REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

VENANCIO CARREON TONG TEK
and JUANITO TONG,
Petitioners,

versus C. T. A. CASE NO. 135

THE COMMISSIONER OF CUSTOMS,
Respondent.

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Nov. 21, 1956

D E C I S I O N

On the night of October 8, 1954, 138 pieces of gold bars weighing 97,290 grams and with an estimated value of ₱470,760.00 were seized from petitioners. After due hearing, the said gold bars were declared forfeited by the Collector of Customs of Manila, which was affirmed, on appeal, by respondent Commissioner of Customs in a decision rendered on April 21, 1955.

The facts, as found by respondent, are as follows:

> "On October 8, 1954, at about 7:00 p.m., the herein claimants arrived at the Center Gate of Pier 9 in a car together with one George Tong, intending to go on board the SS 'President Cleveland', then docked alongside Pier 9. As they had no car pass, the car was not allowed to enter the pier. The trio entered the pier and presented their respective visitors' passes to Port Patrol Policeman Felipe de Guzman, then on duty at the Center Gate of pier 9. The passes show on their faces that they were issued for the purpose of visiting the SS 'President Wilson' on August 3, 1954. However, the name President Wilson and the date August 3, 1954 were cancelled and the words President Cleveland and the date October 8, 1954, were stamped in their stead. The claimants, together with George Tong, were allowed to enter. Later, when the claimants

were about to pass out of the Center Gate of Pier 9, Policeman De Guzman became suspicious and approached them with the intention of searching their persons. He was not able to do so because the two tried to prevent him. With the help of some other policemen, however, the claimants were taken to the Port Patrol Headquarters and there searched thoroughly. Four canvas belts containing 138 pieces of gold bars, now the subject of these seizure proceedings, were found tied around their waists. The claimants were then investigated and claimant Venancio Tong, in his statement marked Exh. '1', declared that he boarded the SS 'President Cleveland' with the gold bullions to look for an unoccupied cabin where the gold could be hidden and that he wanted to send the gold bullions to Mr. Tokida in Japan because he had a plan to establish a textile factory there, but he could not get the necessary dollar allocation from the Central Bank. In his statement marked Exh. 'J', claimant Juanito Tong testified that when he went to the vessel he was not carrying anything as he merely went along with his brother to see the ship but that when they were about to leave the ship, his brother, Venancio, gave him twenty-four bundles containing three gold bars each and asked him to carry them home.

"During the hearing of the case it was shown that the claimants did not apply for and were not issued any license from the Central Bank of the Philippines prior to the commencement of the execution of their overt acts manifesting their desire to export the gold bars in question to Japan. Neither have they applied for and obtained any license from the same Central Bank prior to their having had any dealings or transactions with Tokida of Japan as regards their plan to establish a textile factory in that country. It was also shown that claimant Venancio Tong, after his arrest by the Port Patrol Policemen, intimated and manifested his desire and readiness to fix up the case and to this end, he went as far as offering Policeman Magpayo, one of the arresting officers, some bribe money."

Having found that petitioner Venancio Carreon Tong Tek attempted to export the aforesaid gold bars without license from the Central Bank, and without going through the customhouse, the Collector of Customs of Manila ordered the forfeiture of the gold bars in Seizure Identification No. 2040.

Before proceeding to the consideration of the legality of the forfeiture, we shall first take up the question in regard to the claim that the number of gold bars actually seized from the claimants was 144 and not 138. The then Acting Collector of Customs of Manila, in his decision dated March 7, 1955, ordered the forfeiture of "four (4) CANVAS belts containing ONE HUNDRED AND THIRTY-EIGHT (138) pieces of gold bars weighing NINETY-SEVEN THOUSAND, TWO HUNDRED AND NINETY (97,290) grams with an estimated value of FOUR HUNDRED AND SEVENTY THOUSAND, SEVEN HUNDRED AND SIXTY PESOS (₱470,760.00)." This was affirmed by respondent Commissioner of Customs. The subject matter of this appeal is the 138 pieces of gold bars, not 144 pieces. Accordingly, the jurisdiction of this Court is confined to the consideration of the validity of the forfeiture of the said 138 pieces of gold bars. If, as alleged, the number of gold bars actually seized from petitioners was 144, the remedy, if any, of petitioners in regard to the missing 6 pieces of gold bars must be sought elsewhere.

