IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, **J**.
Agha Faisal, **J**.

SCRA 1381 of 2015	:	The Collector of Customs vs. M/s. Time Press (Pvt.) Ltd.
SCRA 1382 of 2015	:	The Collector of Customs vs. M/s. Time Press (Pvt.) Ltd.
SCRA 1383 of 2015	:	The Collector of Customs vs. M/s. Pak Pap (Pvt.) Ltd.
SCRA 1384 of 2015	:	The Collector of Customs vs. M/s. Pak Pap (Pvt.) Ltd.
SCRA 1385 of 2015	:	The Collector of Customs vs. M/s. Pak Pap (Pvt.) Ltd.
SCRA 1386 of 2015	:	The Collector of Customs vs. M/s. Pak Pap (Pvt.) Ltd.
For the Applicant	:	Mr. Muhammad Khalid Rajper, Advocate
For the Respondents	:	Mr. Muhammad Khalid Hayat, Advocate
Date of hearing	:	24.03.2021
Date of announcement	:	24.03.2021

JUDGMENT

Muhammad Junaid Ghafar, **J**. Through these Reference Applications the Applicant has impugned order dated 16.06.2015, passed by the Customs Appellate Tribunal, Karachi in Customs Appeal No.K-210 of 2015 and in all other connected matters, proposing the following questions of law:

> "1. Whether the Hon'ble Tribunal erred in law and facts and failed to appreciate that in instant case the provisional assessment was made under the directions/interim orders of the Hon'ble Islamabad High Court and therefore, the case of the importer was neither covered by the time frame provided under section 81 of the Customs Act, 1969 nor the ratio decided in the case of M/s. Sus Motors (Pvt.) Ltd. Versus Federation of Pakistan and others (2011 PTD 135) was attracted to the case of importer?
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> 2. Whether the learned Appellate Tribunal has erred in law and failed to appreciate that the case of M/s. Sus Motors v/s. Federation of Pakistan & others

(2011 PTD 235) is distinguishable from the case of the respondent importer due to changed facts, circumstances and law i.e. Section 25-A of the Act?

3. Whether the learned Single Member of the Hon'ble Tribunal erred in law and failed to appreciate that the goods were correctly assessed under section 25 of the Customs Act, 1969 and not on the basis of any valuation ruling?

4. Whether the impugned Order passed by the learned Member Technical-I, Islamabad, is in violation to section 195-B and as such is void and without jurisdiction?

2. Learned Counsel for the Applicant has read out the order of the Tribunal and has argued that the Tribunal has failed to appreciate the facts as well as law inasmuch as the final assessment were made within time, whereas, the respondents had filed some Petitions before the Islamabad High Court which were ultimately disposed of with directions to made assessments, and, therefore, no case was made out on behalf of the respondents. According to him the Values were determined pursuant to a Valuation Ruling; hence, no illegality was committed by the department in passing the assessment orders. In the alternative he has also placed reliance on judgment dated 11.12.2014 passed in W.P.No. 1760/2014 and other connected matters by the same bench of Islamabad High Court, whereby, the petitions were dismissed for lack of territorial jurisdiction

3. On the other hand, learned Counsel for the respondents has supported the impugned judgment and submits that the department had released the goods provisionally under section 81 of the Customs Act, 1969, pursuant to the directions of Islamabad High Court, whereas, final assessment was time-barred and therefore, the Tribunal has correctly concluded that the final assessments were beyond the limitation period as provided under section 81 of the Customs Act, 1969. He has further argued that during pendency of the petitions another Valuation Ruling was issued which was to be applied; therefore, the Reference Applications are liable to be dismissed.

4. We have heard both the learned Counsel and perused the record which reflects that the respondents had imported uncoated wood free paper in sheet/roll which was assessed on the basis of Valuation Ruling No.378 of 2011; and Respondents being aggrieved impugned the same before the Islamabad High Court through W.P.No.2880/2011, wherein the learned Court passed ad-interim orders on 17.10.2011 by directing the respondents to pay Customs Duty and taxes on the declared value and for

the differential amount shall furnish post-dated cheques. This continued from time to time and various consignments were released on such directions. The petition pending before the Islamabad High Court was finally disposed of vide order dated 11.12.2014 and perusal of the said order reflects that it was in a way a remand order to the department for passing appropriate orders in accordance with law. However, insofar as existence and validity of the impugned Valuation Ruling is concerned, the same was not attended to by the Islamabad High Court, whereas, respondents also never felt aggrieved any further. Resultantly, the impugned Ruling remains alive and applicable to the imports of the Respondents. It further appears that during pendency of the petition(s), before the Islamabad High Court, the respondents in the meantime also challenged the Valuation Ruling under Section 25-D of the Customs Act 1969 by way of a Revision which stands dismissed and against that no further proceedings have been initiated by the respondents. It further appears that before final disposal of the petition by the Court, the department finalized the pending cases of assessments treating them as a provisional assessment in terms of section 81 of the Customs Act; against which the Respondents preferred Appeals before the Collector of Customs (Appeals) which were dismissed and the Tribunal vide impugned order has allowed the same in the following terms:-

