REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

DUTY FREE SHOPPERS, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5688

COMMISSIONER OF THE BUREAU OF CUSTOMS,
Respondent.

Promulgated:

AUG 11 2000

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DECISION

The case at bar seeks for (1) the setting aside the 2nd Indorsement of Deputy Commissioner Emma M. Rosqueta dated August 25, 1995 and her Order dated September 21, 1998 denying the Motion for Reconsideration of herein Petitioner and (2) the release of the shipment of 1 x 20' container consisting of 1,500 cases of Del Monte Sardines without the imposition of the 20% penalty.

As represented, Petitioner is a corporation organized in accordance with the laws of the Philippines, with business address at 1230 Hormiga St. cor. Cardona St. J.P. Rizal, City of Makati.

On October 20, 1997, Petitioner Duty Free Shoppers, Inc., through its buyers placed an order with Super Source LLC of Tacoma, Washington, USA for the importation of 1,500 cases of Del Monte sardines in tomato sauce ("Shipment", for brevity) (Exhs. A, A-1, A-2, A-3 and A-4).

On October 30, 1997, Petitioner together with the other importers were informed by then Commissioner Guillermo Parayno about Executive Order (EO) No. 444 and Customs Memorandum Order (CMO) No. 35-97-A, *inter alia*, which provide among others that Duty Free Shoppers' (DFS) goods will now be covered by the Pre-Shipment Inspection (PSI) requirement and that a corresponding Clean Report of Findings (CRF) is now required, thus:

> "When the B/L or AWB indicates the date of the exportation to be on or after November 10, 1997, DFS goods is covered by PSI requirement and the corresponding CRF shall be required. If none is presented, the goods shall be recommended for seizure to the Collector of Customs unless the consignee avails of CMO 9-95, as amended, in which case the handling and disposition of said NO-CRF case shall be in accordance with said Order and related issuances."

On November 3, 1997, Petitioner informed its buyers, as well as its suppliers thru the said buyers, of the New Customs Regulation requiring an SGS Pre-Shipment Inspection on duty free importation (Exh. B).

Upon learning of the same, the "Supplier" of the subject "Shipment", Super Source LLC of Tacoma, Washington, informed Petitioner through its buyer, that they can no longer arrange for an SGS inspection since it had already loaded the "Shipment" in a sea-bound container when it was notified of the new SGS inspection requirement (Exh. D-2).

On November 13, 1997, the vessel carrying the "Shipment" left the port of Long Beach, California and arrived in the port of Manila on November 27, 1997 without the PSI requirement and CRF. Thus, the subject "Shipment" was placed on hold by the Formal Entry Division of the Bureau of Customs (Bureau, for brevity) for violation of E.O. 444 as implemented by CAO 4-97 and CMO Nos. 33-97 and 35-97A which required pre-shipment inspection of all importation of duty free shops registered in the Special Economic Zone of Clark and Subic.

Upon referral to the Law Division of the Bureau, the subject shipment was approved for continued processing for its release by the District Collector of Customs in view of the preliminary injunction issued by Judge Leopoldo Calderon of the Regional Trial Court (RTC) of Olongapo against the Bureau in Civil Case No. 413-0-97, commanding the latter, the Executive Secretary and Customs Collector to desist from enforcing Executive Order No. 444, CAO No. 4-97 and CMO No. 33-97. However, Deputy Commissioner Licerio Evangelista, in his indorsement dated April 4, 1998, denied the release of the shipment on the ground that said injunction is applicable only to shipments bound for the Subic Special Economic Zone (Exh. 2, pp. 91-92, docket). Hence, the District Collector of the Manila International Container Port (MICP) issued on April 7, 1998 a Warrant of Seizure and Detention against the subject shipment allegedly in violation of Section 2530(f) of the Tariff and Customs Code of the Philippines (TCCP) in relation to Joint Order 1-91; CMOS 35-97 and CAO 4-97 (p. 44, Customs records), which was immediately opposed by Petitioner on April 29, 1998, averring, *inter alia*, that there was <u>no fraud</u> in the importation of the subject shipment in violation of Section 2530(f) of the TCCP (p. 64, Customs records).

On August 13, 1998, the District Collector of the MICP rendered a decision ordering the lifting of the Warrant of Seizure and Detention against the said shipment and the release of the same without any penalty (Exh. 2, pp. 91 to 95, docket).

In her 2nd Indorsement dated August 25, 1995 (Exh. 1), Deputy Commissioner Emma M. Rosqueta of the Bureau modified the above decision to the effect that the shipment is approved for release only upon payment of the 20% penalty for lack of CRF.

On September 21, 1998, Deputy Commissioner Rosqueta issued an Order denying Petitioner's Motion for Reconsideration (p. 13, docket). A copy of which was received by Petitioner on October 12, 1998.

On November 3, 1998, Petitioner filed with this Court the instant Petition for Review.

