

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application ("SCRA") Nos. 156 to 167 / 2016

Date

Order with signature of Judge

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

Applicant:

Collector of Customs
Through Additional Collector of Customs
Model Customs Collectorate
(Appraisalment) West,
Customs House, Karachi.
Through Mr. Kafeel Ahmed Abbasi
Advocate.

Respondent:

M/s. S. Najmuddin Ahmed & Co.
A-35, Mominabad Sector 4/F, Orangi
Town, Karachi.
Through Mr. Sardar Faisal Zafar,
Advocate.

Date of hearing:

03.02.2021.

Date of Order:

03.02.2021.

ORDER

Muhammad Junaid Ghaffar, J: Through this set of Reference Applications, the Applicant has impugned a common order dated 07.12.2015 passed by the Customs Appellate Tribunal, Karachi, in Customs Appeal Nos. K-189 to 193 of 2009 and other connected matters by proposing the following Questions of law:-

- “1) Whether on the facts and circumstances of the case, the learned Appellate Tribunal erred in law by deciding the appeals on Omni (mutatis mutandis) basis, without adhering to the law settled by this Hon'ble Court in the case of Pakistan Cables Ltd. V. Federation of Pakistan & Others (2011 PTD 2849)?
- 2) Whether in the light of record, facts and circumstances of the case, the learned Appellate Tribunal erred in law and have no jurisdiction for not considering the very fact that it was primarily a case of mis-declaration of physical description, i.e. import of 'Menthol' under the garb of Hexahydrothymol, and PCT heading i.e. 2906.1100 (menthol) instead of 2915.3990 (Hexahydrothymol), of the imported goods within the meaning of Section 32 of the Customs Act, 1969?
- 3) Whether on facts and circumstances of the case the learned Appellate Tribunal erred in law and have no jurisdiction to hold that the customs value, determined under Section 81(2) read with Section 25 of the Act, cannot be determined by the Assistant Director of Customs Valuation?

- 4) Whether in the light of facts and circumstances of the case the learned Appellate Tribunal erred in law to hold that the assessment was made as per Valuation Ruling of Section 25-A(l) of the Act instead of "Valuation Data", maintained in terms of Rule 107 of the Customs Rules, 2001, read with Section 25(9) & Section 25(13)(a) of the Act and Article-VII of the WTO Agreement, 1994 and further read with Valuation Advice of Section 81(2) of the Act?
- 5) Whether on the facts and circumstances of the case the learned Appellate Tribunal has acted beyond jurisdiction / justification to set aside the orders passed by the authorities under Section 80(3), 179 and 193 of the Act, on irrelevant technical grounds?"

2. Learned Counsel for the Applicant has read out the impugned order, including the orders passed by the forums below and has argued that in terms of Section 5(2) of the Customs Act, 1969 ("**Act**") the Assistant Director Valuation who had issued the Valuation Ruling in question was competent to do so, and the Tribunal has erred in law by holding otherwise. He further submits that it is a case of mis-declaration as the Respondents got their goods cleared at a lower value; hence, Section 32 of the Act is attracted in these matters. He has prayed for setting aside the impugned order; or in the alternative to remand the matter to the Department for once again passing an appropriate order.

3. On the other hand, learned Counsel for the Respondents has placed on record order dated 16.12.2008 passed in Custom Reference Application Nos. 157 to 221 of 2008 (S. M Naqi v Collector of Customs & Others) and submits that this Court has allowed the Tribunal to pass a common order involving common points of facts and law; hence, the Tribunal was justified in passing a common order in these matters. He has further argued that no mis-declaration of description can be alleged as the Respondents had declared the item in question as Hexahydrothymol which is a chemical name of Menthol, and therefore, no case is made out so as to attract the provisions of Section 32 of the Act. According to him, the Goods Declarations were examined and assessed and all aspects were checked by the Department, whereas, the Show Cause Notices in question were issued subsequently without any basis. He has supported the impugned order.

4. We have heard both the learned Counsel and perused the record. It appears that the Respondents imported various consignments of Hexahydrothymol and filed Home Consumption

Goods Declarations, claiming assessment under HS Code 2915.3990 and all such Goods Declarations were processed and were out of charged by releasing the goods in question. Thereafter, Show Cause Notices were issued under s.32 of the Act to the Respondents on the ground that the item in question consists of Menthol which is to be assessed at a much higher value; hence, a case of mis-declaration is made out. The relevant and operating part of the Show Cause Notice reads as under:-

“The instant import consists of Menthol i.e. Hexahydrothymol which is being assessed @ US \$ 20.45/Kg as per Valuation Advice No. 829/2006 dated 15.11.2006. On post importation scrutiny of documents, it revealed that apart from the facts narrated above, importer tried to escape the actual valuation by declaring chemical winked and the goods could be released at lower value than the actual one. This mis-declaration is therefore, resulted in short recovery of Rs. 354470/- (i.e. customs duty Rs. 59938/- sales tax Rs. 188802/- and income tax Rs. 86849/- additional sales tax Rs. 18881/- which is recoverable in this case.”

