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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ENJAY, INC. (Licensee of Hotel Intercontinental Manila),
Petitioner,

- versus - C.T.A. CASE NO. 3010

HONORABLE RAMON J. FAROLAN, in his capacity as Acting Commissioner of Customs,
Respondent.

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4/28/81

D E C I S I O N

Petition to review the decision of respondent Commissioner of Customs dated March 14, 1979 dismissing for lack of merit an appeal from the decision of the Collector of Customs, Manila International Airport, denying the request of petitioner Enjay, Inc., licensee of the Hotel Intercontinental Manila, for abatement of customs duties and taxes paid on its importation of cheese under Airway Bill No. 160-976279-3.

The records of the case show that petitioner Enjay, Inc., licensee of the Hotel Intercontinental Manila, imported various cheese from the Goodwood Trading Company of Hongkong. The importation, consisting of twenty-five (25) cartons, arrived at the Manila International Airport on board Cathay Pacific Airways Flight No. 901 on September 21, 1977.

Upon arrival, the shipment was immediately stored in the cold storage room of the Philippine Skylanders Incorporated, a customs bonded warehouse at the Manila International Airport. The shipment was declared under Formal Entry No. 89608 by petitioner's authorized customs broker, the Forbes Customs Brokerage Corporation.

On September 30, 1977, after the release papers were duly processed by the entry processing section of the office of the district collector of customs, the corresponding customs duties, taxes and other charges amounting to ₱20,450.00 were paid by petitioner under Official Receipt No. 7879162. The shipment remained in the Philippine Skylanders Incorporated until it was withdrawn on October 3, 1977, without exception by the Forbes Customs Brokerage Corporation. It was delivered directly to the warehouse of the Hotel Intercontinental Manila, Makati, Metro Manila, covered by Delivery Receipt No. 1003: "Subject for final inspection." It appears that the Hotel Intercontinental Manila did not accept delivery of the shipment because the executive chef of the hotel, after inspection, allegedly found the cheese to be spoiled and unfit for human consumption.

The records reveal that immediately upon discovery of the spoilage, petitioner hired the services of the Authorized Adjusters, Inc., a duly registered and licensed marine and cargo surveyor, to ascertain and determine the nature and extent of the loss and/or damage sustained by the shipment. The marine cargo warehouse survey report dated October 19, 1977 prepared by the adjuster states that the "damages sustained by the shipment may be attributed to improper handling anywhere in transit." Consequently, petitioner was advised to file claims against all parties concerned to conform with the stipulation of the policy. (Last paragraph of the report, p. 25, Customs records.)

Formal protest was therefore immediately filed with the Philippine Skylanders Incorporated. The latter however denied its liability for the reason that the shipment was stored in the same condition as it was received from the carrier and accepted by the customs broker for petitioner Hotel Intercontinental Manila in the same good condition that it was received from the airline.

Upon denial by the Philippine Skylanders Incorporated of its claim for reimbursement for the value of the spoiled shipment of cheese, petitioner, thru counsel, filed with the Collector of Customs, Manila International Airport, on September 13, 1978, after almost one year from the release of the goods from customs custody, a formal claim for abatement of duties and taxes paid on the importation on the ground that the various cheese deteriorated and spoiled after their arrival and while remaining in the customs bonded warehouse. The claim for abatement was however denied by the Collector for the reason that the importation did not deteriorate and become spoiled after its arrival and while remaining under customs custody. After resort to the Commissioner of Customs proved unavailing, petitioner Enjay, Inc., licensee of the Hotel Intercontinental Manila, appealed to this Court.

The lone question tendered for resolution is whether or not petitioner is legally entitled to abatement or refund of the customs duty and sales tax (advance sales tax) assessed and collected on its importation of various cheese under Airway Bill No. 160-976279-3.

Under Section 1704(b) of the Tariff and Customs Code, "a Collector may abate or refund the amount of duties accruing or paid, x x x x x upon satisfactory proof of injury, destruction x x x x of any article x x x x while remaining in customs custody after unlading."

