value shall be the home consumption value of the imported article which shall be the subject of customs duty and taxes.
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> The same article then provides:

From the data thus gathered, the Commissioner of Customs shall ascertain and establish the home consumption values of articles exported to the Philippines and shall publish such lists of values from time to time *(Sec. 201 of the TCCP)*

The law does not provide that it is only after the "established" or "information" value is "published" that such home consumption value may be the basis of assessment of the customs duty and taxes. On the contrary, it is explicitly provided that upon reasonable doubt as to the accuracy of the declared value of the article in the consular or commercial invoice, the Commissioner of Customs may determine its home consumption value from other available and more reliable sources which "established" or "information" value shall then be the basis of the imposition of the customs duty and taxes. The publication of said "established or "information" value is not a prerequisite before it may be the basis of the imposition of customs duty and taxes. Conversely, it's non-publication is no obstacle to the assessment of customs duty and taxes based on such "established" or "information" value. The publication is intended as guide in the assessment of future shipment of similar articles. While such published value of an imported article is reliable, nevertheless, in the absence of the same, the Commissioner of Customs may establish said value from other sources as above provided by law."

With the foregoing circumstances in mind, this Court yields its conformity to the action taken by the Committee and the District Collector of Customs and deny Petitioner's claim for refund.

WHEREFORE, the instant Petitions for Review are hereby **DENIED** for lack of merit. No pronouncement as to costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge