IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1696 of 2000

[**Beecham Pakistan (Private) Limited v. Assistant Collector of Customs and another**]

Dates of hearing	:	12.09.2019, 17.09.2019 and 23.09.2019.
Plaintiff	:	Beecham Pakistan (Pvt.) Limited, through Mr. Muhammad Umer Soomro, Advocate.
Defendants	:	Assistant Collector of Customs and another, through Ms. Dil Khurram Shaheen, Advocate and Mr. Aminullah Siddiqui, Assistant Attorney General for Pakistan, respectively.

Case law cited by learned counsel for Plaintiff

i. 2006 P T D page-909
[***Rehan Umar v. Collector of Customs, Karachi and 2 others***] – Rehan Umar case;

ii. 2008 P T D page-1250
[***Messrs Najam Impex, Lahore through Sole Proprietor v. Assistant Collector of Customs, Karachi and 4 others***] – Najam Impex case.

Case law relied upon by learned Assistant Attorney General for Pakistan (on behalf of Defendants).

2017 P T D page-130
[***New Allied Electronics Industries (Pvt.) Ltd. v. Federation of Pakistan through Secretary, Revenue Division and another***] – New Allied case.

Other Precedent:

Law under discussion:
(1). The Constitutional Islamic Republic of Pakistan, 1973 (the "**Constitution**").
(2). The Customs Act, 1969.

(3). Customs Valuation (Determination of Value of Imported Goods) Rules, 1999.

(4). Custom General Order No. 57/99 dated 30.12.1999 (**"CGO"**)

(5). Code of Civil Procedure, 1908 ***(CPC).***

JUDGMENT

Muhammad Faisal Kamal Alam, J:- In this proceeding, imposition of loading charges by Defendants on consignments of Plaintiff has been challenged. Plaint contains the following Prayer Clause_

"***(a) To declare that the Defendant No. 1 is required to undertake the clearance of the Plaintiff's imported goods, including the consignments(s) of Aquafresh products of the Plaintiff, in accordance with the requirements of Custom Act, 1969 and Customs Valuation (Determination of Value of Imported Goods) Rules, 1999;***

(b) To declare that the Defendant No. 2 does not have any legal title or authority to determine or dictate the value of any consignment to be imported by the Plaintiff;

(c) To grant permanent injunction restraining the Defendants or any person or authority acting for or on their behalf from imposing any loading on the declared value of the goods imported by the Plaintiff including the consignment(s) of Aquafresh products;

(d) Grant mandatory injunction requiring the Defendant No. 1 to clear the consignment of the Plaintiff on the basis of the payment of customs duties as per the declared value determined by the Defendant No. 1 in accordance with the provisions of the Custom Act, 1969 and the Customs Valuation (Determination of Value of Imported Goods) Rules, 1999;

(e) Direct the Defendants to clear the Bill of Entry bearing IGM No.153/2000, Index No.269 dated 18.9.2000 in accordance with the provisions of the Custom Act, 1969 and the Customs Valuation (Determination of Value of Imported Goods) Rules, 1999 and without imposition of any loading;

(f) ***Direct the Defendants to pay the amount levied as demurrage in respect of IGM No.153/2000, Index No.269 dated 18.9.2000 in accordance with the provisions of the Customs Act, 1969 and the Custom Valuation (Determination of Value of Imported Good) Rules 1999, and any demurage incurred on any other consignment(s), which was delayed clearance on account of arbitrary imposition of loading;***

(g) ***Grant costs; and***

(h) ***Grant any such better/further relief or reliefs that this Hon'ble Court may deem fit in the circumstances of the case***.**"**

2. Claim as set forth in the plaint is that in 1999-2000, customs duty on toothpaste and mouthwash was reduced from 45 to 35 percent and hence it became viable for Plaintiff to start import of 'Aquafresh Brand' products into Pakistan. Over a period of nearly six months, three consignments of Aquafresh products were imported and were cleared by Defendant No. 1 on the basis of invoice value declared in the Bill of Entry (B/E). However, in September 2000, a consignment of Aquafresh products (***subject goods***) were imported and in routine a Bill of Entry regarding the same - bearing IGM No. 1538/2000, Index No.269 (***subject B/E***) was filed for clearance on 18.09.2000. Defendant No. 1 (Assistant Collector of Customs, Group III) accepted the value declared on the above B/E, but the consignment could not be cleared, because it was learnt that on the instructions of Defendant No.2 (Ministry of Defence) a 'forty percent loading' was imposed on the above consignment. This was challenged by Plaintiff before the Defendants through different representations/letters and ultimately loading charges were reduced to 10% from 40%.

