ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. **460 of 2017**

Date	Order with signature of Judge

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

Applicant:	**Collector of Customs** **Through Mr. Khalid Rajpar, Advocate.**
Respondents:	**M/s. Talha Dyes Chemical**
Date of hearing:	**12.03.2021**
Date of Order:	**12.03.2021**

Muhammad Junaid Ghaffar, J: It appears that in respect of the same impugned order dated 27.3.2017, the Director of Post Clearance Audit had filed SCRA Nos.363 to 397 of 2017, which have already been dismissed by this bench vide order dated 25.1.2021. The relevant finding in the said order reads as under;

> 4. We have heard all the learned Counsel and perused the record. It appears that consignments of Titanium Dioxide were imported by the respondents herein and claimed assessment under HS Code 2823.0010 which were allowed release by the department from time to time at various intervals. Thereafter pursuant to the contravention initiated by the Directorate General of Post Clearance Audit ("**PCA**"), Show Cause Notices were issued to the respondents on the ground that the product in question is surface treated having deliberate addition of other substance; hence classifiable under HS Code 3206.1100 chargeable to higher rate of duties. The said show cause notices were adjudicated vide Order-in-Original No. 130/2015-2016 dated 07.12.2015 and in similar fashion the Order-in-Original was passed against other respondents. The learned Tribunal in the impugned order has dealt with this issue in detail and in our considered view, the finding of the learned Tribunal is primarily dependent on a factual matrix that as to whether the goods in question would fall under HS Code 2823.0010 or HS Code 3206.1100. The relevant finding of the learned Tribunal is as under:-

"13. It is also of critical importance that chemistry of Titanium Dioxide changes with deliberate mixing and its crystallization to render it as a 'colouring material' of Chapter 32. Otherwise in its untreated but prepared form Titanium Dioxide is classifiable under Chapter 28. There has been no dispute on this attribute but the respondent's case revolves around this sole argument that he impugned chemical has been deliberately coated/treated and mixed hence it is a 'product' useable as a colouring material. This point remains unproved, neither the chemical properties and attributes help the respondent in forcing a classification upon so many importers to deprive them from availing the exemption from Sale Tax and Income Tax, which was given upon initial assessment and clearance.

14. For such an issue involving a dispute of pure technical nature and chemical attributes, lab tests are the only determining method to ascertain exact chemical composition and properties of such goods to arrive at the correct classification. For this in case of each consignment where the respondent is not ready to accept the declare description there was and is logically a need for such a chemical Test. In this particular case the respondent did not get that particular test conducted. There respondent had given the following general response on this;

> *"The contention in the subject para is denied due to the fact that as per practice and procedure adopted in the field Collectorate is that a test report for one brand/origin is tested only once in two years on the basis of that test report, the subsequent (01) consignment is cleared without testing just to save minimize the clearance time and to save importer from demurrage and detention charges. The importers at the import stage also agitate retesting, if the test report is already available to save themselves from the demurrages and detention charges."*

15. It the above justification given by the respondent for not getting each consignment chemically tested is admitted for argument sake then why had the same goods with different trade names assessed and allowed release by customs under PCT heading 2823.0010? The appellants have placed on record this Tribunal that more than 1000 GDs of Titanium Dioxide had been assessed and cleared under PCT 2823.0010 at Karachi Port and various upcountry Dry ports. There are numerous importers and goods had been imported from different countries i.e. UAE, Korea, USA, Japan, China, Germany, UK etc and there has been no dispute of classification during the years 2008 to 2012 as is evident from the perusal of the detailed list of such GDs/Bes which are brought and placed by the appellant(s) on this Tribunal's record.

16. This Tribunal has also observed that based on a Test Report pertaining to a particular consignment of an appellant, the impugned goods of several other appellants had been ruled as classifiable under PCT 3026.1100 instead of the declar3ed PCT of 2823.0010. This law does not allow such generalization and blanket-application is found inadmissible and ultra-vires.

17. Appellant have also aptly questioned the jurisdiction but more importantly the ch3rges of mis-delcaration have been rightly denied by them as it was simply a clear understanding and established practice to declare and assess the goods under a specific PCT heading viz. 2800.0010 and this Tribunal also finds no mense rea, collusion or an act of deliberate4 misreporting or mis-delcaration of description, value, origin or quantity of goods in all the cases under decision at this tribunal. The simple fact is that the trade in general has been over years getting the impugned goods declared under PCT 2823.0010 and it was the post clearance audit's pointation that has questioned such clearance in a post facto observation. Therefore, this Tribunal is of the considered opinion that there is nothing on

record against the appellants to prove that they had violated any provisional of section 32 of the Customs Act, 1969.

