REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

DEL MONTE PHILIPPINES, INC.,
Petitioner,

- versus -

THE COMMISSIONER OF CUSTOMS,
Respondent.

C.T.A. CASE NO. 5079

Promulgated:
APR 02 1996

x - x

DECISION

This is a petition to review the decision of respondent in Customs Case No.94-06, affirming *in toto* the twenty-six (26) decisions of the Acting District Collector of Customs of Cagayan de Oro City, Philippines involving two shipments of frozen orange juice concentrate (designated as Protest Case Nos. 01-93 and 02-93) and twenty-four shipments of industrial tomato paste (designated as Protest Case Nos.03-93 to 26-93) which were all bought from Del Monte Corporation, U.S.A. during the period, May 2, 1992 to October 10, 1992.

The aforesaid decisions of the Acting District Collector had the following uniform dispositive portion, to wit:

> "WHEREFORE, in view of the foregoing, this Office holds to maintain the CRF Value less 30 % (as discount) as the correct FMV and thus, hereby denies the protest of herein Protestant,

for the refund of alleged excess payment of duties and taxes, SO ORDERED."

The facts are undisputed.

Petitioner is a domestic corporation organized and existing under the laws of the Republic of the Philippines with principal office at Bugo, Cagayan de Oro City. It has for its purposes, among others, to develop and cultivate agricultural lands; to buy, hold, produce, sell, export, import and otherwise dispose of all kinds of personal property; and to obtain and use licenses in respect to any trade-marks, trade names, patents and inventions, processes, and the like.

The herein controversy arose when respondent subjected to *Societe Generale de Surveillance* (SGS for brevity) inspection said frozen orange juice concentrate contained in 68 articles of 55-gallon capacity drums. Petitioner contends that the shipments fall under the category of frozen foodstuff pursuant to Section 3 (e) of Joint Order No. 1-91 of the Department of Finance, Department of Trade and Industry, and the Central Bank of the Philippines, and were thus exempt from pre-shipment inspection by SGS. Worse still, petitioner avers that respondent adopted the SGS-Clean Report of Findings (CRF for short) valuation for the shipments based on the price of 24/12 oz. retail can instead of the 55-gallon capacity drums they were actually stored in.

In the same manner, petitioner asserts that, while admittedly subject to SGS inspection, respondent erroneously valued its shipments of tomato paste based on the SGS-CRF valuation of 24/12-oz. retail can, instead of considering their packaging in 300-gallon capacity bins.

In both instances, petitioner claims that the shipments were of different technical specification as compared to their valuation in retail can made by SGS. It thus insists on the invoice valuation as per import entry as the true and correct valuation of the shipments.

Records show that petitioner, pursuant to Customs Memorandum Order No.51-92, questioned the Fair Market Value (FMV for short) of each of the shipments as determined by SGS before the Customs-SGS Import Valuation and Classification Committee (Committee for brevity). The Committee, taking into account the packaging condition of the shipments, resolved to adjust the SGS-CRF valuation by deducting a 30% discount from it, which was found sufficient to reflect the true and correct valuation of the shipments.

During the deliberations of the Committee, petitioner cited the technical differences between its shipments and that of the 24/12 oz. retail can used by SGS as the basis for its CRF valuation. It also submitted in evidence a copy of the February 22, 1993 issue of the Food Institute Report, a US publication indicating the prices of tomato paste on a weekly basis for the year 1992 as proof of the correctness of its invoice valuations. At the same time, the SGS, through its representative, Alex Pellereto, acknowledged that the CRF valuation was based on a wholesale distributor's price list for cases of 24/12 oz. retail pack rather than for the 300-gallon capacity bins. (Indorsement of Committee Findings dated October 30, 1992, p.437, Customs records)

Despite the above, however, the Committee still maintained its position to adopt the 30% discount due to the nature of packaging of the shipments, and the unconfirmed status of the publication.

