# REPUBLIC OF THE PHILIPPINES
# COURT OF TAX APPEALS
# QUEZON CITY

**DART PHILIPPINES, INC.,**
Petitioner,

- versus - C.T.A. CASE NO. 6394

**THE HONORABLE COMMISSIONER, OF CUSTOMS,**
Respondent.

**Promulgated:**
NOV 05 2003

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

## DECISION

This case is a judicial appeal on the decision of the respondent denying petitioner's Protest Cases Numbers- 97-093, 97-224, 97-299, 97-400, 97-444 and 97-445.

As borne out by the records, the antecedent facts of the case are as follows:

Petitioner is a corporation duly established and registered under the laws of the Philippines, with business address at the 10th Floor, Bankmer Building, 6758 Ayala Avenue, Makati City. It imports materials used in manufacturing plastic products under the brand name "Tupperware" *(pars. 1 and 5, Petition for Review).*

Between January 1997 to October 1997, petitioner made six (6) importations of plastic materials from South Korea, identified as Daelim PP Copolymer PP-33-1T. They were classified by SGS Korea under H.S. Code No. 3902.30 00 of the Tariff and Customs Code of the Philippines, subject to the tariff rate of three percent (3%). However, upon arrival in the Philippines, the imported materials were reclassified by the

Bureau of Customs under H.S. Code No. 3902.10 00 with a tariff rate of ten percent (10%) *(pars. 6, 7 and 8, Petition for Review).*

Petitioner paid under protest the difference between the tariff rates imposed by SGS Korea and the Bureau of Customs on the said importations, detailed as follows:

| **EXHIBIT** | **PROTEST CASE NO.** | **ENTRY NUMBER** | | **Overpaid Duties, Taxes, and other Fees** |
|---|---|---|---|---|
| BOC Records, Folder A, page 68 | 97-093 | 131687-97 | P | 367,766.00 |
| BOC Records, Folder F, page 3 | 97-224 | 154937-97 | | 151,026.00 |
| BOC Records, Folder B, page 16 | 97-299 | 188275-97 | | 246,279.00 |
| BOC Records, Folder D, page 7 | 97-400 | 195719-97 | | 465,154.00 |
| BOC Records, Folder C, page 9 | 97-444 | C204592-97 | | 232,337.00 |
| BOC Records, Folder E, page 9 | 97-445 | 203936-97 | | 277,786.00 |
| **TOTAL** | | | **P** | **1,740,348.00** |

On September 2, 1997, the Tariff Commission issued a ruling which classified the subject article under HS subheading No. 3902.30 00 of the Tariff and Customs Code with the rate of duty of 3% ad valorem *(BOC Records, Folder A, p.46)*. On March 12, 1998, the Deputy Commissioner and Chairman, BOC-SGS Appeals Committee affirmed the above classification.

Acting on the protests filed by petitioner, on August 6, 2001, Atty. Felipe A. Bartolome, the District Collector of Customs of the Port of Manila, issued a decision finding petitioner's protests meritorious. Hence, he ordered that the additional duties and taxes paid by petitioner be refunded in the form of tax credit and that the records of the cases be forwarded to the Office of the Commissioner of Customs for automatic review pursuant to Section 2313 of the Tariff and Customs Code, as amended *(BOC Records, Folder A, pp. 22-27)*.

172

On January 18, 2002, petitioner received the Notice of Decision/Order from Atty. Ronnie C. Silvestre, Chief of the Law Division of the Port of Manila, informing petitioner that the Decision of the District Collector was DENIED by the Commissioner of Customs as contained in a 2nd Indorsement dated December 8, 2001, which stated:

> Respectfully returned to the District Collector, POM, the within Decision of that Port, together with the entire records of **POM Protest Case Nos. 97-093, 97-224, 97-229, 97-400 and 97-445, DART (PHILS.) INC., Protestant,** with the information that subject protest is hereby **DENIED.** The Tariff Commission Ruling dated September 4, 1997, submitted by protestant to support its case is merely advisory and does not bind the Bureau of Customs. Moreover, there is nothing on record that would show that the Port undertook an analysis of the product in question *(BOC Records, Folder A, p. 12)*.

Unsatisfied with the above decision, petitioner elevated its case to this court through a Petition for Review on February 18, 2002.

On account of the repeated failure of the respondent to file his Answer, he was declared in default, upon motion of the petitioner, during the hearing of the case on September 13, 2002. On September 25, 2002, the court issued the Resolution confirming the said order.

On June 20, 2003, the case was submitted for decision after the Customs Records were transmitted to the court.

