IN THE HIGH COURT OF SINDH, KARACHI
SCRA No.347 of 2018

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

BEFORE: Irfan Saadat Khan,
Rashida Asad,JJ

The Collector of Customs,
Applicant : through Mr.Muhammad Khalil Dogar, Advocate.

Hasnain Qutbuddin,
Respondent : through Mr.Raj Ali Wahid Kunwar, Advocate.

Date of hearing : 25.08.2022

Date of decision : 25.08.2022

JUDGEMENT

Irfan Saadat Khan,J. Through this Special Customs Reference Application (SCRA) certain questions of law were raised, which were admitted for regular hearing on 26.01.2022. However, subsequently a request was made by the Department that they wanted to amend the questions of law. The said request was acceded to and the following amended questions of law, filed through statement dated 12.4.2019, were admitted for regular hearing vide order dated 26.5.2022.

> i. Whether learned Appellate Tribunal has erred in law by not considering the Provision of Section 79(1)(b) read with Section 21(1)(c) of the Customs Act, 1969, the loss of payment of Revenue through wrong self-assessment by the importer?
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> ii. Whether the wrong self-assessment is not a case of mis-declaration within the meaning of Section 32 of the Custom Act, 1969 r/w SRO 499(1) 2009 and Rule 389 of Customs Rules, 2001?

2. Briefly stated the facts of the case are that the Respondent filed a goods declaration bearing No.KAPE-HC-44726-07-09-2017 mentioning therein that they imported “Alloy Steel Round Bar”

from China and sought release of the same under PCT heading 7228.3090, by declaring value of the said goods at US$ 10338.28. In order to check the veracity of the GD, filed by the Respondent, the same was selected for scrutiny by the Custom Authorities. However on physical examination of the container containing the goods an invoice bearing No.OTJ17807C valued US$40229.57 was found from the container. The Department then issued a show cause notice dated 04.10.2017, to the Respondent. In response to which the Respondent filed a reply. However the Department did not accept the same and passed order-in-original dated 28.9.2017 by observing that since incorrect declaration of the goods was detected therefore respondent was found to be involved in deliberate suppression of the value of the goods and has violated the provisions of Sections 32(1), 32(2), and 79(1) of the Customs Act, 1969 (hereinafter referred to as the Act) read with Section 33 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001. The goods were then confiscated under clause 14 of Section 156(1) of the Act and the Respondent was directed to pay the suppressed duties and taxes amounting to Rs.1529570/-, alongwith final penalty. Appeal thereafter was preferred to the Tribunal bearing Customs Appeal No.1284/2017. The Tribunal then vide order dated 10.4.2018 observed that since there was no correlation between the invoice, as declared by the Respondent, and the invoice retrieved by the Customs Authorities and that the Department has miserably failed to match the invoice number, LC, weight, supplier name and other details in the two invoices, which was necessary before finalization of the assessment, thereafter, set aside the order-in-original and directed the Customs Authorities to assess the goods of the Respondent as per the provision of Section

25 of the Act. It was then the present S.C.R.A was filed by the Department.

3. Mr. Muhammad Khalil Dogar, Advocate has appeared on behalf of the Department and stated that when an invoice was retrieved from the container containing the goods of the Respondent, the Department was fully justified in proceeding as per the retrieved invoice / GD and imposing tax thereupon. He stated that the Tribunal while passing the order has ignored this fact and has based its decision on the ground that the Department made no effort to reconcile the difference in the two invoices. He stated that when the invoice was recovered from the very goods of the Respondent there was hardly any occasion of reconciliation and the Department, in his view, was fully justified in proceeding as per the retrieved invoice and applying tax thereupon. He supported the show cause notice and the order-in-original and stated that the answer to the admitted questions may be given in favour of the Department and against the Respondent.