The said 138 pieces of gold bars were ordered forfeited pursuant to (1) Section 1363(f) of the

Administrative Code, petitioner Venancio Carreon Tong Tek, the owner, having allegedly attempted to export said gold without license from the Central Bank as required by Central Bank Circulars Nos. 20, 21 and 42; (2) Section 1363(m-1) of the same Code, the attempt to export said gold having been made without going through the customhouse; and (3) Section 2710 of the same Code.

We agree with counsel for petitioners that the Collector of Customs of Manila has no power to order the forfeiture of gold bars or gold bullion under Section 2710 of the Administrative Code. That section provides -

> "SEC. 2710. Unlawful exportation of coin or bullion.—It shall be unlawful to export or attempt to export from the Philippines any Philippine silver money coined under the authority of any law of the United States, or bullion made therefrom, except as such money may be carried away by departing travelers in ordinary course and in sums not exceeding twenty-five pesos or as such coin or bullion may be exported in the course of the lawful operations of the Philippine Treasury; and any person who effects or attempts the exportation of such coin or bullion contrary to law shall be punished by a fine not exceeding two thousand pesos or by imprisonment for not more than one year, or both; and the coin or bullion in question shall be forfeited."

It is clear from Section 2710 of the Administrative Code that what is prohibited to be exported under that section is Philippine silver money or bullion made therefrom. It does not apply to gold bars or gold bullion.

The other ground relied upon for the forfeiture of the gold bars in question is that petitioner

Venancio Carreon Tong Tek attempted to export said gold bars on October 8, 1954 through the SS President Cleveland without first securing a license from the Central Bank. Section 1363(f) of the Administrative Code provides -

> "SECTION 1363. Property subject to forfeiture under customs laws.— Vessels, cargo, merchandise, and other objects and things shall, under the conditions hereinbelow specified, be subject to forfeiture:
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> x x x x x x
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> "(f) Any merchandise of prohibited importation or exportation, the importation or exportation of which is effected or attempted contrary to law, and all other merchandise which, in the opinion of the collector, have been used, are or were intended to be used as instrument in the importation or exportation of the former."

Paragraph (f) of Section 1363, quoted above, provides for the forfeiture of any "merchandise of prohibited importation or exportation, the importation or exportation of which is effected or attempted contrary to law." May gold bars be forfeited under this paragraph if they are exported or attempted to be exported without license from the Central Bank?

It is alleged that the term "prohibited importation" has a definite and fixed meaning; that it refers to the articles enumerated in Section 3 of the Philippine Tariff Act of 1909 (which are firearms and explosives, obscene and subversive articles, gambling outfits, falsely marked gold or silver articles, adulterated foods, lottery tickets, opium, opium pipes); that gold bars are not among those enumerated therein; and that articles of prohibited exportation also refer to the articles of prohibited importation as provided in the Tariff Act. We can not subscribe to this view. Section 1363(f) embraces articles which are absolutely prohibited to be imported or exported, as well as those which may be imported or exported only upon compliance with the requirements prescribed by law and the requirements of law for their importation or exportation are not complied with. This is evident from the provision "the importation or exportation of which is effected or attempted contrary to law", for if paragraph (f) of Section 1363 applies exclusively to articles of prohibited importation or exportation, there is no need for the provision just quoted. Thus, the validity of the forfeiture of rubber boots, nylon remnants and candies was sustained by this Court in Po Eng Trading v. Commissioner of Customs, C.T.A. No. 131, December 10, 1955; Catalina R. Reyes v. Commissioner of Customs, C.T.A. No. 132, January 9, 1956; and Francisco Pascual v. Commissioner of Customs, C.T.A. Nos. 146 & 148, February 29, 1956, for failure of the importers thereof to secure the necessary licenses from the Central Bank, although such articles are not among those enumerated in the Tariff Act as articles of prohibited importation. We are, therefore, of the opinion that gold bars are subject to forfeiture under Section 1363 (f) of the Administrative Code if their exportation is effected or attempted contrary to law.