> 16. As regards Section 81, it is well settled that if the matter there-under is not finalized within the stipulated period, then the provisional determination was deemed to have become final. Reliance is placed on a number of decisions of superior courts, including Hassan Trading Company v. C.B.R. and Others 2004 PTD 1979, Colgate Palmolive (Pakistan) Ltd. v. Federation of Pakistan 2004 PTD 2516, Collector of Customs vs. H.M. Abdullah and others 2004 PTD 2993, Habib-ur-Rehman and Company v. Collector (Appraisement) and Others 2005 PTD 69, Collector of Customs (Appraisement) and Others v. Auto Mobile Corporation of Pakistan 2005 PTD 2116, Wall Master v. Collector Excise and Sales Tax Appellate Tribunal and Others 2006 PTD 1276.
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> 17. As regards legal question (ii) that "*whether the learned Respondent erred in law and procedure by converting provisional determination of duty into final determination without having any new evidence on record for such final determination as required under Section 81 of the Customs Act, 1969*" it is evident that answer to this question is in the affirmative.
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> 18. As regards legal question (iii) that "*whether Respondent erred in law for not accepting the transaction value while substantial evidence was available*" the learned Advocate of the Appellants presented the following documents:
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> (i) The commercial invoice No.94297069 dated 06.07.2012 reflecting Reference No.4202793.
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> (a) Invoice reflecting quantity, unit price and total price of each item for various category items, total of US 15086,58 (FOB).
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> (b) Freight US$ 1,905.77

(c) C&F US$ 16,992.35

The Export Declaration Line Summary, the document which is same to Pakistan on line GD. The Export Declaration Line Summary can be retrieved by the exporter as per unique EDN (which is AA7MLLW in this particular case). The export GD (in shape of Export Declaration Line Summary) reflects the Reference No.4202793 (which was depicted on the invoice presented to Pakistan Customs with import GD). The Export GD of the same consignment reflected the per unit (FOB) and Freight value exactly the same what was declared on the impugned import GD by the Appellant.

19. The presentation of Export GD as an evidence of truthful declaration of the price by the Appellant is an ultimate proof for per unit price verification/ C&F value verification. In my view the Respondent erred in law for not accepting this verifiable proof of transaction value and proceeded for provisional assessment under Section 81 of the Customs Act, 1969, and finally did not arrive at the final determination of value in the impugned case within parameters of Section 81(4) of the Customs Act, 1969, read with a plethora of case laws on the subject.

20. As regards question (iv) *"Whether the learned Respondent erred in law and procedure while relying upon the Ruling No.378/2011 (date of final assessment 22.5.2013) while the same was not in the field having been superseded*, the learned Respondent/department illegally applied on 22.05.2013 the Ruling No.378/2011 dated 27.09.2011 for final assessment. The Ruling No.378/2011 dated 27.09.2011 had a lease for its life upto 28.06.2012, and any application of this ruling subsequent to that date was illegal. The following Rulings for the valuation of impugned products were in the field at different times, as indicated against each:-

S.No.	Ruling No.	Issuance date	Rescinded On
1	308/2011	05.04.2011	26.09.2011
2	378/2011	27.09.2011	28.06.2012
3	460/2012	29.06.2012	23.10.2012
4	482/2012	24.10.2012	18.08.2013
5	482/2012 (Addendum)	19.08.2013	

21. The final determination of value in the impugned case was made on 22.05.2013, as per valuation Ruling 378/2011 when the Ruling 378/2011 was not in the field. Therefore, its application has no legal effect and the determination of final liability, based on an "illegal, expired, superseded piece of regulation" had no legal value. Such final determination is thus devoid of any merit and void, ab-initio.

