IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Applications No. **98 of 2017**

Date	Order with signature of Judge

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

Applicants:	**The Collector of Customs,** **Through Ms. Masooda Siraj, Advocate.**
Respondent:	**M/s. Habib Sugar Mills Limited.**
Date of hearing:	**26.02.2021.**
Date of Order:	**26.02.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant Department has impugned Order dated 17.11.2016 passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No.K-1402/2015, proposing the following questions of law:-

i. Whether in the facts & circumstances of the case the Customs Appellate Tribunal erred in law to allow the appeal of the respondent without giving any findings on the charges established on the respondent importer for provision of Section 79(1)(b), 32(1)(c) and 32(2) and 32A(1)(a) & (c) of the Customs Act, 1969, thus, made a heavy loss to the national exchequer?

ii. Whether on the facts & circumstances of the case the learned Appellate Tribunal has not failed to consider that the respondent importer and the clearing agent have deliberately mis-declared the value specification of the goods and PCT classification as specified 8716.3190 (CD@ 15%), instead of 7311.0030@ 5% customs duty, thus, made an attempt to deprive the Government from its legitimate revenue amounting to Rs. 1,020,611/-?

iii. Whether in terms of amended provisions of Section 79(1) (b) and Section 80(1) of the Customs Act, 1969, read with the dictum settled in the case of M/s. Lever Brothers Pakistan Ltd., V/s. Customs, Sales Tax and Central Excise Customs Appellate Tribunal and another (2005 PTD 2462), under Pakistan Customs Computerized System a lesser payment of revenue constitute as an offence for penal action in terms of Section 32 and 32A read with clause (14) and (14A) of Section 156(1) of the Customs Act, 1969?

iv. Whether the Customs Appellate Tribunal erred in law by not considering the provisions of Section 79(1) of the Customs Act, 1969, wherein an importer is responsible for filing a true declaration of all particulars of the imported goods, giving therein complete and correct particulars of such goods,

moreover in case of self-assessment an importer is responsible to pay correct leviable duty / taxes?

v. Whether the Honourable Customs Appellate Tribunal has not erred in law by not considering the fact that the mensrea on the part of respondent is very much visible due to detection of grossly mis-declaration of classification and value of imported items meaning thereby the respondent is not mis-declared under Section 32 of the Customs Act, 1969?

vi. Whether in view of the established facts & relevant provisions of law, the findings of the Customs Appellate Tribunal are not perverse of non-reading and / or mis-reading of the available record to the determent of revenue and the consequent benefit to the respondent importer, who has made an attempt to deprive the Government from its legitimate revenue?

2. Learned Counsel for the Applicant submits that it is a case of mis-declaration of HS Code; hence the Tribunal was not justified in allowing the Appeal to the extent of imposition of fine and penalty. According to her, the respondent had mis-declared the HS Code so as to get benefit of a lesser rate of duty; hence the questions be answered in favour of the Applicant.

3. We have heard the learned Counsel for the Applicant and perused the record. It reflects that appellant imported *"1 Unit of 32 M3 — 2MPA LCO2 Cryogenic Vacuum Perlite Insulated Semi-Trailer"* and claimed assessment of the goods under HS Code No. 7311.0030, which was disputed by the applicant, as according to them the goods were correctly classifiable under HS Code 8716.3190, attracting customs duty at the rate of 15%. Show Cause Notice was issued and matter was adjudicated, whereby, fine and penalty was imposed, which in appeal has been set-aside to the extent of such fine and penalty. The relevant finding of the Tribunal reads as under:-

> "6. We have heard both the contesting parties as well as examined the relevant record. The summary of the whole case is that as per departmental version, the appellant imported "1 Unit of 32 M3 — 2MPA LCO2 Cryogenic Vacuum Perlite Insulated Semi-Trailer" and classified the same under PCT heading 7311.0030 while filing of Goods Declaration in the automated system of WeBOC whereas the said goods were classifiable under PCT heading 8716.3190. While the former PCT heading attracted customs duty @ 5% ad valorem, the latter required payment of customs duty @ 15% ad valorem. The tariff of taxes i.e. sales tax and withholding taxes, is not disputed. The said misclassification of imported consignment was a deliberate attempt on the part of the appellant to pay less amount of customs duty and other taxes amounting to Rs.1,020,611/-. On the other hand, the appellant's contention is that it is simply matter of classification of their imported consignment. To their best understanding, based on import documents including the Certificate of Origin, they classified the same under PCT heading 7311.0030 which attracted customs duty @ 5% ad val. However, on departmental pointation, they made the payment of duty and taxes as per PCT heading 8716.3190. The learned counsel for

the appellant laid tremendous emphasis that the classification was done without any malafide contention as all the relevant import documents indicated one classification i.e. PCT heading 7311.0030.