The Collector of Customs of Manila found, after due hearing, that petitioners attempted on October 8, 1954 to export 138 pieces of gold bars through the SS President Cleveland without license as required by Central Bank Circulars Nos. 20, 21 and 42. The pertinent provisions of said circulars which require a license from the Central Bank before gold in any shape or form may be exported are as follows:

CIRCULAR NO. 20, December 9, 1949 -

> 1. Pursuant to the provisions of Republic Act No. 265 (Central Bank Act) the Monetary Board, by unanimous vote and with the approval of the President of the Philippines, and in accordance with Executive and International Agreements to which the Republic of the Philippines is a party, hereby restricts sales of exchange by the Central Bank and subjects all transactions in gold and foreign exchange to licensing by the Central Bank.
>
> 2. Transactions in the assets described below and all dealings in them of whatever nature, including, where practicable, their exportation and importation, shall not be effected, except with respect to deposit accounts included in sub-paragraphs (b) and (c) of this paragraph, when such deposit accounts are owned by, and in the name of, banks.
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> x x x x
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> (c) Any and all assets existent within the Philippines including x x x bullions x x x belonging to any person, firm, partnership, association, branch office, agency, company or other unincorporated body or corporation residing or located within the Philippines.
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> - -

8. Strict observance of the provisions of this Circular is enjoined; and any person, firm or corporation, foreign or domestic, who, being bound to the observance thereof, or of such other rules, regulations or directives as may hereafter be issued in implementation of this Circular, shall fail or refuse to comply with, or abide by, or shall violate the same, shall be subject to the penal sanctions provided in the Central Bank Act.

9. Further regulations in respect to transactions covered by this Circular will be issued separately. (Underscoring supplied.)

CIRCULAR NO. 21 (as amended), October 15, 1952 -

SECTION 4. Export of gold

Any person desiring to export gold in any form, including jewelry, whether for refining abroad or otherwise, must obtain a license from the Central Bank. Applicants for export licenses must present satisfactory evidence that the import of the gold into the country of the importer will not be in violation of the rules and regulations of such country. (Underscoring supplied.)

CIRCULAR NO. 42, May 21, 1953.

SECTION 1.

Pursuant to the provisions of Sec. 14 in connection with Sec. 74 of Republic Act No. 265, the Monetary Board hereby promulgates this Circular. Violation of any of its provisions shall subject the offender to the penal provisions of Section 34 of the Act.

SECTION 2.

The following are foreign exchange transactions and as required by Central Bank Circular No. 20 are subject to prior licensing by or on behalf of the Central Bank:

x x x x

(m) Any other transactions involving international financial implications.

Circular No. 20 subjects all transactions in gold, including its importation or exportation, to licensing by the Central Bank. Circular No. 21, which was issued to implement Circular No. 20, requires any person desiring to export gold in any form to obtain a license from the Central Bank. A license to export gold may be issued only upon presentation of evidence showing that the importation of gold into the country of the importer will not be in violation of the rules and regulations of such country. Circular No. 42 requires licensing of all transactions involving international financial implications. The exportation of gold in any form may, therefore, be legally effected only after a license has been duly issued by the Central Bank.

It is argued, however, that the said circulars are void because they have not been approved by the President of the Philippines as required by Section 74 of the Central Bank Act (Rep. Act No. 265). We are satisfied from the evidence submitted by counsel for respondent that their promulgation had the prior approval of the President of the Philippines. In fact, paragraph 1 of Circular No. 20 expressly states that it was issued "with the approval of the President of the Philippines."

Granting, arguendo, that the said circulars have not been duly approved by the President of the

Philippines, pursuant to Section 74 of Republic Act No. 265, we agree with counsel for respondent that said circulars have been validly promulgated by the Monetary Board by authority of Section 72 in relation to Section 14 of said Act. We quote from the memorandum of counsel for respondent:

> "Assuming without conceding that emergency restrictions on exchange operations need the signature of the President and not merely his approval, still Central Bank Circular No. 20 and its implementations, Circulars Nos. 21 and 42, would still be a valid exercise of the authority granted to the Monetary Board under Section 72 of Republic Act No. 265 in relation to Sec. 14 of the same Act. Section 72 authorizes the Monetary Board at any time to require that gold held by any person or entity in the Philippines be delivered to the Central Bank or any banks or agents contracted by the Central Bank for the purpose. It may also impose conditions under which gold in any shape or form may be acquired and held, transported, melted or treated, imported, exported, earmarked or held in custody for foreign or domestic account." (Pp. 13-14, Memorandum for Respondent.)

At any rate, the validity of Circular No. 20 is now a settled matter. The Supreme Court, in People v. Que Po Lay, 50 O. G. No. 10, p. 4850, has sustained its validity when it stated:

> "It is true that Circular No. 20 of the Central Bank is not a statute or law but being issued for the implementation of the law authorizing its issuance, it has the force and effect of law according to settled jurisprudence. (See U. S. vs. Tupasi Molina, 29 Phil., 119 and authorities cited therein.)"

Granting that said circulars of the Central Bank are valid, it is argued that they do not prescribe the penalty of forfeiture; hence, the forfeiture of the gold bars in question is illegal. This question has already been resolved by this Court in Catalina R. Reyes v. Commissioner of Customs, supra, wherein it was held:

> "While Central Bank Circular No. 44 contains no provision in regard to forfeiture of merchandise imported in violation of said circular, Section 1363 (f) of the Revised Administrative Code, quoted above, confers upon the Collector of Customs concerned the power to order the seizure and forfeiture of merchandise the importation of which is effected or attempted contrary to law. The said circular, having been issued and promulgated in accordance with law, at least in respect of its provisions applicable to the importation here in issue, has the force and effect of law. Hence, the importation of merchandise effected or attempted contrary to its provisions is contrary to law within the meaning of Section 1363 (f) of the Revised Administrative Code and, therefore, subject to seizure and forfeiture. x x x" (See also Po Eng Trading v. Commissioner of Customs and Francisco Pascual v. Commissioner of Customs, supra.)

Having arrived at the conclusion that gold bars are subject to forfeiture if they are exported or attempted to be exported in violation of the aforesaid circulars of the Central Bank, we shall now consider whether or not Venancio Carreon Tong Tek attempted to export the said 138 pieces of gold bars on the night of October 8, 1954 through the S.S. President Cleveland. Here is the story as related by counsel for petitioners:

> "Petitioner Venancio Carreon Tong Tek is the owner of the 144 gold bars involved in this case. He pur-

chased them in little quantities from time to time and kept them in the house of a friend on Clavel Street, Manila. He intended to send those gold bars to an acquaintance in Japan named Tokida for the purpose of using the same as capital in establishing a textile factory as he learned from someone that he could not obtain from the Central Bank dollar allocation. In the afternoon of October 8, 1954, he intended to bring all the 144 gold bars to his house in Pasay City. Leaving his office downtown at about 4:30 p.m. he saw his brother Juanito Tong and on knowing from the latter that he was bound for home, Venancio asked Juanito to go along with him. They proceeded to Clavel Street. Venancio placed the 144 gold bars in four (4) canvas belts and placed them around his waist and went downstairs. On their way home, they met a friend who offered to give them a lift in his car. While crossing the Del Pan Bridge Venancio remembered that the SS President Cleveland was then docked at Pier 9, and decided on the spur of a moment to visit the steamship for the purpose of looking for a place wherein to keep the gold, so that if he succeeded in looking for a suitable place, he would apply for a license from the Central Bank to export the gold to Japan. Venancio declared positively he never intended to export the gold bars without first securing a license from the Central Bank. Juanito only went sight seeing. As they were duly provided with a pass to visit the SS Cleveland, they were allowed to pass through the center gate of Pier 9 by Harbor Policeman Felipe de Guzman. While on board the SS Cleveland Venancio started looking for a place and as he could not look for a suitable place he decided to return home. In the meanwhile the weight of the gold bars began to tire him, so in a men's toilet he gave to Juanito 2 canvas belts containing 72 bars. While they were passing through the same center gate of Pier 9 on their way out, they were stopped by Harbor Policeman Felipe de Guzman, who later brought them to the Headquarters of the Port Patrol Division

> of the Bureau of Customs where they were searched. There they were investigated and the canvas belts together with the 144 gold bars found in their bodies were seized."

It is contended that Venancio Carreon Tong Tek merely went to the S.S. President Cleveland on the night of October 8, 1954 to find a place where to hide the gold bars; that in case he should find a safe place, he would apply for a license from the Central Bank the following day, Saturday, October 9, 1954, in time for the departure of the ship on the night of that day; and that upon failure to find a place wherein to hide the gold bars, he brought them back. On the other hand, it is contended on behalf of respondent that Venancio Carreon Tong Tek attempted to export the gold bars on October 8, 1954 when he brought them to the S. S. President Cleveland to find a hiding place in one of the unoccupied cabins. If he found such a hiding place, he would have left the gold bars there. That Venancio failed to consummate the exportation of the gold bars was not due to his voluntary desistance; the exportation was frustrated by his failure to find a safe hiding place. We quote from the memorandum of counsel for respondent:

