REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

JAMES A. TIUSECO,
Petitioner,

- versus -

C.T.A CASE NO. 4380

VICENTE JAIME, in his capacity as Secretary of Finance, and Salvador Mison, in his capacity as the Commissioner of Customs,
Respondent.

Promulgated :
APR 21 1995

x - x

DECISION

This is a petition for the release of some 3,202 bags of polyethelene resins acquired by the Petitioner from the Bureau of Customs.

Petitioner is of legal age, married and engaged in the business of plastic manufacturing. Among the raw materials supplied to him are polyethelene resins. He is the assignee of the goods in question who "financed the acquisition and purchase of the aforementioned resins from the Bureau of Customs and defray all the expenses for its release". (Deed of Assignment, Exh. G, CTA Records, p. 159)

The facts of the case are narrated by the Petitioner in his Petition for Review, thus:

> 4. On or about October 26, 1986, a shipment of polyprophelene and polyethelene resins in bags arrived in the Philippines which were consigned to a customs bonded warehouse in Cainta, Rizal.
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> Even after due notice and publication, no one came forward to claim the imported articles. Thus, a Notice and Declaration of Abandonment docketed as Abandonment Proceeding No. 87-269 was issued by the acting Law Division chief of the Port of Manila (POM).
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> 5. The goods were thereafter subjected to seizure proceedings covered by Seizure Identification No. 86-2530 (f) and (i), pursuant to Secs. 3, 4 and 5 of the Tariff and Customs Code.
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> 6. After hearing, then Deputy Commissioner and concurrently POM Collector, Cesar Dario, rendered a decision forfeiting 3,630 bags of polythelene resins in favor of the Government on August 6, 1987.
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> 7. As early as March 12, 1987, the E.L. Reyes General Merchandise and Contractors ("E.L. Reyes" for brevity) made a formal offer to purchase the articles through negotiated sale in a letter addressed to then Commissioner Alexander Padilla. (A photocopy of the letter is hereto attached as Annex "C").
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> The offer was reiterated on May 25, 1987 through the law firm of now Representative Francisco Sumulong. (A photocopy of the 2nd letter is hereto attached as Annex "D").
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> 8. Under date of September 10, 1987, Commissioner Padilla issued an indorsement approving the sale, at the same time instructing the PMO District Collector to release the resins to E.L. Reyes, the vendee in the negotiated sale, in consideration of

P400,250.00 (or P5.00 per kilo). (A photocopy of the indorsement is hereto attached as Annex "E").

9. Several days later, Commissioner Salvador Mison was appointed to take the place of Commissioner Padilla after the latter's resignation was accepted.

10. E.L. Reyes followed-up release of the shipment with the different officials of the Bureau of Customs but the release could not be had.

11. On June 13, 1989, the E.L. Reyes wrote collector Ampil for the POM requesting that a recomputation of the duties, taxes and other charges due on the subject shipment be made as suggested by responsible officials of the Bureau of Customs. (A photocopy of the request is hereto attached as Annex "F").

12. Accordingly, the records of the information were referred to the Special Appraiser's Group (SAG) by Atty. Jimenez, chief of the Ruling and Research Division, for the desired computation relative to the "request for implementation of the negotiated sale approved and signed by then Commissioner Padilla." (A photocopy of the indorsement is hereto attached as Annex "G")

13. Acting on the referral, the SAG assessed the amount of P503,957.01 representing duties, taxes and other charges on the subject articles. (A photocopy of the memorandum of the SAG is hereto attached as Annex "H" hereof).

14. Meanwhile, another indorsement signed by Atty. Woodrow Burgos, Chief of the Customs Legal Service, dated September 06, 1988 was addressed to the District Collector of Manila "for appropriate action inviting the attention of that office to the computation of the duties and taxes made by the SAG of the office of the Commissioner." (A photocopy of the indorsement is hereto attached as Annex "I".)

15. When Mr. Rolando Manuel, Chief of the ACDD, received the indorsement, he conferred with his immediate supervisor, Collector Ampil, regarding the matter. The latter decided to make the E.L. Reyes Merchandise pay for the goods. Thus, Mr. Manuel wrote a Memorandum dated September 12, 1988 to the Chief of the Cash Division ordering the latter to receive from E.L. Reyes General Merchandise the sum of P503,457.01 representing the price of 59,225 kgs. low density polyethelene resin and 20,825 kgs of polypropylene resin. A photocopy of the Memorandum, is hereto attached as Annex "J".

