TaxHelpline Case No. 185 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

C.A. No.252/LB of 2012, decided on 15th April, 2013. Date of hearing: 3rd April, 2013

Before Ch. Muhammad Asghar Paswal, Member (Judicial) and Ch. Muhammad Mubeen, Member (Judicial)

Mian Abdul Ghaffar for Appellant. Muhammad Ismail, D.R. for Respondents.

Messrs PIONEER STEEL INDUSTRIES (PVT.) LTD., MULTAN
vs
COLLECTOR OF CUSTOMS, MULTAN and 2 others

JUDGMENT

CH. MUHAMMAD ASGHAR PASWAL, (MEMBER (JUDICIAL)).---This appeal is being directed against Order-in-Original No.28 of 2012 dated 20-11-2012 passed by the Collector of Customs (Adjudication), Model Customs Collectorate, Customs House, Multan.

2. The facts giving rise to this appeal are that Deputy Director, Intelligence and Investigation-FBR, Range Office, Multan received information to the effect that appellant, registered as manufacturer and importer in steel sector with Regional Tax Office, Multan availing the facility of concessionary import of raw material in term of S.R.O. 565(I)/ 2006 dated 5-6-2006 was involved in massive evasion of duty and other taxes through mis-declaration at import stage in connivance with the staff of Model Customs Collectorate of PaCCS, Karachi. Perusal of import authorization certificates did confirm that the certificates were issued for concessionary import of raw material for manufacturing of Choukhats vide C.No. E&C-09/S.R.O.565/02/5883 dated 28-2-2011. Later-on, a modification in the said import authorization was made vide C.No.

E&C-09/S.R.O.565/02/7936 dated 16-4-2011, where-under the words "Choukhats" were amended to read "Composite roll formed windows and doors" whereas Serial-27 of the said S.R.O. provides the concessionary import facility on Electro-galvanized falling under HS code 7210.3010, 7210.4910 and 7210.7020 for manufacturing of composite rolls formed windows and doors in excess of 10% while the aforesaid PCT headings were attracting statutory rate of duty at 20%. Since the exemption in customs-duty in excess of 10% was available to the appellant and as such he was liable to pay customs-duty at the rate of 10% under concessionary regime in term of S.R.O. 565(I)/2006 dated 5-6-2006 whereas the appellant had been importing the said material by paying customs duty at the rate of zero percent at import stage instead of 10% ad veloram vide Serial-27 of the said S.R.O., thus, evaded Customs duty, Sales Tax and Income Tax to the tune of Rs.22,883,548 at import stage and on the basis thereof the appellant was served with a show cause notice on the allegation that by evading the aforesaid amount of duty and other taxes, they violated the provisions of S.R.O. in question, condition of provisional import authorization certificates read with sections 18 and 19 and sub-clauses (a) (c) of clause (1) of sections 32(1) and 32(2) read with S.R.O. 565(I)/2006 dated 5-6-2006 punishable under clauses 10(A) and 14 of subsection (1) of section 156 of the Customs Act, 1969. The aforesaid show cause notice ultimately culminated Order-in-Original No.28 of 2012 dated 20-11-2012 impugned in the instant appeal.

3. The appellant has filed the instant appeal before this Tribunal where the main grounds of appeal are as under:--

(a) That as per the provision of S.R.O. 565(I)/2006 dated the importing collectorate has exclusive jurisdiction to call for record and information and to conduct the audit on the import of the importer. All the consignments of the importer has been imported at Karachi Port so under the S.R.O. 565(I)/2006 Karachi Collectorate has the exclusive jurisdiction to issue the notice and the learned Collector Customs Multan has no jurisdiction to try and to proceed upon the case. It is therefore the impugned order is corum non judice as the same has been passed by the Collector Customs

Multan without lawful authority. The relevant pages of the S.R.O. 565(I)/2006 are enclosed as Annex-D.

(b) That the show cause notice has been issued on the report of the staff of directorate of intelligent and investigation FBR range office Multan who, according to the notice, on the information that the appellant availed the facility of concession in the rate of duty and taxes under S.R.O. 565(I)/2006 dated 5-6-2006 was involved in massive evasion of duty and taxes through mis-declaration at import stage. It has also, been reported in the notice that the staff of directorate collected some record and information in this respect from different corners and submitted the report to this honorable office for adjudicating proceedings.

