IN THE HIGH COURT OF SINDH, KARACHI

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

Special Customs Appeal No. 63 of 2002

M/s. Xavier Company	.....	Appellant
Versus		
Customs, Excise & Sales Tax Appellate Tribunal and others	.....	Respondents

Appellant	:	Through Mr. Ammar Yasser, Advocate
Respondent Nos.1,2 & 4	:	Through Mr. G.M Bhutto, AAG
Respondent No. 3	:	Through Mr. Sarfaraz Khan Marwat, Advocate
Date of hearing	:	29.09.2022
Date of judgment	:	03.11.2022

JUDGMENT

Zulfiqar Ahmad Khan, J:- Appellant through the instant SCRA has impugned the order dated 04.02.2002 passed in Customs Appeal No.K-1599 of 2001 by raising the following questions of law:-

1. Whether the amendment in Section 25 of the Customs Act, 1969 eliminates the concept of economic zone for comparison and fixation of value of the goods imported and the Transaction value shall be the value for levy of the Customs Duty and other leviable taxes?

2. Whether the provisions of Section 32 of the Customs Act, 1969 are applicable to the case of the appellant?

2. Background of the case is that the appellant being an importer of various automobile parts including Carbon Brushes, as a part of its usual business, imported a consignment of 50 cartons of such brushes from Thailand (hereinafter to be called as "**the subject goods**") vide IGM No.1494/2000 dated 11-09-2000 Index No.18 at the declared value of Rs.204,789/- and cleared the said consignment for Bond vide Bill of Entry dated 16.09.2000. Upon filing of ex-bond Bill of Entry, the department (Group-VIII) assessed the duty and taxes for Rs.29,422/-,

whereafter the goods were sent to the Special Monitoring Team for further checking of duty and taxes, which also confirmed that the duty and taxes assessed by the said Group were correct, and for the purpose of payment of the aforementioned assessed duty, the importer drew a pay order No.595657 dated 18.11.2000 for Rs.29,422/-. The said pay order was duly deposited in the National Bank of Pakistan, Customs House Branch, Karachi. However at the time of clearance, the importer was informed that some objection regarding valuation of the said goods has been raised by the Appraising Intelligence Branch (AIB). The importer immediately approached AIB and the Customs Authorities for clearance of the subject goods and presented relevant documents to prove his valuation, which were not accepted and a Show Cause Notice dated 15.01.2001 was issued to the appellant and his Clearing Agent. Based on the valuation of Carbon Brushes imported from China, it was alleged that the importer's goods were grossly under-valued. The same stance was adopted by the department during the course of hearings before the learned Collector alleging that third parties have imported similar consignments from China, but at a much higher rates. Order-in-Original No.32/2001 dated 30.01.2001 was passed against the appellant on the grounds of misdeclaration and under-invoicing, whereas the Clearing Agent was discharged. The importer preferred an Appeal. While passing Order-in-Appeal the Respondent No.1 remanded the case back to the Respondent No.2 for *de novo* consideration on the ground of violation of principles of natural justice. Written Arguments with physical evidence were presented by the appellant before the Respondent No.2, who passed the impugned Order-II on 18.08.2001 wherein a fresh version of the department was incorporated, which were neither mentioned in the show cause notices. Via Corrigendum Order-III dated 06.10.2001 passed by the Respondent No.2, liability of the Clearing Agent was discharged upon an application made under section 206 of the Customs Act. The appellant, again preferred an appeal before

the Respondent No.1, which was dismissed vide the impugned order, which is assailed herein on.

3. Per learned counsel of the appellant, by wrongly comparing the value of the subject goods of Thailand origin with those of Chinese origin, the department has contravened the principles settled by the Hon'ble Supreme Court of Pakistan in the case reported as 1992 SCMR 1083 that *"country of origin and not country of import is the criterion for determination of value of goods"*. The orders impugned are passed in haste and without application of judicial mind, whereby the Respondent Nos.1 and 2 failed to appreciate the principle settled by the Supreme Court in the aforesaid case that *"price of goods provided by other exporters could not be taken into consideration to treat declared version of another importer as misdeclaration"*, per learned counsel who also emphasized that the allegation of misdeclaration is based on the premise that part numbers of certain items imported differ from the confiscated goods to which he states that part numbers of items declared in the invoice are the same which have been imported and the importer, hence no mis-declaration of any item(s) is seen. Per learned counsel, in respect of each and every item prices prevailing in one country cannot be matched with those in the other country. The assessment by the appellant per learned was based upon the price-list admittedly published by the Customs Department SMT for the non-genuine auto parts. On the basis of the same price listing, goods from Thailand were imported. Rates charged by the manufacturer, as evident from the manufacturer's Invoice were declared and on the basis of the same, taxes and duties were assessed/paid, per learned counsel. It was also submitted that in the absence of any price data available regarding non-genuine auto parts of Thailand origin, the importer was completely justified in relying upon the pricing mentioned in the said Price Manual as the same goods have been previously imported by the appellant and

cleared by the Customs Department prices whereof were based on the above mentioned SMT manual, hence the appellant has committed no illegality.

4. Learned counsel for the department and Mr. G.M Butto, learned Assistant Attorney General supported the impugned judgment and argued in favour of the findings given therein. They contended that the consignment was under-invoiced and even if it is compared to raw material such under-invoicing is apparent on the face of it. They added that China and Thailand both fall in the same economic zone and parts made therein are more or less of the same quality and the respondents have rightly compared prices of imported goods with China.

5. Heard the counsel and perused the record. In the case at hand, the appellant imported Carbon Brushes form Thailand and declared part numbers, which have been mentioned on the brushes as well. As to the question No.1, it is now an admitted position that post GATT, section 25 has no concept of economic zone and goods are to be compared with identical goods from the same source of export only. This departure to liberate goods from economic zones to one-market economy in result of lengthy deliberations which led to the General Agreement on Tariffs and Trade (GATT) wherein incentives related to special economic zones can be broadly grouped into three categories: (i) measures that are consistent with the World Trade Organization (WTO), notably exemptions from duties and taxes on goods exported from special economic zones; (ii) measures that are prohibited or subject to challenge under WTO law, notably export subsidies and import substitution or domestic content subsidies; and (iii) and measures where WTO consistency depends on the facts of the particular case. The very purpose of GATT was to promote international trade by reducing or eliminating trade barriers such as tariffs and quotas. According to

Agreement's preamble, its purpose was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." Core obligations under GATT are to give Non-discriminatory treatment to members, which fundamental principle of non-discrimination is expressed in Article I of the Agreement known as "most favoured nation treatment" (MFN) which provides that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Thus the obligation to provide all contracting parties (i.e. countries) with any benefit conferred on a contracting party (i.e. a country) is made explicit by the Agreement. Under Article II, contracting parties are restricted from importing duties on importation from other contracting parties in excess of those provided for in their own tariffs. Application of the MFN principle to all contracting parties in this way is aimed to constitute a multilateralization of the MFN obligations which hitherto had been found only in bilateral treaties, The core strength of GATT is that no comparison or preferential treatment could be given to goods originating from one country over another, adversarial to any importer.

6. In the above context Article VII of GATT Agreement is worth discussing which deals with the issue of Valuation for customs purposes as it requires the contracting parties to recognize the validity of the general principles of valuation set forth in the said Article, which should give effect in respect of all products subject to duties or other charges or restrictions on importation and exportation, based upon or regulated in any manner by value. These covenants require that:

> (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of

> merchandise of national origin or on arbitrary or fictitious values.
>
> (b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.
>
> (c) When the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value."

7. With the aforementioned knowledge, coming back to the issue of special economic zones it is pertinent to observe that such zones are not specifically mentioned by name in any of the multilateral agreements concluded under the auspices of WTO, where several types of incentives that were typically part of such a policy were made subject to discipline of WTO laws, most notably through provisions in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) which largely prohibits such a discriminatory treatment. To conclude, the post GATT era section 25 of the Customs Act, 1969 not only eliminates the concept of economic zones for the comparison and fixation of the values of imported goods for customs purposes but at the same time requires such valuation to be based on the actual value of the imported merchandise on which duty is to be assessed and bars valuation hinged to the value of merchandise of national or any other country's origin or on arbitrary or fictitious values. Resultantly Question No.1 is answered in **Affirmative** i.e., against the department and in favor of the importer.

8. Now coming to the question No.2 as to *whether the provisions of Section 32 of the Customs Act, 1969 are applicable to the case of the appellant*. Learned counsel for the appellant stated that no evidence whatsoever on the subject was produced during the course of hearing

before the Additional Collector in the earlier round of hearing, nor any evidence was produced at the time of hearing by the department before the Respondent No.1, and whole case is based upon the contention of the department that prices of the items imported from Thailand differ from the prices of the Chinese origin, which is a real possibility as goods made in different countries would have different cost of production and profit margins. As far as allegation of under-invoicing is concerned, per learned counsel, the same is again based upon the department's version that goods of Thailand origin are supposed to be more expensive than those having Chinese origin. Attention of this Court is drawn towards the settled principle that penal provisions of Section 32 of the Customs Act are only attracted when a person makes a false statement or false document knowingly or having reasons to believe that such document or statement is false. It is not the case of the department that false Invoice has been produced by the Appellant, but the allegation is that prices of these goods do not match with that of Chinese origin, thus per learned counsel, section 32 is not applicable in the instant case since admittedly, the importer has produced the same invoice which was sent by the manufacturer and has assessed and paid taxes and duties accordingly.

9. It is an admitted position that offence under section 32 of the Customs Act, 1969 could not be constituted in the absence of *mens rea* on the part of an importer therefore it could not be put in operation.[1] Section 32 of the Customs Act, 1969 could only be invoked on an importer upon the availability of a deliberate act or connivance, error, ommission or misconstruction. In the case at hand, element of *mens rea* is missing and no deliberate mis-declaration is apparent from the record. The department had not adduced any evidence to substantiate that it was a willful fault and a deliberate mis-declaration. The department's

[1] 2021 PTD 2027 Peshawar High Court

desire to levy fine in the absence of incriminating evidence could not be entertained in the circumstances at hand. Merely hypothecation would not *ipso facto* mean that the element of *mens rea* was present making the importer liable for imposition of penalty, in such circumstances, allegation of mis-declaration and imposition of fine and penalty do not sustain. This view finds support from the case of *Messrs Latif Brothers v. Deputy Collector, Customs, Lahore*[2]. Accordingly, question No.2 is answered in **Affirmative**, i.e., in favor of the appellant and against the respondent.

10. 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.

Judge

Judge

B-K Soomro

[2] 1992 SCMR 1083