

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
C. P. NO. D-6918 / 2015

Date	Order with signature of Judge
------	-------------------------------

- 1) For hearing of Misc. No. 34296/2015.
- 2) For hearing of main case.

10.11.2015.

Mr. Ghulam Nabi Shar Advocate for the petitioner.
Mrs. Masooda Siraj Advocate for the Respondent No. 2.
Mr. Kashif Nazeer Advocate for the Respondent No. 3.
Mr. Manzoor Ahmed Memon Director (Valuation).
Mr. Abdul Majid Yousfani, Collector of Customs, (East).
Mr. Muhammad Shehzad Deputy Director (Valuation).
Mr. Ali Waheed Deputy Collector of Customs.
Mr. Ilyas Ahsan Appraising Officer Legal.

Through instant petition the petitioner has impugned blocking of its user ID, as well as application of Valuation Ruling No.583/2013 dated 23.9.2013, on import of its consignment in question, on the ground that despite the fact that the Customs Appellate Tribunal vide its order dated 3.3.2014 passed in Custom Appeal No. K-104/2014, has set aside the said Valuation Ruling, the same is still being made basis for assessment, whereas, to enforce recovery in respect of the past consignments, the petitioner's user ID has been blocked.

We while issuing notices on this petition had noticed that the Customs Tribunal while setting aside the Valuation Ruling in question had even directed the Customs Authorities / Director Valuation to assess the goods in terms of Section 25 and 25-D of the Customs Act, 1969, however, no such assessment was done by the department and therefore, we had directed appearance of Collector of Customs (East) as well as Director of Valuation, Karachi.

At the very outset the Mr. Manzoor Memon, Director Valuation has conceded that despite setting aside of the Valuation Ruling in question, the computer system of the department was not updated, and the Valuation Ruling was still being shown in field, and as soon as this was brought to his knowledge, the system has been updated and the Valuation Ruling is no more being applied, till such time the reference application preferred by the department against the order of the Tribunal is decided finally or some interim orders are obtained by the department. At this juncture, Mr. Kashif Nazeer Counsel for respondent No. 2 submits that the consignment in question has already been

assessed in terms of Section 25 read with Section 81 of the Customs Act, 1969 and therefore instant petition has served its purpose.

Be that as it may, it would not be out of place to mention that we have been noticing on a daily basis, that a number of petitions are being filed before this Court, simply seeking provisional release of consignments, specially on the ground, that either the representation for reviewing the Valuation Ruling which has been in field for more than 90 days, is not being decided, one way or the other, and secondly, where the Valuation Ruling has been challenged under Section 25-D of the Customs Act, before the Director General of Valuation, through a proper Revision / Review application and the same is pending. In both these situations, neither the concerned Collector, nor the Director Valuation / Director General Valuation, are entertaining requests for provisional release as contemplated under Section 81 of the Customs Act, 1969 and having left with no option / remedy, the importers are approaching this Court for seeking such provisional release, which we have entertained, in numerous cases.

The Director Valuation present in Court while confronted has shown his adamant attitude, and has contended that he cannot exercise powers under Section 81 of the Customs Act, 1969 for allowing any provisional release on the ground that, though such Rulings are more than 90 days old, however, since they have been issued by him under Section 25A of the Act, and therefore, in his opinion the values have been correctly determined. This response has been tendered by him in respect of Valuation Rulings in which the applications for revision / reviewing the same are made to his office, on the ground that 90 days period has lapsed since issuance of issuance of Valuation Ruling. Insofar as the second category of cases is concerned, whereby the Valuation Ruling has been challenged under Section 25-D of the Customs Act, according to him such powers are to be exercised by Director General Valuation and not by him.

We have heard the Counsel for the parties as well as the Director Valuation at some length and on perusal of the record we are of the view that some appropriate orders / directions are to be passed / issued for provisional release of imported consignments as the Respondents have failed to properly exercise the powers vested in them in this respect.

