

IN THE HIGH COURT OF SINDH, KARACHI

Present

Mr. Justice Irfan Saadat Khan
Mr. Justice Zulfiqar Ahmad Khan

C.P No. D-5924 of 2021

Mahnour Food Industries (Pvt.) Ltd Petitioner

versus

Federation of Pakistan through Secretary
M/o Industries and Production & others Respondents

Petitioner : Through Mr. Zain A. Jatoy, Advocate a/w
Mr. Muhammad Mustafa and Syed Haris
Hassan, Advocates

Respondent Nos.1 & 2 : Through Mr. Kafeel Ahmed Abbasi, DAG

Respondent No.3 : Through Mr. Khalid Hayat Khan, Advocate

Respondent No.4 : Through Mr. Pervaiz Ahmed Memon,
Advocate

Date of hearing : 02.03.2022

Date of order : 07.03.2022

JUDGMENT

Zulfiqar Ahmad Khan, J:- Through the instant petition, learned counsel has challenged Circular dated 13.11.2020 issued by Respondent No.3, alleging that the same has been issued without jurisdiction consequently having no legal effect and the ratio of 80:20, which the said Circular proposes to be calculated on the “Customs Assessed Value” instead of “Production Value”, is in violation of the Export Promotion Zones Rules 1981.

2. By way of background, learned counsel states that the petitioner is engaged in the trade and exportation of frozen foods and vegetables and in this regard operates a manufacturing-cum-processing unit within Karachi Export Processing Zone being an investor licensed by the Export

Processing Zone Authority established under Export Processing Zones Authority Ordinance, 1980 ("EPZA Ordinance, 1980"). Per learned counsel, provisions of the Customs Act, 1969 are applicable to the imports and exports from EPZA, and removal of goods from EPZA to Tariff Areas is regulated by SRO 249(I)/1981 and SRO 450(I)/2001 having been issued under section 219 of the Customs Act, 1969. Per learned counsel, historically, investors have always been allowed to remove a maximum 20% of their total production output to Tariff Area whilst exporting 80% of their production output abroad, which position is covered by Rule 228(5) of the 2001 Rules without any further stipulation or requirement laid down in this regard, which practice per learned counsel, has been attempted to be changed by the issuance of the impugned circular. Learned counsel further points out that the schematic arrangement of the 1981 and 2001 Rules is such that the exportation of goods outside Pakistan from EPZ is dealt differently from removal of goods from out of EPZ to Tariff Area (within Pakistan) to the extent that Export Goods Declaration is required to be filed by an investor while exporting goods outside Pakistan, and Import Goods Declaration is needed for removal of goods from EPZ to a Tariff Area. Per learned counsel, role of Respondent No.4 i.e. Pakistan Customs has been limited to the extent of processing and clearance of export GDs with EPZA and while allowing import GDs filed by the Tariff Area importers. Learned counsel emphasized the 80:20 ratio has always been dealt with by the Respondent No.3 i.e. EPZA alone without any involvement of Customs. Per learned counsel, with this established practice spread over last 20 years at least, the Respondent No.3 chose to issue the impugned circular purportedly in consultation with the Customs department and chose to decide that determination of the said 80:20 ratio would be made on the basis of value of goods (value of goods assessed by the customs) despite the same having been historically determined on the basis of value of production pursuant to rule 228(5) of the 2001 Rules. Per learned counsel, the new criteria of customs assessed value goods

has resulted into chaos for the investors, which led the Respondent No.4 taking prejudicial action against petitioner's interest. Per learned counsel, this sudden change in criterion for determination of the said ratio from value of production, (which falls exclusively within the Respondent No.3's purview) to values assessed by Pakistan Customs (which is singularly within the Respondent No.4's domain), has culminated in the Respondent No.3's now relying on the Respondent No.4's assessed values of such goods which are removed to the Tariff Area and GDs wherefore are filed by the importers. Such per learned counsel is done, when Pakistan Customs, under the 1969 Act cannot exercise any authority over a foreign-based exporter, who is now given power to value goods of EPZ investors, the latter despite being foreign enterprises under EPZ's statutory scheme. Per learned counsel, not only that EPZA Ordinance 1980 and the 1981 Rules do not entrust the Respondent No.3 to delegate any of its functions to third parties and where Section 25 of the Customs Act, 1969, also limits jurisdiction of Pakistan Customs to an exporter not located within this country. Hence, issuance of the impugned Circular and the consequent Customs' assessments being made basis for calculating 80:20 ratio aims to defeat the very purpose of the law for which EPZs were created and such values now being deciphered from inflated assessment made by the Respondent No.4 is a death warrant to the investors. Per learned counsel, the cumulative effect of the referred unlawful action is such that whilst the Respondent No.3, for the purposes of codal formalities, accepts the invoices (and the values therein) meant for Tariff Area, but levy, duty, tax and charges on the values assessed by Respondent No.4, who in turn, deducts such assessed value of "Tariff Area" exports from the value of "exports abroad" offsetting the two against each other to calculate 80:20 ratio on transaction-to-transaction basis. Per learned counsel such *modus operandi* is not only illogical but also is unlawful as it does nothing more than impeding the business activities of the EPZ investors, including the petitioner, towards their lawful removal of goods to Tariff Area. Per learned

