

IN THE HIGH COURT OF SINDH, KARACHI

Spl. CRA No.409 of 2011

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

*BEFORE: Irfan Saadat Khan,
Zulfiqar Ahmed Khan, JJ*

The Collector of Customs,
Applicant

: through Mr.Iqbal M. Khurram,
Advocate.

M/s. Khalid Impex,
Respondent

: Nemo

Date of hearing

: 10.11.2022

Date of decision

: 16.11.2022

JUDGEMENT

Irfan Saadat Khan, J. The instant Special Customs Reference Application (SCRA) has been filed against the order passed by the Customs Appellate Tribunal (CAT) in Customs Appeal No.K-340/2009 dated 22.02.2011. Though as many as 09 questions of law were raised in the present SCRA, however only questions No.1, 4 & 8 were admitted for regular hearing, vide order dated 27.04.2022, which are reproduced as under:-

1. “Whether as per the amended provisions of Section 79(1)(b) read with Section 155-D & 155-E of the Customs Act, 1969, an importer is not responsible for filing a true declaration of the imported goods, giving therein complete and correct particulars (which includes HS Code/PCT Heading) of such goods and made correct self-assessment and payment of duty / taxes correctly?
4. Whether the Tribunal erred in law by not considering the proposition of law that in terms of amended provision of law i.e. Sections 79(1) & 80 of the Customs Act, 1969, incorrect self-assessment resulting into loss of revenue is an

offence attracting the provisions of Section 32(1) & 32(2) of the Customs Act, 1969?

8. Whether on the facts & circumstances of the case the Appellate Tribunal erred in law to misinterpret the CGO 12/2022 and further erred in law to give preference/overriding effect of CGO (an administrative order) on a notification SRO 487(1)/2007 dated 09.-06.2007 (a Statutory Order)?”

2. Briefly stated the facts of the case are that the Respondent electronically filed its Goods Declaration bearing CRN-874052 dated 10.01.2009 mentioning therein one sided coated duplex board with grey back, weighing 21695 kgs, at an invoice value of US\$ 8687/- under HS Code 4810.9200. The said GD was however selected by the Department for scrutiny and upon examination; it revealed that the subject consignment was both sided coated duplex board of Manila Back, the value of which according to the Department was US\$ 0.93 per kg as against declared value at US\$ 0.490 per kg. A show cause notice dated 13.01.2009 was then issued for the alleged suppression of duty and tax amounting to Rs.482338/-, alongwith imposition of applicable penalty/fine etc. Reply was then given by the Respondent, however the said reply was not found satisfactory by the Department. Thereafter vide Order-in-Original No.4024/2009 dated 12.02.2009, the Respondent was directed to pay the above referred amount alongwith applicable penalty/fine for mis-declaration of the description of the imported goods.

3. Being aggrieved with the said order an appeal was preferred before the Collector of Customs (Appeals) by the Respondent. The said Collector (Appeals) after hearing the matter, vide Order-in-

Appeal No.1645/2009 dated 14.3.2009, found that since the H.S Code and the applicable duty/taxes of the goods declared by the Respondent and assessed by the Department were the same and that there was no difference in the description of the goods, as declared by the Respondent and as assessed by the Department, waived the redemption fine and penalty by allowing the appeal.

4. Being aggrieved with the said order appeal was preferred by the Department before the CAT, who also affirmed the order of the Collector (Appeals), by observing that since there was no difference in the duty paid and the duty assessed by the Department and as the H.S Code of the goods description made by the Respondent and assessed by the Department were the same, hence no adverse inference could be drawn by the Department against the Respondent and affirmed the order of the Collector (Appeals) by observing that provisions of Section 32 of the Customs Act, 1969 (hereinafter referred to as the Act) were not attracted and that the Collector (Appeals) was justified in remitting the fine/penalty. It is against this order of the CAT that the present SCRA was filed by raising the above referred questions.

5. Mr. Iqbal M. Khurram, Advocate, at the very outset, stated that he does not press Question No.1 as the same does not arise out of the order passed by the CAT and stated that he would advance his arguments with regard to Questions No.4 & 8 only. He stated that a clear deviation in the description of the goods was detected by the Department and thereafter proceedings were initiated. He stated that no doubt the duty and taxes on the

description of the goods, as declared by the Respondent and as assessed by the Department, were the same and even the H.S Code of the consignment imported by the Respondent and as assessed by the Department were the same but equal true is the fact that there was a mis-declaration on the part of the Respondent hence the Department was justified in imposing penalty / fine upon the Respondent for the said mis-declaration. He stated that the provisions of Section 32 of the Act do attract in the present circumstances with regard to mis-declaration and therefore, the CAT was not justified in up-holding the order of the Collector (Appeals) who also had incorrectly remitted the fine/penalty on the ground that since the rate of duty and taxes of both the items were the same, hence there was no element of mens rea on the part of the Respondent with regard to mis-declaration. He stated that it is not the question of applicability of the duty and taxes, rather the prime responsibility of an importer is to make a true declaration of the goods giving therein complete and correct particulars of the imported goods. He stated that nowhere the Collector (Appeals) or the CAT have denied the fact that there was no mis-declaration on the part of the Respondent with regard to the description of the goods. He stated that even in the cases where the H.S Code and the duty/taxes are the same but incorrect declaration/description of the goods is detected the said importer is liable for imposition of fine/penalty for the said mis-declaration. He stated that the provisions of Section 32 of the Act, thus are fully attracted in the instant matter and therefore the answer to the questions raised in

the instant SCRA may be answered in favour of the Department and against the Respondent.