Insofar as validity of a Valuation Ruling is concerned, though in terms of subsection (4) of Section 25-A of the Customs Act, 1969 under which the Valuation Ruling is issued, it has been provided that the same shall be applicable until and unless reviewed or rescinded by the competent authority. However, this issue of validity and otherwise of a Valuation Ruling came for discussion before a Division Bench of this Court in the case of *Sadia Jabbar V. Federation of Pakistan and others* (PTCL 2014 CL 537) and the relevant observations are at Para 21 (pg: 579) which reads as under:-

“Two further points must be made. Firstly, it is clear that the section 25A cannot have retrospective effect, i.e. a valuation ruling cannot be issued in relation to goods actually imported, nor can it be applied to imported

goods unless it was issued before such importation. As noted above, what section 25A enables is a predetermination of the customs value. Such a determination can only apply in relation to goods not actually imported at the time that the determination is issued. If there is no valuation ruling when the goods are actually imported, it is only section 25 which is applicable. Secondly, a valuation ruling issued under section 25A can, in our view, only apply for a certain period and no more. The reason for this lies in the fact that the valuation ruling must be determined using one of the methods of section 25 the Valuation agreement. Now at least three of those methods, the identical goods method, the similar goods method and the deductive value method, require the value to be determined “at or about the same time” as the goods being valued. This expression has been defined in Chapter IX of the Rules (in Rule 107) as meaning “within ninety days prior to the importation or within ninety days after the importation of goods being valued”. In our view, a valuation ruling must therefore ordinarily be regarded as valid for a period of ninety days from the date of issuance. Subsection (4) of Section 25A, added by the Finance Act, 2010, of course now provides that a valuation ruling “shall be applicable until and unless revised or rescinded by the competent authority”. In our view, the proper interpretation and application of this subsection, in the light of the principles stated in para 10 supra, is that while the valuation ruling will continue to hold the field unless revised or rescinded, any aggrieved importer has the right to approach the concerned officer after the ninety day period mentioned above, and he would then have to give reasons why the ruling has not been revised or rescinded.” (Emphasis supplied)

The above judgment has not been challenged by the department any further, whereas, on a challenge by the petitioner, it stands approved (though partially) by the Hon’ble Supreme Court in the case reported as *Sadia Jabbar Vs Federation of Pakistan (PTCL 2014 CL 586)*. However, it has been noticed that in complete defiance, when the importer approaches for revision of values on the ground that 90 days period has passed since the Valuation Ruling was issued, no revision exercise is carried out promptly, nor any reasons are recorded for not reviewing and or rescinding it, as directed by this Court in the case of *Sadia Jabbar (Supra)*. This in fact is true in respect of Valuation Rulings which were issued in the years 2012, 2013 and 2014, and has not been denied by the Director Valuation. Not only this, the exercise has not even been carried out in respect of Valuation Rulings which have been issued for products dependent on or related to the prices of Oil in the International market, such as petro chemicals and plastics etc., despite repeated requests / representations. It is an undeniable fact that prices of Oil have gone down drastically to the extent of 50% to 60% in recent times. Not only this when a fresh consignment arrives no request for provisional release of the consignment under Section 81 of the Customs Act, 1969 is entertained either by the concerned Collector or by the Director Valuation simply on the ground that a Valuation Ruling exists though it maybe more than 90 days old. Similarly in cases where a proper revision application under Section 25-D of the Act has been preferred, the Director General Valuation does not exercises powers under Section 81 of the Customs Act, 1969. Needless to observe that in case of Section 25-D the Director General Valuation is the authority to pass a final order in respect of revision of the Valuation Ruling and therefore, can also pass any interim orders, which otherwise are available to the respondents in terms of Section 81 of the Act *ibid*.

It would not be out of place to observe that a Division Bench of this Court in the case of *Rehan Umar Vs. Collector of Customs Karachi and 2 others (2006 PTD 909)* in which one of us, namely *Sajjad Ali Shah J*, was also a member, had dealt with the issue of provisional release of goods under Section 81 of the Customs Act, 1969 and went on to hold that such provisional release “*is a matter of right of the importer and not a matter of concession within the discretion of the appropriate officer of Customs*”. The relevant finding is at pg: 950 and reads as under:-

“.....The tenor of the language used shows that the legislature has made substantial provisions for protecting the interest of Revenue in case of release of the goods on provisional assessment under section 81 and has allowed sufficient time to the customs officials for making necessary inquiry/probe to determine the final valuation under section 80. The purpose of making these provisions is to protect the State Revenue in a manner that the trade and industry is also allowed to run smoothly. After prescription of detailed method to be adopted in such situation it appears reasonable, that, when if it is not possible for the officer of the customs to determine the final tax liability for the reason that chemical or other tests or a further inquiry is required then it give right to the importer to get the goods released on payment of duty and taxed assessed by him under section 79 and on furnishing of bank guarantee or a post dated cheque of a schedule bank along with an indemnity bond for payment of the differential amount as determined by the customs officials. In such situation the importer should not be left at the mercy of Assistant Collector of Customs or any officer above in rank. It is therefore, held that if the declared value in the Bill of Entry/goods declaration is not acceptable to the appropriate officer of the customs department and the value cannot be determined under the provisions of subsection (1) of section 25 and resort is to be made to the other methods provided in section 25 of the Customs Act, then the importer is entitled for the release of goods under section 81 of the Customs Act, by provisional determination of the liability. The release of goods in such manner is a matter of right of importer and not a matter of concession within the discretion of appropriate officer of the customs.” (Emphasis supplied)

