IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Custom Reference Application No 218 OF 2012

Present:-
Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Muhammad Junaid Ghaffar.

Muhammad Waheed----------Applicant

Versus

The Customs Appellate Tribunal & another------Respondents

Date of hearing:	**24.3.2015 & 14-07-2015**
Date of judgment:	**23.07.2015**
Applicant	**Through Mr.Mohabbat Hussain Awan, Advocate.**
Respondent	**Through Mr. Kashif Nazeer, Advocate along with Mr. Ilyas Ahsan Appraising Officer (Legal)**

J U D G M E N T

Muhammad Junaid Ghaffar, J:- Through instant reference application, the applicant has impugned Order dated 25.6.2011 passed by the Customs Appellate Tribunal, Karachi in Customs Appeal No.K-734 of 2007, whereby, the appeal filed by the respondent against the order of Collector of Customs (Appeals), Karachi has been allowed. The applicant has proposed the following questions, which according to the applicant are questions of law arising out of the Order of the Customs Appellate Tribunal, as referred to hereinabove, however, on 6.9.2013, the learned Counsel for the applicant had made a statement at bar that the applicant will not press Question No.1.

1. Whether the learned Appellate Tribunal has erred in law and equity by accepting the appeal of the Department and passing an order –Exparte without affording the appellant any opportunity whatsoever, which is unfair, unjust and inequitable as it condemns the appellant unheard.

2. Whether the learned Appellate Tribunal was justified in law and in equity by not considering the cogent speaking order of the Collector (Appeals) Karachi and overturning the same?

3. Whether the learned Appellate Tribunal has erred in law and in equity by not appreciating the prevalent SRO 487(1)/2007, wherein, it is expressly enunciated that no penal action be initiated against an importer if there is not a difference of over 30% between the declared value and the ascertained value?

4. Whether the learned Appellate Tribunal has failed to appreciate the law laid down by the superior Courts, wherein the ratio decidendi explicitly states that no case of mis-declaration of PCT heading is tenable when the rates of duty/taxes under different PCT headings are the same?

5. Whether the learned Tribunal erred in law and in equity by not considering the scope of Section 32 of the Customs Act, 1969, which contemplates a fine/penalty only when an attempt of willful or deliberate mis-declaration is made, which is not the case in the present matter pursuant to the entrenched findings of the learned Collector (Appeals) together with the facts that there was less than 30% difference between the declared value & ascertained value and less than 2% difference between the declared weight and the ascertained weight?

6. Whether the impugned order passed by the learned Appellate Tribunal is sustainable in law and on facts of this case?

7. Whether the learned Appellate Tribunal has applied its judicial mind and taken into consideration the law laid down by the Hon'ble Superior Courts with regard to the subject matter before it?

2. Briefly the facts as mentioned in the statement of case are that the applicant had imported a consignment of Cold Rolled Steel Sheet in coils of Secondary Quality ("CRC Sheet") at a declared value of US $ 27,187/- and filed Goods Declaration dated 30.8.2007, which was referred for First Examination by respondent, and on examination, the goods were found to be GP Steel Sheets in Coils ("GP Sheet"), instead of CRC Sheet. The HS Code declared by the applicant was 7209.1610, whereas, the HS Code determined by the respondent was 7210.1110. The GP sheet was required to be assessed @ US $ 406/- per Metric Ton as against the assessable value of CRC Sheet @ US$ 372/- per Metric Ton. Thereafter a Show Cause Notice dated 18.9.2007, was issued, and Order-In-Original No.1914 of 2007 dated 27.9.2007 was passed, whereby 50% fine on the value of offending goods was imposed on the applicant in terms of SRO 487(I)/2007 dated 9.6.2007 in addition to a penalty of Rs.25,000/-. The applicant being dissatisfied with the Order-In-Original, filed an Appeal before the Collector of Customs (Appeals), who vide Order in Appeal No.722 of 2007 dated 20.10.2007,

allowed the same to the extent of penal action, and remitted the fine and penalty, against which the respondent department preferred further appeal under Section 194-A of the Custom Act, 1969 before the Custom Appellate Tribunal, which has been allowed vide impugned order dated 25.6.2011.

3. Learned Counsel for the applicant has contended that no mis-declaration was made by the applicant, as the rate of duty under HS Code 7209.1610 declared by the applicant and on HS Code 7210.1110 determined by respondent is same i.e. 20%, whereas, the goods being of Secondary Quality were necessarily required to be examined first, before any assessment could be finalized, therefore, Section 32 of the Custom Act 1969 is not attracted in the instant matter. Learned Counsel further contended that even otherwise, the difference in assessed value of both categories of Goods under respective HS Codes, was less than 30%, and in terms clause (d) of Serial No.1 of the Table to SRO 487(I)/2007 dated 9.6.2007, no fine could have been imposed on the applicant. It has been further contended by the learned Counsel that this is a case of First Examination of goods, therefore in terms of Para 101(B) of CGO 12 of 2002; Section 32 cannot be invoked against the applicant as no case of “Mens Rea” is made out.

