

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
C.P. No.D-6039 of 2015

DATE: ORDER WITH SIGNATURE(S) OF JUDGE(S)

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI
MR. JUSTICE MAHMOOD A. KHAN

1. For hearing of CMA No.30347/2015 (U/A 199)
2. For hearing of main case

16.10.2019

Mr. Khawaja Shamsul Islam a/w Mr. Khalid Iqbal, advocates for petitioner
Ms. Masooda Siraj, advocate for respondents

ORDER

Through instant petition, the petitioner has expressed its grievance against assessment made by the Customs authorities in respect of 46 consignments consisting of electronic home appliances imported from China in the name of 'WESTPOINT' which, according to learned counsel for petitioner, is a locally registered copyrighted brand of the petitioner which is liable to be assessed as per Colum 5 of the table to the Valuation Ruling No.384/2011 dated 08.10.2011, which has been superseded by Valuation Ruling 755/2015 dated 31.08.2015. However, according to learned counsel, respondents in total violation of law and without following the sequential method of assessment in terms of Section 25 of the Customs Act, 1969, have finally assessed the subject consignments of the petitioner on the basis of purported Valuation Advice No.I/15/2015-VII/9423, dated 15.09.2015, issued by one Deputy Director, Group-VII, Directorate General of Customs Valuations, Custom House, Karachi. It has been contended by learned counsel for the petitioner that prior to importation of subject consignments, the petitioner had imported the similar electronic appliances in the name of 'WESTPOINT' from China, which were duly adjudicated upon by the customs authorities through four orders i.e. Order-in-Original Nos.528 to 532/2013-2014 dated 17.04.2014 and the same were assessed as per Valuation

Ruling No.384/2011 dated 08.10.2011 with declaration that the imported articles of the petitioner from China in the name of WESTPOINT are not international branded items, however, in respect of same consignments which are subject matter of instant petition, the Customs Authorities have assessed the same on the basis of some purported Valuation Advice by Deputy Collector on the presumption that the imported Articles of the petitioner in the name of WESTPOINT are branded articles, whereas, according to learned counsel, the method adopted by the respondents is also illegal, contrary to the provisions of Section 25 of the Customs Act, 1969 and various judgments of this Court on the subject controversy which provides for a sequential method of Valuation. It has been further contended by the learned counsel for the petitioner that in absence of any exercise undertaken by the respondents in terms of Section 25 of the Customs Act, 1969, the respondents were bound to accept the transaction value of the petitioner, more particularly, when similar goods were being assessed as per Valuation Ruling No.384/2011 dated 08.10.2011. Learned counsel for the petitioner, without prejudice to herein above submissions, submitted that the assessment on the basis of Valuation Advice by the Customs Authorities is also illegal and of no legal effect, as there is no concept of issuing Valuation Advice under the Customs Act, 1969, whereas, under similar circumstances, the circular issued for the purposes of determination of value by the customs authorities has already been declared to be illegal and without lawful authority by this Court in C.P. No.D-8281 of 2017 and others (M/s Sky Overseas vs. Fed. of Pakistan and Others). In support of his contention, learned counsel for petitioner has also placed reliance on the cases reported as 2018 PTD 1746 (Sadia Jabbar vs. Federation of Pakistan & Others); 2016 PTD 2866 (M/s. Shoghan International (Pvt.) Limited vs. Central Board of Revenue & Others); 2019 PTD 1308 (M/s. GLOBAL TRADE LINK & Others versus FEDERATION OF PAKISTAN and others) and order dated 18.09.2014 passed by this Court in C.P. No.D-5173/2014 and others (Muhammad Mansoor vs. Federation of Pakistan and another).

2. Notices were issued to the respondents, who have filed their comments, wherein, objection regarding maintainability of instant petition

has been raised on the ground that instead of filing instant petition, the petitioner could have followed the remedy by filing appeal(s) against the impugned assessment order(s) passed in the instant case. It has been contended by the learned counsel for respondents that petitioner is using a brand name, i.e., 'WESTPOINT', therefore, the goods imported by the petitioner are not covered under Valuation Ruling No.384 dated 08.10.2011. According to learned counsel for respondents, in terms of 2nd proviso to subsection (2) of Section 81 of the Customs Act, 1969, the matter can be referred to the Customs authorities for the purpose of seeking clarification.