Though the above finding is in respect of assessments under Section 25 of the Act, and not in respect of Valuation Rulings issued under Section 25A of the Act *ibid*, however, we are of the view that the same is also applicable in respect of Valuation Rulings issued under Section 25A for the reason that it has been very clearly held by this Court in the case of *Sadia Jabbar (Supra)* that a Valuation Ruling “*must therefore ordinarily be regarded as valid for a period of ninety days from the date of issuance,*” and “*any aggrieved importer has the right to approach the concerned officer after the ninety day period mentioned above, and he would then have to give reasons why the ruling has not been revised or rescinded*”. In such circumstances when the Valuation Ruling, though valid, but has lost its credibility and effectiveness for all legal and practical purposes, we do not see any justification in refusal of such provisional release of consignments by the department. We may further observe that Rule 125 of the Customs Rules 2001, issued by FBR in terms of Section 219 of the Customs Act, notified vide SRO 450(I)/2001 dated 18.6.2001, also provides for provisional release of consignments if there is any Valuation dispute. It is also pertinent to mention that the determination of Valuation under Section 25A of the Act is dependent on the methods and mechanism provided for valuation under Section 25 of the Customs Act. Therefore, if the assessments

made under Section 25 can be disputed and release can be allowed in terms of Section 81 provisionally, we do not see any justifiable reason to withhold or deny such provisional release in case of assessments made under Section 25A of the Act. A learned Single Judge of the Lahore High Court in the case of *Wasim Radio Vs. Federation of Pakistan and others* (PTCL 2014 CL 465) has expressed the same view. Notwithstanding this, a Valuation Ruling issued by the Director Valuation, if challenged, does not remain sacrosanct / final, and is subject to review by the DG Valuation under Section 25-D, against which an appeal lies to the Customs Tribunal, whereafter a Reference Application is provided under Section 196 of the Customs Act before this Court and finally a leave to appeal before the Hon'ble Supreme Court.

Finally, it is also to be kept in mind that the cost of doing business is increasing day by day and specially in cases of delay at the Port, the storage / demurrage charges and container rent charges accumulate in an escalating manner on daily basis, and every passing day increases the liability of Importers, whereas, delay and detention certificates, even if issued, have also lost their efficacy, as they are not being accepted by the Port / Terminal authorities and numerous petitions in that regard are already pending before this Court. It must also be kept in mind that such refusal to allow provisional release of the consignments is resulting in unwarranted litigation, which ultimately is burdening the Exchequer in the shape of payment of fee to Advocates for no justifiable reasons as all such petitions are being disposed of by us on the first date of hearing after notice by directing provisional release of consignments, which in our view, should be done by the department itself. In such circumstances and in view of the aforesaid discussion as well as legal position we have been compelled to record the aforesaid observations.

In view of hereinabove facts and circumstances we while disposing of instant petition direct the respondents as under:-

- 1) In cases where the Valuation Ruling is more than 90 days old and an importer has approached Director Valuation in terms of Para 21 of the judgment in the case of *Sadia Jabbar supra*, fresh consignments of such importers shall be allowed provisional release in terms of Section 81 of the Customs Act, 1969 by securing the differential amount of duty and taxes in the shape of Pay Order / Bank Guarantee as the case may be, by the Director Valuation and or the concerned Collector without fail.
- 2) In cases where a proper revision application has been filed by an importer in terms of Section 25-D of the Customs Act, 1969, before the Director General, Valuation, and pending such review / revision, a fresh consignment is imported, then at the request of the importer who has filed such revision / review, the consignment in question shall be released in terms of Section 81 of the Customs Act, 1969 after securing the differential amount of duty and taxes in the shape of Pay Order / Bank

Guarantee as the case may be, by the Director General Valuation, without fail.

- 3) Needless to observe that any wilful disobedience and defiance of these directions shall entail initiation of contempt of court proceedings against such delinquent officer(s).

Let a copy of this order be sent to Chairman, Member (Customs), and Member (Legal), FBR Islamabad, Chief Collector of Customs (South) and Director General Valuation, Custom House, Karachi, for information and strict compliance thereof.

J U D G E

J U D G E

ARSHAD/