(c) That so the show cause notice was issued to the appellant under clauses (a) and (b) of sections 32(1) and 32(2) read with sections 18 and 19 of the Customs Act 1969 with the allegation that the appellant evaded the duty and taxes to the tune of Rs.2,28,83,548 without mentioning the period and details of the goods declaration which renders the show cause notice illegal as it is the mandatory requirement that there should be specific and explicit charge in the notice with details of evasion of duties and taxes with the period of its default but the instant show cause notice is totally silent in this regard hence needs to be quashed on this score alone. Reliance in this regard is placed on 2007 PTD 2265, 2010 PTD 1759, 2004 PTCL 212 and 2000 PTD 2388.

(d) That the appellant made no misdeclaration at the time of import on the documents like as goods declaration, invoice and packing list etc. as to quantity, value and descriptions of the goods imported. The appellant declared all the details required to be mentioned on the import documents as per the customs law and the appellant sought clearance under S.R.O. 565(I)/2012 on the basis of import Authorization issued by the competent authority and thus it was the duty of Assessing Officer to apply the proper rate of duty as per the provision of S.R.O. 565(I)/2006. It is therefore clear that the appellant did not made any mis-declaration while submitting the import documents at the port and the staff of directorate has

completely failed to brought on record any mis-declaration, false statement and forged documents on the part of appellant so the provision of section 32 can not be invoked in the instant case so the show cause notice in reply is palpably illegal and requires to be annulled on this account as well.

(e) That the directorate General of Intelligence and Investigation FBR is formed and established under section 3A of the Customs Act, 1969 and the Directorate was assigned the powers, function and jurisdiction under S.R.O. 486(I)/2007 dated 9-6-2007 issued under 3E and 4 of the Customs Act, 1969 whereunder staff of the directorate was empowered to perform certain functions and duties. The perusal of the said S.R.O. clearly revealed that the staff of directorate can not take cognizance and any action under sections 18, 19 and 32 of the Customs Act, 1969 so the action of the Directorate of intelligence and investigation under sections 18,19 and 32 of the Act, 1969 is beyond its power and authority conferred upon them under S.R.O. 486(I)/2007 and so the subsequent proceedings on the basis of such illegal and without lawful authority act do not have any legal sanctity. The Honorable Karachi High Court has held in the case of Shehzad Ahmed Corporation reported as 2005 PTD 23 that no officer of the Directorate had power to detain or seize or re-examine the goods already examined and assessed by the appropriate officer of the Customs.

(f) That the examination and assessment was made under section 80 of the Customs Act, 1969 and the goods were cleared on the payment of duty and taxes calculated by the Assessing Officer under S.R.O. 565(I)/2006. The officer of customs examine the goods imported into Pakistan under section 80(1) as to ascertain the correctness of the documents relating to the declaration of particular for the purpose of assessment of duties and taxes. The Officer after such examination assessed the duty and taxes leviable on the goods imported which is required to be paid before the clearance of goods. This sort of assessment is an order of the customs officer passed under section 80, on the receipt of goods declaration under section 79 of the Customs Act, 1969 by the importer. The order passed under section 80 of the Act is an appealable order and appeal lies under section 193 of the Act, 1969.

It is appropriate to reproduce the relevant part of section 193 of the Customs Act, 1969:-

"Appeals to Collector (Appeals).---(1) Any person [other than] an officer of customs aggrieved by any decision or order passed under [sections 79, 80 and 179 of this Act by an officer of Customs not below the rank of an Assistant Collector] [***] may prefer appeal to the Collector (Appeals) within thirty days of the date of communication to him of such decision or order"

(g) That as per provision of section 193, the order passed under section 80 is an appealable order and no show cause notice regarding the matter which have been decided through an appealable order can be issued thus the issuance of the instant show cause notice is illegal, without lawful authorities and severely hit by law contains in the Customs Act, 1969. The Honorable Appellate Tribunal of Pakistan has held in case reported as 2011 PTD 2480 that the goods imported and had been assessed by the competent officer exercising the power under section 79 read with section 80 of the Act, 1969 so the issuance of show cause notice and order passed thereon by the authorities is illegal, unlawful and coram non judice as the only course available to the authority was to reopen the order passed under section 80 as per the provision of section 195 of the Customs Act, 1969. The reliance is also placed on the judgment reported as 2010 PTD 2523.

