IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No. **638 of 2019** alongwith
SCRA Nos.653, 654, 655 & 664 of 2019
Collector of Customs Vs. M/s. Junaid Enterprices & others.

DATE	ORDER WITH SIGNATURE OF JUDGE

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

Applicant(s): **M/s. Collector of Customs**
Through Mr. Muhammad Bilal Bhatti, Advocate.

Respondents: **M/s. Junaid Enterprises (in SCRA No.638/2019)**
M/s. Rahman Ullah (in SCRA No.653/2019)
M/s. Jumbo International (in SCRA No.654/2019)
Mustafa Ali (in SCRA No.655/2019)
M/s. Umer Khitab Khan (in SCRA No.664/2019)

Date of hearing: **24.12.2020**

Date of Order: **24.12.2020**

O R D E R

Muhammad Junaid Ghaffar J.- These Reference Applications have been filed by the Applicant-Department against a common Judgment dated 03.05.2019 passed by the Customs Appellate Tribunal in Customs Appeal Nos.K-231/2019 to K-235/2019 (Five identical Cases) proposing the following questions of law purportedly arising out of the Order of the Tribunal:-

A. Whether the learned Appellate Tribunal has erred in law not to consider and appreciate that assessment of vehicle of above 1800CC is governed by procedure prescribed vide CGO-14/2005 dated 06.06.2005. The guidelines incorporated in the CGO based issued Valuation Ruling No 1051/2017 dated 21.02.2017 by the Valuation Directorate in consultation of the local agents which covers vast majority of all the categories of commonly imported model. Hence the assessment has been made as per Law?

B. Whether the learned Appellate Tribunal has erred in law not to consider that the Customs Agent now the respondent being responsible to make true statement has grossly mis-declared the value of imported vehicle and made an attempt to deprive the Government of its legitimate revenue in millions of Rupees. Therefore, the provision of section 32(1), 32(2) and 79(1) of the Act has been rightly invoked against the importer / respondent?

C. Whether the learned Appellate Tribunal has not erred in law to waive the fine and penalty have been rightly imposed by the adjudicating authority against the importer in terms of Para 1(d) of SRO 499(I)/2009 dated 13-06-2009, which clearly states that value with difference of more than 30% viz ascertained value states that value with different of more than 30% viz ascertained value determined on the basis of evidence after due process of adjudication. Moreover, the penalty has been imposed by the adjudicating authority against the respondent under clause 14 of section 156(I) of the Customs Act?

D. Whether the learned Appellate Tribunal has not erred in law not to consider that Customs Agent was responsible for declaring true value of the goods but he in collusion with importer declared value of the vehicle in GD as Yen 203,7000/- whereas the vehicle is being assessed is being assessed in accordance with MSRP, by virtue of which its assessable values worked out as Yen 45,85, 233/-. The difference between the declared and the assessable value is 125% higher than declared value. This proves beyond doubt that the respondent importer grossly mis-declared actual value of subject vehicle?

E. Whether the learned Appellate Tribunal has erred in law, not to consider the order passed by the Honourable Supreme Court of Pakistan's judgments in the case of Collector of Sales Tax & Central Excise, Lahore v/s. Zamindara Paper & Board Mills, etc. (PTCL 2007 CL 260) & Supreme Court's order dated 10-11-2003, in the case of Sadruddin Alladin v/s. Collector of Customs in Civil Petition No.775-K/2003 where it was held that the merit of the case cannot be scrapped on sheer technicalities?

F. Whether in view of the established facts & relevant provisions of law, the finding of the Appellate Tribunal are not perverse fro non-reading and / or mis-reading of the available record to the determent of revenue and the consequent benefit to the respondent importer, who has made an attempt to deprive the Government from its legitimate revenue?

2. Learned Counsel for the Applicant-Department has read out the order in question and so also the Show Cause Notice and submits that the value was mis-declared by the respondents; hence a Notice under Section 32(1) of the Customs Act, 1969 was issued; vehicle was confiscated and redeemed on fine, and therefore the impugned order has not appreciated the facts and law; hence liable to be set-aside.