5. According to the contents of the Show Cause Notice as above, it appears that the Applicant's case is that Menthol is to be assessed @ US\$ 20.45/Kg pursuant to some Valuation Ruling as against declared value, and therefore, the Respondents are liable for to pay the short levied amount in question. The said Show Cause Notices were decided by the Adjudicating authority in the following terms:-

“4. I have gone through the record of the case and found tht importers were served with hearing notices but no one appeared personally to attend the hearing, rather, written reply was sent. In their reply, not at one place, they denied the allegation that Menthol and Hexahydrothymol are synonym of same commodity and they deliberately mentioned Hexahydrothymol instead of Menthol in order to avoid implementation of Valuation Ruling. The fact is further strengthened from condensed chemical dictionary that Hexahydrothymol and Menthol is same commodity. The importers declared menthol by its chemical name i.e. Hexahydrothymol under HS Code 2915.3990 and also declared the value as abnormally low against the actually classifiable HS Code 2006.1100 specified for 'Menthol' in order to escape from correct assessment which is also evident from Test Report No. INP/2048/2008 dated 16.01.2008 of the identical item. Therefore, the goods were assessable at US\$ 20.45/Kg in terms of Valuation Advice No. 820/2006 dated 15.11.2006 under PCT heading 2006.1100. Keeping in view the facts mentioned above, the charges in Show Cause Notice stands established. I, therefore, order for payment of short levied amount of Rs. 356044/- in terms of Section 32(3)A of the Customs Act, 1969.”

6. Subsequently in Appeal the Order as above was maintained by the Collector of Customs (Appeals) and thereafter, the same was impugned before the Appellate Tribunal and through impugned order

the Appeals of Respondents have been allowed in the following terms:-

“8. I have heard the argument of the advocate of the appellant, representative of the respondent and gone through the complete record of the case. The respondent, the Adjudicating Officer and the Collector (Appeals) while dealing this case have relied on Valuation Ruling No. 827/2006 dated 15.11.2006. Unfortunately, neither the Adjudicating Officer nor the Collector (Appeals) have given any consideration towards a blatantly unlawful valuation Ruling issued by an Assistant Director instead of Director (Valuation) as Valuation Ruling has made himself a laughing stock before the taxpayers. In the subject Ruling there is no mention as to why the declared values by the appellants were not accepted and what are the basis on which this Valuation Ruling has been issued. Unfortunately, the Customs Authorities have also accepted this Ruling despite the fact that the Assistant Director (Valuation) issued the Ruling in total disregarded to the provisions of Section 25 of the Customs Act 1969 and the rules made thereunder. While making the case of mis-declaration they knew that for the purposes of Valuation Rulings, the appropriate officer issued the same is Director (Valuation).

9. In view of my above observations and discussions and considering the fact that statutory provisions have been totally disregarded and no respect have been shown towards the prescribed procedure under Customs Act, 1969 and the Rules made thereunder, I have no other option but to declare the Valuation Ruling No. 827/2006 dated 15.11.2006 as unlawful and ab-initio, void. Therefore, Show Cause Notice No. SI/Misc/1422 to 1426/2008-II dated 03.11.2008 No. SI/MISC/1427 to 1431/2008-II dated 03.11.2008, No. SI/MISC/261/2008-II dated 03.04.2008, and No. SI/MISC/1221/2008-II dated 30.09.2008 are vacated and the Orders-in-Original No. 07/2008 dated 31.12.2008, No. 06/2008 dated 31.12.2008, No. 70/2008 dated 15.10.2008 and No. 04/2008 dated 24.12.2008, and Original-in-Original No. 1662 to 1671/2009 dated 26.03.2009, No. 1767/2009 dated 16.05.2009 and No. 2035/2009 dated 05.10.2009 are set aside. The appeal is accordingly accepted with no order as to cost.”

7. Insofar as question No. (1) is concerned, after being confronted that the Adjudicating Authority as well the Collector Appeals have also passed orders by applying the same as mutatis mutandis; and if this question is answered in favour of the Applicant by applying the law settled by this Court¹, then the orders passed by the forums below would also have to be set aside; learned Counsel for the Applicant has not pressed this question and has instead requested to decide these Reference Applications on merits.

