IN THE HIGH COURT OF SINDH, KARACHI

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

1.	Spl. Custom Appeal No. 38/2003	M/s. Al-Hamza Ship Breaking Company Vs. Collector of Customs, Excise & Sales Tax (Appeals II) & Others
2.	Spl. Custom Appeal No. 17/2003	M/s. Shaukat Hussain & Company, Karachi Vs. Customs, Excise & Sales Tax Appellate Tribunal Karachi Bench-I & Others
3.	Spl. Custom Appeal No. 18/2003	M/s. Shaukat Hussain & Company, Karachi Vs. Customs, Excise & Sales Tax Appellate Tribunal Karachi Bench-I & Other S
4.	Spl. Custom Appeal No. 19/2003	M/s. Ozone International (Pvt) Ltd. Vs. Assistant Collector of Customs, Custom House, Gadani & Others
5.	Spl. Custom Appeal No. 39/2003	M/s. Karachi Steel Vs. Collector Customs, Excise & Sales Tax & Another
6.	Spl. Custom Appeal No. 40/2003	M/s. Abbasi Ship Breaking Co. Vs. Collector Customs, Excise & Sales Tax & Another
7.	Spl. Custom Appeal No. 41/2003	M/s. G. N. Brothers Vs. Collector Customs, Excise & Sales Tax & Another
8.	Spl. Custom Appeal No. 42/2003	M/s. Imran Ship Breaking Co. Vs. Collector Customs, Excise & Sales Tax & Another
9.	Spl. Custom Appeal No. 43/2003	N. S. Enterprises Vs. Collector Customs, Excise & Sales Tax (Appeals II) & Another
10.	Spl. Custom Appeal No. 44/2003	M/s. S. N. Enterprises Vs. Collector Customs, Excise & Sales Tax & Another
11.	Spl. Custom Appeal No. 45/2003	M/s. Dewan Sons Vs. Collector Customs, Excise & Sales Tax & Another

For the Appellants: Mr. Adil H. Saeed, Advocate.

For the Respondents: Mr. Kashif Nazeer, Advocate.

Date of hearing: **09.03.2023**
Date of judgment: **03.04.2023**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through all these Special Customs Appeals the Appellants have impugned a common Judgment dated 26.02.2002 passed by the then Customs Excise Sales Tax Appellate Tribunal in Customs Appeal No. 2020 of 1999 and other connected matters proposing the following Questions of Law: -

> "a. Whether the Appellate Tribunal has correctly construed and applied the provisions of the Inspection, Valuation and Assessment of Imported Goods Rules 1994 ("the PS1 Rules") and the relevant Customs General Orders ("CGO's") in the light and context of, and in a manner consistent with, ss. 25 and 30 of the Customs Act, 1969?

b. Whether the Appellate Tribunal has correctly concluded that the PSI Company could not, under the PSI Rules read consistently, with ss. 25 and 30 of the Customs Act and the relevant CGOs, have issued the CRF relied upon by the Appellant?

c. Whether (without prejudice to question (a) above), if the PSI Rules as framed and relevant CGOs as issued could not be read and applied consistently with ss. 25 and 30 of the Customs Act, the said Rules and CGOs must give way to the terms of the parent Act, and can only be applied (if at all) in a manner in conformity with the provisions of the parent Act?

d. Whether the Customs Department could refuse to accept or apply a CRF issued by the PSI Company even though they did not have any evidence to the contradict the same?

e. Whether the Impugned Order is a nullity in the eyes of law and illegal as having been passed without giving a reasonable and fair opportunity of hearing to the Appellant and/or there has been a failure to apply the principles of natural justice?

f. Whether the Appellate Tribunal has correctly concluded that the show cause notice was not barred by limitation?"

2. Learned Counsel for the Appellants has contended that The Appellants imported various ships for scarp purposes, whereas, during the period between berthing / beaching of these ships and filing of Bills of Entries ("**B/E's**") the International prices of such ships had fallen even below the contract / invoice price; hence, in view of the then applicable provisions of Section 25 read with Section 30 of the Customs Act, 1969, ("**Act**") further read with Customs General Order No. 01 of 1981 dated 16.2.1981 the Pre-shipment Inspection ("**PSI**") Companies issued revised Clean Report of Findings ("**CRF**") in accordance with law; that the Tribunal has seriously erred in law by holding that the revised CRFs could not be accepted, whereas, the same were issued in accordance with law; that the prices of the ships in question had fallen considerably at the time of filing of bill of entries and therefore, the PSI companies were fully justified in revising the CRFs.; that the objection of the Respondents that the matter ought to have been referred to the Working Committee in terms of Rule 4(6) of the Inspection, Valuation and Assessment of Imported Goods Rules, 1994 notified vide SRO 1108(I)/1994 dated 14.11.1994 ("**Inspection Rules**") is not justified as the price was revised by the PSI Companies without objections, and if at all required, it was for the Customs to refer the matter to the Working Committee in terms of Rule 8(2)(d) of the Inspection Rules; that the date of filing of B/E is relevant in law and not the date of inspection of ships as held by the Tribunal; that it is the normal value or the open market value which is applicable in the instant case, which admittedly had fallen below the declared values; that

any orders issued by CBR in terms of Section 223 of the Act are not binding; that though original / first CRF's were issued, but were never filed or submitted before the Customs; hence, they are not relevant once a revised CRF was issued by the PSI Company, and therefore, in view of the law[1] settled by the Courts, the proposed questions be answered in favour of the Appellants .

3. On the other hand, Respondent's Counsel has argued that Rule 4(6) of the Inspection Rules required that if the value as stated in the CRF is not acceptable to an importer, the PSI Company could be approached for revision of such values and if the matter is not resolved within 72 hours, then it is the domain of the Working Committee constituted under the Inspection Rules to look into the matter; that admittedly, the CRFs were initially issued on the declared values, whereas, due to peculiar facts of these cases wherein, the scraping of the Vessel is permitted on deferred payments, the B/Es were filed after a considerable delay on the basis of revised CRFs issued and corrected beyond the period of 72 hours, and therefore, the Customs were fully justified in refusing to accept the revised CRFs without directions of the Working Committee; that the Appellants being aggrieved with the refusal of the Customs to accept revised CRFs approached the Baluchistan High Court and their Petitions were dismissed, whereas, even before the Supreme Court they could not get any relief; hence, no case is made out.

4. We have heard both the learned Counsel and perused the record. At the very outset we may clarify that these being very old matters are governed by the repealed / amended provisions of Section 25 and 30 of the Act; i.e. the concept of "Brussels Definition of Value" ("BDV") or the normal / open market value as commonly known, as against the present concept of "Transactional Value" under Article VII of the General Agreement on Tariffs & Trade ("GATT"). From perusal of the record it reflects that the Appellants in all the listed matters had imported ships / Vessels for scrap purposes which were beached on different dates, whereas, respective IGM's were also filed independently in respect of each Vessel. It further appears that in each case the B/E's were filed

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[1] Zaman Cement Company Pvt. Ltd. Vs. Central Board of Revenue (2002 SCMR 312), Hansraj Gordhandas vs. Assistant Collector (AIR 1970 SC 755), Mustafa Impex vs. Government of Pakistan (2016 PTD 2269), Indus Automobile (Pvt.) Ltd. vs. Central Board of Revenue (PLD 1988 Karachi 99), M/s Sufi Steel Industries Pvt. Ltd. Vs. Federation of Pakistan (PTCL 2018 CL. 25), Sami Pharmaceutical (Pvt.) Ltd vs. Province of Sindh (2021 PTD 731), Sadia Jabbar vs. Federation of Pakistan & Others (PTCL 2014 CL. 537), M/s Pakistan Television Corporation Limited vs. Commissioner Inland Revenue (2017 SCMR 1136), Chairman, Federal Board of Revenue vs. M/s Al- Technique Corporation of Pakistan Ltd. (PLD 2017 SC 99), Government of Sindh vs. Muhammad Shafi & Others (PLD 2015 SC 380).

