REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ABS-CBN BROADCASTING
CORPORATION and SCAN, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 3162

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - x

ABS-CBN BROADCASTING
CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3163

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - x

5/15/92

ABS-CBN BROADCASTING
CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3164

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - x

ABS-CBN BROADCASTING
CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3165

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - x

ABS-CBN BROADCASTING
CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3166

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - - - x

ABS-CBN BROADCASTING
CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3167

COMMISSIONER OF CUSTOMS,
Respondent.
x - - - - - - - - - - - - - - x

D E C I S I O N

These cases, involving similar factual antecedents and the same issues, were consolidated and are jointly decided herein.

Petitioners ABS-CBN, formerly known as the Bolinao Electronics Corporation, and SCAN, Inc., are corporations duly organized and existing under the laws of the Philippines, respectively. ABS-CBN was granted temporary permits under Repulic Acts Nos. 511 and 512 as amended by Republic Acts Nos. 5730 and 5731, respectively, to: (1) construct, maintain and operate stations for international telecommunications and television stations in the Philippines; and (2) to construct, maintain and operate radio broadcasting station also in the Philippines for a period of fifty years. The permits granted by Republic Acts Nos. 511 and 512, to operate radio and television stations were converted into regular franchises by the amendatory acts and the name of the grantee was changed to "ABS-CBN Broadcasting Corporation".

Section 4 of Republic Act No. 511 and Section 3 of Republic Act No. 512 contain an **ipso facto** clause which reads:

> "In the event of any competing individual, partnership or corporation receiving from the Congress a similar temporary permit in which there shall be any term or terms more favorable than those herein granted or tending to place the herein grantee at any disadvantage, then such term or terms shall, **ipso facto**, become a part of the terms hereof and shall operate equally in favor of the individual, partnership or corporation." (Emphasis Ours)

Subsequently, Congress enacted Republic Act No. 2036 granting the Radio Communication of the Philippines, Inc. (RCPI), a franchise to establish radio stations for domestic telecommunication which was later amended by Republic Acts Nos. 2963 and 4054.

Section 1 of Republic Act No. 2036, as amended by Republic Act No. 2963, provides:

> "SECTION 1. Subject to the provisions of the Constitution, and to the provisions, not inconsistent herewith, of Act numbered three thousand eight hundred and forty-six, entitled "An Act providing for the regulation of radio stations and radio communications in the Philippine Islands, and for other purposes; Commonwealth Act numbered one hundred forty-six, known as

> the Public Service Act, and their amendments, and other applicable laws, there is hereby granted to the Radio Communication of the Philippines, Inc., its successors or assigns, the right and privilege of constructing, installing, establishing and operating in the Philippines, at such places as the said corporation may select and the Secretary of Public Works and Communications may approve, radio stations for the reception and transmission of wireless messages on radiotelegraphy and/or radiotelephony, including both coastal and marine telecommunications, each station to consist of two radio appratus comprising of a receiving and sending radio apparatus, stations for international telecommunications and stations for broadcasting, including television." (Emphasis Ours)

And Section 14 of the same Act, as amended by Republic Act No. 4054, reads:

> "SECTION 14. In consideration of the franchise and rights hereby granted and any provision of law to the contrary notwithstanding, the grantee shall pay the same taxes as are now or may hereafter be required by law from other individual, copartnerships, private, public or quasi-public associations, corporations, or joint stock companies, on real estate, buildings and other personal property except radio equipment, machinery and spare parts needed in connection with the business of the grantee, which shall be exempt from customs duties, tariffs and other taxes, as well as those properties declared exempt in this section. In consideration of the franchise, a tax equal to one and one-half per centum of all gross receipts from the business transacted under this franchise by the grantee shall be paid to the Treasurer of the Philippines each year, within ten days after the audit and approval of the accounts as prescribed in this Act. Said tax shall be in lieu of any and all taxes of any kind, nature or description levied, established or collected by any authority

whatsoever, municipal, provincial or national, from which taxes the grantee is hereby expressly exempted." (Emphasis Ours)

It appears that ABS-CBN started importing television broadcasting equipment from 1966 when it was still Bolinao Broadcasting Corporation. Upon conversion of the temporary permits into regular franchise, and the name of the grantee was changed to "ABS-CBN Broadcasting Corporation", it paid the franchise taxes on its operations of 1 1/2% of its gross receipt without paying customs duties and taxes on the importation of television equipment, spare parts and machineries.

