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THIRD DIVISION

[G.R. No. 116623. March 23, 1995]

PEOPLE OF THE PHILIPPINES and HONORABLE ALFREDO GUSTILO, *petitioners, vs.* COURT OF APPEALS and ESAM GADI y ABDULLAH, *respondents.*

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; PRELIMINARY INVESTIGATION; RATIONALE.** — Section 7 of Rule 112 of the present Rules of Criminal Procedure gives the accused the right to ask for a preliminary investigation, but it does not give him the right to do so *after* the lapse of the five-day period. This is in accord with the intent of the Rules of Criminal Procedure to make preliminary investigation simple and speedy. The Supreme Court, elaborating on the rationale of the rules on preliminary investigation, held: "The new Rules were drafted in the light of the *Court's experience with cases where preliminary investigations had dragged on for weeks and even months. The Court had intended* to remove this clog upon the judicial machinery and *to make a preliminary investigation as simple and as speedy as is consistent with the substantial rights of the accused.* The investigation is advisedly preliminary, to be followed by the trial proper. The investigating judge or prosecuting officer acts upon probable cause and reasonable belief, not upon proof beyond reasonable doubt. The occasion is not for the full and exhaustive display of the parties' evidence; *it is for the presentation of such evidence only as may engender well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.* When all this is fulfilled, the accused will not be permitted to cast about for fancied reasons to delay the proceedings; the time to ask for more is at the trial."

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2. ID.; ID.; ID.; SEC. 7, RULE 112; REGLEMENTARY PERIOD; USE OF THE WORD "MAY," CONSTRUED; CASE AT BAR.— While in Tan *v.* SEC, 206 SCRA 740 (1992) and the cases there cited show that the use of the term "may" is indicative of an opportunity or possibility, they cannot be used to support the proposition that the *five-day period under Section 7 of Rule 112 is not mandatory and may be disregarded at will.* The "opportunity" or "possibility" engendered by the use of the term "may" in this rule relates only to the *option of filing* a motion for preliminary investigation; it does *not* refer to the filing of the motion *after the expiration of the five-day period.* This rule grants the accused a right or faculty and not an obligation. In the sense that he is not obliged to exercise this right, this rule is permissive only; in the sense that he may exercise this right *only within the five-day period*, the rule is *mandatory.* Put a little differently, Esam Gadi had the option or faculty of demanding preliminary investigation; if he wanted to exercise that option, however, he had to exercise it within the reglementary period. Upon expiration of that period, his option lapsed. Much the same situation obtains in respect of the period for filing a petition for review. Section 1, Rule 45 of the Rules of Court provides that: "Sec. 1. *Filing of petition with Supreme Court.* — A party *may* appeal by certiorari from a judgment of the Court of Appeals, by filing with the Supreme Court a petition for certiorari *within fifteen (15) days* from notice of judgment or of the denial of his motion for reconsideration filed in due time, and paying at the same time, to the clerk of said court the corresponding docketing fee. The petition shall not be acted upon without proof of service of a copy thereof to the Court of Appeals." The use of "may" in Section 1 of Rule 45 refers only to the opportunity or option to file a petition for review. This, however, does not give a party a license to file a petition for review beyond the fifteen-day period. Hence, under Rule 45, Section 1, a petition for review filed after lapse of the fifteen-day period is not to be entertained. Innumerable petitions have been denied by the Court for having been filed unseasonably.

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3. **ID.; ID.; ID.; ID.; APPLICATION IN CASE AT BAR; GO CASE COMPARED.**— The reliance of the Court of Appeals on the case of *Rolito Go vs. Court of Appeals*, 206 SCRA 138 (1992) is misplaced. In *Go*, as in the present case, an information was filed without a prior preliminary investigation of the accused. The accused in both cases demanded their right to a preliminary investigation before arraignment. The similarity between the two (2) cases ends there. There are, upon the other hand, critical differences in the fact situations in one and the other case which must not be overlooked. In *Go*, the accused asked for preliminary investigation *on the very day the information was filed.* In the present case, Esam Gadi did so only on 9 February 1994, or *a month after he had learned of the filing of the information* against him. In the present case, Esam Gadi insists on the application of Section 7, Rule 112 in effect claiming or conceding there was a lawful warrantless arrest. It appears that the accused was apprehended while engaged in the commission of an offense, i.e, possession of marijuana punishable under Section 8, Article II of the Dangerous Drugs Act, as amended. In *Go*, the Court relied on the general rule that an information may be filed only after a preliminary investigation has been conducted. The Court did not apply Section 7, Rule 112 because there had been no arrest at all. The Court found that accused Rolito Go had merely walked into the police station in the company of his two lawyers and placed himself at the disposal of the police authorities. In fact, the Court did not consider his act as surrender for the accused did not expressly declare that he was surrendering himself, probably to avoid the implication that he was admitting his guilt. Further, in *Go*, the Prosecutor had himself filed with the trial court a motion for leave to conduct a preliminary investigation. This motion, along with the application for bail, was in fact initially granted by the trial court. But the trial court a few days later turned around and inexplicably changed its mind, cancelled the bail, refused to accord preliminary investigation to the accused Go and the trial began over the vehement protests of Go. The Court said: "Nonetheless, since petitioner in his omnibus motion

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was asking for preliminary investigation and not for a re-investigation *(Crespo vs. Mogul* involved *a re-investigation)*, and *since the Prosecutor himself did file with the trial court, on the 5th day after filing the information for murder, a motion for leave to conduct preliminary investigation* (attaching to his motion a copy of petitioner's omnibus motion), we conclude that petitioner's omnibus motion was in effect filed with the trial court. *What was crystal clear was that petitioner did ask for a preliminary investigation on the very day that the information was filed* without such preliminary investigation, and that *the trial court was five (5) days later apprised of the desire of the petitioner for such preliminary investigation.* Thus, even on the (mistaken) supposition apparently made by the Prosecutor that Section 7 of Rule 112 of the Revised Rules of Court was applicable, *the 5-day reglementary period on Section 7, Rule 112 must be held to have been substantially complied with."* Hence, while the accused in *Go* was entitled to preliminary investigation as a matter of right, Esam Gadi is not. His right to demand preliminary investigation was subject to the condition that he should claim it seasonably. He did not do so. Esam Gadi, accordingly, effectively waived his right to a preliminary investigation.

4. **ID.; ID.; ID.; WAIVER THEREOF; CASE AT BAR.**— The denial of Esam Gadi's motion for preliminary investigation is also warranted by his posting of a cash bail bond without previously or simultaneously demanding a preliminary investigation. In People *vs.* Hubilo, 220 SCRA 389 (1993) an accused who had posted bail was deemed to have foregone his right to preliminary investigation. In the present case, Esam Gadi *asked for and was granted bail on 10 January 1994, or one month before he asked for a preliminary investigation on 9 February 1994.* Once more, Esam Gadi in fact waived his right to preliminary investigation. In *Go*, in contrast, the accused had asked for preliminary investigation and the right to post bail at the same time in one omnibus motion. Accordingly, the Court held that the accused in *Go* had *not* waived his right to

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preliminary investigation: "Again, in the circumstances of this case, *we do not believe that by posting bail, petitioner had waived his right to preliminary investigation.* In *People v. Selfaison* (110 Phil. 839 [1961]), we did not hold that appellants there had waived their right to preliminary investigation because immediately after their arrest, they filed bail and proceeded to trial "*without previously claiming that they did not have the benefit of a preliminary investigation.*" In the instant case, *petitioner Go asked for release on recognizance or on bail and for preliminary investigation in one omnibus motion.* He had thus claimed his right to preliminary investigation *before* respondent Judge approved the cash bond posted by petitioner and ordered his release on 12 July 1991. Accordingly, *we cannot reasonably imply waiver of preliminary investigation on the part of petitioner.* In fact, when the Prosecutor filed a motion in court asking for leave to conduct preliminary investigation, he clearly if impliedly recognized that petitioner's claim to preliminary investigation was a legitimate one." (206 SCRA at 154)

APPEARANCES OF COUNSEL

The Solicitor General for petitioners.

Augusto S. Jimenez for private respondent.