In view of the fact that under paragraph II (F) of Customs Memorandum Order No.12-93, the resolutions of the Committee are final and unappealable, petitioner pursued its various protests with the Collector of Customs of Cagayan de Oro City. Subsequently, it paid the required deficiency duties and taxes in the aggregate amount of P3,420,648.00. (Petition for Review, par.11.6; Answer, par.7; Exhibit "C")

Meanwhile, Committee report somehow reveals that the July 1993 issue of the Food Institute Report had already been adopted by the Committee itself for import valuation of similar shipments.(1st Indorsement dated October 1993 by the Chairman of the Committee, pp. 441 to 443, Customs records)

On December 6, 1993, the Collector eventually denied all of the 26 protest cases, and on appeal, respondent wholly affirmed on February 15, 1994 all of the decisions of said Collector.

Hence, this appeal.

At the trial, respondent presented his case for decision based on the records and waived his right to file his memorandum. Petitioner, on the other hand, filed its memorandum on July 5, 1995.

The issues to be resolved thus center on:

1) Whether or not respondent is justified in disregarding the probative value of the February 22, 1993 issue of the Food Institute Report as a basis of valuation, for the reason that it was unverified; and

2) Whether or not respondent is justified in adopting the SGS-CRF valuation less 30% discount in arriving at the true and correct FMV of petitioner's goods.

For better understanding, the pertinent provision of the Tariff and Customs Code of the Philippines, as amended, governing the issues involved herein, is hereunder quoted (hereinafter called the "law"), to wit:

> "SEC.201. ***Basis of Dutiable Value.***-The dutiable value of an imported article subject to an *ad valorem* rate of duty shall be based on the cost (fair market value) of same, like or similar articles, as bought and sold or offered

for sale freely in the usual wholesale quantities in the ordinary course of trade in the principal markets of the exporting country on the date of exportation to the Philippines (excluding internal excise taxes to be remitted or rebated) or where there is none on such date, then on the cost (fair market value) nearest to the date of exportation, including the value of all containers, coverings and/or packings of any kind and all other expenses, costs and charges incident to placing the article in a condition ready for shipment to the Philippines, and freight as well as insurance premiums covering the transportation of such articles to the port of entry in the Philippines.

Where the fair market value or price of the article cannot be ascertained thereat or where there exists a reasonable doubt as to the fairness of such value or price, then the fair market value or price in the principal market in the country of manufacture or origin, if it is not the country of exportation, or in a third country with the same stage of economic development as the country of exportation shall be used.

When the dutiable value of the article cannot be ascertained in accordance with the preceding paragraphs or where there exists a reasonable doubt as to the cost (fair market value) of the imported article declared in the entry, the correct dutiable value of the article shall be ascertained by the Commissioner of Customs from the reports of the Revenue or Commercial Attache (Foreign Trade Promotion Attache), pursuant to Republic Act Numbered Fifty-Four Hundred and Sixty-Six or other Philippine diplomatic officers or Customs Attaches and from such other information that may be available to the Bureau of Customs. Such values shall be published by the Commissioner of Customs from time to time.

When the dutiable value cannot be ascertained as provided in the preceding paragraphs, or where there exists a reasonable doubt as to the dutiable value of the imported article declared in the entry, it shall be the domestic wholesale selling price of such or similar article in Manila or other principal markets in the Philippines on the date the duty become payable on the article under appraisement, on the usual wholesale quantities and in the ordinary course of trade, minus:

(a) not more than twenty-five (25) per cent thereof for expenses and profits; and

(b) duties and taxes paid thereon."

(as amended by E.O. No.156)

At a glance, we do not see in the provisions of the law the kind of procedure taken by the respondent in determining the dutiable value of the questioned shipments. Analyzed from the facts of the case, it is only on the ground of "reasonable doubt" as provided under the third paragraph of said section that the act of respondent may be approximated.