Shortly after the declartion of Martial Law (under Proclamation No. 1080, dated September 21, 1972) the Department of Finance formed a Joint Customs/BIR Team to investigate alleged tax deficiency of ABS-CBN in the importations of television equipment.

In a memorandum report to the Commissioner of Customs dated July 6, 1973, Heracleo Pagtanac, Supervising Special Investigator, a member of the Joint Team, indicated that the Department of Finance committed errors when it allowed the release of the importations of television equipment of ABS-CBN tax free.

As a consequence thereof, seizure proceedings were instituted against the electronics and television equipment of ABS-CBN with the collectors of customs of Manila, Davao, Batangas, Iloilo, Cebu and San Fernando, La Union where said equipment were released. Meanwhile, the equipment in question were subjected to seizure in the ABS-CBN stations where they were located.

After due hearings, the respective collectors of customs, rendered the following decisions:

> 1. The Collector of Customs of the Port of Manila ordered that all seized articles of ABS-CBN under S.I. Nos. 14093, 14093-A and 14093-B, be released only after payment in full of the assessed duties (P8,824,411.00) and the internal revenue taxes (P2,321,217.00), exclusive of other charges, plus a fine equal to twice the amount of the above assessed duties (P17,648,922.00) or a grand total of P28,954,600.00 exclusive of other charges, fine and other charges; (CTA 3162)
>
> 2. The Collector of Customs of the Port of Iloilo ordered that the articles seized under S.I. No. 15-73 be released only after payment in full of the assessed customs duties (P581,148.00) and the internal revenue taxes (P69,511.00), exclusive of other charges, plus a fine equivalent to twice the amount of the above assessed duties of (P1,162,296.00) or a grand total of P1,912,955.00, exclusive of other charges; (CTA Case No. 3163)
>
> 3. The Collector of Customs of the Port of Batangas ordered that the articles seized under S.I. No. 4-76 be released, only after payment in full of the assessed customs duties (P40,726.00) and internal revenue taxes (P15,638.00), exclusive of other charges; (CTA Case No. 3164)
>
> 4. The Collector of Customs of the Port of Davao ordered that the articles seized under S.I. No. 73-009 be released, only after payment in full of the assessed customs duties (P294,472.00) and the

internal revenue taxes (P95,519.00), exclusive of other charges, plus a fine equivalent to twice the amount of the above assessed duties (P598,484.00) or a grand total of P988,745.00, exclusive of other charges; (CTA Case No. 3165)

5. The Collector of Customs of the Port of Cebu ordered that the articles seized under the unnumbered seizure indentification be released only after full payment of the assessed customs duties (P569,254.00) and internal revenue taxes (P171,046.00), exclusive of other charges, and a fine equivalent to twice the amount of the above assessed duties (P1,138,508.00) or a grand total of P1,878,808.00, exclusive of other charges; (CTA Case No. 3166) and

6. The Collector of Customs of the Port of San Fernando, La Union, ordered that the articles seized under S.I. No. 7-76 be released only after payment in full of the assessed customs duties (P248,959.00) and internal revenue taxes (P59,494.00), exclusive of other charges, and a fine equivalent to twice the amount of the above assessed duties (P497,918.00), or a grand total of P806,371.00 exclusive of other charges. (CTA Case No. 3167)

Not satisfied with the ruling of the different collectors of customs, petitioners appealed to the Commissioner of Customs.

On October 8, 1990, the Acting Commissioner of Customs rendered a decision in Customs Case No. 79-44 affirming the decisions of the different collectors and decreed the release, not to forfeit the articles involved in the seizure proceedings, subject however, to the full payment by the claimants-appellants of the corresponding duties, taxes and fines.

Hence, the petitions for review.

Set forth are the issues raised and our discussions thereof:

1. **Whether or not petitioners are exempt from taxes and customs duties.**

In assailing the decision appealed from, ABS-CBN invariably asserts that under Republic Act No. 511, as amended by Republic Act No. 5731 in relation to Republic Act No. 2036, as amended by Republic Act No. 4054, its importations of television equipment and parts are tax and customs duty free. Respondent on the other hand, contends otherwise.