In assailing the legality of the 2nd Indorsement of Deputy Commissioner Rosqueta dated August 25, 1998 and her Order dated September 21, 1998, Petitioner maintains that the Deputy Commissioner committed reversible errors when she literally applied paragraph 2.2 of CMO 35-97A, in her 2nd Indorsement which states that since "the Bill of Lading of this particular shipment indicates that the date of exportation is 13 November 1997 x x x the shipment should be covered by PSI requirement and the corresponding CRF is required", hence, the imposition of the 20% penalty. Petitioner argues, thus:

> "This observation of Deputy Commissioner Rosqueta appears to be a highly technical interpretation of the facts and CMO 35-97A. A mere perusal of the records will reveal that the intervening period from the time the supplier was informed of the new PSI requirement on November 3, 1997 (actually this was the date Petitioner's buyers were informed, the buyers in turn notified the suppliers concerned.) and the time the shipment left port on November 13, 1997 (date of the Bill of Lading) appears to be too short a time to comply therewith because the IAN which would support the SGS inspection at the port of origin (in this case, Long Beach, California) must be filed at least five (5) days before loading.
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> In fact, immediately after the supplier was informed of the new PSI requirement, petitioner was advised that the shipment was already on water or loaded into the container of the vessel in order to free space in the loading

dock area of their warehouse. Upon receipt of this information, petitioner inquired from SGS Manila if it could obtain an IAN for the shipment and was informed that there was no need to apply therefor as the shipment was already on water. It was suggested that petitioner coordinate with its broker to request them to coordinate with the Bureau of Customs to arrange for a local SGS inspection.

When petitioner's broker followed this suggestion, the shipment was immediately slapped the 20% penalty (by this time, the vessel carrying the shipment had already arrived).

Indeed, the time frame (less than 10 days before the vessel carrying the shipment left the port of origin) for strict compliance with the new PSI requirement appears too short that even then Commissioner Parayno, when approached by the Asst. Manager of petitioner about this predicament, intimated his understanding and assured the importers that the Bureau will exercise leniency in the enforcement of the new regulation during its initial stage.

It is clear that the shipment was caught between the imposition of the PSI requirement under Executive Order No. 444 and its subsequent implementation by the Bureau. The supplier explained that the shipment was already loaded into the container at the time they learned of the new regulation. Surely, petitioner cannot be penalized for an act totally beyond its control and at a time when EO 444 was still to be implemented."

Further, it said that the Deputy Commissioner committed grave abuse of discretion amounting to lack or excess of jurisdiction in ordering the release of the shipment but subject to the imposition of the 20% penalty on the grounds that (1) the enforcement of EO 444 and its implementing CAO 4-97 and CMO 35-97 and CMO 35-97A is still contested in Civil Case No. 413-0-97 of the RTC of Olongapo, (2) previous shipments bound for the Clark Economic Zone were released by the Bureau despite the absence of CRF, (3) the non-compliance with the pre-shipment inspection requirement was in good faith as established by the evidence presented during the trial, and (4) the interpretation of the law should be tempered with the good faith exhibited by Petitioner. Thus, the instant petition for review for the release of the subject shipment without the 20% penalty.

On the other hand, Respondent argues that the allegation of Petitioner that the shipment is not liable for seizure is bereft of merit. He said that paragraph 2.2 of CMO 35-97A is explicit that the DFS goods exported to the Philippines without the required CRF, shall be recommended for seizure. Thus, he alleged that since in the case at bar it was undisputed that the subject shipment was without the required CRF, the same must be subjected to seizure. Respondent likewise disagrees with Petitioner's claim that the imposition of a twenty percent (20%) penalty is a strict and technical interpretation of the law. Respondent avers that such claim finds no support in our jurisprudence and that the claim is in the nature of an exemption from tax laws, thus, should be construed against the Petitioner. Finally, he belittles the allegation of Petitioner that the shipment should not be penalized for lack of CRF the absence of same was beyond its control. To this argument, Respondent reasons that the records of the case disclose clearly that the shipment left the port of Long Beach, California on November 13, 1997 and the supplier had actual knowledge of the PSI on November 3, 1997, hence, there was still ample time for Petitioner to hold the exportation of the shipment and comply with the Pre-Shipment Inspection requirement.

The issue that comes to fore for our consideration is: Whether or not the imposition by Deputy Commissioner Rosqueta of the twenty percent (20%) penalty on Petitioner's shipment pursuant to the provisions of CMO 35-97A is justified.