8. As to the above finding of the learned Tribunal is concerned, it reflects that the only legal question which has been dealt with and decided is, that the Valuation Ruling in question could not have been issued by the Assistant Director of Valuation; but only by the Director of Valuation in terms of Section 25-A of the Act. According to the Tribunal based on such Valuation Ruling, no case for mis-declaration could have been made out in terms of s.32 ibid as the

¹ Pakistan Telephone Cables Ltd v Fed. Of Pakistan [2011 PTD 2849]

Valuation Ruling in question was issued without any lawful authority and jurisdiction. In response to this learned Counsel for the Applicant has referred to Section 5(2)² of the Act; however, while confronted, he could not satisfy us as to whether the Assistant Director in question was delegated or authorized in any manner to exercise powers of the Director Valuation in terms of Section 5(2) of the Act. There is nothing on record to substantiate this factual position. In fact, no specific question of law has been proposed in this regard and it is only while making submissions that the Applicant's Counsel has raised this issue. In that case, we have no choice but to accept the facts as available before us that the Valuation Ruling in question was issued by the Assistant Director who had no authority or jurisdiction to do so, nor he was conferred any such powers or delegation by the Director Valuation as contemplated in s.5(2) of the Act. Moreover, the law is also settled in this regard that s.25A does not grant or delegate powers to a Deputy Director to issue such ruling, as he does not figure anywhere in the said section³. Therefore, the Tribunal was fully justified in holding that the Ruling in question was issued without any lawful authority.

9. Notwithstanding, and on our own we have also noted that the Valuation Ruling No. 827/2006 dated 15.11.2006 in question is though titled as a Valuation Ruling; but in fact, is a Valuation Advice pertaining to a consignment imported by M/s Elite Chemicals Karachi imported on 20.04.2006 i.e. much prior to the import in question. Moreover, such a Valuation Advice is only relatable to the specific consignment for which the advice had been sought by the respective Collectorate from the Valuation Department and cannot be treated as a statutory Valuation Ruling in terms of section 25-A of the Act. Therefore, even if there was a Valuation Advice in field; it was not strictly applicable on the Respondents imports coming into Pakistan much subsequent to the period for which the Valuation Advice was issued and that too for a specific consignment as per the details mentioned therein. Moreover, and without prejudice, it is also settled proposition of law that a Valuation Advice (and not a Valuation Ruling) is nothing but an advice which has no binding effect, whereas, it is not to be taken as a conclusive evidence while making assessment of

² 5(2) Unless the Board in any case otherwise directs, the Director General, Director, and Collector may authorize any officer to exercise within any specified area any of the powers of the Director General, Director, Collector or any other officer of Customs under this Act.

³ Rashid Arms Company v Federation of Pakistan (2008 PTD 1742)

goods⁴; and reliance upon the valuation advice simpliciter is not a valid basis of assessment of the value of imported goods within the framework of section 25 of the Act⁵; hence, after releasing the consignments without any objection as to the values so declared, merely on the basis of a valuation advice of 2006, which was already in field and appears to have been discarded by the assessing officer, it was not justified to issue a show cause notice on such basis.

10. In view of hereinabove facts and circumstances of the case there appears to be no illegality in the findings of the Tribunal in the impugned order, whereas, the Applicant department has not been able to controvert the legal and factual position as noted hereinabove so as to upset the said finding of the Tribunal. The questions proposed do not appear to be properly drafted; hence, we would like to rephrase them in the following manner.

- (i) Whether in the facts and circumstances of the case the Tribunal was justified in holding that the Valuation Ruling in question was incompetently issued by the Assistant Director in terms of s.25A of the Act?
- (ii) Whether in the facts and circumstances of the case a valuation advice is binding in nature for issuance of a show cause notice in terms of s.32 of the Act for recovery of short levied duty and taxes?

11. And in view of the above discussion question No.(i) is answered in the affirmative, against the Applicant and in favour of the Respondents; whereas, question No.2 is answered in negative, against the Applicant and in favour of the Respondents. Accordingly, all these Reference Applications are dismissed. 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 and be also placed in all connected files by the office.

J U D G E

⁴ Kings Pen Company v Collector of Customs [2005 PTD 118] & followed in Habib ur Rehman & Company v Collector of Customs [2005 PTD 69]

⁵ M.M.M. Traders v Deputy Collector of Customs [2006 PTD 313]

J U D G E

Arshad/