16. Payment was thereafter made on September 12, 1988 under BCOR No. 2158312. Gate Pass Nos. 5980 and 5981 were also issued on the same date. Photocopies of the BCOR and the gate passes are hereto attached as Annexes "K" and "L". A storage fee in the amount of P258,000.00 was also paid prior to the issuance of the gate passes.

17. Meanwhile, in a Memorandum dated August 02, 1988 addressed to Commissioner Mison, Atty. Edgardo Lopez of the Legal Service opined that Executive Order No. 1073 impliedly amended Section 2610 of the Tariff and Customs Code of the Philippines (TCCP) which provides for the holding of public auctions before goods can be sold via negotiated sale. The same E.O. also dispensed with the requirements of securing the prior approval by the Secretary of Finance as a condition for a valid negotiated sale. In order to further justify the sale, Atty. Lopez opined that while there is no showing that E.L. Reyes General Merchandise and Contractor is a local producer of polyethelene resin, there will be no harm to the local market if the resins were sold to E.L. Reyes General Merchandise (A photocopy of the Memorandum is hereto attached as Annex "M").

18. Despite all these, however, the said articles were not released for the reason that the Commissioner himself intervened and objected to the release thereof. He insisted that the negotiated sale should first be approved by the Secretary of Finance.

19. Realizing that the Commissioner could not be convinced to change his view on the matter, the petitioner, thru E.L. Reyes General Merchandise, wrote a letter-request to the Honorable Undersecretary of Finance Marcelo Fernando for the release of the subject goods (A photocopy of the letter request is hereto attached as Annex "N").

20. Several follow-up letters were thereafter sent to the Department.

21. The Honorable Undersecretary indorsed the request to the legal division of the Department for Comment (The indorsement is hereto attached as Annex "O").

22. Acting on the indorsement, the legal division, through E. Cesista, sent a Memorandum to the Undersecretary recommending the immediate release of the goods in favor of E.L. Reyes General Merchandise (The Memorandum is hereto attached as Annex "P").

23. On May 22, 1989, the Honorable Undersecretary of Finance, in his first indorsement, returned for appropriate action the request of E.L. Reyes General Merchandise, "attention being invited to the provisions of Sec. 9 of Executive Order No. 1073 x x x" (A photocopy of the indorsement is hereto attached as Annex "Q").

24. In a letter dated June 01, 1989, the legal Counsel of the Petitioner, the undersigned law firm of Ongkiko Bucoy and Associates, requested the Commissioner of Customs to release the three thousand two hundred two (3,202) bags of low density polyethelene on the basis of the Undersecretary's indorsement (The letter is hereto attached as Annex "R").

25. In reply, the Commissioner sent a letter dated June 07, 1989 to the undersigned law firm and attached thereto a copy of the 2nd indorsement dated June 08, 1989. In his haste to inform the undersigned of his intention not to release the goods, the Commissioner failed

to note the disparity in the dates aforementioned. (Photocopy of the June 07, 1989 letter are attached as Annex "S").

26. Meanwhile, while all this events were taking place, another party in the name of Alvino Tan has filed a request for the release of subject goods in his favor.

27. In a letter dated July 05, 1989 and received by the undersigned on July 14, 1989, the Honorable Undersecretary Marcelo Fernando stated that the Department concurs with the findings of the Customs Commissioner. (Annex "B" hereof).

(Petition for Review, pp. 3-9)

Hence, this appeal.

On November 28, 1989, Petitioner filed a Motion for Release Under Bond saying that:

4. The continuous detention of said bags of Polyprophelene and Polyethelene resins since March 1988 has caused them to deteriorate due to exposure to elements and will become yellowish. In fact, the continuous deterioration of the aforementioned bags of Polyprophelene and Polyethelene resins may render the same virtually worthless and valueless to the damage and prejudice of herein Petitioner.

5. Indubitably, unless said imported bags of Polyprohelene and Polyethelene resins are released from customs custody upon posting of a bond, Petitioner will continue to suffer great and irreparable injuries.

6. Petitioner is willing and able to post a bond in such amount to be fixed by this Honorable Court for the release of the said 3,202 bags of Polyprophelene and Polyethelene resins pending adjudication of this case. The bond will answer for the subject importation and their corresponding taxes, duties and

charges in the event that the decision in this case would be adverse to the Petitioner.