3. We have heard the Counsel for the applicant-department and perused the record. It appears that the case of the department is that the respondents imported used vehicles and declared value, which was less than the value determined pursuant to a Valuation Ruling, and therefore, as per the department's stance, it was a case of mis-declaration and proceedings were initiated. Thereafter Order-in-Original was passed against the respondents confiscating the vehicle and redeeming it upon payment of fine, which was then challenged before the Tribunal, and through the impugned order the appeals of respondents were allowed by remission of redemption fine imposed in lieu of confiscation, and vehicles were ordered to be released upon payment of duty and taxes as assessed by the Applicant. The relevant findings of the learned Tribunal reads as under:-

"5. Record of the case has been examined. At the outset it is noted that the appeals were filed on 09.02.2019. The respective responding department was required to file a memorandum of cross objection as required under sub-section (4) of section 194-A of the Customs Act, 1969 within one month of receipt of notice. No cross objections were filed by the department. The perusal of record shows that the whole case is based upon directions issued vide a circular No.01/2017, issued from the office of Chief Collector, which is incorrectly referred as Public Notice in the impugned orders. Even if it were a Public Notice, the same should have been issued in accordance with procedure laid down under Customs General Order 9 of 2004, dated 25.08.2014. The said circular is not only in derogation of the departmental instructions, is destructive to facility provided to expatriate Pakistanis, but is also contrary to established law and departmental practice. For the sake of clarity, it is mentioned here that old and used vehicles are importable in accordance with the procedure provided under Appendix-E of the Import Policy Order 2016. This procedure is applicable to Pakistan National residing abroad, who can import a vehicle as baggage or gift a vehicle. As such vehicles are owned by Pakistanis living abroad or they are bought from the market, therefore, variation in actual value of the vehicles depending upon condition is inevitable. However for the sake of uniformity in collection of duty and taxes chargeable on equivalent make and model the customs department has issued Valuation Ruling o. 1051/2017. The said Valuation Ruling has determined customs value of imported vehicles, nationally based on MSRP of different grades of Japanese vehicles, subject to certain deductions.

06. It is the case of department that the customs value declared by the appellant was 55% lower than the value derived from MSRP of the same make and model, therefore, the appellant has committed an offence of misdeclaration. The appellant has been penalized in accordance with the above mentioned circular and SRO 499(I)/2009, holding that difference of declared value and ascertained value on the basis of direct evidence is more than 30%.

07. Evidently the respondent's contention that MSRP is direct evidence is misplaced. The MSRP is the manufacturer's suggested retail price for a "new" vehicle. The manufacturer's suggested retail price is the window sticker price which buyers will see and use as a basis of negotiation. For the car dealer, the difference between the invoice price and the MSRP is the potential profit margin on a particular car. The invoice price is what the car manufacturer charges the dealer to buy the car so the car can then be sold to a customer. By definition, it is only a suggested selling price not the actual price. When selling the car, the dealer wants to earn as much profit as possible above the invoice cost and will use the MSRP price as a starting price for negotiating. The difference between the invoice cost and MSRP varies significantly. The MSRP is determined ahead of time by the auto manufacturer and it is only a suggested price, a guideline as to where dealers should base their starting asking price. Therefore, it is clear that MSRP (or sticker price) in the country of exportation is infact a maximum possible inflated invoice price and is starting point of negotiation. Therefore, in true sense it cannot represent the "cost paid or payable". Further MSRP pertains to new vehicles, the price of old and used vehicle will vary depending upon many factors, such as mileage, physical condition, on line shopping etc.

07. The determination of customs value is done in accordance with the provisions of Section 25, read with Customs Valuation Rules. These provisions of law cannot be bypassed through a circular or a public notice. The impugned circular 01/2017 has no legal value when seen in juxtaposition with statutory provisions of law. Further, provisions of Section 32 cannot be invoked on basis of circular as it is settled principle of customs jurisdiction that provisions of section 32(1) cannot be invoked in customs value cases unless the declared transaction value is proved to be false by direct

