

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
 Special Customs Reference Application ("SCRA") No. 145 of 2019

Date Order with signature of Judge

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

Applicant: **Collector of Customs**
Through Mr. Muhammad Khalil Dogra,
Advocate.

Respondent: **M/s. BNN Enterprises**
Through Mr. Taimoor Ahmed Qureshi,
Advocate.

Date of hearing: **20.01.2021.**

Date of Order: **20.01.2021.**

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant Department has impugned Judgement dated 23.10.2018 passed by the Customs Appellate Tribunal, Karachi, in Customs Appeal Nos. K-1080 & 1081 of 2018. Initially four questions of law were proposed on behalf of the Applicant; however, on 30.9.2019 notice was ordered only on question Nos.(i) & (iii), which reads as under:-

"i. Whether the learned Customs Appellate Tribunal has erred in law and has considered the legal and factual aspect that the declared used vibratory Road roller dismantled condition with all standard accessories and found new vibratory Road Roller with all accessories is not a case of mis-declaration within the meaning of Section 32 of the Customs Act, 1969 read with SRO 499(I)/2009?

iii. Whether the learned Customs Appellate Tribunal has considered the provision of Section 79(1)(a) read with Section 32(1)(a) further read with Section 209 of the Customs Act, 1969, which made the importer or his authorized agent to file a true declaration of goods giving therein complete and correct particulars of goods?"

2. Learned Counsel for the Applicant submits that it a case of clear mis-declaration as the respondent had imported New Vibrator Road Rollers; but declared the same as used and attempted to evade duties and taxes, whereafter a show cause notice was issued and goods were confiscated with an option to redeem the same against payment of fine and penalty. He submits that the Tribunal has erred

in holding that this is not a case of mis-declaration within the contemplation of Section 32 of the Customs Act, 1969, whereas, CGO 12 of 2002 is not relevant or applicable in this case. He has prayed for setting aside the order of the Tribunal.

3. On the other hand, learned Counsel for respondent has supported the impugned order and submits that since HS Code and the rate of duty remained same; hence in view of Para 101 (sub-Para B-II) of CGO-12/2002 no case of mis-declaration is made out for initiating proceedings under Section 32 of the Customs Act, 1969. He has further argued that the goods in question were of 2017 Model and were not used, therefore, the Tribunal has arrived at a conclusion which is in accordance with law and this Reference application is liable to be dismissed.

4. We have heard both the learned Counsel and perused the record. It appears that the respondents imported two consignments of used Vibrator Road Roller and filed Goods Declaration claiming the following description of goods:

USED VIBRATOR ROAD ROLLER DISMANTLED CONDITION, WITH ALL STANDARD ACCESSORIES, MODEL:CA251, S/NO10100154CHE004036 BRAND : DYNAPAC”

Upon filing of the Goods Declaration the goods were examined and it was confirmed that the respondent had imported a **New** Vibratory Road Roller as against declaration of used. Thereafter, show cause notice was issued and an Order was passed by the Adjudicating Officer, whereby, the goods were ordered to be confiscated under clause 14 of s.156(1) of the Act, but were redeemed against payment of fine, whereas, penalty was also imposed. The finding of the Adjudicating Officer reads as under;

“6. The undersigned carefully examined the case in light of foregoing facts. The contention of the respondent importer through their counsel that the goods were not new because the model was 2017 is not maintainable. The importer has declared in his GD that the imported goods are used whereas the examination report has confirmed it categorically that the goods are not used but in a brand new condition. Similarly, the benefit of CGO 12/2002 is not admissible due to the fact that the charge of mis-declaration of description, new declared as used, if also established on examination of the consignment. Once the case of mis-declaration is established then SRO 499(I)/2009 dated 13th June 2009 is invariably attracted. It is also pertinent to mention that WeBoc system is based on self-assessment in which importer first declares description/classification/quantity or weight/origin/value/SRO and calculates/assesses duty and taxes, and then customs counter checks the

declaration, hence the onus of correct declaration and assessment is on the importer. However, in clear violation of the trust reposed in the importer, the respondent deliberately mis-declared the impugned goods, and avoided payment of leviable duty and taxes, so as to deprive government exchequer of the due revenue.

7. Therefore, the charge of the mis-declaration of the instant consignment, leveled in the show cause notice stand established. Accordingly, the offending goods are confiscated under clause 14 of Section 156(1) of the Customs Act, 1969 for violation of provisions of Sections 32(1), 32(2) and 79 *ibid*. However, an option is given to the importer to redeem the goods 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.1610284/- 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 amounting to Rs.1286720/- approximately thereon. A penalty of Rs. 300,000/- (Rupees three hundred thousand Only) is also imposed under clause 14 of Section 156(1) of Customs Act, 1969 on the importer M/s. BNN Enterprises, ASA Jalal Complex Suit No.G-S-19, R/C 4/370, Nabibux Road, Gazdarabad, Karachi and Rs.100,000/- (Rupees One hundred thousand Only) imposed on the Clearing Agent M/s. Mehran International (CHAL No. 1652) 44, 4th Floor Idrees Chamber, Talpur Road, Gazdarabad Karahci. The assessing officer also directed to check all other legal formalities before release of the said consignment. “

5. On perusal of the above finding, it reflects that the arguments of the respondent that the goods were not new because the Model was of 2017 has been correctly discarded as the examination report categorically confirms that the goods are not used; but in brand new condition. This factual aspect of the matter has though been disputed by the respondent’s Counsel; however, from the record and customs examination report it is clear that a new Road Roller was imported as against declaration of a used Road Roller. After having arrived at this conclusion, the Adjudicating Authority confiscated the goods in question and redeemed the same on payment of fine equal to 35% of the value of the offending goods. Additionally, penalty was also imposed on the respondent in the sum of Rs.300,000/-. The Tribunal in appeal has remitted the fine and penalty imposed upon the respondent.

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 CGO-12 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.

7. In view of the above facts and discussion, question No.(i) is answered in the affirmative in favour of the Applicant and against the Respondent, and as a consequence thereof, in our view answer to question No.(iii) would be academic in nature; hence we refrain ourselves from answering the same. This Reference application stands allowed; the order of the Tribunal, whereby, fine and penalty imposed upon the respondent was remitted is set-aside. Let copy of this order be sent to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969.

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