> "Petitioners' allegations in their original and amended petitions for review are based on the statements given by them during their investigation by the Investigation Section of the Port Patrol Division. According to petitioner Venancio Carreon Tong Tek's statement, he

boarded the S/S President Cleveland with the gold bullions to look for an unoccupied cabin wherein he intended to hide the gold and then notify his friend in Japan, named Tokida, of the cabin where the gold would have been hidden; that he wanted to send the gold bullions to Mr. Tokida in Japan because he (Venancio) had a plan to establish a textile factory there and because he could not get the necessary dollar allocation from the Central Bank; that he was the owner of the gold bars having purchased the same from someone in Plaza Lunch, City of Manila.

"However, counsel for petitioners tried to change the theory of the case by attempting to prove that while passing the Del Pan Bridge, petitioner Venancio saw the SS President Cleveland docked at Pier 9, and decided at the spur of the moment to visit the steamship and look for a place where he could hide the gold and if he found one he would apply for a license from the Central Bank to export the gold. Venancio further declared that he secured the passes only on that day October 8, 1954 from the APL office. He did not go to any other office to have the passes stamped but pocketed them after leaving the APL office. He took them out only when he and his brother were about to enter the center gate of Pier 9.

"According to Mr. Eugenio Raymundo of the APL who issued the passes, the same were not valid until endorsed by the Bureau of Customs and he was not authorized to stamp them for the Bureau of Customs. The bearer had to bring them to the Bureau of Customs for proper counter signature. Unless the passes were endorsed by the authorized customs officer, the bearers would not be allowed to enter the gate of Pier 9. The passes as originally issued were for the visit to the President Wilson on August 3, 1954, and were stamped by the Bureau of Customs on July 29, 1954, which meant that they were issued on or before July 29, 1954, and not on October 8, 1954, as stated by Venancio Carreon Tong Tek. The name of the boat intended to be visited on August 3, 1954, was cancelled and in lieu thereof the name President Cleveland and the date of visit, October 8, 1954, were written. If petitioners did not intend to ship out the gold bullions on that day, why did they take the risk of carrying those 138 gold bullions weighing 97,290 grams on their persons to the Pier, at nighttime, on October 8, 1954, just for the purpose of inspecting the boat? Venancio Carreon Tong Tek admitted having secured personally the passes from the APL office. He must have known that the boat was leaving the next day at midnight. The date of his visit to the President Cleveland was indicated on the passes as in fact he did visit the President Cleveland on that day. October 8, 1954, being a Friday, and the next day, Saturday, the banks would be closed and he could not, therefore, apply for a license to export the gold. The passes themselves are mute but eloquent proofs of petitioners' persistent attempts to export the gold because, as petitioner Venancio Carreon Tong Tek admitted in his statement, he could not get the necessary dollar allocation from the Central Bank and he wanted to send the gold bullions to Mr. Tokida in Japan to finance his project to establish a textile factory there.

"If petitioners really wanted to comply with legal requirements, they would have secured the necessary license to export the gold before looking for a cabin to hide them. And they need not hide the gold bars that they allegedly intend to export on the level. It was only petitioners' failure to find a suitable cabin and not their voluntary desistance that frustrated their exportation of the gold bars." (Pp. 14-16, Memorandum for Respondent, August 22, 1956.)

We are convinced beyond doubt that Venancio Carreon Tong Tek attempted to export the gold bars in question on the night of October 8, 1954 through the

the S. S. President Cleveland and that he had no intention of obtaining a license from the Central Bank. He was aware, by his own admission, of the necessity of securing a license from the Central Bank for the purpose of exporting the gold bars. He claims, however, that he would apply for such license on October 9, 1954, Saturday. The ship was scheduled to leave, as in fact it left, at midnight on that day. An application for a license must precede any step to have the gold brought on board the exporting vessel. In this case, the gold bars were brought on board the vessel prior to the filing of an application for a license. Even if the Central Bank transacts business on Saturdays for the purpose of issuing licenses for the exportation of gold, we do not think Venancio Carreon Tong Tek could have secured such a license in one-half day. Evidently, when he brought the gold on board the S.S. President Cleveland on the night of October 8, 1954, he had no intention of securing a license despite his pretensions to the contrary.