> evidence. Whereas in the impuged show cause notice, the provisions of section 32(1) have been invoked without having any direct evidence. This principle is also evident in SRO 499(1)/2009 where the fine of 35% is only applicable %. when -the value difference is more than 30% between declared value and ascertained value on basis of direct evidence. Therefore it is concluded in the instant case that provisions of section 32(1) have been invoked without keeping in view the basic spirit of law and in perfunctory manner which is not sustainable in the eyes of laws. While reaching this conclusion, I derive strength from judgements of superior courts namely; PTCL 2009 CL 330 and 2009 PTD 467 ST Enterprises Vs. FBR, wherein, it was held that on basis of Valuation Ruling the provisions of section 32 cannot be invoked and notices issued are not lawful.
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> 08. In view of the above deliberations, it is clear that the appellants have not indulged in willful misdeclaration. The declared transaction value has not been proved false by the department. Even otherwise the appellants being a Pakistan National living abroad cannot be held accountable for not knowing a value determined through a Valuation Ruling which in turn is based on some notional calculation. Accordingly, it is held that charge of misdeclaration in terms of section 32(1) of the Customs Act, 1969 against the appellant is based upon presumption and faulty evidence. The impugned orders are discriminatory and violative of principle of equal treatment before law. Therefore without disturbing the departmental practice of assessment of leviable duty and taxes, the redemption fine in lieu of confiscation and penalty imposed against the appellants are hereby set aside. The department is further directed to issue delay certificate to save the appellants from storage and demurrage charges."

4. Perusal of the aforesaid finding reflects that after a detailed examination of the facts as well as law, it has been held by the Tribunal that no willful mis-declaration was made by the respondents, whereas, the respondents had brought vehicles from abroad in personal baggage scheme, and therefore, cannot be held accountable for any mis-declaration pursuant to values arrived at by the department by way of a Valuation Ruling. It has been further held that such Valuation Ruling has been issued on the basis of Manufacturers Suggested Retail Price (MSRP) of a new vehicle, and therefore, even otherwise, cannot be made basis at least for a case to be sustained insofar as penal action is concerned. It needs to be taken note of that notwithstanding the electronic system in vogue for filing and processing of Goods Declaration, in the instant case the Vehicle being old and used was processed through a Red Channel after first examination, whereas, the assessment / valuation was dependent on the examination report which would determine the model, seating capacity as well as the accessories installed in it. Perusal of the record affirms this fact and it has been endorsed in the report that the assessment is to be made by the concerned officer on the basis of this examination report. It is therefore clear that the valuation and

assessment was entirely dependent on the said examination report; hence, how could an importer of such a vehicle be required to not only have knowledge of the valuation ruling; but also to declare it and assess it on his own. In that case, in our view issuance of a show cause notice for incorrect declaration of value of a vehicle by an importer who happens to be an overseas Pakistani, and penalizing him by confronting that he ought to have declared a value which has been notified by the department through a valuation ruling is not at all in consonance with law and the principles settled in respect of section 32 of the Customs Act. In our considered view, the Tribunal has arrived at a just, fair and correct conclusion inasmuch as in cases, wherein, the assessment is being made on the basis of a Valuation Ruling issued by the Customs Authorities, no case for any mis-declaration to the extent of value, so declared by an importer, can be made out in terms of Section 32 of the Customs Act, 1969. At the most, if the importer is not disputing the value so determined, the Customs Authorities can make assessment of the imported consignment on the basis of the said Valuation Ruling; but in any case no action can be taken in terms of Section 32 of the Customs Act for imposition of fine and penalty. In terms of section 181 of the Customs Act, SRO 499(I)/2009 dated 13.6.2009 has been issued by FBR and Para (1)(d) deals with mis-declaration of value and imposition of minimum fine in lieu of confiscation and reads as under:

> *SRO 499(I)/2009 dated 13.6.2009*: In exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969), and in supersession of its Notification No. S.R.O. 487(I)/2007, dated 9th June, 2007, the Federal Board of Revenue is pleased to direct that no option shall be given to pay fine in lieu of confiscation in respect of the following goods or classes of goods, namely:--
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> (a) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969);
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> (b) lawfully registered conveyance including packages and containers found carrying smuggled goods in false cavities or being used exclusively or wholly for transportation of offending goods under clause (s) of section 2 the Customs Act, 1969 (IV of 1969);
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> (c) goods imported in violation of section 15 the Customs Act, 1969 (IV of 1969);
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> (d) banned items, goods of Israeli origin and goods of Indian origin other than those importable from India in accordance with the Import Policy Order, for the time being in force; or
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> (e) job lot and stock lot goods;
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> (f) restricted and other items which are subject to procedural requirement under Import Policy Order, for the time being in force unless such condition and procedural requirements are fulfilled; or

