IN THE HIGH COURT OF SINDH, KARACHI

S. C. R. A. No. 530 of 2022

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Arshad Hussain Khan

Applicant:	**M/S JW SEZ (Pvt) Ltd,** **Through M/s. Khalid Javed Khan, Irfan Ali Shaikh & Uzair Shoro, Advocates.**
Respondents:	**The Director, Directorate of Post Clearance Audit (South), Custom House, Karachi,** **Through Mr. Khalid Mehmood Rajpar, Advocate.**
Date of hearing:	**27.11.2024.**
Date of Order:	**27.11.2024.**

O R D E R

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant has impugned Judgment dated 30.08.2022 passed in Customs Appeal No. K-713 of 2022 by the Customs Appellate Tribunal Karachi, proposing various Questions of law; however, vide order dated 28.09.2022 this Reference Application was admitted for regular hearing on Question No. I, II & V which reads as under:-

> "I. Whether on the facts and circumstances of the case the Appellate Tribunal and the Directorate of Post Clearance Audit erred in law by failing to apply Section 25(I), (3) and (4) of the Customs Act, 1969 and the Rules framed thereunder, which is a mandatory requirement for determination of Transaction Value of imported goods?
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> II. Whether on the facts and circumstances of the case the Appellate Tribunal and the Directorate of Post Clearance Audit erred in law by failing to apply provisions of Section 25 of the Customs Act, 1969 and appreciate that owning to commercial considerations and expediency bulk purchase of goods / vehicles are procured at a concessional value / price as compared to single or isolated purchase and the purchase and import of (744) subject vehicles by the Applicant were also at concessional price as compared to the value and price of (03) vehicles purchased and imported earlier by the Applicant?

V. Whether on the facts and circumstances of the case the Appellate Tribunal erred in law in upholding the arbitrary and unlawful proceedings undertaken by the Directorate of Post Clearance Audit for determining value of the subject vehicles to the exclusion of the Directorate of Valuation and other Collectorates in violation of the provisions of the Customs Act, 1969 including Section 25 and C.G.O. 14/2005?"

2. Learned Counsel for the Applicant at the very outset, submits that the issue as raised in this matter is covered by Judgment dated 22.02.2024[1] passed by this Court whereby, in respect of identical goods / transaction in hand, the value(s) as declared by the present Applicant has been accepted under Section 25(I) of the Customs Act, 1969 as true and correct Transactional Value which Judgment has been maintained by the Hon'ble Supreme Court vide order dated 01.08.2024[2]. He further submits that insofar as the vehicle in question as well as the Agreement on the basis of which the same was imported are concerned; they are identical, however, in this matter the Post Clearance Audit department had determined the values of vehicle in question under Section 25(9) (Fall Back Method) of the Customs Act, 1969, whereas, in the earlier round another department of FBR had determined the value under [identical goods method] Section 25(5) of the Act. However, per learned Counsel, this Court has already held that the values declared by the Applicant pursuant to a Tripartite Agreement between the Applicant and foreign suppliers, the values in question are true transactional value(s) under Section 25(1) ibid. When confronted, Respondent's Counsel submits that since in this matter the Post Clearance Audit department had determined the values under Section 25(9) of the Act; therefore, the said Judgment is not relevant and applicable.

Heard learned Counsel for the parties and perused the record. It is not in dispute that insofar as the vehicle and the agreement in question are concerned, they are the same which were before this Court in the cited judgment. It further appears that in the earlier round, the department had assessed the vehicle of the present Applicant by applying the identical goods methods under Section 25(5) of the Act on the ground that the same Vehicle was earlier imported by the Applicant

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[1] Special Customs Reference Application No. 1355 of 2023 *(The Collector of Customs v. M/s. JW SEZ (Pvt.) Ltd.)*

[2] in CPLA No. 459-K of 2024 *(The Collector of Customs v. M/s. JW SEZ (Pvt.) Ltd.).*

on a higher value, whereas, as per Show Cause Notice in the instant matter, the Post Clearance Audit department had determined the values under Section 25(9) [Fall Back Method] of the Act. However, it is not in dispute that this Court in its Judgment dated 22.02.2024 has already dealt with this issue of values declared by the present Applicant and the determination of it by the Respondents. It is also not in dispute that not only the Vehicle is the same, but so also the Agreement under which they have been imported. It would be advantageous to refer to finding of the Division Bench[3] in that case which reads as under:-

