IN THE HIGH COURT OF SINDH AT KARACHI.

Spl. Customs Reference Application No.69 of 2010

Present: **Mr. Justice Syed Hassan Azhar Rizvi**
Mr. Justice Muhammad Junaid Ghaffar

The Collector of Customs, ……. Applicant

Versus

M/s. Faisal Enterprises, …..… Respondent

Date of Hearing: **04.12.2013**

Date of Order **03.01.2014**

Applicant: **Through Mr. Shakeel Ahmed, Advocate**

Respondent: **Through Mr. Haider Waheed, Advocate**

J U D G M E N T

MUHAMMAD JUNAID GHAFFAR, J:- The instant Special Customs Reference Application arises out of an Order dated 22.01.2010 passed by the Customs, Excise and Sales Tax Appellate Tribunal Bench-II, Karachi ("Tribunal") in Customs Appeal No.K-452/09 (Old Customs Appeal No.K-95/2005).

2. The applicant has proposed the following questions of law purported to be arising out of the said order of the Tribunal:

A. *Whether on the facts and circumstances of the case that the learned Appellate Tribunal erred in law to hold that the transactional value under Section 25(1) is not applicable in this case?*

B. *Whether on the facts and circumstances of the case that the learned Appellate Tribunal has not gone beyond the scope of the remanded order dated 02.07.2009 passed by the Honourable Supreme Court of Pakistan?*

C. Whether on the facts and circumstances of the case that the learned Appellate Tribunal erred to ignore that the Section 88(5) of the Customs Act, 1969 specifying that where value of any goods has been incorrectly stated in the Good Declaration, due to inadvertence, the error may be rectified before the warehousing of the goods is completed and not subsequently?

D. whether on the facts and circumstances of the that the learned Appellate Tribunal has erred in allowing modification of the assessment in the case of ex-bond Goods Declaration at value lower than that which was finalized at the time of into bonding of the goods under Section 25(1) of the Customs Act, 1969 read with Section 88(5) of the Customs Act, 1969?

E. Whether on the facts and circumstances of the case that the learned Appellate Tribunal failed to determine the status of the goods, whether it was wrong shipment and not covered by the definition of deteriorated goods as per requirement of Section 27 of the Customs Act, 1969?

F. Whether on the facts and circumstances of the case that the learned Appellate Tribunal has not given his findings on the demand raised by the applicant under Section 32(3) of the Customs Act, 1969.

G. Whether on the facts and circumstances of the case that the learned Appellate Tribunal failed to determine the return of Foreign Exchange and repatriation of remittance as a result of import of secondary quality goods?

3. Succinctly, the facts as per the statement of facts filed in the instant case are that the respondent had imported two consignments of HR Steel Sheet in Coils declared to be of prime quality from Ukraine at a unit price of US$180/MT and US$175/MT respectively. On physical examination of the goods, it was found that they were of "secondary quality" instead of "prime quality". To avoid any further delay, the goods were allowed to be into-bonded subject to the condition that all the aspects would be examined at the time of ex-bonding of goods. Thereafter, the respondent filed ex-bond Bill of Entry and claimed the goods as of "secondary quality" to be assessed at the rate of US$157/MT which was the value of identical type of secondary quality goods instead of original declaration of "prime quality" at the rate of US$175/MT and US$180/MT. It is further stated that at the time of ex-bonding of the goods the assessment was completed by the

applicant / department by applying the value agreed between the Pakistan Iron and Steel Merchants Association in August, 2001, @ US$174/MT and duties and taxes were paid by the respondent *(though this was done under protest as claimed by the respondent in their comments as well as perusal of endorsement at the back of the Goods Declaration "GD")*. It has been further stated that during the post clearance audit, it was observed that the assessment at the rate of US$174/MT, which was less than the declared transactional values of US$175/MT and US$180/MT was not permissible under the law, therefore, such assessment had resulted in short levy of Rs.55,142/-, for which a direct demand notice dated 05.08.2002 was issued. However, the respondent instead of paying the alleged short levied amount, filed two separate refund claims for Rs.3,97,358/- and Rs.6,67,054/- in respect of the above mentioned assessment. The said claims were filed by the respondent on the ground that since the quality of their goods was ascertained as of secondary in nature as against their actual imported quality of prime, therefore, the assessment of their goods should have been made at the rate of US$157/MT, which was the value prevalent at the relevant time for identical type of secondary quality goods. Thereafter the case was adjudicated vide Order-in-Original dated 19.08.2002 whereby the demand raised was upheld and the respondent was directed to make payment of the alleged short levied amount of Rs. 55,142/-. Being aggrieved, the respondent preferred an appeal against the said order before the Collector (Appeals), who vide its Order in Appeal No 81/2003 dated 28.02.2003, set aside the impugned order and remanded the matter for *de-novo* consideration in the light of legal and factual points raised by the respondent. One remand another Order in Original dated 12.05.2003 was passed by the adjudicating authority whereby the refund claims of the respondents were rejected. The respondent being once again aggrieved

preferred an appeal before the Collector (Appeals), which was also dismissed vide Order dated 27.12.2004. Being further aggrieved, the respondent filed appeal before the Tribunal and the learned Tribunal vide its Order dated 20.09.2008 dismissed the said appeal, against which a Customs Reference Application vide No.259/2008 was preferred before this Court and vide Order dated 25.03.2009 the said Reference Application was also dismissed. The respondent thereafter filed a Civil Petition for Leave to Appeal before the Honorable Supreme Court of Pakistan bearing No.476-K/2009 which was allowed vide order dated 02.07.2009 whereby the Honorable Supreme Court after setting aside the order of this Court, remanded the matter to the Tribunal for reconsideration of the points as discussed in the said order. On remand the learned Tribunal has allowed the appeal of the respondent vide the impugned order dated 22.01.2010 against which the instant reference application has been filed by the applicant.

4. Mr. Shakeel Ahmed Advocate appearing on behalf of the applicant contended that in view of the provisions of section 88 (5) of the Customs Act, 1969, the value of the goods cannot be amended or altered once the same have been warehoused. The learned counsel further contended that the applicant is bound to accept the transactional value of the goods in question in terms of section 25(1) of the Act. It was further contended that the applicant had made the correct assessment of the goods on the basis of declaration as being of prime goods. Learned counsel further contended that the respondent had also failed to bring on record any repatriation of the foreign exchange, which was paid and remitted for prime quality goods. Learned counsel relied upon the case reported in *2006 SCMR 864. (M/s FLYING BOARD AND PAPER PRODUCTS Vs. DEPUTY COLLECTOR, CUSTOMS)*

5. Mr. Haider Waheed, Advocate appearing on behalf of the respondent contended that in the peculiar facts and circumstances of this case the transactional value in terms of Section 25(1) of the Act was not the correct assessment value. It was contended that the applicant was bound to make the assessment of the said goods under Section 25(5) of the Act, wherein the assessment is to be made on the basis of the value of identical goods. Per learned counsel, the provisions of section 27 as well as section 88 of the Act as pressed upon by the applicant are not applicable, as the nature and state of the goods was already determined by the applicant at the time of examination of the same at port i.e. prior to warehousing of goods; therefore, there was no question of applicability of Section 88 of the Act. Per learned counsel, since Pakistan is a signatory to the General Agreement on Trade and Tariff (GATT agreement), therefore, in view of Explanatory Notes No. EN 3.1/1, of the World Customs Organization notified under the Compendium of Customs Valuation (Goods Not in accordance with Contract), the assessment of the instant goods was required to be made under the concept of Goods not in accordance with specification or wrong goods, for which the applicable method of valuation was prescribed under section 25(5) of the Act as identical goods method. The learned counsel contended that the Tribunal's order was correct in law and did not require any interference by this Court.

6. We have heard learned counsel for the parties, perused the record and the case law relied upon by the learned counsel for the applicant. By consent, the matter was taken up at Katcha Peshi stage for final disposal.

7. It appears that the controversy in the instant matter relates to the actual assessment value of the goods i.e. whether the same was required to be made on the basis of the invoice value (*transactional value*) under

section 25(1) of the Act or on the basis of the values of identical or similar goods as contained in Section 25 (5) of the Act. For convenience, the relevant provisions of section 25 are reproduced hereunder:

> *[**25. [Value of imported and exported goods].- (1) Transaction Value.-** The customs value of imported goods, subject to the provisions of this section and the rules, shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to Pakistan:*
>
> *Provided that-*
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> *(a) ....*
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> *(i) ……*
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> *(ii)…….*
>
> *(iii) …….*
>
> *(b) ……..*
>
> *(c) …….*
>
> *(d)…….*
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> *(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.*
>
> *(a) ……*
>
> *(b) ……*
>
> *(c) ……..*
>
> *[(d) If, in applying the provisions of this sub-section, there are two or more transaction values of identical goods that meet all the requirements of this sub-section and clauses (b),(d),(e) and (f) of sub-section (13), the customs value of the imported goods shall be the lowest such transaction value, adjusted as necessary in accordance with clauses (b) and (c).]*

