REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

LITONJUA SHIPPING COMPANY, represented by Granexport Corporation as sub-agent,
Petitioner,

- versus -

C.T.A. CASE NO. 3141

COMMISSIONER OF CUSTOMS,
Respondent.

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

9/14/93

RESOLUTION

A Motion to Dismiss the petition for review in this case was filed by respondent on October 2, 1980 on the ground that this Court is allegedly without jurisdiction to take cognizance and/or entertain petitioner's appeal since it was filed out of time. (C.T.A Records, pp. 35-36.)

In its Manifestation and Motion filed on November 7, 1980, petitioner assailed the Motion to Dismiss for lack of notice of hearing and therefore a "mere scrap of paper which should be considered non-existent." Petitioner prayed that respondent be declared in default for not having filed an answer within the prescribed period. (C.T.A. records, pp.

39-41).

Upon manifestation of petitioner's counsel in the hearing of this case on November 12, 1980, respondent's Motion to Dismiss and petitioner's Manifestation and Motion were held in abeyance indefinitely until such time when the Supreme Court has decided the cases involving the same parties and issues (C.T.A. records, p. 42). A Motion to Cancel Hearing and to Continue Suspension of Hearings or to Archive the instant case was filed by petitioner on July 27, 1987 (C.T.A. Records, pp. 43-44). Without objection on the part of respondent, this Court resolved to archive without prejudice this case to await the decision of the Supreme Court in the case of Commissioner of Customs vs. Court of Tax Appeals, et. al., G.R. Nos. L-48886, 4887 and 48888 (C.T.A. Cases Nos. 2785, 2831 and 2832) which are now pending before it and involving the same issues and similar facts as the instant case.

In the hearing of this case on August 31, 1993, petitioner's counsel manifested that there was already a decision by the Supreme Court in favor of petitioner in the foregoing cases however, it was noted that the Court has not yet resolved respondent's Motion to Dismiss and petitioner's Manifestation and Motion.

The ground relied upon by respondent for moving for the dismissal of the petition was lack of jurisdiction since it was filed out of time. Respondent clearly established the following:

> 1. On February 18, 1977, petitioner received the decision of the Commissioner of Customs dated January 31, 1977 denying petitioner's protest against the collection of berthing charges (Annex "A")
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> 2. On March 17, 1977, petitioner filed a Consolidated Motion for Reconsideration of the aforementioned decision (Annex "B")
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> 3. On August 12, 1980, petitioner received the order of the Commissioner of Customs dated March 13, 1980 denying the motion for reconsideration (Annex "C")
>
> 4. On September 11, 1980, petitioner filed the instant petition for review (C.T.A. Records, pp. 1-11).

From petitioner's receipt of the decision on February 18, 1977 to the filing of the motion for reconsideration on March 17, 1977, a period of 27 days has already lapsed. From petitioner's receipt of respondent's order of denial of the reconsideration on August 12, 1980 to the filing of petition for review on September 11, 1980, a period of 30 days have lapsed. A total of 57 days have elapsed from receipt of the decision to the filing of the petition. Section 11 of Republic Act No. 1125 provides that appeal from decision of the Commissioner of Customs to the Court of Tax Appeals must be filed within 30 days after receipt of such decision. Verily, the instant petition for review was time barred.

Petitioner countered with a manifestation to declare respondent's Motion to Dismiss a "worthless piece of paper" for failing to provide for a notice of hearing pursuant to Sections 4 and 5 of Rule 15 of the Revised Rules of Court, quoted below:

> RULE 15
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> MOTION IN GENERAL
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> xxx xxx xxx
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> Section 4. Notice. - Notice of a motion shall be served by the applicant to all parties concerned, at least three (3) days before the hearing thereof, together with a copy of the motion and of any affidavits and other papers accompanying it. The court, however, for good cause may hear a motion on shorter notice, specially on matters, which the court may dispose of on its own motion.
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> Section 5. Contents of notice. - The notice shall be directed to the parties concerned, and shall state the time and place for the hearing of the motion.
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> xxx xxx xxx

On the premise that respondent's Motion to Dismiss should be considered non-existent, petitioner moved that respondent be declared in default for failure to file an answer within the reglementary period.