RESOLUTION

FELICIANO, *J.*:

Petitioners assail a Decision of the Court of Appeals which reversed the Regional Trial Court, Branch 116 of Pasay City and granted the motion for reinvestigation of private respondent Esam Gadi.

On 31 December 1993, Esam Gadi, a national of Saudi Arabia, was apprehended at the Manila International Airport and subsequently detained for possession of marijuana.

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On 3 January 1994, an information was filed and docketed as Criminal Case No. 94-4820 in the Regional Trial Court, Branch 116, Pasay City charging Esam Gadi with violation of Section 8, Article II of the Dangerous Drugs Act, as amended.

Three (3) days later, on 6 January 1994, Esam Gadi filed an "*Ex Parte* Motion to Reduce Bail," from P90,000.00 to P30,000.00. This Motion was denied. Esam Gadi then posted a cash bond of P90,000.00 which was approved by the trial court on 10 January 1994.

On 9 February 1994, Esam Gadi filed a motion for "reinvestigation,"[1] claiming that the seriousness of the offense charged warranted the grant of his motion. Admitting that this motion was filed beyond the five-day period prescribed in Section 7, Rule 112 of the Rules of Court,[2] he contended that the reglementary period was not mandatory. Section 7, Rule 112 of the Rules of Court provides:

"Sec. 7. *When accused lawfully arrested without warrant. - When a person is lawfully arrested without a warrant for an offense* cognizable by the Regional Trial Court, *the* complaint or *information may be filed by* the offended party, peace officer or *fiscal without a preliminary investigation having first been conducted*, on the basis of the affidavit of the offended party or arresting officer or person.

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[1] Private respondent used the term "*re*investigation" although, as far as the records shows, he had not previously undergone preliminary investigation. In doing so, he apparently followed the terminology employed in Section 15 of old Rule 112; see *infra*, note 6.

[2] While the records do not indicate the exact date, he may be deemed to have learned, at the latest, of the filing of the information when he filed a motion for reduction of bail on 6 January 1994, or thirty-four (34) days before he filed the motion for reinvestigation on 9 February 1994, clearly beyond the five-day period prescribed in Section 7 of Rule 112.

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However, *before the filing of such* complaint or *information, the person arrested may ask for a preliminary investigation* by a proper officer *in accordance with this rule*, but he must sign a waiver of the provisions of Article 125 of the Revised Penal Code, as amended, with the assistance of a lawyer and in case of non-availability of a lawyer, a responsible person of his own choice. Notwithstanding such waiver, he may apply for bail as provided in the corresponding rule and the investigation must be terminated fifteen (15) days from its inception.

If the case has been filed in court without a preliminary investigation having been conducted, the accused may within five (5) days from the time he learns of the filing of the information, ask for a preliminary investigation with the same right to adduce evidence in his favor in the manner prescribed in this Rule." (Italics supplied)

The motion for "reinvestigation" was denied by the trial court. A motion for reconsideration was likewise turned down on 8 March 1994, the date of his arraignment where Esam Gadi pleaded not guilty. He then challenged the denial of his motion for "reinvestigation" in a petition for *certiorari* before the Court of Appeals.

The Court of Appeals granted the petition and reversed the trial court Order denying reinvestigation. Citing *Tan vs. Securities Exchange Commission,*[3] the Court of Appeals held that the five-day period for asking reinvestigation was only permissive, considering the use of the word "may." The appellate court also relied on *Go vs. Court of Appeals*[4] and held that a motion for preliminary investigation may be granted even if trial on the merits had begun, provided that the motion was filed before arraignment.

In this Petition for Review, the Solicitor General contends that it is a mandatory rule that a motion for preliminary

[3] 206 SCRA 740 (1992).

[4] 206 SCRA 138 (1992).

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investigation be filed within five (5) days from the time the accused had learned of the filing of the information. It is also maintained that Esam Gadi had waived his right to preliminary investigation when he posted bail for his release.

Deliberating on the Petition for Review and the Comment of private respondent, the Court finds that the Court of Appeals fell into reversible error in granting the motion for "reinvestigation" of private respondent.