4. Conversely, learned Counsel for the respondent has contended that this is a case of deliberate mis-declaration of description to avoid proper assessment of the goods as according the learned Counsel, the goods covered by the HS Code declared by the applicant are to be assessed @ US$ 372/- per Metric Ton, whereas, the actual assessment value of the goods in question i.e. GP Sheet is US$ 406/- per Metric Ton. Per learned Counsel the applicant had mis-declared the H.S code to avoid proper valuation of the goods, whereas, Para 101 of CGO of 2012 is not attracted in case of Electronic assessment under the Pakistan Customs Computerized System (PaCCS). Learned Counsel finally contended that in terms of clause (c) of Serial No.1 of the Table to SRO 487(I)/2007 dated 9.6.2007, this is a case of mis-declaration of physical description of goods in question, and therefore, appropriate penal action has been taken by the respondent department.

5. We have heard both the learned Counsel and perused the record. By consent of both the learned Counsel, instant Reference Application is being finally decided at Katcha peshi stage. It appears that the applicant had imported a consignment of CRC Sheet (Secondary Quality) and filed a Goods Declaration bearing No.CRN 1-1B-PBW-373542-300807 by claiming assessment under HS code 7209.1610 (chargeable to Custom Duty @ 20%) which was referred for First Examination by respondent, and after physical inspection, was assessed under HS Code 7210.1110, which admittedly also attracts same rate of Customs duty i.e. 20%. On the basis of examination report, a Show Cause Notice dated 18.9.2007 was issued to the applicant, whereby, it was alleged that the applicant had mis-declared the goods in terms of description and value, as the actual description of the goods has been found as G.P. Sheet of Secondary Quality, correctly classifiable under HS Code 7210.1110 as against the declared description of CRC Sheet of Secondary Quality under HS Code 7209.1610. The respondent alleged violation of the provision of Section 79(1), Clause (1) & (2) of Section 32, and 32(A) of Customs Act, 1969 punishable under Clause 14,14-A and 45 of Section 156 of the Custom Act, 1969. The said Show Cause Notice was adjudicated upon vide Order-In-Original No. 1914 of 2007, dated 27.9.2007, whereby, the adjudicating authority observed *that it is proven beyond doubt that the importer has deliberately mis-declared* ***the goods*** *(emphasis supplied) in order to get away with evasion of duties and taxes, however, the goods were selected for examination and mis-declaration was detected and the attempt at evasion was thwarted.* On this finding, the Adjudicating Authority ordered confiscation of goods, however taking a lenient view, the applicant was given an option to re-deem the goods on payment of duties and taxes plus Fine amounting to 50% of the offending value of the goods, in addition to penalty of Rs.25,000/- The said Order-In-Original was successfully challenged by the applicant before the Collector of Customs (Appeals) who vide Order in Appeal dated 20.10.2007 set-aside the ONO to the extent of imposition of fine and penalty, and in further appeal by the respondent, the Customs Appellate Tribunal has reversed the findings of the Collector of Customs (Appeals) and has maintained the Order-In-Original.

6. On perusal of the record, including the finding of the Adjudicating Authority in the ONO as referred to hereinabove, it reflects that the matter had been decided against the applicant for alleged mis-declaration of physical description, and after confiscation of goods, fine of 50% on the offending value of goods was imposed in terms of clause (c) of Serial No.1 of Table to SRO 487(I)/2007 dated 9.6.2007, on the ground that the goods in question have been found to be GP Sheet, as against CRC Sheet as declared by the applicant. However, it appears to be an admitted position that the rate of duty in respect of both types of goods i.e. CRC Sheet as well as GP Sheet, under their respective HS Codes, is same i.e. 20%. It also appear to be an admitted position that the goods in question are Secondary Quality goods and are necessarily required to be referred for First Examination, before any assessment can be finalized. It further appears that admittedly the assessment of goods in question i.e. CRC Sheet as well as GP Sheet is being made by the department on the basis of agreed / determined/ fixed values and not on the basis of methods provided for determination of values in terms of Section 25 of the Custom Act 1969. This appears to be on the basis of a consensus between the Importer's Association and respondent / department, which presently is not in dispute before us. Therefore, the issue before us, is as to whether, on any alleged mis-declaration of description of goods, penal action can be sustained, wherein, the goods being of Secondary Quality, are necessarily required to be referred for First Examination, however, attract same rate of Customs Duty.