The following are the issues submitted by petitioner for this court's resolution:

1. Whether or not the Commissioner of Customs committed an error in denying petitioner's protest; and
2. Whether or not petitioner is entitled to the refund of its overpaid duties, taxes and other fees.

173

Petitioner maintains that the Commissioner of Customs committed an error in denying petitioner's protests on the classification of the article identified as Daelim PP Copolymer PP-33-1T in view of the following:

a. The chemical properties of the item imported by petitioner identified as DAELIM PP COPOLYMER PP-331T are as follows:

| | |
|---|---|
| (a) ethelyn as comononer | 5.5 wt% |
| (b) propelyne as main monomer | 94.2 wt% |
| (c) antioxidants | 0.1 wt% |
| (d) nucleating agent | 0.2 wt%; |

b. Heading No. 39.02 of the Harmonized System (HS) Tariff and Customs Code covers polymers of propylene or of other olefins, in primary forms. Subheading 3902.30 00 applies to propelyne copolymers.

c. Note 4 of Chapter 39 of the Tariff and Customs Code which states that "(t)he expression "copolymers" covers all polymers in which no single monomer unit contributes 95% or more by weight to the total polymer content."

d. The General Explanatory Notes state that block copolymers are copolymers composed of at least two connected polymeric sequence having different monomer unit compositions (e.g. a copolymer of ethylene and propylene containing alternating segments of polyethylene and polypropylene).

Thus, according to petitioner, the subject article identified as DAELIM PP COPOLYMER PP-331T should be classified under HS subheading No. 3902.30 00 of the Tariff and Customs Code with a rate of duty of three percent (3%) ad valorem and not under HS subheading No. 3902.10 00 of the Tariff and Customs Code.

To prove its allegation, petitioner presented its SGS Clean Reports of Findings (CRF). In the said reports, Daelim Copolymer PP-331T was classified under H.S. 3902.30 00 (*Exhibits A-5, B-5, C-5, D-5, E-5, and F-5*). Moreover, petitioner offered in

174

evidence the Certificate of Analysis issued by Daelim Corporation, dated March 27, 1997, which certified that the subject article's ethylene content (as co-monomer) is 5.5% by weight of the total polymer content and that no single monomer unit contributes 95% or more by weight to the total polymer content. This was duly authenticated by the Philippine Embassy in Seoul on April 23, 1997 (*Exhibit H).* In 1998, the said finding was reiterated by Daelim Corporation in its Certification of chemical composition *(Exhibit H-1).*

In addition, petitioner relied on Ruling No. 97-375 dated September 2, 1997, issued by the Tariff Commission, which declared that the classification of Daelim PP Copolymer PP-331T is H.S. subheading No. 3902.30 00 with a rate of duty of 3% ad valorem *(Exhibits G and G-1).*

Finally, petitioner cited the ruling of Mr. Ray M. Allas, Deputy Commissioner & Chairman of the Bureau of Customs – SGS Appeals Committee II, dated March 12, 1998, which stated that Copolymer PP-331T should be classified under H.S. 3902.30 00 at 3% *(Exhibits I and I-1).*

After a careful examination of the records of the case, the court is convinced that petitioner was able to establish by preponderance of evidence that the reclassification of the imported articles by the Commissioner of Customs is erroneous. By preponderance of evidence is meant simply evidence which is of greater weight, or more convincing than that which is offered in opposition to it ***(New Testament Church of God vs. Court of Appeals, 246 SCRA 266).***

The records show that the SGS Clean Reports of Finding classified petitioner's imported materials under H.S. 3902.30 00 of the Tariff and Customs Code, which covers

175

polymers of propylene or of other olefins, in primary forms. Subheading 3902.30 00 applies to propelyne copolymers. In the case of ***Electrolux Industrial, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5736, promulgated February 17, 2003***, this court held that granting that the classification of SGS is questionable and respondent believes that it is not correct, the Customs Examiner should have raised the issue to the BOC-SGS Appeals Committee, in accordance with Customs Memorandum Order No. 12-96- A, which provides:

The Committee shall have jurisdiction relative to questions/disputes:

1. **Arising from the SGS classification reported in the SGS-CRF.**
2. On the applicability, comparability and correctness of published values (*Emphasis supplied*).