much after the date of IGM's whereas, the original CRFs issued earlier in time were then subsequently revised even below the declared values. The details of such particulars are as under;

S.No	DATE OF MOA	INVOICE PRICE	NAME OF SHIP	IGM NO & DT	DT OF FIL OF B/E	CRF NO. & DATE	REVISE CRF DT	FINAL CRF REVISED ON	REVISED UNIT PRICE
1.	29.5.96	$. 188	M.V.AZAK II	002/96 23.6.96	24.9.96	PKAE005140/AE 8.7.96	24.9.96	14.1.97 SRO APPL	$ 156.28
2.	13.7.96	$. 192.50	BERLIN STAR	006/96 31.7.96	24.9.96	PKAE005685/1E 15.8.96	24.9.96	14.1.97 SRO APPL	$ 160.18
3.	3.6.96	$. 190.50	ENTERPRIDE	23/96 12.6.96	24.9.96	PKNL0007320 3.7.96	24.9.96	17.2.97	$. 161.67
4.	6.7.96	$.196	WEST STAR	007/96 4.8.96	30.9.96	PKAE0005798/AE 24.8.96	30.9.96	23.1.97 SRO APPL	$. 160.52
5.	6.8.96	$.187	M.V. TANGA	008/96 8.8.96	24.9.96	PKDE0018826/DE 24.9.96	24.9.96	4.2.97	$. 164
6.	6.6.96	$.186	KANDILLI-I	001/96 22.6.96	24.9.96	PKAE005276/AE 23.7.96	24.9.96	18.1.97	$. 156.79
7.	4.6.96	$.188.55	M.V. RIO	003/96 26.6.96	30.9.96	PKDE0017345/DE 18.7.96	30.9.96	4.2.97	$. 159.36
8.	1.6.96	$. 195	KONKAR ALPIN	004/96 18.7.96	22.9.96	PKAE0005548/AE 24.8.96	22.9.96	20.1.97 SRO APPL	$. 161.89
9.	25.5.96	$. 195	CABRITE	005/96 24.7.96	22.9.96	PKAE005663/AE 12.8.96	22.9.96	19.1.97 SRO APPL	$. 177.27
10.	21.5.96	$. 188	M.V. GLORY	021/96 6.6.96	22.9.96	PKAE04999/AE 5.8.96	22.9.96	18.1.97 SRO APPL	$. 159.29
11.	6.7.96	$. 196	ARIANA	009/96 7.9.96	9.10.96	PKAE0006192/AE 13.10.96	9.10.96	14.1.97	$. 160.45

5. The Values declared by the Appellants were more or less in the same range, whereas, at the relevant time it was mandatory to obtain a PSI Certificate in terms of the Inspection Rules. In all the matters the said PSI certificates were issued to the Appellants respectively, whereby, their declared values were accepted and worked out for the purposes of payment of duties and taxes. This does not appear to be in dispute as it is a matter of record duly reflected in the particulars as detailed above in Para 4. It is also a matter of fact that the Federal Government to accommodate and promote scrapping of ships / Vessels at Gaddani, Baluchistan, had issued Deferment of Import Duty (On Ships for Scrapping) Rules, 1993 vide SRO 245(I)/93 dated 31.3.1993, under Section 219 of the Act. The crux of the matter is that notwithstanding, availing of the facility of Deferment of Import Duty in terms of SRO 245, at what value the Ships were to be assessed. It has so happened that during the process of beaching the Ships and their scrapping (which is a continuous process spread over months), at the time of filing of respective B/Es,