Prefatorily, it must be stressed that fraud in the importation of the subject shipment was not established in the instant case, thus, the shipment should not be liable for forfeiture, for it must be proved that fraud has been committed by the importer/consignee to evade payment of the duties due. The *onus probandi* to establish the existence of fraud is lodged with the Bureau of Customs who ordered the forfeiture of the imported goods. Fraud is never presumed. It must be proved **(Republic vs. Ker and Company, Ltd., L-21609, September 29, 1966).** Failure of proof of fraud is a bar to forfeiture. The reason is that forfeitures are not favored in law and equity **(Yu Phi Khim vs. Amparo, 86 Phil. 441, 446; Farm Implement and Machinery Co. vs. Commissioner of Customs, 24 SCRA 905).** The fraud contemplated by law must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some right **(Farolan vs. Court of Tax Appeals, 217 SCRA 298).** As stated earlier in the case at bar, Respondent failed to show that fraud had been committed by Petitioner, hence, Respondent is barred from forfeiting the subject shipment.

Thus, we are left with the issue of whether or not Petitioner's shipment should be subjected to the 20% penalty.

After a careful study of the attending facts, the disposition of the parties, the applicable laws, rules and regulations, the Court finds for the Petitioner.

The question of good or bad faith on the part of Petitioner are matters which are evidentiary in character which have to be proven during the hearing of the case.

Petitioner had established by evidence that there was good faith on its part when it failed to comply with the new SGS pre-shipment inspection requirement. Records indeed reveal that (1) the intervening period when the US supplier was informed of the new SGS pre-shipment inspection requirement (first week of November 1997) and the time when the vessel left the Port of Long Beach, California (November 13, 1997), is too short a time to comply with the said requirement; (2) at the time the Supplier was informed by Ms. Beverly Abad, Petitioner's buyer, of the new PSI requirement, the supplier had already loaded the goods in the container in accordance with the instruction in purchase order dated October 20, 1997 (TSN, April 14, 1999, pp. 17-19); (3) immediately after the supplier came to know of the new PSI requirement, the latter immediately advised the Petitioner that the shipment was already on water or loaded into the container of the vessel in order to free space in the loading dock area of their warehouse (TSN, April 14, 1999, pp. 30-31); (4) that the supplier likewise explained to the Chief of the Formal Entry Division of the Bureau the reasons for the non-compliance of said requirement in a letter dated December 15, 1997 (Exh. D); (5) Petitioner inquired from the local SGS if it could obtain an Import Advice Notice (IAN) for the shipment but was answered in the negative as the shipment was already on water; (6) it followed the suggestion of the local SGS to coordinate with its brokers and with the Bureau for local SGS inspection but the Assessment Division of the Bureau nevertheless assessed and levied the 20% penalty against the shipment (TSN, April 14, 1997, p. 26).

The aforesaid facts clearly manifest the diligence and good faith of Petitioner when it earnestly exerted efforts to comply with the CMO's of the Respondent but failed due to timing difference which is a reason beyond its control.

Stated otherwise, Petitioner sufficiently proved its claim of good faith on the non-production of CRF. It had presented evidence to support its claim and satisfy the Court for the grant of the relief sought. It had satisfactorily explained to the Court why it failed to comply or to produce the CRF. More so, the testimony of its witness Mr. Dindo Capulong was not controverted by Respondent, hence, our reliance on the same. Besides, there was the finding of the District Collector of Customs, MICP, which states that the reason for the non-compliance of the subject CMO's by herein Petitioner is valid and excusable (Exh. 2), thus:

> "On the first issue, Claimant sought to establish that there was good faith on its part in its failure to comply with the pre-shipment inspection. As narrated by the witness for the claimant, Mr. Capulong, it appears that there was no sufficient notice and material time for the supplier to comply with the new regulation under Executive Order 444 during the exportation processes. As borne out by the facts, the cut off date for effectivity of the implementing CMO Nos. 35-97, 35-97A was 10 November 1997. The shipment arrived on 27 November 1997. Considering that the average travelling time of the vessel from USA to Philippines is 30 days, and counting days backward, during the effectivity of the new PSI requirement, the shipment was already in transit and in the seas. This fact gives merit to the testimony of Mr. Capulong that indeed, there was no more chance to have the shipment placed for the SGS inspection at the time. Claimant has notified the supplier about the new PSI requirement on the shipment. This appears to be a valid and excusable ground for non-compliance." (Underscoring supplied)

Moreover, the circumstances surrounding the case pointed out that there were instances/rulings where various shipments bound for the Clark Economic Zone without CRF were released by the Bureau without imposition of any penalty, hence, in the spirit of fair play and observance of equity, the same should be made to apply to the peculiar case at bar.

Accordingly, We find no justification to the order of Deputy Commissioner Rosqueta imposing the 20% penalty on the subject shipment of Petitioner.

IN THE LIGHT OF ALL THE FOREGOING, the instant Petition for Review is hereby **GRANTED**. Therefore, the 2nd Indorsement dated August 25, 1998, and the Order dated September 21, 1998 of Deputy Commissioner Rosqueta are hereby **REVERSED** and **SET ASIDE**, and accordingly herein Respondent is hereby

ORDERED to **RELEASE** the subject shipment to Petitioner without the imposition of the 20% penalty.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge