REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

CTA Crim. Case No. 0-081

- versus -

For: Violation of Section 3601, in relation to Sections 2530 and 101 (f) of the Tariff and Customs Code of the Philippines

PETER SHERMAN,
MICHAEL WHELAN,
OFELIA CAJIGAL &
TEODORO B. LINGAN,
Accused.

Members:

CASTAÑEDA, JR., Chairperson;
UY, and
ENRIQUEZ, JJ.

Promulgated:
SEP 0 3 2009
10:55 a.m.

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RESOLUTION

This resolves the following motions:

1. July 9, 2009 accused's "Manifestation and Motion" to dismiss; and

2. July 14, 2009 prosecution's "Motion to Withdraw Information with Leave of Court".

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In his "Manifestation and Motion", counsel for the accused states that on March 20, 2009, the Secretary of Justice issued a resolution reversing the resolution of State Prosecutor Rohairah Lao-Tamano which found probable cause against herein accused for Violation of Section 3601, in relation to Sections 2530 and 101 (f) of the Tariff and Customs Code, and ordering said State Prosecutor to file a motion with this Honorable Court for dismissal of this case.

In her "Motion to Withdraw Information With Leave of Court", the Public Prosecutor states that pending arraignment, accused Cajigal and Lingan filed a petition for review with the Office of the Secretary of Justice and the said petition was granted in the March 20, 2009 Resolution, the dispositive portion of which provides:

> **WHEREFORE**, premises considered, the assailed resolution is hereby **MODIFIED**. The complaint against respondents Peter Sherman, Michael Whelan, Atty. Ofelia Cajigal and Teodoro Lingan is hereby dismissed for lack of probable cause. The Office of the Chief State Prosecutor is directed to withdraw the information filed against the abovementioned cases and to report the action taken within ten (10) days from receipt hereof. Furthermore, the dismissal of the complaint against respondents Erick Ariate, Ricardo J. Ebuna, Jr. and Eugenio Pasco shall stand.
>
> **SO ORDERED.**

The Prosecutor also states that the Bureau of Customs sought reconsideration thereof, but the same was denied by the Secretary of Justice in his April 29, 2009 Resolution. Thus, in compliance with the directive of the Secretary of Justice, the Prosecutor filed the said motion.

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On July 28, 2009, the Court considered/treated prosecution's "Motion to Withdraw Information with Leave of Court" as Comment on the accused's "Manifestation and Motion" to dismiss. Accused's "Manifestation and Motion" to dismiss and the prosecution's "Motion to Withdraw Information with Leave of Court" are deemed submitted for resolution. Subsequently, this resolution was recalled and set aside in the August 6, 2009 resolution of this Court.

On July 30, 2009, complainant filed its "Opposition to Motion to Withdraw Information Dated 9 July 2009".

On August 6, 2009, the Court granted defense counsel, Atty. Romeo C. Dela Cruz, and the Public Prosecutor, Rohaira Lao-Tamano, ten (10) days from receipt thereof within which to file their respective Reply thereto. The July 28, 2009 resolution of this Court was also recalled and set aside. The arraignment of accused Ofelia Cajigal and Teodoro B. Lingan was reset to September 7, 2009, at 9:00 a.m.

On August 20, 2009, counsel for the accused filed his "Reply (To Opposition to Motion to Withdraw Information dated July 9, 2009). The Public Prosecutor, however, failed to file her Reply to the Bureau of Custom's "Opposition to Motion to Withdraw Information Dated 9 July 2009". Hence, the July 9, 2009 accused's "Manifestation and Motion" to dismiss and July 14, 2009 prosecution's "Motion to Withdraw Information With Leave of Court" are now submitted for resolution.

Both motions are granted.

It is basic that the purpose of the determination of probable cause by the prosecutor is different from that which is to be made by the judge. "Whether there is reasonable ground to believe that the accused is guilty of the offense charged and should be held for trial is what the prosecutor passes upon. The judge, on the other hand, determines whether a warrant of arrest should be issued against the accused, *i.e.*, whether there is a necessity for placing him under immediate custody in order not to frustrate the ends of justice. Thus, even if both should base their findings on one and the same proceeding or evidence, there should be no confusion as to their distinct objectives."[1] (Citation Omitted by Ours).