7. In this context we need to examine the provisions of SRO 487(I)/2007 dated 9.6.2007 issued by Federal Board of Revenue by exercising powers Under Section 181 of the Custom Act 1969, whereby, certain directions have been issued in respect of certain goods or classes of goods, wherein such goods are to be confiscated out rightly and no option is to be given to pay fine in lieu of confiscation, and has also provided a minimum threshold of quantum of fine, to be imposed in lieu of confiscation in respect of certain offences / category of goods specified in column (2) of the Table to the SRO. It would be advantageous to refer the relevant portion of the said table which reads as under:-`

S.No.	Description	Redemption fine on custom value
1	2	3

1. Offences related to mis-declaration of:-

(a) difference between ascertained and declared weight or Quantity subject to the condition that the percentage Difference is more than 5%.	30%
(b) Origin.	30%
(c) Physical description	50%
(d) value with difference of more than 30% in declared viz, ascertained value determined on the basis of direct evidence after due process of adjudication.	50%

8. Similarly, the Federal Board of Revenue has also issued a Customs General Order bearing CGO No.12 of 2002, wherein, Para 101 (B) deals with Question of taking cognizance of mis-declaration of description, value and HS Code. The relevant portion reads as under;

> ***(B) Question of taking cognizance of mis-declaration of description, value and PCT headings***,---For invoking Provisions of mis-declaration under section 32 of the Customs Act, 1969 prima facie, an element of "mens rea" should be present i.e. there should be an attempt of willful and deliberate false declaration. The importers may not be charged for mis-declaration under Section 32 of the Customs Act, 1969, in the following situation.
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> (i) where an importer makes a correct declaration on bill of entry or opts for IST appraisement for determination of correct description, PCT heading of quantity of goods.
>
> (ii) *when a consignment is found to contain goods of description other than the one declared falling under separate PCT heading but chargeable to same rate of duty.* ***(Emphasis supplied)***
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> (iii) Where the description of goods is as per declaration but incorrect PCT heading has been mentioned in the bill of entry no mis-declaration case under section 32 of the Customs Act, 1969, be made out provided there is no change in the rate of customs duty as a result of ascertained PCT heading.

9. When the aforesaid provision of SRO 487(1)/2007 as well as Para 101 (B) of CGO 12 of 2002, are read in juxtaposition, it reflects that though, a fine of 50% can be imposed in terms of SRO 487(I)/2007, on the alleged mis-declaration of physical description of goods, however, the executive and or the Collectorate who is responsible for assessment of goods, has to ensure before invoking the provisions of Section 32 of the Customs Act, 1969, that prima facie an element of "*Mens rea*" is present, i.e. there should be an attempt of willful and deliberate false declaration. The directions

contained in CGO 12 of 2002, though not binding upon the authorities performing Quasi Judicial functions, but are mandatory in nature and are binding upon the field officers of the Collectorates in terms of Section 223 of the Customs Act 1969. The field officers are required to follow such directions and or guidelines before making any contravention report / case against an Importer. The field officers are not authorized to act as per their own discretion in a situation wherein, FBR has already issued directions and or guidelines, after considering the issue in depth in line with settled principles of law, and any act of the field officers in violation of such directions would be illegal and of no consequence. Reliance in this regard may be placed on the case of ***Akhtar Hussain Vs. Collector of Customs (Appraisement), and 3 Others (2003 PTD 2090)***, wherein, a learned Division Bench of this Court, speaking through *Mr. Mujeebullah Siddiqui, J*, (as his Lordship then was) has observed that *it is undeniable proposition of law that instructions issued by C.B.R. under section 219 of the Customs Act, 1969, are binding on all the officers of the Customs employed in the execution of Customs Act by virtue of provision contained in section 223 of the Customs Act. If there is any conflict in the instructions issued by C.B.R. and the instructions / orders issued by the Officer subordinate to the C.B.R., that [sic] the instructions / orders issued by the subordinate official are invalid and inoperative to the extent of conflict.* Insofar as the contention of the learned Counsel for the respondent to the effect that after introduction of PaCCS /electronic assessment, CGO 12 of 2002 is no more applicable is concerned, we are of the view that such contention appears to be misconceived, as it has been conceded by the learned Counsel as well as by the departmental representative present before us, that CGO 12 of 2002 [Para 101(B)] still exists and is available on the Statute Book. Therefore, in such a situation, and in absence of any clarification and or amendment, to that effect, we have not been able to persuade ourselves to observe that the same would not be applicable in case of assessment of Goods Declarations under PaCCS or Electronic processing of the same.

10. After having examined the applicability of CGO and the SRO as referred to hereinabove in the instant matter, it appears that the case as made out by the respondent department would fall under clause (ii) of Para 101(B) of the aforesaid CGO, as the

goods in question have been found to be the goods of description other than the one declared, however, same rate of duty is applicable on both category of goods. Insofar as the contention of the respondent department to the effect that the applicant had not made any request himself for first examination of goods, we are of the view that the situation in hand does not fall under clause (i) as referred to hereinabove, but under clause (ii), wherein, no such condition i.e. requesting for first appraisement / examination is stipulated. Needless to observe, that even otherwise, it has not been disputed before us that insofar as Secondary Quality goods are concerned, they are mandatorily required to be referred for First examination before any assessment can be finalized.