8. From the perusal of the above provisions, it is clear that the customs value of the imported goods, subject to section 25 and the rules thereon shall be the transactional value, that is the price actually paid or payable for the goods when sold for export to Pakistan. Similarly, if the value of the goods cannot be determined or accepted in terms of sub-section (1) of section 25 of the Act, the next method of valuation is provided under sub-section (5) of section 25 of the Act, wherein 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 transactional value of identical goods sold for export to Pakistan and exported at or about the same time as the goods being valued. It is further provided under the rules vide Rule 107 (a) that "at or about the same time" means within 90 days prior to the importation or within 90 days after the importation of goods being valued. In the instant case it is an admitted position that the goods were found to be of *secondary quality* at the time of examination within the port area and before warehousing of the same, thereby confirming that the goods were not in accordance with the contract or Letter of credit. Such examination report is endorsed at the back of Goods Declaration (G.D) available at page 59 of the Court file. In so far as the provisions of section 88(5) of the Act are concerned, the same relate to a situation wherein if the quantity or value of any goods has been incorrectly stated in the GD, due to inadvertence or bona fide error, the error may be rectified at any time before the warehousing of the goods is completed and not subsequently. Therefore, in so far as the applicability of section 88 of the Act is concerned, we are of the view that the same is misconceived; hence not applicable on the facts of the instant case. The reason being, that the applicant had itself confirmed the quality of the goods being secondary in nature; therefore, the assessment of the goods was required to be made in accordance with the provisions of the Act before the warehousing of the same. Though the warehousing was allowed in the instant matter, but such warehousing of goods was subject to determination of all aspects later-on and therefore, now the applicant is barred and estopped by its own conduct and cannot be allowed to take shelter under the provisions of section 88 of the Act. Similarly, it is not a case of abetment in terms of section 27 of the Act, as the respondent had not claimed that the value of the goods has

diminished as a result of some damage or deterioration sustained before or during the unloading at port, rather it is their case that the shipper has made a wrong shipment of goods or of goods for which no contract was entered upon by the parties.

9. On perusal of the record, we have also noticed that the assessment of the goods at the time of ex-bonding was not made on the transactional value of the goods, but at the rate of US$174/MT. This was less than the declared transactional value of the respondent, though not substantially. The assessment was made on the basis of an agreed value between Pakistan Iron and Steel Merchants Association and the applicant for the period of August 2001. Therefore, now subsequently the applicant after making assessment of the goods on the basis of ascertained value (*though disputed by the respondent as not being the value of identical goods*) at the rate of US$174/MT cannot plead that the assessment ought to have been made on the basis of transactional value of the goods, which was US$175/MT and US$180/MT respectively. The applicant had at the very first instance had accepted the plea of the respondent that the goods which were not in accordance with the contract, were liable to be assessed in terms of sub section (5) of section 25 of the Act on the basis of values of identical goods and not in terms of section 25(1) of the Act on the basis of the transactional value of the goods. Since Pakistan is a signatory to various agreements relating to different aspects of the International Trade as agreed upon by the World Trade Organization ("WTO") including the agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("GATT Agreement on Valuation"). After the expiry of the five years grace period from 1995, the relevant provisions of the Act as contemplated in section 25 have been duly amended with effect from

01.01.2000 and now the same is based on the concept of "Transactional Value" of the goods as against the previous concept of notional value or commonly known as Brussels Definition of Value (BDV). In view of such position the interpretation and guidelines provided by the World Custom Organization ("WCO") in respect of valuation disputes are to be followed, though not incorporated in our own law or statutes. In fact the relevant Valuation rules as notified in Chapter IX of the Customs Rules 2001 are silent on this issue; as such the Explanatory Note has a somewhat binding effect on member countries and it Customs administration. This court vide its judgment dated 28.02.2011 in the case of ***Sadia Jabbar V/s Federation of Pakistan & others in CP No 2673/2009*** while dilating upon the consequences of non-compliance of the WTO agreements has observed that the Parliament is presumed to know and keep in mind the country's international obligations, and the consequences that could flow from any non-compliance with such obligations; and that the courts should, to the maximum extent possible, avoid an interpretation that conflicts with the WTO agreement concerned, and thereby has the potential of exposing Pakistan to the possibility of retaliatory measures being adopted by other member countries under the WTO system. The WCO vide its Explanatory Note 3.1 arrived at by the Technical Committee on Customs Valuation has settled some guidelines and instruction for valuation of goods not in accordance with contracts. Article I of this note deals with valuation treatment of damaged goods and Article II with the valuation of goods not in accordance with the specification. In the instant matter Article II clause B relating to retained goods of this note is more appropriately applicable. The same is reproduced hereunder for a clear understanding of the matter;

II. Goods not in accordance with specification

A) Re-exportation, abandonment or destruction

9. On the presumption of the existence of national procedures for the re-exportation, abandonment or destruction of the goods, there is no liability to duty (see also Standard 8 of Annex F.6. to the Kyoto Convention).