Basically, ABS-CBN argues that the **ipso facto** clause contained in Section 14 of Republic Act No. 511, as amended, is deemed to have incorporated into its franchise any privilege or privileges found in the franchise of RCPI under Republic Act No. 2036, as amended. The franchise tax it pays is therefore in lieu of "any and all taxes of any kind, nature and description levied, established or collected by any authority whatsoever, municipal, provincial or national." Hence, ABS-CBN cannot be subjected to taxes and customs duties on its importations of television equipment and parts.

It must be pointed out that the claim of petitioners lacks legal and factual basis.

For ready reference, We are again quoting Section 4 of Republic Act No. 522 containing the **ipso**

facto clause upon which petitioners' claim is predicated, to wit:

> "In the event of any competing individual, partnership or corporation receiving from the Congress a similar temporary permit in which there shall be any term or terms more favorable than those herein granted or tending to place the herein grantee at any disadvantage, then such term shall, **ipso facto**, become a part of the terms hereof and shall operate equally in favor of the grantee as in the case of said competing individual, partnership or corporation." (Underscoring supplied)

while the provisions of Section 3 and 14 of Republic Act 2036, as amended, in part pertinent read:

> "SECTION 1. Section three of Republic Act Numbered Twenty Hundred Thirty-six, as amended, is hereby further amended to read as follows:
>
> > 'SEC. 3. This franchise shall continue for a period of fifty years xxx. Provided however, That the stations for international communications, broadcasting and television be operated within four years from the approval of the amendatory Act.'
>
> SECTION 2. Section fourteen of the same Act is hereby repealed and in lieu thereof a new section is hereby inserted to read as follows:
>
> > 'SEC. 14. In consideration of the franchise and rights hereby granted and any provision of law to the contrary notwithstanding, the grantee shall pay the same taxes as are now or may hereafter be required by law from other individuals, co-partnership, private, public or quasi-public associations, corporations, or joint stock companies, on real estate, buildings and other personal property except radio equipment, machinery and spare

> parts needed in connection with the business of the grantee, which shall be exempt from customs duties, tariffs and other taxes, as well as those properties declared exempt in this section. In consideration of the franchise, a tax equal to one-half per centum of all gross receipts from the business transacted under this franchise by the grantee shall be paid to the Teasurer of the Philippines each year, within ten days after the audit and approval of the accounts as prescribed in this Act. Said tax shall be in lieu of any and all taxes of any kind, nature or description levied, established or collected by any authority whatsoever, municipal, provincial or national, from which taxes the grantee is hereby expressly exempted." (Underscoring supplied)

It is to be stressed that under the foregoing provision of Section 14 of Republic Act No. 2036, as amended, what are exempted from customs duties, tariffs and other taxes are "radio equipment, machinery and spare parts needed in connection with the business of the grantee. Said provision is significantly important for the reason that RCPI is engaged in the operations of radio stations for domestic telecommunications while ABS-CBN are both engaged in radio and television operations. Although the mandatory Act in Section 1 amended Section 3 of Republic Act No. 2036 and under its proviso authorizes RCPI to establish stations for international communications, broadcasting and television be operated within four years from the approval of the amendatory Act or on June 10, 1964, it does not appear that RCPI has ever engaged in operating television stations, like ABS-CBN. Thus, it cannot be considered as competing corporation with respect to the operation of television stations. To extend the tax exemption privilege of RCPI under Section 14 of Republic Act No. 2036, as amended, to ABS-CBN when their businesses are not the same, would seem to be stretching the grant of exemption too far to include television equipment and parts under said law beyond its scope, in contravention of the rule of strict construction of tax exemptions. In other words, exemptions from taxations are highly disfavored and will not be permitted to arise from mere implication (**Asiatic Petroleun Co. v. Llanes,** 49 Phil. 466). It is also well settled that exemption from taxation should be construed in **strictissimi juris** against the taxpayer and liberally in favor of the taxing authority (**Esso Standard Eastern Inc. v. Acting Commissioner of Customs,** 18 SCRA 488 [1966]). Likewise, this is also the interpretation made by the Department of Finance, the agency primarily in charge of implementing the Tariff and Customs Code, which carries a great weight and for our purpose is cited below:

"August 29, 1966

Atty. Lorenzo R. Tanada, Jr.
P.O. Box 1344
M a n i l a

S i r :

