ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") No. 456 of 2019

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Adnan-ul-Karim Memon

Applicant:	**The Collector of Customs, through the Additional Collector of Customs MCC-Export, PMBQ, Karachi Through Mr. Khalid Mehmood Rajpar, Advocate.**
Respondents:	**M/s S.M Traders (Pvt) Ltd. Through Mr. Salman Aziz, Advocate.**
Date of hearing:	**14.03.2024.**
Date of Judgment:	**09.04.2024.**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant has impugned judgment dated 24.04.2019 passed by the Customs Appellate Tribunal in Customs Appeal No. K-1439/2018 proposing the following questions of law, on which this Reference Application was admitted for regular hearing vide Order dated 26.01.2022.

i. Whether on the basis of facts and circumstances of the case the learned Appellate Tribunal was justified that the Exporter / investor has filed true declaration under Section 79(1) of the Customs Act, 1969 of the impugned consignment, the goods were subjected to 100% examination in the designated examination area of Karachi Export Processing Zone (KEPZ) in terms of Section 80 of the Customs Act, 1969 read with Standing Order No. 06/1983?

ii. Whether on the basis of facts and circumstances of the case the learned Appellate Tribunal while passing the impugned order has considered that on scrutiny of the documents it revealed that contrary to the contents on Bill of Lading No. 575027786 dated 12.02.2018 the port of shipment and origin is found to be "Xiamen China" instead of "Houston USA" mentioned in the aforesaid Bill of Lading provided by the Investor / Clearing Agent and as declared in the Goods Declaration by them?

iii. Whether the learned Appellate Tribunal has considered the provision of Section 79(1)(b) read with Section 32(1)(c) of the Customs Act, 1969, that the less payment of revenue through wrong self-assessment

is also a case of mis-declaration within the meaning of Section 32 of the Customs Act, 1969 read with SRO 499(1)/2009?

iv. Whether on the basis of facts and circumstances of the case the learned Appellate Tribunal Was justified that the "Customs Authorities" are not empowered to recover the taxes in terms of Section 32 of the Customs Act, 1969?

v. Whether the Appellate Tribunal's findings are not perverse and a result of non-reading/mis-reading of record?

2. Learned Counsel for the Applicant has contended that it is a case of mis-declaration falling within the contemplation of Section 32 of the Customs Act, 1969 **("Act")** as admittedly the goods found on examination were other than what was declared; hence not only Section 32 has been violated; but so also an attempt was made to claim exemption, which is restricted under HS Code 9917, and therefore the Tribunal was not justified in allowing the Appeal of the Respondent. He has relied upon the cases of ***Premier Coating***[1] and ***Baba Khan***[2].

3. On the other hand, learned Counsel for the Respondent has contended that since goods were meant for Export Processing Zone ("**EPZ"**); wherein, no customs duty and sales tax is leviable in terms of SRO 881(I)80 dated 23.08.1980; hence, the impugned action of recovery duty and taxes and imposition of redemption fine could have been taken under Section 32 of the Customs Act, 1969. He has further contended that the jurisdiction in this regard, if any, vests with the EPZ authorities under the Export Processing Zone Authority Ordinance, 1980 ("**EPZ Ordinance**") in respect of the License issued to the Respondent and they have already imposed a penalty upon the Respondent in this regard which has been paid. In support he has relied upon the case of ***Kamran Industries***[3] ***and R. A Hosiery Works***[4].

---

[1] Premier Coating Resin (Pvt.) Ltd. Vs. Collector of Custom Export 2017 PTD 1018
[2] Baba Khan Vs. Collector of Customs, Quetta 2000 SCMR 678
[3] Kamran Industries Vs. The Collector of Customs PLD 1996 Karachi 68
[4] Collector of Customs v R. A. Hosiery Works (2007 SCMR 1881)

4. We have heard both the learned Counsel and perused the record. It appears that the Respondent imported a consignment stated to contain used clothing classifiable under HS Code 6309.000 read with Special Classification Provision 9917 at the declared value of US$ 7312. The goods were processed and allowed to be shifted to EPZ area; wherein, upon filing of a Goods Declaration (GD) under section 79 of the Act, they were subjected to examination in terms of Section 80 of the Act read with Standing Oder No. 06/1983 and it was found that instead of used clothing "*prime quality printed furnishing / curtain cloth"* valued at *"US$ 84,616"* weighing 15110 Kgs. was found; hence a Show Cause Notice dated 8.6.2018 was issued under Sections 32(1), 32(2), 32A, 79(1) and 192(1) of the Customs Act, 1969 read with special classification provisions 9917 and Sub-Section 1 of Section 11 of the EPZA Ordinance 1980 read with clause 19 & 39 of EPZA License Agreement, Sections 3, 6 and 7A of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001. The Respondent contested the same whereafter an Order-in-Original was passed on 12.11.2018; whereby, the charges alleged in the Show Cause Notice were affirmed and impugned action was taken in the following terms:

> "In light of the above facts and findings, it is proved that the charges leveled in the show cause notice stand established. Accordingly, the offending goods are confiscated under clauses (1), (3), (14). (14A), (41). (44) & (45) of Section 156 of the Customs Act 1969 for violation of provisions of Sections 32(1), 32(2). 32A, 79(1) and 192(1) of the Customs Act, 1969, read with special classification provisions 9917 and Sub-Section 1 of Section 11 of the EPZA Ordinance 1980 read with clause 19 & 39 of EPZA License Agreement. Sections 3, 6 and 7A of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001. However, an option is given to the respondent to redeem and clear the goods to the tariff area under Section 181 of Customs Act, 1969 on payment of a fine equal to 35% of the value of offending goods to the tune of Rs. 3,272,524/- (35% of ascertained value of impugned goods Rs. 9,350,068/-) subject to the condition that the same are otherwise importable as per Import Policy Order in-vogue as prescribed under SRO 499(I)/2009 dated 13th June 2009, in addition to leviable duty and taxes to the tune of Rs. 5,448,096/ (Customs Duty amounting to Rs.1,496,011/-, Sales Tax amounting to Rs.1,923,309/-, Additional Sales Tax amounting to Rs.339,407/- and Income Tax amounting to Rs.1,221,866/-, Regulatory Duty amounting to Rs.467,503/- (approximately) thereon. A penalty of Rs. 100,000/- (Rupee One Hundred Thousands Only) is also imposed under

clauses (3), (14), (14A), (41), (44) & (45) of Section 156(1) of Customs Act, 1969 on the importer / respondent for violation of Section 32 and EPZ Rules. The Collectorate shall proceed to recover the default surcharges (to be calculated at the time of payment as per Section 34 of the Sales Tax Act, 1990) strictly is accordance with law)"

5. The Respondent being aggrieved filed an Appeal before the Tribunal and vide impugned judgment it has allowed the Appeal primarily on the ground that since no duty and taxes are leviable in EPZ area; therefore, the provisions of Section 32 were not applicable and at best any action which could have been taken was within the jurisdiction of EPZ Authorities and not with the Customs Department. Now the moot question before us is, that despite there being an admitted mis-declaration in filing a GD in terms of Section 79(1) of the Act, and notwithstanding that no duties are leviable in EPZ area, can any action be taken in terms of Section 32(1) read with clause (3), (14) & (45) of Section 156(1) of the Act.

6. Section 32(1)[5] of the Act provides that if any person in connection with any matter of Customs makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or submits any false statement or document electronically through automated clearance system regarding any matter of Customs knowing or having reason to believe that such document or statement is false in any material particular, he shall be guilty of an offence under this section. It is not in dispute that EPZ area is a

---

[5] "32. [False] statement, error, etc.- (1) If any person, in connection with any matter of customs,-

(a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or

(b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer, [or]

[(c) submits any false statement or document electronically through automated clearance system regarding any matter of Customs.]

[knowing or having reason to believe that such document or statement is false] in any material particular, he shall be guilty of an offence under this section.

customs bonded area and the relevant provisions of the Act are applicable including filing of GD and its processing under Section 79 read with Section 80 of the Act. Section 79(1) of the Act, obligates that the owner of any imported goods shall make entry of such goods by filing a true declaration of goods, giving therein complete and correct particulars of such goods, duly supported by commercial invoice, bill of lading or airway bill, packing list or any other document required for clearance of such goods in such form and manner as the Board may prescribe. At the same time, it is also not in dispute that the declaration made by the Respondent was false in material particulars inasmuch some different goods of a higher value were found on examination. Similarly, the origin of goods was also mis-declared, whereas, upon inquiry from the concerned shipping line it has also come on record that there was manipulation in the contents of Bills of Lading as well, as the goods had originated from China as against USA. These facts have not been controverted on behalf of the Respondent in any manner. Clause 14[6] (as relevant at the time of issuance of show cause as post 2019 it stands amended) of Section 156(1) of Act provides that, if any person commits an offence under section 32; of the Act, such person shall be liable to a penalty not exceeding one hundred thousand rupees or three times the value of the goods in respect of which such offence is committed, whichever be

---

6 (14) If any person commits an offence under Section 32 such person shall be liable to a penalty not exceeding one hundred thousand rupees or three times the value of the goods in respect of which such offence is committed, whichever be greater; and such goods shall also be liable to confiscation; and upon conviction by a Special Judge he shall further be liable to imprisonment for a term not exceeding three years, or to fine, or to both;

greater; and such goods shall also be liable to confiscation; and upon conviction by a Special Judge he shall further be liable to imprisonment for a term not exceeding three years, or to fine, or to both. It has been conceded before us that the action and penalty imposed by the EPZ authorities in this regard has been duly paid and accepted by the said Respondent. It is also a matter of record that in respect of alleged mis-declaration a finding of fact has been recorded in the ONO to the extent that "*the issue of mis declaration and concealment is proved beyond doubt. The examination report clearly mentions that almost half of the consignment consisted of the goods not declared. The mis declaration of the origin is also established. Both of these facts are accepted by the respondent. Although the consignment was for the EPZ but that does not mean not to declare or conceal the facts in Customs documents"*. Now the only argument which has been raised on behalf of the Respondent and also accepted by the Tribunal is that even if a mis-declaration was made, since no duties and taxes are leviable; Section 32 does not apply and is not relevant or confers jurisdiction upon the Customs authorities. However, we are not in agreement with such submission of the Respondent as well as the finding of the Tribunal inasmuch Section 32(1) squarely applies on the present facts and circumstances of the case, notwithstanding that no duties and taxes are to be paid. It is of utmost importance that time and again Section 32(1) is linked and confused with two other subsections of Section 32 i.e. Subsection (2) and Subsection (3). Sub-sections (2) & (3) of Section 32 relates to different and independent situations vis-à-vis Section 32(1) and they provide that whereby reason of a misdeclaration under Section 32(1) any duty and taxes have been short levied, they can be recovered by way of a Show Cause Notice issued within the two different limitation periods provided thereunder. Section 32(2) deals with the cases of any misdeclaration as provided under Section 32(1); whereas,

Section 32(3) covers a situation where, by reason of inadvertence, error or misconstruction, any duty and taxes has been short levied. Therefore, if there is a situation like the one in hand, that though no duties and taxes are to be paid or are leviable, it does not ipso facto means that any wilful misdeclaration by any person while filing a GD or any other document with the Customs Authorities can go scot free without any further action. This view is further supported by Clause (14) of Section 156(1) of the Act, which provides for penalties, confiscation and conviction as noted hereinabove. It may also be of relevance to note that post 2019 clause (14) ibid has been amended and now section 32 is substituted with subsection (1) and Subsection (2) of Section 32 of the Act, independently so as to further clarify and substantiate our above view. Therefore, in our considered view the Customs Authorities in EPZ area will have jurisdiction at least to the extent of Section 32(1) of the Act and this is notwithstanding the fact that they cannot impose or recover any duties and taxes as they are otherwise exempt under the relevant notification and rules so prescribed. The very non-applicability of Section 32(2) for that matter does not take away this jurisdiction. If in the same line it is held that section 32(1) of the Act is also not applicable, then this will only encourage incorrect declarations before the Customs Authorities by the Importers in EPZ area. Similarly, clause (45) of section 156(1) of the Act deals with violation of Section 79 of the Act and provides that if any goods have been declared on a goods declaration and it is found that goods not so declared have been concealed in, or mixed within the goods so declared, the owner of such goods and every person who aids or abets such concealment or mixing of goods shall be liable to a penalty not exceeding twenty five thousand rupees or five times the duty and taxes involved whichever is higher; and both the goods so declared and the goods not so declared *shall be liable to confiscation*. Here, a false declaration has been made