The period for filing a motion for preliminary investigation after an information has been filed against an accused who was arrested without a warrant has been characterized as mandatory by the Court. In *People vs. Figueroa*,[5] the Supreme Court applied Section 15, Rule 112[6] of the old Rules, which is substantially reproduced in Section 7, Rule 112 of the 1985 Rules of Criminal Procedure. The Court held that Section 15 of old Rule 112 granted the accused the right to ask for preliminary investigation *within a period of five (5) days* from the time he learned of the filing of the information.

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[5] 27 SCRA 1239 (1969).

[6] Section 15, Rule 112 of the Rules of Court prior to the 1985 amendment provides:

"Sec. 15. *Investigations of persons in custody.* Where the accused is detained without a warrant for his arrest, he may ask for a preliminary investigation by a proper officer in accordance with the preceding sections, but he must sign a waiver of the provisions of Article 125 of the Revised Penal Code, as amended. Notwithstanding such waiver the investigation must be terminated within seven (7) days from its inception.

If the case has already been filed in court and no preliminary investigation has been conducted by the fiscal because the accused has not made the waiver referred to in the preceding paragraph, the accused may, within five (5) days from the time he learns of the filing of the information, ask for a reinvestigation thereof with the same right to cross-examine the witnesses against him and adduce evidence in his favor."

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As the accused in that case did *not* exercise his right *within the five-day period*, his motion for "reinvestigation" was denied.[7]

Clearly, Section 7 of Rule 112 of the present Rules gives the accused the right to ask for a preliminary investigation, but it does not give him the right to do so *after* the lapse of the five-day period. This is in accord with the intent of the Rules of Criminal Procedure to make preliminary investigation simple and speedy. The Supreme Court, elaborating on the rationale of the rules on preliminary investigation, held:

"The new Rules were drafted in the light of the *Court's experience with cases where preliminary investigations had dragged on for weeks and even months. The Court had intended* to remove this clog upon the judicial machinery and *to make a preliminary investigation as simple and speedy as is consistent with the substantial rights of the accused.* The investigation is advisedly preliminary, to be followed by the trial proper. The investigating judge or prosecuting officer acts upon probable cause and reasonable belief, not upon proof beyond reasonable doubt. The occasion is not for the full and exhaustive display of the parties' evidence; *it is for the presentation of such evidence only as may engender well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.* When all this is fulfilled, the accused will not be permitted to cast about for fancied reasons to delay the proceedings; the time to ask for more is at the trial."[8] (Italics supplied)

The respondent Court of Appeals held, however, that the five-day period prescribed in Section 7, Rule 112 was not mandatory as the provision uses the permissive term "may." As already noted, the Court of Appeals cited *Tan vs. Securities and Exchange Commission*[9] where the Supreme Court held

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[7] See also, Lava *vs.* Gonzales, 11 SCRA 650 (1964).

[8] People *vs.* Figueroa, *supra* at 1252, citing Hashim *vs.* Boncan, 71 Phil. 216 at 225 (1941).

[9] *Supra.*

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that the term "may" as used in adjective rules is only permissive and not mandatory.

Tan, however, does not really support a ruling that the five-day period for asking for preliminary investigation of a person accused of crime is only permissive. *Tan* was concerned with "may" as used in a provision of the *Corporation Code dealing with the transfer of shares of stock*. Two (2) cases relied upon in *Tan* are equally inapplicable to the present case. In *Shauf vs. Court of Appeals*,[10] "may" was used in a U.S. federal statute on equal opportunity for civilian employment in U.S. military installations which enumerated the remedies of an aggrieved party. Holding that remedial statutes are to be construed liberally and that the term "may" as used in adjective rules was only permissive and not mandatory, our Supreme Court held that the substantive remedies of a party were not limited to those enumerated in that U.S. legislation.[11] In *Legaspi vs. Estrella*,[12] the Court had to interpret "may" as used in Section 146 of *Batas Pambansa Blg.* 337 or the old Local Government Code. That term, being indicative of a "possibility" or an "opportunity," was read as permissive rather than mandatory to avoid defeating the purpose of the law immediately to include sectoral representatives in the legislative councils of local government units.[13]

While *Tan* and the cases there cited show that the use of the term "may" is indicative of an opportunity or possibility, they cannot be used to support the proposition that *the five-*

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[10] 191 SCRA 713 (1990).

