

# IN THE HIGH COURT OF SINDH AT KARACHI

## Special Customs Reference Application Nos. 39 to 50 of 2016

Present: *Mr. Justice Muhammad Junaid Ghaffar*  
*Mr. Justice Agha Faisal*

Applicants: M/s. Haris Trading Co.  
(in SCRA Nos. 39 to 50 of 2016)  
Through Mr. Sardar Faisal Zafar, Advocate.

Respondents: The Deputy Collector of Customs, Export,  
Through Mr. Iqbal M. Khurram, Advocate.

**Date of hearing:** 19.11.2020

**Date of Order:** 19.11.2020

### O R D E R

**Muhammad Junaid Ghaffar J.-** All these connected Reference Applications impugn a common order of the Customs Appellate Tribunal at Karachi dated 14.12.2015 passed in Customs Appeal Nos. K-953 to 964 of 2015 proposing the following questions of law:

- I. Whether under the facts and circumstances of the case the Customs Appellate Tribunal was justified for upholding the orders without establishing the basis / jurisdiction for invocation of Para 17 of the Export Policy Order?
- II. Whether under the facts and circumstances of the case there was any notification or embargo to export "**The Marble Blocks**" and invocation of Para 16(g) by the Adjudicating Authority without having any jurisdiction or authority under the Export Policy Order 2013?
- III. Whether the Deputy Collector Adjudication has any authority and jurisdiction to issue Show Cause Notice under the SRO 886(I)/2013?
- IV. Whether under the facts and circumstances of the case the method of valuation for export u/s 25(15) has been misconstrued by the Adjudicating Authority for fixation of any value in absence of method of fixation of exported goods in the Customs Act, 1969?
- V. Whether under the facts and circumstances of the case without establishing the mensrea imposition of penalty is in accordance with law?"

2. Learned Counsel for the Applicant has read out the impugned Order as well as the Show Cause Notice and the Order-in-Original and submits that all the forums below have erred in law by failing to appreciate that the Applicant had not contravened any provisions of the Customs Act, 1969 (“Act”) entailing imposition of any penalty under Clause (9) & (45) of s.156 of the Act. According to him the provisions of Section 25(15) of the Act, read with Section 131 ibid have been wrongly invoked; hence the orders are liable to be set aside. In support he has relied upon the cases reported as **2007 PTD 2215 (Collector of Customs (Exports) and another v. Messrs R.A. Hosiery Works)** and **PTCL 1985 (C.L) 353 (Farooq International vs. Chief Controller of Imports and Exports and 4 others.)**

3. On the other hand, learned Counsel for the respondent department submits that the Applicant was required to file a correct Declaration under Section 131 of the Act and had knowingly under invoiced the value; hence the impugned order is correct in law.

4. We have heard both the learned Counsel and perused the record. It would be advantageous to refer to the relevant provisions of the Show Cause Notice, the Order in Original passed by the Adjudicating Officer and the impugned order of the Tribunal, which reads as under: -

**Show Cause Notice:**

“5. Thus the exporter and clearing agent have tried hoodwink the automated Self Clearance System by mis-declaring the actual value of the goods to evade the foreign exchange and have violated provisions of Sections 16 & 131 of the Customs Act, 1969 Para 3 and Para 16(g) of the Current Export Policy Order, 2013, punishable under clause 9. \*\*5 of Section 156(i) of Customs Act, 1969, read with Para 17 of Current Export Policy Order 2013.

6. Accordingly M/s Haris Trading Co. Office NO. 47, Faiz Market Chowk Yadgar, NTN No. 2148931, are hereby, called upon to show cause as to why the goods should not be assessed @ US\$0.15 /kg and penal action under the aforesaid provisions of the Customs Act, 1969 Para 3 and Para 16(g) of the Current Export Policy Order, 2013, should not be taken against them for committing of aforesaid acts. A written reply to this show cause notice may reach this office within seven (07) days from the date of issuance.”

**Order In Original**

"I have carefully gone through the case details, available evidence and the defense presented by the respondent. The Department has substantiated its charge of under invoicing by the respondent by providing export values of the identical goods being exported on the higher values, while there was no defense provided in this regard by the respondent. The respondent's profile also portrays habitual violation of the law. Therefore the charges framed in the show cause notice stand established and I hereby impose a penalty of Rs. 10000 (ten thousand rupees only) on the respondent under the charged provisions of law to be deposited within one month of the issuance of this order and I also order assessment of Goods Declaration at the prevalent rates of the identical goods in terms of the provisions of the Customs Act, 1969, failing which recovery proceedings would be initiated against him under the relevant laws."

#### **Order of Tribunal**

"10. We have heard both the parties and gone through the case record carefully. M/s Haris Trading Company exported marble blocks at a unit value of US\$0.0708 per kg. In terms of Section 25(15) of the Customs Act, 1969, customs value of any exported goods shall be the value at the prescribed time, on a sale in open market for exportation to the country to which the goods are consigned having regard to the following provisions:

- (a) that the goods are treated as having been delivered to the buyer on board the conveyance in which they are to be exported; and
- (b) that the seller will bear all packing, commission, transport, loading and all other costs, charges and expenses (including any 92 (regulatory duty which may be chargeable under sub-section (3) of section 18) incidental to the sale and to the delivery of the goods on board the conveyance in which they are to be deported and which will be included in the customs value;
- (c) that where goods are manufactured in accordance with any patented invention or goods to which any protected design has been applied, the customs value shall be determined taking into consideration the value of the right to use design in respect of the goods;
- (d) that where goods are exported for sale, other disposal or use, whether or not after further manufacture, under a Pakistan trade mark, the customs value shall be determined taking into consideration the value of the right to use the patent, design or trade mark in respect of the goods."