7. We have scrutinized all the import-related documents including the Commercial Invoice, Packing List, Bill of Lading, Certificate of Origin and find that the appellant's contention is correct that all the aforestated documents indicated PCT heading as 7311.0030. It is important here to highlight as to what is the exact description of goods as given in both the PCT headings. The PCT 73.11 describes "Containers for Compressed or Liquified Gas, of iron or steel" whereas PCT heading 8716 indicates "Trailers and Semi-Trailers, other vehicles, not mechanically-propelled, parts thereof'. The appellant have also taken the plea that had they classified with bad intention of evading government revenue, they could have suppressed the words "Semi-trailers" from their description as declared in the Goods Declaration since the same was specifically mentioned in PCT heading 8716.3190. We would like to comment here that the classification of goods in Pakistan Customs Tariff is a highly technical job which requires lot of professional skill and to expect in each declaration whether by the importer or his clearing agent that he possesses that level of skill, would not be fair on part of the department. We do not find any malafide intent on the part of the appellant while classifying goods under PCT heading 7311.0030. The respondent has not been able to bring forward a single corroborative evidence to establish the element of 'mens rea' in the said declaration. We are not inclined to appreciate argument of the respondent department that the element of mens rea is present in the case simply because the appellant tried to get the consignment cleared under PCT heading attracting low rate of customs duty. Conversely, we find weight in appellant's argument that had there been any malafide intent, they could have conveniently suppressed the words 'semi-trailer' from their declaration as the same is specifically mentioned in PCT heading 8716.3190. It is the basic principle of law that the act itself does not constitute guilt unless done with guilty intent. To constitute guilt there must be a guilty mind. The presence of 'mens rea' is an essential ingredient in every offence. As mentioned above, the appellant classified their consignment in the PCT heading, as was declared in all the import-related documents. The factual position as aforesaid, unambiguously establishes that incorrect classification of their goods was a bonafide act on the part of the importers. It is important to note here that the respondent department has neither disputed their declared description of the consignment nor its valuation. Furthermore, the appellant made payment of duty and taxes as per departmental version, immediately after their pointation.

8. The above discussion conveniently leads us to conclude that it is not a case of misdeclaration by any stretch of imagination, as such provisions of section 32 of the Customs Act, 1969 and related provisions in other Acts, are not attracted at all. We, therefore, set aside the impugned Order-in-Original to the extent of confiscation of the consignment imported by the appellant, imposition of redemption fine in lieu of confiscation as well as the penalty imposed on the importer. The appellant is also entitled for refund of Rs.1,653,682/-, if already deposited being the amount of redemption fine. The appeal is allowed on merit and is decided in the aforesaid terms."

4. Perusal of the above finding reflects that the learned Tribunal has been pleased to hold that since all imported related documents including the Free Trade Agreement (FTA) Certificate were showing HS Code 7311.0030, whereas, the description of the goods was correctly mentioned by the respondents, therefore, this was not a case of any intentional mis-declaration and element of *mens rea* was missing. The learned Tribunal has also accepted the plea of the

respondents that, if any mis-declaration could have been made it was the description, which could have been changed; however, admittedly correct description of goods was declared on the Goods Declaration. The respondent had declared the HS Code on the basis of the documents including the FTA Certificate. We are of the view that the Tribunal's finding is correct in law and it is not that in each and every case wherein upon scrutiny of the Goods Declaration if HS Code is changed attracting a higher rate of customs duty, that fine and penalty has to be imposed mandatorily, as it is always dependent upon facts and circumstances of the case as well. One has to see the intention in doing so as well as presence of element of mens-rea. Here, in this case when admittedly description of goods was correct, then such a harsh action against an Industrial Importer could have been avoided. It is also a settled proposition of 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 fine and penalty if the claimed HS Code is not accepted by the Department and therefore, in our opinion to the extent of imposition of fine and penalty the order of the adjudicating authority has been rightly modified by the Tribunal. 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.***

5. Accordingly in our view the present facts do not warrant any interference by this Court as apparently the questions of law, as proposed, do not arise out of the Order of the Tribunal; hence we are not inclined to answer these questions. The 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.

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