In connection with your request for in behalf of Bolinao Electronics Corporation to be extended an equal treatment in the application of certain tax concessions conferred to a presently enjoyed by the Radio Communications of the Philiippines by virtue of Republic Act No. 2036, as amended, in the light of the terms and conditions in your grant under Republic Acts No. 511 and 512, please be advised that this Department is in full accord with the view of the Commissioner of Internal Revenue in his 2nd Indorsement to this Office dated August 18, 1966, which, insofar as pertinent, reads as follows:

'The Bolinao Electronic Corporation considers the Radio Communications of the Philippines as a competing corporation and Section 14 of its franchise contained in terms which are more favorable than those granted to the Bolinao Electronics Corporation. Specifically, the Radio Communications of the Philippines is:

(a) Exempt from duties, tariffs and compensating tax on radio equipment, machinery and spare parts needed in connection with the business of the grantee;

(b) Exempt from income tax and other taxes of any kind, nature or description on the receipts derived from the operation of its franchise;

(c) Subject to the franchise tax of one and one-half per centum of all gross receipts from the business transacted under its franchise.'

xxx xxx xxx"

(See Answer in C.T.A. Case No. 3162, pp. 115-116, CTA rec.). Hence, petitioners' claim for exemption from taxes and customs duties on the imported television equipment and parts, should be rejected.

2. Whether there was legal basis for the seizure of the imported television equipment and parts in question.

Petitioners contend that there was no legal basis for the seizure of the imported television equipment and parts because said articles were released from customs custody pursuant to the release certificate issued by the Department of Finance. Respondent argued otherwise, alleging that fraud and misrepresentation were committed in securing the release of said equipment and parts, hence, subject to seizure under Section 2530(m) 3, 4 and 5 of the Tariff and Customs Code.

We are not impressed by the contention of both petitioners and respondent.

The records reflect that on March 28, 1966, ABS-CBN, then Bolinao Electronics Corporation addressed a letter to the Secretary of Finance seeking exemption from customs duties and taxes on all its importation and from income tax. Said request was indorsed to the Commissioner of Internal Revenue who opined that Bolinao Electronics Corporation is entitled to the same tax exemption as those granted the RCPI but subject to the franchise tax of one and one-half per centum of its gross receipts derived from the operation of its franchise. On August 29, 1966, the opinion was affirmed by the

Acting Secretary of Finance Juan Ponce Enrile who advised Bolinao Electronics Corporation that his department is in full accord with the view of the Commissioner of Internal Revenue to the effect that RCPI is a competing corporation and Bolinao Electronics Corporation was entitled to the same tax exemption privilege, specifically, from customs duties and compensating tax on radio equipment, machinery and spare parts needed in connection with its business (Exh. L-C, Joint Stipulation of Facts, pp. 511-580, Bundle III, Folder I, Customs rec.). However, it appears that ABS-CBN was subsequently informed by Secretary Enrile that Section 14 of Republic Act Nos. 511 and 512 grant it exemption only on importation of radio equipment machinery and spare parts (Exh. O-23, p. 37, Bundle V, Folder I, Customs rec.). This notwithstanding, it requested and continue to request release of the importation free of duties and taxes, including television equipment and parts which are not clearly within the category of articles in respect to the importation of which have been granted exemption. Be that as it may, the importation and release of the equipment in question may not be considered within the contemplation of Section 2530(m) 3, 4 and 5, sans the presentation of evidence of fraud by respondent. To our mind, the release of said equipment still constitute a violation of customs law by ABS-CBN because taxes and duties thereon have not been paid. In this connection, we are of the opinion that the situation is governed by Section 1204 of the Tariff and Customs Code. Under Section 1204, liability for customs duties, taxes and other charges attaching on the importation constitute personal debt and lien which can be enforced until paid.

As to the contention that respondent has shifted the burden to ABS-CBN to show that the seized equipment were imported legally, suffice it to state that in seizure proceedings, when respondent has established its case, it becomes incumbent upon petitioner to show the innocence of the importation by fair preponderance of evidence (See **Sanches v. Commissioner of Customs**, B.T.A. Case No. 185, November 2, 1954). At this point petitioners likewise failed. Consequently, We find sufficient legal basis for the seizure of the imported television equipment and parts.

3. Whether there has been proper identification of the articles alleged to have been illegally imported.

Petitioners postulate that in seizure proceedings, it is the duty of the Bureau of Customs to identify the particular articles which it claims to have been illegally imported and listed in the warrants of seizure and detention. It cannot, as was done in these cases, just make an inventory of all the broadcast equipment found in ABS-CBN broadcast stations and proclaim that all of those articles are subject to seizure proceedings.

We are not convinced.

It must be noted that when the Joint Team made and inventory of all the equipment and machineries found in the television stations of ABS-CBN, imported stock inventories were included. Existing facilities of Bolinao as well as items which were locally procured were considered and excluded in the inventories (See Bundle V, Folder I, Customs rec.). We are of the persuasion that respondent's duty to identify the equipment in question has been satisfied.

4. Whether or not failure of the Bureau of Customs to take actual custody of seized equipment invalidate seizure.

Petitioners claim that the seized articles were never turned over to the Auction and Cargo Disposal Division. Instead, said articles which have already been installed in the different stations of ABS-CBN were left in the custody of KBS, a broadcasting corporation owned by Roberto Benedicto, hence, no valid seizure has been effected pursuant to Section 2607 of the Tariff and Customs Code.

We disagree.

This Court notes that when the various collectors of customs decreed the seizure of the imported articles for violation of Section 2530(m) 3, 4 and 5 of the Tariff and Customs Code, under the Warrants of Seizure and Detention (See Warrants attached to the corresponding petitions), said articles were subjected to constructive distraint. The warrants were served on Mr. Aladino Aguirre of Radio Philippines Network, Inc. (Exh. LC, par. 2226, Joint Stipulation of Facts June 23, 1976). It is enough that claimants be notified thereof, because whoever is or are in possession of the articles in question is/are legally bound and obligated to hold and preserve the articles for the Government. Thus, seizure has been duly effected.

Anent the argument that no report has been made to the Commission on Audit as required under Section 2303 of the Tariff and Customs Code, it may not be amiss to point out that such provisions which are intended to promote dispatch, method, system or designed merely for information or direction of officers, or to serve methodical and systematic modes of proceedings, are merely directory (**Roxas v. Rafferty**, 37 Phil. 958). Non-compliance therefore in reporting to the Commission on Audit in these cases does not render the seizure of the equipment in question invalid.

5. Whether or not final liquidation has already set in.

Petitioners insist that when the warrants of seizure and detention of the articles were issued, they have already been installed and are being used by ABS-CBN for one year or more after release from customs custody. Invoking Section 1603 of the Tariff and Customs Code, petitioners argue that when the articles were released free of duty, such release would after the expiration of one year from said date, in the absence of fraud, be final and conclusive upon all parties, unless the liquidation became final with respect to the importation.

Again, We disagree.

The fact that the television equipment and parts have already been installed and are being used by ABS-CBN is of no consequence. This Court observes, as indicated earlier, that when ABS-CBN was subsequently advised by Secretary Enrile that Section 14 of Republic Act No. 511 and 512 grant it exemption only on importation of radio equipment, machinery and spare parts, the importation and release of television equipment free of duty is contrary to law, because the same does not come within the category of articles in respect to the importation of which have been granted exemption. The Supreme Court has held that merchandise, the importation of which is effected contrary to law is subject to forfeiture and that goods released contrary to law are subject to seizure and forfeiture (**Papa v. Mago**, 22 SCRA 857 [1968]). As correctly observed by respondent, when the television equipment and parts were entered and released "free of duty", there could have been no "liquidation", as there was no ascertainment of the duties due on the said importations. Besides, it is clear from Section 1202 of the Tariff and Customs Code, that in case of taxable articles coming from abroad, importation is not terminated until the duties, taxes and other charges due thereon have been paid or secured to be paid at the port of entry (**C.F. Sharp & Company, Inc. v. Romualdez**, C.T.A. Case No. 1309, August 17, 164, affirmed in 22 SCRA 760 [1968]). It appearing that the taxes and duties due on said importations of television equipment have not been paid, We find untenable therefore, the contention that there has been a final liquidation of said importations.

6. Whether the warrants of seizure and detention were valid.

Petitioners assert that the warrants of seizure and detention issued against ABS-CBN were null and void because there was no showing of probable cause for their issuance, as determined by a responsible officer authorized by law, much less was an examination conducted under oath or affirmation of the complainant and the witnesses, particularly describing the place to be searched and things to be seized, as mandated under the 1973 Constitution, enforced at the time of the seizure. On the contrary, respondent asserts that the warrants of seizure and detention issued, were valid.

Petitioners' assertion is flawed.

What they seem to overlook is that in seizure cases, one important aspect of the proceedings in consideration of the issue involved, is the duty on the part of the government of presenting evidence which indicate probable cause for instituting such proceedings (See **U.S. v. One Bag of Paradise and Ghoura Feathers**, N.Y. 256 F 301, 167 C.C.A. 473). The term "probable cause", means less than evidence which will justify condemnation. It imports a seizure made under circumstances which warrart suspicion (**Locke v. United States**, 7 Crank [U.S.] 339). When therefore, the respondent in these cases ordered the seizure of the television equipment and parts for violation of certain provisions of law, it is thereby incumbent upon him to show by preponderance of evidence that there was probable cause for the seizure. The question to be resolved therefore, boils down to whether the facts warrant probable cause for seizure.

From the records, what created suspicion and impelled respondent to issue warrants is the Memorandum for the Commissioner of Customs dated August 24, 1973 of Pedro C. Mendoza, Jr., Acting Deputy Commissioner of Customs (See pp. 560-561, Bundle V, Folder 5, Customs rec.), based on the findings of Heracleo Pagtanac on the investigation conducted for alleged non-payment of taxes and duties on importations of television equipment and spare parts, stating among others, that:

a. ABS-CBN imported television equipment and spare parts and others;

b. The importations are definitely not radio equipment, machinery and spare parts;

c. ABS-CBN can import radio equipment machinery and spare parts needed in connection with the operation of its business of radio telecommunication; and

d. ABS-CBN with full knowledge of specific articles covered by the exemption, through misrepresentation availed of the importation of television equipment, machinery and spare parts.

After careful study of the aforecited jurisprudence, and consideration of the facts surrounding the importations and release of the articles in question, this Court is of the opinion that "probable cause" for seizure and detention has been established.

On the allegation of petitioners that the procedure prescribed under the 1973 Constitution in the issuance of warrants of searches and seizure is not followed, it must be noted that said mandate does not prohibit or bar any person having police authority under Section 2203 of the Tariff and Customs Code to effect searches, seizure and arrest for the enforcement of customs law. The Tariff and Customs Code was interpreted to mean that except in the case of search of a dwelling house, persons exercising authority under the customs law may effect search and seizure without a search (Papa v. Mago, **supra; Viduya v. Berdiago,** 73 SCRA 553 [1976]).

7. Whether the appraisal of the value of the seized articles and the assessment of taxes were correct.

Petitioners impugn the appraisal and assessment on the grounds, among others:

(1.) That the inventory was erroneous because it included items not illegally imported like equipment which could be used for both radio and television broadcasting, television equipment locally fabricated or purchased; and

(2.) That the assessment of taxes due was faulty because:

a. There was double counting, appraisal and assessment of taxes on many items;

b. The appraisal and assessment was based on Cost of Reproduction New (CRN) instead of the domestic market value as required by Section 201 of the Tariff and Customs Code;

c. There was erroneous classification of articles; and

d. Wrong foreign exchange rate and wrong tariff rates were used.

Hence, the assessment of taxes made should be nullified.

Respondent, on the other hand, maintains that petitioners failed to substantiate the allegations with evidence. In support of his position, respondent presented Marcial Cruzado, Principal Appraiser of the Bureau of Customs, who testified on his role as a member of the inter-agency committee which investigated the importations of television equipment of ABS-CBN. On cross examination by counsel for petitioners, he testified as follows:

"Q. Now, will you tell us how you proceeded to perform your own task with respect to the items or equipment found in the Bohol

Broadcast Center at Bohol Avenue, Quezon City?

A. We went to Bohol Avenue together with the representative of the radio control office, BIR and ASAC at that time, and we were briefed how we are going to proceed with the inventory. Now, when we went to all the television broadcasting stations and we took the inventory of all the equipment, we found in that station then that's it, that is in all relay station throughout the country.

Q. Did I get you correctly when you said that when you went to a particular ABS-CBN station you just inventoried all the items found in that station?