It is quite apparent that the importer's right to abatement or refund of customs duties under Section 1704(b) is planted upon satisfactory proof of injury or destruction of the article while remaining in customs custody after unloading. The statute employs the term satisfactory proof of injury, destruction. The law therefore casts upon petitioner the burden of establishing by sufficient and competent evidence that its shipment of cheese deteriorated and become spoiled after its arrival and while remaining in the customs bonded warehouse. The question then is whether under all the evidence petitioner has sustained the burden placed upon it by the applicable law.

Respondent Commissioner of Customs found that the shipment did not spoil while in customs custody and that none of the circumstances enumerated under Section 1704 of the Tariff and Customs Code, as amended, allowing abatement are present. We agree with this conclusion.

To begin with, as already stated above, immediately upon discovery by the executive chef of the Hotel Intercontinental Manila that the various cheese were found to be spoiled and unfit for human consumption, petitioner hired the services of the Authorized Adjusters, Inc., a duly registered and licensed marine cargo surveyor, "in order to ascertain and determine the nature and extent of loss and/or damage sustained by the shipment reportedly received with twenty-one (21) cartons in damaged condition." (p. 28, Customs records.) In its marine cargo warehouse survey report dated October 19, 1977, the Authorized Adjusters, Inc. found out that the shipment was withdrawn from the Philippine Skylanders Incorporated by the Forbes Customs Brokerage, forwarding agent of petitioner, on October 5, 1977 without exception and directly delivered to the consignee's warehouse covered by Receipt No. 1003. While it was subject to final inspection, the damages sustained by the shipment, according to the report, may be attributed to improper handling anywhere in transit. (pp. 25-28, Customs records.) It should be noted that according to the findings of the marine adjuster, which may be considered as skilled in the trade, the damages may be attributed to improper handling anywhere in transit - not while remaining in customs custody after unloading.

Secondly, the only direct evidence of petitioner that the subject shipment was spoiled or destroyed while remaining in customs custody is the testimony of Cesar Mendoza, its purchasing manager, that "based on my opinion, the cheeses were really spoiled in the Skylander because of the poor refrigeration." (t.s.n., p. 49, hearing on January 9, 1980.) The opinion of a witness is not however admissible unless he is an expert or skilled in the trade or matter under question. (Secs. 42, 43, 44, Rule 130, Rules of Court.) Witness Mendoza has not been qualified and presented as an expert or skilled in refrigeration. As a matter of fact, Cesar Mendoza declared, when asked where exactly the spoilage of the cheese occur, that "I can not tell you where the cheese were spoiled." (t.s.n., p. 50, hearing on January 9, 1980.) While he hastened to add that "I was sure the cheeses were spoiled in the Skylanders the same as I experienced with meats" (ibid), the fact that petitioner allowed the shipment to remain in the Philippine Skylanders cold storage for twelve (12) days in effect negates this assertion.

Thirdly, if the subject importation of cheese actually and really deteriorated and became spoiled in the cold storage room of the Philippine Skylanders Incorporated because of poor refrigeration, why is it that petitioner did not present sufficient and competent evidence to this effect rather than relying on the opinion of its purchasing manager who is incompetent to testify on this matter, and whose testimony is self-serving? Then too, why is it that the marine cargo warehouse survey report prepared and submitted by the marine adjuster hired by petitioner states that the damage sustained by the shipment "may be attributed to improper handling anywhere in transit" and not to the poor refrigeration of the cold storage of the Philippine Skylanders Incorporated? And again, since petitioner knew that the cold storage of the Philippine Skylanders Incorporated had poor refrigeration, why is it that it still stored its perishable shipment of cheese in that place, and for a period of twelve (12) days?