11. In addition to our above observations, we have also gone through the order of Collector of Customs (Appeals) dated 20.10.2007 and have noticed that the same appears to be a well reasoned order, depicts correct legal position and has been passed after taking into consideration the relevant provisions of law, as well as the directions / guidelines of FBR, which even otherwise, are binding upon the field Collectorate, who in the first instance was not required, in the given facts, to issue any contravention report for initiation of adjudication proceedings. The relevant findings of the Collector of Customs (Appeals) are as under:-

> "9. I have examined the available case record and given due consideration to the arguments made before me. During the course of hearing the learned consultant of the appellants contended that the goods were examined on the basis of Ist Examination under the provisions of section 80 of the Custom Act, 1969 and this fact was also not denied by the Department Representative. The goods are steel sheets imported as Secondary Quality and examination report also confirms this condition. The CRC Steel sheets of Secondary Quality are being assessed at US$ 372/- PMT whereas GP Steel are being assessed at US$ 406/- hence there is slight difference of value which comes hardly to the extent of 8% or to 26% as claimed by the DR which is also much less than prescribed limit under the provisions clause (d) of Para 1 to SRO 487(I)/2007 dated 9.7.2007. The Penal action is to be taken when the value difference between the declared and ascertained custom value exceeds 30%. The Departmental representative intervened to clarify the issue and stated that the value declared by the importer is US$ 320/- as against US$ 406/- per M.ton and the difference also comes to 26% when it calculated by him. Moreover the CRC is to be assessed under HS Code 7209.1610 attracting to custom duty 20% and GP Steel Sheets under HS Code No.7210.1110 is also attracting same rate of 20% of customs duty.
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> 10. My findings and observation on the issues involved in this appeal case are as under;

"That PCT heading declared by the appellants in respect of goods under dispute was 7209.1610 and determined by the department to be 7210.1110. However, there is no change of rate of duty is involved and as such no intention of evading duty/taxes can be attributed to the appellant on this account. The instructions contained in Para 101(b) (ii) of CGO 12/2002 dated 15.6.2012 which is in field and reads as under:

(b) QUESTION OF TAKING COGNIZANCE OFMISDECLARATION OF DESCRIPTION, VALUE AND PCT HEADINGS.

For invoking provisions of mis-declaration under section 32 of the Custom Act, 1969, prima facie, an element of "mens rea" should be present i.e. there should be an attempt of willful and deliberate false declaration. The importer may not be changed for mis-declaration under section 32 of the Customs Act, 1969, in the following "situations".

(ii) when a consignment is found to contain goods of description other than the one declared falling under separate PCT heading but chargeable to same rate of duty.

(ii) The difference between the declared value and ascertained value of CRC and GP Steel Sheets of Secondary Quality is 8% or 26% and even difference between declared value and ascertained value by the department has been found less than 30% for which importer cannot be fined under the provisions of clause 1(d) of SRO 487(I)/2007 dated 9.6.2007.

11. Therefore I hold that in view of above discussion the no penal action is warranted against the appellants under the circumstances and the same is remitted and consequent to above, the order in original No.1914 of 2007 dated 27.9.2007 is modified to above extent only thus appeal case stands disposed of accordingly."

12. Insofar as the finding of the Customs Appellate Tribunal is concerned, the same appears to have been arrived at on the basis of difference in assessed value of both categories of goods. This in fact is not the case of respondent, as the learned Counsel for the department has contended that their case is of mis-declaration of physical description of goods, whereas, even otherwise, for taking penal action in respect of difference in value, the SRO itself provides that *it can only be initiated when the difference in value is more than 30% on the basis of direct evidence after due process of adjudication*, which in the instant case is neither relevant nor has been invoked by the respondent.

13. The upshot of the above discussion is that we would reframe the Question of law, which according to us is a material question involved in the instant case, in the following terms:-

"whether in the facts and circumstances of the case, the Customs Appellate Tribunal was justified in setting aside the order of Collector of Customs (Appeals) dated 20.10.2007, whereby the fine and penalty had been remitted in view of clause (ii) of Para 101(B) of CGO 12 of 2002."

In view of hereinabove findings as recorded on the subject controversy, we would answer the same in *negative*, in favor of the applicant and against the respondent.

14. Accordingly Reference Application is allowed. The Registrar of this Court is directed to send copy of this order to the Customs Appellate Tribunal in terms of Section 196(5) of the Custom Act, 1969, for information.

JUDGE

JUDGE