

**IN THE HIGH COURT OF SINDH, KARACHI**

Special Customs Reference Applications No. 409 of 2017

Date

Order with signature of Judge

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

**Applicant:**

**The Collector of Customs,  
 Through Mr. Muhammad Khalil Dogar,  
 Advocate.**

**Respondents:**

**M/s. Sajid Plastic Factory,  
 Through Mr. Aqeel Ahmed Khan,  
 Advocate.**

**Date of hearing:****10.02.2021.****Date of Order:****10.02.2021.****ORDER**

**Muhammad Junaid Ghaffar, J:** Through this Reference Application, the Applicant Department has impugned Order dated 15.04.2017, passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No.K-36/2016, proposing the following questions of law:-

- i. Whether the Appellate Tribunal rightly interpreted the provisions of Section 32 and its penal provisions in respect of mis-declaration of PCT heading by the respondent?
- ii. Whether the Appellate Tribunal was competent to change the commodity description falling under one head of Customs Tariff without examination of consignment?
- iii. Whether there was any material before the Appellate Tribunal in form of an expert report to interfere in the PCT heading as applied by the applicant?
- iv. Whether the respondents were guilty of mis-declaration thus causing loss of revenue to the government and were rightly penalized under clause (14) & (14-A) of Section 156 (1) of the Customs Act, 1969 thus confiscating the goods?
- v. Whether there is any ambiguity in respect of fact or law by the Adjudicating Authority in order in original resulting in miscarriage of justice?

- vi. Whether the impugned order is supported by any provisions of Customs Act, 1969 giving any benefit to the respondent in support of their mis-declaration?

2. Learned Counsel for the Applicant has read out the order and submits that the Tribunal has erred in law by allowing the Appeal inasmuch as pursuant to determination of classification of goods under HS Code 3915.3000, Serial No.51 of Part-I of Appendix-B of the Import Policy Order, 2013 is attracted and the respondent has not fulfilled the said conditions of the Import Policy; hence according to him the Order in Original be restored, whereby, part of the consignment was allowed to be released against redemption fine, whereas, the other part was liable for outright confiscation.

3. On the other hand, learned Counsel for the respondent has supported the impugned order and submits that primarily the dispute is factual as no question of law arises out of the Order of the Tribunal. In support he has relied upon **2016 PTD 2902 (Collector of Customs V. Bashir Sons)**.

4. We have heard both the learned Counsel and perused the record. The precise facts as available on record depicts that respondent imported a consignment of 104 M. Tons, declaring the goods as “recycled plastic granular in grey colour”, packed in four containers and filed Bill of Entry claiming Assessment under HS Code No. 3901.9000 chargeable to customs duty at the rate of 5%. The goods were examined and two containers were found as per Declaration i.e. “recycled plastic granular in grey colour”, whereas, in the remaining two containers according to the applicant goods contained “plastic crushed chips” classifiable as scrap under HS Code 3915.3000 and were hit by Serial No.51 of Part-I of Appendix-B of the Import Policy Order, 2013 which requires fulfillment of certain conditions. Samples were sent for test in Customs Laboratory and thereafter a show cause notice was issued pursuant to which Order-in-Original was passed, whereby, two containers were allowed to be released against imposition of fine and penalty, whereas, remaining two containers were confiscated out rightly. In appeal, the Tribunal through impugned order has set-aside the Order-in-Original with directions to release the consignment.

After perusal of the record placed before us, we are in agreement with the arguments of the respondent's Counsel that primarily the issue before us is more of a factual nature inasmuch as the Applicant Department has come to a conclusion that the goods in question are Scrap on the basis of their physical appearance. However, admittedly in the test report no such finding was given by the Laboratory and it is a mere opinion of the Adjudicating Authority that two containers, in which, allegedly the description was found to be "plastic crushed chips" falls under Heading of Scrap (HS Code 3915.3000), which then is subject to certain restrictions under Para-51 (ibid). Such finding has been overturned by the Tribunal thereafter. It would be advantageous to refer to the two test reports of the Customs own laboratory, which reads as under:

- (i) "The sample on test is found to be synthetic resin composed of Polyvinyl Chloride (PVC). It is in the form of grey color irregular crushed pieces.
- (ii) Report of the same GD No. 55475 dated 20.10.2015 vide Receipt No.032164 has already been sent to the Group, now another same received which on test is found to be synthetic resin composed of Polyvinyl Chloride (PVC). It is in the form of grey color irregular crushed pieces."

