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ATTORNEYS-AT-LAW

HANDLING CUSTOMS TAX AUDITS AND REMEDIES

By: Domingo G. Castillo

A. PROCEDURE IN THE IMPORTATION AND RELEASE FROM CUSTOMS CUSTODY OF IMPORTED GOODS AND ARTICLES

1. Importation

a. When importation begins and ends

Importation is the act of bringing goods into a domestic port from a foreign country. Importation begins when the carrying vessel or aircraft enters the jurisdiction of the Philippines with intention to unlade therein and is deemed terminated upon payment of the proper duties, taxes and other charges due upon the articles, or secured to be paid, at a port of entry and the legal permit for withdrawal shall have been granted.[1]

b. Customs duties

All articles, when imported from any foreign country into the Philippines, shall be subject to duty upon each importation, even though previously exported from the Philippines.[2] The term "customs duties" are the taxes charged upon commodities on their being imported into or exported from a country. The exceptions are:

i. Those provided for under the TCCP (e.g., Section 105, CBMWs);

ii. Those granted under special laws;

iii. Those granted to government agencies, instrumentalities, GOCCs with existing contracts, agreements, obligations or commitments with foreign countries;

iv. Those that may be granted by the President upon prior recommendation by NEDA in the interest of national economy; and

v. Those granted to international organizations or associations and institutions pursuant to agreements or special laws.

In the Philippines, as a general rule, all kinds of imports are allowed. However, by virtue of the police power of the State, Congress has the plenary power to regulate or prohibit certain commodities for reasons of public health and safety, national security, and for the protection, development or rationalization of the local industry. Also by reason of our membership in the international community, we have the commitment to enforce international agreements to restrict trade on certain commodities or prohibit the same from entering or exiting our territory. Foremost of which are the protection against illegal or pirated tapes and discs under the TRIPS Convention, the protection on endangered Flora and Fauna under other treaties under the WTO.

Following are the classification of commodities according to their degree of restrictions:

[1] Section 1202, Tariff and Customs Code of the Philippines (TCCP).
[2] *Id.,* Section 100.

i. Freely-Importable Commodities

These are commodities the importations of which is neither regulated nor prohibited and may be made without the prior approval or clearance from any government agency.

Articles falling under this category are those importations that any person, whether natural or judicial, can immediately purchase abroad and free to bring into the Philippines without securing any permit from regulatory government body. Example of these commodities are: computers, typewriters, pencils or pens, shoes, toys (other than toy guns that are replicas) and any other social items.

ii. Regulated Commodities

These are commodities the importation of which requires import clearance or permit to import from regulatory or appropriate government agencies. Hence, the would be importers of the following articles need to secure or obtain a clearance or permit from the appropriate regulatory agency before they could legally bring the same to the Philippines:

	Commodity	Agency/Department
1.	Food and food products, drugs & devices, cosmetic products & hazardous substances	Bureau of Food and Drugs (BFAD) / Department of Health (DOH)
2.	Antibiotics, penicillin and its derivatives	BFAD
3.	Prohibited and/or Dangerous drugs	Philippine Drugs Enforcement Agency (PDEA)
4.	Precursors & essential chemicals	PDEA
5.	Various chemicals for the manufacture of explosives	Firearms and Explosive Office (FEO) / Philippine National Police (PNP)
6.	Dynamite, gunpowder, firearms & weapons of war & parts thereof, ammunitions & other explosives	FEO/PNP
7.	Radioactive materials	Philippine Nuclear Research Institute (PNRI)
8.	Radiation-emitting apparatus & related devices	Radiology Health Services (RHS) / DOH
9.	Radio communications equipment, accessories, components & parts thereof	National Telecommunications Commission (NTC) / Department of Transportation & Communication (DOTC)
10.	Plants & plant products	Bureau of Plant Industry /Department of Agriculture (DOA)

11. Animals & their products	Bureau of Animal Industry (BAI) / DOA
12. Fish & fishery aquatic products	Bureau of Fisheries & Aquatic Resources (BFAR) / DOA
13. Endangered Species of wild Fauna & Flora	Bureau of Forest Development (BFD) /Department of Environment and Natural Resources (DENR)
14. Pesticides & Fertilizers	Fertilizer and Pesticide Authority
15. Videograms (tapes, CD, VCD)	Optical Media Board
16. Movie films, TV programs & related promotional programs	Movie and Television Review and Classification Board
17. Rice	National Food Authority
18. Sugar & Molasses	Sugar Regulatory Administration
19. Tobacco	National Tobacco Administration
20. Color reproduction machines	National Bureau of Investigation/ Bangko Sentral ng Pilipinas (BSP)
21. Logs & Lumber	BFD/DENR
22. Philippine Legal tender in excess of Php10,000; Coin Blanks & Bank Notes	BSP
23. Parts & components of motor vehicles	Bureau of Import Services (BIS)/ Department of Trade & Industry (DTI)
24. Used trucks & engines, used tires	BIS/DTI
25. No-dollar imports of used cars	BIS/DTI
26. Products covered by mandatory Philippine National Standards	Bureau of Product Standards / DTI
27. Ships, vessels and warships of all kinds	Maritime Industry Authority
28. Sodium Cyanide, Chlorouflourocarbon & other Ozone-depleting substances	Environmental Management Bureau
29. Coals & Coals derivatives	Energy Industry Administration Bureau
30. Commodities originating from Socialist & other centrally-planned economy countries (Albania, Angola, Ethiopia, Laos, Libya, Mongolia, Mozambigue, Myanmmar, Nicaragua, North Korea)	Philippine International Trading Corporation

The enumeration above are exclusive and maybe changed or added as the need arises from time to time by the Philippine regulatory agency concerned.

iii. Prohibited Commodities

These are commodities the importation of which is not allowed or banned under existing Philippine laws or rules and regulations. Under Sec. 101 of the Tariff and Customs Code of the Philippines ("TCCP"), the importation of the following articles are prohibited.

- Absolutely Prohibited Importations

  Goods the importation of which is prohibited by law have been said to be *ipso facto* forfeited by the fact of importation.

  The following articles because of their very nature are considered prohibited without any qualifications or conditions:

  1. Written or printed articles in any form containing any matter advocating or inciting treason, or rebellion, insurrection, or subversion against the Government of the Philippines, or forcible resistance to any law of the Philippines, or containing any threat to take the life of, or inflict bodily harm upon any person in the Philippines.

  2. Written or printed articles, negatives or cinematographic films, photographs, engravings, lithographs, objects, paintings, drawings or other representation of an obscene or immoral character.