3. We have heard the learned counsel for the parties, perused the record with their assistance and have also examined the relevant provisions of law, including section 81 of the Customs Act, 1969 and have also gone through the judgments/order(s), relied upon by the learned counsel during course of arguments.

4. It is admitted position that the petitioner has been importing the home electronic appliances including juicer, blender, cordless kettle, roti maker, steam iron, dry iron, deluxe sandwich toaster, kitchen robot (chopper), microwave ovens, meat grinder, electric toaster oven, spare parts, etc. in the name of WESTPOINT, which is registered with the Registrar of Copyrights, whereas, for the consignments prior to the subject consignments, the similar issue cropped up between the petitioner and the customs authorities, which was finally adjudicated upon by the Deputy Collector (Adjudication-I) in Orders-in-Original Nos.528 to 532 of 2013-14 all dated 17.04.2014 in the following terms:

"I have gone through the record of the case and considered the verbal and written submissions of the legal counsel of the respondent and departmental representative. The whole discussion revolves around this argument whether "WESTPOINT" is a local Brand/non brand or it is international brand. I tend to agree with the contention of the respondent counsel that the International Brand is the generally known and used in more than one country. The international brands create image, recognition and loyalty among the consumers, owing to their experience with it, and become household names all over the world. The multinational companies put in a lot of money and effort in

making their brands a success and they create a niche in the market among a certain segment of society. Whereas the local brands/non branded items are those consumer items or items are those that are produced by lesser known manufacturers and they try to capture the attention of those consumers who does not have brand loyalty or more cautious about the price of the items or does not have enough buying power to get at the branded items. In most of the cases, the manufacturing of these local brands/non branded goods is taking place in China under the instructions from their importers in the third world to affix certain logos or brand names. Resultantly, the prices of such items are substantially higher in the markets as compared to the local brands/non branded items and it would be out of place to equate the branded item with the unbranded/local brand/non branded items. "WESTPOINT" is registered with the local copyright office in Pakistan and its appliances are available in the local market in Pakistan. Even the web media is silent about the presence of this item anywhere except Pakistan, hence, it would be unfair to equate it with Branded Items. Moreover, the evidences provided by the respondent's consultant that "WESTPOINT" Brand items are still cleared by other Collectorates on the basis of Valuation Ruling No.384 dated 08.10.2011 for unbranded/local branded items. Even otherwise, the Department could not bring any tangible evidence on record to prove whether "WESTPOINT" is international brand and they have shown their lack of knowledge about this aspect. Hence, in the light of the above narrated facts, I, hereby order to vacate show cause notice, and that the assessment so made earlier was in line with the Valuation Ruling No.384 dated 08.10.2011 for unbranded/local branded items."

5. It has been informed by learned counsel for parties that the afore-referred orders of adjudication have not been challenged before any forum, therefore, *prima facie*, the finding with regard to status of the articles being imported by the petitioner from China in the name of "WESTPOINT" which, according to learned counsel for the petitioner, is the brand name of the petitioner and has been registered as a local brand with Registrar of Copyrights, and has no nexus whatsoever, with the International Brand WESTPOINT TROPICAL registered at France which, according to learned counsel for petitioner otherwise, does not manufacture the small electronic appliances being imported by the petitioner. Record further reveals that the respondents have not confronted the petitioner with any material which may suggest that the articles imported by the petitioner are of the same international brand of WESTPOINT TROPICAL of France nor there seems to

be any dispute by any claimant of above International Brand in respect of locally registered WESTPOINT brand in the name of petitioner before the Registrar of Copyrights. Moreover, while deviating from previous assessment and determination of customs value of same goods on the basis of Valuation Ruling No.384/2011 dated 08.10.2011, the Customs authorities have not undertaken an exercise of determining the value of the consignments of the petitioner by adopting sequential method of valuation in terms of Section 25 of the Customs Act, 1969. On the contrary, value has been determined on the basis of purported Valuation Advice issued by one Deputy Director, Group-VII, Directorate General of Valuations, Custom House, Karachi vide letter dated 15.09.2015. Learned counsel for respondents was required to refer to any provision of the Customs Act, 1969, whereby, in case of any dispute with regard to valuation, such Valuation Advice can be made basis of determination of value in terms of Section 25 of the Customs Act, 1969, in response to which, learned counsel for respondents could not submit any explanation, however, referred to 2nd proviso to subsection (2) of Section 81 of the Customs Act, 1969. Perusal of such proviso shows that it does not relate to the determination of customs value, on the contrary, it only provides for a mechanism of provisional release of consignment. Whereas, in case of any dispute with regard to valuation, complete procedure is provided under Section 25 of the Customs Act, 1969, for determination of customs value in sequential manner, which in the instant case, has not been followed. This Court in C.P. No.D-8281 of 2017 and others (M/s Sky Overseas vs. Federation of Pakistan and Others) has already declared a similar circular No.SI/Misc/13/2014:CC(Appr)/375, dated 22.11.2017, issued by the Chief Collector of Customs Appraisement (South) for the purpose of determination of value to be illegal and without lawful authority. It will be advantageous to reproduce the relevant finding as contained in para 28 of the above cited judgment of this Court, which reads as follows:-

“28. Without prejudice to our hereinabove findings regarding legality and interpretation of amendment in Rule 107(a) of the Customs Rules, 2001 through SRO 564(i)/2017 dated 01.07.2017, we may further observe that the Chief Collector Customs and/or for such purpose the Federal

Board of Revenue has no authority to issue any circular and administrative direction of the nature, which may interfere with the judicial or quasi-judicial function entrusted to the various functionaries under Statute. Any circular or instructions issued by the F.B.R. or by any other officer performing functions under the administrative control of F.B.R, relating to interpretation of any statutory provision, rule or regulation, cannot be treated as judicial interpretation, hence not binding on authorities performing judicial and/or quasi-judicial functions. Reliance in this regard can be placed in the case of Central Insurance Company v/s Central Board of Revenue (1993 SCMR 1232), wherein, the Hon'ble Supreme Court, while examining the legality of a Circular issued by the Central Board of Revenue, interpreting the provisions of Income Tax Ordinance, 1979, has been pleased to hold as under:-

“22. It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of Section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and this Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation.”

6. It may be further observed that in case of any dispute with regard to valuation, customs authorities are under legal obligation to determine the customs value in terms of Section 25 of the Customs Act, 1969 by adopting the sequential method. Reliance in this regard can be placed on the reported judgments of this Court in the cases 2016 PTD 702 (*Danish Jahangir Vs. Federation of Pakistan through Secretary/Chairman & 2 Others*); 2016 PTD 2866 (*M/s. Shoghan International (Pvt.) Limited vs. Central Board of Revenue & Others*); and 2019 PTD

1308 (M/s. GLOBAL TRADE LINK & Others versus FEDERATION OF PAKISTAN and others).

7. In view of herein above facts and circumstances of the case, we are of the opinion that the impugned assessment / assessment notes by the Customs authorities in respect of the subject (53) consignments of the petitioner i.e. electronic home appliances in the name of WESTPOINT from China, while placing reliance on purported Valuation Advice No.1/15/215-VII/9423, dated 15.09.2015 issued by Deputy Collector Customs is totally illegal and without lawful authority, whereas, express provisions of Section 25 of the Customs Act, 1969, which provides for a sequential method of valuation, have been violated while making the impugned assessment of the subject consignments in the instant case. Since the very basis of disputing transactional value of the petitioner's consignments and the method adopted by the customs authorities in the instant case is illegal and without lawful authority, therefore, the objection regarding maintainability of instant petition in the instant case is without any substance. This Court while exercising constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, in appropriate cases where an aggrieved person can demonstrate that any impugned act or omission, and the order passed by any public functionary suffers from jurisdictional defect, or the same is patently illegal and without lawful authority, as well as contrary to the judgment(s) of the superior Courts on the subject legal controversy, can invoke the constitutional jurisdiction to remedy such grievance of an aggrieved person, instead of non-suiting an aggrieved person on the plea of availability of alternate departmental remedies, more particularly, when such action or the order is based on departmental instructions or some Valuation Advice, as in the instant case.

8. Accordingly, instant petition is allowed by declaring that impugned Valuation Advice No. I dated 22.11.2017 is illegal and without lawful authority, whereas, determination of customs value and the assessments made by the respondents in respect of (53) consignments of the petitioner on the basis of purported Valuation Advice No.I/15/2015-VII/9423, dated 15.09.2015 are

also declared to be illegal and without lawful authority. Since the consignments of the petitioner have already been provisionally released by the Customs Authorities, subject to securing the disputed amount of duty and taxes in the shape of pay orders before the concerned Collectorate, the same shall be returned to the petitioner within 15 days from the date of receipt of this order.

The petition stands allowed in the above terms along with listed application.

JUDGE

JUDGE

Gulsher/PS