The high FMV indicated in the various SGS-CRFs was enough basis, initially, for the respondent to have reasonable doubt on the correctness of the valuations declared by petitioner. Upon later appeal to the Committee, petitioner, in the case of tomato paste, presented the prices listed in the Food Institute Report to support its case. Unfortunately, the Committee disregarded the evidentiary value of the publication because it only indicated price trends, and, on the basis of SGS findings, that the same did not reflect domestic wholesale level. (April 14-16, 1993 and September 22-23, 1993 Committee reports, pp. 324, 416, Customs records) Subsequently, however, the Committee cited another reason for not accepting the publication. It said that the publication has not been confirmed or verified, but stated otherwise that future shipments of similar nature shall be assessed based on such publication. (2nd Indorsement, November 12, 1993 of the Chairman of the Committee, p.424, Customs records)

On appeal, the Committee findings were adopted and affirmed in the decisions of the Collector and herein respondent respectively.

It appears from the foregoing narration that, eventually, respondent upheld the decision of the Collector to disregard the validity of the Food Institute Report because it was so unverified at the time of shipments and during its presentation before the Committee, but afterwards, made use of the same.

We deem such disregard of the publication as an error on the part of the respondent.

Let it be understood that at the time the Collector handed down his decisions on December 6, 1993, similar shipments of tomato pastes were already being subjected to valuation based on the prices listed in the Food Institute Report which has been previously ignored for being unverified.

The subsequent acceptance of the publication should be made to benefit the petitioner as the protested cases were then still pending in status, meaning not yet terminated.

By its acceptance, common sense dictates that prior issues of the publication should have been given weight in determining the correct dutiable value. We observe that the publication was on its 66th year of publication at the time its February 22, 1993 issue was presented by petitioner in evidence (p. 445, Customs records). The later adoption of the July, 1993 issue of the publication (p.443, Customs records) as the basis for establishing the dutiable value necessarily resulted in giving full faith and credence to the trustworthiness of the entire publication, most especially on issues released only a few months prior to such adoption. Its recognition retroacts to prior issues. In effect, it was verified while the protest cases were still pending with the Collector.

Applying the Rules of Court " x x x by analogy or in a suppletory character and whenever practicable and convenient x x x " (Rule 143, Revised Rules of Court), the Food Institute Report, which is a weekly posting of the American Institute of Food Distribution, Inc. can easily qualify as a commercial list under Section 45, Rule 130 of the same, which states, thusly:

"Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation is admissible as tending to prove the truth of any relevant matter so stated if that compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them therein."

SGS has already relied on the publication. There is no justifiable reason therefore for this Court not to validate the other issues of said publication.

Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon and demand evidence of a less certain and satisfactory character. (20 Am. Jur. 818: Sisson vs. Cleveland and T.R. Co., 90 Am. Dec. 252 as cited in Compendium on Evidence by Sibal and Salazar, 3rd Ed.)

With the adoption of the publication, it is obvious that SGS committed a mistake in not knowing the existence of tomato paste in bins and correspondingly basing thereon the true and correct dutiable value.

In our earlier discussion on reasonable doubt as to the FMV of the imported articles declared in the entry, respondent is mandated to ascertain the correct dutiable value from, among others, "such other information" that may be available to him (3rd par., Section 201, Tariff and Customs Code, *supra*).

We assume in this case that "such other information" pertains to the SGS-CRF, it being found to be different from the declaration of the petitioner. Under Customs Memorandum No.39-92, pars. II-1 and 4, SGS is the inspector of goods destined for importation into the Philippines from all countries, while CRF refers to the inspection report issued by SGS for inspection as to quality, quantity, price, ***dutiable value***, verification of Customs and Tariff Code Classification and Verification of tariff rate of the imported goods prior to shipment to the Philippines.