  3. Roulette wheels, gambling outfits, loaded dice, marked cards.

  4. Any adulterated or misbranded articles of foods or drugs in violation of the provisions of the "Food and Drugs Act".

  5. Opium pipes and parts thereof, of whatever material.

- Conditionally Prohibited Importations

  The following articles, notwithstanding their nature, maybe imported in the Philippines provided the conditions set forth by law are complied with:

  1. Gunpowder, ammunitions and other explosives, firearms and weapon of war, and parts thereof, when authorized by law [Sec. 101(a)];

  2. Articles, instruments, drugs and substances designed, intended or adapted for producing lawful abortion [Sec. 101(d)];

  3. Machines, apparatus or mechanical devices used in gambling or the distribution of money, cigars, cigarettes or other articles when such distribution is dependent on chance [Sec. 101(c)];

  4. Lottery and sweepstakes tickets authorized by the Philippine Government [Sec. 101(f)];

5. Marijuana, opium, poppies, coca leaves, heroin, or any other narcotics or synthetic drugs when imported by the Government of the Philippines or any person duly authorized by the DDB for medicinal purposes only {Sec. 101(i)];

6. Toy Guns, except those replicas; and

7. Used Clothing or Rags, except those donations to the DSWD or any duly registered relief organizations.

- Importation of Copyrighted Articles and/or Infringing Goods Prohibited

  Customs Administrative Order ("CAO") 6-2002 provides for the rules and regulations implementing the Intellectual Property Code of the Philippines (IP Code/R.A. 8293) in relation to Sections 51-60 of the Trade Related Aspects of Intellectual Property Rights Agreements (TRIPS), which has its objective of prohibiting the importation of goods or products that infringe upon all intellectual property rights. *[Handbook on the Tariff and Customs Code of the Philippines, as amended, and the Customs Brokers Act of 2004 (R.A. 9280) and its Implementing Rules and Regulations (First Edition 2005) by Atty. Ferdinand Nague, pp. 71 to 78)*

c. Who is the importer

Section 1203 of the TCCP considers the following persons the owners of imported articles:[3]

i. Consignee – the words "importers, owner or consignee" of cargos refer to the clientele of shippers of merchandise or those for whose account or benefit the shipment is made;

ii. Holder of the bill of lading or air waybill – duly indorsed by the consignee named therein;

iii. Consignor – the shipper of the imported articles from abroad if consigned to another;

iv. Underwriters of the abandoned articles – these are the insurance companies from whom the imported articles are insured under the principle of subrogation; and

v. Salvor – one who voluntarily and successfully saves imperiled property on navigable waters, be it damages, derelict or wrecked, for the benefit of the owner and with the expectation of receiving an appropriate salvage award.

d. Registration of Importers

Pursuant to Customs Memorandum Order ("CMO") 149-88, as amended by CMO 23-99, all regular importers are required to file an application under oath at the office of the Customs Intelligence and Investigation Service ("CIIS") of the Bureau of Customs ("BOC") and shall be issued a Certificate of Registration with an assigned registration number and shall be required to undergo a yearly update at the CIIS and at the office of Management

[3] ATTY. FERDINAND ASEJO NAGUE, C.B., Handbook on the Tariff and Customs Code of the Philippines, as amended, and the Customs Brokers Act of 2004 and its Implementing Rules and Regulations, p. 318.

Information Systems and Technology Group ("MISTG") of the BOC. Failure on the part of the importer to register shall be a ground for the non-acceptance of the entry filed or lodged by the importer or his customhouse broker.[4]

e. Liability of Importer for Duties

The importer is the person primarily liable for the payment of any duties on the imported goods/articles. It constitutes a personal debt due from the importer to the government which can be discharged only by payment in full of all duties, taxes, fees and other charges legally accruing. It also constitutes lien upon the articles imported which may be enforced while such articles are in custody or subject to the control of the government.[5]

f. Harmonized System

The Harmonized Commodity Description and Coding System or "Harmonized System ("HS") is an international product nomenclature since the Philippines is a member of International Convention for the Harmonized Commodity Description and Coding System which is reflected in Sections 103 and 104 of the TCCP, Volume I.

The HS effects uniformity in the classification of goods and standardizes commercial documents which ultimately enhances customs administration.

The Philippines generally uses the 8-Digit HS level to accommodate specific nomenclature for the purpose of reflecting our national requirements (e.g. for tariff protection and incentives).

Section 103 of the TCCP sets out the "General Rules for the Interpretation of the Harmonized System" to assure correct merchandise classification. As U.S. Customs defined it: "The General Rules of Interpretation ("GRI") are the single set of legal principles that govern the classification of merchandise under the Harmonized System.

2. Declaration of Dutiable Value

To determine the customs duties imposable upon an imported article, one must determine its dutiable value. The dutiable value of imported goods shall be determined using one of the six (6) methods of valuation enumerated under Section 201 of the TCCP, as amended by Republic Act ("RA") 9135. These methods, which are to be applied sequentially in the order provided by law, are as follows: transaction value, transaction value of identical goods, transaction value of similar goods, deductive value, computed value and fallback value. Section 204 of the TCCP states that the imported articles shall be subject to the rate or rates of import duties existing at the time of entry or withdrawal from warehouse in the Philippines, for consumption.

The primary method of valuation is the transaction value method. The law provides for certain conditions when the alternative methods may be applied in lieu of the transaction value method. Customs Administrative Order No. 4-2004 provides for a detailed discussion on the valuation methods.

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[4] *Id*., 319.
[5] Section 1204, TCCP.

The WTO Valuation Agreement provides for the following six (6) methods of valuation which should be applied, as a matter of rule in hierarchical order.

"Hierarchical order of application" provides that, in determining the correct customs valuation of an imported articles, the application of the six (6) methods of valuation above should be in strict order from Method 1 to 6, which means that, if the first method (Transaction value) fails to produce a correct value, then customs should proceed to apply the second value (transaction value of Identical Goods), and so on.

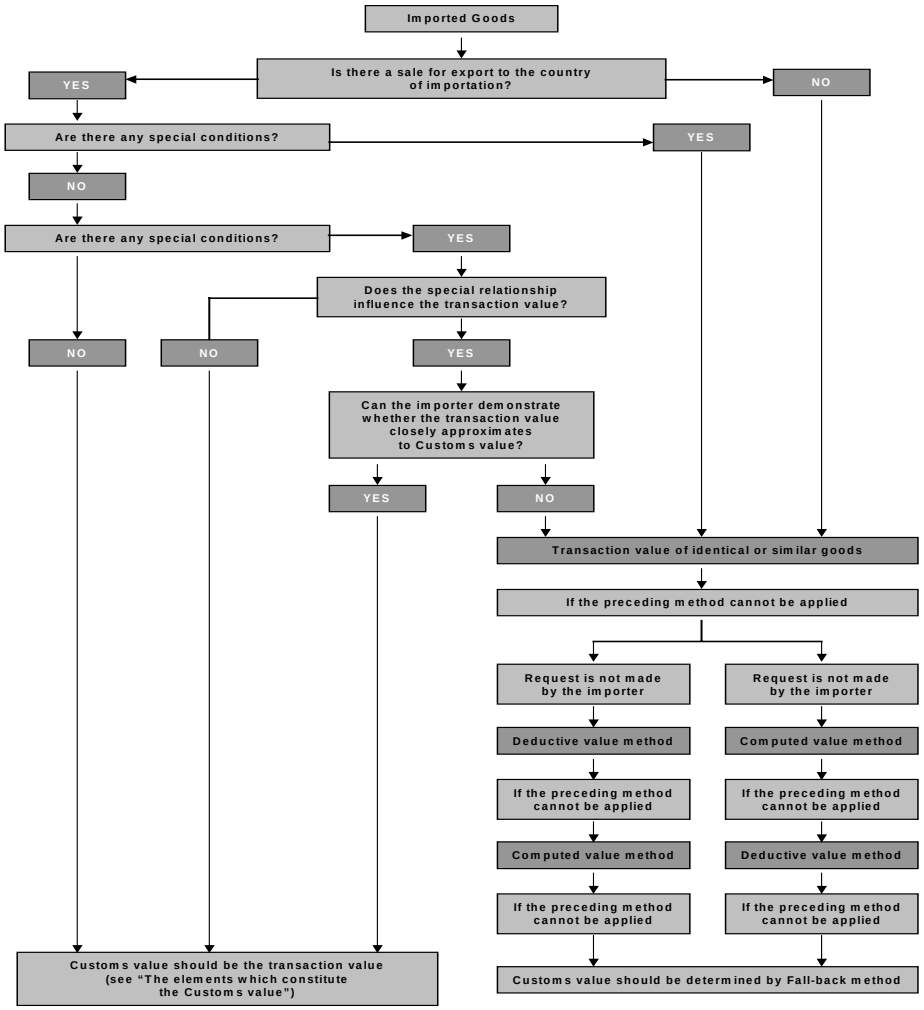
Valuation issues will not delay the release of shipments since the WTO valuation system promotes facility in the clearance of goods at different customs offices. The implementing rules further state that "If in the course of determining the dutiable value of imported goods, delay will necessarily ensue in the final determination of such dutiable value, the importer may secure the release of the imported goods from Customs provided:

a. The importer pays the duties and taxes based on his declaration.

b. The importer puts up a sufficient guarantee in such form as will be determined by the Commissioner of Customs in an appropriate regulation and in an amount equivalent to the additional duties and taxes due, computed by BOC using the alternative methods sequentially and in the order of succession as provided by law, to be approved by the Collector of Customs concerned.

c. Provided, however, that goods, the importation of which is prohibited by law shall not be released under any circumstance whatsoever. *(Sec. III.C, CAO 4-2004)*. Under the old law (RA 8181), the amount of Cash bond is 125%. Under the law (RA 9135) the amount of guarantee is equal to 100% of the ascertained duties and taxes.

Sequential Order of Valuation Method



Customs Value (A + B)

A. Price actually paid or payable:

The total payment (including indirect payment) made or to be made by the buyer to or for the benefit of the seller for the imported goods

(a) Invoice price (+)

If a price adjustment clause is applicable, the actual price replaces the invoice price.)

(b) Elements not included in the invoice price which constitute part of the price actually paid or payable (+): Price actually paid or payable.

For example,

(I) separate payment of part of the imported goods in addition to the invoice price;

(ii) settlement made or to be made by the buyer of debt owed to a third party by the seller in addition to the payment of the invoice price;

(iii) offset to debt owed the buyer by the seller, taken into account when determining the invoice price.

* Non-dutiable elements (-)

These elements do not constitute the price actually paid or payable and have to be deducted if distinguishable from the price.

For Example,

(I) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on the imported goods such as industrial plant, machinery or equipment;
(Price actually paid or payable)

(ii) the transport cost after importation; (ditto)

(iii) duties and taxes of the country of importation; (ditto)

(iv) interest charges; (Decision 3.1 if applied)

(v) activities undertaken by the buyer in his own account other than those for which adjustment is provided. (Price actually paid or payable)

Other elements which should be considered

a) Restrictions as to the disposition of the goods

b) Conditions or considerations

c) Proceeds of subsequent resale

d) Related party transaction

Additions to the Price actually paid or payable shall be made only on the base of objective and quantifiable data.

B. Adjustment, and in case Customs value is based on C.I.F., the optional adjustments.

(a) The following commissions and expenses, to the extent that they are incurred by the buyer (+);

(I) Commissions and brokerage fees, except buying commissions;

(ii) The cost of containers which is treated as being one for customs purposes with the goods in question;

(iii) The cost of packing whether for labor or materials.

* Non-dutiable elements (-)

Buying commissions. (-)

(b) The value of the following goods and services where supplied directly or indirectly by the buyer, free of charge or at a reduced cost for use in connection with the production and import transaction of the imported goods (+):

(I) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dyes, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods

(iv) engineering, development, artwork, plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods.

*Non-dutiable elements (-)

Engineering, development, artwork, plans and sketches undertaken in the country of importation.

(c) Royalties and license fees related to the goods being valued (excluding the right to reproduce the imported goods to the country of importation) that the buyer must pay directly or indirectly as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable. (+)

*Non-dutiable elements (-)

(I) the charges for the right to reproduce the imported goods in the country of importation

(ii) Payments made by the buyer for the right to distribute or resell the imported goods.

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller. (+)

(e) Freight charges, cost of insurance and other expenses incurred for transport of the goods to the port of importation.

3. Classification cases

Below is a summary of the procedure followed in the event of any dispute on the classification (and eventual dispute in the payment of customs taxes and duties) cases before the BOC.

a. Upon importation, the importer submits among others,[6] an Import Entry and Internal Revenue Declaration ("IEIRD") to the BOC. The IEIRD is based on self-assessment – that is, the importer provides a complete and correct declaration of the specifications of the importation and, on that basis, computes the duties and taxes due using the applicable valuation methods. The importer then pays the duties and taxes to the BOC through an authorized agent bank.[7]

b. The BOC officer/appraiser at the BOC's Formal Entry Division reviews the importer's supporting documents and, if warranted, conducts a physical examination of the goods.[8] If the appraiser contests the importer's classification of the goods, he shall immediately forward the documents to the BOC's Valuation Classification Review Committee Technical Support Team (VCRC-TST).[9]

c. The VCRC-TST, which is tasked to provide administrative and technical support to the VCRC, shall notify the importer to submit within ten (10) days from receipt thereof a written explanation/justification as to the truthfulness and accuracy of the declared value including the submission of documents relevant to the determination of the applicable method of valuation as well as the applicable dutiable value.[10]

d. The VCRC[11] deliberates and renders a decision on the classification issue.[12] The VCRC has twenty (20) working days from the date the case is calendared for deliberation within which to resolve the case. A case referred to the VCRC shall be calendared immediately, not later than three (3) working days from receipt thereof.[13] The VCRC is enjoined to convene at least once a week, or as often as necessary.[14]

e. While the case is pending before the VCRC, the importer can secure the tentative release of this goods by posting sufficient guarantee in the form of cash, manager's check, bank guaranty or surety bond equivalent to the additional duties and taxes due.[15] As a matter of policy, the guarantee should be in the form of cash, manager's check, or bank guarantee.[16]

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[6] Bill of lading or airway bill, commercial invoice, packing last and other documents as may be required by the BOC from time to time [See CMO No. 37-2001, Section IV(A)].
[7] See CMO No. 37-2001, section IV(A)(1)(2) & (3).
[8] See CMO No. 37-2001, section IV(C) outlining the detailed procedure at the Formal Entry Division or its equivalent unit.
[9] See CMO No. 37-2001, section IV(D)(5).
[10] See CMO No. 37-2001, Section IV(D)(5).
[11] The member of the VCRC are: (i) the District Collector as Chairman (ii) the Deputy Collector for Assessment as Vice-Chairman (iii) the Chief of the Formal Entry Division or equivalent unit as Member and (iv) other personnel as may be appointed by the BOC Commissioner upon the District Collector's recommendation following the guidelines set out in CMO No. 37-2001, Section III(E).
[12] See CMO No. 37-2001, Section IV(D)(6).
[13] See CMO No. 37-2001, Section IV(D)(7).
[14] See CMO No. 37-2001, Section IV(E) outlining the detailed procedure at the VCRC level.
[15] See CMO No. 37-2001, Section V(A); CAO No. 5-2001, Section III(C).
[16] See CMO No. 37-2001, Section V(A).

f. If the VCRC's decision is favorable to the importer, the Chief of the Collection Division shall notify the Chief of the Administration Division to issue a disbursement voucher and prepare a check payable to the importer in the full amount of the guarantee posted by the importer.[17]

g. If the VCRC's decision is adverse to the importer, the latter may either: (i) protest the decision pursuant to Section 2308 of the TCCP; or (ii) appeal the adverse decision to the BOC Commissioner.[18]

- Protest – the assessed duties and taxes and the corresponding docket fees must be paid. The importer has fifteen (15) days from the date the duties and taxes are paid or collected from the guaranty, within which to file the protest. Assuming he has not previously secured the release thereof from the VCRC, the importer may obtain the release of the goods upon payment of the assessed duties and taxes.[19] The District Collector shall issue an order for hearing within fifteen (15) days from receipt of the protest and hear the matter. Upon termination of the hearing, the District Collector shall render a decision within thirty (30) days.[20]

- Appeal – the importer has fifteen (15) days from receipt of the VCRC's adverse decision to appeal to the BOC Commissioner on the condition that the importer will agree to undergo a post entry audit.[21] Any appeal filed after the prescribed period shall be deemed dismissed.[22] No hearing on the appeal is required.[23]

h. If the District Collector's decision is adverse to the importer, the decision may be appealed to the BOC Commissioner within fifteen (15) days from receipt thereof.[24] If the BOC Commissioner's decision is adverse to the importer, the decision may be appealed to the CTA within thirty (30) days from receipt thereof.[25] Unless an appeal is made to the CTA in the manner and within the period prescribed by law, the BOC Commissioner's decision shall be final and conclusive.[26]

i. If the District Collector's decision is adverse to the government, the decision shall be automatically elevated to, and review by, the BOC Commissioner. If the BOC Commissioner affirms the District Collector's decision, the decision shall be automatically elevated to, and review by, the Secretary of Finance. However, if within thirty (30) days from receipt of the record of the case by the BOC Commissioner or the

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[17] See CMO No. 4-99, Section III(2.4). The documents required to support a disbursement voucher are: (i) original of BOC Form 38-A (Cash Bond-Provisional) equivalent to the guarantee (ii) the Collection Division Chief's notice to the Administration Division Chief (iii) the BOC-SGS Appeals Committee decision or the decision by any BOC-authorized officer (iv) a photocopy of the import entry with final assessment of duties and taxes.

[18] Please note that while CMO 37-2001 provides for these alternative remedies, under CAO 5-2001, the importer's only remedy from an adverse decision is an "appeal in the form of a protest" pursuant to Section 2308 of the TCCP, while under CMO 37-2001.

[19] TCCP, Section 2308; see CAO No. 5-2001, Section III-D; see also CMO No. 37-2001, Section III(A).

[20] TCCP, Section 2312. If the nature of the articles permit, the importer may be required to supply the District Collector with samples of the articles subject of the protest [TCCP, Section 2311].

[21] See CMO NO. 37-2001, Section III(B). In agreeing to a post entry audit, the importer effectively agrees to allow a customs officer to enter its premises during office hours to conduct an audit examination, inspection and investigation of its document flow, financial flow, goods inventory and other business processes. The detailed procedure is outlined in Section IV(C) of CAO No. 5-2001.

[22] TCCP, Section 2313.

[23] Vitug and Acosta, Tax Law and Jurisprudence 380 (2000).

[24] TCCP, Section 2313.

[25] TCCP, Section 2315.

[26] TCCP, Section 2402.

Secretary of Finance, as the case maybe, no decision is rendered by either of them, the decision under review shall become final and executory. The party aggrieved by the Secretary of Finance's decision may appeal to the CTA within thirty (30) days from receipt of the decision.[27]

j. An adverse decision by one of the CTA's Division may be appealed to the CTA *En Banc* by way of petition for review. The appeal may be taken within fifteen (15) days from receipt of the CTA's decision.[28]

k. If the CTA *En Banc* s decision is adverse to the importer, the decision may be elevated to the Supreme Court within fifteen (15) days from receipt thereof by way of petition for review on certiorari.[29]

4. Post-Clearance

a. Requirement to Keep Records

All importers are required to keep at their principal place of business in the manner prescribed by regulations to be issued by the Commissioner of Customs and for a period of three (3) years from the date of importation, all the records of their importations and/or books of accounts, business and computer systems and all customs commercial data including payment records relevant for the verification of the accuracy of the transaction value declared by the importers/customs brokers on the import entry.[30]

b. Post Entry Audit

The BOC, through its authorized customs officers, shall conduct audit examination, inspection, verification and/or investigation of transaction records of importers/customs brokers.[31] Pursuant to this power of the BOC, the Post Entry Audit Group (PEAG) was created under Executive Order No. 160.

The post entry audit of the BOC may be conducted within three (3) years from the date of final import entry (i.e., settlement of duties). The audit aims to, among others, verify a company's import transactions in order to determine whether:[32]

i. Imported goods are valued using the appropriate customs valuation method;

ii. The price paid or payable and the dutiable adjustments are correct and complete;

iii. Goods are properly described and the correct tariff classification are used;

iv. Quantity of goods, as reported, are correct;

v. Importer has complied with the reportorial, registration and other administrative requirements imposed by the BOC.

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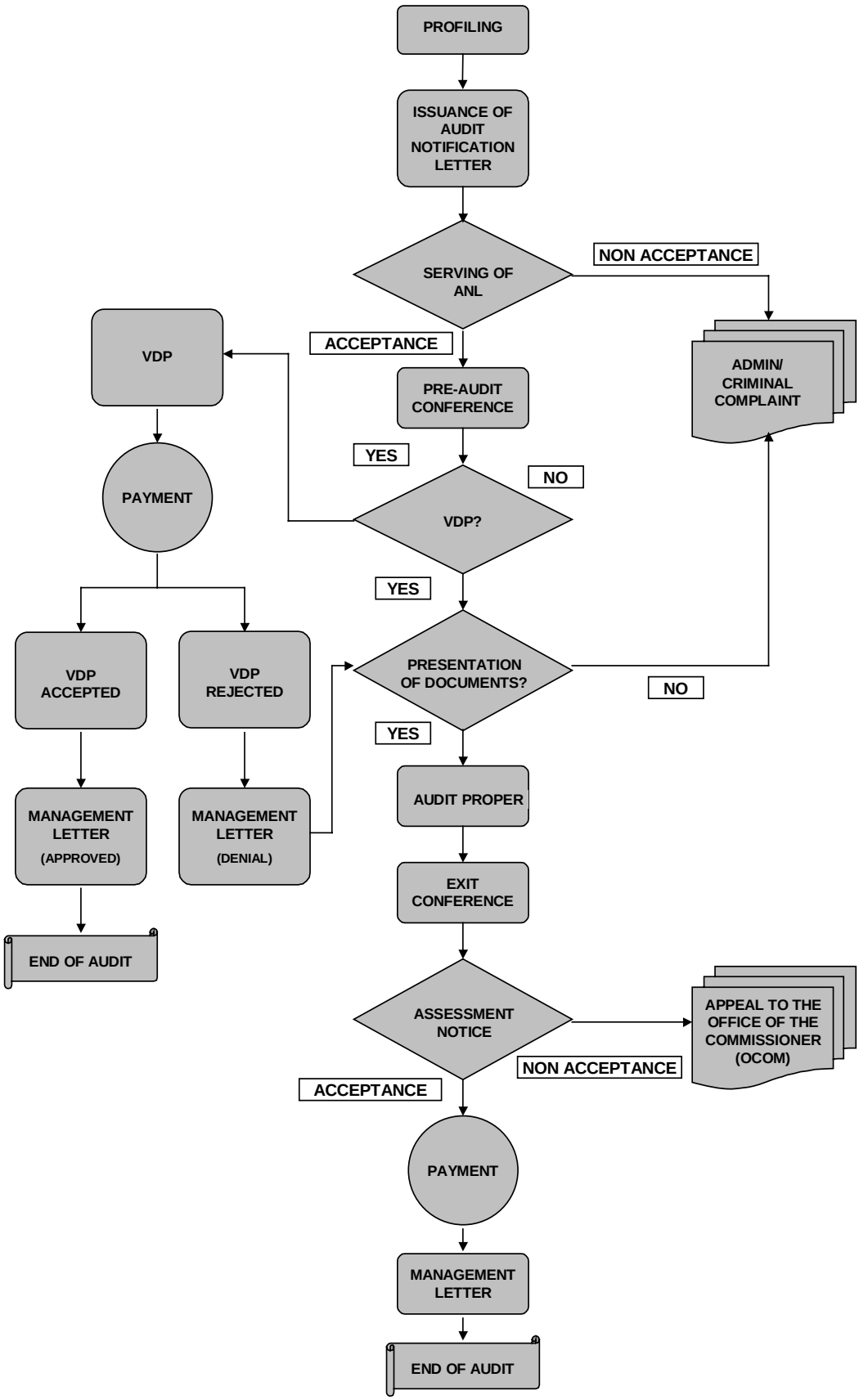
[27] TCCP, Section 2315.
[28] See Rules of Court, Rule 43, Sections 1, 3 and 4.
[29] See Rules of Court, Rule 43, Sections 1 and 2.
[30] Section 3514, TCCP.
[31] Section 3515, TCCP.
[32] http://www.ey.com/GLOBAL/content.nsf/Philippines/Customs_Compliance_Review?OpenDocument (last accessed February 24, 2008).


PROFILING
ISSUANCE OF AUDIT NOTIFICATION LETTER
SERVING OF ANL
NON ACCEPTANCE
ADMIN/ CRIMINAL COMPLAINT
ACCEPTANCE
PRE-AUDIT CONFERENCE
VDP
YES
NO
VDP?
PAYMENT
YES
VDP ACCEPTED
VDP REJECTED
PRESENTATION OF DOCUMENTS?
NO
YES
MANAGEMENT LETTER (APPROVED)
MANAGEMENT LETTER (DENIAL)
AUDIT PROPER
EXIT CONFERENCE
END OF AUDIT
ASSESSMENT NOTICE
APPEAL TO THE OFFICE OF THE COMMISSIONER (OCOM)
NON ACCEPTANCE
ACCEPTANCE
PAYMENT
MANAGEMENT LETTER
END OF AUDIT

5. Failure to pay correct duties and taxes on imported goods[33]

   Any person who, after being subjected to post entry audit and examination, is found to have incurred deficiencies in duties and taxes paid for imported goods, shall be penalized according to three (3) degrees of culpability subject to mitigating, aggravating or extraordinary factors that are clearly established by the available evidence. The penalty imposable is an administrative fine which ranges from ½ to 8 times the revenue loss depending on the degree of culpability i.e. negligence, gross negligence or fraud.

   Under the PEAG system, the importer has the right to:

   a. Verify the auditor's identification and the authenticity of the Audit Notification Letter (ANL);

   b. To clarify and inquire about the audit process;

   c. To be informed of the purpose of the audit, the composition of the audit team and the documents and records to be submitted and examined;

   d. To be informed of the audit findings;

   e. Contest the deficiency assessment, if any.

II. STEPS TO FOLLOW WHEN YOU RECEIVE AN ASSESSMENT FROM THE BOC.

1. Read the BOC letter carefully and study the basis of the assessment including the computations thereof.

2. Determine of the allegations in the assessment are correct including the correct classification under the Harmonized Code and the use of the tariff rate. If they are wrong, consult your customs broker and/or lawyer to formally write the BOC disputing the same.

   Where the customs value cannot be determined under provisions of Article 1 (transaction value method), there should normally be a process of consultation between the BOC and the importer with a view to arriving at a basis of value under the provisions of Articles 2 (transaction value of identical goods) or 3 (transaction value of similar goods), etc. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods, which is not immediately available to the customs administration may have information about the customs value of identical or similar imported goods, which is nor readily available to the importer. A process of consultation between the two (2) parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes. *[WTO Valuation Code, General Introductory Commentary]*

3. Request for a conference with the customs examiner and/or the District Collector disputing the assessment.

4. In case of doubt, pay the customs taxes and duties "under protest".

[33] Section 3611, TCCP.

5. Appeal any adverse ruling of the District Collector to the Commissioner of Customs.
6. Appeal any adverse ruling by the Commissioner of Customs to the Court of Tax Appeals.

III. DIFFERENCE BETWEEN SMUGGLING AND TECHNICAL SMUGGLING?

The term "smuggling" conveys the idea of a secret introduction of goods with intend to avoid payment of customs taxes and duties and signifies some form of deceit to introduce or to bring on shore, or carry from the shore, goods, wares or merchandise.[34] Section 3601 of the TCCP provides that:

"Any person who shall fraudulently import or bring into the Philippines, or assist in so doing, any article, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such article after importation, knowing the same to have been imported contrary to law, shall be guilty of smuggling and shall be punishable by fines stated therein."