That Venancio Carreon Tong Tek actually attempted to export the gold bars on the night of October 8, 1954 has been sufficiently established by the evidence of record. Knowing the necessity of having a license from the Central Bank, he should not have brought the gold bars on board the S.S. President Cleveland. If, as alleged, he was bringing home the gold bars when on the spur of the moment he thought of visiting the S. S. President Cleveland, he should have left the gold bars with his brother outside the customs premises. That he brought them on board the vessel, secretly hidden around his waist, to look for a hiding place wherein to place them is an indication of his intention to surreptitiously export them if he had found a hiding place for the purpose.

There are other circumstances which have impelled us in not giving credence to the testimony of Venancio Carreon Tong Tek. He claims that his decision to visit the S. S. President Cleveland was made on the spur of the moment when he and his brother, together with a "friend" who turned out to be George Tong, a relative who was employed in the American President Lines, were crossing the Del Pan Bridge. We can not believe that the decision was made on the spur of the moment. The evidence shows that Venancio and his brother obtained passes from the American President Lines on or before July 29, 1954 to visit the S. S. President Wilson on August 3, 1954. The name of the steamer President Wilson was cancelled and in lieu thereof "Pres. Cleveland" was stamped on both passes. Then the date of the visit "Aug. 3, 1954" was also cancelled and in lieu thereof the date "Oct. 8, 1954" was stamped. The allegation that Venancio met his brother by chance on the afternoon of October 8, 1954 and that they decided to visit the S. S. President Cleveland only when they were on their way home can hardly be believed. Venancio and his brother had their passes amended on that date, or prior thereto, so that their intention to visit the said vessel must have been planned well in advance.

Then there is the allegation that Venancio intended to ship the gold bars to a "Mr. Tokida" in Japan. He claims that "Mr. Tokida" was his "friend". In the investigation in the Bureau of Customs, he could not even state the business in which "Mr. Tokida" was engaged. What kind of friendship exists or existed between Venancio Carreon Tong Iek and "Mr. Tokida"? We are inclined to believe that "Mr. Tokida" merely existed in the imagination of Venancio and that the latter must have intended to ship the gold bars abroad to someone whom he does not care to reveal for reasons known only to himself.

It is also alleged that there was no attempt to export the gold bars because of the voluntary desistance of Venancio in bringing back the said gold bars. It appears, however, that the desistance was not altogether voluntary. The desistance was due to the inability of Venancio to find an unoccupied cabin wherein to hide the gold bars. As stated by the Court of Appeals in People v. Juanito Tong y Ty and Venancio Carreon Tong y Ty, CA-G.R. No. 15666-R, Aug. 31, 1956:

> "In the instant case the desire on the part of the appellants to export the gold bars found in their possession has been admitted by Venancio Carreon Tong who in his statement at the investigation in the office of the harbor police on the night of his arrest as well as at the trial of this case said that he was

> intending to send said gold bars to a certain Mr. Tokida in Japan for the establishment of a textile factory for him although he had not yet written nor informed Mr. Tokida about his plan. His desire to export said gold bars was not consummated because he had not found a suitable cabin in the S. S. President Cleveland where to hide them, as he stated, but undoubtedly such desire has been unmistakably demonstrated and the only thing lacking is the evidence of an omission on his part to secure the necessary license therefor."

Further, the Court of Appeals said:

> "We can not, however, accept the theory of the defense that the appellants have not incurred any criminal liability because of their desistance. Desistance is only a ground for exemption when the crime has not gone beyond the stage of attempted, and inasmuch as the crime alleged to have been committed cannot be punished unless consummated, hence the inapplicability of the theory of appellants."

It is true that in the same decision the Court of Appeals stated that petitioners did not intend to ship the gold bars when they visited the S. S. President Cleveland, but this appears to be contrary to the portions of the decision just quoted and to the facts established in the present proceedings.

IN VIEW OF THE FOREGOING, we are convinced that Venancio Carreon Tong Tek attempted to export the gold bars in question without license from the Central Bank, and under paragraph (f) of Section 1363 of the Administrative Code, which provides for the forfeiture of merchandise exported or attempted to be exported contrary to law, the said gold bars are subject to forfeiture.

The last ground for the forfeiture of the said gold bars is Section 1363 (m-1) of the Administrative Code, which provides:

> "SEC. 1363. Property subject to forfeiture under customs laws.—Vessels, cargo, merchandise, and other objects and things shall, under the conditions hereinbelow specified, be subject to forfeiture:
>
> x x x x
>
> "(m) Any merchandise the importation or exportation of which is effected or attempted in any of the ways or under any of the conditions hereinbelow described -
>
> "1. Upon importation or exportation, either consummate or frustrate, without going through a customhouse. x x x."

Counsel for petitioners concedes that it is Section 1363 (m-1) that is applicable to this case and not Section 1363 (f). However, it is alleged that Section 1363 (m-1) does not authorize the forfeiture of merchandise. What should have been done, according to counsel for petitioners, was for the Collector of Customs to collect "import duties, the usual 10% surcharge, a fine equal to the duty, and internal revenue taxes." It is enough to state here that Section 1363 expressly provides that merchandise, and other objects and things shall, under the conditions therein specified, be subject to forfeiture. If, as alleged, former Insular Collectors of Customs did not order the forfeiture of merchandise under Section 1363 (m-1) but imposed only fines in addition to the customs duties, the decisions in those cases must have been made under and by authority of Section 1365, which provides:

> "SEC. 1365. Imposition of fine in lieu of forfeiture. - Where property is subject to forfeiture, the Commissioner (formerly Insular Collector of Customs) may, if in his opinion the public interests so require, waive the forfeiture and in lieu thereof impose a fine upon the property in such amount as the nature of the case shall indicate as proper."

That the Commissioner of Customs in this case has not applied Section 1365 by waiving the forfeiture and imposing, in lieu thereof, a fine is a matter that calls for the exercise of a discretionary power. We are not authorized to review the exercise by the Commissioner of his discretionary power, specially where, as in this case, no allegation has been made that the exercise of his discretionary power has been abused.

Finally, it is contended that the acquittal of petitioners in the criminal case filed against them for exporting the said gold bars without license operates as a bar to the forfeiture thereof. Petitioners were charged in the criminal case filed in the Court of First Instance of Manila with violation of Section 4 of Central Bank Circular No. 21, as amended, and Sec. 2 (m) of Central Bank Circular No. 42, as amended, in relation to Sec. 32 of Republic Act No. 265. They were acquitted by the Court of

Appeals in People v. Juanito Tong y Ty and Venancio Carreon Tong y Ty, CA-G.R. No. 15666-R, Aug. 31, 1956, because in order that a person may be penalized under said Act for exporting gold without license, it is necessary that the offense be consummated. In this case, there was merely an attempt.

In support of the view that the acquittal of petitioners in the criminal case is a bar to the forfeiture of the gold bars, counsel for petitioners cited two American cases, to wit:

> "A judgment of acquittal in a criminal prosecution for violation of the internal revenue laws is conclusive in favor of the defendant, as claimant of the property involved in a subsequent suit <u>in rem</u>, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property." (Coffey vs. U. S., 116 U. S. 436.)

> "x x x where an indictment for violation of the Internal Revenue Law had resulted in an acquittal the facts which were necessary to that indictment had been conclusively established against the government and constituted an estoppel in a subsequent libel or information to forfeit." (U. S. vs. Sully, DCNY 9 F 2d 959.)

It will be noted that in the cases cited for an acquittal in a criminal case to be a bar to the forfeiture of the merchandise, it is essential that the same act or fact involved in the criminal case be in issue as a cause for the forfeiture of such merchandise. In the instant case, the act or fact in issue in the criminal case was whether or not there was a <u>consummated offense</u> of exporting gold without license. In the proceedings for the forfeiture of said merchandise, the act or fact in issue is whether or not petitioners attempted to export gold without license. The issues in the two cases are, therefore, totally distinct and different. The acquittal of petitioners in the criminal case, following the decisions in the cases cited, is not a bar to the forfeiture proceedings in the instant case.

IN VIEW OF THE FOREGOING CONSIDERATIONS, we are of the opinion that the said 138 gold bars have been validly forfeited under Section 1363, paragraphs (f) and (m-1), of the Administrative Code. Accordingly, the decision appealed from is affirmed, with costs against petitioners.

SO ORDERED.

Manila, November 21, 1956.

ROMAN M. UMALI
Associate Judge

WE CONCUR:

MARIANO NABLE
Presiding Judge

AUGUSTO M. LUCIANO
Associate Judge