Once the information is filed in court, the determination of the presence or absence of probable cause for the issuance of a warrant of arrest against the accused, or for the withdrawal of the information, or for the dismissal of the case, is addressed to its sound discretion.[2]

The information in this case reads:

> "That on or about June 2005 to December 2007, in Manila City, and within the jurisdiction of this Honorable Court, the above-named accused, in conspiracy with one another, made forty (40) *unlawful importations of 255,870 pieces of finished printed bet slips and 205, 200 rolls of finished thermal papers* from Australia valued at approximately One Milllion Two Hundred Forty Thousand Eight Hundred Eighty US Dollars & Fourteen Cents (US $1,240,880.14), and caused the removal of said imported articles from the Clark Special Economic Zone and the delivery thereof to the Philippine Charity Sweepstakes Office without payment of its corresponding duties and taxes estimated at around Fifteen Million Nine Hundred

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[1] Ho vs. People of the Philippines, G.R. Nos. 106632 and 106678, October 9, 1997, 280 SCRA 365, 380.
[2] Sarigumba, et al. vs. Sandiganbayan, G.R. Nos. 154239-41, February 16, 2005, 451 SCRA 533,551.

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Seventeen Thousand Six Hundred Eleven Pesos and Eighty Three Cents (Php15,917,611.83) in violation of Section 3601 in relation to Sections 2530 and 101 paragraph (f) of the Tariff and Customs Code of the Philippines, to the damage and prejudice of herein complainant.

CONTRARY TO LAW."

Section 3601 of the Tariff and Customs Code of the Philippines reads:

SEC. 3601. *Unlawful Importation.* — Any person who shall fraudulently import or bring into the Philippines, or assist in so doing, any article, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such article after importation, knowing the same to have been imported contrary to law, shall be guilty of smuggling and shall be punished with:

1. A fine of not less than fifty pesos nor more than two hundred pesos and imprisonment of not less than five days nor more than twenty days, if the appraised value, to be determined in the manner prescribed under this Code, including duties and taxes, of the article unlawfully imported does not exceed twenty-five pesos;

2. A fine of not less than eight hundred pesos nor more than five thousand pesos and imprisonment of not less than six months and one day nor more than four years, if the appraised value, to be determined in the manner prescribed under this Code, including duties and taxes, of the article unlawfully imported exceeds twenty-five pesos but does not exceed fifty thousand pesos;

3. A fine of not less than six thousand pesos nor more than eight thousand pesos and imprisonment of not less than five years and one day nor more than eight years, if the appraised value, to be determined in the manner prescribed under this Code, including duties and taxes, of the article unlawfully imported is more than fifty thousand pesos but does not exceed one hundred fifty thousand pesos;

4. A fine of not less than eight thousand pesos nor more than ten thousand pesos and imprisonment of not less than eight years and one day nor more than twelve years, if the appraised value to be determined in the manner prescribed under this

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Code, including duties and taxes, of the article unlawfully imported exceeds one hundred fifty thousand pesos;

5. The penalty of prison may or shall be imposed when the crime of serious physical injuries shall have been committed and the penalty of reclusion perpetua to death shall be imposed when the crime of homicide shall have been committed by reason or on the occasion of the unlawful importation.

In applying the above scale of penalties, if the offender is an alien and the prescribed penalty is not death, he shall be deported after serving the sentence without further proceedings for deportation. If the offender is a government official or employee, the penalty shall be the maximum as hereinabove prescribed and the offender shall suffer an additional penalty of perpetual disqualification from public office, to vote and to participate in any public election.

When, upon trial for violation of this section, the defendant is shown to have had possession of the article in question, possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the court: Provided, however, That payment of the tax due after apprehension shall not constitute a valid defence in any prosecution under this section.

On the other hand, Sections 2530 and 101 (f) of the Tariff and Customs Code of the Philippines provide:

SECTION 2530. *Property Subject to Forfeiture Under Tariff and Customs Laws.* — Any vehicle, vessel or aircraft, cargo, article and other objects shall, under the following conditions be subjected to forfeiture:

a. Any vehicle, vessel or aircraft, including cargo, which shall be used unlawfully in the importation or exportation of articles or in conveying and/or transporting contraband or smuggled articles in commercial quantities into or from any Philippine port or place. The mere carrying or holding on board of contraband or smuggled articles in commercial quantities shall subject such vessel, vehicle, aircraft or any other craft to forfeiture; Provided, That the vessel, or aircraft or any other craft is not used as duly authorized common

