ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Appeal No. 30 of 2004

Date	Order with signature of Judge

FRESH CASE:

1. For hearing of CMA No.361/2004.
2. For hearing of main case.

Dated; 7th October 2024

Mr. S. Yasir Ali, Advocate for Appellant.

Mr. Muhabbat Hussain Awan, Advocate for Respondent.

-*-*-*-*-*-

Muhammad Junaid Ghaffar, J: Through this Special Custom Appeal, the Appellant has impugned Order dated 30.10.2003 passed in Custom Appeal No.1243 of 2001 by the then Customs, Excise & Sales Tax Appellate Tribunal, Bench-II at Karachi; proposing various questions of law, however, vide order dated 17.08.2004 this Reference Application was admitted for regular hearing on the following question: -

> *"Whether in the facts and circumstances of the case any penalty could have been imposed against the Appellant Corporation?"*

Heard learned counsel for the parties and perused the record. It appears that a case was made out by the Respondent department against the present appellant on the ground that the invoice furnished in respect of value of re-import of parts sent abroad for repairs along with Goods Declaration, was false and incorrect, whereas subsequently it had transpired that another invoice was submitted by the Appellant and, therefore, a Show Cause Notice dated 19.04.2001 was issued alleging mis-declaration and violation of Sections 16, 19 and 32 of the Customs Act,

1969. Such show cause notice was adjudicated vide Order-in-Original No.222 of 2001 dated 21.07.2001, whereby, the matter was decided against the Appellant with direction to deposit the differential amount of duty and taxes with a penalty of Rs.3.5 million. Appellant being aggrieved preferred appeal before the Tribunal and the same has been partly allowed by reducing penalty of Rs.3.5 million to Rs.1.5 million, whereas, for the present purposes, there is no dispute as to any short levy of custom duty and taxes which have been paid by the Appellant. The relevant findings of the Tribunal read as under: -

> *"4. In the reply to the show cause notice the appellant pleaded innocence and contended that it was done due to ignorance and inadvertence without any intention to evade the revenue. According to it, the invoice, on the basis of which the value was declared in the bill of entry, was simply a proforma invoice not depicting the real cost of repairs and that in such circumstances, the proper course for the appellant was to make a request for provisional assessment under section 81 ibid. and to produce the real invoice dated 15.02.2000 for the purpose of making final assessment. The proper course, according to the appellant, was not adopted simply due to mistake and inadvertence. The learned Adjudicating Officer did not accept the contention of appellant and imposed the penalty of Rs.3.500.000.00. The appellant has reiterated the same contention before this Tribunal, adding that all could not have happened without involvement of the customs staff. It is true, and as a matter of fact, it is the case of the department itself that the evasion of the duty and taxes had been made with the active connivance of the concerned customs staff. This was mentioned in paragraph 1 of the counter comments filed before the Adjudicating Officer by the departmental representative, namely, Mr. Dost Muhammad, the Detecting Officer.*
>
> *5. The contention of the appellant that request for the provisional assessment was not made and the actual invoice, after its receipt, was not filed and the goods were got finally assessed at drastically lower value due to ignorance and inadvertence of its concerned staff, is illogical and unacceptable. However, there is force in the contention of the appellant, which is admitted by the department, that the evasion of such a big amount of revenue could not take place without involvement of the customs staff.*
>
> *6. The finding of the Adjudicating Officer that there was deliberate misdeclaration regarding the value is*

> *unexceptionable. Nevertheless, the question regarding the quantum of penalty deserves consideration. Penalties are not the source of revenue in the real sense. Moreover, the appellant is an organization mainly owned and controlled by the Federal Government and in such a situation the penalty will not make any significant difference in raising the revenue for the Government. So far the deterrent aspect is concerned, in the present case high penalty will not be as much effective as it will be in the case of a common tax-payer. Both the organizations i.e. PIAC as well as the Customs Department are controlled by the Federal Government. In such circumstances, the real deterrence for avoiding such incidents lies in taking drastic disciplinary action against the concerned staff of both the organizations and not in imposing high penalties. It appears that the staff of the appellant, with the active connivance of the customs staff, has tried to show their good performance by such tactics. While expecting both the organizations to take strict disciplinary action against their respective staff found involved in the scam, we reduce the amount of penalty from Rs.3.5 millions to Rs.1.5 million. The appeal is accordingly allowed partly. We will appreciate if the result of the disciplinary action is communicated to this tribunal."*

From perusal of the record and the above findings of the Tribunal, it appears that insofar as the present issue is concerned, it is only the amount of penalty so reduced by the Tribunal, which is the bone of contention between the parties. As to the Respondents, they do not appear to be aggrieved by such reduction of penalty. Appellant's case is that there was no *mens rea* in the instant matter on their part, whereas pursuant to issuance of a Notice under section 26 of the Customs Act, 1969, they had themselves produced actual invoice issued by the foreign supplier for repair of the parts in question which was not available earlier and also requested the department to permit them to make payment of the amount in question. Such fact is borne out from the Order-in-Original in its Para 5, which reads as under: -

> *"05. The case was refixed for hearing on 02.06.2001. Mr. Muhammad Saleem, Appraising Officer represented the Collectorate of Customs (Preventive). Mr. Muhammad Yakoob Mughal appeared on behalf of M/s. Pakistan International Airline Corporation arid submitted written reply. Mr. Dost Muhammad, Detecting*

Officer (EO) also appeared and submitted written arguments on 07.06.2001. The written reply submitted by M/s PIAC dated 2nd June, 2001 are as under:-

1. *The subject engine was imported against 14M No. 13077 dated 27.12.1999 showing value of invoice for repair charges as NLG 64,000/- for which clearance staff of PIA as well as Customs AFU were un-aware of its actual value of repair charges. Accordingly, the engine was cleared on declared value as per invoice sent by the shipper. Therefore, the element of deliberate mis-declaration at the time of clearance of engine is not established. On receipt of Notice under section 26 of the Customs Act, 1969 vide notice No. S-2/175/1999-2000-STC(P) dated 08.05.2000 received from Assistant Collector H.Q-II, we collected the repair invoice No.2TD/9002029 dated 15.02.2000 and submitted to Assistant Collector H.Q-II vide our letter No. GMS&P/MS/A/C-Engine/2K dated 1st June 2000, showing repair charges as US$ 739,459.44.*
2. *Kindly note actual date of invoice i.e., 15.02.2000 of engine which established that since nobody was aware of actual value of invoice at the time of import, the declaration of incorrect value was an in-avoidable mistake and should not be treated as mis-declaration.*

3. *The actual value of invoice was presented to AC Customs H.Q-II voluntarily with the intention that demand may be raised and payment of due amount may be deposited in the Government treasury which shows our positive attitude.*

4. *After submitting the actual invoice vide our letter No. GMS&P/MS/A/C/Engine/2K dated 01.06.2000 we did not receive any response from Customs. Therefore, the issue remained unsolved.*

5. *We, therefore, request you to kindly allow payment of demanded duties and taxes of Rs. 57,68,487.00."*

Similarly, the prosecuting department had filed its comments before the Adjudicating officer, and it was pleaded as under;

Page 6 of ONO

d. The file was put up to the then ACP/Hqrs Mrs. Lubna Jaffar ali on 23.05.2000 for approval of the draft Show Cause Notice to the importers and putting up the file to the then Collector (P) for necessary action with reference to non-accorded post-fecto approval. Mrs. Lubna avoided the issuance of the SCN to the importers as well as putting up of the file to the then Collector till 22.07.2000 (when she herself was transferred to AFU) despite lapse of sufficient time period, availability of concrete evidences on record against the party, my repeated verbal requests and willingness of the importers' representative Mr. Nasser Jameel (shown during personal hearings of him before Mrs. Lubna in the aforesaid another case

No.S2/99/1999-2000-STC(P) to immediately pay the evaded revenue.

Page 8 of ONO

(iv) The actual repair invoice was not presented voluntarily. It was procured by the STC(P) after serving a notice dated 08.05.2000 to the importers under section 26 of the Customs Act, 1969 followed by our repeated verbal requests. Their representative Mr. Nasser Jameel, however, verbally offered to pay the evaded revenue only but the then ACP/Hqrs Mrs. Lubna Jaffer Ali took no interest to recover the agreed amount or issue a SCN despite my repeated written as well as verbal requests.

It is not in dispute that the Appellant had come forward and volunteered to make payment even before issuance of show cause notice, but the request of the Appellant was not entertained and, thereafter, the amount was paid by the Appellant after issuance of show cause notice. The above response of the Respondents fully supports the intention of the Appellant to pay the amount before any action was taken. Any notice under section 26 of the Customs Act, 1969, is by itself not penal in nature; rather requires a person to comply with the directions so mentioned in the notice. The Tribunal while reducing the penalty has been pleased to hold that the Appellant is a government organization and at the end of the day any amount, which has been short paid, is to be borne by the Federal Government itself. In fact, the Tribunal took upon itself that the alleged act of the Appellant was not possible without connivance of Respondent department and, therefore, while reducing the penalty also asked Respondent department to proceed further and take disciplinary action against the delinquent officials. It further appears that such finding was also recorded in the Order-in-Original and again the Respondent department or any of its officials had not impugned such observations.

Today, we have confronted the Respondents Counsel as to the directions of the forums below and learned counsel submits that no action has been taken pursuant such orders / directions. In that case, we do not see any justification for maintaining the reduced amount of penalty for the simple reason that the Appellant before issuance of any formal show cause notice had approached the department to voluntarily make payment, whereas the reasoning assigned by the Tribunal required it to waive the entire penalty. It could not be reduced and sustained in part at the same time. Either the Appellant was guilty or not, whereas the reasoning assigned by the Tribunal for reduction of penalty has not been challenged by the Respondent, therefore, the benefit of doubt, if any goes to the Appellant.

As to imposition of penalty it may be of relevance to observe that penalty in this case has been levied in terms of clauses (9), (10A) and (14) of Section 156(1) of the Customs Act, 1969, which uses the words that *"such person shall be liable to penalty"* and such words are to be found in other statutes also and have been construed by the High Courts of the sub-continent for a very long time and the consistent view of the Courts was that these words confer discretion on the Courts and do not make it incumbent upon the Courts to impose it mandatorily[1].

It is trite law that penalty is to be imposed when there is a guilty mind present with an element of *Mensrea*. The same is lacking in this case. It is also a settled proposition that punishment disproportionate to the gravity of offence / guilt is as much illegal as the act itself calling for its imposition. A mere fact that the amount was only paid after show cause was issued and Order was passed would not

[1] Shamroz Khan v Muhammad Amin (PLD 1978 SC 89)

ipso facto mean that the duty was avoided intentionally and element of *mens-rea* was present. This, in and of itself, is not a ground to sustain imposition of penalty, as for that some corroborative material to the contrary must be on record. Moreso when it has been reduced by the Tribunal and the department is not aggrieved of it anymore. It has come on record that the mistake was admitted much prior to passing of the order and the department was requested to accept payment by issuing a demand / challan. Per settled law, the authority while imposing any penalty has to keep in mind the gravity of the charge in the attending circumstances[2].

It is also a matter of fact that Appellant is a majority owned Government Corporation and, therefore, the reduced amount of penalty (as also noted by the Tribunal) has to be paid and borne by the Government itself; hence, no useful purpose will be served in sustaining it. Lastly, it would have been better that the Appellant and Respondent Department had referred the matter to Alternate Dispute Resolution Committee, as it would have saved legal costs, and this Courts precious time. Therefore, in our considered view, and owing to the peculiar facts as above, it is not a case wherein the imposition of penalty must ought to be sustained.

In view of the above facts and circumstances of this case the proposed question is answered ***in negative*** in favour of the Appellant and against the Respondent. Consequently, the impugned order is hereby set-aside and this Appeal is allowed.

[2] G.M. Pakistan Railways v Muhammad Rafique (2013 SCMR 372)

Let copy of this order be sent to the Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of the Customs Act, 1969.

JUDGE

JUDGE

Farhan/PS