4. Mr. Raj Ali Wahid Kunwar, Advocate has appeared on behalf of the Respondent and stated that hardly any question of law is arising out of the order passed by the Tribunal, as the decision of the Tribunal was based on the facts obtaining in the instant matter. He stated that the Tribunal has categorically observed that the Respondent has discharged its responsibility and has paid the duties and taxes, as per the GD declared by them. He stated that it was submitted before the Customs Authorities that the retrieved invoice has nothing to do with the goods of the Respondent. He stated that even after the said denial the Department did not make any effort to inquire from the supplier, agent whose name were

mentioned in the two invoices about the veracity or otherwise of the retrieved invoice with that of the GD declared by the Respondent. He stated that proper reply in respect of the show cause notice issued by the Department was given by the Respondent but the same was brushed aside.

5. The learned counsel stated that even WEBOC system of the Customs Department has supported the stance of the Respondent, as duly noted by the Tribunal, but no heed to this effect was also paid by the Department. He stated that as per WEBOC system also all the description of the goods including quantity of the duty of the declared goods was found to be in accordance with law, as duly noted by the Tribunal. He stated that apart from this the Department never tried to collect data of the relevant period of the imports made by the Respondent. He further stated that even previous record furnished by the Respondent correlated with the present import but that too was ignored by the Department, which onus according to him lies upon the Department. He stated that the Tribunal has passed a well-reasoned, detailed judgment thrashing out each and every aspect in detail, therefore, in his view the questions admitted may be answered in favour of the Respondent and against the Department.

6. In addition to the above, the learned counsel for the Respondent has also invited our attention to the decision given in S.C.R.A. No.491 of 2016 dated 27.01.2022 (authored by one of us namely Irfan Saadat Khan.J.) wherein according to him under identical circumstances the matter was decided in favour of the taxpayer and against the Department.

7. We have heard both the learned counsel at some length, and have also perused the decision given in SCRA No.491 of 2016 relied upon by the learned counsel appearing for the Respondent.

8. We have noted that the Tribunal while passing the order has categorically observed that the Department has miserably failed to correlate the difference between the two invoices. It is further noted that the Tribunal has observed that the WEBOC system of the Customs Department has also confirmed that the number of packages, description and quantity of the goods were as per the declaration. The Tribunal while deciding the matter has elaborated the matter in detail and thereafter came to the conclusion that nothing adverse has been found against the Respondent. It is noted that though an invoice was retrieved from the container but the question is whether the Department has made any effort to inquire with regard to the identification of the goods, their description or to seek confirmation from the supplier etc., and other details. We are afraid that the said aspect is totally missing and lacking in the instant matter though a show cause notice has been issued by the Department with regard to the retrieval of the invoice but has failed to corroborate the same in the order-in-original. In view of the reply furnished by the Respondent the Tribunal has categorically observed that after the retrieval of the invoice the Department should have made some scrutiny with regard to the difference in the invoices but it is noted with utter surprise that no such effort was made, as noted by the Tribunal. We have further noted that even the WEBOC system, which was generated by the Customs Authorities, has also not supported the view of the Department.