Moreover, in the case of *"Felicisimo Rieta vs. People of the Philippines"* (436 SCRA 273), the Supreme Court held that in order that the person may be deemed guilty of smuggling or illegal importation prerequisites must concur:

1. that the merchandise must have been fraudulently or knowingly imported contrary to law;

2. that the defendant, if he is not the importer himself, must have received, concealed, bought, sold or in any manner facilitated the transportation, concealment or sale of the merchandise; and

3. that the defendant must be shown to have knowledge that the merchandise had been illegally imported. If the defendant, however, is shown to have had possession of the illegally imported merchandise, without satisfactory explanation, such possession shall be deemed sufficient to authorize conviction.

The term "technical smuggling" involves the false declaration in the import entries of the true or correct classification and/or the proper cost of taxes and duties or tariff rate that have to be paid thereon thereby resulting in a lower payment of customs taxes and duties. The difference between "smuggling" and "technical smuggling" is that oftentimes in "smuggling" there is no submission of a documents more particularly, the import entry with respect to the payment of taxes and duties whereas in the term "technical smuggling" it oftentimes result in the submission or falls or fraudulent documents to the BOC whereby there is a misclassification or misdeclaration of the goods supposed to be the subject of customs taxes and duties.

IV. WHAT TO DO WHEN YOU OVERPAY YOUR CUSTOMS TAXES AND DUTIES.

Due to the various procedures laid down by the TCCP on the challenge or protest of the correct taxes and duties that to be paid, oftentimes the importer is compelled to pay the taxes and duties under protest. The term "protest" is meant to be a written document to be filed by the importer with the District Collector against its decision as to the rate and amount of duty for classification of the imported goods. The filing of the protest suspends the running of the statutory period of limitation in the event that the protest has been decided in a re-liquidation

[34] 25 C.J.S. customs duties, subsection 248.

and conformity which has decision is made the statute of limitation begins to run. Once the formal protest is filed, the District Collector has to resolve the matter. If he denies the protest, the importer may still appeal to the Commissioner of Customs. As such, the goods are released. If the protest is given due course, the importer is entitled to a tax credit whereby he can apply to the District Collector and subsequently to the Commissioner of Customs with regards to issuance of a tax credit certificate that may be used for the future payment of customs taxes and duties. At this point, it is pertinent to mention that the issuances of tax credit certificates is only good for the taxes which is issued by the taxing authority. For example, if the tax credit certificate is issued by the BOC, the said certificate can only be use for the payment of customs taxes and duties which is assessed by the BOC. In contrast, if the tax credit certificate is issued by the Bureau of Internal Revenue ("BIR"), said certificate can only be used for the payment of taxes assessed by the BIR.

To stress this point, the Supreme Court in the case of *"Commissioner of Customs vs. Philippine Phosphate Fertilizer Corporation"* (437 SCRA 452) allowed the application by Philippine Phosphate Fertilizer Corporation of the tax credit certificate for refunds of duties and taxes on the basis of the Philippine Export Zone Authority Law more particularly Section 17 with regards to tax treatment of merchandise in the zone. Thus:

Section 17 of the EPZA (now PEZA) Law particularizes the tax benefits accorded to duly registered enterprises. It states:

> "SEC. 17 Tax Treatment of Merchandise in the Zone. – "(1) Except as otherwise provided in this Decree, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the Zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise or used whether directly or indirectly in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the following provisions of law to the contrary notwithstanding."

The cited provision certainly covers petroleum supplies used, directly or indirectly, by Philphos to facilitate its production of fertilizers, subject to the minimal requirement that these supplies are brought into the zone. The supplies are not subject to customs and internal revenue laws and regulations, nor to local tax ordinances. It is clear that Sec. 17(a) considers such supplies exempt even if they are used indirectly, as they had been in this case. Since Sec. 17(1) treats these supplies for tax purposes as beyond the ambit of customs laws and regulations, the arguments of the Commissioner invoking the provisions of the TCCP must fail. Particularly, his point that the importation of the petroleum products by Petron was deemed terminated under Sec. 1202 of the TCCP, and that the termination consequently barred any future claim for refund under Sec. 1603 of the same law is misplaced and inconsequential. Moreover, the cited provisions of the TCCP if related to Sec. 17(1) of the EPZA Law would significantly render the argument strained and, if upheld, obviate many of the benefits granted by Sec. 17(1), for the provision does not limit the tax exemption only to direct taxes.

V. WHEN IMPORTED GOODS CONSIDERED ABANDONED.

Section 1801 and 1802 of the TCCP deals with abandonment on imported articles. Thus:

> "SECTION 1801. *Abandonment, Kinds and Effects of.* — An imported article is deemed abandoned under any of the following circumstances:
>
> x x x
>
> f. When the owner, importer or consignee of the imported article expressly signifies in writing to the Collector of Customs his intentions to abandon; or
>
> g. When the owner, importer, consignee or interested party after due notice, fails to file an entry within thirty (30) days, which shall not be extendible, from the date of discharge of the last package from the vessel or aircraft, or having filed such entry, fails to claim his importation within fifteen (15) days which shall not likewise be extendible, from the date of posting of the notice to claim such importation.

Any person who abandons an article or who fails to claim his importation as provided for in the preceding paragraph shall be deemed to have renounced all his interests and property rights therein.

> SECTION 1802. *Abandonment of Imported Articles*. — An abandoned article shall *ipso facto* be deemed the property of the Government and shall be disposed of in accordance with the provisions of this Code.

Nothing in this section shall be construed as relieving the owner or importer from any criminal liability which may arise from any violation of law committed in connection with the importation of the abandoned article.

Any official or employee of the Bureau of Customs or of other government agencies who, having knowledge of the existence of an abandoned article or having control or custody of such abandoned article, fails to report to the Collector within twenty-four (24) hours from the time the article is deemed abandoned, shall be punished with the penalties prescribed in Paragraph 1, Section 3604 of this Code."

Based on the foregoing, there are two (2) kinds of abandonment.

1. Express abandonment – Under Section 1801 of the TCCP, as amended, there is an express abandonment when the owner, importer or consignee signifies with the District Collector his intention to abandon his importation in favor of the government, in writing and in under oath.

2. Implied abandonment – It is when:

    a. the importer, owner, consignee or interested party after due notice, fails to file and entry for its importation within the non-extendible period of thirty (30) days from the date of discharge of the last package from the vessel or aircraft; or,

    b. having filed an entry for a shipment fail to claim its importation within fifteen (15) non-extendible days the date of posting of the notice to claim such importation.

The following are the effects of abandoning imported articles.

1. Any person who abandons an article or who fails to claim his importation within the reglamentary period shall be deemed to have renounced all interest and property rights therein; and

2. An abandoned article shall *ipso facto* be deemed the property of the government to be disposed off in accordance with law.