5. Perusal of the aforesaid report reflects that according to the opinion of the Laboratory the goods were in the form of grey color irregular crushed pieces, whereas, the Applicant being still not satisfied, referred the matter once again for retest and again the opinion was that the goods in question are in the form of grey color irregular rushed pieces. The Applicant department, on the basis of the above report, has classified the goods in question as Scrap, under HS Code 3915.3000 (with applicability of restrictions at Serial No.51 ibid) whereas, the Appellate Tribunal, after going through the record, has not agreed with this contention and the relevant finding of the Tribunal is as under:-

"11. In our view, the Respondent No.1 has erred by finding the second part to contain plastic flakes scrap falling under Tariff Heading 3915.3000 and attracting S.No.51 of the IPO for following reasons;

Whether plastic is scrap or not cannot be determined solely on the basis of shape it may take. Firstly, we take up the task of considering the meaning of the word 'scrap'. We are of the view that the word "scrap" can be interpreted as being an item which is discarded, used, condemned, or otherwise tainted, but not able to be put to its original

use. Our attention has also been drawn by the learned counsel for the Appellant to the judgment by a Division Bench of the Hon'ble Sindh High Court, titled *Khyber Traders v/s Central Board of Revenue*, reported at 1994 MLD 1473, where their Lordships were interpreting the meaning of the term “scrap in the context of “waste and scrap of iron”. At paragraph 7, His Lordship Mamoon Kazi J. stated,

"7. As would appear from the various dictionary meanings assigned to the word "scrap" the said word refers to waste material or used articles. The different meaning referred to above further indicate that only such material which no longer can be used in the same form can be called scrap."

It appears from the foregoing passage that it is the nature of the item that lends to its character as 'scrap', and not merely shape and / or size by itself. In fact, if the contention of the Respondents was to be accepted, it would mean that recycled plastic shaped as flakes would also be considered as plastic scrap, whereas plastic scrap that has been shaped as granules would be considered to be recycled plastic. The Respondents have alleged that 'flakes / crushed pieces' are actually raw material for granular plastic, which is 'recycled plastic'. In this respect, both sides submitted what may be processes for recycling. It has been stated before us by the Appellant, and has been supported by various online resources on the subject, that in order to obtain recycled plastic, plastic scrap is used as raw material and that, at the conclusion of the recycling process, recycled plastic usually takes shape as 'flakes / crushed' plastic, also known as 'regrind'. This 'regrind' is then processed and 'granular' and / or 'pulverized' plastic may be obtained. It is immaterial if this final process is made a seamless part of the process, as the nature /character of the plastic would remain to be 'recycled'."

6. When the above finding is read in juxta-position with the test reports and finding of the Adjudicating Authority, we are of the considered view that the same is primarily dependent on facts and does not give rise to any question of law, which could be entertained by this Court under its Reference Jurisdiction under Section 196 of the Customs Act, 1969. The Tribunal being the last fact finding forum has given appropriate reasons for its disagreement with the findings of the Adjudicating authority. Moreover, in the given facts whether the goods in question are scrap or otherwise is not a question of law but a question of fact; which we cannot attend to in our Reference jurisdiction. We may add that if it had been merely a question of classification of goods on admitted facts, then it could have been dealt with by us in this Reference Jurisdiction as the question of classification is not always purely a question of fact; but a mixed question of fact and law. However, this is not so in this matter as facts are in dispute, whereas, the Tribunal has given a finding of fact in favor of the Respondent which in our view in the given facts and circumstances does not warrant any interference.

7. In view of hereinabove facts and circumstances of this case, we do not find any substance in the arguments of the Applicant's Counsel, whereas, no question of law arises out of the Order of the Tribunal, which in fact has given its finding after overturning the opinion on facts arrived at by the Adjudicating Officer pursuant to the reports of the Customs Own Laboratory; hence Reference Application, being misconceived, is hereby dismissed. Let copy of this order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

**J U D G E**

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