IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, **J**.
Agha Faisal, **J**.

SCRA 243 of 2012	:	Collector of Customs vs. M/s. Paramount Enterprises
For the Applicant	:	Mr. Kafeel Ahmed Abbasi, Advocate
For the Respondent	:	Mr. Asad Raza Khan, Advocate
Date of hearing	:	07.04.2021
Date of announcement	:	07.04.2021

JUDGMENT

Muhammad Junaid Ghafar, **J**. Through this Reference Application the Applicant has impugned order dated 04.05.2012, passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No.K-1132/2011, proposing the following questions of law:

> "1. Whether on the facts & circumstances of the case and the law settled by the Apex Court in the case of M/s. West Pakistan Tank (Pvt.) Ltd., v/s. Collector of Customs, Appraisement (2007 SCMR 1318), for the importers approached with unclean hands, the Appellate Tribunal erred in law to hold that the goods imported through mis-declaration should be assessed at the lowest value @ US$ 1022/PMT?
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> 2. Whether in an established case of mis-declaration and attempt of evasion and in the presence of SRO 499(I)/2009 dated 13.06.2009 read with section 156(1)(14) of the Act, the Appellate Tribunal erred in law to waive penalty?
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> 3. Whether on the facts and circumstances of the case and in the presence of higher customs value data of averaging around @ US$ 1766/ PMT and in the presence of Section 25(13) (a) & Rule 110 of the Customs Rules, 2001, the Appellate Tribunal has erred in law to order for assessment of the impugned goods @ US$ 1022?PMT?

2. Learned Counsel for the Applicant has read out the order and submits that learned Tribunal has seriously erred in law and facts inasmuch as this was a case of mis-declaration under Section 32 of the Customs Act, 1969 ("**Act**") and findings of the forums below have been set aside by the learned Tribunal without dilating upon this aspect of the matter, and instead, the value and assessment of the goods has been dealt with which is erroneous and not relevant to the facts of the case. He has prayed for

setting aside of the impugned order by answering the proposed questions of law in favour of the Applicant.

3. On the other hand, learned Counsel for respondent has argued that this was not a case of mis-declaration as alleged but was of a wrong-shipment by the shipper, whereas, the assessment was required to be made in terms of Section 25 of the Customs Act, 1969 which was done by the Tribunal after considering the data of past imports placed before it. He submits that notwithstanding the allegation of mis-declaration, respondent was entitled for assessment of goods in terms of Section 25 of the Act.

4. We have heard both the learned Counsel and perused the record. It appears that respondent had imported four (4) containers and declared the same as containing ***Coconut Acid Oil*** claiming assessment under HS Code 3823.1990 and after paying duties and taxes through computerized system sought clearance and the Goods Declaration was processed and completed by the concerned Collectorate. Thereafter, it was intercepted by the Directorate of Intelligence & Investigation and after examination and laboratory tests, it transpired that goods in-question were mis-declared as the actual consignment consisted ***RBD Coconut Oil*** classifiable under HSD Code 1513.1900 and as consequence thereof proceedings for recovery of duty and taxes were initiated besides other penal action. The show cause notice was adjudicated by the authority whereby it was held that an amount of Rs.2,535,580/- was to be recovered in lieu of duties and taxes and after confiscation a fine was also imposed amounting to Rs.1,161,808/- along with a penalty of Rs.200,000/-. The said order was challenged in Appeal before the Collector Appeals which was dismissed in the following terms.

> 6. I have examined the case record and given due consideration to the arguments advanced before me. It is an admitted position that physical description and classification of the goods had been mis-declared: the goods had been declared to be Coconut Acid oil of PCT heading 3823.1990 whereas the goods actually imported were RBD Coconut Oil of Philippine origin, as established through the laboratory test as well, correctly classifiable under PCT heading 1513.1900 on which customs duty @Rs.10800/MT, federal excise duty @16% + 1% and sales tax as well as advance income tax were chargeable at standard rates. The appellant has attributed the above-stated mis-declaration to wrong shipment by a supplier. Clearly, such a plea, not having been supported by any documentary evidence, is nothing more than a routine afterthought. It is evident from the record that the appellant had self-assessed his tax liability in accordance with his (mis) declaration and had paid the less amount of duty/taxes under the system of self-assessment and automated clearances operative under PaCCS. Therefore, had the consignment not been subjected to physical examination in terms of section 80 of the Act, the appellant would certainly have defrauded the Exchequer of is legitimate revenue amounting to 2,535,580/- For the forgoing reasons, I rule that the arguments advanced in memo of appeal, reproduced at para-3 above, are

clearly belied by the evidence on record and are rejected as such. I, therefore, hold that the impugned order is correct in law and on facts and there is no reason to interfere with the same. The appeal being absolutely devoid of merit, is rejected accordingly.

6. The said order of the Appellate forum was then impugned by the respondent before the Tribunal which has allowed the Appeal vide impugned order in the following terms:-

7. While gathering brief facts of the case, it has been observed that, the appellant was charged under Section 32(1)(2) of Customs Act, 1969, Section 36(1) of Sales Tax Act 1990, Section 14 of the Federal Excise Act, 2005 and Section 148, 161 of the Income Tax Ordinance (as per Show Cause Notice). It is also very vital to indicate that, at the end of para-1 of the show cause notice the differential amount of duty and other taxes have been worked out to the tune of Rs.25,35,580/- whereas at para-5 the short paid amount has been stated as Rs.33,19,451/- leaving vast difference of amount. Now question arises that, whether the respondent was legally justified to charge excess duty and taxes than raised in the show cause notice and adjudged through the impugned order? In presence of this question appellant was compelled to deposit an amount of Rs.30,46,463/-. The learned advocate confronted the subject question with the argument that the Assessing Officer in presence of adjudged amount was not competent nor empowered to charge duties and taxes beyond the scope of Order-in-Original, as such the act of the respondents is violative under the law. There are stringent requirements prescribed by law, in order to ensure the use of powers, for bonafide purpose and on reasonable grounds, this safeguard can be effective only if procedure prescribed by law is faithfully and honestly followed by Application of mind. In this present case it is evident that norms of legal obligations as described above were not taken into consideration.

8. As such appellant challenged the assessed value and recovery of excess duties learned advocate emphatically contended that during the relevant period of import of appellants consignment RBC Coconut oil, imported from the same country origin (Philippine) were assessed and released around US$ 1000/- per ton to 1100/- per ton but on the contrary, appellant consignment as assessed at US$ 1766/- per ton which is arbitrary and in violation of clause (d) of sub-section (5) of section 25 of the Customs Act, 1969.

9. During the course of the hearing departmental representative, was directed to bring a detailed record of valuation data about the relevant period for comparative study of the controversy raised by the appellant with regard to the valuation of the goods. Subject data was called only for purpose of administration of natural justice. The departmental representative produced printout of subject data (placed on record) which was also provided to the learned Counsel for the appellant. After the scrutiny of Data, it has been observed that RBD Coconut oil imported from the same country of origin (Philippines) manufacturer, DLEO-FATS Inc, was assessed at different values, details of some of the consignments are referred therein to confront the mandatory requirement of clause (d) of sub-section (5) of Section 25 of the Customs Act 1969. Selective detail is as under:-

i. CRN 1-HC-1690587-250111 declared and assessed @ US$ 1776/PMT

ii. CRN HC-1693270-270111 declared and assessed @ US$ 1763/PMT

iii. CRN 1-HC-1693338-270111 declared and assessed @ US$ 1759/PMT

iv. CRN 1-HC-1699687-010211 declared and assessed @ US$ 1276/PMT and assessed US$ 1761/PMT

v. CRN 1-HC-1700278-010211 declared and assessed @ US$ 1022/PMT

vi. CRN 1-HC-1701600-020211 declared and assessed @ US$ 1022/PMT and assessed @ US$ 1300/PMT

vii. CRN 1-HC-1702858-030211 declared and assessed @ US$ 1761/PMT

viii. CRN 1-HC-1750781-140311, 74480 Kgs declared and assessed @ US$ 1113/PMT

ix. CRN 1-HC-1838570-3511 declared and assessed @ US$ 1113/PMT and assessed @ US$ 1456/PMT

x. CRN 1-HC-1838572-3511 declared and assessed @ US$ 1113/PMT and assessed @ US$ 1456/PMT

For compliance of the legal obligations, it is better to understand the spirit of section 25(5) of the Customs Act 1969 and enhancement of value of goods by the Customs Department. Basic requirement for refusing to accept the declared price in view of Section 25 of the Customs Act, was that, the department was in possession of sufficient material on the basis of which it could be said that the department had rightly come for the conclusion that, the declared value of goods was by way of concealment or under valuation or was not the true value, onus as on the customs authorities to prove that, the declared value was untrue before the same could be rejected warranting the enhancement or deterioration of the value.

In the present case, the department produced the material evidence in support of their contention, according to that; declared value is not the true value at the relevant time. But on the contrary and according to above listed data which is the part of the evidence provided by the Department, the action for rejection of the declared value appears to be arbitrary whimsical capricious and in complete disregard of the provision of section 25 of the Customs Act, in presence of the evidence of the relevant period noted above at No.(Viii) CRN-1-HC-1838570-3511 74480 Kgs declared and assessed @ US$ 1113/PMT which is exactly having similar weight as equal to appellants imported goods and at No.(v) CRN-1-HC-1700278-0100211 declared and assessed @ US$ 1022/PMT was the lowest transaction value. In presence of above mentioned iota of evidence, onus was on the Customs Authorities to prove that the declared value was untrue. Since the department failed to discharge its onus of establishing that the value declared by the appellant is not acceptable, most importantly the Data provided by the respondent contains the subjective evidence, which was the lowest transaction value. Hence to prove the liability for an offence is squarely upon department and also no penalty could be imposed on mere inferences, after applying the said principle and for the foregoing and upon the above discussion, I find that this appeal merits consideration to the extent of assessment of valuation and the correct amount of taxes, respondent is directed to assess the value of the goods in accordance with the Data provided, having lowest evidence of declared and assessed value as US$ 1022/PMT in terms clause (d) of sub-section (5) of Section 25 of the Customs Act, and also order to remit the penalty imposed on the importer along with the surcharge. This impugned order is modified in the above terms. The appeal is disposed off accordingly.

7. From perusal of the aforesaid order it appears that the learned Tribunal has not touched upon the aspect of mis-declaration which clearly stands established from the Show Cause Notice and the reply furnished by the respondent inasmuch as it was contended by the respondent that it was a case of wrong or misdirected shipment. However, the respondent had failed to justify the same with any supporting document. The said contention was repelled by the Original authority as well as Collector (Appeals) by holding that such plea is not supported by any documentary evidence, and was apparently

an afterthought. Though, we in our limited jurisdiction under a Reference Application in terms s.196 of the Act, cannot look into any further material which was not placed before the forums below; however, as an indulgence, today we have confronted the learned Counsel for respondent to respond to such finding of fact, whereby, this argument of a wrong-shipment has been repelled, and he has not been able to satisfactorily respond to this; however, has made attempt to argue, that notwithstanding such allegation and lack of evidence to contradict the same, the consignment ought to have been assessed in terms of section 25 of the Act. However, we are least impressed by this argument inasmuch as firstly, the respondent has not been able to satisfactorily come up with any explanation or any supporting documents as to the claim of a wrong-shipment. Secondly, such blatant mis-declaration of description and HS Code and the attempt to avoid the actual payable duties and taxes, disentitles the respondent from any further indulgence and the plea of an assessment strictly in terms of s.25 of the Act. In our view a mere statement of receiving a wrong or misdirected shipment would not suffice. In that case, first onus has to be discharged as to the wrong-shipment; then the wrongly shipped goods are to be re-exported; and lastly, actual / correct shipment has to be imported. There is nothing on record to satisfy any of such pleas taken by the Respondent. Rather, it is belied by the conduct as duties and taxes were paid as alleged and delivery of wrongly shipped goods was accepted and taken. In that case, we do not see any justification to raise such a plea that assessment ought to have made in accordance with section 25. It was never a case of any dispute regarding assessment; rather a case of mis-declaration within the contemplation of Section 32 of the Act which has completely gone un-rebutted. The learned Tribunal without dilating upon this very crucial aspect of the matter has merely given its findings on the assessment aspect as if it was a case of some wrong assessment under section 25 of the Act. The original proceedings were never in respect of an assessment order under Section 80 of the Act; rather it was a case wherein proceedings had been initiated in terms of Section 32 of the Act for mis-declaration. And once this has been alleged, first it has to be responded to; or in the alternative conceded to. Until the importer comes forward with an explanation against allegation of mis-declaration with some considerable material and documents, no refuge can be taken for having the said goods assessed as per his wishes in terms of s.25 of the Act. That would always be a secondary step and can only be examined subsequent to discharge of or withdrawal of the allegation of mis-declaration. One who seeks equity must come with clean hands. In any case once it is held that the respondent was

found indulging in the act of mis-declaration with a view to evade payment of duties and taxes he would not be entitled to seek shelter behind any other proposition. One who seeks equity must have equities in his favour[1]. In the present case we are firmly of the opinion that the equities do not lean in favour of the respondent; hence, indulgence as has been granted through the impugned judgment was unwarranted, requiring our indulgence for setting aside the same In the impugned order nothing has been said about this aspect; hence, we cannot subscribe to the finding of the learned Tribunal in respect of applicability of s.25 of the Act, when the very basis of the show cause notice regarding mis-declaration remains unexplained. Therefore, insofar as the respondent is concerned no case was ever made out by it for having any such relief which has been granted by the Tribunal in unnecessary and irrelevant terms.

8. Though it was totally unwarranted for the Tribunal to only decide the valuation aspect in isolation and without adverting to the main issue; however, even in that the Tribunal has erred as apparently the material and data which was never a part of the original and appellate proceedings was considered and relied upon in deciding the matter in favor of the Respondent. This again cannot be approved by us as being not in conformity with settled law.

9. In view of hereinabove facts and circumstances of the case question No.1 is not relevant and need not be answered. Insofar as question No.2 and 3 are concerned they are answered in the affirmative; in favor of the Applicant and against the respondent. The impugned order of the Tribunal stands set-aside, and the orders of the forum below are restored. Let copy of this order be sent to the Appellate Tribunal in terms of Section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Amjad/PA

[1] (2007 SCMR 1318) West Pakistan Tanks Terminal Ltd v Collector of Customs.