22. Referring to question (v) "*whether in the absence of the ruling upon which Customs relied (Ruling 378/2011 dated 27.09.2011), the next Ruling (460/2012 dated 29.06.2012) could be applicable to the assessment by default, and with retrospective effect in the light of the case of law of M/s.Sus Motors (Pvt.) Ltd., Karachi vs. Federation of Pakistan and others [2011 PTS 235} which is expressly stated that no ruling could be applied with retrospective effect*", if for discussion's sake, it is considered that Ruling 460/2012 would take the field by default for the impugned final determination of tax liability (though assessment notes reflect Ruling 378/2011 for this purpose), even then it would not make the impugned assessment legal as the Ruling 482/2012 dated 29.06.2012 had been struck down by this Tribunal vide Customs Appeal No.K-548/2013/3598, holding "*We set aside Customs Valuation Ruling 482/2012 dated 24.10.2012 along with its addendum dated 19.08.2013, and declare the same null and void".*

> 23. The above determination can logically lead to the answer to question (vi), "*if the assessment made by the Respondent on the basis of void, superseded valuation ruling is also `void`, could the impugned consignment not be assessed under provisions of Section 25(I) of the Customs Act, 1969*". It is evident that the Appellants, (i) declared correct transaction value which is supported by GDs of exporting country to verify the FoB and CIF value of the good on the anvil, (ii) the case ought to have been finalized under Section 25 of the Customs Act, 1969, (iii) the processing under Section 81 (by not accepting the transaction value) suffered from legal infirmity as the final determination under section 81 (4) of the Customs Act, 1969, was not effected within the stipulated period. This view is further strengthened by the fact that GD filed on 07.04.2012 was assessed provisionally. The final determination was made on 22.05.2013 in a time-span of 404 days (between the provisional and final assessments) as against the mandatory period of 180 days for arriving at it. No cogent reason is available on record for exceeding the prescribed time limit. Similarly, no exceptional circumstances resulting in the delay have been cited. This can only lead to the inevitable conclusion that the provisional determination at the declared value has attained finality.

5. Though the Tribunal has taken pains to address the issues before it; however, primarily, it is only one issue on which the Tribunal has non-suited the Applicant and that is in respect of limitation provided under s.81 of the Act for passing of a final assessment order. Respondent's case is that provisional assessment made by the department pursuant to ad-interim orders of the learned Islamabad High Court was never finalized within the period provided under Section 81 of the Customs Act 1969; hence, the said orders were time-barred. The learned Tribunal has agreed with submission of the Respondents.

6. On perusal of the entire record and the discussion hereinabove, it appears that the Tribunal does not appear to be justified in reaching the conclusion that the provisional assessments were not finalized within the period provided in Section 81 ibid, and the final assessments are time barred. In fact, it was never a case of a provisional assessment *stricto sensu* in terms of section 81 of the Act. When a Court issues certain directions to release the goods provisionally against some security, it is not an assessment under section 81 of the Act, by mere use of the words "*provisionally*". It is an order of the Court exercising jurisdiction under Article 199 of the Constitution in a writ petition and not under s.81 ibid. And such provisional arrangement is always subject to final decision of the Court. Provision of section 81 of the Customs Act, 1969 requiring finalization of provisional assessment of the duty within six month was not attracted in these cases as the goods were released on the provisional assessment made in pursuance of an interim order passed by learned High Court

pending decision[1]. Therefore, the Tribunal's conclusion that the provisional assessments in these cases were never finalized in time cannot be sustained. It is an admitted position that the learned Islamabad High Court had not touched merits of the impugned Valuation Ruling while disposing off the petition(s); therefore, on mere presumption and taking shelter in respect of limitation period and its purported non-adherence by the department as alleged, cannot be taken into account to non-suit the department. In our view, the provision of section 81 ibid and its limitation was never attracted in the facts and circumstances of the case, whereas, nothing has been agitated as to the validity of the impugned Valuation Ruling. Since we are of the opinion that the issue was not of a provisional assessment under s.81 ibid, and the limitation provided therein would not apply; therefore, we have not attended to the issue of territorial jurisdiction of the learned Islamabad High Court in view of the submission made by the learned Counsel for the Applicant by placing reliance on the judgment dated 11.12.2014 passed in W.P.No. 1760/2014 and other connected matters, whereby, the petitions were dismissed for lack of territorial jurisdiction.

7. In view of hereinabove facts and circumstances of the case it appears that Tribunal has not appreciated the facts and law in coming to the conclusion that this was a case of provisional assessment strictly under section 81 of the Customs Act 1969. Accordingly, question No.(i) is answered in affirmative in favour of the Applicant and against the respondent, whereas, the other questions needs not to be answered. The impugned judgment of the Tribunal is set-aside and the Reference Applications are allowed.

8. Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office to place copy of this order in connected Reference Applications as above.

JUDGE

JUDGE

Khuhro/PA

[1] Flying Board and Paper Products (Pvt) Ltd v Deputy Collector (2006 SCMR 1648)