In this case, the BOC-SGS Appeals Committee likewise issued a resolution finding that the articles imported by petitioner should be classified under H.S. 3902.30 00 of the Tariff and Customs Code with the duty rate of 3% (*Exhibits I and I-1*). Moreover, the Tariff Commission similarly ruled that the subject article is classified under H.S. subheading No. 3902.30 00 of the Tariff and Customs Code with a rate of duty of 3% ad valorem *(Exhibits G and G-1)*. Pertinent portion of the ruling provides:

> Heading No. 39.02 of the Harmonized System (HS) Tariff and Customs Code covers polymers of propylene or of other olefins, in primary forms. Subheading 3902.30 applies to propylene copolymers. Note 4 to Chapter 39 states that the expression "copolymers" covers all polymers in which no single monomer unit contributes 95% or more by weight to the total polymer content. The General Explanatory Notes state that block copolymers are copolymers composed of at least two connected polymeric sequence having different monomer unit compositions (e.g.

176

copolymer of ethylene and propylene containing alternating segments of polyethylene and polypropylene).

Considering the expertise of the Tariff Commission in the field and considering further that respondent failed to present controverting evidence, we cannot just set aside or consider lightly the ruling of the Tariff Commissioner and the BOC-SGS Appeals Committee without justifiable reasons.

We now proceed to the second issue.

A circumspect study of the evidence adduced by petitioner would disclose that petitioner's claim is supported by official receipts issued by the Bureau of Customs representing the additional payments of duties and value-added taxes imposed by the respondent. The proofs of payments are presented in the table below:

| Exhibit | Date of Payment | Import Duties | VAT | Total Payment |
|---|---|---|---|---|
| A-6 | 01/20/97 | P 334,333.00 | P 33,433.00 | P 367,766.00 |
| B-6 | 05/07/97 | 137,296.00 | 13,730.00 | 151,026.00 |
| C-6 | 08/20/97 | 246,279.00 | - | 246,279.00 |
| D-6 | 10/24/97 | 390,096.00 | 75,058.00 | 465,154.00 |
| E-6 | 12/08/97 | 210,847.00 | 21,490.00 | 232,337.00 |
| F-6 | 12/08/97 | 252,532.00 | 25,254.00 | 277,786.00 |
| **Total** | | **P 1,571,383.00** | **P168,965.00** | **P 1,740,348.00** |

But even if petitioner was able to substantiate the full amount sought, the court believes that the amount pertaining to the value-added tax may no longer be refunded. It should be noted that VAT is an internal revenue tax and refund thereof must be made within two years from the date of payment of the tax pursuant to Section 230 of the Tax Code.

For easy reference, Section 230 of the Tax Code provides:

177

> **Sec. 230.** ***Recovery of tax erroneously or illegally collected.*** – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> **In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax** or penalty regardless of any supervening cause that may arise after payment: **Provided, however,** That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid. (*Emphasis supplied*).

Applying the above provisions, petitioner had until the following dates to file claim for refund pertaining to the value-added tax paid under protest:

| **Exhibit** | **Date of Payment** | **Last Day to File for Refund** |
|---|---|---|
| A-6 | 01/20/97 | **01/20/99** |
| B-6 | 05/07/97 | **05/07/99** |
| C-6 | 08/20/97 | **08/20/99** |
| D-6 | 10/24/97 | **10/24/99** |
| E-6 | 12/08/97 | **12/08/99** |
| F-6 | 12/08/97 | **12/08/99** |

Since petitioner elevated its case with this court only on **February 18, 2002** *(CTA records, page 1)*, its claim for refund for VAT had clearly prescribed.

Moreover, in the case of ***Electrolux Industrial, Inc., vs. Commissioner of Internal Revenue,*** *supra,* we ruled that:

> "x x x . Although there appears to be an overpaid value-added tax when the same was computed on the basis of the higher tariff heading, there is still a

178

necessity to prove that the overpayment remained unutilized. In the ordinary course of business, customs duties and taxes paid on imported articles are passed on by the importer to the buyer as part of the selling price. The articles sold by the importer are also subject to output VAT but his output VAT liability may be reduced by the VAT it paid when the articles were imported in which case the VAT paid may be considered an input VAT. To be entitled to the refund being claimed, petitioner should prove by documentary evidence that it failed to utilize said excess payment to reduce his output VAT liability. Otherwise, it will be benefited twice."

The foregoing pronouncement is relevant in this case. We do not have any way of determining whether petitioner utilized the VAT paid as deductible input VAT against its output VAT liability considering that petitioner appears to be subject to VAT.

**IN VIEW OF THE FOREGOING,** petitioner's claim for refund or issuance of tax credit certificate is hereby ***GRANTED*** but in the reduced amount of P1,571,383.00.

**SO ORDERED.**

**LOVELL R. BAUTISTA**
Associate Judge

WE CONCUR:

**ERNESTO D. ACOSTA**
Presiding Judge

**JUANITO C. CASTAÑEDA, JR.**
Associate Judge

179

# 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

180