> "5. Insofar as the first argument of the Applicant's Counsel that the Tribunal was required to follow the earlier judgment in Customs Appeal No. 713 of 2022 is concerned, on perusal of the record and the above finding of fact, we are not inclined to agree with such submission inasmuch as the assessment in the instant matter has been made under identical goods method as provided under Section 25(5) of the Act, by placing reliance on an earlier import of the same Respondent; whereas, in Custom Appeal No.713 of 2022 (Now pending in Special Custom Reference No.530 of 2022), the assessments were made under Section 25(9) of the Act. Both the assessment methods are completely different and independent in nature; therefore, the finding arrived at by the Tribunal is fully justified that the earlier decision was not relevant; hence the matter ought not to be referred to a Larger Bench; or in the alternative follow the earlier judgment. The proposed question No.(iii) in this regard is answered accordingly.
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> 6. Before proceeding further on merits of the case it will be advantageous to understand the mode and manner in which Section 25 of the Act is to be applied and dealt with. This provision of the Act has been aligned in line with the International Agreement commonly known as General Agreement on Trade & Tariff (GATT) envisaged in the World Trade Organization's Valuation Agreement concluded in the year 1995. In the case of ***Indus Motors***[4] a Division Bench of this Court speaking through one of us *Muhammad Junaid Ghaffar, J*; has delved upon this aspect in the following manner which is also relevant for the present case. The same reads as under;
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> "It need not be reiterated that w.e.f. 01.01.2000 Section 25 of the Act has done away with the old concept of notional / normal value or the Brussels Definition of value (BDV)[5] of goods and has adopted the concept of transactional value based entirely on General Agreement on Trade & Tariff (GATT) envisaged in the World Trade Organization's Valuation Agreement concluded in the year 1995 and signed by more than 140 Countries including Pakistan. After the expiry of the grace period provided to Pakistan being a developing country pursuant to Article 20.1 of the WTO Agreement read with WTO first annual review dated 13.10.1995 for transformation to the new system, it is now effective from 01.01.2000 in Pakistan. The idea of change in the concept of Valuation of Imported Goods was an outcome of long deliberations and after successive meetings and conferences of around 124 Governments as well as the European Community participating in Uruguay Round of Multilateral Trade

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[3] (authored by one of us, Muhammad Junaid Ghaffar, J)

[4] Judgment dated 17.7.2023 in CP No.D-1372 of 2018 & other connected matter (still unreported) in the case of Indus Motor Company Limited v Federation of Pakistan.

[5] i.e. the notional concept of value: *that is, goods should be valued at the price at which such goods would sell* in the open market independent of the buyer and the seller

negotiations held in 1994, resulting in the establishment of World Trade Organization (WTO) in Geneva on 01.01.1995 and after abolition of GATT and formation of WTO for regulating International Trade, the entire GATT Code of Valuation has been incorporated as Article VII of WTO Agreement. For a better understanding, it may further be explained that Transactional Value system has in itself 6 methods of Valuation of Imported Goods which per law are to be applied in a sequential manner (except that the Importer may request that the order in which Deductive Method and Computed Method are to be applied, be Reversed-See S.25(10)). Under the Act, Section 25(1) to (4) describes and defines the Transaction Value of the Imported Goods and how it has to be determined. Sub-section (5) deals with Transaction Value of Identical Goods; Sub-section (6) deals with Transaction Value of Similar Goods; Sub-section (7) deals with Deductive Value method; Sub-section (8) provides how the Computed Value method is to be applied; and lastly Sub-section (9) explains the Fall Back or Reasonable Means Method…."