B) Retained

10. If, despite the non-conformity to specifications found upon delivery, the goods are kept by the importer, the determination of the Customs value would be influenced by the nature of the nonconformity. Goods of this type would fall into two categories: those which involve a shipment of the wrong goods (e.g. a shipment of woolen gloves against an order of sweaters) and those which are, in fact, the goods actually ordered but which fail to conform to the specifications in the original order to such an extent that the buyer seeks some form of reimbursement from the seller.

11. *(i) Wrong goods*

Article 1 : If there is no sale for export, transaction value is not applicable.

Article 2 : *Applicable, on the basis of the transaction value of identical goods if available*

10. Therefore, in view of the above explanatory note, the valuation of the goods in question cannot be made in terms of the transactional value under section 25(1) of the Act and has to be made in terms of sub section (5) of section 25 on the basis of values of identical goods. In fact the applicant had already made the assessment at a value which was not the transactional value as contemplated under section 25(1) of the Act; rather it was made under section 25(5) of the Act on the basis of the method of valuation of identical goods. However such assessment of goods at the rate of US$174/MT was disputed by the respondents from day one as they had lodged a proper and valid protest note on the back side of the GD, as this was the only recourse available for them at the relevant time. The precise objection of the respondent was that since the goods had been accepted as being of “secondary quality”, then the assessment of the same ought to have been made @ USD 157/MT, as according to the respondents 2 shipments of identical goods had been imported in the same Vessel and at the same time from the same country of origin details of which are

available at pages 79 and 81 of part-II of the court file. This contention of the respondent further lends credence from the record itself as it appears that identical goods at the relevant time were assessed by the applicant at the same values. On examination of Order in Appeal No 81/2003 dated 28.02.2003 (pg.83) passed by the Collector (Appeals) it appears that the departmental representative was unable to rebut such contention of the respondent. The learned Collector (Appeals) in its order dated 28.02.2003 had observed as follows

" 4(iv). The respondent stated that their value @ US$ 157/PMT is wholly [in] consonance with the value of identical goods imported during the same period and also by the same vessel. This needs to be checked and verified from the record of the case. The D/R could not rebut the points raised that goods imported by the same vessel and during the same period were assessed at US$ 157/PMT." (Underlining is ours)

11. In so far as the question regarding status of the demand raised in terms of section 32(3) of the Act on behalf of the applicant is concerned, it would have been enough to say that the same does not arise out of the order of the tribunal and hence cannot be answered by this court under its advisory jurisdiction in terms of section 196 of the Act. However, we have noticed that at the time of passing of the second Order in Original dated 12.05.2003, after remand of the case, the applicant/department had itself foregone its right to any recovery on the basis of the demand made in terms of section 32(3) of the Act. This demand was enforced in the first Order in Original dated 19.08.2002, which was set aside by the Collector Appeals vide its Order dated 28.02.2003. After remand of the case, the adjudicating authority did not give any findings on the merits of such demand and only rejected the refund claim of the respondent against which the respondent had filed an appeal. Therefore, the applicant is not justified in raising the same at this stage of the case. The judgment of the Honorable Supreme

Court in the case of *Flying Board & Paper Products* (Supra), relied upon by the learned counsel for the applicant is not applicable to the facts of the instant case as it pertains to a period prior to 01.01.2000 when the un-amended provision of section 25 of the Act was applicable, which was primarily based on the concept of notional value of goods, commonly known as Brussels Definition of Value.

12. Therefore Questions A, B, C, & D, are answered in negative, in favor of the respondent and against the applicant. In so far as questions E and G are concerned, in our humble view neither do they arise out of the order of the tribunal nor are they relevant, hence need not be answered. We have discussed question "F" (See Para 11) and are of the view that no finding was required to be given by the Tribunal on this issue.

13. In view of the above discussion; the instant reference application is dismissed and the order passed by the Tribunal is upheld and is hereby maintained. The Registrar is directed to send copy of this judgment under the seal of the Court to the Tribunal for information.

Judge

Judge

Dated 03.01.2014