Notwithstanding the foregoing, there has been a conservative view that there should be a hearing first conducted before forfeiture of the abandoned article should be effected by virtue of a seizure proceedings initiated by the Bureau of Customs. However, the importer or owner of the abandoned article is not relieved of any criminal liability which may arise from the violation of Tariff and Customs Law and other laws enforced by the Bureau of Customs committed in connection with the importation of the abandoned article. In contrast, the importer/owner if he has already renounced his rights over the imported article and the same has already been forfeited in favor of the government, the supposed civil liability of the importer/owner is distinguished unless the disposition of the article is burdensome on the part of the government like those harmful or anti-social goods.

VI. MODIFICATION OF DUTY

Section 401 of the TCCP, allows the modification of duties under the "Flexible Clause" where public hearings are conducted on petitions for tariff modification initiated by the private sector and the government before the Tariff Commission where its findings are recommendations are submitted to the NEDA for consideration of the Tariff and Related Matters (TRM) Technical and Cabinet Committees whereby the President of the Philippines signs an Executive Order ("EO") reducing or increasing import duties. For example, three (3) EOs were issued in 2010, thus:

> "EO No. 790 (Modifying the nomenclature and rates of import duty on various products under Section 104 of the Tariff and Customs Code of 1978, as amended).
>
> EO No. 818 (Extending the effectivity of the zero rate of import duty on milling wheat under Section 104 of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978, as amended, as provided for under Section 3 of Executive Order No. 765, Series of 2008).
>
> EO No. 819 (Extending the effectivity of the zero rate of import duties on cement and cement clinker under Section 104 of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978, as amended, as provided for under Section 3 of Executive Order No. 766, Series of 2008)"

Moreover, public consultations are conducted by the Tariff Commission regarding the Philippines' regional tariff commitments under the Association of Southeast Asian Nations (ASEAN); ASEAN Integration System of Preferences (AISP); ASEAN Trade in Goods Agreement (ATIGA); ASEAN-China Free Trade Area (ACFTA); and ASEAN-Korea Free Trade Area (AKFTA). With regard to WTO activities, the Tariff Commission reviewed and verified the comments/changes made by the United States on the Philippines' HS 2002 Revised Schedule of Commitments submitted to the WTO and participated in the Workshop on Market Access for ASEAN Economies.

In 2010, the President signed the following EOs drafted by the Tariff Commission concerning the implementation of the tariff commitments of the Philippines arising from its membership in the ASEAN:

> "EO No. 812 (Modifying the rates of duty on certain imported articles as provided for under the Tariff and Customs Code of 1978, as amended, in order to implement the commitment to reduce the tariff rates on ninety percent (90%) of the products in the normal track to zero with flexibility under the ASEAN-Korea Free Trade Area [AKFTA]).
>
> EO No. 814 (Modifying the rates of duty on certain imported articles as provided for under the Tariff and Customs Code of 1978, as amended, in order to implement the 2010-2012 Philippine schedule of tariff reduction under the normal track of the ASEAN-China Free Trade Area on certain products and to implement the transfer of certain tariff lines from the sensitive track to the normal track category of the ASEAN-China Free Trade)"

VII. WARRANTS OF SEIZURE AND DETENTION (WSD)

Section 2205 of the TCCP states that:

> "It should be within the power and duty of the customs official or any authorized person to make seizure of any vessel, aircraft, cargo, article, animal or other movable property, could the same be subject to forfeiture or liable for any fine imposed under tariff and customs laws, rules and regulations provided. However, the same is to be exercised on a conformity with the law and provisions of the TCC of the Philippines."

In this connection, the Supreme Court had occasion to rule in the case of *"Felicisimo Rieta vs. People of the Philippines"* (436 SCRA 273) that:

Furthermore, the search and seizure of goods, suspected to have been introduced into the country in violation of customs laws, is one of the seven (7) doctrinally accepted exceptions 36 to the constitutional provision. Such provision mandates that no search or seizure shall be made except by virtue of a warrant issued by a judge who has personally determined the existence of probable cause.

Under the Tariff and Customs Code ("TCC"), a search, seizure and arrest will be made even without a warrant of purposes of enforcing Customs and Tariff Laws. Without mentioning the need of priory obtained a judicial warrant, the code specifically allows police authorities "to enter, pass through or search any land or inclosure or any warehouse, store, or other building, not being a dwelling house and also to inspect, search and examine any vessel or aircraft, trunk, package, box or envelope to any person onboard or to stop and search and examine any vehicles, beasts or person reasonably suspected of holding or conveying any dutiable or prohibited article introduced in the Philippines contrary to law."

In the case of *"Feeder International Line Pte., Ltd. vs. Court of Appeals"* (197 SCRA 842) it was held that it is quite clear that seizure and forfeiture proceedings under the Tariff and Customs Law are not criminal in nature as they do not result in the conviction of the offender nor the imposition of penalty provided for in Section 3601 of the Code. As can be gleaned from Section 2533 of the code, seizure proceedings, such as those instituted in this case, are purely civil and

administrative in character. The main purpose of which is enforced against fines or forfeiture incident to unlawful importation of goods for the indeliberate incident to unlawful importation of goods or the indeliberate possession. The penalty of in seizure cases is distinct and separate from the criminal liability that may be imposed against the indicted importer or possessor in both kinds of penalties may be imposed. In other words, forfeiture proceedings are proceedings *in rem* and are directed against the *res* ("*Commissioner of Customs vs. Manila Star Ferry, Inc."* [227 SCRA 317]). In the case of *"New Frontier Sugar Corporation vs. Commissioner of Customs"* (CTA Case No. 5347, June 19, 1998) it was held that a "WSD" is essentially a conditions *sine quanon* before any seizure proceedings can be formally initiated. Section 2301 of the TCCP, as amended, is a express it enough in that it requires the Collector to issue a WSD upon making any seizure. Likewise, Section 2303 provides that the "Collector shall give the owner/importer of the property or its agent a written notice of decision and shall give him an opportunity to be heard in reference to the delinquency which was the occasion of such seizure".

The remedies of the owner/importer to secure immediate release of the seized property are, as follows:

1. Posting a sufficient cash bond (surety bond or other sufficient instruments is permitted under Republic Act No. 9135) shall not be in any case be less than the appraise value of the article plus fine, expenses and cost that may be adjudged in the case;

2. That there is no *prima facie* evidence of fraud attendant to the importation;

3. That the importation of the article is not prohibited by law; and

4. The release under cash bond (surety bond or other sufficient instrument as approved by the Commissioner of Customs [Section 4, Customs Administrative Order No. 9-93]).

Formal hearings are conducted after the notification of the notice of seizure. Offers of settlement of seizure case shall be made in the form of a motion with a copy thereof furnished the prosecuting officer concerned who shall be required to submit his memorandum on the matter.

Settlement in seizure cases is not allowed in any case where the importation is:

1. Attended with fraud;

2. Absolutely prohibited;

3. The release of the property would be contrary to law. (Sec. 2307, last par., TCCP)

The fraud contemplated by law must be actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some right.