(h) That it is alleged in the notice in reply that the appellant has evaded the amount of duties and taxes to the tune of Rs.5,92,05,142 by not depositing the customs duty, sales tax and income tax on prescribed rates under the Customs Act, 1969 by making the misdeclaration in import documents. This observation of the directorate needs to be annulled, withdrawn and quashed on the following grounds as well;

(1) That the directions did not referred any document which was forged or on the face of that any statement was not correctly declared by the appellant and even the department has miserably

failed to establish any misdeclaration as to the origin, quantity of the goods, quality of the goods and even the value of the goods so the charge of mis-declaration can not be invoked against the appellant. It is the duty of the Assessing Officer to apply the rate of the duty and other taxes and the same is out of control of the importer/appellant particularly when the appellant has declared the relevant provision of the customs law and or as the case may be the S.R.O. issued under the Customs Act, 1969.

(2) That customs duty and sales tax is an indirect form of tax and the same is not born by the appellant/importer but the incidence thereof is made the part of casting of sale value which has been passed to the consumer who being the ultimate consumer bear all the effect of such indirect form of tax. The appellant paid the value of taxes and duties which were required to be paid on the basis of payment challan created by the appropriate officer of customs dry port and supplied the goods manufactured from such raw material on the value so calculated on the basis of paid indirect taxes and duty. The customs duty paid at import stage has been directly made the part of sale value and whereas the sales tax paid on import stage has been collected, from the buyers and thus in this way it is liability of the consumer to all such like duty and taxes. There is no allegation in the show cause levelled against the appellant that the appellant collected the extra amount of sales tax and duty etc. from their buyer but did not deposit the same in the government exchequer hence the observation is beyond the spirit and strength of customs and sales tax law and the philosophy/theme applicable in the case of indirect form of taxes.

(3) That determination of the duties and taxes was the duty of the Pakistan Revenue Automation Limited under one customs system and for any wrong calculation or error done by such authority, the importer could not be held responsible. The total consignments of the appellant were assessed and cleared under one customs systems and the responsibility for any fault occurred due to the one customs is on the shoulder of the customs department because the system was under the use and control of the department. The honorable customs Appellate Tribunal has held in the case reported

as 2011 PTD 1695 that the importer can not be held responsible for any fault done by the department under one customs.

(4) That the Assessing Officer or the appropriate officer of the customs enjoys the powers of adjudicating officer which means while making assessment of the goods of the appellant he was acting as an adjudicating officer the court and it was the duty of the court to ascertain the calculated due amount of the duty and tax leviable on the goods of the appellant. It is also not out of place to mention here that the appellant did not have any excess to the data of customs and he was bond to pay the duty and taxes which had asked to pay by the department and to apply the rate of duty and taxes is also the sole authority of the Assessing Officer. It is therefore if there was any short payment was made on the direction of the Assessing Officer, the same can not be recovered form the importer/appellant at the belated stage particularly when the goods so produced/ manufactured from such material had been sold out in the market.

(5) That similarly the income tax paid at import stage is not a final discharge of the appellant but it is adjustable towards the annual final tax liability of the appellant company as envisaged under subsection (7) of section 148 of the Income Tax Ordinance, 2001 and the appellant has discharged its income tax liability by filing income tax return for the relevant period under section 114 of the Ordinance, 2001 the sales tax is also adjustable under section 7 of the Sales Tax Act, 1990 against the output tax collected from the buyers but the appellant has already paid the whole output tax on supplies for the period in question so the demand of income tax and sales tax is illegal and unwarranted by law as well.

