

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2364 of 2015

*[M/s. Wadood Engineering Services (Pvt)
Limited vs. the Federation of Pakistan and others]*

Dates of hearing : 30.04.2021 and 22.11.2021.

Plaintiff

*[M/s. Wadood Engineering
Services (Pvt) Limited]*

: Through M/s. Ahmed Ali Hussain
and Umair Nabi, Advocates.

Defendants No.6, 12 to 15

*[The Collector of Customs
[West], Assessment Officer [West],
Principal Appraiser [West],
Additional Collector [West] and
Deputy Collector [West]]:*

: Through Mr. Muhammad Khalil
Dogar, Advocate

Nemo for remaining Defendants,
viz, Defendants No.1 to 5, 7 to 10,
16 to 20.

JUDGMENT

MUHAMMAD FAISAL KAMAL ALAM, J. This suit has been filed primarily challenging the Show Cause Notices, issued by the Customs officials (Defendants), in respect of consignments of Solar LED Lights-“*the Subject Consignments*” imported by the Plaintiff. The Plaintiff contains the following Prayer Clause_

“It is, therefore, respectfully prayed in the interest of justice that this Hon’ble Court may be pleased to pass Judgment and Decree in favour of the Plaintiff in the following terms:

(a) *Declare that the 24th subject consignments imported by the Plaintiff consisting of solar lights, fully qualifies for the*

benefits and exemptions available under 5th Schedule to the Customs Act, 1969 as well as 6th Schedule to the Sales Tax, 1999, as per the policy directives of the Federal Government;

- (b) Declare that the action of the Defendants in withholding / detaining the consignments of the Plaintiff are patently illegal, void ab-initio, arbitrary as well as based on mala fides and discrimination, as the Customs officials have themselves allowed duty free clearance of similar types of imports made by Plaintiff and now the same benefit is being denied to the Plaintiff without any lawful justification;*
- (c) Declare that the consignments of the Plaintiff falls under Pakistan Customs Tariff Heading 9405.1090;*

Or in the alternative

- (d) Declare that the letters of commensuration issued by the Defendant No.2 certifying that the subject consignments were for public works and were for the import of alternative energy products was sufficient to grant the exemption of duties and taxes to the Plaintiff and that no further scrutiny / requirement was necessary;*
- (e) Declare that the Plaintiff is entitled to delay and detention certificate in respect of port demurrage charges as well as container detention charges, therefore, the Defendants be directed to issue such certificate giving full benefit u/s 14-A of the Customs Act, 1969.*
- (f) Grant permanent injunction, restraining the Defendants No.16 & 17 from issuing unwarranted Notices and from undertaking unwarranted proceedings against the Plaintiff.*
- (g) Set-aside the impugned show cause notices dated 15.10.2015 (Annex A/38) and 03.11.2015 (Annex A/59) issued to the Plaintiff;*
- (h) Direct the Defendants No.18 & 19 to stop roving and fishing inquiring and set-aside the Impugned Inquiry Notice dated 30.10.2015 (Annex A/60);*

- (i) *Direct the Defendants to immediately release the consignments of the Plaintiff, illegally withheld / detained by the Defendants, that are currently lying at the Karachi Port;*
- (j) *Direct the Defendants No.20 not to charge any port demurrage and container detention charges from the Plaintiff from the date of arrival of the consignments till the same are finally released, in view of section 14-A of the Customs Act, 1969;*
- (k) *Grant Permanent Injunction restraining the Defendants No.3 to 19, their employees, subordinates, agents, representatives or any one claiming / acting on their behalf, from taking any coercive action against the Plaintiff on basis of the import of subject 24 consignments of Solar powered Lights, including but not limited to any adjustment of any amount from the bank accounts of the Plaintiff, or stoppage of clearance of Plaintiff's goods at all ports or blocking the Bill of Entries/imports/containers of the Plaintiff or taking any nature of coercive action against the Plaintiff in any manner consequent to the aforesaid illegal show cause notices issued on 15.10.2015 and 03.11.2015 as well as Inquiry Notice dated 30.10.2015.*
- (l) *Award a sum of Rs.800 million to the Plaintiffs by way of damages against Defendants No.3 to 19;*
- (m) *Grant any other relief as the Hon'ble Court may deem just and fit in the circumstances.*
- (n) *Grant cost of the suit."*

2. The Written Statements have been filed by Defendants No.18 and 19 and a joint Written Statement by Defendants No.6, 12 to 15, which are the contesting Defendants.

3. At the very outset when the learned counsel for the Plaintiff has been asked about the monetary relief he is claiming, he has stated that he does not

press his relief for damages of Rs.800 Million and Prayer Clause “I” and “j”, concerning the damages.

4. In view of the above Statement about Prayer Clause, both learned Advocates state that the entire controversy can be decided without leading the evidence at this stage and on the basis of legal Issues.

5. Succinctly, material facts for deciding the controversy are that Plaintiff has been issued Work Orders for installation of Solar LED Lights in different Municipal and Town Committees of Sindh by the Sindh Government. These Work Orders, which are not disputed, are available from pages-97 to 101. In paragraph-11 of the Plaint, it is specifically stated that number of consignments of the above products were cleared without any hindrance; but when the 21st consignment was imported, the controversy was raised by the contesting Defendants, viz. Defendants No.6 and 12 to 15 with regard to description of goods.