The present issue is dealt with under Article 2 (or the 2nd method of Valuation) of the Customs Valuation under the terms of the GATT Agreement 1994 and provides that if the Customs value of the imported goods cannot be determined under the provisions of Article 1, the Customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported *at or about the same time* as the goods being valued. It may be noted that in the Valuation Agreement the definition of at or about the same time has not been defined. Coming to the case in hand that whether the assessment made by the department under Section 25(5) of the Act i.e. identical goods method is correct in law is concerned, there is no denial of the fact that the Goods Declaration on the basis of which the present assessment was made is of 18.05.2020; whereas, the Goods Declaration(s) in the instant matter are of the period starting from February, 2021 onwards. In terms of Section 25(5)[6] of the Act, it is provided that if the customs value of the imported goods cannot be determined under the provisions of sub-section (1), it shall, subject to rules, be the transaction value of identical goods sold for export to Pakistan and exported *at or about the same time* as the goods being valued. This sub-section is based on Article 2 of the Customs Valuation Agreement and in ordinary sense would mean that at or about the same time is the time which is most recent, hypothetically, may be within a week or months' time. However, in the wisdom of the legislature, the words *"at or about the same time"* as defined in Rule 107(a)[7] of the Customs Rules, 2001, means within ninety days prior to the importation or within ninety days after the importation of goods being valued. It is an admitted position that the Goods Declaration on the basis of which the impugned assessment(s) were finalized is much beyond the period of 90 days as provided in the above Rule read with Section 25(5) of the Act; therefore, was not at all relevant and applicable. There are other factors which are also required to be looked into while making an assessment under this method of valuation such as the transaction levels, the quantity and any other conditions attached to such a sale transaction; however, they will only be relevant and required to be considered when the very transaction of identical goods is *at or about the same time*. Since in this matter, the transaction relied upon by the Applicants is not of *at or about the same time*; any other discussion of the law is not relevant. The proposed question No.(i) to this effect is also answered accordingly.

6. Lastly, the question that whether the relationship of the present Respondents is of any influence in the determination of the transactional values vis-à-vis the supplier, it may be of relevance to observe that the learned Tribunal has recorded a

[6] (5) TRANSACTION VALUE OF IDENTICAL GOODS.- If the customs value of the imported goods cannot be determined under the provisions of sub-section
(1), it shall, subject to rules, be the transaction value of identical goods sold for export to Pakistan and exported at or about the same time as the goods being valued.

[7] 107. Definitions.- In this Chapter, unless there is anything repugnant in the subject or context,-
(a) "at or about the same time" means within ninety days prior to the importation or within ninety days after the importation of goods being valued;

finding of fact on the basis of material placed before it that such relationship was not influenced and therefore, there is no impediment in accepting the transactional value under Section 25(1) of the Act. It has been held that "*ample factual and legal evidence has been placed before this Bench, entailing beyond reasonable doubt, that the declared values for the impugned imports did in fact qualify under section 25(1) read with 25(3) specially in wake of the fact that no inquiry or reservation whatsoever, in terms of section 25(4), were ever made or conveyed to the importer by the department while finalizing the impugned assessments* ***nor any such reservations were pressed by the DR's before this Bench in writing or verbally***". The Tribunal has recorded a definite finding of fact which cannot be interfered by us in our Reference Jurisdiction as per settled law, the highest authority for factual determination in tax matters is the Tribunal[8]. Therefore, we are not inclined to further examine this aspect of the factual determination. Accordingly, proposed question No.(11) is also answered accordingly.

7. In view of hereinabove facts and circumstances of this case, the rephrased questions of law, as above, by means of a short order dated 22.02.2024, were answered in the *affirmative*; against the Applicant Department and in favor of the Respondents and all listed Reference Applications were ***dismissed***. The above are the reasons thereof. Let copy of this order be sent to the Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of the Customs Act, 1969. Office shall also place copy of this order in the connected Reference Applications."

Since this Court has already held that the values declared by the present Applicant are true transactional values in terms of Section 25(I) of the Customs Act, 1969 which Judgment has been maintained by the Hon'ble Supreme Court, therefore, the assessment of the same in terms of section 25(9) ibid [Fall Back Method] cannot be sustained. Accordingly, the proposed Questions are answered in favor of the Applicant and against the Respondent; and consequently, thereof, the impugned Judgment ***stands set aside***. This Reference Application is ***allowed***. Let copy of this order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

J U D G E

J U D G E

[8] Commissioner Inland Revenue v RYK Mills Lahore; (SC citation- 2023 SCP 226);
Also see Commissioner Inland Revenue v. Sargodha Spinning Mills, (2022 SCMR 1082); Commissioner Inland Revenue v. MCB Bank Limited, (2021 PTD 1367); Wateen Telecom Limited v Commissioner Inland Revenue (2015 PTD 936)

Arshad