In this instance, however, where the Food Institute Report has been utilized by respondent, the CRF should have been disregarded and the publication well-considered as the true information. In so adopting the Food Institute Report, respondent has in effect acceded to the fact that the cost (FMV) of the goods imported by petitioner is truly reflected by the prices indicated in such report. The reasonable doubt initially entertained by respondent was eventually obliterated by the later adoption of the publication, hence, there is no longer the need to resort to other modes of determining the dutiable value as prescribed in the second up to the fourth paragraphs of Section 201 of the Tariff and Customs Code, as amended. In earlier cases decided by the Honorable Supreme Court, before the amendment introduced by E.O. No. 156, the failure to substantiate "reasonable doubt" has resulted in the adoption of home consumption value or price as declared in the consular, commercial, trade, or sales invoice. (**Commissioner of Customs vs. Court of Tax Appeals**, 162 SCRA 730; **Acting Commissioner of Customs vs. Wise and Company, Inc.**, 214 SCRA 597). With the aforesaid amendment and the consequent abandonment of "reasonable doubt" through the later adoption of the publication as above discussed, we firmly believe that the cost (FMV) as declared in the import entry is the true and correct valuation of the shipments in question.

Examined from another angle and ***assuming*** that there is "reasonable doubt", the decisions of the Collector consistently declare that the basis for the 30% discount was attributable to the different packaging condition of the subject shipments. We consider such basis on the nature of packaging and the 30% discount as arbitrary.

First, let us discuss the nature of packaging.

Petitioner has sufficiently demonstrated the wide differences in production specifications between industrial tomato paste (300 gallon bins) and consumer paste (12 oz. retail can) which are as follows:

	12 oz. Retail Can	300-Gallon Bins
Description	Consumer size for home use	Bulk pack for remanufacture
Processing method	Hot fill/cook	Aseptic
Solids (Brix)	24.7	31.3
Specific Gravity (lbs./gal.)	9.18	9.45
Viscosity (Bostwick)	8.0 max	4-6
Container	Enameled steel three piece can	Flexible bag in wooden bin
Container cost	$0.12 each	$130.00 each
Pkg. cost/lb. of Product	$0.160	$0.046

(Protest, p.3, pp.348, 340, etc., Customs records.)

The two items above are different in packaging, processing method, solids, specific gravity, viscosity, container, cost of container and packaging cost. What respondent took into consideration was the packaging condition only. Assuming that 30% discount could have taken care of the disparity in packaging, still it is evident that the other factors were not considered at all.

In the usual course of trade, the packaging and the contents of a wholesale product is no different from the retail product. The main difference lies in the volume of purchase of the particular product and in its stage of entry in the distribution channels of the market, and not on any variation in the container and substance of the product. To illustrate, a retail- sized can of tomato paste when bought at a *sari-sari* store would surely command a higher price when compared to a tomato paste of similar size and packaging bought in large quantity from a wholesaler or manufacturer. The manufacturer of the product would, as industry practice dictates, give discounts on the retail price of the product when bought in large volume because it would relieve him of so many variable costs attendant to marketing the product when sold through retail. That, however, is not the scenario in this case. Specifically, petitioner's "wholesale",or more accurately, bulk shipments were industrial grade materials needing further processing while the 12 oz. retail can of SGS was based on ready to eat finished products. (Protest of petitioner, pp.348-349, 340-341, etc., Customs records)

The Honorable Supreme Court has invariably defined "wholesale" and "retail" in this wise, to quote:

> "If the use made or to be made by the purchaser of goods or merchandise be for resale at profit, the goods being unaltered when resold, the quantity of the goods sold being

> large not to be used by the purchaser or in excess of the requirements of his business and the merchant selling the goods habitually engaged in the sale of such goods in large quantities to his customers, the sale may be deemed wholesale. Otherwise, it is retail." (Tan vs. De la Fuente , 90 Phil. 522 as cited in Philippine Law Dictionary, 3rd Ed. by Moreno; emphasis supplied), and;
>
> "A term [wholesale] which accurately imports a selling, the primary and usual meaning of which is the sale of goods in gross to retailers who sell to consumers.
>
> *Prima facie*, a sale by a merchant to a retailer; a sale by large parcels, **generally in original packages**, and not by retail; a sale of goods by the piece or in large quantity, as distinguished from those made in samall quantities.
>
> A sale in large quantity to one who intends to resell; **selling by the original or unbroken package or barrel only to dealers for resale; selling in unbroken pieces or parcels, or in a number of pieces or parcels**; selling to retailers or jobbers rather than to consumers; the sale of goods in gross to retailers who sell to consumers; or the sale of goods in mass, in the gross, in great quantities." (Ciudad de Manila vs. Tanjuangco, 18230, February 28, 1958 as cited in Philippine Law Dictionary, ibid; emphasis supplied)

From the foregoing definitions and elucidations, it is crystal clear that the determination made by the respondent in arriving at the wholesale price of the imported shipments of petitioner is tainted with arbitrariness.

On the 30% discount, this Court declares it to be not in conformity with the law. It could not have been derived based on "such other information" as abovestated because no SGS report or finding was ever made on the matter. The Committee merely described it as a "x x standard discount in accordance with a previous Committee decision x x" (2nd Indorsement by the Chairman of the Committee, p.424, Customs records) and one "x x which may be logically approximated x x." (Decision of Collector, p. 2) These descriptions can not override the validity of the information provided by the publication, which are based on factual figures.

It is not even possible to think that the 30% discount is a "standard" derived from "such other information" described under the third paragraph of the law because to construe it that way would, in effect, render inutile and nugatory the fourth paragraph of the same law, requiring the dutiable value to be based on the domestic wholesale selling price minus 25% for expenses and profits, and duties and taxes paid thereon. To accept such "standard" would cause all goods or articles placed under "reasonable doubt" as subject to an across the board 30% discount in determining wholesale valuation in all instances, without qualification. The aforesaid fourth paragraph would be moot and academic. Clearly, this is not the intendment of the law.

With regard to the shipments of frozen orange juice concentrate, we, likewise, conclude that respondent acted arbitrarily in adopting the SGS-CRF valuation less 30% discount as their true and correct FMV.

Ditto in the case of tomato paste, we can not fathom the logic and legality behind respondent's resort to 30% discount due to nature of packaging.

For one, it is evident that SGS used the retail price of 12 oz. in computing the FMV of 55 gallon capacity drums of the orange juice imported by petitioner. A copy of the facsimile message of SGS representative Alex Pellereto dated May 11, 1992 shows the following calculations, to wit:

\$2.19 retail price for 12 oz. of can	x	.76% (retail market rate per U.S. Dept. of Commerce, Census Bureau)	=	\$17.7536 per gallon

(Customs records, p.365)

The above computation illustrates the price of orange juice concentrate on a per gallon basis. When it is multiplied by 55 gallon times the number of drums imported, it tallies with the figures stated in the corresponding CRFs' (Petitioner's Exhibits "C-5" and "D-5")

We observe, however, that the price of one gallon in the abovequoted computation applies to the retail market price of a finished product. In our opinion, the 55 gallon drums were priced based on wholesale cost of industrial grade orange juice concentrate. To apply the retail price per gallon to drums which were purchased in bulk and deduct 30% is simply ***non sequitur***.

Even worse is that the SGS calculation is mathematically incorrect. Multiplying $2.19 x .76% equals $0.016644 and not $17.7536. Also, how the dry weight of ounce is converted into liquid measure of gallon escapes our imagination.

Secondly, petitioner cited the following technical differences between the two packaging to prove its point that the 55-gallon drums it imported were different from SGS 12 oz. retail can valuation, to wit:

	12 oz. Retail Can	55-Gallon Drums
Description	Consumer size for home use	Bulk pack for remanufacture
Brix	41.8 to 42.2	62.8 to 63.3
Ratio (Base/Acid)	14.2:1 to 16.5:1	14.5:1 to 18.0:1
Plate Count (CFU/ml) OSA	50,000	1,000
Weight (lb/gal)	9.887 to 9.904	10.866 to 10.891
Container	Enameled steel three piece can	Steel drum
Container Cost	$0.07 each	$14.00 each
Pkg. cost/lbs. of product	$0.0058	$0.0021

We conclude that the above comparison of the technical characteristics of the orange juice concentrate are at variance in every respect. Again, respondent solely considered the nature of packaging in imposing a flat application of 30% discount. Verily, adjusting the packaging, assuming that it is correct, would not result in similarity of the two products. To reiterate, wholesale and retail are different only in terms of distribution channels and volume of purchase. Respondent would have been correct if the orange juice concentrate were of ready to drink quality similar to that of the retail packs. That is not the case, however.