(CTA Records, pp. 79-80)

On January 8, 1990, Respondent, instead of disputing the above-narrated facts, filed a Motion To Dismiss And Opposition To The Motion For Release Under Bond on the following grounds:

1. Petitioner is not the real party in interest and/or he has no legal personality to file the petition;

2. Petitioner not being the real party in interest is not entitled to the release of the goods in question;

3. The alleged negotiated contract of sale over the subject matter of the Petition is null and void.

(CTA Records p. 90)

Opposition and Reply to Motion to Dismiss and Opposition to the Motion for Release Under Bond was submitted by Petitioner on February 5, 1990 maintaining, on the other hand, that:

a. Petitioner, being the assignee of the goods in question is the real party in interest and has legal personality to file the petition;

b. Petitioner is entitled to the release of the goods being the assignee and real party in interest;

c. The negotiated contract of sale of the articles in this case is perfectly legal, valid and binding.

(CTA Records, pp. 117-118)

In their Rejoinder filed on February 19, 1990, Respondents reiterated their aforementioned position and elaborating that the provisions of law applicable to the case at bar should be Sections 2601 to 2610 of the Tariff and Customs Code and not Executive Order No. 1073 as erroneously viewed by the Petitioner.

On June 26, 1992, this Court in resolving the above-said issues ruled, thus:

> On the question of the legal personality of petitioner to file the petition and/or his not being the real party in interest, the Deed of Assignment submitted by petitioner as evidence and subsequently admitted by this Court appears to work in petitioner's favor. It may be noted that respondents failed to put any objection to the admission of the Deed of Assignment as evidence. We deem that the failure of petitioner to include said Deed in its petition was mere inadvertence on its part, but cured by the subsequent admission of the Deed as evidence. The same Deed of Assignment contains the answer to respondents' contention that petitioner did not play any role in the negotiations, nor that his name was never mentioned as an interested or affected party, as it is indicated in the Deed that the assignee (petitioner) "has financed the acquisition and purchase of the aforementioned resins from the Bureau of Customs". In accordance with law, therefore, the Deed and Assignment effected to transmit all the rights, object of the contract, of the assignor to the assignee, petitioner in the case.

Hence, the petition to release under bond the subject 3,202 bags of Polyethelene resins and Polyprophelene resins was thereby GRANTED. In fact, this

Court ORDERED the RELEASE of said goods under bond but was not actually released to the Petitioner for the alleged reason that the same can no longer be found.

The only issue left to be resolved therefore is: Whether or not Petitioner is entitled to the final release of the goods in question.

In denying the release of the subject good, the Respondent Commissioner of Customs ruled that:

> xxx xxx xxx
>
> Executive Order No. 1073 was issued to prescribe safeguards for domestic industries upon the lifting of import licensing for certain products. It did not amend the provisions of the Tariff and Customs Code of the Philippines on the manner of disposing property in custody under Sections 2601 to 2612
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> Section 9 of E.O. No. 1073 is hereunder quoted for clarity and to facilitate verification:
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>> "Sec. 9. Any product subject to import licensing but imported without prior clearance of the designated import regulating or monitoring agency, as provided for in Section 1 and 2 of this Executive Order, shall be seized by the Bureau of Customs, which shall then export such product directly or through the appropriate government agency or sell the product with preference to an injured party (local producer) at a negotiated price taking into consideration potential revenues to the government and the damage due to lost production."

The provision of E.O. 1073 about negotiated price must be reconciled with Section 2610 of the TCCP where the approval of the Secretary of Finance must be obtained by the Customs Commissioner before a negotiated private sale can be undertaken to the best interest of the government. There is no such approval. The price offered by E.L. REYES GENERAL MERCHANDISE was initially P400,250.00, but later unilaterally increased to P503,957.01. These resins can be sold at a much higher price. In fact, the Bureau received several offers to purchase the resins for at least ONE MILLION PESOS. For this reason, the offer of E.L. REYES was not favorably indorsed by the undersigned to the Secretary of Finance because it was disadvantageous to government interest.

The provision of E.O. 1073 was not complied with since E.L. REYES GENERAL MERCHANDISE failed to establish itself as an injured party, thereby having preference over the other domestic industries. For this reason alone, E.L. REYES cannot avail of E.O. No. 1073 to acquire the resins.

Finally, it is submitted that the requirement of two (2) failed public auctions must first be complied with before the resins can be sold in a private negotiated sale. The resins were never sold at public auction.

We agree.