3. Upon issuance of summons, only Defendant No. 1 (Assistant Collector of Customs) contested the matter and filed Written Statement, wherein in paragraph-7 it is stated that 10% loading was imposed on the

declared value of the consignment on the basis of Market Enquiry and under the instructions of Special Monitoring Team 5-Corps. The said Defendant justified the impugned levy by stating that it is within the parameters of sub-section 9 of Section 25 of the Customs Act, 1969.

4. Defendant No. 2 (Ministry of Defense, which was impleaded at the relevant time through Special Monitoring Team) was debarred from filing Written Statement (as per record vide order of 18-5-2001).

5. Vide order dated 22-12-2000, as an interim measure subject goods were released against depositing of disputed amount of impugned loading.

6. On 15.09.2003, following issues were framed_

1. ***Whether the plaintiff's consignment is subject to loading / duty charges under the provisions of Custom Act, 1969.***
2. ***Whether the valuation done by the Custom was in terms of the Custom Valuation (Determination) of Value Imported Goods Rules, 1999.***
3. ***Whether the Plaintiffs are entitled to any relief.***
4. ***What should the decree be.***

7. Record shows that only Plaintiff led the evidence as despite providing ample opportunities, the Defendant(s) did not lead the evidence. Vide order dated 26.11.2008, since no cross-examination was done by Defendants, therefore, their side was closed and matter was adjourned for recording of Defendants' evidence, which they failed to produce.

8. Arguments heard and record perused.

9. Learned Advocates for the parties have cited case law mentioned in the opening part of this decision.

10. Findings on the above Issues are as under:-

ISSUE NO.1	Negative.
ISSUE NO.2	As under.
ISSUES NO.3-4	Suit decreed with costs.

REASONS

ISSUE NO.1:

11. Plaintiff's witness (Syed Iqbal Ahmed) filed his Affidavit-in-Evidence and his examination in chief was recorded as P.W.-1. He has produced three earlier Bill of Entries as Exhibits-4/1, 4/2 and 4/3 to fortify Plaintiff's stance that different consignments of its Oral Healthcare Products, viz. Aquafresh toothpaste and mouthwash were imported and released by Defendant No.1 after levying applicable customs duty, sales tax, income tax, insurance and landing charges, but, without imposition of the above impugned 'ten percent loading'.

12. Mr. Umer Soomro, learned Advocate, then referred to the Bill of Entry, which is the subject matter of present controversy and has been produced in the evidence as **Exhibit 4/4.** This document / Bill of Entry has been perused. The consignment consists of Aquafresh mouthwash and toothpaste, which falls within the HS Code / PCT Heading No.3306.9090 and 3306.1010. This product was subject to different duties and taxes, that is, 25% and 35% of customs duty for tooth paste and mouth wash, respectively, 15% of sales tax and 6% of income tax; besides 1% towards insurance and landing charges (each). The grand total of the above came to Rs.685,619/- (rupees six hundred eighty-five thousand six hundred nineteen only). As testified by the P.W.-1, the competent authority in this regard, that is, Defendant No.1, did not charge any impugned loading, which was later endorsed/mentioned on this document / subject Bill of Entry, on the instructions of Defendant No.2. Interestingly, the impugned **"40%**

loading" is hand written on the above Bill of Entry (Exhibit 4/4), ***"as approved by SMT"***. This was challenged by Plaintiff, *inter alia*, through representations to Defendants No.1 and 2. First letter / representation is of 18.10.2000 to Defendant No.1 and is produced in the evidence as Exhibit 4/5; *whereas*, the other two letters / representations of 01.11.2000 and 08.11.2000 (Exhibits-**4/6** and **4/7**) were made to Army Officers (at the relevant time) of Defendant No.2. The gist of all these representations is what has been pleaded by Plaintiff so also deposed that once the declared value (transactional value) of above consignment / goods was accepted by Defendant No.1, which is the competent Authority in this regard, under the Customs Act, the Defendant No.2 could not have imposed the impugned '40% loading', which was subsequently reduced to 10%.