(6) That it is an established principle of practicing statute that no one can be made to suffer on account of act/omission on the part of the court or other State functionaries and in the instant case the assessment was made by the adjudicating authority acting as quasi judicial functions and hence if there was any miss calculation on the part of such functionaries, the appellant can not be held responsible for that act or omission. The Honorable superior courts of the

country while interpreting the legal maxim "Actus curiae neminem gravabit" held that the no person shall make to suffer on the account of the act of court or State functionaries. Reliance in this regard is placed on the judgment Reported as 2002 SCMR 134, 2001 SCMR 424 and 2001 SCMR 1001.

(7) That it has been held by the courts of the country that even if any fact or law was not brought into the notice of the court by the parties, the courts are duty bound to apply the correct provisions of law in their true and correct perspective and thus it was the duty of the Assessing Officer to apply the correct rate of duty and taxes but not that of appellant. Reliance in this regard is placed on the judgments reported as 2002 SCMR 134 and PLD 1992 SC 236.

4. The learned counsel appearing on behalf of the appellant in addition to aforesaid points has contended that the entire action on the part of respondents Nos.2 and 3 as well as the impugned order are void ab initio, being without jurisdiction. According to him, the Deputy Director, Intelligence and Investigation-FBR, Range Office, Multan has made out the case of misdeclaration for violation of section 32 of the Customs Act, 1969 for which he was never empowered or authorized to take any action under the said provision of law by the FBR while conferring powers under certain sections of the Customs Act, 1969 on officers and staff of the Directorate-General of Intelligence and investigation-FBR vide, S.R.O. 486(I)/2007 dated 9-6-2007. He further contended that Section 32 is not included in the provisions under which the powers were entrusted to the said Directorate General and its officers and staff. In this behalf, he relied upon a judgment dated 24-3-2010 rendered by this Tribunal in C.A. No.603/LB/2009 titled "Khawaja Waseem v. Superintendent, Intelligence and Investigation-FBR and 2 others". He also relied upon the judgments of the hon'able High Court of Sindh at Karachi reported as 2004 PTD 2994 and 2005 PTD 23. According to him since no powers for taking any action under Section 32 were entrusted to the Directorate General of Intelligence and Investigation-FBR and its officers and staff, thus, the entire action on the part of Deputy Director, Intelligence and Investigation-FBR, Range Office, Multan was without jurisdiction and, thus, of no legal effect. The learned counsel further contented

that according to show cause notice as well as impugned order, alleged evasion of duties and taxes took place at import stage in connivance with the staff of Model Customs, Collectorate of PaCCS, Karachi where the goods were cleared under the concessionary regime in term of S.R.O. 565(I)/2006 dated 5-6-2006. He further contended that in identical situation a reference was made to FBR by he Model Customs Collectorate, Lahore vide letter dated 10-8-2009 seeking clarification that if the clearance of the goods was made by some other Collectorate and the contravention case was made by different Collectorate which Collectorate would have the powers to adjudicate such cases and in response thereto FBR vide letter dated 1-9-2009 clarified that the importing and clearing Collectorate shall have the lawful jurisdiction to adjudicate such matter. The learned counsel also referred to the ruling of FBR in a recent case given vide letter C.No.2(2)/L&P/89-Pt-A dated 5-10-2012, where-under again FBR has confirmed its earlier views and directed that only the importing and clearing Collectorate shall have powers to adjudicate such matters and none else. According to him, since entire action on the part of the reporting agency as well as adjudicating authority was void, illegal being without jurisdiction which also rendered the impugned order nullity in the eyes of law. He relied upon the judgments reported as PLD 1971 SC 124, 2006 SCMR 783, 2007 SCMR 729, 2007 SCMR 1835, 2006 SCMR 1713, PLD 1958 SC 104, PLD 1973 SC 326, PLD 2002 SC 630, 2003 SCMR 59, 2004 SCMR 28, 2004 SCMR 1798. He also referred the cases of "Messrs Capron Overseas" 2010 PTD 465. He further prayed that the impugned order being without jurisdiction be struck down.

5. On the other hand, learned Departmental Representative has supported the impugned order mainly on merits. According to him, the appellant has evaded duty and other taxes by importing the raw material under concessionary regime in term of S.R.O. 565(I)/2006 dated 5-6-2006 at import stage. He, however, admitted that the offence of mis-declaration, if any, was committed at Karachi while importing and clearing the goods through Model Customs Collectorate of PaCCS, Karachi where the import document and GD were filed and processed. The learned DR was unable to controvert the contention of the learned counsel for the appellant that had there been any complaint of mis-declaration on the part the

appellant, the matter would have been reported to the importing and clearing Collectorate at Karachi for initiating action in term of section 32 of the Customs Act, 1969. He also failed to defend the reporting agency with regard to their powers under section 32 as the said provision of law was not figuring in S.R.O. 486(I)/ 2007, where-under the powers of the officer of Customs under certain provisions of the Customs Act, 1969 were entrusted to the officers and staff of Directorate-General, Intelligence and Investigation-FBR by Federal Board of Revenue under sections 3E and 4 of the Customs Act, 1969.

6. We have heard the learned counsel appearing on behalf the appellant as well as learned Departmental-Representative and perused the record carefully. As regards the powers of the Deputy Director, Intelligence and Investigation-FBR, Range Office, Multan, this Tribunal in its earlier judgment dated 24-3-2010 has already held that the said department was not competent and authorized to take any action under section 32 of the Customs Act, 1969. The contention of the learned Departmental Representative that Deputy Director, Intelligence and Investigation-FBR, Range Office Multan has only reported the contravention to the Collector of Customs (Adjudication) Multan by rightly exercising his powers is not tenable. Since charging clause/ powers in term of section 32 of the Customs Act, 1969 were not vested with the Intelligence and Investigation department, therefore, the action on the part of the said officer was illegal. The judgment of the hon'able High Court of Sindh at Karachi reported as 2004 PTD 2994 and 2005 PTD 23 are also fully applicable to the said issue. The contention of the learned counsel that the Collector of Customs (Adjudication), Multan was neither competent nor authorized to issue show cause notice and pass the impugned order for the alleged evasion of taxes or for the offences of mis-declaration committed at Karachi is convincing. It is an admitted fact that the import and clearance of the goods took place at Karachi through Model Customs Collectorate of PaCCS Karachi where the import documents and GD were filed. The goods were examined, assessed and cleared by the said Collectorate. The offences of mis-declaration or as the case may be evasion of taxes, if any, also took place at Karachi and as such the Collector of Customs (Adjudication) Multan had no jurisdiction at all either to

entertain contravention report or to issue show cause notice or to pass the impugned order. According to the ruling of FBR as contained in its directives dated 1-9-2009 and 5-10-2012, it is only the importing and clearing Collectorate which can take cognizance of such mis-declaration or as the case may be evasion of taxes, if any, made at import stage. Since the initial action of taking cognizance by the Deputy Director as well as Collector (Adjudication) Multan was without jurisdiction, thus, the entire subsequent proceedings including the impugned order would be rendered without jurisdiction, ab initio void and of no legal effect. The hon'able Supreme Court of Pakistan in case "Mansab Ali v. Amir" (PLD 1971 SC 1241 was kind enough to hold that "It is an elementary principle that if a mandatory condition was not fulfilled, then the entire proceedings, which follow become illegal and suffer for want of jurisdiction." In "Faqir Abdul Majeed Khan v. District Returning Officer and others" (2006 SCMR 1713), it was held by their Lordships that "By now it is well-settled that any order which suffers from patent illegality or is without jurisdiction, deserves to be knocked down". In "Saeed Farooq v. The State and 2 others" (1996 MLD 434), it was held that "Where a particular Court or forum has exclusive jurisdiction to proceed with a case, any attempt by any other forum to take cognizance of the matter or to institute proceedings would render cognizance and proceedings void ab initio and of no legal effect". The other judgments of the Superior courts relied upon by the learned counsel for the appellant aforementioned are also applicable in full force in the present case. The learned departmental representative when confronted with the aforesaid situation was unable to controvert the same. Thus, we inclined to hold that the entire action on the part of the respondents was without lawful authority and coram non-judice. Hence, in view of our above findings and the authorities (supra) we allow the appeal and set aside this impugned order.

Appeal accepted