6. Mr. Ahmed Ali Hussain, Advocate, along with Mr. Umair Nabi, Advocate, representing the Plaintiff argued that consignments of other importers, who were given contracts by the Government of Sindh for installation of LED Street Lights, was given different treatment from the Plaintiff and when dispute arose with regard to one of the Contractors, namely, Mirza Jameel Baig, he preferred Constitutional Petition No.D-6231 of 2015 and the learned Division Bench was of the view that issue of classification of goods can be resolved by resorting to serial 23 (16) of the Fifth Schedule to the Customs Act, by placing on record the approval Letter by Alternate Engineering Development Board-present Defendant No.2 and concurred by the Federal Board Revenue-FBR (present Defendant No.3), respectively. The Order of Constitutional Petition No.D-2631 of 2015 is available in the File, at pages-169 to 187 Part-II.

7. Advocates representing Plaintiff have referred to the documents relating to the present Plaintiff and the controversy, which are at page-131 and page-143, that is, Letter of Recommendation by Defendant No.2 and concurrence by Defendant No.4. Learned counsel has further referred to the relevant classification in support of his arguments that under Heading 24 (2) of the 5th Schedule to the Customs Act (Tariff and Trade Control), SMD/LEDs with or without ballast with fittings and fixtures, is classified under HS Code 9405.1090 against which 0% Customs duty is chargeable.

8. The above arguments are controverted by Mr. Muhammad Khalil Dogar, Advocate representing the official of the Model Customs Collectorate (West). As per the learned Advocate, the goods imported by the Plaintiff falls within the HS Code 9405.4090, relating to Solar LED (Street Lights), being outdoor lights, hence, applicable Customs Duty and Taxes should be paid by the Plaintiff and since it did not mention the correct HS Code and attempted to evade applicable duties and taxes, therefore, Show Cause Notices were issued for such consignments under relevant provisions. Learned Advocate for Defendants has also referred to Preliminary Objections mentioned in his Written Statement about non maintainability of present *Lis*.

9. Arguments heard and record perused.

10. The relevant Issues for deciding the controversy are_

- i. Whether the Order passed in the above Constitutional Petition is applicable to the case of Plaintiff?
- ii. Whether the Plaintiff has mis-declared the subject Goods to evade the Customs duties and Taxes?

iii. What should the Decree be?

11. These impugned Show Cause Notices are at page-397; that is, Annexure-A-38; dated 15.10.2015, Annexure A/59; dated 05.11.2015 and 06.11.2015. It is necessary to clarify that earlier restraining order was granted by this Court, hence, Assessment Order has not been passed in respect of all these three Show Cause Notices and Order dated 02.12.2015 has restrained the Defendants from taking action in pursuance of the Show Cause Notices as well as the Inquiry Notice. Consignments in respect of above Show Cause Notices were cleared against furnishing of Bank Guarantee for a sum of Rs.9,694,882/- (rupees nine million six hundred ninety-four thousand eight hundred eighty-two only).

12. The Order of the learned Division Bench of this Court in the above Constitutional Petition is perused, wherefrom it appears that identical controversy existed with regard to classification of subject goods; according to the official respondents HS Code No.9405.4090 is applicable, whereas, as per the petitioner (of the above petition) HS Code No.9405-1090 was applicable, for which 0% duty was chargeable. The controversy was resolved by the learned Division Bench by resorting to Serial No.23(16) of the Fifth Schedule to the Customs Act; which provides that any other item approved by Defendant No.2 (AEDB) and concurred by Defendant No.3 (FBR), would be given exemption from payment of Customs duty.

13. Fact of the matter is that in the present case of Plaintiff, Defendant No.2-Alternate Energy Development Board (AEDB) vide its correspondence of 16.03.2016 has conveyed the approval for inclusion of LED/SMDs for outdoor use with HS Code No.9405.4090, for all the companies importing similar lights and requested the Federal Board of Revenue (FBR) to issue

concurrence for all such companies. This correspondence is at page-131 (Annexure-S/6); whereas, Defendant-Federal Board of Revenue vide its letter dated 30.06.2016 (at page-143; Annexure-S/11) addressed to Defendant No.6 (Model Customs Collectorate Appraisement [West]) has mentioned its concurrence in respect of the goods imported by the present Plaintiff. Hence, Issue No.1 is answered accordingly that controversy mentioned in the present *Lis* is covered by the Order of the learned Division Bench passed in the above Constitutional Petition.

ISSUE NO.2.

14. The Goods Declaration in respect of consignments in question are available in record from pages-301 onwards, wherein, Plaintiff has mentioned the classification of Goods as 9405.1090 and it is also an undisputed fact that earlier similar consignments have been cleared by the same Plaintiff from different Collectorates including the Customs Collectorate (West) without any objection. This has been specifically stated in Paragraph-11 of the Plaint, which is not disputed by the contesting Defendants in the corresponding paragraph of their Written Statement. The controversy as agitated by contesting Defendants about usage of the present products as the outdoor Street Lights is also resolved by the two competent Authorities of the Federal Government, viz. Defendants No.2 and 3, respectively. Consequently, contesting Defendants should have withdrawn the impugned Show Cause Notices, in particular, after concurrence Letter of Defendant/FBR. Hence, Issue No.2 is answered accordingly that the classification of products in question has been clarified by Defendants No.2 and 3, that even if the product is imported under HS Code 9405.4090, for the outdoor purposes, will be exempted from duties and taxes. Thus, in view of the above undisputed documents, it is held in the present *Lis* that the Plaintiff has neither mis-declared the Goods for evading duty and taxes, nor played

fraud upon the official Defendants for any illegal motive, which are the basic elements for issuance such kind of the impugned Notices.

ISSUE NO.3.

15. In view of the above, this suit is decreed only to the extent of Prayer Clause “g”, “h” and “m”. The Bank Guarantee furnished with the Nazir of this Court is ordered to be released, as per the Rules and Procedure together with accruals, if any, to Plaintiff.

16. Parties are left to bear their own costs.

Dated: 22.11.2021

M.Javid.PA

JUDGE