(g) commodities which are not importable in used or second-hand condition under the Import Policy Order, for the time being in force;

Provided that in respect of the following goods or classes of goods where an option is given to pay fine in lieu of confiscation, the quantum of fine in lieu of confiscation in respect of offences specified in column (2) of the Table below shall be at a rate specified in column (3) of that Table and shall be over and above the customs-duties and other taxes and penalties imposed under the relevant law, namely:--

TABLE

S No.	**Description**	**Redemption fine on customs value**
(1)	**(2)**	**(3)**
1.	**Offences related to mis-declaration of:-**	
(a)	------------	
(b)	------------	
(c)	------------	
(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.	35%

5. Perusal of the aforesaid provision which in fact is a binding guideline for the adjudication officer, not to impose a fine less than 35% on such type of cases, clearly reflects that it can only be done when the declared value is less than 30% from the value ascertained / determined ***on the basis of a direct evidence***. Admittedly, the applicants case is not that there was any direct evidence of the identical or similar goods; but there was some valuation ruling pursuant to negotiations and consultation with local agents of the vehicle in question as per directions of the Chief Collector vide Circular No. 01/2017. It is very strange that the Adjudicating authority while passing the Order in Original has relied upon this very provision i.e. Serial No.1(d) of SRO 499 to first confiscate the vehicle and then redeeming the same upon payment of fine in lieu of confiscation. We are of the view that instant case is certainly not the one which would fall in this clause of the SRO 499 as the show cause notice as well as the entire case of the Applicant is based on a Valuation Ruling and not of a direct evidence of identical or similar goods.

6. We may also observe that a value notified through a valuation ruling by the department is in fact based on estimation and is not always reflective of the transactional value. It is in fact notional at times and in majority has been subject to challenge in accordance with s.25D of the Act. Though it is required to be notified after following the methods as provided under s.25 ibid, (which seldom is a case); but in any case it is not reflective of any direct evidence of exactly an identical goods; hence, will not fulfill the criterion as laid down in para 1(d) of SRO 499 to sustain any confiscation and imposition of fine.

7. In the case reported as[1] a learned Division Bench of this Court had the occasion to deal with somewhat similar situation wherein the customs department was insisting that import license value would be debited on the basis of value of arms notified in terms s.25B of the Act (ITP) and not on the basis of invoice value. The importers case that though they were required to pay duties on the ITP values; but the import license and its value had goth nothing to do with such values and could only be debited for the purposes of record and authorization of the same on the basis of invoice value or the value on which the arms had been sold to them by the seller. The learned division bench was pleased to decide the issue against the department by observing that "*the notional value which is an artificial price determined under section 25B of the Customs Act, 1969, as stated above, is exclusively for the purpose of levy of customs duty and cannot be used for any other purpose as the law does not indicate such application*". Though it was in the context of the old valuation law; nonetheless the same in our view still holds field wherein the department intends to take punitive action pursuant to a value notified through a valuation ruling.

8. The questions of law, so proposed, do not appear to be properly drafted as it is only one question, which arises out of the order of Tribunal and that is ***"Whether in the facts and circumstances of the case, the Tribunal was justified in holding that in cases, wherein, assessment has been made on the basis of a Valuation Ruling, no action of confiscation and imposition of redemption fine in lieu thereof can be sustained in terms of Section 32 of the Customs Act, 1969"*** and the same is answered in the affirmative, against the Applicant and

[1] 2004 PTD 1769

in favour of the respondents. Accordingly, these Reference Applications are dismissed in limine.

9. Office to issue copy of this Order to the Customs Tribunal under Section 196(5) of the Customs Act, 1969 and shall also place the same in all connected files.

Judge

Judge

Ayaz P.S.