ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") Nos. 191 / 2012 a/w
SCRA No. 192 to 202 / 2012

Date	Order with signature of Judge

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

Applicant:	**M/s. Dastagir Engineering,** **1426-B, Dacca Road, Saddar Bazar** **Lahore Cantonment Lahore.** **Through Mrs. Arjumand Khan, Advocate.**
Respondents:	**1.The Collector of Customs (Appeals)** **Customs House, Karachi.** **2.The Additional Collector of Customs** **Model Customs Collectorate** **(Appraisement) East, Formerly MCC** **PaCCS, Customs House, Karachi** **Through Mrs. Masooda Siraj Advocate.**
Date of hearing:	**15.12.2020**
Date of Order:	**15.12.2020.**

Muhammad Junaid Ghaffar, J: Through listed Reference Applications, the Applicant has impugned order dated 30.11.2011 passed by the Customs Appellate Tribunal in Customs Appeal No. K-950/2010 and other connected matters proposing the following Questions of Law which according to the Applicant purportedly arise out of the order of the Tribunal:-

i) "Whether the Applicant was entitled to the concessionary benefit as claimed by him under SRO 575(I)/2006 dated 05.06.2006?

ii) Whether in the facts and circumstances of the case the learned Tribunal was justified in holding that Bakery Counter Refrigerators are classifiable under PCT Heading 8415.5000 and not under PCT Heading 8418.9000 as alleged?

iii) Whether in view of the circumstances of the case any show cause notice can be issued where the classification of goods was altered after application of mind and duty assessed accordingly?

iv) Whether in the facts and circumstances of the case penalty can be levied only on the basis of wrong mentioning of PCT Heading without proving mense rea?

v) Whether in the facts and circumstances of the case penalty could be levied by the order in original in declaring the goods under PCT Heading different than one mentioned in the show cause notice?

vi) Whether the order in original is passed in violation of the provisions of Section 24-A of the General Clauses Act and principle of natural justice?"

Learned Counsel for the Applicant has read out the impugned order and submits that the goods in question were already released by the Department after a Final Assessment Order under Section 80 of the Customs Act, 1969; hence, no Show Cause Notice could have been issued for changing the classification of the goods. She further submits that no mis-declaration could be alleged as it is a matter of interpretation, whereas, the exemption under SRO 575(I)/2006 is also admissible on the imported goods and therefore, the impugned order is liable to be set aside. She has relied upon ***M/s A. R. Hosiery V. Collector of Customs (Export), Karachi and another*** **(PTCL 2005 CL 93)** and ***Messrs Pakistan Telephone Cables Ltd. V. Federation of Pakistan and 3 others*** **(2011 P T D 2849).**

On the other hand, learned Counsel for the Department has supported the impugned order and submits that the Applicant deliberately and consciously mis-declared the HS Code which is reflected from the record including the import documents and made an attempt to get the goods cleared under wrong HS Code by claiming exemption under SRO; hence, the authorities below have passed well-reasoned order and no case for interference is made out.

We have heard both the learned Counsel and perused the record. It appears that the Applicant imported Bakery Counter Refrigerator through different shipments and sought clearance of the same by filing Electronic Goods Declaration and claimed the assessment of the goods under HS Code 8418.9000 and paid duty at the rate of 5%, and such assessment as claimed under exemption SRO 575(I)/2006 was accepted and the goods were released. Thereafter, Show Cause Notice was issued to the Applicant on the ground that the goods are correctly classifiable under HS Code 8418.5000 chargeable to Customs duty at the rate of 35% and in addition the exemption SRO was also not applicable. Subsequently, order in original was passed by the adjudicating authority and the relevant finding is as under:-

"I have gone through the record of the case and the arguments put forth by the respondent importers before the honourable High Court in their Petition C. P. No. D-1320/2010. Perusal of the record shows that the imported goods are correctly

> classifiable under PCT heading 8418.5000. The fact is confirmed from the statement of the importer in Para 3 Page 3 of the petition and also from the documents i.e. Bill of Lading, shipping company's information. Therefore, as far as PCT classification is concerned, it is clear that the goods impugned in this case are correctly classifiable under PCT heading 8418.5000. Thus, the offence relating to PCT classification and wrong self-assessment stands established, which attracts the provisions of Section 79(I), 32(I), 32(2) & 32A of the Customs Act, 1969. Therefore, in terms of clauses (14) & (14A) of Section 156(I) of the Customs Act, 1969, the goods in question are liable for confiscation. Since the goods in question have already been allowed released, therefore, taking into consideration aforesaid provisions of law and the spirit of provisions of SRO 499(I)/2009 dated 11.06.2009, a penalty of Rs. 150,000/- is imposed on the importers in terms of clauses (14) & (14A) of Section 156(I) of the Customs Act, 1969."