Viewed from the language of the law, the 30% discount on the orange juice concentrate is also deemed to be without basis. The declaration of the Collector that the discount was found sufficient on the basis of the formula utilized by the SGS (Decision of Collector, Customs records) is not substantiated by the evidence on record. In fact, we have already elaborated in the above discussion that the calculation of the SGS was erroneous.

We frown upon the flat application of 30% discount on all the shipments involved in the case at bar as a way of determining dutiable value. It runs afoul with the essence of the law on cost (FMV).

As defined, FMV is the fair value of a property as between one who desires to purchase and one who desires to sell. (**Manila Railroad Co. vs. Fabie**, 17 Phil. 206)

The law requires that the articles subject of FMV be "x x bought and sold or offered for sale freely in the casual wholesale quantities in the ordinary course of trade in the principal markets of the exporting country x x."

The flat application of 30% discount ignores the preceding circumstances. It removes the element of "buy and sell or offer for sale" in the price valuation. The law is clear and unambiguous. It requires FMV to be based on "wholesale quantities" and when it talks of the same, it must be the actual, which should have been ascertained by respondent from "such other information", selling and buying or offer for sale freely in the ordinary course of trade. There are no shortcuts. A discount of 30% of the supposed wholesale price (SGS-CRF valuation) derived by using retail price is simply not the FMV contemplated by law, especially that the products differ in content specifications. Moreso, when it is ably shown that the supposed wholesale price was premised on failure to get the correct pricing of the articles then actually available in the country of origin (as in the case of wholesale price of tomato paste) and on wrong calculations (as in the case of orange juice concentrate).

In recapitulation, we arrive at the following observations, to wit:

> 1. Respondent committed a grave error in not considering the February 22, 1993 issue of the Food Institute Report.
>
> 2. Respondent committed a grave error in determining the wholesale price of petitioner's shipments through the use of retail price stated in the SGS-CRF.
>
> 3. Respondent committed a grave error in applying the flat 30% discount due to the nature of packaging to arrive at the wholesale price of petitioner's shipments.

In fine, the findings of respondent are hereby set aside and the FMV stated in the invoice of all the 26 shipments in question are hereby declared by this Court to actually represent the true and correct valuation thereof.

While findings by administrative or quasi-judicial agencies are entitled to the greatest respect and are practically binding and conclusive, they may be reviewed and reversed or nullified where they are patently arbitrary or capricious or are not supported by substantial evidence. (Republic vs. Sandiganbayan, 206 SCRA 506)

Prescinding from the above, we would like to make one last clarification on the particular idea advanced by petitioner that dutiable value should be based on invoice valuation, in view of the exemption from pre-shipment inspection and the corresponding non-issuance of CRF for shipments of orange juice concentrate, pursuant to Joint Order No.1-91.

Petitioner's attention is peremptorily directed to the provisions of said Order, more particularly par. 11.2.2 thereof, which states that shipments not pre-inspected by SGS or for which a CRF has not been issued, shall be subject to one hundred per cent (100%) examination. Assuming thus that the SGS-CRFs for the shipments of orange juice concentrate were not in accordance with the Order and hence, null and void, said shipment are nevertheless subject to 100% inspection. And in inspection, respondent is not precluded from treating the wrongly issued SGS-CRF as a ground to engender reasonable doubt based on such information.

WHEREFORE, in view of the foregoing, the decision of respondent in Customs Case No. 94-06 is hereby **REVERSED** and **NULLIFIED**. **ACCORDINGLY**, respondent is **ORDERED** to **REFUND** in favor of petitioner the amount of P3,420,648.00 representing excess duties and taxes paid under Protest Case Nos. 01-93 to 26-93. No Costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O. DE VEYRA
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