6. Nobody has appeared on behalf of the Respondent despite proper service of notice.

7. Matter has been heard, record has been perused.

8. Record reveals that the Respondent filed its GD electronically and same was cleared under the provisions of Section 79(1) of the Act. However when the said goods were scrutinized, under the provisions of Section 80 of the Act, it revealed that the items as disclosed in the GD by the Respondent were materially different from the goods imported by the Respondent and on the basis of this fact since it was found that the exchequer has been precluded from its legitimate taxes and duties thereafter show cause notice was issued and proceedings were initiated. In order-in-appeal and Tribunal's order it was observed that since there was no difference in the HS Code and the duty/taxes in respect of the declared and found out goods, no adverse inference would be drawn against the importer. It may be noted that neither the Collector (Appeals) nor the Tribunal has said a single word about the fact that the goods declared found out by the Department were materially different from the one disclosed and declared in the GD electronically filed by the Respondent and the goods detected upon their physical examination. The emphasis of the Collector (Appeals) and the Tribunal were based on the fact as the H.S Code and the rate of duty and taxes were the same hence since no loss to the exchequer has been caused therefore the imposition of redemption fine/duty

were waived. No doubt the H.S Code of the goods declared electronically and as found out by the Department as well as the rate of duty/taxes of the declared goods and the examined goods were the same but the prime question with regard to the incorrect declaration of the goods electronically filed by the Respondent had remained unanswered and uncontroverted. We have not find from any correspondence made by the Respondent with the Customs Department or from any argument advanced by them before the fora below that there was no difference in the declaration of goods by the Respondent and the goods as found out by the Department but the main and the prime emphasis of the Respondent had remained that the H.S Code and the duty/taxes had since remained the same, therefore, no adverse inference could be drawn against them.

9. We are of the view that on physical examination since the goods were found to be different from the one declared by the Respondent therefore in such circumstances the department was fully justified in drawing adverse inference against the Respondent notwithstanding the fact that H.S Code and the taxes/duties had remained the same, as how could the Respondent be absolved from the responsibility of making a true declaration of their goods, as provided under Section 79 of the Act and from the fact that the goods as declared in the GD electronically filed by them were materially different from the goods found on physical examination on which, in our view, provisions of Section 32 are fully attracted.

10. In our view a person is guilty of making untrue declaration of its goods, as specifically provided under Section 79 of the Act,

notwithstanding/irrespective of the fact that after final determination H.S Code and the rate of duty/taxes had remained the same and penal action in such circumstances is warranted for untrue declaration coupled with giving incorrect particular of such goods of the description of the goods. We were also able to lay our hands on a decision given in the case of *Collector of Customs ..vs.. Messrs BNN Enterprises (2022 PTD 1418)* given by a bench of this High Court, which observed as under:-

“6. Insofar as the argument that since there was no difference of rate of duty under the claimed HS Code as against the assessment made by the Applicant, it would suffice to observe that this contention is wholly misconceived and reliance on Para 101 of CGO12 of 2002 in the given facts and circumstances of this case is misplaced. The same applies in cases, wherein, an importer claims assessment under certain HS Code which is not accepted and the assessment is made in some other HS Code by the department and if as a result thereof, there is no change in the rate of duty, then benefit of Para 101 of CGO 12 of 2002 can be claimed by an importer. In this case the facts are entirely different as an attempt has been made to declare goods as used as against new and as a consequence thereof, notwithstanding that the rate of duty remains same, an attempt had been made to pay duty and taxes on lower / reduced value of used goods as against the value of new goods. If this would have gone undetected, naturally lesser taxes and duties would have been paid on the value of used Road Roller as against the value of a new Road Roller. This apparently is a case of mis-declaration of actual description of goods warranting initiation of proceedings in terms of Section 32 of the Act and the benefit, if any, of Para 101 of CGO 12 of 2002 is not available in the facts and circumstances of the case. The respondent had made an attempt; but was unsuccessful, and therefore, the Tribunal has seriously erred in setting aside the order of Adjudicating Authority, whereby, goods were confiscated and redeemed against fine and penalty. The Adjudicating Authority has dealt with the issue in accordance with the legal provisions applicable in this case and the finding of the said authority did not warrant any interference by the Tribunal which is based on completely irrelevant appreciation of law which cannot be endorsed or sustained by this Court.”

11. In view of what has been discussed above, we answer the Questions No.4 & 8, referred to in the present Spl.CRA, in affirmative i.e. in favour of the Department and against the Respondent. Let a copy of this order be sent to the Registrar Tribunal for doing the needful in accordance with law.

JUDGE

JUDGE

Karachi

Dated:-16.11.2022

SM