[11] 191 SCRA at 738.

[12] 189 SCRA 56 (1990), cited in the SCRA as *Supangan vs. Santos*. This is actually a consolidation of several cases, one of which is entitled *Legaspi vs. Estrella*.

[13] 189 SCRA at 73-74.

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day period under Section 7 of Rule 112 is not mandatory and may be disregarded at will. The "opportunity" or "possibility" engendered by the use of the term "may" in this rule relates only to the *option of filing* a motion for preliminary investigation; it does *not* refer to the filing of the motion *after the expiration of the five-day period.* This rule grants the accused a right or faculty and not an obligation. In the sense that he is not obliged to exercise this right, this rule is permissive only; in the sense that he may exercise this right *only within the five-day period*, the rule is *mandatory.* Put a little differently, Esam Gadi had the option or faculty of demanding preliminary investigation; if he wanted to exercise that option, however, he had to exercise it within the reglementary period. Upon expiration of that period, his option lapsed.

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"Sec. 1. *Filing of petition with Supreme Court.* — A party *may* appeal by certiorari from a judgment of the Court of Appeals, by filing with the Supreme Court a petition for certiorari *within fifteen (15) days* from notice of judgment or of the denial of his motion for reconsideration filed in due time, and paying at the same time, to the clerk of said court the corresponding docketing fee. The petition shall not be acted upon without proof of service of a copy thereof to the Court of Appeals." (Italics supplied)

The use of "may" in Section 1 of Rule 45 refers only to the opportunity or option to file a petition for review. This, however, does not give a party a license to file a petition for review beyond the fifteen-day period. Hence, under Rule 45, Section 1, a petition for review filed after lapse of the fifteen-day period is not to be entertained. Innumerable petitions have been denied by the Court for having been filed unseasonably.

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The reliance of the Court of Appeals on the case of *Rolito Go vs. Court of Appeals*[14] is misplaced. In *Go*, as in the present case, an information was filed without a prior preliminary investigation of the accused. The accused in both cases demanded their right to a preliminary investigation before arraignment. The similarity between the two (2) cases ends there. There are, upon the other hand, critical differences in the fact situations in one and the other case which must not be overlooked.

In *Go*, the accused asked for preliminary investigation *on the very day the information was filed.* In the present case, Esam Gadi did so only on 9 February 1994, or *a month after he had learned of the filing of the information* against him.

In the present case, Esam Gadi insists on the application of Section 7, Rule 112 in effect claiming or conceding there was a lawful warrantless arrest. It appears that the accused was apprehended while engaged in the commission of an offense, i.e., possession of marijuana punishable under Section 8, Article II of the Dangerous Drugs Act, as amended. In *Go*, the Court relied on the general rule that an information may be filed only after a preliminary investigation has been conducted. The Court did not apply Section 7, Rule 112 because there had been no arrest at all. The Court found that accused Rolito Go had merely walked into the police station in the company of his two lawyers and placed himself at the disposal of the police authorities. In fact, the Court did not consider his act as surrender for the accused did not expressly declare that he was surrendering himself, probably to avoid the implication that he was admitting his guilt.

Further, in *Go*, the Prosecutor had himself filed with the trial court a motion for leave to conduct a preliminary investigation. This motion, along with the application for

[14] *Supra.*

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bail, was in fact initially granted by the trial court. But the trial court a few days later turned around and inexplicably changed its mind, cancelled the bail, refused to accord preliminary investigation to the accused Go and the trial began over the vehement protests of Go. The Court said:

"Nonetheless, since petitioner in his omnibus motion was asking for preliminary investigation and not for a re-investigation (*Crespo vs. Mogul* involved a *re-investigation*), and *since the Prosecutor himself did file with the trial court, on the 5th day after filing the information for murder, a motion for leave to conduct preliminary investigation* (attaching to his motion a copy of petitioner's omnibus motion), we conclude that petitioner's omnibus motion was in effect filed with the trial court. *What was crystal clear was that petitioner did ask for a preliminary investigation on the very day that the information was filed* without such preliminary investigation, and that *the trial court was five (5) days later apprised of the desire of the petitioner for such preliminary investigation.* Thus, even on the (mistaken) supposition apparently made by the Prosecutor that Section 7 of Rule 112 of the Revised Rules of Court was applicable, *the 5-day reglementary period on Section 7, Rule 112 must be held to have been substantially complied with.*"[15] (Italics supplied)