9. Moreover under somewhat identical circumstances this Court in S.C.R.A No.491 of 2016 has observed as under:-

> 7. The controversy between the Applicant and the Department arose when an invoice from the container was found. From that invoice the Department came to the conclusion that the parts imported by the Respondent were genuine and thereafter since the Respondent, according to the department, has concealed the true facts in the G.D worked out tax liability upon the Respondent on the basis of the said invoice. In the O&O it seems that the Customs Authority, on the basis of the facts as mentioned in the show cause notice, finalized the case and imposed the duty and the tax upon the Respondent without making some homework on his own and to ascertain the facts in their true perspective. The Tribunal, however, on the other hand examined the factual aspects of the matter in detail and thereafter came to the conclusion that before making the assessment neither any confirmation was sought from the shipper nor any attempt was made to get the spare parts examined, so as to ascertain whether the parts were genuine or non-genuine. It could be seen from the order of the Tribunal that they noted that the consigner has written a letter by clearly mentioning that due to mistake at their end an incorrect declaration about the goods were made and clarified that the said parts were not genuine.
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> 8. The Tribunal has highlighted this point and then came to the conclusion that when the letter from the consigner was produced by the Respondent to the Customs Authorities, inspite of making the assessment, rather they acted in a perfunctory manner whereas they should have got the goods examined either from the market or got some confirmation from other importers about the veracity with regard to the description of the parts that whether these were genuine or non-genuine, since it is an admitted position that the difference in duty rates was quite substantial in respect of both the parts. It would also not be out of place to mention that it was in this background that the Tribunal has reached to a factual finding that the method of assessment and the imposition of the duty and the tax was not in accordance with law, as mentioned either under Section 25 or 25-A of the Act, 1969, and thus the Respondent was not liable to be punished under the provisions of Section 32 and 156(1)(4) of the Act, 1969.
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> 9. It is a settled proposition of law that Tribunal is always considered to be the last fact finding authority, which has emphatically opined that the Respondent has submitted all the required commercial documents including commercial invoice, packing list and bill of

lading to the custom authorities. In all these documents it has categorically been mentioned that the goods imported were non-genuine spare parts. It may also be noted that the Valuation Ruling upon which reliance was placed by the Tribunal, talks about the duties and the taxes of the spare parts, hence, we are of the view that when the Tribunal has reached to the conclusion and have factually opined that the parts imported by the Respondent were non-genuine therefore, they were justified in directing the department to adopt the valuation and to impose the duty and the taxes as per the Valuation Ruling No.661/2014 dated 29.3.2014. It may further be noted that the learned Tribunal while deciding the matter also came to the conclusion that the department has miserably failed to refer any provision of law / rules or notification to justify that the value declared by the Respondent was either not correct or that the invoices received were in any way not descriptive of the items imported by the Respondents. The Tribunal has categorically observed that the invoice retrieved could not be termed as conclusive evidence so as to attract the provision of Section 25(1)(b) of the Act, 1969.

10. From the order of the Tribunal it is evident that the documents presented and relied upon by the Respondent were admissible in terms of Section 2(kka) of the Act, 1969. It may further be noted that the Tribunal has given a factual finding that the examination report furnished by the Examination Staff of the Custom Department has also not been objected, with regard to the quantity of the items imported, but the difference between the department and the Respondent was only with regard to the fact that whether the parts imported were genuine or non-genuine which aspect, according to the Tribunal, has satisfactorily been explained by the Respondent. It is also a matter of record that the price of the items, as determined by the Directorate General Valuation, is in consonance with the rates as declared by the Respondent in the various documents furnished by them and in the G.D as well pertaining to non-genuine parts.

11. Hence, in view of the findings of facts, as recorded by the Tribunal in the instant matter, we do not deem it appropriate to interfere with these findings of the Tribunal, as it is settled proposition of law that while exercising advisory jurisdiction the points of facts determined by the Tribunal cannot be interfered with. In the instant matter also the observations given by the Tribunal are based on the factual aspects determined by them. We therefore, under the circumstances answer the questions as under:-

Question Nos.1, 2 & 4 in negative.

> Question No.3 in our view is a question of fact, therefore answered in affirmative as the Tribunal has determined the specification of the parts on the facts presented before it.

10. We therefore, in view of the uncontroverted facts have come to the conclusion that the Department has miserably failed to correlate the two invoices and their own WEBOC system has also not supported their stance hence we cannot approve the action of the Department, in view of the facts and circumstances as prevailing in the matter, and in view of the decision given in SCRA No.491 of 2016. We therefore are of the view that the admitted Question No.1 does not seem to be arising out of the order of the Tribunal, whereas answer the admitted Question No.2 against the Department and in favour of the Respondent.

11. With these directions the instant Spl.C.R.A. stands disposed of alongwith the listed application. Let a copy of this order be sent to the Registrar Tribunal to do the needful in accordance with law.

JUDGE

JUDGE

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