knowing and having reason to believe that it is false or incorrect. The Respondent has been a issued a Licence for warehousing in EPZ area and not for any manufacturing of goods. It has been permitted to sort, grade, pack used textile clothing and worn items, shoes, purses, bags, soft and hard toys, whereas, it has imported new curtain cloth. For doing so, as per record there is no justification, except legal objections as to the jurisdiction of the Customs in EPZ area. Moreover, they have admitted their guilt by paying the penalty so imposed by EPZ Authorities. In that case, there is nothing on record to draw any exception that a false declaration was made by it in terms of Section 79(1) of the Act. It has not been justified by the Respondent that as to how they would have been able to export these goods if it had not been detected as in that case they can only re-export from EPZ what they had imported. This also established mensrea on their part falling within the contemplation of Section 32(1) of the Act.

7. While concluding we may observe in the given facts and circumstances of the case in hand, though no recovery can be made under Section 32(2) & (3); but at the same time in our considered view as noted hereinabove, Section 32(1) read with Section 79(1) of the Act fully applies independently, and as a consequence thereof, penal action is provided under clause (14) & (45) of Section 156(1) of the Act, notwithstanding that no duties and taxes are being recovered.

8. Lastly, as to placing reliance on the case of *Kamran Industries* (Supra) by the Tribunal and the Respondents Counsel as well, it will suffice to observe that the facts in that case were somewhat different. In that case, all along the issue was that there was no *"mis-declaration"*, whereas, the entire judgment of the Court deals with this, and that whether the case of under valuation falls within the ambit of Section 32(2) of the Act or not. The Court in *Kamran Industries* (Supra) case has

not dealt with the implication of an admitted false declaration in terms of Section 79(1) read with 32(1) punishable under clauses (3), (14) & (45) of the Act. Therefore, to that extent the ratio of the said judgment being distinguishable in facts as well as law, in not applicable to present set of facts.

9. Insofar as the case of *R. A. Hosiery* (Supra), which otherwise is a leave refusing order, (against judgment of a single judge of this Court reported as 2004 PTD 2977) is concerned, with respect, we may observe that at times the same is relied upon invariably without first examining the facts of that case. It was never a case of any import and filing of a GD in terms of Section 79(1) of the Act. It was a case of export requiring filing of a declaration under Section 131 of the Act, which at the relevant time did not require filing of a correct and complete particulars of goods[7]. In that case the exporter intended to export 445 cartons of men's and children's Pyjamas and in the Bill of Export (filed under s.131) declared it to be of 100 cotton, whereas, on examination they were found to contain 90% cotton blended with 10% polyester. It was in that context the Court came to the conclusion that section 32 of the Act was not applicable. The finding of the learned Single Judge was maintained by the Supreme Court by refusing leave to appeal. However, it was never a case of filing of a false declaration under Section 79(1) of the Act and the applicability of the penal provision provided under clause (45) of Section 156(1) of the Act. Therefore, the ratio of the said judgment, besides being a leave refusal order, is also not relevant or applicable to the present case and discussion as above.

10. In view of hereinabove facts and circumstances, the Respondent is though not liable to pay any duties and taxes as determined by the Adjudicating Authority in the ONO; however, the Respondent is liable to pay the determined amount of

[77] Section 131 substituted by Finance Act, 2005.

redemption fine as well as penalty as ordered by the Adjudicating Authority. The proposed questions on which this Reference Application was admitted do not appear to be relevant or proper as to the controversy in hand, and is therefore rephrased that **"*Whether in the facts and circumstances of the case, the Customs Authorities can initiate action under Section 79(1) of the Customs Act, 1969, punishable under clause (45) of Section 156(1) read with Section 32(1) ibid in respect of Goods Declarations filed by the Importers at Export Processing Zone (EPZ)?"*** and the same is answered in the *affirmative* in favour of the Applicant and against the Respondent. The orders of the forum below are modified to the extent of the question as above. As a consequence, thereof, instant Reference Application is ***partly allowed***. Let copy of this order be sent to the Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of the Customs Act, 1969.

Dated: 09.04.2024

JUDGE

JUDGE

Ayaz P.S.