The following cases demonstrate the presence of fraud:

1. The use of forced or spurious documents;

2. The *prima facie* evidence of fraud under Section 2503, TCCP;

3. The use of false machinations, misrepresentation, concealment of facts that resulted in loss of revenues reaching levels that is unconscionable and unbecoming of a law-abiding taxpayer and citizen; and

4. Other cases similarly situated.[35]

The TCC contemplates that fraud must be actual, amounting to intentional wrong-doing with the clear purpose of evading the tax. Mere negligence is not equivalent to the fraud contemplated by law. What is here involved is an honest mistake that even directly attributable to private respondent who deprived by the government of the right to collect the proper tax (*"Republic vs. Court of Tax Appeals"* [366 SCRA 489]).

Section 2503 of TCC with respect to undervaluation, misclassification and misdeclaration in entry:

> "That an undervaluation, misdeclaration in weight, measurement or quantity of more than thirty percent (30%) between the value, weight, measurement, or quantity declared in the entry, and the actual value, weight, quantity, or measurement shall constitute a *prima facie* evidence of fraud penalized under Section 2530 of this Code: Provided, further, That any misdeclared or undeclared imported articles/items found upon examination shall *ipso facto* be forfeited in favor of the Government to be disposed of pursuant to the provisions of this Code."

which simply means that if the undervaluation, misdeclaration or misclassification exceeds thirty percent (30%) of the value then there is immediately a presumption of fraud. In fact, Section 3611 of the TCC, as amended by Republic Act No. 9135 states:

> "Section. 3611. Failure to Pay Correct Duties and Taxes on Imported Goods. — Any person who, after being subjected to post-entry audit and examination as provided in Section 3515 of Part 2, Title VII hereof, is found to have incurred deficiencies in duties and taxes paid for imported goods, shall be penalized according to three (3) degrees of culpability subject to any mitigating, aggravating or extraordinary factors that are clearly established by the available evidence:
>
> 1. Negligence — When a deficiency results from an offenders failure, through an act or acts of omission or commission, to exercise reasonable care and competence to ensure that a statement made is correct, it shall be determined to be negligent and punishable by a fine equivalent to not less than one-half (½) but not more than two (2) times the revenue loss.
>
> 2. Gross Negligence — When a deficiency results from an act or acts of omission or commission done with actual knowledge or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligation under the statute, it shall be determined to be grossly negligent and punishable by a fine equivalent to not less than two and a half (2½) but not more than four (4) times the revenue loss.
>
> 3. Fraud — When the material false statement or act in connection with the transaction was committed or omitted knowingly, voluntarily and intentionally, as established by clear and convincing evidence, it shall be determined to be fraudulent and be punishable by a fine equivalent to not less than five (5) times

[35] Sec. 1, CMO 87-92.

but not more than eight (8) times the revenue loss and imprisonment of not less than two (2) years but not more than eight (8) years.

The decision of the Commissioner of Customs, upon proper hearing, to impose penalties as prescribed in this Section may be appealed in accordance with Section 2402 hereof."

VIII. RECOURSE BY LOCAL MANUFACTURERS WITH RESPECT TO THE INFLUX OF CHEAP IMPORTED GOODS.

There are times when manufacturers of locally manufactured goods are threatened by the influx of certain imported goods which are subject to a low valuation and suffers some economic loss due to this importations. The law grants them the right to raise a dutiable value in three (3) ways: the imposition of anti-dumping duty, a countervailing duty and a safeguard duty.

Globalization opened up the national economy to foreign competition. Inherent in the integration of markets is the opportunity for all stakeholders in the economy to benefit from the fruits of liberalization: expanded market access for Philippine products; improved competitiveness of domestic industries; acquisition of modern technology; enhanced productivity; infusion of new investments; efficiency in trade in services; and diversification of markets and products.

New developments in trade and tariff policy have emerged with the updating of the ASEAN Harmonized Tariff Nomenclature ("AHTN"), the implementation of the HS 2007, the forging of bilateral trade relations and regional economic integration and the ongoing multilateral trade negotiations under the Doha Development Agenda. While all these are foreseen to lead to growth and economic development, challenges and costs brought about by trade liberalization are also expected.

The Philippine government, realizing the need of business to adjust to globalization, resolved to provide the domestic industries with the necessary "safety nets" to cope with foreign competition. Strengthened and WTO-consistent trade remedy rules, *e.g.*, RA 8751 ("Countervailing Duty Act of 1999") and RA 8752 ("Anti-Dumping Act of 1999") were enacted to govern the prosecution of cases of such unfair trade practices as dumping and subsidization. Also, the passage of RA 8800 ("Safeguard Measures Act") enhanced protection to local industries against injurious import surges.

The following are classes of duty which have their special purpose of protecting domestic industries from the competition brought about by cheap imported merchandize:

1. Anti-dumping duty – This special duty which is equal to the difference between the lower price of the dumped imported articles and the higher price of a like domestic product, is imposed in addition to the regular duty, to prevent the continuous dumping of imported articles into the local market of a country at a price less than those prevailing in its domestic markets, which has the effect of causing material injury or threatening to retard the establishment of a domestic industry producing the same product.

2. Countervailing duty – This special duty which is equal to the ascertained amount of subsidy granted, is intended to offset or forestall the subsidy or bounty directly or indirectly granted by the manufacture, production or exportation of a product imported in a country which has caused or threatens to cause material injury to a domestic industry or retard the establishment of a domestic industry producing identical or like articles.

3. Safeguard duty – This is a new multilateral measure in the form of an "increase tariff" (in the case of industrial or non-tariffied imports) or additional special "safeguard duty" (in the case agricultural products) levied in addition to the regular duty against covered products being imported in an increased quantities, or its volume exceeds the trigger level or its C.I.F. value falls below the trigger price.

Dumping occurs when foreign producers sell their products to an importer in the domestic market at prices lower than in their own national markets, or at prices below cost of production, the sale or importation of which injures or threatens to injure a domestic industry producing like or comparable products or retards the establishment of a potential industry. It is a form of price discrimination between two national markets.

When countervailing duty imposed, the following are the elements or factors which must be considered before a counterveiling duty may be imposed:

a. Product Comparability – a product is identical or alike in all respects to the article under consideration or, in absence of such product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

b. Subsidy – refers to any specific assistance directly or indirectly provided by the government of the country of export or origin in respect of a product imported into the Philippines.

c. Injury – means material injury to a domestic industry, threat of material injury or material retardation of the growth or the prevention of the establishment of a domestic industry.

d. Causal Link – the material injury suffered by the domestic industry is the direct result of the importation of the subsidized product.

RA 8800, otherwise known as "Safeguard Measures Act" provides for:

a. General safeguard measures to relieve domestic industries suffering from serious injury as a result of increased imports.

b. Special safeguard measures (additional duty not exceeding 1/3 of the existing rate of duty) on agricultural products marked "SSG" in Schedule LXXV-Philippines, when the import volume exceeds its trigger level or when the actual c.i.f. import falls below a trigger level.

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