

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.98 of 2022
[Yasmeen Trading International (Pvt.) Ltd. Vs. The Additional Collector of Customs (Adjudication-I) & another]

Special Customs Reference Application No.99 of 2022
[Ahsan Traders (KCUS: 552) Vs. The Additional Collector of Customs & another]

And

Special Customs Reference Application No.100 of 2022
[Mohsin Plastic Works Vs. Vs. The Collector of Customs (Adjudication-I) & another]

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Zulfiqar Ahmad Khan

Applicants through : Mr. Muhammad Younus Rao Advocate.
Respondents through : Mr. Aamir Raza, Advocate.
Date of hearing : 30.08.2023.

JUDGMENT

IRFAN SAADAT KHAN, J. The instant Special Customs Reference Applications (SCRAs) have been filed impugning the order of the Customs Appellate Tribunal (CAT) passed in Customs Appeals No.K-603/2019, K-612/2019 and K-604/2019, in respect of the above named applicants respectively.

2. On 24.05.2022, out of the five proposed questions, only questions No.“c” and “d” were admitted for regular hearing. For the sake of brevity the said questions are reproduced herein below:

c. Whether the Tribunal has erred by applying PCT heading 6305.3300 to the subject goods which was a change brought about without issuance of a Public Notice as required under Para-2 and 7A of CGO 12/2002 read with the Judgment of hon'ble Sindh High Court reported 2016 PTD 2910?

d. Whether the Tribunal has erred by not considering that the provisions of Section 32(1) and 32(2) could not be invoked in this case where the goods were duly examined and assessed under Section 80 of the Customs Act, 1969 by the Customs authorities as a conscious decisions?

3. When the matters proceeded on 15.08.2023, with the consent of the parties, a new question of law was reframed. The reframed question is reproduced herein below:

That whether under the facts and circumstances of the case, the Customs Authorities after accepting description of goods to be falling under PCT heading 3923.2900 were justified at post clearance stage in applying PCT heading 6305.3300 on the basis of the images of the goods taken approximately one year ago at the time of assessment of the goods declaration on the basis of examination of the goods in real?

4. Briefly stated the facts of the case are that as per the applicant, Yasmeen Trading imported PP Packing material and declared the same under PCT Heading 3923.2900. The customs authorities examined the said goods, took images of the same and after fulfilling the legal and codal formalities released the same under Section 80 of the Customs Act 1969 **(the Act)**. Thereafter the department reexamined the retained images and issued a Show Cause Notice **(SCN)**, bearing No.Group-III-PRV-996-PQ dated 29.01.2019, on the ground that a mis-declaration of the goods has been detected, as the applicant was required to declare the imported goods under PCT Heading 6305.3300 and not under PCT Heading 3923.2900 and thus due to this act the government has suffered a loss of revenue amounting to Rs.1,879,049/-. The department through the said SCN apprised the applicant that from the retained images it is evident that the goods imported were not PP Packing Material but in fact printed PP Woven Bags. The applicant filed its reply dated 28.02.2019. The Adjudicating Authority **(AA)**, however did not accept the same and vide Order-in-

Original (ONO) No.956/2018-19 dated 28.03.2019, came to the conclusion that mis-declaration on the part of the applicant stood established and thereafter directed the applicant to deposit an amount of Rs.1,879,049/-, being the evaded amount of duty and taxes. The AA also imposed personal penalty of Rs.200,000/- upon the said applicant. Being aggrieved with the said order an appeal bearing No.K-603/2019 was filed before the CAT.

5. Similarly in the cases of Ahsan Traders and Mohsin Plastic Works SCNs bearing No.Group-III-PRV-916-2018-PQ-VI, dated 31.12.2018 were issued. Replies whereof were furnished on 23.01.2019 and 21.01.2019 respectively. Thereafter ONO, bearing No.910/2018-19, dated 12.03.2019 was passed, whereby the applicant Mohsin Plastic Works was required to pay an amount of Rs.2,084,485/- in the government treasury and a personal penalty of Rs.100,000/- was also imposed upon it, whereas a personal penalty of Rs.50,000/- was imposed upon the applicant Ahsan Traders. Appeals thereafter were preferred by the applicants before the CAT bearing No.K-612/2019 and K-604/2019. All the three appeals were then taken up together by the CAT on 25.11.2021 and thereafter vide order dated 06.12.2021 these were finally dismissed. It is against this consolidated order of the CAT that the instant SCRA's were filed by the present applicants.

6. Mr. Muhammad Younus Rao Advocate has appeared on behalf of the applicant and stated that previously vide order dated 24.05.2022 only questions of law at Sr. No."c" & "d" were admitted for regular hearing but when the matter was heard on 15.08.2023, with the consent of the parties' counsel, the above referred reframed question of law was framed hence he will argue these matters on the reframed question of law only. While elaborating the matter he stated that the applicants imported the

consignment from China and filed goods declaration by declaring the said imported goods as PP Packing Material, under the PCT Heading 3923.2900, which were physically examined by the Customs Authorities and after fulfilling legal and codal formalities and taking images of the imported goods, the same were cleared and released under Section 80 of the Act. He stated that after a period of almost one year the department, on the basis of change of opinion, issued SCN to the present applicants by informing that after physical examination of the retained images it was found that the goods imported by the applicants were in fact assessable under PCT Heading 6305.3300, applicable to Printed Woven Bags, as the goods imported by the applicants, according to the department, as per the retained images were incorrectly assessed as PP Packing Material whereas in fact according to them (the department) these should have been declared and assessed as PP Woven Bags and thus the applicants have made a mis-declaration and were liable to be assessed on the duties as applicable to the goods assessable under the PCT Heading 6305.3300 relating to Printed Woven Bags. He stated that the action of the department is illegal on two counts, firstly the action of the department in taking action under Section 32 of the Act by reopening a closed matter on the basis of the material already available with them amounts to change of opinion, which is not permissible under the law. He next stated that on factual aspects also the order of the CAT is quite vague and sketchy as the learned Member (Technical) without examining the so called retained images has come to the conclusion that “although the product is made of woven fabric, it is only laminated on the outside of the bag”. According to him, this is an erroneous, perverse and totally incorrect finding of fact as how could the learned Member (Technical), without examining the retained images, as the same were never produced before him, has come to the conclusion that the

imported goods were assessable under PCT Heading 6305.3300 as Printed PP Woven Bag “laminated on the outside of the bag” on the basis of mere conjectures and surmises. He stated that the CAT is the last facts finding authority and for dispensation of justice the learned Member (Technical) should have cared to examine those retained images by himself or have asked the department to produce the same, however the said exercise was not done and in a very summary manner, has directly jumped to the erroneous finding of fact and conclusion that the goods were only “laminated on the outside of the bag”. He stated that since the CAT has recorded erroneous and perverse finding of facts, which is not based on any material, the answer to the reframed question may be given in ‘Negative’ i.e. in favour of the applicants and against the department.

7. Mr. Aamir Raza Advocate has appeared on behalf of the respondents / department and has supported the order of the CAT and stated that so far as the factual aspects of the matter are concerned, the Tribunal is always considered to be the last fact finding authority and since the CAT has duly observed that the goods were “laminated on the outside of the bag” which is a finding of fact, hence the same cannot be agitated in the present SCRA's. So far as the legal objection with regard to the applicability of Section 32 of the Act is concerned, he invited our attention to Section 32 of the Act and stated that the department has the authority under Section 32(2) of the Act to serve a notice within five years of the relevant date requiring a person to show cause why he should not pay the amount specified in the said notice. He stated that since the SCNs were issued within five years period, therefore, on this aspect also the objection raised by the learned counsel for the applicants is not correct and the present SCRA's are liable to be dismissed by answering the reframed question in ‘Affirmative’ i.e. in favour of the department and against the applicants.

8. We have heard all the learned counsel at considerable length and have also perused the record. Since the facts of all the three SCRA's are same, we propose to dispose of these matters through this common judgment.

9. During the course of the arguments, we specifically asked a question from the counsel representing the respondent / department to show from the order of the CAT any finding with regard to the applicability of Section 32 of the Act, which was duly raised by the applicants in the memo of the appeal, to which the learned counsel candidly conceded that there is no discussion in the order of the CAT with regard to the applicability or otherwise of Section 32 of the Act. So far as the factual aspect of the instant matter is concerned, it is noted that the CAT while passing the order has observed that "the goods imported are made of woven fabric and are laminated on the outside of the bag" without considering the fact that out of three SCNs issued to the applicants only in two SCNs retained images were reproduced as a part of the examination report however surprisingly the said examination report, which was based on those retained images, was never confronted to the applicants by the department to enable them to give a proper reply in this regard, which fact was also conceded by the counsel for the department. Moreover it is also an admitted position that the CAT while passing the order never required the department to produce those retained images for examination by itself before reaching to any final factual conclusion.

10. We are mindful of the fact that the Tribunal is the last fact finding authority, so far as the factual aspects in any matter are concerned, however it is also a settled law that where the Tribunal has based its decision on

some perverse findings, in the interest of justice, the matter could be required to be reexamined by the Tribunal afresh for ascertainment of proper facts, in order to reach to a just conclusion. Reference in this regard may be made to the decision given in the case of *National Logistics Cell, Government of Pakistan, HQ NLC, Karachi Vs. The Collector of Customs, Model Customs Collectorate, Port Muhammad Bin Qasim, Karachi and others (2023 SCMR 1325)* wherein the Supreme Court of Pakistan has observed that where the order of the Tribunal is based on mere conjectures and surmises and on erroneous findings, the same can be corrected by the High Court. In the instant matter it has come on the record that the findings of the CAT that the goods imported were made of “woven fabric and were laminated on the outside of the bag” and that “these were classifiable under PCT Heading 6305.3300” are not based on any cogent material as it seems that the CAT has simply affirmed the stance of the department without examining the retained images and factually probing the matter more deeply hence, in our view, it could not be said that the findings arrived at by the CAT in any manner fulfill the requirements of the law.

11. In view of what has been stated above, we are of the candid view that it would be in the fitness of things and in the interest of justice, if the instant matters are remanded to the CAT for examination of the matters on factual aspects as well as to examine the legal aspects raised by the applicants in the memo of their appeals and thereafter to pass a well-reasoned order covering both legal and factual aspects, after providing opportunity of hearing to the applicants as well as to the respondent / department in accordance with law preferably within a period of 03 months from the date of receipt of this order. Since we are remanding these cases to the CAT, we do not deem it appropriate to answer the reframed question.

12. The instant SCRAAs stand disposed of in the above manner alongwith the listed application(s), if any. Let a copy of this judgment be sent to the Registrar of the CAT for doing the needful in accordance with law.

Office is directed to place a copy of this judgment in all the captioned SCRAAs.

JUDGE

JUDGE

Karachi:

Dated: 30.08.2023.