purportedly, international prices of such ships had fallen. The Appellants, notwithstanding the issuance of earlier PSI Certificates, approached liaison offices of respective PSI companies (i.e. Cotecna and SGS), for issuance of a revised CRF. The PSI companies accepted the request of the Appellants and revised their CRF's to a considerable lower values (in fact even below the values declared in B/E's), by placing reliance on Rule 2(e) of CGO 01 of 1981. It is this revision of values by the PSI Companies which is the bone of contention between the Appellants and the Respondent department. It may also be relevant to note that during this period the Appellants challenged the refusal of the Respondents to accept such revised values determined by the PSI Companies, before the Baluchistan High Court; but remained unsuccessful, and thereafter appealed before the Supreme Court; wherein on 16.9.1997 the following order was passed;

> "The above petitions are directed against the judgment of a Division Bench of the High Court of Balochistan dated 7.7.1997 in C.P.No.244 of 1997 and other connected petitions filed by the petitioners against the refusal of the Customs Department to accept the revised CRF, dismissing the same. The petitioners along with the above petitions have filed applications for a direction against the department to finalize the petitioners bill of entry.
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> It seems that the petitioners while filing the bill of entry declared higher prices but subsequently they obtained revised CRF from PSI Company which the Customs Department declined to accept.
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> It will be just and proper that the Customs Department may finalise the bills of entry on the basis of value originally declared subject to the right of the petitioners to contest the correctness of the above valuation. The petitioners shall pay customs duty and other charges on the basis of above declared value subject to their above right. It will be open to both the parties to raise whatever legal pleas are legally admissible before the competent forums. Mr. Sohail Muzaffar, learned ASC for the petitioners, states that in view of the above interim order, he would not press the present petitions for the time being and in case need arises, he will file fresh legal proceedings. The above petitions are disposed of as having been withdrawn."

Pursuant to the above order, duty and taxes were paid on the basis of the declared values, and it seems that thereafter, the Appellants were issued notices for finalizing the values and subsequently, Order in Originals were passed, whereas, the Appellants have been unsuccessful at the two Appellate forums of the Collector (Appeals) and the Customs Tribunal.

6 The first and foremost question before this Court is as to whether in the peculiar facts and circumstances of the cases in hand, wherein, the Appellants had availed the benefit of Deferment of Import Duty Rules, the Appellants were even justified to insist upon assessment on the basis of revised CRF. The Appellants Counsel, on the one had has argued that the

assessment ought to have been made strictly in accordance with section 25 read with section 30 of the Act, as according to him the instructions and Rules framed and circulated by CBR (now FBR) in terms of Section 223 of the Act cannot override the provisions of the Act. To that perhaps there cannot be any cavil, as that seems to be settled by now. However, at the same time, these Appellants have also sought refuge under these very instructions and guidelines. Their entire case is based on Customs General Order No.1 of 1981 dated 16.2.1981, which has set guidelines for assessment of goods in terms of section 25 and 30 of the Act, when there is abnormal fluctuation in the values as reflected in the contract of sale as against what is prevailing at the time of filing of the B/E. In fact, the revised CRF were issued to them mainly on such basis. Their own case as per the contents of their Appeals[2] before the Tribunal was that pursuant to SRO 1108 inspection was carried out and CRF was issued on 3.7.1996; however, since the Appellants had material objections relating to the said CRF on the grounds that on the date of filing of B/E's the prices of the vessel had considerably fallen, therefore, the CRF's were required to be revised. Hence, if the Appellants are seeking assessment of their goods on the basis of General Order issued by CBR, then they cannot, at the same time contend that the other guidelines or for that matter, an SRO, would not apply to them as it is not strictly in line with the main provision of the Act. In our considered view one thing is evident that the Appellants Counsel has been blowing hot and cold in the same breath, and has been taking different contradictory positions as and when suited to him with regard to the validity of the Rules and General Orders in consideration. It is a matter of fact that they took advantage of a facility granted by CBR whereby, the duties and taxes were deferred, whereas, the ships were permitted to be beached and scrapped, without filing of B/E's; and not only this, the original CRF's were issued to them by the PSI company on the basis of their declared values. They kept waiting by retaining such CRF's with them, and ultimately, after a considerable lapse of time, filed B/E's with revised CRF's. At the very outset, it is not clear that as to how and under what law or authority they could have managed a revised CRF after such delay, without referral of the matter to the Working Committee constituted for this purpose under the Inspection Rules. The Inspections Rules provide the mode and manner by which a PSI company could revise its CRF. The relevant provision is Rule 4(6) of the Inspection Rules which reads as under:

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[2] See Para 10 of the memo of Appeal in SCRA No.38-2003

> "In case of dispute with reference to the services performed by the PSI Company, enhancement of value, change of classification, refusal to allow benefit under any notification, or for any other reason, the importer may take up the matter directly with the PSI Company liaison office in Karachi or Lahore. *If the dispute is not resolved within seventy-two hours, the importer may file a presentation for resolution of dispute by the working committee,* headed by a Deputy Collector of Customs, and comprising of representatives of PSI company, Pakistan Customs and any other person nominated by the Central Board of Revenue or the Government." (emphasis supplied)

7. From perusal of the above Rules it is clear that in case of enhancement of value, the importer may take up the matter directly with the PSI company and if the dispute is not resolved *within seventy-two hours*, the importer may file a presentation for resolution of dispute by the working committee, headed by a Deputy Collector of Customs, and comprising of representatives of PSI company, Pakistan Customs and any other person nominated by CBR or the Government. It is an admitted position that first CRF was issued on the basis of the declared values, and with that the Appellants were not satisfied; rather withheld the submission of the said CRF to the Customs. Not only this, when the time to file B/E's came, they on their own approached the PSI Company and got the CRF revised without any referral to the Working Committee. While confronted, the Appellants Counsel argued that in terms of Rule 8(2)(d) of the Inspection Rules, it was for the Customs to refer the matter to the Working Committee, as the Appellants were never dissatisfied with the revised CRF's. This contention appears to be misconceived and contrary to the admitted facts. Once the first CRF was not according to the Applicant's stance, then, come what may, it was for them to approach the Working Committee and not vice versa as contended. Their objection to the first CRF was never resolved by the PSI company *within seventy-two hours*; hence, the case was fully covered under the above Rule, and the CRF could not have been revised by the PSI Company on its own, without engaging the Customs, including the members of the working committee. As to the other argument that these Rules were merely administrative in nature and will not override the provisions of the Act, it would suffice to observe that in fact these are Rules framed under section 219 of the Customs Act, therefore, these are not akin to an Administrative Order or a CGO, but on the contrary these are statutory Rules framed under the Customs Act; as such, the argument that Administrative Order cannot substitute or take the place of legal provisions is totally inapt and the authorities to the said effect are irrelevant for determination of the

dispute[3]. As to Rule 8(2)(d) ibid, it will suffice to observe that even if that Rule was to be applied, the second proviso to it clearly provides that any provisional assessment so made under this rule shall be finalized on higher value in case of a substantial evidence to the effect that the actual normal price is higher, ignoring the lower value reported by the PSI Company in the CRF; hence, even otherwise is of no help.

8. Similarly the argument that the original CRF's issued on the basis of contract / invoice values were never submitted to Customs; hence, not applicable is also misconceived and not tenable as it is a matter of record. Moreover, as per prevailing practice, one copy of every CRF issued by the PSI company was required to be transmitted to the concerned Customs station without fail, therefore, the said CRF's were already a part of the record once issued by the PSI company.