Moreover, since this action is a claim for refund of duties and taxes, it partakes of the nature of an exemption, and the same cannot be allowed unless granted in the most explicit and categorical language. (Resins, Inc. vs. Auditor General, L-17888, October 29, 1968, 25 SCRA 754.) Claims for refund are construed strictly against claimants since a claim for refund is in the nature of an exemption from taxation. (Commissioner of Internal Revenue vs. Ledesma, L-17509, January 30, 1970, 31 SCRA 95.) As stressed by the Supreme Court in Acting Commissioner of Customs vs. Manila Electric Company and Court of Tax Appeals, L-23632, June 30, 1977, 77 SCRA 469, an exemption from taxation must be justified by words too clear to be misread. From 1906, in Catholic Church vs. Hastings to 1966, in Esso Standard Eastern, Inc. vs. Acting Commissioner of Customs, it has been the constant and uniform holding that exemption from taxation is not favored and is never presumed, so that if granted it must be strictly construed against the taxpayer. Affirmatively put, the law frowns on exemption from taxation, hence, an exempting provision should be construed strictissimi juris. (Catholic Church vs. Hastings, 5 Phil. 701; Esso Standard Eastern, Inc. vs. Acting Commissioner of Customs, L-21841, October 28, 1966, 18 SCRA 488.)

Last, but not least, with regard to the request for abatement or refund of advance sales tax (in the amount of ₱3,638.00, per Exh. "A-8", p. 49, CTA records), the same can not even be passed upon by the Court in view of the fact that nothing in the records show that petitioner had filed its written claim for refund thereof with the Commissioner of Internal Revenue and that the latter was made a party to this case. Without satisfying these jurisdictional requirements, which in the instant case are lacking, the same is fatal to the claim of petitioner for the abatement or refund of the advance sales tax paid on the importation in question. (Wise & Company vs. Commissioner of Customs, CTA Case No. 2717, December 29, 1977; see also resolution dated January 15, 1979, certiorari denied in G.R. No. L-51242, March 7, 1980; National Dental Supply Incorporated vs. Commissioner of Customs, CTA Case No. 2826, June 30, 1980; Campos Rueda Corporation vs. Commissioner of Customs, CTA Case No. 2829, July 28, 1980; Jardine Davies, Inc. vs. Commissioner of Customs, CTA Case No. 2634, October 16, 1980; Procter & Gamble Philippine Manufacturing Corporation vs. Commissioner of Customs, CTA Case No. 2786, February 27, 1981.) Even more, adverting to the terms of Section 1704 of the Customs and Tariff Code, _supra_, it is quite clear and explicit that a Collector of Customs may abate or refund only the amount of _duties_ accruing or paid. The statute employs the word _duties_ - without more. Nothing there said speaks of taxes or internal revenue taxes paid on the importation. Where the law applicable does not include the advance sales tax paid on an importation as subject to abatement or refund by a collector of customs, such tax should not be read into the law.

WHEREFORE, the decision appealed from should be, as it is hereby affirmed, with costs of this instance against petitioner.

SO ORDERED.

Quezon City, Metro Manila, April 28, 1981.

Amante Filler

AMANTE FILLER
Presiding Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge
Dissents and concurs in a separate opinion

Alex Z. Reyes

ALEX Z. REYES
Associate Judge

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3/21/81

DISSENTING AND CONCURRING OPINION

The Authorized Adjusters, Inc, through Jacinto J. Bituin, manager, Marine Department, stated in its "Marine Cargo Warehouse Survey Report" dated October 19, 1977 that "xxx damages sustained by the shipment (cheese) may be attributed to improper handling anywhere in transit." (pp. 25-28, Customs rec.) Petitioner, therefore, on that basis, filed a formal claim for abatement of duties and taxes it had paid on the importation of the spoiled boxes of cheese but which was denied by the Collector of Customs, and was later sustained, on appeal, by respondent Commissioner of Customs, on the ground that the imported cheese in question did not deteriorate, or otherwise became spoiled at the time of its unloading in the Customs' Zone, or while under the custody of the Bureau of Customs. If the cheese had deteriorated while under the custody of the Bureau of Customs, petitioner would definitely be legally entitled to the abatement or refund of the customs duty assessed and collected on the importation of the spoiled cheese under the provisions of Section 1704 (b) of the Tariff and Customs Code.