Such order was impugned before the Collector of Customs (Appeals) and the said Appeal was also dismissed by holding that the correct classification was to be made under HS Code 8418.5000, whereas, the element of mens rea was also present in this case. The relevant findings of the Collector Appeals is as under:-

> "I have thoroughly examined the entire case record and given very careful consideration to the arguments advanced before me. Three issues are involved in these case; one, whether goods imported (that is, Bakery Counter Refrigerators) are correctly classifiable under PCT Heading 8418.5000; two, whether benefit of notification SRO 575(I)/2006 was available to the goods imported in these cases and; three, whether the appellant had deliberately mis-declared PCT classification of the goods. From the record, I observe that the goods are correctly classifiable under PCT heading 8418.5000 without any doubt, as the appellant has not even contested the same and since PCT heading 8418.5000 does not appear in the list of the headings to which benefit of notification SRO 575(I)/2006 was available there is no doubt that benefit of the said notification was not available to the goods imported by the appellant. The first two issues stand settled accordingly in favour of the department. The evidence on record also establishes beyond doubt that the appellant had deliberately mis-declared classification of the goods and had evaded a huge amount of Government revenue by way of paying customs duty @ 5% instead of applicable 35% and not paying sales tax by unlawfully self-availing the benefit of notification SRO 575(I)/2006. The information available with the appellant (that is, bill of lading and other shipping documents) shows classification of the impugned goods under PCT heading 8418.5000 and not PCT heading 8418.9000 under which the appellant manage to clear the goods; had the applicant acted in good faith he would certainly have quoted the HS Code which had been mentioned in the shipping documents, i.e. 8418.5000. There was no reason behind changing the known HS Code for the purpose of customs clearance of the goods other than paying customs duty at the lesser rate and not paying sales tax. Thus, mens rea on the part of the appellant stands clearly established. The case laws quoted by the learned counsel in this behalf are not relevant to the facts and circumstances of the instant cases. The amount of penalty imposed on the appellant is also in consonance with the gravity of the offence committed by him. Since the valuation issue raised by the learned counsel does not constitute part of the impugned order. I do not find it appropriate to take up the same. All in all, the arguments advanced by the learned counsel do not find any support from the evidence on record. I, therefore, hold that the impugned orders are correct in law and on facts and there is no reason to interfere with the same. The appeals are rejected accordingly."

The order was further impugned before the Customs Appellate Tribunal by way of an Appeal which also stands dismissed against which the present Reference Applications have been filed. The learned Appellate Tribunal held as under:-

> "7. I have perused the written submissions, filed by both the sides and also have gone through the relevant provisions of law including concerned SROs.
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> 8. After perusal of the case file I am of the view that the case is base upon three main issues as narrated below:-
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> i) Whether the appellant has correctly classified his goods i.e. Bakery Counter Refrigerators under HC Code 8418.9000, if no, what is the correct HSC of the goods in question?
>
> ii) Whether the concessionary benefit is claimed by the appellant under SRO 575(I)/2006 was available to the goods of the appellant?
>
> iii) Whether there exist any mens rea to evade customs duty payable on import of appellants goods i.e. Bakery Counter Refrigerators?
>
> In order to decide issue No. 1 and 2 on merits, I would like to reproduce here the H.S.C. No. 8418.9100 as claimed by the appellant in his GD and HSC 8418.5000 as found by the department during the post importation scrutiny.
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> **HSC 8418.9000:**
>
> - Furniture designed to receive refrigerating or freezing equipment.
>
> **HSC 8418.5000:**
>
> - Other refrigerating or freezing chests, cabinets, display counters, show cases and similar refrigerating or freezing furniture.
>
> The appellant has imported Bakery Counter Refrigerators, which no doubt falls under HSC 8418.5000, while HSC 8418.9000 deals with the furniture which are designed to receive refrigerating or freezing equipments.
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> 9. The Issue No. 1 is therefore answered that the correct HSC of the appellants goods Bakery Counter Refrigerator is 8418.5000. Now I have to see that whether the concessionary relief was available to the appellants goods or not under SRO 575(I)/2006?
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> 10. The SRO 575(I)/2006 referred exemption to plant, machinery, equipment and apparatus including capital goods for setting up of a new industrial units against valid contract or letter of credit and total C&F value of such imports for the project of US $ 50 million or above subject to conditions that the imported goods are not listed in the locally manufactured items, notified through a CGOs issued by the FBR from time to time, certified by the EDB but it does not reefer exemption to the appellant's goods. Issue No. 2 is hereby answered accordingly.
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> 11. Now I have to determine that whether there exist any mens rea / intention to evade the payment of taxes & duties to the Government exchequer. The respondent in their comments have pointed out that the GD was not filed by the clearing agent, rather it was filed by the appellant through his user ID, and despite clear indication of payment of duties and taxes under PCT heading 8418.5000 through import documents and tariff, the appellant has deliberately selected the irrelevant PCT hearing.

