IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Applications No. **2186 of 2015** along with
SCRA Nos.868/2015 to 927/2015 (61 cases)

Date	Order with signature of Judge

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

Applicants:	**Collector of Customs** **Through Mr. Iqbal M. Khurram, Advocate.**
Respondents:	**M/s. Al-Karam Trading** **in SCRA No.2186/2015 & others.**
Date of hearing:	**25.02.2021.**
Date of Order:	**25.02.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant Department has impugned a common Judgment dated 28.10.2014, passed by the Customs Appellate Tribunal in Customs Appeal Nos.K-230 to 291 of 2011 (total 61 Appeals), proposing the following questions of law:-

i. Whether the learned Appellate Tribunal has erred in law not to consider that the Valuation Rules were made in the year 2000-2001 for Section "25" of the Act, whereas the Valuation Ruling were issued under Section 25-A of the Act, and said provision of law was promulgated in the year 2006, hence, Rule 107 of the Customs Rules, 2001, has no over-riding effect on the values, which are determined under Section 25- A of the Act, further without prejudice to the above, the provision of Rule 107 of the Customs Rules, 2001, cannot be applied, so rigidly that no value can be taken for the reference purpose. Moreover, the Valuation Rulings issued under Section 25-A(1) of the Act, are applicable until the revision made under Section 25-D of the Act, or a fresh Ruling is issued under the aforesaid provision of law?

ii. Whether the learned Appellate Tribunal has erred in law not to consider that in terms of Section 25-A(2) of the Act, it is mandatory for all the "Assessors" of Section 79(1)(b) & 80(c) of the Act, to make the assessment as per the customs values determined by the Director (Valuation) in terms of Section 25-A(1) of the Act?

iii. Whether the learned Appellate Tribunal has erred in law not to consider that the respondent deliberately short paid the Government dues, even in the presence of Valuation Rulings issued by the

competent authority under Section 25-A(1) of the Act, was in field, thus, committed an offence under Section 32(3A) of the Act?

iv. Whether the learned Appellate Tribunal has erred in law not to consider that the appeal filed by the respondent before learned Collector (Appeals) was time barred and beyond the stipulated time period prescribed under Section "193" of the Act. Moreover, no condonation in this regard was sought by the respondent?

v. Whether the learned Member (Judicial) of the Honourable Appellate Tribunal sitting single was right to decide a technical and valuation issues involved in the instant case without the association of Member (Technical)?

vi. Whether in view of the established facts & relevant provisions of law, the findings of learned Appellate Tribunal are not perverse for non-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 has read out the order of the Tribunal and submits that the Tribunal has erred in law by ignoring the fact that in presence of a Valuation Ruling issued under Section 25-A of the Customs Act, 1969 (**Act**), no assessment can be made under Section 25(ibid), whereas, even after clearance of the consignments, if the Ruling issued under Section 25-A of the Act has not been applied, the recovery of the customs duty and taxes can be made under Section 32 of the Act and for that it is not mandatory to first reopen the Assessment under Section 195 of the Act. According to him, both the forums below have seriously erred in law; hence question be answered in favour of the Applicant and the impugned orders be set-side.

3. We have heard the learned Counsel for the Applicant and perused the record. It appears that in some of the cases notice(s) were ordered; but no compliance was made and the cases are coming up for non-prosecution. Nonetheless after hearing the learned Counsel for the Applicant and on perusal of the record, we are not inclined to issue any pre-admission notice to the respondents. It appears that as per Applicant's case i.e. Directorate of Post Clearance Audit, the consignments imported by the respondent in question were released without proper application of Valuation Ruling No.Misc/25/2007-IV-A/3711 dated 10.12.2007, revised on 10.09.2008; hence the same resulted in short payment of government revenue; for which show cause notices were issued and adjudicated against the

respondents; however, Collector of Customs (Appeals) as well as learned Tribunal have decided the issue in favour of the respondents. There are in all three legal issues involved in these matters as apparently the Applicant has not properly drafted the legal questions. First is that **(i)** *"whether in the given facts and circumstances of the case, short levied duties and taxes can be recovered through a show cause notice under Section 32 of the Act without first reopening of assessment orders already passed under Section 195 of the Act for reopening the assessment orders pursuant to which the Goods Declarations were processed and the consignments were released";* **(ii)** "*Whether any assessment cane be made under Section 25 of the Act when a Valuation Ruling of the goods has been issued under Section 25-A of the Act"* and **(iii)** "*whether in the given facts and circumstances of the case, the show cause notices, which do not contain any details as to the alleged short levy of duty and taxes and even the applicability of the Valuation Ruling can be sustained"*. Insofar as first two issues are concerned, were are of the view that though the forums below have not fully appreciated the facts as well as the law in this regard, and apparently arguments of the Applicant's Counsel to this extent appears to be justified and correct; however, for the present purposes and to decide these Reference Applications we believe that adjudication of these two legal issues would be of no help to the Applicant's case as apparently the third legal issue (discussed hereinafter), which is in relation to the very merits of the case appears to be in favour of the respondents. Therefore, we have left open these two legal issues, which would be dealt with, if so required, in an appropriate case and for the present purposes, we are not affirming it to this extent as recorded by the Collector of Customs (Appeals) as well as the learned Tribunal.