counsel, universally too Customs assessed values are held to be no substitute or yardstick of “value of production”, which even otherwise finds statutory backing through Rule 228(5) of the 2001 Rules, however, such method was unilaterally changed by the respondents through issue of the impugned Circular at the onset of the WeBOC’s roll-out by Respondent No.4 at KEPZ notwithstanding the understanding reached between the KEPZ investors with these respondents in the past. Per learned counsel, the impugned Circular does nothing more than increasing the value of goods destined towards Tariff Area compared to those being exported abroad and resultantly reduces the ratio for carrying out transactions with the Tariff Area importers. Per learned counsel, the Respondent No.3 was created to facilitate the investors but it is now acting to their detriment aimed to extract excessive monies from the former in the garb of levies, taxes, charges etc. on the inflated values which are meant for Tariff Area importers only and ought not to be of any concern to KEPZ Authority or KEPZ investors, including the petitioner, who is left with no remedy except to invoke this Hon’ble Court’s Constitutional jurisdiction for the redressal of its grievance.

3. Learned counsel for the petitioner submits that on the basis of the said Circular the respondents are imposing unwarranted restrictions on the goods of the petitioner imported into the Tariff Area and requests that the said Circular be *set aside* and the earlier established production value based method of 80:20 determination be maintained.

4. Learned counsel for Respondent No.3 submitted that the impugned Circular has been issued to assist the investors in the calculation of 80:20 ratio, as in the past it was observed that investors who had set up industries in the Export Processing Zone were undervaluing their goods destined for Tariff Area while jacking the price of quantum exported abroad. Resultantly, the 80:20 formula based on the production value was creating market distorting, as well as, exports from the Zone

were diminishing with the passage of time. Example of two GDs was presented to this Court, where, while exporting goods to foreign countries value of \$ 5.26 were shown, whereas, the same exporter while sending goods to the Tariff Area had declared values as low as \$ 0.31, which were later on assessed under section 25 of the Customs Act, 1969 at \$ 1.116. Per learned counsel, the investors were not providing any data about their production capacity and export orders while they were keen to send their goods to Tariff Areas within Pakistan. Learned counsel for Respondent No.4 also supported the contentions of the Respondent No.3's counsel and by drawing Court's attention to a Table attached at page 87 attempted to show how invoice values for removal of goods towards Tariff Areas were purposefully kept low, whilst the petitioner (or investors) did not provide any information as to the export values of their consignments. Learned DAG supported contentions of the Respondent's counsel.

5. Heard the learned counsel for the rival parties and perused the record.

6. To start with, it would not be out of place to consider the scheme envisaged by the EPZA Ordinance, 1980, where investors were given the opportunity to boost exports from Pakistan through creating substantial zones, which for all legal purposes were considered as foreign territories. The said law created Export Processing Zone Authority for carrying out the purpose of the EPZA Ordinance, 1980, where general directions and administrative control of the authority vested in a Board. Authority's powers are given under Section 12 of the EPZA Ordinance, 1980 which are restricted to:-

- (i) incur any expenditure;
- (ii) undertake any work in the Zones in pursuance of any scheme;
- (iii) procure plants, machinery, instruments and material required for its use;
- (iv) enter into and perform all such contracts as it may consider necessary;
- (v) cause studies, surveys, experiments and technical research to be made or contribute towards the cost of any such studies, surveys, experiments or technical research;

- (vi) restrict or prohibit by general or special order any change in the use of land and alteration in buildings and installations; and
- (vii) cause removal of any work obstructing the execution of any of its schemes.