To Our mind, the applicable law in the case at bar is Section 2610 of the Tariff and Customs Code which provides, thus:

Sec. 2610. Disposition of Unsold Articles for Want of Bidders. -

xxx xxx xxx

If the Article offered for sale is not suitable either for official use or charity, then the same may be re-exported as government

> property through the Ministry of Trade or any other government entity through barter or sale. If the article cannot be disposed of as provided above, the Collector shall report the matter immediately to the Commissioner who **may,** subject to the approval of the Minister of Finance, dispose of the article to the best advantage of the government in a **negotiated private sale** which shall be consummated in the presence of a representative of the Commissioner on Audit, in the manner provided for by this Code. (Underscoring supplied)

Note should be taken on the underscored phrase "the collector shall report the matter immediately to the Commissioner who **may,** subject to the approval of the Minister of Finance, dispose of the article to the best advantage of the government in a negotiated private sale... " particularly on the word "**may**" which gave ample discretion to the Commissioner on whether or not he would dispose the articles in a negotiated sale. And if he would thus submit them in a negotiated sale, **there should be prior approval thereof by the Minister** (now Secretary) **of Finance**. There being no such approval, in the case at bar, such negotiated sale fell short of its legality. Hence, null and void.

Executive Order 1073 is not applicable to the instant case as the Petitioner failed to establish that the articles in question are subject "to import licensing but imported without prior clearance of the designated

Section 1 and 2 of this Executive Order..." (Sec. 9, thereof) Let it be recalled that E.O. 1073 was promulgated to protect particular industries in the Philippines for a period of one (1) year (Sec. 1, E.O. 1073). Thus, where the articles are brought into the country without prior clearance from the monitoring agency where such clearance is needed the articles in question may be disposed of pursuant to E.O. 1073 particularly No. VII, Sections 8 and 9 thereof which provided, thus:

> VII DISPOSAL OF ABANDONED AND SEIZED PRODUCTS
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> Sec. 8 Where an importer abandons a shipment of the product which is the subject of anti-dumping protest, the Bureau of Customs shall export such product directly or through the appropriate government agency or sell the product with preference to an injured party (local producer) at a negotiated price, taking into consideration potential revenue to the government and the damages due to lost production.
>
> Sec. 9. Any product subject to import licensing but imported without prior clearance of the designated import regulating or monitoring agency, as provided for in Section 1 and 2 of this Executive Order, shall be seized by the Bureau of Customs, which shall then export such product directly or through the appropriate government agency or sell the product with preference to an injured party (local producer) at a negotiated price taking into consideration potential revenues to the government and the damage due to lost production.

but which is not so in this particular case. Hence, E.O. 1073 should not apply.

Moreover, Petitioner also failed to establish that E.L. Reyes was "an injured party" much less having any preference over other domestic industries pursuant to above Section 9, E.O. 1073. In fact, Petitioner in effect admitted that E.L. Reyes was not "an injured party" when he stated, thus:

> 33.3. On the allegation that E.L. Reyes General Merchandise failed to establish itself as an injured party (local producer), suffice it to mention that there are no local producers of the articles subject matter of the case. Were these ground considered, there would be no local entity which may be allowed to acquire the said goods (Petition, CTA Records p. 15)

Such being the case, E.O. 1073 is again inapplicable. Hence, disposition thereof under said provision is null and void.

Lastly, the final blow that will put Petitioner's argument to rest comes from Section 10 of the same E.O. 1073 which provides, thus:

> SEC. 10. Suppletory Provision. - **The provisions of Sections 8 and 9 notwithstanding, the Bureau of Customs may apply Section 2603 and relevant provisions of the Tariff and Customs Code on the disposal of abandoned and seized products when it deems it a more appropriate procedure under the circumstances.** (Emphasis supplied)

This is, precisely, what the Respondents did. They, thus, applied "Section 2603 and relevant provisions (namely, Section 2610) of the Tariff and Customs on the disposal of abandoned and seized products when it deems it a more appropriate procedure under the circumstances".

Accordingly, in the light of the above explanations, it can now be safely concluded that where the goods entering the country are not those subject to regulation by the monitoring agency as contemplated by Sections 1 and 2 of E.O. 1073, such importation is nothing more than ordinary importation, and the disposition thereof is governed by Section 2610 of the Tariff and Customs Code --- i.e, a **negotiated private sale can only be valid** **<u>subject</u> to the approval of the Minister of Finance.**

Records of the case, however, reveal that herein Petitioner, through E.L. Reyes General Mds. and Contractor paid the Respondent the sum of P503,957.01 as evidenced by Official Receipt No. SER-2158312 dated September 13, 1988, the refund of the same amount is but proper and is in accordance with justice and equity.

WHEREFORE, in all the foregoing, the Decision of the Respondents not to release the polyethelene resins to the Petitioner is hereby **AFFIRMED**. Respondents, however, are hereby **ORDERED** to **REFUND** to Petitioner the sum of

P503,957.01 which the latter previously paid to and accepted by the former. The surety bond posted by the Petitioner is hereby ordered CANCELLED, the same having been unutilized.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

(On leave)
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