13. The evidence further shows that no reply was given by the Defendants to the above representations of Plaintiff, except that impugned loading was reduced from 40% to 10%. This reduction in the impugned loading is **also hand written on the above Exhibit 4/4 (Bill of Entry).** Since Defendant No.2 refused to withdraw the 10% loading, Plaintiff challenged the same and filed present ***lis***.

14. Testimony of above witness has not been contradicted when it is stated that the Government of Pakistan in order to rationalise the trade and to stop the smuggled goods coming into Pakistan, had reduced the tariff from 45% to 35%, which encouraged the Plaintiff to import the above consignments of foreign origin into Pakistan, as the subject products were / are well-known international brands, but because of non-clearance of the above consignment of the subject goods, Plaintiff had to bear demurrage of more than rupees one hundred thousand.

15. On a specific query, the learned Assistant Attorney General and Advocate for Defendants could not point out any statutory provision, rule or notification under which Defendant No.2 was vested with the authority to impose or even recommend such impugned loading. It is also pertinent to mention that at the relevant time, present Section 25 of the Customs Act, 1969, was already enacted, replacing the earlier provision, vide Finance Act, (IV) of 1999. Similarly, at the relevant time Customs Valuation (Determination of Value of Imported Goods) Rules, 1999, was in the field. The P.W.-1 has produced the above statutory provision and a copy of the Customs Rule, 1999 with his deposition, which are part of the evidence file.

16. Although, Defendants have not led any evidence, but Written Statement of Defendant No.1 is considered only to the extent of defence taken in it on the basis of legal grounds, that is, justifying the impugned levy / loading on the basis of sub-section 9 of section 25 of the Customs Act. The above defence of Defendant No. 1 is to be considered in view of cited reported decisions. Learned Division Bench of this Court in Rehan Umar case (***ibid***, 2006 P T D page-909) has laid down; that Customs Authorities, viz. Defendant No. 1, while assessing the transactional value of imported goods, should follow Section 25 in a sequential manner; ***secondly***, while referring to another reported case, it was held that enhancement in value without sufficient evidence was not permissible; ***thirdly***, transactional value cannot be rejected, because there are some **contemporaneous** import at higher price. It is held that assessment of value on the basis of working of a 'Committee' purportedly working under Section 25 (7) of Customs Act, 1969, was an illegality.

In subsequent decision of Najam Impex case (***supra***, 2008 P T D page-1250) learned Division Bench of this Court has reiterated the above principle of assessment of value in terms of Section 25 (of the Customs

Act) by enjoining the Defendant No.1 to follow step-by-step process as contained in Section 25. In this latest decision, a Valuation Ruling relied upon by Customs Department was set aside.

Even the reported decision in New Allied case (***ibid***, 2017 P T D page-130), hardly lends any support to the case of Defendants. This reported case was handed down by learned Division Bench in number of constitutional petitions, wherein controversy was about charging Value Added Tax at 3% on imports as per Rule 58(b) of Sales Tax (Special Procedure) Rules, 2007. After an exhaustive discussion including on the competence of the concerned government functionary for framing such Rules, it was reiterated and held that levy of tax for the purpose of Federation is not permissible except by an Act of Parliament, as envisaged in Article 77 of the Constitution. The impugned levy (of the reported case) was set aside while holding that the above Rule 58(b) is <u>inconsistent</u> with the provisions of the main statute, viz. Sales Tax Act, 1990.