7. Section 24 of the EPZA Ordinance, 1980 provides for a mechanism for settlement of disputes on any rights conferred or any liability imposed by the said Ordinance by referring the matter to the Arbitrator appointed by the parties. EPZ Rules 1981 conferred under section 26 of the EPZA Ordinance, 1980, were supplemented by the Customs Export Processing Zone Rules 1981. Rule 5 of the 1981 EPZ rules dealt with the matter of export of goods from zone, where Rule 6 set up a mechanism for removal of goods from Zone to Tariff Area, which Rules were later incorporated in the Customs Rules 2001 under the chapter titled Export Processing Zone and Rule 228 and 229 now deal with Export of Goods from the Zone and Removal of the Goods from Zone to Tariff Areas. As the controversy pertains to paragraph 5 of Rule 228, full text thereof is reproduced as under. Also it is of relevance to reproduce rule 229:-

“228. Export of goods from Zones.-.....

(5) The units established in the Export Processing Zones [excluding M/s. al-Tuwairqi Steel Mills Karachi] shall export only upto twenty per cent of their total production of tariff areas in Pakistan while eighty per cent shall be exported to other countries. The condition of supply of twenty percent of the total production to tariff area shall not include the supplies made from the EPZ to tariff area under SRO 492(I)/2009 dated 13.06.2009 or DTRE scheme or Manufacturing Bond scheme or Export Oriented Units scheme, as the case may be, as the same are used for manufacture of goods which are eventually exported out of Pakistan.....

229. Removal of goods from the Zone to Tariff Area;- (1) Removal of imported raw material, imported goods in the same state and goods produced by investors in a Zone to Tariff Area for home consumption may be allowed subject to the import restrictions and formalities applicable to imports from abroad, customs-duties and other taxes levied on imports into Tariff Area from the Zone shall be the same as duties and taxes levied on similar imports from abroad.

(2) Any goods permitted by the aforesaid authority for entry into the Tariff area under sub-rule (1) may be taken out of the Zone after fulfilling all the requirements prescribed under the Act and the Rules made there-under for the direct import from abroad into the Tariff Area. The investor shall file export GD against the goods being exported from Zone to Tariff Area

and the importer in the Tariff Area shall also file corresponding Import GD.

(3) The point in time to be taken into consideration for the purpose of determination of value and the rate of duties and other taxes applicable on goods removed for home consumption shall be determined in accordance with provisions of the Act and the Rules made thereunder.

(4) The goods produced in a zone and removed to Tariff Area for home consumption shall be chargeable to customs-duties in the state in which they enter the Tariff Area.

Explanation:- the normal value of the goods manufactured in the E.P.Z, on entry into the Tariff Area and vice versa shall be assessed as per the provisions of section 25 of the Customs Act, 1969.”

8. Perusal of these Rules reflect that at the time of export of goods from Zone to the foreign markets by an amendment brought in paragraph (5) for the first time an option of 20% maximum exports of total **production** to Tariff Areas in Pakistan was provided, whilst the said Rule required that 80% of the total **production** be exported to foreign countries, which practice has been followed over the years, which situation with the issuance of the impugned Circular has challenged to Customs Assessed Value of Goods for the purpose of calculation of 80:20 ratios. Court was informed about the dynamics of the said process which is purely factual and somewhat complicated embodying various intermediary steps for the calculation of Customs Value of Goods as opposed to the Value of Production. It appears that both the sides have valid arguments. While the Respondents alleged that the Investors including the Petitioner tend to send their goods to Tariff Area instead of achieving maximum exports from the country as this process appears to be more lucrative and efficient, whereas, the petitioner's grievance is that the Respondents while calculating the Customs Assessed Value of Goods are not considering the Value of the Goods at export stage, hence how a true 80:20 ratio could be truly calculated in this way, is a serious question. Also the Respondents claim that Petitioner's or Investor's tend to export their consignment towards Tariff Areas in the beginning of the year, while they have not established that how and at what value they would export 80% of their production.

9. As factual controversy is involved, which cannot be adjudged through this petition, where this Court has observed that the impugned Circular does not even mention under which Rule or Section of law it has been issued, and having observed that a mechanism of dispute resolution is provided for under Section 24 of the EPZA Ordinance 1980 by way of arbitration, we dispose of the instant petition by directing both the sides to resolve their dispute as per the mechanism provided under Section 24 through arbitration by appointing an arbitrator. Till any findings are given by the arbitrator, whose decision as evident under sub-section (2) of Section 24 is binding on the parties, operation of the impugned Circular to remain suspended.

Judge

Judge

B-K Soomro