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carrier and as such a carrier it is not chartered or leased;

b. Any vessel engaging in the coastwise which shall have on board any article of foreign growth, produce, or manufacture in excess of the amount necessary for sea stores, without such article having been properly entered or legally imported;

c. Any vessel or aircraft into which shall be transferred cargo unladen contrary to law prior to the arrival of the importing vessel or aircraft at her port of destination;

d. Any part of the cargo, stores or supplies of a vessel or aircraft arriving from a foreign port which is unladen before arrival at the vessel's or aircraft's port of destination and without authority from the customs officials; but such cargo, ship or aircraft stores and supplies shall not be forfeited if such unlading was due to accident, stress of weather or other necessity and is subsequently approved by the Collector;

e. Any article which is fraudulently concealed in or removed contrary to law from any public or private warehouse, container yard or container freight station under customs supervision;

f. Any article the importation or exportation of which is effected or attempted contrary to law, or any article of prohibited importation or exportation, and all other articles which, in the opinion of the Collector, have been used, are or were entered to be used as instruments in the importation or exportation of the former;

g. Unmanifested article found on any vessel or aircraft if manifest therefore is required;

h. Sea stores or aircraft stores adjudged by the Collector to be excessive, when the duties assessed by the Collector thereon are not paid or secured forthwith upon assessment of the same;

i. Any package of imported article which is found by the examining official to contain any article not specified in the invoice or entry, including all other packages purportedly containing imported articles

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similar to those declared in the invoice or entry to be the contents of the misdeclared package; Provided, That the Collector is of the opinion that the misdeclaration was contrary to law;

j. Boxes, cases, trunks, envelopes and other containers of whatever character used as receptacles or as device to conceal article which is itself subject to forfeiture under the tariff and customs laws or which is so designed as to conceal the character of such articles;

k. Any conveyance actually being used for the transport of articles subject to forfeiture under the tariff and customs laws, with its equipage or trappings, and any vehicle similarly used, together with its equipage and appurtenances including the beast, steam or other motive power drawing or propelling the same. The mere conveyance of contraband or smuggled articles by such beast or vehicle shall be sufficient cause for the outright seizure and confiscation of such beast or vehicle, but the forfeiture shall not be effected if it is established that the owner of the means of conveyance used as aforesaid, is engaged as common carrier and not chartered or leased, or his agent in charge thereof at the time, has no knowledge of the unlawful act;

1. Any article sought to be imported or exported.

(1) Without going through a customhouse, whether the act was consummated, frustrated or attempted;

(2) By failure to mention to a customs official, articles found in the baggage of a person arriving from abroad;

(3) On the strength of a false declaration or affidavit executed by the owner, importer, exporter or consignee concerning the importation of such article;

(4) On the strength of a false invoice or other document executed by the owner, importer, exporter or consignee concerning the importation or exportation of such article; and

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(5) Through any other practice or device contrary to law by means of which such articles was entered through a customhouse to the prejudice of the government.

SECTION 101. *Prohibited Importations.* — The importation into the Philippines of the following articles is prohibited:

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f. Lottery and sweepstakes tickets except those authorised by the Philippine Government, advertisements thereof and lists of drawings therein.

The discussion related to Section 3601 of the Tariff and Customs Code of the Philippines and the meaning of fraud in the Supreme Court case of *Jardeleza vs. People*[3] is enlightening, as follows:

> Section 3601 of the TCC was designed to supplement the existing provisions of the TCC against the means leading up to smuggling, which might render it beneficial by a substantive and criminal statement separately providing for the punishment of smuggling. The law was intended not to merge into one and the same offense all the many acts which are classified and punished by different penalties, penal or administrative, but to legislate against the overt act of smuggling itself. This is manifested by the use of the words "fraudulently" and "contrary to law" in the law.
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> Smuggling is committed by any person who: (1) fraudulently imports or brings into the Philippines any article contrary to law; (2) assists in so doing any article contrary to law; or (3) receives, conceals, buys, sells or in any manner facilitate the transportation, concealment or sale of such goods after importation, knowing the same to have been imported contrary to law.
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> The phrase "contrary to law" in Section 3601 qualifies the phrases "imports or brings into the Philippines" and "assists in so doing," and not the word "article." The law penalizes the importation of any merchandise in any manner contrary to law.

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[3] G.R. No. 165265, February 6, 2006, 481 SCRA 638,660-663.

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The word "law" includes regulations having the force and effect of law, meaning substantive or legislative type rules as opposed to general statements of policy or rules of agency, organization, procedures or positions. An inherent characteristic of a substantive rule is one affecting individual rights and obligations; the regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority; the regulation must have been promulgated in conformity to with congressionally-imposed procedural requisites.

Importation consists of bringing an article into the country from the outside. The crime of unlawful importation is complete, in the absence of a *bona fide* intent to make entry and pay duties when the prohibited article enters Philippine territory. Importation is complete when the taxable, dutiable commodity is brought within the limits of the port of entry. Entry through a customs house is not the essence of the act.

Section 3602 of the TCC, on the other hand, provides:

> Sec. 3602. *Various Fraudulent Practices Against Customs Revenue.* — Any person who makes or attempts to make any entry of imported or exported article by means of any false or fraudulent invoice, declaration, affidavit, letter, paper or by any means of any false statement, written or verbal, or by any means of any false or fraudulent practice whatsoever, or knowingly effects any entry of goods, wares or merchandise, at less than the true weight or measures thereof or upon a false classification as to quality or value, or by the payment of less than the amount legally due, or knowingly and wilfully files any false or fraudulent entry or claim for the payment of drawback or refund of duties upon the exportation of merchandise, or makes or files any affidavit, abstract, record, certificate or other document, with a view to securing the payment to himself or others of any drawback, allowance or refund of duties on the exportation of merchandise, greater than that legally due thereon, or who shall be guilty of any wilful act or omission shall, for each offense, be punished in accordance with the penalties prescribed in the preceding section.

The provision enumerates the various fraudulent practices against customs revenue, such as the entry of imported or exported articles by means of any false or fraudulent invoice, statement or practice; the entry of goods at less than the true weight or measure; or the filing of any false or fraudulent entry for the payment of drawback or refund of duties.

The fraud contemplated by law must be intentional fraud, consisting of deception, willfully and deliberately dared or resorted to in order to give up some right. The offender must

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> **have acted knowingly and with the specific intent to deceive for the purpose of causing financial loss to another; even false representations or statements or omissions of material facts come within fraudulent intent. The fraud envisaged in the law includes the suppression of a material fact which a party is bound in good faith to disclose. Fraudulent nondisclosure and fraudulent concealment are of the same genre.**
>
> Fraudulent concealment presupposes a duty to disclose the truth and that disclosure was not made when opportunity to speak and inform was present, and that the party to whom the duty of disclosure as to a material fact was due was thereby induced to act to his injury. Fraud is not confined to words or positive assertions; it may consist as well of deeds, acts or artifice of a nature calculated to mislead another and thus allow one to obtain an undue advantage.
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> The term "entry" in Customs law has a triple meaning. It means (1) the documents filed at the Customs house; (2) the submission and acceptance of the documents; and (3) the procedure of passing goods through the Customs house. Customs declaration forms or customs entry forms required to be accomplished by passengers of incoming vessels or passenger planes are envisaged in the section.
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> There is thus no conflict between Sections 2505, 3601 and 3602 of the TCC. In point of fact, the three provisions complement each other. (Citations Omitted by Ours; Emphasis Supplied)

The record reveals that the importations subject of this case were covered by Import/Warehousing Entries, Bills of Lading, Commercial Invoices, CDC Import Permit, Transshipment Permit, Boat Notes (Annexes "C" to "PP"). These documents reveal that MSPI imported finished bet slips in pieces which were packaged in pallets and thermal paper rolls which were likewise packaged in pallets from Australia to Manila International Container Port (MICP). There is indeed transparency as to what goods are imported, thus, fraud cannot be imputed against the accused.

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As regards the accused Sherman and Whelan, we rule that this Court validly acquired jurisdiction over their person when they submitted their motion to dismiss for lack of probable cause to issue a warrant of arrest following the ruling in *Defensor-Santiago vs. Vasquez*[4], as follows:

> It has been held that where after the filing of the complaint or information a warrant for the arrest of the accused is issued by the trial court and the accused either voluntarily submitted himself to the court or was duly arrested, the court thereby acquires jurisdiction over the person of the accused. The voluntary appearance of the accused, whereby the court acquires jurisdiction over his person, is accomplished either by his pleading to the merits (such as by filing a motion to quash or other pleadings requiring the exercise of the court's jurisdiction thereover, appearing for arraignment, entering trial) or by filing bail. (Citation Omitted by Ours).

WHEREFORE, in view of the foregoing, the accused's "Manifestation and Motion" to dismiss and prosecution's "Motion to Withdraw the Information With Leave of Court" are both GRANTED. Consequently, the Information is hereby deemed WITHDRAWN and the case against the accused Peter Sherman, Michael Whelan, Ofelia Cajigal, and Teodoro B. Lingan is hereby DISMISSED.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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[4] *G.R. Nos. 99289-90, January 27, 1993, 217 SCRA 633,643.*

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