A. Only in the television station.

Q. Yes. All the items found there?

A. All the television equipment, sir.

Q. And that was the basis of your appraisal?

A. Yes, sir.

Q. You did not make any distinction as to whether the items is used for radio and television?

A. Well, the fact that they are found in the television and broadcasting station and they have separate station for radio, we presume that is a part of the TV station.

Q. So, you presumed that that is a television equipment. You don't know that a certain item can be used for both television and radio broadcast?

A. I think so, sir.

Q. And you did not consider that some of those items you found in the television stations were locally fabricated?

A. Well, we are inclined to believe that some of them are locally fabricated but we assure the representative of the station that the moment you can prove that these are locally fabricated, then we are going to take that out of the inventory.

Q. Yes. And the representative of the station presented you items which were locally fabricated?

A. Yes, sir.

Q. And did you receive those items from your worksheet?

A. Well, I am not a member, sir, of the screening committee, but I think all the items that are there, we presumed that they are television equipment.

Q. No, no.

A. There were items that were deleted.

Q. In your worksheet?

A. In the screening committee, we have the technical man from the radio control, and then the BIR, then the representative from ABS-CBN they went over ---

Q. But, the basis of your assessment was your worksheet?

A. After they have been screened.

ATTY. QUIAZON

Can we ask for the worksheet?

(Pause in the proceedings.)

Q. And even if they are already in the worksheet, we assure them that the moment you can show proof that they are locally manufactured, even if they are already assessed, we can still delete them from the list.

Q. And your inventory included items or rather you did not consider items which were locally purchased?

A. Well, I think they have considered that.

Q. No, you, your inventory.

A. I did not consider, sir, because I presumed that the moment they were presented to me for appraisal, I just ---

Q. You just assumed that they were imported?

A. Yes, sir.

Q. And I noticed that some of the items there they were purchased from Secretary Jose Concepcion Industries. Did you not come across those items?

A. The representative of the station presented invoices and documents to prove that they are really locally purchased and locally fabricated.

Q. But inspite of that, those items were not deleted from your worksheet.

A. As far as I know, sir, they deleted.

Q. Okay, We can check that later on. How about television items which were acquired from the old Bolinao Broadcasting Corporation and old Alto Broadcasting Corporation, did you also include those in your inventory?

A. I cannot remember that anymore, sir. As far as I know, only those we found in Bohol Avenue and other television relay station in the country.

Q. Now, let's go to the appraisal. What was the basis for appraising the supposed tax and duties or the different items included in your inventory and worksheet?

A. Those items covered by commercial invoice, we based that on the commercial invoice. Those items found in the television station which we do not have any value, we used the value stated in their book. They have an inventory of all these items and with the value stated therein.

Q. And the inventory and the valuation used in the books of ABS-CBN were on appraised or current value?

A. I think that was appraised by a competent ---

Q. Customs appraiser?

A. Yes, sir.

Q. And they used the reproduction cost?

A. Well, inasmuch as we have no value available for that under our Tariff Code, we can use the domestic wholesale value minus incidental expenses and other duties and taxes.

Q. And under the Customs and Tariff Code enforced at the time of the importations, how did the Customs determine the customs duties to be assessed on the imported items?

A. The rate of duties, sir?

Q. No, the basis. Is it consular invoice, is it home consumption value or what not?

A. Well, their shipment is covered by consular invoice. It is consular invoice. I think.

Q. But in this case, what you used is the fair market value, not the consular invoice?

A. Because there was no consular invoice.

Q. Why are there no consular invoice?

A. Because they are already installed."

(See T.s.n., pp. 14-21, June 21, 1990.)

Witness further testified that not all the importations are covered by consular invoice.

This Court feels it unnecessary to discuss further ground (1), i.e. that the inventory was erroneous, for as adverted to earlier, when the Joint Team made an inventory of all the equipment and machineries found in the television stations of ABS-CBN, imported stock inventories were included and We are satisfied that the articles in question were identified.

As to ground (2), that the assessment of taxes due was faulty, We find after careful study of the respective position of the parties, and on the basis of the unrefuted testimony of respondent's witness, with petitioners failure to show that the method used by the appraiser is not proper, we are convinced that the appraisal of the value of the articles and assessment of the taxes due were correct. The presumption is that official duty is performed until the contrary is proven (McCarthy v. Aldanese, 44 Phil. 576). Thus, respondent's appraisal should be upheld.

