

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-7101 of 2021

[M/s. Zakwan Steel & othersv.....The Federation of Pakistan & others]

&

C.P. No.D-1641 of 2022

[Mohsin Razav..... Federation of Pakistan & others]

Present

Mr. Justice Irfan Saadat Khan.

Mr. Justice Zulfiqar Ahmad Khan.

- Dates of Hearing : 24.02.2022, 03.03.2022 & 16.03.2022
- Petitioners through : Mr. Muhammad Adeel Awan,
Advocate for petitioners in C.P.
No.D-7101 of 2021.
- Ms. Wajiha Maryam Mehdi,
Advocate for the petitioner in C.P.
No.D-1641 of 2022 a/w Mr.
Muhammad Usman Ahmed,
Advocate.
- Respondents through : M/s. Mirza Nadeem Taqi, Afsheen
Aman, Advocates for Respondents/
Department.
- Mr. Shahab Imam, Advocate/Amicus
Curiae.
- Mr. Kafeel Ahmed Abbasi, DAG.

J U D G M E N T

Zulfiqar Ahmad Khan, J:- These petitions posed an interesting question as to whether the Respondents rightly applied values of the imported goods as existing on the date of Bill of Lading verses the date of Registered Bank Contracts for the purposes of imposing customs duties and allied taxes. The present petitions were argued on this solitary issue and these are determined conjunctively vide this common judgment.

2. Briefly stated, petitioners imported Prime Quality Steel Products and Hot Rolled Steel Strips in Coil form. It manifests from the pleadings of the petitioners that the respondent Collectorates applied London Metal Bulletin (LMB) prices as existed on the date of Bill of Lading instead of the date of Registered Bank Contracts, owing to which, the petitioners had to pay duties and taxes at an exorbitant rate, hence the petitioners have impugned such methodology here.

3. Mr. Adeel Awan, learned counsel represented the petitioners in C.P. No.D-7101/2021 while Ms. Wajiha Mehdi, learned counsel set forth the case of the petitioner in C.P. No.D-1641/2022. Both the learned counsel argued the matter conjunctively in their respective petitions. The crux of their submissions is that per Foreign Exchange Manual, Letter of Credit (“LC”), Registered Bank Contract (“RBC”), Documentary Collection (“DC”), Open Account (“OA”) and Advance Payment (“AP”) are the recognized modes of payment and after entering into a contract, when the importers were to open Electronic Import Form (“EIF”) through a Bank for the payments to be remitted by the Bank to the seller on the basis of contract and EIF, importers were(are) only given option to make payments through LCs and no other option is provided for making payment and accordingly for valuing the goods. They avowed that there is no difference between a letter of credit and registered bank contract as both the modes of payment are recognized by the State Bank of Pakistan. Mr. Awan vociferously argued that the petitioners were treated discriminately as the changed parameters

for assessing the imported Prime Quality goods as per LMB prices was discriminatory and violative of the provisions made by SBP and such imports charged on the basis of their date of import turned out to be more expensive, thus waste of valuable foreign exchange.

4. Learned counsel appearing for the respondents/department articulated that during scrutiny of the documents it came on the surface that the petitioners willfully declared the bank contracts as letter of credit just to evade the legal duties/taxes and attempted to have the goods assessed on suppressed values in order to evade legitimate amount of government duties and taxes and the petitioners were not treated discriminately. Mr. Kafeel Ahmed Abbasi, learned DAG supported the official position.

5. We have heard the arguments of respective learned counsel and considered the pertinent law and have looked through a number of lexicons to understand meaning of the words “Letter of Credit”, “Letter of Guarantee”, “Bank Guarantee”, “Demand Draft”, “Documentary Collection”, “Open Account” and “Registered Bank Contract” which are reproduced as under:

Letter of Credit:- Letter of Credit is a financial document for assured payments, i.e. an undertaking of the buyer's bank to make payment to seller, against the documents stated.

Bank Guarantee:- A Bank Guarantee is a guarantee given by the bank to the beneficiary on behalf of the applicant, to effect payment, if the applicant defaults in payment¹.

¹<https://keydifferences.com/difference-between-letter-of-credit-and-bank-guarantee.html>

Letter of Guarantee:-Letter of guarantee: is issued by the bank at the request of one party in order to use it when conducting a deal or entering a bid.²

Demand Draft:- A demand draft is a method used by an individual to make a transfer payment from one bank account to another and is a way to initiate a bank transfer that does not require a signature³.

Documentary Collection:- Documentary collection is method of trade finance in which an exporter's bank forwards documents to an importer's bank and collects payment for shipped goods. Documentary collection is less common than advance cash payment and open account terms, particularly in countries with weak enforcement of contracts⁴.

Open Account:- An open account is an arrangement between a business and a customer, where the customer can buy goods and services on a deferred payment basis. The customer then pays the business at a later date. This arrangement is typically capped by the maximum amount of credit that the organization is willing to extend to the customer. When purchases are made under this arrangement, the seller does not charge interest to the buyer⁵.

Registered Contract:- Registered contract means a variable annuity contract or variable life insurance policy subject to the prospectus delivery requirements of the Securities⁶.

6. Representatives of Customs have vigorously opposed the mode of payments through registered bank contract which is the case of both the petitioners. In a general business sense “Letter of Credit”, “Letter of Guarantee”, “Bank Guarantee”, “Demand Draft”, “Documentary Collection”, “Open Account” and “Registered Bank

² <https://specialties.bayt.com/en/specialties/q/83066/what-is-the-difference-between-lc-and-lg-and-why-we-need-both-of-them-and-in-which-situation/>

³ <https://www.investopedia.com/terms/d/demanddraft.asp>

⁴ <https://www.investopedia.com/terms/d/documentary-collection.asp>

⁵ <https://www.accountingtools.com/articles/open-account>

⁶ <https://www.lawinsider.com/dictionary/registered-contract#:~:text=Registered%20contract%20means%20a%20variable,the%20Securities%20Act%20of%201933.>

Contract” are all recognized modes of payments. These arrangements are made to facilitate the payments between a buyer and a seller, whether locally or internationally which admittedly prevail internationally.

7. In the case of Collector of Customs MCC v. Tariq Chobdar & others (Special Customs Reference Application No.340/2018) (authored by one of us Zulfiqar Ahmad Khan.J) and Sky Overseas v. The Federation of Pakistan (2019 PTD 1964), discussed the nitty-gritties of Section 25 & 25A of the Customs Act, 1969 and the background of London Metal Bulletin & London Metal Exchange were also discussed in detail. We do not intend to discuss Section 25 & 25A of the Act, 1969 at that length here, however, in order to aid the current discussion, relevant para-8 to 10 reproduced hereunder:-

“8. To start with, we would like check background of London Metal Exchange which publishes London Metal Bulletin. LME though finds its origin from the 18th century, however in the modern times, it is in existence as a “for profit” company owned by its members. In Dec-2012 the said company was sold to Hong Kong Exchanges and Clearing Limited (HKEx) for £1.4 billion⁷. The company is incorporated in England and Wales and remains an indirect subsidiary of HKEx since 2012. Articles of Association of the Company⁸ show that the company operates under the UK Companies Act, 2006 where it is treated as an “Unlimited Company having a Share Capital”. Profit before tax for the year 2020 of the company was \$44,382,000 and after accounting for taxation, the company made a profit of \$36,108,000⁹. LME is primarily a commodities exchange that deals in metals futures¹⁰ and options¹¹. One must keep in mind that futures and options are a sort of speculative

⁷ Sanderson, Henry (24 March 2017). "London Metal Exchange debates its future" - Financial Times - 8 June 2017

⁸ <https://www.lme.com/-/media/Files/About/Corporate-information/Committees/The-London-Metal-Exchange-Articles-Effective-13-December-2012.pdf?la=en-GB>

⁹ LME Clear Limited Directors' report and financial statements 31 December 2020

¹⁰ Futures are derivative financial contracts that obligate the parties to transact an asset at a predetermined future date and price. The buyer must purchase or the seller must sell the underlying asset at the set price, regardless of the current market price at the expiration date.

¹¹ Options are financial instruments that are derivatives based on the value of underlying securities such as stocks. An options contract offers the buyer the opportunity to buy or sell depending on the type of contract they hold the underlying asset. Options, give the buyer of the contract the right but not the obligation to execute the transaction.

(futuristic) transactions made without instantaneous delivery of goods, hence are not indicative of current transactional values of a commodity coupled with the delivery of goods at that instant. Now coming to LMB, which for the longest time has been a publication of LME, however, its rigid use for customs valuation is only novel to our jurisdiction as research has not revealed any other country where customs values are so directly entrenched with LMB rates. In the case of *Sky Overseas v. The Federation of Pakistan* (2019 PTD 1964), we have made a threadbare analysis of Section 25 of the Act and in paragraph 20, we have held that *“The (GATT) Implementation Agreement under Article 2 while determining value on the basis of identical goods requires that the customs value shall be the transactional value of identical goods for export to the same country of importation and export at or about the same time as the goods being valued, as well as, under Article 3 while determining value of similar goods, customs value is held to be the transactional value of similar goods sold for export to the country of importation and exported at or about the same time as the goods being valued. Similarly in Article 5 which uses deductive method, the customs value of the imported goods (or identical or similar imported goods being sold in the country of importation in the condition as imported) are required to be based on the unit price at which the imported goods or identical or similar greatest aggregate quantity at or about the same time of importation of the goods being valued to persons who are not related to the persons from whom they buy such goods. In Notes to Article 7, the Agreement requires that the customs values determined under fall back method (Article 7), to the greatest extent possibility, be based on provisional customs values. It also requires that the matter of valuation deployed under Article 7 should be those laid down in Article 1 through 6, but reasonable flexibility in the application of such methods must be made in conformity with the aims and provisions of Article 7.* While international acceptance to the valuation base of the LMB is beyond any doubt as it provides for the base price at which metals and metal scrap are ordinarily sold, however using LMB values as transactional values, in our humble view shows total lack of application of mind since this analogy does surpasses the valuation methods given under section 25. Loading an arbitrary discount quotient to LMB, makes it even more questionable and creates venues for undue interference of the department. How the applicant chose to give 15% discount for Secondary Quality goods does not satisfy logic and such colorable exercise of power is specifically forbidden by the very intent and language of Section 25 which lists all plausible methods of determination of transactional values wherein riveting to a third party (for profit company’s) or exchange’s rates is not an option. In *Sadia Jabbar case* (2012 PTD 898) the Hon’ble Supreme Court has held that *“when Section 25 of Customs Act, 1969 exhaustively provided the modes for determination of value, resorting to Section 25A of the Act without any convincing reason was uncalled for”*. In the case of *Collector of Customs v. Faisal Enterprises* (2019 PTD 1776 SC) where the importer was able to show transaction value of each of the two imported consignments being USD 175 and USD 180 per metric ton respectively, which was duly reflected in the Letter of Credit and the Goods Declaration filed at the time of in-bonding of goods and the importer contending that the goods at the time of in-bonding upon inspection were found

to be of secondary quality instead of prime quality and as similar goods of secondary quality imported from the same country of origin and shipped on the same ship were assessed at USD 157 per metric ton, the Hon'ble Supreme Court held that "when the goods without any difficulty could be assessed on the basis of the transaction value under subsection (1) of Section 25 of the Act i.e. the price actually paid or payable for the goods sold for export to Pakistan, then the question of invoking subsection (5) of Section 25 did not arise at all". The Apex court further directed that "only in circumstances when the goods could not be assessed on transaction value then they were to be assessed on the basis of the value of identical goods sold for export to Pakistan at about the same time at which the goods were being valued under subsection (5) of Section 25". In the case of *Latif Brothers v. Deputy Collector Customs Lahore* (1992 SCMR 1083), while dilating on the infrastructure installed by Section 25, the Hon'ble Supreme Court held that the Customs Authorities first *had to secure material to show, that declared price of goods was considerably lower than that at which identical or similar goods were freely sold by the same or other sellers in country of origin at the same time for the same quantity to any buyer in Pakistan at the same commercial level as the importer before making it a case of mis-declaration*. These views strengthen our belief that any enhancement of value based upon the comparison of the value of an imported metal, as specified in LMB in the instant case, without first establishing the transaction value to be wrong, is not accordance with the settled law.

9. Reliance on sequential method embedded in section 25 is sine qua non in customs valuations. There is no escape from it. GATT evolved this mechanism to provide a fair, uniform, and neutral system for the valuation of goods for customs purposes to prohibit the use of arbitrary or fictitious values. It provides, as its basis, the use of transaction value (selling price) between buyer and seller however at the same time, it specifies alternative methods to be used in sequential order for determining value when the transaction value cannot be used. These methods are woven in various clauses of Section 25 being transaction value of identical goods method; transaction value of similar goods method; deductive method; computed method and fall-back method. In these internationally negotiated arrangements, there is no place for arbitrary or fictitious method as deployed in the case of the valuation ruling No. 1213/2017. It is also worth mentioning that legislature has specifically provided in subsection (10) of Section 25 that subsections (1), (5), (6), (7), (8) and (9) define as to how the customs value of the imported goods is to be determined and methods of customs valuation are required to be applied in a sequential order except reversal of the order of subsections (7) and (8) at the importer's, request, if so agreed by the Collector of Customs and that customs value of the imported goods shall be the transaction value i.e. the price actually paid or payable for the goods when sold for export to Pakistan. Subsections (1) to (4) of Section 25 and Rules 107 to 116 of Customs Rules, 2001 contain primary methods of valuation, and in the first instance such primary method of valuation is required to be adopted in each case. This view has been confirmed in numerous cases including *Rehan Umer v. Collector of Customs* (2006 PTD 909), *Najam Impex Lahore v. Asst. Collector of Customs, Karachi* (2008 PTD 1250), *Faco Trading Co. v. Member Customs, Federal*

Board of Revenue (2013 PTD 825), Goodwill Traders Karachi v. Federation of Pakistan (2014 PTD 176).

10. As evident from the reproduction of operating part of the Order -in-Revision and echoed in the judgment of the Tribunal, local manufacturers were also included in the exercise that led to the issuance of the valuation ruling No. 1213/2017. The issue of involvement of local manufacturers while determining customs values under section 25 of the Act has been dealt at length in the case of D.G. Customs Valuation & another v. Al Amin Cera passed in SCRA No. 744/2016 (2019 PTD 301) where an Hon'ble bench of this court has held that "local manufacturers had no standing to ask for determination and/or enhancement of customs value of any goods under Section 25-A or Section 25-D of Customs Act, 1969 as said manufacturers for such purpose could not file an application or petition under either sections of the Customs Act, 1969 or intervene or be allowed to ask to participate in any pending proceedings or be made a party thereto whether as stakeholders or otherwise since interest of local manufacturers was to have value set at as high a level as possible on ground that transaction value or value set in valuation ruling was otherwise too low and was causing them injury which was exclusively in domain of Anti-Dumping Duties Act, 2015 thus neither Director Valuation nor Collector of Customs or Director-General had any jurisdiction in such regard as local manufacturers could not be allowed to circumvent and evade requirements of Anti-Dumping Duties Act, 2015 by asking for a customs value under Section 25-A of Customs Act, 1969 or any enhancement therein". In fact, the Agreement on the Implementation of Article VII of GATT Agreement and Explanatory Notes thereto specifically bars such initiatives.

8. Reverting to the issue at hand, two points ought to be noted. Firstly and foremost, the primary method of determining the customs value under Section 25A is the "transaction value", i.e., the price actually paid or payable for the imported goods. The words "actually paid or payable" are important to keep in mind and the fact that only if the transaction value cannot be determined, then any subsequent methods are to be applied sequentially, in the order set forth in the Act.

9. In order to place the matter in its proper context, it will be necessary to examine how section 25 had stood earlier, and how this section, and section 25A, subsequently evolved. Section 25 is said to one of the most important provisions of the Act, 1969 as it lays down the manner in which the customs value of imported goods are to be

determined. The trouble is that customs value determined under the Act are also used to levy sales tax, income tax and excise duty in respect of the imported goods, therefore, its impact resonates throughout the economic system. A proper determination of the customs value is therefore absolutely essential as it leads to affordability of goods at reasonable price by commonman and alleviation of poverty. As originally enacted, section 25 had provided that the customs value of imported goods were to be the "normal price" of the goods, the later itself being a legal construct of Sub-section (1) providing that it was the price that the goods would fetch on the date mentioned in section 30 "*on a sale in the open market between a buyer and a seller independent of each other*". The subsequent subsections then set forth in details as to how the normal price was to be determined. The date mentioned in Section 30 was the date on which the Bill of Entry for home consumption or ex-bonding (as the case may be) was filed. It can be seen that as such, under the above scheme, the actual price of the goods was not determinative of the normal price, since (e.g.) the date specified in section 30 was later (perhaps even much later) than the date on which the contract between the foreign seller and a local buyer came about. In principle therefore, the normal price could be higher (or lower) than the actual price of the goods. It is also important to keep in mind that since the normal price was a statutory construct, it was to be determined by the appropriate officer of customs in the manner specified in section 25. In practice, the Central Board of Revenue, through various Customs General Orders and other instructions did make the actual price relevant.

12. Subsection (1) of section 25A however, had a rather unusual feature which is a creation of GATT. While the opening non-obstante clause overrode section 25, the subsection closed by requiring that the "scheme" and "sequential order" laid down in section 25 should be followed which appears to be a contradiction, whereas, Section 25A(1) appeared to simultaneously seek to prevail over section 25 but at the same time, mandates application of the very section which was being overridden. The primary method of determining the value of imported goods as stated earlier remains the transaction value, i.e., the price actually paid or payable for the goods in question. Such a price can arise only in relation to goods actually imported. Section 25A(1), at the other hand, speaks of goods imported into Pakistan. Section 18 of the Act, which is the charging section, levies customs duty on "goods imported into Pakistan". It is a well-settled principle of interpretation that words or expressions used in the same statute in different sections should be given the same meaning unless the context otherwise requires. Obviously, as used in section 18, the expression relates to goods to be imported into Pakistan. The same meaning was, in our view, intended by section 25A(1). Therefore, as used therein, this expression applied to goods that could be, or were to be, imported into Pakistan at any time, or from time to time. In other words, section 25A permitted a predetermination of the customs value of goods to be imported into Pakistan. It is also pertinent to note that subsection (2) of section 25A specifically provided that the value determined in terms of subsection (1) was to be the customs value of the "relevant imported goods". This is the reason why subsection (1) opened with a non-obstante clause. If only

section 25 was applicable, or there were no non-obstante clause, there could be no predetermination of the customs value. The determination of the customs value would have to start with the primary method, the transaction value, i.e., the price actually paid or payable, which could only arise in the context of goods actually imported. Furthermore, if section 25A were intended only to apply to goods actually imported into Pakistan, then there would essentially be no point to it, since the exercise therein contemplated would in any case be carried out under section 25. Section 25A therefore can safely be assumed had to apply to goods yet to be imported into Pakistan.

13. Reliance on sequential method embedded in section 25 is *sine qua non* in customs valuations. There is no escape from it. GATT evolved this mechanism to provide a fair, uniform, and neutral system for the valuation of goods for customs purposes to prohibit the use of arbitrary or fictitious values. It provides, as its basis, the use of transaction value (selling price) between buyer and seller however at the same time, it specifies alternative methods to be used in sequential order for determining value when the transaction value cannot be used. These methods are inter-woven in various clauses of Section 25 being transaction value of identical goods method; transaction value of similar goods method; deductive method; computed method and fall-back method. It is also worth mentioning that legislature has specifically provided in subsection (10) of Section 25 that subsections (1), (5), (6), (7), (8) and (9) define as to how the customs value of the imported goods is to be determined and methods of customs valuation are required to be

applied in a sequential order except reversal of the order of subsections (7) and (8) at the importer's, request, if so agreed by the Collector of Customs and that customs value of the imported goods are to be the transaction value i.e. the price actually paid or payable for the goods when sold for export to Pakistan. Subsections (1) to (4) of Section 25 and Rules 107 to 116 of Customs Rules, 2001 contain primary methods of valuation, and in the first instance such primary method of valuation is required to be adopted in each case. This view has been confirmed in numerous cases including *Rehan Umer v. Collector of Customs* (2006 PTD 909), *Najam Impex Lahore v. Asst. Collector of Customs, Karachi* (2008 PTD 1250), *Faco Trading Co. v. Member Customs, Federal Board of Revenue* (2013 PTD 825), *Goodwill Traders Karachi v. Federation of Pakistan* (2014 PTD 176) and *Sadia Jabbar v. Federation of Pakistan & others* (2018 PTD 1746).

14. With regards applicability of *Sadia Jabbar v. Federation of Pakistan* (2018 PTD 1746) = (PTCL 2014 CL 537), an Hon'ble bench of this court in paragraph 24 has in similar circumstances where reference was made to the London Metal Bulletin for the determination of customs values set aside valuation ruling C.No.Misc/32/2007-IVA dated 13.03.2009 issued in relation to flat rolled iron and steel products as it purported to apply a method (taking the average of prices reported in the London Metal Bulletin) which the Hon'ble court did not consider to be one of the methods provided under Section 25.

15. Mr. Awan, learned counsel appearing for the petitioners in C.P. No.D-7101/2021 raised a plea of discriminatory treatment at the hands of Customs Collectorate/Respondents to the effect that the

importers/petitioners who are showing Registered Banking Contract are being treated discriminately as compared to importers having a Letter of Credit. The Customs Authorities may exercise the powers at their own aspiration and discretion rather in contravention or infringement of fundamental rights envisioned under the Constitution. The statutory bodies and the corporation under the control of Government are not above the law and Constitution. At the same time the principle of good governance are equally applicable and cannot be ignored. The object of good governance cannot be achieved by exercising discriminatory powers unreasonably or arbitrarily and without application of mind, but such objective can only be achieved by following rules of justness, fairness and openness in consonance with command of constitution enshrined in different Articles of the Constitution including Articles 4 and 25 which is supreme law of this country.

16. *Verba cum effectu accipienda sunt* is a judicial maxim that means that words must be interpreted so as to have effect¹². Every word and every provision is to be given effect and none should be ignored so as to needlessly be given another interpretation that causes it to duplicate another provision or to have no consequence¹³. Redundancy could not be attributed to legislation¹⁴ and words cannot be considered meaningless, else they would not have been used¹⁵.

17. Residual effect of the above discussion is that in our humble view LMB (on the date of LC) was not the right way to determine the

¹² Black's Law Dictionary; Seventh Edition.

¹³ Reading Law: The Interpretation of Legal Texts; Antonin Scalia and Bryan A Garner.

¹⁴ *Collector of Sales Tax vs. Messrs Mega Tech Pvt Ltd* reported as 2005 SCMR 1166; *Iqbal Hussain vs. Pakistan* reported as 2010 PTD 2338.

¹⁵ Per *Roberts J.* in *United States vs. Butler* reported as 297 US 1 65.

valuation of the goods thus interpretation of Section 25 of Customs Act, 1969 vis-à-vis reliance on the London Metal Bulletin was not compliance of Section 25 of Customs Act, 1969 hence Custom Collectorates/Respondents have coercively applied LMB prices from the date of Bill of Lading instead of the date of Registered Bank Contracts which is also a mode of payment recognized by the State Bank of Pakistan.

18. In view of the foregoing, these petitions are allowed. The assessment made by the Custom Collectorates/respondents from the Bill of Lading through LMB instead of date of Bank Registered Contract is set aside as being ultra virus to Section 25A and is declared to be without legal effect. The petitioners' consignments are therefore to be valued on the declared value via the Bank Registered Contract and an importer is only liable to pay duty, taxes et cetera on such basis. Excessive pricing is anti-productive as it fuels inflation as well as depletion of foreign reserves. If the petitioners availed the interim relief to ex-bond the goods/consignments, then the security furnished by them stands discharged. The amount deposited with the Nazir are to be returned forthwith subject to proper verification and confirmation.

Karachi
Dated:27.06.2022

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