18. In view of the forgiven detailed observations and findings, we are of the considered opinion that the impugned order fails to hold ground under the relevant provisions of the customs act, 1969 and, prima facie, the goods had been wrongly classified under PCT 3206.1100 as against the true declaration given by the appellant under PCT 2823.1100. all the appeals mentioned above are allowed and the imputed orders are set aside.

19. Judgment passed and announced accordingly."

5. Perusal of the aforesaid finding reflects that the question raised before the Tribunal by the Applicant that Titanium Dioxide in question is surface treated having deliberate addition of other substance is purely a question of fact. For that purposes it requires a laboratory test of each consignment cleared by the department. This is admittedly not the case here as the department has issued show cause notices on the basis of some test report, which is not relevant for the present purposes. It has been further observed by the Tribunal that the issue involves a dispute, which is purely of a technical nature and is dependent on the chemical attributes, which can only be arrived at or adjudicated upon after a proper laboratory test applying requisite methods to ascertain the exact chemical composition and the property of such goods. It has been further held that in that case laboratory test is the only way to determine that whether Titanium Dioxide in question imported by the respondents was surface treated and mixed with other deliberate chemicals or not, and for this purposes, there was, and it is, logically a need for a chemical test of each and every consignment imported by the respondents. This is more so as concerned Collectorates had already released these consignments under HS Code 2823.0010 as claimed by the respondents. At that point of time no objection was raised in this context; nor the respondents were ever asked as to how in presence of any adverse report (now allegedly being relied upon), the assessment had been claimed under HS Code 2823.0010 instead of 3206.1100. It was only after PCA generated a contravention report that these proceedings were initiated. The Tribunal has posed a specific question to the Applicant as to why tests were not carried out in respect of each consignment and the reply[1] is of no help to the Applicant's case. We have not been assisted in any manner as to from where this analogy has come that test reports of other like consignments are valid for two years. It may have been a practice of the department; but once the goods have been released without specific individual tests, then it does not lie with the Applicant to ask for a shelter under this practice which is not supported by any law or rule, more so, when it is affecting the rights of the Respondent. No

[1] "The contention in the subject para is denied due to the fact that as per practice and procedure adopted in the field Collectorate is that a test report for one brand/origin is tested only once in two years on the basis of that test report, the subsequent (01) consignment is cleared without testing just to save minimize the clearance time and to save importer from demurrage and detention charges. The importers at the import stage also agitate retesting, if the test report is already available to save themselves from the demurrages and detention charges."

one had stopped or restrained the Collectorate from drawing samples and getting the goods tested before making an assessment order.

6. After going through the record and in the light of above observations it is our considered view that the questions proposed in these Reference Applications require adjudication of the case on merits, whereas, the finding of the Tribunal is primarily based on the fact that in absence of a test report of each consignment imported by the Respondents, it was not possible to decide the issue of classification which in the instant matter, is purely dependent on the chemical composition of the goods so imported. In absence of such report, it is not safe to conclude that the goods imported by the Respondents would fall under HS Code 3206.1100, coupled with the fact that at the time of import the Collectorate itself had accepted the HS code without ordering any test of the goods. These questions, are therefore, questions of fact and not law.

7. Insofar as the Sample Analysis Report dated 12.11.2011 available in SCRA No. 363/2017 and referred to by the applicant's Counsel is concerned, we have noted that the show cause notice is prior in time to the laboratory report which is dated 25.06.2011, and as a consequence thereof, it could not be in relation to the consignments already released by the Customs Department; hence this test report so heavily relied upon by the Applicant is of no relevance and has been rightly discarded by the learned Tribunal. Moreover, by in their own show cause notice[2] it has been alleged that respondents had imported these goods from Germany, Netherlands, South Korea, France, China and Belgium. We are at a loss to agree with the argument of Applicants Counsel as to how it could be justified when it is their own case that a test report remains valid for *one brand/ origin* for two years. Here admittedly the goods of respondents are of different origin; hence, even otherwise, this argument is misconceived and untenable.

8. It is settled law that this Court under its Reference Jurisdiction as contemplated under Section 196 of the Customs Act, 1969 can only consider a question of law and not of facts. The finding of the Tribunal clearly states that no tests were carried out, whereas, the correct determination of the classification of goods in question is dependent on facts. This is notwithstanding the fact that determination of a correct classification is though a mixed question of facts and law; but here it is entirely dependent on chemical composition of the goods, which were never tested and were released as per declared HS Code.

9. In view of hereinabove facts and circumstances of this case, we do not see that any question of law arises out of the order of the Tribunal; hence these Reference Applications being misconceived are dismissed. Let copy of this order be sent to

[2] Dated 25.6.2011 in SCRA No.363-2017 at pg:101

Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

In view of the above, this Reference Application also stands dismissed. Let copy of this order be sent to the Customs Tribunal in terms of section 196(5) of the Customs Act, 1969.

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