8. Whether or not the imposition of the 50% fraud penalty is proper.

Petitioners state assuming arguendo that the different Finance Secretaries erred in releasing the television equipment and parts when only radio equipment were tax exempt, the error does not stamp the brand of fraud on ABS-CBN's importations as to justify the imposition of fraud penalty.

On the other hand, Section 2530(L)-3, 4 and 5 of the Tariff and Customs Code, under which respondent predicates the imposition of the fraud penalty, in part pertinent, states:

> "SECTION 2530. Property Subject to Forfeiture Under Tariff and Customs Law. Any vehicle, vessel or aircraft, cargo, article and other objects shall, under the following conditions be subject to forfeiture:
>
> xxx xxx xxx
>
> 1. Any articles sought to be imported or exported.
>
> xxx xxx xxx
>
> (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 of such article; and

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

It is clear from the foregoing provisions, that to be within the ambit of subparagraphs (3) and (4), the requisites are: (1) there must be wrongful making by the importer or consignee of any declaration or affidavit or the wrongful making or delivery by the same persons of any invoice, letter or paper - all touching on the importation of the merchandise; and (2) that such declaration, affidavit, invoice is false. But there is nothing of this sort in these cases. In fact, as admitted by respondent, everytime a shipment of television equipment arrived, ABS-CBN had to request in writing for the release of the articles, attaching the corresponding commercial invoice and all pertinent documents for the scrutiny of the Finance and Customs authorities (See Joint Stipulaion of Facts, par. 6-17). This only indicates, that ABS-CBN is in good faith.

For subparagraph (5), to be applicable, there must be fraud on the part of the importer to evade payment of duties and taxes due. But, We found nothing in these cases which would label petitioners with fraud. While there were claims that ABS-CBN used fraud and misrepresentation in the importations of television equipment and parts, not a single piece of evidence was presented by respondent to show that a specific importation was fraudulently made by ABS-CBN. Fraud is never presumed. It must be proven (**Farm Implement and Machinery Co. v. Commissioner of Customs,** 24 SCRA 905 [1968]). While the application for tax free release filed with the Department of Finance includes a request for television equipment as well, this fact was not hidden from the officials of the Department of Finance and the Bureau of Customs. We find it normal and not fraudulent to maximize what you believe your firm or client would be entitled under the law but it's up to the agency to evaluate the request. Hence, We find no justification for the imposition of fraud penalty.

9. Whether respondent can comply with the decision should the seizure proceedings be upheld.

Petitioners in their memorandum filed on July 29, 1991, raised new issue to the effect that in the event that the said seizure proceedings are upheld, can respondent Commissioner of Customs comply with the decision ordering the release of the seized articles to ABS-CBN upon payment of taxes and duties assessed, considering that most of the seized articles have been lost or destroyed.

This issue is hardly a point for extended discussion it appearing that said question was not raised in the petition for review but merely for the first time in their memorandum (See **Republic Flour Mills, Inc. v. Commissioner of Customs,** C.T.A. Case No. 1844, November 27, 1967, affirmed in 39 SCRA 269 [1971]); **Macondray & Co., Inc. v. Commissioner of Customs,** C.T.A. Case No. 2079, September 29, 1972). Nevertheless for the satisfaction of petitioners, it is worth to cite, the comment under Section 1204 of the Tariff and Customs Code, that "Duties are taxes paid on account of the act of bringing foreign goods into a country. For convenience of administration and security of revenue, this tax is made a lien on the goods and goods itself is liable for its payment, but the payment itself is a payment for the act of 'bringing in'; it is only secondarily a tax on the property imported. The subsequent loss of the government's lien which, like all other liens, is dependent upon possession, does not free the importer from the debt which accrued by reason of the importation (**Ker & Co. v. Cebu Collector of Customs,** T.D.C. 679)." (See Tejam, Commentaries on the Revised Tariff and Customs Code, p. 2311, Vol. IV). Hence, We find for the respondent Commmissioner of Customs.

IN VIEW OF THE FOREGOING, the decision appealed from is **MODIFIED.** Judgment is hereby rendered -- Affirming the decision of the Acting Commissioner of Customs in Customs Case No. 79-44 rendered on October 8, 1980 except the imposition of the 50% fraud penalty. No costs.

SO ORDERED.

Quezon City, Metro Manila, May 15, 1992.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

STELLA DADIVAS-FARRALES
Acting Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals