

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Iqbal Kalhoro, J.
Agha Faisal, J.

SCRA 756 of 2015 : Packages Limited vs.
Customs Appellate Tribunal & Others

For the Applicant : Mr. Pervaiz Iqbal Kasi, Advocate

For the Respondents : Mr. Khalid Rajpar, Advocate

Mr. Irfan Ahmed Memon
Deputy Attorney General

Date of hearing : 24.03.2022

Date of announcement : 29.03.2022

JUDGMENT

Agha Faisal, J. The applicant seeks absolution from payment of pertinent duties and taxes, despite the composition of his consignments and the classification thereof having been adjudged in competent proceedings undertaken at its behest, primarily on the premise that previously it had been able to clear identical consignments while paying lower duties and taxes.

2. Briefly stated, a show cause notice, dated 10.09.2014 (“Notice”), was issued to the applicant alleging import and clearance of water based varnishes¹ in the garb of acrylic polymer². Adjudication proceedings pursuant to the Notice culminated in an order in original dated 02.01.2015 (“OinO”), whereby the appellant was found culpable, ordered to deposit the evaded duties and taxes and a penalty was also imposed thereupon. In appeal, the learned Customs Appellate Tribunal, vide judgment dated 27.05.2015 (“Impugned Judgment”), maintained the findings, in so far as the evaded duties and taxes were concerned, however, remitted the fine imposed. The applicant remained aggrieved, hence, this reference application.

¹ PCT Heading 3209.1010; attracting duty at the rate of 20%.

² PCT Heading 3906.9090; attracting duty at the rate of 10%.

3. In order to illustrate the *lis* before us, it is considered appropriate to reproduce the pertinent constituents / findings of the instruments referred to supra.

Show cause notice

"3. And whereas, the Directorate (I&I), Karachi initial investigations revealed that majority of consignments declared to contain "Acrylic Polymer in Primary Form 370" are being imported by leading packaging industries from German manufacturers namely M/s. Actega Coating & Sealant. The literature available on official website of aforesaid industry confirmed the fact that said manufacturers are exclusively involved in manufacturing of Terra Wet brand water based coatings (varnishes) including food grade varnishers, gloss coatings of different categories under Art numbers like G 9/370, G 9/704, G 9/521, G 9/300, G 9/351, G 9/56, G 9/378, etc, which are meant for coating and sealing etc, of folded food boxes, pharmaceutical boxes, non-food boxes and cigarette packaging, etc, while no polymers in primary forms are being manufactured or supplied by the said company.

4. And whereas, security of import records further revealed that during recent past a consignment declared to contain Polymer in primary form imported vide Goods Declaration No. KAPE-HC-49842 dated 10-12-2013 was examined by the staff of clearance Collectorate and on suspicion by assessing staff, representative samples of the commodity were drawn and forwarded to Industrial Analytical Centre, H.E.J. Research Institute of Chemistry, University of Karachi for lab test. The aforesaid laboratory vide its report dated 02-01-2014 reported that sample declared to be P:olymer in Primary Form 370 was found to be a preparation of styrene Acrylate Polymers and alkaline neutralized resins which can be used as water base varnish in various industries. The information available for products on the website of M/s. Actega Germany shows that under reference goods are actually marketed in the name of "Terra Wet gloss coating G 9/370" which is used on the printed surface of packaging material to make it water proof and to give it a glossy look. The aforesaid test report duly confirms that goods imported are not polymer in primary form but prepared/modified products based on acrylic polymers which are correctly classifiable under PCT heading 3209.1010 chargeable to Customs Duty @ 20%.

5. And whereas, in order to physically confirm veracity of the information, the detained consignment imported by M/s. Merit Packaging Ltd, Karachi declared to contain "Acrylic Polymer in Primary Form 370" declared vide Goods Declaration No.KAPW-HC-126167 dated 01-04-2014 from Model Customs Appraisalment (West), PMBQ, Karachi was examined by the staff of the Directorate General and representative samples drawn in the presence of clearing agents and musheers were sent to M/s. HEJ Laboratory, Karachi for chemical analysis. M/s. HEJ Laboratory vide its Test Report dated 29-04-2014 reported "that the given samples has been found to be a preparation of Styrene Acrylate Polymers & Alkaline Naturalized Resins which can be used as water base varnish in various industries". Since mis-declaration of description and PCT established as per test report, the consignment was seized and Seizure Report was sent to Adjudication Collectorate-I. The case was adjudicated vide Order-in-Original NO. 573 of 2013 dated 09-05-2014 passed by the Deputy Collector (Adjudication-I), whereby the goods were allowed to release on payment of redemption fine amounting to Rs.477,833/- and personal penalty of Rs.25,000/- besides payment of leviable Customs Duty @ 20% plus usual taxes under relevant PCT heading 3209.1010. The willful default on party of importers was admitted and adjudged amount of taxes and penalties were accordingly paid by the importer.

6. And whereas, in order to quantify evasion of duty and taxes on account of mis-declaration of description and PCT of identical consignment cleared previously, import data of M/s Saima Packages (Pvt.) Ltd, M/s. Merit Packaging Ltd and M/s. Packages Ltd for the period July, 2011 to-date was retrieved and scrutinized which revealed that afore-said importers in collusion with their clearing agents have cleared a huge number of identical goods which were cleared as "acrylic polymer in primary form 370" under wrong PCT heading 3906.9090 on 10% customs duty evading thereby huge amount of customs duty and other taxes. Contravention reports in respect of M/s. Merit Packaging Ltd and M/s. Packages Ltd are being issued separately.

7. And whereas, scrutiny of import date of M/s. Packages Ltd (NTN-711438), P.O. Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan revealed that the importer had imported 27 consignments of TerraWet brand water based varnishes / coatings in the garb of 'acrylic polymers in primary form 370' by claiming assessment thereof under PCT heading 3906.9090 chargeable to Customs Duty @ 10% instead of actual PCT heading 3209.1010 chargeable to Customs Duty @ 20% evading thereby huge amount of customs duty and other taxes. Since it has been proved beyond any doubt that German suppliers M/s. Actega Germany only manufacture and supply water based varnishes under brand name "TerraWet / gloss coatings and also that test report of identical goods duly confirmed the same to be water based varnishes of PCT heading 3209.1010, it is established that M/s. Packages Ltd (NTN-711438), P.O. Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan have evaded customs duty and other taxes amounting to Rs. 12,584,835/-, (Customs Duty Rs. 274,682/-, Sales Tax amounting to Rs. 2,132,162/*- and Income Tax amounting to Rs. 2,177,991/-), on under-reference imports cleared through Customs Automated Clearance System of erstwhile Model Customs Collectorate of (PaCCS) now Model Customs Collectorate of Appraisalment (East), Karachi and Model Customs Collectorate (PMBQ), Port Muhammad Bin Qasim, Karachi.

8. Thus, M/s. Packages Ltd (NTN-711438, P.O. Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan and their clearing agent namely (i) M/s. UF Enterprises (Pvt.) Ltd, (CHAL No.1905), 2-A, 1st Floor, Puri House, West Wharf Road, Karachi (ii) M/s. Sas Pak Cargo (Pvt.) Ltd, (CHAL No.1549), 603, Land Mark P:laza, Opposite Jang Press, I.I. Chundrigar Road, Karachi & (iii) M/s. Ijaz & Sons (CHAL No.1576), 25/C, 3rd Floor, Textile Plaza, M.A. Jinnah Road, Karachi by mis-declaring description and PCT of TerraWet brand water based varnishers evading thereby customs duty and taxes to the tune of Rs. 12,584,35/-, (Customs Duty Rs.8,274,682/-, Sales Tax amounting to Rs.2,132,162/-, Income Tax amounting to Rs.2,177,991/-) have committed an offence of mis-declaration in terms of Sections 32(1) & (2) read with Sections 79 and 80 of the Customs Act, 1969, read with Sections 3 and 6 of Sales Tax Act, 1990, further read with Section 148 of the Income Tax Ordinance, 2001, punishable under clause (14) of Section 156(1) of the Customs Act, 1969, and Section 33, 34 and 36 of Sales Tax Act, 1990. The evaded amount is recoverable from importers besides penal action as warranted under the afore-said provisions of la.

9. Accordingly, M/s. Packages Ltd (NTN-711438, P.O. Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan and their clearing agent namely (i) M/s. UF Enterprises (Pvt.) Ltd, (CHAL No.1905), 2-A, 1st Floor, Puri House, West Wharf Road, Karachi (ii) M/s. Sas Pak Cargo (Pvt.) Ltd, (CHAL No.1549), 603, Land Mark P:laza, Opposite Jang Press, I.I. Chundrigar Road, Karachi & (iii) M/s. Ijaz & Sons (CHAL No.1576), 25/C, 3rd Floor, Textile Plaza, M.A. Jinnah Road, Karachi are called upon to show cause under provisions of Section 32(1), 32(2) & 32(3A) read with Section 79 and 80 of the Customs Act, 1969, read with Sections 3 and 6 of Sales Tax Act, 1990, further read with Sections 148 of the Income Tax Ordinance, as to why evaded the amount of duty and taxes to the tune of Rs.12,584,835/-, (Customs Duty Rs.8,274,682/-, Sales Tax amounting to Rs.2,132,162/-, Income Tax amounting to Rs.2,177,991/-) may not be recovered from them and penal action may not be taken against them under clause (14) of Section 156 (1) of the Customs Act, 1969, and Section 33,

34 and 36 of Sales Tax Act, 1990. The evaded amount is recoverable from importers besides penal action as warranted under the afore-said provisions of law.”

Order in original

“16. I have gone through the record of the case and considered the written reply and the reply submitted to Chairman, Classification Committee by the respondent, the Public Notice 14 of 2014 dated 18-11-2014 wherein the core issue of classification was deliberated upon and decided, the written reply of the Advocate submitted on 15.12.2014 and the arguments made during the course of the hearing. The charges leveled against M/s. Packages Ltd (NTN-711438), Lahore, as per Show Cause Notice are that they imported 27 consignments of Terra Wet brand water based varnishers / coatings in the garb of ‘acrylic polymers in primary form 370’ by examining assessment thereof under PCT heading 3906.9090 chargeable to Customs Duty @ 10% instead of PCT heading 3209.1010 chargeable to Customs Duty @ 20%, evading thereby customs duty and other taxes amounting to Rs.12,584,835/-, (Customs Duty Rs.8,274,682/-, Sales Tax amounting to Rs.2,132,162/-, Income Tax amounting to Rs.2,177,991/-). The respondent was allowed time to prove his contention before the Classification Committee, which is the appropriate authority to determine such disputes. The Classification Committee ruled that “product complies with the description given in heading 3209. As such it attracts the classification under sub-heading 3209.1010 being Water based Varnish by application of rule 1 to the General rules for Interpretation”. As such the contention of the respondent that his product is correctly classified in Chapter 39 is incorrect. The respondent’s claim that his product is declared by the supplier as ‘acrylic polymer primary form 370’ which could be confirmed from the supplier’s website was also found to be incorrect as the description stated on the website is ‘Terra Wet gloss coating G9/370’. The arguments of the Advocate that the supplier classifies the goods in chapter 39 is irrelevant as it is an undeniable fact that Customs is the sole authority to determine classification of goods, which has ruled that the goods are correctly classifiable in heading 3209.1010. As regards the protection given to past practice argued by the Advocate, the same is not applicable in the case as the department has proved beyond doubt that the respondent in association with the supplier had deliberately used terminology of “Acrylic polymer in primary form” to hoodwink the customs authorities and had been clearing their goods at 10% customs duties under PCT heading 3906.9090 rather than 20% chargeable to the correct PCT heading of 3209.1010. Had they used the name given on the supplier’s website “Terra Wet” is coating G9/370’, they would not have been able to clear their goods at reduced rate of duty under a wrong classification. Besides, no evidence has been submitted to substantiate that all imports of this material by all importers were being cleared under the wrong PCT heading. The CGO referred to covers bonafide mistake are no untrue declaration is made and the incorrect classification is based on all bonafide misunderstanding of all importers importing this product and the department allowing clearance to such goods. The argument is therefore without any base and is rejected.

17. In view of the above facts, it is clear that M/s. Packages Ltd (NTN-711438), P.O Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan imported and cleared 27 consignments listed above of water-base Varnishers (PCT heading 3209.1010 chargeable to Customs Duty @ 20%) by filing untrue declaration under Section 32(1) of the Customs Act 1969 as Acrylic polymer in primary form” (PCT heading 3906.9090 (Customs Duty Rs.8,274,682/-, Sales Tax amounting to Rs.2,132,162/- and Income Tax amounting to Rs.2,177,991/-), M/s. Packages Ltd (NTN-711438), P.O Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan are hereby ordered to deposit the evaded duties and taxes stated above of Rs.12,584,835/- in government treasury immediately under section 32(2) of the Customs Act 1969. Since the charges enumerated in the show cause notice stand established. I also impose a penalty of Rs.500,000 (Rupees Five Hundred Thousand) on Packages Ltd (NTN-711438), P.O Amer Sidhu, Shahrah-e-Roomi, 54760 Lahore, Pakistan under clause 14 of section 156(1) of Customs Act 1969.”

Impugned Judgment

“08. According to show cause notice, the appellant imported 27 consignments of ‘Terra Wet’ brand water based varnisher in the garb of Acrylic Polymer in Primary Form 370 under PCT Heading 3906.9090, chargeable to customs duty @ 10% instead of actual PCT heading 3209.1010 attracting customs duty @ 20%.

09. To resolve the controversy, the matter was referred to the Classification Committee of the Custom House, which after examining the issue determined that the goods were appropriately classifiable within PCT 3209.1010, on the basis of their composition, consistent with the view claimed in the show cause notice. It has also been brought before us, during the hearing, that the importers including the appellant have now been getting their goods cleared under the PCT classification ascertained by Customs, which attracts higher rate of duty.

10. This Tribunal also does not agree with the argument of learned counsel for the appellant regarding the benefit in terms of paragraph 74 of CGO No.12 of 2002, simply because the previous classification (PCT 3906.9090) was actually based on the incorrect and incomplete data provided by the appellant. It was only through the intervention of the Directorate General Intelligence and Investigation and the resultant scrutiny that the actual composition of the goods was known, leading to their correct PCT classification.

11. We therefore hold that all 27 consignments of water based varnishers are chargeable to 20% Customs duty under PCT Heading 3209.1010. The appellant is liable to pay evaded duty and taxes, determined by the Collector of Customs Adjudication, Karachi. Nonetheless, since the D/R appearing on behalf of the respondent could not point out any evidence of mens-rea against the appellant, we also assume that the mis-declaration would not have necessarily emanated from any mal-intent on the part of appellant – who generally has good business reputation. The penalty of Rs.500,000/- imposed on the appellant/importer is therefore hereby remitted. The impugned order is modified to this extent only, while rest of order is upheld. Appeal is disposed of in above terms.”

4. Per applicant’s counsel, the Impugned Judgment could not be sustained as it was contrary to past practice; amounted to giving retrospective effect to latter findings; and abjured the effect of instructions. Counsel for the department sought to demonstrate from the

record that the findings impugned were findings of fact, based on evidence, not amenable to deliberation in the reference jurisdiction; classification had already taken place, upon request of the applicant, and no exception has been identified in such regard; hence, no interference was warranted in the Impugned Judgment.

5. Heard and perused. It is observed that the Notice was predicated on data coming into the knowledge of the department and not upon any ruling. It is also apparent from the reply filed by the applicant, to the Notice, that no objection had been taken to the jurisdiction of the issuing authority or the applicability of the provisions of law under which the same was issued. No cavil has been articulated before us to suggest any impropriety in the departmental adjudication procedure, initiated vide the Notice and concluded vide the Impugned Judgment.

6. Various questions had been proposed on behalf of the applicant, *prima facie* being argumentative / raising factual controversies³, however, we are, respectfully, constrained to observe that the same are extraneous and dissonant to the Impugned Judgment. It is our considered view that the only question arising herein was “*Whether in the facts and circumstances of the case the department had due cause to adjudge evaded duties and taxes on cleared consignments of the applicant*”. Therefore, we hereby reformulate⁴ the question to be answered herein, in terms of the verbiage supra.

7. The first plea of the applicant was with respect to past departmental practice. The learned Tribunal has specifically addressed that issue and observed that previous treatment of like consignments was “*actually based on incorrect and incomplete data provided by the applicant*”. The Tribunal further observed that the subsequent scrutiny resulted in identification of the actual composition of the imported item, hence, the determinant classification.

³ Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as 2011 PTD 2577 – Findings of fact cannot be challenged in reference jurisdiction.

⁴ *A. P. Moller Maersk & Others vs. Commissioner Inland Revenue & Others* reported as 2020 PTD 1614; *Commissioner (Legal) Inland Revenue vs. E.N.I. Pakistan (M) Limited, Karachi* reported as 2011 PTD 476; *Commissioner Inland Revenue, Zone-II, Karachi vs. Kassim Textile Mills (Private) Limited, Karachi* reported as 2013 PTD 1420.

It is imperative to denote at this juncture that no cavil has been articulated by the applicant's counsel to the findings with regard to the composition of the imported item and the sole objection was that the earlier classification ought to have been maintained merely as the same had been done in the past.

Respectfully, we find ourselves unable to concur with the applicant's counsel. While the law provisions for an *unsubstantiated* departure from settled departmental practice⁵, however, there is no unsubstantiated departure in the present facts and circumstances. It is settled law that a wrong benefit, extended beyond the law / policy, may not be perpetuated; as was recently reiterated by the august Supreme Court in *Azam Shah*⁶.

8. In so far as the objection with respect to retrospective effect is concerned, it is paramount to observe that the applicant's counsel has articulated no cavil to the factum that the sample / consignment scrutinized was identical to the consignments subject matter of the Notice. It is also noted that the applicant's counsel made no effort to controvert the findings with regard to composition or the classification, maintained vide the Impugned Judgment. In this context it is apparent that no case has been set forth to dispel the findings of mis-declaration arrived at vide the departmental adjudication process.

9. The learned Tribunal took a lenient view and remitted the penalty, however, such remission could not absolve the applicant to pay the requisite duties and taxes. Applicant's counsel made no endeavor to suggest that the composition of the imported consignments was anything but that determined by the department. It was also never the case set forth before us that the determined composition did not attract the classification heading apportioned in the very proceedings initiated per the applicant's requisition. Therefore, there is no occasion to consider mere remission of penalty as absolution for the applicant.

⁵ Per *Nasim Hasan Shah J* in *Radaka Corporation & Others vs. Collector of Customs & Another* reported as 1989 SCMR 353; while approving *Nazir Ahmad vs. Pakistan and Others* reported as PLD 1970 SC 453.

⁶ Per *Muhammad Ali Mazhar J* in *Syed Azam Shah vs. Federation (Civil Appeal 764 of 2021)*; Judgment dated 19.11.2021.

10. The applicant's counsel has raised no argument to call into question the findings of fact rendered by the tribunal. Even otherwise the learned Tribunal is final arbitrator of facts⁷ and that factual controversies are not ordinarily amenable for adjudication before the reference jurisdiction of this court.

11. In view of the foregoing and in pursuance of the binding ratio of the judgments cited supra, we are of the considered view that question framed for determination be answered in the positive, in favor of the respondent department and against the applicant. Therefore, this reference application is disposed of accordingly.

12. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, as required per section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Amjad/PA

⁷ Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as 2011 PTD 2577.