Coming to the third issue, in our considered view it has to be decided against the Applicant. It would be advantageous to refer to the operative part of the show cause notice dated 14.06.2010 in SCRA No.2186/2015, from which learned Counsel for the Applicant has made his arguments. It reads as under:-

"GOVERNMENT OF PAKISTAN
MODEL CUSTOMS COLLECTORATE OF PACCS
CUSTOM HOUSE, KARACHI
Web: www.paccs.gov.pk

NO.MCC/PCA/1035/2010/Audit Dated: 14-06-2010

SHOW CAUSE NOTICE

SUBJECT: **SHORT LEVIED / EVADED AMOUNT OF DUTY & TAXES RS.2,91,951/-.**

Whereas the Directorate General of Post Clearance Audit has reported that during the post clearance audit under section 32(3A) read with Section 26A of the Customs Act 1969, M/s. AL-Karam Trading (NTN-1620380), 27, Aftab Steel Market, G. T. Road, Gujranwala, imported 01 consignment vide Goods Declarations bearing CRN #I-HC-1121635 dated 27-08-2009, comprising, of Stainless Steel Sheet of Secondary Quality AISI 430 Series (Magnetic) and succeeded in getting clearance of the consignment without proper application of valuation Ruling No.Misc/25/2007-IV-A/3711 dated 10-12-2007 which pertains to Valuation of Secondary Quality of Stainless Steel of 400, 300 & 200, Series. The Valuation Ruling was subsequently reviewed in respect of Secondly qualify Stainless Steel of-430 Series by the Competent Authority under section 25-D ibid vide ruling of even number dated 10-09-2008 issued by the Directorate General of Customs Valuation, Karachi. Non application of Valuation Ruling has resulted in short payment of Government Revenue amounting to Rs.2,91,951/-."

4. It reflects that it has been merely alleged that the assessment made earlier escaped the application of Valuation Ruling; however, only total amount alleged to have been short levied has been stated therein by placing reliance on Valuation Ruling dated 10.12.2007 read with 10.09.2008; but when the said Valuation Ruling is examined, it appears that the Ruling by itself has not determined any values under Section 25-A of the Act in question. The Collector of Customs (Appeals) has dealt with this third issue in detail and it would be advantageous to refer to the relevant finding of the Collector as available at typed page-19 of his order which reads as under:-

"As for the third issue, I observe from the record that none of the three adjudicating officers had bothered to give details as to how the amount alleged to have been short paid by the appellants had been worked out/calculated. The rulings did not notify fixed customs values for imported goods but only provided certain formulae through which assessable value of goods in each case had to be reached keeping in view the date of letter of credit and the average price of the products published in the LMB. For the ease of reference, the aforesaid formulae notified in the rulings are reproduced as under:-

Valuation Ruling Dated 10.12.2007

"a) Formula for Non-magnetic Stainless Steel Sheets / Coils 300-Series (Secondary Quality)

Average price reported in Metal Bulletin for relevant period	=----
Add 10% loading to cover thinner sizes	=----
Discount for Secondary Quality @ 40%	=----
Add Freight @ US$ 45/MT or Actual freight paid from the Origin, whichever is higher	=----

Customs Assessment Value =----
(In case of Japan origin, loading should be 15%)

b) Formula for Non-magnetic Stainless Steel Sheets / Coils 200-Series (Secondary Quality)
Average price AISI-300-Series (Non-Magnetic) reported in =----
Metal Bulletin for relevant period =----
Add 10% loading to cover thinner sizes =----
Less 20% Discount on 200-Series =----
Discount for Secondary Quality @ 40% =----
Add Freight @ US$ 45/MT or Actual freight paid from the Origin, whichever is higher =----
Less 5% further Discount for Indian origin =----
(In case of Japan origin, loading should be 15%)

c) Formula for Magnetic Stainless Steel Sheets / Coils 400-Series (Secondary Quality)
Average LMB Price of AISI 430-Series for the relevant period =----
Add 10% loading to thinner sizes =----
Discount for Secondary Quality @ 40% . =----
Add Freight @ US$ 45/MT or Actual freight paid from the Origin, whichever is higher =----
(Note: In case of consignments from Japan and other origins (excepting China), loading should be 15%, as currently, the LMB is providing the prices of Chinese origin 430-Series, only)

Valuation Ruling Dated 01.09.2008

Average price AISI-300-Series (Non-Magnetic) reported in
Metal Bulletin for relevant period =----
Add 10% loading to cover thinner sizes =----
Less 37% Discount on 200-Series =----
Discount for Secondary Quality 40% =----
Add Freight @ US$ 45/MT or Actual freight paid from the Origin, whichever is higher =----
Less 5% further Discount for Indian origin =----
(in case of Japan origin, loading should be 15%)

Thus, it is apparent that in respect of the goods covered by each GD, the adjudicating officers had to mention, in the show cause notices and the impugned orders, the date of letter of credit as well as the average reported price in the Metal Bulletin, besides mentioning details/workings to establish the assessable value on which, in the opinion of the department, the duty/taxes should have been charged. Non-mention of the above-mentioned crucial details in the show cause notices and the impugned orders clearly points out that the adjudicating officers had not applied their mind and had carried out the proceedings, even otherwise unlawful and without jurisdiction, in perfunctory and casual manner. Needless to say that such proceedings have often attracted wrath of the superior judiciary.