Hence, while the accused in *Go* was entitled to preliminary investigation as a matter of right, Esam Gadi is not. His right to demand preliminary investigation was subject to the condition that he should claim it seasonably. He did not do so. Esam Gadi, accordingly, effectively waived his right to a preliminary investigation.

The denial of Esam Gadi's motion for preliminary investigation is also warranted by his posting of a cash bail bond without previously or simultaneously demanding a preliminary investigation. In *People vs. Hubilo*,[16] an accused

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[15] 206 SCRA at 152-153.

[16] 220 SCRA 389 (1993).

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who had posted bail was deemed to have foregone his right to preliminary investigation. In the present case, Esam Gadi *asked for and was granted bail on 10 January 1994, or one month before he asked for a preliminary investigation on 9 February 1994.* Once more, Esam Gadi in fact waived his right to preliminary investigation.

In *Go*, in contrast, the accused had asked for preliminary investigation and the right to post bail at the same time in one omnibus motion. Accordingly, the Court held that the accused in *Go* had *not* waived his right to preliminary investigation:

"Again, in the circumstances of this case, *we do not believe that by posting bail, petitioner had waived his right to preliminary investigation.* In *People vs. Selfaison* (110 Phil. 839 [1961]), we did not hold that appellants there had waived their right to preliminary investigation because immediately after their arrest, they filed bail and proceeded to trial "*without previously claiming that they did not have the benefit of a preliminary investigation.*" In the instant case, *petitioner Go asked for release on recognizance or on bail and for preliminary investigation in one omnibus motion.* He had thus claimed his right to preliminary investigation *before* respondent Judge approved the cash bond posted by petitioner and ordered his release on 12 July 1991. Accordingly, *we cannot reasonably imply waiver of preliminary investigation on the part of petitioner.* In fact, when the Prosecutor filed a motion in court asking for leave to conduct preliminary investigation, he clearly if impliedly recognized that petitioner's claim to preliminary investigation was a legitimate one."[17] (Italics partly in the original and partly supplied)

All in all, Esam Gadi's demand for preliminary investigation was an afterthought merely.

WHEREFORE, the Petition for Review is hereby **GRANTED** and the assailed Decision of the Court of Appeals

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[17] 206 SCRA at 154.

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is hereby **REVERSED** and **SET ASIDE**. The Orders of the Regional Trial Court, Branch 116 of Pasay City dated 14 February 1994 and 8 March 1994 are hereby **REINSTATED** and the Regional Trial Court is **ORDERED** to proceed with the trial of Criminal Case No. 94-4820, with all deliberate dispatch. Costs against private respondent.

Romero, Melo, Vitug, and *Francisco, JJ.*, concur.

THIRD DIVISION

[G.R. No. 116820. March 23, 1995]

COMMISSIONER OF INTERNAL REVENUE, ***petitioner,*** ***vs.*** **ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION, COURT OF TAX APPEALS, and COURT OF APPEALS,** ***respondents.***

SYLLABUS

1. **TAXATION;** ***AD VALOREM*** **TAX FOR MINING PRIVILEGES; UNIT DEDUCTION; ELABORATED IN CASE AT BAR.—** Whether Atlas is liable for deficiency *ad valorem* tax for 1977 lies in the clarification of the concept of the "unit deduction" and its role and utility in the mining industry. We begin with a description of the process of producing copper. We are aware that the precise process employed by Atlas may, in some degree, be different from the procedures generally outlined below. Nonetheless, for purposes of clarifying the function or utility of the "unit deduction," we consider a generalized description of the copper-making process useful. The extraction of copper from ore is commonly carried out in three (3) major phases: mineral processing, smelting or leaching, and refining. The first step, mineral processing, involves the separation of copper minerals from the raw ore and the removal of waste