11. The Appellant failed to provide the aforementioned information. Therefore, the export value could not be determined in a normal way and resort was made by comparing with the values of identical / similar marble blocks at the relevant time of export. The data revealed that the marble blocks were being exported at US\$0.15 per KG which established the gross mis-declaration of the export value committed by the applicant.

12. The exporter was required to file a correct declaration under Section 131 of the Customs Act, 1969 but they had given a false declaration with respect to export value. In terms of para 17 of the Export Policy Order, if any export is made on the basis of false or incorrect particulars it shall be treated as contravention of the provisions of the Act. As such it has been rightly determined by the lower fora that appellant had committed an offence under the Export Policy Order read with Section 16 of the Customs Act, 1969. The appeal has not merit and rejected being inadmissible.

5. The Show Cause Notice alleges mis-declaring actual value of the goods in order to evade Foreign Exchange, and the Applicant having violated the provisions of Sections 16 and 131 of the Act and Para 3 and Para-16(g) of the relevant Export Policy order 2013 punishable under Clause (9) & (45) of Section 156(1)

of the Act read with Para-17 of the Export Policy Order. It appears that such Show Cause Notice was adjudicated against the Applicant by imposition of penalty of Rs.10,000/- each; however, in the Order no specific provision was cited or invoked while imposing the penalty and in a slipshod manner, it was observed that the same has been imposed under the charged provisions of law as mentioned in the Show Cause Notice. Firstly, we may observe that no Order-in-Original could have been passed in such a manner without specifying the relevant clause(s) under which the penalty was being imposed. For the present purposes, we suppose and that is without prejudice, the penalty has been imposed under Clause (9) and Clause (45) of Section 156(1) (ibid) as it is only these two clauses which have been mentioned in the show cause notice and for which, at the most the Adjudication Authority had jurisdiction. Insofar as the other provisions of Export Policy Order are concerned, for that again the only these clauses of the Act could be invoked. Clauses (9) & (45) of s.156(1) of the Act reads as under: -

9. (i) If any goods, not being goods referred to in clause 8, are imported into or exported from Pakistan evading customs-duties or leviable customs-duties in violation of any Prohibition or restriction on the importation or exportation of such goods imposed by or under this Act or any other law; or
- (ii) If any attempt be made so to import or export any such goods; or
- (iii) If any such goods be found in any package produced before any officer of customs as containing no such goods; or
- (iv) If any such goods be Found either before or after landing or shipment to have been concealed in any manner on board any within the limits of any
- such goods shall be liable to confiscation; and any person concerned in the offence shall also be liable to a penalty not exceeding two times the value of the goods.

seaport, airport, railway station or other place where conveyances are ordinarily loaded or unloaded; or

(v) If any such goods, the exportation of which is prohibited or restricted as aforesaid be brought within a customs area or to a wharf, with the intention of loading them on a conveyance for exportation in violation of such prohibition or restriction,”

45. If any goods have been Declared on a goods Declaration], as the case may be, and it is found that goods not so declared have been concealed in, or mixed within the goods so declared, the owner of such goods and every person who aids or abets such concealment or mixing of goods shall be liable to a penalty not exceeding [twenty five thousand] rupees [or five times the duty and taxes involved whichever is higher]; and both the goods so declared and the goods not so declared shall be liable to confiscation.”

6. Perusal of the aforesaid two clauses clearly reflects that these two do not apply to the facts in question as neither there is an allegation of any evasion of duty; nor the goods in question have been notified in terms of s.16 of the Act to be banned or otherwise restricted; and lastly neither the goods so declared have been concealed. In all fairness in that situation no penalty could have been imposed. In fact, in the instant case after filing of Goods Declarations the export shipment was allowed by accepting the value declared by the Applicant without raising any objection, and thereafter, the show cause notices were issued. Insofar as the violation alleged in respect of Foreign Exchange Regulations is concerned for that the officer concerned had no jurisdiction and at the most the matter could have been referred to State Bank of Pakistan to act in accordance with the Foreign Exchange Regulation Act, 1947 and the Rules a framed thereunder. Reliance in this regard may be placed on the case of Umar Farooq<sup>1</sup>.

<sup>1</sup> 2014 PTD 894 (authored by one of us namely Muhammad Junaid Ghaffar,J.)

7. Insofar as the Tribunal is concerned, with utmost respect we may observe that the Tribunal seriously fell in error by dismissing the Appeal and failing to consider the legal issue involved in this matter. We cannot appreciate and concur with such finding of the learned Tribunal.

8. In view of hereinabove facts and circumstances of this case, it appears that the forums below have erred in law and facts by upholding the imposition of penalty upon the Applicant. The questions, which have been proposed need to be rephrased as it is only one question, which arises out of the order of the Tribunal and that is "*Whether the Adjusting Authority had any jurisdiction to impose penalty under Clauses (9) and (45) of Section 156(1) of the Act*" and the answer to the same is in negative in favour of the Applicant and against the respondent department and as a consequence thereof the orders passed by the forums below are set aside. All listed Reference Applications are allowed.

Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

Judge

Judge