8. For the reasons recorded above, I am constrained to rule that the impugned orders, having been passed without jurisdiction in disregard of the provisions of law mentioned above and the judgments / orders quoted above, are void in the eyes of law and not maintainable as such. The same are, therefore, set aside and the appeals are allowed accordingly."

5. Perusal of the aforesaid order and so also the relevant Valuation Rulings in question reflects that insofar as the determination of values under Section 25-A is concerned, the Director Valuation has not notified any prices by itself for assessment of the goods; rather, has notified a method of making assessment of the goods in question. We are not sure, how and under what authority he could do so, as apparently the values could only be notified after following one of the methods of assessment as provided under s.25 of the Act, and admittedly, none of the methods permits determination of any formula or method, and instead the very values are to be determined and notified. It may also be of relevance to take note of that in identical circumstances and in respect of a Valuation Ruling issued in an identical manner, a learned Division Bench of this Court, has been pleased to set aside the same[1]. Nonetheless, for the present purposes the said valuation Ruling by itself is not impugned before us. However, in any case in the show cause notice, no such exercise has been carried out as required pursuant to the Valuation Ruling wherein the method of valuation has been notified. The exercise was required to be carried out in respect of each and every Goods Declaration allegedly so assessed by the concerned Collectorate without applying the Valuation Ruling in question. We have time and again confronted the learned Counsel for the Applicant on this as apparently the show cause notice(s) are silent to this effect as no such individual exercise has been made for recovery of duty and taxes allegedly short levied; but he has not been able to satisfactorily respond. This was necessary, as in absence of the same the assessments already made could not have been disturbed otherwise. We are of the view that it was incumbent upon the Applicant pursuant to the Valuation Ruling relied upon by them, first to determine the average prices reported in the Metal Bulletin for the relevant period, and then scrutinize the date of Goods Declaration, Letter of Credit etcetera as against values so declared and assessed

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[1] 24. The next ruling is C.No.Misc/32/2007-IVA dated 13.03.2009, issued in relation to flat rolled iron and steel products. This ruling is retrospective, since it purports to apply to the relevant goods imported during the period November-December, 2008 and January-February, 2009. Furthermore, it purports to apply a method (taking the average of prices reported in the London Metal Bulletin) which is not one of the methods provided under section 25. The ruling does not give the PCT headings of the goods to which it is to apply, i.e., does not properly identify and specify the "category of goods" to which it is applicable. It also purports to apply the "invoice value" (i.e., the transaction value) if it is "higher" than the "formula value". As noted above, section 25A contemplates and permits a predetermination of customs value. It is impermissible to apply the transaction value in terms of section 25A; that value can only apply under section 25. This ruling is therefore, also ultra vires section 25A.
Sadia Jabbar v Fed. of Pakistan (2018 PTD 1746)

by the assessing officer, and thereafter, add or discount them as per the Origin of the goods in respect of which the show cause notices were issued. There is no such exercise on record before us, whereas, for the present purposes, we cannot permit such exercise to be done at this stage as it ought to have been part of the show cause notice as the entire basis of the Applicant's case is dependent on such exercise. Lastly, we may observe that such an exercise is dependent on facts; hence even otherwise in our Reference Jurisdiction, we cannot determine the same.

6. In view of hereinabove facts and circumstances of the case, though we are not fully in agreement with the findings in respect of legal questions (i) & (ii) as above, by the two forums below in favor of the Respondents; however, as to the third issue[2] before us, we are in agreement with their findings inasmuch as the show cause notice(s) by itself were defective, vague and unlawful; hence, could not be sustained. The mode and manner adopted for up-setting the assessments made by the assessing officer was not legal and lawful, as it required a detailed factual determination, either before issuance of the show cause notice; or in the alternative, ought to have been made part of the show cause notice itself. This has not been done admittedly. Accordingly, the said question is answered against the Applicant and in favor of the Respondents. The orders of the Tribunal as well as Collector (Appeals) in respect of issues (i) & (ii) as above stands modified, resultantly, these Reference Applications are 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. Office is further directed to place copy of this order in connected Reference Applications as above.

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[2] *whether in the given facts and circumstances of the case, the show cause notices, which do not contain any details as to the alleged short levy of duty and taxes and even the applicability of the Valuation Ruling can be sustained*