9. The next argument as well as the proposed questions (though not properly phrased) is that whether in the facts and circumstances of the case, was there any compelling circumstances available so as to invoke the provisions of Rule (2) (e) of CGO 01 of 1981 dated 16.2.1981 (Valuation of goods for the purposes of Customs Duty in terms of Section 25 and 30 of the Act), which provides that *the application of periods of grace referred to in sub-paras (a) to (c)[4] may be suspended in a period of abnormal price instability. Fluctuations in prices of over 10% will be considered as an abnormal fluctuation.* This, under exceptional circumstances, provided that the assessment can be made even below the declared values. The claim of the Appellants is that since the prices had fluctuated abnormally from the date of contract made by them till the filing of B/E's; hence, they were entitled for the benefit of Rule 2(e) of CGO 01 of 1981. Even for the sake of arguments it is assumed that the Appellants stance is correct legally; facts so determined at the level of Collector (Appeals) and the Tribunal, do not support this proposition. It would be relevant to refer to the finding of the Collector (Appeals) to this effect. The same reads as under;

> "10. I have also thought over the contention of the appellant that as provided under CGO 1/81 in case of abnormal fluctuation i.e. more than 10%, the value can be revised accordingly without observing the dictum of time tolerance and as in this case the price fluctuated abnormally, the appellant was entitled to avail the benefit thereunder. The

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[3] Ghulam Nabi v Central Board of Revenue (PLD 1997 Quetta 22)

[4] (a) The price paid or payable may be accepted if the date of the contract precedes the date of filing of the date of entry for home consumption or warehousing by not more than six months;
(b) Where the goods are manufactured to order, the price paid or payable may be accepted for the purpose of rule 1 if delivery has been made with the agreed period;
(c) the value ascertained at the time of filing of bills of entry may be valid on *ex*-bonding if the *ex*-bond is effected within four months of the date of in bonding of the goods;

> perusal of evidence produced by the appellant by the title "Demolition, Sales & Prices" claiming that revised CRF was based thereupon indicated that during the relevant period i.e. September 1996 when the appellant filed bill of entry, the prices were $178/LDT and 181/LDT. Even the prices prevailing during the month of October 1996 out of 22 ships sold the prices of only 8 ships were given in the above evidence, which implies that the information given therein was not comprehensive and hence, irreliable. The difference in declared value and the value shown in the evidence relied upon by the appellant is less than 10%, therefore, Sub Rule (a) of Rule 2 as given in CGO1/81 will prevail and bill of entry will be finalized on declared value…."

This is a finding of fact recorded by the forums below, and per settled law, we in our Reference Jurisdiction cannot embark upon factual aspects or controversy to upset such finding of facts[5]. It has been categorically held that in fact the fluctuation was below 10%; hence, was not abnormal, and therefore, benefit of Rule 2(e) of CGO1 of 1981 as relied upon by the PSI company while revising the CRF's was otherwise not available. The Appellants counsel has not been able to controvert this aspect of the matter, and therefore, we do not see as to how, notwithstanding our above observations as to the other issues, benefit of this CGO was claimed and accepted by the PSI company.

10. In view of hereinabove facts and circumstances of this case, it appears that the proposed questions need to be modified. In our considered view only two questions of law are relevant and arise out of the impugned order of the Tribunal, and that is (i) *"whether in the facts and circumstances of the case the Tribunal was justified in holding that the PSI Companies could not have revised CRF's of the Appellants on its own without referring the matter to the Working Committee in terms of Rule 4(6) of the Inspection Rules?"* and the same is answered in the ***affirmative***; against the Appellants and in favour of the Respondents; and (ii) *whether in the facts and circumstances of the case the Appellants case was covered under Rule 2(e) of CGO 01 of 1981 dated 16.2.1981?* and the same is answered in ***negative***; against the Appellants and in favour of the Respondents.

11. All Reference Applications stand ***dismissed***. 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. Office to place copy of this order in the connected Reference Applications as above.

Dated: 03.04.2023

J U D G E

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[5] T & N Pakistan Private Limited v Collector of Customs (2022 SCMR 1119); Pakistan State Oil Co. Ltd., v Collector of Customs (2019 SCMR 1124); Fateh Yarn Pvt. Limited v Commissioner Inland Revenue (2021 SCMR 1133)

J U D G E

Ayaz