17. In the light of the above cited reported precedents, case of present Plaintiff is on a better footing. With regard to the argument of Defendants on Section 25 (9) of the Customs Act, the same is misconceived in nature and meritless. This provision itself states that if the customs value of imported goods cannot be determined **under earlier sub-sections**, then '*fall back method'* as envisaged in this sub-section (9) [of Section 25] should be invoked. If Defendant No.1 had to challenge the declared value, then the procedure as mentioned in Section 25 of the Customs Act had to be followed step wise (in a sequential order); that is, Defendant No.1 should have first exhausted the primary method of valuation as envisaged in sub-sections (1) to (4) of Section 25, which as per the above cited case law is mandatory, but, which undisputedly, was not done in the present Case.

Since Defendant No.1 never disputed the declared value of subject goods, hence, question to invoke other sub-sections of Section 25 did not arise.

18. No statutory provision has been shown to have been invoked by Defendant No.2, conferring it / them with the power and authority to interfere in the assessment of valuation of goods at the import stage, which is the domain of Customs Authorities / Defendant No.1 in terms of the Customs Act. ***Secondly***, reduction of forty percent loading charges to ten percent, on the basis of representations made by Plaintiff to Defendants (which all have been exhibited as discussed above), itself proves that both Defendants and particularly Defendant No.2 were not acting under some statutory scheme, but on the basis of some unwritten policy or rather at whims of those who were at the helm of affairs at the relevant time of Defendant No.2. It was nothing but usurpation of authority by officers of Defendant No.2; they did not have any mandate to give instructions (as pleaded by Defendant No.1), to Defendant No.1 for imposing loading on the subject goods. Government functionaries have to function within their prescribed statutory domain and not otherwise.

19. Admittedly and rightly argued by learned Advocate for Plaintiff, that Defendant No.1 did not disagree with the declared/transactional value of the subject goods, otherwise Defendant No.1 would not have made the assessment in accordance with the Customs Act and above Rules (of the relevant time).

20. In written synopsis filed by present Defendant No.1 – Ms. Sakina, Assistant Collector Group – II, **dated 25.09.2019**, it is reiterated that subject goods were assessed in terms of sub-section (9) of Section 25 of the Customs Act and further stated, that assessment was made in line with Customs General Order No. 57 / 99 dated 30.12.1999 (CGO), on the basis

of "Market Survey", while admitting that initial 40% loading was later reduced to 10%, "under the instruction from Special Monitoring Team 5-Corps".

21. This Custom General Order No. 57 / 99, dated 30.12.1999, is also available in the evidence file, at page-81 and the same has been taken into the account. Amongst other things, a Valuation Committee was formed under this CGO with the object to bring about transparency, *particularly*, in those cases where customs values were required to be enhanced. This Valuation Committee in terms of paragraph-3 of this CGO consisted of (***i***) Controller of Customs Valuation, (***ii***) Nominee of the Relevant Collectorate, (***iii***) Nominee of the FPCCI (Federation of Pakistan Chambers and Commerce Industry), (***iv***) Nominee of the concerned Commerce and Chambers Industry. In this Valuation Committee, Special Monitoring Team Five-Corps has not been mentioned.

It is also ironic, that instead of assisting this Court in a fair manner, such type of synopsis is filed, that too very recently, when there is a constitutional dispensation in this Country.

22. The imposition of impugned ten percent loading (charges) was **in effect a levy**, which could not have been imposed or recovered except through a valid legislation or other permissible statutory method. This impugned **'**loading of 10%**'** was/is illegal *per se* and cannot be sustained and is, therefore, declared void abinitio. **Issue No.1 is answered in Negative.**

ISSUE NO.2

23. Summation is that subject goods / consignment of Plaintiff was assessed as per Section 25 of the Customs Act, 1969, and afore referred Rules (of 1999) except imposition of 10% (percent) loading, which was an illegality. **Issue No.2 is answered accordingly.**

ISSUES NO.3 AND 4.

24. In view of the above discussion, the suit of Plaintiff is decreed and amount earlier deposited in pursuance of the order dated 22.12.2000 for release of subject goods, will be returned to Plaintiff's authorized representative by learned Nazir of this Court along with accruals. Looking at the nature of controversy, Plaintiff is also entitled to costs of this suit.

JUDGE

Karachi.
Dated: 20.04.2020.
Riaz PS.