The majority decision of my colleagues is anchored on the finding of fact that petitioner has not shown, by satisfactory proof, that the 21 cartoons of cheese were in Customs' custody when the same were spoiled and this finding was based upon the only single authority that per petitioner's authorized adjuster, the Authorized Adjusters, Inc. and as aforesaid, the "damages sustained by the shipment (cheese) may be attributed to improper handling anywhere in transit." The majority decision seems to convey the view that there was, in this instant case, doubt that the spoilage of the cheese occurred at the time these were still under the customs custody. However, from the very majority decision itself, insofar as the abatement of the customs duties is concerned and from the evidence it is quite clear that the Executive Chef, Henry Blin, of the Hotel Intercontinental Manila, licensee of petitioner, categorically testified to the fact that upon release and arrival of the cheese in the warehouse of the Hotel Intercontinental Manila, said cheese "x x x were found to be spoiled and unfit for human consumption x x x." (pp. 37-38, t.s.n., Jan. 9, 1980.) In addition, another witness of petitioner, one Cesar Mendoza, who was its purchasing manager, unequivocally stated that "based on (his) my opinion, the cheese were really spoiled in the Skylander because of the poor refrigeration." Since Mendoza was the purchasing manager of the Hotel Intercontinental Manila, and considering his position and experience, he "X X X was sure the cheeses (sic) were spoiled in the Skylanders the same as (he) experienced with meats."

Furthermore, it was testified to by Franklin Galacgac, marine adjuster, of the Authorized Adjusters, Inc., that after the release from the customs area and immediately upon arrival and unloading of the cheese in question from the delivery truck on October 3, 1977 in the premises of the Hotel Intercontinental Manila, the cheese "x x x emit(ted) foul odor;" "that it had turned into black and greenish color and covered with molds", which was corroborated by Cesar Mendoza, purchasing manager of the Hotel Intercontinental Manila, that the molds in the cheese were visible to the naked eye, and that, consequently, the Executive Chef, Henry Blin, testified that on that basis, he did not accept the cheese as they were not good or rotten.

(pp. 57-59, 62-64, t.s.n., March 18, 1980; pp. 37-39; 43-45, t.s.n., Jan. 9, 1980; pp. 4-7, 15-16, t.s.n., July 23, 1979.) Inasmuch as the warehouse in which the cheese were temporarily stored, the Philippine Skylanders Cold Storage, pending withdrawal to petitioner's storage warehose, is within the customs custody, it is not difficult for a person of even the least of intelligence to rationalize that the spoilage must have taken place in the customs zone. There is, therefore, sufficient and convincing evidence to establish the fact that it was spoiled while under the customs custody. This fact having been so established by clear, convincing and uncontradicted evidence, the burden of proof to show otherwise then shifted to the government to show that the cheese were not spoiled while under the customs custody but became rotten in the warehouse of the Hotel Intern-continental Manila, which the Bureau of Customs has not done in this case.

In view of the above, I vote for the refund of the corresponding customs duties paid by petitioner Enjay, Inc. (Licensee of Hotel Intercontinental Manila) to the Bureau of Customs in the sum of ₱16,815.00 (O.R. No. 7879162, 9/30/77, page 29 Customs rec.)

With respect to the refund of the advance sales tax, I concur with the majority opinion that this Court has no jurisdiction to entertain the claim for the refund of the advance sales tax in the amount of ₱3,638.00 (should be ₱3,635.00 as shown in the zerox copy of O.R. No. 7879162).

Quezon City, May 29, 1981.

CONSTANTE C. ROAQUIN
Associate Judge