The party who has filed a motion to dismiss is entitled to have that motion resolved before being required to answer. It follows, therefore, where one party had filed a motion to dismiss, the Court, without resolving said motion, would be incorrect to declare him in default for his failure to file an answer since it would be tantamount to a denial of due process (Francisco, Revised Rules of Court, Volume I, p. 971 citing Epang vs. De Leyco, 51 O.G. 2367).

In the case at bar, there was no notice of hearing of the motion to dismiss filed on October 2, 1980. However, the Court issued a notice of hearing dated October 7, 1980 (C.T.A records, p. 37) pursuant to Section 3, Rule 6 of the Rules of the Court of Tax Appeals in relation to Section 8 of Republic Act No. 1125, which provides as follows:

RULE 6

MOTION FOR DISMISSAL OF PETITION

xxx xxx xxx

> Section 3. Upon receipt of the said Opposition or upon the expiration of five (5) days from the time the petitioner received his copy of the Motion to Dismiss with no Opposition thereto having been filed, the Clerk of Court shall set the Motion to Dismiss for hearing by the Court.

On the date of hearing (November 12, 1980) provided in the Court's notice, petitioner's counsel appeared and manifested that the decision on the foregoing motions be held in abeyance indefinitely (C.T.A. Records, p. 42).

The purpose of a notice of motion is to bring the party into Court at the time of the motion, thereby enabling him to appear and contest the motion if he desire to do so. (Francisco, Revised Rules of Court of Court, Volume I, p. 856 citing 37 Am Jur., 505). The purpose of the law in requiring a three-day notice of hearing of a motion, to wit: "to avoid surprises upon the opposite party and to give to the latter time to study and meet the arguments of the motion" (J.M. Tuason and Company, vs. Magdangal , No. L-15539, January 30, 1962), has been sufficiently complied with. For, plaintiffs have had the chance to present - and in fact virtually did present - their objection to the motion to dismiss. Hearing on the motion to dismiss has thus become a superfluity, a surplusage. The ends of justice have been subserved. And the court's failure to note that, on the date of hearing of said motion plaintiffs had no notice thereof, descends to the level of error without prejudice and may well be overlooked (Remonte et al., vs. Bonto et al., No. L-19900, February 28, 1966, 16 SCRA 257). Where a party appears and argues against a motion, he cannot later complain that sufficient notice thereof was not given him. His action constitutes a waiver of his right to due notice (Francisco, Revised Rules of Court Volume I, p. 859 citing Southern Motors, Incorporated vs. Gaw, et al., G.R. No. 24880-R, May 13, 1963, citing Naylor vs. Adams, 15 Cal. Supp. 353). In any case, what the law prohibits is not the absence of previous notice, but absolute absence thereof and lack of opportunity to be heard (Sun Un Giok vs. Matusa, 101 Phil. 727 citing Borja vs. Tan, 93 Phil. 167; Duran Embate vs. Penolio, 93 Phil. 782).

In view of the foregoing, We find that the lack of notice of hearing of respondent's motion to dismiss has been sufficiently cured with the notice of hearing issued by this Court in accordance with its Rules. Petitioner was immediately informed of respondent's motion to dismiss as clearly shown by its manifestation and motion opposing the motion to dismiss and the subsequent appearance of petitioner's counsel in the hearing set for the purpose where it was manifested that decision on said motions be deferred. Evidently, petitioner can neither claim that it has no knowledge of respondent's motion to dismiss nor it was not heard in court.

WHEREFORE, the instant **petition for review is** hereby ordered dismissed for lack of **jurisdiction,** having been filed beyond the reglementary **period.**

SO ORDERED.

Quezon City, Metro Manila, September 14, 1993.

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

MANUEL K. GRUBA
Associate Judge