> 12. The act of the appellant to submit GD under wrong HS Code inspite of having full information in this regard and claiming undue exemption, I am of the clear view that there exist clear mens rea / intention to evade the payment of due duty and taxes in account of Government exchequer. Issue No. 3 is therefore answered as affirmative.
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> 13. The upshot of the above discussion is that the appeal of the appellant has no merit consideration, hence dismissed. The order passed by the learned Collector is therefore upheld and requires no interference of this forum."

Perusal of the aforesaid findings of the forums below including the Appellate Tribunal reflects that the controversy is to the effect that as to under what HS Code the imported goods are to be classified; that whether benefit of SRO 575(I)/2006 dated 5.6.2006 could be granted to the Applicant; and whether mens rea was present in the facts and circumstances of the case warranting imposition of any penalty.

Insofar as the classification of the goods in question is concerned, the learned Counsel for the Applicant has not been able to convince us on merits of the case and as to whether the Refrigerators imported by the Applicant could be classified under HS Code 8418.9000 as claimed by the Applicant. We have on our own examined the relevant HS codes and it appears to us that appropriate classification of the Refrigerators imported by the Applicant is under HS Code 8418.5000 wherein it is specifically covered as *"Other refrigerating or freezing chests, cabinets, display counters, show cases and similar refrigerating or freezing furniture"*. How it could be classified under HS Code 8418.9000 which specifies "*Furniture designed to receive refrigerating or freezing equipment*" is not understandable nor the Counsel for the Applicant has been able to assist us in any manner to this aspect of the matter. Similarly, as to the entitlement of exemption under SRO 575 again she has not been able to convince us as to how such exemption was available to the goods imported by the Applicant. She has referred to Serial No.17 of the table to the said SRO; however, the same pertains to imports by wholesale / retail chain stores only with fulfilment of further conditions as mentioned in column 5 of the said table, including requirement of projects to be approved by the Board of Investment and various other conditions. No effort has been made before us to satisfy as to fulfilment of any of these conditions. On both these issues we are of the view that no case for indulgence is made out and no exception can be drawn to the findings of the forums below. As to her argument that after clearance of the goods and assessment under Section 80 of the Act no Show Cause Notice

could be issued under Section 32, we may observe that we are least impressed by such argument of the Applicant's Counsel. If that be so, then the provision of Section 32 for recovery of any alleged short levied duty and taxes after release of consignments would be redundant. Hence, we are not inclined to agree that if an assessment has been made under Section 80 of the Customs Act, 1969 then after clearance of the goods no Show Cause Notice could be issued under Section 32 of the Act.

Insofar as the imposition of penalty and the presence of mens rea is concerned, we are of the view that since the HS Code claimed by the Applicant in its goods declaration as well as the claim of exemption under the said SRO was accepted by the Department while processing the goods declaration (though electronically); but, in any case without raising any objection, and therefore, imposition of any penalty by holding that element of mens rea was present in the matter would be too harsh to sustain. The observations of the learned forums below that since HS Code was declared in the import documents as 8418.5000; hence, no other HS Code could have been claimed by the Applicant does not seems to be a justified contention inasmuch as the HS Code mentioned in the import documents are at times only as a matter of reference and are coming from the country of origin and are not always binding either on the person importing the goods; or even the Customs authorities. The Applicant importer is a best judge to claim classification of the goods and exemption if any, and in this case after such claim was filed; the Department instead of objecting and refusing the assessment or issuing any Show Cause Notice at the time of clearance of the goods accepted the same and after processing the goods declaration allowed release of the goods to the Applicant. In that situation, in our considered view merely for the fact that some other HS Code was mentioned in the import documents would not ipso facto mean that element of mens rea was present making the Applicant liable for imposition of penalty. It is settled law that classification of goods is a question based on legal and factual determination and so also of interpretation of the HS Code and the Customs tariff; hence, there could always be difference of opinion for interpreting the same. It is not that it always be a case of mens rea and imposition of penalty if the claimed HS Code is not accepted by the Department and therefore, in our opinion to the extent of imposition of penalty the order of the adjudicating authority affirmed subsequently, by the Appellate Authorities cannot be sustained. In support reliance may be placed on the cases reported

as ***Collector of Customs vs. Shaikh Shakeel Ahmed*** **reported as** ***2011 PTD 495*** **and** ***Collector of Customs Karachi vs. Power Electronic Pakistan (Pvt.) Limited Lahore*** **reported as** ***2011 PTD 2837***

In view of hereinabove facts and circumstances, Question No. i) is answered in negative; Question No. ii) in affirmative; Question No. iii) in affirmative; Question No. iv) in negative; Question No. v) in negative. Insofar as Question No vi) is concerned, in view of the above need not be answered. Accordingly, the instant Reference Applications are partly dismissed to the extent of claimed assessment and exemption under the SRO in question; and partly allowed to the extent of penalty which stands remitted in the above terms. Copy of this order be placed in all connected files by the office.

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

J U D G E

J U D G E

Arshad/